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covered by the agreement are given a copy of the following materials:

- (i) the written text of the agreement;
 - (ii) any other material incorporated by reference in the agreement; or
- (b) the relevant employees have access, throughout the access period for the agreement, to a copy of those materials.
- (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:
- (a) the time and place at which the vote will occur;
 - (b) the voting method that will be used.
- (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).

Employees must be given copy of disclosure documents etc.

- (4A) If an organisation gives the employer a document under section 179 by the end of the fourth day of the access period for the agreement, the employer must take all reasonable steps to ensure that the relevant employees:
- (a) are given a copy of the document as soon as practicable after it was given to the employer; or
 - (b) are given access to a copy of the document as soon as practicable after it was given to the employer and have access to that copy throughout the remainder of the access period for the agreement.
- Note: This subsection is a civil remedy provision (see Part 4-1).
- (4B) If the employer is required to prepare a document under section 179A, the employer must take all reasonable steps to ensure that the relevant employees:
- (a) are given a copy of the document by the end of the fourth day of the access period for the agreement; or

- (b) are given access to a copy of the document by the end of that fourth day and have access to that copy throughout the remainder of the access period for the agreement.

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

- (4C) The employer must not knowingly or recklessly make a false or misleading representation in the document that the relevant employees are given a copy of or access to under subsection (4B).

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

Terms of the agreement must be explained to employees etc.

- (5) The employer must take all reasonable steps to ensure that:
 - (a) the terms of the agreement, and the effect of those terms, are explained to the relevant employees; and
 - (b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees.
- (6) Without limiting paragraph (5)(b), the following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with that paragraph:
 - (a) employees from culturally and linguistically diverse backgrounds;
 - (b) young employees;
 - (c) employees who did not have a bargaining representative for the agreement.

181 Employers may request employees to approve a proposed enterprise agreement

- (1) An employer that will be covered by a proposed enterprise agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it.

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- (2) The request must not be made until at least 21 days after the day on which the last notice under subsection 173(1) (which deals with giving notice of employee representational rights) in relation to the agreement is given.
- (3) Without limiting subsection (1), the employer may request that the employees vote by ballot or by an electronic method.

182 When an enterprise agreement is made

Single-enterprise agreement that is not a greenfields agreement

- (1) If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is **made** when a majority of those employees who cast a valid vote approve the agreement.

Multi-enterprise agreement that is not a greenfields agreement

- (2) If:
 - (a) a proposed enterprise agreement is a multi-enterprise agreement; and
 - (b) the employees of each of the employers that will be covered by the agreement have been asked to approve the agreement under subsection 181(1); and
 - (c) those employees have voted on whether or not to approve the agreement; and
 - (d) a majority of the employees of at least one of those employers who cast a valid vote have approved the agreement;

the agreement is **made** immediately after the end of the voting process referred to in subsection 181(1).

Greenfields agreement

- (3) A greenfields agreement is **made** when it has been signed by each employer and each relevant employee organisation that the

agreement is expressed to cover (which need not be all of the relevant employee organisations for the agreement).

- (4) If:
- (a) a proposed single-enterprise agreement is a greenfields agreement that has not been made under subsection (3); and
 - (b) there has been a notified negotiation period for the agreement; and
 - (c) the notified negotiation period has ended; and
 - (d) the employer or employers that were bargaining representatives for the agreement (the **relevant employer or employers**) gave each of the employee organisations that were bargaining representatives for the agreement a reasonable opportunity to sign the agreement; and
 - (e) the relevant employer or employers apply to the FWC for approval of the agreement;
- the agreement is taken to have been **made**:
- (f) by the relevant employer or employers with each of the employee organisations that were bargaining representatives for the agreement; and
 - (g) when the application is made to the FWC for approval of the agreement.

Note: See also section 185A (material that must accompany an application).

183 Entitlement of an employee organisation to have an enterprise agreement cover it

- (1) After an enterprise agreement that is not a greenfields agreement is made, an employee organisation that was a bargaining representative for the proposed enterprise agreement concerned may give the FWC a written notice stating that the organisation wants the enterprise agreement to cover it.
- (2) The notice must be given to the FWC, and a copy given to each employer covered by the enterprise agreement, before the FWC approves the agreement.

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Note: The FWC must note in its decision to approve the enterprise agreement that the agreement covers the employee organisation (see subsection 201(2)).

184 Multi-enterprise agreement to be varied if not all employees approve the agreement

Application of this section

- (1) This section applies if:
- (a) a multi-enterprise agreement is made; and
 - (b) the agreement was not approved by the employees of all of the employers that made a request under subsection 181(1) in relation to the agreement.

Variation of agreement

- (2) Before a bargaining representative applies under section 185 for approval of the agreement, the bargaining representative must vary the agreement so that the agreement is expressed to cover only the following:
- (a) each employer whose employees approved the agreement;
 - (b) the employees of each of those employers.
- (3) The bargaining representative who varies the agreement as referred to in subsection (2) must give written notice of the variation to all the other bargaining representatives for the agreement.
- (4) The notice must specify the employers and employees that the agreement as varied covers.
- (5) Subsection (3) does not require the bargaining representative to give a notice to a person if the bargaining representative does not know, or could not reasonably be expected to know, that the person is a bargaining representative for the agreement.

185 Bargaining representative must apply for the FWC's approval of an enterprise agreement

Application for approval

- (1) If an enterprise agreement is made, a bargaining representative for the agreement must apply to the FWC for approval of the agreement.
- (1A) Despite subsection (1), if the agreement is a multi-enterprise agreement that is a greenfields agreement, the application must be made by:
 - (a) an employer covered by the agreement; or
 - (b) a relevant employee organisation that is covered by the agreement.

Material to accompany the application

- (2) The application must be accompanied by:
 - (a) a signed copy of the agreement; and
 - (b) any declarations that are required by the procedural rules to accompany the application.

When the application must be made

- (3) If the agreement is not a greenfields agreement, the application must be made:
 - (a) within 14 days after the agreement is made; or
 - (b) if in all the circumstances the FWC considers it fair to extend that period—within such further period as the FWC allows.
- (4) If the agreement is a greenfields agreement, the application must be made within 14 days after the agreement is made.

Signature requirements

- (5) The regulations may prescribe requirements relating to the signing of enterprise agreements.

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Single-enterprise agreements that are greenfields agreements

- (6) This section does not apply to an agreement made under subsection 182(4).

185A Material that must accompany an application under subsection 182(4) for approval of a greenfields agreement

An application under subsection 182(4) for approval of an agreement must be accompanied by:

- (a) a copy of the agreement; and
- (b) any declarations that are required by the procedural rules to accompany the application.

Subdivision B—Approval of enterprise agreements by the FWC

186 When the FWC must approve an enterprise agreement—general requirements

Basic rule

- (1) If an application for the approval of an enterprise agreement is made under subsection 182(4) or section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.

Note: The FWC may approve an enterprise agreement under this section with undertakings (see section 190).

Requirements relating to the safety net etc.

- (2) The FWC must be satisfied that:
- (a) if the agreement is not a greenfields agreement—the agreement has been genuinely agreed to by the employees covered by the agreement; and
 - (b) if the agreement is a multi-enterprise agreement:
 - (i) the agreement has been genuinely agreed to by each employer covered by the agreement; and

- (ii) no person coerced, or threatened to coerce, any of the employers to make the agreement; and
- (c) the terms of the agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); and
- (d) the agreement passes the better off overall test.

Note 1: For when an enterprise agreement has been genuinely agreed to by employees, see section 188.

Note 2: The FWC may approve an enterprise agreement that does not pass the better off overall test if approval would not be contrary to the public interest (see section 189).

Note 3: The terms of an enterprise agreement may supplement the National Employment Standards (see paragraph 55(4)(b)).

Requirement that the group of employees covered by the agreement is fairly chosen

- (3) The FWC must be satisfied that the group of employees covered by the agreement was fairly chosen.
- (3A) If the agreement does not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Requirement that there be no unlawful terms

- (4) The FWC must be satisfied that the agreement does not include any unlawful terms (see Subdivision D of this Division).

Requirement that there be no designated outworker terms

- (4A) The FWC must be satisfied that the agreement does not include any designated outworker terms.

Requirement for a nominal expiry date etc.

- (5) The FWC must be satisfied that:

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- (a) the agreement specifies a date as its nominal expiry date; and
- (b) the date will not be more than 4 years after the day on which the FWC approves the agreement.

Requirement for a term about settling disputes

- (6) The FWC must be satisfied that the agreement includes a term:
 - (a) that provides a procedure that requires or allows the FWC, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:
 - (i) about any matters arising under the agreement; and
 - (ii) in relation to the National Employment Standards; and
 - (b) that allows for the representation of employees covered by the agreement for the purposes of that procedure.

Note 1: The FWC or a person must not settle a dispute about whether an employer had reasonable business grounds under subsection 65(5) or 76(4) (see subsections 739(2) and 740(2)).

Note 2: However, this does not prevent the FWC from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4).

**187 When the FWC must approve an enterprise agreement—
additional requirements**

Additional requirements

- (1) This section sets out additional requirements that must be met before the FWC approves an enterprise agreement under section 186.

Requirement that approval not be inconsistent with good faith bargaining etc.

- (2) The FWC must be satisfied that approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives for a proposed enterprise

agreement, or an enterprise agreement, in relation to which a scope order is in operation.

Requirement relating to notice of variation of agreement

- (3) If a bargaining representative is required to vary the agreement as referred to in subsection 184(2), the FWC must be satisfied that the bargaining representative has complied with that subsection and subsection 184(3) (which deals with giving notice of the variation).

Requirements relating to particular kinds of employees

- (4) The FWC must be satisfied as referred to in any provisions of Subdivision E of this Division that apply in relation to the agreement.

Note: Subdivision E of this Division deals with approval requirements relating to particular kinds of employees.

Requirements relating to greenfields agreements

- (5) If the agreement is a greenfields agreement, the FWC must be satisfied that:
- (a) the relevant employee organisations that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement; and
 - (b) it is in the public interest to approve the agreement.
- (6) If an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a greenfields agreement), the FWC must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.

Note: In considering the prevailing pay and conditions within the relevant industry for equivalent work, the FWC may have regard to the prevailing pay and conditions in the relevant geographical area.

188 When employees have genuinely agreed to an enterprise agreement

An enterprise agreement has been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:

- (a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:
 - (i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);
 - (ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and
- (b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and
- (c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.

188A Disclosure documents

Failure by an organisation to comply with section 179 (disclosure by organisations), or by an employer to comply with section 179A or subsection 180(4A), (4B) or (4C) (disclosure by employers), in relation to an agreement:

- (a) does not amount to reasonable grounds for believing that the agreement has not been genuinely agreed to by employees; and
- (b) is not otherwise relevant to approval by the FWC of the agreement.

189 FWC may approve an enterprise agreement that does not pass better off overall test—public interest test

Application of this section

- (1) This section applies if:
 - (a) the FWC is not required to approve an enterprise agreement under section 186; and
 - (b) the only reason for this is that the FWC is not satisfied that the agreement passes the better off overall test.

Approval of agreement if not contrary to the public interest

- (2) The FWC may approve the agreement under this section if the FWC is satisfied that, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest.

Note: The FWC may approve an enterprise agreement under this section with undertakings (see section 190).

- (3) An example of a case in which the FWC may be satisfied of the matter referred to in subsection (2) is where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer covered by the agreement.

Nominal expiry date

- (4) The **nominal expiry date** of an enterprise agreement approved by the FWC under this section is the earlier of the following:
 - (a) the date specified in the agreement as the nominal expiry date of the agreement;
 - (b) 2 years after the day on which the FWC approved the agreement.

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190 FWC may approve an enterprise agreement with undertakings

Application of this section

- (1) This section applies if:
 - (a) an application for the approval of an enterprise agreement has been made under subsection 182(4) or section 185; and
 - (b) the FWC has a concern that the agreement does not meet the requirements set out in sections 186 and 187.

Approval of agreement with undertakings

- (2) The FWC may approve the agreement under section 186 if the FWC is satisfied that an undertaking accepted by the FWC under subsection (3) of this section meets the concern.

Undertakings

- (3) The FWC may only accept a written undertaking from one or more employers covered by the agreement if the FWC is satisfied that the effect of accepting the undertaking is not likely to:
 - (a) cause financial detriment to any employee covered by the agreement; or
 - (b) result in substantial changes to the agreement.

FWC must seek views of bargaining representatives

- (4) The FWC must not accept an undertaking under subsection (3) unless the FWC has sought the views of each person who the FWC knows is a bargaining representative for the agreement.

Signature requirements

- (5) The undertaking must meet any requirements relating to the signing of undertakings that are prescribed by the regulations.

191 Effect of undertakings

- (1) If:
-

- (a) the FWC approves an enterprise agreement after accepting an undertaking under subsection 190(3) in relation to the agreement; and
 - (b) the agreement covers a single employer;
the undertaking is taken to be a term of the agreement, as the agreement applies to the employer.
- (2) If:
- (a) the FWC approves an enterprise agreement after accepting an undertaking under subsection 190(3) in relation to the agreement; and
 - (b) the agreement covers 2 or more employers;
the undertaking is taken to be a term of the agreement, as the agreement applies to each employer that gave the undertaking.

192 When the FWC may refuse to approve an enterprise agreement

- (1) If an application for the approval of an enterprise agreement is made under subsection 182(4) or section 185, the FWC may refuse to approve the agreement if the FWC considers that compliance with the terms of the agreement may result in:
 - (a) a person committing an offence against a law of the Commonwealth; or
 - (b) a person being liable to pay a pecuniary penalty in relation to a contravention of a law of the Commonwealth.
- (2) Subsection (1) has effect despite sections 186 and 189 (which deal with the approval of enterprise agreements).
- (3) If the FWC refuses to approve an enterprise agreement under this section, the FWC may refer the agreement to any person or body the FWC considers appropriate.

