

2008

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

Fair Work Bill 2008

No. , 2008

(Education, Employment and Workplace Relations)

**A Bill for an Act relating to workplace relations,
and for related purposes**

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1 **A Bill for an Act relating to workplace relations,**
2 **and for related purposes**

3 The Parliament of Australia enacts:

4 **Chapter 1—Introduction**

5 **Part 1-1—Introduction**

6 **Division 1—Preliminary**

7 **1 Short title**

8 This Act may be cited as the *Fair Work Act 2008*.

Section 2

1 **2 Commencement**

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

6

| Commencement information | | |
|--|---|---------------------|
| Column 1 | Column 2 | Column 3 |
| Provision(s) | Commencement | Date/Details |
| 1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table | The day on which this Act receives the Royal Assent. | |
| 2. Sections 3 to 800 | A day or days to be fixed by Proclamation. A Proclamation must not specify a day that occurs before the day on which the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i> receives the Royal Assent. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i> receives the Royal Assent, they commence on the first day after the end of that period. | |

7 Note: This table relates only to the provisions of this Act as originally
8 passed by both Houses of the Parliament and assented to. It will not be
9 expanded to deal with provisions inserted in this Act after assent.

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

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Division 2—Object of this Act

3 Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia’s future economic prosperity and take into account Australia’s international labour obligations; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
- (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

Section 4

1

2 **Division 3—Guide to this Act**

3 **4 Guide to this Act**

4 *Overview of this Act*

- 5 (1) This Act is about workplace relations. It:
- 6 (a) provides for terms and conditions of employment
7 (Chapter 2); and
- 8 (b) sets out rights and responsibilities of employees, employers
9 and organisations in relation to that employment (Chapter 3);
10 and
- 11 (c) provides for compliance with, and enforcement of, this Act
12 (Chapter 4); and
- 13 (d) provides for the administration of this Act by establishing
14 Fair Work Australia and the Office of the Fair Work
15 Ombudsman (Chapter 5); and
- 16 (e) deals with other matters relating to the above (Chapter 6).

17 *Overview of the rest of this Chapter*

- 18 (2) The rest of this Chapter deals with:
- 19 (a) definitions that are used in this Act (Part 1-2); and
- 20 (b) the application of this Act (Part 1-3), including how this Act
21 interacts with certain State and Territory laws and its
22 geographical application.

23 *Definitions*

- 24 (3) Many of the terms in this Act are defined. The Dictionary in
25 section 12 contains a list of every term that is defined in this Act.

26 **5 Terms and conditions of employment (Chapter 2)**

- 27 (1) Chapter 2 provides for terms and conditions of employment of
28 national system employees.

Section 5

- 1 (2) Part 2-1 has the core provisions for the Chapter. It deals with
2 compliance with, and interaction between, the sources of the main
3 terms and conditions provided under this Act—the National
4 Employment Standards, modern awards and enterprise agreements.

5 Note: Workplace determinations are another source of main terms and
6 conditions. In most cases, this Act applies to a workplace
7 determination as if it were an enterprise agreement in operation (see
8 section 279).

9 *Main terms and conditions*

- 10 (3) Part 2-2 contains the National Employment Standards, which are
11 minimum terms and conditions that apply to all national system
12 employees.
- 13 (4) Part 2-3 is about modern awards. A modern award is made for a
14 particular industry or occupation and provides additional minimum
15 terms and conditions for those national system employees to whom
16 it applies. A modern award can have terms that are ancillary or
17 supplementary to the National Employment Standards.
- 18 (5) Part 2-4 is about enterprise agreements. An enterprise agreement is
19 made at the enterprise level and provides terms and conditions for
20 those national system employees to whom it applies. An enterprise
21 agreement can have terms that are ancillary or supplementary to
22 the National Employment Standards.
- 23 (6) Part 2-5 is about workplace determinations. A workplace
24 determination provides terms and conditions for those national
25 system employees to whom it applies. A workplace determination
26 is made by FWA if certain conditions are met.
- 27 (7) Part 2-8 provides for the transfer of certain modern awards,
28 enterprise agreements, workplace determinations and other
29 instruments if there is a transfer of business from one national
30 system employer to another national system employer.

31 *Other terms and conditions*

- 32 (8) In addition, other terms and conditions of employment for national
33 system employees include those:

Section 6

- 1 (a) provided by a national minimum wage order (see Part 2-6) or
2 an equal remuneration order (see Part 2-7); and
3 (b) provided by Part 2-9 (which deals with the frequency and
4 method of making payments to employees, deductions from
5 payments and high-income employees).

6 **6 Rights and responsibilities of employees, employers, organisations**
7 **etc. (Chapter 3)**

- 8 (1) Chapter 3 sets out rights and responsibilities of national system
9 employees, national system employers, organisations and others
10 (such as independent contractors and industrial associations).
- 11 (2) Part 3-1 provides general workplace protections. It:
12 (a) protects workplace rights; and
13 (b) protects freedom of association and involvement in lawful
14 industrial activities; and
15 (c) provides other protections, including protection from
16 discrimination.
- 17 (3) Part 3-2 deals with unfair dismissal of national system employees,
18 and the granting of remedies when that happens.
- 19 (4) Part 3-3 deals mainly with industrial action by national system
20 employees and national system employers and sets out when
21 industrial action is protected industrial action. No action lies under
22 any law in force in a State or Territory in relation to protected
23 industrial action except in certain circumstances.
- 24 (5) Part 3-4 is about the rights of officials of organisations who hold
25 entry permits to enter premises for purposes related to their
26 representative role under this Act and under State or Territory OHS
27 laws. In exercising those rights, permit holders must comply with
28 the requirements set out in the Part.
- 29 (6) Part 3-5 allows a national system employer to stand down a
30 national system employee without pay in certain circumstances.
- 31 (7) Part 3-6 deals with other rights and responsibilities of national
32 system employers in relation to:
33 (a) termination of employment; and

1 (b) keeping records and giving payslips.

2 **7 Compliance and enforcement (Chapter 4)**

3 (1) Chapter 4 provides for compliance with, and enforcement of, this
4 Act.

5 (2) Part 4-1 is about civil remedies. Certain provisions in this Act
6 impose obligations on certain persons. Civil remedies may be
7 sought in relation to contraventions of these civil remedy
8 provisions. Part 4-1:

9 (a) deals with applications for orders for contraventions of civil
10 remedy provisions; and

11 (b) sets out the orders the courts can make in relation to a
12 contravention of a civil remedy provision.

13 (3) Part 4-2 is about the jurisdiction and powers of the courts in
14 relation to matters arising under this Act.

15 **8 Administration (Chapter 5)**

16 (1) Chapter 5 provides for the administration of this Act by
17 establishing Fair Work Australia and the Office of the Fair Work
18 Ombudsman.

19 (2) Part 5-1 is about FWA. It:

20 (a) establishes and confers functions on FWA; and

21 (b) sets out how matters before FWA are to be conducted (for
22 example, how FWA is to deal with applications made to it).

23 (3) Part 5-2 is about the Office of the Fair Work Ombudsman. It:

24 (a) establishes and confers functions on the Fair Work
25 Ombudsman; and

26 (b) confers functions and powers on Fair Work Inspectors.

27 **9 Miscellaneous (Chapter 6)**

28 (1) Chapter 6 is a collection of miscellaneous matters that relate to the
29 other Chapters.

Chapter 1 Introduction

Part 1-1 Introduction

Division 3 Guide to this Act

Section 9

- 1 (2) Part 6-1 provides rules relating to applications for remedies under
2 this Act. It prevents certain applications if other remedies are
3 available and prevents multiple applications or complaints in
4 relation to the same conduct.
- 5 (3) Part 6-2 is about dealing with disputes between national system
6 employees and their employers under modern awards, enterprise
7 agreements and contracts of employment.
- 8 (4) Part 6-3 extends the National Employment Standards relating to
9 unpaid parental leave and notice of termination to non-national
10 system employees.
- 11 (5) Part 6-4 contains provisions to give effect, or further effect, to
12 certain international agreements relating to termination of
13 employment.
- 14 (6) Part 6-5 deals with miscellaneous matters such as delegations and
15 regulations.

1

2

Part 1-2—Definitions

3

Division 1—Introduction

4

10 Guide to this Part

5

This Part is about the terms that are defined in this Act.

6

Division 2 has the Dictionary (see section 12). The Dictionary is a list of every term that is defined in this Act. A term will either be defined in the Dictionary itself, or in another provision of this Act. If another provision defines the term, the Dictionary will have a signpost to that definition.

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11

Division 3 has definitions relating to the meanings of employee and employer.

12

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Division 4 has some other definitions that apply across this Act.

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11 Meanings of *employee* and *employer*

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In this Part, *employee* and *employer* have their ordinary meanings.

Section 12

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Division 2—The Dictionary

12 The Dictionary

In this Act:

4 yearly review of modern awards: see subsection 156(1).

access period for a proposed enterprise agreement: see subsection 180(4).

action includes an omission.

adoption-related leave: see subsection 67(5).

adverse action: see section 342.

affected employees for a variation of an enterprise agreement: see subsection 207(2).

affected employer:

- (a) in relation to an entry under Subdivision A of Division 2 of Part 3-4: see subsection 482(2); and
- (b) in relation to an entry in accordance with Division 3 of Part 3-4: see subsection 495(2).

affected member certificate: see subsection 520(1).

agreed terms for a workplace determination: see section 274.

agreed to in relation to a termination of an enterprise agreement: see section 221.

annual rate of an employee's guaranteed annual earnings: see subsection 330(3).

annual wage review: see subsection 285(1).

applicable award-derived long service leave terms: see subsection 113(3).

1 **application or complaint under another law:** see subsection
2 732(2).

3 **applies:**

4 (a) in relation to a modern award: see section 47; and

5 (b) in relation to an enterprise agreement: see section 52.

6 **applies to employment generally:** see subsection 26(4).

7 **appointment** of a bargaining representative means an appointment
8 of a bargaining representative under paragraph 176(1)(c) or (d) or
9 177(b).

10 **appropriate safe job:** see subsection 81(4).

11 **approved by FWA**, in relation to an enterprise agreement, means
12 approved by FWA under section 186 or 189.

13 **associated entity** has the meaning given by section 50AAA of the
14 *Corporations Act 2001*.

15 **Australian-based employee:** see subsections 35(2) and (3).

16 **Australian employer:** see subsection 35(1).

17 **Australian ship** means a ship that has Australian nationality under
18 section 29 of the *Shipping Registration Act 1981*.

19 **authority documents:** see subsection 489(3).

20 **available parental leave period:** see subsection 75(2).

21 **award/agreement free employee** means a national system
22 employee to whom neither a modern award nor an enterprise
23 agreement applies.

24 **award covered employee** for an enterprise agreement: see
25 subsection 193(4).

26 **award modernisation process** means the process of making
27 modern awards under Part 10A of the *Workplace Relations Act*
28 *1996*, as in force immediately before the commencement of
29 Part 2-3 of this Act (which deals with modern awards).

Section 12

- 1 ***bargaining order***: see subsection 229(1).
- 2 ***bargaining related workplace determination***: see subsection
3 269(1).
- 4 ***bargaining representative*** for a proposed enterprise agreement: see
5 sections 176 and 177.
- 6 ***bargaining services***: see subsection 353(3).
- 7 ***bargaining services fee***: see subsection 353(2).
- 8 ***base rate of pay***: see section 16.
- 9 ***birth-related leave***: see subsection 67(4).
- 10 ***child*** of a person: see subsection 17(1).
- 11 ***civil remedy provision***: see subsection 539(1).
- 12 ***Commissioner*** means a Commissioner of FWA.
- 13 ***common requirements*** in relation to industrial action: see
14 section 413.
- 15 ***Commonwealth authority*** means:
16 (a) a body corporate established for a public purpose by or under
17 a law of the Commonwealth; or
18 (b) a body corporate:
19 (i) incorporated under a law of the Commonwealth or a
20 State or a Territory; and
21 (ii) in which the Commonwealth has a controlling interest.
- 22 ***Commonwealth place*** means a place referred to in paragraph 52(i)
23 of the Constitution, other than the seat of government.
- 24 ***compassionate leave*** means compassionate leave to which a
25 national system employee is entitled under section 104.
- 26 ***compliance powers***: see section 703.
- 27 ***compliance purposes***: see subsection 706(1).
- 28 ***conduct*** includes an omission.

- 1 **conduct** of a protected action ballot: see subsection 458(5).
- 2 **conscientious objection certificate**: see subsection 485(2).
- 3 **consent low-paid workplace determination**: see subsection 260(2).
- 4 **consistent with the Small Business Fair Dismissal Code**: see
5 subsection 388(2).
- 6 **constitutional corporation** means a corporation to which
7 paragraph 51(xx) of the Constitution applies.
- 8 **constitutionally-covered entity**: see subsection 338(2).
- 9 **constitutional trade or commerce** means trade or commerce:
10 (a) between Australia and a place outside Australia; or
11 (b) among the States; or
12 (c) between a State and a Territory; or
13 (d) between 2 Territories; or
14 (e) within a Territory.
- 15 **continental shelf** means the continental shelf (as defined in the
16 *Seas and Submerged Lands Act 1973*) of Australia (including its
17 external Territories).
- 18 **continuous service** has a meaning affected by section 22.
- 19 **coverage terms** in relation to a modern award: see subsection
20 143(1).
- 21 **covers**:
22 (a) in relation to a modern award: see section 48; and
23 (b) in relation to an enterprise agreement: see section 53; and
24 (c) in relation to a workplace determination: see section 277.
- 25 **day of placement**: see subsection 67(6).
- 26 **de facto partner** of a national system employee:
27 (a) means a person who, although not legally married to the
28 employee, lives with the employee in a relationship as a
29 couple on a genuine domestic basis (whether the employee
30 and the person are of the same sex or different sexes); and
-

Section 12

- 1 (b) includes a former de facto partner of the employee.
- 2 ***Deputy President*** means a Deputy President of FWA.
- 3 ***discriminatory term*** of an enterprise agreement: see section 195.
- 4 ***dismissal remedy bargaining order application***: see subsection
5 726(2).
- 6 ***dismissed***: see section 386.
- 7 ***earnings***: see subsections 332(1) and (2).
- 8 ***eligible community service activity***: see section 109.
- 9 ***eligible State or Territory court*** means one of the following courts:
10 (a) a District, County or Local Court;
11 (b) a magistrates court;
12 (c) the Industrial Relations Court of South Australia;
13 (d) any other State or Territory court that is prescribed by the
14 regulations.
- 15 ***employee*** is defined in the first Division of each Part (other than
16 Part 1-1) in which the term appears.
- 17 Note 1: The definition in the Part will define ***employee*** either as a national
18 system employee or as having its ordinary meaning. However, there
19 may be particular provisions in the Part where a different meaning for
20 the term is specified.
- 21 Note 2: If the term has its ordinary meaning, see further subsection 15(1).
- 22 ***employee claim action***: see section 409.
- 23 ***employee couple***: 2 national system employees are an ***employee***
24 ***couple*** if each of the employees is the spouse or de facto partner of
25 the other.
- 26 ***employee organisation*** means an organisation of employees.
- 27 ***employee record***, in relation to an employee, has the meaning
28 given by the *Privacy Act 1988*.
- 29 ***employee response action***: see section 410.

1 **employee with a disability** means a national system employee who
2 is qualified for a disability support pension as set out in section 94
3 or 95 of the *Social Security Act 1991*, or who would be so qualified
4 but for paragraph 94(1)(e) or 95(1)(c) of that Act.

5 **employer** is defined in the first Division of each Part (other than
6 Part 1-1) in which the term appears.

7 Note 1: The definition in the Part will define **employer** either as a national
8 system employer or as having its ordinary meaning. However, there
9 may be particular provisions in the Part where a different meaning for
10 the term is specified.

11 Note 2: If the term has its ordinary meaning, see further subsection 15(2).

12 **employer organisation** means an organisation of employers.

13 **employer response action**: see section 411.

14 **employing authority**: see subsection 795(6).

15 **engages in industrial activity**: see section 347.

16 **enterprise** means a business, activity, project or undertaking.

17 **enterprise agreement** means:

18 (a) a single-enterprise agreement; or

19 (b) a multi-enterprise agreement.

20 **entry notice**: see subsection 487(2).

21 **entry permit**: see section 512.

22 **equal remuneration for work of equal or comparable value**: see
23 subsection 302(2).

24 **equal remuneration order**: see subsection 302(1).

25 **exclusive economic zone** means the exclusive economic zone (as
26 defined in the *Seas and Submerged Lands Act 1973*) of Australia
27 (including its external Territories).

28 **exemption certificate**: see subsection 519(1).

29 **extended notice of termination provisions**: see subsection 759(3).

Section 12

- 1 ***extended parental leave provisions***: see subsection 744(3).
- 2 ***Fair Work Australia*** or ***FWA*** means the body established by
3 section 575.
- 4 ***Fair Work Information Statement***: see subsection 124(1).
- 5 ***Fair Work Inspector*** means:
6 (a) a person appointed as a Fair Work Inspector under
7 section 700; or
8 (b) the Fair Work Ombudsman in his or her capacity as a Fair
9 Work Inspector under section 701.
- 10 ***fair work instrument*** means:
11 (a) a modern award; or
12 (b) an enterprise agreement; or
13 (c) a workplace determination; or
14 (d) an FWA order.
- 15 ***Federal Court*** means the Federal Court of Australia.
- 16 ***first employer***, in relation to a transfer of employment: see
17 subsection 22(7).
- 18 ***fixed platform*** means an artificial island, installation or structure
19 permanently attached to the sea-bed for the purpose of exploration
20 for, or exploitation of, resources or for other economic purposes.
- 21 ***flexibility term***:
22 (a) in relation to a modern award—see subsection 144(1); and
23 (b) in relation to an enterprise agreement—see subsection
24 202(1).
- 25 ***flight crew officer*** means a person who performs (whether with or
26 without other duties) duties as a pilot, navigator or flight engineer
27 of aircraft, and includes a person being trained for the performance
28 of such duties.
- 29 ***franchise*** has the meaning given by the *Corporations Act 2001*.
- 30 ***Full Bench*** means a Full Bench of FWA constituted under
31 section 618.

1 *full rate of pay*: see section 18.

2 *FWA*: see *Fair Work Australia*.

3 *FWA Member* means the President, a Deputy President, a
4 Commissioner or a Minimum Wage Panel Member.

5 *General Manager* means the General Manager of FWA.

6 *general protections court application*: see subsection 370(2).

7 *general protections FWA application*: see subsection 727(2).

8 *general State industrial law*: see subsection 26(3).

9 *genuinely agreed* in relation to an enterprise agreement: see
10 section 188.

11 *genuine redundancy*: see section 389.

12 *good faith bargaining requirements*: see section 228.

13 *greenfields agreement*: see subsection 172(4).

14 *guaranteed period* for a guarantee of annual earnings: see
15 section 331.

16 *guarantee of annual earnings*: see subsection 330(1).

17 *high income employee*: see section 329.

18 *high income threshold*: see section 333.

19 *ILO* means the International Labour Organization.

20 *immediate family* of a national system employee means:

21 (a) a spouse, de facto partner, child, parent, grandparent,
22 grandchild or sibling of the employee; or

23 (b) a child, parent, grandparent, grandchild or sibling of a spouse
24 or de facto partner of the employee.

25 *independent advisor* for a protected action ballot means the person
26 (if any) specified in the protected action ballot order as the
27 independent advisor for the ballot.

Section 12

- 1 ***independent contractor*** is not confined to an individual.
- 2 ***individual flexibility arrangement:***
- 3 (a) in relation to a modern award—see subsection 144(1); and
- 4 (b) in relation to an enterprise agreement—see paragraph
- 5 202(1)(a).
- 6 ***industrial action:*** see section 19.
- 7 ***industrial action related workplace determination:*** see subsection
- 8 266(1).
- 9 ***industrial association*** means:
- 10 (a) an association of employees or independent contractors, or
- 11 both, or an association of employers, that is registered or
- 12 recognised as such an association (however described) under
- 13 a workplace law; or
- 14 (b) an association of employees, or independent contractors, or
- 15 both (whether formed formally or informally), a purpose of
- 16 which is the protection and promotion of their interests in
- 17 matters concerning their employment, or their interests as
- 18 independent contractors (as the case may be); or
- 19 (c) an association of employers a principal purpose of which is
- 20 the protection and promotion of their interests in matters
- 21 concerning employment and/or independent contractors;
- 22 and includes:
- 23 (d) a branch of such an association; and
- 24 (e) an organisation; and
- 25 (f) a branch of an organisation.
- 26 ***industrial body*** means:
- 27 (a) FWA; or
- 28 (b) a court or commission (however described) performing or
- 29 exercising, under an industrial law, functions and powers
- 30 corresponding to those conferred on FWA by this Act; or
- 31 (c) a court or commission (however described) performing or
- 32 exercising, under a workplace law, functions and powers
- 33 corresponding to those conferred on FWA by Schedule 1 to
- 34 the *Workplace Relations Act 1996*.

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industrial law means:

- (a) this Act; or
- (b) Schedule 1 to the *Workplace Relations Act 1996*; or
- (c) a law of the Commonwealth, however designated, that regulates the relationships between employers and employees; or
- (d) a State or Territory industrial law.

industry-specific redundancy scheme means redundancy arrangements in a modern award that are described in the award as an industry-specific redundancy scheme.

inspector means a Fair Work Inspector.

involved in: see section 550.

irregularity, in relation to the conduct of a protected action ballot: see subsection 458(6).

junior employee means a national system employee who is under 21.

jury service pay: see subsection 111(6).

jury service summons: see subsection 111(7).

lawyer means a person who is admitted to the legal profession by a Supreme Court of a State or Territory.

lock out: see subsection 19(3).

long term casual employee: a national system employee of a national system employer is a ***long term casual employee*** at a particular time if, at that time:

- (a) the employee is a casual employee; and
- (b) the employee 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.

low-paid authorisation: see subsection 242(1).

low-paid workplace determination means:

Section 12

- 1 (a) a consent low-paid workplace determination; or
2 (b) a special low-paid workplace determination.

3 **made:**

- 4 (a) in relation to an enterprise agreement: see section 182; and
5 (b) in relation to a variation of an enterprise agreement: see
6 section 209.

7 **magistrates court** means:

- 8 (a) a court constituted by a police, stipendiary or special
9 magistrate; or
10 (b) a court constituted by an industrial magistrate who is also a
11 police, stipendiary or special magistrate.

12 **majority support determination:** see subsection 236(1).

13 **maritime employee** means a person who is, or whose occupation is
14 that of, a master as defined in section 6 of the *Navigation Act 1912*,
15 a seaman as so defined or a pilot as so defined.

16 **medical certificate** means a certificate signed by a medical
17 practitioner.

18 **medical practitioner** means a person registered, or licensed, as a
19 medical practitioner under a law of a State or Territory that
20 provides for the registration or licensing of medical practitioners.

21 **membership action:** see subsection 350(3).

22 **minimum employment period:** see section 383.

23 **Minimum Wage Panel** means the Minimum Wage Panel of FWA
24 constituted under section 620.

25 **Minimum Wage Panel Member** means a Minimum Wage Panel
26 Member of FWA.

27 **minimum wages objective:** see subsection 284(1).

28 **miscellaneous modern award:** see subsection 163(4).

29 **model consultation term:** see subsection 205(3).

- 1 ***model flexibility term***: see subsection 202(5).
- 2 ***modern award*** means a modern award made under Part 2-3.
- 3 ***modern award minimum wages***: see subsection 284(3).
- 4 ***modern award powers***: see subsection 134(2).
- 5 ***modern awards objective***: see subsection 134(1).
- 6 ***modifications*** includes additions, omissions and substitutions.
- 7 ***multi-enterprise agreement*** means an enterprise agreement made
8 as referred to in subsection 172(3).
- 9 ***named employer award***: see subsection 312(2).
- 10 ***National Employment Standards***: see subsection 61(3).
- 11 ***national minimum wage order*** means a national minimum wage
12 order made in an annual wage review.
- 13 ***national system employee***: see section 13.
- 14 ***national system employer***: see section 14.
- 15 ***new employer***, in relation to a transfer of business: see subsection
16 311(1).
- 17 ***nominal expiry date***:
- 18 (a) of an enterprise agreement approved under section 186,
19 means the date specified in the agreement as its nominal
20 expiry date; or
- 21 (b) of an enterprise agreement approved under section 189
22 (which deals with agreements that do not pass the better off
23 overall test): see subsection 189(4); or
- 24 (c) of a workplace determination, means the date specified in the
25 determination as its nominal expiry date.
- 26 ***non-excluded matters***: see subsection 27(2).
- 27 ***non-monetary benefits***: see subsection 332(3).

Section 12

1 ***non-national system employee*** means an employee who is not a
2 national system employee.

3 ***non-national system employer*** means an employer that is not a
4 national system employer.

5 ***non-transferring employee*** of a new employer, in relation to a
6 transfer of business: see subsection 314(2).

7 ***notification time*** for a proposed enterprise agreement: see
8 subsection 173(2).

9 ***objectionable term*** means a term that:

10 (a) requires, has the effect of requiring, or purports to require or
11 have the effect of requiring; or

12 (b) permits, has the effect of permitting, or purports to permit or
13 have the effect of permitting;

14 either of the following:

15 (c) a contravention of Part 3-1 (which deals with general
16 protections);

17 (d) the payment of a bargaining services fee.

18 ***occupier***, of premises, includes a person in charge of the premises.

19 ***office***, in an industrial association, means:

20 (a) an office of president, vice president, secretary or assistant
21 secretary of the association; or

22 (b) the office of a voting member of a collective body of the
23 association, being a collective body that has power in relation
24 to any of the following functions:

25 (i) the management of the affairs of the association;

26 (ii) the determination of policy for the association;

27 (iii) the making, alteration or rescission of rules of the
28 association;

29 (iv) the enforcement of rules of the association, or the
30 performance of functions in relation to the enforcement
31 of such rules; or

32 (c) an office the holder of which is, under the rules of the
33 association, entitled to participate directly in any of the
34 functions referred to in subparagraphs (b)(i) and (iv), other

- 1 than an office the holder of which participates only in
2 accordance with directions given by a collective body or
3 another person for the purpose of implementing:
4 (i) existing policy of the association; or
5 (ii) decisions concerning the association; or
6 (d) an office the holder of which is, under the rules of the
7 association, entitled to participate directly in any of the
8 functions referred to in subparagraphs (b)(ii) and (iii); or
9 (e) the office of a person holding (whether as trustee or
10 otherwise) property:
11 (i) of the association; or
12 (ii) in which the association has a beneficial interest.

13 **Office of the Fair Work Ombudsman** means the body established
14 by section 696.

15 **officer**, of an industrial association, means:

- 16 (a) an official of the association; or
17 (b) a delegate or other representative of the association.

18 **official**, of an industrial association, means a person who holds an
19 office in, or is an employee of, the association.

20 **old employer**, in relation to a transfer of business: see subsection
21 311(1).

22 **ordinary hours of work** of an award/agreement free employee: see
23 section 20.

24 **organisation** means an organisation registered under Schedule 1 to
25 the *Workplace Relations Act 1996*.

26 **outworker** means:

- 27 (a) an employee who, for the purpose of the business of his or
28 her employer, performs work at residential premises or at
29 other premises that would not conventionally be regarded as
30 being business premises; or
31 (b) an individual who, for the purpose of a contract for the
32 provision of services, performs work:
33 (i) in the textile, clothing or footwear industry; and

Section 12

1 (ii) at residential premises or at other premises that would
2 not conventionally be regarded as being business
3 premises.

4 ***outworker entity*** means any of the following entities, other than in
5 the entity's capacity as a national system employer:

- 6 (a) a constitutional corporation;
7 (b) the Commonwealth;
8 (c) a Commonwealth authority;
9 (d) a body corporate incorporated in a Territory;
10 (e) a person who carries on an activity (whether of a commercial,
11 governmental or other nature) in a Territory in Australia, in
12 connection with the activity carried on in the Territory.

13 Note: In this context, ***Australia*** includes the Territory of Christmas Island
14 and the Territory of Cocos (Keeling) Islands (see paragraph 17(a) of
15 the *Acts Interpretation Act 1901*).

16 ***outworker terms***: see subsection 140(3).

17 ***paid agent***, in relation to a matter before FWA, means an agent
18 (other than a bargaining representative) who charges or receives a
19 fee to represent a person in the matter.

20 ***paid annual leave*** means paid annual leave to which a national
21 system employee is entitled under section 87.

22 ***paid no safe job leave*** means paid no safe job leave to which a
23 national system employee is entitled under paragraph 81(3)(b).

24 ***paid personal/carer's leave*** means paid personal/carer's leave to
25 which a national system employee is entitled under section 96.

26 ***partial work ban***: see subsection 470(3).

27 ***passes the better off overall test***:

- 28 (a) in relation to an enterprise agreement that is not a greenfields
29 agreement: see subsection 193(1); and
30 (b) in relation to a greenfields agreement: see subsection 193(3).

31 ***pattern bargaining***: see section 412.

1 **peak council** means a national or State council or federation that is
2 effectively representative of a significant number of organisations
3 (within the ordinary meaning of the term) representing employers
4 or employees in a range of industries.

5 **pecuniary penalty order** means an order under subsection 546(1).

6 **penalty unit** has the meaning given by section 4AA of the *Crimes*
7 *Act 1914*.

8 **period of employment**: see section 384.

9 **permissible occasion**: see sections 102 and 104.

10 **permit holder** means a person who holds an entry permit.

11 **permit qualification matters**: see subsection 513(1).

12 **permitted matters** in relation to an enterprise agreement: see
13 subsection 172(1).

14 **piecemaker**: see section 21.

15 **pilot**, in relation to an aircraft, includes a pilot in command,
16 co-pilot or pilot of any other description.

17 **post-declaration negotiating period**: see subsection 269(2).

18 **post-industrial action negotiating period**: see subsection 266(3).

19 **premises** includes:

- 20 (a) any land, building, structure, mine, mine working, aircraft
21 ship, vessel, vehicle or place; and
22 (b) a part of premises (including premises referred to in
23 paragraph (a)).

24 **pre-parental leave position**: see subsection 83(2).

25 **prescribed State industrial authority** means a State board, court,
26 tribunal, body or official prescribed by the regulations.

27 **President** means the President of FWA.

Section 12

- 1 ***procedural rules*** means the procedural rules of FWA made under
2 section 609.
- 3 ***process or proceedings under a workplace law or workplace***
4 ***instrument***: see subsection 341(2).
- 5 ***prospective award covered employee*** for an enterprise agreement:
6 see subsection 193(5).
- 7 ***protected action ballot*** means a ballot conducted under Division 8
8 of Part 3-3.
- 9 ***protected action ballot agent*** for a protected action ballot means
10 the person that conducts the protected action ballot.
- 11 ***protected action ballot order***: see subsection 437(1).
- 12 ***protected from unfair dismissal***: see section 382.
- 13 ***protected industrial action***: see section 408.
- 14 ***public holiday***: see section 115.
- 15 ***public sector employment***: see subsections 795(4) and (5).
- 16 ***public sector employment law***: see subsection 40(3).
- 17 ***recognised emergency management body***: see subsection 109(3).
- 18 ***registered employee association*** means:
19 (a) an employee organisation; or
20 (b) an association of employees or independent contractors, or
21 both, that is registered or recognised as such an association
22 (however described) under a State or Territory industrial law.
- 23 ***related body corporate*** has the meaning given by the *Corporations*
24 *Act 2001*.
- 25 ***relevant employee organisation***, in relation to a greenfields
26 agreement, means an employee organisation that is entitled to
27 represent the industrial interests of one or more of the employees
28 who will be covered by the agreement, in relation to work to be
29 performed under the agreement.

Section 12

- 1 ***safety net contractual entitlement*** means an entitlement under a
2 contract between an employee and an employer that relates to any
3 of the subject matters described in:
4 (a) subsection 61(2) (which deals with the National Employment
5 Standards); or
6 (b) subsection 139(1) (which deals with modern awards).
- 7 ***school age***, for a child, means the age at which the child is required
8 by a law of the State or Territory in which the child lives to start
9 attending school.
- 10 ***school-based apprentice*** means a national system employee who is
11 an apprentice to whom a school-based training arrangement
12 applies.
- 13 ***school-based trainee*** means a national system employee (other
14 than a school-based apprentice) to whom a school-based training
15 arrangement applies.
- 16 ***school-based training arrangement*** means a training arrangement
17 undertaken as part of a course of secondary education.
- 18 ***scope order***: see subsection 238(1).
- 19 ***second employer***, in relation to a transfer of employment: see
20 subsection 22(7).
- 21 ***serious breach declaration***: see section 234.
- 22 ***serious misconduct*** has the meaning prescribed by the regulations.
- 23 ***service***: see section 22.
- 24 ***setting*** modern award minimum wages: see subsection 284(4).
- 25 ***Sex Discrimination Commissioner*** means the Sex Discrimination
26 Commissioner appointed under the *Sex Discrimination Act 1984*.
- 27 ***ship*** includes a barge, lighter, hulk or other vessel.
- 28 ***single-enterprise agreement*** means an enterprise agreement made
29 as referred to in subsection 172(2).
- 30 ***single interest employer authorisation***: see subsection 248(1).
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Section 12

- 1 *small business employer*: see section 23.
- 2 *Small Business Fair Dismissal Code* means the Small Business
3 Fair Dismissal Code declared under subsection 388(1).
- 4 *special low-paid workplace determination*: see subsection 260(4).
- 5 *spouse* includes a former spouse.
- 6 *State industrial instrument* means an award, an agreement
7 (whether individual or collective), or another industrial instrument
8 or order, that:
9 (a) is made under, or recognised by, a law of a State that is a
10 State or Territory industrial law; and
11 (b) determines terms and conditions of employment.
- 12 *state of mind*: see subsection 793(3).
- 13 *State or Territory anti-discrimination law*: see subsection 351(3).
- 14 *State or Territory industrial law*: see subsection 26(2).
- 15 *State or Territory OHS law*: see subsection 494(3).
- 16 *State or Territory OHS right*: see subsection 494(2).
- 17 *step-child*: without limiting who is a step-child of a person,
18 someone who is a child of the person's de facto partner is a
19 *step-child* of a person, if he or she would be the person's step-child
20 except that the person is not legally married to the de facto partner.
- 21 *termination of industrial action instrument*: see subsection
22 266(2).
- 23 *territorial sea*, in relation to Australia, has the meaning given by
24 Division 1 of Part II of the *Seas and Submerged Lands Act 1973*.
- 25 *Territory employer*: see subsection 338(4).
- 26 *test time*: see subsection 193(6).
- 27 *this Act* includes the regulations.
- 28 *trade and commerce employer*: see subsection 338(3).

1 **training arrangement** means a combination of work and training
2 that is subject to a training agreement, or a training contract, that
3 takes effect under a law of a State or Territory relating to the
4 training of employees.

5 **transferable instrument**: see subsection 312(1).

6 **transfer of business**: see subsection 311(1).

7 **transfer of employment**: see subsection 22(7).

8 **transfer of employment between associated entities**: see paragraph
9 22(8)(a).

10 **transfer of employment between non-associated entities**: see
11 paragraph 22(8)(b).

12 **transferring employee**, in relation to a transfer of business: see
13 subsection 311(2).

14 **transferring work**, in relation to a transfer of business: see
15 paragraph 311(1)(c).

16 **unfair dismissal application**: see subsection 729(2).

17 **unfairly dismissed**: see section 385.

18 **unlawful term** of an enterprise agreement: see section 194.

19 **unlawful termination court application**: see subsection 778(2).

20 **unlawful termination FWA application**: see subsection 730(2).

21 **unpaid carer's leave** means unpaid carer's leave to which a
22 national system employee is entitled under section 102.

23 **unpaid parental leave** means unpaid parental leave to which a
24 national system employee is entitled under section 70.

25 **unpaid pre-adoption leave** means unpaid pre-adoption leave to
26 which a national system employee is entitled under section 85.

Section 12

- 1 ***unpaid special maternity leave*** means unpaid special maternity
2 leave to which a national system employee is entitled under
3 section 80.
- 4 ***varying*** modern award minimum wages: see subsection 284(4).
- 5 ***vocational placement*** means a placement that is:
6 (a) undertaken with an employer for which a person is not
7 entitled to be paid any remuneration; and
8 (b) undertaken as a requirement of an education or training
9 course; and
10 (c) authorised under a law or an administrative arrangement of
11 the Commonwealth, a State or a Territory.
- 12 ***voluntary emergency management activity***: see subsection 109(2).
- 13 ***waters above the continental shelf*** means any part of the area in,
14 on or over the continental shelf.
- 15 ***waterside worker*** has the meaning given by clause 1 of Schedule 2
16 to the *Workplace Relations Act 1996* as in force immediately
17 before the commencement of this section.
- 18 ***working day*** means a day that is not a Saturday, a Sunday or a
19 public holiday.
- 20 ***workplace determination*** means:
21 (a) a low-paid workplace determination; or
22 (b) an industrial action related workplace determination; or
23 (c) a bargaining related workplace determination.
- 24 ***workplace instrument*** means an instrument that:
25 (a) is made under, or recognised by, a workplace law; and
26 (b) concerns the relationships between employers and
27 employees.
- 28 ***workplace law*** means:
29 (a) this Act; or
30 (b) Schedule 1 to the *Workplace Relations Act 1996*; or
31 (c) the *Independent Contractors Act 2006*; or

Section 12

1 (d) any other law of the Commonwealth, a State or a Territory
2 that regulates the relationships between employers and
3 employees (including by dealing with occupational health
4 and safety matters).

5 ***workplace right***: see subsection 341(1).

6 ***work value reasons***: see subsection 156(4).

Section 13

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

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13 Meaning of *national system employee*

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A national system employee is an individual so far as he or she is employed, or usually employed, as described in the definition of *national system employer* in section 14, by a national system employer, except on a vocational placement.

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14 Meaning of *national system employer*

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A national system employer is:

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(a) a constitutional corporation, so far as it employs, or usually employs, an individual; or

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(b) the Commonwealth, so far as it employs, or usually employs, an individual; or

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(c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or

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(d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:

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(i) a flight crew officer; or

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(ii) a maritime employee; or

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(iii) a waterside worker; or

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(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or

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(f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

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Note: In this context, *Australia* includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see paragraph 17(a) of the *Acts Interpretation Act 1901*).

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1 **15 Ordinary meanings of *employee* and *employer***

- 2 (1) A reference in this Act to an employee with its ordinary meaning:
3 (a) includes a reference to a person who is usually such an
4 employee; and
5 (b) does not include a person on a vocational placement.
- 6 (2) A reference in this Act to an employer with its ordinary meaning
7 includes a reference to a person who is usually such an employer.

Section 16

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2 **Division 4—Other definitions**

3 **16 Meaning of *base rate of pay***

4 *General meaning*

- 5 (1) The ***base rate of pay*** of a national system employee is the rate of
6 pay payable to the employee for his or her ordinary hours of work,
7 but not including any of the following:
- 8 (a) incentive-based payments and bonuses;
 - 9 (b) loadings;
 - 10 (c) monetary allowances;
 - 11 (d) overtime or penalty rates;
 - 12 (e) any other separately identifiable amounts.

13 *Meaning for pieceworkers in relation to entitlements under*
14 *National Employment Standards*

- 15 (2) However, if one of the following paragraphs applies to a national
16 system employee who is a pieceworker, the employee's ***base rate***
17 ***of pay***, in relation to entitlements under the National Employment
18 Standards, is the base rate of pay referred to in that paragraph:
- 19 (a) a modern award applies to the employee and specifies the
20 employee's base rate of pay for the purposes of the National
21 Employment Standards;
 - 22 (b) an enterprise agreement applies to the employee and specifies
23 the employee's base rate of pay for the purposes of the
24 National Employment Standards;
 - 25 (c) the employee is an award/agreement free employee, and the
26 regulations prescribe, or provide for the determination of, the
27 employee's base rate of pay for the purposes of the National
28 Employment Standards.

29 **17 Meaning of *child* of a person**

- 30 (1) A ***child*** of a person includes:

Section 18

1 (a) someone who is a child of the person within the meaning of
2 the *Family Law Act 1975*; and

3 (b) an adopted child or step-child of the person.

4 It does not matter whether the child is an adult.

5 (2) If, under this section, one person is a child of another person, other
6 family relationships are also to be determined on the basis that the
7 child is a child of that other person.

8 Note: For example, for the purpose of leave entitlements in relation to
9 immediate family under Division 7 of Part 2-2 (which deals with
10 personal/carer's leave and compassionate leave):

11 (a) the other person is the parent of the child, and so is a member of
12 the child's immediate family; and

13 (b) the child, and any other children, of the other person are siblings,
14 and so are members of each other's immediate family.

15 **18 Meaning of *full rate of pay***

16 *General meaning*

17 (1) The ***full rate of pay*** of a national system employee is the rate of
18 pay payable to the employee, including all the following:

19 (a) incentive-based payments and bonuses;

20 (b) loadings;

21 (c) monetary allowances;

22 (d) overtime or penalty rates;

23 (e) any other separately identifiable amounts.

24 *Meaning for pieceworkers in relation to entitlements under*
25 *National Employment Standards*

26 (2) However, if one of the following paragraphs applies to a national
27 system employee who is a pieceworker, the employee's ***full rate of***
28 ***pay***, in relation to entitlements under the National Employment
29 Standards, is the full rate of pay referred to in that paragraph:

30 (a) a modern award applies to the employee and specifies the
31 employee's full rate of pay for the purposes of the National
32 Employment Standards;

Section 19

- 1 (b) an enterprise agreement applies to the employee and specifies
2 the employee's full rate of pay for the purposes of the
3 National Employment Standards;
4 (c) the employee is an award/agreement free employee, and the
5 regulations prescribe, or provide for the determination of, the
6 employee's full rate of pay for the purposes of the National
7 Employment Standards.

8 **19 Meaning of *industrial action***

- 9 (1) ***Industrial action*** means action of any of the following kinds:
10 (a) the performance of work by an employee in a manner
11 different from that in which it is customarily performed, or
12 the adoption of a practice in relation to work by an employee,
13 the result of which is a restriction or limitation on, or a delay
14 in, the performance of the work;
15 (b) a ban, limitation or restriction on the performance of work by
16 an employee or on the acceptance of or offering for work by
17 an employee;
18 (c) a failure or refusal by employees to attend for work or a
19 failure or refusal to perform any work at all by employees
20 who attend for work;
21 (d) the lockout of employees from their employment by the
22 employer of the employees.

23 Note: In *Automotive, Food, Metals, Engineering, Printing and Kindred*
24 *Industries Union v The Age Company Limited*, PR946290, the Full
25 Bench of the Australian Industrial Relations Commission considered
26 the nature of industrial action and noted that action will not be
27 industrial in character if it stands completely outside the area of
28 disputation and bargaining.

- 29 (2) However, ***industrial action*** does not include the following:
30 (a) action by employees that is authorised or agreed to by the
31 employer of the employees;
32 (b) action by an employer that is authorised or agreed to by, or
33 on behalf of, employees of the employer;
34 (c) action by an employee if:
35 (i) the action was based on a reasonable concern of the
36 employee about an imminent risk to his or her health or
37 safety; and

- 1 (ii) the employee did not unreasonably fail to comply with a
2 direction of his or her employer to perform other
3 available work, whether at the same or another
4 workplace, that was safe and appropriate for the
5 employee to perform.
- 6 (3) An employer **locks out** employees from their employment if the
7 employer prevents the employees from performing work under
8 their contracts of employment without terminating those contracts.

9 **20 Meaning of *ordinary hours of work* for award/agreement free**
10 **employees**

11 *Agreed ordinary hours of work*

- 12 (1) The ***ordinary hours of work*** of an award/agreement free employee
13 are the hours agreed by the employee and his or her national
14 system employer as the employee's ordinary hours of work.

15 *If there is no agreement*

- 16 (2) If there is no agreement about ordinary hours of work for an
17 award/agreement free employee, the ***ordinary hours of work*** of the
18 employee in a week are:
19 (a) for a full time employee—38 hours; or
20 (b) for an employee who is not a full-time employee—the lesser
21 of:
22 (i) 38 hours; and
23 (ii) the employee's usual weekly hours of work.

24 *If the agreed hours are less than usual weekly hours*

- 25 (3) If, for an award/agreement free employee who is not a full-time
26 employee, there is an agreement under subsection (1) between the
27 employee and his or her national system employer, but the agreed
28 ordinary hours of work are less than the employee's usual weekly
29 hours of work, the ***ordinary hours of work*** of the employee in a
30 week are the lesser of:
31 (a) 38 hours; and
32 (b) the employee's usual weekly hours of work.

Section 21

1 *Regulations may prescribe usual weekly hours*

- 2 (4) For an award/agreement free employee who is not a full-time
3 employee and who does not have usual weekly hours of work, the
4 regulations may prescribe, or provide for the determination of,
5 hours that are taken to be the employee's usual weekly hours of
6 work for the purposes of subsections (2) and (3).

7 **21 Meaning of *piecemaker***

8 (1) A *piecemaker* is:

- 9 (a) a national system employee to whom a modern award applies
10 and who is defined or described in the award as a
11 piecemaker; or
12 (b) a national system employee to whom an enterprise agreement
13 applies and who is defined or described in the agreement as a
14 piecemaker; or
15 (c) an award/agreement free employee who is in a class of
16 employees prescribed by the regulations as piecemakers.

17 Note: Sections 197 and 198 affect whether FWA may approve an enterprise
18 agreement covering a national system employee that includes a term
19 that:

- 20 (a) defines or describes the employee as a piecemaker, if the
21 employee is covered by a modern award that is in operation and
22 does not include such a term; or
23 (b) does not define or describe the employee as a piecemaker, if the
24 employee is covered by a modern award that is in operation and
25 includes such a term.

26 (2) Without limiting the way in which a class may be described for the
27 purposes of paragraph (1)(c), the class may be described by
28 reference to one or more of the following:

- 29 (a) a particular industry or part of an industry;
30 (b) a particular kind of work;
31 (c) a particular type of employment.

1 **22 Meanings of *service* and *continuous service***

2 *General meaning*

- 3 (1) A period of ***service*** by a national system employee with his or her
4 national system employer is a period during which the employee is
5 employed by the employer, but does not include any period (an
6 ***excluded period***) that does not count as service because of
7 subsection (2).
- 8 (2) The following periods do not count as service:
9 (a) any period of unauthorised absence;
10 (b) any period of unpaid leave or unpaid authorised absence,
11 other than:
12 (i) a period of absence under Division 8 of Part 2-2 (which
13 deals with community service leave); or
14 (ii) a period of stand down under Part 3-5, under an
15 enterprise agreement that applies to the employee, or
16 under the employee's contract of employment; or
17 (iii) a period of leave or absence of a kind prescribed by the
18 regulations.
- 19 (3) An excluded period does not break a national system employee's
20 ***continuous service*** with his or her national system employer, but
21 does not count towards the length of the employee's continuous
22 service.

23 *Meaning for Divisions 4 and 5, and Subdivision A of Division 11,*
24 *of Part 2-2*

- 25 (4) For the purposes of Divisions 4 and 5, and Subdivision A of
26 Division 11, of Part 2-2:
27 (a) a period of ***service*** by a national system employee with his or
28 her national system employer is a period during which the
29 employee is employed by the employer, but does not include
30 any period of unauthorised absence; and
31 (b) a period of unauthorised absence does not break a national
32 system employee's ***continuous service*** with his or her
33 national system employer, but does not count towards the
34 length of the employee's continuous service; and
-

Section 22

1 (c) subsections (1), (2) and (3) do not apply.

2 Note: Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2
3 deal, respectively, with requests for flexible working
4 arrangements, parental leave and related entitlements, and notice
5 of termination or payment in lieu of notice.

6 *When service with one employer counts as service with another*
7 *employer*

8 (5) If there is a transfer of employment (see subsection (7)) in relation
9 to a national system employee:

10 (a) any period of service of the employee with the first employer
11 counts as service of the employee with the second employer;
12 and

13 (b) the period between the termination of the employment with
14 the first employer and the start of the employment with the
15 second employer does not break the employee's continuous
16 service with the second employer (taking account of the
17 effect of paragraph (a)), but does not count towards the
18 length of the employee's continuous service with the second
19 employer.

20 Note: This subsection does not apply to a transfer of employment between
21 non-associated entities, for the purpose of Division 6 of Part 2-2
22 (which deals with annual leave) or Subdivision B of Division 11 of
23 Part 2-2 (which deals with redundancy pay), if the second employer
24 decides not to recognise the employee's service with the first
25 employer for the purpose of that Division or Subdivision (see
26 subsections 91(1) and 122(1)).

27 (6) If the national system employee has already had the benefit of an
28 entitlement the amount of which was calculated by reference to a
29 period of service with the first employer, subsection (5) does not
30 result in that period of service with the first employer being
31 counted again when calculating the employee's entitlements of that
32 kind as an employee of the second employer.

33 Note: For example:

34 (a) the accrued paid annual leave to which the employee is entitled
35 as an employee of the second employer does not include any
36 period of paid annual leave that the employee has already taken
37 as an employee of the first employer; and

38 (b) if an employee receives notice of termination or payment in lieu
39 of notice in relation to a period of service with the first employer,

1 that period of service is not counted again in calculating the
2 amount of notice of termination, or payment in lieu, to which the
3 employee is entitled as an employee of the second employer.

4 *Meaning of transfer of employment etc.*

5 (7) There is a **transfer of employment** of a national system employee
6 from one national system employer (the **first employer**) to another
7 national system employer (the **second employer**) if:

8 (a) the following conditions are satisfied:

9 (i) the employee becomes employed by the second
10 employer not more than 3 months after the termination
11 of the employee's employment with the first employer;

12 (ii) the first employer and the second employer are
13 associated entities when the employee becomes
14 employed by the second employer; or

15 (b) the following conditions are satisfied:

16 (i) the employee is a transferring employee in relation to a
17 transfer of business from the first employer to the
18 second employer;

19 (ii) the first employer and the second employer are not
20 associated entities when the employee becomes
21 employed by the second employer.

22 Note: Paragraph (a) applies whether or not there is a transfer of business
23 from the first employer to the second employer.

24 (8) A transfer of employment:

25 (a) is a **transfer of employment between associated entities** if
26 paragraph (7)(a) applies; and

27 (b) is a **transfer of employment between non-associated entities**
28 if paragraph (7)(b) applies.

29 **23 Meaning of small business employer**

30 (1) A national system employer is a **small business employer** at a
31 particular time if the employer employs fewer than 15 employees
32 at that time.

33 (2) For the purpose of calculating the number of employees employed
34 by the employer at a particular time:

Section 23

- 1 (a) subject to paragraph (b), all employees employed by the
2 employer at that time are to be counted; and
3 (b) a casual employee is not to be counted unless, at that time, he
4 or she has been employed by the employer on a regular and
5 systematic basis.
- 6 (3) For the purpose of calculating the number of employees employed
7 by the employer at a particular time, associated entities are taken to
8 be one entity.
- 9 (4) To avoid doubt, in determining whether a national system
10 employer is a *small business employer* at a particular time in
11 relation to the dismissal of an employee, or termination of an
12 employee's employment, the employees that are to be counted
13 include (subject to paragraph (2)(b)):
14 (a) the employee who is being dismissed or whose employment
15 is being terminated; and
16 (b) any other employee of the employer who is also being
17 dismissed or whose employment is also being terminated.

1

2 **Part 1-3—Application of this Act**

3 **Division 1—Introduction**

4 **24 Guide to this Part**

5

This Part deals with the extent of the application of this Act.

6

Division 2 is about how this Act affects the operation of certain State or Territory laws.

7

8

Division 3 is about the geographical application of this Act.

9

Division 4 deals with other matters relating to the application of this Act.

10

11 **25 Meanings of *employee* and *employer***

12

In this Part, *employee* and *employer* have their ordinary meanings.

Section 26

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Division 2—Interaction with State and Territory laws

26 Act excludes State or Territory industrial laws

- (1) This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer.
- (2) A *State or Territory industrial law* is:
 - (a) a general State industrial law; or
 - (b) an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:
 - (i) regulating workplace relations (including industrial matters, industrial activity, collective bargaining, industrial disputes and industrial action);
 - (ii) providing for the establishment or enforcement of terms and conditions of employment;
 - (iii) providing for the making and enforcement of agreements (including individual agreements and collective agreements), and other industrial instruments or orders, determining terms and conditions of employment;
 - (iv) prohibiting conduct relating to a person’s membership or non-membership of an industrial association;
 - (v) providing for rights and remedies connected with the termination of employment;
 - (vi) providing for rights and remedies connected with conduct that adversely affects an employee in his or her employment; or
 - (c) a law of a State or Territory that applies to employment generally and deals with leave (other than long service leave or leave for victims of crime); or
 - (d) a law of a State or Territory providing for a court or tribunal constituted by a law of the State or Territory to make an

- 1 order in relation to equal remuneration for work of equal or
2 comparable value; or
- 3 (e) a law of a State or Territory providing for the variation or
4 setting aside of rights and obligations arising under a contract
5 of employment, or another arrangement for employment, that
6 a court or tribunal finds is unfair; or
- 7 (f) a law of a State or Territory that entitles a representative of a
8 trade union to enter premises; or
- 9 (g) an instrument made under a law described in paragraph (a),
10 (b), (c), (d), (e) or (f), so far as the instrument is of a
11 legislative character; or
- 12 (h) either of the following:
13 (i) a law that is a law of a State or Territory;
14 (ii) an instrument of a legislative character made under such
15 a law;
16 that is prescribed by the regulations.
- 17 (3) Each of the following is a **general State industrial law**:
18 (a) the *Industrial Relations Act 1996* of New South Wales;
19 (b) the *Industrial Relations Act 1999* of Queensland;
20 (c) the *Industrial Relations Act 1979* of Western Australia;
21 (d) the *Fair Work Act 1994* of South Australia;
22 (e) the *Industrial Relations Act 1984* of Tasmania.
- 23 (4) A law or an Act of a State or Territory **applies to employment**
24 **generally** if it applies (subject to constitutional limitations) to:
25 (a) all employers and employees in the State or Territory; or
26 (b) all employers and employees in the State or Territory except
27 those identified (by reference to a class or otherwise) by a
28 law of the State or Territory.
- 29 For this purpose, it does not matter whether or not the law also
30 applies to other persons, or whether or not an exercise of a power
31 under the law affects all the persons to whom the law applies.

32 **27 State and Territory laws that are not excluded by section 26**

- 33 (1) Section 26 does not apply to a law of a State or Territory so far as:
34 (a) the law deals with either or both of the following:
-

Section 27

- 1 (i) the prevention of discrimination (including
2 discrimination in relation to parental or carer
3 responsibilities);
4 (ii) the promotion of equal employment opportunity;
5 unless the law is, or is contained in, a State or Territory
6 industrial law; or
7 (b) the law is prescribed by the regulations as a law to which
8 section 26 does not apply; or
9 (c) the law deals with any non-excluded matters; or
10 (d) the law deals with rights or remedies incidental to:
11 (i) any matter covered by paragraph (a); or
12 (ii) any matter dealt with by a law to which paragraph (b)
13 applies; or
14 (iii) any non-excluded matters.

15 Note: Examples of incidental matters covered by paragraph (d) are entry to
16 premises for a purpose connected with workers compensation,
17 occupational health and safety or outworkers.

- 18 (2) The *non-excluded matters* are as follows:
19 (a) superannuation;
20 (b) workers compensation;
21 (c) occupational health and safety;
22 (d) matters relating to outworkers;
23 (e) child labour;
24 (f) training arrangements, except in relation to terms and
25 conditions of employment to the extent that those terms and
26 conditions are provided for by the National Employment
27 Standards or may be included in a modern award;
28 (g) long service leave, except in relation to an employee who is
29 entitled under Division 9 of Part 2-2 to long service leave;
30 (h) leave for victims of crime;
31 (i) attendance for service on a jury, or for emergency service
32 duties;

33 Note: See also section 112 for employee entitlements in relation to
34 engaging in eligible community service activities.

- 1 (j) declaration, prescription or substitution of public holidays,
2 except in relation to the rights and obligations of an
3 employee or employer in relation to public holidays;
- 4 (k) the following matters relating to provision of essential
5 services or to situations of emergency:
 - 6 (i) directions to perform work (including to perform work
7 at a particular time or place, or in a particular way);
 - 8 (ii) directions not to perform work (including not to perform
9 work at a particular time or place, or in a particular
10 way);
- 11 (l) regulation of any of the following:
 - 12 (i) employee organisations;
 - 13 (ii) employer organisations;
 - 14 (iii) members of employee organisations or of employer
15 organisations;
- 16 (m) workplace surveillance;
- 17 (n) business trading hours;
- 18 (o) claims for enforcement of contracts of employment, except
19 so far as the law in question provides for a matter to which
20 paragraph 26(2)(e) applies;
- 21 (p) any other matters prescribed by the regulations.

22 **28 Act excludes prescribed State and Territory laws**

- 23 (1) This Act is intended to apply to the exclusion of a law of a State or
24 Territory that is prescribed by the regulations.
- 25 (2) However, subsection (1) applies only so far as the law of the State
26 or Territory would otherwise apply in relation to a national system
27 employee or a national system employer.
- 28 (3) To avoid doubt, subsection (1) has effect even if the law is covered
29 by section 27 (so that section 26 does not apply to the law). This
30 subsection does not limit subsection (1).

Section 29

1 **29 Interaction of modern awards and enterprise agreements with**
2 **State and Territory laws**

3 (1) A modern award or enterprise agreement prevails over a law of a
4 State or Territory, to the extent of any inconsistency.

5 (2) Despite subsection (1), a term of a modern award or enterprise
6 agreement dealing with any of the following matters applies
7 subject to a law of a State or Territory to the extent that the law
8 deals with the matter:

- 9 (a) the prevention of discrimination (including discrimination in
10 relation to parental or carer responsibilities);
11 (b) the promotion of equal employment opportunity;
12 (c) a non-excluded matter;
13 (d) a matter prescribed by the regulations.

14 (3) Despite subsection (2), a term of a modern award or enterprise
15 agreement does not apply subject to a law of a State or Territory
16 that is prescribed by the regulations as a law to which modern
17 awards and enterprise agreements are not subject.

18 **30 Act may exclude State and Territory laws etc. in other cases**

19 This Division is not a complete statement of the circumstances in
20 which this Act and instruments made under it are intended to apply
21 to the exclusion of, or prevail over, laws of the States and
22 Territories or instruments made under those laws.

1
2 **Division 3—Geographical application of this Act**

3 **31 Exclusion of persons etc. insufficiently connected with Australia**

- 4 (1) A provision of this Act prescribed by the regulations does not
5 apply to a person or entity in Australia prescribed by the
6 regulations as a person to whom, or an entity to which, the
7 provision does not apply.

8 Note 1: In this context, *Australia* includes the Territory of Christmas Island,
9 the Territory of Cocos (Keeling) Islands and the coastal sea (see
10 section 15B and paragraph 17(a) of the *Acts Interpretation Act 1901*).

11 Note 2: The regulations may prescribe the person or entity by reference to a
12 class (see subsection 13(3) of the *Legislative Instruments Act 2003*).

- 13 (2) Before the Governor-General makes regulations for the purposes of
14 subsection (1) prescribing either or both of the following:
15 (a) a provision of this Act that is not to apply to a person or
16 entity;
17 (b) a person to whom, or an entity to which, a provision of this
18 Act is not to apply;
19 the Minister must be satisfied that the provision should not apply to
20 the person or entity in Australia because there is not a sufficient
21 connection between the person or entity and Australia.

22 **32 Regulations may modify application of this Act in certain parts of**
23 **Australia**

24 If the regulations prescribe modifications of this Act for its
25 application in relation to all or part of any one or more of the
26 following areas:

- 27 (a) all the waters of the sea on the landward side of the outer
28 limits of the territorial sea of Australia, including:
29 (i) such waters within the limits of a State or Territory; and
30 (ii) the airspace over, and the seabed and sub-soil beneath,
31 such waters;
32 (b) the Territory of Christmas Island;
33 (c) the Territory of Cocos (Keeling) Islands;

Section 33

1 then this Act has effect as so modified in relation to any such area
2 or part.

3 Note: This Act would, in the absence of any such regulations, apply in
4 relation to these areas in the same way as it applies in relation to the
5 rest of Australia.

6 **33 Extension of this Act to the exclusive economic zone and the**
7 **continental shelf**

8 *Extension to Australian ships etc.*

- 9 (1) Without limiting subsection (3), this Act extends to or in relation
10 to:
- 11 (a) any Australian ship in the exclusive economic zone or in the
12 waters above the continental shelf; and
 - 13 (b) any fixed platform in the exclusive economic zone or in the
14 waters above the continental shelf; and
 - 15 (c) any ship, in the exclusive economic zone or in the waters
16 above the continental shelf, that:
 - 17 (i) supplies, services or otherwise operates in connection
18 with a fixed platform in the exclusive economic zone or
19 in the waters above the continental shelf; and
 - 20 (ii) operates to and from an Australian port; and
 - 21 (d) any ship, in the exclusive economic zone or in the waters
22 above the continental shelf, that:
 - 23 (i) is operated or chartered by an Australian employer; and
 - 24 (ii) uses Australia as a base.
- 25 (2) For the purposes of extending this Act in accordance with
26 paragraph (1)(d):
- 27 (a) any reference in a provision of this Act to an employer is
28 taken to include a reference to an Australian employer; and
 - 29 (b) any reference in a provision of this Act to an employee is
30 taken to include a reference to an employee of an Australian
31 employer.

1 *Extensions prescribed by regulations*

- 2 (3) Without limiting subsection (1), if the regulations prescribe further
3 extensions of this Act, or specified provisions of this Act, to or in
4 relation to the exclusive economic zone or to the waters above the
5 continental shelf, then this Act extends accordingly.

6 *Modifications relating to extended application*

- 7 (4) Despite subsections (1) and (3), if the regulations prescribe
8 modifications of this Act, or specified provisions of this Act, for its
9 operation under subsection (1) or (3) in relation to one or both of
10 the following:

- 11 (a) all or part of the exclusive economic zone;
12 (b) all or part of the continental shelf;

13 then, so far as this Act would, apart from this subsection, extend to
14 the zone or part, or to the continental shelf or part, it has effect as
15 so modified.

- 16 (5) For the purposes of subsection (4), the regulations may prescribe
17 different modifications in relation to different parts of the exclusive
18 economic zone or continental shelf.

19 **34 Extension of this Act beyond the exclusive economic zone and the**
20 **continental shelf**

21 *Extension to Australian ships etc.*

- 22 (1) Without limiting subsection (3), this Act extends to or in relation
23 to:
24 (a) any Australian ship outside the outer limits of the exclusive
25 economic zone and the continental shelf; and
26 (b) any ship, outside the outer limits of the exclusive economic
27 zone and the continental shelf, that:
28 (i) is operated or chartered by an Australian employer; and
29 (ii) uses Australia as a base.
- 30 (2) For the purposes of extending this Act in accordance with
31 paragraph (1)(b):

Section 35

- 1 (a) any reference in a provision of this Act to an employer is
2 taken to include a reference to an Australian employer; and
3 (b) any reference in a provision of this Act to an employee is
4 taken to include a reference to an employee of an Australian
5 employer.

6 *Extensions prescribed by regulations*

- 7 (3) Without limiting subsection (1), if the regulations prescribe further
8 extensions of this Act, or specified provisions of this Act, in
9 relation to all or part of the area outside the outer limits of the
10 exclusive economic zone and the continental shelf, then this Act, or
11 the specified provisions, extend accordingly to:
12 (a) any Australian employer;
13 (b) any Australian-based employee.

14 *Modified application in the area outside the outer limits of the*
15 *exclusive economic zone and the continental shelf*

- 16 (4) Despite subsections (1) and (3), if the regulations prescribe
17 modifications of this Act, or specified provisions of this Act, for
18 their operation under subsection (1) or (3) in relation to all or part
19 of the area outside the outer limits of the exclusive economic zone
20 and the continental shelf, then this Act, or the specified provisions,
21 have effect as so modified in relation to the area or part.
- 22 (5) For the purposes of subsection (4), the regulations may prescribe
23 different modifications in relation to different parts of the area
24 outside the outer limits of the exclusive economic zone and the
25 continental shelf.

26 **35 Meanings of *Australian employer* and *Australian-based employee***

- 27 (1) An *Australian employer* is an employer that:
28 (a) is a trading corporation formed within the limits of the
29 Commonwealth (within the meaning of paragraph 51(xx) of
30 the Constitution); or
31 (b) is a financial corporation formed within the limits of the
32 Commonwealth (within the meaning of paragraph 51(xx) of
33 the Constitution); or

- 1 (c) is the Commonwealth; or
2 (d) is a Commonwealth authority; or
3 (e) is a body corporate incorporated in a Territory; or
4 (f) carries on in Australia, in the exclusive economic zone or in
5 the waters above the continental shelf an activity (whether of
6 a commercial, governmental or other nature), and whose
7 central management and control is in Australia; or
8 (g) is prescribed by the regulations.
- 9 (2) An ***Australian-based employee*** is an employee:
10 (a) whose primary place of work is in Australia; or
11 (b) who is employed by an Australian employer (whether the
12 employee is located in Australia or elsewhere); or
13 (c) who is prescribed by the regulations.
- 14 (3) However, paragraph (2)(b) does not apply to an employee who is
15 engaged outside Australia and the external Territories to perform
16 duties outside Australia and the external Territories.

17 **36 Geographical application of offences**

18 Division 14 (Standard geographical jurisdiction) of the *Criminal*
19 *Code* does not apply in relation to an offence against this Act.

20 Note: The extended geographical application that this Division gives to this
21 Act will apply to the offences in this Act.

Section 37

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Division 4—Miscellaneous

3

37 Act binds Crown

4

(1) This Act binds the Crown in each of its capacities.

5

(2) However, this Act does not make the Crown liable to be prosecuted for an offence.

6

7

38 Act not to apply so as to exceed Commonwealth power

8

(1) Unless the contrary intention appears, if a provision of this Act:

9

(a) would, apart from this section, have an application (an *invalid application*) in relation to:

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11

(i) one or more particular persons, things, matters, places, circumstances or cases; or

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13

(ii) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases;

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because of which the provision exceeds the Commonwealth's legislative power; and

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17

(b) also has at least one application (a *valid application*) in relation to:

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19

(i) one or more particular persons, things, matters, places, circumstances or cases; or

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21

(ii) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases;

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that, if it were the provision's only application, would be within the Commonwealth's legislative power;

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it is the Parliament's intention that the provision is not to have the invalid application, but is to have every valid application.

26

27

(2) Despite subsection (1), the provision is not to have a particular valid application if:

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(a) apart from this section, it is clear, taking into account the provision's context and the purpose or object underlying this Act, that the provision was intended to have that valid application only if every invalid application, or a particular

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- 1 invalid application, of the provision had also been within the
2 Commonwealth's legislative power; or
3 (b) the provision's operation in relation to that valid application
4 would be different in a substantial respect from what would
5 have been its operation in relation to that valid application if
6 every invalid application of the provision had been within the
7 Commonwealth's legislative power.
- 8 (3) Subsection (2) does not limit the cases where a contrary intention
9 may be taken to appear for the purposes of subsection (1).
- 10 (4) This section applies to a provision of this Act, whether enacted
11 before, at or after the commencement of this section.

12 **39 Acquisition of property**

13 This Act, or any instrument made under this Act, does not apply to
14 the extent that the operation of this Act or the instrument would
15 result in an acquisition of property (within the meaning of
16 paragraph 51(xxxi) of the Constitution) from a person otherwise
17 than on just terms (within the meaning of that paragraph).

18 **40 Interaction between fair work instruments and public sector 19 employment laws**

20 *Generally, public sector employment laws prevail*

- 21 (1) A public sector employment law prevails over a fair work
22 instrument that deals with public sector employment, to the extent
23 of any inconsistency.

24 *When fair work instruments or their terms prevail*

- 25 (2) However, a fair work instrument, or a term of a fair work
26 instrument, that deals with public sector employment prevails over
27 a public sector employment law, to the extent of any inconsistency,
28 if:
29 (a) the instrument or term is prescribed by the regulations for the
30 purposes of that particular law; or

Section 40

- 1 (b) the instrument or term (other than an FWA order or a term of
2 an FWA order) is included in a class of instruments or terms
3 that are prescribed by the regulations for the purposes of that
4 particular law.

5 *Meaning of public sector employment law*

- 6 (3) A **public sector employment law** is a law of the Commonwealth
7 (other than this Act) or a Territory, or a term of an instrument made
8 under such a law, that deals with public sector employment.

9 *Laws that fair work instruments never prevail over*

- 10 (4) Subsection (2) does not apply to any provisions of the following
11 that are public sector employment laws:
12 (a) the *Safety, Rehabilitation and Compensation Act 1988*;
13 (b) the *Superannuation Act 1976*;
14 (c) the *Superannuation Act 1990*;
15 (d) the *Superannuation Act 2005*;
16 (e) the *Superannuation (Productivity Benefit) Act 1988*;
17 (f) an instrument made under a law referred to in any of the
18 above paragraphs.

19 *Relationship with section 29*

- 20 (5) This section prevails over section 29, to the extent of any
21 inconsistency.

1
2 **Chapter 2—Terms and conditions of**
3 **employment**

4 **Part 2-1—Core provisions for this Chapter**

5 **Division 1—Introduction**

6 **41 Guide to this Part**

7 This Part has the core provisions for this Chapter, which deals with
8 terms and conditions of employment of national system employees.
9 The main terms and conditions come from the National
10 Employment Standards, modern awards, enterprise agreements and
11 workplace determinations.

12 The National Employment Standards (Part 2-2) are minimum terms
13 and conditions that apply to all national system employees.

14 A modern award (see Part 2-3), an enterprise agreement (see
15 Part 2-4) or a workplace determination (see Part 2-5) provides
16 terms and conditions for those national system employees to whom
17 the award, agreement or determination applies. Only one of those
18 instruments can apply to an employee at a particular time.

19 Division 2 has the provisions to enforce the National Employment
20 Standards, modern awards and enterprise agreements. It also sets
21 out when a modern award or enterprise agreement applies to a
22 person and the significance of that for this Act.

23 Note: In most cases, this Act applies to a workplace
24 determination as if it were an enterprise agreement in
25 operation (see section 279). For the rules about
26 workplace determinations, see Part 2-5.

27 Division 3 deals with the interaction between the National
28 Employment Standards, modern awards and enterprise agreements.

Chapter 2 Terms and conditions of employment

Part 2-1 Core provisions for this Chapter

Division 1 Introduction

Section 42

1 **42 Meanings of *employee* and *employer***

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

1

2 **Division 2—Core provisions for this Chapter**

3 **Subdivision A—Terms and conditions of employment provided**
4 **under this Act**

5 **43 Terms and conditions of employment provided under this Act**

6 *Main terms and conditions*

7 (1) The main terms and conditions of employment of an employee that
8 are provided under this Act are those set out in:

- 9 (a) the National Employment Standards (see Part 2-2); and
10 (b) a modern award (see Part 2-3), an enterprise agreement (see
11 Part 2-4) or a workplace determination (see Part 2-5) that
12 applies to the employee.

13 Note 1: The situations in which a workplace determination, rather than a
14 modern award or enterprise agreement, provides an employee's terms
15 and conditions of employment are limited. In most cases, this Act
16 applies to a workplace determination as if it were an enterprise
17 agreement in operation (see section 279). See Part 2-5 generally for
18 the rules on workplace determinations.

19 Note 2: Part 2-8 provides for the transfer of certain modern awards, enterprise
20 agreements and workplace determinations if there is a transfer of
21 business from an employee's employer to another employer.

22 *Other terms and conditions*

23 (2) In addition, other terms and conditions of employment include:

- 24 (a) those terms and conditions arising from:
25 (i) a national minimum wage order (see Part 2-6); or
26 (ii) an equal remuneration order (see Part 2-7); and
27 (b) those terms and conditions provided by Part 2-9.

28 Note: Part 2-9 deals with miscellaneous terms and conditions of
29 employment, such as payment of wages.

Section 44

1 **Subdivision B—Terms and conditions of employment provided**
2 **by the National Employment Standards**

3 **44 Contravening the National Employment Standards**

4 (1) An employer must not contravene a provision of the National
5 Employment Standards.

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

7 (2) However, an order cannot be made under Division 2 of Part 4-1 in
8 relation to a contravention (or alleged contravention) of subsection
9 65(5) or 76(4).

10 Note 1: Subsections 65(5) and 76(4) state that an employer may refuse a
11 request for flexible working arrangements, or an application to extend
12 unpaid parental leave, only on reasonable business grounds.

13 Note 2: Modern awards and enterprise agreements include terms about settling
14 disputes in relation to the National Employment Standards (other than
15 disputes as to whether an employer had reasonable business grounds
16 under subsection 65(5) or 76(4)).

17 **Subdivision C—Terms and conditions of employment provided**
18 **by a modern award**

19 **45 Contravening a modern award**

20 A person must not contravene a term of a modern award.

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

22 Note 2: A person does not contravene a term of a modern award unless the
23 award applies to the person: see subsection 46(1).

24 **46 The significance of a modern award applying to a person**

25 (1) A modern award does not impose obligations on a person, and a
26 person does not contravene a term of a modern award, unless the
27 award applies to the person.

28 (2) A modern award does not give a person an entitlement unless the
29 award applies to the person.

1 Note: This subsection does not affect the question whether an outworker
2 who is not an employee is an outworker to whom outworker terms in a
3 modern award relate, or is affected by a contravention of such terms.

4 **47 When a modern award *applies* to an employer, employee,
5 organisation or outworker entity**

6 *When a modern award **applies** to an employee, employer,
7 organisation or outworker entity*

- 8 (1) A modern award **applies** to an employee, employer, organisation or
9 outworker entity if:
- 10 (a) the modern award covers the employee, employer,
11 organisation or outworker entity; and
 - 12 (b) the modern award is in operation; and
 - 13 (c) no other provision of this Act provides, or has the effect, that
14 the modern award does not apply to the employee, employer,
15 organisation or outworker entity.

16 Note 1: Section 57 provides that a modern award does not apply to an
17 employee (or to an employer, or an employee organisation, in relation
18 to the employee) in relation to particular employment at a time when
19 an enterprise agreement applies to the employee in relation to that
20 employment.

21 Note 2: In a modern award, coverage of an outworker entity must be
22 expressed to relate only to outworker terms: see subsection 143(4).

23 *Modern awards do not apply to high income employees*

- 24 (2) However, a modern award does not apply to an employee (or to an
25 employer, or an employee organisation, in relation to the
26 employee) at a time when the employee is a high income
27 employee.

28 *Modern awards apply to employees in relation to particular
29 employment*

- 30 (3) A reference in this Act to a modern award applying to an employee
31 is a reference to the award applying to the employee in relation to
32 particular employment.

Section 48

1 **48 When a modern award covers an employer, employee,**
2 **organisation or outworker entity**

3 *When a modern award covers an employee, employer,*
4 *organisation or outworker entity*

- 5 (1) A modern award **covers** an employee, employer, organisation or
6 outworker entity if the award is expressed to cover the employee,
7 employer, organisation or outworker entity.

8 Note: In a modern award, coverage of an outworker entity must be
9 expressed to relate only to outworker terms: see subsection 143(4).

10 *Effect of other provisions of this Act, FWA orders or court orders*
11 *on coverage*

- 12 (2) A modern award also **covers** an employee, employer, organisation
13 or outworker entity if any of the following provides, or has the
14 effect, that the award covers the employee, employer, organisation
15 or outworker entity:

- 16 (a) a provision of this Act;
17 (b) an FWA order made under a provision of this Act;
18 (c) an order of a court.

- 19 (3) Despite subsections (1) and (2), a modern award does not **cover** an
20 employee, employer, organisation or outworker entity if any of the
21 following provides, or has the effect, that the award does not cover
22 the employee, employer or organisation or outworker entity:

- 23 (a) a provision of this Act;
24 (b) an FWA order made under a provision of this Act;
25 (c) an order of a court.

26 *Modern awards that have ceased to operate*

- 27 (4) Despite subsections (1) and (2), a modern award that has ceased to
28 operate does not **cover** an employee, employer, organisation or
29 outworker entity.

1 *Modern awards cover employees in relation to particular*
2 *employment*

- 3 (5) A reference to a modern award covering an employee is a
4 reference to the award covering the employee in relation to
5 particular employment.

6 **49 When a modern award is in operation**

7 *When a modern award comes into operation*

- 8 (1) A modern award comes into operation:
9 (a) on 1 July in the next financial year after it is made; or
10 (b) if it is made on 1 July in a financial year—on that day.
- 11 (2) However, if FWA specifies another day as the day on which the
12 modern award comes into operation, it comes into operation on
13 that other day. FWA must not specify another day unless it is
14 satisfied that it is appropriate to do so.
- 15 (3) The specified day must not be earlier than the day on which the
16 modern award is made.

17 *When a determination revoking a modern award comes into*
18 *operation*

- 19 (4) A determination revoking a modern award comes into operation on
20 the day specified in the determination.
- 21 (5) The specified day must not be earlier than the day on which the
22 determination is made.

23 *Modern awards and revocation determinations take effect from*
24 *first full pay period*

- 25 (6) A modern award, or a determination revoking a modern award,
26 does not take effect in relation to a particular employee until the
27 start of the employee's first full pay period that starts on or after
28 the day the award or determination comes into operation.

Chapter 2 Terms and conditions of employment

Part 2-1 Core provisions for this Chapter

Division 2 Core provisions for this Chapter

Section 50

1 *Modern awards operate until revoked*

2 (7) A modern award continues in operation until it is revoked.

3 **Subdivision D—Terms and conditions of employment provided**
4 **by an enterprise agreement**

5 **50 Contravening an enterprise agreement**

6 A person must not contravene a term of an enterprise agreement.

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

8 Note 2: A person does not contravene a term of an enterprise agreement unless
9 the agreement applies to the person: see subsection 51(1).

10 **51 The significance of an enterprise agreement applying to a person**

11 (1) An enterprise agreement does not impose obligations on a person,
12 and a person does not contravene a term of an enterprise
13 agreement, unless the agreement applies to the person.

14 (2) An enterprise agreement does not give a person an entitlement
15 unless the agreement applies to the person.

16 **52 When an enterprise agreement *applies* to an employer, employee**
17 **or employee organisation**

18 *When an enterprise agreement applies to an employee, employer*
19 *or organisation*

20 (1) An enterprise agreement *applies* to an employee, employer or
21 employee organisation if:

22 (a) the agreement is in operation; and

23 (b) the agreement covers the employee, employer or
24 organisation; and

25 (c) no other provision of this Act provides, or has the effect, that
26 the agreement does not apply to the employee, employer or
27 organisation.

1 *Enterprise agreements apply to employees in relation to particular*
2 *employment*

3 (2) A reference in this Act to an enterprise agreement applying to an
4 employee is a reference to the agreement applying to the employee
5 in relation to particular employment.

6 **53 When an enterprise agreement *covers* an employer, employee or**
7 **employee organisation**

8 *Employees and employers*

9 (1) An enterprise agreement ***covers*** an employee or employer if the
10 agreement is expressed to cover (however described) the employee
11 or the employer.

12 *Employee organisations*

13 (2) An enterprise agreement ***covers*** an employee organisation:
14 (a) for an enterprise agreement that is not a greenfields
15 agreement—if FWA has noted in its decision to approve the
16 agreement that the agreement covers the organisation (see
17 subsection 201(2)); or
18 (b) for a greenfields agreement—if the agreement is made by the
19 organisation.

20 *Effect of provisions of this Act, FWA orders and court orders on*
21 *coverage*

22 (3) An enterprise agreement also ***covers*** an employee, employer or
23 employee organisation if any of the following provides, or has the
24 effect, that the agreement covers the employee, employer or
25 organisation:

- 26 (a) a provision of this Act;
27 (b) an FWA order made under a provision of this Act;
28 (c) an order of a court.

29 (4) Despite subsections (1), (2) and (3), an enterprise agreement does
30 not ***cover*** an employee, employer or employee organisation if any

Chapter 2 Terms and conditions of employment

Part 2-1 Core provisions for this Chapter

Division 2 Core provisions for this Chapter

Section 54

1 of the following provides, or has the effect, that the agreement does
2 not cover the employee, employer or organisation:

- 3 (a) another provision of this Act;
4 (b) an FWA order made under another provision of this Act;
5 (c) an order of a court.

6 *Enterprise agreements that have ceased to operate*

7 (5) Despite subsections (1), (2) and (3), an enterprise agreement that
8 has ceased to operate does not **cover** an employee, employer or
9 employee organisation.

10 *Enterprise agreements cover employees in relation to particular*
11 *employment*

12 (6) A reference in this Act to an enterprise agreement covering an
13 employee is a reference to the agreement covering the employee in
14 relation to particular employment.

15 **54 When an enterprise agreement is in operation**

16 (1) An enterprise agreement approved by FWA operates from:
17 (a) 7 days after the agreement is approved; or
18 (b) if a later day is specified in the agreement—that later day.

19 (2) An enterprise agreement ceases to operate on the earlier of the
20 following days:
21 (a) the day on which a termination of the agreement comes into
22 operation under section 224 or 227;
23 (b) the day on which section 58 first has the effect that there is
24 no employee to whom the agreement applies.

25 Note: Section 58 deals with when an enterprise agreement ceases to apply to
26 an employee.

27 (3) An enterprise agreement that has ceased to operate can never
28 operate again.

**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**

**55 Interaction between the National Employment Standards and a
modern award or enterprise agreement**

National Employment Standards must not be excluded

- (1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.

Terms expressly permitted by Part 2-2 or regulations may be included

- (2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:
- (a) by a provision of Part 2-2 (which deals with the National Employment Standards); or
 - (b) by regulations made for the purposes of section 127.

Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.

- (3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).

Note: See also the note to section 63 (which deals with the effect of averaging arrangements).

Chapter 2 Terms and conditions of employment

Part 2-1 Core provisions for this Chapter

Division 3 Interaction between the National Employment Standards, modern awards and enterprise agreements

Section 55

1

Ancillary and supplementary terms may be included

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(4) A modern award or enterprise agreement may also include the following kinds of terms:

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(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;

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(b) terms that supplement the National Employment Standards;

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but only if the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

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Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

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(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

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(b) that specify when payment under section 90 for paid annual leave must be made.

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Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

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(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

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(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

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Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

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(5) A term of a modern award or enterprise agreement that is permitted by subsection (4) does not contravene subsection (1).

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Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56).

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1 **56 Terms of a modern award or enterprise agreement contravening**
2 **section 55 have no effect**

3 A term of a modern award or enterprise agreement has no effect to
4 the extent that it contravenes section 55.

5 **Subdivision B—Interaction between modern awards and**
6 **enterprise agreements**

7 **57 Interaction between modern awards and enterprise agreements**

8 (1) A modern award does not apply to an employee in relation to
9 particular employment at a time when an enterprise agreement
10 applies to the employee in relation to that employment.

11 (2) If a modern award does not apply to an employee in relation to
12 particular employment because of subsection (1), the award does
13 not apply to an employer, or an employee organisation, in relation
14 to the employee.

15 **Subdivision C—Interaction between one or more enterprise**
16 **agreements**

17 **58 Only one enterprise agreement can apply to an employee**

18 *Only one enterprise agreement can apply to an employee*

19 (1) Only one enterprise agreement can apply to an employee at a
20 particular time.

21 *General rule—later agreement does not apply until earlier*
22 *agreement passes its nominal expiry date*

23 (2) If:
24 (a) an enterprise agreement (the *earlier agreement*) applies to an
25 employee in relation to particular employment; and
26 (b) another enterprise agreement (the *later agreement*) that
27 covers the employee in relation to the same employment
28 comes into operation; and

Chapter 2 Terms and conditions of employment

Part 2-1 Core provisions for this Chapter

Division 3 Interaction between the National Employment Standards, modern awards and enterprise agreements

Section 58

- 1 (c) subsection (3) (which deals with a single-enterprise
2 agreement replacing a multi-enterprise agreement) does not
3 apply;
4 then:
5 (d) if the earlier agreement has not passed its nominal expiry
6 date:
7 (i) the later agreement cannot apply to the employee in
8 relation to that employment until the earlier agreement
9 passes its nominal expiry date; and
10 (ii) the earlier agreement ceases to apply to the employee in
11 relation to that employment when the earlier agreement
12 passes its nominal expiry date, and can never so apply
13 again; or
14 (e) if the earlier agreement has passed its nominal expiry date—
15 the earlier agreement ceases to apply to the employee when
16 the later agreement comes into operation, and can never so
17 apply again.

18 *Special rule—single-enterprise agreement replaces*
19 *multi-enterprise agreement*

- 20 (3) Despite subsection (2), if:
21 (a) a multi-enterprise agreement applies to an employee in
22 relation to particular employment; and
23 (b) a single-enterprise agreement that covers the employee in
24 relation to the same employment comes into operation;
25 the multi-enterprise agreement ceases to apply to the employee in
26 relation to that employment when the single-enterprise agreement
27 comes into operation, and can never so apply again.

1

2 **Part 2-2—The National Employment Standards**

3 **Division 1—Introduction**

4 **59 Guide to this Part**

5

This Part contains the National Employment Standards.

6

Division 2 identifies the National Employment Standards, the detail of which is set out in Divisions 3 to 12.

7

8

Division 13 contains miscellaneous provisions relating to the National Employment Standards.

9

10

The National Employment Standards are minimum standards that apply to the employment of national system employees. Part 2-1 (which deals with the core provisions for this Chapter) contains the obligation for employers to comply with the National Employment Standards (see section 44).

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The National Employment Standards also underpin what can be included in modern awards and enterprise agreements. Part 2-1 provides that the National Employment Standards cannot be excluded by modern awards or enterprise agreements, and contains other provisions about the interaction between the National Employment Standards and modern awards or enterprise agreements (see sections 55 and 56).

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Divisions 2 and 3 of Part 6-3 extend the operation of the parental leave and notice of termination provisions of the National Employment Standards to employees who are not national system employees.

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26 **60 Meanings of *employee* and *employer***

27

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

28

Section 61

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2 **Division 2—The National Employment Standards**

3 **61 The National Employment Standards are minimum standards**
4 **applying to employment of employees**

5 (1) This Part sets minimum standards that apply to the employment of
6 employees.

7 (2) The minimum standards relate to the following matters:

8 (a) maximum weekly hours (Division 3);

9 (b) requests for flexible working arrangements (Division 4);

10 (c) parental leave and related entitlements (Division 5);

11 (d) annual leave (Division 6);

12 (e) personal/carer's leave and compassionate leave (Division 7);

13 (f) community service leave (Division 8);

14 (g) long service leave (Division 9);

15 (h) public holidays (Division 10);

16 (i) notice of termination and redundancy pay (Division 11);

17 (j) Fair Work Information Statement (Division 12).

18 (3) Divisions 3 to 12 constitute the *National Employment Standards*.

1

2 **Division 3—Maximum weekly hours**

3 **62 Maximum weekly hours**

4 *Maximum weekly hours of work*

- 5 (1) An employer must not request or require an employee to work
6 more than the following number of hours in a week unless the
7 additional hours are reasonable:
8 (a) for a full-time employee—38 hours; or
9 (b) for an employee who is not a full-time employee—the lesser
10 of:
11 (i) 38 hours; and
12 (ii) the employee's ordinary hours of work in a week.

13 *Employee may refuse to work unreasonable additional hours*

- 14 (2) The employee may refuse to work additional hours (beyond those
15 referred to in paragraph (1)(a) or (b)) if they are unreasonable.

16 *Determining whether additional hours are reasonable*

- 17 (3) In determining whether additional hours are reasonable or
18 unreasonable for the purposes of subsections (1) and (2), the
19 following must be taken into account:
20 (a) any risk to employee health and safety from working the
21 additional hours;
22 (b) the employee's personal circumstances, including family
23 responsibilities;
24 (c) the needs of the workplace or enterprise in which the
25 employee is employed;
26 (d) whether the employee is entitled to receive overtime
27 payments, penalty rates or other compensation for, or a level
28 of remuneration that reflects an expectation of, working
29 additional hours;
30 (e) any notice given by the employer of any request or
31 requirement to work the additional hours;

Section 63

- 1 (f) any notice given by the employee of his or her intention to
2 refuse to work the additional hours;
- 3 (g) the usual patterns of work in the industry, or the part of an
4 industry, in which the employee works;
- 5 (h) the nature of the employee's role, and the employee's level of
6 responsibility;
- 7 (i) whether the additional hours are in accordance with
8 averaging terms included under section 63 in a modern award
9 or enterprise agreement that applies to the employee, or with
10 an averaging arrangement agreed to by the employer and
11 employee under section 64;
- 12 (j) any other relevant matter.

13 *Authorised leave or absence treated as hours worked*

- 14 (4) For the purposes of subsection (1), the hours an employee works in
15 a week are taken to include any hours of leave, or absence, whether
16 paid or unpaid, that the employee takes in the week and that are
17 authorised:
- 18 (a) by the employee's employer; or
19 (b) by or under a term or condition of the employee's
20 employment; or
21 (c) by or under a law of the Commonwealth, a State or a
22 Territory, or an instrument in force under such a law.

23 **63 Modern awards and enterprise agreements may provide for**
24 **averaging of hours of work**

25 A modern award or enterprise agreement may include terms
26 providing for the averaging of hours of work over a specified
27 period. The average weekly hours over the period must not exceed:

- 28 (a) for a full-time employee—38 hours; or
29 (b) for an employee who is not a full-time employee—the lesser
30 of:
31 (i) 38 hours; and
32 (ii) the employee's ordinary hours of work in a week.

33 Note: Hours in excess of the hours referred to in paragraph (a) or (b) that are
34 worked in a week in accordance with averaging terms in a modern
35 award or enterprise agreement will be treated as additional hours for

1 the purpose of section 62, but the averaging terms will be relevant in
2 determining whether the additional hours are reasonable (see
3 paragraph 62(3)(i)).

4 **64 Averaging of hours of work for award/agreement free employees**

5 An employer and an award/agreement free employee may agree in
6 writing to an averaging arrangement under which hours of work
7 over a specified period of not more than 26 weeks are averaged.
8 The average weekly hours over the specified period must not
9 exceed:

- 10 (a) for a full-time employee—38 hours; or
11 (b) for an employee who is not a full-time employee—the lesser
12 of:
13 (i) 38 hours; and
14 (ii) the employee's ordinary hours of work in a week.

15 **Note:** Hours in excess of the hours referred to in paragraph (a) or (b) that are
16 worked in a week in accordance with an agreed averaging
17 arrangement will be treated as additional hours for the purpose of
18 section 62, but the averaging arrangement will be relevant in
19 determining whether the additional hours are reasonable (see
20 paragraph 62(3)(i)).

Section 65

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2 **Division 4—Requests for flexible working arrangements**

3 **65 Requests for flexible working arrangements**

4 *Employee may request change in working arrangements*

- 5 (1) An employee who is a parent, or has a responsibility for the care,
6 of a child under school age may request the employer for a change
7 in working arrangements to assist the employee to care for the
8 child.

9 Note: Examples of changes in working arrangements include changes in
10 hours of work, changes in patterns of work and changes in location of
11 work.

- 12 (2) The employee is not entitled to make the request unless:
13 (a) for an employee other than a casual employee—the employee
14 has completed at least 12 months of continuous service with
15 the employer immediately before making the request; or
16 (b) for a casual employee—the employee:
17 (i) is a long term casual employee of the employer
18 immediately before making the request; and
19 (ii) has a reasonable expectation of continuing employment
20 by the employer on a regular and systematic basis.

21 *Formal requirements*

- 22 (3) The request must:
23 (a) be in writing; and
24 (b) set out details of the change sought and of the reasons for the
25 change.

26 *Agreeing to the request*

- 27 (4) The employer must give the employee a written response to the
28 request within 21 days, stating whether the employer grants or
29 refuses the request.
30 (5) The employer may refuse the request only on reasonable business
31 grounds.

- 1 (6) If the employer refuses the request, the written response under
2 subsection (4) must include details of the reasons for the refusal.

3 **66 State and Territory laws that are not excluded**

4 This Act is not intended to apply to the exclusion of laws of a State
5 or Territory that provide employee entitlements in relation to
6 flexible working arrangements, to the extent that those entitlements
7 are more beneficial to employees than the entitlements under this
8 Division.

Section 67

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Division 5—Parental leave and related entitlements

3

Subdivision A—General

4

67 General rule—employee must have completed at least 12 months of service

5

6

Employees other than casual employees

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- (1) An employee, other than a casual employee, is not entitled to leave under this Division (other than unpaid pre-adoption leave) unless the employee has, or will have, completed at least 12 months of continuous service with the employer immediately before the date that applies under subsection (3).

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Casual employees

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- (2) A casual employee, is not entitled to leave (other than unpaid pre-adoption leave) under this Division unless:

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- (a) the employee is, or will be, a long term casual employee of the employer immediately before the date that applies under subsection (3); and

- (b) but for:

(i) the birth or expected birth of the child; or

(ii) the placement or the expected placement of the child; or

(iii) if the employee is taking a period of unpaid parental leave that starts under subsection 71(6) or paragraph 72(3)(b) or 72(4)(b)—the taking of the leave;

the employee would have a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

27

Date at which employee must have completed 12 months of service

28

- (3) For the purpose of subsections (1) and (2), the date that applies is:

29

30

31

- (a) unless paragraph (b) or (c) applies:

(i) if the leave is birth-related leave—the date of birth, or the expected date of birth, of the child; or

- 1 (ii) if the leave is adoption-related leave—the day of
2 placement, or the expected day of placement, of the
3 child; or
4 (b) for an employee taking a period of unpaid parental leave that
5 is to start within 12 months after the birth or placement of the
6 child under subsection 71(6)—the date on which the
7 employee’s period of leave is to start; or
8 (c) for a member of an employee couple taking a period of
9 unpaid parental leave that is to start under paragraph 72(3)(b)
10 or 72(4)(b) after the period of unpaid parental leave of the
11 other member of the employee couple—the date on which the
12 employee’s period of leave is to start.

13 *Meaning of birth-related leave*

- 14 (4) **Birth-related leave** means leave of either of the following kinds:
15 (a) unpaid parental leave taken in association with the birth of a
16 child (see section 70);
17 (b) unpaid special maternity leave (see section 80).

18 *Meaning of adoption-related leave*

- 19 (5) **Adoption-related leave** means leave of either of the following
20 kinds:
21 (a) unpaid parental leave taken in association with the placement
22 of a child for adoption (see section 70);
23 (b) unpaid pre-adoption leave (see section 85).

24 *Meaning of day of placement*

- 25 (6) The **day of placement**, in relation to the adoption of a child by an
26 employee, means the earlier of the following days:
27 (a) the day on which the employee first takes custody of the
28 child for the adoption;
29 (b) the day on which the employee starts any travel that is
30 reasonably necessary to take custody of the child for the
31 adoption.

Section 68

1 **68 General rule for adoption-related leave—child must be under 16**
2 **etc.**

3 An employee is not entitled to adoption-related leave unless the
4 child that is, or is to be, placed with the employee for adoption:

- 5 (a) is, or will be, under 16 as at the day of placement, or the
6 expected day of placement, of the child; and
7 (b) has not, or will not have, lived continuously with the
8 employee for a period of 6 months or more as at the day of
9 placement, or the expected day of placement, of the child;
10 and
11 (c) is not (otherwise than because of the adoption) a child of the
12 employee or the employee’s spouse or de facto partner.

13 **69 Transfer of employment situations in which employee is entitled**
14 **to continue on leave etc.**

15 (1) If:

- 16 (a) there is a transfer of employment in relation to an employee;
17 and
18 (b) the employee has already started a period of leave under this
19 Division when his or her employment with the first employer
20 ends;

21 the employee is entitled to continue on that leave for the rest of that
22 period.

23 (2) If:

- 24 (a) there is a transfer of employment in relation to an employee;
25 and
26 (b) the employee has, in relation to the first employer, already
27 taken a step that is required or permitted by a provision of
28 this Division in relation to taking a period of leave;

29 the employee is taken to have taken the step in relation to the
30 second employer.

31 Note: Steps covered by this subsection include (for example) giving the first
32 employer notice under subsection 74(1), confirmation or advice under
33 subsection 74(4) or evidence under subsection 74(5).

1 **Subdivision B—Parental leave**

2 **70 Entitlement to unpaid parental leave**

3 An employee is entitled to 12 months of unpaid parental leave if:

4 (a) the leave is associated with:

5 (i) the birth of a child of the employee or the employee's
6 spouse or de facto partner; or

7 (ii) the placement of a child with the employee for
8 adoption; and

9 (b) the employee has or will have a responsibility for the care of
10 the child.

11 Note 1: Entitlement is also affected by section 67 (which deals with length of
12 the employee's service) and, for adoption, section 68 (which deals
13 with the age etc. of the adopted child).

14 Note 2: The 12 months is reduced by the amount of any unpaid special
15 maternity leave the employee has taken (see subsection 80(7)).

16 **71 The period of leave—other than for members of an employee**
17 **couple who each intend to take leave**

18 *Application of this section*

19 (1) This section applies to an employee who intends to take unpaid
20 parental leave if:

21 (a) the employee is not a member of an employee couple; or

22 (b) the employee is a member of an employee couple, but the
23 other member of the couple does not intend to take unpaid
24 parental leave.

25 *Leave must be taken in single continuous period*

26 (2) The employee must take the leave in a single continuous period.

27 Note: An employee may take a form of paid leave at the same time as he or
28 she is on unpaid parental leave (see section 79).

29 *When birth-related leave must start*

30 (3) If the leave is birth-related leave for a female employee who is
31 pregnant with, or gives birth to, the child, the period of leave may

Section 72

1 start up to 6 weeks before the expected date of birth of the child,
2 but must not start later than the date of birth of the child.

3 (4) If the leave is birth-related leave but subsection (3) does not apply,
4 the period of leave must start on the date of birth of the child.

5 *When adoption-related leave must start*

6 (5) If the leave is adoption-related leave, the period of leave must start
7 on the day of placement of the child.

8 *Leave may start later for employees whose spouse or de facto*
9 *partner is not an employee*

10 (6) Despite subsections (3) to (5), the period of leave may start at any
11 time within 12 months after the date of birth or day of placement of
12 the child if:

13 (a) the employee has a spouse or de facto partner who is not an
14 employee; and

15 (b) the spouse or de facto partner has a responsibility for the care
16 of the child for the period between the date of birth or day of
17 placement of the child and the start date of the leave.

18 Note: An employee whose leave starts under subsection (6) is still entitled
19 under section 76 to request an extension of the period of leave beyond
20 his or her available parental leave period. However, the period of
21 leave may not be extended beyond 24 months after the date of birth or
22 day of placement of the child (see subsection 76(7)).

23 **72 The period of leave—members of an employee couple who each**
24 **intend to take leave**

25 *Application of this section*

26 (1) This section applies to an employee couple if each of the
27 employees intends to take unpaid parental leave.

28 *Leave must be taken in single continuous period*

29 (2) Each employee must take the leave in a single continuous period.

30 Note: An employee may take a form of paid leave at the same time as he or
31 she is on unpaid parental leave (see section 79).

1 *When birth-related leave must start*

- 2 (3) If the leave is birth-related leave:
- 3 (a) one employee's period of leave must start first, in accordance
- 4 with the following rules:
- 5 (i) if the member of the employee couple whose period of
- 6 leave starts first is a female employee who is pregnant
- 7 with, or gives birth to, the child—the period of leave
- 8 may start up to 6 weeks before the expected date of birth
- 9 of the child, but must not start later than the date of birth
- 10 of the child;
- 11 (ii) if subparagraph (i) does not apply—the period of leave
- 12 must start on the date of birth of the child; and
- 13 (b) the other employee's period of leave must start immediately
- 14 after the end of the first employee's period of leave (or that
- 15 period as extended under section 75 or 76).

16 *When adoption-related leave must start*

- 17 (4) If the leave is adoption-related leave:
- 18 (a) one employee's period of leave must start on the day of
- 19 placement of the child; and
- 20 (b) the other employee's period of leave must start immediately
- 21 after the end of the first employee's period of leave (or that
- 22 period as extended under section 75 or 76).

23 *Limited entitlement to take concurrent leave*

- 24 (5) If one of the employees takes a period (the ***first employee's period***
- 25 ***of leave***) of unpaid parental leave in accordance with
- 26 paragraph (3)(a) or (4)(a), the other employee may take a period of
- 27 unpaid parental leave (the ***concurrent leave***) during the first
- 28 employee's period of leave, if the concurrent leave complies with
- 29 the following requirements:
- 30 (a) the concurrent leave must be for a period of 3 weeks or less;
- 31 (b) unless the employer agrees as referred to in paragraph (c), the
- 32 concurrent leave must not start before, and must not end
- 33 more than 3 weeks after:

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- 1 (i) if the leave is birth-related leave—the date of birth of
2 the child; or
3 (ii) if the leave is adoption-related leave—the day of
4 placement of the child;
5 (c) if the employer agrees, the concurrent leave may (subject to
6 paragraph (a)):
7 (i) start earlier than is permitted by paragraph (b); or
8 (ii) end up to 3 weeks later than is permitted by
9 paragraph (b).
- 10 (6) Concurrent leave taken by an employee:
11 (a) is an exception to the rule that the employee must take his or
12 her leave in a single continuous period (see subsection (2));
13 and
14 (b) is an exception to the rules about when the employee’s period
15 of unpaid parental leave must start (see subsection (3) or (4)).
- 16 Note: The concurrent leave is unpaid parental leave and so comes out of the
17 employee’s entitlement to 12 months of unpaid parental leave under
18 section 70.

19 **73 Pregnant employee may be required to take unpaid parental**
20 **leave within 6 weeks before the birth**

21 *Employer may ask employee to provide a medical certificate*

- 22 (1) If a pregnant employee who is entitled to unpaid parental leave
23 (whether or not she has complied with section 74) continues to
24 work during the 6 week period before the expected date of birth of
25 the child, the employer may ask the employee to give the employer
26 a medical certificate containing the following statements (as
27 applicable):
28 (a) a statement of whether the employee is fit for work;
29 (b) if the employee is fit for work—a statement of whether it is
30 inadvisable for the employee to continue in her present
31 position during a stated period because of:
32 (i) illness, or risks, arising out of the employee’s
33 pregnancy; or
34 (ii) hazards connected with the position.

1 Note: Personal information given to an employer under this subsection may
2 be regulated under the *Privacy Act 1988*.

3 *Employer may require employee to take unpaid parental leave*

4 (2) The employer may require the employee to take a period of unpaid
5 parental leave (the *period of leave*) as soon as practicable if:

- 6 (a) the employee does not give the employer the requested
7 certificate within 7 days after the request; or
8 (b) within 7 days after the request, the employee gives the
9 employer a medical certificate stating that the employee is
10 not fit for work; or
11 (c) the following subparagraphs are satisfied:
12 (i) within 7 days after the request, the employee gives the
13 employer a medical certificate stating that the employee
14 is fit for work, but that it is inadvisable for the employee
15 to continue in her present position for a stated period for
16 a reason referred to in subparagraph (1)(b)(i) or (ii);
17 (ii) section 81 does not apply to the employee.

18 Note: If the medical certificate contains a statement as referred to in
19 subparagraph (c)(i) and section 81 applies to the employee, the
20 employee is entitled under that section to be transferred to a safe job,
21 or to paid no safe job leave.

22 *When the period of leave must end*

- 23 (3) The period of leave must not end later than the earlier of the
24 following:
25 (a) the end of the pregnancy;
26 (b) if the employee has given the employer notice of the taking
27 of a period of leave connected with the birth of the child
28 (whether it is unpaid parental leave or some other kind of
29 leave)—the start date of that leave.

30 *Special rules about the period of leave*

- 31 (4) The period of leave:
32 (a) is an exception to the rule that the employee must take her
33 unpaid parental leave in a single continuous period (see
34 subsection 71(2) or 72(2)); and

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1 (b) is an exception to the rules about when the employee's period
2 of unpaid parental leave must start (see subsections 71(3) and
3 (6), or subsection 72(3)).

4 Note: The period of leave is unpaid parental leave and so comes out of the
5 employee's entitlement to 12 months of unpaid parental leave under
6 section 70.

7 (5) The employee is not required to comply with section 74 in relation
8 to the period of leave.

9 **74 Notice and evidence requirements**

10 *Notice*

11 (1) An employee must give his or her employer written notice of the
12 taking of unpaid parental leave under section 71 or 72 by the
13 employee.

14 (2) The notice must be given to the employer:
15 (a) at least 10 weeks before starting the leave; or
16 (b) if that is not practicable—as soon as practicable (which may
17 be a time after the leave has started).

18 (3) The notice must specify the intended start and end dates of the
19 leave.

20 *Confirmation or change of intended start and end dates*

21 (4) At least 4 weeks before the intended start date specified in the
22 notice given under subsection (1), the employee must:
23 (a) confirm the intended start and end dates of the leave; or
24 (b) advise the employer of any changes to the intended start and
25 end dates of the leave;
26 unless it is not practicable to do so.

27 *Evidence*

28 (5) An employee who has given his or her employer notice of the
29 taking of unpaid parental leave must, if required by the employer,
30 give the employer evidence that would satisfy a reasonable person:

Section 75

- 1 (a) if the leave is birth-related leave—of the date of birth, or the
2 expected date of birth, of the child; or
3 (b) if the leave is adoption-related leave:
4 (i) of the day of placement, or the expected day of
5 placement, of the child; and
6 (ii) that the child is, or will be, under 16 as at the day of
7 placement, or the expected day of placement, of the
8 child.
- 9 (6) Without limiting subsection (5), an employer may require the
10 evidence referred to in paragraph (5)(a) to be a medical certificate.

11 *Compliance*

- 12 (7) An employee is not entitled to take unpaid parental leave under
13 section 71 or 72 unless the employee complies with this section.

14 Note: Personal information given to an employer under this section may be
15 regulated under the *Privacy Act 1988*.

16 **75 Extending period of unpaid parental leave—extending to use**
17 **more of available parental leave period**

18 *Application of this section*

- 19 (1) This section applies if:
20 (a) an employee has, in accordance with section 74, given notice
21 of the taking of a period of unpaid parental leave (the
22 ***original leave period***); and
23 (b) the original leave period is less than the employee's available
24 parental leave period; and
25 (c) the original leave period has started.
- 26 (2) The employee's ***available parental leave period*** is 12 months, less
27 any periods of the following kinds:
28 (a) a period of concurrent leave that the employee has taken in
29 accordance with subsection 72(5);
30 (b) a period of unpaid parental leave that the employee has been
31 required to take under subsection 73(2) or 82(2);

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- 1 (c) a period by which the employee's entitlement to unpaid
2 parental leave is reduced under paragraph 76(6)(c);
3 (d) a period of special maternity leave that the employee has
4 taken.

5 *First extension by giving notice to employer*

- 6 (3) The employee may extend the period of unpaid parental leave by
7 giving his or her employer written notice of the extension at least 4
8 weeks before the end date of the original leave period. The notice
9 must specify the new end date for the leave.
10 (4) Only one extension is permitted under subsection (3).

11 *Further extensions by agreement with employer*

- 12 (5) If the employer agrees, the employee may further extend the period
13 of unpaid parental leave one or more times.

14 *No entitlement to extension beyond available parental leave period*

- 15 (6) The employee is not entitled under this section to extend the period
16 of unpaid parental leave beyond the employee's available parental
17 leave period.

18 **76 Extending period of unpaid parental leave—extending for up to**
19 **12 months beyond available parental leave period**

20 *Employee may request further period of leave*

- 21 (1) An employee who takes unpaid parental leave for his or her
22 available parental leave period may request his or her employer to
23 agree to an extension of unpaid parental leave for the employee for
24 a further period of up to 12 months immediately following the end
25 of the available parental leave period.

26 *Making the request*

- 27 (2) The request must be in writing, and must be given to the employer
28 at least 4 weeks before the end of the available parental leave
29 period.

1 *Agreeing to the requested extension*

- 2 (3) The employer must give the employee a written response to the
3 request stating whether the employer grants or refuses the request.
4 The response must be given as soon as practicable, and not later
5 than 21 days, after the request is made.
- 6 (4) The employer may refuse the request only on reasonable business
7 grounds.
- 8 (5) If the employer refuses the request, the written response under
9 subsection (3) must include details of the reasons for the refusal.

10 *Special rules for employee couples*

- 11 (6) The following paragraphs apply in relation to a member of an
12 employee couple extending a period of unpaid parental leave in
13 relation to a child under this section:
- 14 (a) the request must specify any amount of unpaid parental leave
15 and unpaid special maternity leave that the other member of
16 the employee couple has taken, or will have taken, in relation
17 to the child before the extension starts;
- 18 (b) the period of the extension cannot exceed 12 months, less any
19 period of unpaid parental leave or unpaid special maternity
20 leave that the other member of the employee couple has
21 taken, or will have taken, in relation to the child before the
22 extension starts;
- 23 (c) the amount of unpaid parental leave to which the other
24 member of the employee couple is entitled under section 70
25 in relation to the child is reduced by the period of the
26 extension.

27 *No extension beyond 24 months after birth or placement*

- 28 (7) Despite any other provision of this Division, the employee is not
29 entitled to extend the period of unpaid parental leave beyond 24
30 months after the date of birth or day of placement of the child.

Section 77

1 **77 Reducing period of unpaid parental leave**

2 If the employer agrees, an employee whose period of unpaid
3 parental leave has started may reduce the period of unpaid parental
4 leave he or she takes.

5 **78 Employee who ceases to have responsibility for care of child**

6 (1) This section applies to an employee who has taken unpaid parental
7 leave in relation to a child if the employee ceases to have any
8 responsibility for the care of the child.

9 (2) The employer may give the employee written notice requiring the
10 employee to return to work on a specified day.

11 (3) The specified day:

12 (a) must be at least 4 weeks after the notice is given to the
13 employee; and

14 (b) if the leave is birth-related leave taken by a female employee
15 who has given birth—must not be earlier than 6 weeks after
16 the date of birth of the child.

17 (4) The employee’s entitlement to unpaid parental leave in relation to
18 the child ends immediately before the specified day.

19 **79 Interaction with paid leave**

20 (1) This Subdivision (except for subsections (2) and (3)) does not
21 prevent an employee from taking any other kind of paid leave
22 while he or she is taking unpaid parental leave. If the employee
23 does so, the taking of that other paid leave does not break the
24 continuity of the period of unpaid parental leave.

25 Note: For example, if the employee has paid annual leave available, he or
26 she may (with the employer’s agreement) take some or all of that paid
27 annual leave at the same time as the unpaid parental leave.

28 (2) An employee is not entitled to take paid personal/carer’s leave or
29 compassionate leave while he or she is taking unpaid parental
30 leave.

- 1 (3) An employee is not entitled to any payment under Division 8
2 (which deals with community service leave) in relation to activities
3 the employee engages in while taking unpaid parental leave.

4 **Subdivision C—Other entitlements**

5 **80 Unpaid special maternity leave**

6 *Entitlement to unpaid special maternity leave*

- 7 (1) A female employee is entitled to a period of unpaid special
8 maternity leave if she is not fit for work during that period because:
9 (a) she has a pregnancy-related illness; or
10 (b) she has been pregnant, and the pregnancy ends within 28
11 weeks of the expected date of birth of the child otherwise
12 than by the birth of a living child.

13 Note: Entitlement is also affected by section 67 (which deals with the length
14 of the employee's service).

15 *Notice and evidence*

- 16 (2) An employee must give her employer notice of the taking of
17 unpaid special maternity leave by the employee.
- 18 (3) The notice:
19 (a) must be given to the employer as soon as practicable (which
20 may be a time after the leave has started); and
21 (b) must advise the employer of the period, or expected period,
22 of the leave.
- 23 (4) An employee who has given her employer notice of the taking of
24 unpaid special maternity leave must, if required by the employer,
25 give the employer evidence that would satisfy a reasonable person
26 that the leave is taken for a reason specified in subsection (1).
- 27 (5) Without limiting subsection (4), an employer may require the
28 evidence referred to in that subsection to be a medical certificate.
- 29 (6) An employee is not entitled to take unpaid special maternity leave
30 unless the employee complies with subsections (2) to (4).

Section 81

1 *Taking of special maternity leave reduces entitlement to unpaid*
2 *parental leave*

3 (7) A female employee's entitlement to 12 months of unpaid parental
4 leave associated with the birth of a child (see section 70) is reduced
5 by the amount of any unpaid special maternity leave taken by the
6 employee while she was pregnant.

7 Note: Personal information given to an employer under this section may be
8 regulated under the *Privacy Act 1988*.

9 **81 Transfer to a safe job**

10 *Application of this section*

11 (1) This section applies to a pregnant employee if:
12 (a) she is entitled to unpaid parental leave; and
13 (b) she has already complied with the notice and evidence
14 requirements of section 74 for taking unpaid parental leave;
15 and
16 (c) she gives her employer evidence that would satisfy a
17 reasonable person that she is fit for work, but that it is
18 inadvisable for her to continue in her present position during
19 a stated period (the *risk period*) because of:
20 (i) illness, or risks, arising out of her pregnancy; or
21 (ii) hazards connected with that position.

22 Note: Personal information given to an employer under this subsection may
23 be regulated under the *Privacy Act 1988*.

24 (2) Without limiting paragraph (1)(c), an employer may require the
25 evidence referred to in that paragraph to be a medical certificate.

26 *Employee entitled to appropriate safe job or paid no safe job leave*
27 *during risk period*

28 (3) If this section applies to an employee:
29 (a) if there is an appropriate safe job available—the employer
30 must transfer the employee to that job for the risk period,
31 with no other change to the employee's terms and conditions
32 of employment; or

1 (b) if there is no appropriate safe job available—the employee is
2 entitled to take paid no safe job leave for the risk period.

3 (4) An **appropriate safe job** is a safe job that has:

- 4 (a) the same ordinary hours of work as the employee’s present
5 position; or
6 (b) a different number of ordinary hours agreed to by the
7 employee.

8 *Payment to employee if transferred to appropriate safe job*

9 (5) Without limiting paragraph (3)(a), if the employee is transferred to
10 an appropriate safe job for the risk period, the employer must pay
11 the employee for the safe job at the employee’s full rate of pay (for
12 the position she was in before the transfer) for the hours that she
13 works in the risk period.

14 *Payment to employee if on paid no safe job leave*

15 (6) If the employee takes paid no safe job leave for the risk period, the
16 employer must pay the employee at the employee’s base rate of
17 pay for the employee’s ordinary hours of work in the risk period.

18 *Risk period ends if pregnancy ends*

19 (7) If the employee’s pregnancy ends before the end of the risk period,
20 the risk period ends when the pregnancy ends.

21 **82 Employee on paid no safe job leave may be asked to provide a**
22 **further medical certificate**

23 *Employer may ask employee to provide a medical certificate*

24 (1) If an employee is on paid no safe job leave during the 6 week
25 period before the expected date of birth of the child, the employer
26 may ask the employee to give the employer a medical certificate
27 stating whether the employee is fit for work.

28 Note: Personal information given to an employer under this subsection may
29 be regulated under the *Privacy Act 1988*.

Section 83

1 *Employer may require employee to take unpaid parental leave*

- 2 (2) The employer may require the employee to take a period of unpaid
3 parental leave (the *period of leave*) as soon as practicable if:
4 (a) the employee does not give the employer the requested
5 certificate within 7 days after the request; or
6 (b) within 7 days after the request, the employee gives the
7 employer a certificate stating that the employee is not fit for
8 work.

9 *Entitlement to paid no safe job leave ends*

- 10 (3) When the period of leave starts, the employee's entitlement to paid
11 no safe job leave ends.

12 *When the period of leave must end etc.*

- 13 (4) Subsections 73(3), (4) and (5) apply to the period of leave.

14 **83 Consultation with employee on unpaid parental leave**

- 15 (1) If:
16 (a) an employee is on unpaid parental leave; and
17 (b) the employee's employer makes a decision that will have a
18 significant effect on the status, pay or location of the
19 employee's pre-parental leave position;
20 the employer must take all reasonable steps to give the employee
21 information about, and an opportunity to discuss, the effect of the
22 decision on that position.
- 23 (2) The employee's *pre-parental leave position* is:
24 (a) unless paragraph (b) applies, the position the employee held
25 before starting the unpaid parental leave; or
26 (b) if, before starting the unpaid parental leave, the employee:
27 (i) was transferred to a safe job because of her pregnancy;
28 or
29 (ii) reduced her working hours due to her pregnancy;
30 the position the employee held immediately before that
31 transfer or reduction.

1 **84 Return to work guarantee**

2 On ending unpaid parental leave, an employee is entitled to return
3 to:

- 4 (a) the employee's pre-parental leave position; or
5 (b) if that position no longer exists—an available position for
6 which the employee is qualified and suited nearest in status
7 and pay to the pre-parental leave position.

8 **85 Unpaid pre-adoption leave**

9 *Entitlement to unpaid pre-adoption leave*

- 10 (1) An employee is entitled to up to 2 days of unpaid pre-adoption
11 leave to attend any interviews or examinations required in order to
12 obtain approval for the employee's adoption of a child.

13 Note: Entitlement is also affected by section 68 (which deals with the age
14 etc. of the adopted child).

- 15 (2) However, an employee is not entitled to take a period of unpaid
16 pre-adoption leave if:
17 (a) the employee could instead take some other form of leave;
18 and
19 (b) the employer directs the employee to take that other form of
20 leave.
- 21 (3) An employee who is entitled to a period of unpaid pre-adoption
22 leave is entitled to take the leave as:
23 (a) a single continuous period of up to 2 days; or
24 (b) any separate periods to which the employee and the employer
25 agree.

26 *Notice and evidence*

- 27 (4) An employee must give his or her employer notice of the taking of
28 unpaid pre-adoption leave by the employee.
- 29 (5) The notice:
30 (a) must be given to the employer as soon as practicable (which
31 may be a time after the leave has started); and

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1 (b) must advise the employer of the period, or expected period,
2 of the leave.

3 (6) An employee who has given his or her employer notice of the
4 taking of unpaid pre-adoption leave must, if required by the
5 employer, give the employer evidence that would satisfy a
6 reasonable person that the leave is taken to attend an interview or
7 examination as referred to in subsection (1).

8 (7) An employee is not entitled to take unpaid pre-adoption leave
9 unless the employee complies with subsections (4) to (6).

10 Note: Personal information given to an employer under this section may be
11 regulated under the *Privacy Act 1988*.

1

2 **Division 6—Annual leave**

3 **86 Division applies to employees other than casual employees**

4 This Division applies to employees, other than casual employees.

5 **87 Entitlement to annual leave**

6 *Amount of leave*

7 (1) For each year of service with his or her employer, an employee is
8 entitled to:

9 (a) 4 weeks of paid annual leave; or

10 (b) 5 weeks of paid annual leave, if:

11 (i) a modern award applies to the employee and defines or
12 describes the employee as a shiftworker for the purposes
13 of the National Employment Standards; or

14 (ii) an enterprise agreement applies to the employee and
15 defines or describes the employee as a shiftworker for
16 the purposes of the National Employment Standards; or

17 (iii) the employee qualifies for the shiftworker annual leave
18 entitlement under subsection (3) (this relates to
19 award/agreement free employees).

20 Note: Section 196 affects whether FWA may approve an enterprise
21 agreement covering an employee, if the employee is covered by a
22 modern award that is in operation and defines or describes the
23 employee as a shiftworker for the purposes of the National
24 Employment Standards.

25 *Accrual of leave*

26 (2) An employee's entitlement to paid annual leave accrues
27 progressively during a year of service according to the employee's
28 ordinary hours of work, and accumulates from year to year.

29 Note: If an employee's employment ends during what would otherwise have
30 been a year of service, the employee accrues paid annual leave up to
31 when the employment ends.

Section 88

- 1 *Award/agreement free employees who qualify for the shiftworker*
2 *entitlement*
- 3 (3) An award/agreement free employee qualifies for the shiftworker
4 annual leave entitlement if:
- 5 (a) the employee:
- 6 (i) is employed in an enterprise in which shifts are
7 continuously rostered 24 hours a day for 7 days a week;
8 and
9 (ii) is regularly rostered to work those shifts; and
10 (iii) regularly works on Sundays and public holidays; or
11 (b) the employee is in a class of employees prescribed by the
12 regulations as shiftworkers for the purposes of the National
13 Employment Standards.
- 14 (4) However, an employee referred to in subsection (3) does not
15 qualify for the shiftworker annual leave entitlement if the
16 employee is in a class of employees prescribed by the regulations
17 as not being qualified for that entitlement.
- 18 (5) Without limiting the way in which a class may be described for the
19 purposes of paragraph (3)(b) or subsection (4), the class may be
20 described by reference to one or more of the following:
- 21 (a) a particular industry or part of an industry;
22 (b) a particular kind of work;
23 (c) a particular type of employment.

88 Taking paid annual leave

- 24
- 25 (1) Paid annual leave may be taken for a period agreed between an
26 employee and his or her employer.
- 27 (2) The employer must not unreasonably refuse to agree to a request
28 by the employee to take paid annual leave.

1 **89 Employee not taken to be on paid annual leave at certain times**

2 *Public holidays*

- 3 (1) If the period during which an employee takes paid annual leave
4 includes a day or part-day that is a public holiday in the place
5 where the employee is based for work purposes, the employee is
6 taken not to be on paid annual leave on that public holiday.

7 *Other periods of leave*

- 8 (2) If the period during which an employee takes paid annual leave
9 includes a period of any other leave (other than unpaid parental
10 leave) under this Part, or a period of absence from employment
11 under Division 8 (which deals with community service leave), the
12 employee is taken not to be on paid annual leave for the period of
13 that other leave or absence.

14 **90 Payment for annual leave**

- 15 (1) If, in accordance with this Division, an employee takes a period of
16 paid annual leave, the employer must pay the employee at the
17 employee's base rate of pay for the employee's ordinary hours of
18 work in the period.
- 19 (2) If, when the employment of an employee ends, the employee has a
20 period of untaken paid annual leave, the employer must pay the
21 employee the amount that would have been payable to the
22 employee had the employee taken that period of leave.

23 **91 Transfer of employment situations that affect entitlement to**
24 **payment for period of untaken paid annual leave**

25 *Transfer of employment situation in which employer may decide*
26 *not to recognise employee's service with first employer*

- 27 (1) Subsection 22(5) does not apply (for the purpose of this Division)
28 to a transfer of employment between non-associated entities in
29 relation to an employee, if the second employer decides not to
30 recognise the employee's service with the first employer (for the
31 purpose of this Division).

Section 92

1 *Employee is not entitled to payment for untaken annual leave if*
2 *service with first employer counts as service with second employer*

3 (2) If subsection 22(5) applies (for the purpose of this Division) to a
4 transfer of employment in relation to an employee, the employee is
5 not entitled to be paid an amount under subsection 90(2) for a
6 period of untaken paid annual leave.

7 Note: Subsection 22(5) provides that, generally, if there is a transfer of
8 employment, service with the first employer counts as service with the
9 second employer.

10 **92 Paid annual leave must not be cashed out except in accordance**
11 **with permitted cashing out terms**

12 Paid annual leave must not be cashed out, except in accordance
13 with:

- 14 (a) cashing out terms included in a modern award or enterprise
15 agreement under section 93, or
16 (b) an agreement between an employer and an award/agreement
17 free employee under subsection 94(1).

18 **93 Modern awards and enterprise agreements may include terms**
19 **relating to cashing out and taking paid annual leave**

20 *Terms about cashing out paid annual leave*

21 (1) A modern award or enterprise agreement may include terms
22 providing for the cashing out of paid annual leave by an employee.

23 (2) The terms must require that:

- 24 (a) paid annual leave must not be cashed out if the cashing out
25 would result in the employee's remaining accrued entitlement
26 to paid annual leave being less than 4 weeks; and
27 (b) each cashing out of a particular amount of paid annual leave
28 must be by a separate agreement in writing between the
29 employer and the employee; and
30 (c) the employee must be paid at least the full amount that would
31 have been payable to the employee had the employee taken
32 the leave that the employee has forgone.

1 *Terms about requirements to take paid annual leave*

- 2 (3) A modern award or enterprise agreement may include terms
3 requiring an employee, or allowing for an employee to be required,
4 to take paid annual leave in particular circumstances, but only if
5 the requirement is reasonable.

6 *Terms about taking paid annual leave*

- 7 (4) A modern award or enterprise agreement may include terms
8 otherwise dealing with the taking of paid annual leave.

9 **94 Cashing out and taking paid annual leave for award/agreement**
10 **free employees**

11 *Agreements to cash out paid annual leave*

- 12 (1) An employer and an award/agreement free employee may agree to
13 the employee cashing out a particular amount of the employee's
14 accrued paid annual leave.
- 15 (2) The employer and the employee must not agree to the employee
16 cashing out an amount of paid annual leave if the agreement would
17 result in the employee's remaining accrued entitlement to paid
18 annual leave being less than 4 weeks.
- 19 (3) Each agreement to cash out a particular amount of paid annual
20 leave must be a separate agreement in writing.
- 21 (4) The employer must pay the employee at least the full amount that
22 would have been payable to the employee had the employee taken
23 the leave that the employee has forgone.

24 *Requirements to take paid annual leave*

- 25 (5) An employer may require an award/agreement free employee to
26 take a period of paid annual leave, but only if the requirement is
27 reasonable.

28 Note: A requirement to take paid annual leave may be reasonable if, for
29 example:

- 30 (a) the employee has accrued an excessive amount of paid annual
31 leave; or

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Division 6 Annual leave

Section 94

- 1 (b) the employer's enterprise is being shut down for a period (for
2 example, between Christmas and New Year).

3 *Agreements about taking paid annual leave*

- 4 (6) An employer and an award/agreement free employee may agree on
5 when and how paid annual leave may be taken by the employee.

6 Note: Matters that could be agreed include, for example, the following:

- 7 (a) that paid annual leave may be taken in advance of accrual;
8 (b) that paid annual leave must be taken within a fixed period of time
9 after it is accrued;
10 (c) the form of application for paid annual leave;
11 (d) that a specified period of notice must be given before taking paid
12 annual leave.

1

2 **Division 7—Personal/carer's leave and compassionate**
3 **leave**

4 **Subdivision A—Paid personal/carer's leave**

5 **95 Subdivision applies to employees other than casual employees**

6 This Subdivision applies to employees, other than casual
7 employees.

8 **96 Entitlement to paid personal/carer's leave**

9 *Amount of leave*

10 (1) For each year of service with his or her employer, an employee is
11 entitled to 10 days of paid personal/carer's leave.

12 *Accrual of leave*

13 (2) An employee's entitlement to paid personal/carer's leave accrues
14 progressively during a year of service according to the employee's
15 ordinary hours of work, and accumulates from year to year.

16 **97 Taking paid personal/carer's leave**

17 An employee may take paid personal/carer's leave if the leave is
18 taken:

- 19 (a) because the employee is not fit for work because of a
20 personal illness, or personal injury, affecting the employee;
21 or
22 (b) to provide care or support to a member of the employee's
23 immediate family, or a member of the employee's household,
24 who requires care or support because of:
25 (i) a personal illness, or personal injury, affecting the
26 member; or
27 (ii) an unexpected emergency affecting the member.

28 Note: The notice and evidence requirements of section 107 must be
29 complied with.

Section 98

1 **98 Employee taken not to be on paid personal/carer's leave on**
2 **public holiday**

3 If the period during which an employee takes paid personal/carer's
4 leave includes a day or part-day that is a public holiday in the place
5 where the employee is based for work purposes, the employee is
6 taken not to be on paid personal/carer's leave on that public
7 holiday.

8 **99 Payment for paid personal/carer's leave**

9 If, in accordance with this Subdivision, an employee takes a period
10 of paid personal/carer's leave, the employer must pay the employee
11 at the employee's base rate of pay for the employee's ordinary
12 hours of work in the period.

13 **100 Paid personal/carer's leave must not be cashed out except in**
14 **accordance with permitted cashing out terms**

15 Paid personal/carer's leave must not be cashed out, except in
16 accordance with cashing out terms included in a modern award or
17 enterprise agreement under section 101.

18 **101 Modern awards and enterprise agreements may include terms**
19 **relating to cashing out paid personal/carer's leave**

- 20 (1) A modern award or enterprise agreement may include terms
21 providing for the cashing out of paid personal/carer's leave by an
22 employee.
- 23 (2) The terms must require that:
- 24 (a) paid personal/carer's leave must not be cashed out if the
25 cashing out would result in the employee's remaining
26 accrued entitlement to paid personal/carer's leave being less
27 than 15 days; and
- 28 (b) each cashing out of a particular amount of paid
29 personal/carer's leave must be by a separate agreement in
30 writing between the employer and the employee; and

- 1 (c) the employee must be paid at least the full amount that would
2 have been payable to the employee had the employee taken
3 the leave that the employee has forgone.

4 **Subdivision B—Unpaid carer's leave**

5 **102 Entitlement to unpaid carer's leave**

6 An employee is entitled to 2 days of unpaid carer's leave for each
7 occasion (a *permissible occasion*) when a member of the
8 employee's immediate family, or a member of the employee's
9 household, requires care or support because of:

- 10 (a) a personal illness, or personal injury, affecting the member;
11 or
12 (b) an unexpected emergency affecting the member.

13 **103 Taking unpaid carer's leave**

- 14 (1) An employee may take unpaid carer's leave for a particular
15 permissible occasion if the leave is taken to provide care or support
16 as referred to in section 102.
- 17 (2) An employee may take unpaid carer's leave for a particular
18 permissible occasion as:
19 (a) a single continuous period of up to 2 days; or
20 (b) any separate periods to which the employee and his or her
21 employer agree.
- 22 (3) An employee cannot take unpaid carer's leave during a particular
23 period if the employee could instead take paid personal/carer's
24 leave.

25 Note: The notice and evidence requirements of section 107 must be
26 complied with.

27 **Subdivision C—Compassionate leave**

28 **104 Entitlement to compassionate leave**

29 An employee is entitled to 2 days of compassionate leave for each
30 occasion (a *permissible occasion*) when a member of the

Section 105

- 1 employee's immediate family, or a member of the employee's
2 household:
3 (a) contracts or develops a personal illness that poses a serious
4 threat to his or her life; or
5 (b) sustains a personal injury that poses a serious threat to his or
6 her life; or
7 (c) dies.

8 **105 Taking compassionate leave**

- 9 (1) An employee may take compassionate leave for a particular
10 permissible occasion if the leave is taken:
11 (a) to spend time with the member of the employee's immediate
12 family or household who has contracted or developed the
13 personal illness, or sustained the personal injury, referred to
14 in section 104; or
15 (b) after the death of the member of the employee's immediate
16 family or household referred to in section 104.
- 17 (2) An employee may take compassionate leave for a particular
18 permissible occasion as:
19 (a) a single continuous 2 day period; or
20 (b) 2 separate periods of 1 day each; or
21 (c) any separate periods to which the employee and his or her
22 employer agree.
- 23 (3) If the permissible occasion is the contraction or development of a
24 personal illness, or the sustaining of a personal injury, the
25 employee may take the compassionate leave for that occasion at
26 any time while the illness or injury persists.
- 27 Note: The notice and evidence requirements of section 107 must be
28 complied with.

29 **106 Payment for compassionate leave (other than for casual
30 employees)**

31 If, in accordance with this Subdivision, an employee, other than a
32 casual employee, takes a period of compassionate leave, the

1 employer must pay the employee at the employee's base rate of
2 pay for the employee's ordinary hours of work in the period.

3 Note: For casual employees, compassionate leave is unpaid leave.

4 **Subdivision D—Notice and evidence requirements**

5 **107 Notice and evidence requirements**

6 *Notice*

7 (1) An employee must give his or her employer notice of the taking of
8 leave under this Division by the employee.

9 (2) The notice:

10 (a) must be given to the employer as soon as practicable (which
11 may be a time after the leave has started); and

12 (b) must advise the employer of the period, or expected period,
13 of the leave.

14 *Evidence*

15 (3) An employee who has given his or her employer notice of the
16 taking of leave under this Division must, if required by the
17 employer, give the employer evidence that would satisfy a
18 reasonable person that:

19 (a) if it is paid personal/carer's leave—the leave is taken for a
20 reason specified in section 97; or

21 (b) if it is unpaid carer's leave—the leave is taken for a
22 permissible occasion in circumstances specified in subsection
23 103(1); or

24 (c) if it is compassionate leave—the leave is taken for a
25 permissible occasion in circumstances specified in subsection
26 105(1).

27 *Compliance*

28 (4) An employee is not entitled to take leave under this Division unless
29 the employee complies with this section.

Section 107

1 *Modern awards and enterprise agreements may include evidence*
2 *requirements*

3 (5) A modern award or enterprise agreement may include terms
4 relating to the kind of evidence that an employee must provide in
5 order to be entitled to paid personal/carer's leave, unpaid carer's
6 leave or compassionate leave.

7 Note: Personal information given to an employer under this section may be
8 regulated under the *Privacy Act 1988*.

1

2 **Division 8—Community service leave**

3 **108 Entitlement to be absent from employment for engaging in**
4 **eligible community service activity**

5 An employee who engages in an eligible community service
6 activity is entitled to be absent from his or her employment for a
7 period if:

- 8 (a) the period consists of one or more of the following:
9 (i) time when the employee engages in the activity;
10 (ii) reasonable travelling time associated with the activity;
11 (iii) reasonable rest time immediately following the activity;
12 and
13 (b) unless the activity is jury service—the employee’s absence is
14 reasonable in all the circumstances.

15 **109 Meaning of *eligible community service activity***

16 *General*

- 17 (1) Each of the following is an ***eligible community service activity***:
18 (a) jury service (including attendance for jury selection) that is
19 required by or under a law of the Commonwealth, a State or a
20 Territory; or
21 (b) a voluntary emergency management activity (see
22 subsection (2)); or
23 (c) an activity prescribed in regulations made for the purpose of
24 subsection (4).

25 *Voluntary emergency management activities*

- 26 (2) An employee engages in a ***voluntary emergency management***
27 ***activity*** if, and only if:
28 (a) the employee engages in an activity that involves dealing
29 with an emergency or natural disaster; and
30 (b) the employee engages in the activity on a voluntary basis
31 (whether or not the employee directly or indirectly takes or

Section 109

- 1 agrees to take an honorarium, gratuity or similar payment
2 wholly or partly for engaging in the activity); and
3 (c) the employee is a member of, or has a member-like
4 association with, a recognised emergency management body;
5 and
6 (d) either:
7 (i) the employee was requested by or on behalf of the body
8 to engage in the activity; or
9 (ii) no such request was made, but it would be reasonable to
10 expect that, if the circumstances had permitted the
11 making of such a request, it is likely that such a request
12 would have been made.
- 13 (3) A **recognised emergency management body** is:
14 (a) a body, or part of a body, that has a role or function under a
15 plan that:
16 (i) is for coping with emergencies and/or disasters; and
17 (ii) is prepared by the Commonwealth, a State or a
18 Territory; or
19 (b) a fire-fighting, civil defence or rescue body, or part of such a
20 body; or
21 (c) any other body, or part of a body, a substantial purpose of
22 which involves:
23 (i) securing the safety of persons or animals in an
24 emergency or natural disaster; or
25 (ii) protecting property in an emergency or natural disaster;
26 or
27 (iii) otherwise responding to an emergency or natural
28 disaster; or
29 (d) a body, or part of a body, prescribed by the regulations;
30 but does not include a body that was established, or is continued in
31 existence, for the purpose, or for purposes that include the purpose,
32 of entitling one or more employees to be absent from their
33 employment under this Division.

1 *Regulations may prescribe other activities*

- 2 (4) The regulations may prescribe an activity that is of a community
3 service nature as an eligible community service activity.

4 **110 Notice and evidence requirements**

5 *Notice*

- 6 (1) An employee who wants an absence from his or her employment to
7 be covered by this Division must give his or her employer notice of
8 the absence.
- 9 (2) The notice:
- 10 (a) must be given to the employer as soon as practicable (which
11 may be a time after the absence has started); and
- 12 (b) must advise the employer of the period, or expected period,
13 of the absence.

14 *Evidence*

- 15 (3) An employee who has given his or her employer notice of an
16 absence under subsection (1) must, if required by the employer,
17 give the employer evidence that would satisfy a reasonable person
18 that the absence is because the employee has been or will be
19 engaging in an eligible community service activity.

20 *Compliance*

- 21 (4) An employee's absence from his or her employment is not covered
22 by this Division unless the employee complies with this section.

23 Note: Personal information given to an employer under this section may be
24 regulated under the *Privacy Act 1988*.

25 **111 Payment to employees (other than casuals) on jury service**

26 *Application of this section*

- 27 (1) This section applies if:

Section 111

- 1 (a) in accordance with this Division, an employee is absent from
2 his or her employment for a period because of jury service;
3 and
4 (b) the employee is not a casual employee.

5 *Employee to be paid base rate of pay*

- 6 (2) Subject to subsections (3), (4) and (5), the employer must pay the
7 employee at the employee's base rate of pay for the employee's
8 ordinary hours of work in the period.

9 *Evidence*

- 10 (3) The employer may require the employee to give the employer
11 evidence that would satisfy a reasonable person:
12 (a) that the employee has taken all necessary steps to obtain any
13 amount of jury service pay to which the employee is entitled;
14 and
15 (b) of the total amount (even if it is a nil amount) of jury service
16 pay that has been paid, or is payable, to the employee for the
17 period.

18 Note: Personal information given to an employer under this subsection may
19 be regulated under the *Privacy Act 1988*.

- 20 (4) If, in accordance with subsection (3), the employer requires the
21 employee to give the employer the evidence referred to in that
22 subsection:
23 (a) the employee is not entitled to payment under subsection (2)
24 unless the employee provides the evidence; and
25 (b) if the employee provides the evidence—the amount payable
26 to the employee under subsection (2) is reduced by the total
27 amount of jury service pay that has been paid, or is payable,
28 to the employee, as disclosed in the evidence.

29 *Payment only required for first 10 days of absence*

- 30 (5) If an employee is absent because of jury service in relation to a
31 particular jury service summons for a period, or a number of
32 periods, of more than 10 days in total:

Section 112

- 1 (a) the employer is only required to pay the employee for the
2 first 10 days of absence; and
3 (b) the evidence provided in response to a requirement under
4 subsection (3) need only relate to the first 10 days of absence;
5 and
6 (c) the reference in subsection (4) to the total amount of jury
7 service pay as disclosed in evidence is a reference to the total
8 amount so disclosed for the first 10 days of absence.

9 *Meaning of jury service pay*

- 10 (6) **Jury service pay** means an amount paid in relation to jury service
11 under a law of the Commonwealth, a State or a Territory, other
12 than an amount that is, or that is in the nature of, an
13 expense-related allowance.

14 *Meaning of jury service summons*

- 15 (7) **Jury service summons** means a summons or other instruction
16 (however described) that requires a person to attend for, or
17 perform, jury service.

18 **112 State and Territory laws that are not excluded**

- 19 (1) This Act is not intended to apply to the exclusion of laws of a State
20 or Territory that provide employee entitlements in relation to
21 engaging in eligible community service activities, to the extent that
22 those entitlements are more beneficial to employees than the
23 entitlements under this Division.

24 Note: For example, this Act would not apply to the exclusion of a State or
25 Territory law providing for a casual employee to be paid jury service
26 pay.

- 27 (2) If the community service activity is an activity prescribed in
28 regulations made for the purpose of subsection 109(4),
29 subsection (1) of this section has effect subject to any provision to
30 the contrary in the regulations.

Section 113

1

2 **Division 9—Long service leave**

3 **113 Entitlement to long service leave**

4 *General rule*

5 (1) An employee is entitled to long service leave in accordance with
6 applicable award-derived long service leave terms (see
7 subsection (3)).

8 Note: This Act does not exclude State and Territory laws that deal with long
9 service leave, except in relation to employees who are entitled to long
10 service leave under this Division (see paragraph 27(2)(g)).

11 *General rule does not apply while workplace agreement, AWA etc.*
12 *continues to apply*

13 (2) However, subsection (1) does not apply if:

14 (a) a workplace agreement, or an AWA, that came into operation
15 before the commencement of this Part applies to the
16 employee; or

17 (b) one of the following kinds of instrument that came into
18 operation before the commencement of this Part applies to
19 the employee and expressly deals with long service leave:

20 (i) a preserved State agreement;

21 (ii) a workplace determination;

22 (iii) a pre-reform certified agreement;

23 (iv) a pre-reform AWA;

24 (v) a section 170MX award;

25 (vi) an old IR agreement;

26 (vii) an employment agreement.

27 Note: If there ceases to be any agreement or instrument of a kind referred to
28 in paragraph (a) or (b) that applies to the employee, the employee will,
29 at that time, become entitled under subsection (1) to long service leave
30 in accordance with applicable award-derived long service leave terms.

1

What are applicable award-derived long service leave terms?

2

(3) ***Applicable award-derived long service leave terms***, in relation to an employee, are terms of an award:

3

4

(a) that would have applied to the employee immediately before the commencement of this Part if:

5

6

(i) the employee had, at that time, been in his or her current circumstances of employment; and

7

8

(ii) no workplace agreement, AWA or workplace determination had (whether at that time or earlier) applied to the employee; and

9

10

11

(b) that would have entitled the employee to long service leave (or that relate to matters that are ancillary or incidental to such an entitlement).

12

13

14

References are to instruments as defined in the Workplace Relations Act 1996

15

16

(4) References in this section to a kind of instrument are references to that kind of instrument as defined in the *Workplace Relations Act 1996*, as in force immediately before the commencement of this Part.

17

18

19

Section 114

1

2 **Division 10—Public holidays**

3 **114 Entitlement to be absent from employment on public holiday**

4 *Employee entitled to be absent on public holiday*

- 5 (1) An employee is entitled to be absent from his or her employment
6 on a day or part-day that is a public holiday in the place where the
7 employee is based for work purposes.

8 *Reasonable requests to work on public holidays*

- 9 (2) However, an employer may request an employee to work on a
10 public holiday if the request is reasonable.
- 11 (3) If an employer requests an employee to work on a public holiday,
12 the employee may refuse the request if:
13 (a) the request is not reasonable; or
14 (b) the refusal is reasonable.
- 15 (4) In determining whether a request, or a refusal of a request, to work
16 on a public holiday is reasonable, the following must be taken into
17 account:
18 (a) the nature of the employer's workplace or enterprise
19 (including its operational requirements), and the nature of the
20 work performed by the employee;
21 (b) the employee's personal circumstances, including family
22 responsibilities;
23 (c) whether the employee could reasonably expect that the
24 employer might request work on the public holiday;
25 (d) whether the employee is entitled to receive overtime
26 payments, penalty rates or other compensation for, or a level
27 of remuneration that reflects an expectation of, work on the
28 public holiday;
29 (e) the type of employment of the employee (for example,
30 whether full-time, part-time, casual or shiftwork);
31 (f) the amount of notice in advance of the public holiday given
32 by the employer when making the request;

- 1 (g) in relation to the refusal of a request—the amount of notice in
2 advance of the public holiday given by the employee when
3 refusing the request;
4 (h) any other relevant matter.

5 **115 Meaning of *public holiday***

6 *The public holidays*

- 7 (1) The following are ***public holidays***:
8 (a) each of these days:
9 (i) 1 January (New Year's Day);
10 (ii) 26 January (Australia Day);
11 (iii) Good Friday;
12 (iv) Easter Monday;
13 (v) 25 April (Anzac Day);
14 (vi) the Queen's birthday holiday (on the day on which it is
15 celebrated in a State or Territory or a region of a State
16 or Territory);
17 (vii) 25 December (Christmas Day);
18 (viii) 26 December (Boxing Day);
19 (b) any other day, or part-day, declared or prescribed by or under
20 a law of a State or Territory to be observed generally within
21 the State or Territory, or a region of the State or Territory, as
22 a public holiday, other than a day or part-day, or a kind of
23 day or part-day, that is excluded by the regulations from
24 counting as a public holiday.

25 *Substituted public holidays under State or Territory laws*

- 26 (2) If, under (or in accordance with a procedure under) a law of a State
27 or Territory, a day or part-day is substituted for a day or part-day
28 that would otherwise be a public holiday because of subsection (1),
29 then the substituted day or part-day is the ***public holiday***.

Section 116

1 *Substituted public holidays under modern awards and enterprise*
2 *agreements*

3 (3) A modern award or enterprise agreement may include terms
4 providing for an employer and employee to agree on the
5 substitution of a day or part-day for a day or part-day that would
6 otherwise be a public holiday because of subsection (1) or (2).

7 *Substituted public holidays for award/agreement free employees*

8 (4) An employer and an award/agreement free employee may agree on
9 the substitution of a day or part-day for a day or part-day that
10 would otherwise be a public holiday because of subsection (1) or
11 (2).

12 Note: This Act does not exclude State and Territory laws that deal with the
13 declaration, prescription or substitution of public holidays, but it does
14 exclude State and Territory laws that relate to the rights and
15 obligations of an employee or employer in relation to public holidays
16 (see paragraph 27(2)(j)).

17 **116 Payment for absence on public holiday**

18 If, in accordance with this Division, an employee is absent from his
19 or her employment on a day or part-day that is a public holiday, the
20 employer must pay the employee at the employee's base rate of
21 pay for the employee's ordinary hours of work on the day or
22 part-day.

23 Note: If the employee does not have ordinary hours of work on the public
24 holiday, the employee is not entitled to payment under this section.
25 For example, the employee is not entitled to payment if the employee
26 is a casual employee who is not rostered on for the public holiday, or
27 is a part-time employee whose part-time hours do not include the day
28 of the week on which the public holiday occurs.

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2 **Division 11—Notice of termination and redundancy pay**

3 **Subdivision A—Notice of termination or payment in lieu of**
4 **notice**

5 **117 Requirement for notice of termination or payment in lieu**

6 *Notice specifying day of termination*

7 (1) An employer must not terminate an employee's employment unless
8 the employer has given the employee written notice of the day of
9 the termination (which cannot be before the day the notice is
10 given).

11 Note 1: Section 123 describes situations in which this section does not apply.

12 Note 2: Sections 28A and 29 of the *Acts Interpretation Act 1901* provide how
13 a notice may be given. In particular, the notice may be given to an
14 employee by:

- 15 (a) delivering it personally; or
16 (b) leaving it at the employee's last known address; or
17 (c) sending it by pre-paid post to the employee's last known address.

18 *Amount of notice or payment in lieu of notice*

19 (2) The employer must not terminate the employee's employment
20 unless:

21 (a) the time between giving the notice and the day of the
22 termination is at least the period (the ***minimum period of***
23 ***notice***) worked out under subsection (3); or

24 (b) the employer has paid the employee payment in lieu of notice
25 of at least the amount the employer would have been liable to
26 pay the employee at the full rate of pay for the hours he or
27 she would have worked had the employment continued until
28 the end of the minimum period of notice.

29 (3) Work out the minimum period of notice as follows:

30 (a) first, work out the period using the following table:
31

Section 118

| Period | Employee's period of continuous service with the employer at the end of the day the notice is given | Period |
|---------------|--|---------------|
| 1 | Not more than 1 year | 1 week |
| 2 | More than 1 year but not more than 3 years | 2 weeks |
| 3 | More than 3 years but not more than 5 years | 3 weeks |
| 4 | More than 5 years | 4 weeks |

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(b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

118 Modern awards and enterprise agreements may provide for notice of termination by employees

A modern award or enterprise agreement may include terms specifying the period of notice an employee must give in order to terminate his or her employment.

Subdivision B—Redundancy pay

119 Redundancy pay

Entitlement to redundancy pay

- (1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:
- (a) 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
 - (b) because of the insolvency or bankruptcy of the employer.

Note: Sections 121, 122 and 123 describe situations in which the employee does not have this entitlement.

Amount of redundancy pay

- (2) The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee's base rate of pay for his or her ordinary hours of work:

| Redundancy pay period | |
|---|------------------------------|
| Employee's period of continuous service with the employer on termination | Redundancy pay period |
| 1 At least 1 year but less than 2 years | 4 weeks |
| 2 At least 2 years but less than 3 years | 6 weeks |
| 3 At least 3 years but less than 4 years | 7 weeks |
| 4 At least 4 years but less than 5 years | 8 weeks |
| 5 At least 5 years but less than 6 years | 10 weeks |
| 6 At least 6 years but less than 7 years | 11 weeks |
| 7 At least 7 years but less than 8 years | 13 weeks |
| 8 At least 8 years but less than 9 years | 14 weeks |
| 9 At least 9 years but less than 10 years | 16 weeks |
| 10 At least 10 years | 12 weeks |

120 Variation of redundancy pay for other employment or incapacity to pay

- (1) This section applies if:
- (a) an employee is entitled to be paid an amount of redundancy pay by the employer because of section 119; and
 - (b) the employer:
 - (i) obtains other acceptable employment for the employee; or
 - (ii) cannot pay the amount.
- (2) On application by the employer, FWA may determine that the amount of redundancy pay is reduced to a specified amount (which may be nil) that FWA considers appropriate.

Section 121

- 1 (3) The amount of redundancy pay to which the employee is entitled
2 under section 119 is the reduced amount specified in the
3 determination.

4 **121 Exclusions from obligation to pay redundancy pay**

5 Section 119 does not apply to the termination of an employee's
6 employment if, immediately before the time of the termination, or
7 at the time when the person was given notice of the termination as
8 described in subsection 117(1) (whichever happened first):

- 9 (a) the employee's period of continuous service with the
10 employer is less than 12 months; or
11 (b) the employer is a small business employer.

12 **122 Transfer of employment situations that affect the obligation to**
13 **pay redundancy pay**

14 *Transfer of employment situation in which employer may decide*
15 *not to recognise employee's service with first employer*

- 16 (1) Subsection 22(5) does not apply (for the purpose of this
17 Subdivision) to a transfer of employment between non-associated
18 entities in relation to an employee if the second employer decides
19 not to recognise the employee's service with the first employer (for
20 the purpose of this Subdivision).

21 *Employee is not entitled to redundancy pay if service with first*
22 *employer counts as service with second employer*

- 23 (2) If subsection 22(5) applies (for the purpose of this Subdivision) to
24 a transfer of employment in relation to an employee, the employee
25 is not entitled to redundancy pay under section 119 in relation to
26 the termination of his or her employment with the first employer.

27 Note: Subsection 22(5) provides that, generally, if there is a transfer of
28 employment, service with the first employer counts as service with the
29 second employer.

1 *Employee not entitled to redundancy pay if refuses employment in*
2 *certain circumstances*

- 3 (3) An employee is not entitled to redundancy pay under section 119
4 in relation to the termination of his or her employment with an
5 employer (the **first employer**) if:
6 (a) the employee rejects an offer of employment made by
7 another employer (the **second employer**) that:
8 (i) is on terms and conditions substantially similar to, and,
9 considered on an overall basis, no less favourable than,
10 the employee's terms and conditions of employment
11 with the first employer immediately before the
12 termination; and
13 (ii) recognises the employee's service with the first
14 employer, for the purpose of this Subdivision; and
15 (b) had the employee accepted the offer, there would have been a
16 transfer of employment in relation to the employee.
- 17 (4) If FWA is satisfied that subsection (3) operates unfairly to the
18 employee, FWA may order the first employer to pay the employee
19 a specified amount of redundancy pay (not exceeding the amount
20 that would be payable but for subsection (3)) that FWA considers
21 appropriate. The first employer must pay the employee that amount
22 of redundancy pay.

23 **Subdivision C—Limits on scope of this Division**

24 **123 Limits on scope of this Division**

25 *Employees not covered by this Division*

- 26 (1) This Division does not apply to any of the following employees:
27 (a) an employee employed for a specified period of time, for a
28 specified task, or for the duration of a specified season;
29 (b) an employee whose employment is terminated because of
30 serious misconduct;
31 (c) a casual employee;
32 (d) an employee (other than an apprentice) to whom a training
33 arrangement applies and whose employment is for a specified

Section 123

1 period of time or is, for any reason, limited to the duration of
2 the training arrangement;

3 (e) an employee prescribed by the regulations as an employee to
4 whom this Division does not apply.

5 (2) Paragraph (1)(a) does not prevent this Division from applying to an
6 employee if a substantial reason for employing the employee as
7 described in that paragraph was to avoid the application of this
8 Division.

9 *Other employees not covered by notice of termination provisions*

10 (3) Subdivision A does not apply to:

11 (a) an employee who has not completed at least the following
12 period of continuous service with his or her employer
13 immediately before the time of the termination, or at the time
14 when the person was given notice of the termination as
15 described in subsection 117(1) (whichever happened first):

16 (i) if the employer is not a small business employer at that
17 time—6 months of service;

18 (ii) if the employer is a small business employer at that
19 time—12 months of service;

20 (b) a daily hire employee working in the building and
21 construction industry (including working in connection with
22 the erection, repair, renovation, maintenance, ornamentation
23 or demolition of buildings or structures); or

24 (c) a daily hire employee working in the meat industry in
25 connection with the slaughter of livestock; or

26 (d) a weekly hire employee working in connection with the meat
27 industry and whose termination of employment is determined
28 solely by seasonal factors; or

29 (e) an employee prescribed by the regulations as an employee to
30 whom that Subdivision does not apply.

31 *Other employees not covered by redundancy pay provisions*

32 (4) Subdivision B does not apply to:

33 (a) an employee who is an apprentice; or

Section 123

- 1 (b) an employee to whom an industry-specific redundancy
2 scheme in a modern award applies; or
3 (c) an employee to whom a redundancy scheme in an enterprise
4 agreement applies if:
5 (i) the scheme is an industry-specific redundancy scheme
6 that is incorporated by reference (and as in force from
7 time to time) into the enterprise agreement from a
8 modern award that is in operation; and
9 (ii) the employee is covered by the industry-specific
10 redundancy scheme in the modern award; or
11 (d) an employee prescribed by the regulations as an employee to
12 whom that Subdivision does not apply.

Section 124

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Division 12—Fair Work Information Statement

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124 FWA to determine and publish Fair Work Information Statement

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- (1) FWA must determine a *Fair Work Information Statement*. FWA must publish the Statement in the *Gazette*.

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Note: If FWA changes the Statement, it must publish the new version of the Statement in the *Gazette*.

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- (2) The Statement must contain information about the following:

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(a) the National Employment Standards;

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(b) modern awards;

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(c) agreement-making under this Act;

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(d) the right to freedom of association;

14

(e) the role of FWA and the Fair Work Ombudsman.

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- (3) The regulations may prescribe other matters relating to the content or form of the Statement, or the manner in which employers may give the Statement to employees.

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125 Giving new employees the Fair Work Information Statement

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- (1) An employer must give each employee the Fair Work Information Statement before, or as soon as practicable after, the employee starts employment.

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- (2) Subsection (1) does not require the employer to give the employee the Statement more than once in any 12 months.

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Note: This is relevant if the employer employs the employee more than once in the 12 months.

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2 **Division 13—Miscellaneous**

3 **126 Modern awards and enterprise agreements may provide for**
4 **school-based apprentices and trainees to be paid loadings**
5 **in lieu**

6 A modern award or enterprise agreement may provide for
7 school-based apprentices or school-based trainees to be paid
8 loadings in lieu of any of the following:

- 9 (a) paid annual leave;
10 (b) paid personal/carer's leave;
11 (c) paid absence under Division 10 (which deals with public
12 holidays).

13 Note: Section 199 affects whether FWA may approve an enterprise agreement
14 covering an employee who is a school-based apprentice or school-based
15 trainee, if the employee is covered by a modern award that is in
16 operation and provides for the employee to be paid loadings in lieu of
17 paid annual leave, paid personal/carer's leave or paid absence under
18 Division 10.

19 **127 Regulations about what modern awards and enterprise**
20 **agreements can do**

21 The regulations may:

- 22 (a) permit modern awards or enterprise agreements or both to
23 include terms that would or might otherwise be contrary to
24 this Part or section 55 (which deals with the interaction
25 between the National Employment Standards and a modern
26 award or enterprise agreement); or
27 (b) prohibit modern awards or enterprise agreements or both
28 from including terms that would or might otherwise be
29 permitted by a provision of this Part or section 55.

30 **128 Relationship between National Employment Standards and**
31 **agreements etc. permitted by this Part for**
32 **award/agreement free employees**

33 The National Employment Standards have effect subject to:

Section 129

- 1 (a) an agreement between an employer and an award/agreement
2 free employee or a requirement made by an employer of an
3 award/agreement free employee, that is expressly permitted
4 by a provision of this Part; or
5 (b) an agreement between an employer and an award/agreement
6 free employee that is expressly permitted by regulations
7 made for the purpose of section 129.

8 Note 1: In determining what matters are permitted to be agreed or required
9 under paragraph (a), any regulations made for the purpose of
10 section 129 that expressly prohibit certain agreements or requirements
11 must be taken into account.

12 Note 2: See also the note to section 64 (which deals with the effect of
13 averaging arrangements).

14 **129 Regulations about what can be agreed to etc. in relation to**
15 **award/agreement free employees**

16 The regulations may:

- 17 (a) permit employers, and award/agreement free employees, to
18 agree on matters that would or might otherwise be contrary to
19 this Part; or
20 (b) prohibit employers and award/agreement free employees
21 from agreeing on matters, or prohibit employers from making
22 requirements of such employees, that would or might
23 otherwise be permitted by a provision of this Part.

24 **130 Restriction on taking or accruing leave or absence while**
25 **receiving workers' compensation**

- 26 (1) An employee is not entitled to take or accrue any leave or absence
27 (whether paid or unpaid) under this Part during a period (a
28 **compensation period**) when the employee is absent from work
29 because of a personal illness, or a personal injury, for which the
30 employee is receiving compensation payable under a law (a
31 **compensation law**) of the Commonwealth, a State or a Territory
32 that is about workers' compensation.
33 (2) Subsection (1) does not prevent an employee from taking or
34 accruing leave during a compensation period if the taking or
35 accruing of the leave is permitted by a compensation law.

Section 131

- 1 (3) Subsection (1) does not prevent an employee from taking unpaid
2 parental leave during a compensation period.

3 **131 Relationship with other Commonwealth laws**

4 This Part establishes minimum standards and so is intended to
5 supplement, and not to override, entitlements under other laws of
6 the Commonwealth.

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Part 2-3—Modern awards

3

Division 1—Introduction

4

132 Guide to this Part

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This Part provides for FWA to make, vary and revoke modern awards. Modern awards may set minimum terms and conditions for national system employees in particular industries or occupations. Modern awards can have terms that are ancillary or supplementary to the National Employment Standards (see Part 2-1).

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Division 2 provides for the modern awards objective. This requires FWA to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account certain social and economic factors. Division 2 also contains special provisions about modern award minimum wages.

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Division 3 deals with the terms of modern awards.

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Division 4 provides for FWA to conduct 4 yearly reviews of modern awards.

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Division 5 provides for FWA to exercise modern award powers outside the system of 4 yearly reviews in certain circumstances.

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Division 6 contains some general provisions relating to modern award powers.

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The obligation to comply with a modern award is in section 45 (in Part 2-1).

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In relation to minimum wages in modern awards, FWA has powers both under this Part and under Part 2-6 (which deals with minimum wages). The following is a summary of FWA's powers under the 2 Parts:

Section 133

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- (a) the initial making of a modern award setting modern award minimum wages can only occur under this Part;
- (b) the main power to vary modern award minimum wages is in annual wage reviews under Part 2-6;
- (c) modern award minimum wages can also be varied under this Part, but only for work value reasons or in other limited circumstances;
- (d) modern award minimum wages can be set (otherwise than in the initial making of a modern award) or revoked either under this Part or in annual wage reviews under Part 2-6.

11 **133 Meanings of *employee* and *employer***

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

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2 **Division 2—Overarching provisions**

3 **134 The modern awards objective**

4 *What is the modern awards objective?*

- 5 (1) FWA must ensure that modern awards, together with the National
6 Employment Standards, provide a fair and relevant minimum
7 safety net of terms and conditions, taking into account:
- 8 (a) relative living standards and the needs of the low paid; and
 - 9 (b) the need to encourage collective bargaining; and
 - 10 (c) the need to promote social inclusion through increased
11 workforce participation; and
 - 12 (d) the need to promote flexible modern work practices and the
13 efficient and productive performance of work; and
 - 14 (e) the principle of equal remuneration for work of equal or
15 comparable value; and
 - 16 (f) the likely impact of any exercise of modern award powers on
17 business, including on productivity, employment costs and
18 the regulatory burden; and
 - 19 (g) the need to ensure a simple, easy to understand, stable and
20 sustainable modern award system for Australia that avoids
21 unnecessary overlap of modern awards; and
 - 22 (h) the likely impact of any exercise of modern award powers on
23 employment growth, inflation and the sustainability,
24 performance and competitiveness of the national economy.

25 This is the *modern awards objective*.

26 *When does the modern awards objective apply?*

- 27 (2) The modern awards objective applies to the performance or
28 exercise of FWA's *modern award powers*, which are:
- 29 (a) FWA's functions or powers under this Part; and
 - 30 (b) FWA's functions or powers under Part 2-6, so far as they
31 relate to modern award minimum wages.

32 Note: FWA must also take into account the objects of this Act and any other
33 applicable provisions. For example, if FWA is setting, varying or

Section 136

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2 **Division 3—Terms of modern awards**

3 **Subdivision A—Preliminary**

4 **136 What can be included in modern awards**

5 *Terms that may or must be included*

6 (1) A modern award must only include terms that are permitted or
7 required by:

8 (a) Subdivision B (which deals with terms that may be included
9 in modern awards); or

10 (b) Subdivision C (which deals with terms that must be included
11 in modern awards); or

12 (c) section 55 (which deals with interaction between the National
13 Employment Standards and a modern award or enterprise
14 agreement); or

15 (d) Part 2-2 (which deals with the National Employment
16 Standards).

17 Note 1: Subsection 55(4) permits inclusion of terms that are ancillary or
18 incidental to, or that supplement, the National Employment Standards.

19 Note 2: Part 2-2 includes a number of provisions permitting inclusion of terms
20 about particular matters.

21 *Terms that must not be included*

22 (2) A modern award must not include terms that contravene:

23 (a) Subdivision D (which deals with terms that must not be
24 included in modern awards); or

25 (b) section 55 (which deals with the interaction between the
26 National Employment Standards and a modern award or
27 enterprise agreement).

28 Note: The provisions referred to in subsection (2) limit the terms that can be
29 included in modern awards under the provisions referred to in
30 subsection (1).

1 **137 Terms that contravene section 136 have no effect**

2 A term of a modern award has no effect to the extent that it
3 contravenes section 136.

4 **138 Achieving the modern awards objective**

5 A modern award may include terms that it is permitted to include,
6 and must include terms that it is required to include, only to the
7 extent necessary to achieve the modern awards objective and (to
8 the extent applicable) the minimum wages objective.

9 **Subdivision B—Terms that may be included in modern awards**

10 **139 Terms that may be included in modern awards—general**

11 (1) A modern award may include terms about any of the following
12 matters:

13 (a) minimum wages (including wage rates for junior employees,
14 employees with a disability and employees to whom training
15 arrangements apply), and:

16 (i) skill-based classifications and career structures; and
17 (ii) incentive-based payments, piece rates and bonuses;

18 (b) type of employment, such as full-time employment, casual
19 employment, regular part-time employment and shift work,
20 and the facilitation of flexible working arrangements,
21 particularly for employees with family responsibilities;

22 (c) arrangements for when work is performed, including hours of
23 work, rostering, notice periods, rest breaks and variations to
24 working hours;

25 (d) overtime rates;

26 (e) penalty rates, including for any of the following:

27 (i) employees working unsocial, irregular or unpredictable
28 hours;

29 (ii) employees working on weekends or public holidays;

30 (iii) shift workers;

31 (f) annualised wage arrangements that:

Section 140

- 1 (i) have regard to the patterns of work in an occupation,
2 industry or enterprise; and
3 (ii) provide an alternative to the separate payment of wages
4 and other monetary entitlements; and
5 (iii) include appropriate safeguards to ensure that individual
6 employees are not disadvantaged;
7 (g) allowances, including for any of the following:
8 (i) expenses incurred in the course of employment;
9 (ii) responsibilities or skills that are not taken into account
10 in rates of pay;
11 (iii) disabilities associated with the performance of particular
12 tasks or work in particular conditions or locations;
13 (h) leave, leave loadings and arrangements for taking leave;
14 (i) superannuation;
15 (j) procedures for consultation, representation and dispute
16 settlement.
- 17 (2) Any allowance included in a modern award must be separately and
18 clearly identified in the award.