Subdivision C—Better off overall test

193 Passing the better off overall test

When a non-greenfields agreement passes the better off overall test

- (1) An enterprise agreement that is not a greenfields agreement **passes the better off overall test** under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

FWC must disregard individual flexibility arrangement

- (2) If, under the flexibility term in the relevant modern award, an individual flexibility arrangement has been agreed to by an award covered employee and his or her employer, the FWC must disregard the individual flexibility arrangement for the purposes of determining whether the agreement passes the better off overall test.

When a greenfields agreement passes the better off overall test

- (3) A greenfields agreement **passes the better off overall test** under this section if the FWC is satisfied, as at the test time, that each prospective award covered employee for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

Award covered employee

- (4) An **award covered employee** for an enterprise agreement is an employee who:
 - (a) is covered by the agreement; and
 - (b) at the test time, is covered by a modern award (the **relevant modern award**) that:
 - (i) is in operation; and

- (ii) covers the employee in relation to the work that he or she is to perform under the agreement; and
- (iii) covers his or her employer.

Prospective award covered employee

- (5) A **prospective award covered employee** for an enterprise agreement is a person who, if he or she were an employee at the test time of an employer covered by the agreement:
- (a) would be covered by the agreement; and
 - (b) would be covered by a modern award (the **relevant modern award**) that:
 - (i) is in operation; and
 - (ii) would cover the person in relation to the work that he or she would perform under the agreement; and
 - (iii) covers the employer.

Test time

- (6) The **test time** is the time the application for approval of the agreement by the FWC was made under subsection 182(4) or section 185.

FWC may assume employee better off overall in certain circumstances

- (7) For the purposes of determining whether an enterprise agreement passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant modern award applied to that class, the FWC is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee.

Subdivision D—Unlawful terms

194 Meaning of *unlawful term*

A term of an enterprise agreement is an *unlawful term* if it is:

- (a) a discriminatory term; or
- (b) an objectionable term; or
- (baa) an objectionable emergency management term; or
- (ba) a term that provides a method by which an employee or employer may elect (unilaterally or otherwise) not to be covered by the agreement; or
- (c) if a particular employee would be protected from unfair dismissal under Part 3-2 after completing a period of employment of at least the minimum employment period—a term that confers an entitlement or remedy in relation to a termination of the employee’s employment that is unfair (however described) before the employee has completed that period; or
- (d) a term that excludes the application to, or in relation to, a person of a provision of Part 3-2 (which deals with unfair dismissal), or modifies the application of such a provision in a way that is detrimental to, or in relation to, a person; or
- (e) a term that is inconsistent with a provision of Part 3-3 (which deals with industrial action); or
- (f) a term that provides for an entitlement:
 - (i) to enter premises for a purpose referred to in section 481 (which deals with investigation of suspected contraventions); or
 - (ii) to enter premises to hold discussions of a kind referred to in section 484;
other than in accordance with Part 3-4 (which deals with right of entry); or
- (g) a term that provides for the exercise of a State or Territory OHS right other than in accordance with Part 3-4 (which deals with right of entry); or

- (h) a term that has the effect of requiring or permitting contributions, for the benefit of an employee (the **relevant employee**) covered by the agreement who is a default fund employee, to be made to a superannuation fund or scheme that is specified in the agreement but does not satisfy one of the following:
- (i) it is a fund that offers a MySuper product;
 - (ii) it is a fund or scheme of which the relevant employee, and each other default fund employee in relation to whom contributions are made to the fund or scheme by the same employer as the relevant employee, is a defined benefit member;
 - (iii) it is an exempt public sector superannuation scheme.

195 Meaning of *discriminatory term*

Discriminatory term

- (1) A term of an enterprise agreement is a **discriminatory term** to the extent that it discriminates against an employee covered by the agreement because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Certain terms are not discriminatory terms

- (2) A term of an enterprise agreement does not discriminate against an employee:
- (a) if the reason for the discrimination is the inherent requirements of the particular position concerned; or
 - (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:
 - (i) in good faith; and

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- (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.
- (3) A term of an enterprise agreement does not discriminate against an employee merely because it provides for wages for:
 - (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.

195A Meaning of *objectionable emergency management term*

Objectionable emergency management term

- (1) A term of an enterprise agreement is an ***objectionable emergency management term*** if an employer covered by the agreement is a designated emergency management body and the term has, or is likely to have, the effect of:
 - (a) restricting or limiting the body's ability to do any of the following:
 - (i) engage or deploy its volunteers;
 - (ii) provide support or equipment to those volunteers;
 - (iii) manage its relationship with, or work with, any recognised emergency management body in relation to those volunteers;
 - (iv) otherwise manage its operations in relation to those volunteers; or
 - (b) requiring the body to consult, or reach agreement with, any other person or body before taking any action for the purposes of doing anything mentioned in subparagraph (a)(i), (ii), (iii) or (iv); or
 - (c) restricting or limiting the body's ability to recognise, value, respect or promote the contribution of its volunteers to the well-being and safety of the community; or
 - (d) requiring or permitting the body to act other than in accordance with a law of a State or Territory, so far as the

law confers or imposes on the body a power, function or duty that affects or could affect its volunteers.

- (2) However, a term of an enterprise agreement is not an ***objectionable emergency management term*** if:
- (a) both of the following apply:
 - (i) the term provides for the matters required by subsections 205(1) and (1A) (which deal with terms about consultation in enterprise agreements);
 - (ii) the term does not provide for any other matter that has, or is likely to have, the effect referred to in paragraph (1)(a), (b), (c) or (d) of this section; or
 - (b) the term is the model consultation term.
- (3) Paragraphs (1)(a), (b), (c) and (d) do not limit each other.

Meaning of designated emergency management body

- (4) A body is a ***designated emergency management body*** if:
- (a) either:
 - (i) the body is, or is a part of, a fire-fighting body or a State Emergency Service of a State or Territory (however described); or
 - (ii) the body is a recognised emergency management body that is prescribed by the regulations for the purposes of this subparagraph; and
 - (b) the body is, or is a part of a body that is, established for a public purpose by or under a law of the Commonwealth, a State or a Territory.
- (5) However, a body is not a ***designated emergency management body*** if the body is, or is a part of a body that is, prescribed by the regulations for the purposes of this subsection.

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Meaning of volunteer of a designated emergency management body

- (6) A person is a **volunteer** of a designated emergency management body if:
- (a) the person engages in activities with the body on a voluntary basis (whether or not the person directly or indirectly takes or agrees to take an honorarium, gratuity or similar payment wholly or partly for engaging in the activity); and
 - (b) the person is a member of, or has a member-like association with, the body.

Limited application of subsection (1) for certain terms

- (7) If:
- (a) a term of an enterprise agreement deals to any extent with the following matters relating to provision of essential services or to situations of emergency:
 - (i) directions to perform work (including to perform work at a particular time or place, or in a particular way);
 - (ii) directions not to perform work (including not to perform work at a particular time or place, or in a particular way); and
 - (b) the application of subsection (1) in relation to the term would (apart from this subsection) be beyond the Commonwealth's legislative power to the extent that the term deals with those matters;

then subsection (1) does not apply in relation to the term to that extent.

Note: See paragraph (1) of the definition of **excluded subject matter** in subsections 30A(1) and 30K(1).

Subdivision E—Approval requirements relating to particular kinds of employees

196 Shiftworkers

Application of this section

- (1) This section applies if:
 - (a) an employee is covered by an enterprise agreement; and
 - (b) a modern award that is in operation and covers the employee defines or describes the employee as a shiftworker for the purposes of the National Employment Standards.

Shiftworkers and the National Employment Standards

- (2) The FWC must be satisfied that the agreement defines or describes the employee as a shiftworker for the purposes of the National Employment Standards.

Note: Section 87 provides an employee with an entitlement to 5 weeks of paid annual leave if an enterprise agreement that applies to the employee defines or describes the employee as a shiftworker for the purposes of the National Employment Standards.

197 Pieceworkers—enterprise agreement includes pieceworker term

Application of this section

- (1) This section applies if:
 - (a) an enterprise agreement that covers an employee includes a term that defines or describes the employee as a pieceworker; and
 - (b) a modern award that is in operation and covers the employee does not include such a term.

No detriment test

- (2) The FWC must be satisfied that the effect of including such a term in the agreement is not detrimental to the employee in relation to

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the entitlements of the employee under the National Employment Standards.

198 Pieceworkers—enterprise agreement does not include a pieceworker term

Application of this section

- (1) This section applies if:
- (a) an enterprise agreement that covers an employee does not include a term that defines or describes the employee as a pieceworker; and
 - (b) a modern award that is in operation and covers the employee includes such a term.

No detriment test

- (2) The FWC must be satisfied that the effect of not including such a term in the agreement is not detrimental to the employee in relation to the entitlements of the employee under the National Employment Standards.

199 School-based apprentices and school-based trainees

Application of this section

- (1) This section applies if:
- (a) an employee who is a school-based apprentice or a school-based trainee is covered by an enterprise agreement; and
 - (b) the agreement provides for the employee to be paid loadings (the **agreement loadings**) in lieu of any of the following:
 - (i) paid annual leave;
 - (ii) paid personal/carer's leave;
 - (iii) paid absence under Division 10 of Part 2-2 (which deals with public holidays); and

- (c) a modern award that is in operation and covers the employee provides for the employee to be paid loadings (the *award loadings*) in lieu of leave or absence of that kind.

No detriment test

- (2) The FWC must be satisfied that the amount or rate (as the case may be) of the agreement loadings is not detrimental to the employee when compared to the amount or rate of the award loadings.

200 Outworkers

Application of this section

- (1) This section applies if:
 - (a) an employee who is an outworker is covered by an enterprise agreement; and
 - (b) a modern award that is in operation and covers the employee includes outworker terms.

Agreement must include outworker terms etc.

- (2) The FWC must be satisfied that:
 - (a) the agreement includes terms of that kind; and
 - (b) those terms of the agreement are not detrimental to the employee in any respect when compared to the outworker terms of the modern award.

Subdivision F—Other matters

201 Approval decision to note certain matters

Approval decision to note model terms included in an enterprise agreement

- (1) If:
 - (a) the FWC approves an enterprise agreement; and

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- (b) either or both of the following apply:
 - (i) the model flexibility term is taken, under subsection 202(4), to be a term of the agreement;
 - (ii) the model consultation term is taken, under subsection 205(2), to be a term of the agreement;

the FWC must note in its decision to approve the agreement that those terms are so included in the agreement.

Approval decision to note that an enterprise agreement covers an employee organisation

- (2) If:
 - (a) an employee organisation has given a notice under subsection 183(1) that the organisation wants the enterprise agreement to cover it; and
 - (b) the FWC approves the agreement;the FWC must note in its decision to approve the agreement that the agreement covers the organisation.

- (2A) If:
 - (a) an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a greenfields agreement); and
 - (b) the FWC approves the agreement;the FWC must note in its decision to approve the agreement that the agreement covers each employee organisation that was a bargaining representative for the agreement.

Approval decision to note undertakings

- (3) If the FWC approves an enterprise agreement after accepting an undertaking under subsection 190(3) in relation to the agreement, the FWC must note in its decision to approve the agreement that the undertaking is taken to be a term of the agreement.

Division 5—Mandatory terms of enterprise agreements

202 Enterprise agreements to include a flexibility term etc.

Flexibility term must be included in an enterprise agreement

- (1) An enterprise agreement must include a term (a ***flexibility term***) that:
 - (a) enables an employee and his or her employer to agree to an arrangement (an ***individual flexibility arrangement***) varying the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer; and
 - (b) complies with section 203.

Effect of an individual flexibility arrangement

- (2) If an employee and employer agree to an individual flexibility arrangement under a flexibility term in an enterprise agreement:
 - (a) the agreement has effect in relation to the employee and the employer as if it were varied by the arrangement; and
 - (b) the arrangement is taken to be a term of the agreement.
- (3) To avoid doubt, the individual flexibility arrangement:
 - (a) does not change the effect the agreement has in relation to the employer and any other employee; and
 - (b) does not have any effect other than as a term of the agreement.

Model flexibility term

- (4) If an enterprise agreement does not include a flexibility term, the model flexibility term is taken to be a term of the agreement.
- (5) The regulations must prescribe the ***model flexibility term*** for enterprise agreements.

Section 203

203 Requirements to be met by a flexibility term

Flexibility term must meet requirements

- (1) A flexibility term in an enterprise agreement must meet the requirements set out in this section.

Requirements relating to content

- (2) The flexibility term must:
- (a) set out the terms of the enterprise agreement the effect of which may be varied by an individual flexibility arrangement agreed to under the flexibility term; and
 - (b) require the employer to ensure that any individual flexibility arrangement agreed to under the flexibility term:
 - (i) must be about matters that would be permitted matters if the arrangement were an enterprise agreement; and
 - (ii) must not include a term that would be an unlawful term if the arrangement were an enterprise agreement.
- (2A) If, in accordance with this Part, the enterprise agreement includes terms that would be outworker terms if they were included in a modern award, the flexibility term must not allow the effect of those outworker terms to be varied.

Requirement for genuine agreement

- (3) The flexibility term must require that any individual flexibility arrangement is genuinely agreed to by the employer and the employee.

Requirement that the employee be better off overall

- (4) The flexibility term must require the employer to ensure that any individual flexibility arrangement agreed to under the term must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to.