19 **140 Outworker terms**

- 20 (1) A modern award may include either or both of the following:
21 (a) terms relating to the conditions under which an employer
22 may employ employees who are outworkers;
23 (b) terms relating to the conditions under which an outworker
24 entity may arrange for work to be performed for the entity
25 (either directly or indirectly), if the work is, or is reasonably
26 likely to be, performed by outworkers.
- 27 (2) Without limiting subsection (1), terms referred to in that subsection
28 may include terms relating to the pay or conditions of outworkers.
- 29 (3) The following terms of a modern award are *outworker terms*:
30 (a) terms referred to in subsection (1);
31 (b) terms that are incidental to terms referred to in subsection (1),
32 included in the modern award under subsection 142(1);

- 1 (c) machinery terms in relation to terms referred to in
2 subsection (1), included in the modern award under
3 subsection 142(2).

4 **141 Industry-specific redundancy schemes**

5 *When can a modern award include an industry-specific*
6 *redundancy scheme?*

- 7 (1) A modern award may include an industry-specific redundancy
8 scheme if the scheme was included in the award:
9 (a) in the award modernisation process; or
10 (b) in accordance with subsection (2).

11 Note: An employee to whom an industry-specific redundancy scheme in a
12 modern award applies is not entitled to the redundancy entitlements in
13 Subdivision B of Division 11 of Part 2-2.

14 *Coverage of industry-specific redundancy schemes must not be*
15 *extended*

- 16 (2) If:
17 (a) a modern award includes an industry-specific redundancy
18 scheme; and
19 (b) FWA is making or varying another modern award under
20 Division 4 or 5 so that it (rather than the modern award
21 referred to in paragraph (a)) will cover some or all of the
22 classes of employees who are covered by the scheme;
23 FWA may include the scheme in that other modern award.
24 However, FWA must not extend the coverage of the scheme to
25 classes of employees that it did not previously cover.

26 *Varying industry-specific redundancy schemes*

- 27 (3) FWA may only vary an industry-specific redundancy scheme in a
28 modern award under Division 4 or 5:
29 (a) by varying the amount of any redundancy payment in the
30 scheme; or
31 (b) in accordance with a provision of Subdivision B of
32 Division 5 (which deals with varying modern awards in some
33 limited situations).

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- 1 (4) In varying an industry-specific redundancy scheme as referred to in
2 subsection (3), FWA:
3 (a) must not extend the coverage of the scheme to classes of
4 employees that it did not previously cover; and
5 (b) must retain the industry-specific character of the scheme.

6 *Omitting industry-specific redundancy schemes*

- 7 (5) FWA may vary a modern award under Division 4 or 5 by omitting
8 an industry-specific redundancy scheme from the award.

9 **142 Incidental and machinery terms**

10 *Incidental terms*

- 11 (1) A modern award may include terms that are:
12 (a) incidental to a term that is permitted or required to be in the
13 modern award; and
14 (b) essential for the purpose of making a particular term operate
15 in a practical way.

16 *Machinery terms*

- 17 (2) A modern award may include machinery terms, including formal
18 matters (such as a title, date or table of contents).

19 **Subdivision C—Terms that must be included in modern**
20 **awards**

21 **143 Coverage terms**

22 *Coverage terms must be included*

- 23 (1) A modern award must include terms (*coverage terms*) setting out
24 the employers, employees, organisations and outworker entities
25 that are covered by the award, in accordance with this section.

26 *Employers and employees*

- 27 (2) A modern award must be expressed to cover:

- 1 (a) specified employers; and
2 (b) specified employees of employers covered by the modern
3 award.

4 *Organisations*

- 5 (3) A modern award may be expressed to cover one or more specified
6 organisations, in relation to all or specified employees or
7 employers that are covered by the award.

8 *Outworker entities*

- 9 (4) A modern award may be expressed to cover, but only in relation to
10 outworker terms included in the award, specified outworker
11 entities.

12 *How coverage is expressed*

- 13 (5) For the purposes of subsections (2) to (4):
14 (a) employers may be specified by name or by inclusion in a
15 specified class or specified classes; and
16 (b) employees must be specified by inclusion in a specified class
17 or specified classes; and
18 (c) organisations must be specified by name; and
19 (d) outworker entities may be specified by name or by inclusion
20 in a specified class or specified classes.
- 21 (6) Without limiting the way in which a class may be described for the
22 purposes of subsection (5), the class may be described by reference
23 to a particular industry or part of an industry, or particular kinds of
24 work.

25 *Employees not traditionally covered by awards etc.*

- 26 (7) A modern award must not be expressed to cover classes of
27 employees:
28 (a) who, because of the nature or seniority of their role, have
29 traditionally not been covered by awards (whether made
30 under laws of the Commonwealth or the States); or

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- 1 (b) who perform work that is not of a similar nature to work that
2 has traditionally been regulated by such awards.

3 Note: For example, in some industries, managerial employees have
4 traditionally not been covered by awards.

5 **144 Flexibility terms**

6 *Flexibility terms must be included*

- 7 (1) A modern award must include a term (a ***flexibility term***) enabling
8 an employee and his or her employer to agree on an arrangement
9 (an ***individual flexibility arrangement***) varying the effect of the
10 award in relation to the employee and the employer, in order to
11 meet the genuine needs of the employee and employer.

12 *Effect of individual flexibility arrangements*

- 13 (2) If an employee and employer agree to an individual flexibility
14 arrangement under a flexibility term in a modern award:
15 (a) the modern award has effect in relation to the employee and
16 the employer as if it were varied by the flexibility
17 arrangement; and
18 (b) the arrangement is taken, for the purposes of this Act, to be a
19 term of the modern award.
- 20 (3) To avoid doubt, the individual flexibility arrangement does not
21 change the effect the modern award has in relation to the employer
22 and any other employee.

23 *Requirements for flexibility terms*

- 24 (4) The flexibility term must:
25 (a) identify the terms of the modern award the effect of which
26 may be varied by an individual flexibility arrangement; and
27 (b) require that the employee and the employer genuinely agree
28 to any individual flexibility arrangement; and
29 (c) require the employer to ensure that any individual flexibility
30 arrangement must result in the employee being better off
31 overall than the employee would have been if no individual
32 flexibility arrangement were agreed to; and

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- 1 (d) set out how any flexibility arrangement may be terminated by
2 the employee or the employer; and
3 (e) require the employer to ensure that any individual flexibility
4 arrangement must be in writing and signed:
5 (i) in all cases—by the employee and the employer; and
6 (ii) if the employee is under 18—by a parent or guardian of
7 the employee; and
8 (f) require the employer to ensure that a copy of any individual
9 flexibility arrangement must be given to the employee.
- 10 (5) Except as required by subparagraph (4)(e)(ii), the flexibility term
11 must not require that any individual flexibility arrangement agreed
12 to by an employer and employee under the term must be approved,
13 or consented to, by another person.

14 **145 Effect of individual flexibility arrangement that does not meet**
15 **requirements of flexibility term**

16 *Application of this section*

- 17 (1) This section applies if:
18 (a) an employee and employer agree to an arrangement that
19 purports to be an individual flexibility arrangement under a
20 flexibility term in a modern award; and
21 (b) the arrangement does not meet a requirement set out in
22 section 144.

23 Note: A failure to meet such a requirement may be a contravention of a
24 provision of Part 3-1 (which deals with general protections).

25 *Arrangement has effect as if it were an individual flexibility*
26 *arrangement*

- 27 (2) The arrangement has effect as if it were an individual flexibility
28 arrangement.

29 *Employer contravenes flexibility term in specified circumstances*

- 30 (3) If subsection 144(4) requires the employer to ensure that the
31 arrangement meets the requirement, the employer contravenes the
32 flexibility term of the award.

Section 146

1 *Flexibility arrangement may be terminated by agreement or notice*

2 (4) The flexibility term is taken to provide (in addition to any other
3 means of termination of the arrangement that the term provides)
4 that the arrangement can be terminated:

5 (a) by either the employee, or the employer, giving written
6 notice of not more than 28 days; or

7 (b) by the employee and the employer at any time if they agree,
8 in writing, to the termination.

9 **146 Terms about settling disputes**

10 Without limiting paragraph 139(1)(j), a modern award must
11 include a term that provides a procedure for settling disputes:

12 (a) about any matters arising under the award; and

13 (b) in relation to the National Employment Standards.

14 Note: FWA or a person must not settle a dispute about whether an employer
15 had reasonable business grounds under subsection 65(5) or 76(4) (see
16 subsections 739(2) and 740(2)).

17 **147 Ordinary hours of work**

18 A modern award must include terms specifying, or providing for
19 the determination of, the ordinary hours of work for each
20 classification of employee covered by the award and each type of
21 employment permitted by the award.

22 Note: An employee's ordinary hours of work are significant in determining
23 the employee's entitlements under the National Employment
24 Standards.

25 **148 Base and full rates of pay for pieceworkers**

26 If a modern award defines or describes employees covered by the
27 award as pieceworkers, the award must include terms specifying,
28 or providing for the determination of, base and full rates of pay for
29 those employees for the purposes of the National Employment
30 Standards.

31 Note: An employee's base and full rates of pay are significant in
32 determining the employee's entitlements under the National
33 Employment Standards.

1 **149 Automatic variation of allowances**

2 If a modern award includes allowances that FWA considers are of
3 a kind that should be varied when wage rates in the award are
4 varied, the award must include terms providing for the automatic
5 variation of those allowances when wage rates in the award are
6 varied.

7 **Subdivision D—Terms that must not be included in modern**
8 **awards**

9 **150 Objectionable terms**

10 A modern award must not include an objectionable term.

11 **151 Terms about payments and deductions for benefit of employer**
12 **etc.**

13 A modern award must not include a term that has no effect because
14 of subsection 326(1) (which deals with unreasonable payments and
15 deductions for the benefit of an employer) or subsection 326(3)
16 (which deals with unreasonable requirements to spend an amount).

17 **152 Terms about right of entry**

18 A modern award must not include terms that require or authorise
19 an official of an organisation to enter premises:

- 20 (a) to hold discussions with, or interview, an employee; or
21 (b) to inspect any work, process or object.

22 **153 Terms that are discriminatory**

23 *Discriminatory terms must not be included*

- 24 (1) A modern award must not include terms that discriminate against
25 an employee because of, or for reasons including, the employee's
26 race, colour, sex, sexual preference, age, physical or mental
27 disability, marital status, family or carer's responsibilities,
28 pregnancy, religion, political opinion, national extraction or social
29 origin.

Section 154

1

Certain terms are not discriminatory

2

- (2) A term of a modern award does not discriminate against an employee:

3

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- (a) if the reason for the discrimination is the inherent requirements of the particular position held by the employee; or

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- (b) 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:

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- (i) in good faith; and

12

13

- (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

14

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- (3) A term of a modern award does not discriminate against an employee merely because it provides for minimum wages for:

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- (a) all junior employees, or a class of junior employees; or
(b) all employees with a disability, or a class of employees with a disability; or
(c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.

21

154 Terms that contain State-based differences

22

General rule—State-based difference terms must not be included

23

- (1) A modern award must not include terms and conditions of employment (***State-based difference terms***) that:

24

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27

- (a) are determined by reference to State or Territory boundaries; or
or
(b) are not capable of having effect in each State and Territory.

28

When State-based difference terms may be included

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- (2) However, a modern award may include State-based difference terms if the terms were included in the award:
(a) in the award modernisation process; or
(b) in accordance with subsection (3);

Section 155

1 but only for up to 5 years starting on the day on which the first
2 modern award that included those terms came into operation.

3 (3) If:

4 (a) a modern award includes State-based difference terms as
5 permitted under subsection (2); and

6 (b) FWA is making or varying another modern award so that it
7 (rather than the modern award referred to in paragraph (a))
8 will cover some or all of the classes of employees who are
9 covered by those terms;

10 FWA may include those terms in that other modern award.

11 However, FWA must not extend the coverage of those terms to
12 classes of employees that they did not previously cover.

13 **155 Terms dealing with long service leave**

14 A modern award must not include terms dealing with long service
15 leave.

1

2 **Division 4—4 yearly reviews of modern awards**

3 **156 4 yearly reviews of modern awards to be conducted**

4 *Timing of 4 yearly reviews*

- 5 (1) FWA must conduct a **4 yearly review of modern awards** starting as
6 soon as practicable after each 4th anniversary of the
7 commencement of this Part.

8 Note 1: FWA must be constituted by a Full Bench to conduct 4 yearly reviews
9 of modern awards, and to make determinations and modern awards in
10 those reviews (see subsections 616(1), (2) and (3)).

11 Note 2: The President may give directions about the conduct of 4 yearly
12 reviews of modern awards (see section 582).

13 *What has to be done in a 4 yearly review?*

- 14 (2) In a 4 yearly review of modern awards, FWA:
15 (a) must review all modern awards; and
16 (b) may make:
17 (i) one or more determinations varying modern awards;
18 and
19 (ii) one or more modern awards; and
20 (iii) one or more determinations revoking modern awards.

21 Note: Special criteria apply to changing coverage of modern awards or
22 revoking modern awards (see sections 163 and 164).

23 *Variation of modern award minimum wages must be justified by*
24 *work value reasons*

- 25 (3) In a 4 yearly review of modern awards, FWA may make a
26 determination varying modern award minimum wages only if
27 FWA is satisfied that the variation of modern award minimum
28 wages is justified by work value reasons.

- 29 (4) **Work value reasons** are reasons justifying the amount that
30 employees should be paid for doing a particular kind of work,
31 being reasons related to any of the following:

Section 156

- 1 (a) the nature of the work;
2 (b) the level of skill or responsibility involved in doing the work;
3 (c) the conditions under which the work is done.

4 *Each modern award to be reviewed in its own right*

- 5 (5) A 4 yearly review of modern awards must be such that each
6 modern award is reviewed in its own right. However, this does not
7 prevent FWA from reviewing 2 or more modern awards at the
8 same time.

Section 157

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2

**Division 5—Exercising modern award powers outside 4
yearly reviews and annual wage reviews**

3

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**Subdivision A—Exercise of powers if necessary to achieve
modern awards objective**

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**157 FWA may vary etc. modern awards if necessary to achieve
modern awards objective**

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(1) FWA may:

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(a) make a determination varying a modern award, otherwise
than to vary modern award minimum wages; or

10

11

(b) make a modern award; or

12

(c) make a determination revoking a modern award;

13

if FWA is satisfied that making the determination or modern award
outside the system of 4 yearly reviews of modern awards is
necessary to achieve the modern awards objective.

14

15

16

Note 1: FWA must be constituted by a Full Bench to make a modern award
(see subsection 616(1)).

17

18

Note 2: Special criteria apply to changing coverage of modern awards or
revoking modern awards (see sections 163 and 164).

19

20

Note 3: If FWA is setting modern award minimum wages, the minimum
wages objective also applies (see section 284).

21

22

(2) FWA may make a determination varying modern award minimum
wages if FWA is satisfied that:

23

24

(a) the variation of modern award minimum wages is justified by
work value reasons; and

25

26

(b) making the determination outside the system of annual wage
reviews and the system of 4 yearly reviews of modern awards
is necessary to achieve the modern awards objective.

27

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Note: As FWA is varying modern award minimum wages, the minimum
wages objective also applies (see section 284).

30

31

(3) FWA may make a determination or modern award under this
section:

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33

(a) on its own initiative; or

Section 158

1 (b) on application under section 158.

2 **158 Applications to vary, revoke or make modern award**

3 (1) The following table sets out who may apply for the making of a
 4 determination varying or revoking a modern award, or for the
 5 making of a modern award, under section 157:
 6

| Who may make an application? | | |
|-------------------------------------|---|--|
| Item | Column 1 This kind of application ... | Column 2 may be made by ... |
| 1 | an application to vary, omit or include terms (other than outworker terms or coverage terms) in a modern award | (a) an employer, employee or organisation that is covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award. |
| 2 | an application to vary, omit or include outworker terms in a modern award | (a) an employer, employee or outworker entity that is or would be covered by the outworker terms; or (b) an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate or would relate. |
| 3 | an application to vary or include coverage terms in a modern award to increase the range of employers, employees or organisations that are covered by the award | (a) an employer, employee or organisation that would become covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that would become covered by the modern award. |
| 4 | an application to vary or include coverage terms in a modern award to increase the range of outworker entities that are covered by | (a) an outworker entity that would become covered by the outworker terms; or (b) an organisation that is entitled to |

Chapter 2 Terms and conditions of employment

Part 2-3 Modern awards

Division 5 Exercising modern award powers outside 4 yearly reviews and annual wage reviews

Section 158

| Who may make an application? | | |
|-------------------------------------|--|--|
| Item | Column 1 | Column 2 |
| | This kind of application ... | may be made by ... |
| | outworker terms | represent the industrial interests of one or more outworkers who would become outworkers to whom the outworker terms relate. |
| 5 | an application to vary or omit coverage terms in a modern award to reduce the range of employers, employees or organisations that are covered by the award | (a) an employer, employee or organisation that would stop being covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that would stop being covered by the modern award. |
| 6 | an application to vary or omit coverage terms in a modern award to reduce the range of outworker entities that are covered by outworker terms | (a) an outworker entity that would stop being covered by the outworker terms; or (b) an organisation that is entitled to represent the industrial interests of one or more outworkers who would stop being outworkers to whom the outworker terms relate. |
| 7 | an application for the making of a modern award | (a) an employee or employer that would be covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that would be covered by the modern award. |
| 8 | an application to revoke a modern award | (a) an employer, employee or organisation that is covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or |

Section 159

Who may make an application?

| Item | Column 1 | Column 2 |
|------|------------------------------|---|
| | This kind of application ... | may be made by ... |
| | | employees that are covered by the modern award. |

1 (2) Subject to the requirements of the table about who can make what
 2 kind of application, an applicant may make applications for 2 or
 3 more related things at the same time.

4 Note: For example, an applicant may apply for the making of a modern
 5 award and for the related revocation of an existing modern award.

6 **Subdivision B—Other situations**

7 **159 Variation of modern award to update or omit name of**
 8 **employer, organisation or outworker entity**

9 (1) FWA may make a determination varying a modern award:
 10 (a) to reflect a change in the name of an employer, organisation
 11 or outworker entity; or
 12 (b) to omit the name of an organisation, employer or outworker
 13 entity from the modern award, if:
 14 (i) the registration of the organisation has been cancelled
 15 under the *Workplace Relations Act 1996*; or
 16 (ii) the employer, organisation or outworker entity has
 17 ceased to exist; or
 18 (c) if the modern award is a named employer award and the
 19 named employer is the old employer in a transfer of
 20 business—to reflect the transfer of business to the new
 21 employer.

22 (2) FWA may make a determination under this section:
 23 (a) in any case—on its own initiative; or
 24 (b) if paragraph (1)(a) or (b) applies—on application by the
 25 employer, organisation or outworker entity referred to in that
 26 paragraph; or
 27 (c) if paragraph (1)(c) applies—on application by:
 28 (i) the old employer or the new employer; or

Section 160

- 1 (ii) a transferring employee who was covered by the
2 modern award as an employee of the old employer; or
3 (iii) an organisation that is entitled to represent the industrial
4 interests of the old employer, the new employer, or one
5 or more employees referred to in subparagraph (ii).

6 **160 Variation of modern award to remove ambiguity or uncertainty**
7 **or correct error**

- 8 (1) FWA may make a determination varying a modern award to
9 remove an ambiguity or uncertainty or to correct an error.
- 10 (2) FWA may make the determination:
11 (a) on its own initiative; or
12 (b) on application by an employer, employee, organisation or
13 outworker entity that is covered by the modern award.

14 **161 Variation of modern award on referral by HREOC**

- 15 (1) FWA must review a modern award if the award is referred to it
16 under section 46PW of the *Human Rights and Equal Opportunity*
17 *Commission Act 1986* (which deals with discriminatory industrial
18 instruments).
- 19 (2) The Sex Discrimination Commissioner is entitled to make
20 submissions to FWA for consideration in the review.
- 21 (3) If FWA considers that the modern award reviewed requires a
22 person to do an act that would be unlawful under Part II of the *Sex*
23 *Discrimination Act 1984* (but for the fact that the act would be
24 done in direct compliance with the modern award), FWA must
25 make a determination varying the modern award so that it no
26 longer requires the person to do an act that would be so unlawful.

27 Note: Special criteria apply to changing coverage of modern awards (see
28 section 163).

1

2 **Division 6—General provisions relating to modern award**
3 **powers**

4 **162 General**

5 This Division contains some specific provisions relevant to the
6 exercise of modern award powers. For other provisions relevant to
7 the exercise of modern award powers, see the general provisions
8 about FWA's processes in Part 5-1.

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

- 10 (a) section 582 (which deals with the President's power to give
11 directions);
- 12 (b) section 590 (which deals with FWA's discretion to inform itself
13 as it considers appropriate, including by commissioning
14 research);
- 15 (c) section 596 (which deals with being represented in a matter
16 before FWA);
- 17 (d) section 601 (which deals with writing and publication
18 requirements).

19 **163 Special criteria relating to changing coverage of modern awards**

20 *Special rule about reducing coverage*

- 21 (1) FWA must not make a determination varying a modern award so
22 that certain employers or employees stop being covered by the
23 award unless FWA is satisfied that they will instead become
24 covered by another modern award (other than the miscellaneous
25 modern award) that is appropriate for them.

26 *Special rule about making a modern award*

- 27 (2) FWA must not make a modern award covering certain employers
28 or employees unless FWA has considered whether it should,
29 instead, make a determination varying an existing modern award to
30 cover them.

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1 *Special rule about covering organisations*

- 2 (3) FWA must not make a modern award, or make a determination
3 varying a modern award, so that an organisation becomes covered
4 by the award, unless the organisation is entitled to represent the
5 industrial interests of one or more employers or employees who are
6 or will be covered by the award.

7 *The miscellaneous modern award*

- 8 (4) The *miscellaneous modern award* is the modern award that is
9 expressed to cover employees who are not covered by any other
10 modern award.

11 **164 Special criteria for revoking modern awards**

12 FWA must not make a determination revoking a modern award
13 unless FWA is satisfied that:

- 14 (a) the award is obsolete or no longer capable of operating; or
15 (b) all the employees covered by the award are covered by a
16 different modern award (other than the miscellaneous modern
17 award) that is appropriate for them, or will be so covered
18 when the revocation comes into operation.

19 **165 When variation determinations come into operation, other than**
20 **determinations setting, varying or revoking modern**
21 **award minimum wages**

22 *Determinations come into operation on specified day*

- 23 (1) A determination under this Part that varies a modern award (other
24 than a determination that sets, varies or revokes modern award
25 minimum wages) comes into operation on the day specified in the
26 determination.

27 Note 1: For when a modern award, or a revocation of a modern award, comes
28 into operation, see section 49.

29 Note: For when a determination under this Part setting, varying or revoking
30 modern award minimum wages comes into operation, see section 166.

- 1 (2) The specified day must not be earlier than the day on which the
2 determination is made, unless:
3 (a) the determination is made under section 160 (which deals
4 with variation to remove ambiguities or correct errors); and
5 (b) FWA is satisfied that there are exceptional circumstances that
6 justify specifying an earlier day.

7 *Determinations take effect from first full pay period*

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

11 **166 When variation determinations setting, varying or revoking**
12 **modern award minimum wages come into operation**

13 *Determinations generally come into operation on 1 July*

- 14 (1) A determination under this Part that sets, varies or revokes modern
15 award minimum wages comes into operation:
16 (a) on 1 July in the next financial year after it is made; or
17 (b) if it is made on 1 July in a financial year—on that day.

18 Note: Modern award minimum wages can also be set, varied or revoked by
19 determinations made in annual wage reviews. For when those
20 determinations come into operation, see section 286.

21 *FWA may specify another day of operation if appropriate*

- 22 (2) However, if FWA specifies another day in the determination as the
23 day on which it comes into operation, the determination comes into
24 operation on that other day. FWA must not specify another day
25 unless it is satisfied that it is appropriate to do so.
- 26 (3) The specified day must not be earlier than the day on which the
27 determination is made, unless:
28 (a) the determination is made under section 160 (which deals
29 with variation to remove ambiguities or correct errors); and
30 (b) FWA is satisfied that there are exceptional circumstances that
31 justify specifying an earlier day.
-

Section 167

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Determinations may take effect in stages

2

- (4) FWA may specify in the determination that changes to modern award minimum wages made by the determination take effect in stages if FWA is satisfied that it is appropriate to do so.

3

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Determinations take effect from first full pay period

6

- (5) A change to modern award minimum wages made by the determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after:

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- (a) unless paragraph (b) applies—the day the determination comes into operation; or

11

12

- (b) if the determination takes effect in stages under subsection (4)—the day the change to modern award minimum wages is specified to take effect.

13

14

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167 Special rules relating to retrospective variations of awards

16

Application of this section

17

- (1) This section applies if a determination varying a modern award has a retrospective effect because it comes into operation under subsection 165(2) or 166(3) on a day before the day on which the determination is made.

18

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No effect on past approval of enterprise agreement or variation

22

- (2) If, before the determination was made, an enterprise agreement or a variation of an enterprise agreement was approved by FWA, the validity of the approval is not affected by the retrospective effect of the determination.

23

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26

No creation of liability to pay pecuniary penalty for past conduct

27

- (3) If:

28

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

29

1 (b) but for the retrospective effect of the determination, the
2 conduct would not have contravened a term of the modern
3 award or an enterprise agreement;
4 a court must not order the person to pay a pecuniary penalty under
5 Division 2 of Part 4-1 in relation to the conduct, on the grounds
6 that the conduct contravened a term of the modern award or
7 enterprise agreement.

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

10 Note 2: A determination varying a modern award could result in a
11 contravention of a term of an enterprise agreement because of the
12 effect of subsection 206(2).

13 **168 Varied modern award must be published**

- 14 (1) If FWA makes a determination under this Part or Part 2-6 (which
15 deals with minimum wages) varying a modern award, FWA must
16 publish the award as varied as soon as practicable.
- 17 (2) The publication may be on FWA's website or by any other means
18 that FWA considers appropriate.

1

2 **Part 2-4—Enterprise agreements**

3 **Division 1—Introduction**

4 **169 Guide to this Part**

5

This Part is about enterprise agreements. An enterprise agreement is made at the enterprise level and provides terms and conditions for those national system employees to whom it applies. An enterprise agreement can have terms that are ancillary or supplementary to the National Employment Standards.

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Division 2 deals with the making of enterprise agreements about permitted matters. An enterprise agreement (including a greenfields agreement) may be a single-enterprise agreement or a multi-enterprise agreement.

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Division 3 deals with the right of employees to be represented by a bargaining representative during bargaining for a proposed enterprise agreement. It also sets out the persons who are bargaining representatives for such agreements.

15

16

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18

Subdivision A of Division 4 deals with the approval of proposed enterprise agreements by employees and sets out when an enterprise agreement is made.

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21

Subdivision B of Division 4 deals with the approval of enterprise agreements by FWA. The remaining Subdivisions of the Division deal with certain approval requirements, including in relation to genuine agreement by employees and the better off overall test.

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Division 5 deals with the mandatory terms of enterprise agreements relating to individual flexibility arrangements and consultation requirements.

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Division 6 deals with the base rate of pay under an enterprise agreement.

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Division 7 deals with the variation and termination of enterprise agreements.

Division 8 provides for FWA to facilitate bargaining by making bargaining orders, serious breach declarations, majority support determinations and scope orders. It also permits bargaining representatives to apply for FWA to deal with bargaining disputes.

Division 9 provides for the making of low-paid authorisations in relation to proposed multi-enterprise agreements. The effect of such an authorisation is that specified employers are subject to certain rules that would not otherwise apply (for example, bargaining orders that would not usually be available for multi-enterprise agreements will be available). It also permits FWA to assist the bargaining representatives for such agreements.

Division 10 deals with single interest employer authorisations. The effect of such an authorisation is that the employers specified in the authorisation are single interest employers in relation to a proposed enterprise agreement.

Division 11 deals with other matters relating to enterprise agreements.

170 Meanings of *employee* and *employer*

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

171 Objects of this Part

The objects of this Part are:

- (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and
- (b) to enable FWA to facilitate good faith bargaining and the making of enterprise agreements, including through:
 - (i) making bargaining orders; and

Chapter 2 Terms and conditions of employment

Part 2-4 Enterprise agreements

Division 1 Introduction

Section 171

- 1 (ii) dealing with disputes where the bargaining
- 2 representatives request assistance; and
- 3 (iii) ensuring that applications to FWA for approval of
- 4 enterprise agreements are dealt with without delay.

1
2 **Division 2—Employers and employees may make**
3 **enterprise agreements**

4 **172 Making an enterprise agreement**

5 *Enterprise agreements may be made about permitted matters*

6 (1) An agreement (an *enterprise agreement*) that is about one or more
7 of the following matters (the *permitted matters*) may be made in
8 accordance with this Part:

- 9 (a) matters pertaining to the relationship between an employer
10 that will be covered by the agreement and that employer's
11 employees who will be covered by the agreement;
12 (b) matters pertaining to the relationship between the employer
13 or employers, and the employee organisation or employee
14 organisations, that will be covered by the agreement;
15 (c) deductions from wages for any purpose authorised by an
16 employee who will be covered by the agreement;
17 (d) how the agreement will operate.

18 Note 1: For when an enterprise agreement *covers* an employer, employee or
19 employee organisation, see section 53.

20 Note 2: An employee organisation that was a bargaining representative for a
21 proposed enterprise agreement will be covered by the agreement if the
22 organisation notifies FWA under section 183 that it wants to be
23 covered.

24 *Single-enterprise agreements*

25 (2) An employer, or 2 or more employers that are single interest
26 employers, may make an enterprise agreement (a *single-enterprise*
27 *agreement*):

- 28 (a) with the employees who are employed at the time the
29 agreement is made and who will be covered by the
30 agreement; or
31 (b) with one or more relevant employee organisations if:
32 (i) the agreement relates to a genuine new enterprise that
33 the employer or employers are establishing or propose
34 to establish; and
-

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- 1 (ii) the employer or employers have not employed any of
2 the persons who will be necessary for the normal
3 conduct of that enterprise.

4 Note: The expression genuine new enterprise includes a genuine new
5 business, activity, project or undertaking (see the definition of
6 *enterprise* in section 12).

7 *Multi-enterprise agreements*

- 8 (3) Two or more employers that are not all single interest employers
9 may make an enterprise agreement (a ***multi-enterprise agreement***):
10 (a) with the employees who are employed at the time the
11 agreement is made and who will be covered by the
12 agreement; or
13 (b) with one or more relevant employee organisations if:
14 (i) the agreement relates to a genuine new enterprise that
15 the employers are establishing or propose to establish;
16 and
17 (ii) the employers have not employed any of the persons
18 who will be necessary for the normal conduct of that
19 enterprise.

20 Note: The expression genuine new enterprise includes a genuine new
21 business, activity, project or undertaking (see the definition of
22 *enterprise* in section 12).

23 *Greenfields agreements*

- 24 (4) A single-enterprise agreement made as referred to in
25 paragraph (2)(b), or a multi-enterprise agreement made as referred
26 to in paragraph (3)(b), is a ***greenfields agreement***.

27 *Single interest employers*

- 28 (5) Two or more employers are ***single interest employers*** if:
29 (a) the employers are engaged in a joint venture or common
30 enterprise; or
31 (b) the employers are related bodies corporate; or
32 (c) the employers are specified in a single interest employer
33 authorisation that is in operation in relation to the proposed
34 enterprise agreement concerned.

1

2 **Division 3—Bargaining and representation during**
3 **bargaining**

4 **173 Notice of employee representational rights**

5 *Employer to notify each employee of representational rights*

6 (1) An employer that will be covered by a proposed enterprise
7 agreement that is not a greenfields agreement must take all
8 reasonable steps to give notice of the right to be represented by a
9 bargaining representative to each employee who:

- 10 (a) will be covered by the agreement; and
11 (b) is employed at the notification time for the agreement.

12 Note: For the content of the notice, see section 174.

13 *Notification time*

14 (2) The **notification time** for a proposed enterprise agreement is the
15 time when:

- 16 (a) the employer agrees to bargain, or initiates bargaining, for the
17 agreement; or
18 (b) a majority support determination in relation to the agreement
19 comes into operation; or
20 (c) a scope order in relation to the agreement comes into
21 operation; or
22 (d) a low-paid authorisation in relation to the agreement that
23 specifies the employer comes into operation.

24 Note: The employer cannot request employees to approve the agreement
25 under section 181 until 21 days after the last notice is given (see
26 subsection 181(2)).

27 *When notice must be given*

28 (3) The employer must give the notice as soon as practicable, and not
29 later than 14 days, after the notification time for the agreement.

Section 174

1 *Notice need not be given in certain circumstances*

- 2 (4) An employer is not required to give a notice to an employee under
3 subsection (1) in relation to a proposed enterprise agreement if the
4 employer has already given the employee a notice under that
5 subsection within a reasonable period before the notification time
6 for the agreement.

7 *How notices are given*

- 8 (5) The regulations may prescribe how notices under subsection (1)
9 may be given.

10 **174 Content of notice of employee representational rights**

11 *Application of this section*

- 12 (1) This section applies if an employer that will be covered by a
13 proposed enterprise agreement is required to give a notice under
14 subsection 173(1) to an employee.

15 *Content of notice—employee may appoint a bargaining
16 representative*

- 17 (2) The notice must specify that the employee may appoint a
18 bargaining representative to represent the employee:
19 (a) in bargaining for the agreement; and
20 (b) in a matter before FWA that relates to bargaining for the
21 agreement.

22 *Content of notice—default bargaining representative*

- 23 (3) If subsection (4) does not apply, the notice must explain that:
24 (a) if the employee is a member of an employee organisation that
25 is entitled to represent the industrial interests of the employee
26 in relation to work that will be performed under the
27 agreement; and
28 (b) the employee does not appoint another person as his or her
29 bargaining representative for the agreement;

1 the organisation will be the bargaining representative of the
2 employee.

3 *Content of notice—bargaining representative if a low-paid*
4 *authorisation is in operation*

5 (4) If a low-paid authorisation in relation to the agreement that
6 specifies the employer is in operation, the notice must explain the
7 effect of paragraph 176(1)(b) and subsection 176(2) (which deal
8 with bargaining representatives for such agreements).

9 *Content of notice—copy of instrument of appointment to be given*

10 (5) The notice must explain the effect of paragraph 178(2)(a) (which
11 deals with giving a copy of an instrument of appointment of a
12 bargaining representative to an employee's employer).

13 **175 Relevant employee organisations to be given notice of**
14 **employer's intention to make greenfields agreements etc.**

15 *Notice of intention to make greenfields agreement*

16 (1) An employer that agrees to bargain, or initiates bargaining, for a
17 proposed greenfields agreement must take all reasonable steps to
18 give notice of its intention to make the agreement to each
19 employee organisation that is a relevant employee organisation in
20 relation to the agreement.

21 Note: The agreement cannot be made until 14 days after the last notice is
22 given (see subsection 182(4)).

23 (2) Subsection (1) does not apply if the employer does not know, or
24 could not reasonably be expected to know, that the employee
25 organisation is a relevant employee organisation in relation to the
26 agreement.

27 *Content of notice*

28 (3) The notice must state that the relevant employee organisation is a
29 bargaining representative for the agreement.

Section 176

- 1 *When notice must be given*
- 2 (4) The employer must give the notice, as soon as practicable, and not
3 later than 14 days, after the obligation to give the notice first arises.

- 4 *Copy of notice to be given to FWA*
- 5 (5) The employer must give a copy of the notice to FWA at the same
6 time as, or as soon as practicable after, the notice is given to the
7 relevant employee organisation.

- 8 *How notices are given*
- 9 (6) The regulations may prescribe how notices under subsection (1)
10 may be given.

11 **176 Bargaining representatives for proposed enterprise agreements**
12 **that are not greenfields agreements**

13 *Bargaining representatives*

- 14 (1) The following paragraphs set out the persons who are ***bargaining***
15 ***representatives*** for a proposed enterprise agreement that is not a
16 greenfields agreement:
- 17 (a) an employer that will be covered by the agreement is a
18 bargaining representative for the agreement;
- 19 (b) an employee organisation is a bargaining representative of an
20 employee who will be covered by the agreement if:
- 21 (i) the employee is a member of the organisation; and
22 (ii) in the case where the agreement is a multi-enterprise
23 agreement in relation to which a low-paid authorisation
24 is in operation—the organisation applied for the
25 authorisation;
- 26 unless the employee has appointed another person under
27 paragraph (c) as his or her bargaining representative for the
28 agreement; or
- 29 (c) a person is a bargaining representative of an employee who
30 will be covered by the agreement if the employee appoints, in
31 writing, the person as his or her bargaining representative for
32 the agreement;

- 1 (d) a person is a bargaining representative of an employer that
2 will be covered by the agreement if the employer appoints, in
3 writing, the person as his or her bargaining representative for
4 the agreement.

5 *Bargaining representatives for a proposed multi-enterprise*
6 *agreement if a low-paid authorisation is in operation*

- 7 (2) If:
8 (a) the proposed enterprise agreement is a multi-enterprise
9 agreement in relation to which a low-paid authorisation is in
10 operation; and
11 (b) an employee organisation applied for the authorisation; and
12 (c) but for this subsection, the organisation would not be a
13 bargaining representative of an employee who will be
14 covered by the agreement;
15 the organisation is taken to be a ***bargaining representative*** of such
16 an employee unless:
17 (d) the employee is a member of another employee organisation
18 that also applied for the authorisation; or
19 (e) the employee has appointed another person under
20 paragraph (1)(c) as his or her bargaining representative for
21 the agreement.

22 *Requirement relating to employee organisations*

- 23 (3) Despite subsections (1) and (2), an employee organisation cannot
24 be a bargaining representative of an employee unless the
25 organisation is entitled to represent the industrial interests of the
26 employee in relation to work that will be performed under the
27 agreement.

28 *Employee may appoint himself or herself*

- 29 (4) To avoid doubt, an employee who will be covered by the
30 agreement may appoint, under paragraph (1)(c), himself or herself
31 as his or her bargaining representative for the agreement.

32 Note: Section 228 sets out the good faith bargaining requirements.
33 Applications may be made for bargaining orders that require

Section 177

1 bargaining representatives to meet the good faith bargaining
2 requirements (see section 229).

3 **177 Bargaining representatives for proposed greenfields agreements**

4 The following paragraphs set out the persons who are *bargaining*
5 *representatives* for a proposed greenfields agreement:

- 6 (a) an employer that will be covered by the agreement is a
7 bargaining representative for the agreement;
8 (b) a person is a bargaining representative of an employer that
9 will be covered by the agreement if the employer appoints, in
10 writing, the person as his or her bargaining representative for
11 the agreement;
12 (c) a relevant employee organisation in relation to the agreement
13 is a bargaining representative for the agreement.

14 Note: Section 228 sets out the good faith bargaining requirements.
15 Applications may be made for bargaining orders that require
16 bargaining representatives to meet the good faith bargaining
17 requirements (see section 229).

18 **178 Appointment of bargaining representatives—other matters**

19 *When appointment of a bargaining representative comes into force*

- 20 (1) An appointment of a bargaining representative comes into force on
21 the day specified in the instrument of appointment.

22 *Copies of instruments of appointment must be given*

- 23 (2) A copy of an instrument of appointment of a bargaining
24 representative for a proposed enterprise agreement must:
25 (a) for an appointment made by an employee who will be
26 covered by the agreement—be given to the employee's
27 employer; and
28 (b) for an appointment made by an employer that will be covered
29 by a proposed enterprise agreement that is not a greenfields
30 agreement—be given, on request, to a bargaining
31 representative of an employee who will be covered by the
32 agreement; and

- 1 (c) for an appointment made by an employer that will be covered
2 by a proposed greenfields agreement—be given, on request,
3 to a relevant employee organisation that is a bargaining
4 representative for the agreement.

5 *Regulations may prescribe matters relating to qualifications and*
6 *appointment*

- 7 (3) The regulations may prescribe matters relating to the qualifications
8 or appointment of bargaining representatives.

9 **179 Employer etc. must not refuse to recognise or bargain with**
10 **other bargaining representatives**

- 11 (1) An employer that will be covered by a proposed enterprise
12 agreement, or a bargaining representative of such an employer,
13 must not refuse to recognise or bargain with another bargaining
14 representative for the agreement.

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

- 16 (2) Subsection (1) does not apply if the employer or the bargaining
17 representative does not know, or could not reasonably be expected
18 to know, that the other person is a bargaining representative for the
19 agreement.

Section 180

1

2

Division 4—Approval of enterprise agreements

3

Subdivision A—Pre-approval steps and applications for FWA approval

4

5

180 Employees must be given a copy of a proposed enterprise agreement etc.

6

7

Pre-approval requirements

8

- (1) Before an employer requests under subsection 181(1) that employees approve a proposed enterprise agreement by voting for the agreement, the employer must comply with the requirements set out in this section.

9

10

11

12

Employees must be given copy of the agreement etc.

13

- (2) The employer must take all reasonable steps to ensure that:

14

- (a) during the access period for the agreement, the employees (the *relevant employees*) employed at the time who will be covered by the agreement are given a copy of the following materials:

15

16

17

18

- (i) the written text of the agreement;

19

- (ii) any other material incorporated by reference in the agreement; or

20

21

- (b) the relevant employees have access, throughout the access period for the agreement, to a copy of those materials.

22

23

- (3) The employer must take all reasonable steps to notify the relevant employees of the following by the start of the access period for the agreement:

24

25

26

- (a) the time and place at which the vote will occur;

27

- (b) the voting method that will be used.

28

- (4) The *access period* for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process referred to in subsection 181(1).

29

30

Section 182

1 **182 When an enterprise agreement is made**

2 *Single-enterprise agreement that is not a greenfields agreement*

3 (1) If the employees of the employer, or each employer, that will be
4 covered by a proposed single-enterprise agreement that is not a
5 greenfields agreement have been asked to approve the agreement
6 under subsection 181(1), the agreement is **made** when a majority of
7 those employees who cast a valid vote approve the agreement.

8 *Multi-enterprise agreement that is not a greenfields agreement*

9 (2) If:

- 10 (a) a proposed enterprise agreement is a multi-enterprise
11 agreement; and
12 (b) the employees of each of the employers that will be covered
13 by the agreement have been asked to approve the agreement
14 under subsection 181(1); and
15 (c) those employees have voted on whether or not to approve the
16 agreement; and
17 (d) a majority of the employees of at least one of those
18 employers who cast a valid vote have approved the
19 agreement;

20 the agreement is **made** immediately after the end of the voting
21 process referred to in subsection 181(1).

22 *Greenfields agreement*

23 (3) A greenfields agreement is **made** when it has been signed by each
24 employer and each relevant employee organisation that will be
25 covered by the agreement.

26 (4) A greenfields agreement is not made unless the agreement is
27 signed as referred to in subsection (3) at least 14 days after the day
28 on which the last notice under subsection 175(1) (which deals with
29 giving notice of the intention to make a greenfields agreement etc.)
30 in relation to the agreement is given.

1 **183 Entitlement of an employee organisation to have an enterprise**
2 **agreement cover it**

- 3 (1) After an enterprise agreement that is not a greenfields agreement is
4 made, an employee organisation that was a bargaining
5 representative for the proposed enterprise agreement concerned
6 may give FWA a written notice stating that the organisation wants
7 the enterprise agreement to cover it.
- 8 (2) The notice must be given to FWA, and a copy given to each
9 employer covered by the enterprise agreement, before FWA
10 approves the agreement.

11 Note: FWA must note in its decision to approve the enterprise agreement
12 that the agreement covers the employee organisation (see subsection
13 201(2)).

14 **184 Multi-enterprise agreement to be varied if not all employees**
15 **approve the agreement**

16 *Application of this section*

- 17 (1) This section applies if:
18 (a) a multi-enterprise agreement is made; and
19 (b) the agreement was not approved by the employees of all of
20 the employers that made a request under subsection 181(1) in
21 relation to the agreement.

22 *Variation of agreement*

- 23 (2) Before a bargaining representative applies under section 185 for
24 approval of the agreement, the bargaining representative must vary
25 the agreement so that the agreement is expressed to cover only the
26 following:
27 (a) each employer whose employees approved the agreement;
28 (b) the employees of each of those employers.
- 29 (3) The bargaining representative who varies the agreement as referred
30 to in subsection (2) must give written notice of the variation to all
31 the other bargaining representatives for the agreement.

Section 185

- 1 (4) The notice must specify the employers and employees that the
2 agreement as varied covers.
- 3 (5) Subsection (3) does not require the bargaining representative to
4 give a notice to a person if the bargaining representative does not
5 know, or could not reasonably be expected to know, that the person
6 is a bargaining representative for the agreement.

7 **185 Bargaining representative must apply for FWA approval of an**
8 **enterprise agreement**

9 *Application for approval*

- 10 (1) If an enterprise agreement is made, a bargaining representative for
11 the agreement must apply to FWA for approval of the agreement.

12 *Material to accompany the application*

- 13 (2) The application must be accompanied by:
14 (a) a signed copy of the agreement; and
15 (b) any declarations that are required by the procedural rules to
16 accompany the application.

17 *When the application must be made*

- 18 (3) If the agreement is not a greenfields agreement, the application
19 must be made:
20 (a) within 14 days after the agreement is made; or
21 (b) if in all the circumstances FWA considers it fair to extend
22 that period—within such further period as FWA allows.
- 23 (4) If the agreement is a greenfields agreement, the application must
24 be made within 14 days after the agreement is made.

25 *Signature requirements*

- 26 (5) The regulations may prescribe requirements relating to the signing
27 of enterprise agreements.

1 **Subdivision B—Approval of enterprise agreements by FWA**

2 **186 When FWA must approve an enterprise agreement—general**
3 **requirements**

4 *Basic rule*

- 5 (1) If an application for the approval of an enterprise agreement is
6 made under section 185, FWA must approve the agreement under
7 this section if the requirements set out in this section and
8 section 187 are met.

9 Note: FWA may approve an enterprise agreement under this section with
10 undertakings (see section 190).

11 *Requirements relating to the safety net etc.*

- 12 (2) FWA must be satisfied that:
- 13 (a) if the agreement is not a greenfields agreement—the
14 agreement has been genuinely agreed to by the employees
15 covered by the agreement; and
- 16 (b) if the agreement is a multi-enterprise agreement:
- 17 (i) the agreement has been genuinely agreed to by each
18 employer covered by the agreement; and
- 19 (ii) no person coerced, or threatened to coerce, any of the
20 employers to make the agreement; and
- 21 (c) the terms of the agreement do not contravene section 55
22 (which deals with the interaction between the National
23 Employment Standards and enterprise agreements etc.); and
- 24 (d) the agreement passes the better off overall test.

25 Note 1: For when an enterprise agreement has been genuinely agreed to by
26 employees, see section 188.

27 Note 2: FWA may approve an enterprise agreement that does not pass the
28 better off overall test if approval would not be contrary to the public
29 interest (see section 189).

30 Note 3: The terms of an enterprise agreement may supplement the National
31 Employment Standards (see paragraph 55(4)(b)).

Section 186

1 *Requirement that the group of employees covered by the agreement*
2 *is fairly chosen*

3 (3) If:

- 4 (a) the agreement does not cover all the employees of the
5 employer or employers covered by the agreement; and
6 (b) the group of employees covered by the agreement is not
7 geographically, operationally or organisationally distinct;
8 FWA must be satisfied that the group was fairly chosen.

9 *Requirement that there be no unlawful terms*

10 (4) FWA must be satisfied that the agreement does not include any
11 unlawful terms (see Subdivision D of this Division).

12 *Requirement for a nominal expiry date etc.*

13 (5) FWA must be satisfied that:

- 14 (a) the agreement specifies a date as its nominal expiry date; and
15 (b) the date will not be more than 4 years after the day on which
16 FWA approves the agreement.

17 *Requirement for a term about settling disputes*

18 (6) FWA must be satisfied that the agreement includes a term:

- 19 (a) that provides a procedure that requires or allows FWA, or
20 another person who is independent of the employers,
21 employees or employee organisations covered by the
22 agreement, to settle disputes:
23 (i) about any matters arising under the agreement; and
24 (ii) in relation to the National Employment Standards; and
25 (b) that allows for the representation of employees covered by
26 the agreement for the purposes of that procedure.

27 Note: FWA or a person must not settle a dispute about whether an employer
28 had reasonable business grounds under subsection 65(5) or 76(4) (see
29 subsections 739(2) and 740(2)).

1 **187 When FWA must approve an enterprise agreement—additional**
2 **requirements**

3 *Additional requirements*

- 4 (1) This section sets out additional requirements that must be met
5 before FWA approves an enterprise agreement under section 186.

6 *Requirement that approval not be inconsistent with good faith*
7 *bargaining etc.*

- 8 (2) FWA must be satisfied that approving the agreement would not be
9 inconsistent with or undermine good faith bargaining by one or
10 more bargaining representatives for a proposed enterprise
11 agreement, or an enterprise agreement, in relation to which a scope
12 order is in operation.

13 *Requirement relating to notice of variation of agreement*

- 14 (3) If a bargaining representative is required to vary the agreement as
15 referred to in subsection 184(2), FWA must be satisfied that the
16 bargaining representative has complied with that subsection and
17 subsection 184(3) (which deals with giving notice of the variation).

18 *Requirements relating to particular kinds of employees*

- 19 (4) FWA must be satisfied as referred to in any provisions of
20 Subdivision E of this Division that apply in relation to the
21 agreement.

22 Note: Subdivision E of this Division deals with approval requirements
23 relating to particular kinds of employees.

24 **188 When employees have genuinely agreed to an enterprise**
25 **agreement**

26 An enterprise agreement has been *genuinely agreed* to by the
27 employees covered by the agreement if FWA is satisfied that:

- 28 (a) the employer, or each of the employers, covered by the
29 agreement complied with the following provisions in relation
30 to the agreement:

Section 189

- 1 (i) subsections 180(2), (3) and (5) (which deal with
2 pre-approval steps);
3 (ii) subsection 181(2) (which requires that employees not be
4 requested to approve an enterprise agreement until 21
5 days after the last notice of employee representational
6 rights is given); and
7 (b) the agreement was made in accordance with whichever of
8 subsection 182(1) or (2) applies (those subsections deal with
9 the making of different kinds of enterprise agreements by
10 employee vote); and
11 (c) there are no other reasonable grounds for believing that the
12 agreement has not been genuinely agreed to by the
13 employees.

14 **189 FWA may approve an enterprise agreement that does not pass**
15 **better off overall test—public interest test**

16 *Application of this section*

- 17 (1) This section applies if:
18 (a) FWA is not required to approve an enterprise agreement
19 under section 186; and
20 (b) the only reason for this is that FWA is not satisfied that the
21 agreement passes the better off overall test.

22 *Approval of agreement if not contrary to the public interest*

- 23 (2) FWA may approve the agreement under this section if FWA is
24 satisfied that, because of exceptional circumstances, the approval
25 of the agreement would not be contrary to the public interest.

26 Note: FWA may approve an enterprise agreement under this section with
27 undertakings (see section 190).

- 28 (3) An example of a case in which FWA may be satisfied of the matter
29 referred to in subsection (2) is where the agreement is part of a
30 reasonable strategy to deal with a short-term crisis in, and to assist
31 in the revival of, the enterprise of an employer covered by the
32 agreement.

1 *Nominal expiry date*

- 2 (4) The *nominal expiry date* of an enterprise agreement approved by
3 FWA under this section is the earlier of the following:
4 (a) the date specified in the agreement as the nominal expiry date
5 of the agreement;
6 (b) 2 years after the day on which FWA approved the agreement.

7 **190 FWA may approve an enterprise agreement with undertakings**

8 *Application of this section*

- 9 (1) This section applies if:
10 (a) an application for the approval of an enterprise agreement has
11 been made under section 185; and
12 (b) FWA has a concern that the agreement does not meet the
13 requirements set out in sections 186 and 187.

14 *Approval of agreement with undertakings*

- 15 (2) FWA may approve the agreement under section 186 if FWA is
16 satisfied that an undertaking accepted by FWA under
17 subsection (3) of this section meets the concern.

18 *Undertakings*

- 19 (3) FWA may only accept a written undertaking from one or more
20 employers covered by the agreement if FWA is satisfied that the
21 effect of accepting the undertaking is not likely to:
22 (a) cause financial detriment to any employee covered by the
23 agreement; or
24 (b) result in substantial changes to the agreement.

25 *FWA must seek views of bargaining representatives*

- 26 (4) FWA must not accept an undertaking under subsection (3) unless
27 FWA has sought the views of each person who FWA knows is a
28 bargaining representative for the agreement.

Section 191

1 *Signature requirements*

2 (5) The undertaking must meet any requirements relating to the
3 signing of undertakings that are prescribed by the regulations.

4 **191 Effect of undertakings**

5 (1) If:

6 (a) FWA approves an enterprise agreement after accepting an
7 undertaking under subsection 190(3) in relation to the
8 agreement; and

9 (b) the agreement covers a single employer;
10 the undertaking is taken to be a term of the agreement, as the
11 agreement applies to the employer.

12 (2) If:

13 (a) FWA approves an enterprise agreement after accepting an
14 undertaking under subsection 190(3) in relation to the
15 agreement; and

16 (b) the agreement covers 2 or more employers;
17 the undertaking is taken to be a term of the agreement, as the
18 agreement applies to each employer that gave the undertaking.

19 **192 When FWA may refuse to approve an enterprise agreement**

20 (1) If an application for the approval of an enterprise agreement is
21 made under section 185, FWA may refuse to approve the
22 agreement if FWA considers that compliance with the terms of the
23 agreement may result in:

24 (a) a person committing an offence against a law of the
25 Commonwealth; or

26 (b) a person being liable to pay a pecuniary penalty in relation to
27 a contravention of a law of the Commonwealth.

28 (2) Subsection (1) has effect despite sections 186 and 189 (which deal
29 with the approval of enterprise agreements).

30 (3) If FWA refuses to approve an enterprise agreement under this
31 section, FWA may refer the agreement to any person or body FWA
32 considers appropriate.

1 **Subdivision C—Better off overall test**

2 **193 Passing the better off overall test**

3 *When a non-greenfields agreement passes the better off overall test*

- 4 (1) An enterprise agreement that is not a greenfields agreement *passes*
5 *the better off overall test* under this section if FWA is satisfied, as
6 at the test time, that each award covered employee, and each
7 prospective award covered employee, for the agreement would be
8 better off overall if the agreement applied to the employee than if
9 the relevant modern award applied to the employee.

10 *FWA must disregard individual flexibility arrangement*

- 11 (2) If, under the flexibility term in the relevant modern award, an
12 individual flexibility arrangement has been agreed to by an award
13 covered employee and his or her employer, FWA must disregard
14 the individual flexibility arrangement for the purposes of
15 determining whether the agreement passes the better off overall
16 test.

17 *When a greenfields agreement passes the better off overall test*

- 18 (3) A greenfields agreement *passes the better off overall test* under
19 this section if FWA is satisfied, as at the test time, that the
20 prospective award covered employees for the agreement would be
21 better off overall if the agreement applied to the employees than if
22 the relevant modern award applied to the employees.

23 *Award covered employee*

- 24 (4) An *award covered employee* for an enterprise agreement is an
25 employee who:
26 (a) is covered by the agreement; and
27 (b) at the test time, is covered by a modern award (the *relevant*
28 *modern award*) that:
29 (i) is in operation; and
30 (ii) covers the employee in relation to the work that he or
31 she is to perform under the agreement; and
-

Section 194

1 (iii) covers his or her employer.

2 *Prospective award covered employee*

3 (5) A ***prospective award covered employee*** for an enterprise
4 agreement is a person who, if he or she were an employee at the
5 test time of an employer covered by the agreement:

6 (a) would be covered by the agreement; and

7 (b) would be covered by a modern award (the ***relevant modern***
8 ***award***) that:

9 (i) is in operation; and

10 (ii) would cover the person in relation to the work that he or
11 she would perform under the agreement; and

12 (iii) covers the employer.

13 *Test time*

14 (6) The ***test time*** is the time the application for approval of the
15 agreement by FWA was made under section 185.

16 **Subdivision D—Unlawful terms**

17 **194 Meaning of *unlawful term***

18 A term of an enterprise agreement is an ***unlawful term*** if it is:

19 (a) a discriminatory term; or

20 (b) an objectionable term; or

21 (c) if a particular employee would be protected from unfair
22 dismissal under Part 3-2 after completing a period of
23 employment of at least the minimum employment period—a
24 term that confers an entitlement or remedy in relation to a
25 termination of the employee's employment that is unfair
26 (however described) before the employee has completed that
27 period; or

28 (d) a term that excludes the application to, or in relation to, a
29 person of a provision of Part 3-2 (which deals with unfair
30 dismissal), or modifies the application of such a provision in
31 a way that is detrimental to, or in relation to, a person; or

- 1 (e) a term that is inconsistent with a provision of Part 3-3 (which
2 deals with industrial action); or
3 (f) a term that provides for an entitlement:
4 (i) to enter premises for a purpose referred to in section 481
5 (which deals with investigation of suspected
6 contraventions); or
7 (ii) to enter premises to hold discussions of a kind referred
8 to in section 484;
9 other than in accordance with Part 3-4 (which deals with
10 right of entry); or
11 (g) a term that provides for the exercise of a State or Territory
12 OHS right other than in accordance with Part 3-4 (which
13 deals with right of entry).

14 **195 Meaning of *discriminatory term***

15 *Discriminatory term*

- 16 (1) A term of an enterprise agreement is a ***discriminatory term*** to the
17 extent that it discriminates against an employee covered by the
18 agreement because of, or for reasons including, the employee's
19 race, colour, sex, sexual preference, age, physical or mental
20 disability, marital status, family or carer's responsibilities,
21 pregnancy, religion, political opinion, national extraction or social
22 origin.

23 *Certain terms are not discriminatory terms*

- 24 (2) A term of an enterprise agreement does not discriminate against an
25 employee:
26 (a) if the reason for the discrimination is the inherent
27 requirements of the particular position concerned; or
28 (b) merely because it discriminates, in relation to employment of
29 the employee as a member of the staff of an institution that is
30 conducted in accordance with the doctrines, tenets, beliefs or
31 teachings of a particular religion or creed:
32 (i) in good faith; and
33 (ii) to avoid injury to the religious susceptibilities of
34 adherents of that religion or creed.

Section 196

- 1 (3) A term of an enterprise agreement does not discriminate against an
2 employee merely because it provides for wages for:
3 (a) all junior employees, or a class of junior employees; or
4 (b) all employees with a disability, or a class of employees with
5 a disability; or
6 (c) all employees to whom training arrangements apply, or a
7 class of employees to whom training arrangements apply.

8 **Subdivision E—Approval requirements relating to particular**
9 **kinds of employees**

10 **196 Shiftworkers**

11 *Application of this section*

- 12 (1) This section applies if:
13 (a) an employee is covered by an enterprise agreement; and
14 (b) a modern award that is in operation and covers the employee
15 defines or describes the employee as a shiftworker for the
16 purposes of the National Employment Standards.

17 *Shiftworkers and the National Employment Standards*

- 18 (2) FWA must be satisfied that the agreement defines or describes the
19 employee as a shiftworker for the purposes of the National
20 Employment Standards.

21 Note: Section 87 provides an employee with an entitlement to 5 weeks of
22 paid annual leave if an enterprise agreement that applies to the
23 employee defines or describes the employee as a shiftworker for the
24 purposes of the National Employment Standards.

25 **197 Pieceworkers—enterprise agreement includes pieceworker term**

26 *Application of this section*

- 27 (1) This section applies if:
28 (a) an enterprise agreement that covers an employee includes a
29 term that defines or describes the employee as a pieceworker;
30 and

Section 198

- 1 (b) a modern award that is in operation and covers the employee
2 does not include such a term.

3 *No detriment test*

- 4 (2) FWA must be satisfied that the effect of including such a term in
5 the agreement is not detrimental to the employee in relation to the
6 entitlements of the employee under the National Employment
7 Standards.

8 **198 Pieceworkers—enterprise agreement does not include a**
9 **pieceworker term**

10 *Application of this section*

- 11 (1) This section applies if:
12 (a) an enterprise agreement that covers an employee does not
13 include a term that defines or describes the employee as a
14 pieceworker; and
15 (b) a modern award that is in operation and covers the employee
16 includes such a term.

17 *No detriment test*

- 18 (2) FWA must be satisfied that the effect of not including such a term
19 in the agreement is not detrimental to the employee in relation to
20 the entitlements of the employee under the National Employment
21 Standards.

22 **199 School-based apprentices and school-based trainees**

23 *Application of this section*

- 24 (1) This section applies if:
25 (a) an employee who is a school-based apprentice or a
26 school-based trainee is covered by an enterprise agreement;
27 and
28 (b) the agreement provides for the employee to be paid loadings
29 (the **agreement loadings**) in lieu of any of the following:
30 (i) paid annual leave;
-

Section 200

- 1 (ii) paid personal/carer's leave;
2 (iii) paid absence under Division 10 of Part 2-2 (which deals
3 with public holidays); and
4 (c) a modern award that is in operation and covers the employee
5 provides for the employee to be paid loadings (the *award*
6 *loadings*) in lieu of leave or absence of that kind.

7 *No detriment test*

- 8 (2) FWA must be satisfied that the amount or rate (as the case may be)
9 of the agreement loadings is not detrimental to the employee when
10 compared to the amount or rate of the award loadings.

11 **200 Outworkers**

12 *Application of this section*

- 13 (1) This section applies if:
14 (a) an employee who is an outworker is covered by an enterprise
15 agreement; and
16 (b) a modern award that is in operation and covers the employee
17 includes outworker terms.

18 *Agreement must include outworker terms etc.*

- 19 (2) FWA must be satisfied that:
20 (a) the agreement includes terms of that kind; and
21 (b) those terms of the agreement are not detrimental to the
22 employee when compared to the outworker terms of the
23 modern award.

24 **Subdivision F—Other matters**

25 **201 Approval decision to note certain matters**

26 *Approval decision to note model terms included in an enterprise*
27 *agreement*

- 28 (1) If:
29 (a) FWA approves an enterprise agreement; and

Section 201

- 1 (b) either or both of the following apply:
2 (i) the model flexibility term is taken, under subsection
3 202(4), to be a term of the agreement;
4 (ii) the model consultation term is taken, under subsection
5 205(2), to be a term of the agreement;
6 FWA must note in its decision to approve the agreement that those
7 terms are so included in the agreement.

8 *Approval decision to note that an enterprise agreement covers an*
9 *employee organisation*

- 10 (2) If:
11 (a) an employee organisation has given a notice under subsection
12 183(1) that the organisation wants the enterprise agreement
13 to cover it; and
14 (b) FWA approves the agreement;
15 FWA must note in its decision to approve the agreement that the
16 agreement covers the organisation.

17 *Approval decision to note undertakings*

- 18 (3) If FWA approves an enterprise agreement after accepting an
19 undertaking under subsection 190(3) in relation to the agreement,
20 FWA must note in its decision to approve the agreement that the
21 undertaking is taken to be a term of the agreement.

Section 202

1

2 **Division 5—Mandatory terms of enterprise agreements**

3 **202 Enterprise agreements to include a flexibility term etc.**

4 *Flexibility term must be included in an enterprise agreement*

- 5 (1) An enterprise agreement must include a term (a *flexibility term*)
6 that:
7 (a) enables an employee and his or her employer to agree to an
8 arrangement (an *individual flexibility arrangement*) varying
9 the effect of the agreement in relation to the employee and
10 the employer, in order to meet the genuine needs of the
11 employee and employer; and
12 (b) complies with section 203.

13 *Effect of an individual flexibility arrangement*

- 14 (2) If an employee and employer agree to an individual flexibility
15 arrangement under a flexibility term in an enterprise agreement:
16 (a) the agreement has effect in relation to the employee and the
17 employer as if it were varied by the arrangement; and
18 (b) the arrangement is taken to be a term of the agreement.
- 19 (3) To avoid doubt, the individual flexibility arrangement:
20 (a) does not change the effect the agreement has in relation to the
21 employer and any other employee; and
22 (b) does not have any effect other than as a term of the
23 agreement.

24 *Model flexibility term*

- 25 (4) If an enterprise agreement does not include a flexibility term, the
26 model flexibility term is taken to be a term of the agreement.
- 27 (5) The regulations must prescribe the *model flexibility term* for
28 enterprise agreements.

1 **203 Requirements to be met by a flexibility term**

2 *Flexibility term must meet requirements*

- 3 (1) A flexibility term in an enterprise agreement must meet the
4 requirements set out in this section.

5 *Requirements relating to content*

- 6 (2) The flexibility term must:
7 (a) set out the terms of the enterprise agreement the effect of
8 which may be varied by an individual flexibility arrangement
9 agreed to under the flexibility term; and
10 (b) require the employer to ensure that any individual flexibility
11 arrangement agreed to under the flexibility term:
12 (i) must be about matters that would be permitted matters if
13 the arrangement were an enterprise agreement; and
14 (ii) must not include a term that would be an unlawful term
15 if the arrangement were an enterprise agreement.

16 *Requirement for genuine agreement*

- 17 (3) The flexibility term must require that any individual flexibility
18 arrangement is genuinely agreed to by the employer and the
19 employee.

20 *Requirement that the employee be better off overall*

- 21 (4) The flexibility term must require the employer to ensure that any
22 individual flexibility arrangement agreed to under the term must
23 result in the employee being better off overall than the employee
24 would have been if no individual flexibility arrangement were
25 agreed to.

26 *Requirement relating to approval or consent of another person*

- 27 (5) Except as required by subparagraph (7)(a)(ii), the employer must
28 ensure that the flexibility term does not require that any individual
29 flexibility arrangement agreed to by an employer and employee
30 under the term be approved, or consented to, by another person.

Section 204

1 *Requirement relating to termination of individual flexibility*
2 *arrangements*

- 3 (6) The flexibility term must require the employer to ensure that any
4 individual flexibility arrangement agreed to under the term must be
5 able to be terminated:
6 (a) by either the employee, or the employer, giving written
7 notice of not more than 28 days; or
8 (b) by the employee and the employer at any time if they agree,
9 in writing, to the termination.

10 *Other requirements*

- 11 (7) The flexibility term must require the employer to ensure that:
12 (a) any individual flexibility arrangement agreed to under the
13 term must be in writing and signed:
14 (i) in all cases—by the employee and the employer; and
15 (ii) if the employee is under 18—by a parent or guardian of
16 the employee; and
17 (b) a copy of any individual flexibility arrangement agreed to
18 under the term must be given to the employee within 14 days
19 after it is agreed to.

20 **204 Effect of arrangement that does not meet requirements of**
21 **flexibility term**

22 *Application of this section*

- 23 (1) This section applies if:
24 (a) an employee and employer agree to an arrangement that
25 purports to be an individual flexibility arrangement under a
26 flexibility term in an enterprise agreement; and
27 (b) the arrangement does not meet a requirement set out in
28 section 203.

29 Note: A failure to meet such a requirement may be a contravention of a
30 provision of Part 3-1 (which deals with general protections).

Section 205

1 *Arrangement has effect as if it were an individual flexibility*
2 *arrangement*

3 (2) The arrangement has effect as if it were an individual flexibility
4 arrangement.

5 *Employer contravenes flexibility term in specified circumstances*

6 (3) If section 203 requires the employer to ensure that the arrangement
7 meets the requirement, the employer contravenes the flexibility
8 term of the agreement.

9 *Requirement relating to termination of arrangement*

10 (4) If the arrangement does not provide that the arrangement is able to
11 be terminated:

12 (a) by either the employee, or the employer, giving written
13 notice of not more than 28 days; or

14 (b) by the employee and the employer at any time if they agree,
15 in writing, to the termination;

16 the arrangement is taken to provide that the arrangement is able to
17 be so terminated.

18 **205 Enterprise agreements to include a consultation term etc.**

19 *Consultation term must be included in an enterprise agreement*

20 (1) An enterprise agreement must include a term (a ***consultation term***)
21 that:

22 (a) requires the employer or employers to which the agreement
23 applies to consult the employees to whom the agreement
24 applies about major workplace changes that are likely to have
25 a significant effect on the employees; and

26 (b) allows for the representation of those employees for the
27 purposes of that consultation.

28 *Model consultation term*

29 (2) If an enterprise agreement does not include a consultation term, the
30 model consultation term is taken to be a term of the agreement.

Chapter 2 Terms and conditions of employment

Part 2-4 Enterprise agreements

Division 5 Mandatory terms of enterprise agreements

Section 205

- 1 (3) The regulations must prescribe the *model consultation term* for
2 enterprise agreements.

1

2 **Division 6—Base rate of pay under enterprise agreements**

3 **206 Base rate of pay under an enterprise agreement must not be less**
4 **than the modern award rate or the national minimum**
5 **wage order rate etc.**

6 *If an employee is covered by a modern award that is in operation*

- 7 (1) If:
- 8 (a) an enterprise agreement applies to an employee; and
 - 9 (b) a modern award that is in operation covers the employee;
- 10 the base rate of pay payable to the employee under the agreement
11 (the **agreement rate**) must not be less than the base rate of pay that
12 would be payable to the employee under the modern award (the
13 **award rate**) if the modern award applied to the employee.
- 14 (2) If the agreement rate is less than the award rate, the agreement has
15 effect in relation to the employee as if the agreement rate were
16 equal to the award rate.

17 *If an employer is required to pay an employee the national*
18 *minimum wage etc.*

- 19 (3) If:
- 20 (a) an enterprise agreement applies to an employee; and
 - 21 (b) the employee is not covered by a modern award that is in
22 operation; and
 - 23 (c) a national minimum wage order would, but for the agreement
24 applying to the employee, require the employee's employer
25 to pay the employee a base rate of pay (the **employee's order**
26 **rate**) that at least equals the national minimum wage, or a
27 special national minimum wage, set by the order;
- 28 the base rate of pay payable to the employee under the enterprise
29 agreement (the **agreement rate**) must not be less than the
30 employee's order rate.

Chapter 2 Terms and conditions of employment

Part 2-4 Enterprise agreements

Division 6 Base rate of pay under enterprise agreements

Section 206

- 1 (4) If the agreement rate is less than the employee's order rate, the
2 agreement has effect in relation to the employee as if the
3 agreement rate were equal to the employee's order rate.

1

2 **Division 7—Variation and termination of enterprise**
3 **agreements**

4 **Subdivision A—Variation of enterprise agreements by**
5 **employers and employees**

6 **207 Variation of an enterprise agreement may be made by**
7 **employers and employees**

8 *Variation by employers and employees*

- 9 (1) The following may jointly make a variation of an enterprise
10 agreement:
- 11 (a) if the agreement covers a single employer—the employer
12 and:
 - 13 (i) the employees employed at the time who are covered by
14 the agreement; and
 - 15 (ii) the employees employed at the time who will be
16 covered by the agreement if the variation is approved by
17 FWA;
 - 18 (b) if the agreement covers 2 or more employers—all of those
19 employers and:
 - 20 (i) the employees employed at the time who are covered by
21 the agreement; and
 - 22 (ii) the employees employed at the time who will be
23 covered by the agreement if the variation is approved by
24 FWA.

25 Note: For when a variation of an enterprise agreement is *made*, see
26 section 209.

- 27 (2) The employees referred to in paragraphs (1)(a) and (b) are the
28 ***affected employees*** for the variation.

29 *Variation has no effect unless approved by FWA*

- 30 (3) A variation of an enterprise agreement has no effect unless it is
31 approved by FWA under section 211.

Section 208

1 *Limitation—greenfields agreement*

- 2 (4) Subsection (1) applies to a greenfields agreement only if one or
3 more of the persons who will be necessary for the normal conduct
4 of the enterprise concerned have been employed.

5 *Exception—enterprise agreements approved if not contrary to the*
6 *public interest*

- 7 (5) Subsection (1) does not apply to an enterprise agreement that was
8 approved under section 189 (which deals with the approval of
9 agreements that do not pass the better off overall test, if approval is
10 not contrary to the public interest).

11 **208 Employers may request employees to approve a proposed**
12 **variation of an enterprise agreement**

- 13 (1) An employer covered by an enterprise agreement may request the
14 affected employees for a proposed variation of the agreement to
15 approve the proposed variation by voting for it.
- 16 (2) Without limiting subsection (1), the employer may request that the
17 affected employees vote by ballot or by an electronic method.

18 **209 When a variation of an enterprise agreement is made**

19 *Single-enterprise agreement*

- 20 (1) If the affected employees of an employer, or each employer,
21 covered by a single-enterprise agreement have been asked to
22 approve a proposed variation under subsection 208(1), the
23 variation is *made* when a majority of the affected employees who
24 cast a valid vote approve the variation.

25 *Multi-enterprise agreement*

- 26 (2) If the affected employees of each employer covered by a
27 multi-enterprise agreement have been asked to approve a proposed
28 variation under subsection 208(1), the variation is *made* when a
29 majority of the affected employees of each individual employer
30 who cast a valid vote have approved the variation.

1 **210 Application for FWA approval of a variation of an enterprise**
2 **agreement**

3 *Application for approval*

- 4 (1) If a variation of an enterprise agreement has been made, a person
5 covered by the agreement must apply to FWA for approval of the
6 variation.

7 *Material to accompany the application*

- 8 (2) The application must be accompanied by:
9 (a) a signed copy of the variation; and
10 (b) a copy of the agreement as proposed to be varied; and
11 (c) any declarations that are required by the procedural rules to
12 accompany the application.

13 *When the application must be made*

- 14 (3) The application must be made:
15 (a) within 14 days after the variation is made; or
16 (b) if in all the circumstances FWA considers it fair to extend
17 that period—within such further period as FWA allows.

18 *Signature requirements*

- 19 (4) The regulations may prescribe requirements relating to the signing
20 of variations of enterprise agreements.

21 **211 When FWA must approve a variation of an enterprise**
22 **agreement**

23 *Approval of variation by FWA*

- 24 (1) If an application for the approval of a variation of an enterprise
25 agreement is made under section 210, FWA must approve the
26 variation if:
27 (a) FWA is satisfied that had an application been made under
28 section 185 for the approval of the agreement as proposed to

Section 211

- 1 be varied, FWA would have been required to approve the
2 agreement under section 186; and
3 (b) FWA is satisfied that the agreement as proposed to be varied
4 would not specify a date as its nominal expiry date which is
5 more than 4 years after the day on which FWA approved the
6 agreement; and
7 (c) FWA considers it appropriate to approve the variation taking
8 into account the views of the employee organisation or
9 employee organisations (if any) covered by the agreement.

10 Note: FWA may approve a variation under this section with undertakings
11 (see section 212).

12 *Modification of approval requirements*

- 13 (2) For the purposes of FWA deciding whether it is satisfied of the
14 matter referred to in paragraph (1)(a), FWA must:
15 (a) take into account subsections (3) and (4) and any regulations
16 made for the purposes of subsection (6); and
17 (b) comply with subsection (5); and
18 (c) disregard sections 190 and 191 (which deal with the approval
19 of enterprise agreements with undertakings).
- 20 (3) The following provisions:
21 (a) section 180 (which deals with pre-approval steps);
22 (b) subsection 186(2) (which deals with FWA approval of
23 enterprise agreements);
24 (c) section 188 (which deals with genuine agreement);
25 have effect as if:
26 (d) references in those provisions to the proposed enterprise
27 agreement, or the enterprise agreement, were references to
28 the proposed variation, or the variation, of the enterprise
29 agreement (as the case may be); and
30 (e) references in those provisions to the employees employed at
31 the time who will be covered by the proposed enterprise
32 agreement, or the employees covered by the enterprise
33 agreement, were references to the affected employees for the
34 variation; and
35 (f) references in section 180 to subsection 181(1) were
36 references to subsection 208(1); and

Section 212

- 1 (g) the words “if the agreement is not a greenfields
2 agreement—” in paragraph 186(2)(a) were omitted; and
3 (h) paragraph 186(2)(b) and subparagraph 188(a)(ii) were
4 omitted; and
5 (j) the words “182(1) or (2)” in paragraph 188(b) were omitted
6 and the words “209(1) or (2)” were substituted.
- 7 (4) Section 193 (which deals with passing the better off overall test)
8 has effect as if:
9 (a) the words “that is not a greenfields agreement” in
10 subsection (1) were omitted; and
11 (b) subsection (3) were omitted; and
12 (c) the words “the agreement” in subsection (6) were omitted
13 and the words “the variation of the enterprise agreement”
14 were substituted; and
15 (d) the reference in subsection (6) to section 185 were a
16 reference to section 210.
- 17 (5) For the purposes of determining whether an enterprise agreement
18 as proposed to be varied passes the better off overall test, FWA
19 must disregard any individual flexibility arrangement that has been
20 agreed to by an award covered employee and his or her employer
21 under the flexibility term in the agreement.

22 *Regulations may prescribe additional modifications*

- 23 (6) The regulations may provide that, for the purposes of FWA
24 deciding whether it is satisfied of the matter referred to in
25 paragraph (1)(a), specified provisions of this Part have effect with
26 such modifications as are prescribed by the regulations.

27 **212 FWA may approve a variation of an enterprise agreement with**
28 **undertakings**

29 *Application of this section*

- 30 (1) This section applies if:
31 (a) an application for the approval of a variation of an enterprise
32 agreement has been made under section 210; and

Section 213

1 (b) FWA has a concern that the variation does not meet the
2 requirements set out in section 211.

3 *Approval of agreement with undertakings*

4 (2) FWA may approve the variation under section 211 if FWA is
5 satisfied that an undertaking accepted by FWA under
6 subsection (3) of this section meets the concern.

7 *Undertakings*

8 (3) FWA may only accept a written undertaking from one or more
9 employers covered by the agreement if FWA is satisfied that the
10 effect of accepting the undertaking is not likely to:

11 (a) cause financial detriment to any affected employee for the
12 variation; or

13 (b) result in substantial changes to the variation.

14 *Signature requirements*

15 (4) An undertaking must meet any requirements relating to the signing
16 of undertakings that are prescribed by the regulations.

17 **213 Effect of undertakings**

18 (1) If:

19 (a) FWA approves a variation of an enterprise agreement after
20 accepting an undertaking under subsection 212(3) in relation
21 to the variation; and

22 (b) the agreement covers a single employer;
23 the undertaking is taken to be a term of the agreement, as the
24 agreement applies to the employer.

25 (2) If:

26 (a) FWA approves a variation of an enterprise agreement after
27 accepting an undertaking under subsection 212(3) in relation
28 to the variation; and

29 (b) the agreement covers 2 or more employers;
30 the undertaking is taken to be a term of the agreement, as the
31 agreement applies to each employer that gave the undertaking.

1 **214 When FWA may refuse to approve a variation of an enterprise**
2 **agreement**

- 3 (1) If an application for the approval of a variation of an enterprise
4 agreement is made under section 210, FWA may refuse to approve
5 the variation if FWA considers that compliance with the terms of
6 the agreement as proposed to be varied may result in:
7 (a) a person committing an offence against a law of the
8 Commonwealth; or
9 (b) a person being liable to pay a pecuniary penalty in relation to
10 a contravention of a law of the Commonwealth.
- 11 (2) Subsection (1) has effect despite section 211 (which deals with the
12 approval of variations of enterprise agreements).
- 13 (3) If FWA refuses to approve a variation of an enterprise agreement
14 under this section, FWA may refer the agreement as proposed to be
15 varied to any person or body FWA considers appropriate.

16 **215 Approval decision to note undertakings**

17 If FWA approves a variation of an enterprise agreement after
18 accepting an undertaking under subsection 212(3) in relation to the
19 variation, FWA must note in its decision to approve the variation
20 that the undertaking is taken to be a term of the agreement.

21 **216 When variation comes into operation**

22 If a variation of an enterprise agreement is approved under
23 section 211, the variation operates from the day specified in the
24 decision to approve the variation.

25 **Subdivision B—Variations of enterprise agreements where**
26 **there is ambiguity, uncertainty or discrimination**

27 **217 Variation of an enterprise agreement to remove an ambiguity or**
28 **uncertainty**

- 29 (1) FWA may vary an enterprise agreement to remove an ambiguity or
30 uncertainty on application by any of the following:

Section 218

- 1 (a) one or more of the employers covered by the agreement;
2 (b) an employee covered by the agreement;
3 (c) an employee organisation covered by the agreement.
- 4 (2) If FWA varies the enterprise agreement, the variation operates
5 from the day specified in the decision to vary the agreement.

6 **218 Variation of an enterprise agreement on referral by HREOC**

7 *Review of an enterprise agreement*

- 8 (1) FWA must review an enterprise agreement if the agreement is
9 referred to it under section 46PW of the *Human Rights and Equal*
10 *Opportunity Commission Act 1986* (which deals with
11 discriminatory industrial instruments).
- 12 (2) The Sex Discrimination Commissioner is entitled to make
13 submissions to FWA for consideration in the review.

14 *Variation of an enterprise agreement*

- 15 (3) If FWA considers that the agreement reviewed requires a person to
16 do an act that would be unlawful under Part II of the *Sex*
17 *Discrimination Act 1984* (but for the fact that the act would be
18 done in direct compliance with the agreement), FWA must vary the
19 agreement so that it no longer requires the person to do an act that
20 would be so unlawful.
- 21 (4) If the agreement is varied under subsection (3), the variation
22 operates from the day specified in the decision to vary the
23 agreement.

1 **Subdivision C—Termination of enterprise agreements by**
2 **employers and employees**

3 **219 Employers and employees may agree to terminate an enterprise**
4 **agreement**

5 *Termination by employers and employees*

- 6 (1) The following may jointly agree to terminate an enterprise
7 agreement:
8 (a) if the agreement covers a single employer—the employer and
9 the employees covered by the agreement; or
10 (b) if the agreement covers 2 or more employers—all of the
11 employers and the employees covered by the agreement.

12 Note: For when a termination of an enterprise agreement is *agreed to*, see
13 section 221.

14 *Termination has no effect unless approved by FWA*

- 15 (2) A termination of an enterprise agreement has no effect unless it is
16 approved by FWA under section 223.

17 *Limitation—greenfields agreement*

- 18 (3) Subsection (1) applies to a greenfields agreement only if one or
19 more of the persons who will be necessary for the normal conduct
20 of the enterprise concerned have been employed.

21 **220 Employers may request employees to approve a proposed**
22 **termination of an enterprise agreement**

- 23 (1) An employer covered by an enterprise agreement may request the
24 employees covered by the agreement to approve a proposed
25 termination of the agreement by voting for it.
- 26 (2) Before making the request, the employer must:
27 (a) take all reasonable steps to notify the employees of the
28 following:
29 (i) the time and place at which the vote will occur;
30 (ii) the voting method that will be used; and

Section 221

1 (b) give the employees a reasonable opportunity to decide
2 whether they want to approve the proposed termination.