Requirement relating to approval or consent of another person

- (5) Except as required by subparagraph (7)(a)(ii), the employer must ensure that the flexibility term does not require that any individual flexibility arrangement agreed to by an employer and employee under the term be approved, or consented to, by another person.

Requirement relating to termination of individual flexibility arrangements

- (6) The flexibility term must require the employer to ensure that any individual flexibility arrangement agreed to under the term must be able to be terminated:
- (a) by either the employee, or the employer, giving written notice of not more than 28 days; or
 - (b) by the employee and the employer at any time if they agree, in writing, to the termination.

Other requirements

- (7) The flexibility term must require the employer to ensure that:
- (a) any individual flexibility arrangement agreed to under the term must be in writing and signed:
 - (i) in all cases—by the employee and the employer; and
 - (ii) if the employee is under 18—by a parent or guardian of the employee; and
 - (b) a copy of any individual flexibility arrangement agreed to under the term must be given to the employee within 14 days after it is agreed to.

204 Effect of arrangement that does not meet requirements of flexibility term

Application of this section

- (1) This section applies if:

Section 205

- (a) an employee and employer agree to an arrangement that purports to be an individual flexibility arrangement under a flexibility term in an enterprise agreement; and
- (b) the arrangement does not meet a requirement set out in section 203.

Note: A failure to meet such a requirement may be a contravention of a provision of Part 3-1 (which deals with general protections).

Arrangement has effect as if it were an individual flexibility arrangement

- (2) The arrangement has effect as if it were an individual flexibility arrangement.

Employer contravenes flexibility term in specified circumstances

- (3) If section 203 requires the employer to ensure that the arrangement meets the requirement, the employer contravenes the flexibility term of the agreement.

Requirement relating to termination of arrangement

- (4) If the arrangement does not provide that the arrangement is able to be terminated:
 - (a) by either the employee, or the employer, giving written notice of not more than 28 days; or
 - (b) by the employee and the employer at any time if they agree, in writing, to the termination;the arrangement is taken to provide that the arrangement is able to be so terminated.

205 Enterprise agreements to include a consultation term etc.

Consultation term must be included in an enterprise agreement

- (1) An enterprise agreement must include a term (a **consultation term**) that:

- (a) requires the employer or employers to which the agreement applies to consult the employees to whom the agreement applies about:
 - (i) a major workplace change that is likely to have a significant effect on the employees; or
 - (ii) a change to their regular roster or ordinary hours of work; and
 - (b) allows for the representation of those employees for the purposes of that consultation.
- (1A) For a change to the employees' regular roster or ordinary hours of work, the term must require the employer:
- (a) to provide information to the employees about the change; and
 - (b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and
 - (c) to consider any views given by the employees about the impact of the change.

Model consultation term

- (2) If an enterprise agreement does not include a consultation term, or if the consultation term is an objectionable emergency management term, the model consultation term is taken to be a term of the agreement.
- (3) The regulations must prescribe the *model consultation term* for enterprise agreements.

Division 6—Base rate of pay under enterprise agreements

206 Base rate of pay under an enterprise agreement must not be less than the modern award rate or the national minimum wage order rate etc.

If an employee is covered by a modern award that is in operation

- (1) If:
 - (a) an enterprise agreement applies to an employee; and
 - (b) a modern award that is in operation covers the employee;the base rate of pay payable to the employee under the agreement (the **agreement rate**) must not be less than the base rate of pay that would be payable to the employee under the modern award (the **award rate**) if the modern award applied to the employee.
- (2) If the agreement rate is less than the award rate, the agreement has effect in relation to the employee as if the agreement rate were equal to the award rate.

If an employer is required to pay an employee the national minimum wage etc.

- (3) If:
 - (a) an enterprise agreement applies to an employee; and
 - (b) the employee is not covered by a modern award that is in operation; and
 - (c) a national minimum wage order would, but for the agreement applying to the employee, require the employee's employer to pay the employee a base rate of pay (the **employee's order rate**) that at least equals the national minimum wage, or a special national minimum wage, set by the order;the base rate of pay payable to the employee under the enterprise agreement (the **agreement rate**) must not be less than the employee's order rate.

- (4) If the agreement rate is less than the employee's order rate, the agreement has effect in relation to the employee as if the agreement rate were equal to the employee's order rate.

Division 7—Variation and termination of enterprise agreements

Subdivision A—Variation of enterprise agreements by employers and employees

207 Variation of an enterprise agreement may be made by employers and employees

Variation by employers and employees

- (1) The following may jointly make a variation of an enterprise agreement:
 - (a) if the agreement covers a single employer—the employer and:
 - (i) the employees employed at the time who are covered by the agreement; and
 - (ii) the employees employed at the time who will be covered by the agreement if the variation is approved by the FWC;
 - (b) if the agreement covers 2 or more employers—all of those employers and:
 - (i) the employees employed at the time who are covered by the agreement; and
 - (ii) the employees employed at the time who will be covered by the agreement if the variation is approved by the FWC.

Note: For when a variation of an enterprise agreement is *made*, see section 209.

- (2) The employees referred to in paragraphs (1)(a) and (b) are the *affected employees* for the variation.

Variation has no effect unless approved by the FWC

- (3) A variation of an enterprise agreement has no effect unless it is approved by the FWC under section 211.

Limitation—greenfields agreement

- (4) Subsection (1) applies to a greenfields agreement only if one or more of the persons who will be necessary for the normal conduct of the enterprise concerned and are covered by the agreement have been employed.

208 Employers may request employees to approve a proposed variation of an enterprise agreement

- (1) An employer covered by an enterprise agreement may request the affected employees for a proposed variation of the agreement to approve the proposed variation by voting for it.
- (2) Without limiting subsection (1), the employer may request that the affected employees vote by ballot or by an electronic method.

209 When a variation of an enterprise agreement is made

Single-enterprise agreement

- (1) If the affected employees of an employer, or each employer, covered by a single-enterprise agreement have been asked to approve a proposed variation under subsection 208(1), the variation is **made** when a majority of the affected employees who cast a valid vote approve the variation.

Multi-enterprise agreement

- (2) If the affected employees of each employer covered by a multi-enterprise agreement have been asked to approve a proposed variation under subsection 208(1), the variation is **made** when a majority of the affected employees of each individual employer who cast a valid vote have approved the variation.

Section 210

210 Application for the FWC’s approval of a variation of an enterprise agreement

Application for approval

- (1) If a variation of an enterprise agreement has been made, a person covered by the agreement must apply to the FWC for approval of the variation.

Material to accompany the application

- (2) The application must be accompanied by:
- (a) a signed copy of the variation; and
 - (b) a copy of the agreement as proposed to be varied; and
 - (c) any declarations that are required by the procedural rules to accompany the application.

When the application must be made

- (3) The application must be made:
- (a) within 14 days after the variation is made; or
 - (b) if in all the circumstances the FWC considers it fair to extend that period—within such further period as the FWC allows.

Signature requirements

- (4) The regulations may prescribe requirements relating to the signing of variations of enterprise agreements.

211 When the FWC must approve a variation of an enterprise agreement

Approval of variation by the FWC

- (1) If an application for the approval of a variation of an enterprise agreement is made under section 210, the FWC must approve the variation if:

- (a) the FWC is satisfied that had an application been made under subsection 182(4) or section 185 for the approval of the agreement as proposed to be varied, the FWC would have been required to approve the agreement under section 186; and
- (b) the FWC is satisfied that the agreement as proposed to be varied would not specify a date as its nominal expiry date which is more than 4 years after the day on which the FWC approved the agreement;

unless the FWC is satisfied that there are serious public interest grounds for not approving the variation.

Note: The FWC may approve a variation under this section with undertakings (see section 212).

Modification of approval requirements

- (2) For the purposes of the FWC deciding whether it is satisfied of the matter referred to in paragraph (1)(a), the FWC must:
 - (a) take into account subsections (3) and (4) and any regulations made for the purposes of subsection (6); and
 - (b) comply with subsection (5); and
 - (c) disregard sections 190 and 191 (which deal with the approval of enterprise agreements with undertakings).
- (3) The following provisions:
 - (a) section 180 (which deals with pre-approval steps);
 - (b) subsection 186(2) (which deals with the FWC's approval of enterprise agreements);
 - (c) section 188 (which deals with genuine agreement);have effect as if:
 - (d) references in sections 180 and 188 to the proposed enterprise agreement, or the enterprise agreement, were references to the proposed variation, or the variation, of the enterprise agreement (as the case may be); and
 - (e) references in those provisions to the employees employed at the time who will be covered by the proposed enterprise agreement, or the employees covered by the enterprise

Section 211

- agreement, were references to the affected employees for the variation; and
- (f) references in section 180 to subsection 181(1) were references to subsection 208(1); and
 - (g) the words “if the agreement is not a greenfields agreement—” in paragraph 186(2)(a) were omitted; and
 - (h) paragraph 186(2)(b) were omitted; and
 - (ha) references in paragraphs 186(2)(c) and (d) to the agreement were references to the enterprise agreement as proposed to be varied; and
 - (hb) subparagraph 188(a)(ii) were omitted; and
 - (j) the words “182(1) or (2)” in paragraph 188(b) were omitted and the words “209(1) or (2)” were substituted.
- (4) Section 193 (which deals with passing the better off overall test) has effect as if:
- (a) the words “that is not a greenfields agreement” in subsection (1) were omitted; and
 - (b) subsection (3) were omitted; and
 - (c) the words “the agreement” in subsection (6) were omitted and the words “the variation of the enterprise agreement” were substituted; and
 - (d) the reference in subsection (6) to subsection 182(4) or section 185 were a reference to section 210.
- (5) For the purposes of determining whether an enterprise agreement as proposed to be varied passes the better off overall test, the FWC must disregard any individual flexibility arrangement that has been agreed to by an award covered employee and his or her employer under the flexibility term in the agreement.

Regulations may prescribe additional modifications

- (6) The regulations may provide that, for the purposes of the FWC deciding whether it is satisfied of the matter referred to in paragraph (1)(a), specified provisions of this Part have effect with such modifications as are prescribed by the regulations.

212 FWC may approve a variation of an enterprise agreement with undertakings

Application of this section

- (1) This section applies if:
 - (a) an application for the approval of a variation of an enterprise agreement has been made under section 210; and
 - (b) the FWC has a concern that the variation does not meet the requirements set out in section 211.

Approval of agreement with undertakings

- (2) The FWC may approve the variation under section 211 if the FWC is satisfied that an undertaking accepted by the FWC under subsection (3) of this section meets the concern.

Undertakings

- (3) The FWC may only accept a written undertaking from one or more employers covered by the agreement if the FWC is satisfied that the effect of accepting the undertaking is not likely to:
 - (a) cause financial detriment to any affected employee for the variation; or
 - (b) result in substantial changes to the variation.

Signature requirements

- (4) An undertaking must meet any requirements relating to the signing of undertakings that are prescribed by the regulations.

213 Effect of undertakings

- (1) If:
 - (a) the FWC approves a variation of an enterprise agreement after accepting an undertaking under subsection 212(3) in relation to the variation; and
 - (b) the agreement covers a single employer;

Section 214

the undertaking is taken to be a term of the agreement, as the agreement applies to the employer.

- (2) If:
- (a) the FWC approves a variation of an enterprise agreement after accepting an undertaking under subsection 212(3) in relation to the variation; and
 - (b) the agreement covers 2 or more employers;
- the undertaking is taken to be a term of the agreement, as the agreement applies to each employer that gave the undertaking.

214 When the FWC may refuse to approve a variation of an enterprise agreement

- (1) If an application for the approval of a variation of an enterprise agreement is made under section 210, the FWC may refuse to approve the variation if the FWC considers that compliance with the terms of the agreement as proposed to be varied may result in:
- (a) a person committing an offence against a law of the Commonwealth; or
 - (b) a person being liable to pay a pecuniary penalty in relation to a contravention of a law of the Commonwealth.
- (2) Subsection (1) has effect despite section 211 (which deals with the approval of variations of enterprise agreements).
- (3) If the FWC refuses to approve a variation of an enterprise agreement under this section, the FWC may refer the agreement as proposed to be varied to any person or body the FWC considers appropriate.

215 Approval decision to note undertakings

If the FWC approves a variation of an enterprise agreement after accepting an undertaking under subsection 212(3) in relation to the variation, the FWC must note in its decision to approve the variation that the undertaking is taken to be a term of the agreement.

216 When variation comes into operation

If a variation of an enterprise agreement is approved under section 211, the variation operates from the day specified in the decision to approve the variation.

Subdivision B—Variations of enterprise agreements where there is ambiguity, uncertainty or discrimination

217 Variation of an enterprise agreement to remove an ambiguity or uncertainty

- (1) The FWC may vary an enterprise agreement to remove an ambiguity or uncertainty on application by any of the following:
 - (a) one or more of the employers covered by the agreement;
 - (b) an employee covered by the agreement;
 - (c) an employee organisation covered by the agreement.
- (2) If the FWC varies the enterprise agreement, the variation operates from the day specified in the decision to vary the agreement.

217A FWC may deal with certain disputes about variations

- (1) This section applies if a variation of an enterprise agreement is proposed.
- (2) An employer or employee organisation covered by the enterprise agreement or an affected employee for the variation may apply to the FWC for the FWC to deal with a dispute about the proposed variation if the employer and the affected employees are unable to resolve the dispute.
- (3) The FWC must not arbitrate (however described) the dispute.

Section 218

218 Variation of an enterprise agreement on referral by Australian Human Rights Commission

Review of an enterprise agreement

- (1) The FWC must review an enterprise agreement if the agreement is referred to it under section 46PW of the *Australian Human Rights Commission Act 1986* (which deals with discriminatory industrial instruments).
- (2) The following are entitled to make submissions to the FWC for consideration in the review:
 - (a) if the referral relates to action that would be unlawful under Part 4 of the *Age Discrimination Act 2004*—the Age Discrimination Commissioner;
 - (b) if the referral relates to action that would be unlawful under Part 2 of the *Disability Discrimination Act 1992*—the Disability Discrimination Commissioner;
 - (c) if the referral relates to action that would be unlawful under Part II of the *Sex Discrimination Act 1984*—the Sex Discrimination Commissioner.

Variation of an enterprise agreement

- (3) If the FWC considers that the agreement reviewed requires a person to do an act that would be unlawful under any of the Acts referred to in subsection (2) (but for the fact that the act would be done in direct compliance with the agreement), the FWC must vary the agreement so that it no longer requires the person to do an act that would be so unlawful.
- (4) If the agreement is varied under subsection (3), the variation operates from the day specified in the decision to vary the agreement.

Subdivision C—Termination of enterprise agreements by employers and employees

219 Employers and employees may agree to terminate an enterprise agreement

Termination by employers and employees

- (1) The following may jointly agree to terminate an enterprise agreement:
 - (a) if the agreement covers a single employer—the employer and the employees covered by the agreement; or
 - (b) if the agreement covers 2 or more employers—all of the employers and the employees covered by the agreement.

Note: For when a termination of an enterprise agreement is *agreed to*, see section 221.

Termination has no effect unless approved by the FWC

- (2) A termination of an enterprise agreement has no effect unless it is approved by the FWC under section 223.

Limitation—greenfields agreement

- (3) Subsection (1) applies to a greenfields agreement only if one or more of the persons who will be necessary for the normal conduct of the enterprise concerned and are covered by the agreement have been employed.

220 Employers may request employees to approve a proposed termination of an enterprise agreement

- (1) An employer covered by an enterprise agreement may request the employees covered by the agreement to approve a proposed termination of the agreement by voting for it.

Section 221

- (2) Before making the request, the employer must:
 - (a) take all reasonable steps to notify the employees of the following:
 - (i) the time and place at which the vote will occur;
 - (ii) the voting method that will be used; and
 - (b) give the employees a reasonable opportunity to decide whether they want to approve the proposed termination.
- (3) Without limiting subsection (1), the employer may request that the employees vote by ballot or by an electronic method.

221 When termination of an enterprise agreement is agreed to

Single-enterprise agreement

- (1) If the employees of an employer, or each employer, covered by a single-enterprise agreement have been asked to approve a proposed termination of the agreement under subsection 220(1), the termination is **agreed to** when a majority of the employees who cast a valid vote approve the termination.

Multi-enterprise agreement

- (2) If the employees of each employer covered by a multi-enterprise agreement have been asked to approve a proposed termination of the agreement under subsection 220(1), the termination is **agreed to** when a majority of the employees of each individual employer who cast a valid vote have approved the termination.

222 Application for the FWC's approval of a termination of an enterprise agreement

Application for approval

- (1) If a termination of an enterprise agreement has been agreed to, a person covered by the agreement must apply to the FWC for approval of the termination.

Material to accompany the application

- (2) The application must be accompanied by any declarations that are required by the procedural rules to accompany the application.

When the application must be made

- (3) The application must be made:
- (a) within 14 days after the termination is agreed to; or
 - (b) if in all the circumstances the FWC considers it fair to extend that period—within such further period as the FWC allows.

223 When the FWC must approve a termination of an enterprise agreement

If an application for the approval of a termination of an enterprise agreement is made under section 222, the FWC must approve the termination if:

- (a) the FWC is satisfied that each employer covered by the agreement complied with subsection 220(2) (which deals with giving employees a reasonable opportunity to decide etc.) in relation to the agreement; and
- (b) the FWC is satisfied that the termination was agreed to in accordance with whichever of subsection 221(1) or (2) applies (those subsections deal with agreement to the termination of different kinds of enterprise agreements by employee vote); and
- (c) the FWC is satisfied that there are no other reasonable grounds for believing that the employees have not agreed to the termination; and
- (d) the FWC considers that it is appropriate to approve the termination taking into account the views of the employee organisation or employee organisations (if any) covered by the agreement.

Section 224

224 When termination comes into operation

If a termination of an enterprise agreement is approved under section 223, the termination operates from the day specified in the decision to approve the termination.

Subdivision D—Termination of enterprise agreements after nominal expiry date

225 Application for termination of an enterprise agreement after its nominal expiry date

If an enterprise agreement has passed its nominal expiry date, any of the following may apply to the FWC for the termination of the agreement:

- (a) one or more of the employers covered by the agreement;
- (b) an employee covered by the agreement;
- (c) an employee organisation covered by the agreement.

226 When the FWC must terminate an enterprise agreement

If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:

- (a) the FWC is satisfied that it is not contrary to the public interest to do so; and
- (b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:
 - (i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and
 - (ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.

227 When termination comes into operation

If an enterprise agreement is terminated under section 226, the termination operates from the day specified in the decision to terminate the agreement.

Division 8—FWC's general role in facilitating bargaining

Subdivision A—Bargaining orders

228 Bargaining representatives must meet the good faith bargaining requirements

- (1) The following are the *good faith bargaining requirements* that a bargaining representative for a proposed enterprise agreement must meet:
- (a) attending, and participating in, meetings at reasonable times;
 - (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
 - (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
 - (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
 - (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
 - (f) recognising and bargaining with the other bargaining representatives for the agreement.
- Note: See also section 255A (limitations relating to greenfields agreements).
- (2) The good faith bargaining requirements do not require:
- (a) a bargaining representative to make concessions during bargaining for the agreement; or
 - (b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

229 Applications for bargaining orders

Persons who may apply for a bargaining order

- (1) A bargaining representative for a proposed enterprise agreement may apply to the FWC for an order (a ***bargaining order***) under section 230 in relation to the agreement.

Note: See also section 255A (limitations relating to greenfields agreements).

Multi-enterprise agreements

- (2) An application for a bargaining order must not be made in relation to a proposed multi-enterprise agreement unless a low-paid authorisation is in operation in relation to the agreement.

Timing of applications

- (3) The application may only be made at whichever of the following times applies:
- (a) if one or more enterprise agreements apply to an employee, or employees, who will be covered by the proposed enterprise agreement:
 - (i) not more than 90 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be); or
 - (ii) after an employer that will be covered by the proposed enterprise agreement has requested under subsection 181(1) that employees approve the agreement, but before the agreement is so approved;
 - (b) otherwise—at any time.

Note: An employer cannot request employees to approve the agreement under subsection 181(1) until 21 days after the last notice of employee representational rights is given.

Section 230

Prerequisites for making an application

- (4) The bargaining representative may only apply for the bargaining order if the bargaining representative:
- (a) has concerns that:
 - (i) one or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or
 - (ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and
 - (b) has given a written notice setting out those concerns to the relevant bargaining representatives; and
 - (c) has given the relevant bargaining representatives a reasonable time within which to respond to those concerns; and
 - (d) considers that the relevant bargaining representatives have not responded appropriately to those concerns.

Non-compliance with notice requirements may be permitted

- (5) The FWC may consider the application even if it does not comply with paragraph (4)(b) or (c) if the FWC is satisfied that it is appropriate in all the circumstances to do so.

230 When the FWC may make a bargaining order

Bargaining orders

- (1) The FWC may make a bargaining order under this section in relation to a proposed enterprise agreement if:
- (a) an application for the order has been made; and
 - (b) the requirements of this section are met in relation to the agreement; and
 - (c) the FWC is satisfied that it is reasonable in all the circumstances to make the order.

Note: See also section 255A (limitations relating to greenfields agreements).

Agreement to bargain or certain instruments in operation

- (2) The FWC must be satisfied in all cases that one of the following applies:
- (a) the employer or employers have agreed to bargain, or have initiated bargaining, for the agreement;
 - (b) a majority support determination in relation to the agreement is in operation;
 - (c) a scope order in relation to the agreement is in operation;
 - (d) all of the employers are specified in a low-paid authorisation that is in operation in relation to the agreement.

Good faith bargaining requirements not met

- (3) The FWC must in all cases be satisfied:
- (a) that:
 - (i) one or more of the relevant bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or
 - (ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and
 - (b) that the applicant has complied with the requirements of subsection 229(4) (which deals with notifying relevant bargaining representatives of concerns), unless subsection 229(5) permitted the applicant to make the application without complying with those requirements.

Bargaining order must be in accordance with section 231

- (4) The bargaining order must be in accordance with section 231 (which deals with what a bargaining order must specify).

231 What a bargaining order must specify

- (1) A bargaining order in relation to a proposed enterprise agreement must specify all or any of the following:

Section 231

- (a) the actions to be taken by, and requirements imposed upon, the bargaining representatives for the agreement, for the purpose of ensuring that they meet the good faith bargaining requirements;
 - (b) requirements imposed upon those bargaining representatives not to take action that would constitute capricious or unfair conduct that undermines freedom of association or collective bargaining;
 - (c) the actions to be taken by those bargaining representatives to deal with the effects of such capricious or unfair conduct;
 - (d) such matters, actions or requirements as the FWC considers appropriate, taking into account subparagraph 230(3)(a)(ii) (which deals with multiple bargaining representatives), for the purpose of promoting the efficient or fair conduct of bargaining for the agreement.
- (2) The kinds of bargaining orders that the FWC may make in relation to a proposed enterprise agreement include the following:
- (a) an order excluding a bargaining representative for the agreement from bargaining;
 - (b) an order requiring some or all of the bargaining representatives of the employees who will be covered by the agreement to meet and appoint one of the bargaining representatives to represent the bargaining representatives in bargaining;
 - (c) an order that an employer not terminate the employment of an employee, if the termination would constitute, or relate to, a failure by a bargaining representative to meet the good faith bargaining requirement referred to in paragraph 228(1)(e) (which deals with capricious or unfair conduct that undermines freedom of association or collective bargaining);
 - (d) an order to reinstate an employee whose employment has been terminated if the termination constitutes, or relates to, a failure by a bargaining representative to meet the good faith bargaining requirement referred to in paragraph 228(1)(e) (which deals with capricious or unfair conduct that undermines freedom of association or collective bargaining).

- (3) The regulations may:
- (a) specify the factors the FWC may or must take into account in deciding whether or not to make a bargaining order for reinstatement of an employee; and
 - (b) provide for the FWC to take action and make orders in connection with, and to deal with matters relating to, a bargaining order of that kind.

232 Operation of a bargaining order

A bargaining order in relation to a proposed enterprise agreement:

- (a) comes into operation on the day on which it is made; and
- (b) ceases to be in operation at the earliest of the following:
 - (i) if the order is revoked—the time specified in the instrument of revocation;
 - (ii) when the agreement is approved by the FWC;
 - (iii) when a workplace determination that covers the employees that would have been covered by the agreement comes into operation;
 - (iv) when the bargaining representatives for the agreement agree that bargaining has ceased.

Note: See also section 255A (limitations relating to greenfields agreements).

233 Contravening a bargaining order

A person to whom a bargaining order applies must not contravene a term of the order.

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

Subdivision B—Serious breach declarations

234 Applications for serious breach declarations

A bargaining representative for a proposed enterprise agreement may apply to the FWC for a declaration (a *serious breach declaration*) under section 235 in relation to the agreement.

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Note 1: The consequence of a serious breach declaration being made in relation to the agreement is that the FWC may, in certain circumstances, make a bargaining related workplace determination under section 269 in relation to the agreement.

Note 2: See also section 255A (limitations relating to greenfields agreements).

235 When the FWC may make a serious breach declaration

Serious breach declaration

- (1) The FWC may make a serious breach declaration in relation to a proposed enterprise agreement if:
- (a) an application for the declaration has been made; and
 - (b) the FWC is satisfied of the matters set out in subsection (2).

Note: See also section 255A (limitations relating to greenfields agreements).

Matters of which the FWC must be satisfied before making a serious breach declaration

- (2) The FWC must be satisfied that:
- (a) one or more bargaining representatives for the agreement has contravened one or more bargaining orders in relation to the agreement; and
 - (b) the contravention or contraventions:
 - (i) are serious and sustained; and
 - (ii) have significantly undermined bargaining for the agreement; and
 - (c) the other bargaining representatives for the agreement (the ***designated bargaining representatives***) have exhausted all other reasonable alternatives to reach agreement on the terms that should be included in the agreement; and
 - (d) agreement on the terms that should be included in the agreement will not be reached in the foreseeable future; and
 - (e) it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

Factors the FWC must take into account in deciding whether reasonable alternatives exhausted

- (3) In deciding whether or not the designated bargaining representatives have exhausted all other reasonable alternatives to reach agreement on the terms that should be included in the agreement, the FWC may take into account any matter the FWC considers relevant, including the following:
- (a) whether the FWC has provided assistance under section 240 in relation to the agreement;
 - (b) whether a designated bargaining representative has applied to a court for an order under Part 4-1 in relation to the contravention or contraventions referred to in paragraph (2)(a) of this section; and
 - (c) any findings or orders made by the court in relation to such an application.

What declaration must specify

- (4) The declaration must specify:
- (a) the proposed enterprise agreement to which the declaration relates; and
 - (b) any other matter prescribed by the procedural rules.

Operation of declaration

- (5) The declaration:
- (a) comes into operation on the day on which it is made; and
 - (b) ceases to be in operation when each employer specified in the declaration is covered by an enterprise agreement or a workplace determination.