3 (3) Without limiting subsection (1), the employer may request that the
4 employees vote by ballot or by an electronic method.

5 **221 When termination of an enterprise agreement is agreed to**

6 *Single-enterprise agreement*

7 (1) If the employees of an employer, or each employer, covered by a
8 single-enterprise agreement have been asked to approve a proposed
9 termination of the agreement under subsection 220(1), the
10 termination is **agreed to** when a majority of the employees who
11 cast a valid vote approve the termination.

12 *Multi-enterprise agreement*

13 (2) If the employees of each employer covered by a multi-enterprise
14 agreement have been asked to approve a proposed termination of
15 the agreement under subsection 220(1), the termination is **agreed**
16 **to** when a majority of the employees of each individual employer
17 who cast a valid vote have approved the termination.

18 **222 Application for FWA approval of a termination of an enterprise**
19 **agreement**

20 *Application for approval*

21 (1) If a termination of an enterprise agreement has been agreed to, a
22 person covered by the agreement must apply to FWA for approval
23 of the termination.

24 *Material to accompany the application*

25 (2) The application must be accompanied by any declarations that are
26 required by the procedural rules to accompany the application.

27 *When the application must be made*

28 (3) The application must be made:

- 1 (a) within 14 days after the termination is agreed to; or
2 (b) if in all the circumstances FWA considers it fair to extend
3 that period—within such further period as FWA allows.

4 **223 When FWA must approve a termination of an enterprise**
5 **agreement**

6 If an application for the approval of a termination of an enterprise
7 agreement is made under section 222, FWA must approve the
8 termination if:

- 9 (a) FWA is satisfied that each employer covered by the
10 agreement complied with subsection 220(2) (which deals
11 with giving employees a reasonable opportunity to decide
12 etc.) in relation to the agreement; and
13 (b) FWA is satisfied that the termination was agreed to in
14 accordance with whichever of subsection 221(1) or (2)
15 applies (those subsections deal with agreement to the
16 termination of different kinds of enterprise agreements by
17 employee vote); and
18 (c) FWA is satisfied that there are no other reasonable grounds
19 for believing that the employees have not agreed to the
20 termination; and
21 (d) FWA considers that it is appropriate to approve the
22 termination taking into account the views of the employee
23 organisation or employee organisations (if any) covered by
24 the agreement.

25 **224 When termination comes into operation**

26 If a termination of an enterprise agreement is approved under
27 section 223, the termination operates from the day specified in the
28 decision to approve the termination.

Section 225

1 **Subdivision D—Termination of enterprise agreements after**
2 **nominal expiry date**

3 **225 Application for termination of an enterprise agreement after its**
4 **nominal expiry date**

5 If an enterprise agreement has passed its nominal expiry date, any
6 of the following may apply to FWA for the termination of the
7 agreement:

- 8 (a) one or more of the employers covered by the agreement;
9 (b) an employee covered by the agreement;
10 (c) an employee organisation covered by the agreement.

11 **226 When FWA must terminate an enterprise agreement**

12 If an application for the termination of an enterprise agreement is
13 made under section 225, FWA must terminate the agreement if:

- 14 (a) FWA is satisfied that it is not contrary to the public interest
15 to do so; and
16 (b) FWA considers that it is appropriate to terminate the
17 agreement taking into account all the circumstances
18 including:
19 (i) the views of the employees, each employer, and each
20 employee organisation (if any), covered by the
21 agreement; and
22 (ii) the circumstances of those employees, employers and
23 organisations including the likely effect that the
24 termination will have on each of them.

25 **227 When termination comes into operation**

26 If an enterprise agreement is terminated under section 226, the
27 termination operates from the day specified in the decision to
28 terminate the agreement.

1

2 **Division 8—FWA's general role in facilitating bargaining**

3 **Subdivision A—Bargaining orders**

4 **228 Bargaining representatives must meet the good faith bargaining**
5 **requirements**

6 (1) The following are the *good faith bargaining requirements* that a
7 bargaining representative for a proposed enterprise agreement must
8 meet:

- 9 (a) attending, and participating in, meetings at reasonable times;
10 (b) disclosing relevant information (other than confidential or
11 commercially sensitive information) in a timely manner;
12 (c) responding to proposals made by other bargaining
13 representatives for the agreement in a timely manner;
14 (d) giving genuine consideration to the proposals of other
15 bargaining representatives for the agreement, and giving
16 reasons for the bargaining representative's responses to those
17 proposals;
18 (e) refraining from capricious or unfair conduct that undermines
19 freedom of association or collective bargaining.

20 (2) The good faith bargaining requirements do not require:

- 21 (a) a bargaining representative to make concessions during
22 bargaining for the agreement; or
23 (b) a bargaining representative to reach agreement on the terms
24 that are to be included in the agreement.

25 **229 Applications for bargaining orders**

26 *Persons who may apply for a bargaining order*

27 (1) A bargaining representative for a proposed enterprise agreement
28 may apply to FWA for an order (a *bargaining order*) under
29 section 230 in relation to the agreement.

Section 229

1 *Multi-enterprise agreements*

- 2 (2) An application for a bargaining order must not be made in relation
3 to a proposed multi-enterprise agreement unless a low-paid
4 authorisation is in operation in relation to the agreement.

5 *Timing of applications*

- 6 (3) The application may only be made at whichever of the following
7 times applies:
8 (a) if one or more enterprise agreements apply to an employee,
9 or employees, who will be covered by the proposed
10 enterprise agreement:
11 (i) not more than 90 days before the nominal expiry date of
12 the enterprise agreement, or the latest nominal expiry
13 date of those enterprise agreements (as the case may
14 be); or
15 (ii) after an employer that will be covered by the proposed
16 enterprise agreement has requested under subsection
17 181(1) that employees approve the agreement, but
18 before the agreement is so approved;
19 (b) otherwise—at any time.

20 Note: An employer cannot request employees to approve the agreement
21 under subsection 181(1) until 21 days after the last notice of employee
22 representational rights is given.

23 *Prerequisites for making an application*

- 24 (4) The bargaining representative may only apply for the bargaining
25 order if the bargaining representative:
26 (a) has concerns that:
27 (i) one or more of the bargaining representatives for the
28 agreement have not met, or are not meeting, the good
29 faith bargaining requirements; or
30 (ii) the bargaining process is not proceeding efficiently or
31 fairly because there are multiple bargaining
32 representatives for the agreement; and
33 (b) has given a written notice setting out those concerns to the
34 relevant bargaining representatives; and

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- 1 (c) has given the relevant bargaining representatives a reasonable
2 time within which to respond to those concerns; and
3 (d) considers that the relevant bargaining representatives have
4 not responded appropriately to those concerns.

5 *Non-compliance with notice requirements may be permitted*

- 6 (5) Despite subsection (4), if the bargaining representative has not
7 complied with paragraph (4)(b) or (c), the bargaining
8 representative may apply for the bargaining order if FWA is
9 satisfied that it is appropriate for the application to be made in all
10 the circumstances.

11 **230 When FWA may make a bargaining order**

12 *Bargaining orders*

- 13 (1) FWA may make a bargaining order under this section in relation to
14 a proposed enterprise agreement if:
15 (a) an application for the order has been made; and
16 (b) the requirements of this section are met in relation to the
17 agreement; and
18 (c) FWA is satisfied that it is reasonable in all the circumstances
19 to make the order.

20 *Agreement to bargain or certain instruments in operation*

- 21 (2) FWA must be satisfied in all cases that one of the following
22 applies:
23 (a) the employer or employers have agreed to bargain, or have
24 initiated bargaining, for the agreement;
25 (b) a majority support determination in relation to the agreement
26 is in operation;
27 (c) a scope order in relation to the agreement is in operation;
28 (d) all of the employers are specified in a low-paid authorisation
29 that is in operation in relation to the agreement.

30 *Good faith bargaining requirements not met*

- 31 (3) FWA must in all cases be satisfied:
-

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- 1 (a) that:
2 (i) one or more of the relevant bargaining representatives
3 for the agreement have not met, or are not meeting, the
4 good faith bargaining requirements; or
5 (ii) the bargaining process is not proceeding efficiently or
6 fairly because there are multiple bargaining
7 representatives for the agreement; and
8 (b) that the applicant has complied with the requirements of
9 subsection 229(4) (which deals with notifying relevant
10 bargaining representatives of concerns), unless subsection
11 229(5) permitted the applicant to make the application
12 without complying with those requirements.

13 *Bargaining order must be in accordance with section 231*

- 14 (4) The bargaining order must be in accordance with section 231
15 (which deals with what a bargaining order must specify).

16 **231 What a bargaining order must specify**

- 17 (1) A bargaining order in relation to a proposed enterprise agreement
18 must specify all or any of the following:
19 (a) the actions to be taken by, and requirements imposed upon,
20 the bargaining representatives for the agreement, for the
21 purpose of ensuring that they meet the good faith bargaining
22 requirements;
23 (b) requirements imposed upon those bargaining representatives
24 not to take action that would constitute capricious or unfair
25 conduct that undermines freedom of association or collective
26 bargaining;
27 (c) the actions to be taken by those bargaining representatives to
28 deal with the effects of such capricious or unfair conduct;
29 (d) such matters, actions or requirements as FWA considers
30 appropriate, taking into account subparagraph 230(3)(a)(ii)
31 (which deals with multiple bargaining representatives), for
32 the purpose of promoting the efficient or fair conduct of
33 bargaining for the agreement.

- 1 (2) The kinds of bargaining orders that FWA may make in relation to a
2 proposed enterprise agreement include the following:
- 3 (a) an order excluding a bargaining representative for the
4 agreement from bargaining;
- 5 (b) an order requiring some or all of the bargaining
6 representatives of the employees who will be covered by the
7 agreement to meet and appoint one of the bargaining
8 representatives to represent the bargaining representatives in
9 bargaining;
- 10 (c) an order that an employer not terminate the employment of
11 an employee, if the termination would constitute, or relate to,
12 a failure by a bargaining representative to meet the good faith
13 bargaining requirement referred to in paragraph 228(e)
14 (which deals with capricious or unfair conduct that
15 undermines freedom of association or collective bargaining);
- 16 (d) an order to reinstate an employee whose employment has
17 been terminated if the termination constitutes, or relates to,
18 a failure by a bargaining representative to meet the good faith
19 bargaining requirement referred to in paragraph 228(e)
20 (which deals with capricious or unfair conduct that
21 undermines freedom of association or collective bargaining).
- 22 (3) The regulations may:
- 23 (a) specify the factors FWA may or must take into account in
24 deciding whether or not to make a bargaining order for
25 reinstatement of an employee; and
- 26 (b) provide for FWA to take action and make orders in
27 connection with, and to deal with matters relating to, a
28 bargaining order of that kind.

29 **232 Operation of a bargaining order**

- 30 A bargaining order in relation to a proposed enterprise agreement:
- 31 (a) comes into operation on the day on which it is made; and
- 32 (b) ceases to be in operation at the earliest of the following:
- 33 (i) if the order is revoked—the time specified in the
34 instrument of revocation;
- 35 (ii) when the agreement is approved by FWA;

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- 1 (iii) when a workplace determination that covers the
2 employees that would have been covered by the
3 agreement comes into operation;
4 (iv) when the bargaining representatives for the agreement
5 agree that bargaining has ceased.

6 **233 Contravening a bargaining order**

7 A person to whom a bargaining order applies must not contravene
8 a term of the order.

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

10 **Subdivision B—Serious breach declarations**

11 **234 Applications for serious breach declarations**

12 A bargaining representative for a proposed enterprise agreement
13 may apply to FWA for a declaration (a *serious breach declaration*)
14 under section 235 in relation to the agreement.

15 Note: The consequence of a serious breach declaration being made in
16 relation to the agreement is that FWA may, in certain circumstances,
17 make a bargaining related workplace determination under section 269
18 in relation to the agreement.

19 **235 When FWA may make a serious breach declaration**

20 *Serious breach declaration*

- 21 (1) FWA may make a serious breach declaration in relation to a
22 proposed enterprise agreement if:
23 (a) an application for the declaration has been made; and
24 (b) FWA is satisfied of the matters set out in subsection (2).

25 *Matters of which FWA must be satisfied before making a serious*
26 *breach declaration*

- 27 (2) FWA must be satisfied that:
28 (a) one or more bargaining representatives for the agreement has
29 contravened one or more bargaining orders in relation to the
30 agreement; and

- 1 (b) the contravention or contraventions:
2 (i) are serious and sustained; and
3 (ii) have significantly undermined bargaining for the
4 agreement; and
5 (c) the other bargaining representatives for the agreement (the
6 ***designated bargaining representatives***) have exhausted all
7 other reasonable alternatives to reach agreement on the terms
8 that should be included in the agreement; and
9 (d) agreement on the terms that should be included in the
10 agreement will not be reached in the foreseeable future; and
11 (e) it is reasonable in all the circumstances to make the
12 declaration, taking into account the views of all the
13 bargaining representatives for the agreement.

14 *Factors FWA must take into account in deciding whether*
15 *reasonable alternatives exhausted*

- 16 (3) In deciding whether or not the designated bargaining
17 representatives have exhausted all other reasonable alternatives to
18 reach agreement on the terms that should be included in the
19 agreement, FWA may take into account any matter FWA considers
20 relevant, including the following:
21 (a) whether FWA has provided assistance under section 240 in
22 relation to the agreement;
23 (b) whether a designated bargaining representative has applied to
24 a court for an order under Part 4-1 in relation to the
25 contravention or contraventions referred to in
26 paragraph (2)(a) of this section; and
27 (c) any findings or orders made by the court in relation to such
28 an application.

29 *What declaration must specify*

- 30 (4) The declaration must specify:
31 (a) the proposed enterprise agreement to which the declaration
32 relates; and
33 (b) any other matter prescribed by the procedural rules.

Section 236

1 *Operation of declaration*

2 (5) The declaration:

3 (a) comes into operation on the day on which it is made; and

4 (b) ceases to be in operation when each employer specified in the
5 declaration is covered by an enterprise agreement or a
6 workplace determination.

7 **Subdivision C—Majority support determinations and scope**
8 **orders**

9 **236 Majority support determinations**

10 (1) A bargaining representative of an employee who will be covered
11 by a proposed single-enterprise agreement may apply to FWA for a
12 determination (a *majority support determination*) that a majority
13 of the employees who will be covered by the agreement want to
14 bargain with the employer, or employers, that will be covered by
15 the agreement.

16 (2) The application must specify:

17 (a) the employer, or employers, that will be covered by the
18 agreement; and

19 (b) the employees who will be covered by the agreement.

20 **237 When FWA must make a majority support determination**

21 *Majority support determination*

22 (1) FWA must make a majority support determination in relation to a
23 proposed single-enterprise agreement if:

24 (a) an application for the determination has been made; and

25 (b) FWA is satisfied of the matters set out in subsection (2) in
26 relation to the agreement.

27 *Matters of which FWA must be satisfied before making a majority*
28 *support determination*

29 (2) FWA must be satisfied that:

30 (a) a majority of the employees:

- 1 (i) who are employed by the employer or employers at a
2 time determined by FWA; and
3 (ii) who will be covered by the agreement;
4 want to bargain; and
5 (b) the employer, or employers, that will be covered by the
6 agreement have not yet agreed to bargain, or initiated
7 bargaining, for the agreement; and
8 (c) if the agreement will not cover all the employees of the
9 employer or employers, and the group of employees that will
10 be covered is not geographically, operationally or
11 organisationally distinct—the group was fairly chosen; and
12 (d) it is reasonable in all the circumstances to make the
13 determination.
- 14 (3) For the purposes of paragraph (2)(a), FWA may work out whether
15 a majority of employees want to bargain using any method FWA
16 considers appropriate.

17 *Operation of determination*

- 18 (4) The determination comes into operation on the day on which it is
19 made.

20 **238 Scope orders**

21 *Bargaining representatives may apply for scope orders*

- 22 (1) A bargaining representative for a proposed single-enterprise
23 agreement may apply to FWA for an order (a **scope order**) under
24 this section if:
25 (a) the bargaining representative has concerns that bargaining for
26 the agreement is not proceeding efficiently or fairly; and
27 (b) the reason for this is that the bargaining representative
28 considers that the agreement will not cover appropriate
29 employees, or will cover employees that it is not appropriate
30 for the agreement to cover.

Section 238

1 *No scope order if a single interest employer authorisation is in*
2 *operation*

3 (2) Despite subsection (1), the bargaining representative must not
4 apply for the scope order if a single interest employer authorisation
5 is in operation in relation to the agreement.

6 *Bargaining representative must have given notice of concerns*

7 (3) The bargaining representative may only apply for the scope order if
8 the bargaining representative:

9 (a) has given a written notice setting out the concerns referred to
10 in subsection (1) to the relevant bargaining representatives
11 for the agreement; and

12 (b) has given the relevant bargaining representatives a reasonable
13 time within which to respond to those concerns; and

14 (c) considers that the relevant bargaining representatives have
15 not responded appropriately.

16 *When FWA may make scope order*

17 (4) FWA may make the scope order if FWA is satisfied:

18 (a) that the bargaining representative who made the application
19 has met, or is meeting, the good faith bargaining
20 requirements; and

21 (b) that making the order will promote the fair and efficient
22 conduct of bargaining; and

23 (c) if the agreement will not cover all the employees of the
24 employer or employers, and the group of employees that will
25 be covered is not geographically, operationally or
26 organisationally distinct—the group was fairly chosen; and

27 (d) it is reasonable in all the circumstances to make the order.

28 *Scope order must specify employer and employees to be covered*

29 (5) The scope order must specify, in relation to a proposed
30 single-enterprise agreement:

31 (a) the employer, or employers, that will be covered by the
32 agreement; and

33 (b) the employees who will be covered by the agreement.

1 *Scope order must be in accordance with this section etc.*

2 (6) The scope order:

- 3 (a) must be in accordance with this section; and
4 (b) may relate to more than one proposed single-enterprise
5 agreement.

6 *Orders etc. that FWA may make*

7 (7) If FWA makes the scope order, FWA may also:

- 8 (a) amend any existing bargaining orders; and
9 (b) make or vary such other orders (such as protected action
10 ballot orders), determinations or other instruments made by
11 FWA, or take such other actions, as FWA considers
12 appropriate.

13 **239 Operation of a scope order**

14 A scope order in relation to a proposed single-enterprise
15 agreement:

- 16 (a) comes into operation on the day on which it is made; and
17 (b) ceases to be in operation at the earliest of the following:
18 (i) if the order is revoked—the time specified in the
19 instrument of revocation;
20 (ii) when the agreement is approved by FWA;
21 (iii) when a workplace determination that covers the
22 employees that would have been covered by the
23 agreement comes into operation;
24 (iv) when the bargaining representatives for the agreement
25 agree that bargaining has ceased.

Section 240

1 **Subdivision D—FWA may deal with a bargaining dispute on**
2 **request**

3 **240 Application for FWA to deal with a bargaining dispute**

4 *Bargaining representative may apply for FWA to deal with a*
5 *dispute*

- 6 (1) A bargaining representative for a proposed enterprise agreement
7 may apply to FWA for FWA to deal with a dispute about the
8 agreement if the bargaining representatives for the agreement are
9 unable to resolve the dispute.
- 10 (2) If the proposed enterprise agreement is:
11 (a) a single-enterprise agreement; or
12 (b) a multi-enterprise agreement in relation to which a low-paid
13 authorisation is in operation;
14 the application may be made by one bargaining representative,
15 whether or not the other bargaining representatives for the
16 agreement have agreed to the making of the application.
- 17 (3) If subsection (2) does not apply, a bargaining representative may
18 only make the application if all of the bargaining representatives
19 for the agreement have agreed to the making of the application.
- 20 (4) If the bargaining representatives have agreed that FWA may
21 arbitrate (however described) the dispute, FWA may do so.

1
2 **Division 9—Low-paid bargaining**

3 **241 Objects of this Division**

4 The objects of this Division are:

- 5 (a) to assist and encourage low-paid employees and their
6 employers, who have not historically had the benefits of
7 collective bargaining, to make an enterprise agreement that
8 meets their needs; and
9 (b) to assist low-paid employees and their employers to identify
10 improvements to productivity and service delivery through
11 bargaining for an enterprise agreement that covers 2 or more
12 employers, while taking into account the specific needs of
13 individual enterprises; and
14 (c) to address constraints on the ability of low-paid employees
15 and their employers to bargain at the enterprise level,
16 including constraints relating to a lack of skills, resources,
17 bargaining strength or previous bargaining experience; and
18 (d) to enable FWA to provide assistance to low-paid employees
19 and their employers to facilitate bargaining for enterprise
20 agreements.

21 Note: A low-paid workplace determination may be made in specified
22 circumstances under Division 2 of Part 2-5 if the bargaining
23 representatives for a proposed enterprise agreement in relation to
24 which a low-paid authorisation is in operation are unable to reach
25 agreement.

26 **242 Low-paid authorisations**

- 27 (1) The following persons may apply to FWA for an authorisation (a
28 ***low-paid authorisation***) under section 243 in relation to a proposed
29 multi-enterprise agreement:
30 (a) a bargaining representative for the agreement;
31 (b) an employee organisation that is entitled to represent the
32 industrial interests of an employee in relation to work to be
33 performed under the agreement.

34 Note: The effect of a low-paid authorisation is that the employers specified
35 in it are subject to certain rules in relation to the agreement that would

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1 not otherwise apply (such as in relation to the availability of
2 bargaining orders, see subsection 229(2)).

- 3 (2) The application must specify:
4 (a) the employers that will be covered by the agreement; and
5 (b) the employees who will be covered by the agreement.
- 6 (3) An application under this section must not be made in relation to a
7 proposed greenfields agreement.

8 **243 When FWA must make a low-paid authorisation**

9 *Low-paid authorisation*

- 10 (1) FWA must make a low-paid authorisation in relation to a proposed
11 multi-enterprise agreement if:
12 (a) an application for the authorisation has been made; and
13 (b) FWA is satisfied that it is in the public interest to make the
14 authorisation, taking into account the matters specified in
15 subsections (2) and (3).

16 *FWA must take into account historical and current matters relating*
17 *to collective bargaining*

- 18 (2) In deciding whether or not to make the authorisation, FWA must
19 take into account the following:
20 (a) whether granting the authorisation would assist low-paid
21 employees who have not had access to collective bargaining
22 or who face substantial difficulty bargaining at the enterprise
23 level;
24 (b) the history of bargaining in the industry in which the
25 employees who will be covered by the agreement work;
26 (c) the relative bargaining strength of the employers and
27 employees who will be covered by the agreement;
28 (d) the current terms and conditions of employment of the
29 employees who will be covered by the agreement, as
30 compared to relevant industry and community standards;
31 (e) the degree of commonality in the nature of the enterprises to
32 which the agreement relates, and the terms and conditions of
33 employment in those enterprises.

1 *FWA must take into account matters relating to the likely success*
2 *of collective bargaining*

- 3 (3) In deciding whether or not to make the authorisation, FWA must
4 also take into account the following:
- 5 (a) whether granting the authorisation would assist in identifying
6 improvements to productivity and service delivery at the
7 enterprises to which the agreement relates;
 - 8 (b) the extent to which the likely number of bargaining
9 representatives for the agreement would be consistent with a
10 manageable collective bargaining process;
 - 11 (c) the views of the employers and employees who will be
12 covered by the agreement;
 - 13 (d) the extent to which the terms and conditions of employment
14 of the employees who will be covered by the agreement is
15 controlled, directed or influenced by a person other than the
16 employer, or employers, that will be covered by the
17 agreement;
 - 18 (e) the extent to which the applicant for the authorisation is
19 prepared to consider and respond reasonably to claims, or
20 responses to claims, that may be made by a particular
21 employer named in the application, if that employer later
22 proposes to bargain for an agreement that:
 - 23 (i) would cover that employer; and
 - 24 (ii) would not cover the other employers specified in the
25 application.

26 *What authorisation must specify etc.*

- 27 (4) The authorisation must specify:
- 28 (a) the employers that will be covered by the agreement (which
29 may be some or all of the employers specified in the
30 application); and
 - 31 (b) the employees who will be covered by the agreement (which
32 may be some or all of the employees specified in the
33 application); and
 - 34 (c) any other matter prescribed by the procedural rules.

Section 244

1 *Operation of authorisation*

- 2 (5) The authorisation comes into operation on the day on which it is
3 made.

4 **244 Variation of low-paid authorisations—general**

5 *Variation to remove employer*

- 6 (1) An employer specified in a low-paid authorisation may apply to
7 FWA for a variation of the authorisation to remove the employer's
8 name from the authorisation.
- 9 (2) If an application is made under subsection (1), FWA must vary the
10 authorisation to remove the employer's name if FWA is satisfied
11 that, because of a change in the employer's circumstances, it is no
12 longer appropriate for the employer to be specified in the
13 authorisation.

14 *Variation to add employer*

- 15 (3) The following may apply to FWA for a variation of a low-paid
16 authorisation to add the name of an employer that is not specified
17 in the authorisation:
- 18 (a) the employer;
- 19 (b) a bargaining representative of an employee who will be
20 covered by the proposed multi-enterprise agreement to which
21 the authorisation relates;
- 22 (c) an employee organisation that is entitled to represent the
23 industrial interests of an employee in relation to work to be
24 performed under that agreement.
- 25 (4) If an application is made under subsection (3), FWA must vary the
26 authorisation to add the employer's name if FWA is satisfied that it
27 is in the public interest to do so, taking into account the matters
28 specified in subsections 243(2) and (3).

1 **245 Variation of low-paid authorisations—enterprise agreement etc.**
2 **comes into operation**

3 FWA is taken to have varied a low-paid authorisation to remove an
4 employer's name when an enterprise agreement, or a workplace
5 determination, that covers the employer comes into operation.

6 **246 FWA assistance for the low-paid**

7 *Application of this section*

- 8 (1) This section applies if a low-paid authorisation is in operation in
9 relation to a proposed multi-enterprise agreement.

10 *FWA assistance*

- 11 (2) FWA may, on its own initiative, provide to the bargaining
12 representatives for the agreement such assistance:
13 (a) that FWA considers appropriate to facilitate bargaining for
14 the agreement; and
15 (b) that FWA could provide if it were dealing with a dispute.

16 Note: This section does not empower FWA to arbitrate, because subsection
17 595(3) provides that FWA may arbitrate only if expressly authorised
18 to do so.

19 *FWA may direct a person to attend a conference*

- 20 (3) Without limiting subsection (2), FWA may provide assistance by
21 directing a person who is not an employer specified in the
22 authorisation to attend a conference at a specified time and place if
23 FWA is satisfied that the person exercises such a degree of control
24 over the terms and conditions of the employees who will be
25 covered by the agreement that the participation of the person in
26 bargaining is necessary for the agreement to be made.
- 27 (4) Subsection (3) does not limit FWA's powers under Subdivision B
28 of Division 3 of Part 5-1.

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1

2 **Division 10—Single interest employer authorisations**

3 **Subdivision A—Declaration that employers may bargain**
4 **together for a proposed enterprise agreement**

5 **247 Ministerial declaration that employers may bargain together for**
6 **a proposed enterprise agreement**

7 *Application for declaration*

8 (1) Two or more employers that will be covered by a proposed
9 enterprise agreement may apply to the Minister for a declaration
10 under subsection (3).

11 Note: Employers named in a declaration may apply for a single interest
12 employer authorisation (see Subdivision B of this Division).

13 (2) The application must specify the employers (the *relevant*
14 *employers*) that will be covered by the agreement.

15 *Declaration by the Minister*

16 (3) If an application is made under subsection (1), the Minister may
17 declare, in writing, that the relevant employers may bargain
18 together for agreement.

19 (4) In deciding whether or not to make the declaration, the Minister
20 must take into account the following matters:

21 (a) the history of bargaining of each of the relevant employers,
22 including whether they have previously bargained together;

23 (b) the interests that the relevant employers have in common,
24 and the extent to which those interests are relevant to whether
25 they should be permitted to bargain together;

26 (c) whether the relevant employers are governed by a common
27 regulatory regime;

28 (d) whether it would be more appropriate for each of the relevant
29 employers to make a separate enterprise agreement with its
30 employees;

- 1 (e) the extent to which the relevant employers operate
2 collaboratively rather than competitively;
3 (f) whether the relevant employers are substantially funded,
4 directly or indirectly, by the Commonwealth, a State or a
5 Territory;
6 (g) any other matter the Minister considers relevant.
- 7 (5) If the Minister decides to make the declaration, the relevant
8 employers must be specified in the declaration.
- 9 (6) A declaration under subsection (3) is not a legislative instrument.

10 **Subdivision B—Single interest employer authorisations**

11 **248 Single interest employer authorisations**

- 12 (1) Two or more employers may apply to FWA for an authorisation (a
13 ***single interest employer authorisation***) under section 249 in
14 relation to a proposed enterprise agreement.

15 Note: The effect of a single interest employer authorisation is that the
16 employers are single interest employers in relation to the agreement
17 (see paragraph 172(5)(c)).

- 18 (2) The application must specify the following:
19 (a) the employers that will be covered by the agreement;
20 (b) the employees who will be covered by the agreement;
21 (c) the person (if any) nominated by the employers to make
22 applications under this Act if the authorisation is made.

23 **249 When FWA must make a single interest employer authorisation**

24 *Single interest employer authorisation*

- 25 (1) FWA must make a single interest employer authorisation in
26 relation to a proposed enterprise agreement if:
27 (a) an application for the authorisation has been made; and
28 (b) FWA is satisfied that:
29 (i) the employers that will be covered by the agreement
30 have agreed to bargain together; and

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- 1 (ii) no person coerced, or threatened to coerce, any of the
2 employers to agree to bargain together; and
3 (c) the requirements of either subsection (2) (which deals with
4 franchisees) or (3) (which deals with employers that may
5 bargain together for a proposed enterprise agreement) are
6 met.

7 *Franchisees*

- 8 (2) The requirements of this subsection are met if FWA is satisfied
9 that the employers carry on similar business activities under the
10 same franchise and are:
11 (a) franchisees of the same franchisor; or
12 (b) related bodies corporate of the same franchisor; or
13 (c) any combination of the above.

14 *Employers that may bargain together for the agreement*

- 15 (3) The requirements of this subsection are met if FWA is satisfied
16 that all of the employers are specified in a declaration made under
17 section 247 in relation to the agreement.

18 *Operation of authorisation*

- 19 (4) The authorisation:
20 (a) comes into operation on the day on which it is made; and
21 (b) ceases to be in operation at the earlier of the following:
22 (i) the day on which the enterprise agreement to which the
23 authorisation relates is made;
24 (ii) 12 months after the day on which the authorisation is
25 made or, if the period is extended under section 252, at
26 the end of that period.

27 **250 What a single interest employer authorisation must specify**

28 *What authorisation must specify*

- 29 (1) A single interest employer authorisation in relation to a proposed
30 enterprise agreement must specify the following:
31 (a) the employers that will be covered by the agreement;
-

- 1 (b) the employees who will be covered by the agreement;
2 (c) the person (if any) nominated by the employers to make
3 applications under this Act if the authorisation is made;
4 (d) any other matter prescribed by the procedural rules.

5 *Authorisation may relate to only some of employers or employees*

- 6 (2) If FWA is satisfied of the matters specified in subsection 249(2) or
7 (3) (which deal with franchisees and employers that may bargain
8 together for a proposed enterprise agreement) in relation to only
9 some of the employers that will be covered by the agreement,
10 FWA may make a single interest employer authorisation specifying
11 those employers and their employees only.

12 **251 Variation of single interest employer authorisations**

13 *Variation to remove employer*

- 14 (1) An employer specified in a single interest employer authorisation
15 in relation to a proposed enterprise agreement may apply to FWA
16 for a variation of the authorisation to remove the employer's name
17 from the authorisation.
- 18 (2) If an application is made under subsection (1), FWA must vary the
19 authorisation to remove the employer's name if FWA is satisfied
20 that, because of a change in the employer's circumstances, it is no
21 longer appropriate for the employer to be specified in the
22 authorisation.

23 *Variation to add employer*

- 24 (3) An employer that is not specified in a single interest employer
25 authorisation may apply to FWA for a variation of the
26 authorisation to add the employer's name to the authorisation.
- 27 (4) If an application is made under subsection (3), FWA must vary the
28 authorisation to add the employer's name if FWA is satisfied that:
29 (a) each employer specified in the authorisation has agreed to the
30 employer's name being added; and
31 (b) no person coerced, or threatened to coerce, the employer to
32 make the application; and

Section 252

- 1 (c) the requirements of subsection 249(2) or (3) (which deal with
2 franchisees and employers that may bargain together for a
3 proposed enterprise agreement) are met.

4 **252 Variation to extend period single interest employer**
5 **authorisation is in operation**

- 6 (1) A bargaining representative for a proposed enterprise agreement to
7 which a single interest employer authorisation relates may apply to
8 FWA to vary the authorisation to extend the period for which the
9 authorisation is in operation.
- 10 (2) FWA may vary the authorisation to extend the period if FWA is
11 satisfied that:
- 12 (a) there are reasonable prospects that the agreement will be
13 made if the authorisation is in operation for a longer period;
14 and
15 (b) it is appropriate in all the circumstances to extend the period.

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2 **Division 11—Other matters**

3 **253 Terms of an enterprise agreement that are of no effect**

- 4 (1) A term of an enterprise agreement has no effect to the extent that:
5 (a) it is not a term about a permitted matter; or
6 (b) it is an unlawful term.

7 Note 1: A term of an enterprise agreement has no effect to the extent that it
8 contravenes section 55 (see section 56).

9 Note 2: A term of an enterprise agreement permitting or requiring deductions
10 or payments to be made has no effect if it benefits the employer and is
11 unreasonable in the circumstances (see section 326).

- 12 (2) However, if an enterprise agreement includes a term that has no
13 effect because of subsection (1), or section 56 or 326, the inclusion
14 of the term does not prevent the agreement from being an
15 enterprise agreement.

16 **254 Applications by bargaining representatives**

17 *Application of this section*

- 18 (1) This section applies if a provision of this Part permits an
19 application to be made by a bargaining representative of an
20 employer that will be covered by a proposed enterprise agreement.

21 *Persons who may make applications*

- 22 (2) If the agreement will cover more than one employer, the
23 application may be made by:
24 (a) in the case of a proposed enterprise agreement in relation to
25 which a single interest employer authorisation is in
26 operation—the person (if any) specified in the authorisation
27 as the person who may make applications under this Act; or
28 (b) in any case—a bargaining representative of an employer that
29 will be covered by the agreement, on behalf of one or more
30 other such bargaining representatives, if those other
31 bargaining representatives have agreed to the application
32 being made on their behalf.

Section 255

1 **255 Part does not empower FWA to make certain orders**

2 (1) This Part does not empower FWA to make an order that requires,
3 or has the effect of requiring:

- 4 (a) particular content to be included or not included in a
5 proposed enterprise agreement; or
6 (b) an employer to request under subsection 181(1) that
7 employees approve a proposed enterprise agreement; or
8 (c) an employee to approve, or not approve, a proposed
9 enterprise agreement.

10 (2) Despite paragraph (1)(a), FWA may make an order that particular
11 content be included or not included in a proposed enterprise
12 agreement if the order is made in the course of arbitration
13 undertaken when dealing with a dispute under section 240.

14 Note: FWA may only arbitrate a dispute under section 240 if arbitration has
15 been agreed to by the bargaining representatives for the agreement
16 (see subsection 240(4)).

17 **256 Prospective employers and employees**

18 A reference to an employer, or an employee, in relation to a
19 greenfields agreement, includes a reference to a person who may
20 become an employer or employee.

21 **257 Enterprise agreements may incorporate material in force from
22 time to time etc.**

23 Despite section 46AA of the *Acts Interpretation Act 1901*, an
24 enterprise agreement may incorporate material contained in an
25 instrument or other writing:

- 26 (a) as in force at a particular time; or
27 (b) as in force from time to time.

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Part 2-5—Workplace determinations

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Division 1—Introduction

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258 Guide to this Part

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

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Division 2 deals with low-paid workplace determinations.

9

Bargaining representatives for a proposed multi-enterprise agreement may apply to FWA for such a determination if they are unable to reach agreement on the terms that should be included in the agreement.

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

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

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

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Division 4 deals with bargaining related workplace determinations. FWA must make such a determination if:

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(a) a serious breach declaration is made in relation to a proposed enterprise agreement; and

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

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Chapter 2 Terms and conditions of employment

Part 2-5 Workplace determinations

Division 1 Introduction

Section 259

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

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

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Division 7 deals with contraventions of workplace determinations and other matters relating to applications by bargaining representatives.

13 **259 Meanings of *employee* and *employer***

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

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2 **Division 2—Low-paid workplace determinations**

3 **260 Applications for low-paid workplace determinations**

4 *Application of this section*

- 5 (1) This section applies if:
- 6 (a) a low-paid authorisation is in operation in relation to a
- 7 proposed multi-enterprise agreement; and
- 8 (b) one or more of the bargaining representatives for the
- 9 agreement are unable to reach agreement on the terms that
- 10 should be included in the agreement.

11 *Consent low-paid workplace determination*

- 12 (2) The following bargaining representatives for the agreement may
- 13 jointly apply to FWA for a determination (a ***consent low-paid***
- 14 ***workplace determination***) under section 261:
- 15 (a) one or more bargaining representatives of one or more of the
- 16 employers that would have been covered by the agreement;
- 17 (b) the bargaining representative or representatives of the
- 18 employees of those employers.
- 19 (3) An application for a consent low-paid workplace determination
- 20 must specify the following:
- 21 (a) the bargaining representatives making the application;
- 22 (b) the terms that those bargaining representatives have, at the
- 23 time of the application, agreed should be included in the
- 24 agreement;
- 25 (c) the matters at issue at the time of the application;
- 26 (d) the employers that have consented to being covered by the
- 27 determination;
- 28 (e) those employers' employees who will be covered by the
- 29 determination;
- 30 (f) each employee organisation (if any) that is a bargaining
- 31 representative of those employees.

Section 261

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Special low-paid workplace determination

- (4) A bargaining representative for the agreement may apply to FWA for a determination (a *special low-paid workplace determination*) under section 262.
- (5) An application for a special low-paid workplace determination must specify the following:
 - (a) the terms that the bargaining representatives concerned have, at the time of the application, agreed should be included in the agreement;
 - (b) the matters at issue at the time of the application;
 - (c) the employers that will be covered by the determination;
 - (d) the employees who will be covered by the determination;
 - (e) each employee organisation (if any) that is a bargaining representative of those employees.

261 When FWA must make a consent low-paid workplace determination

FWA must make a consent low-paid workplace determination if:

- (a) an application for the determination has been made; and
- (b) FWA is satisfied that the bargaining representatives who made the application have made all reasonable efforts to agree on the terms that should be included in the agreement; and
- (c) there is no reasonable prospect of agreement being reached.

Note: FWA must be constituted by a Full Bench to make a consent low-paid workplace determination (see subsection 616(4)).

262 When FWA must make a special low-paid workplace determination—general requirements

Special low-paid workplace determination

- (1) FWA must make a special low-paid workplace determination under this section if:
 - (a) an application for the determination has been made; and

Section 262

1 (b) the requirements set out in this section and section 263 are
2 met.

3 Note: FWA must be constituted by a Full Bench to make a special low-paid
4 workplace determination (see subsection 616(4)).

5 *Genuinely unable to reach agreement etc.*

6 (2) FWA must be satisfied that:

- 7 (a) the bargaining representatives for the proposed
8 multi-enterprise agreement concerned are genuinely unable
9 to reach agreement on the terms that should be included in
10 the agreement; and
11 (b) there is no reasonable prospect of agreement being reached.

12 *Minimum safety net*

13 (3) FWA must be satisfied that, at the time of the application, the
14 terms and conditions of the employees who will be covered by the
15 determination were substantially equivalent to the minimum safety
16 net of terms and conditions provided by modern awards together
17 with the National Employment Standards.

18 *Promotion of future bargaining for an enterprise agreement etc.*

19 (4) FWA must be satisfied that the making of the determination will
20 promote:

- 21 (a) bargaining in the future for an enterprise agreement or
22 agreements that will cover the employers and employees who
23 will be covered by the workplace determination; and
24 (b) productivity and efficiency in the enterprise or enterprises
25 concerned.

26 *Public interest*

27 (5) FWA must be satisfied that it is in the public interest to make the
28 determination.

Section 263

1 **263 When FWA must make a special low-paid workplace**
2 **determination—additional requirements**

3 *Additional requirements*

4 (1) This section sets out additional requirements that must be met
5 before FWA makes a special low-paid determination (the *relevant*
6 *determination*) under section 262.

7 *No employer is specified in an application for a consent low-paid*
8 *workplace determination*

9 (2) FWA must be satisfied that no employer that will be covered by
10 the relevant determination is specified in an application for a
11 consent low-paid workplace determination that was made by
12 bargaining representatives for the proposed multi-enterprise
13 agreement concerned before or after the application for the relevant
14 determination was made.

15 *No employer is, or has previously been, covered by an enterprise*
16 *agreement or workplace determination*

17 (3) FWA must be satisfied that no employer that will be covered by
18 the relevant determination is, or has previously been, covered by an
19 enterprise agreement, or another workplace determination, in
20 relation to the work to be performed by the employees who will be
21 covered by the relevant determination.

22 **264 Terms etc. of a low-paid workplace determination**

23 *Basic rule*

24 (1) A low-paid workplace determination must comply with
25 subsection (4) and include:

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

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

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

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

Section 265

1 *Agreed terms*

2 (2) The determination must include the agreed terms (see subsection
3 274(1)) for the determination.

4 *Terms dealing with the matters at issue*

5 (3) The determination must include the terms that FWA considers deal
6 with the matters at issue specified in the application for the
7 determination.

8 *Coverage*

9 (4) The determination must be expressed to cover the employers,
10 employees and employee organisations (if any) that were specified
11 in the application for the determination.

12 **265 No other terms**

13 A low-paid workplace determination must not include any terms
14 other than those required by subsection 264(1).

Section 266

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Division 3—Industrial action related workplace determinations

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266 When FWA must make an industrial action related workplace determination

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Industrial action related workplace determination

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(1) If:

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

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

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

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

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

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Termination of industrial action instrument

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

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

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

25

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Post-industrial action negotiating period

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

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

30

(b) ends:

31

(i) 21 days after that day; or

- 1 (ii) if FWA extends that period under subsection (4)—42
2 days after that day.
- 3 (4) FWA must extend the period referred to in subparagraph (3)(b)(i)
4 if:
- 5 (a) all of the bargaining representatives for the agreement jointly
6 apply to FWA for the extension within 21 days after the
7 termination of industrial action instrument was made; and
8 (b) those bargaining representatives have not settled all of the
9 matters that were at issue during bargaining for the
10 agreement.

11 **267 Terms etc. of an industrial action related workplace**
12 **determination**

13 *Basic rule*

- 14 (1) An industrial action related workplace determination must comply
15 with subsection (4) and include:
- 16 (a) the terms set out in subsections (2) and (3); and
17 (b) the core terms set out in section 272; and
18 (c) the mandatory terms set out in section 273.

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

21 *Agreed terms*

- 22 (2) The determination must include the agreed terms (see subsection
23 274(2)) for the determination.

24 *Terms dealing with the matters at issue*

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

28 *Coverage*

- 29 (4) The determination must be expressed to cover:

Chapter 2 Terms and conditions of employment

Part 2-5 Workplace determinations

Division 3 Industrial action related workplace determinations

Section 268

- 1 (a) each employer that would have been covered by the proposed
2 enterprise agreement concerned; and
3 (b) the employees who would have been covered by that
4 agreement; and
5 (c) each employee organisation (if any) that was a bargaining
6 representative of those employees.

7 **268 No other terms**

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

1

2 **Division 4—Bargaining related workplace determinations**

3 **269 When FWA must make a bargaining related workplace**
4 **determination**

5 *Bargaining related workplace determination*

6 (1) If:

- 7 (a) a serious breach declaration has been made in relation to a
8 proposed enterprise agreement; and
9 (b) the post-declaration negotiating period ends; and
10 (c) the bargaining representatives for the agreement have not
11 settled all of the matters that were at issue during bargaining
12 for the agreement;

13 FWA must make a determination (a *bargaining related workplace*
14 *determination*) as quickly as possible after the end of that period.

15 Note 1: A serious breach declaration may be made in relation to a proposed
16 single-enterprise agreement or a proposed multi-enterprise agreement
17 in relation to which a low-paid authorisation is in operation (see
18 sections 229 and 235).

19 Note 2: FWA must be constituted by a Full Bench to make a bargaining
20 related workplace determination (see subsection 616(4)).

21 *Post-declaration negotiating period*

22 (2) The *post-declaration negotiating period* is the period that:

- 23 (a) starts on the day on which the serious breach declaration is
24 made; and
25 (b) ends:
26 (i) 21 days after that day; or
27 (ii) if FWA extends that period under subsection (3)—42
28 days after that day.

29 (3) FWA must extend the period referred to in subparagraph (2)(b)(i)
30 if:

- 31 (a) all of the bargaining representatives for the agreement jointly
32 apply to FWA for the extension within 21 days after the
33 serious breach declaration was made; and
-

Section 270

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

4 **270 Terms etc. of a bargaining related workplace determination**

5 *Basic rule*

- 6 (1) A bargaining related workplace determination must comply with
7 whichever of subsection (4), (5) or (6) applies and include:
8 (a) the terms set out in this section; and
9 (b) the core terms set out in section 272; and
10 (c) the mandatory terms set out in section 273.

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

13 *Agreed terms*

- 14 (2) The determination must include the agreed terms (see subsection
15 274(3)) for the determination.

16 *Terms dealing with the matters at issue*

- 17 (3) The determination must include the terms that FWA considers deal
18 with the matters that were still at issue at the end of the
19 post-declaration negotiating period.

20 *Coverage—single-enterprise agreement*

- 21 (4) If the serious breach declaration referred to in paragraph 269(1)(a)
22 was made in relation to a proposed single-enterprise agreement, the
23 determination must be expressed to cover:
24 (a) each employer that would have been covered by the
25 agreement; and
26 (b) the employees who would have been covered by that
27 agreement; and
28 (c) each employee organisation (if any) that was a bargaining
29 representative of those employees.

1 *Coverage—multi-enterprise agreement*

2 (5) If:

3 (a) the serious breach declaration referred to in paragraph
4 269(1)(a) was made in relation to a proposed multi-enterprise
5 agreement in relation to which a low-paid authorisation is in
6 operation; and

7 (b) the bargaining representatives for the agreement that
8 contravened a bargaining order as referred to in subsection
9 235(2) were bargaining representatives of one or more
10 employers that would have been covered by the agreement;

11 the determination must be expressed to cover:

12 (c) each of those employers; and

13 (d) their employees who would have been covered by the
14 agreement; and

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

17 (6) If:

18 (a) the serious breach declaration referred to in paragraph
19 269(1)(a) was made in relation to a proposed multi-enterprise
20 agreement in relation to which a low-paid authorisation is in
21 operation; and

22 (b) the bargaining representatives for the agreement that
23 contravened a bargaining order as referred to in subsection
24 235(2) were bargaining representatives of one or more
25 employees who would have been covered by the agreement;

26 the determination must be expressed to cover:

27 (c) the employers of those employees if they are employers that
28 would have been covered by the agreement; and

29 (d) all of their employees who would have been covered by the
30 agreement; and

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

33 **271 No other terms**

34 A bargaining related workplace determination must not include any
35 terms other than those required by subsection 270(1).

Section 272

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

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272 Core terms of workplace determinations

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Core terms

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

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Nominal expiry date

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

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Permitted matters etc.

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- (3) The determination must not include:

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(a) any terms that would not be about permitted matters if the determination were an enterprise agreement; or

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(b) a term that would be an unlawful term if the determination were an enterprise agreement.

18

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Better off overall test

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

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22

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Safety net requirements

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

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27

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

28

29

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

4 **273 Mandatory terms of workplace determinations**

5 *Mandatory terms*

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

8 *Term about settling disputes*

- 9 (2) The determination must include a term that provides a procedure
10 for settling disputes:
11 (a) about any matters arising under the determination; and
12 (b) in relation to the National Employment Standards.
- 13 (3) Subsection (2) does not apply to the determination if FWA is
14 satisfied that an agreed term for the determination would, if the
15 determination were an enterprise agreement, satisfy paragraphs
16 186(6)(a) and (b) (which deal with terms in enterprise agreements
17 about settling disputes).

18 *Flexibility term*

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

24 *Consultation term*

- 25 (5) The determination must include the model consultation term unless
26 FWA is satisfied that an agreed term for the determination would,
27 if the determination were an enterprise agreement, satisfy
28 subsection 205(1) (which deals with terms about consultation in
29 enterprise agreements).

Section 274

1 **274 Agreed terms for workplace determinations**

2 *Agreed term for a low-paid workplace determination*

3 (1) An **agreed term** for a low-paid workplace determination is a term
4 that the application for the determination specifies as a term that
5 the bargaining representatives concerned had, at the time of the
6 application, agreed should be included in the proposed
7 multi-enterprise agreement concerned.

8 Note: The determination must include an agreed term (see subsection
9 264(2)).

10 *Agreed term for an industrial action related workplace*
11 *determination*

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

17 Note: The determination must include an agreed term (see subsection
18 267(2)).

19 *Agreed term for a bargaining related workplace determination*

20 (3) An **agreed term** for a bargaining related workplace determination
21 is a term that the bargaining representatives for the proposed
22 enterprise agreement concerned had, at end of the post-declaration
23 negotiating period, agreed should be included in the agreement.

24 Note: The determination must include an agreed term (see subsection
25 270(2)).

26 **275 Factors FWA must take into account in deciding terms of a**
27 **workplace determination**

28 The factors that FWA must take into account in deciding which
29 terms to include in a workplace determination include the
30 following:

31 (a) the merits of the case;

Section 275

- 1 (b) for a low-paid workplace determination—the interests of the
- 2 employers and employees who will be covered by the
- 3 determination, including ensuring that the employers are able
- 4 to remain competitive;
- 5 (c) for a workplace determination other than a low-paid
- 6 workplace determination—the interests of the employers and
- 7 employees who will be covered by the determination;
- 8 (d) the public interest;
- 9 (e) how productivity might be improved in the enterprise or
- 10 enterprises concerned;
- 11 (f) the extent to which the conduct of the bargaining
- 12 representatives for the proposed enterprise agreement
- 13 concerned was reasonable during bargaining for the
- 14 agreement;
- 15 (g) the extent to which the bargaining representatives for the
- 16 proposed enterprise agreement concerned have complied
- 17 with the good faith bargaining requirements;
- 18 (h) incentives to continue to bargain at a later time.

Section 276

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

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276 When a workplace determination operates etc.

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

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

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

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(b) the day on which section 278 first has the effect that there is no employee to whom the agreement applies.

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Note: Section 278 deals with when a workplace determination ceases to apply to an employee.

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

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19

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

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Employers, employees and employee organisations

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

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

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27

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

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- 1 (a) a provision of this Act;
2 (b) an FWA order made under a provision of this Act;
3 (c) an order of a court.
- 4 (3) Despite subsections (1) and (2), a workplace determination does
5 not **cover** an employer, employee or employee organisation if any
6 of the following provides, or has the effect, that the determination
7 does not cover the employer, employee or organisation:
8 (a) another provision of this Act;
9 (b) an FWA order made under another provision of this Act;
10 (c) an order of a court.

11 *Workplace determinations that have ceased to operate*

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

15 *Workplace determinations cover employees in relation to*
16 *particular employment*

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

20 **278 Interaction of a workplace determination with enterprise**
21 **agreements etc.**

22 *Interaction with an enterprise agreement*

- 23 (1) If:
24 (a) a workplace determination applies to an employee in relation
25 to particular employment; and
26 (b) an enterprise agreement that covers the employee in relation
27 to the same employment comes into operation;
28 the determination ceases to apply to the employee in relation to
29 that employment, and can never so apply again.

Section 279

Interaction with another workplace determination

(2) If:

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

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

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

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

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

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

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

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

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

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

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

(f) the provisions of Subdivisions A and B of Division 7 of Part 2-4 (which deal with the variation of enterprise agreements).

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

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2 **Division 7—Other matters**

3 **280 Contravening a workplace determination**

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

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

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

9 **281 Applications by bargaining representatives**

10 *Application of this section*

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

15 *Persons who may make applications*

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

- 18 (a) in the case of a proposed enterprise agreement in relation to
19 which a single interest employer authorisation is in
20 operation—the person (if any) specified in the authorisation
21 as the person who may make applications under this Act; or
22 (b) in any case—a bargaining representative of an employer that
23 would have been covered by the agreement, on behalf of one
24 or more other such bargaining representatives, if those other
25 bargaining representatives have agreed to the application
26 being made on their behalf.

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2 **Part 2-6—Minimum wages**

3 **Division 1—Introduction**

4 **282 Guide to this Part**

5

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

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

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

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

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

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Section 283

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- (a) in setting or varying modern award minimum wages, FWA must take the national minimum wage into account (see subsection 135(2) (in Part 2-3) and subsection 285(3) (in this Part));
- (b) for an employee who is not covered by a modern award and to whom an enterprise agreement applies, the employee's base rate of pay under the agreement must not be less than the relevant national minimum wage or special national minimum wage (see subsection 206(3) (in Part 2-4)).

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

283 Meanings of *employee* and *employer*

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

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2 **Division 2—Overarching provisions**

3 **284 The minimum wages objective**

4 *What is the minimum wages objective?*

- 5 (1) FWA must establish and maintain a safety net of fair minimum
6 wages, taking into account:
- 7 (a) the performance and competitiveness of the national
8 economy, including productivity, business competitiveness
9 and viability, inflation and employment growth; and
 - 10 (b) promoting social inclusion through increased workforce
11 participation; and
 - 12 (c) relative living standards and the needs of the low paid; and
 - 13 (d) the principle of equal remuneration for work of equal or
14 comparable value; and
 - 15 (e) providing a comprehensive range of fair minimum wages to
16 junior employees, employees to whom training arrangements
17 apply and employees with a disability.

18 This is the *minimum wages objective*.

19 *When does the minimum wages objective apply?*

- 20 (2) The minimum wages objective applies to the performance or
21 exercise of:
- 22 (a) FWA's functions or powers under this Part; and
 - 23 (b) FWA's functions or powers under Part 2-3, so far as they
24 relate to setting, varying or revoking modern award minimum
25 wages.

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

30 *Meaning of modern award minimum wages*

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

Section 284

- 1 (a) wage rates for junior employees, employees to whom training
2 arrangements apply and employees with a disability; and
3 (b) casual loadings; and
4 (c) piece rates.

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

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

Section 285

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2 **Division 3—Annual wage reviews**

3 **Subdivision A—Main provisions**

4 **285 Annual wage reviews to be conducted**

5 (1) FWA must conduct and complete an *annual wage review* in each
6 financial year.

7 Note 1: FWA must be constituted by the Minimum Wage Panel to conduct
8 annual wage reviews, and to make determinations and orders in those
9 reviews (see section 617).

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

12 (2) In an annual wage review, FWA:

13 (a) must review:

14 (i) modern award minimum wages; and

15 (ii) the national minimum wage order; and

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

19 (c) must make a national minimum wage order.

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

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

25 **286 When annual wage review determinations varying modern**
26 **awards come into operation**

27 *Determinations generally come into operation on 1 July*

28 (1) A determination (a *variation determination*) varying one or more
29 modern awards to set, vary or revoke modern award minimum
30 wages that is made in an annual wage review comes into operation
31 on 1 July in the next financial year.

Section 287

Later operation of determinations in exceptional circumstances

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

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

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

12 *Effect of determinations cannot be deferred*

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

16 *Determinations take effect from first full pay period*

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

21 **287 When national minimum wage orders come into operation**

22 *Orders come into operation on 1 July*

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

25 *Effect of orders cannot be deferred*

- 26 (2) FWA cannot provide for the effect of the order to be deferred to a
27 day that is later than that 1 July.

Chapter 2 Terms and conditions of employment

Part 2-6 Minimum wages

Division 3 Annual wage reviews

Section 288

1 *Orders take effect from first full pay period*

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

5 **Subdivision B—Provisions about conduct of annual wage**
6 **reviews**

7 **288 General**

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

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

- 13 (a) section 582 (which deals with the President's power to give
14 directions);
- 15 (b) section 590 (which deals with FWA's discretion to inform itself
16 as it considers appropriate, including by commissioning
17 research);
- 18 (c) section 596 (which deals with being represented in a matter
19 before FWA);
- 20 (d) section 601 (which deals with writing and publication
21 requirements).

22 **289 Everyone to have a reasonable opportunity to make and**
23 **comment on submissions**

- 24 (1) FWA must, in relation to each annual wage review, ensure that all
25 persons and bodies have a reasonable opportunity to make written
26 submissions to FWA for consideration in the review.
- 27 (2) FWA must:
- 28 (a) publish all submissions made to FWA for consideration in
29 the review; and
- 30 (b) ensure that all persons and bodies have a reasonable
31 opportunity to make comments to FWA on those submissions
32 for consideration in the review.

Section 290

- 1 (3) The publication may be on FWA’s website or by any other means
2 that FWA considers appropriate.

3 **290 President may direct investigations and reports**

- 4 (1) The President may give a direction under section 582 requiring that
5 a matter be investigated, and that a report about the matter be
6 prepared, for consideration in an annual wage review.
- 7 (2) The direction:
8 (a) may be given to:
9 (i) the Minimum Wage Panel; or
10 (ii) a Minimum Wage Panel Member; or
11 (iii) a Full Bench that includes one or more Minimum Wage
12 Panel Members; and
13 (b) must (unless the direction is given to the Minimum Wage
14 Panel) require the report be given to the Minimum Wage
15 Panel.

16 **291 Research must be published**

- 17 (1) If FWA undertakes or commissions research for the purposes of an
18 annual wage review, FWA must publish the research so that
19 submissions can be made addressing issues covered by the
20 research.
- 21 (2) The publication may be on FWA’s website or by any other means
22 that FWA considers appropriate.

23 **292 Varied wage rates must be published by 1 July**

- 24 (1) If FWA makes one or more determinations varying modern award
25 minimum wages in an annual wage review, FWA must publish the
26 rates of those wages as so varied before 1 July in the next financial
27 year.
- 28 Note: FWA must also publish the modern award as varied (see section 168).
- 29 (2) The publication may be on FWA’s website or by any other means
30 that FWA considers appropriate.

Section 293

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Division 4—National minimum wage orders

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293 Contravening a national minimum wage order

4

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

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

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294 Content of national minimum wage order—main provisions

8

Setting minimum wages and the casual loading

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(1) A national minimum wage order:

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(a) must set the national minimum wage; and

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

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(i) junior employees;

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(ii) employees to whom training arrangements apply;

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(iii) employees with a disability; and

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

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

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Requiring employers to pay minimum wages and the casual loading

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(2) The order:

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

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

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

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Section 295

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

3 *What employees does the national minimum wage apply to?*

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

9 *What employees does a special national minimum wage apply to?*

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

20 **295 Content of national minimum wage order—other matters**

21 *Expressing minimum wages and the casual loading*

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

28 Note: The means by which the national minimum wage or a special national
29 minimum wage may be expressed include:

- 30 (a) a monetary amount per hour; or
31 (b) a monetary amount for a specified number of hours; or
32 (c) a method for calculating a monetary amount per hour.

Section 296

1 *Terms about how the order applies*

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

4 **296 Variation of national minimum wage order to remove ambiguity**
5 **or uncertainty or correct error**

6 *Permitted variations*

- 7 (1) FWA may make a determination varying a national minimum
8 wage order to remove an ambiguity or uncertainty or to correct an
9 error.

10 Note: FWA must be constituted by the Minimum Wage Panel to vary a
11 national minimum wage order (see section 617).

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

15 *No other variation or revocation permitted*

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

19 **297 When determinations varying national minimum wage orders**
20 **come into operation**

21 *Determinations come into operation on specified day*

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

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

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

1 *Determinations take effect from first full pay period*

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

5 **298 Special rule about retrospective variations of national minimum**
6 **wage orders**

7 *Application of this section*

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

12 *No creation of liability to pay pecuniary penalty for past conduct*

- 13 (2) If:
14 (a) a person engaged in conduct before the determination was
15 made; and
16 (b) but for the retrospective effect of the determination, the
17 conduct would not have contravened a term of the national
18 minimum wage order or an enterprise agreement;
19 a court must not order the person to pay a pecuniary penalty under
20 Division 2 of Part 4-1 in relation to the conduct, on the grounds
21 that the conduct contravened a term of the national minimum wage
22 order or enterprise agreement.

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

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

28 **299 When a national minimum wage order is in operation**

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

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

Chapter 2 Terms and conditions of employment

Part 2-7 Equal remuneration

Division 1 Introduction

Section 300

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Part 2-7—Equal remuneration

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Division 1—Introduction

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300 Guide to this Part

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

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301 Meanings of *employee* and *employer*

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

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2 **Division 2—Equal remuneration orders**

3 **302 FWA may make an order requiring equal remuneration**

4 *Power to make an equal remuneration order*

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

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

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

14 *Who may apply for an equal remuneration order*

- 15 (3) FWA may make the equal remuneration order only on application
16 by any of the following:
17 (a) an employee to whom the order will apply;
18 (b) an employee organisation that is entitled to represent the
19 industrial interests of an employee to whom the order will
20 apply;
21 (c) the Sex Discrimination Commissioner.

22 *FWA must take into account orders and determinations of the*
23 *Minimum Wage Panel*

- 24 (4) In deciding whether to make an equal remuneration order, FWA
25 must take into account:
26 (a) orders and determinations made by the Minimum Wage
27 Panel in annual wage reviews; and
28 (b) the reasons for those orders and determinations.

Section 303

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Restriction on power to make an equal remuneration order

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- (5) However, FWA may make the equal remuneration order only if it is satisfied that, for the employees to whom the order will apply, there is not equal remuneration for work of equal or comparable value.

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

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

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

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304 Equal remuneration order may implement equal remuneration in stages

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

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305 Contravening an equal remuneration order

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

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

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306 Inconsistency with modern awards, enterprise agreements and orders of FWA

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A term of a modern award, an enterprise agreement or an FWA order has no effect to the extent that it is inconsistent with a term of an equal remuneration order.

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Part 2-8—Transfer of business

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Division 1—Introduction

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307 Guide to this Part

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This Part provides for the transfer of enterprise agreements, certain modern awards and certain other instruments if there is a transfer of business from one national system employer to another national system employer.

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

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

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

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308 Meanings of *employee* and *employer*

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

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309 Object of this Part

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

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

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Chapter 2 Terms and conditions of employment

Part 2-8 Transfer of business

Division 1 Introduction

Section 309

- 1 (b) the interests of employers in running their enterprises
2 efficiently;
3 if there is a transfer of business from one employer to another
4 employer.

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2 **Division 2—Transfer of instruments**

3 **310 Application of this Division**

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

8 **311 When does a transfer of business occur**

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

- 11 (1) There is a **transfer of business** from an employer (the **old**
12 **employer**) to another employer (the **new employer**) if the following
13 requirements are satisfied:
- 14 (a) the employment of an employee of the old employer has
15 terminated;
 - 16 (b) within 3 months after the termination, the employee becomes
17 employed by the new employer;
 - 18 (c) the work (the **transferring work**) the employee performs for
19 the new employer is the same, or substantially the same, as
20 the work the employee performed for the old employer;
 - 21 (d) there is a connection between the old employer and the new
22 employer as described in any of subsections (3) to (6).

23 *Meaning of transferring employee*

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

27 *Transfer of assets from old employer to new employer*

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

Section 311

- 1 (a) the old employer or an associated entity of the old employer;
2 and
3 (b) the new employer or an associated entity of the new
4 employer;
5 the new employer, or the associated entity of the new employer,
6 owns or has the beneficial use of some or all of the assets (whether
7 tangible or intangible):
8 (c) that the old employer, or the associated entity of the old
9 employer, owned or had the beneficial use of; and
10 (d) that relate to, or are used in connection with, the transferring
11 work.

12 *Old employer outsources work to new employer*

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

19 *New employer ceases to outsource work to old employer*

- 20 (5) There is a connection between the old employer and the new
21 employer if:
22 (a) the transferring work had been performed by one or more
23 transferring employees, as employees of the old employer,
24 because the new employer, or an associated entity of the new
25 employer, had outsourced the transferring work to the old
26 employer or an associated entity of the old employer; and
27 (b) the transferring work is performed by those transferring
28 employees, as employees of the new employer, because the
29 new employer, or the associated entity of the new employer,
30 has ceased to outsource the work to the old employer or the
31 associated entity of the old employer.

32 *New employer is associated entity of old employer*

- 33 (6) There is a connection between the old employer and the new
34 employer if the new employer is an associated entity of the old

1 employer when the transferring employee becomes employed by
2 the new employer.

3 **312 Instruments that may transfer**

4 *Meaning of transferable instrument*

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

9 *Meaning of named employer award*

- 10 (2) A *named employer award* is a modern award that is expressed to
11 cover one or more named employers.

12 **313 Transferring employees and new employer covered by** 13 **transferable instrument**

- 14 (1) If a transferable instrument covered the old employer and a
15 transferring employee immediately before the termination of the
16 transferring employee's employment with the old employer, then:
- 17 (a) the transferable instrument covers the new employer and the
18 transferring employee in relation to the transferring work
19 after the time (the *transfer time*) the transferring employee
20 becomes employed by the new employer; and
 - 21 (b) while the transferable instrument covers the new employer
22 and the transferring employee in relation to the transferring
23 work, no other enterprise agreement or named employer
24 award that covers the new employer at the transfer time
25 covers the transferring employee in relation to that work.
- 26 (2) To avoid doubt, a transferable instrument that covers the new
27 employer and a transferring employee under paragraph (1)(a)
28 includes any individual flexibility arrangement that had effect as a
29 term of the transferable instrument immediately before the
30 termination of the transferring employee's employment with the
31 old employer.

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- 1 (3) This section has effect subject to any FWA order under subsection
2 318(1).

3 **314 New non-transferring employees of new employer may be**
4 **covered by transferable instrument**

- 5 (1) If:
6 (a) a transferable instrument covers the new employer because of
7 paragraph 313(1)(a); and
8 (b) after the transferable instrument starts to cover the new
9 employer, the new employer employs a non-transferring
10 employee; and
11 (c) the non-transferring employee performs the transferring
12 work; and
13 (d) at the time the non-transferring employee is employed, no
14 other enterprise agreement or modern award covers the new
15 employer and the non-transferring employee in relation to
16 that work;
17 then the transferable instrument covers the new employer and the
18 non-transferring employee in relation to that work.
- 19 (2) A *non-transferring employee* of a new employer, in relation to a
20 transfer of business, is an employee of the new employer who is
21 not a transferring employee.
- 22 (3) This section has effect subject to any FWA order under subsection
23 319(1).

24 **315 Organisations covered by transferable instrument**

25 *Employer organisation covered by named employer award*

- 26 (1) If:
27 (a) a named employer award covers the new employer because
28 of paragraph 313(1)(a); and
29 (b) the named employer award covered an employer organisation
30 in relation to the old employer immediately before the
31 termination of a transferring employee's employment with
32 the old employer;

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

3 *Employee organisation covered by named employer award*

4 (2) If:

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

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

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

13 (c) the transferring employee; and

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

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

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

18 *Employee organisation covered by enterprise agreement*

19 (3) To avoid doubt, if:

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

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

26 then the enterprise agreement covers the employee organisation.

27 **316 Transferring employees who are high income employees**

28 (1) This section applies if:

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

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

Section 316

- 1 (c) some of the guaranteed period occurs after the time (the
2 *transfer time*) the transferring employee becomes employed
3 by the new employer; and
4 (d) an enterprise agreement does not apply to the transferring
5 employee in relation to the transferring work at the transfer
6 time.
- 7 (2) The guarantee of annual earnings has effect after the transfer time
8 (except as provided in this section) as if it had been given to the
9 transferring employee by the new employer.
- 10 (3) The new employer is not required to comply with the guarantee of
11 annual earnings in relation to any part of the guaranteed period
12 before the transfer time.
- 13 (4) The new employer is not required to comply with the guarantee of
14 annual earnings to the extent that it requires the new employer to
15 pay an amount of earnings to the transferring employee, in relation
16 to the part of the guaranteed period after the transfer time, at a rate
17 that is more than the annual rate of the guarantee of annual
18 earnings.
- 19 (5) If:
20 (a) the transferring employee is entitled to non-monetary benefits
21 under the guarantee of annual earnings after the transfer time;
22 and
23 (b) it is not practicable for the new employer to provide those
24 benefits to the transferring employee;
25 then the guarantee of annual earnings is taken to be varied so that,
26 instead of the entitlement to those benefits, the transferring
27 employee is entitled to an amount of money that is equivalent to
28 the agreed money value of those benefits.
- 29 (6) This section does not affect the rights and obligations of the old
30 employer that arose before the transfer time in relation to the
31 guarantee of annual earnings.

1

2 **Division 3—Powers of FWA**

3 **317 FWA may make orders in relation to a transfer of business**

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

7 **318 Orders relating to instruments covering new employer and**
8 **transferring employees**

9 *Orders that FWA may make*

10 (1) FWA may make the following orders:

- 11 (a) an order that a transferable instrument that would, or would
12 be likely to, cover the new employer and a transferring
13 employee because of paragraph 313(1)(a) does not, or will
14 not, cover the new employer and the transferring employee;
- 15 (b) an order that an enterprise agreement or a named employer
16 award that covers the new employer covers, or will cover, the
17 transferring employee.

18 *Who may apply for an order*

19 (2) FWA may make the order only on application by any of the
20 following:

- 21 (a) the new employer or a person who is likely to be the new
22 employer;
- 23 (b) a transferring employee, or an employee who is likely to be a
24 transferring employee;
- 25 (c) if the application relates to an enterprise agreement—an
26 employee organisation that is, or is likely to be, covered by
27 the agreement;
- 28 (d) if the application relates to a named employer award—an
29 employee organisation that is entitled to represent the
30 industrial interests of an employee referred to in
31 paragraph (b).

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1 *Matters that FWA must take into account*

- 2 (3) In deciding whether to make the order, FWA must take into
3 account the following:
- 4 (a) the views of:
 - 5 (i) the new employer or a person who is likely to be the
6 new employer; and
 - 7 (ii) the employees who would be affected by the order;
 - 8 (b) whether any employees would be disadvantaged by the order
9 in relation to their terms and conditions of employment;
 - 10 (c) if the order relates to an enterprise agreement—the nominal
11 expiry date of the agreement;
 - 12 (d) the public interest.

13 *Restriction on when order may come into operation*

- 14 (4) The order must not come into operation in relation to a particular
15 transferring employee before the later of the following:
- 16 (a) the time when the transferring employee becomes employed
17 by the new employer;
 - 18 (b) the day on which the order is made.

19 **319 Orders relating to instruments covering new employer and**
20 **non-transferring employees**

21 *Orders that FWA may make*

- 22 (1) FWA may make the following orders:
- 23 (a) an order that a transferable instrument that would, or would
24 be likely to, cover the new employer and a non-transferring
25 employee because of subsection 314(1) does not, or will not,
26 cover the non-transferring employee;
 - 27 (b) an order that a transferable instrument that covers, or is likely
28 to cover, the new employer, because of a provision of this
29 Part, covers, or will cover, a non-transferring employee who
30 performs, or is likely to perform, the transferring work for the
31 new employer;
 - 32 (c) an order that an enterprise agreement or a modern award that
33 covers the new employer does not, or will not, cover a

Section 319

1 non-transferring employee who performs, or is likely to
2 perform, the transferring work for the new employer.

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

9 *Who may apply for an order*

10 (2) FWA may make the order only on application by any of the
11 following:

- 12 (a) the new employer or a person who is likely to be the new
13 employer;
- 14 (b) a non-transferring employee who performs, or is likely to
15 perform, the transferring work for the new employer;
- 16 (c) if the application relates to an enterprise agreement—an
17 employee organisation that is, or is likely to be, covered by
18 the agreement;
- 19 (d) if the application relates to a named employer award—an
20 employee organisation that is entitled to represent the
21 industrial interests of an employee referred to in
22 paragraph (b).

23 *Matters that FWA must take into account*

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

- 26 (a) the views of:
- 27 (i) the new employer or a person who is likely to be the
28 new employer; and
- 29 (ii) the employees who would be affected by the order;
- 30 (b) whether any employees would be disadvantaged by the order
31 in relation to their terms and conditions of employment;
- 32 (c) if the order relates to an enterprise agreement—the nominal
33 expiry date of the agreement;
- 34 (d) the public interest.

Section 320

1 *Restriction on when order may come into operation*

- 2 (4) The order must not come into operation in relation to a particular
3 non-transferring employee before the later of the following:
4 (a) the time when the non-transferring employee starts to
5 perform the transferring work for the new employer;
6 (b) the day on which the order is made.

7 **320 Variation of transferable instruments**

8 *Application of this section*

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

12 *Power to vary transferable instrument*

- 13 (2) FWA may vary the transferable instrument:
14 (a) to remove terms that FWA is satisfied are not, or will not be,
15 capable of meaningful operation because of the transfer of
16 business to the new employer; or
17 (b) to remove an ambiguity or uncertainty about how a term of
18 the instrument operates if:
19 (i) the ambiguity or uncertainty has arisen, or will arise,
20 because of the transfer of business to the new employer;
21 and
22 (ii) FWA is satisfied that the variation will remove the
23 ambiguity or uncertainty.

24 *Who may apply for a variation*

- 25 (3) FWA may make the variation only on application by:
26 (a) a person who is, or is likely to be, covered by the transferable
27 instrument; or
28 (b) if the application is to vary a named employer award—an
29 employee organisation that is entitled to represent the
30 industrial interests of an employee who is, or is likely to be,
31 covered by the named employer award.

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1

Matters that FWA must take into account

2

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

3

4

(a) the views of:

5

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

6

7

(ii) the employees who would be affected by the transferable instrument as varied;

8

9

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

10

11

12

(c) if the transferable instrument is an enterprise agreement—the nominal expiry date of the agreement;

13

14

(d) the public interest.

15

Restriction on when variation may come into operation

16

(5) A variation of a transferable instrument under subsection (2) must not come into operation before the later of the following:

17

18

(a) the time when the transferable instrument starts to cover the new employer;

19

20

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

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1

2 **Part 2-9—Other terms and condition of**
3 **employment**

4 **Division 1—Introduction**

5 **321 Guide to this Part**

6

This Part deals with other terms and conditions of employment.

7

Division 2 is about the frequency and methods of payment of amounts payable to national system employees in relation to the performance of work, and the circumstances in which a national system employer may make deductions from such amounts.

8

9

10

11

Division 3 is about the guarantee of annual earnings that may be given to a national system employee whose earnings exceed the high income threshold. Modern awards do not apply to such an employee.

12

13

14

15 **322 Meanings of *employee* and *employer***

16

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

17

1

2 **Division 2—Payment of wages**

3 **323 Method and frequency of payment**

- 4 (1) An employer must pay an employee amounts payable to the
5 employee in relation to the performance of work:
6 (a) in full (except as provided by section 324); and
7 (b) in money by one, or a combination, of the methods referred
8 to in subsection (2); and
9 (c) at least monthly.

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

11 Note 2: Amounts referred to in this subsection include the following if they
12 become payable during a relevant period:

- 13 (a) incentive-based payments and bonuses;
14 (b) loadings;
15 (c) monetary allowances;
16 (d) overtime or penalty rates;
17 (e) leave payments.

- 18 (2) The methods are as follows:
19 (a) cash;
20 (b) cheque, money order, postal order or similar order, payable
21 to the employee;
22 (c) the use of an electronic funds transfer system to credit an
23 account held by the employee;
24 (d) a method authorised under a modern award or an enterprise
25 agreement.

- 26 (3) Despite paragraph (1)(b), if a modern award or an enterprise
27 agreement specifies a particular method by which the money must
28 be paid, then the employer must pay the money by that method.

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

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1 **324 Permitted deductions**

2 An employer may deduct an amount from an amount payable to an
3 employee in accordance with subsection 323(1) if:

- 4 (a) the deduction is authorised in writing by the employee and is
5 principally for the employee's benefit; or
6 (b) the deduction is authorised by the employee in accordance
7 with an enterprise agreement; or
8 (c) the deduction is authorised by or under a modern award or an
9 FWA order; or
10 (d) the deduction is authorised by or under a law of the
11 Commonwealth, a State or a Territory, or an order of a court.

12 Note 1: A deduction in accordance with a salary sacrifice or other
13 arrangement, under which an employee chooses to:

- 14 (a) forgo an amount payable to the employee in relation to the
15 performance of work; but
16 (b) receive some other form of benefit or remuneration;

17 will be permitted if it is made in accordance with this section and the
18 other provisions of this Division.

19 Note 2: Certain terms of modern awards, enterprise agreements and contracts
20 of employment relating to deductions have no effect (see section 326).
21 A deduction made in accordance with such a term will not be
22 authorised for the purposes of this section.

23 **325 Unreasonable requirements to spend amount**

24 (1) An employer must not directly or indirectly require an employee to
25 spend any part of an amount payable to the employee in relation to
26 the performance of work if the requirement is unreasonable in the
27 circumstances.

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

29 (2) The regulations may prescribe circumstances in which a
30 requirement referred to in subsection (1) is or is not reasonable.

1 **326 Certain terms have no effect**

2 *Unreasonable payments and deductions for benefit of employer*

- 3 (1) A term of a modern award, an enterprise agreement or a contract of
4 employment has no effect to the extent that the term:
5 (a) permits, or has the effect of permitting, an employer to
6 deduct an amount from an amount that is payable to the
7 employee in relation to the performance of work; or
8 (b) requires, or has the effect of requiring, an employee to make
9 a payment to an employer or another person;
10 if the deduction or payment is:
11 (c) directly or indirectly for the benefit of the employer; and
12 (d) unreasonable in the circumstances.
- 13 (2) The regulations may prescribe circumstances in which a deduction
14 or payment referred to in subsection (1) is or is not reasonable.

15 *Unreasonable requirements to spend an amount*

- 16 (3) A term of a modern award, an enterprise agreement or a contract of
17 employment has no effect to the extent that the term:
18 (a) permits, or has the effect of permitting, an employer to make
19 a requirement that would contravene subsection 325(1); or
20 (b) directly or indirectly requires an employee to spend an
21 amount, if the requirement would contravene subsection
22 325(1) if it had been made by an employer.

23 **327 Things given or provided, and amounts required to be spent, in**
24 **contravention of this Division**

25 In proceedings for recovery of an amount payable to an employee
26 in relation to the performance of work:

- 27 (a) anything given or provided by the employer contrary to
28 paragraph 323(1)(b) and subsection 323(3) is taken never to
29 have been given or provided to the employee; and
30 (b) any amount that the employee has been required to spend
31 contrary to subsection 325(1), or in accordance with a term to

Chapter 2 Terms and conditions of employment
Part 2-9 Other terms and condition of employment
Division 2 Payment of wages

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1 which subsection 326(3) applies, is taken never to have been
2 paid to the employee.

1

2 **Division 3—Guarantee of annual earnings**

3 **328 Employer obligations in relation to guarantee of annual**
4 **earnings**

5 *Employer must comply with guarantee*

6 (1) An employer that has given a guarantee of annual earnings to an
7 employee must (subject to any reductions arising from
8 circumstances in which the employer is required or entitled to
9 reduce the employee's earnings) comply with the guarantee during
10 any period during which the employee:

- 11 (a) is a high income employee of the employer; and
12 (b) is covered by a modern award that is in operation.

13 Note 1: Examples of circumstances in which the employer is required or
14 entitled to reduce the employee's earnings are unpaid leave or
15 absence, and periods of industrial action (see Division 9 of Part 3-3).

16 Note 2: This subsection is a civil remedy provision (see Part 4-1).

17 *Employer must comply with guarantee for period before*
18 *termination*

19 (2) If:

- 20 (a) the employment of a high income employee is terminated
21 before the end of the guaranteed period; and
22 (b) either or both of the following apply:
23 (i) the employer terminates the employment;
24 (ii) the employee becomes a transferring employee in
25 relation to a transfer of business from the employer to a
26 new employer, and the guarantee of annual earnings has
27 effect under subsection 316(2) as if it had been given to
28 the employee by the new employer; and
29 (c) the employee is covered by a modern award that is in
30 operation at the time of the termination;

31 the employer must pay earnings to the employee in relation to the
32 part of the guaranteed period before the termination at the annual
33 rate of the guarantee of annual earnings.

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

2 *Employer must give notice of consequences*

3 (3) Before or at the time of giving a guarantee of annual earnings to an
4 employee covered by a modern award that is in operation, an
5 employer must notify the employee in writing that a modern award
6 will not apply to the employee during any period during which the
7 annual rate of the guarantee of annual earnings exceeds the high
8 income threshold.

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

10 **329 High income employee**

11 (1) A full-time employee is a *high income employee* of an employer at
12 a time if:

- 13 (a) the employee has a guarantee of annual earnings for the
14 guaranteed period; and
15 (b) the time occurs during the period; and
16 (c) the annual rate of the guarantee of annual earnings exceeds
17 the high income threshold at that time.

18 (2) An employee other than a full-time employee is a *high-income*
19 *employee* of an employer at a time if:

- 20 (a) the employee has a guarantee of annual earnings for the
21 guaranteed period; and
22 (b) the time occurs during the period; and
23 (c) the annual rate of the guarantee of annual earnings would
24 have exceeded the high income threshold at that time if the
25 employee were employed on a full-time basis at the same rate
26 of earnings.

27 (3) To avoid doubt, the employee does not have a guarantee of annual
28 earnings for the guaranteed period if the employer revokes the
29 guarantee of annual earnings with the employee's agreement.

30 **330 Guarantee of annual earnings and annual rate of guarantee**

31 (1) An undertaking given by an employer to an employee is a
32 *guarantee of annual earnings* if:

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- 1 (a) the employee is covered by a modern award that is in
2 operation; and
3 (b) the undertaking is an undertaking in writing to pay the
4 employee an amount of earnings in relation to the
5 performance of work during a period of 12 months or more;
6 and
7 (c) the employee agrees to accept the undertaking, and agrees
8 with the amount of the earnings; and
9 (d) the undertaking and the employee's agreement are given
10 before the start of the period, and within 14 days after:
11 (i) the day the employee is employed; or
12 (ii) a day on which the employer and employee agree to
13 vary the terms and conditions of the employee's
14 employment; and
15 (e) an enterprise agreement does not apply to the employee's
16 employment at the start of the period.
- 17 (2) However, if:
18 (a) an employee is employed for a period shorter than 12
19 months; or
20 (b) an employee will perform duties of a particular kind for a
21 period shorter than 12 months;
22 the undertaking may be given for that shorter period.
- 23 (3) The *annual rate* of the guarantee of annual earnings is the annual
24 rate of the earnings covered by the undertaking.