Subdivision C—Majority support determinations and scope orders

236 Majority support determinations

- (1) A bargaining representative of an employee who will be covered by a proposed single-enterprise agreement may apply to the FWC for a determination (a *majority support determination*) that a majority of the employees who will be covered by the agreement want to bargain with the employer, or employers, that will be covered by the agreement.
- (2) The application must specify:
 - (a) the employer, or employers, that will be covered by the agreement; and
 - (b) the employees who will be covered by the agreement.

237 When the FWC must make a majority support determination

Majority support determination

- (1) The FWC must make a majority support determination in relation to a proposed single-enterprise agreement if:
 - (a) an application for the determination has been made; and
 - (b) the FWC is satisfied of the matters set out in subsection (2) in relation to the agreement.

Matters of which the FWC must be satisfied before making a majority support determination

- (2) The FWC must be satisfied that:
 - (a) a majority of the employees:
 - (i) who are employed by the employer or employers at a time determined by the FWC; and
 - (ii) who will be covered by the agreement; want to bargain; and

- (b) the employer, or employers, that will be covered by the agreement have not yet agreed to bargain, or initiated bargaining, for the agreement; and
 - (c) that the group of employees who will be covered by the agreement was fairly chosen; and
 - (d) it is reasonable in all the circumstances to make the determination.
- (3) For the purposes of paragraph (2)(a), the FWC may work out whether a majority of employees want to bargain using any method the FWC considers appropriate.
- (3A) If the agreement will not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding for the purposes of paragraph (2)(c) whether the group of employees who will be covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Operation of determination

- (4) The determination comes into operation on the day on which it is made.

238 Scope orders

Bargaining representatives may apply for scope orders

- (1) A bargaining representative for a proposed single-enterprise agreement (other than a greenfields agreement) may apply to the FWC for an order (a **scope order**) under this section if:
- (a) the bargaining representative has concerns that bargaining for the agreement is not proceeding efficiently or fairly; and
 - (b) the reason for this is that the bargaining representative considers that the agreement will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover.

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No scope order if a single interest employer authorisation is in operation

- (2) Despite subsection (1), the bargaining representative must not apply for the scope order if a single interest employer authorisation is in operation in relation to the agreement.

Bargaining representative to give notice of concerns

- (3) The bargaining representative may only apply for the scope order if the bargaining representative:
- (a) has taken all reasonable steps to give a written notice setting out the concerns referred to in subsection (1) to the relevant bargaining representatives for the agreement; and
 - (b) has given the relevant bargaining representatives a reasonable time within which to respond to those concerns; and
 - (c) considers that the relevant bargaining representatives have not responded appropriately.

When the FWC may make scope order

- (4) The FWC may make the scope order if the FWC is satisfied:
- (a) that the bargaining representative who made the application has met, or is meeting, the good faith bargaining requirements; and
 - (b) that making the order will promote the fair and efficient conduct of bargaining; and
 - (c) that the group of employees who will be covered by the agreement proposed to be specified in the scope order was fairly chosen; and
 - (d) it is reasonable in all the circumstances to make the order.

Matters which the FWC must take into account

- (4A) If the agreement proposed to be specified in the scope order will not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding for the purposes of paragraph (4)(c) whether the group of employees who

will be covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Scope order must specify employer and employees to be covered

- (5) The scope order must specify, in relation to a proposed single-enterprise agreement:
- (a) the employer, or employers, that will be covered by the agreement; and
 - (b) the employees who will be covered by the agreement.

Scope order must be in accordance with this section etc.

- (6) The scope order:
- (a) must be in accordance with this section; and
 - (b) may relate to more than one proposed single-enterprise agreement.

Orders etc. that the FWC may make

- (7) If the FWC makes the scope order, the FWC may also:
- (a) amend any existing bargaining orders; and
 - (b) make or vary such other orders (such as protected action ballot orders), determinations or other instruments made by the FWC, or take such other actions, as the FWC considers appropriate.

239 Operation of a scope order

A scope order in relation to a proposed single-enterprise agreement:

- (a) comes into operation on the day on which it is made; and
- (b) ceases to be in operation at the earliest of the following:
 - (i) if the order is revoked—the time specified in the instrument of revocation;
 - (ii) when the agreement is approved by the FWC;

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- (iii) when a workplace determination that covers the employees that would have been covered by the agreement comes into operation;
- (iv) when the bargaining representatives for the agreement agree that bargaining has ceased.

Subdivision D—FWC may deal with a bargaining dispute on request

240 Application for the FWC to deal with a bargaining dispute

Bargaining representative may apply for the FWC to deal with a dispute

- (1) A bargaining representative for a proposed enterprise agreement may apply to the FWC for the FWC to deal with a dispute about the agreement if the bargaining representatives for the agreement are unable to resolve the dispute.

Note: See also section 255A (limitations relating to greenfields agreements).

- (2) If the proposed enterprise agreement is:
 - (a) a single-enterprise agreement; or
 - (b) a multi-enterprise agreement in relation to which a low-paid authorisation is in operation;the application may be made by one bargaining representative, whether or not the other bargaining representatives for the agreement have agreed to the making of the application.
- (3) If subsection (2) does not apply, a bargaining representative may only make the application if all of the bargaining representatives for the agreement have agreed to the making of the application.
- (4) If the bargaining representatives have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.

Division 9—Low-paid bargaining

241 Objects of this Division

The objects of this Division are:

- (a) to assist and encourage low-paid employees and their employers, who have not historically had the benefits of collective bargaining, to make an enterprise agreement that meets their needs; and
- (b) to assist low-paid employees and their employers to identify improvements to productivity and service delivery through bargaining for an enterprise agreement that covers 2 or more employers, while taking into account the specific needs of individual enterprises; and
- (c) to address constraints on the ability of low-paid employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and
- (d) to enable the FWC to provide assistance to low-paid employees and their employers to facilitate bargaining for enterprise agreements.

Note: A low-paid workplace determination may be made in specified circumstances under Division 2 of Part 2-5 if the bargaining representatives for a proposed enterprise agreement in relation to which a low-paid authorisation is in operation are unable to reach agreement.

242 Low-paid authorisations

- (1) The following persons may apply to the FWC for an authorisation (a ***low-paid authorisation***) under section 243 in relation to a proposed multi-enterprise agreement:
 - (a) a bargaining representative for the agreement;
 - (b) an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under the agreement.

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Note: The effect of a low-paid authorisation is that the employers specified in it are subject to certain rules in relation to the agreement that would not otherwise apply (such as in relation to the availability of bargaining orders, see subsection 229(2)).

- (2) The application must specify:
 - (a) the employers that will be covered by the agreement; and
 - (b) the employees who will be covered by the agreement.
- (3) An application under this section must not be made in relation to a proposed greenfields agreement.

243 When the FWC must make a low-paid authorisation

Low-paid authorisation

- (1) The FWC must make a low-paid authorisation in relation to a proposed multi-enterprise agreement if:
 - (a) an application for the authorisation has been made; and
 - (b) the FWC is satisfied that it is in the public interest to make the authorisation, taking into account the matters specified in subsections (2) and (3).

FWC must take into account historical and current matters relating to collective bargaining

- (2) In deciding whether or not to make the authorisation, the FWC must take into account the following:
 - (a) whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level;
 - (b) the history of bargaining in the industry in which the employees who will be covered by the agreement work;
 - (c) the relative bargaining strength of the employers and employees who will be covered by the agreement;
 - (d) the current terms and conditions of employment of the employees who will be covered by the agreement, as compared to relevant industry and community standards;

- (e) the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises.

FWC must take into account matters relating to the likely success of collective bargaining

- (3) In deciding whether or not to make the authorisation, the FWC must also take into account the following:
 - (a) whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates;
 - (b) the extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process;
 - (c) the views of the employers and employees who will be covered by the agreement;
 - (d) the extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, that will be covered by the agreement;
 - (e) the extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement that:
 - (i) would cover that employer; and
 - (ii) would not cover the other employers specified in the application.

What authorisation must specify etc.

- (4) The authorisation must specify:
 - (a) the employers that will be covered by the agreement (which may be some or all of the employers specified in the application); and

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- (b) the employees who will be covered by the agreement (which may be some or all of the employees specified in the application); and
- (c) any other matter prescribed by the procedural rules.

Operation of authorisation

- (5) The authorisation comes into operation on the day on which it is made.

244 Variation of low-paid authorisations—general

Variation to remove employer

- (1) An employer specified in a low-paid authorisation may apply to the FWC for a variation of the authorisation to remove the employer's name from the authorisation.
- (2) If an application is made under subsection (1), the FWC must vary the authorisation to remove the employer's name if the FWC is satisfied that, because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation.

Variation to add employer

- (3) The following may apply to the FWC for a variation of a low-paid authorisation to add the name of an employer that is not specified in the authorisation:
 - (a) the employer;
 - (b) a bargaining representative of an employee who will be covered by the proposed multi-enterprise agreement to which the authorisation relates;
 - (c) an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under that agreement.
- (4) If an application is made under subsection (3), the FWC must vary the authorisation to add the employer's name if the FWC is

satisfied that it is in the public interest to do so, taking into account the matters specified in subsections 243(2) and (3).

245 Variation of low-paid authorisations—enterprise agreement etc. comes into operation

The FWC is taken to have varied a low-paid authorisation to remove an employer's name when an enterprise agreement, or a workplace determination, that covers the employer comes into operation.

246 FWC's assistance for the low-paid

Application of this section

- (1) This section applies if a low-paid authorisation is in operation in relation to a proposed multi-enterprise agreement.

FWC's assistance

- (2) The FWC may, on its own initiative, provide to the bargaining representatives for the agreement such assistance:
 - (a) that the FWC considers appropriate to facilitate bargaining for the agreement; and
 - (b) that the FWC could provide if it were dealing with a dispute.

Note: This section does not empower the FWC to arbitrate, because subsection 595(3) provides that the FWC may arbitrate only if expressly authorised to do so.

FWC may direct a person to attend a conference

- (3) Without limiting subsection (2), the FWC may provide assistance by directing a person who is not an employer specified in the authorisation to attend a conference at a specified time and place if the FWC is satisfied that the person exercises such a degree of control over the terms and conditions of the employees who will be covered by the agreement that the participation of the person in bargaining is necessary for the agreement to be made.

Chapter 2 Terms and conditions of employment

Part 2-4 Enterprise agreements

Division 9 Low-paid bargaining

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- (4) Subsection (3) does not limit the FWC's powers under Subdivision B of Division 3 of Part 5-1.

Division 10—Single interest employer authorisations

Subdivision A—Declaration that employers may bargain together for a proposed enterprise agreement

247 Ministerial declaration that employers may bargain together for a proposed enterprise agreement

Application for declaration

- (1) Two or more employers that will be covered by a proposed enterprise agreement may apply to the Minister for a declaration under subsection (3).

Note: Employers named in a declaration may apply for a single interest employer authorisation (see Subdivision B of this Division).

- (2) The application must specify the employers (the **relevant employers**) that will be covered by the agreement.

Declaration by the Minister

- (3) If an application is made under subsection (1), the Minister may declare, in writing, that the relevant employers may bargain together for the agreement.
- (4) In deciding whether or not to make the declaration, the Minister must take into account the following matters:
 - (a) the history of bargaining of each of the relevant employers, including whether they have previously bargained together;
 - (b) the interests that the relevant employers have in common, and the extent to which those interests are relevant to whether they should be permitted to bargain together;
 - (c) whether the relevant employers are governed by a common regulatory regime;
 - (d) whether it would be more appropriate for each of the relevant employers to make a separate enterprise agreement with its employees;

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- (e) the extent to which the relevant employers operate collaboratively rather than competitively;
 - (f) whether the relevant employers are substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory;
 - (g) any other matter the Minister considers relevant.
- (5) If the Minister decides to make the declaration, the relevant employers must be specified in the declaration.
- (6) A declaration under subsection (3) is not a legislative instrument.

Subdivision B—Single interest employer authorisations

248 Single interest employer authorisations

- (1) Two or more employers may apply to the FWC for an authorisation (a *single interest employer authorisation*) under section 249 in relation to a proposed enterprise agreement.

Note: The effect of a single interest employer authorisation is that the employers are single interest employers in relation to the agreement (see paragraph 172(5)(c)).

- (2) The application must specify the following:
- (a) the employers that will be covered by the agreement;
 - (b) the employees who will be covered by the agreement;
 - (c) the person (if any) nominated by the employers to make applications under this Act if the authorisation is made.

249 When the FWC must make a single interest employer authorisation

Single interest employer authorisation

- (1) The FWC must make a single interest employer authorisation in relation to a proposed enterprise agreement if:
- (a) an application for the authorisation has been made; and
 - (b) the FWC is satisfied that:

- (i) the employers that will be covered by the agreement have agreed to bargain together; and
- (ii) no person coerced, or threatened to coerce, any of the employers to agree to bargain together; and
- (c) the requirements of either subsection (2) (which deals with franchisees) or (3) (which deals with employers that may bargain together for a proposed enterprise agreement) are met.

Franchisees

- (2) The requirements of this subsection are met if the FWC is satisfied that the employers carry on similar business activities under the same franchise and are:
 - (a) franchisees of the same franchisor; or
 - (b) related bodies corporate of the same franchisor; or
 - (c) any combination of the above.

Employers that may bargain together for the agreement

- (3) The requirements of this subsection are met if the FWC is satisfied that all of the employers are specified in a declaration made under section 247 in relation to the agreement.

Operation of authorisation

- (4) The authorisation:
 - (a) comes into operation on the day on which it is made; and
 - (b) ceases to be in operation at the earlier of the following:
 - (i) the day on which the enterprise agreement to which the authorisation relates is made;
 - (ii) 12 months after the day on which the authorisation is made or, if the period is extended under section 252, at the end of that period.

250 What a single interest employer authorisation must specify

What authorisation must specify

- (1) A single interest employer authorisation in relation to a proposed enterprise agreement must specify the following:
 - (a) the employers that will be covered by the agreement;
 - (b) the employees who will be covered by the agreement;
 - (c) the person (if any) nominated by the employers to make applications under this Act if the authorisation is made;
 - (d) any other matter prescribed by the procedural rules.

Authorisation may relate to only some of employers or employees

- (2) If the FWC is satisfied of the matters specified in subsection 249(2) or (3) (which deal with franchisees and employers that may bargain together for a proposed enterprise agreement) in relation to only some of the employers that will be covered by the agreement, the FWC may make a single interest employer authorisation specifying those employers and their employees only.

251 Variation of single interest employer authorisations

Variation to remove employer

- (1) An employer specified in a single interest employer authorisation in relation to a proposed enterprise agreement may apply to the FWC for a variation of the authorisation to remove the employer's name from the authorisation.
- (2) If an application is made under subsection (1), the FWC must vary the authorisation to remove the employer's name if the FWC is satisfied that, because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation.

Variation to add employer

- (3) An employer that is not specified in a single interest employer authorisation may apply to the FWC for a variation of the authorisation to add the employer's name to the authorisation.
- (4) If an application is made under subsection (3), the FWC must vary the authorisation to add the employer's name if the FWC is satisfied that:
 - (a) each employer specified in the authorisation has agreed to the employer's name being added; and
 - (b) no person coerced, or threatened to coerce, the employer to make the application; and
 - (c) the requirements of subsection 249(2) or (3) (which deal with franchisees and employers that may bargain together for a proposed enterprise agreement) are met.

252 Variation to extend period single interest employer authorisation is in operation

- (1) A bargaining representative for a proposed enterprise agreement to which a single interest employer authorisation relates may apply to the FWC to vary the authorisation to extend the period for which the authorisation is in operation.
- (2) The FWC may vary the authorisation to extend the period if the FWC is satisfied that:
 - (a) there are reasonable prospects that the agreement will be made if the authorisation is in operation for a longer period; and
 - (b) it is appropriate in all the circumstances to extend the period.

Division 11—Other matters

253 Terms of an enterprise agreement that are of no effect

- (1) A term of an enterprise agreement has no effect to the extent that:
 - (a) it is not a term about a permitted matter; or
 - (b) it is an unlawful term; or
 - (c) it is a designated outworker term.

Note 1: A term of an enterprise agreement has no effect to the extent that it contravenes section 55 (see section 56).

Note 2: Certain terms of enterprise agreements relating to deductions, or requiring employees to spend or pay amounts, have no effect (see section 326).

- (2) However, if an enterprise agreement includes a term that has no effect because of subsection (1), or section 56 or 326, the inclusion of the term does not prevent the agreement from being an enterprise agreement.

254 Applications by bargaining representatives

Application of this section

- (1) This section applies if a provision of this Part permits an application to be made by a bargaining representative of an employer that will be covered by a proposed enterprise agreement.

Persons who may make applications

- (2) If the agreement will cover more than one employer, the application may be made by:
 - (a) in the case of a proposed enterprise agreement in relation to which a single interest employer authorisation is in operation—the person (if any) specified in the authorisation as the person who may make applications under this Act; or
 - (b) in any case—a bargaining representative of an employer that will be covered by the agreement, on behalf of one or more

other such bargaining representatives, if those other bargaining representatives have agreed to the application being made on their behalf.

254A Entitlement for volunteer bodies to make submissions

- (1) A body covered by subsection (2) is entitled to make a submission for consideration in relation to a matter before the FWC if:
 - (a) the matter arises under this Part; and
 - (b) the matter affects, or could affect, the volunteers of a designated emergency management body.
- (2) The bodies are as follows:
 - (a) a body corporate that:
 - (i) has a history of representing the interests of the designated emergency management body's volunteers; and
 - (ii) is not prescribed by the regulations for the purposes of this subparagraph;
 - (b) any other body that is prescribed by the regulations for the purposes of this paragraph.
- (3) Subsection (1) applies whether or not the FWC holds a hearing in relation to the matter.

255 Part does not empower the FWC to make certain orders

- (1) This Part does not empower the FWC to make an order that requires, or has the effect of requiring:
 - (a) particular content to be included or not included in a proposed enterprise agreement; or
 - (b) an employer to request under subsection 181(1) that employees approve a proposed enterprise agreement; or
 - (c) an employee to approve, or not approve, a proposed enterprise agreement; or
 - (d) an employer to give a notice under section 178B; or

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- (e) an employer to specify a particular day in a notice under section 178B; or
 - (f) an employer to agree to the giving of a notice under section 178B.
- (2) Despite paragraph (1)(a), the FWC may make an order that particular content be included or not included in a proposed enterprise agreement if the order is made in the course of arbitration undertaken when dealing with a dispute under section 240.

Note: The FWC may only arbitrate a dispute under section 240 if arbitration has been agreed to by the bargaining representatives for the agreement (see subsection 240(4)).

255A Limitations relating to greenfields agreements

- (1) If:
- (a) a proposed single-enterprise agreement is a greenfields agreement; and
 - (b) there has been a notified negotiation period for the agreement; and
 - (c) the notified negotiation period has ended;
- then:
- (d) the following provisions do not apply in relation to the agreement at any time after the end of the notified negotiation period:
 - (i) section 228 (which deals with good faith bargaining requirements);
 - (ii) sections 229 and 230 (which deal with bargaining orders);
 - (iii) sections 234 and 235 (which deal with serious breach declarations);
 - (iv) section 240 (which deals with bargaining disputes); and
 - (e) a bargaining order that relates to the agreement ceases to have effect at the end of the notified negotiation period.

- (2) Paragraph (1)(e) has effect despite anything in section 232 (which deals with the operation of bargaining orders).

256 Prospective employers and employees

A reference to an employer, or an employee, in relation to a greenfields agreement, includes a reference to a person who may become an employer or employee.

256A How employees, employers and employee organisations are to be described

- (1) This section applies if a provision of this Part requires or permits an instrument of any kind to specify the employers, employees or employee organisations covered, or who will be covered, by an enterprise agreement or other instrument.
- (2) The employees may be specified by class or by name.
- (3) The employers and employee organisations must be specified by name.
- (4) Without limiting the way in which a class may be described for the purposes of subsection (2), the class may be described by reference to one or more of the following:
- (a) a particular industry or part of an industry;
 - (b) a particular kind of work;
 - (c) a particular type of employment;
 - (d) a particular classification, job level or grade.

257 Enterprise agreements may incorporate material in force from time to time etc.

Despite section 46AA of the *Acts Interpretation Act 1901*, an enterprise agreement may incorporate material contained in an instrument or other writing:

- (a) as in force at a particular time; or
- (b) as in force from time to time.

Part 2-5—Workplace determinations

Division 1—Introduction

258 Guide to this Part

This Part is about workplace determinations, which provide terms and conditions for those national system employees to whom they apply.

Division 2 deals with low-paid workplace determinations. Bargaining representatives for a proposed multi-enterprise agreement may apply to the FWC for such a determination if they are unable to reach agreement on the terms that should be included in the agreement.

Division 3 deals with industrial action related workplace determinations. The FWC must make such a determination if:

- (a) a termination of industrial action instrument is made in relation to a proposed enterprise agreement; and
- (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.

Division 4 deals with bargaining related workplace determinations. The FWC must make such a determination if:

- (a) a serious breach declaration is made in relation to a proposed enterprise agreement; and
- (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.

Division 5 sets out the core terms, mandatory terms and agreed terms of workplace determinations. It also sets out the factors that the FWC must take into account in deciding the terms of a workplace determination.

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.

Division 7 deals with other matters relating to workplace determinations.

259 Meanings of *employee* and *employer*

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

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

Division 2—Low-paid workplace determinations

260 Applications for low-paid workplace determinations

Application of this section

- (1) This section applies if:
 - (a) a low-paid authorisation is in operation in relation to a proposed multi-enterprise agreement; and
 - (b) one or more of the bargaining representatives for the agreement are unable to reach agreement on the terms that should be included in the agreement.

Consent low-paid workplace determination

- (2) The following bargaining representatives for the agreement may jointly apply to the FWC for a determination (a **consent low-paid workplace determination**) under section 261:
 - (a) one or more bargaining representatives of one or more of the employers that would have been covered by the agreement;
 - (b) the bargaining representative or representatives of the employees of those employers.
- (3) An application for a consent low-paid workplace determination must specify the following:
 - (a) the bargaining representatives making the application;
 - (b) the terms that those bargaining representatives have, at the time of the application, agreed should be included in the agreement;
 - (c) the matters at issue at the time of the application;
 - (d) the employers that have consented to being covered by the determination;
 - (e) those employers' employees who will be covered by the determination;
 - (f) each employee organisation (if any) that is a bargaining representative of those employees.

Special low-paid workplace determination

- (4) A bargaining representative for the agreement may apply to the FWC 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 the FWC must make a consent low-paid workplace determination

The FWC must make a consent low-paid workplace determination if:

- (a) an application for the determination has been made; and
- (b) the FWC 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: The FWC must be constituted by a Full Bench to make a consent low-paid workplace determination (see subsection 616(4)).

Section 262

262 When the FWC must make a special low-paid workplace determination—general requirements

Special low-paid workplace determination

- (1) The FWC must make a special low-paid workplace determination under this section if:
- (a) an application for the determination has been made; and
 - (b) the requirements set out in this section and section 263 are met.

Note: The FWC must be constituted by a Full Bench to make a special low-paid workplace determination (see subsection 616(4)).

Genuinely unable to reach agreement etc.

- (2) The FWC must be satisfied that:
- (a) the bargaining representatives for the proposed multi-enterprise agreement concerned are genuinely unable to reach agreement on the terms that should be included in the agreement; and
 - (b) there is no reasonable prospect of agreement being reached.

Minimum safety net

- (3) The FWC must be satisfied that, at the time of the application, the terms and conditions of the employees who will be covered by the determination were substantially equivalent to the minimum safety net of terms and conditions provided by modern awards together with the National Employment Standards.

Promotion of future bargaining for an enterprise agreement etc.

- (4) The FWC must be satisfied that the making of the determination will promote:
- (a) bargaining in the future for an enterprise agreement or agreements that will cover the employers and employees who will be covered by the workplace determination; and

- (b) productivity and efficiency in the enterprise or enterprises concerned.

Public interest

- (5) The FWC must be satisfied that it is in the public interest to make the determination.

263 When the FWC must make a special low-paid workplace determination—additional requirements

Additional requirements

- (1) This section sets out additional requirements that must be met before the FWC makes a special low-paid determination (the **relevant determination**) under section 262.

No employer is specified in an application for a consent low-paid workplace determination

- (2) The FWC must be satisfied that no employer that will be covered by the relevant determination is specified in an application for a consent low-paid workplace determination that was made by bargaining representatives for the proposed multi-enterprise agreement concerned before or after the application for the relevant determination was made.

No employer is, or has previously been, covered by an enterprise agreement or workplace determination

- (3) The FWC must be satisfied that no employer that will be covered by the relevant determination is, or has previously been, covered by an enterprise agreement, or another workplace determination, in relation to the work to be performed by the employees who will be covered by the relevant determination.

Section 264

264 Terms etc. of a low-paid workplace determination

Basic rule

- (1) A low-paid workplace determination must comply with subsection (4) and include:
 - (a) the terms set out in subsections (2) and (3); and
 - (b) the core terms set out in section 272; and
 - (c) the mandatory terms set out in section 273.

Note: For the factors that the FWC must take into account in deciding the terms of the determination, see section 275.

Agreed terms

- (2) The determination must include the agreed terms (see subsection 274(1)) for the determination.

Terms dealing with the matters at issue

- (3) The determination must include the terms that the FWC considers deal with the matters at issue specified in the application for the determination.

Coverage

- (4) The determination must be expressed to cover the employers, employees and employee organisations (if any) that were specified in the application for the determination.

265 No other terms

A low-paid workplace determination must not include any terms other than those required by subsection 264(1).

Division 3—Industrial action related workplace determinations

266 When the FWC must make an industrial action related workplace determination

Industrial action related workplace determination

- (1) If:
- (a) a termination of industrial action instrument has been made in relation to a proposed enterprise agreement; and
 - (b) the post-industrial action negotiating period ends; and
 - (c) the bargaining representatives for the agreement have not settled all of the matters that were at issue during bargaining for the agreement;

the FWC must make a determination (an ***industrial action related workplace determination***) as quickly as possible after the end of that period.

Note: The FWC must be constituted by a Full Bench to make an industrial action related workplace determination (see subsection 616(4)).

Termination of industrial action instrument

- (2) A ***termination of industrial action instrument*** in relation to a proposed enterprise agreement is:
- (a) an order under section 423 or 424 terminating protected industrial action for the agreement; or
 - (b) a declaration under section 431 terminating protected industrial action for the agreement.

Post-industrial action negotiating period

- (3) The ***post-industrial action negotiating period*** is the period that:
- (a) starts on the day on which the termination of industrial action instrument is made; and
 - (b) ends:

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- (i) 21 days after that day; or
 - (ii) if the FWC extends that period under subsection (4)—
42 days after that day.
- (4) The FWC must extend the period referred to in subparagraph (3)(b)(i) if:
- (a) all of the bargaining representatives for the agreement jointly apply to the FWC for the extension within 21 days after the termination of industrial action instrument was made; and
 - (b) those bargaining representatives have not settled all of the matters that were at issue during bargaining for the agreement.