25 **331 Guaranteed period**

- 26 The *guaranteed period* for a guarantee of annual earnings is the
27 period that:
28 (a) starts at the start of the period of the undertaking that is the
29 guarantee of annual earnings; and
30 (b) ends at the earliest of the following:
31 (i) the end of that period;
32 (ii) an enterprise agreement starting to apply to the
33 employment of the employee;
-

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- 1 (iii) the employer revoking the guarantee of annual earnings
2 with the employee's agreement.

3 **332 Earnings**

- 4 (1) An employee's *earnings* include:
5 (a) the employee's wages; and
6 (b) amounts applied or dealt with in any way on the employee's
7 behalf or as the employee directs; and
8 (c) the agreed money value of non-monetary benefits; and
9 (d) amounts or benefits prescribed by the regulations.

- 10 (2) However, an employee's *earnings* do not include the following:
11 (a) payments the amount of which cannot be determined in
12 advance;
13 (b) reimbursements;
14 (c) contributions to a superannuation fund to the extent that they
15 are contributions to which subsection (4) applies;
16 (d) amounts prescribed by the regulations.

17 Note: Some examples of payments covered by paragraph (a) are
18 commissions, incentive-based payments and bonuses, and overtime
19 (unless the overtime is guaranteed).

- 20 (3) *Non-monetary benefits* are benefits other than an entitlement to a
21 payment of money:
22 (a) to which the employee is entitled in return for the
23 performance of work; and
24 (b) for which a reasonable money value has been agreed by the
25 employee and the employer;
26 but does not include a benefit prescribed by the regulations.

- 27 (4) This subsection applies to contributions that the employer makes to
28 a superannuation fund to the extent that one or more of the
29 following applies:
30 (a) the employer would have been liable to pay superannuation
31 guarantee charge under the *Superannuation Guarantee*
32 *Charge Act 1992* in relation to the person if the amounts had
33 not been so contributed;

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- 1 (b) the employer is required to contribute to the fund for the
2 employee's benefit in relation to a defined benefit interest
3 (within the meaning of section 292-175 of the *Income Tax*
4 *Assessment Act 1997*) of the employee;
- 5 (c) the employer is required to contribute to the fund for the
6 employee's benefit under a law of the Commonwealth, a
7 State or a Territory.

8 **333 High income threshold**

9 The *high income threshold* is the amount prescribed by, or worked
10 out in the manner prescribed by, the regulations.

1

2

Chapter 3—Rights and responsibilities of employees, employers, organisations etc.

3

4

5

Part 3-1—General protections

6

Division 1—Introduction

7

334 Guide to this Part

8

This Part provides general workplace protections.

9

Division 2 sets out the circumstances in which this Part applies.

10

11

Division 3 protects workplace rights, and the exercise of those rights.

12

13

Division 4 protects freedom of association and involvement in lawful industrial activities.

14

15

Division 5 provides other protections, including protection from discrimination.

16

Division 6 deals with sham arrangements.

17

18

Division 7 sets out rules for the purposes of establishing contraventions of this Part.

19

20

21

Division 8 deals with compliance. In most cases, a general protections dispute that involves dismissal will be dealt with by a court only if the dispute has not been resolved by FWA.

22

335 Meanings of *employee* and *employer*

23

In this Part, *employee* and *employer* have their ordinary meanings.

1 **336 Objects of this Part**

2 The objects of this Part are as follows:

- 3 (a) to protect workplace rights;
- 4 (b) to protect freedom of association by ensuring that persons
- 5 are:
- 6 (i) free to become, or not become, members of industrial
- 7 associations; and
- 8 (ii) free to be represented, or not represented, by industrial
- 9 associations; and
- 10 (iii) free to participate, or not participate, in lawful industrial
- 11 activities;
- 12 (c) to provide protection from workplace discrimination;
- 13 (d) to provide effective relief for persons who have been
- 14 discriminated against, victimised or otherwise adversely
- 15 affected as a result of contraventions of this Part.

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1

2 **Division 2—Application of this Part**

3 **337 Application of this Part**

4 This Part applies only to the extent provided by this Division.

5 **338 Action to which this Part applies**

- 6 (1) This Part applies to the following action:
- 7 (a) action taken by a constitutionally-covered entity;
- 8 (b) action that affects, is capable of affecting or is taken with
- 9 intent to affect the activities, functions, relationships or
- 10 business of a constitutionally-covered entity;
- 11 (c) action that consists of advising, encouraging or inciting, or
- 12 action taken with intent to coerce, a constitutionally-covered
- 13 entity:
- 14 (i) to take, or not take, particular action in relation to
- 15 another person; or
- 16 (ii) to threaten to take, or not take, particular action in
- 17 relation to another person;
- 18 (d) action taken in a Territory or a Commonwealth place;
- 19 (e) action taken by:
- 20 (i) a trade and commerce employer; or
- 21 (ii) a Territory employer;
- 22 that affects, is capable of affecting or is taken with intent to
- 23 affect an employee of the employer;
- 24 (f) action taken by an employee of:
- 25 (i) a trade and commerce employer; or
- 26 (ii) a Territory employer;
- 27 that affects, is capable of affecting or is taken with intent to
- 28 affect the employee's employer.
- 29 (2) Each of the following is a *constitutionally-covered entity*:
- 30 (a) a constitutional corporation;
- 31 (b) the Commonwealth;
- 32 (c) a Commonwealth authority;

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- 1 (d) a body corporate incorporated in a Territory;
2 (e) an organisation.

3 (3) A *trade and commerce employer* is a national system employer
4 within the meaning of paragraph 14(d).

5 (4) A *Territory employer* is a national system employer within the
6 meaning of paragraph 14(f).

7 **339 Additional effect of this Part**

8 In addition to the effect provided by section 338, this Part also has
9 the effect it would have if any one or more of the following
10 applied:

- 11 (a) a reference to an employer in one or more provisions of this
12 Part were a reference to a national system employer;
- 13 (b) a reference to an employee in one or more provisions of this
14 Part were a reference to a national system employee;
- 15 (c) a reference to an industrial association in one or more
16 provisions of this Part were a reference to an organisation, or
17 another association of employees or employers, a purpose of
18 which is the protection and promotion of the interests of
19 national system employees or national system employers in
20 matters concerning employment;
- 21 (d) a reference to an officer of an industrial association in one or
22 more provisions of this Part were a reference to an officer of
23 an organisation;
- 24 (e) a reference to a person, another person or a third person in
25 one or more provisions of this Part were a reference to a
26 constitutionally-covered entity;
- 27 (f) a reference to a workplace law in one or more provisions of
28 this Part were a reference to a workplace law of the
29 Commonwealth;
- 30 (g) a reference to a workplace instrument in one or more
31 provisions of this Part were a reference to a workplace
32 instrument made under, or recognised by, a law of the
33 Commonwealth;
- 34 (h) a reference to an industrial body in one or more provisions of
35 this Part were a reference to an industrial body performing

Chapter 3 Rights and responsibilities of employees, employers, organisations etc.

Part 3-1 General protections

Division 2 Application of this Part

Section 339

1 functions or exercising powers under a law of the
2 Commonwealth.

1

2 **Division 3—Workplace rights**

3 **340 Protection**

- 4 (1) A person must not take adverse action against another person:
5 (a) because the other person:
6 (i) has a workplace right; or
7 (ii) has, or has not, exercised a workplace right; or
8 (iii) proposes or proposes not to, or has at any time proposed
9 or proposed not to, exercise a workplace right; or
10 (b) to prevent the exercise of a workplace right by the other
11 person.

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

- 13 (2) A person must not take adverse action against another person (the
14 ***second person***) because a third person has exercised, or proposes
15 or has at any time proposed to exercise, a workplace right for the
16 second person's benefit, or for the benefit of a class of persons to
17 which the second person belongs.

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

19 **341 Meaning of *workplace right***

20 *Meaning of workplace right*

- 21 (1) A person has a ***workplace right*** if the person:
22 (a) is entitled to the benefit of, or has a role or responsibility
23 under, a workplace law, workplace instrument or order made
24 by an industrial body; or
25 (b) is able to initiate, or participate in, a process or proceedings
26 under a workplace law or workplace instrument; or
27 (c) is able to make a complaint or inquiry:
28 (i) to a person or body having the capacity under a
29 workplace law to seek compliance with that law or a
30 workplace instrument; or
31 (ii) if the person is an employee—in relation to his or her
32 employment.

Section 341

1 *Meaning of process or proceedings under a workplace law or*
2 *workplace instrument*

- 3 (2) Each of the following is a *process or proceedings under a*
4 *workplace law or workplace instrument*:
- 5 (a) a conference conducted or hearing held by FWA;
 - 6 (b) court proceedings under a workplace law or workplace
7 instrument;
 - 8 (c) protected industrial action;
 - 9 (d) a protected action ballot;
 - 10 (e) making, varying or terminating an enterprise agreement;
 - 11 (f) appointing, or terminating the appointment of, a bargaining
12 representative;
 - 13 (g) making or terminating an individual flexibility arrangement
14 under a modern award or enterprise agreement;
 - 15 (h) agreeing to cash out paid annual leave or paid
16 personal/carer's leave;
 - 17 (i) making a request under Division 4 of Part 2-2 (which deals
18 with requests for flexible working arrangements);
 - 19 (j) dispute settlement for which provision is made by, or under,
20 a workplace law or workplace instrument;
 - 21 (k) any other process or proceedings under a workplace law or
22 workplace instrument.

23 *Prospective employees taken to have workplace rights*

- 24 (3) A prospective employee is taken to have the workplace rights he or
25 she would have if he or she were employed in the prospective
26 employment by the prospective employer.

27 Note: Among other things, the effect of this subsection would be to prevent
28 a prospective employer making an offer of employment conditional on
29 entering an individual flexibility arrangement.

30 *Exceptions relating to prospective employees*

- 31 (4) Despite subsection (3), a prospective employer does not contravene
32 subsection 340(1) if the prospective employer makes an offer of
33 employment conditional on the prospective employee accepting a
34 guarantee of annual earnings.

1 (5) Despite paragraph (1)(a), a prospective employer does not
 2 contravene subsection 340(1) if the prospective employer refuses
 3 to employ a prospective employee because the prospective
 4 employee would be entitled to the benefit of Part 2-8 (which deals
 5 with transfer of business).

6 **342 Meaning of *adverse action***

7 (1) The following table sets out circumstances in which a person takes
 8 *adverse action* against another person.
 9

| Meaning of <i>adverse action</i> | | |
|---|--|--|
| Item | Column 1 <i>Adverse action is taken by ...</i> | Column 2 <i>if ...</i> |
| 1 | an employer against an employee | the employer: (a) dismisses the employee; or (b) injures the employee in his or her employment; or (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer. |
| 2 | a prospective employer against a prospective employee | the prospective employer: (a) refuses to employ the prospective employee; or (b) discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee. |
| 3 | a person (the <i>principal</i>) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor | the principal: (a) terminates the contract; or (b) injures the independent contractor in relation to the terms and conditions of the contract; or (c) alters the position of the independent contractor to the independent contractor's prejudice; or (d) refuses to make use of, or agree to make |

Section 342

| Meaning of <i>adverse action</i> | | |
|---|---|--|
| Item | Column 1 | Column 2 |
| | <i>Adverse action is taken by ...</i> | <i>if ...</i> |
| | | use of, services offered by the independent contractor; or (e) refuses to supply, or agree to supply, goods or services to the independent contractor. |
| 4 | a person (the <i>principal</i>) proposing to enter into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor | the principal: (a) refuses to engage the independent contractor; or (b) discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor; or (c) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (d) refuses to supply, or agree to supply, goods or services to the independent contractor. |
| 5 | an employee against his or her employer | the employee: (a) ceases work in the service of the employer; or (b) takes industrial action against the employer. |
| 6 | an independent contractor against a person who has entered into a contract for services with the independent contractor | the independent contractor: (a) ceases work under the contract; or (b) takes industrial action against the person. |
| 7 | an industrial association, or an officer or member of an industrial association, against a person | the industrial association, or the officer or member of the industrial association: (a) organises or takes industrial action against the person; or (b) takes action that has the effect, directly or indirectly, of prejudicing the person in the person's employment or prospective employment; or |

Meaning of *adverse action*

| Item | Column 1 | Column 2 |
|-------------|--|---|
| | <i>Adverse action is taken by ...</i> | <i>if ...</i> |
| | | (c) if the person is an independent contractor—takes action that has the effect, directly or indirectly, of prejudicing the independent contractor in relation to a contract for services; or |
| | | (d) if the person is a member of the association—imposes a penalty, forfeiture or disability of any kind on the member (other than in relation to money legally owed to the association by the member). |

1

2 (2) ***Adverse action*** includes:

- 3 (a) threatening to take action covered by the table in
4 subsection (1); and
5 (b) organising such action.

6 (3) ***Adverse action*** does not include action that is authorised by or
7 under:

- 8 (a) this Act or any other law of the Commonwealth; or
9 (b) a law of a State or Territory prescribed by the regulations.

10 (4) Without limiting subsection (3), ***adverse action*** does not include an
11 employer standing down an employee who is:

- 12 (a) engaged in protected industrial action; and
13 (b) employed under a contract of employment that provides for
14 the employer to stand down the employee in the
15 circumstances.

16 **343 Coercion**

17 (1) A person must not organise or take, or threaten to organise or take,
18 any action against another person with intent to coerce the other
19 person, or a third person, to:

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- 1 (a) exercise or not exercise, or propose to exercise or not
2 exercise, a workplace right; or
3 (b) exercise, or propose to exercise, a workplace right in a
4 particular way.

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

- 6 (2) Subsection (1) does not apply to protected industrial action.

7 **344 Undue influence or pressure**

8 An employer must not exert undue influence or undue pressure on
9 an employee in relation to a decision by the employee to:

- 10 (a) make, or not make, an agreement or arrangement under the
11 National Employment Standards; or
12 (b) make, or not make, an agreement or arrangement under a
13 term of a modern award or enterprise agreement that is
14 permitted to be included in the award or agreement under
15 subsection 55(2); or
16 (c) agree to, or terminate, an individual flexibility arrangement;
17 or
18 (d) accept a guarantee of annual earnings; or
19 (e) agree, or not agree, to a deduction from amounts payable to
20 the employee in relation to the performance of work.

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

22 **345 Misrepresentations**

- 23 (1) A person must not knowingly or recklessly make a false or
24 misleading representation about:
25 (a) the workplace rights of another person; or
26 (b) the exercise, or the effect of the exercise, of a workplace right
27 by another person.

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

- 29 (2) Subsection (1) does not apply if the person to whom the
30 representation is made would not be expected to rely on it.

1

2 **Division 4—Industrial activities**

3 **346 Protection**

4 A person must not take adverse action against another person
5 because the other person:

- 6 (a) is or is not, or was or was not, an officer or member of an
7 industrial association; or
8 (b) engages, or has at any time engaged or proposed to engage,
9 in industrial activity within the meaning of paragraph 347(a)
10 or (b); or
11 (c) does not engage, or has at any time not engaged or proposed
12 to not engage, in industrial activity within the meaning of
13 paragraphs 347(c) to (g).

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

15 **347 Meaning of *engages in industrial activity***

16 A person *engages in industrial activity* if the person:

- 17 (a) becomes or does not become, or remains or ceases to be, an
18 officer or member of an industrial association; or
19 (b) does, or does not:
20 (i) become involved in establishing an industrial
21 association; or
22 (ii) organise or promote a lawful activity for, or on behalf
23 of, an industrial association; or
24 (iii) encourage, or participate in, a lawful activity organised
25 or promoted by an industrial association; or
26 (iv) comply with a lawful request made by, or requirement
27 of, an industrial association; or
28 (v) represent or advance the views, claims or interests of an
29 industrial association; or
30 (vi) pay a fee (however described) to an industrial
31 association; or
32 (vii) seek to be represented by an industrial association; or

Section 348

- 1 (c) organises or promotes an unlawful activity for, or on behalf
2 of, an industrial association; or
3 (d) encourages, or participates in, an unlawful activity organised
4 or promoted by an industrial association; or
5 (e) complies with an unlawful request made by, or requirement
6 of, an industrial association; or
7 (f) takes part in industrial action; or
8 (g) makes a payment:
9 (i) that, because of Division 9 of Part 3-3 (which deals with
10 payments relating to periods of industrial action), an
11 employer must not pay; or
12 (ii) to which an employee is not entitled because of that
13 Division.

14 **348 Coercion**

15 A person must not organise or take, or threaten to organise or take,
16 any action against another person with intent to coerce the other
17 person, or a third person, to engage in industrial activity.

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

19 **349 Misrepresentations**

- 20 (1) A person must not knowingly or recklessly make a false or
21 misleading representation about either of the following:
22 (a) another person's obligation to engage in industrial activity;
23 (b) another person's obligation to disclose whether he or she, or
24 a third person:
25 (i) is or is not, or was or was not, an officer or member of
26 an industrial association; or
27 (ii) is or is not engaging, or has or has not engaged, in
28 industrial activity.

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

- 30 (2) Subsection (1) does not apply if the person to whom the
31 representation is made would not be expected to rely on it.

1 **350 Inducements—membership action**

2 (1) An employer must not induce an employee to take, or propose to
3 take, membership action.

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

5 (2) A person who has entered into a contract for services with an
6 independent contractor must not induce the independent contractor
7 to take, or propose to take, membership action.

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

9 (3) A person takes *membership action* if the person becomes, does not
10 become, remains or ceases to be, an officer or member of an
11 industrial association.

Section 351

1

2

Division 5—Other protections

3

351 Discrimination

4

- (1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

5

6

7

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10

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

11

- (2) However, subsection (1) does not apply to action that is:

12

(a) authorised by, or under, a State or Territory anti-discrimination law; or

13

14

(b) taken because of the inherent requirements of the particular position concerned; or

15

16

(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken:

17

18

19

(i) in good faith; and

20

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

21

22

Note: Subsection (1) does not apply to action authorised by or under a law of the Commonwealth: see subsection 342(3).

23

24

- (3) Each of the following is a *State or Territory anti-discrimination law*:

25

26

(a) the *Anti-Discrimination Act 1977* of New South Wales;

27

(b) the *Equal Opportunity Act 1995* of Victoria;

28

(c) the *Anti-Discrimination Act 1991* of Queensland;

29

(d) the *Equal Opportunity Act 1984* of Western Australia;

30

(e) the *Equal Opportunity Act 1984* of South Australia;

31

(f) the *Anti-Discrimination Act 1998* of Tasmania;

32

(g) the *Discrimination Act 1991* of the Australian Capital Territory;

33

1 (h) the *Anti-Discrimination Act* of the Northern Territory.

2 **352 Temporary absence—illness or injury**

3 An employer must not dismiss an employee because the employee
4 is temporarily absent from work because of illness or injury of a
5 kind prescribed by the regulations.

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

7 **353 Bargaining services fees**

8 (1) An industrial association, or an officer or member of an industrial
9 association, must not:

- 10 (a) demand; or
11 (b) purport to demand; or
12 (c) do anything that would:
13 (i) have the effect of demanding; or
14 (ii) purport to have the effect of demanding;
15 payment of a bargaining services fee.

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

17 (2) A *bargaining services fee* is a fee (however described) payable:

- 18 (a) to an industrial association; or
19 (b) to someone in lieu of an industrial association;
20 wholly or partly for the provision, or purported provision, of
21 bargaining services, but does not include membership fees.

22 (3) *Bargaining services* are services provided by, or on behalf of, an
23 industrial association in relation to an enterprise agreement, or a
24 proposed enterprise agreement (including in relation to bargaining
25 for, or the making, approval, operation, variation or termination of,
26 the enterprise agreement, or proposed enterprise agreement).

27 *Exception for fees payable under contract*

28 (4) Subsection (1) does not apply if the fee is payable to the industrial
29 association under a contract for the provision of bargaining
30 services.

Section 354

1 **354 Coverage by particular instruments**

- 2 (1) A person must not discriminate against an employer because:
- 3 (a) employees of the employer are covered, or not covered, by:
- 4 (i) provisions of the National Employment Standards; or
- 5 (ii) a particular type of workplace instrument (including a
- 6 particular kind of workplace instrument within a type of
- 7 workplace instrument); or
- 8 (iii) an enterprise agreement that does, or does not, cover an
- 9 employee organisation, or a particular employee
- 10 organisation; or
- 11 (b) it is proposed that employees of the employer be covered, or
- 12 not be covered, by:
- 13 (i) a particular type of workplace instrument (including a
- 14 particular kind of workplace instrument within a type of
- 15 workplace instrument); or
- 16 (ii) an enterprise agreement that does, or does not, cover an
- 17 employee organisation, or a particular employee
- 18 organisation.

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

- 20 (2) Subsection (1) does not apply to protected industrial action.

21 **355 Coercion—allocation of duties etc. to particular person**

22 A person must not organise or take, or threaten to organise or take,

23 any action against another person with intent to coerce the other

24 person, or a third person, to:

- 25 (a) employ, or not employ, a particular person; or
- 26 (b) engage, or not engage, a particular independent contractor; or
- 27 (c) allocate, or not allocate, particular duties or responsibilities to
- 28 a particular employee or independent contractor; or
- 29 (d) designate a particular employee or independent contractor as
- 30 having, or not having, particular duties or responsibilities.

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

1 **356 Objectionable terms**

2 A term of a workplace instrument, or an agreement or arrangement
3 (whether written or unwritten), has no effect to the extent that it is
4 an objectionable term.

1

2 **Division 6—Sham arrangements**

3 **357 Misrepresenting employment as independent contracting**
4 **arrangement**

5 (1) A person (the *employer*) that employs, or proposes to employ, an
6 individual must not represent to the individual that the contract of
7 employment under which the individual is, or would be, employed
8 by the employer is a contract for services under which the
9 individual performs, or would perform, work as an independent
10 contractor.

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

12 (2) Subsection (1) does not apply if the employer proves that, when the
13 representation was made, the employer:
14 (a) did not know; and
15 (b) was not reckless as to whether;
16 the contract was a contract of employment rather than a contract
17 for services.

18 **358 Dismissing to engage as independent contractor**

19 An employer must not dismiss, or threaten to dismiss, an individual
20 who:

- 21 (a) is an employee of the employer; and
22 (b) performs particular work for the employer;

23 in order to engage the individual as an independent contractor to
24 perform the same, or substantially the same, work under a contract
25 for services.

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

27 **359 Misrepresentation to engage as independent contractor**

28 A person (the *employer*) that employs, or has at any time
29 employed, an individual to perform particular work must not make
30 a statement that the employer knows is false in order to persuade or
31 influence the individual to enter into a contract for services under

Section 359

- 1 which the individual will perform, as an independent contractor,
2 the same, or substantially the same, work for the employer.
3 Note: This section is a civil remedy provision (see Part 4-1).

Section 360

1

2 **Division 7—Ancillary rules**

3 **360 Multiple reasons for action**

4 For the purposes of this Part, a person takes action for a particular
5 reason if the reasons for the action include that reason.

6 **361 Reason for action to be presumed unless proved otherwise**

7 (1) If:

8 (a) in an application in relation to a contravention of this Part, it
9 is alleged that a person took, or is taking, action for a
10 particular reason or with a particular intent; and

11 (b) taking that action for that reason or with that intent would
12 constitute a contravention of this Part;

13 it is presumed, in proceedings arising from the application, that the
14 action was, or is being, taken for that reason or with that intent,
15 unless the person proves otherwise.

16 (2) Subsection (1) does not apply in relation to orders for an interim
17 injunction.

18 **362 Advising, encouraging, inciting or coercing action**

19 (1) If:

20 (a) for a particular reason (the *first person's reason*), a person
21 advises, encourages or incites, or takes any action with intent
22 to coerce, a second person to take action; and

23 (b) the action, if taken by the second person for the first person's
24 reason, would contravene a provision of this Part;

25 the first person is taken to have contravened the provision.

26 (2) Subsection (1) does not limit section 550.

27 **363 Actions of industrial associations**

28 (1) For the purposes of this Part, each of the following is taken to be
29 action of an industrial association:

- 1 (a) action taken by the committee of management of the
2 industrial association;
- 3 (b) action taken by an officer or agent of the industrial
4 association acting in that capacity;
- 5 (c) action taken by a member, or group of members, of the
6 industrial association if the action is authorised by:
7 (i) the rules of the industrial association; or
8 (ii) the committee of management of the industrial
9 association; or
10 (iii) an officer or agent of the industrial association acting in
11 that capacity;
- 12 (d) action taken by a member of the industrial association who
13 performs the function of dealing with an employer on behalf
14 of the member and other members of the industrial
15 association, acting in that capacity;
- 16 (e) if the industrial association is an unincorporated industrial
17 association that does not have a committee of management—
18 action taken by a member, or group of members, of the
19 industrial association.
- 20 (2) Paragraphs (1)(c) and (d) do not apply if:
21 (a) the committee of management of the industrial association;
22 or
23 (b) a person authorised by the committee; or
24 (c) an officer of the industrial association;
25 has taken all reasonable steps to prevent the action.
- 26 (3) If, for the purposes of this Part, it is necessary to establish the state
27 of mind of an industrial association in relation to particular action,
28 it is enough to show:
29 (a) that the action was taken by a person, or a group, referred to
30 in paragraphs (1)(a) to (e); and
31 (b) that the person, or a person in the group, had that state of
32 mind.
- 33 (4) Subsections (1) to (3) have effect despite subsections 793(1) and
34 (2) (which deal with liabilities of bodies corporate).
-

Section 364

1 **364 Unincorporated industrial associations**

2 *Person includes unincorporated industrial association*

3 (1) For the purposes of this Part, a reference to a person includes a
4 reference to an unincorporated industrial association.

5 *Liability for contraventions by unincorporated industrial*
6 *associations*

7 (2) A contravention of this Part that would otherwise be committed by
8 an unincorporated industrial association is taken to have been
9 committed by each member, officer or agent of the industrial
10 association who:

- 11 (a) took, or took part in, the relevant action; and
12 (b) did so with the relevant state of mind.

1

2 **Division 8—Compliance**

2

3 **Subdivision A—Contraventions involving dismissal**

3

4 **365 Application for FWA to deal with a dispute**

4

5 If:

5

6 (a) a person has been dismissed; and

6

7 (b) the person, or an industrial association that is entitled to
8 represent the industrial interests of the person, alleges that the
9 person was dismissed in contravention of this Part;

7

8

8

9

10 the person, or the industrial association, may apply to FWA for
11 FWA to deal with the dispute.

10

11

12 **366 Time for application**

12

13 (1) An application under section 365 must be made:

13

14 (a) within 60 days after the dismissal took effect; or

14

15 (b) within such further period as FWA allows under
16 subsection (2).

15

16

17 (2) FWA may allow a further period if FWA is satisfied that there are
18 exceptional circumstances, taking into account:

17

18

19 (a) the reason for the delay; and

19

20 (b) any action taken by the person to dispute the dismissal; and

20

21 (c) prejudice to the employer (including prejudice caused by the
22 delay); and

21

22

23 (d) the merits of the application; and

23

24 (e) fairness as between the person and other persons in a like
25 position.

24

25

26 **367 Application fees**

26

27 (1) The application must be accompanied by any fee prescribed by the
28 regulations.

27

28

29 (2) The regulations may prescribe:

29

Section 368

- 1 (a) a fee for making an application to FWA under section 365;
2 and
3 (b) a method for indexing the fee; and
4 (c) the circumstances in which all or part of the fee may be
5 waived or refunded.

6 **368 Conferences**

- 7 (1) If an application is made under section 365, FWA must conduct a
8 conference to deal with the dispute.

9 Note 1: For conferences, see section 592.

10 Note 2: FWA may deal with a dispute by mediation or conciliation, or by
11 making a recommendation or expressing an opinion (see subsection
12 595(2)). One of the recommendations that FWA might make is that an
13 application be made under Part 3-2 (which deals with unfair dismissal)
14 in relation to the dispute.

- 15 (2) Despite subsection 592(3), FWA must conduct the conference in
16 private.

17 **369 Certificate if dispute not resolved**

18 If FWA is satisfied that all reasonable attempts to resolve the
19 dispute have been, or are likely to be, unsuccessful, FWA must
20 issue a certificate to that effect.

21 **370 Advice on general protections court application**

- 22 (1) If FWA considers, taking into account all the materials before it,
23 that a general protections court application in relation to the dispute
24 would not have a reasonable prospect of success, it must advise the
25 parties accordingly.

- 26 (2) A *general protections court application* is an application to a court
27 under Division 2 of Part 4-1 for orders in relation to a
28 contravention of this Part.

1 **371 General protections court applications**

2 *FWA conference to be held before application*

- 3 (1) A person who is entitled to apply under section 365 to FWA for
4 FWA to deal with a dispute must not make a general protections
5 court application in relation to the dispute unless:
6 (a) FWA has issued a certificate under section 369 in relation to
7 the dispute; or
8 (b) the general protections court application includes an
9 application for an interim injunction.

10 *Time for application*

- 11 (2) Despite section 544, a general protections court application that
12 requires a certificate under section 369 must be made within 14
13 days after the certificate is issued.

14 **Subdivision B—Other contraventions**

15 **372 Application for FWA to deal with a dispute**

16 If:

- 17 (a) a person alleges a contravention of this Part; and
18 (b) the person is not entitled to apply to FWA under section 365
19 for FWA to deal with the dispute;
20 the person may apply to FWA under this section for FWA to deal
21 with the dispute.

22 **373 Application fees**

- 23 (1) The application must be accompanied by any fee prescribed by the
24 regulations.
25 (2) The regulations may prescribe:
26 (a) a fee for making an application to FWA under section 372;
27 and
28 (b) a method for indexing the fee; and
29 (c) the circumstances in which all or part of the fee may be
30 waived or refunded.

Section 374

1 **374 Conferences**

- 2 (1) If:
- 3 (a) an application is made under section 372; and
- 4 (b) the parties to the dispute agree to participate;
- 5 FWA must conduct a conference to deal with the dispute.

6 Note 1: For conferences, see section 592.

7 Note 2: FWA may deal with a dispute by mediation or conciliation, or by

8 making a recommendation or expressing an opinion (see subsection

9 595(2)).

- 10 (2) Despite subsection 592(3), FWA must conduct the conference in
- 11 private.

12 **375 Advice on general protections court application**

13 If FWA considers, taking into account all the materials before it,

14 that a general protections court application in relation to the dispute

15 would not have a reasonable prospect of success, it must advise the

16 parties accordingly.

17 **Subdivision C—Conference costs**

18 **376 Costs orders against lawyers and paid agents**

- 19 (1) If FWA has granted permission in accordance with section 596 for
- 20 a person to be represented by a lawyer or paid agent in relation to
- 21 an application under section 365 or 372, FWA may make an order
- 22 for costs against the lawyer or paid agent if FWA is satisfied:

23 (a) that:

- 24 (i) the lawyer or paid agent caused costs to be incurred by
- 25 another party to the dispute because the lawyer or paid
- 26 agent encouraged the person to make the application;
- 27 and

- 28 (ii) it should have been reasonably apparent that the
- 29 application would have no reasonable prospect of
- 30 success; or

- 31 (b) that the lawyer or paid agent caused costs to be incurred by
- 32 another party to the dispute because of an unreasonable act or

Section 377

1 omission of the lawyer or paid agent in connection with the
2 conduct or continuation of the dispute.

3 (2) FWA may make an order under this section only if the other party
4 has applied for it under section 377.

5 (3) This section does not limit FWA's power to order costs under
6 section 611.

7 **377 Applications for costs orders**

8 An application for an order for costs in relation to an application
9 under section 365 or 372 must be made within 14 days after FWA
10 finishes dealing with the dispute.

11 **378 Contravening costs orders**

12 A person to whom an order for costs made under section 376
13 applies must not contravene a term of the order.

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

1

2 **Part 3-2—Unfair dismissal**

3 **Division 1—Introduction**

4 **379 Guide to this Part**

5

This Part is about the unfair dismissal of national system employees, and the granting of remedies for unfair dismissal.

6

7

Division 2 sets out when a person is protected from unfair dismissal.

8

9

Division 3 sets out the elements that make up an unfair dismissal.

10

Division 4 sets out the remedies FWA can grant for unfair dismissal.

11

12

Division 5 is about the procedural aspects of getting remedies for unfair dismissal.

13

14 **380 Meanings of *employee* and *employer***

15

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

16

17 **381 Object of this Part**

18

(1) The object of this Part is:

19

(a) to establish a framework for dealing with unfair dismissal that balances:

20

21

(i) the needs of business (including small business); and

22

(ii) the needs of employees; and

23

(b) to establish procedures for dealing with unfair dismissal that:

24

(i) are quick, flexible and informal; and

25

(ii) address the needs of employers and employees; and

Section 381

1 (c) to provide remedies if a dismissal is found to be unfair, with
2 an emphasis on reinstatement.

3 (2) The procedures and remedies referred to in paragraphs (1)(b) and
4 (c), and the manner of deciding on and working out such remedies,
5 are intended to ensure that a “fair go all round” is accorded to both
6 the employer and employee concerned.

7 Note: The expression “fair go all round” was used by Sheldon J in *in re Loty*
8 *and Holloway v Australian Workers’ Union* [1971] AR (NSW) 95.

Section 382

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2

Division 2—Protection from unfair dismissal

3

382 When a person is protected from unfair dismissal

4

A person is *protected from unfair dismissal* at a time if, at that time:

5

6

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

7

8

9

(b) one or more of the following apply:

10

(i) a modern award covers the person;

11

(ii) an enterprise agreement applies to the person in relation to the employment;

12

13

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

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383 Meaning of *minimum employment period*

18

The *minimum employment period* is:

19

(a) if the employer is not a small business employer—6 months ending at the earlier of the following times:

20

21

(i) the time when the person is given notice of the dismissal;

22

23

(ii) immediately before the dismissal; or

24

(b) if the employer is a small business employer—one year ending at that time.

25

26

384 Period of employment

27

(1) An employee's *period of employment* with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

28

29

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(2) However:

- 1 (a) a period of service as a casual employee does not count
2 towards the employee's period of employment unless:
3 (i) the employment as a casual employee was on a regular
4 and systematic basis; and
5 (ii) during the period of service as a casual employee, the
6 employee had a reasonable expectation of continuing
7 employment by the employer on a regular and
8 systematic basis; and
9 (b) if:
10 (i) the employee is a transferring employee in relation to a
11 transfer of business from an old employer to a new
12 employer; and
13 (ii) the old employer and the new employer are not
14 associated entities when the employee becomes
15 employed by the new employer; and
16 (iii) the new employer informed the employee in writing
17 before the new employment started that a period of
18 service with the old employer would not be recognised;
19 the period of service with the old employer does not count
20 towards the employee's period of employment with the new
21 employer.

Section 385

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Division 3—What is an unfair dismissal

3

385 What is an unfair dismissal

4

A person has been *unfairly dismissed* if FWA is satisfied that:

5

(a) the person has been dismissed; and

6

(b) the dismissal was harsh, unjust or unreasonable; and

7

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

8

9

(d) the dismissal was not a case of genuine redundancy.

10

Note: For the definition of *consistent with the Small Business Fair Dismissal Code*: see section 388.

11

12

386 Meaning of *dismissed*

13

(1) A person has been *dismissed* if:

14

(a) the person's employment with his or her employer has been terminated on the employer's initiative; or

15

16

(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

17

18

19

(2) However, a person has not been *dismissed* if:

20

(a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or

21

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25

(b) the person was an employee:

26

(i) to whom a training arrangement applied; and

27

(ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;

28

29

and the employment has terminated at the end of the training arrangement; or

30

31

32

(c) the person was demoted in employment but:

- 1 (i) the demotion does not involve a significant reduction in
2 his or her remuneration or duties; and
3 (ii) he or she remains employed with the employer that
4 effected the demotion.
- 5 (3) Subsection (2) does not apply to a person employed under a
6 contract of a kind referred to in paragraph (2)(a) if a substantial
7 purpose of the employment of the person under a contract of that
8 kind is, or was at the time of the person's employment, to avoid the
9 employer's obligations under this Part.

10 **387 Criteria for considering harshness etc.**

- 11 In considering whether it is satisfied that a dismissal was harsh,
12 unjust or unreasonable, FWA must take into account:
- 13 (a) whether there was a valid reason for the dismissal related to
14 the person's capacity or conduct (including its effect on the
15 safety and welfare of other employees); and
16 (b) whether the person was notified of that reason; and
17 (c) whether the person was given an opportunity to respond to
18 any reason related to the capacity or conduct of the person;
19 and
20 (d) any unreasonable refusal by the employer to allow the person
21 to have a support person present to assist at any discussions
22 relating to dismissal; and
23 (e) if the dismissal related to unsatisfactory performance by the
24 person—whether the person had been warned about that
25 unsatisfactory performance before the dismissal; and
26 (f) the degree to which the size of the employer's enterprise
27 would be likely to impact on the procedures followed in
28 effecting the dismissal; and
29 (g) the degree to which the absence of dedicated human resource
30 management specialists or expertise in the enterprise would
31 be likely to impact on the procedures followed in effecting
32 the dismissal; and
33 (h) any other matters that FWA considers relevant.

Section 388

1 **388 The Small Business Fair Dismissal Code**

- 2 (1) The Minister may, by legislative instrument, declare a Small
3 Business Fair Dismissal Code.
- 4 (2) A person's dismissal was *consistent with the Small Business Fair*
5 *Dismissal Code* if:
- 6 (a) immediately before the time of the dismissal or at the time
7 the person was given notice of the dismissal (whichever
8 happened first), the person's employer was a small business
9 employer; and
- 10 (b) the employer complied with the Small Business Fair
11 Dismissal Code in relation to the dismissal.

12 **389 Meaning of *genuine redundancy***

- 13 (1) A person's dismissal was a case of *genuine redundancy* if:
- 14 (a) the person's employer no longer required the person's job to
15 be performed by anyone because of changes in the
16 operational requirements of the employer's enterprise; and
- 17 (b) the employer has complied with any obligation in a modern
18 award or enterprise agreement that applied to the
19 employment to consult about the redundancy.
- 20 (2) A person's dismissal was not a case of *genuine redundancy* if it
21 would have been reasonable in all the circumstances for the person
22 to be redeployed within:
- 23 (a) the employer's enterprise; or
24 (b) the enterprise of an associated entity of the employer.

1

2 **Division 4—Remedies for unfair dismissal**

3 **390 When FWA may order remedy for unfair dismissal**

- 4 (1) Subject to subsection (3), FWA may order a person's
5 reinstatement, or the payment of compensation to a person, if:
6 (a) FWA is satisfied that the person was protected from unfair
7 dismissal (see Division 2) at the time of being dismissed; and
8 (b) the person has been unfairly dismissed (see Division 3).
- 9 (2) FWA may make the order only if the person has made an
10 application under section 394.
- 11 (3) FWA must not order the payment of compensation to the person
12 unless:
13 (a) FWA is satisfied that reinstatement of the person is
14 inappropriate; and
15 (b) FWA considers an order for payment of compensation is
16 appropriate in all the circumstances of the case.

17 Note: Division 5 deals with procedural matters such as applications for
18 remedies.

19 **391 Remedy—reinstatement etc.**

20 *Reinstatement*

- 21 (1) An order for a person's reinstatement must be an order that the
22 person's employer at the time of the dismissal reinstate the person
23 by:
24 (a) reappointing the person to the position in which the person
25 was employed immediately before the dismissal; or
26 (b) appointing the person to another position on terms and
27 conditions no less favourable than those on which the person
28 was employed immediately before the dismissal.

Section 392

1 *Order to maintain continuity*

2 (2) If FWA makes an order under subsection (1) and considers it
3 appropriate to do so, FWA may also make any order that FWA
4 considers appropriate to maintain the following:

- 5 (a) the continuity of the person's employment;
6 (b) the period of the person's continuous service with the
7 employer.

8 *Order to restore lost pay*

9 (3) If FWA makes an order under subsection (1) and considers it
10 appropriate to do so, FWA may also make any order that FWA
11 considers appropriate to cause the employer to pay to the person an
12 amount for the remuneration lost, or likely to have been lost, by the
13 person because of the dismissal.

14 (4) In determining an amount for the purposes of an order under
15 subsection (3), FWA must take into account:

- 16 (a) the amount of any remuneration earned by the person from
17 employment or other work during the period between the
18 dismissal and the making of the order for reinstatement; and
19 (b) the amount of any remuneration reasonably likely to be so
20 earned by the person during the period between the making
21 of the order for reinstatement and the actual reinstatement.

22 **392 Remedy—compensation**

23 *Compensation*

24 (1) An order for the payment of compensation to a person must be an
25 order that the person's employer at the time of the dismissal pay
26 compensation to the person in lieu of reinstatement.

27 *Criteria for deciding amounts*

28 (2) In determining an amount for the purposes of an order under
29 subsection (1), FWA must take into account all the circumstances
30 of the case including:

- 1 (a) the effect of the order on the viability of the employer's
2 enterprise; and
3 (b) the length of the person's service with the employer; and
4 (c) the remuneration that the person would have received, or
5 would have been likely to receive, if the person had not been
6 dismissed; and
7 (d) the efforts of the person (if any) to mitigate the loss suffered
8 by the person because of the dismissal; and
9 (e) the amount of any remuneration earned by the person from
10 employment or other work during the period between the
11 dismissal and the making of the order for compensation; and
12 (f) the amount of any income reasonably likely to be so earned
13 by the person during the period between the making of the
14 order for compensation and the actual compensation; and
15 (g) any other matter that FWA considers relevant.

16 *Misconduct reduces amount*

- 17 (3) If FWA is satisfied that misconduct of a person contributed to the
18 employer's decision to dismiss the person, FWA must reduce the
19 amount it would otherwise order under subsection (1) by an
20 appropriate amount on account of the misconduct.

21 *Shock, distress etc. disregarded*

- 22 (4) The amount ordered by FWA to be paid to a person under
23 subsection (1) must not include a component by way of
24 compensation for shock, distress or humiliation, or other analogous
25 hurt, caused to the person by the manner of the person's dismissal.

26 *Compensation cap*

- 27 (5) The amount ordered by FWA to be paid to a person under
28 subsection (1) must not exceed the lesser of:
29 (a) the amount worked out under subsection (6); and
30 (b) half the amount of the high income threshold immediately
31 before the dismissal.
- 32 (6) The amount is the total of the following amounts:
33 (a) the total amount of remuneration:
-

Section 393

- 1 (i) received by the person; or
2 (ii) to which the person was entitled;
3 (whichever is higher) for any period of employment with the
4 employer during the 26 weeks immediately before the
5 dismissal; and
6 (b) if the employee was on leave without pay or without full pay
7 while so employed during any part of that period—the
8 amount of remuneration taken to have been received by the
9 employee for the period of leave in accordance with the
10 regulations.

11 **393 Monetary orders may be in instalments**

12 To avoid doubt, an order by FWA under subsection 391(3) or
13 392(1) may permit the employer concerned to pay the amount
14 required in instalments specified in the order.

1

2 **Division 5—Procedural matters**

3 **394 Application for unfair dismissal remedy**

4 (1) A person who has been dismissed may apply to FWA for an order
5 under Division 4 granting a remedy.

6 Note 1: Division 4 sets out when FWA may order a remedy for unfair
7 dismissal.

8 Note 2: For application fees, see section 395.

9 Note 3: Part 6-1 may prevent an application being made under this Part in
10 relation to a dismissal if an application or complaint has been made in
11 relation to the dismissal other than under this Part.

12 (2) The application must be made:

13 (a) within 7 days after the dismissal took effect; or

14 (b) within such further period as FWA allows under
15 subsection (3).

16 (3) FWA may allow a further period for the application to be made by
17 a person under subsection (1) if FWA is satisfied that there are
18 exceptional circumstances, taking into account:

19 (a) the reason for the delay; and

20 (b) whether the person first became aware of the dismissal after
21 it had taken effect; and

22 (c) any action taken by the person to dispute the dismissal; and

23 (d) prejudice to the employer (including prejudice caused by the
24 delay); and

25 (e) the merits of the application; and

26 (f) fairness as between the person and other persons in a similar
27 position.

28 **395 Application fees**

29 (1) An application to FWA under this Division must be accompanied
30 by any fee prescribed by the regulations.

31 (2) The regulations may prescribe:

Section 396

- 1 (a) a fee for making an application to FWA under this Division;
2 and
3 (b) a method for indexing the fee; and
4 (c) the circumstances in which all or part of the fee may be
5 waived or refunded.

6 **396 Initial matters to be considered before merits**

7 FWA must decide the following matters relating to an application
8 for an order under Division 4 before considering the merits of the
9 application:

- 10 (a) whether the application was made within the period required
11 in subsection 394(2);
12 (b) whether the person was protected from unfair dismissal;
13 (c) whether the dismissal was consistent with the Small Business
14 Fair Dismissal Code;
15 (d) whether the dismissal was a case of genuine redundancy.

16 **397 Matters involving contested facts**

17 FWA must conduct a conference or hold a hearing in relation to a
18 matter arising under this Part if, and to the extent that, the matter
19 involves facts the existence of which is in dispute.

20 **398 Conferences**

- 21 (1) This section applies in relation to a matter arising under this Part if
22 FWA conducts a conference in relation to the matter.
23 (2) Despite subsection 592(3), FWA must conduct the conference in
24 private.
25 (3) FWA must take into account any difference in the circumstances of
26 the parties to the matter in:
27 (a) considering the application; and
28 (b) informing itself in relation to the application.
29 (4) FWA must take into account the wishes of the parties to the matter
30 as to the way in which FWA:
31 (a) considers the application; and

1 (b) informs itself in relation to the application.

2 **399 Hearings**

3 (1) FWA must not hold a hearing in relation to a matter arising under
4 this Part unless FWA considers it appropriate to do so, taking into
5 account:

6 (a) the views of the parties to the matter; and

7 (b) whether a hearing would be the most effective and efficient
8 way to resolve the matter.

9 (2) If FWA holds a hearing in relation to a matter arising under this
10 Part, it may decide not to hold the hearing in relation to parts of the
11 matter.

12 (3) FWA may decide at any time (including before, during or after
13 conducting a conference in relation to a matter) to hold a hearing in
14 relation to the matter.

15 **400 Appeal rights**

16 (1) Despite subsection 604(2), FWA must not grant permission to
17 appeal from a decision made by FWA under this Part unless FWA
18 considers that it is in the public interest to do so.

19 (2) Despite subsection 604(1), an appeal from a decision made by
20 FWA in relation to a matter arising under this Part can only, to the
21 extent that it is an appeal on a question of fact, be made on the
22 ground that the decision involved a significant error of fact.

23 **401 Costs orders against lawyers and paid agents**

24 (1) If FWA has granted permission in accordance with section 596 for
25 a person to be represented by a lawyer or paid agent in a matter
26 arising under this Part before FWA, FWA may make an order for
27 costs against the lawyer or paid agent if FWA is satisfied:

28 (a) that:

29 (i) the lawyer or paid agent caused costs to be incurred by
30 the other party to the matter because the lawyer or paid

Section 402

- 1 agent encouraged the person to start or continue the
2 matter; and
3 (ii) it should have been reasonably apparent that the person
4 had no reasonable prospect of success in the matter; or
5 (b) that the lawyer or paid agent caused costs to be incurred by
6 the other party to the matter because of an unreasonable act
7 or omission of the lawyer or paid agent in connection with
8 the conduct or continuation of the matter.
- 9 (2) FWA may make an order under this section only if the other party
10 to the matter has applied for it in accordance with section 402.
- 11 (3) This section does not limit FWA's power to order costs under
12 section 611.

13 **402 Applications for costs orders**

- 14 An application for an order for costs under section 611 in relation
15 to a matter arising under this Part, or for costs under section 401,
16 must be made within 14 days after:
17 (a) FWA determines the matter; or
18 (b) the matter is discontinued.

19 **403 Schedule of costs**

- 20 (1) A schedule of costs may be prescribed in relation to items of
21 expenditure likely to be incurred in relation to matters that can be
22 covered by an order:
23 (a) under section 611 in relation to a matter arising under this
24 Part; or
25 (b) under section 401;
26 including expenses arising from the representation of a party by a
27 person or organisation other than on a legal professional basis.
- 28 (2) If a schedule of costs is prescribed for the purposes of
29 subsection (1), then, in awarding costs under section 611 in relation
30 to a matter arising under this Part, or awarding costs under
31 section 401, FWA:
32 (a) is not limited to the items of expenditure appearing in the
33 schedule; but

1 (b) if an item does appear in the schedule—must not award costs
2 in relation to that item at a rate or of an amount that exceeds
3 the rate or amount appearing in the schedule.

4 **404 Security for costs**

5 The procedural rules may provide for the furnishing of security for
6 the payment of costs in relation to matters arising under this Part.

7 **405 Contravening orders under this Part**

8 A person to whom an order under this Part applies must not
9 contravene a term of the order.

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

1

2

Part 3-3—Industrial action

3

Division 1—Introduction

4

406 Guide to this Part

5

This Part deals mainly with industrial action by national system employees and national system employers.

6

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Division 2 sets out when industrial action for a proposed enterprise agreement is protected industrial action. No action lies under any law in force in a State or Territory in relation to protected industrial action except in certain circumstances.

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Division 3 provides that industrial action must not be organised or engaged in by certain persons before the nominal expiry date of an enterprise agreement or workplace determination has passed.

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Division 4 provides for FWA to make orders, in certain circumstances, that industrial action stop, not occur or not be organised for a specified period.

15

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Division 5 deals with injunctions against industrial action if a bargaining representative of an employee who will be covered by a proposed enterprise agreement is engaging in pattern bargaining.

18

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Division 6 provides for FWA to make orders suspending or terminating protected industrial action for a proposed enterprise agreement in certain circumstances. If FWA makes such an order, the action will no longer be protected industrial action.

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Division 7 provides for the Minister to make a declaration terminating protected industrial action for a proposed enterprise agreement in certain circumstances. If the Minister makes such an order, the action will no longer be protected industrial action.

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Division 8 establishes the process that will allow employees to choose, by means of a fair and democratic secret ballot, whether to authorise protected industrial action for a proposed enterprise agreement.

Division 9 sets out restrictions about payments to employees relating to periods of industrial action.

Division 10 deals with the making of applications under this Part.

8 **407 Meanings of *employee* and *employer***

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

Section 408

1

2 **Division 2—Protected industrial action**

3 **Subdivision A—What is protected industrial action**

4 **408 Protected industrial action**

5 Industrial action is *protected industrial action* for a proposed
6 enterprise agreement if it is one of the following:

- 7 (a) employee claim action for the agreement (see section 409);
8 (b) employee response action for the agreement (see
9 section 410);
10 (c) employer response action for the agreement (see
11 section 411).

12 **409 Employee claim action**

13 *Employee claim action*

- 14 (1) *Employee claim action* for a proposed enterprise agreement is
15 industrial action that:
16 (a) is organised or engaged in for the purpose of supporting or
17 advancing claims in relation to the agreement that are about,
18 or are reasonably believed to be about, permitted matters; and
19 (b) is organised or engaged in, against an employer that will be
20 covered by the agreement, by:
21 (i) a bargaining representative of an employee who will be
22 covered by the agreement; or
23 (ii) an employee who is included in a group or groups of
24 employees specified in a protected action ballot order
25 for the industrial action; and
26 (c) meets the common requirements set out in Subdivision B;
27 and
28 (d) meets the additional requirements set out in this section.

1 *Protected action ballot is necessary*

2 (2) The industrial action must be authorised by a protected action
3 ballot (see Division 8 of this Part).

4 *Unlawful terms*

5 (3) The industrial action must not be in support of, or to advance,
6 claims to include unlawful terms in the agreement.

7 *Industrial action must not be part of pattern bargaining*

8 (4) A bargaining representative of an employee who will be covered
9 by the agreement must not be engaging in pattern bargaining in
10 relation to the agreement.

11 *Industrial action must not relate to a demarcation dispute etc.*

12 (5) The industrial action must not, if it is being organised or engaged
13 in by a bargaining representative, relate to a significant extent to a
14 demarcation dispute or contravene an FWA order that relates to a
15 significant extent to a demarcation dispute.

16 *Notice requirements after suspension order must be met*

17 (6) If section 429 (which deals with employee claim action without a
18 further protected action ballot after a period of suspension) applies
19 in relation to the industrial action, the notice requirements of
20 section 430 must be met.

21 *Officer of an employee organisation*

22 (7) If an employee organisation is a bargaining representative of an
23 employee who will be covered by the agreement, the reference to a
24 bargaining representative of the employee in subparagraph (1)(b)(i)
25 of this section includes a reference to an officer of the organisation.

Section 410

1 **410 Employee response action**

2 *Employee response action*

- 3 (1) **Employee response action** for a proposed enterprise agreement
4 means industrial action that:
- 5 (a) is organised or engaged in as a response to industrial action
6 by an employer; and
 - 7 (b) is organised or engaged in, against an employer that will be
8 covered by the agreement, by:
 - 9 (i) a bargaining representative of an employee who will be
10 covered by the agreement; or
 - 11 (ii) an employee who will be covered by the agreement; and
 - 12 (c) meets the common requirements set out in Subdivision B;
13 and
 - 14 (d) meets the additional requirements set out in this section.

15 *Industrial action must not relate to a demarcation dispute etc.*

- 16 (2) The industrial action must not, if it is being organised or engaged
17 in by a bargaining representative, relate to a significant extent to a
18 demarcation dispute or contravene an FWA order that relates to a
19 significant extent to a demarcation dispute.

20 *Officer of an employee organisation*

- 21 (3) If an employee organisation is a bargaining representative of an
22 employee who will be covered by the agreement, the reference to a
23 bargaining representative of the employee in subparagraph (1)(b)(i)
24 includes a reference to an officer of the organisation.

25 **411 Employer response action**

26 *Employer response action* for a proposed enterprise agreement
27 means industrial action that:

- 28 (a) is organised or engaged in as a response to industrial action
29 by:
 - 30 (i) a bargaining representative of an employee who will be
31 covered by the agreement; or

Section 412

- 1 (ii) an employee who will be covered by the agreement; and
2 (b) is organised or engaged in by an employer that will be
3 covered by the agreement against one or more employees that
4 will be covered by the agreement; and
5 (c) meets the common requirements set out in Subdivision B;
6 and
7 (d) does not affect the continuity of the employees' employment,
8 for such purposes as are prescribed by the regulations.

9 **412 Pattern bargaining**

10 *Pattern bargaining*

- 11 (1) A course of conduct by a person is *pattern bargaining* if:
12 (a) the person is a bargaining representative for 2 or more
13 proposed enterprise agreements; and
14 (b) the course of conduct involves seeking common terms to be
15 included in 2 or more of the agreements; and
16 (c) the course of conduct relates to 2 or more employers.

17 *Exception—genuinely trying to reach an agreement*

- 18 (2) The course of conduct, to the extent that it relates to a particular
19 employer, is not pattern bargaining if the bargaining representative
20 is genuinely trying to reach an agreement with that employer.
- 21 (3) For the purposes of subsection (2), the factors relevant to working
22 out whether a bargaining representative is genuinely trying to reach
23 an agreement with a particular employer, include the following:
24 (a) whether the bargaining representative is demonstrating a
25 preparedness to bargain for the agreement taking into account
26 the individual circumstances of that employer, including in
27 relation to the nominal expiry date of the agreement;
28 (b) whether the bargaining representative is bargaining in a
29 manner consistent with the terms of the agreement being
30 determined as far as possible by agreement between that
31 employer and its employees;
32 (c) whether the bargaining representative is meeting the good
33 faith bargaining requirements.

Section 413

- 1 (4) If a person seeks to rely on subsection (2), the person has the
2 burden of proving that the subsection applies.

3 *Genuinely trying to reach an agreement*

- 4 (5) This section does not affect, and is not affected by, the meaning of
5 the expression “genuinely trying to reach an agreement”, or any
6 variant of the expression, as used elsewhere in this Act.

7 **Subdivision B—Common requirements for industrial action to**
8 **be protected industrial action**

9 **413 Common requirements that apply for industrial action to be**
10 **protected industrial action**

11 *Common requirements*

- 12 (1) This section sets out the *common requirements* for industrial
13 action to be protected industrial action for a proposed enterprise
14 agreement.

15 *Type of proposed enterprise agreement*

- 16 (2) The industrial action must not relate to a proposed enterprise
17 agreement that is a greenfields agreement or multi-enterprise
18 agreement.

19 *Genuinely trying to reach an agreement*

- 20 (3) The following persons must be genuinely trying to reach an
21 agreement:
22 (a) if the person organising or engaging in the industrial action is
23 a bargaining representative for the agreement—the
24 bargaining representative;
25 (b) if the person organising or engaging in the industrial action is
26 an employee who will be covered by the agreement—the
27 bargaining representative of the employee.

Section 414

1 *Notice requirements*

- 2 (4) The notice requirements set out in section 414 must have been met
3 in relation to the industrial action.

4 *Compliance with orders*

- 5 (5) The following persons must not have contravened any orders that
6 apply to them and that relate to, or relate to industrial action
7 relating to, the agreement or a matter that arose during bargaining
8 for the agreement:

9 (a) if the person organising or engaging in the industrial action is
10 a bargaining representative for the agreement—the
11 bargaining representative;

12 (b) if the person organising or engaging in the industrial action is
13 an employee who will be covered by the agreement—the
14 employee and the bargaining representative of the employee.

15 *No industrial action before an enterprise agreement etc. passes its*
16 *nominal expiry date*

- 17 (6) The person organising or engaging in the industrial action must not
18 contravene section 417 (which deals with industrial action before
19 the nominal expiry date of an enterprise agreement etc.) by
20 organising or engaging in the industrial action.

21 *No suspension or termination order is in operation etc.*

- 22 (7) Neither of the following must be in operation:
23 (a) an order under Division 6 of this Part suspending or
24 terminating the industrial action;
25 (b) a Ministerial declaration under subsection 431(1) terminating
26 the industrial action.

27 **414 Notice requirements for industrial action**

28 *Notice requirements—employee claim action*

- 29 (1) Before a person engages in employee claim action for a proposed
30 enterprise agreement, a bargaining representative of an employee

Section 414

1 who will be covered by the agreement must give written notice of
2 the action to the employer of the employee.

3 (2) The period of notice must be at least:

4 (a) 3 working days; or

5 (b) if a protected action ballot order for the employee claim
6 action specifies a longer period of notice for the purposes of
7 this paragraph—that period of notice.

8 *Notice of employee claim action not to be given until ballot results*
9 *declared*

10 (3) A notice under subsection (1) must not be given until after the
11 results of the protected action ballot for the employee claim action
12 have been declared.

13 *Notice requirements—employee response action*

14 (4) Before a person engages in employee response action for a
15 proposed enterprise agreement, a bargaining representative of an
16 employee who will be covered by the agreement must give written
17 notice of the action to the employer of the employee.

18 *Notice requirements—employer response action*

19 (5) Before an employer engages in employer response action for a
20 proposed enterprise agreement, the employer must:
21 (a) give written notice of the action to each bargaining
22 representative of an employee who will be covered by the
23 agreement; and
24 (b) take all reasonable steps to notify the employees who will be
25 covered by the agreement of the action.

26 *Notice requirements—content*

27 (6) A notice given under this section must specify the nature of the
28 action and the day on which it will start.

1 **Subdivision C—Significance of industrial action being**
2 **protected industrial action**

3 **415 Immunity provision**

4 (1) No action lies under any law (whether written or unwritten) in
5 force in a State or Territory in relation to any industrial action that
6 is protected industrial action unless the industrial action has
7 involved or is likely to involve:

8 (a) personal injury; or

9 (b) wilful or reckless destruction of, or damage to, property; or

10 (c) the unlawful taking, keeping or use of property.

11 (2) However, subsection (1) does not prevent an action for defamation
12 being brought in relation to anything that occurred in the course of
13 industrial action.

14 **416 Employer response action—employer may refuse to make**
15 **payments to employees**

16 If an employer engages in employer response action against
17 employees, the employer may refuse to make payments to the
18 employees in relation to the period of the action.

19 Note: If an employee engages in protected industrial action against his or her
20 employer, the employer must not make a payment to an employee in
21 relation to certain periods of action (see Subdivision A of Division 9
22 of this Part).

Section 417

1

2

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

3

4

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

5

6

No industrial action

7

- (1) A person referred to in subsection (2) must not organise or engage in industrial action from the day on which:

8

9

- (a) an enterprise agreement is approved by FWA until its nominal expiry date has passed; or

10

11

- (b) a workplace determination comes into operation until its nominal expiry date has passed;

12

13

whether or not the industrial action relates to a matter dealt with in the agreement or determination.

14

15

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

16

- (2) The persons are:

17

- (a) an employer, employee, or employee organisation, to whom the agreement or determination applies; or

18

19

- (b) an officer of an employee organisation to which the agreement or determination applies, acting in that capacity.

20

21

Injunctions and other orders

22

- (3) If a person contravenes subsection (1), the Federal Court or Federal Magistrates Court may do either or both of the following:

23

24

- (a) grant an injunction under this subsection;

25

- (b) make any other order under subsection 545(1);

26

that the court considers necessary to stop, or remedy the effects of, the contravention.

27

28

- (4) The court may grant an injunction under subsection (3) only on application by a person referred to in column 2 of item 14 of the table in subsection 539(2).

29

30

Section 417

1 (5) Despite subsection 545(4), the court may make any other order
2 under subsection 545(1) only on application by a person referred to
3 in column 2 of item 14 of the table in subsection 539(2).

4 Note: Section 539 deals with applications for orders in relation to
5 contraventions of civil remedy provisions.

Section 418

1

2 **Division 4—FWA orders stopping etc. industrial action**

3 **418 FWA must order that industrial action by employees or**
4 **employers stop etc.**

5 (1) If it appears to FWA that industrial action by one or more
6 employees or employers that is not, or would not be, protected
7 industrial action:

- 8 (a) is happening; or
9 (b) is threatened, impending or probable; or
10 (c) is being organised;

11 FWA must make an order that the industrial action stop, not occur
12 or not be organised (as the case may be) for a period (the *stop*
13 *period*) specified in the order.

14 Note: For interim orders, see section 420.

15 (2) FWA may make the order:

- 16 (a) on its own initiative; or
17 (b) on application by either of the following:
18 (i) a person who is affected (whether directly or indirectly),
19 or who is likely to be affected (whether directly or
20 indirectly), by the industrial action;
21 (ii) an organisation of which a person referred to in
22 subparagraph (i) is a member.

23 (3) In making the order, FWA does not have to specify the particular
24 industrial action.

25 (4) If FWA is required to make an order under subsection (1) in
26 relation to industrial action and a protected action ballot authorised
27 the industrial action:

- 28 (a) some or all of which has not been taken before the beginning
29 of the stop period specified in the order; or
30 (b) which has not ended before the beginning of that stop period;
31 or
32 (c) beyond that stop period;

1 FWA may state in the order whether or not the industrial action
2 may be engaged in after the end of that stop period without another
3 protected action ballot.

4 **419 FWA must order that industrial action by non-national system**
5 **employees or non-national system employers stop etc.**

6 *Stop orders etc.*

- 7 (1) If it appears to FWA that industrial action by one or more
8 non-national system employees or non-national system employers:
9 (a) is:
10 (i) happening; or
11 (ii) threatened, impending or probable; or
12 (iii) being organised; and
13 (b) will, or would, be likely to have the effect of causing
14 substantial loss or damage to the business of a constitutional
15 corporation;

16 FWA must make an order that the industrial action stop, not occur
17 or not be organised (as the case may be) for a period specified in
18 the order.

19 Note: For interim orders, see section 420.

- 20 (2) FWA may make the order:
21 (a) on its own initiative; or
22 (b) on application by either of the following:
23 (i) a person who is affected (whether directly or indirectly),
24 or who is likely to be affected (whether directly or
25 indirectly), by the industrial action;
26 (ii) an organisation of which a person referred to in
27 subparagraph (i) is a member.
- 28 (3) In making the order, FWA does not have to specify the particular
29 industrial action.

Section 420

1 **420 Interim orders etc.**

2 *Application must be determined within 2 days*

3 (1) As far as practicable, FWA must determine an application for an
4 order under section 418 or 419 within 2 days after the application
5 is made.

6 *Interim orders*

7 (2) If FWA is unable to determine the application within that period,
8 FWA must, within that period, make an interim order that the
9 industrial action to which the application relates stop, not occur or
10 not be organised (as the case may be).

11 (3) However, FWA must not make the interim order if FWA is
12 satisfied that it would be contrary to the public interest to do so.

13 (4) In making the interim order, FWA does not have to specify the
14 particular industrial action.

15 (5) An interim order continues in operation until the application is
16 determined.

17 **421 Contravening an order etc.**

18 *Contravening orders*

19 (1) A person to whom an order under section 418, 419 or 420 applies
20 must not contravene a term of the order.

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

22 (2) However, a person is not required to comply with an order if:
23 (a) the order is an order under section 418, or an order under
24 section 420 that relates to an application for an order under
25 section 418; and
26 (b) the industrial action to which the order relates is, or would
27 be, protected industrial action.

Section 421

1

Injunctions

2

(3) The Federal Court or Federal Magistrates Court may grant an injunction, under this subsection, on such terms as the court considers appropriate if:

3

4

5

(a) a person referred to in column 2 of item 15 of the table in subsection 539(2) has applied for the injunction; and

6

7

(b) the court is satisfied that another person to whom the order applies has contravened, or proposes to contravene, a term of the order.

8

9

10

Note: Section 539 deals with applications for orders in relation to contraventions of civil remedy provisions.

11

12

No other orders

13

(4) Section 545 (which deals with orders that a court can make if a person has contravened etc. a civil remedy provision) does not apply to a contravention of a term of the order.

14

15

Section 422

1

2

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

3

4

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

5

6

(1) The Federal Court or Federal Magistrates Court may grant an injunction on such terms as the court considers appropriate if:

7

8

(a) a person has applied for the injunction; and

9

(b) the requirement set out in subsection (2) is met.

10

(2) The court is satisfied that:

11

(a) employee claim action for a proposed enterprise agreement is being engaged in, or is threatened, impending or probable;

12

13

and

14

(b) a bargaining representative of an employee who will be

15

covered by the agreement is engaging in pattern bargaining in relation to the agreement.

16

1

2

Division 6—Suspension or termination of protected industrial action by FWA

3

4

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

5

6

Suspension or termination of protected industrial action

7

- (1) FWA may make an order suspending or terminating protected industrial action for a proposed enterprise agreement that is being engaged in if the requirements set out in this section are met.

8

9

10

Requirement—significant economic harm

11

- (2) If the protected industrial action is employee claim action, FWA must be satisfied that the action is causing, or is threatening to cause, significant economic harm to:

12

13

14

- (a) the employer, or any of the employers, that will be covered by the agreement; and

15

16

- (b) any of the employees who will be covered by the agreement.

17

- (3) If the protected industrial action is:

18

- (a) employee response action; or

19

- (b) employer response action;

20

FWA must be satisfied that the action is causing, or is threatening to cause, significant economic harm to any of the employees who will be covered by the agreement.

21

22

23

- (4) For the purposes of subsections (2) and (3), the factors relevant to working out whether protected industrial action is causing, or is threatening to cause, significant economic harm to a person referred to in those subsections, include the following:

24

25

26

- (a) the source, nature and degree of harm suffered or likely to be suffered;

27

28

29

- (b) the likelihood that the harm will continue to be caused or will be caused;

30

31

- (c) the capacity of the person to bear the harm;
-

Section 423

- 1 (d) the views of the person and the bargaining representatives for
2 the agreement;
- 3 (e) whether the bargaining representatives for the agreement
4 have met the good faith bargaining requirements and have
5 not contravened any bargaining orders in relation to the
6 agreement;
- 7 (f) if FWA is considering terminating the protected industrial
8 action:
- 9 (i) whether the bargaining representatives for the
10 agreement are genuinely unable to reach agreement on
11 the terms that should be included in the agreement; and
- 12 (ii) whether there is no reasonable prospect of agreement
13 being reached;
- 14 (g) the objective of promoting and facilitating bargaining for the
15 agreement.

16 *Requirement—harm is imminent*

- 17 (5) If the protected industrial action is threatening to cause significant
18 economic harm as referred to in subsection (2) or (3), FWA must
19 be satisfied that the harm is imminent.

20 *Requirement—protracted action etc.*

- 21 (6) FWA must be satisfied that:
- 22 (a) the protected industrial action has been engaged in for a
23 protracted period of time; and
- 24 (b) the dispute will not be resolved in the reasonably foreseeable
25 future.

26 *Order may be made on own initiative or on application*

- 27 (7) FWA may make the order:
- 28 (a) on its own initiative; or
- 29 (b) on application by any of the following:
- 30 (i) a bargaining representative for the agreement;
- 31 (ii) the Minister;
- 32 (iii) a person prescribed by the regulations.

1 **424 FWA must suspend or terminate protected industrial action—**
2 **endangering life etc.**

3 *Suspension or termination of protected industrial action*

- 4 (1) FWA must make an order suspending or terminating protected
5 industrial action for a proposed enterprise agreement that:
6 (a) is being engaged in; or
7 (b) is threatened, impending or probable;
8 if FWA is satisfied that the protected industrial action has
9 threatened, is threatening, or would threaten:
10 (c) to endanger the life, the personal safety or health, or the
11 welfare, of the population or of part of it; or
12 (d) to cause significant damage to the Australian economy or an
13 important part of it.
- 14 (2) FWA may make the order:
15 (a) on its own initiative; or
16 (b) on application by any of the following:
17 (i) a bargaining representative for the agreement;
18 (ii) the Minister;
19 (iii) a person prescribed by the regulations.

20 *Application must be determined within 5 days*

- 21 (3) If an application for an order under this section is made, FWA
22 must, as far as practicable, determine the application within 5 days
23 after it is made.

24 *Interim orders*

- 25 (4) If FWA is unable to determine the application within that period,
26 FWA must, within that period, make an interim order suspending
27 the protected industrial action to which the application relates until
28 the application is determined.
- 29 (5) An interim order continues in operation until the application is
30 determined.

Section 425

1 **425 FWA must suspend protected industrial action—cooling off**

- 2 (1) FWA must make an order suspending protected industrial action
3 for a proposed enterprise agreement that is being engaged in if
4 FWA is satisfied that the suspension is appropriate taking into
5 account the following matters:
6 (a) whether the suspension would be beneficial to the bargaining
7 representatives for the agreement because it would assist in
8 resolving the matters at issue;
9 (b) the duration of the protected industrial action;
10 (c) whether the suspension would be contrary to the public
11 interest or inconsistent with the objects of this Act;
12 (d) any other matters that FWA considers relevant.
- 13 (2) FWA may make the order only on application by:
14 (a) a bargaining representative for the agreement; or
15 (b) a person prescribed by the regulations.

16 **426 FWA must suspend protected industrial action—significant**
17 **harm to a third party**

18 *Suspension of protected industrial action*

- 19 (1) FWA must make an order suspending protected industrial action
20 for a proposed enterprise agreement that is being engaged in if the
21 requirements set out in this section are met.

22 *Requirement—adverse effect on employers or employees*

- 23 (2) FWA must be satisfied that the protected industrial action is
24 adversely affecting:
25 (a) the employer, or any of the employers, that will be covered
26 by the agreement; or
27 (b) any of the employees who will be covered by the agreement.

28 *Requirement—significant harm to a third party*

- 29 (3) FWA must be satisfied that the protected industrial action is
30 threatening to cause significant harm to any person other than:
31 (a) a bargaining representative for the agreement; or
-

- 1 (b) an employee who will be covered by the agreement.
- 2 (4) For the purposes of subsection (3), FWA may take into account
3 any matters it considers relevant including the extent to which the
4 protected industrial action threatens to:
- 5 (a) damage the ongoing viability of an enterprise carried on by
6 the person; or
- 7 (b) disrupt the supply of goods or services to an enterprise
8 carried on by the person; or
- 9 (c) reduce the person's capacity to fulfil a contractual obligation;
10 or
- 11 (d) cause other economic loss to the person.

12 *Requirement—suspension is appropriate*

- 13 (5) FWA must be satisfied that the suspension is appropriate taking
14 into account the following:
- 15 (a) whether the suspension would be contrary to the public
16 interest or inconsistent with the objects of this Act;
- 17 (b) any other matters that FWA considers relevant.

18 *Order may only be made on application by certain persons*

- 19 (6) FWA may make the order only on application by:
- 20 (a) an organisation, person or body directly affected by the
21 protected industrial action other than:
- 22 (i) a bargaining representative for the agreement; or
23 (ii) an employee who will be covered by the agreement; or
- 24 (b) the Minister; or
- 25 (c) a person prescribed by the regulations.

26 **427 FWA must specify the period of suspension**

27 *Application of this section*

- 28 (1) This section applies if FWA is required or permitted by this
29 Division to make an order suspending protected industrial action.

Section 428

1

Suspension period

2

- (2) FWA must specify, in the order, the period for which the protected industrial action is suspended.

3

4

Notice period

5

- (3) FWA may specify, in the order, a longer period of notice of up to 7 working days for the purposes of paragraph 430(2)(b) if FWA is satisfied that there are exceptional circumstances justifying that longer period of notice.

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428 Extension of a period of suspension

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- (1) FWA may make an order extending the period of suspension specified in an order (the *suspension order*) suspending protected industrial action for a proposed enterprise agreement if:

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- (a) the person who applied, or a person who could have applied, for the suspension order, applies for the extension; and

- (b) FWA has not previously made an order under this section in relation to the suspension order; and

- (c) FWA is satisfied that the extension is appropriate taking into account any matters FWA considers relevant including the matters specified in the provision under which the suspension order was made.

21

- (2) If FWA is permitted to make an order under this section:

22

23

24

25

26

- (a) FWA must specify, in the order, the period of extension; and

- (b) FWA may specify, in the order, a longer period of notice of up to 7 working days for the purposes of paragraph 430(2)(b) if FWA is satisfied that there are exceptional circumstances justifying that longer period of notice.

27

429 Employee claim action without a further protected action ballot after a period of suspension etc.

28

29

Application of this section

30

- (1) This section applies in relation to employee claim action for a proposed enterprise agreement if:

31

Section 430

- 1 (a) an order suspending the employee claim action has been
2 made; and
3 (b) a protected action ballot authorised the employee claim
4 action:
5 (i) some or all of which had not been taken before the
6 beginning of the period (the *suspension period*) of
7 suspension specified in the order; or
8 (ii) which had not ended before the beginning of the
9 suspension period; or
10 (iii) beyond the suspension period; and
11 (c) the suspension period (including any extension under
12 section 428) ends, or the order is revoked before the end of
13 that period.

14 *Further protected action ballot not required to engage in employee*
15 *claim action*

- 16 (2) A person may engage in the employee claim action without another
17 protected action ballot.
18 (3) For the purposes of working out when the employee claim action
19 may be engaged in, the suspension period (including any dates
20 authorised by the protected action ballot as dates on which
21 employee claim action is to be engaged in) must be disregarded.
22 (4) Nothing in this section authorises employee claim action that is
23 different in type or duration from the employee claim action that
24 was authorised by the protected action ballot.

25 **430 Notice of employee claim action engaged in after a period of**
26 **suspension etc.**

- 27 (1) Before a person engages in employee claim action for a proposed
28 enterprise agreement as permitted by subsection 429(2), a
29 bargaining representative of an employee who will be covered by
30 the agreement must give written notice of the action to the
31 employer of the employee.
32 (2) The period of notice must be at least:
33 (a) 3 working days; or
-

Section 430

- 1 (b) if, under subsection 427(3) or paragraph 428(2)(b), FWA
2 specified, for the purposes of this paragraph, a longer period
3 of notice in an order relating to the employee claim action—
4 that period of notice.
- 5 (3) The notice must state the nature of the employee claim action and
6 the day on which it will start.

1

2 **Division 7—Ministerial declarations**

3 **431 Ministerial declaration terminating industrial action**

- 4 (1) The Minister may make a declaration, in writing, terminating
5 protected industrial action for a proposed enterprise agreement if
6 the Minister is satisfied that:
- 7 (a) the industrial action is being engaged in, or is threatened,
8 impending or probable; and
 - 9 (b) the industrial action is threatening, or would threaten:
 - 10 (i) to endanger the life, the personal safety or health, or the
11 welfare, of the population or a part of it; or
 - 12 (ii) to cause significant damage to the Australian economy
13 or an important part of it.
- 14 (2) The declaration comes into operation on the day that it is made.
- 15 (3) A declaration under subsection (1) is not a legislative instrument.

16 **432 Informing people of declaration**

- 17 (1) This section applies if the Minister makes a declaration under
18 subsection 431(1).
- 19 (2) The declaration must be published in the *Gazette*.
- 20 (3) The Minister must inform FWA of the making of the declaration.
- 21 (4) The Minister must, as soon as practicable, take all reasonable steps
22 to ensure that the bargaining representatives for the proposed
23 enterprise agreement concerned are made aware:
- 24 (a) of the making of the declaration; and
 - 25 (b) of the effect of Part 2-5 (which deals with workplace
26 determinations).

27 **433 Ministerial directions to remove or reduce threat**

- 28 (1) If a declaration under subsection 431(1) is in operation in relation
29 to a proposed enterprise agreement, the Minister may give

Section 434

- 1 directions, in writing, requiring the following persons to take, or
2 refrain from taking, specified actions:
- 3 (a) specified bargaining representatives for the agreement;
4 (b) specified employees who will be covered by the agreement.
- 5 (2) The Minister may only give directions that the Minister is satisfied
6 are reasonably directed to removing or reducing the threat referred
7 to in paragraph 431(1)(b).
- 8 (3) A direction under subsection (1) is not a legislative instrument.

9 **434 Contravening a Ministerial direction**

10 A person to whom a direction under subsection 433(1) applies
11 must not contravene the direction.

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

1

2 **Division 8—Protected action ballots**

3 **Subdivision A—Introduction**

4 **435 Guide to this Division**

5

This Division establishes the process that will allow employees to choose, by means of a fair and democratic secret ballot, whether to authorise protected industrial action for a proposed enterprise agreement.

6

7

8

9

Subdivision B provides for FWA to make a protected action ballot order, on application by a bargaining representative of an employee who will be covered by a proposed enterprise agreement, requiring a protected action ballot to be conducted.

10

11

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Subdivision C deals with the conduct of a protected action ballot.

14

Subdivision D deals with the effect of a protected action ballot.

15

16

Subdivision E deals with compliance matters in relation to a protected action ballot.

17

18

Subdivision F deals with the liability for the costs of a protected action ballot.

19

Subdivision G deals with records and other miscellaneous matters.

20 **436 Object of this Division**

21

The object of this Division is to establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action for a proposed enterprise agreement.

22

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24

25

Note: Under Division 2, industrial action by employees for a proposed enterprise agreement (other than employee response action) is not protected industrial action unless it has been authorised in advance by a protected action ballot.

26

27

28

Section 437

1 **Subdivision B—Protected action ballot orders**

2 **437 Application for a protected action ballot order**

3 *Who may apply for a protected action ballot order*

4 (1) A bargaining representative of an employee who will be covered
5 by a proposed enterprise agreement, or 2 or more such bargaining
6 representatives (acting jointly), may apply to FWA for an order (a
7 ***protected action ballot order***) requiring a protected action ballot to
8 be conducted to determine whether employees wish to engage in
9 particular protected industrial action for the agreement.

10 (2) Subsection (1) does not apply if the proposed enterprise agreement
11 is:

- 12 (a) a greenfields agreement; or
13 (b) a multi-enterprise agreement.

14 *Matters to be specified in application*

15 (3) The application must specify:

- 16 (a) the group or groups of employees who are to be balloted; and
17 (b) the question or questions to be put to the employees who are
18 to be balloted, including the nature of the proposed industrial
19 action.

20 (4) If the applicant wishes a person other than the Australian Electoral
21 Commission to be the protected action ballot agent for the
22 protected action ballot, the application must specify the name of
23 the person.

24 Note: The protected action ballot agent will be the Australian Electoral
25 Commission unless FWA specifies another person in the protected
26 action ballot order as the protected action ballot agent (see subsection
27 443(4)).

28 (5) A group of employees specified under paragraph (3)(a) is taken to
29 include only employees who:

- 30 (a) will be covered by the proposed enterprise agreement; and
31 (b) are represented by a bargaining representative who is an
32 applicant for the protected action ballot order.

1 *Documents to accompany application*

- 2 (6) The application must be accompanied by any documents and other
3 information prescribed by the regulations.

4 **438 Restriction on when application may be made**

- 5 (1) If one or more enterprise agreements apply to the employees who
6 will be covered by the proposed enterprise agreement, an
7 application for a protected action ballot order must not be made
8 earlier than 30 days before the nominal expiry date of the
9 enterprise agreement, or the latest nominal expiry date of those
10 enterprise agreements (as the case may be).
- 11 (2) To avoid doubt, making an application for a protected action ballot
12 order does not constitute organising industrial action.

13 **439 Joint applications**

14 Without limiting section 609, the procedural rules may provide for
15 the following:

- 16 (a) how a provision of this Act that applies in relation to an
17 applicant for a protected action ballot order is to apply in
18 relation to joint applicants for such an order;
- 19 (b) the joinder, with the consent of each existing applicant, of
20 one or more bargaining representatives to an application for a
21 protected action ballot order;
- 22 (c) the withdrawal of one or more applicants from a joint
23 application for a protected action ballot order.

24 **440 Notice of application**

25 Within 24 hours after making an application for a protected action
26 ballot order, the applicant must give a copy of the application to
27 the employer of the employees who are to be balloted, and:

- 28 (a) if the application specifies a person that the applicant wishes
29 to be the protected action ballot agent—that person; or
30 (b) otherwise—the Australian Electoral Commission.

Section 441

1 **441 Application to be determined within 2 days after it is made**

- 2 (1) FWA must, as far as practicable, determine an application for a
3 protected action ballot order within 2 working days after the
4 application is made.
- 5 (2) However, FWA must not determine the application unless it is
6 satisfied that each applicant has complied with section 440.