267 Terms etc. of an industrial action related workplace determination

Basic rule

- (1) An industrial action related workplace determination must comply with subsection (4) and include:
- (a) the terms set out in subsections (2) and (3); and
 - (b) the core terms set out in section 272; and
 - (c) the mandatory terms set out in section 273.

Note: For the factors that the FWC must take into account in deciding the terms of the determination, see section 275.

Agreed terms

- (2) The determination must include the agreed terms (see subsection 274(2)) for the determination.

Terms dealing with the matters at issue

- (3) The determination must include the terms that the FWC considers deal with the matters that were still at issue at the end of the post-industrial action negotiating period.

Coverage

- (4) The determination must be expressed to cover:
- (a) each employer that would have been covered by the proposed enterprise agreement concerned; and
 - (b) the employees who would have been covered by that agreement; and
 - (c) each employee organisation (if any) that was a bargaining representative of those employees.

268 No other terms

An industrial action related workplace determination must not include any terms other than those required by subsection 267(1).

Division 4—Bargaining related workplace determinations

269 When the FWC must make a bargaining related workplace determination

Bargaining related workplace determination

- (1) If:
- (a) a serious breach declaration has been made in relation to a proposed enterprise agreement; and
 - (b) the post-declaration negotiating period ends; and
 - (c) the bargaining representatives for the agreement have not settled all of the matters that were at issue during bargaining for the agreement;

the FWC must make a determination (a ***bargaining related workplace determination***) as quickly as possible after the end of that period.

Note 1: A serious breach declaration may be made in relation to a proposed single-enterprise agreement or a proposed multi-enterprise agreement in relation to which a low-paid authorisation is in operation (see sections 229 and 235).

Note 2: The FWC must be constituted by a Full Bench to make a bargaining related workplace determination (see subsection 616(4)).

Note 3: See also section 271A (limitations relating to greenfields agreements).

Post-declaration negotiating period

- (2) The ***post-declaration negotiating period*** is the period that:
- (a) starts on the day on which the serious breach declaration is made; and
 - (b) ends:
 - (i) 21 days after that day; or
 - (ii) if the FWC extends that period under subsection (3)—42 days after that day.

- (3) The FWC must extend the period referred to in subparagraph (2)(b)(i) if:
- (a) all of the bargaining representatives for the agreement jointly apply to the FWC for the extension within 21 days after the serious breach declaration was made; and
 - (b) those bargaining representatives have not settled all of the matters that were at issue during bargaining for the agreement.

270 Terms etc. of a bargaining related workplace determination

Basic rule

- (1) A bargaining related workplace determination must comply with whichever of subsection (4), (5) or (6) applies and include:
- (a) the terms set out in this section; and
 - (b) the core terms set out in section 272; and
 - (c) the mandatory terms set out in section 273.

Note: For the factors that the FWC must take into account in deciding the terms of the determination, see section 275.

Agreed terms

- (2) The determination must include the agreed terms (see subsection 274(3)) for the determination.

Terms dealing with the matters at issue

- (3) The determination must include the terms that the FWC considers deal with the matters that were still at issue at the end of the post-declaration negotiating period.

Coverage—single-enterprise agreement

- (4) If the serious breach declaration referred to in paragraph 269(1)(a) was made in relation to a proposed single-enterprise agreement, the determination must be expressed to cover:

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- (a) each employer that would have been covered by the agreement; and
- (b) the employees who would have been covered by that agreement; and
- (c) each employee organisation (if any) that was a bargaining representative of those employees.

Coverage—multi-enterprise agreement

(5) If:

- (a) the serious breach declaration referred to in paragraph 269(1)(a) was made in relation to a proposed multi-enterprise agreement in relation to which a low-paid authorisation is in operation; and
- (b) the bargaining representatives for the agreement that contravened a bargaining order as referred to in subsection 235(2) were bargaining representatives of one or more employers that would have been covered by the agreement;

the determination must be expressed to cover:

- (c) each of those employers; and
- (d) their employees who would have been covered by the agreement; and
- (e) each employee organisation (if any) that was a bargaining representative of those employees.

(6) If:

- (a) the serious breach declaration referred to in paragraph 269(1)(a) was made in relation to a proposed multi-enterprise agreement in relation to which a low-paid authorisation is in operation; and
- (b) the bargaining representatives for the agreement that contravened a bargaining order as referred to in subsection 235(2) were bargaining representatives of one or more employees who would have been covered by the agreement;

the determination must be expressed to cover:

- (c) the employers of those employees if they are employers that would have been covered by the agreement; and
- (d) all of their employees who would have been covered by the agreement; and
- (e) each employee organisation (if any) that was a bargaining representative of those employees.

271 No other terms

A bargaining related workplace determination must not include any terms other than those required by subsection 270(1).

271A Limitations relating to greenfields agreements

If:

- (a) a proposed single-enterprise agreement is a greenfields agreement; and
 - (b) there has been a notified negotiation period for the agreement; and
 - (c) the notified negotiation period has ended;
- section 269 (which deals with bargaining related workplace determinations) does not apply in relation to the agreement at any time after the end of the notified negotiation period.

Section 272

Division 5—Core terms, mandatory terms and agreed terms of workplace determinations etc.

272 Core terms of workplace determinations

Core terms

- (1) This section sets out the core terms that a workplace determination must include.

Nominal expiry date

- (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.

Permitted matters etc.

- (3) The determination must not include:
- (a) any terms that would not be about permitted matters if the determination were an enterprise agreement; or
 - (b) a term that would be an unlawful term if the determination were an enterprise agreement; or
 - (c) any designated outworker terms.

Better off overall test

- (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.

Safety net requirements

- (5) The determination must not include a term that would, if the determination were an enterprise agreement, mean that the FWC could not approve the agreement:

- (a) because the term would contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); or
- (b) because of the operation of Subdivision E of Division 4 of Part 2-4 (which deals with approval requirements relating to particular kinds of employees).

273 Mandatory terms of workplace determinations

Mandatory terms

- (1) This section sets out the mandatory terms that a workplace determination must include.

Term about settling disputes

- (2) The determination must include a term that provides a procedure for settling disputes:
 - (a) about any matters arising under the determination; and
 - (b) in relation to the National Employment Standards.
- (3) Subsection (2) does not apply to the determination if the FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraphs 186(6)(a) and (b) (which deal with terms in enterprise agreements about settling disputes).

Flexibility term

- (4) The determination must include the model flexibility term unless the FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraph 202(1)(a) and section 203 (which deal with flexibility terms in enterprise agreements).

Consultation term

- (5) The determination must include the model consultation term unless the FWC is satisfied that an agreed term for the determination

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would, if the determination were an enterprise agreement, satisfy subsection 205(1) (which deals with terms about consultation in enterprise agreements).

274 Agreed terms for workplace determinations

Agreed term for a low-paid workplace determination

- (1) An **agreed term** for a low-paid workplace determination is a term that the application for the determination specifies as a term that the bargaining representatives concerned had, at the time of the application, agreed should be included in the proposed multi-enterprise agreement concerned.

Note: The determination must include an agreed term (see subsection 264(2)).

Agreed term for an industrial action related workplace determination

- (2) An **agreed term** for an industrial action related workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at the end of the post-industrial action negotiating period, agreed should be included in the agreement.

Note: The determination must include an agreed term (see subsection 267(2)).

Agreed term for a bargaining related workplace determination

- (3) An **agreed term** for a bargaining related workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at the end of the post-declaration negotiating period, agreed should be included in the agreement.

Note: The determination must include an agreed term (see subsection 270(2)).

275 Factors the FWC must take into account in deciding terms of a workplace determination

The factors that the FWC must take into account in deciding which terms to include in a workplace determination include the following:

- (a) the merits of the case;
- (b) for a low-paid workplace determination—the interests of the employers and employees who will be covered by the determination, including ensuring that the employers are able to remain competitive;
- (c) for a workplace determination other than a low-paid workplace determination—the interests of the employers and employees who will be covered by the determination;
- (d) the public interest;
- (e) how productivity might be improved in the enterprise or enterprises concerned;
- (f) the extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement;
- (g) the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements;
- (h) incentives to continue to bargain at a later time.

Division 6—Operation, coverage and interaction etc. of workplace determinations

276 When a workplace determination operates etc.

- (1) A workplace determination operates from the day on which it is made.
- (2) A workplace determination ceases to operate on the earlier of the following days:
 - (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);
 - (b) the day on which section 278 first has the effect that there is no employee to whom the agreement applies.

Note: Section 278 deals with when a workplace determination ceases to apply to an employee.

- (3) A workplace determination that has ceased to operate can never operate again.

277 Employers, employees and employee organisations covered by a workplace determination

Employers, employees and employee organisations

- (1) A workplace determination **covers** an employer, employee or employee organisation if the determination is expressed to cover the employer, employee or organisation.

Effect of provisions of this Act, FWC orders and court orders on coverage

- (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:

- (a) a provision of this Act;
 - (b) an FWC order made under a provision of this Act;
 - (c) an order of a court.
- (3) Despite subsections (1) and (2), a workplace determination does not **cover** an employer, employee or employee organisation if any of the following provides, or has the effect, that the determination does not cover the employer, employee or organisation:
- (a) another provision of this Act;
 - (b) an FWC order made under another provision of this Act;
 - (c) an order of a court.

Workplace determinations that have ceased to operate

- (4) Despite subsections (1) and (2), a workplace determination that has ceased to operate does not **cover** an employer, employee or employee organisation.

Workplace determinations cover employees in relation to particular employment

- (5) A reference in this Act to a workplace determination covering an employee is a reference to the determination covering the employee in relation to particular employment.

278 Interaction of a workplace determination with enterprise agreements etc.

Interaction with an enterprise agreement

- (1) If:
- (a) a workplace determination applies to an employee in relation to particular employment; and
 - (b) an enterprise agreement that covers the employee in relation to the same employment comes into operation;

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the determination ceases to apply to the employee in relation to that employment, and can never so apply again.

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) other than section 218 (which deals with

variation of an enterprise agreement on referral by the Australian Human Rights Commission).

- (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.

Division 7—Other matters

280 Contravening a workplace determination

A person must not contravene a term of a workplace determination.

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

Note 2: A person does not contravene a term of a workplace determination unless the determination applies to the person: see subsections 51(1) and 279(1).

281 Applications by bargaining representatives

Application of this section

- (1) This section applies if a provision of this Part permits an application to be made by a bargaining representative of an employer that would have been covered by a proposed enterprise agreement.

Persons who may make applications

- (2) If the agreement would have covered more than one employer, the application may be made by:
 - (a) in the case of a proposed enterprise agreement in relation to which a single interest employer authorisation is in operation—the person (if any) specified in the authorisation as the person who may make applications under this Act; or
 - (b) in any case—a bargaining representative of an employer that would have been covered by the agreement, on behalf of one or more other such bargaining representatives, if those other bargaining representatives have agreed to the application being made on their behalf.

281AA Entitlement for volunteer bodies to make submissions

- (1) A body covered by subsection (2) is entitled to make a submission for consideration in relation to a matter before the FWC if:

- (a) the matter arises under this Part; and
 - (b) the matter affects, or could affect, the volunteers of a designated emergency management body.
- (2) The bodies are as follows:
- (a) a body corporate that:
 - (i) has a history of representing the interests of the designated emergency management body's volunteers; and
 - (ii) is not prescribed by the regulations for the purposes of this subparagraph;
 - (b) any other body that is prescribed by the regulations for the purposes of this paragraph.
- (3) Subsection (1) applies whether or not the FWC holds a hearing in relation to the matter.

281A How employees, employers and employee organisations are to be described

- (1) This section applies if a provision of this Part requires or permits an instrument of any kind to specify the employers, employees or employee organisations covered, or who will be covered, by a workplace determination or other instrument.
- (2) The employees may be specified by class or by name.
- (3) The employers and employee organisations must be specified by name.
- (4) Without limiting the way in which a class may be described for the purposes of subsection (2), the class may be described by reference to one or more of the following:
 - (a) a particular industry or part of an industry;
 - (b) a particular kind of work;
 - (c) a particular type of employment;
 - (d) a particular classification, job level or grade.

Part 2-6—Minimum wages

Division 1—Introduction

282 Guide to this Part

This Part provides for the FWC (constituted by an Expert 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.

Division 2 provides for the minimum wages objective. This requires the FWC to establish and maintain a safety net of fair minimum wages, taking into account certain social and economic factors.

Division 3 provides for the FWC (constituted by an Expert Panel) to conduct annual wage reviews. In an annual wage review, the FWC 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).

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.

National minimum wages and special national minimum wages apply to award/agreement free employees. However, they are also relevant to other employees as follows:

- (a) in setting or varying modern award minimum wages, the FWC 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*

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

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

Division 2—Overarching provisions

284 The minimum wages objective

What is the minimum wages objective?

- (1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:
 - (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
 - (b) promoting social inclusion through increased workforce participation; and
 - (c) relative living standards and the needs of the low paid; and
 - (d) the principle of equal remuneration for work of equal or comparable value; and
 - (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the ***minimum wages objective***.

When does the minimum wages objective apply?

- (2) The minimum wages objective applies to the performance or exercise of:
 - (a) the FWC's functions or powers under this Part; and
 - (b) the FWC's functions or powers under Part 2-3, so far as they relate to setting, varying or revoking modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the modern awards objective also applies (see section 134).

Meaning of modern award minimum wages

- (3) **Modern award minimum wages** are the rates of minimum wages in modern awards, including:
- (a) wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; and
 - (b) casual loadings; and
 - (c) piece rates.

Meaning of setting and varying modern award minimum wages

- (4) **Setting** modern award minimum wages is the initial setting of one or more new modern award minimum wages in a modern award, either in the award as originally made or by a later variation of the award. **Varying** modern award minimum wages is varying the current rate of one or more modern award minimum wages.