7 **442 Dealing with multiple applications together**

- 8 FWA may deal with 2 or more applications for a protected action
9 ballot order at the same time if:
- 10 (a) the applications relate to industrial action by:
11 (i) employees of the same employer; or
12 (ii) employees at the same workplace; and
- 13 (b) FWA is satisfied that dealing with the applications at the
14 same time will not unreasonably delay the determination of
15 any of the applications.

16 **443 When FWA must make a protected action ballot order**

- 17 (1) FWA must make a protected action ballot order in relation to a
18 proposed enterprise agreement if:
19 (a) an application has been made under section 437; and
20 (b) FWA is satisfied that each applicant has been, and is,
21 genuinely trying to reach an agreement with the employer of
22 the employees who are to be balloted.
- 23 (2) FWA must not make a protected action ballot order in relation to a
24 proposed enterprise agreement except in the circumstances referred
25 to in subsection (1).
- 26 (3) A protected action ballot order must specify the following:
27 (a) the name of each applicant for the order;
28 (b) the group or groups of employees who are to be balloted;
29 (c) the date by which voting in the protected action ballot closes;
30 (d) the question or questions to be put to the employees who are
31 to be balloted, including the nature of the proposed industrial
32 action.

Section 444

- 1 (4) If FWA decides that a person other than the Australian Electoral
2 Commission is to be the protected action ballot agent for the
3 protected action ballot, the protected action ballot order must also
4 specify:
5 (a) the person that FWA decides, under subsection 444(1), is to
6 be the protected action ballot agent; and
7 (b) the person (if any) that FWA decides, under subsection
8 444(3), is to be the independent advisor for the ballot.
- 9 (5) If FWA is satisfied, in relation to the proposed industrial action
10 that is the subject of the protected action ballot, that there are
11 exceptional circumstances justifying the period of written notice
12 referred to in paragraph 414(2)(a) being longer than 3 working
13 days, the protected action ballot order may specify a longer period
14 of up to 7 working days.
- 15 Note: Under subsection 414(1), before a person engages in employee claim
16 action for a proposed enterprise agreement, a bargaining
17 representative of an employee who will be covered by the agreement
18 must give written notice of the action to the employer of the
19 employee.

20 **444 FWA may decide on ballot agent other than the Australian**
21 **Electoral Commission and independent advisor**

22 *Alternative ballot agent*

- 23 (1) FWA may decide that a person other than the Australian Electoral
24 Commission is to be the protected action ballot agent for a
25 protected action ballot only if:
26 (a) the person is specified in the application for the protected
27 action ballot order as the person the applicant wishes to be
28 the protected action ballot agent; and
29 (b) FWA is satisfied that:
30 (i) the person is a fit and proper person to conduct the
31 ballot; and
32 (ii) any other requirements prescribed by the regulations are
33 met.
- 34 (2) The regulations may prescribe:
-

Section 445

- 1 (a) conditions that a person must meet in order to satisfy FWA
2 that the person is a fit and proper person to conduct a
3 protected action ballot; and
4 (b) factors that FWA must take into account in determining
5 whether a person is a fit and proper person to conduct a
6 protected action ballot.

7 *Independent advisor*

- 8 (3) FWA may decide that a person (the *other person*) is to be the
9 independent advisor for a protected action ballot if:
10 (a) FWA has decided that a person other than the Australian
11 Electoral Commission is to be the protected action ballot
12 agent for the ballot; and
13 (b) FWA considers it appropriate that there be an independent
14 advisor for the ballot; and
15 (c) FWA is satisfied that:
16 (i) the other person is sufficiently independent of each
17 applicant for the protected action ballot order; and
18 (ii) any other requirements prescribed by the regulations are
19 met.

20 **445 Notice of protected action ballot order**

21 As soon as practicable after making a protected action ballot order,
22 FWA must give a copy of the order to:

- 23 (a) each applicant for the order; and
24 (b) the employer of the employees who are to be balloted; and
25 (c) the protected action ballot agent for the protected action
26 ballot.

27 **446 Protected action ballot order may require 2 or more protected**
28 **action ballots to be held at the same time**

- 29 (1) This section applies if:
30 (a) FWA has made a protected action ballot order; and
31 (b) FWA proposes to make another protected action ballot order
32 or orders; and

- 1 (c) the orders would require a protected action ballot to be held
2 in relation to industrial action by employees of the same
3 employer or employees at the same workplace.
- 4 (2) FWA may make, or vary, the protected action ballot orders so as to
5 require the protected action ballots to be held at the same time if
6 FWA is satisfied:
- 7 (a) that the level of disruption of the employer's enterprise, or at
8 the workplace, could be reduced if the ballots were held at
9 the same time; and
- 10 (b) that requiring the ballots to be held at the same time will not
11 unreasonably delay either ballot.

12 **447 Variation of protected action ballot order**

- 13 (1) An applicant for a protected action ballot order may apply to FWA
14 to vary the order.
- 15 (2) The protected action ballot agent for a protected action ballot may
16 apply to FWA to vary the protected action ballot order to change
17 the date by which voting in the ballot closes.
- 18 (3) An application may be made under subsection (1) or (2):
- 19 (a) at any time before the date by which voting in the protected
20 action ballot closes; or
- 21 (b) if the ballot has not been held before that date and FWA
22 consents—after that time.
- 23 (4) If an application is made under subsection (1) or (2), FWA may
24 vary the protected action ballot order.

25 **448 Revocation of protected action ballot order**

- 26 (1) An applicant for a protected action ballot order may apply to FWA,
27 at any time before voting in the protected action ballot closes, to
28 revoke the order.
- 29 (2) If an application to revoke a protected action ballot order is made,
30 FWA must revoke the order.

Section 449

1 **Subdivision C—Conduct of protected action ballot**

2 **449 Protected action ballot to be conducted by Australian Electoral**
3 **Commission or other specified ballot agent**

- 4 (1) A protected action ballot must be conducted by:
- 5 (a) if a person is specified in the protected action ballot order as
6 the protected action ballot agent for the ballot—that person;
7 or
8 (b) otherwise—the Australian Electoral Commission.
- 9 (2) The protected action ballot agent must conduct the protected action
10 ballot in accordance with the following:
- 11 (a) the protected action ballot order;
12 (b) the timetable for the ballot;
13 (c) this Subdivision;
14 (d) any directions given by FWA;
15 (e) any procedures prescribed by the regulations.

16 **450 Directions for conduct of protected action ballot**

- 17 (1) This section applies if the protected action ballot agent is not the
18 Australian Electoral Commission.
- 19 (2) FWA must give the protected action ballot agent written directions
20 in relation to the following matters relating to the protected action
21 ballot:
- 22 (a) the development of a timetable;
23 (b) the voting method, or methods, to be used;
24 (c) the compilation of the roll of voters;
25 (d) the addition of names to, or removal of names from, the roll
26 of voters;
27 (e) any other matter in relation to the conduct of the ballot that
28 FWA considers appropriate.

29 Note: A protected action ballot agent must not contravene a term of a
30 direction given by FWA in relation to a protected action ballot (see
31 subsection 463(2)).

Section 451

1 (3) A direction given under subsection (2) may require the protected
2 action ballot agent to comply with a provision of this Subdivision
3 (other than subsection 454(5)) in relation to a particular matter.

4 Note: Subsection 454(5) provides for the Australian Electoral Commission
5 to vary the roll of voters on its own initiative.

6 (4) To enable the roll of voters to be compiled, FWA may direct, in
7 writing, either or both of the following:
8 (a) the employer of the employees who are to be balloted;
9 (b) the applicant for the protected action ballot order;
10 to give to FWA or the protected action ballot agent:
11 (c) the names of the employees included in the group or groups
12 of employees specified in the protected action ballot order;
13 and
14 (d) any other information that it is reasonable for FWA or the
15 protected action ballot agent to require to assist in compiling
16 the roll of voters.

17 **451 Timetable for protected action ballot**

18 (1) This section applies if:
19 (a) the protected action ballot agent is the Australian Electoral
20 Commission; or
21 (b) FWA has directed the protected action ballot agent to comply
22 with this section.

23 Note: If this section does not apply, the protected action ballot agent must
24 comply with directions given by FWA in relation to the matters dealt
25 with by this section (see section 450).

26 (2) As soon as practicable after receiving a copy of the protected
27 action ballot order, the protected action ballot agent must, in
28 consultation with each applicant for the order and the employer of
29 the employees who are to be balloted:
30 (a) develop a timetable for the conduct of the protected action
31 ballot; and
32 (b) determine the voting method, or methods, to be used for the
33 ballot.

Section 452

1 **452 Compilation of roll of voters**

2 (1) This section applies if:

- 3 (a) the protected action ballot agent is the Australian Electoral
4 Commission; or
5 (b) FWA has directed the protected action ballot agent to comply
6 with this section.

7 Note: If this section does not apply, the protected action ballot agent must
8 comply with directions given by FWA in relation to the matters dealt
9 with by this section (see section 450).

10 (2) As soon as practicable after receiving a copy of the protected
11 action ballot order, the protected action ballot agent must compile
12 the roll of voters for the protected action ballot.

13 (3) For the purpose of compiling the roll of voters, the protected action
14 ballot agent may direct, in writing, the employer of the employees
15 who are to be balloted, or the applicant for the order (or both), to
16 give to the ballot agent:

- 17 (a) the names of the employees included in the group or groups
18 of employees specified in the protected action ballot order;
19 and
20 (b) any other information that it is reasonable for the protected
21 action ballot agent to require to assist in compiling the roll of
22 voters.

23 **453 Who is eligible to be included on the roll of voters**

24 An employee is eligible to be included on the roll of voters for the
25 protected action ballot only if:

- 26 (a) the employee will be covered by the proposed enterprise
27 agreement to which the ballot relates; and
28 (b) on the day the protected action ballot order was made, the
29 employee:
30 (i) was represented by a bargaining representative who was
31 an applicant for the order; and
32 (ii) was included in a group of employees specified in the
33 order.

1 **454 Variation of roll of voters**

2 *Variation by protected action ballot agent on request*

- 3 (1) Subsections (2) to (4) apply if:
4 (a) the protected action ballot agent is the Australian Electoral
5 Commission; or
6 (b) FWA has directed the protected action ballot agent to comply
7 with those subsections.

8 Note: If subsections (2) to (4) do not apply, the protected action ballot agent
9 must comply with directions given by FWA in relation to the matters
10 dealt with by those subsections (see section 450).

11 *Adding names to the roll of voters*

- 12 (2) The protected action ballot agent must include an employee's name
13 on the roll of voters for the protected action ballot if:
14 (a) the protected action ballot agent is requested to do so by:
15 (i) an applicant for the protected action ballot order; or
16 (ii) the employee; or
17 (iii) the employee's employer; and
18 (b) the protected action ballot agent is satisfied that the employee
19 is eligible to be included on the roll of voters; and
20 (c) the request is made before the end of the working day before
21 the day on which voting in the ballot starts.

22 *Removing names from the roll of voters*

- 23 (3) The protected action ballot agent must remove an employee's
24 name from the roll of voters for the protected action ballot if:
25 (a) the protected action ballot agent is requested to do so by:
26 (i) an applicant for the protected action ballot order; or
27 (ii) the employee; or
28 (iii) the employee's employer; and
29 (b) the protected action ballot agent is satisfied that the employee
30 is not eligible to be included on the roll of voters; and
31 (c) the request is made before the end of the working day before
32 the day on which voting in the ballot starts.

Section 455

- 1 (4) The protected action ballot agent must remove a person's name
2 from the roll of voters for the protected action ballot if:
3 (a) the person (the *former employee*) is no longer employed by
4 the employer (the *former employer*) of the employees who
5 are to be balloted; and
6 (b) the protected action ballot agent is requested to do so by:
7 (i) an applicant for the protected action ballot order; or
8 (ii) the former employee; or
9 (iii) the former employer; and
10 (c) the request is made before the end of the working day before
11 the day on which voting in the ballot starts.

12 *Variation by Australian Electoral Commission on its own initiative*

- 13 (5) If the protected action ballot agent is the Australian Electoral
14 Commission, the Commission may, on its own initiative and before
15 the end of the working day before the day on which voting in the
16 ballot starts:
17 (a) include an employee's name on the roll of voters for the
18 protected action ballot if the Commission is satisfied that the
19 employee is eligible to be included on the roll of voters; or
20 (b) remove an employee's name from the roll of voters for the
21 protected action ballot if the Commission is satisfied that the
22 employee is not eligible to be included on the roll of voters;
23 or
24 (c) remove a person's name from the roll of voters for the
25 protected action ballot if the person is no longer employed by
26 the employer of the employees who are to be balloted.

27 **455 Protected action ballot papers**

28 The ballot paper for the protected action ballot must:

- 29 (a) if a form is prescribed by the regulations—be in that form;
30 and
31 (b) include any information prescribed by the regulations.

1 **456 Who may vote in protected action ballot**

2 An employee may vote in the protected action ballot only if the
3 employee's name is on the roll of voters for the ballot.

4 **457 Results of protected action ballot**

- 5 (1) As soon as practicable after voting in the protected action ballot
6 closes, the protected action ballot agent must, in writing:
7 (a) make a declaration of the results of the ballot; and
8 (b) inform the following persons of the results:
9 (i) each applicant for the protected action ballot order;
10 (ii) the employer of the employees who were balloted;
11 (iii) FWA.
- 12 (2) FWA must publish the results of the protected action ballot, on its
13 website or by any other means that FWA considers appropriate, as
14 soon as practicable after it is informed of them.

15 **458 Report about conduct of protected action ballot**

16 *Protected action ballot conducted by the Australian Electoral*
17 *Commission*

- 18 (1) If:
19 (a) the protected action ballot agent is the Australian Electoral
20 Commission; and
21 (b) the Commission:
22 (i) receives any complaints about the conduct of the
23 protected action ballot; or
24 (ii) becomes aware of any irregularities in relation to the
25 conduct of the ballot;
26 the Commission must prepare a written report about the conduct of
27 the ballot and give it to FWA.

28 *Protected action ballot conducted by person other than the*
29 *Australian Electoral Commission*

- 30 (2) If:

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- 1 (a) the protected action ballot agent is not the Australian
2 Electoral Commission; and
3 (b) the protected action ballot agent or the independent advisor
4 (if any) for the protected action ballot:
5 (i) receives any complaints about the conduct of the ballot;
6 or
7 (ii) becomes aware of any irregularities in relation to the
8 conduct of the ballot;
9 the protected action ballot agent or the independent advisor (as the
10 case may be) must prepare a report about the conduct of the ballot
11 and give it to FWA.

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

13 (3) If:

- 14 (a) the protected action ballot agent is not the Australian
15 Electoral Commission; and
16 (b) FWA:
17 (i) receives any complaints about the conduct of the
18 protected action ballot; or
19 (ii) becomes aware of any irregularities in relation to the
20 conduct of the ballot;
21 FWA must, in writing, direct the protected action ballot agent or
22 the independent advisor (if any) for the ballot (or both) to prepare a
23 report about the conduct of the ballot and give it to FWA.
24 (4) A report under subsection (2) or (3) must be prepared in
25 accordance with the regulations.

26 *Meaning of **conduct** of a protected action ballot*

- 27 (5) **Conduct** of a protected action ballot includes, but is not limited to,
28 the compilation of the roll of voters for the ballot.

29 *Meaning of **irregularity** in relation to the conduct of a protected
30 action ballot*

- 31 (6) An **irregularity**, in relation to the conduct of a protected action
32 ballot, includes, but is not limited to, an act or omission by means
33 of which the full and free recording of votes by all employees

1 entitled to vote in the ballot, and by no other persons is, or is
2 attempted to be, prevented or hindered.

3 **Subdivision D—Effect of protected action ballot**

4 **459 Circumstances in which industrial action is authorised by**
5 **protected action ballot**

- 6 (1) Industrial action by employees is authorised by a protected action
7 ballot if:
- 8 (a) the action was the subject of the ballot; and
 - 9 (b) at least 50% of the employees on the roll of voters for the
10 ballot voted in the ballot; and
 - 11 (c) more than 50% of the valid votes were votes approving the
12 action; and
 - 13 (d) the action commences:
 - 14 (i) during the 30-day period starting on the date of the
15 declaration of the results of the ballot; or
 - 16 (ii) if FWA has extended that period under subsection (3)—
17 during the extended period.

18 Note: Under Division 2, industrial action by employees for a proposed
19 enterprise agreement (other than employee response action) is not
20 protected industrial action unless it has been authorised in advance by
21 a protected action ballot.

- 22 (2) If:
- 23 (a) the nature of the proposed industrial action specified in the
24 question or questions put to the employees in the protected
25 action ballot included periods of industrial action of a
26 particular duration; and
 - 27 (b) the question or questions did not specify that consecutive
28 periods of that industrial action may be organised or engaged
29 in;

30 then only the first period in a series of consecutive periods of that
31 industrial action is the subject of the ballot for the purposes of
32 paragraph (1)(a).

- 33 (3) FWA may extend the 30-day period referred to in
34 subparagraph (1)(d)(i) by up to 30 days if:

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- 1 (a) an applicant for the protected action ballot order applies to
2 FWA for the period to be extended; and
3 (b) the period has not previously been extended.

4 **460 Immunity for persons who act in good faith on protected action**
5 **ballot results**

- 6 (1) This section applies if:
7 (a) the results of a protected action ballot, as declared by the
8 protected action ballot agent for the ballot, purported to
9 authorise particular industrial action; and
10 (b) an organisation or a person, acting in good faith on the
11 declared ballot results, organised or engaged in that industrial
12 action; and
13 (c) either:
14 (i) it later becomes clear that that industrial action was not
15 authorised by the ballot; or
16 (ii) the decision to make the protected action ballot order is
17 quashed or varied on appeal, or on review by FWA,
18 after the industrial action is organised or engaged in.
- 19 (2) No action lies against the organisation or person under any law
20 (whether written or unwritten) in force in a State or a Territory in
21 relation to the industrial action unless the action involved:
22 (a) personal injury; or
23 (b) intentional or reckless destruction of, or damage to, property;
24 or
25 (c) the unlawful taking, keeping or use of property.
- 26 (3) This section does not prevent an action for defamation being
27 brought in relation to anything that occurred in the course of the
28 industrial action.

29 **461 Validity of protected action ballot etc. not affected by technical**
30 **breaches**

- 31 A technical breach of a provision of this Division does not affect
32 the validity of any of the following:
33 (a) a protected action ballot order;
-

- 1 (b) an order, direction or decision of FWA in relation to a
2 protected action ballot order or a protected action ballot;
3 (c) a direction or decision of the protected action ballot agent in
4 relation to a protected action ballot order or a protected
5 action ballot;
6 (d) a protected action ballot;
7 (e) the conduct of a protected action ballot;
8 (f) the declaration of the results of a protected action ballot.

9 **Subdivision E—Compliance**

10 **462 Interferences etc. with protected action ballot**

11 *General*

- 12 (1) A person (the *first person*) must not do any of the following in
13 relation to a protected action ballot:
14 (a) hinder or obstruct the holding of the ballot;
15 (b) use any form of intimidation to prevent a person entitled to
16 vote in the ballot from voting, or to influence the vote of such
17 a person;
18 (c) threaten, offer or suggest, or use, cause or inflict, any
19 violence, injury, punishment, damage, loss or disadvantage
20 because of, or to induce:
21 (i) any vote or omission to vote; or
22 (ii) any support of, or opposition to, voting in a particular
23 manner;
24 (d) offer an advantage (whether financial or otherwise) to a
25 person entitled to vote in the ballot because of or to induce:
26 (i) any vote or omission to vote; or
27 (ii) any support of, or opposition to, voting in a particular
28 manner;
29 (e) counsel or advise a person entitled to vote to refrain from
30 voting;
31 (f) impersonate another person to obtain a ballot paper to which
32 the first person is not entitled, or impersonate another person
33 for the purpose of voting;

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- 1 (g) do an act that results in a ballot paper or envelope being
2 destroyed, defaced, altered, taken or otherwise interfered
3 with;
4 (h) fraudulently put a ballot paper or other paper:
5 (i) into a ballot box or other ballot receptacle; or
6 (ii) into the post;
7 (i) fraudulently deliver a ballot paper or other paper to a person
8 receiving ballot papers for the purposes of the ballot;
9 (j) record a vote that the first person is not entitled to record;
10 (k) record more than one vote;
11 (l) forge a ballot paper or envelope, or utter a ballot paper or
12 envelope that the first person knows to be forged;
13 (m) provide a ballot paper without authority;
14 (n) obtain or have possession of a ballot paper to which the first
15 person is not entitled;
16 (o) request, require or induce another person:
17 (i) to show a ballot paper to the first person; or
18 (ii) to permit the first person to see a ballot paper in such a
19 manner that the first person can see the vote;
20 while the ballot paper is being marked or after it has been
21 marked;
22 (p) do an act that results in a ballot box or other ballot receptacle
23 being destroyed, taken, opened or otherwise interfered with.

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

25 *Meaning of **utter***

- 26 (2) A person is taken to **utter** a forged document if the person:
27 (a) uses or deals with it; or
28 (b) attempts to use or deal with it; or
29 (c) attempts to induce another person to use, deal with, act upon,
30 or accept it.

31 *Obligations of person performing functions or exercising powers
32 for the purposes of a protected action ballot*

- 33 (3) A person (the **first person**) who is performing functions or
34 exercising powers for the purposes of a protected action ballot

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1 must not show to another person, or permit another person to have
2 access to, a ballot paper used in the ballot, except in the course of
3 performing those functions or exercising those powers.

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

5 **463 Contravening a protected action ballot order etc.**

- 6 (1) A person must not contravene:
7 (a) a term of a protected action ballot order; or
8 (b) a term of an order made by FWA in relation to a protected
9 action ballot order or a protected action ballot.

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

- 11 (2) A person must not contravene a direction given by FWA, or a
12 protected action ballot agent, in relation to a protected action ballot
13 order or a protected action ballot.

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

- 15 (3) However, an order cannot be made under Division 2 of Part 4-1 in
16 relation to a contravention (or alleged contravention) of
17 subsection (1) or (2) by the Australian Electoral Commission.

18 **Subdivision F—Liability for costs of protected action ballot**

19 **464 Costs of protected action ballot conducted by the Australian**
20 **Electoral Commission**

- 21 (1) This section applies if the protected action ballot agent for a
22 protected action ballot is the Australian Electoral Commission.
- 23 (2) The Commonwealth is liable for the costs incurred by the
24 Australian Electoral Commission in relation to the protected action
25 ballot, whether or not the ballot is completed.
- 26 (3) However, except as provided by regulations made for the purposes
27 of subsection 466(1), the Commonwealth is not liable for any costs
28 incurred by the Australian Electoral Commission in relation to
29 legal challenges to matters connected with the protected action
30 ballot.

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1 **465 Costs of protected action ballot conducted by protected action**
2 **ballot agent other than the Australian Electoral**
3 **Commission**

- 4 (1) This section applies if the protected action ballot agent for a
5 protected action ballot is not the Australian Electoral Commission.
- 6 (2) The applicant for the protected action ballot order is liable for the
7 costs of conducting the protected action ballot, whether or not the
8 ballot is completed.
- 9 (3) If the application for the protected action ballot order was made by
10 joint applicants, each applicant is jointly and severally liable for
11 the costs of conducting the protected action ballot, whether or not
12 the ballot is completed.
- 13 (4) The *costs of conducting a protected action ballot* are:
14 (a) if the protected action ballot agent is an applicant for the
15 protected action ballot order—the costs incurred by the
16 applicant in relation to the ballot; or
17 (b) otherwise—the amount the protected action ballot agent
18 charges to the applicant or applicants in relation to the ballot.
- 19 (5) However, the *costs of conducting a protected action ballot* do not
20 include any costs incurred by the protected action ballot agent in
21 relation to legal challenges to matters connected with the ballot.

22 **466 Costs of legal challenges**

- 23 (1) The regulations may provide for who is liable for costs incurred in
24 relation to legal challenges to matters connected with a protected
25 action ballot.
- 26 (2) Regulations made for the purposes of subsection (1) may also
27 provide for a person who is liable for costs referred to in that
28 subsection to be indemnified by another person for some or all of
29 those costs.

1 **Subdivision G—Miscellaneous**

2 **467 Information about employees on roll of voters not to be**
3 **disclosed**

4 (1) A person who:

- 5 (a) is the protected action ballot agent for a protected action
6 ballot (other than the Australian Electoral Commission); or
7 (b) is the independent advisor for a protected action ballot; or
8 (c) acquires information from, or on behalf of, a person referred
9 to in paragraph (a) or (b) in the course of performing
10 functions or exercising powers for the purposes of the ballot;

11 must not disclose to any other person information about an
12 employee who is on the roll of voters for the ballot if the
13 information will identify whether or not the employee is a member
14 of an employee organisation.

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

16 (2) Subsection (1) does not apply if:

- 17 (a) the disclosure is made in the course of performing functions
18 or exercising powers for the purposes of the protected action
19 ballot; or
20 (b) the disclosure is required or authorised by or under a law; or
21 (c) the employee has consented, in writing, to the disclosure.

22 Note 1: Personal information given to FWA, the Australian Electoral
23 Commission or another protected action ballot agent under this
24 Division may be regulated under the *Privacy Act 1988*.

25 Note 2: The President of FWA may, in certain circumstances, disclose, or
26 authorise the disclosure of, information acquired by FWA or a
27 member of the staff of FWA, in the course of performing functions or
28 exercising powers as FWA (see section 655).

29 **468 Records**

30 (1) The protected action ballot agent for a protected action ballot must
31 keep the following ballot material:

- 32 (a) the roll of voters for the ballot;
33 (b) the ballot papers, envelopes and other documents and records
34 relating to the ballot;
-

Section 469

- 1 (c) any other material prescribed by the regulations.
- 2 (2) The ballot material must be kept for one year after the day on
- 3 which the protected action ballot closed.
- 4 (3) The protected action ballot agent must comply with any
- 5 requirements prescribed by the regulations relating to how the
- 6 ballot material is to be kept.

7 **469 Regulations**

8 The regulations may provide for the following matters:

- 9 (a) the requirements that must be satisfied for a person (other
- 10 than the Australian Electoral Commission) to be:
- 11 (i) the protected action ballot agent for a protected action
- 12 ballot; or
- 13 (ii) the independent advisor for a protected action ballot;
- 14 (b) the procedures to be followed in relation to the conduct of a
- 15 protected action ballot;
- 16 (c) the form and content of the ballot paper for a protected action
- 17 ballot;
- 18 (d) the qualifications, appointment, powers and duties of
- 19 scrutineers for a protected action ballot;
- 20 (e) the preparation of reports under subsection 458(2) or (3);
- 21 (f) the records that the protected action ballot agent must keep in
- 22 relation to a protected action ballot and how those records are
- 23 to be kept.

1

2 **Division 9—Payments relating to periods of industrial**
3 **action**

4 **Subdivision A—Protected industrial action**

5 **470 Payments not to be made relating to certain periods of**
6 **industrial action**

7 (1) If an employee engaged, or engages, in protected industrial action
8 against an employer on a day, the employer must not make a
9 payment to an employee in relation to the total duration of the
10 industrial action on that day.

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

12 (2) However, this section does not apply to a partial work ban.

13 Note: For payments relating to periods of partial work bans, see section 471.

14 (3) A *partial work ban* is industrial action that is not:

- 15 (a) a failure or refusal by an employee to attend for work; or
16 (b) a failure or refusal by an employee who attends for work to
17 perform any work at all; or
18 (c) an overtime ban.

19 (4) To the extent that the industrial action is an overtime ban:

20 (a) this section does not apply, in relation to a period of overtime
21 to which the ban applies, unless:

- 22 (i) the employer requested or required the employee to
23 work the period of overtime; and
24 (ii) the employee refused to work the period of overtime;
25 and
26 (iii) the refusal was a contravention of the employee's
27 obligations under a modern award, enterprise agreement
28 or contract of employment; or

29 (b) if paragraph (a) does not apply—the duration of the industrial
30 action is taken, for the purposes of this section, not to extend
31 beyond the period of overtime to which the ban relates.

Section 471

1 **471 Payments relating to partial work bans**

2 *Employer gives notice of reduction in payments*

3 (1) If:

- 4 (a) an employee engaged, or engages, in protected industrial
5 action against an employer on a day; and
6 (b) the industrial action is a partial work ban; and
7 (c) the employer gives to the employee a written notice stating
8 that, because of the ban, the employee's payments will be
9 reduced by a proportion specified in the notice;

10 then the employee's payments are reduced in accordance with
11 subsection (2) in relation to the period (the ***industrial action***
12 ***period***) referred to in subsection (5).

13 (2) The employee's payments in relation to the industrial action period
14 are reduced:

- 15 (a) by the proportion specified in the notice; or
16 (b) if FWA has ordered a different proportion under
17 section 472—by the proportion specified in the order;
18 and the modern award, enterprise agreement or contract of
19 employment that applies to the employee's employment has effect
20 accordingly.

21 (3) The regulations may prescribe how the proportion referred to in
22 paragraph (2)(a) is to be worked out.

23 *Employer gives notice of non-payment*

24 (4) If:

- 25 (a) an employee engaged, or engages, in protected industrial
26 action against an employer on a day; and
27 (b) the industrial action is a partial work ban; and
28 (c) the employer gives to the employee a written notice stating
29 that, because of the ban, the employee will not be entitled to
30 any payments;

31 then the employee is not entitled to any payments in relation to the
32 period (the ***industrial action period***) referred to in subsection (5).

1 *The industrial action period*

- 2 (5) The **industrial action period** is the period:
3 (a) starting at the later of:
4 (i) the start of the first day on which the employee
5 implemented the partial work ban; or
6 (ii) the start of the next day, after the day on which the
7 notice was given, on which the employee performs
8 work; and
9 (b) ending at the end of the day on which the ban ceases.

10 *Form and content of notice*

- 11 (6) The regulations may prescribe requirements relating to one or both
12 of the following:
13 (a) the form of a notice given under paragraph (1)(c) or (4)(c);
14 (b) the content of such a notice.

15 *Manner of giving notice*

- 16 (7) Without limiting paragraph (1)(c) or (4)(c), the employer is taken
17 to have given a notice in accordance with that paragraph to the
18 employee if the employer:
19 (a) has taken all reasonable steps to ensure that the employee,
20 and the employee's bargaining representative (if any),
21 receives the notice; and
22 (b) has complied with any requirements, relating to the giving of
23 the notice, prescribed by the regulations.

24 *Employer does not give notice*

- 25 (8) If:
26 (a) an employee engaged, or engages, in protected industrial
27 action against an employer on a day; and
28 (b) the industrial action is a partial work ban; and
29 (c) the employer does not give the employee a notice in
30 accordance with paragraph (1)(c) or (4)(c);
31 then the employee's payments for the day are not to be reduced
32 because of the ban.

Section 472

1 **472 Orders by FWA relating to certain partial work bans**

- 2 (1) FWA may make an order varying the proportion by which an
3 employee's payments are reduced.
- 4 (2) FWA may make the order only if a person has applied for it under
5 subsection (4).
- 6 (3) In considering making such an order, FWA must take into account:
7 (a) whether the proportion specified in the notice given under
8 paragraph 471(1)(c) was reasonable having regard to the
9 nature and extent of the partial work ban to which the notice
10 relates; and
11 (b) fairness between the parties taking into consideration all the
12 circumstances of the case.
- 13 (4) An employee, or the employee's bargaining representative, may
14 apply to FWA for an order under subsection (2) if a notice has
15 been given under paragraph 471(1)(c) stating that the employee's
16 payments will be reduced.

17 **473 Accepting or seeking payments relating to periods of industrial**
18 **action**

- 19 (1) An employee must not:
20 (a) accept a payment from an employer if the employer would
21 contravene section 470 by making the payment; or
22 (b) ask the employer to make such a payment.
- 23 Note 1: This subsection is a civil remedy provision (see Part 4-1).
24 Note 2: Acts of coercion, or misrepresentations, relating to such payments
25 may also contravene section 348 or 349.
- 26 (2) An employee organisation, or an officer or member of an employee
27 organisation, must not ask an employer to make a payment to an
28 employee if the employer would contravene section 470 by making
29 the payment.
- 30 Note 1: This subsection is a civil remedy provision (see Part 4-1).
31 Note 2: Acts of coercion, or misrepresentations, relating to such payments
32 may also contravene section 348 or 349.

1 **Subdivision B—Industrial action that is not protected**
2 **industrial action**

3 **474 Payments not to be made relating to certain periods of**
4 **industrial action**

5 (1) If an employee engaged, or engages, in industrial action that is not
6 protected industrial action against an employer on a day, the
7 employer must not make a payment to an employee in relation to:

- 8 (a) if the total duration of the industrial action on that day is at
9 least 4 hours—the total duration of the industrial action on
10 that day; or
11 (b) otherwise—4 hours of that day.

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

13 (2) However, if the industrial action is, or includes, an overtime ban,
14 this section does not apply, in relation to a period of overtime to
15 which the ban applies, unless:

- 16 (a) the employer requested or required the employee to work the
17 period of overtime; and
18 (b) the employee refused to work the period of overtime; and
19 (c) the refusal was a contravention of the employee's obligations
20 under a modern award, enterprise agreement or contract of
21 employment.

22 Note: An employee is able to refuse to work additional hours if they are
23 unreasonable (see subsection 62(2)). There may be other
24 circumstances in which an employee can lawfully refuse to work
25 additional hours.

26 (3) If:

- 27 (a) the industrial action is during a shift (or other period of
28 work); and
29 (b) the shift (or other period of work) occurs partly on one day
30 and partly on the next day;

31 then, for the purposes of this section, the shift is taken to be a day
32 and the remaining parts of the days are taken not to be part of that
33 day.

34 Example: An employee, who is working a shift from 10 pm on Tuesday until 7
35 am on Wednesday, engages in industrial action that is not protected

Section 475

1 industrial action from 11 pm on Tuesday until 1 am on Wednesday.
2 That industrial action would prevent the employer making a payment
3 to the employee in relation to 4 hours of the shift, but would not
4 prevent the employer from making a payment in relation to the
5 remaining 5 hours of the shift.

6 (4) For the purposes of subsection (3), overtime is taken not to be a
7 separate shift.

8 **475 Accepting or seeking payments relating to periods of industrial**
9 **action**

10 (1) An employee must not:

11 (a) accept a payment from an employer if the employer would
12 contravene section 474 by making the payment; or

13 (b) ask the employer to make such a payment.

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

15 Note 2: Acts of coercion, or misrepresentations, relating to such payments
16 may also contravene section 348 or 349.

17 (2) An employee organisation, or an officer or member of an employee
18 organisation, must not ask an employer to make a payment to an
19 employee if the employer would contravene section 474 by making
20 the payment.

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

22 Note 2: Acts of coercion, or misrepresentations, relating to such payments
23 may also contravene section 348 or 349.

24 **Subdivision C—Miscellaneous**

25 **476 Other responses to industrial action unaffected**

26 If an employee engaged, or engages, in industrial action against an
27 employer, this Division does not affect any right of the employer,
28 under this Act or otherwise, to do anything in response to the
29 industrial action that does not involve payments to the employee.

1

2 **Division 10—Other matters**

3 **477 Applications by bargaining representatives**

4 *Application of this section*

- 5 (1) This section applies if a provision of this Part permits an
6 application to be made by a bargaining representative of an
7 employer that will be covered by a proposed single-enterprise
8 agreement.

9 *Persons who may make applications*

- 10 (2) If the agreement will cover more than one employer, the
11 application may be made by:
- 12 (a) in the case of a proposed single-enterprise agreement in
13 relation to which a single interest employer authorisation is in
14 operation—the person (if any) specified in the authorisation
15 as the person who may make applications under this Act; or
 - 16 (b) in any case—a bargaining representative of an employer that
17 will be covered by the agreement, on behalf of one or more
18 other such bargaining representatives, if those other
19 bargaining representatives have agreed to the application
20 being made on their behalf.

1

2 **Part 3-4—Right of entry**

3 **Division 1—Introduction**

4 **478 Guide to this Part**

5

This Part is about the rights of officials of organisations who hold entry permits to enter premises for purposes related to their representative role under this Act and under State or Territory OHS laws.

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Division 2 allows permit holders to enter premises to investigate suspected contraventions of this Act and fair work instruments. Division 2 also allows permit holders to enter premises to hold discussions with certain employees. In exercising rights under Division 2, permit holders must comply with the requirements set out in the Division.

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Division 3 sets out requirements for exercising rights under State or Territory OHS laws.

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Division 4 prohibits certain action in relation to the operation of this Part.

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Division 5 sets out powers of FWA in relation to the operation of this Part.

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21

Division 6 deals with entry permits, entry notices and certificates.

22 **479 Meanings of *employee* and *employer***

23

In this Part, *employee* and *employer* have their ordinary meanings.

24 **480 Object of this Part**

25

The object of this Part is to establish a framework for officials of organisations to enter premises that balances:

26

Section 480

- 1 (a) the right of organisations to represent their members in the
2 workplace, hold discussions with potential members and
3 investigate suspected contraventions of:
4 (i) this Act and fair work instruments; and
5 (ii) State or Territory OHS laws; and
6 (b) the right of employees to receive, at work, information and
7 representation from officials of organisations; and
8 (c) the right of occupiers of premises and employers to go about
9 their business without undue inconvenience.

Section 481

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Division 2—Entry rights under this Act

3

Subdivision A—Entry to investigate suspected contravention

4

481 Entry to investigate suspected contravention

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(1) A permit holder may enter premises and exercise a right under section 482 or 483 for the purpose of investigating a suspected contravention of this Act, or a term of a fair work instrument, that relates to, or affects, a member of the permit holder's organisation:

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(a) whose industrial interests the organisation is entitled to represent; and

(b) who performs work on the premises.

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Note 1: Particulars of the suspected contravention must be specified in an entry notice or exemption certificate (see subsections 518(2) and 519(2)).

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Note 2: FWA may issue an affected member certificate if it is satisfied that a member referred to in this subsection is on the premises (see subsection 520(1)).

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(2) The fair work instrument must apply or have applied to the member.

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(3) The permit holder must reasonably suspect that the contravention has occurred, or is occurring. The burden of proving that the suspicion is reasonable lies on the person asserting that fact.

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482 Rights that may be exercised while on premises

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Rights that may be exercised while on premises

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(1) While on the premises, the permit holder may do the following:

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(a) inspect any work, process or object relevant to the suspected contravention;

(b) interview any person about the suspected contravention:

(i) who agrees to be interviewed; and

(ii) whose industrial interests the permit holder's organisation is entitled to represent;

Section 483

- 1 (c) require the occupier or an affected employer to allow the
2 permit holder to inspect, and make copies of, any record or
3 document relevant to the suspected contravention that:
4 (i) is kept on the premises; or
5 (ii) is accessible from a computer that is kept on the
6 premises.

7 Note: Personal information obtained by a permit holder under this section
8 may be regulated under the *Privacy Act 1988*. See also section 504
9 (which deals with unauthorised use or disclosure of employee records
10 obtained under this section).

11 *Meaning of affected employer*

- 12 (2) A person is an *affected employer*, in relation to an entry onto
13 premises under this Subdivision, if:
14 (a) the person employs a member of the permit holder's
15 organisation whose industrial interests the organisation is
16 entitled to represent; and
17 (b) the member performs work on the premises; and
18 (c) the suspected contravention relates to, or affects, the member.

19 *Occupier and affected employer must not contravene requirement*

- 20 (3) An occupier or affected employer must not contravene a
21 requirement under paragraph (1)(c).

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

23 **483 Later access to record or document**

24 *Later access to record or document*

- 25 (1) The permit holder may, by written notice, require an affected
26 employer to produce, or provide access to, a record or document
27 relevant to the suspected contravention on a later day or days
28 specified in the notice.

29 *Other rules relating to notices*

- 30 (2) The day or days specified in the notice must not be earlier than 14
31 days after the notice is given.

Section 484

- 1 (3) The notice may be given:
2 (a) while the permit holder is on the premises; or
3 (b) within 5 days after the entry.

4 *Affected employer must not contravene requirement*

- 5 (4) An affected employer must not contravene a requirement under
6 subsection (1).

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

8 *Where record or document may be inspected or copied*

- 9 (5) The permit holder may inspect, and make copies of, the record or
10 document at:
11 (a) the premises; or
12 (b) if another place is agreed upon by the permit holder and the
13 affected employer—that other place.

14 Note: Personal information obtained by a permit holder under this section
15 may be regulated under the *Privacy Act 1988*. See also section 504
16 (which deals with unauthorised use or disclosure of employee records
17 obtained under this section).

18 **Subdivision B—Entry to hold discussions**

19 **484 Entry to hold discussions**

20 A permit holder may enter premises to hold discussions with one
21 or more persons:

- 22 (a) who perform work on the premises; and
23 (b) whose industrial interests the permit holder's organisation is
24 entitled to represent; and
25 (c) who wish to participate in those discussions.

26 **485 Conscientious objection certificates**

27 *Exception for certain premises where certificate endorsed*

- 28 (1) This Subdivision does not apply in relation to premises if:
29 (a) no more than 20 employees perform work on the premises;
30 and

Section 486

- 1 (b) none of the employees are members of an organisation; and
2 (c) all the employees are employed by a person who holds a
3 conscientious objection certificate that has been endorsed
4 under subsection (3).

5 *Meaning of conscientious objection certificate*

- 6 (2) A *conscientious objection certificate* is a certificate in force under
7 section 180 of Schedule 1 to the *Workplace Relations Act 1996*.

8 *Endorsement of conscientious objection certificate*

- 9 (3) FWA may endorse a conscientious objection certificate if FWA is
10 satisfied that:
11 (a) the person who holds it is a practising member of a religious
12 society or order; and
13 (b) the doctrines or beliefs of that society or order prevent
14 membership of an organisation or body other than that
15 society or order.
- 16 (4) FWA may endorse the certificate only on application by the person
17 who holds it.
- 18 (5) An application under subsection (4) may be made at the same time
19 as an application is made for the certificate, or at any later time.
- 20 (6) FWA's endorsement of the certificate ceases to be in force when:
21 (a) the certificate ceases to be in force; or
22 (b) the certificate is renewed.

23 Note: The holder will need to make a new application for endorsement of a
24 renewed certificate.

25 **Subdivision C—Requirements for permit holders**

26 **486 Permit holder must not contravene this Subdivision**

27 Neither Subdivision A nor B authorises a permit holder to enter or
28 remain on premises, or exercise any other right, if he or she
29 contravenes this Subdivision, or regulations prescribed under
30 section 521, in exercising that right.

Section 487

1 **487 Giving entry notice or exemption certificate**

- 2 (1) Unless FWA has issued an exemption certificate for the entry, the
3 permit holder must:
- 4 (a) before entering premises under Subdivision A—give the
5 occupier of the premises and any affected employer an entry
6 notice for the entry; and
- 7 (b) before entering premises under Subdivision B—give the
8 occupier of the premises an entry notice for the entry.
- 9 (2) An *entry notice* for an entry is a notice that complies with
10 section 518.
- 11 (3) An entry notice must be given during working hours at least 24
12 hours, but not more than 14 days, before the entry.
- 13 (4) If FWA has issued an exemption certificate for the entry, the
14 permit holder must, either before or as soon as practicable after
15 entering the premises, give a copy of the certificate to:
- 16 (a) the occupier of the premises or another person who
17 apparently represents the occupier; and
- 18 (b) any affected employer or another person who apparently
19 represents the employer;
- 20 if the occupier, employer or other person is present at the premises.

21 **488 Contravening entry permit conditions**

22 The permit holder must not contravene a condition imposed on the
23 entry permit.

24 **489 Producing authority documents**

- 25 (1) If the permit holder has entered premises under Subdivision A, the
26 permit holder must produce his or her authority documents for
27 inspection by the occupier of the premises, or an affected
28 employer:
- 29 (a) on request; and
- 30 (b) before making a requirement under paragraph 482(1)(c) or
31 subsection 483(1).

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1 Note: Paragraph 482(1)(c) and subsection 483(1) deal with access to records
2 and documents while the permit holder is on the premises and at later
3 times.

4 (2) If the permit holder has entered premises under Subdivision B, the
5 permit holder must produce his or her authority documents for
6 inspection by the occupier of the premises on request.

7 (3) **Authority documents**, for an entry under Subdivision A or B,
8 means:

9 (a) the permit holder's entry permit; and

10 (b) either:

11 (i) a copy of the entry notice for the entry; or

12 (ii) if FWA has issued an exemption certificate for the
13 entry—the certificate.

14 **490 When right may be exercised**

15 (1) The permit holder may exercise a right under Subdivision A or B
16 only during working hours.

17 (2) The permit holder may hold discussions under section 484 only
18 during mealtimes or other breaks.

19 (3) The permit holder may only enter premises under Subdivision A or
20 B on a day specified in the entry notice or exemption certificate for
21 the entry.

22 **491 Occupational health and safety requirements**

23 The permit holder must comply with any reasonable request by the
24 occupier of the premises for the permit holder to comply with an
25 occupational health and safety requirement that applies to the
26 premises.

27 Note: FWA may deal with a dispute about whether the request is reasonable
28 (see subsection 505(1)).

29 **492 Conduct of interviews in particular room etc.**

30 (1) The permit holder must comply with any reasonable request by the
31 occupier of the premises to:

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1 (a) conduct interviews or hold discussions in a particular room or
2 area of the premises; or

3 (b) take a particular route to reach a particular room or area of
4 the premises.

5 Note: FWA may deal with a dispute about whether the request is reasonable
6 (see subsection 505(1)).

7 (2) Without limiting when a request under subsection (1) might
8 otherwise be unreasonable, a request under paragraph (1)(a) is
9 unreasonable if:

10 (a) the room or area is not fit for the purpose of conducting the
11 interviews or holding the discussions; or

12 (b) the request is made with the intention of:

13 (i) intimidating persons who might participate in the
14 interviews or discussions; or

15 (ii) discouraging persons from participating in the
16 interviews or discussions; or

17 (iii) making it difficult for persons to participate in the
18 interviews or discussions, whether because the room or
19 area is not easily accessible during mealtimes or other
20 breaks, or for some other reason.

21 (3) However, a request under subsection (1) is not unreasonable only
22 because the room, area or route is not that which the permit holder
23 would have chosen.

24 (4) The regulations may prescribe circumstances in which a request
25 under subsection (1) is or is not reasonable.

26 **493 Residential premises**

27 The permit holder must not enter any part of premises that is used
28 mainly for residential purposes.

1

2 **Division 3—State or Territory OHS rights**

3 **494 Official must be permit holder to exercise State or Territory**
4 **OHS right**

5 *Official must be permit holder*

6 (1) An official of an organisation must not exercise a State or Territory
7 OHS right unless the official is a permit holder.

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

9 *Meaning of State or Territory OHS right*

10 (2) A right to enter premises, or to inspect or otherwise access an
11 employee record of an employee that is on premises, is a **State or**
12 **Territory OHS right** if the right is conferred by a State or Territory
13 OHS law, and:

14 (a) the premises are occupied or otherwise controlled by any of
15 the following:

16 (i) a constitutional corporation;

17 (ii) a body corporate incorporated in a Territory;

18 (iii) the Commonwealth;

19 (iv) a Commonwealth authority; or

20 (b) the premises are located in a Territory; or

21 (c) the premises are, or are located in, a Commonwealth place;

22 or

23 (d) the right relates to requirements to be met, action taken, or
24 activity undertaken or controlled, by any of the following in
25 its capacity as an employer:

26 (i) a constitutional corporation;

27 (ii) a body corporate incorporated in a Territory;

28 (iii) the Commonwealth;

29 (iv) a Commonwealth authority; or

30 (e) the right relates to requirements to be met, action taken, or
31 activity undertaken or controlled, by an employee of, or an

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- 1 independent contractor providing services for, any of the
2 following:
- 3 (i) a constitutional corporation;
4 (ii) a body corporate incorporated in a Territory;
5 (iii) the Commonwealth;
6 (iv) a Commonwealth authority; or
- 7 (f) the exercise of the right will have a direct effect on any of the
8 following in its capacity as an employer:
- 9 (i) a constitutional corporation;
10 (ii) a body corporate incorporated in a Territory;
11 (iii) the Commonwealth;
12 (iv) a Commonwealth authority; or
- 13 (g) the exercise of the right will have a direct effect on a person
14 who is employed by, or who is an independent contractor
15 providing services for, any of the following:
- 16 (i) a constitutional corporation;
17 (ii) a body corporate incorporated in a Territory;
18 (iii) the Commonwealth;
19 (iv) a Commonwealth authority.

20 *Meaning of State or Territory OHS law*

- 21 (3) A *State or Territory OHS law* is a law of a State or a Territory
22 prescribed by the regulations.

23 **495 Giving notice of entry**

- 24 (1) A permit holder must not exercise a State or Territory OHS right to
25 inspect or otherwise access an employee record of an employee,
26 unless:
- 27 (a) he or she has given the occupier of the premises, and any
28 affected employer, a written notice setting out his or her
29 intention to exercise the right, and reasons for doing so; and
30 (b) the notice is given at least 24 hours before exercising the
31 right.

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

1 *Meaning of affected employer*

2 (2) A person is an *affected employer*, in relation to an entry onto
3 premises in accordance with this Division, if one or more of the
4 person's employees perform work on the premises.

5 **496 Contravening entry permit conditions**

6 In exercising a State or Territory OHS right, a permit holder must
7 not contravene a condition imposed on his or her entry permit.

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

9 **497 Producing entry permit**

10 A permit holder must not exercise a State or Territory OHS right
11 unless the permit holder produces his or her entry permit for
12 inspection when requested to do so by the occupier of the premises
13 or an affected employer.

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

15 **498 When right may be exercised**

16 A permit holder may exercise a State or Territory OHS right only
17 during working hours.

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

19 **499 Occupational health and safety requirements**

20 A permit holder must not exercise a State or Territory OHS right
21 unless he or she complies with any reasonable request by the
22 occupier of the premises to comply with an occupational health and
23 safety requirement that applies to the premises.

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

25 Note 2: FWA may deal with a dispute about whether the request is reasonable
26 (see subsection 505(1)).

Section 500

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2 **Division 4—Prohibitions**

3 **500 Permit holder must not hinder or obstruct**

4 A permit holder exercising, or seeking to exercise, rights in
5 accordance with this Part must not intentionally hinder or obstruct
6 any person, or otherwise act in an improper manner.

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

8 **501 Person must not refuse or delay entry**

9 A person must not refuse or unduly delay entry onto premises by a
10 permit holder who is entitled to enter the premises in accordance
11 with this Part.

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

13 **502 Person must not hinder or obstruct permit holder**

14 (1) A person must not intentionally hinder or obstruct a permit holder
15 exercising rights in accordance with this Part.

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

17 (2) To avoid doubt, a failure to agree on a place as referred to in
18 paragraph 483(5)(b) does not constitute hindering or obstructing a
19 permit holder.

20 (3) Without limiting subsection (1), that subsection extends to
21 hindering or obstructing that occurs after an entry notice is given
22 but before a permit holder enters premises.

23 **503 Misrepresentations about things authorised by this Part**

24 (1) A person must not take action:
25 (a) with the intention of giving the impression; or
26 (b) reckless as to whether the impression is given;
27 that the doing of a thing is authorised by this Part if it is not so
28 authorised.

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

- 1 (2) Subsection (1) does not apply if the person reasonably believes that
2 the doing of the thing is authorised.

3 **504 Unauthorised use or disclosure of employee records**

- 4 (1) A person must not use or disclose an employee record of an
5 employee obtained by a permit holder under section 482 or 483 if
6 that use or disclosure would contravene National Privacy Principle
7 2 in Schedule 3 to the *Privacy Act 1988*.

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

9 Note 2: National Privacy Principle 2 provides that an organisation to which
10 that Principle applies must not use or disclose personal information
11 about an individual for a purpose other than the primary purpose of
12 collection except in limited circumstances.

- 13 (2) For the purposes of subsection (1), the person is taken to be an
14 organisation to which the National Privacy Principle applies.

Section 505

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2 **Division 5—Powers of FWA**

3 **Subdivision A—Dealing with disputes**

4 **505 FWA may deal with a dispute about the operation of this Part**

- 5 (1) FWA may deal with a dispute about the operation of this Part
6 (including a dispute about whether a request under section 491,
7 492 or 499 is reasonable).

8 Note: Sections 491, 492 and 499 deal with requests for permit holders to use
9 particular rooms or areas, and comply with occupational health and
10 safety requirements.

- 11 (2) FWA may deal with the dispute by arbitration, including by
12 making one or more of the following orders:

- 13 (a) an order imposing conditions on an entry permit;
14 (b) an order suspending an entry permit;
15 (c) an order revoking an entry permit;
16 (d) an order about the future issue of entry permits to one or
17 more persons;
18 (e) any other order it considers appropriate.

19 Note: FWA may also deal with a dispute by mediation or conciliation, or by
20 making a recommendation or expressing an opinion (see subsection
21 595(2)).

- 22 (3) FWA may deal with the dispute:

- 23 (a) on its own initiative; or
24 (b) on application by any of the following to whom the dispute
25 relates:
26 (i) a permit holder;
27 (ii) a permit holder's organisation;
28 (iii) an employer;
29 (iv) an occupier of premises.

- 30 (4) In dealing with the dispute, FWA must take into account fairness
31 between the parties concerned.

Section 506

- 1 (5) In dealing with the dispute, FWA must not confer rights on a
2 permit holder that are additional to, or inconsistent with, rights
3 exercisable in accordance with Division 2 or 3 of this Part, unless
4 the dispute is about whether a request under section 491, 492 or
5 499 is reasonable.

6 **506 Contravening order made to deal with dispute**

7 A person must not contravene a term of an order under subsection
8 505(2).

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

10 **Subdivision B—Taking action against permit holder**

11 **507 FWA may take action against permit holder**

- 12 (1) FWA may, on application by an inspector or a person prescribed
13 by the regulations, take the following action against a permit
14 holder:
15 (a) impose conditions on any entry permit issued to the permit
16 holder;
17 (b) suspend any entry permit issued to the permit holder;
18 (c) revoke any entry permit issued to the permit holder.
19 (2) In deciding whether to take action under subsection (1), FWA must
20 take into account the permit qualification matters.

21 Note: For *permit qualification matters*, see subsection 513(1).

22 **Subdivision C—Restricting rights of organisations and officials**
23 **where misuse of rights**

24 **508 FWA may restrict rights if organisation or official has misused**
25 **rights**

- 26 (1) FWA may restrict the rights that are exercisable under this Part by
27 an organisation, or officials of an organisation, if FWA is satisfied
28 that the organisation, or an official of the organisation, has misused
29 those rights.

1 **Subdivision D—When FWA must revoke or suspend entry**
2 **permits**

3 **510 When FWA must revoke or suspend entry permits**

4 *When FWA must revoke or suspend entry permits*

- 5 (1) FWA must, under this subsection, revoke or suspend each entry
6 permit held by a permit holder if it is satisfied that any of the
7 following has happened since the first of those permits was issued:
8 (a) the permit holder was found, in proceedings under this Act,
9 to have contravened subsection 503(1) (which deals with
10 misrepresentations about things authorised by this Part);
11 (b) the permit holder has contravened subsection 504(1) (which
12 deals with unauthorised use or disclosure of employee
13 records);
14 (c) the Privacy Commissioner has, under paragraph 52(1)(b) of
15 the *Privacy Act 1988*, found substantiated a complaint
16 relating to action taken by the permit holder in relation to an
17 employee record of an employee obtained under section 482
18 or 483;
19 (d) the permit holder, or another person, was ordered to pay a
20 pecuniary penalty under this Act in relation to a
21 contravention of this Part by the permit holder;
22 (e) a court, or other person or body, under a State or Territory
23 industrial law:
24 (i) cancelled or suspended a right of entry for industrial
25 purposes that the permit holder had under that law; or
26 (ii) disqualified the permit holder from exercising, or
27 applying for, a right of entry for industrial purposes
28 under that law;
29 (f) the permit holder has, in exercising a right of entry under a
30 State or Territory OHS law, taken action that was not
31 authorised by that law.
- 32 (2) Despite subsection (1), FWA is not required to suspend or revoke
33 an entry permit under paragraph (1)(d) or (f) if FWA is satisfied
34 that the suspension or revocation would be harsh or unreasonable
35 in the circumstances.

Section 511

- 1 (3) Subsection (1) does not apply in relation to a circumstance referred
2 to in a paragraph of that subsection if FWA took the circumstance
3 into account when taking action under that subsection on a
4 previous occasion.

5 *Minimum suspension period*

- 6 (4) A suspension under subsection (1) must be for a period that is at
7 least as long as the period (the *minimum suspension period*)
8 specified in whichever of the following paragraphs applies:
9 (a) if FWA has not previously taken action under subsection (1)
10 against the permit holder—3 months;
11 (b) if FWA has taken action under subsection (1) against the
12 permit holder on only one occasion—12 months;
13 (c) if FWA has taken action under subsection (1) against the
14 permit holder on more than one occasion—5 years.

15 *Banning issue of future entry permits*

- 16 (5) If FWA takes action under subsection (1), it must also ban the
17 issue of any further entry permit to the permit holder for a specified
18 period (the *ban period*).
19 (6) The ban period must:
20 (a) begin when the action is taken under subsection (1); and
21 (b) be no shorter than the minimum suspension period.

22 **Subdivision E—General rules for suspending entry permits**

23 **511 General rules for suspending entry permits**

- 24 If FWA suspends an entry permit, the suspension:
25 (a) must be for a specified period; and
26 (b) does not prevent the revocation of, or the imposition of
27 conditions on, the entry permit during the suspension period;
28 and
29 (c) does not alter the time at which the entry permit would
30 otherwise expire.

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2 **Division 6—Entry permits, entry notices and certificates**

3 **Subdivision A—Entry permits**

4 **512 FWA may issue entry permits**

5 FWA may, on application by an organisation, issue a permit (an
6 ***entry permit***) to an official of the organisation if FWA is satisfied
7 that the official is a fit and proper person to hold the entry permit.

8 **513 Considering application**

- 9 (1) In deciding whether the official is a fit and proper person, FWA
10 must take into account the following ***permit qualification matters***:
- 11 (a) whether the official has received appropriate training about
12 the rights and responsibilities of a permit holder;
 - 13 (b) whether the official has ever been convicted of an offence
14 against an industrial law;
 - 15 (c) whether the official has ever been convicted of an offence
16 against a law of the Commonwealth, a State, a Territory or a
17 foreign country, involving:
 - 18 (i) entry onto premises; or
 - 19 (ii) fraud or dishonesty; or
 - 20 (iii) intentional use of violence against another person or
21 intentional damage or destruction of property;
 - 22 (d) whether the official, or any other person, has ever been
23 ordered to pay a penalty under this Act or any other industrial
24 law in relation to action taken by the official;
 - 25 (e) whether a permit issued to the official under this Part, or
26 under a similar law of the Commonwealth (no matter when in
27 force), has been revoked or suspended or made subject to
28 conditions;
 - 29 (f) whether a court, or other person or body, under a State or
30 Territory industrial law or a State or Territory OHS law, has:
 - 31 (i) cancelled, suspended or imposed conditions on a right
32 of entry for industrial or occupational health and safety
33 purposes that the official had under that law; or

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- 1 (ii) disqualified the official from exercising, or applying for,
2 a right of entry for industrial or occupational health and
3 safety purposes under that law;
4 (g) any other matters that FWA considers relevant.
- 5 (2) Despite paragraph 85ZZH(c) of the *Crimes Act 1914*, Division 3 of
6 Part VIIC of that Act applies in relation to the disclosure of
7 information to or by, or the taking into account of information by,
8 FWA for the purpose of making a decision under this Part.
- 9 Note: Division 3 of Part VIIC of the *Crimes Act 1914* includes provisions
10 that, in certain circumstances, relieve persons from the requirement to
11 disclose spent convictions and require persons aware of such
12 convictions to disregard them.

13 **514 When FWA must not issue permit**

14 FWA must not issue an entry permit to an official at a time when a
15 suspension or disqualification, imposed by a court or other person
16 or body:

- 17 (a) applies to the official's exercise of; or
18 (b) prevents the official from exercising or applying for;
19 a right of entry for industrial or occupational health and safety
20 purposes under a State or Territory industrial law or a State or
21 Territory OHS law.

22 **515 Conditions on entry permit**

- 23 (1) FWA may impose conditions on an entry permit when it is issued.
- 24 (2) In deciding whether to impose conditions under subsection (1),
25 FWA must take into account the permit qualification matters.
- 26 (3) FWA must record on an entry permit any conditions that have been
27 imposed on its use (whether under subsection (1) or any other
28 provision of this Part).
- 29 (4) If FWA imposes a condition on an entry permit after it has been
30 issued, the permit ceases to be in force until FWA records the
31 condition on the permit.

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- 1 (5) To avoid doubt, a permit holder does not contravene an FWA order
2 merely because the permit holder contravenes a condition imposed
3 on his or her permit by order (whether the condition is imposed at
4 the time the entry permit is issued or at any later time).

5 **516 Expiry of entry permit**

- 6 (1) Unless it is revoked, an entry permit expires at the earlier of the
7 following times:
8 (a) at the end of the period of 3 years beginning on the day it is
9 issued, or that period as extended under subsection (2);
10 (b) when the permit holder ceases to be an official of the
11 organisation that applied for the permit.
- 12 (2) FWA may extend the period of 3 years referred to in
13 paragraph (1)(a) by a specified period if:
14 (a) the organisation that applied for the permit (the *old permit*)
15 has applied for another entry permit for the permit holder;
16 and
17 (b) the application was made at least 1 month before the old
18 permit would otherwise have expired under that paragraph;
19 and
20 (c) FWA is satisfied that the old permit is likely to expire before
21 FWA determines the application.
- 22 (3) The period specified must not be longer than the period that FWA
23 considers necessary for it to determine the application.
- 24 (4) FWA must not extend the period under subsection (2) if:
25 (a) FWA has requested or required the organisation or permit
26 holder to provide copies of records or documents, or to
27 provide any other information, in relation to the application;
28 and
29 (b) the organisation or permit holder has not complied with the
30 request or requirement; and
31 (c) FWA is satisfied that the organisation or permit holder does
32 not have a reasonable excuse.

Section 517

1 **517 Return of entry permits to FWA**

2 *When permit holder must return entry permit to FWA*

- 3 (1) A permit holder must return an entry permit to FWA within 7 days
4 of any of the following things happening:
5 (a) the permit is revoked or suspended;
6 (b) conditions are imposed on the permit after it is issued;
7 (c) the permit expires.

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

9 *FWA to return entry permit to permit holder after suspension*

- 10 (2) After the end of a suspension period, FWA must return the entry
11 permit to the permit holder if:
12 (a) the permit holder, or the permit holder's organisation, applies
13 to FWA for the return of the entry permit; and
14 (b) the entry permit has not expired.

15 **Subdivision B—Entry notices**

16 **518 Entry notice requirements**

17 *Requirements for all entry notices*

- 18 (1) An entry notice must specify the following:
19 (a) the premises that are proposed to be entered;
20 (b) the day of the entry;
21 (c) the organisation of which the permit holder for the entry is an
22 official.

23 *Requirements for entry notice for entry to investigate suspected
24 contravention*

- 25 (2) An entry notice given for an entry under section 481 (which deals
26 with entry to investigate suspected contraventions) must:
27 (a) specify that section as the provision that authorises the entry;
28 and

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- 1 (b) specify the particulars of the suspected contravention, or
2 contraventions; and
3 (c) contain a declaration by the permit holder for the entry that
4 the permit holder's organisation is entitled to represent the
5 industrial interests of a member, who performs work on the
6 premises, and:
7 (i) to whom the suspected contravention or contraventions
8 relate; or
9 (ii) who is affected by the suspected contravention or
10 contraventions; and
11 (d) specify the provision of the organisation's rules that entitles
12 the organisation to represent the member.

13 *Requirements for entry notice for entry to hold discussions*

- 14 (3) An entry notice given for an entry under section 484 (which deals
15 with entry to hold discussions) must:
16 (a) specify that section as the provision that authorises the entry;
17 and
18 (b) contain a declaration by the permit holder for the entry that
19 the permit holder's organisation is entitled to represent the
20 industrial interests of a person who performs work on the
21 premises; and
22 (c) specify the provision of the organisation's rules that entitles
23 the organisation to represent the person.

24 Note: See section 503 (which deals with misrepresentations about things
25 authorised by this Part).

26 **Subdivision C—Exemption certificates**

27 **519 Exemption certificates**

- 28 (1) FWA must issue a certificate (an *exemption certificate*) to an
29 organisation for an entry under section 481 (which deals with entry
30 to investigate suspected contraventions) if:
31 (a) the organisation has applied for the certificate; and
32 (b) FWA reasonably believes that advance notice of the entry
33 given by an entry notice might result in the destruction,
34 concealment or alteration of relevant evidence.

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- 1 (2) An exemption certificate must specify the following:
2 (a) the premises to which it relates;
3 (b) the organisation to which it relates;
4 (c) the day or days on which the entry may occur;
5 (d) particulars of the suspected contravention, or contraventions,
6 to which the entry relates;
7 (e) section 481 as the provision that authorises the entry.

8 **Subdivision D—Affected member certificates**

9 **520 Affected member certificates**

- 10 (1) FWA must, on application by an organisation, issue a certificate
11 (an *affected member certificate*) to the organisation if FWA is
12 satisfied that:
13 (a) a member of the organisation performs work on particular
14 premises; and
15 (b) the organisation is entitled to represent the industrial interests
16 of the member; and
17 (c) a suspected contravention of a kind referred to in subsection
18 481(1) relates to, or affects, the member.
- 19 (2) An affected member certificate must state the following:
20 (a) the premises to which it relates;
21 (b) the organisation to which it relates;
22 (c) particulars of the suspected contravention, or contraventions,
23 to which it relates;
24 (d) that FWA is satisfied of the matters referred to in
25 paragraphs (1)(a), (b) and (c).
- 26 (3) An affected member certificate must not reveal the identity of the
27 member or members to whom it relates.

28 **Subdivision E—Miscellaneous**

29 **521 Regulations dealing with instruments under this Part**

30 The regulations may provide for, and in relation to, the following:

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- 1 (a) the form of entry permits, entry notices, exemption
2 certificates and affected member certificates;
- 3 (b) additional information to be included on, or given with, entry
4 permits, entry notices, exemption certificates and affected
5 member certificates;
- 6 (c) the manner in which entry permits, entry notices, exemption
7 certificates and affected member certificates are to be given;
- 8 (d) any other matter in relation to entry permits, entry notices,
9 exemption certificates and affected member certificates.

Section 522

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2 **Part 3-5—Stand down**

3 **Division 1—Introduction**

4 **522 Guide to this Part**

5

This Part provides for a national system employer to stand down a national system employee without pay in certain circumstances.

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7

Division 2 sets out the circumstances in which an employer may stand down an employee without pay.

8

9

Division 3 provides for FWA to deal with disputes about the operation of this Part.

10

11 **523 Meanings of *employee* and *employer***

12

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

13

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2 **Division 2—Circumstances allowing stand down**

3 **524 Employer may stand down employees in certain circumstances**

4 (1) An employer may, under this subsection, stand down an employee
5 during a period in which the employee cannot usefully be
6 employed because of one of the following circumstances:

7 (a) industrial action (other than industrial action organised or
8 engaged in by the employer);

9 (b) a breakdown of machinery or equipment, if the employer
10 cannot reasonably be held responsible for the breakdown;

11 (c) a stoppage of work for any cause for which the employer
12 cannot reasonably be held responsible.

13 (2) However, an employer may not stand down an employee under
14 subsection (1) during a period in which the employee cannot
15 usefully be employed because of a circumstance referred to in that
16 subsection if:

17 (a) an enterprise agreement, or a contract of employment, applies
18 to the employer and the employee; and

19 (b) the agreement or contract provides for the employer to stand
20 down the employee during that period if the employee cannot
21 usefully be employed during that period because of that
22 circumstance.

23 Note: If an employer may not stand down an employee under subsection (1),
24 the employer may be able to stand down the employee in accordance
25 with the enterprise agreement or the contract of employment.

26 (3) If an employer stands down an employee during a period under
27 subsection (1), the employer is not required to make payments to
28 the employee for that period.

29 **525 Employee not stood down during a period of authorised leave or
30 absence**

31 An employee is not taken to be stood down under subsection
32 524(1) during a period when the employee:

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Part 3-5 Stand down

Division 2 Circumstances allowing stand down

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1 (a) is taking paid or unpaid leave that is authorised by the
2 employer; or

3 (b) is otherwise authorised to be absent from his or her
4 employment.

5 Note: An employee may take paid or unpaid leave (for example, annual
6 leave) during all or part of a period during which the employee would
7 otherwise be stood down under subsection 524(1).

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2 **Division 3—Dealing with disputes**

3 **526 FWA may deal with a dispute about the operation of this Part**

4 (1) FWA may deal with a dispute about the operation of this Part.

5 (2) FWA may deal with the dispute by arbitration.

6 Note: FWA may also deal with a dispute by mediation or conciliation, or by
7 making a recommendation or expressing an opinion (see subsection
8 595(2)).

9 (3) FWA may deal with the dispute only on application by any of the
10 following:

11 (a) an employee who has been, or is going to be, stood down
12 under subsection 524(1) (or purportedly under subsection
13 524(1));

14 (b) an employee in relation to whom the following requirements
15 are satisfied:

16 (i) the employee has made a request to take leave to avoid
17 being stood down under subsection 524(1) (or
18 purportedly under subsection 524(1));

19 (ii) the employee's employer has authorised the leave;

20 (c) an employee organisation that is entitled to represent the
21 industrial interests of an employee referred to in
22 paragraph (a) or (b);

23 (d) an inspector.

24 (4) In dealing with the dispute, FWA must take into account fairness
25 between the parties concerned.

26 **527 Contravening an FWA order dealing with a dispute about the**
27 **operation of this Part**

28 A person must not contravene a term of an FWA order dealing
29 with a dispute about the operation of this Part.

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

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Part 3-6—Other rights and responsibilities

3

Division 1—Introduction

4

528 Guide to this Part

5

This Part deals with other rights and responsibilities.

6

Division 2 is about the obligations of a national system employer if a decision is made to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature.

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9

Subdivision A of Division 2 deals with notifying the Chief Executive Officer of the Commonwealth Services Delivery Agency (Centrelink) about the proposed dismissals.

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Subdivision B of Division 2 provides for FWA to make orders if the employer fails to notify and consult relevant industrial associations.

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Subdivision C of Division 2 provides that that Division does not apply in relation to certain employees.

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17

Division 3 is about the obligations of national system employers to make and keep employee records in relation to each of their employees and to give pay slips to each of their employees.

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529 Meanings of *employee* and *employer*

21

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

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Division 2—Notification and consultation relating to certain dismissals

Subdivision A—Requirement to notify Centrelink

530 Employer to notify Centrelink of certain proposed dismissals

- (1) If an employer decides to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons, the employer must give a written notice about the proposed dismissals to the Chief Executive Officer of the Commonwealth Services Delivery Agency (Centrelink).
- (2) The notice must be in the form (if any) prescribed by the regulations and set out:
 - (a) the reasons for the dismissals; and
 - (b) the number and categories of employees likely to be affected; and
 - (c) the time when, or the period over which, the employer intends to carry out the dismissals.
- (3) The notice must be given:
 - (a) as soon as practicable after making the decision; and
 - (b) before dismissing an employee in accordance with the decision.
- (4) The employer must not dismiss an employee in accordance with the decision unless the employer has complied with this section.

Note: This subsection is a civil remedy provision (see Part 4-1).
- (5) The orders that may be made under subsection 545(1) in relation to a contravention of subsection (4) of this section:
 - (a) include an order requiring the employer not to dismiss the employees in accordance with the decision, except as permitted by the order; but
 - (b) do not include an order granting an injunction.

1 *Consulting relevant registered employee associations*

- 2 (3) An employer complies with this subsection if:
- 3 (a) the employer gives each registered employee association of
- 4 which any of the employees was a member, and that was
- 5 entitled to represent the industrial interests of that member,
- 6 an opportunity to consult the employer on:
- 7 (i) measures to avert or minimise the proposed dismissals;
- 8 and
- 9 (ii) measures (such as finding alternative employment) to
- 10 mitigate the adverse effects of the proposed dismissals;
- 11 and
- 12 (b) the opportunity is given:
- 13 (i) as soon as practicable after making the decision; and
- 14 (ii) before dismissing an employee in accordance with the
- 15 decision.

16 **532 Orders that FWA may make**

- 17 (1) FWA may make whatever orders it considers appropriate, in the
- 18 public interest, to put:
- 19 (a) the employees; and
- 20 (b) each registered employee association referred to in paragraph
- 21 531(2)(a) or (3)(a);
- 22 in the same position (as nearly as can be done) as if the employer
- 23 had complied with subsections 531(2) and (3).
- 24 (2) FWA must not, under subsection (1), make orders for any of the
- 25 following:
- 26 (a) reinstatement of an employee;
- 27 (b) withdrawal of a notice of dismissal if the notice period has
- 28 not expired;
- 29 (c) payment of an amount in lieu of reinstatement;
- 30 (d) payment of severance pay;
- 31 (e) disclosure of confidential information or commercially
- 32 sensitive information relating to the employer, unless the
- 33 recipient of such information gives an enforceable

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- 1 undertaking not to disclose the information to any other
2 person;
3 (f) disclosure of personal information relating to a particular
4 employee, unless the employee has given written consent to
5 the disclosure of the information and the disclosure is in
6 accordance with that consent.

7 **533 Application for FWA order**

- 8 FWA may make the order only on application by:
9 (a) one of the employees; or
10 (b) a registered employee association referred to in paragraph
11 531(2)(a) or (3)(a); or
12 (c) any other registered employee association that is entitled to
13 represent the industrial interests of one of the employees.

14 **Subdivision C—Limits on scope of this Division**

15 **534 Limits on scope of this Division**

- 16 (1) This Division does not apply in relation to any of the following
17 employees:
18 (a) an employee employed for a specified period of time, for a
19 specified task, or for the duration of a specified season;
20 (b) an employee who is dismissed because of serious
21 misconduct;
22 (c) a casual employee;
23 (d) an employee (other than an apprentice) to whom a training
24 arrangement applies and whose employment is for a specified
25 period of time or is, for any reason, limited to the duration of
26 the training arrangement;
27 (e) a daily hire employee working in the building and
28 construction industry (including working in connection with
29 the erection, repair, renovation, maintenance, ornamentation
30 or demolition of buildings or structures);
31 (f) a daily hire employee working in the meat industry in
32 connection with the slaughter of livestock;

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- 1 (g) a weekly hire employee working in connection with the meat
2 industry and whose dismissal is determined solely by
3 seasonal factors;
4 (h) an employee prescribed by the regulations as an employee in
5 relation to whom this Division does not apply.
- 6 (2) Paragraph (1)(a) does not prevent this Division from applying in
7 relation to an employee if a substantial reason for employing the
8 employee as described in that paragraph was to avoid the
9 application of this Division.

Section 535

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2 **Division 3—Employer obligations in relation to employee**
3 **records and pay slips**

4 **535 Employer obligations in relation to employee records**

5 (1) An employer must make, and keep for 7 years, employee records
6 of the kind prescribed by the regulations in relation to each of its
7 employees.

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

9 (2) The records must:

10 (a) if a form is prescribed by the regulations—be in that form;
11 and

12 (b) include any information prescribed by the regulations.

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

14 (3) The regulations may provide for the inspection of those records.

15 **536 Employer obligations in relation to pay slips**

16 (1) An employer must give a pay slip to each of its employees within
17 one working day of paying an amount to the employee in relation
18 to the performance of work.

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

20 (2) The pay slip must:

21 (a) if a form is prescribed by the regulations—be in that form;
22 and

23 (b) include any information prescribed by the regulations.

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

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Chapter 4—Compliance and enforcement

2

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Part 4-1—Civil remedies

4

Division 1—Introduction

5

537 Guide to this Part

6

This Part is about civil remedies. Certain provisions in this Act impose obligations on certain persons. Civil remedies may be sought in relation to contraventions of these civil remedy provisions.

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Subdivision A of Division 2 deals with applications for orders in relation to contraventions of civil remedy provisions and safety net contractual entitlements, and applications for orders to enforce entitlements arising under subsection 542(1).

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Subdivision B of Division 2 sets out the orders that can be made by the Federal Court, the Federal Magistrates Court or an eligible State or Territory Court in relation to a contravention of a civil remedy provision.

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Division 3 sets out when proceedings relating to a contravention of a civil remedy provision may be dealt with as small claims proceedings.

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Division 4 deals with general provisions relating to civil remedies, including rules about evidence and procedure.

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Division 5 deals with unclaimed money.

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538 Meanings of *employee* and *employer*

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In this Part, *employee* and *employer* have their ordinary meanings.

Section 539

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Division 2—Orders

Subdivision A—Applications for orders

539 Applications for orders in relation to contraventions of civil remedy provisions

- (1) A provision referred to in column 1 of an item in the table in subsection (2) is a *civil remedy provision*.
- (2) For each civil remedy provision, the persons referred to in column 2 of the item may, subject to sections 540 and 544 and Subdivision B, apply to the courts referred to in column 3 of the item for orders in relation to a contravention or proposed contravention of the provision, including the maximum penalty referred to in column 4 of the item.

Note 1: Civil remedy provisions within a single Part may be grouped together in a single item of the table.

Note 2: Applications cannot be made by an inspector in relation to a contravention of a civil remedy provision by a person if an undertaking given by the person in relation to the contravention has not been withdrawn (see subsection 715(4)).

Note 3: The regulations may also prescribe persons for the purposes of an item in column 2 of the table (see subsection 540(8)).

| Standing, jurisdiction and maximum penalties | | | | |
|---|--|---|--|---|
| Item | Column 1 Civil remedy provision | Column 2 Persons | Column 3 Courts | Column 4 Maximum penalty |
| Part 2-1—Core provisions | | | | |
| 1 | 44(1) | (a) an employee; (b) an employee organisation; (c) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 60 penalty units |

Section 539

Standing, jurisdiction and maximum penalties

| Item | Column 1 Civil remedy provision | Column 2 Persons | Column 3 Courts | Column 4 Maximum penalty |
|-------------|---|---|--|---|
| 2 | 45 (other than in relation to a contravention of an outworker term in a modern award) | (a) an employee; (b) an employer; (c) an employee organisation; (d) an employer organisation; (e) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 60 penalty units |
| 3 | 45 (in relation to a contravention of an outworker term in a modern award) | (a) an outworker; (b) an employer; (c) an outworker entity; (d) an employee organisation; (e) an employer organisation; (f) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 60 penalty units |
| 4 | 50 | (a) an employee; (b) an employer; (c) an employee organisation to which the enterprise agreement concerned applies; (d) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 60 penalty units |

Chapter 4 Compliance and enforcement

Part 4-1 Civil remedies

Division 2 Orders

Section 539

| Standing, jurisdiction and maximum penalties | | | | |
|---|--|---|--|---|
| Item | Column 1 Civil remedy provision | Column 2 Persons | Column 3 Courts | Column 4 Maximum penalty |
| Part 2-4—Enterprise agreements | | | | |
| 5 | 179(1) | (a) an employee who the proposed enterprise agreement will cover; (b) a bargaining representative for the proposed enterprise agreement; (c) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 60 penalty units |
| 6 | 233 | (a) an employee who the proposed enterprise agreement will cover; (b) a bargaining representative for the proposed enterprise agreement; (c) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 60 penalty units |
| Part 2-5—Workplace determinations | | | | |
| 7 | 280 | (a) an employee; (b) an employer; (c) an employee organisation to which the workplace determination concerned applies; (d) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 60 penalty units |

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| Standing, jurisdiction and maximum penalties | | | | |
|--|--|--|---|---|
| Item | Column 1 Civil remedy provision | Column 2 Persons | Column 3 Courts | Column 4 Maximum penalty |
| Part 2-6—Minimum wages | | | | |
| 8 | 293 | (a) an employee; (b) an employee organisation; (c) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 60 penalty units |
| Part 2-7—Equal remuneration | | | | |
| 9 | 305 | (a) an employee; (b) an employee organisation; (c) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 60 penalty units |
| Part 2-9—Other terms and conditions of employment | | | | |
| 10 | 323(1) 323(3) 325(1) 328(1) 328(2) 328(3) | (a) an employee; (b) an employee organisation; (c) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 60 penalty units |

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Part 4-1 Civil remedies

Division 2 Orders

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| Standing, jurisdiction and maximum penalties | | | | |
|---|---|---|---|---|
| Item | Column 1 Civil remedy provision | Column 2 Persons | Column 3 Courts | Column 4 Maximum penalty |
| Part 3-1—General protections | | | | |
| 11 | 340(1) 340(2) 343(1) 344 345(1) 346 348 349(1) 350(1) 350(2) 351(1) 352 353(1) 354(1) 355 357(1) 358 359 | (a) a person affected by the contravention; (b) an industrial association; (c) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 60 penalty units |
| 12 | 378 | (a) a person to whom the costs are payable; (b) an industrial association; (c) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 60 penalty units |
| Part 3-2—Unfair dismissal | | | | |
| 13 | 405 | (a) a person affected by the contravention; (b) an employee organisation; (c) an employer organisation; (d) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 60 penalty units |

Section 539

| Standing, jurisdiction and maximum penalties | | | | |
|---|--|---|---|---|
| Item | Column 1 Civil remedy provision | Column 2 Persons | Column 3 Courts | Column 4 Maximum penalty |
| Part 3-3—Industrial action | | | | |
| 14 | 417(1) | (a) an employee; (b) an employer; (c) an employee organisation to which the enterprise agreement or workplace determination concerned applies; (d) a person affected by the industrial action; (e) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 60 penalty units |
| 15 | 421(1) | (a) a person affected by the contravention; (b) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 60 penalty units |
| 16 | 434 | an inspector | the Federal Court | 60 penalty units |
| 17 | 458(2) | (a) an employee; (b) an employer; (c) an applicant for the protected action ballot order; (d) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 30 penalty units |

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Part 4-1 Civil remedies

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| Standing, jurisdiction and maximum penalties | | | | |
|---|--|--|--|---|
| Item | Column 1 Civil remedy provision | Column 2 Persons | Column 3 Courts | Column 4 Maximum penalty |
| 18 | 462(1) 462(3) | (a) an employee; (b) an employer; (c) an applicant for the protected action ballot order; (d) the protected action ballot agent; (e) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 30 penalty units |
| 19 | 463(1) 463(2) | (a) an employee; (b) an employer; (c) an applicant for the protected action ballot order; (d) the protected action ballot agent; (e) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 60 penalty units |
| 20 | 467(1) | (a) an employee; (b) an employer; (c) an applicant for the protected action ballot order; (d) the protected action ballot agent; (e) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 30 penalty units |
| 21 | 470(1) | an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 60 penalty units |

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| Standing, jurisdiction and maximum penalties | | | | |
|---|--|---|--|---|
| Item | Column 1 Civil remedy provision | Column 2 Persons | Column 3 Courts | Column 4 Maximum penalty |
| 22 | 473(1) 473(2) | (a) an employer; (b) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 60 penalty units |
| 23 | 474(1) | an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 60 penalty units |
| 24 | 475(1) 475(2) | (a) an employer; (b) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 60 penalty units |
| Part 3-4—Right of entry | | | | |
| 25 | 482(3) 483(4) 494(1) 495(1) 496 497 498 499 500 501 502(1) 503(1) 504(1) 506 509 | (a) a person affected by the contravention; (b) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 60 penalty units |
| 26 | 517(1) | an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 60 penalty units |

Chapter 4 Compliance and enforcement

Part 4-1 Civil remedies

Division 2 Orders

Section 539

Standing, jurisdiction and maximum penalties

| Item | Column 1 Civil remedy provision | Column 2 Persons | Column 3 Courts | Column 4 Maximum penalty |
|---|--|---|---|---|
| Part 3-5—Stand down | | | | |
| 27 | 527 | (a) an employee; (b) an employee organisation; (c) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 60 penalty units |
| Part 3-6—Other rights and responsibilities | | | | |
| 28 | 530(4) | (a) an employee; (b) a registered employee association; (c) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 30 penalty units |
| 29 | 535(1) 535(2) 536(1) 536(2) | (a) an employee; (b) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 30 penalty units |
| Part 5-1—Fair Work Australia | | | | |
| 30 | 611(3) | (a) a person to whom the costs are payable; (b) an employee organisation; (c) an employer organisation; (d) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 60 penalty units |

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Standing, jurisdiction and maximum penalties

| Item | Column 1 Civil remedy provision | Column 2 Persons | Column 3 Courts | Column 4 Maximum penalty |
|-------------|--|-----------------------------|----------------------------|---|
|-------------|--|-----------------------------|----------------------------|---|

Part 5-2—Office of the Fair Work Ombudsman

| | | | | |
|----|--------|--------------|--|------------------|
| 31 | 711(3) | an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 30 penalty units |
| 32 | 712(3) | an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 60 penalty units |
| 33 | 716(5) | an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 30 penalty units |

Part 6-3—Extension of National Employment Standards entitlements

| | | | | |
|----|---------------|--|--|------------------|
| 34 | 745(1) 760 | (a) an employee; (b) a registered employee association; (c) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court | 60 penalty units |
|----|---------------|--|--|------------------|

Part 6-4—Additional provisions relating to termination of employment

| | | | | |
|----|--------|---|---|------------------|
| 35 | 772(1) | (a) a person affected by the contravention; (b) an industrial association; (c) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 60 penalty units |
|----|--------|---|---|------------------|

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| Standing, jurisdiction and maximum penalties | | | | |
|---|--|---|---|---|
| Item | Column 1 Civil remedy provision | Column 2 Persons | Column 3 Courts | Column 4 Maximum penalty |
| 36 | 782 | (a) a person to whom the costs are payable; (b) an industrial association; (c) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 60 penalty units |
| 37 | 785(4) | (a) an employee; (b) a registered employee association; (c) an inspector | (a) the Federal Court; (b) the Federal Magistrates Court | 30 penalty units |

1 **540 Limitations on who may apply for orders etc.**

2 *Employees, employers, outworkers and outworker entities*

- 3 (1) The following persons may apply for an order under this Division,
4 in relation to a contravention or proposed contravention of a civil
5 remedy provision, only if the person is affected by the
6 contravention, or will be affected by the proposed contravention:
7 (a) an employee;
8 (b) an employer;
9 (c) an outworker;
10 (d) an outworker entity.

11 *Employee organisations and registered employee associations*

- 12 (2) An employee organisation or a registered employee association
13 may apply for an order under this Division, in relation to a
14 contravention or proposed contravention of a civil remedy
15 provision (other than an outworker term) in relation to an
16 employee, only if:
17 (a) the employee is affected by the contravention, or will be
18 affected by the proposed contravention; and

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1 (b) the organisation or association is entitled to represent the
2 industrial interests of the employee.

3 (3) However, subsection (2) does not apply in relation to items 4, 7
4 and 14 in the table in subsection 539(2).

5 (4) An employee organisation may apply for an order under this
6 Division, in relation to a contravention or proposed contravention
7 of an outworker term in a modern award, only if the employee
8 organisation is entitled to represent the industrial interests of an
9 outworker to whom the outworker term relates.

10 *Employer organisations*

11 (5) An employer organisation may apply for an order under this
12 Division, in relation to a contravention or proposed contravention
13 of a civil remedy provision, only if the organisation has a member
14 who is affected by the contravention, or who will be affected by
15 the proposed contravention.

16 *Industrial associations*

17 (6) An industrial association may apply for an order under this
18 Division, in relation to a contravention or proposed contravention
19 of a civil remedy provision, only if:

20 (a) the industrial association is affected by the contravention, or
21 will be affected by the proposed contravention; or

22 (b) if the contravention is in relation to a person:

23 (i) the person is affected by the contravention, or will be
24 affected by the proposed contravention; and

25 (ii) the industrial association is entitled to represent the
26 industrial interests of the person.

27 (7) If an item in column 2 of the table in subsection 539(2) refers to an
28 industrial association then, to avoid doubt, an employee
29 organisation, a registered employee association or an employer
30 organisation may apply for an order, in relation to a contravention
31 or proposed contravention of a civil remedy provision, only if the
32 organisation or association is entitled to apply for the order under
33 subsection (6).

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Regulations

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- (8) The regulations may prescribe a person for the purposes of an item in column 2 of the table in subsection 539(2). The regulations may provide that the person is prescribed only in relation to circumstances specified in the regulations.

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541 Applications for orders in relation to safety net contractual entitlements

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- (1) This section applies if an inspector applies to a court for an order under this Division, in relation to an employer's contravention or proposed contravention of a provision or term referred to in subsection (3) in relation to an employee.

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- (2) The inspector may also apply to the court, on behalf of the employee, for an order in relation to the employer's contravention, or proposed contravention, of a safety net contractual entitlement of the employee.

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- (3) The provisions and terms are the following:

17

(a) a provision of the National Employment Standards;

18

(b) a term of a modern award;

19

(c) a term of an enterprise agreement;

20

(d) a term of a workplace determination;

21

(e) a term of a national minimum wage order;

22

(f) a term of an equal remuneration order.

23

542 Entitlements under contracts

24

- (1) For the purposes of this Part, a safety net contractual entitlement of a national system employer or a national system employee, as in force from time to time, also has effect as an entitlement of the employer or employee under this Act.

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- (2) The entitlement has effect under this Act subject to any modifications, by a law of the Commonwealth (including this Act or a fair work instrument), a State or a Territory, of the safety net contractual entitlement.

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1 **543 Applications for orders in relation to statutory entitlements**
2 **derived from contracts**

3 A national system employer or a national system employee may
4 apply to the Federal Court or the Federal Magistrates Court to
5 enforce an entitlement of the employer or employee arising under
6 subsection 542(1).

7 **544 Time limit on applications**

8 A person may apply for an order under this Division in relation to a
9 contravention of one of the following only if the application is
10 made within 6 years after the day on which the contravention
11 occurred:

- 12 (a) a civil remedy provision;
- 13 (b) a safety net contractual entitlement;
- 14 (c) an entitlement arising under subsection 542(1).

15 Note: This section does not apply in relation to general protections court
16 applications or unlawful termination court applications (see
17 subsections 371(2) and 779(2)).

18 **Subdivision B—Orders**

19 **545 Orders that can be made by particular courts**

20 *Federal Court and Federal Magistrates Court*

- 21 (1) The Federal Court or the Federal Magistrates Court may make any
22 order the court considers appropriate if the court is satisfied that a
23 person has contravened, or proposes to contravene, a civil remedy
24 provision.

25 Note 1: For the court's power to make pecuniary penalty orders, see
26 section 546.

27 Note 2: For limitations on orders in relation to costs, see section 570.

28 Note 3: The Federal Court and the Federal Magistrates Court may grant
29 injunctions in relation to industrial action under subsections 417(3)
30 and 421(3).

31 Note 4: There are limitations on orders that can be made in relation to
32 contraventions of subsection 65(5), 76(4), 463(1) or 463(2) (which

Chapter 4 Compliance and enforcement

Part 4-1 Civil remedies

Division 2 Orders

Section 546

1 deal with reasonable business grounds and protected action ballot
2 orders) (see subsections 44(2), 463(3) and 745(2)).

- 3 (2) Without limiting subsection (1), orders the Federal Court or
4 Federal Magistrates Court may make include the following:
- 5 (a) an order granting an injunction, or interim injunction, to
6 prevent, stop or remedy the effects of a contravention;
 - 7 (b) an order awarding compensation for loss that a person has
8 suffered because of the contravention;
 - 9 (c) an order for reinstatement of a person.

10 *Eligible State or Territory courts*

- 11 (3) An eligible State or Territory court may order an employer to pay
12 an amount to, or on behalf of, an employee of the employer if the
13 court is satisfied that:
- 14 (a) the employer was required to pay the amount under this Act
15 or a fair work instrument; and
 - 16 (b) the employer has contravened a civil remedy provision by
17 failing to pay the amount.

18 Note 1: For the court's power to make pecuniary penalty orders, see
19 section 546.

20 Note 2: For limitations on orders in relation to costs, see section 570.

21 *When orders may be made*

- 22 (4) A court may make an order under this section:
- 23 (a) on its own initiative, during proceedings before the court; or
 - 24 (b) on application.

25 **546 Pecuniary penalty orders**

- 26 (1) The Federal Court, the Federal Magistrates Court or an eligible
27 State or Territory court may, on application, order a person to pay a
28 pecuniary penalty that the court considers is appropriate if the court
29 is satisfied that the person has contravened a civil remedy
30 provision.

31 Note: Pecuniary penalty orders cannot be made in relation to conduct that
32 contravenes a term of a modern award, a national minimum wage

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1 order or an enterprise agreement only because of the retrospective
2 effect of a determination (see subsections 167(3) and 298(2)).

3 *Determining amount of pecuniary penalty*

- 4 (2) The pecuniary penalty must not be more than:
- 5 (a) if the person is an individual—the maximum number of
6 penalty units referred to in the relevant item in column 4 of
7 the table in subsection 539(2); or
 - 8 (b) if the person is a body corporate—5 times the maximum
9 number of penalty units referred to in the relevant item in
10 column 4 of the table in subsection 539(2).

11 *Payment of penalty*

- 12 (3) The court may order that the pecuniary penalty, or a part of the
13 penalty, be paid to:
- 14 (a) the Commonwealth; or
 - 15 (b) a particular organisation; or
 - 16 (c) a particular person.

17 *Recovery of penalty*

- 18 (4) The pecuniary penalty may be recovered as a debt due to the
19 person to whom the penalty is payable.

20 *No limitation on orders*

- 21 (5) To avoid doubt, a court may make a pecuniary penalty order in
22 addition to one or more orders under section 545.

23 **547 Interest up to judgment**

- 24 (1) This section applies to an order (other than a pecuniary penalty
25 order) under this Division in relation to an amount that an
26 employer was required to pay to, or on behalf of, an employee
27 under this Act or a fair work instrument.
- 28 (2) In making the order the court must, on application, include an
29 amount of interest in the sum ordered, unless good cause is shown
30 to the contrary.

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Part 4-1 Civil remedies

Division 2 Orders

Section 547

- 1 (3) Without limiting subsection (2), in determining the amount of
2 interest, the court must take into account the period between the
3 day the relevant cause of action arose and the day the order is
4 made.

1

2 **Division 3—Small claims procedure**

3 **548 Plaintiffs may choose small claims procedure**

4 (1) Proceedings are to be dealt with as small claims proceedings under
5 this section if:

- 6 (a) a person applies for an order (other than a pecuniary penalty
7 order) under Division 2 from a magistrates court or the
8 Federal Magistrates Court; and
9 (b) the order relates to an amount that an employer was required
10 to pay to, or on behalf of, an employee:
11 (i) under this Act or a fair work instrument; or
12 (ii) because of a safety net contractual entitlement; or
13 (iii) because of an entitlement of the employee arising under
14 subsection 542(1); and
15 (c) the person indicates, in a manner prescribed by the
16 regulations or by the rules of the court, that he or she wants
17 the small claims procedure to apply to the proceedings.

18 *Limits on award*

- 19 (2) In small claims proceedings, the court may not award more than:
20 (a) \$20,000; or
21 (b) if a higher amount is prescribed by the regulations—that
22 higher amount.

23 *Procedure*

- 24 (3) In small claims proceedings, the court is not bound by any rules of
25 evidence and procedure and may act:
26 (a) in an informal manner; and
27 (b) without regard to legal forms and technicalities.
28 (4) At any stage of the small claims proceedings, the court may amend
29 the papers commencing the proceedings if sufficient notice is given
30 to any party adversely affected by the amendment.

Chapter 4 Compliance and enforcement

Part 4-1 Civil remedies

Division 3 Small claims procedure

Section 548

1

Legal representation

2

(5) A party to small claims proceedings may be represented in the proceedings by a lawyer only with the leave of the court.

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(6) If the court grants leave for a party to the proceedings to be represented by a lawyer, the court may, if it considers appropriate, do so subject to conditions designed to ensure that no other party is unfairly disadvantaged.

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(7) For the purposes of this section, a person is taken not to be represented by a lawyer if the lawyer is an employee or officer of the person.

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Representation by an industrial association

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(8) The regulations may provide for a party to small claims proceedings to be represented in the proceedings, in specified circumstances, by an official of an industrial association.

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(9) However, if small claims proceedings are heard in a court of a State, the regulations may so provide only if the law of the State allows a party to be represented in that court in those circumstances by officials of bodies representing interests related to the matters in dispute.

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18

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2 **Division 4—General provisions relating to civil remedies**

3 **549 Contravening a civil remedy provision is not an offence**

4 A contravention of a civil remedy provision is not an offence.

5 **550 Involvement in contravention treated in same way as actual**
6 **contravention**

- 7 (1) A person who is involved in a contravention of a civil remedy
8 provision is taken to have contravened that provision.
- 9 (2) A person is *involved in* a contravention of a civil remedy provision
10 if, and only if, the person:
- 11 (a) has aided, abetted, counselled or procured the contravention;
12 or
13 (b) has induced the contravention, whether by threats or
14 promises or otherwise; or
15 (c) has been in any way, by act or omission, directly or
16 indirectly, knowingly concerned in or party to the
17 contravention; or
18 (d) has conspired with others to effect the contravention.

19 **551 Civil evidence and procedure rules for proceedings relating to**
20 **civil remedy provisions**

21 A court must apply the rules of evidence and procedure for civil
22 matters when hearing proceedings relating to a contravention, or
23 proposed contravention, of a civil remedy provision.

24 **552 Civil proceedings after criminal proceedings**

25 A court must not make a pecuniary penalty order against a person
26 for a contravention of a civil remedy provision if the person has
27 been convicted of an offence constituted by conduct that is
28 substantially the same as the conduct constituting the
29 contravention.

Section 553

1 **553 Criminal proceedings during civil proceedings**

- 2 (1) Proceedings for a pecuniary penalty order against a person for a
3 contravention of a civil remedy provision are stayed if:
- 4 (a) criminal proceedings are commenced or have already
5 commenced against the person for an offence; and
6 (b) the offence is constituted by conduct that is substantially the
7 same as the conduct in relation to which the order would be
8 made.
- 9 (2) The proceedings for the order may be resumed if the person is not
10 convicted of the offence. Otherwise, the proceedings for the order
11 are dismissed.

12 **554 Criminal proceedings after civil proceedings**

13 Criminal proceedings may be commenced against a person for
14 conduct that is substantially the same as conduct constituting a
15 contravention of a civil remedy provision regardless of whether an
16 order has been made against the person under Division 2.

17 **555 Evidence given in proceedings for pecuniary penalty not**
18 **admissible in criminal proceedings**

- 19 (1) Evidence of information given, or evidence of production of
20 documents, by an individual is not admissible in criminal
21 proceedings against the individual if:
- 22 (a) the individual previously gave the information or produced
23 the documents in proceedings for a pecuniary penalty order
24 against the individual for a contravention of a civil remedy
25 provision (whether or not the order was made); and
26 (b) the conduct alleged to constitute the offence is substantially
27 the same as the conduct in relation to which the order was
28 sought.
- 29 (2) However, this does not apply to criminal proceedings in relation to
30 the falsity of the evidence given by the individual in the
31 proceedings for the pecuniary penalty order.

1 **556 Civil double jeopardy**

2 If a person is ordered to pay a pecuniary penalty under a civil
3 remedy provision in relation to particular conduct, the person is not
4 liable to be ordered to pay a pecuniary penalty under some other
5 provision of a law of the Commonwealth in relation to that
6 conduct.

7 Note: A court may make other orders, such as an order for compensation, in
8 relation to particular conduct even if the court has made a pecuniary
9 penalty order in relation to that conduct (see subsection 546(5)).

10 **557 Course of conduct**

11 (1) For the purposes of this Part, 2 or more contraventions of a civil
12 remedy provision referred to in subsection (2) are, subject to
13 subsection (3), taken to constitute a single contravention if:

- 14 (a) the contraventions are committed by the same person; and
15 (b) the contraventions arose out of a course of conduct by the
16 person.

17 (2) The civil remedy provisions are the following:

- 18 (a) subsection 44(1) (which deals with contraventions of the
19 National Employment Standards);
20 (b) section 45 (which deals with contraventions of modern
21 awards);
22 (c) section 50 (which deals with contraventions of enterprise
23 agreements);
24 (d) section 280 (which deals with contraventions of workplace
25 determinations);
26 (e) section 293 (which deals with contraventions of national
27 minimum wage orders);
28 (f) section 305 (which deals with contraventions of equal
29 remuneration orders);
30 (g) subsection 323(1) (which deals with methods and frequency
31 of payment);
32 (h) subsection 323(3) (which deals with methods of payment
33 specified in modern awards or enterprise agreements);
34 (i) subsection 325(1) (which deals with unreasonable
35 requirements to spend amounts);
-

Chapter 4 Compliance and enforcement

Part 4-1 Civil remedies

Division 4 General provisions relating to civil remedies

Section 558

- 1 (j) subsection 417(1) (which deals with industrial action before
2 the nominal expiry date of an enterprise agreement etc.);
3 (k) subsection 421(1) (which deals with contraventions of orders
4 in relation to industrial action);
5 (l) section 434 (which deals with contraventions of Ministerial
6 directions in relation to industrial action);
7 (m) subsection 530(4) (which deals with notifying Centrelink of
8 certain proposed dismissals);
9 (n) subsections 535(1) and (2) (which deal with employer
10 obligations in relation to employee records);
11 (o) subsections 536(1) and (2) (which deal with employer
12 obligations in relation to pay slips);
13 (p) subsection 745(1) (which deals with contraventions of the
14 extended parental leave provisions);
15 (q) section 760 (which deals with contraventions of the extended
16 notice of termination provisions);
17 (r) subsection 785(4) (which deals with notifying Centrelink of
18 certain proposed terminations);
19 (s) any other civil remedy provisions prescribed by the
20 regulations.
- 21 (3) Subsection (1) does not apply to a contravention of a civil remedy
22 provision that is committed by a person after a court has imposed a
23 pecuniary penalty on the person for an earlier contravention of the
24 provision.

25 **558 Regulations dealing with infringement notices**

- 26 (1) The regulations may provide for a person who is alleged to have
27 contravened a civil remedy provision to pay a penalty to the
28 Commonwealth as an alternative to civil proceedings.
- 29 (2) The penalty must not exceed one-tenth of the maximum penalty
30 referred to in the relevant item in column 4 of the table in
31 subsection 539(2) for contravening that provision.

1

2 **Division 5—Unclaimed money**

3 **559 Unclaimed money**

4 *Payment to the Commonwealth*

- 5 (1) An employer may pay an amount to the Commonwealth if:
- 6 (a) the employer was required to pay the amount to an employee
- 7 under this Act or a fair work instrument; and
- 8 (b) the employee has left the employment of the employer
- 9 without having been paid the amount; and
- 10 (c) the employer is unable to pay the amount to the employee
- 11 because the employer does not know the employee's
- 12 whereabouts.

13 *Discharge of employer*

- 14 (2) Payment of the amount to the Commonwealth is a sufficient
- 15 discharge to the employer, as against the employee, for the amount
- 16 paid.

17 *Payment where money later claimed*

- 18 (3) The Fair Work Ombudsman, on behalf of the Commonwealth,
- 19 must pay an amount to a person if:
- 20 (a) the amount has been paid to the Commonwealth under this
- 21 section; and
- 22 (b) the person has made a claim for the amount in accordance
- 23 with the form prescribed by the regulations; and
- 24 (c) the Fair Work Ombudsman is satisfied that the person is
- 25 entitled to the amount.

26 *Appropriation of Consolidated Revenue Fund*

- 27 (4) The Consolidated Revenue Fund is appropriated for the purposes
- 28 of this section.

Section 560

1

2 **Part 4-2—Jurisdiction and powers of courts**

3 **Division 1—Introduction**

4 **560 Guide to this Part**

5

This Part is about the jurisdiction and powers of the courts in relation to matters arising under this Act.

6

7

Divisions 2 and 3 confer jurisdiction on the Federal Court and the Federal Magistrates Court. That jurisdiction is generally required to be exercised in the Fair Work Divisions of those courts.

8

9

10

Division 4 deals with intervention, costs, limitation on imprisonment, and regulations, in relation to proceedings in the Federal Court, the Federal Magistrates Court and, in some cases, a court of a State or Territory.

11

12

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14 **561 Meanings of *employee* and *employer***

15

In this Part, *employee* and *employer* have their ordinary meanings.

1

2 **Division 2—Jurisdiction and powers of the Federal Court**

3 **562 Conferring jurisdiction on the Federal Court**

4 Jurisdiction is conferred on the Federal Court in relation to any
5 matter (whether civil or criminal) arising under this Act.

6 **563 Exercising jurisdiction in the Fair Work Division of the Federal**
7 **Court**

8 The jurisdiction conferred on the Federal Court under section 562
9 is to be exercised in the Fair Work Division of the Federal Court if:

- 10 (a) an application is made to the Federal Court under this Act; or
11 (b) a writ of mandamus or prohibition or an injunction is sought
12 in the Federal Court against a person holding office under
13 this Act; or
14 (c) a declaration is sought under section 21 of the *Federal Court*
15 *of Australia Act 1976* in relation to a matter arising under this
16 Act; or
17 (d) an injunction is sought under section 23 of the *Federal Court*
18 *of Australia Act 1976* in relation to a matter arising under this
19 Act; or
20 (e) a prosecution is instituted in the Federal Court under this Act;
21 or
22 (f) an appeal is instituted in the Federal Court from a judgment
23 of the Federal Magistrates Court or a court of a State or
24 Territory in a matter arising under this Act; or
25 (g) proceedings in relation to a matter arising under this Act are
26 transferred to the Federal Court from the Federal Magistrates
27 Court; or
28 (h) the Federal Magistrates Court or a court of a State or
29 Territory states a case or reserves a question for the
30 consideration of the Federal Court in a matter arising under
31 this Act; or
32 (i) the President refers, under section 608 of this Act, a question
33 of law to the Federal Court; or

Section 564

- 1 (j) the High Court remits a matter arising under this Act to the
2 Federal Court.

3 **564 No limitation on Federal Court's powers**

4 To avoid doubt, nothing in this Act limits the Federal Court's
5 powers under section 21, 22 or 23 of the *Federal Court of*
6 *Australia Act 1976*.

7 **565 Appeals from eligible State or Territory courts**

- 8 (1) An appeal lies to the Federal Court from a decision of an eligible
9 State or Territory court exercising jurisdiction under this Act.
- 10 (2) It is not necessary to obtain the leave of the Federal Court, or the
11 court appealed from, in relation to an appeal under subsection (1).
- 12 (3) No appeal lies from a decision referred to in subsection (1), except
13 as provided for by this section.

1

2 **Division 3—Jurisdiction and powers of the Federal**
3 **Magistrates Court**

4 **566 Conferring jurisdiction on the Federal Magistrates Court**

5 Jurisdiction is conferred on the Federal Magistrates Court in
6 relation to any civil matter arising under this Act.

7 **567 Exercising jurisdiction in the Fair Work Division of the Federal**
8 **Magistrates Court**

9 Jurisdiction conferred on the Federal Magistrates Court under
10 section 566 is to be exercised in the Fair Work Division of the
11 Federal Magistrates Court if:

- 12 (a) an application is made to the Federal Magistrates Court under
13 this Act; or
14 (b) an injunction is sought under section 15 of the *Federal*
15 *Magistrates Act 1999* in relation to a matter arising under this
16 Act; or
17 (c) a declaration is sought under section 16 of the *Federal*
18 *Magistrates Act 1999* in relation to a matter arising under this
19 Act; or
20 (d) proceedings in relation to a matter arising under this Act are
21 transferred to the Federal Magistrates Court from the Federal
22 Court; or
23 (e) the High Court remits a matter arising under this Act to the
24 Federal Magistrates Court.

25 **568 No limitation on Federal Magistrates Court's powers**

26 To avoid doubt, nothing in this Act limits the Federal Magistrates
27 Court's powers under section 14, 15 or 16 of the *Federal*
28 *Magistrates Act 1999*.

Section 569

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2

Division 4—Miscellaneous

3

569 Minister's entitlement to intervene

4

(1) The Minister may intervene on behalf of the Commonwealth in proceedings before a court (including a court of a State or Territory) in relation to a matter arising under this Act if the Minister believes it is in the public interest to do so.

5

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7

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(2) If the Minister intervenes, the Minister is taken to be a party to the proceedings for the purposes of instituting an appeal from a judgment given in the proceedings.

9

10

11

(3) Despite section 570, a court may make an order as to costs against the Commonwealth if:

12

13

(a) the Minister intervenes under subsection (1); or

14

(b) the Minister institutes an appeal from a judgment as referred to in subsection (2).

15

16

570 Costs only if proceedings instituted vexatiously etc.

17

(1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) exercising jurisdiction under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569.

18

19

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21

22

Note: The Commonwealth might be ordered to pay costs under section 569.

23

(2) The party may be ordered to pay the costs only if:

24

(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or

25

26

(b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or

27

28

(c) the court is satisfied of both of the following:

29

(i) the party unreasonably refused to participate in a matter before FWA;

30

31

(ii) the matter arose from the same facts as the proceedings.

1 **571 No imprisonment for failure to pay pecuniary penalty**

2 (1) A court (including a court of a State or Territory) may not order a
3 person to serve a sentence of imprisonment if the person fails to
4 pay a pecuniary penalty imposed under this Act.

5 (2) This section applies despite any other law of the Commonwealth, a
6 State or a Territory.

7 **572 Regulations dealing with matters relating to court proceedings**

8 The regulations may provide for the fees to be charged in relation
9 to proceedings in a court (including a court of a State or Territory)
10 under this Act.

1
2 **Chapter 5—Administration**

3 **Part 5-1—Fair Work Australia**

4 **Division 1—Introduction**

5 **573 Guide to this Part**

6 This Part is about Fair Work Australia.

7 Division 2 establishes and confers functions on FWA. FWA
8 consists of the President, Deputy Presidents, Commissioners and
9 Minimum Wage Panel Members. Division 2 also confers functions
10 on the President.

11 Division 3 deals with the conduct of matters before FWA (such as
12 applications, representation by lawyers, FWA’s decisions and
13 appeals).

14 Division 4 deals with the organisation of FWA, who may perform
15 functions of FWA and delegation of FWA’s functions and powers.
16 Certain functions must be performed by a Full Bench or the
17 Minimum Wage Panel.

18 Division 5 deals with the appointment, terms and conditions of
19 FWA Members.

20 Division 6 deals with cooperation with the States.

21 Division 7 deals with FWA’s seal, reviews and reports, and
22 disclosing information obtained by FWA.

23 Division 8 is about the General Manager of FWA (whose function
24 is to assist the President), staff of FWA and others assisting FWA.

25 Division 9 contains offences in relation to FWA.

1 **574 Meanings of *employee* and *employer***

2 In this Part, *employee* and *employer* have their ordinary meanings.

Section 575

1

2 **Division 2—Establishment and functions of Fair Work**
3 **Australia**

4 **Subdivision A—Establishment and functions of Fair Work**
5 **Australia**

6 **575 Establishment of Fair Work Australia**

7 (1) Fair Work Australia is established by this section.

8 (2) Fair Work Australia consists of:

9 (a) the President; and

10 (b) such number of Deputy Presidents as, from time to time, hold
11 office under this Act; and

12 (c) such number of Commissioners as, from time to time, hold
13 office under this Act; and

14 (d) a minimum of 4, and no more than 6, Minimum Wage Panel
15 Members.

16 Note: Fair Work Australia also has a General Manager and staff (see
17 Division 8).

18 **576 Functions of FWA**

19 (1) FWA has the functions conferred by this Act in relation to the
20 following subject matters:

21 (a) the National Employment Standards (Part 2-2);

22 (b) modern awards (Part 2-3);

23 (c) enterprise agreements (Part 2-4);

24 (d) workplace determinations (Part 2-5);

25 (e) minimum wages (Part 2-6);

26 (f) equal remuneration (Part 2-7);

27 (g) transfer of business (Part 2-8);

28 (h) general protections (Part 3-1);

29 (i) unfair dismissal (Part 3-2);

30 (j) industrial action (Part 3-3);

31 (k) right of entry (Part 3-4);

- 1 (l) stand down (Part 3-5);
2 (m) other rights and responsibilities (Part 3-6);
3 (n) the extension of the National Employment Standards
4 entitlements (Part 6-3);
5 (o) unlawful termination protections (Part 6-4).
- 6 (2) FWA also has the following functions:
7 (a) dealing with disputes as referred to in section 595;
8 (b) providing assistance and advice about, and undertaking
9 activities to promote public understanding of, its functions
10 and activities;
11 (c) providing administrative support in accordance with an
12 arrangement under section 650;
13 (d) any other function conferred on FWA by a law of the
14 Commonwealth.

15 **577 Performance of functions etc. by FWA**

16 FWA must perform its functions and exercise its powers in a
17 manner that:

- 18 (a) is fair and just; and
19 (b) is quick, informal and avoids unnecessary technicalities; and
20 (c) is open and transparent; and
21 (d) promotes harmonious and cooperative workplace relations.

22 Note: The President also is responsible for ensuring that FWA performs its
23 functions and exercises its powers efficiently etc. (see section 581).

24 **578 Matters FWA must take into account in performing functions** 25 **etc.**

26 In performing functions or exercising powers, in relation to a
27 matter, under a part of this Act (including this Part), FWA must
28 take into account:

- 29 (a) the objects of this Act, and any objects of the part of this Act;
30 and
31 (b) equity, good conscience and the merits of the matter; and
32 (c) the need to respect and value the diversity of the work force
33 by helping to prevent and eliminate discrimination on the

Section 579

1 basis of race, colour, sex, sexual preference, age, physical or
2 mental disability, marital status, family or carer's
3 responsibilities, pregnancy, religion, political opinion,
4 national extraction or social origin.

5 **579 FWA has privileges and immunities of the Crown**

6 FWA has the privileges and immunities of the Crown in right of
7 the Commonwealth.

8 **580 Protection of FWA Members**

9 An FWA Member has, in performing his or her functions or
10 exercising his or her powers as an FWA Member, the same
11 protection and immunity as a Justice of the High Court.

12 **Subdivision B—Functions and powers of the President**

13 **581 Functions of the President**

14 The President is responsible for ensuring that FWA performs its
15 functions and exercises its powers in a manner that:

- 16 (a) is efficient; and
17 (b) adequately serves the needs of employers and employees
18 throughout Australia.

19 Note: The President must perform his or her own functions and exercise his
20 or her own powers in a manner that facilitates cooperation with
21 prescribed State industrial authorities (see section 649).

22 **582 Directions by the President**

23 *The President may give directions*

- 24 (1) The President may give directions under subsection (2) as to the
25 manner in which FWA is to perform its functions, exercise its
26 powers or deal with matters.
27 (2) The President may give a direction that is of a general nature, or
28 that relates to a particular matter, to one or more of the following
29 persons:

- 1 (a) an FWA Member;
2 (b) a Full Bench;
3 (c) the Minimum Wage Panel;
4 (d) the General Manager.
- 5 (3) The direction must not relate to a decision by FWA.
- 6 (4) Without limiting subsection (2), the direction may be a direction of
7 the following kind:
- 8 (a) a direction about the conduct of 4 yearly reviews of modern
9 awards;
10 (b) a direction about the conduct of annual wage reviews;
11 (c) a direction that 2 or more matters be dealt with jointly by one
12 or more single FWA Members or one or more Full Benches;
13 (d) a direction about the transfer between FWA Members
14 (including a transfer between Full Benches) of one or more
15 matters being dealt with by FWA.

16 *Persons must comply with the President's directions*

- 17 (5) A person to whom a direction is given must comply with the
18 direction.

19 Note: For directions to the General Manager, see section 658.

20 *Direction is not a legislative instrument*

- 21 (6) If a direction is in writing, the direction is not a legislative
22 instrument.

23 **583 President not subject to direction**

24 The President is not subject to direction by or on behalf of the
25 Commonwealth.

26 **584 Delegation of functions and powers of the President**

- 27 (1) The President may, in writing, delegate to a Deputy President all or
28 any of the President's functions or powers, other than under:
29 (a) section 620 (which deals with the constitution and
30 decision-making of the Minimum Wage Panel); or

Chapter 5 Administration

Part 5-1 Fair Work Australia

Division 2 Establishment and functions of Fair Work Australia

Section 584

1 (b) section 625 (which deals with the delegation of functions and
2 powers of FWA).

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

5 Note: See also sections 34AA and 34AB of the *Acts Interpretation Act 1901*.

1

2 **Division 3—Conduct of matters before FWA**

3 **Subdivision A—Applications to FWA**

4 **585 Applications in accordance with procedural rules**

5 An application to FWA must be in accordance with the procedural
6 rules (if any) relating to applications of that kind.

7 Note 1: Certain provisions might impose additional requirements in relation to
8 particular kinds of applications (see for example subsection 185(2)).

9 Note 2: FWA may, under section 587, dismiss an application that is not made
10 in accordance with the procedural rules.

11 **586 Correcting and amending applications and documents etc.**

12 FWA may:

- 13 (a) allow a correction or amendment of any application, or other
14 document relating to a matter before FWA, on any terms that
15 it considers appropriate; or
16 (b) waive an irregularity in the form or manner in which an
17 application is made to FWA.

18 **587 Dismissing applications**

19 (1) Without limiting when FWA may dismiss an application, FWA
20 may dismiss an application if:

- 21 (a) the application is not made in accordance with this Act; or
22 (b) the application is frivolous or vexatious; or
23 (c) the application has no reasonable prospects of success.

24 (2) Despite paragraphs (1)(b) and (c), FWA must not dismiss an
25 application under section 365 or 773 on the ground that the
26 application:

- 27 (a) is frivolous or vexatious; or
28 (b) has no reasonable prospects of success.

29 (3) FWA may dismiss an application:

- 30 (a) on its own initiative; or
-

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1 (b) on application.

2 **588 Discontinuing applications**

3 A person who has applied to FWA may discontinue the
4 application:

- 5 (a) in accordance with the procedural rules (if any); and
6 (b) whether or not the matter has been settled.

7 **Subdivision B—Conduct of matters before FWA**

8 **589 Procedural and interim decisions**

- 9 (1) FWA may make decisions as to how, when and where a matter is
10 to be dealt with.
- 11 (2) FWA may make an interim decision in relation to a matter before
12 it.
- 13 (3) FWA may make a decision under this section:
14 (a) on its own initiative; or
15 (b) on application.
- 16 (4) This section does not limit FWA's power to make decisions.

17 **590 Powers of FWA to inform itself**

- 18 (1) FWA may, except as provided by this Act, inform itself in relation
19 to any matter before it in such manner as it considers appropriate.
- 20 (2) Without limiting subsection (1), FWA may inform itself in the
21 following ways:
22 (a) by requiring a person to attend before FWA;
23 (b) by inviting, subject to any terms and conditions determined
24 by FWA, oral or written submissions;
25 (c) by requiring a person to provide copies of documents or
26 records, or to provide any other information to FWA;
27 (d) by taking evidence under oath or affirmation in accordance
28 with the regulations (if any);

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- 1 (e) by requiring an FWA Member, a Full Bench or the Minimum
2 Wage Panel to prepare a report;
3 (f) by conducting inquiries;
4 (g) by undertaking or commissioning research;
5 (h) by conducting a conference (see section 592);
6 (i) by holding a hearing (see section 593).

7 **591 FWA not bound by rules of evidence and procedure**

8 FWA is not bound by the rules of evidence and procedure in
9 relation to a matter before it (whether or not FWA holds a hearing
10 in relation to the matter).

11 **592 Conferences**

- 12 (1) For the purpose of performing a function or exercising a power of
13 FWA (other than a function or power under Part 2-6), FWA may
14 direct a person to attend a conference at a specified time and place.

15 Note: Part 2-6 deals with minimum wages. For the conduct of annual wage
16 reviews, see Subdivision B of Division 3 of Part 2-6.

- 17 (2) An FWA Member (other than a Minimum Wage Panel Member),
18 or a delegate of FWA, is responsible for conducting the
19 conference.

- 20 (3) The conference must be conducted in private, unless the person
21 responsible for conducting the conference directs that it be
22 conducted in public.

23 Note: This subsection does not apply in relation to conferences conducted in
24 relation to unfair dismissal or general protection matters (see
25 sections 368, 374, 398 and 776).

26 **593 Hearings**

- 27 (1) FWA is not required to hold a hearing in performing functions or
28 exercising powers, except as provided by this Act.

- 29 (2) If FWA holds a hearing in relation to a matter, the hearing must be
30 held in public, except as provided by subsection (3).

Section 594

Confidential evidence in hearings

- 1
- 2 (3) FWA may make the following orders in relation to a hearing that
3 FWA holds if FWA is satisfied that it is desirable to do so because
4 of the confidential nature of any evidence, or for any other reason:
5 (a) orders that all or part of the hearing is to be held in private;
6 (b) orders about who may be present at the hearing;
7 (c) orders prohibiting or restricting the publication of the names
8 and addresses of persons appearing at the hearing;
9 (d) orders prohibiting or restricting the publication of, or the
10 disclosure to some or all of the persons present at the hearing
11 of, the following:
12 (i) evidence given in the hearing;
13 (ii) matters contained in documents before FWA in relation
14 to the hearing.
- 15 (4) Subsection (3) does not apply to the publication of a submission
16 made to FWA for consideration in an annual wage review (see
17 subsection 289(2)).

594 Confidential evidence

- 18
- 19 (1) FWA may make an order prohibiting or restricting the publication
20 of the following in relation to a matter before FWA (whether or not
21 FWA holds a hearing in relation to the matter) if FWA is satisfied
22 that it is desirable to do so because of the confidential nature of any
23 evidence, or for any other reason:
24 (a) evidence given to FWA in relation to the matter;
25 (b) the names and addresses of persons making submissions to
26 FWA in relation to the matter;
27 (c) matters contained in documents lodged with FWA or
28 received in evidence by FWA in relation to the matter;
29 (d) the whole or any part of its decisions or reasons in relation to
30 the matter.
- 31 (2) Subsection (1) does not apply to the publication of a submission
32 made to FWA for consideration in an annual wage review (see
33 subsection 289(2)).

1 **595 FWA's power to deal with disputes**

2 (1) FWA may deal with a dispute only if FWA is expressly authorised
3 to do so under or in accordance with another provision of this Act.

4 (2) FWA may deal with a dispute (other than by arbitration) as it
5 considers appropriate, including in the following ways:

6 (a) by mediation or conciliation;

7 (b) by making a recommendation or expressing an opinion.

8 (3) FWA may deal with a dispute by arbitration (including by making
9 any orders it considers appropriate) only if FWA is expressly
10 authorised to do so under or in accordance with another provision
11 of this Act.

12 Example: Parties may consent to FWA arbitrating a bargaining dispute (see
13 subsection 240(4)).

14 (4) In dealing with a dispute, FWA may exercise any powers it has
15 under this Subdivision.

16 Example: FWA could direct a person to attend a conference under section 592.

17 (5) To avoid doubt, FWA must not exercise any of the powers referred
18 to in subsection (2) or (3) in relation to a matter before FWA
19 except as authorised by this section.

20 **Subdivision C—Representation by lawyers and paid agents and**
21 **Minister's entitlement to make submissions**

22 **596 Representation by lawyers and paid agents**

23 (1) Except as provided by subsection (3) or the procedural rules, a
24 person may be represented in a matter before FWA (including by
25 making an application or submission to FWA on behalf of the
26 person) by a lawyer or paid agent only with the permission of
27 FWA.

28 (2) FWA may grant permission for a person to be represented by a
29 lawyer or paid agent in a matter before FWA only if:

30 (a) it would enable the matter to be dealt with more efficiently,
31 taking into account the complexity of the matter; or

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- 1 (b) it would be unfair not to allow the person to be represented
2 because the person is unable to represent himself, herself or
3 itself effectively; or
4 (c) it would be unfair not to allow the person to be represented
5 taking into account fairness between the person and other
6 persons in the same matter.
- 7 (3) FWA's permission is not required for a person to be represented by
8 a lawyer or paid agent in making a written submission under
9 Part 2-3 or 2-6 (which deal with modern awards and minimum
10 wages).
- 11 (4) For the purposes of this section, a person is taken not to be
12 represented by a lawyer or paid agent if the lawyer or paid agent:
13 (a) is an employee or officer of the person; or
14 (b) is an employee or officer of an organisation, peak council or
15 bargaining representative that is representing the person; or
16 (c) is a bargaining representative.

597 Minister's entitlement to make submissions

- 17
- 18 (1) The Minister is entitled to make a submission for consideration in
19 relation to a matter before FWA if:
20 (a) the matter is before a Full Bench and it is in the public
21 interest for the Minister to make a submission; or
22 (b) the matter involves public sector employment.
- 23 (2) Subsection (1) applies whether or not FWA holds a hearing in
24 relation to the matter.

Subdivision D—Decisions of FWA

598 Decisions of FWA

- 25
- 26
- 27 (1) A reference in this Part to a decision of FWA includes any decision
28 of FWA however described. However, to avoid doubt, a reference
29 to a decision of FWA does not include an outcome of a process
30 carried out in accordance with subsection 595(2) (which deals with
31 FWA's power to deal with disputes).

Section 602

- 1 (3) A decision, and reasons, that are in writing must be expressed in
2 plain English and be easy to understand in structure and content.
- 3 (4) FWA must publish the following, on its website or by any other
4 means that FWA considers appropriate:
5 (a) a decision that is required to be in writing and any written
6 reasons that FWA gives in relation to such a decision;
7 (b) an enterprise agreement that has been approved by FWA
8 under Part 2-4.
9 FWA must do so as soon as practicable after making the decision
10 or approving the agreement.
- 11 (5) Subsection (4) does not apply to any of the following decisions or
12 reasons in relation to such decisions:
13 (a) a decision to issue, or refuse to issue, a certificate under
14 section 369;
15 (b) a decision to endorse, or refuse to endorse, a conscientious
16 objection certificate under section 485;
17 (c) a decision to issue an entry permit under section 512;
18 (d) a decision to impose conditions on an entry permit under
19 section 515;
20 (e) a decision to issue, or refuse to issue, an exemption
21 certificate under section 519;
22 (f) a decision to issue, or refuse to issue, an affected member
23 certificate under section 520;
24 (g) a decision or reasons in relation to which an order is in
25 operation under paragraph 594(1)(d).
- 26 (6) Subsections (1) and (4) do not limit FWA's power to put decisions
27 in writing or publish decisions.

602 Correcting obvious errors etc. in relation to FWA's decisions

- 29 (1) FWA may correct or amend any obvious error, defect or
30 irregularity (whether in substance or form) in relation to a decision
31 of FWA (other than an error, defect or irregularity in a modern
32 award or national minimum wage order).

33 Note 1: If FWA makes a decision to make an instrument, FWA may correct
34 etc. the instrument under this section (see subsection 598(2)).

Section 603

1 Note 2: FWA corrects modern awards and national minimum wage orders
2 under sections 160 and 296.

- 3 (2) FWA may correct or amend the error, defect or irregularity:
4 (a) on its own initiative; or
5 (b) on application.

6 **603 Varying and revoking FWA's decisions**

- 7 (1) FWA may vary or revoke a decision of FWA that is made under
8 this Act (other than a decision referred to in subsection (3)).

9 Note: If FWA makes a decision to make an instrument, FWA may vary or
10 revoke the instrument under this subsection (see subsection 598(2)).

- 11 (2) FWA may vary or revoke a decision under this section:
12 (a) on its own initiative; or
13 (b) on application by:
14 (i) a person who is affected by the decision; or
15 (ii) if the kind of decision is prescribed by the regulations—
16 a person prescribed by the regulations in relation to that
17 kind of decision.

- 18 (3) FWA must not vary or revoke any of the following decisions of
19 FWA under this section:
20 (a) a decision under Part 2-3 (which deals with modern awards);
21 (b) a decision under section 235 or Division 4, 7, 9 or 10 of
22 Part 2-4 (which deal with enterprise agreements);
23 (c) a decision under Part 2-5 (which deals with workplace
24 determinations);
25 (d) a decision under Part 2-6 (which deals with minimum
26 wages);
27 (e) a decision under Division 3 of Part 2-8 (which deals with
28 transfer of business);
29 (f) a decision under Division 8 of Part 3-3 (which deals with
30 protected action ballots);
31 (g) a decision under section 472 (which deals with partial work
32 bans);
33 (h) a decision that is prescribed by the regulations.

Section 606

- 1 (4) Nothing in this section affects any right of appeal or any power of
2 FWA under section 604 or 607. A review of a decision and an
3 appeal of the decision may be dealt with together if FWA considers
4 it appropriate.

5 **606 Staying decisions that are appealed or reviewed**

- 6 (1) If, under section 604 or 605, FWA hears an appeal from, or
7 conducts a review of, a decision, FWA may (except as provided by
8 subsection (3)) order that the operation of the whole or part of the
9 decision be stayed, on any terms and conditions that FWA
10 considers appropriate, until a decision in relation to the appeal or
11 review is made or FWA makes a further order.
- 12 (2) If a Full Bench is hearing the appeal or conducting the review, an
13 order under subsection (1) in relation to the appeal or review may
14 be made by:
15 (a) the Full Bench; or
16 (b) the person who has seniority under section 619 in relation to
17 the appeal or review.
- 18 (3) This section does not apply in relation to a decision to make a
19 protected action ballot order.

20 **607 Process for appealing or reviewing decisions**

- 21 (1) An appeal from, or a review of, a decision of FWA may be heard
22 or conducted without holding a hearing only if:
23 (a) it appears to FWA that the appeal or review can be
24 adequately determined without persons making oral
25 submissions for consideration in the appeal or review; and
26 (b) the persons who would otherwise, or who will, make
27 submissions (whether oral or written) for consideration in the
28 appeal or review consent to the appeal or review being heard
29 or conducted without a hearing.
- 30 (2) FWA may:
31 (a) admit further evidence; and
32 (b) take into account any other information or evidence.

Section 608

- 1 (3) FWA may do any of the following in relation to the appeal or
2 review:
3 (a) confirm, quash or vary the decision;
4 (b) make a further decision in relation to the matter that is the
5 subject of the appeal or review;
6 (c) refer the matter that is the subject of the appeal or review to
7 an FWA Member (other than a Minimum Wage Panel
8 Member) and:
9 (i) require the FWA Member to deal with the subject
10 matter of the decision; or
11 (ii) require the FWA Member to act in accordance with the
12 directions of FWA.

13 **608 Referring questions of law to the Federal Court**

- 14 (1) The President may refer a question of law arising in a matter before
15 FWA for the opinion of the Federal Court.
16 (2) A question of law referred under subsection (1) must be
17 determined by the Full Court of the Federal Court.
18 (3) FWA may make a decision in relation to the matter even if the
19 Federal Court is determining the question of law, except if the
20 question is whether FWA may exercise powers in relation to the
21 matter.
22 (4) Once the Federal Court has determined the question, FWA may
23 only make a decision in relation to the matter that is not
24 inconsistent with the opinion of the Federal Court (if FWA has not
25 already done so).
26 (5) However, if FWA has made a decision in relation to the matter that
27 is inconsistent with the opinion of the Federal Court, FWA must
28 vary the decision in such a way as to make it consistent with the
29 opinion of the Federal Court.

1 **Subdivision F—Miscellaneous**

2 **609 Procedural rules**

- 3 (1) After consulting the other FWA Members, the President may, by
4 legislative instrument, make procedural rules in relation to:
5 (a) the practice and procedure to be followed by FWA; or
6 (b) the conduct of business in relation to matters allowed or
7 required to be dealt with by FWA.
- 8 (2) Without limiting subsection (1), the procedural rules may provide
9 for the following:
10 (a) the requirements for making an application to FWA;
11 (b) the circumstances in which a lawyer or paid agent may make
12 an application or submission to FWA on behalf of a person
13 who is entitled to make the application or submission;
14 (c) the form and manner in which, and the time within which,
15 submissions may or must be made to FWA;
16 (d) the procedural requirements for making decisions of FWA;
17 (e) the form and manner in which FWA gives directions and
18 notifies persons of things;
19 (f) who is notified by FWA of things;
20 (g) the manner in which conferences are to be conducted in
21 relation to applications made under Part 3-1, 3-2 or Part 6-4
22 (which deal with general protections, unfair dismissal and
23 unlawful termination).
- 24 (3) To avoid doubt, subsection (1) includes the power to make
25 procedural rules in relation to any functions conferred on FWA by
26 any other law of the Commonwealth.

27 **610 Regulations dealing with FWA matters**

28 The regulations may provide for any matter that the procedural
29 rules may provide for.

30 Note: Regulations made under this section prevail over procedural rules (see
31 subsection 796(2)).

Section 611

1 **611 Costs**

2 (1) A person must bear the person's own costs in relation to a matter
3 before FWA.

4 (2) However, FWA may order a person (the *first person*) to bear some
5 or all of the costs of another person in relation to an application to
6 FWA if:

7 (a) FWA is satisfied that the first person made the application, or
8 the first person responded to the application, vexatiously or
9 without reasonable cause; or

10 (b) FWA is satisfied that it should have been reasonably apparent
11 to the first person that the first person's application, or the
12 first person's response to the application, had no reasonable
13 prospect of success.

14 Note: FWA can also order costs under sections 376, 401 and 780.

15 (3) A person to whom an order for costs applies must not contravene a
16 term of the order.

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

1

2 **Division 4—Organisation of FWA**

3 **Subdivision A—Functions etc. to be performed by a single**
4 **FWA Member, a Full Bench or the Minimum Wage**
5 **Panel**

6 **612 FWA functions etc. may generally be performed by single FWA**
7 **Member**

8 (1) A function or power of FWA may be performed or exercised by a
9 single FWA Member (other than a Minimum Wage Panel
10 Member), as directed by the President, except as provided by this
11 Subdivision.

12 Note: The President gives directions under section 582.

13 (2) Action taken under subsection 508(1) (which deals with misuse of
14 rights under Part 3-4) must be taken by a Deputy President, except
15 as provided by section 615.

16 (3) This section does not limit the power of the President to delegate a
17 function or power of FWA under section 625.

18 **613 Appeal of decisions to be heard by a Full Bench, the President**
19 **or a Deputy President**

20 (1) A Full Bench must (except as provided by subsection (2)):
21 (a) decide under section 604 whether to grant permission to
22 appeal a decision; and
23 (b) if the Full Bench decides to grant the permission—hear the
24 appeal in accordance with section 607.

25 Note: For the constitution of a Full Bench, see section 618.

26 (2) The President, or a Deputy President directed by the President,
27 may:
28 (a) decide under section 604 whether to grant permission to
29 appeal a decision of a delegate under subsection 625(2); and

Section 614

- 1 (b) if President or the Deputy President (as the case may be)
2 grants the permission—hear the appeal in accordance with
3 section 607.

4 Note: The President gives directions under section 582.

5 **614 Review of decisions by a Full Bench**

6 A Full Bench must:

- 7 (a) decide under section 605 whether to conduct a review of a
8 decision; and
9 (b) if the Full Bench decides to conduct the review—conduct the
10 review in accordance with section 607.

11 Note: For the constitution of a Full Bench, see section 618.

12 **615 FWA functions etc. performed by a Full Bench on direction by**
13 **the President**

- 14 (1) A function or power of FWA may be performed or exercised by a
15 Full Bench if the President so directs.

16 Note: The President gives directions under section 582.

- 17 (2) The President may direct that the function or power be exercised
18 by a Full Bench generally, or in relation to a particular matter or
19 class of matters.

- 20 (3) To avoid doubt, a reference in this section to a Full Bench includes
21 a reference to more than one Full Bench.

22 Note: For the constitution of a Full Bench, see section 618.

23 **616 FWA functions etc. that must be performed by a Full Bench**

24 *Modern awards*

- 25 (1) A modern award must be made under Part 2-3 by a Full Bench.

- 26 (2) A 4 yearly review of modern awards must be conducted under
27 Part 2-3 by a Full Bench.

- 28 (3) A determination that varies or revokes a modern award made in a 4
29 yearly review of modern awards must be made by a Full Bench.

Section 617

1 Note: A determination that varies or revokes a modern award may be made
2 by a single FWA Member if it is not made in a 4 yearly review of
3 modern awards or in an annual wage review.

4 *Workplace determinations*

5 (4) A workplace determination must be made under Part 2-5 by a Full
6 Bench.

7 *Full Benches*

8 (5) To avoid doubt, a reference in this section to a Full Bench includes
9 a reference to more than one Full Bench.

10 Note: For the constitution of a Full Bench, see section 618.

11 **617 FWA functions etc. that must be performed by the Minimum**
12 **Wage Panel**

13 (1) An annual wage review must be conducted under Part 2-6 by the
14 Minimum Wage Panel.

15 Note: For the constitution of the Minimum Wage Panel, see section 620.

16 (2) A national minimum wage order, or a determination, made in an
17 annual wage review must be made by the Minimum Wage Panel.

18 (3) A determination that varies a national minimum wage order must
19 be made under Part 2-6 by the Minimum Wage Panel.

20 **Subdivision B—Constitution of FWA by a single FWA**
21 **Member, a Full Bench or the Minimum Wage Panel**

22 **618 Constitution and decision-making of a Full Bench**

23 *Constitution of a Full Bench*

24 (1) A Full Bench constituted under this section consists of at least 3
25 FWA Members, including at least one Deputy President.

26 Note: A Minimum Wage Panel Member might form part of a Full Bench.

27 (2) The President may determine which FWA Members form part of a
28 Full Bench.

Section 619

1 *Making decisions*

2 (3) A decision of a majority of the FWA Members on the Full Bench
3 prevails.

4 (4) However, if there is no majority, the decision of the FWA Member
5 who has seniority under section 619 prevails.

6 **619 Seniority of FWA Members**

7 (1) While FWA is constituted by a Full Bench, the FWA Members on
8 the Full Bench have seniority according to the following order:

9 (a) the President;

10 (b) the Deputy Presidents, according to the days on which their
11 appointments as Deputy Presidents took effect;

12 (c) if 2 or more appointments as Deputy Presidents took effect
13 on the same day—the Deputy Presidents, according to the
14 precedence assigned to them in their instruments of
15 appointment.

16 (2) The FWA Member on a Full Bench who has seniority under this
17 section is responsible for managing the Full Bench in performing
18 functions and exercising powers of FWA.

19 Note: The FWA Member who has seniority also has a deciding vote if there
20 is no majority (see subsection 618(4)).

21 **620 Constitution and decision-making of the Minimum Wage Panel**

22 *Constitution of the Minimum Wage Panel*

23 (1) The Minimum Wage Panel constituted under this section consists
24 of 7 FWA Members (except as provided by section 622), and must
25 include:

26 (a) the President; and

27 (b) at least 3 Minimum Wage Panel Members.

28 (2) The President may determine which FWA Members form part of
29 the Minimum Wage Panel.

Section 621

- 1 (3) The President is responsible for managing the Minimum Wage
2 Panel in performing the functions and exercising the powers
3 referred to in section 617.

4 *Making decisions*

- 5 (4) A decision of the majority of the FWA Members of the Minimum
6 Wage Panel prevails.

- 7 (5) However, if there is no majority, the decision of the President
8 prevails.

9 **621 Reconstitution of FWA when single FWA Member becomes**
10 **unavailable**

- 11 (1) This section applies if:
12 (a) an FWA Member is dealing with a matter (other than by
13 forming part of a Full Bench or the Minimum Wage Panel in
14 relation to a matter); and
15 (b) the FWA Member becomes unavailable to continue dealing
16 with the matter before the matter is completely dealt with.
- 17 (2) The President must direct another FWA Member to constitute
18 FWA for the purposes of dealing with the matter.

19 Note: The new FWA Member must take into account everything that
20 happened before the FWA Member began to deal with the matter (see
21 section 623).

22 **622 Reconstitution of FWA when FWA Member of a Full Bench or**
23 **the Minimum Wage Panel becomes unavailable**

- 24 (1) This section applies if:
25 (a) an FWA Member (the *unavailable member*) forms part of a
26 Full Bench or the Minimum Wage Panel in relation to a
27 matter; and
28 (b) the FWA Member becomes unavailable to continue dealing
29 with the matter before the matter is completely dealt with.
- 30 (2) The Full Bench or the Minimum Wage Panel may continue to deal
31 with the matter without the unavailable member if the Full Bench
32 or the Minimum Wage Panel consists of the following:

Section 623

- 1 (a) for the Minimum Wage Panel—the President and at least 3
2 Minimum Wage Panel Members;
3 (b) for a Full Bench—at least 3 FWA Members, including at
4 least one Deputy President.
- 5 (3) Otherwise, the President must direct another FWA member to form
6 part of the Full Bench or the Minimum Wage Panel. After the
7 President does so, the Full Bench or the Minimum Wage Panel
8 may continue to deal with the matter without the unavailable
9 member.
- 10 Note: The new FWA Member must take into account everything that
11 happened before the FWA Member began to deal with the matter (see
12 section 623).

13 **623 When new FWA Members begin to deal with matters**

14 If an FWA Member begins to deal with a matter under section 621
15 or 622, the FWA Member must take into account everything that
16 occurred before FWA, and everything that FWA did, in relation to
17 the matter before the FWA Member began to deal with the matter.

18 **624 FWA’s decisions not invalid when improperly constituted**

19 A decision of FWA is not invalid merely because it was made by a
20 Full Bench, or the Minimum Wage Panel, constituted otherwise
21 than as provided by this Division.

22 Note: If FWA makes a decision to make an instrument while constituted
23 otherwise than as provided by this Division, the instrument is not
24 invalid (see subsection 598(2)).

25 **Subdivision C—Delegation of FWA’s functions and powers**

26 **625 Delegation by the President of functions and powers of FWA**

- 27 (1) The President may, in writing, delegate all or any of the following
28 powers of FWA to the General Manager or a member of the staff
29 of FWA:
30 (a) correcting or amending applications and documents, or
31 waiving irregularities, under section 586;

Section 625

- 1 (b) informing itself as it considers appropriate under section 590
2 (other than FWA's power to hold a hearing);
3 (c) conducting a conference in accordance with section 592;
4 (d) correcting or amending obvious errors, defects or
5 irregularities under section 602.
- 6 (2) The President may, in writing, delegate all or any of the following
7 functions or powers of FWA to a person referred to in
8 subsection (3):
- 9 (a) publishing varied modern awards under section 168;
10 (b) publishing submissions under section 289;
11 (c) publishing research under section 291;
12 (d) publishing varied wage rates under section 292;
13 (e) endorsing conscientious objection certificates under
14 section 485;
15 (f) imposing conditions on entry permits, revoking or
16 suspending entry permits, or banning the issue of any further
17 entry permits, under section 507 or 510;
18 (g) the functions and powers of FWA under Division 6 of
19 Part 3-4 (which deals with entry permits, entry notices and
20 certificates);
21 (h) publishing enterprise agreements under paragraph 601(4)(b).
- 22 (3) The people to whom a delegation may be given under
23 subsection (2) are any of the following:
- 24 (a) the General Manager;
25 (b) a member of the staff of FWA who is an SES employee or
26 acting SES employee;
27 (c) a member of the staff of FWA who is in a class of employees
28 prescribed by the regulations.
- 29 (4) In performing functions or exercising powers under a delegation
30 under subsection (1) or (2), the delegate must comply with any
31 directions of the President.
- 32 Note: See also sections 34AA and 34AB of the *Acts Interpretation Act 1901*.

Section 626

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2

Division 5—FWA Members

3

Subdivision A—Appointment of FWA Members

4

626 Appointment of FWA Members

5

(1) An FWA Member is to be appointed by the Governor-General by written instrument.

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(2) The instrument of appointment must specify whether the FWA Member is the President, a Deputy President, a Commissioner or a Minimum Wage Panel Member.

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(3) The instrument of appointment must assign a precedence to the FWA Member if the FWA Member and one or more other FWA Members are appointed as Deputy Presidents on the same day.

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Note: Precedence is relevant to the seniority of Deputy Presidents (see paragraph 619(1)(c)).

14

15

(4) The same person must not hold, at the same time, an appointment as both:

16

17

(a) a Minimum Wage Panel Member; and

18

(b) the President, a Deputy President or a Commissioner.

19

627 Qualifications for appointment of FWA Members

20

President

21

(1) Before the Governor-General appoints a person as the President, the Minister must be satisfied that the person:

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23

(a) is or has been a Judge of a court created by the Parliament; or

24

(b) is qualified for appointment because the person has knowledge of, or experience in, one or more of the following fields:

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(i) workplace relations;

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(ii) law;

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(iii) business, industry or commerce.

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Deputy Presidents

- (2) Before the Governor-General appoints a person as a Deputy President, the Minister must be satisfied that the person:
- (a) either:
 - (i) is or has been a Judge of a court created by the Parliament; or
 - (ii) has been a Judge of a court of a State or Territory; or
 - (b) has a high level of experience in the field of workplace relations, including a high level of experience that has been acquired:
 - (i) through legal practice; or
 - (ii) in the service of a peak council or another association representing the interests of employers or employees; or
 - (iii) in the service of government or an authority of government; or
 - (iv) in academia.

Commissioners

- (3) Before the Governor-General appoints a person as a Commissioner, the Minister must be satisfied that the person is qualified for appointment because the person has knowledge of, or experience in, one or more of the following fields:
- (a) workplace relations;
 - (b) law;
 - (c) business, industry or commerce.

Minimum Wage Panel Members

- (4) Before the Governor-General appoints a person as a Minimum Wage Panel Member, the Minister must be satisfied that the person is qualified for appointment because the person has knowledge of, or experience in, one or more of the following fields:
- (a) workplace relations;
 - (b) economics;
 - (c) social policy;
 - (d) business, industry or commerce.

Section 628

1 **628 Basis of appointment of FWA Members**

2 *President, Deputy Presidents and Commissioners*

- 3 (1) The President, a Deputy President or a Commissioner holds office
4 on a full-time basis.
- 5 (2) A Deputy President or a Commissioner may perform his or her
6 duties on a part-time basis, with the President's approval.

7 *Minimum Wage Panel Members*

- 8 (3) A Minimum Wage Panel Member holds office on a part-time basis.

9 **629 Period of appointment of FWA Members**

10 *President, Deputy Presidents and Commissioners*

- 11 (1) The President, a Deputy President or a Commissioner holds office
12 until the earliest of the following:
- 13 (a) he or she attains the age of 65 years;
- 14 (b) he or she resigns or the appointment is terminated under this
15 Part.

16 *Members of a prescribed State industrial authority*

- 17 (2) Despite subsection (1), a person who is a member of a prescribed
18 State industrial authority may be appointed as a Deputy President
19 or Commissioner for a period specified in the instrument of
20 appointment.

21 Note: A member of a prescribed State industrial authority may hold office as
22 a Deputy President or Commissioner (see section 631).

- 23 (3) If a person is so appointed, the person holds office as Deputy
24 President or Commissioner until the earliest of the following:
- 25 (a) the specified period ends;
- 26 (b) the person ceases to be a member of the prescribed State
27 industrial authority;
- 28 (c) the person resigns or the appointment is terminated under this
29 Part.

1 *Minimum Wage Panel Members*

- 2 (4) A Minimum Wage Panel Member holds office for the period
3 specified in the instrument of appointment. The period must not
4 exceed 5 years.

5 Note: A Minimum Wage Panel Member is eligible for reappointment (see
6 subsection 33(4A) of the *Acts Interpretation Act 1901*).

7 **Subdivision B—Terms and conditions of FWA Members**

8 **630 Appointment of a Judge not to affect tenure etc.**

- 9 (1) The appointment of a Judge of a court created by the Parliament as
10 an FWA Member, or service by such a Judge as an FWA Member,
11 does not affect:

- 12 (a) the Judge's tenure of office as a Judge; or
13 (b) the Judge's rank, title, status, precedence, salary, annual or
14 other allowances or other rights or privileges as the holder of
15 his or her office as a Judge.

- 16 (2) For all purposes, the Judge's service as the FWA Member is taken
17 to be service as a Judge.

18 **631 Dual federal and State appointments of Deputy Presidents or**
19 **Commissioners**

- 20 (1) Nothing in this Act prevents a Deputy President or Commissioner
21 from being appointed to, and holding at the same time, an office as
22 a member of a prescribed State industrial authority, with the
23 President's approval.

- 24 (2) Nothing in this Act prevents a member of a prescribed State
25 industrial authority from being appointed to, and holding at the
26 same time, an office as a Deputy President or Commissioner.

27 Note 1: A member of a prescribed State industrial authority may hold office as
28 a Deputy President or Commissioner only if he or she is qualified for
29 appointment (see section 627).

30 Note 2: For the period of appointment, and remuneration and allowances, of a
31 Deputy President or Commissioner who is a member of a prescribed
32 State industrial authority, see sections 629 and 637.

Section 632

- 1 (3) Subsections (1) and (2) have effect subject to any law of the
2 relevant State.

3 **632 Dual federal and Territory appointments of Deputy Presidents**
4 **or Commissioners**

5 Nothing in this Act prevents a Deputy President or Commissioner
6 from being appointed to, and holding at the same time, one of the
7 following offices, with the President's approval:

- 8 (a) an office as a member of a Commonwealth or Territory
9 tribunal prescribed by the regulations (other than a court);
10 (b) an office under a Commonwealth or Territory law that
11 provides for the office to be held by an FWA Member.

12 **633 Outside employment of FWA Members**

13 *Deputy Presidents and Commissioners*

- 14 (1) A Deputy President or Commissioner (whether performing duties
15 on a full-time or part-time basis) must not engage in paid
16 employment outside the duties of his or her office without the
17 President's approval.
18 (2) However, the President's approval is not required if the paid
19 employment is an office or appointment in the Defence Force.

20 *Minimum Wage Panel Members*

- 21 (3) A Minimum Wage Panel Member must not engage in any paid
22 employment that, in the President's opinion, conflicts or may
23 conflict with the proper performance of his or her duties.

24 **634 Oath or affirmation of office**

25 Before beginning to discharge the duties of his or her office, an
26 FWA Member must take an oath or affirmation in accordance with
27 the regulations.

1 **635 Remuneration of the President**

2 *Remuneration if the President is not a Judge*

- 3 (1) The President (other than a President who is a Judge of a court
4 created by the Parliament) is to be paid:
- 5 (a) salary at an annual rate equal to the annual rate of salary
6 payable to the Chief Justice of the Federal Court; and
 - 7 (b) such travelling allowances as are determined from time to
8 time by the Remuneration Tribunal; and
 - 9 (c) such other allowances as are prescribed by the regulations.

10 *Remuneration if the President is a Judge*

- 11 (2) A President who is a Judge of a court created by the Parliament
12 must be paid an additional allowance, in accordance with
13 subsection (3), if the salary payable to the person as a Judge is less
14 than the salary that would be payable to the person as President
15 under subsection (1).
- 16 (3) The amount of the allowance is the difference between the Judge's
17 salary and the salary that is payable to the President under
18 subsection (1).

19 *Additional amount*

- 20 (4) The President or a former President must be paid an amount in
21 accordance with subsection 7(5E) of the *Remuneration Tribunal*
22 *Act 1973* if the President, or former President, would be entitled to
23 that amount had the President or former President held the office of
24 Chief Justice of the Federal Court instead of the office of President.

25 **636 Application of Judges' Pensions Act to the President**

- 26 (1) The *Judges' Pensions Act 1968* does not apply to the President if:
27 (a) immediately before being appointed as the President, he or
28 she was one of the following (a **public sector**
29 **superannuation scheme member**):
30 (i) an eligible employee for the purposes of the
31 *Superannuation Act 1976*;

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- 1 (ii) a member of the superannuation scheme established by
2 deed under the *Superannuation Act 1990*;
- 3 (iii) an ordinary employer-sponsored member of PSSAP
4 (within the meaning of the *Superannuation Act 2005*);
5 and
- 6 (b) he or she does not make an election under subsection (2).
- 7 (2) The President may elect to cease to be a public sector
8 superannuation scheme member.
- 9 (3) The election must be made:
10 (a) within 3 months of the President's appointment; and
11 (b) by written notice to the Minister.
- 12 (4) If the President makes the election:
13 (a) he or she is taken to have ceased to be a public sector
14 superannuation scheme member immediately before being
15 appointed as the President; and
16 (b) the *Judges' Pensions Act 1968* applies to him or her, and is
17 taken to have so applied, immediately after he or she was
18 appointed as the President.

19 **637 Remuneration of FWA Members other than the President**

20 *Remuneration if an FWA Member is not a Judge*

- 21 (1) An FWA Member (other than an FWA Member who is a Judge of
22 a court created by the Parliament) is to be paid the remuneration
23 that is determined by the Remuneration Tribunal. If no
24 determination of that remuneration by the Tribunal is in operation,
25 the FWA Member is to be paid the remuneration that is prescribed
26 by the regulations.
- 27 (2) An FWA Member is to be paid the allowances that are prescribed
28 by the regulations.
- 29 (3) Subsections (1) and (2) have effect subject to the *Remuneration*
30 *Tribunal Act 1973* and to section 638 (which deals with
31 remuneration of part-time Deputy Presidents and Commissioners).

Section 638

- 1 (4) Despite subsections (1) to (3), if a person who is a member of a
2 prescribed State industrial authority is appointed as a Deputy
3 President or Commissioner, the person is not to be paid any
4 remuneration or allowances in relation to the office of Deputy
5 President or Commissioner other than any travel allowance
6 prescribed under subsection (2).

7 *Remuneration if an FWA Member is a Judge*

- 8 (5) An FWA Member who is a Judge (other than the Chief Justice of
9 the Federal Court) of a court created by the Parliament is to be paid
10 an additional allowance, in accordance with subsection (6), if the
11 salary payable to the person as a Judge is less than the salary that
12 would be payable to the person as an FWA Member under
13 subsection (1).
- 14 (6) The amount of the allowance is the difference between the Judge's
15 salary and the salary that is payable to the FWA Member under
16 subsection (1).

17 *Section does not apply to the President*

- 18 (7) This section does not apply to the President.

19 **638 Remuneration of Deputy Presidents or Commissioners**
20 **performing duties on a part-time basis**

- 21 (1) If the President approves a Deputy President or Commissioner (the
22 *part-time member*) performing his or her duties on a part-time
23 basis, the President and the part-time member are to enter into a
24 written agreement specifying the proportion (the *agreed*
25 *proportion*) of full-time duties to be worked by the part-time
26 member.
- 27 (2) The agreed proportion may be varied by a written agreement
28 between the President and the part-time member.
- 29 (3) The part-time member's annual rate of salary at a particular time is
30 equal to the agreed proportion at that time of the annual rate of
31 salary that would be payable to the part-time member if he or she
32 were performing his or her duties on a full-time basis.

Section 639

- 1 (4) The allowances that are to be paid to the part-time member under
2 section 637 are not affected by this section.

3 **639 Leave of absence of FWA Members other than the President**

- 4 (1) An FWA Member has the recreation leave entitlements that are
5 determined by the Remuneration Tribunal.
- 6 (2) The President may grant an FWA Member leave of absence, other
7 than recreation leave, on the terms and conditions as to
8 remuneration or otherwise as the President determines.
- 9 (3) In making a determination in accordance with this section, the
10 Remuneration Tribunal and the President must take into account:
11 (a) any past employment of the FWA Member in the service of a
12 State or an authority of a State; or
13 (b) any past service of the FWA Member as a member of an
14 authority of a State.
- 15 (4) This section does not apply to the President.

16 **640 Disclosure of interests by FWA Members other than the**
17 **President**

- 18 (1) This section applies if:
19 (a) an FWA Member (other than the President) is dealing, or will
20 deal, with a matter; and
21 (b) the FWA Member has or acquires any interest (the *potential*
22 *conflict*), pecuniary or otherwise, that conflicts or could
23 conflict with the proper performance of the FWA Member's
24 functions in relation to the matter.
- 25 (2) An FWA Member must disclose a potential conflict to the
26 President.
- 27 (3) If an FWA Member discloses a potential conflict to the President,
28 the FWA Member may only deal, or continue to deal, with the
29 matter with the President's approval.
- 30 (4) The President must give a direction to the FWA Member not to
31 deal, or to no longer deal, with the matter if:

Section 641

- 1 (a) the President becomes aware that an FWA Member has a
2 potential conflict in relation to a matter (whether or not
3 because of a disclosure under subsection (2)); and
4 (b) the President considers that the FWA Member should not
5 deal, or should no longer deal, with the matter.
- 6 (5) To avoid doubt, subsection (4) applies in relation to an FWA
7 Member even if the President has previously given approval to the
8 FWA Member under subsection (3).

9 **641 Termination of appointment on grounds of misbehaviour or**
10 **incapacity**

11 The Governor-General may terminate the appointment of an FWA
12 Member if an address praying for the termination, on one of the
13 following grounds, is presented to the Governor-General by each
14 House of the Parliament in the same session:

- 15 (a) proved misbehaviour;
16 (b) the FWA Member is unable to perform the duties of his or
17 her office because of physical or mental incapacity.

18 **642 Suspension on grounds of misbehaviour or incapacity**

19 *Governor-General may suspend FWA Member*

- 20 (1) The Governor-General may suspend an FWA Member (other than
21 the President) from office:
22 (a) for misbehaviour; or
23 (b) if the FWA Member is unable to perform the duties of his or
24 her office because of physical or mental incapacity.

25 *Statement of grounds*

- 26 (2) The Minister must cause to be tabled in each House of Parliament,
27 within 7 sitting days of that House after the suspension, a statement
28 identifying the FWA Member and setting out the ground of the
29 suspension.

1 **644 Termination of appointment for outside employment**

2 *Deputy Presidents and Commissioners*

- 3 (1) The Governor-General must terminate the appointment of a Deputy
4 President or Commissioner if the Deputy President or
5 Commissioner engages, except with the President's approval, in
6 paid employment outside the duties of his or her office (see
7 subsection 633(1)).

8 *Minimum Wage Panel Members*

- 9 (2) The Governor-General must terminate the appointment of a
10 Minimum Wage Panel Member if the Minimum Wage Panel
11 Member engages in paid employment that, in the President's
12 opinion, conflicts or may conflict with the proper performance of
13 his or her duties (see subsection 633(3)).

14 **645 Resignation of FWA Members**

- 15 (1) An FWA Member may resign his or her appointment by giving the
16 Governor-General a written resignation.
- 17 (2) The resignation takes effect on the day it is received by the
18 Governor-General or, if a later day is specified in the resignation,
19 on that later day.

20 **646 Other terms and conditions of FWA Members**

21 An FWA Member holds office on the terms and conditions (if any)
22 in relation to matters not covered by this Act that are determined
23 by the Governor-General.

24 **647 Appointment of acting President**

25 *Appointment by Governor-General*

- 26 (1) The Governor-General may, by written instrument, appoint a
27 person who is qualified for appointment as the President to act as
28 the President:

Section 648

- 1 (a) during a vacancy in the office of the President (whether or
2 not an appointment has previously been made to the office);
3 or
4 (b) during any period, or during all periods, when the President
5 is absent from duty or from Australia, or is, for any reason,
6 unable to perform the duties of the office.

7 Note: See also section 33A of the *Acts Interpretation Act 1901*, which
8 contains extra rules about acting appointments.

9 *No invalidity*

- 10 (2) Anything done by or in relation to a person purporting to act under
11 an appointment is not invalid merely because:
12 (a) the occasion for the appointment had not arisen; or
13 (b) there was a defect or irregularity in connection with the
14 appointment; or
15 (c) the appointment had ceased to have effect; or
16 (d) the occasion for the person to act had not arisen or had
17 ceased.

18 *Not disqualified*

- 19 (3) A person is not disqualified from being appointed to act as the
20 President under subsection (1) merely because the person is over
21 65.

22 **648 Appointment of acting Deputy Presidents**

23 *Appointment by Governor-General*

- 24 (1) The Governor-General may, by written instrument, appoint a
25 person who is qualified for appointment as a Deputy President to
26 act as a Deputy President for a specified period (including a period
27 that exceeds 12 months).

28 Note: See also section 33A of the *Acts Interpretation Act 1901*, which
29 contains extra rules about acting appointments.

- 30 (2) Before the Governor-General appoints a person to act as a Deputy
31 President, the Minister must be satisfied that the appointment is
32 necessary to enable FWA to perform its functions effectively.

1 *No invalidity*

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

10 *Not disqualified*

- 11 (4) A person is not disqualified from being appointed to act as a
12 Deputy President under subsection (1) merely because the person
13 is over 65.

Section 649

1

2 **Division 6—Cooperation with the States**

3 **649 President to cooperate with prescribed State industrial**
4 **authorities**

- 5 (1) The President must perform his or her functions, and exercise his
6 or her powers, in a manner that facilitates cooperation between
7 FWA and prescribed State industrial authorities.
- 8 (2) Without limiting subsection (1), the President may invite the heads
9 of prescribed State industrial authorities, or the principal registrars
10 of prescribed State industrial authorities, to meet with the President
11 to exchange information and discuss matters of mutual interest in
12 relation to workplace relations.

13 **650 Provision of administrative support**

14 The President may make a written arrangement with a prescribed
15 State industrial authority for:

- 16 (a) FWA to provide administrative support to the authority; or
17 (b) the authority to provide administrative support to FWA.

1

2 **Division 7—Seals, reviews and reports, and disclosure of**
3 **information**

4 **651 Seals**

5 *Seal of FWA*

- 6 (1) FWA must have a seal on which are inscribed the words “The Seal
7 of Fair Work Australia”.

8 *Duplicate seals*

- 9 (2) There are to be such duplicates of the seal of FWA as the President
10 directs.

11 Note: The President gives directions under section 582.

- 12 (3) A document to which a duplicate seal of FWA is affixed is taken to
13 have the seal of FWA affixed to it.

14 *Custody and use of the seal of FWA and duplicate seals*

- 15 (4) The seal of FWA, and the duplicates of that seal, are to be kept in
16 such custody as the President directs and must not be used except
17 as authorised by the President.

18 Note: The President gives directions under section 582.

19 *Judicial notice of the seal of FWA*

- 20 (5) All courts, judges and persons acting judicially must:
21 (a) take judicial notice of the imprint of the seal of FWA
22 appearing on a document; and
23 (b) presume that the document was duly sealed.

24 **652 Annual report**

- 25 (1) The President must, as soon as practicable after the end of each
26 financial year, prepare and give to the Minister, for presentation to
27 the Parliament, a report on the operations of FWA during that year.

Section 653

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

3 (2) To avoid doubt, subsection (1) does not require or authorise the
4 disclosure of information for the purposes of the *Privacy Act 1988*.

5 **653 Reviews and reports about making enterprise agreements**

6 *Review*

7 (1) The General Manager must review the developments, in Australia,
8 in making enterprise agreements in relation to each of the
9 following periods:

- 10 (a) the 3 year period that starts when this section commences;
11 (b) each later 3 year period.

12 (2) Without limiting subsection (1), the General Manager must review
13 the effects that such bargaining has had, during the period, on the
14 employment (including wages and conditions of employment) of
15 the following persons:

- 16 (a) women;
17 (b) part-time employees;
18 (c) persons from a non-English speaking background;
19 (d) mature age persons;
20 (e) young persons;
21 (f) any other persons prescribed by the regulations.

22 *Report*

23 (3) The General Manager must give the Minister a written report of the
24 review as soon as practicable, and in any event within 6 months,
25 after the end of the period to which it relates.

26 (4) The Minister must cause a copy of the report to be tabled in each
27 House of the Parliament within 15 sitting days of that House after
28 the Minister receives the report.

29 (5) Subsections 34C(4) to (7) of the *Acts Interpretation Act 1901* apply
30 to the report as if it were a periodic report as defined in subsection
31 34C(1) of that Act.

1 **654 President must provide certain information etc. to the Minister**
2 **and Fair Work Ombudsman**

- 3 (1) The President must provide to the Minister and the Fair Work
4 Ombudsman information and copies of documents prescribed by
5 the regulations by the time, and in the form, prescribed.
- 6 (2) The regulations may prescribe:
- 7 (a) information that is publicly available, or derived from
8 information that is publicly available, relating to:
- 9 (i) a decision of FWA that is made under this Act; or
10 (ii) a notice, notification or application that is made or given
11 to FWA under this Act; and
- 12 (b) a decision of FWA that is made under this Act and is publicly
13 available.

14 **655 Disclosure of information by FWA**

15 *Information to which this section applies*

- 16 (1) This section applies to the following information:
- 17 (a) information acquired by FWA, or a member of the staff of
18 FWA, in the course of performing functions or exercising
19 powers as FWA;
- 20 (b) information acquired by a person in the course of assisting
21 FWA under section 672, or in the course of performing
22 functions, or exercising powers, as a consultant under
23 section 673.

24 *Disclosure that is necessary or appropriate, or likely to assist*
25 *administration or enforcement*

- 26 (2) The President may disclose, or authorise the disclosure of, the
27 information if the President reasonably believes:
- 28 (a) that it is necessary or appropriate to do so in the course of
29 performing functions, or exercising powers, under this Act;
30 or

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Division 7 Seals, reviews and reports, and disclosure of information

Section 655

- 1 (b) that the disclosure is likely to assist in the administration or
2 enforcement of a law of the Commonwealth, a State or a
3 Territory.

1

2 **Division 8—General Manager, staff and consultants**

3 **Subdivision A—Functions of the General Manager**

4 **656 Establishment**

5 There is to be a General Manager of Fair Work Australia.

6 **657 Functions and powers of the General Manager**

7 (1) The General Manager is to assist the President in ensuring that
8 FWA performs its functions and exercises its powers.

9 Note: The General Manager must also review Australian developments in
10 making enterprise agreements (see section 653).

11 (2) The General Manager has power to do all things necessary or
12 convenient to be done for the purpose of assisting the President.

13 **658 Directions from the President**

14 Despite the President's power of direction under section 582, the
15 General Manager is not required to comply with a direction by the
16 President to the extent that:

17 (a) compliance with the direction would be inconsistent with the
18 General Manager's performance of functions or exercise of
19 powers under the *Financial Management and Accountability*
20 *Act 1997* in relation to FWA; or

21 (b) the direction relates to the General Manager's performance of
22 functions or exercise of powers under the *Public Service Act*
23 *1999* in relation to FWA; or

24 (c) the direction relates to the General Manager's review of
25 developments in making enterprise agreements under
26 section 653.

27 **659 General Manager not otherwise subject to direction**

28 Except as provided by this or any other Act, the General Manager
29 is not subject to direction by or on behalf of the Commonwealth.

Section 660

1 **Subdivision B—Appointment and terms and conditions of the**
2 **General Manager**

3 **660 Appointment of the General Manager**

- 4 (1) The General Manager is to be appointed by the Governor-General
5 by written instrument.
- 6 (2) The General Manager holds office on a full-time basis.
- 7 (3) The General Manager holds office for the period specified in the
8 instrument of appointment. The period must not exceed 5 years.

9 Note: The General Manager is eligible for reappointment (see subsection
10 33(4A) of the *Acts Interpretation Act 1901*).

11 **661 Remuneration of the General Manager**

- 12 (1) The General Manager is to be paid the remuneration that is
13 determined by the Remuneration Tribunal. If no determination of
14 that remuneration by the Tribunal is in operation, the General
15 Manager is to be paid the remuneration that is prescribed by the
16 regulations.
- 17 (2) The General Manager is to be paid the allowances that are
18 prescribed by the regulations.
- 19 (3) This section has effect subject to the *Remuneration Tribunal Act*
20 1973.

21 **662 Leave of absence of the General Manager**

- 22 (1) The General Manager has the recreation leave entitlements that are
23 determined by the Remuneration Tribunal.
- 24 (2) The Minister may grant the General Manager leave of absence,
25 other than recreation leave, on the terms and conditions as to
26 remuneration or otherwise that the Minister determines.

1 **663 Outside employment of the General Manager**

2 The General Manager must not engage in paid employment outside
3 the duties of his or her office without the President's approval.

4 **664 Disclosure of interests to the President**

5 The General Manager must give written notice to the President of
6 all interests, pecuniary or otherwise, that the General Manager has
7 or acquires and that conflict or could conflict with the proper
8 performance of the General Manager's functions.

9 **665 Resignation of the General Manager**

- 10 (1) The General Manager may resign his or her appointment by giving
11 the Governor-General a written resignation.
- 12 (2) The resignation takes effect on the day it is received by the
13 Governor-General or, if a later day is specified in the resignation,
14 on that later day.

15 **666 Termination of appointment of the General Manager**

- 16 (1) The Governor-General may terminate the appointment of the
17 General Manager:
18 (a) for misbehaviour; or
19 (b) if the General Manager is unable to perform the duties of his
20 or her office because of physical or mental incapacity.
- 21 (2) The Governor-General must terminate the appointment of the
22 General Manager if:
23 (a) the General Manager becomes bankrupt, applies to take the
24 benefit of any law for the relief of bankrupt or insolvent
25 debtors, compounds with his or her creditors, or makes an
26 assignment of his or her remuneration for the benefit of his or
27 her creditors; or
28 (b) the General Manager is absent, except on leave of absence,
29 for 14 consecutive days or for 28 days in any 12 months; or

Section 667

- 1 (c) the General Manager engages, except with the President's
2 approval, in paid employment outside the duties of his or her
3 office (see section 663); or
4 (d) the General Manager fails, without reasonable excuse, to
5 comply with section 664 (which deals with disclosure of
6 interests to the President).

7 **667 Other terms and conditions of the General Manager**

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

11 **668 Appointment of acting General Manager**

- 12 (1) The Minister may, by written instrument, appoint a person to act as
13 the General Manager:
14 (a) during a vacancy in the office of the General Manager
15 (whether or not an appointment has previously been made to
16 the office); or
17 (b) during any period, or during all periods, when the General
18 Manager is absent from duty or from Australia, or is, for any
19 reason, unable to perform the duties of the office.

20 Note: See also section 33A of the *Acts Interpretation Act 1901*, which
21 contains extra rules about acting appointments.

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

29 **669 Minister to consult the President**

30 The Minister must consult the President before:
31 (a) a person is appointed as the General Manager under
32 section 660; or

- 1 (b) terms and conditions are determined under section 667; or
2 (c) a person is appointed to act as the General Manager under
3 section 668.

4 **Subdivision C—Staff and consultants**

5 **670 Staff**

- 6 (1) The staff of FWA must be persons engaged under the *Public*
7 *Service Act 1999*.
- 8 (2) For the purposes of the *Public Service Act 1999*:
9 (a) the General Manager and the staff of FWA together
10 constitute a Statutory Agency; and
11 (b) the General Manager is the Head of that Statutory Agency.

12 **671 Delegation by General Manager to staff**

- 13 (1) The General Manager may, in writing, delegate all or any of his or
14 her functions or powers in relation to assisting the President to:
15 (a) a member of the staff of FWA who is an SES employee or
16 acting SES employee; or
17 (b) a member of the staff of FWA who is in a class of employees
18 prescribed by the regulations.
- 19 (2) In performing functions or exercising powers under a delegation,
20 the delegate must comply with any directions of the General
21 Manager.

22 Note: See also sections 34AA and 34AB of the *Acts Interpretation Act 1901*.

23 **672 Persons assisting FWA**

- 24 FWA may also be assisted:
25 (a) by employees of Agencies (within the meaning of the *Public*
26 *Service Act 1999*); or
27 (b) by officers and employees of a State or Territory; or
28 (c) by officers and employees of authorities of the
29 Commonwealth, a State or a Territory;

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Section 673

1 whose services are made available to FWA in connection with the
2 performance of any of its functions.

3 **673 Consultants**

4 The General Manager may engage persons having suitable
5 qualifications and experience as consultants to FWA.

1

2 **Division 9—Offences relating to Fair Work Australia**

3 **674 Offences in relation to FWA**

4 *Insulting or disturbing an FWA Member*

- 5 (1) A person commits an offence if:
6 (a) the person engages in conduct; and
7 (b) the person's conduct insults or disturbs an FWA Member in
8 the performance of functions, or the exercise of powers, as an
9 FWA Member.

10 Penalty: Imprisonment for 12 months.

11 *Using insulting language*

- 12 (2) A person commits an offence if:
13 (a) the person uses insulting language towards another person;
14 and
15 (b) the person is reckless as to whether the language is insulting;
16 and
17 (c) the other person is an FWA Member performing functions, or
18 exercising powers, as an FWA Member.

19 Penalty: Imprisonment for 12 months.

20 *Interrupting matters before FWA*

- 21 (3) A person commits an offence if:
22 (a) the person engages in conduct; and
23 (b) the person's conduct interrupts a matter before FWA.

24 Penalty: Imprisonment for 12 months.

25 *Creating or continuing a disturbance*

- 26 (4) A person commits an offence if:
27 (a) the person engages in conduct; and

Section 674

- 1 (b) the person's conduct creates, or contributes to creating or
2 continuing, a disturbance; and
3 (c) the disturbance is in or near a place where FWA is dealing
4 with a matter.

5 Penalty: Imprisonment for 12 months.

6 *Improper influence of FWA Members etc.*

- 7 (5) A person commits an offence if:
8 (a) the person uses words (whether by writing or speech) that are
9 intended to improperly influence another person; and
10 (b) the other person is an FWA Member or a person attending
11 before FWA.

12 Penalty: Imprisonment for 12 months.

13 *Delegates of FWA*

- 14 (6) A reference in subsections (1) to (5) to FWA or an FWA Member
15 includes a delegate of FWA.

16 *Adversely affecting public confidence in FWA*

- 17 (7) A person commits an offence if:
18 (a) the person publishes a statement; and
19 (b) the statement implies or states that an FWA Member
20 (whether identified or not) has engaged in misconduct in
21 relation to the performance of functions, or the exercise of
22 powers, as an FWA Member; and
23 (c) the FWA Member has not engaged in that misconduct; and
24 (d) the publication is likely to have a significant adverse effect
25 on public confidence that FWA is properly performing its
26 functions and exercising its powers.

27 Penalty: 12 months imprisonment.

28 Note 1: Sections 135.1, 135.4, 139.1, 141.1 and 142.1 of the *Criminal Code*
29 create offences of using various dishonest means to influence a
30 Commonwealth public official.

31 Note 2: Sections 676 and 678 of this Act and sections 36A, 37, 38 and 40 of
32 the *Crimes Act 1914* create offences relating to interference with a

Section 675

1 witness. Section 39 of that Act makes it an offence to destroy anything
2 that may be required in evidence.

3 **675 Contravening an FWA order**

- 4 (1) A person commits an offence if:
5 (a) FWA has made an order under this Act; and
6 (b) either of the following applies:
7 (i) the order applies to the person;
8 (ii) a term of the order applies to the person; and
9 (c) the person engages in conduct; and
10 (d) the conduct contravenes:
11 (i) a term of the order referred to in subparagraph (b)(i); or
12 (ii) the term referred to in subparagraph (b)(ii).

- 13 (2) However, subsection (1) does not apply to the following orders:
14 (a) an order under Part 2-3 (which deals with modern awards);
15 (b) a bargaining order;
16 (c) a scope order;
17 (d) an order under Part 2-6 (which deals with minimum wages);
18 (e) an equal remuneration order;
19 (f) an order under Part 2-8 (which deals with transfer of
20 business);
21 (g) an order under Division 6 of Part 3-3 (which deals with the
22 suspension or termination of protected industrial action);
23 (h) a protected action ballot order, or an order in relation to a
24 protected action ballot order or a protected action ballot;
25 (i) an order under Part 3-5 (which deals with stand down).

26 Penalty: Imprisonment for 12 months.

- 27 (3) Strict liability applies to paragraphs (1)(a) and (b).

28 Note: For strict liability, see section 6.1 of the *Criminal Code*.

29 **676 Intimidation etc.**

30 A person commits an offence if:

Section 677

- 1 (a) the person threatens, intimidates, coerces or prejudices
2 another person; and
3 (b) the person does so because the other person has given, or
4 proposes to give, information or documents to FWA.

5 **Penalty:** Imprisonment for 12 months.

6 **Note:** A person may also contravene a civil remedy provision by threatening
7 etc. a person who has given, or proposes to give, information or
8 documents to FWA (see section 343).

9 **677 Offences in relation to attending before FWA**

10 *Required to attend*

- 11 (1) A person commits an offence if:
12 (a) the person has been required to attend before FWA; and
13 (b) the person fails to attend as required.

14 **Penalty:** Imprisonment for 6 months.

15 *Oath or affirmation*

- 16 (2) A person commits an offence if:
17 (a) the person attends before FWA; and
18 (b) FWA requires the person to take an oath or make an
19 affirmation; and
20 (c) the person refuses or fails to be sworn or to make an
21 affirmation as required.

22 **Penalty:** Imprisonment for 6 months.

23 *Questions or documents*

- 24 (3) A person commits an offence if:
25 (a) the person attends before FWA; and
26 (b) FWA requires the person to answer a question or produce a
27 document; and
28 (c) the person refuses or fails to answer the question or produce
29 the document.

30 **Penalty:** Imprisonment for 6 months.

1 *Reasonable excuse*

- 2 (4) Subsection (1), (2) or (3) does not apply if the person has a
3 reasonable excuse.

4 Note: A defendant bears an evidential burden in relation to the matter in
5 subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

- 6 (5) A reference in this section to FWA or an FWA Member includes a
7 delegate of FWA.

8 **678 False or misleading evidence**

9 *Giving false or misleading evidence*

- 10 (1) A person (the *witness*) commits an offence if:
11 (a) the witness gives sworn or affirmed evidence; and
12 (b) the witness gives the evidence as a witness:
13 (i) in a matter before FWA; or
14 (ii) before a person taking evidence on behalf of FWA for
15 use in a matter that the witness will start by application
16 to FWA; and
17 (c) the evidence is false or misleading.

18 Penalty: Imprisonment for 12 months.

19 Note: A person will not commit an offence if the person carries out the
20 conduct constituting the offence under duress (see section 10.2 of the
21 *Criminal Code*).

22 *Inducing or coercing another person to give false or misleading
23 evidence*

- 24 (2) A person (the *offender*) commits an offence if:
25 (a) another person (the *witness*) has been, or will be, required to
26 appear as a witness in a matter before FWA (whether the
27 person is to appear before FWA or a delegate of FWA); and
28 (b) the offender induces, threatens or intimidates the witness to
29 give false or misleading evidence in the matter.

30 Penalty: Imprisonment for 12 months.

1

2 **Part 5-2—Office of the Fair Work Ombudsman**

3 **Division 1—Introduction**

4 **679 Guide to this Part**

5

This Part is about the Office of the Fair Work Ombudsman.

6

Division 2 is about the Fair Work Ombudsman. The Fair Work Ombudsman’s functions include promoting and monitoring compliance with this Act, and providing education, assistance and advice to employees, employers and organisations.

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Division 3 is about the Office of the Fair Work Ombudsman. The Office of the Fair Work Ombudsman consists of the Fair Work Ombudsman, Fair Work Inspectors and staff.

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The inspectors exercise compliance powers for purposes including determining whether this Act is being complied with. The compliance powers include the power to enter certain premises, and to inspect and make copies of documents on the premises.

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17 **680 Meanings of *employee* and *employer***

18

In this Part, *employee* and *employer* have their ordinary meanings.

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2 **Division 2—Fair Work Ombudsman**

3 **Subdivision A—Establishment and functions and powers of the**
4 **Fair Work Ombudsman**

5 **681 Establishment**

6 There is to be a Fair Work Ombudsman.

7 **682 Functions of the Fair Work Ombudsman**

8 The Fair Work Ombudsman has the following functions:

- 9 (a) to promote:
- 10 (i) harmonious and cooperative workplace relations; and
- 11 (ii) compliance with this Act and fair work instruments;
- 12 including by providing education, assistance and advice to
- 13 employees, employers and organisations;
- 14 (b) to monitor compliance with this Act and fair work
- 15 instruments;
- 16 (c) to inquire into, and investigate, any act or practice that may
- 17 be contrary to this Act, a fair work instrument or a safety net
- 18 contractual entitlement;
- 19 (d) to commence proceedings in a court, or to make applications
- 20 to FWA, to enforce this Act, fair work instruments and safety
- 21 net contractual entitlements;
- 22 (e) to refer matters to relevant authorities;
- 23 (f) to represent employees who are, or may become, a party to
- 24 proceedings in a court, or a party to a matter before FWA,
- 25 under this Act or a fair work instrument, if the Fair Work
- 26 Ombudsman considers that representing the employees will
- 27 promote compliance with this Act or the fair work
- 28 instrument;
- 29 (g) any other functions conferred on the Fair Work Ombudsman
- 30 by any Act.

31 Note: The Fair Work Ombudsman also has the functions of an inspector (see
32 section 701).

Section 683

1 **683 Delegation by the Fair Work Ombudsman**

2 (1) The Fair Work Ombudsman may, in writing, delegate to a member
3 of the staff of the Office of the Fair Work Ombudsman or to an
4 inspector all or any of the Fair Work Ombudsman's functions or
5 powers under any Act (other than his or her functions or powers as
6 an inspector).

7 (2) In performing functions or exercising powers under a delegation,
8 the delegate must comply with any directions of the Fair Work
9 Ombudsman.

10 **684 Directions from the Minister**

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

14 Note: Section 42 (disallowance) and Part 6 (sunsetting) of the *Legislative*
15 *Instruments Act 2003* do not apply to the direction (see sections 44
16 and 54 of that Act).

17 (2) The direction must be of a general nature only.

18 (3) The Fair Work Ombudsman must comply with the direction.

19 (4) The Fair Work Ombudsman is not required to comply with the
20 direction to the extent that it relates to the Fair Work
21 Ombudsman's performance of functions, or exercise of powers,
22 under the *Public Service Act 1999* in relation to the Office of the
23 Fair Work Ombudsman.

24 **685 Minister may require reports**

25 (1) The Minister may, in writing, direct the Fair Work Ombudsman to
26 give the Minister specified reports relating to the Fair Work
27 Ombudsman's functions.

28 (2) The Fair Work Ombudsman must comply with the direction.

29 (3) The direction, or the report (if made in writing), is not a legislative
30 instrument.

1 **686 Annual report**

- 2 (1) The Fair Work Ombudsman must, as soon as practicable after the
3 end of each financial year, prepare and give to the Minister, for
4 presentation to the Parliament, a report on the operations of the
5 Office of the Fair Work Ombudsman during that year.

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

- 8 (2) To avoid doubt, subsection (1) does not require or authorise the
9 disclosure of information for the purposes of the *Privacy Act 1988*.

10 **Subdivision B—Appointment and terms and conditions of the**
11 **Fair Work Ombudsman**

12 **687 Appointment of the Fair Work Ombudsman**

- 13 (1) The Fair Work Ombudsman is to be appointed by the
14 Governor-General by written instrument.
- 15 (2) Before the Governor-General appoints a person as the Fair Work
16 Ombudsman, the Minister must be satisfied that the person:
17 (a) has suitable qualifications or experience; and
18 (b) is of good character.
- 19 (3) The Fair Work Ombudsman holds office on a full-time basis.
- 20 (4) The Fair Work Ombudsman holds office for the period specified in
21 the instrument of appointment. The period must not exceed 5 years.

22 Note: The Fair Work Ombudsman is eligible for reappointment (see
23 subsection 33(4A) of the *Acts Interpretation Act 1901*).

24 **688 Remuneration of the Fair Work Ombudsman**

- 25 (1) The Fair Work Ombudsman is to be paid the remuneration that is
26 determined by the Remuneration Tribunal. If no determination of
27 that remuneration by the Tribunal is in operation, the Fair Work
28 Ombudsman is to be paid the remuneration that is prescribed by
29 the regulations.

Section 689

1 (2) The Fair Work Ombudsman is to be paid the allowances that are
2 prescribed by the regulations.

3 (3) This section has effect subject to the *Remuneration Tribunal Act*
4 *1973*.

5 **689 Leave of absence of the Fair Work Ombudsman**

6 (1) The Fair Work Ombudsman has the recreation leave entitlements
7 that are determined by the Remuneration Tribunal.

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

11 **690 Outside employment of the Fair Work Ombudsman**

12 The Fair Work Ombudsman must not engage in paid employment
13 outside the duties of his or her office without the Minister's
14 approval.

15 **691 Disclosure of interests to the Minister**

16 The Fair Work Ombudsman must give written notice to the
17 Minister of all interests, pecuniary or otherwise, that the Fair Work
18 Ombudsman has or acquires and that conflict or could conflict with
19 the proper performance of the Fair Work Ombudsman's functions.

20 **692 Resignation of the Fair Work Ombudsman**

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

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

26 **693 Termination of appointment of the Fair Work Ombudsman**

27 (1) The Governor-General may terminate the appointment of the Fair
28 Work Ombudsman:

- 1 (a) for misbehaviour; or
2 (b) if the Fair Work Ombudsman is unable to perform the duties
3 of his or her office because of physical or mental incapacity.
- 4 (2) The Governor-General must terminate the appointment of the Fair
5 Work Ombudsman if:
- 6 (a) the Fair Work Ombudsman becomes bankrupt, applies to
7 take the benefit of any law for the relief of bankrupt or
8 insolvent debtors, compounds with his or her creditors, or
9 makes an assignment of his or her remuneration for the
10 benefit of his or her creditors; or
- 11 (b) the Fair Work Ombudsman is absent, except on leave of
12 absence, for 14 consecutive days or for 28 days in any 12
13 months; or
- 14 (c) the Fair Work Ombudsman engages, except with the
15 Minister's approval, in paid employment outside the duties of
16 his or her office (see section 690); or
- 17 (d) the Fair Work Ombudsman fails, without reasonable excuse,
18 to comply with section 691 (which deals with disclosure of
19 interests to the Minister).

20 **694 Other terms and conditions of the Fair Work Ombudsman**

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

24 **695 Appointment of acting Fair Work Ombudsman**

- 25 (1) The Minister may, by written instrument, appoint a person who is
26 qualified for appointment as the Fair Work Ombudsman to act as
27 the Fair Work Ombudsman:
- 28 (a) during a vacancy in the office of Fair Work Ombudsman
29 (whether or not an appointment has previously been made to
30 the office); or
- 31 (b) during any period, or during all periods, when the Fair Work
32 Ombudsman is absent from duty or from Australia, or is, for
33 any reason, unable to perform the duties of the office.

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Division 3—Office of the Fair Work Ombudsman

3

Subdivision A—Establishment of the Office of the Fair Work Ombudsman

4

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696 Establishment of the Office of the Fair Work Ombudsman

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(1) The Office of the Fair Work Ombudsman is established by this section.

7

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(2) The Office of the Fair Work Ombudsman consists of:

9

(a) the Fair Work Ombudsman; and

10

(b) the staff of the Office of the Fair Work Ombudsman; and

11

(c) the inspectors appointed under section 700.

12

Subdivision B—Staff and consultants etc.

13

697 Staff

14

(1) The staff of the Office of the Fair Work Ombudsman must be persons engaged under the *Public Service Act 1999*.

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16

(2) For the purposes of the *Public Service Act 1999*:

17

(a) the Fair Work Ombudsman and the staff of the Office of the Fair Work Ombudsman together constitute a Statutory Agency; and

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(b) the Fair Work Ombudsman is the Head of that Statutory Agency.

21

22

698 Persons assisting the Fair Work Ombudsman

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The Fair Work Ombudsman may also be assisted:

24

(a) by employees of Agencies (within the meaning of the *Public Service Act 1999*); or

25

26

(b) by officers and employees of a State or Territory; or

27

(c) by officers and employees of authorities of the Commonwealth, a State or a Territory;

28

Section 699

1 whose services are made available to the Fair Work Ombudsman in
2 connection with the performance of any of his or her functions.

3 Note: For example, State or Territory employees could be made available to
4 assist the Fair Work Ombudsman in providing education in a
5 particular region.

6 **699 Consultants**

7 The Fair Work Ombudsman may engage persons having suitable
8 qualifications and experience as consultants to the Office of the
9 Fair Work Ombudsman.

10 **Subdivision C—Appointment of Fair Work Inspectors**

11 **700 Appointment of Fair Work Inspectors**

- 12 (1) The Fair Work Ombudsman may, in writing, appoint as a Fair
13 Work Inspector:
14 (a) a person who has been appointed, or who is employed, by the
15 Commonwealth; or
16 (b) a person who is employed by a State or Territory.
- 17 (2) The Fair Work Ombudsman may appoint a person as a Fair Work
18 Inspector only if the Fair Work Ombudsman is satisfied that the
19 person is of good character.
- 20 (3) A Fair Work Inspector is appointed for the period specified in the
21 instrument of appointment. The period must not exceed 4 years.

22 Note: A Fair Work Inspector is eligible for reappointment (see subsection
23 33(4A) of the *Acts Interpretation Act 1901*).

24 **701 Fair Work Ombudsman is a Fair Work Inspector**

25 The Fair Work Ombudsman is a Fair Work Inspector by force of
26 this section.

27 **702 Identity cards**

- 28 (1) The Fair Work Ombudsman must issue an identity card to an
29 inspector appointed under section 700.

Section 703

- 1 (2) The Minister must issue an identity card to the Fair Work
2 Ombudsman.

3 *Form of identity card*

- 4 (3) The identity card must:
5 (a) be in the form approved by the Fair Work Ombudsman; and
6 (b) contain a recent photograph of the inspector.

7 *Inspector must carry card*

- 8 (4) An inspector must carry the identity card at all times when
9 performing functions or exercising powers as an inspector.

10 *Offence*

- 11 (5) A person commits an offence if:
12 (a) the person ceases to be an inspector; and
13 (b) the person does not, within 14 days of so ceasing, return the
14 person's identity card to the Fair Work Ombudsman or the
15 Minister (as the case may be).

16 Penalty: 1 penalty unit.

- 17 (6) Subsection (5) is an offence of strict liability.

18 Note: For strict liability, see section 6.1 of the *Criminal Code*.

19 *Defence—card lost or destroyed*

- 20 (7) Subsection (5) does not apply if the identity card was lost or
21 destroyed.

22 Note: A defendant bears an evidential burden in relation to the matter in this
23 subsection (see subsection 13.3(3) of the *Criminal Code*).

24 **Subdivision D—Functions and powers of Fair Work Inspectors**

25 **703 Conditions and restrictions on functions and powers**

26 The functions, and powers (*compliance powers*), conferred on an
27 inspector are subject to such conditions and restrictions as are
28 specified in his or her instrument of appointment.

Section 704

1 **704 General directions by the Fair Work Ombudsman**

- 2 (1) The Fair Work Ombudsman may, by legislative instrument, give a
3 written direction to inspectors relating to the performance of their
4 functions or the exercise of their powers as inspectors.
- 5 (2) The direction must be of a general nature only, and cannot relate to
6 a particular case.
- 7 (3) An inspector must comply with the direction.

8 **705 Particular directions by the Fair Work Ombudsman**

- 9 (1) The Fair Work Ombudsman may give a direction to an inspector
10 relating to the performance of the inspector's functions or the
11 exercise of the inspector's powers as an inspector.
- 12 (2) The inspector must comply with the direction.
- 13 (3) If a direction is in writing, the direction is not a legislative
14 instrument.

15 **706 Purpose for which powers of inspectors may be exercised**

- 16 (1) An inspector may exercise compliance powers (other than a power
17 under section 715 or 716) for one or more of the following
18 purposes (*compliance purposes*):
- 19 (a) determining whether this Act or a fair work instrument is
20 being, or has been, complied with;
- 21 (b) subject to subsection (2), determining whether a safety net
22 contractual entitlement is being, or has been, contravened by
23 a person;
- 24 (c) the purposes of a provision of the regulations that confers
25 functions or powers on inspectors;
- 26 (d) the purposes of a provision of another Act that confers
27 functions or powers on inspectors.

28 Note: The powers in sections 715 (which deals with enforceable
29 undertakings) and 716 (which deals with compliance notices) may be
30 exercised for the purpose of remedying the effects of certain
31 contraventions.

- 1 (2) An inspector may exercise compliance powers for the purpose
2 referred to in paragraph (1)(b) only if the inspector reasonably
3 believes that the person has contravened one or more of the
4 following:
5 (a) a provision of the National Employment Standards;
6 (b) a term of a modern award;
7 (c) a term of an enterprise agreement;
8 (d) a term of a workplace determination;
9 (e) a term of a national minimum wage order;
10 (f) a term of an equal remuneration order.

11 **707 When powers of inspectors may be exercised**

12 An inspector may exercise compliance powers:

- 13 (a) at any time during working hours; or
14 (b) at any other time, if the inspector reasonably believes that it
15 is necessary to do so for compliance purposes.

16 **708 Power of inspectors to enter premises**

- 17 (1) An inspector may, without force:
18 (a) enter premises, if the inspector reasonably believes that this
19 Act or a fair work instrument applies to work that is being, or
20 applied to work that has been, performed on the premises; or
21 (b) enter business premises, if the inspector reasonably believes
22 that there are records or documents relevant to compliance
23 purposes on the premises, or accessible from a computer on
24 the premises.
- 25 (2) Despite paragraph (1)(a), an inspector must not enter a part of
26 premises that is used for residential purposes unless the inspector
27 reasonably believes that the work referred to in that paragraph is
28 being performed on that part of the premises.
- 29 (3) The inspector must, either before or as soon as practicable after
30 entering premises, show his or her identity card to the occupier, or
31 another person who apparently represents the occupier, if the
32 occupier or other person is present at the premises.

Section 709

1 **709 Powers of inspectors while on premises**

- 2 The inspector may exercise one or more of the following powers
3 while on the premises:
- 4 (a) inspect any work, process or object;
 - 5 (b) interview any person;
 - 6 (c) require a person to tell the inspector who has custody of, or
7 access to, a record or document;
 - 8 (d) require a person who has the custody of, or access to, a
9 record or document to produce the record or document to the
10 inspector either while the inspector is on the premises, or
11 within a specified period;
 - 12 (e) inspect, and make copies of, any record or document that:
 - 13 (i) is kept on the premises; or
 - 14 (ii) is accessible from a computer that is kept on the
15 premises;
 - 16 (f) take samples of any goods or substances in accordance with
17 any procedures prescribed by the regulations.
- 18 Note: See also sections 713 and 714 (which deal with self-incrimination and
19 produced documents etc.).

20 **710 Persons assisting inspectors**

- 21 (1) A person (the *assistant*) may accompany the inspector onto the
22 premises to assist the inspector if the Fair Work Ombudsman is
23 satisfied that:
- 24 (a) the assistance is necessary and reasonable; and
 - 25 (b) the assistant has suitable qualifications and experience to
26 properly assist the inspector.
- 27 (2) The assistant:
- 28 (a) may do such things on the premises as the inspector requires
29 to assist the inspector to exercise compliance powers; but
 - 30 (b) must not do anything that the inspector does not have power
31 to do.
- 32 (3) Anything done by the assistant is taken for all purposes to have
33 been done by the inspector.

1 **711 Power to ask for person's name and address**

- 2 (1) An inspector may require a person to tell the inspector the person's
3 name and address if the inspector reasonably believes that the
4 person has contravened a civil remedy provision.
- 5 (2) If the inspector reasonably believes that the name or address is
6 false, the inspector may require the person to give evidence of its
7 correctness.
- 8 (3) A person must comply with a requirement under subsection (1) or
9 (2) if:
10 (a) the inspector advises the person that he or she may
11 contravene a civil remedy provision if he or she fails to
12 comply with the requirement; and
13 (b) the inspector shows his or her identity card to the person.
- 14 Note: This subsection is a civil remedy provision (see Part 4-1).
- 15 (4) Subsection (3) does not apply if the person has a reasonable
16 excuse.

17 **712 Power to require persons to produce records or documents**

- 18 (1) An inspector may require a person, by notice, to produce a record
19 or document to the inspector.
- 20 (2) The notice must:
21 (a) be in writing; and
22 (b) be served on the person; and
23 (c) require the person to produce the record or document at a
24 specified place within a specified period of at least 14 days.
25 The notice may be served by sending the notice to the person's fax
26 number.
- 27 (3) A person who is served with a notice to produce must not fail to
28 comply with the notice.
- 29 Note: This subsection is a civil remedy provision (see Part 4-1).
- 30 (4) Subsection (3) does not apply if the person has a reasonable
31 excuse.

Section 713

1 **713 Self-incrimination**

- 2 (1) A person is not excused from producing a record or document
3 under paragraph 709(d), or subsection 712(1), on the ground that
4 the production of the record or document might tend to incriminate
5 the person or expose the person to a penalty.
- 6 (2) However, in the case of an individual:
- 7 (a) the record or document produced; and
8 (b) producing the record or document; and
9 (c) any information, document or thing obtained as a direct or
10 indirect consequence of producing the record or document;
11 are not admissible in evidence against the individual in criminal
12 proceedings.

13 **714 Power to keep records or documents**

- 14 (1) If a record or document is produced to an inspector in accordance
15 with this Subdivision, the inspector may:
- 16 (a) inspect, and make copies of, the record or document; and
17 (b) keep the record or document for such period as is necessary.
- 18 (2) While an inspector keeps a record or document, the inspector must
19 allow the following persons to inspect, or make copies of, the
20 record or document at all reasonable times:
- 21 (a) the person who produced the record or document;
22 (b) any person otherwise entitled to possession of the record or
23 document;
24 (c) a person authorised by the person referred to in
25 paragraph (b).

26 **715 Enforceable undertakings relating to contraventions of civil
27 remedy provisions**

28 *Application of this section*

- 29 (1) This section applies if the Fair Work Ombudsman reasonably
30 believes that a person has contravened a civil remedy provision.

1 *Accepting an undertaking*

- 2 (2) The Fair Work Ombudsman may accept a written undertaking
3 given by the person in relation to the contravention, except as
4 provided by subsection (5).

5 *Withdrawing or varying an undertaking*

- 6 (3) The person may withdraw or vary the undertaking at any time, but
7 only with the Fair Work Ombudsman's consent.

8 *Relationship with orders in relation to contraventions of civil
9 remedy provisions*

- 10 (4) An inspector must not apply for an order under Division 2 of
11 Part 4-1 in relation to a contravention of a civil remedy provision
12 by a person if an undertaking given by the person under this
13 section in relation to the contravention has not been withdrawn.

14 Note: A person other than an inspector who is otherwise entitled to apply for
15 an order in relation to the contravention may do so.

16 *Relationship with compliance notices*

- 17 (5) The Fair Work Ombudsman must not accept an undertaking in
18 relation to a contravention if the person has been given a notice in
19 relation to the contravention under section 716.

20 *Enforcement of undertakings*

- 21 (6) If the Fair Work Ombudsman considers that the person who gave
22 the undertaking has contravened any of its terms, the Fair Work
23 Ombudsman may apply to the Federal Court, the Federal
24 Magistrates Court or an eligible State or Territory Court for an
25 order under subsection (7).
- 26 (7) If the court is satisfied that the person has contravened a term of
27 the undertaking, the court may make one or more of the following
28 orders:
29 (a) an order directing the person to comply with the term of the
30 undertaking;

Section 716

- 1 (b) an order awarding compensation for loss that a person has
2 suffered because of the contravention;
3 (c) any other order that the court considers appropriate.

4 **716 Compliance notices**

5 *Application of this section*

- 6 (1) This section applies if an inspector reasonably believes that a
7 person has contravened one or more of the following:
8 (a) a provision of the National Employment Standards;
9 (b) a term of a modern award;
10 (c) a term of an enterprise agreement;
11 (d) a term of a workplace determination;
12 (e) a term of a national minimum wage order;
13 (f) a term of an equal remuneration order.

14 *Giving a notice*

- 15 (2) The inspector may, except as provided by subsection (4), give the
16 person a notice requiring the person to do either or both of the
17 following within such reasonable time as is specified in the notice:
18 (a) take specified action to remedy the direct effects of the
19 contravention referred to in subsection (1);
20 (b) produce reasonable evidence of the person's compliance with
21 the notice.
- 22 (3) The notice must also:
23 (a) set out the name of the person to whom the notice is given;
24 and
25 (b) set out the name of the inspector who gave the notice; and
26 (c) set out brief details of the contravention; and
27 (d) explain that a failure to comply with the notice may
28 contravene a civil remedy provision; and
29 (e) explain that the person may apply to the Federal Court, the
30 Federal Magistrates Court or an eligible State or Territory
31 Court for a review of the notice on either or both of the
32 following grounds:

Section 717

- 1 (i) the person has not committed a contravention set out in
2 the notice;
3 (ii) the notice does not comply with subsection (2) or this
4 subsection; and
5 (f) set out any other matters prescribed by the regulations.

6 *Relationship with enforceable undertakings*

- 7 (4) An inspector must not give a person a notice in relation to a
8 contravention if:
9 (a) the person has given an undertaking under section 715 in
10 relation to the contravention; and
11 (b) the undertaking has not been withdrawn.

12 *Person must not fail to comply with notice*

- 13 (5) A person must not fail to comply with a notice given under this
14 section.

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

- 16 (6) Subsection (5) does not apply if the person has a reasonable
17 excuse.

18 **717 Review of compliance notices**

- 19 (1) A person who has been given a notice under section 716 may apply
20 to the Federal Court, the Federal Magistrates Court or an eligible
21 State or Territory Court for a review of the notice on either or both
22 of the following grounds:
23 (a) the person has not committed a contravention set out in the
24 notice;
25 (b) the notice does not comply with subsection 716(2) or (3).
26 (2) At any time after the application has been made, the court may stay
27 the operation of the notice on the terms and conditions that the
28 court considers appropriate.
29 (3) The court may confirm, cancel or vary the notice after reviewing it.

1 *Disclosure to the Minister*

- 2 (3) The Fair Work Ombudsman may disclose, or authorise the
3 disclosure of, the information to the Minister if the Fair Work
4 Ombudsman reasonably believes that the disclosure is likely to
5 assist the Minister to consider a complaint or issue in relation to a
6 matter arising under this Act.

7 *Disclosure to the Department*

- 8 (4) The Fair Work Ombudsman may disclose, or authorise the
9 disclosure of, the information to:
10 (a) the Secretary of the Department; or
11 (b) an SES employee, or an APS employee, in the Department;
12 for the purpose of briefing, or considering briefing, the Minister if
13 the Fair Work Ombudsman reasonably believes the disclosure is
14 likely to assist the Minister to consider a complaint or issue in
15 relation to a matter arising under this Act.

1
2 **Chapter 6—Miscellaneous**

3 **Part 6-1—Multiple actions**

4 **Division 1—Introduction**

5 **719 Guide to this Part**

6 This Part provides rules relating to applications for remedies under
7 this Act.

8 Division 2 prevents certain applications where other remedies are
9 available.

10 Division 3 prevents multiple applications or complaints in relation
11 to the same conduct.

12 **720 Meanings of *employee* and *employer***

13 In this Part, *employee* and *employer* have their ordinary meanings.

1

2 **Division 2—Certain actions not permitted if alternative**
3 **action can be taken**

4 **721 Equal remuneration applications**

5 (1) FWA must not deal with an application for an equal remuneration
6 order if FWA is satisfied that there is available to the employees to
7 whom the order will apply, an adequate alternative remedy that:

- 8 (a) exists under a law of the Commonwealth (other than
9 Part 2-7) or a law of a State or Territory; and
10 (b) will ensure equal remuneration for work of equal or
11 comparable value for those employees.

12 (2) A remedy that:

- 13 (a) exists under a law of the Commonwealth, a State or a
14 Territory relating to discrimination in relation to
15 employment; and

16 (b) consists solely of compensation for past actions;
17 is not an adequate alternative remedy for the purposes of this
18 section.

19 **722 Notification and consultation requirements applications**

20 FWA must not make an order under subsection 532(1) or 787(1) if
21 FWA is satisfied that there is available to the applicant, or to the
22 employees represented by the applicant, an alternative remedy that:

- 23 (a) exists under a law of the Commonwealth (other than
24 Division 2 of Part 3-6 or Division 5 of Part 6-1) or a law of a
25 State or Territory; and
26 (b) will give effect, in relation to the employees and registered
27 employee associations concerned, to the requirements of
28 Article 13 of the ILO Convention (No. 158) concerning
29 Termination of Employment at the Initiative of the Employer,
30 done at Geneva on 22 June 1982 ([1994] ATS 4).

31 Note: In 2008, the text of a Convention in the Australian Treaty Series was
32 accessible through the Australian Treaties Library on the AustLII
33 website (www.austlii.edu.au).

Chapter 6 Miscellaneous

Part 6-1 Multiple actions

Division 2 Certain actions not permitted if alternative action can be taken

Section 723

1 **723 Unlawful termination applications**

2 A person must not make an unlawful termination application in
3 relation to conduct if the person is entitled to make a general
4 protections court application in relation to the conduct.

1

2 **Division 3—Preventing multiple actions**

3 **Subdivision A—Equal remuneration applications**

4 **724 Equal remuneration applications**

5 (1) FWA must not deal with an application for an equal remuneration
6 order in relation to an employee if proceedings for an alternative
7 remedy:

8 (a) to ensure equal remuneration for work of equal or
9 comparable value for the employee; or

10 (b) against unequal remuneration for work of equal or
11 comparable value for the employee;

12 have commenced under a law of the Commonwealth (other than
13 Part 2-7) or a law of a State or Territory.

14 (2) Subsection (1) does not prevent FWA from dealing with the
15 application if the proceedings for the alternative remedy:

16 (a) have been discontinued by the party who commenced the
17 proceedings; or

18 (b) have failed for want of jurisdiction.

19 (3) If an application has been made to FWA for an equal remuneration
20 order in relation to an employee, a person is not entitled to
21 commence proceedings for an alternative remedy under a law of
22 the Commonwealth (other than Part 2-7) or a law of a State or
23 Territory:

24 (a) to ensure equal remuneration for work of equal or
25 comparable value for the employee; or

26 (b) against unequal remuneration for work of equal or
27 comparable value for the employee.

28 (4) Subsection (3) does not prevent a person from commencing
29 proceedings for an alternative remedy if:

30 (a) the applicant has discontinued the application for the equal
31 remuneration order; or

32 (b) the application has failed for want of jurisdiction.

Section 725

- 1 (5) A remedy that:
2 (a) exists under a law of the Commonwealth, a State or a
3 Territory relating to discrimination in relation to
4 employment; and
5 (b) consists solely of compensation for past actions;
6 is not an alternative remedy for the purposes of this section.

7 **Subdivision B—Applications and complaints relating to**
8 **dismissal**

9 **725 General rule**

10 A person who has been dismissed must not make an application or
11 complaint of a kind referred to in any one of sections 726 to 732 in
12 relation to the dismissal if any other of those sections applies.

13 **726 Dismissal remedy bargaining order applications**

- 14 (1) This section applies if:
15 (a) a dismissal remedy bargaining order application has been
16 made by, or on behalf of, the person in relation to the
17 dismissal; and
18 (b) the application has not:
19 (i) been withdrawn by the person who made the
20 application; or
21 (ii) failed for want of jurisdiction.
- 22 (2) A *dismissal remedy bargaining order application* is an application
23 for a bargaining order made on the ground that the person was
24 dismissed in contravention of the good faith bargaining
25 requirement in paragraph 228(1)(e).

26 **727 General protections FWA applications**

- 27 (1) This section applies if:
28 (a) a general protections FWA application has been made by, or
29 on behalf of, the person in relation to the dismissal; and
30 (b) the application has not:

- 1 (i) been withdrawn by the person who made the
2 application; or
3 (ii) failed for want of jurisdiction; or
4 (iii) resulted in the issue of a certificate under section 369
5 (which provides for FWA to issue a certificate if FWA
6 is satisfied that all reasonable attempts to resolve a
7 dispute have been, or are likely to be, unsuccessful).
- 8 (2) A *general protections FWA application* is an application under
9 section 365 for FWA to deal with a dispute that relates to
10 dismissal.

11 **728 General protections court applications**

12 This section applies if:

- 13 (a) a general protections court application has been made by, or
14 on behalf of, the person in relation to the dismissal; and
15 (b) the application has not:
16 (i) been withdrawn by the person who made the
17 application; or
18 (ii) failed for want of jurisdiction.

19 **729 Unfair dismissal applications**

- 20 (1) This section applies if:
21 (a) an unfair dismissal application has been made by the person
22 in relation to the dismissal; and
23 (b) the application has not:
24 (i) been withdrawn by the person who made the
25 application; or
26 (ii) failed for want of jurisdiction; or
27 (iii) failed because FWA was satisfied that the dismissal was
28 a case of genuine redundancy.
- 29 (2) An *unfair dismissal application* is an application under subsection
30 394(1) for a remedy for unfair dismissal.

Section 730

1 **730 Unlawful termination FWA applications**

2 (1) This section applies if:

3 (a) an unlawful termination FWA application has been made by,
4 or on behalf of, the person in relation to the dismissal; and

5 (b) the application has not:

6 (i) been withdrawn by the person who made the
7 application; or

8 (ii) failed for want of jurisdiction; or

9 (iii) resulted in the issue of a certificate under section 777
10 (which provides for FWA to issue a certificate if FWA
11 is satisfied that all reasonable attempts to resolve a
12 dispute have been, or are likely to be, unsuccessful).

13 (2) An *unlawful termination FWA application* is an application under
14 section 773 for FWA to deal with a dispute that relates to
15 dismissal.

16 **731 Unlawful termination court applications**

17 This section applies if:

18 (a) an unlawful termination court application has been made by,
19 or on behalf of, the person in relation to the dismissal; and

20 (b) the application has not:

21 (i) been withdrawn by the person who made the
22 application; or

23 (ii) failed for want of jurisdiction.

24 **732 Applications and complaints under other laws**

25 (1) This section applies if:

26 (a) an application or complaint under another law has been made
27 by, or on behalf of, the person in relation to the dismissal;
28 and

29 (b) the application or complaint has not:

30 (i) been withdrawn by the person who made the
31 application; or

32 (ii) failed for want of jurisdiction.

Section 733

- 1 (2) An *application or complaint under another law* is an application
2 or complaint made under:
3 (a) a law of the Commonwealth (other than this Act); or
4 (b) a law of a State or Territory.
- 5 (3) For the purposes of this Subdivision, if a complaint under the
6 *Human Rights and Equal Opportunity Commission Act 1986*
7 relates to a dismissal only as a result of an amendment of the
8 complaint, the complaint is taken to be made when the complaint is
9 amended.

10 **733 Dismissal does not include failure to provide benefits**

11 For the purposes of this Subdivision, a reference to an application
12 or complaint made in relation to a dismissal does not include a
13 reference to an application or complaint made only in relation to
14 failure by the employer concerned to provide a benefit to which the
15 dismissed person is entitled as a result of the dismissal.

16 **Subdivision C—General protections applications that do not**
17 **relate to dismissal**

18 **734 General rule**

- 19 A person must not make a general protections court application in
20 relation to conduct that does not involve the dismissal of the person
21 if:
22 (a) an application or complaint under another law has been made
23 by, or on behalf of, the person in relation to the conduct; and
24 (b) the application or complaint has not:
25 (i) been withdrawn by the person who made the
26 application; or
27 (ii) failed for want of jurisdiction.

Section 735

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2 **Part 6-2—Dealing with disputes**

3 **Division 1—Introduction**

4 **735 Guide to this Part**

5

This Part is about dealing with disputes between national system employees and their employers.

6

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Division 2 deals with the powers of FWA and other persons to deal with a dispute if a modern award, enterprise agreement or contract of employment includes a term that provides for FWA or the person to deal with the dispute.

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11 **736 Meanings of *employee* and *employer***

12

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

13

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2 **Division 2—Dealing with disputes**

3 **Subdivision A—Model term about dealing with disputes**

4 **737 Model term about dealing with disputes**

5 The regulations must prescribe a model term for dealing with
6 disputes for enterprise agreements.

7 **Subdivision B—Dealing with disputes**

8 **738 Application of this Division**

9 This Division applies if:

- 10 (a) a modern award includes a term that provides a procedure for
11 dealing with disputes, including a term in accordance with
12 section 146; or
13 (b) an enterprise agreement includes a term that provides a
14 procedure for dealing with disputes, including a term referred
15 to in subsection 186(6); or
16 (c) a contract of employment includes a term that provides a
17 procedure for dealing with disputes between the employer
18 and the employee, to the extent that the dispute is about any
19 matters in relation to the National Employment Standards or
20 a safety net contractual entitlement.

21 **739 Disputes dealt with by FWA**

- 22 (1) This section applies if a term referred to in section 738 requires or
23 allows FWA to deal with a dispute.
24 (2) FWA must not deal with a dispute to the extent that the dispute is
25 about whether an employer had reasonable business grounds under
26 subsection 65(5) or 76(4).
27 (3) In dealing with a dispute, FWA must not exercise any powers
28 limited by the term.

Section 740

- 1 (4) If, in accordance with the term, the parties have agreed that FWA
2 may arbitrate (however described) the dispute, FWA may do so.
- 3 Note: FWA may also deal with a dispute by mediation or conciliation, or by
4 making a recommendation or expressing an opinion (see subsection
5 595(2)).
- 6 (5) Despite subsection (4), FWA must not make a decision that is
7 inconsistent with this Act, or a fair work instrument that applies to
8 the parties.
- 9 (6) FWA may deal with a dispute only on application by a party to the
10 dispute.

11 **740 Dispute dealt with by persons other than FWA**

- 12 (1) This section applies if a term referred to in section 738 requires or
13 allows a person other than FWA to deal with a dispute.
- 14 (2) The person must not deal with a dispute to the extent that the
15 dispute is about whether an employer had reasonable business
16 grounds under subsection 65(5) or 76(4).
- 17 (3) If, in accordance with the term, the parties have agreed that the
18 person may arbitrate (however described) the dispute, the person
19 may do so.
- 20 (4) Despite subsection (3), the person must not make a decision that is
21 inconsistent with this Act, or a fair work instrument that applies to
22 the parties.

1

2 **Part 6-3—Extension of National Employment**
3 **Standards entitlements**

4 **Division 1—Introduction**

5 **741 Guide to this Part**

6

This Part contains Divisions that extend some National
Employment Standards entitlements to non-national system
employees.

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9

Division 2 extends the entitlements to unpaid parental leave, and
related entitlements.

10

11

Division 3 extends the entitlements to notice of termination or
payment in lieu of notice.

12

13 **742 Meanings of *employee* and *employer***

14

In this Part, *employee* and *employer* have their ordinary meanings.

Section 743

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2

Division 2—Extension of entitlement to unpaid parental leave and related entitlements

3

4

Subdivision A—Main provisions

5

743 Object of this Division

6

The object of this Division is to give effect, or further effect, to:

7

(a) 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

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(b) the Workers with Family Responsibilities Recommendation, 1981 (Recommendation No. R165) which the General Conference of the ILO adopted on 23 June 1981;

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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:

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(c) to prepare for, enter, participate in or advance in economic activity; and

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19

(d) to reconcile their employment and family responsibilities.

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Note 1: In 2008, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

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Note 2: In 2008, the text of a Recommendation adopted by the General Conference of the ILO was accessible through the ILO website (www.ilo.org).

26

744 Extending the entitlement to unpaid parental leave and related entitlements

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28

Extension of Division 5 of Part 2-2 and related provisions

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31

(1) The provisions of Division 5 of Part 2-2, and the related provisions identified in subsection (2), apply in relation to a non-national system employee as if:

Section 745

- 1 (a) any reference in the provisions to a national system employee
2 also included a reference to a non-national system employee;
3 and
4 (b) any reference in the provisions to a national system employer
5 also included a reference to a non-national system employer.

6 Note 1: Division 5 of Part 2-2 provides for unpaid parental leave and related
7 entitlements.

8 Note 2: This subsection applies to express references to national system
9 employees and national system employers, and to references that are
10 to national system employees and national system employers because
11 of section 60 or another similar section.

- 12 (2) The related provisions are the following, so far as they apply in
13 relation to Division 5 of Part 2-2 as it applies because of
14 subsection (1):
15 (a) the provisions of Divisions 2 and 13 of Part 2-2;
16 (b) any other provisions of this Act prescribed by the regulations;
17 (c) any provisions of this Act that define expressions that are
18 used (directly or indirectly) in provisions of Division 5 of
19 Part 2-2, or in provisions referred to in paragraph (a) or (b) of
20 this subsection.

21 *Modifications are set out in Subdivision B*

- 22 (3) The extended parental leave provisions have effect subject to the
23 modifications provided for in Subdivision B. The ***extended***
24 ***parental leave provisions*** are the provisions of Division 5 of
25 Part 2-2, and the related provisions identified in subsection (2) of
26 this section, as they apply because of this section.

27 *Regulations made for the purpose of provisions*

- 28 (4) Subsection (1) also applies to any regulations made for the purpose
29 of a provision to which that subsection applies, other than a
30 provision that is modified by Subdivision B.

31 **745 Contravening the extended parental leave provisions**

- 32 (1) A non-national system employer must not contravene the extended
33 parental leave provisions.

Chapter 6 Miscellaneous

Part 6-3 Extension of National Employment Standards entitlements

Division 2 Extension of entitlement to unpaid parental leave and related entitlements

Section 746

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

2 Note 2: The extended parental leave provisions also affect national system
3 employers (including as section 44 applies to them) and their national
4 system employees. This is because the provisions may result in a
5 national system employee, and a non-national system employee, being
6 an employee couple.

7 (2) However, an order cannot be made under Division 2 of Part 4-1 in
8 relation to a contravention (or alleged contravention) of subsection
9 76(4).

10 Note: Subsection 76(4) states that an employer may refuse an application to
11 extend unpaid parental leave only on reasonable business grounds.

12 **746 References to the National Employment Standards include**
13 **extended parental leave provisions**

14 A reference in this Act, or another law of the Commonwealth, to
15 the National Employment Standards includes a reference to the
16 extended parental leave provisions.

17 **747 State and Territory laws that are not excluded**

18 This Act is not intended to apply to the exclusion of laws of a State
19 or Territory that provide employee entitlements in relation to the
20 birth or adoption of children, to the extent that those laws:

- 21 (a) apply to non-national system employees; and
22 (b) provide entitlements for those employees that are more
23 beneficial than the entitlements under the extended parental
24 leave provisions.

25 **Subdivision B—Modifications of the extended parental leave**
26 **provisions**

27 **748 Non-national system employees are not award/agreement free**
28 **employees**

29 A non-national system employee is not an award/agreement free
30 employee for the purpose of the extended parental leave
31 provisions.

1 **749 Modification of meaning of *base rate of pay* for pieceworkers**

2 Section 16 has effect as if the following paragraph were added at
3 the end of subsection 16(2):

- 4 (d) the employee is a non-national system employee, and the
5 regulations prescribe, or provide for the determination of, the
6 employee's base rate of pay for the purposes of the extended
7 parental leave provisions.

8 **750 Modification of meaning of *full rate of pay* for pieceworkers**

9 Section 18 has effect as if the following paragraph were added at
10 the end of subsection 18(2):

- 11 (d) the employee is a non-national system employee, and the
12 regulations prescribe, or provide for the determination of, the
13 employee's full rate of pay for the purposes of the extended
14 parental leave provisions.

15 **751 Modification of meaning of *ordinary hours of work*—if
16 determined by State industrial instrument**

17 Section 20 has effect as if the following subsection were inserted
18 before subsection 20(1):

- 19 (1A) If a State industrial instrument applies to a non-national system
20 employee and specifies, or provides for the determination of, the
21 employee's *ordinary hours of work*, the employee's *ordinary*
22 *hours of work* are as specified in, or determined in accordance
23 with, that instrument.

24 **752 Modification of meaning of *ordinary hours of work*—if not
25 determined by State industrial instrument**

26 Section 20 has effect as if references in subsections 20(1), (2) and
27 (3) to an award/agreement free employee also included references
28 to a non-national system employee to whom either of the following
29 paragraphs applies:

- 30 (a) a State industrial instrument applies to the employee, but it
31 does not specify, or provide for the determination of, the
32 employee's ordinary hours of work;

Section 753

1 (b) no State industrial instrument applies to the employee.

2 **753 Modification of meaning of *ordinary hours of work*—regulations**
3 **may prescribe usual weekly hours**

4 Section 20 has effect as if the following subsection were added at
5 the end:

- 6 (5) For a non-national system employee:
- 7 (a) who is not a full-time employee; and
 - 8 (b) who does not have usual weekly hours of work; and
 - 9 (c) to whom either of the following subparagraphs applies:
 - 10 (i) a State industrial instrument applies to the employee,
 - 11 but it does not specify, or provide for the determination
 - 12 of, the employee’s ordinary hours of work;
 - 13 (ii) no State industrial instrument applies to the employee;
- 14 the regulations may prescribe, or provide for the determination of,
15 hours that are taken to be the employee’s usual weekly hours of
16 work for the purposes of the extended parental leave provisions.

17 **754 Modification of meaning of *piecemaker***

18 Section 21 has effect as if the following paragraph were added at
19 the end of subsection 21(1):

- 20 (d) a non-national system employee who is in a class of
21 employees prescribed by the regulations as piecemakers for
22 the purpose of the extended parental leave provisions.

23 **755 Modification of provision about interaction with paid leave**

24 Section 79 applies as if subsections 79(2) and (3) were omitted.

25 **756 Modification of provision about relationship between National**
26 **Employment Standards and agreements**

27 Section 128 has effect as if references to an award/agreement free
28 employee also included references to a non-national system
29 employee.

1 **757 Modification of power to make regulations**

2 Section 129 has effect as if the following subsection were added at
3 the end:

4 (2) The regulations may:

- 5 (a) permit non-national system employers and non-national
6 system employees to agree on matters that would or might
7 otherwise be contrary to an extended parental leave
8 provision; and
9 (b) prohibit such employers and employees from agreeing on
10 matters, or prohibit such employers from making
11 requirements of such employees, that would or might
12 otherwise be permitted by an extended parental leave
13 provision.

Section 758

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Division 3—Extension of entitlement to notice of termination or payment in lieu of notice

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Subdivision A—Main provisions

5

758 Object of this Division

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The object of this Division is to give effect, or further effect, to the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer, done at Geneva on 22 June 1982 ([1994] ATS 4).

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Note: In 2008, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

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759 Extending entitlement to notice of termination or payment in lieu of notice

14

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Extension of Subdivision A of Division 11 of Part 2-2 and related provisions

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(1) The provisions of Subdivision A of Division 11 of Part 2-2, and the related provisions identified in subsection (2), apply in relation to a non-national system employee as if:

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(a) any reference in the provisions to a national system employee also included a reference to a non-national system employee; and

21

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23

(b) any reference in the provisions to a national system employer also included a reference to a non-national system employer.

24

25

Note 1: Subdivision A of Division 11 of Part 2-2 provides for notice of termination or payment in lieu of notice.

26

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Note 2: This subsection applies to express references to national system employees and national system employers, and to references that are to national system employees and national system employers because of section 60 or another similar section.

28

29

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Section 760

- 1 (2) The related provisions are the following, so far as they apply in
2 relation to Subdivision A of Division 11 of Part 2-2 as it applies
3 because of subsection (1):
4 (a) the provisions of Division 2, Subdivision C of Division 11,
5 and Division 13, of Part 2-2;
6 (b) any other provisions of this Act prescribed by the regulations;
7 (c) any provisions of this Act that define expressions that are
8 used (directly or indirectly) in provisions of Subdivision A of
9 Division 11 of Part 2-2, or in provisions referred to in
10 paragraph (a) or (b) of this subsection.

11 *Modifications are set out in Subdivision B*

- 12 (3) The extended notice of termination provisions have effect subject
13 to the modifications provided for in Subdivision B. The *extended*
14 *notice of termination provisions* are the provisions of Subdivision
15 A of Division 11 of Part 2-2, and the related provisions identified
16 in subsection (2) of this section, as they apply because of this
17 section.

18 *Regulations made for the purpose of provisions*

- 19 (4) Subsection (1) also applies to any regulations made for the purpose
20 of a provision to which that subsection applies, other than a
21 provision that is modified by Subdivision B.

22 **760 Contravening the extended notice of termination provisions**

23 A non-national system employer must not contravene the extended
24 notice of termination provisions.

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

26 **761 References to the National Employment Standards include**
27 **extended notice of termination provisions**

28 A reference in this Act, or another law of the Commonwealth, to
29 the National Employment Standards includes a reference to the
30 extended notice of termination provisions.

Section 762

1 **762 State and Territory laws that are not excluded**

2 This Act is not intended to apply to the exclusion of laws of a State
3 or Territory that provide employee entitlements relating to notice
4 of termination of employment (or payment in lieu of notice), to the
5 extent that those laws:

- 6 (a) apply to non-national system employees; and
7 (b) provide entitlements for those employees that are more
8 beneficial than the entitlements under the extended notice of
9 termination provisions.

10 **Subdivision B—Modifications of the extended notice of**
11 **termination provisions**

12 **763 Non-national system employees are not award/agreement free**
13 **employees**

14 A non-national system employee is not an award/agreement free
15 employee for the purpose of the extended notice of termination
16 provisions.

17 **764 Modification of meaning of *full rate of pay* for pieceworkers**

18 Section 18 has effect as if the following paragraph were added at
19 the end of subsection 18(2):

- 20 (d) the employee is a non-national system employee, and the
21 regulations prescribe, or provide for the determination of, the
22 employee's full rate of pay for the purposes of the extended
23 notice of termination provisions.

24 **765 Modification of meaning of *pieceworker***

25 Section 21 has effect as if the following paragraph were added at
26 the end of subsection 21(1):

- 27 (d) a non-national system employee who is in a class of
28 employees prescribed by the regulations as pieceworkers for
29 the purpose of the extended notice of termination provisions.

1 **766 Modification of provision about notice of termination by**
2 **employee**

3 Section 118 has effect as if the following subsection were added at
4 the end:

- 5 (2) A State industrial instrument may include terms specifying the
6 period of notice a non-national system employee must give in order
7 to terminate his or her employment.

8 **767 Modification of provision about relationship between National**
9 **Employment Standards and agreements**

10 Section 128 has effect as if references to an award/agreement free
11 employee also included references to a non-national system
12 employee.

13 **768 Modification of power to make regulations**

14 Section 129 has effect as if the following subsection were added at
15 the end:

- 16 (2) The regulations may:
17 (a) permit non-national system employers and non-national
18 system employees to agree on matters that would or might
19 otherwise be contrary to an extended notice of termination
20 provision; and
21 (b) prohibit such employers and employees from agreeing on
22 matters, or prohibit such employers from making
23 requirements of such employees, that would or might
24 otherwise be permitted by an extended notice of termination
25 provision.

Section 769

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**Part 6-4—Additional provisions relating to
termination of employment**

3

4

Division 1—Introduction

5

769 Guide to this Part

6

This Part contains provisions to give effect, or further effect, to certain international agreements relating to discrimination and termination of employment.

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9

Division 2 makes it unlawful for an employer to terminate an employee's employment for certain reasons. Division 2 also deals with compliance. In most cases, a dispute that involves the termination of an employee's employment will be dealt with by a court only if the dispute has not been resolved by FWA.

10

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12

13

14

Division 3 sets out notification and consultation requirements in relation to certain terminations of employment.

15

16

770 Meanings of *employee* and *employer*

17

In this Part, *employee* and *employer* have their ordinary meanings.

1

2 **Division 2—Termination of employment**

3 **771 Object of this Division**

4

The object of this Division is to give effect, or further effect, to:

5

(a) the ILO Convention (No. 111) concerning Discrimination in
6 respect of Employment and Occupation, done at Geneva on
7 25 June 1958 ([1974] ATS 12); and

8

(b) the ILO Convention (No. 156) concerning Equal
9 Opportunities and Equal Treatment for Men and Women
10 Workers: Workers with Family Responsibilities, done at
11 Geneva on 23 June 1981 ([1991] ATS 7); and

12

(c) the Termination of Employment Recommendation, 1982
13 (Recommendation No. R166) which the General Conference
14 of the ILO adopted on 22 June 1982.

15

Note 1: In 2008, the text of a Convention in the Australian Treaty Series was
16 accessible through the Australian Treaties Library on the AustLII
17 website (www.austlii.edu.au).

18

Note 2: In 2008, the text of a Recommendation adopted by the General
19 Conference of the ILO was accessible through the ILO website
20 (www.ilo.org).

21

772 Employment not to be terminated on certain grounds

22

(1) An employer must not terminate an employee's employment for
23 one or more of the following reasons, or for reasons including one
24 or more of the following reasons:

25

(a) temporary absence from work because of illness or injury of
26 a kind prescribed by the regulations;

27

(b) trade union membership or participation in trade union
28 activities outside working hours or, with the employer's
29 consent, during working hours;

30

(c) non-membership of a trade union;

31

(d) seeking office as, or acting or having acted in the capacity of,
32 a representative of employees;

33

(e) the filing of a complaint, or the participation in proceedings,
34 against an employer involving alleged violation of laws or

Chapter 6 Miscellaneous

Part 6-4 Additional provisions relating to termination of employment

Division 2 Termination of employment

Section 772

- 1 regulations or recourse to competent administrative
2 authorities;
- 3 (f) race, colour, sex, sexual preference, age, physical or mental
4 disability, marital status, family or carer's responsibilities,
5 pregnancy, religion, political opinion, national extraction or
6 social origin;
- 7 (g) absence from work during maternity leave or other parental
8 leave;
- 9 (h) temporary absence from work for the purpose of engaging in
10 a voluntary emergency management activity, where the
11 absence is reasonable having regard to all the circumstances.

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

- 13 (2) However, subsection (1) does not prevent a matter referred to in
14 paragraph (1)(f) from being a reason for terminating a person's
15 employment if:
- 16 (a) the reason is based on the inherent requirements of the
17 particular position concerned; or
- 18 (b) if the person is a member of the staff of an institution that is
19 conducted in accordance with the doctrines, tenets, beliefs or
20 teachings of a particular religion or creed—the employment
21 is terminated:
- 22 (i) in good faith; and
- 23 (ii) to avoid injury to the religious susceptibilities of
24 adherents of that religion or creed.
- 25 (3) To avoid doubt, if:
- 26 (a) an employer terminates an employee's employment; and
- 27 (b) the reason, or a reason, for the termination is that the position
28 held by the employee no longer exists, or will no longer
29 exist; and
- 30 (c) the reason, or a reason, that the position held by the employee
31 no longer exists, or will no longer exist, is the employee's
32 absence, or proposed or probable absence, during maternity
33 leave or other parental leave;
- 34 the employee's employment is taken, for the purposes of
35 paragraph (1)(g), to have been terminated for the reason, or for

1 reasons including the reason, of absence from work during
2 maternity leave or other parental leave.

3 (4) For the purposes of subsection (1), subsection 109(2) (which deals
4 with the meaning of *voluntary emergency management activity*)
5 has effect as if the word employee had its ordinary meaning.

6 **773 Application for FWA to deal with a dispute**

7 If:

- 8 (a) an employer has terminated an employee's employment; and
9 (b) the employee, or an industrial association that is entitled to
10 represent the industrial interests of the employee, alleges that
11 the employee's employment was terminated in contravention
12 of subsection 772(1);

13 the employee, or the industrial association, may apply to FWA for
14 FWA to deal with the dispute.

15 **774 Time for application**

16 (1) An application under section 773 must be made:

- 17 (a) within 60 days after the employment was terminated; or
18 (b) within such further period as FWA allows under
19 subsection (2).

20 (2) FWA may allow a further period if FWA is satisfied that there are
21 exceptional circumstances, taking into account:

- 22 (a) the reason for the delay; and
23 (b) any action taken by the employee to dispute the termination;
24 and
25 (c) prejudice to the employer (including prejudice caused by the
26 delay); and
27 (d) the merits of the application; and
28 (e) fairness as between the person and other persons in a like
29 position.

Section 775

1 **775 Application fees**

- 2 (1) The application must be accompanied by any fee prescribed by the
3 regulations.
- 4 (2) The regulations may prescribe:
- 5 (a) a fee for making an application to FWA under section 773;
6 and
7 (b) a method for indexing the fee; and
8 (c) the circumstances in which all or part of the fee may be
9 waived or refunded.

10 **776 Conferences**

- 11 (1) If an application is made under section 773, FWA must conduct a
12 conference to deal with the dispute.
- 13 Note 1: For conferences, see section 592.
- 14 Note 2: FWA may deal with a dispute by mediation or conciliation, or by
15 making a recommendation or expressing an opinion (see subsection
16 595(2)).
- 17 (2) Despite subsection 592(3), FWA must conduct the conference in
18 private.

19 **777 Certificate if dispute not resolved**

20 If FWA is satisfied that all reasonable attempts to resolve the
21 dispute have been, or are likely to be, unsuccessful, FWA must
22 issue a certificate to that effect.

23 **778 Advice on unlawful termination court application**

- 24 (1) If FWA considers, taking into account all the materials before it,
25 that an unlawful termination court application in relation to the
26 dispute would not have a reasonable prospect of success, it must
27 advise the parties accordingly.
- 28 (2) An *unlawful termination court application* is an application to a
29 court under Division 2 of Part 4-1 for orders in relation to a
30 contravention of subsection 772(1).

1 **779 Unlawful termination court applications**

2 *FWA conference to be held before application*

- 3 (1) A person who is entitled to apply under section 773, to FWA for
4 FWA to deal with a dispute must not make an unlawful termination
5 court application in relation to the dispute unless:
6 (a) FWA has issued a certificate under section 777 in relation to
7 the dispute; or
8 (b) the unlawful termination court application includes an
9 application for an interim injunction.

10 *Time for application*

- 11 (2) Despite section 544, an unlawful termination court application that
12 requires a certificate under section 777 must be made within 14
13 days after the certificate is issued.

14 **780 Costs orders against lawyers and paid agents**

- 15 (1) If FWA has granted permission in accordance with section 596 for
16 a person to be represented by a lawyer or paid agent in relation to
17 an application under section 773, FWA may make an order for
18 costs against the lawyer or paid agent if FWA is satisfied:
19 (a) that:
20 (i) the lawyer or paid agent caused costs to be incurred by
21 the other party to the dispute because the lawyer or paid
22 agent encouraged the person to make the application;
23 and
24 (ii) it should have been reasonably apparent that the
25 application would have no reasonable prospect of
26 success; or
27 (b) that the lawyer or paid agent caused costs to be incurred by
28 the other party to the dispute because of an unreasonable act
29 or omission of the lawyer or paid agent in connection with
30 the conduct or continuation of the dispute.
- 31 (2) FWA may make an order under this section only if the other party
32 to the dispute has applied for it under section 781.

Chapter 6 Miscellaneous

Part 6-4 Additional provisions relating to termination of employment

Division 2 Termination of employment

Section 781

- 1 (3) This section does not limit FWA's power to order costs under
2 section 611.

3 **781 Applications for costs orders**

4 An application for an order for costs in relation to an application
5 under section 773 must be made within 14 days after FWA finishes
6 dealing with the dispute.

7 **782 Contravening costs orders**

8 A person to whom an order for costs made under section 780
9 applies must not contravene a term of the order.

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

11 **783 Reason for action to be presumed unless proved otherwise**

- 12 (1) If:
13 (a) in an application in relation to a contravention of subsection
14 772(1), it is alleged that a person took, or is taking, action for
15 a particular reason; and
16 (b) taking that action for that reason would constitute a
17 contravention of subsection 772(1);
18 it is presumed, in proceedings arising from the application, that the
19 action was, or is being, taken for that reason, unless the person
20 proves otherwise.
21 (2) Subsection (1) does not apply in relation to orders for an interim
22 injunction.

**Division 3—Notification and consultation requirements
relating to certain terminations of employment**

Subdivision A—Object of this Division

784 Object of this Division

The object of this Division is to give effect, or further effect, to the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer, done at Geneva on 22 June 1982 ([1994] ATS 4).

Note: In 2008, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

Subdivision B—Requirement to notify Centrelink

785 Employer to notify Centrelink of certain proposed terminations

- (1) If an employer decides 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 employer must give a written notice about the proposed terminations to the Chief Executive Officer of the Commonwealth Services Delivery Agency (Centrelink).
- (2) The notice must be in the form (if any) prescribed by the regulations and set out:
 - (a) the reasons for the terminations; and
 - (b) the number and categories of employees likely to be affected; and
 - (c) the time when, or the period over which, the employer intends to carry out the terminations.
- (3) The notice must be given:
 - (a) as soon as practicable after making the decision; and
 - (b) before terminating an employee's employment in accordance with the decision.

Chapter 6 Miscellaneous

Part 6-4 Additional provisions relating to termination of employment

Division 3 Notification and consultation requirements relating to certain terminations of employment

Section 786

- 1 (4) The employer must not terminate an employee's employment in
2 accordance with the decision unless the employer has complied
3 with this section.

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

- 5 (5) The orders that may be made under subsection 545(1) in relation to
6 a contravention of subsection (4) of this section:

- 7 (a) include an order requiring the employer not to terminate the
8 employment of employees in accordance with the decision,
9 except as permitted by the order; but
10 (b) do not include an order granting an injunction.

11 **Subdivision C—Failure to notify or consult registered employee**
12 **associations**

13 **786 FWA may make orders where failure to notify or consult**
14 **registered employee associations about terminations**

- 15 (1) FWA may make an order under subsection 787(1) if it is satisfied
16 that:
17 (a) an employer has decided to terminate the employment of 15
18 or more employees for reasons of an economic,
19 technological, structural or similar nature, or for reasons
20 including such reasons; and
21 (b) the employer has not complied with subsection (2) (which
22 deals with notifying relevant registered employee
23 associations) or subsection (3) (which deals with consulting
24 relevant registered employee associations); and
25 (c) the employer could reasonably be expected to have known,
26 when he or she made the decision, that one or more of the
27 employees were members of a registered employee
28 association.

29 *Notifying relevant registered employee associations*

- 30 (2) An employer complies with this subsection if:
31 (a) the employer notifies each registered employee association of
32 which any of the employees was a member, and that was

Section 787

-
- 1 entitled to represent the industrial interests of that member, of
2 the following:
- 3 (i) the proposed terminations and the reasons for them;
 - 4 (ii) the number and categories of employees likely to be
5 affected;
 - 6 (iii) the time when, or the period over which, the employer
7 intends to carry out the terminations; and
- 8 (b) the notice is given:
- 9 (i) as soon as practicable after making the decision; and
 - 10 (ii) before terminating an employee's employment in
11 accordance with the decision.

12 *Consulting relevant registered employee associations*

- 13 (3) An employer complies with this subsection if:
- 14 (a) the employer gives each registered employee association of
15 which any of the employees was a member, and that was
16 entitled to represent the industrial interests of that member,
17 an opportunity to consult the employer on:
 - 18 (i) measures to avert or minimise the proposed
19 terminations; and
 - 20 (ii) measures (such as finding alternative employment) to
21 mitigate the adverse effects of the proposed
22 terminations; and
 - 23 (b) the opportunity is given:
 - 24 (i) as soon as practicable after making the decision; and
 - 25 (ii) before terminating an employee's employment in
26 accordance with the decision.

27 **787 Orders that FWA may make**

- 28 (1) FWA may make whatever orders it considers appropriate, in the
29 public interest, to put:
- 30 (a) the employees; and
 - 31 (b) each registered employee association referred to in paragraph
32 786(2)(a) or (3)(a);
- 33 in the same position (as nearly as can be done) as if the employer
34 had complied with subsections 786(2) and (3).

Chapter 6 Miscellaneous

Part 6-4 Additional provisions relating to termination of employment

Division 3 Notification and consultation requirements relating to certain terminations of employment

Section 788

- 1 (2) FWA must not, under subsection (1), make orders for any of the
2 following:
3 (a) reinstatement of an employee;
4 (b) withdrawal of a notice of termination if the notice period has
5 not expired;
6 (c) payment of an amount in lieu of reinstatement;
7 (d) payment of severance pay;
8 (e) disclosure of confidential information or commercially
9 sensitive information relating to the employer, unless the
10 recipient of such information gives an enforceable
11 undertaking not to disclose the information to any other
12 person;
13 (f) disclosure of personal information relating to a particular
14 employee, unless the employee has given written consent to
15 the disclosure of the information and the disclosure is in
16 accordance with that consent.

17 **788 Application to FWA for order**

- 18 FWA may make the order only on application by:
19 (a) one of the employees; or
20 (b) a registered employee association referred to in paragraph
21 786(2)(a) or (3)(a); or
22 (c) any other registered employee association that is entitled to
23 represent the industrial interests of one of the employees.

24 **Subdivision D—Limits on scope of this Division**

25 **789 Limits on scope of this Division**

- 26 (1) This Division does not apply in relation to any of the following
27 employees:
28 (a) an employee employed for a specified period of time, for a
29 specified task, or for the duration of a specified season;
30 (b) an employee whose employment is terminated because of
31 serious misconduct;
32 (c) a casual employee;

Section 789

- 1 (d) an employee (other than an apprentice) to whom a training
2 arrangement applies and whose employment is for a specified
3 period of time or is, for any reason, limited to the duration of
4 the training arrangement;
- 5 (e) a daily hire employee working in the building and
6 construction industry (including working in connection with
7 the erection, repair, renovation, maintenance, ornamentation
8 or demolition of buildings or structures);
- 9 (f) a daily hire employee working in the meat industry in
10 connection with the slaughter of livestock;
- 11 (g) a weekly hire employee working in connection with the meat
12 industry and whose termination of employment is determined
13 solely by seasonal factors;
- 14 (h) an employee prescribed by the regulations as an employee in
15 relation to whom this Division does not apply.
- 16 (2) Paragraph (1)(a) does not prevent this Division from applying in
17 relation to an employee if a substantial reason for employing the
18 employee as described in that paragraph was to avoid the
19 application of this Division.

Chapter 6 Miscellaneous

Part 6-5 Miscellaneous

Division 1 Introduction

Section 790

1

2

Part 6-5—Miscellaneous

3

Division 1—Introduction

4

790 Guide to this Part

5

This Part deals with miscellaneous matters such as delegations and regulations.

6

7

791 Meanings of *employee* and *employer*

8

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

9

1

2

Division 2—Miscellaneous

3

792 Delegation by Minister

4

(1) The Minister may, in writing, delegate all or any of his or her functions or powers under this Act to:

5

6

(a) the Secretary of the Department; or

7

(b) an SES employee, or acting SES employee, in the Department.

8

9

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

10

11

Note: See also sections 34AA and 34AB of the *Acts Interpretation Act 1901*.

12

793 Liability of bodies corporate

13

Conduct of a body corporate

14

(1) Any conduct engaged in on behalf of a body corporate:

15

(a) by an officer, employee or agent (an *official*) of the body within the scope of his or her actual or apparent authority; or

16

17

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of an official of the body, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the official;

18

19

20

21

is taken, for the purposes of this Act and the procedural rules, to have been engaged in also by the body.

22

23

24

State of mind of a body corporate

25

(2) If, for the purposes of this Act or the procedural rules, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is enough to show:

26

27

28

(a) that the conduct was engaged in by a person referred to in paragraph (1)(a) or (b); and

29

30

(b) that the person had that state of mind.

Section 794

1

Meaning of state of mind

2

(3) The *state of mind* of a person includes:

3

(a) the knowledge, intention, opinion, belief or purpose of the person; and

4

5

(b) the person's reasons for the intention, opinion, belief or purpose.

6

7

Disapplication of Part 2.5 of the Criminal Code

8

(4) Part 2.5 of Chapter 2 of the *Criminal Code* does not apply to an offence against this Act.

9

10

Note: Part 2.5 of the *Criminal Code* deals with corporate criminal responsibility.

11

12

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

13

794 Signature on behalf of body corporate

14

For the purposes of this Act, a document may be signed on behalf of a body corporate by an authorised officer of the body and need not be made under the body's seal.

15

16

17

795 Public sector employer to act through employing authority

18

Employer to act through employing authority

19

(1) For the purposes of this Act and the procedural rules, the employer of an employee (a *public sector employee*) employed in public sector employment must act only through the employee's employing authority acting on behalf of the employer.

20

21

22

23

Acts done by or to employing authority

24

(2) For the purposes of this Act and the procedural rules, anything done by or to a public sector employee's employing authority acting on behalf of the employee's employer is taken to have been done by or to the employer (as the case may be).

25

26

27

1 *Application of subsections (1) and (2)*

- 2 (3) Subsections (1) and (2) apply despite any other law of the
3 Commonwealth, a State or a Territory.

4 *Meaning of public sector employment*

- 5 (4) **Public sector employment** means employment of, or service by, a
6 person in any capacity (whether permanently or temporarily, and
7 whether full-time or part-time):
8 (a) under the *Public Service Act 1999* or the *Parliamentary*
9 *Service Act 1999*; or
10 (b) by or in the service of a Commonwealth authority; or
11 (c) under a law of the Australian Capital Territory relating to
12 employment by that Territory, including a law relating to the
13 Australian Capital Territory Government Service; or
14 (d) by or in the service of:
15 (i) an enactment authority as defined by section 3 of the
16 *A.C.T. Self-Government (Consequential Provisions) Act*
17 *1988*; or
18 (ii) a body corporate incorporated by or under a law of the
19 Australian Capital Territory and in which the Australian
20 Capital Territory has a controlling interest;
21 other than an authority or body prescribed by the regulations;
22 or
23 (e) under a law of the Northern Territory relating to the Public
24 Service of the Northern Territory; or
25 (f) by or in the service of a Northern Territory authority; or
26 (g) by or in the service of a person prescribed by the regulations;
27 or
28 (h) under a law prescribed by the regulations.
- 29 (5) However, **public sector employment** does not include:
30 (a) employment of, or service by, a person prescribed by the
31 regulations; or
32 (b) employment or service under a law prescribed by the
33 regulations.
- 34 This subsection does not apply for the purposes of section 40.

Section 796

1 Note: Section 40 deals with the interaction between fair work instruments
2 and public sector employment laws.

3 *Meaning of employing authority*

4 (6) An *employing authority* of an employee is the person prescribed
5 by the regulations as the employee's employing authority.

6 **796 Regulations—general**

7 (1) The Governor-General may make regulations prescribing matters:
8 (a) required or permitted by this Act to be prescribed; or
9 (b) necessary or convenient to be prescribed for carrying out or
10 giving effect to this Act.

11 (2) Regulations made under this Act prevail over procedural rules
12 made under this Act, to the extent of any inconsistency.

13 **797 Regulations dealing with offences**

14 (1) The regulations may provide for offences against the regulations.

15 (2) The penalties for offences must not be more than 20 penalty units.

16 **798 Regulations dealing with civil penalties**

17 (1) The regulations may provide for civil penalties for contravention of
18 the regulations.

19 (2) The penalties for contravention must not be more than:

20 (a) 20 penalty units for an individual; or

21 (b) 100 penalty units for a body corporate.

22 **799 Regulations dealing with infringement notices**

23 *Infringement notices for offences*

24 (1) The regulations may provide for a person who is alleged to have
25 committed an offence against the regulations to pay a penalty to
26 the Commonwealth as an alternative to prosecution.

Section 800

- 1 (2) The penalty must not exceed one-fifth of the maximum penalty
2 prescribed by the regulations for that offence.

3 *Infringement notices for civil penalties*

- 4 (3) The regulations may provide for a person who is alleged to have
5 contravened a civil penalty provision under the regulations to pay a
6 penalty to the Commonwealth as an alternative to civil
7 proceedings.

- 8 (4) The penalty must not exceed one-tenth of the maximum penalty
9 prescribed by the regulations for contravening that provision.

10 **800 Regulations dealing with exhibiting fair work instruments**

11 The regulations may provide for the exhibiting, on the premises of
12 an employer, of a fair work instrument or a term of a fair work
13 instrument.