Division 3—Annual wage reviews

Subdivision A—Main provisions

285 Annual wage reviews to be conducted

- (1) The FWC must conduct and complete an *annual wage review* in each financial year.

Note 1: The FWC must be constituted by an Expert Panel to conduct annual wage reviews, and to make determinations and orders in those reviews (see section 617).

Note 2: The President may give directions about the conduct of annual wage reviews (see section 582).

- (2) In an annual wage review, the FWC:

(a) must review:

(i) modern award minimum wages; and

(ii) the national minimum wage order; and

(b) may make one or more determinations varying modern awards to set, vary or revoke modern award minimum wages; and

(c) must make a national minimum wage order.

Note: For provisions about national minimum wage orders, see Division 4.

- (3) In exercising its power in an annual wage review to make determinations referred to in paragraph (2)(b), the FWC must take into account the rate of the national minimum wage that it proposes to set in the review.

286 When annual wage review determinations varying modern awards come into operation

Determinations generally come into operation on 1 July

- (1) A determination (a *variation determination*) varying one or more modern awards to set, vary or revoke modern award minimum

wages that is made in an annual wage review comes into operation on 1 July in the next financial year.

Later operation of determinations in exceptional circumstances

- (2) If the FWC is satisfied that there are exceptional circumstances justifying why a variation determination should not come into operation until a later day, the FWC may specify that later day as the day on which it comes into operation. However, the determination must be limited just to the particular situation to which the exceptional circumstances relate.

Note: This may mean that the FWC needs to make more than one determination, if different circumstances apply to different employees.

- (3) If a later day is so specified, the variation determination comes into operation on that later day.

Effect of determinations cannot be deferred

- (4) The FWC cannot provide for the effect of a variation determination on modern award minimum wages to be deferred to a day that is later than the day on which the determination comes into operation.

Determinations take effect from first full pay period

- (5) A variation 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 the day the determination comes into operation.

287 When national minimum wage orders come into operation etc.

Orders come into operation on 1 July

- (1) A national minimum wage order that is made in an annual wage review comes into operation on 1 July in the next financial year (the *year of operation*).

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Setting of different wages or loadings only permitted in exceptional circumstances

- (2) The national minimum wage or the casual loading for award/agreement free employees set by the order must be the same for all employees, unless:
 - (a) the FWC is satisfied that there are exceptional circumstances justifying setting different wages or loadings; and
 - (b) the setting of different wages or loadings is limited just to the extent necessary because of the particular situation to which the exceptional circumstances relate.
- (3) A special national minimum wage set by the order for a specified class of employees must be the same for all employees in that class, unless:
 - (a) the FWC is satisfied that there are exceptional circumstances justifying setting different wages; and
 - (b) the setting of different wages is limited just to the extent necessary because of the particular situation to which the exceptional circumstances relate.

Adjustments taking effect during year of operation only permitted in exceptional circumstances

- (4) The order may provide that an adjustment of the national minimum wage, the casual loading for award/agreement free employees, or a special national minimum wage, set by the order takes effect (whether for some or all employees to whom that wage or loading applies) on a specified day in the year of operation that is later than 1 July, but only if:
 - (a) the FWC is satisfied that there are exceptional circumstances justifying the adjustment taking effect on that day; and
 - (b) the adjustment is limited just to the particular situation to which the exceptional circumstances relate.

When orders take effect

- (5) The order takes effect in relation to a particular employee from the start of the employee's first full pay period that starts on or after 1 July in the year of operation. However, an adjustment referred to in subsection (4) takes effect in relation to a particular employee from the start of the employee's first full pay period that starts on or after the day specified as referred to in that subsection.

Subdivision B—Provisions about conduct of annual wage reviews

288 General

This Subdivision contains some specific provisions relevant to the conduct of annual wage reviews. For other provisions relevant to the conduct of annual wage reviews, see the general provisions about the FWC's processes in Part 5-1.

Note: Relevant provisions of Part 5-1 include the following:

- (a) section 582 (which deals with the President's power to give directions);
- (b) section 590 (which deals with the FWC's discretion to inform itself as it considers appropriate, including by commissioning research);
- (c) section 596 (which deals with being represented in a matter before the FWC);
- (d) section 601 (which deals with writing and publication requirements).

289 Everyone to have a reasonable opportunity to make and comment on submissions

- (1) The FWC must, in relation to each annual wage review, ensure that all persons and bodies have a reasonable opportunity to make written submissions to the FWC for consideration in the review.
- (2) The FWC must publish all submissions made to the FWC for consideration in the review.

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- (3) However, if a submission made by a person or body includes information that is claimed by the person or body to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive, the FWC:
- (a) may decide not to publish the information; and
 - (b) may instead publish:
 - (i) a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive); or
 - (ii) if the FWC considers that it is not practicable to prepare a summary that would comply with subparagraph (i)—a statement that confidential or commercially sensitive information in the submission has not been published.
- (4) A reference in this Act (other than in this section) to a submission under this section includes a reference to a summary or statement referred to in paragraph (3)(b).
- (5) The FWC must ensure that all persons and bodies have a reasonable opportunity to make comments to the FWC, for consideration in the review, on the material published under subsections (2) and (3).
- (6) The publishing of material under subsections (2) and (3) may be on the FWC's website or by any other means that the FWC considers appropriate.

290 President may direct investigations and reports

- (1) The President may give a direction under section 582 requiring that a matter be investigated, and that a report about the matter be prepared, for consideration in an annual wage review.
- (2) The direction:
- (a) may be given to:
 - (i) an Expert Panel; or

- (ii) an Expert Panel Member; or
 - (iii) a Full Bench that includes one or more Expert Panel Members; and
- (b) must require the report to be given to the Expert Panel that is constituted to conduct the annual wage review, unless the direction is given to that Expert Panel.

291 Research must be published

- (1) If the FWC undertakes or commissions research for the purposes of an annual wage review, the FWC must publish the research so that submissions can be made addressing issues covered by the research.
- (2) The publication may be on the FWC's website or by any other means that the FWC considers appropriate.

292 Varied wage rates must be published

- (1) If the FWC makes one or more determinations varying modern award minimum wages in an annual wage review, the FWC must publish the rates of those wages as so varied:
 - (a) for wages in a modern award (other than a modern enterprise award or a State reference public sector modern award)—before 1 July in the next financial year; and
 - (b) for wages in a modern enterprise award or a State reference public sector modern award—as soon as practicable.

Note: The FWC must also publish the modern award as varied (see section 168).

- (2) The publication may be on the FWC's website or by any other means that the FWC considers appropriate.

Division 4—National minimum wage orders

293 Contravening a national minimum wage order

An employer must not contravene a term of a national minimum wage order.

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

294 Content of national minimum wage order—main provisions

Setting minimum wages and the casual loading

- (1) A national minimum wage order:
 - (a) must set the national minimum wage; and
 - (b) must set special national minimum wages for all award/agreement free employees in the following classes:
 - (i) junior employees;
 - (ii) employees to whom training arrangements apply;
 - (iii) employees with a disability; and
 - (c) must set the casual loading for award/agreement free employees.

Note: A national minimum wage order must be made in each annual wage review (see section 285).

Requiring employers to pay minimum wages and the casual loading

- (2) The order:
 - (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
 - (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
 - (c) must require employers to pay, to award/agreement free employees who are casual employees, a casual loading that at

least equals the casual loading for award/agreement free employees (as applied to the employees' base rates of pay).

What employees does the national minimum wage apply to?

- (3) The national minimum wage applies to all award/agreement free employees who are not:
- (a) junior employees; or
 - (b) employees to whom training arrangements apply; or
 - (c) employees with a disability.

What employees does a special national minimum wage apply to?

- (4) A special national minimum wage applies to the employees to whom it is expressed in the order to apply. Those employees must be:
- (a) all junior employees who are award/agreement free employees, or a specified class of those employees; or
 - (b) all employees to whom training arrangements apply and who are award/agreement free employees, or a specified class of those employees; or
 - (c) all employees with a disability who are award/agreement free employees, or a specified class of those employees.

295 Content of national minimum wage order—other matters

Expressing minimum wages and the casual loading

- (1) In a national minimum wage order:
- (a) the national minimum wage, and the special national minimum wages, set by the order must be expressed in a way that produces a monetary amount per hour; and
 - (b) the casual loading for award/agreement free employees must be expressed as a percentage.

Note: The means by which the national minimum wage or a special national minimum wage may be expressed include:

- (a) a monetary amount per hour; or
- (b) a monetary amount for a specified number of hours; or

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- (c) a method for calculating a monetary amount per hour.

Terms about how the order applies

- (2) The order may also include terms about how the order, or any of the requirements in it, applies.

296 Variation of national minimum wage order to remove ambiguity or uncertainty or correct error

Permitted variations

- (1) The FWC may make a determination varying a national minimum wage order to remove an ambiguity or uncertainty or to correct an error.

Note: The FWC must be constituted by an Expert Panel to vary a national minimum wage order (see section 617).

- (2) If the FWC varies a national minimum wage order, the FWC must, as soon as practicable, publish the order as varied on its website or by any other means that the FWC considers appropriate.

No other variation or revocation permitted

- (3) A national minimum wage order:
(a) cannot be varied except as referred to in subsection (1); and
(b) cannot be revoked.

297 When determinations varying national minimum wage orders come into operation

Determinations come into operation on specified day

- (1) A determination varying a national minimum wage order under section 296 comes into operation on the day specified in the determination.

Note: For when a national minimum wage order comes into operation, see section 287.

- (2) The specified day must not be earlier than the day on which the determination is made, unless the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

Determinations take effect from first full pay period

- (3) 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 the day the determination comes into operation.

298 Special rule about retrospective variations of national minimum wage orders

Application of this section

- (1) This section applies if a determination varying a national minimum wage order has a retrospective effect because it comes into operation under subsection 297(2) on a day before the day on which the determination is made.

No creation of liability to pay pecuniary penalty for past conduct

- (2) If:
- (a) a person engaged in conduct before the determination was made; and
 - (b) but for the retrospective effect of the determination, the conduct would not have contravened a term of the national minimum wage order or an enterprise agreement;

a court must not order the person to pay a pecuniary penalty under Division 2 of Part 4-1 in relation to the conduct, on the grounds that the conduct contravened a term of the national minimum wage order or enterprise agreement.

Note 1: This subsection does not affect the powers of a court to make other kinds of orders under Division 2 of Part 4-1.

Note 2: A determination varying a national minimum wage order could result in a contravention of a term of an enterprise agreement because of the effect of subsection 206(4).

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299 When a national minimum wage order is in operation

A national minimum wage order continues in operation until the next national minimum wage order comes into operation.

Note: For when a national minimum wage order comes into operation, see section 287.

Part 2-7—Equal remuneration

Division 1—Introduction

300 Guide to this Part

This Part allows the FWC to make orders to ensure that there will be equal remuneration for men and women workers for work of equal or comparable value.

301 Meanings of *employee* and *employer*

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

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

Division 2—Equal remuneration orders

302 FWC may make an order requiring equal remuneration

Power to make an equal remuneration order

- (1) The FWC may make any order (an ***equal remuneration order***) it 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.

Meaning of equal remuneration for work of equal or comparable value

- (2) ***Equal remuneration for work of equal or comparable value*** means equal remuneration for men and women workers for work of equal or comparable value.

Who may apply for an equal remuneration order

- (3) The FWC may make the equal remuneration order only on application by any of the following:
 - (a) an employee to whom the order will apply;
 - (b) an employee organisation that is entitled to represent the industrial interests of an employee to whom the order will apply;
 - (c) the Sex Discrimination Commissioner.

FWC must take into account orders and determinations made in annual wage reviews

- (4) In deciding whether to make an equal remuneration order, the FWC must take into account:
 - (a) orders and determinations made by the FWC in annual wage reviews; and
 - (b) the reasons for those orders and determinations.

Note: The FWC must be constituted by an Expert Panel in annual wage reviews (see section 617).

Restriction on power to make an equal remuneration order

- (5) However, the FWC 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.

303 Equal remuneration order may increase, but must not reduce, rates of remuneration

- (1) Without limiting subsection 302(1), an equal remuneration order may provide for such increases in rates of remuneration as the FWC 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.
- (2) An equal remuneration order must not provide for a reduction in an employee's rate of remuneration.

304 Equal remuneration order may implement equal remuneration in stages

An equal remuneration order may implement equal remuneration for work of equal or comparable value in stages (as provided in the order) if the FWC considers that it is not feasible to implement equal remuneration for work of equal or comparable value when the order comes into operation.

305 Contravening an equal remuneration order

An employer must not contravene a term of an equal remuneration order.

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 the FWC

A term of a modern award, an enterprise agreement or an FWC order has no effect in relation to an employee to the extent that it is less beneficial to the employee than a term of an equal remuneration order that applies to the employee.

Part 2-8—Transfer of business

Division 1—Introduction

307 Guide to this Part

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. (For a transfer of business from a non-national system employer that is a State public sector employer to a national system employer, see Part 6-3A.)

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*.

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.

Division 3 provides for the FWC to make orders in relation to a transfer of business.

308 Meanings of *employee* and *employer*

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

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

309 Object of this Part

The object of this Part is to provide a balance between:

- (a) the protection of employees' terms and conditions of employment under enterprise agreements, certain modern awards and certain other instruments; and
- (b) the interests of employers in running their enterprises efficiently;

if there is a transfer of business from one employer to another employer.

Division 2—Transfer of instruments

310 Application of this Division

This Division provides for the transfer of rights and obligations under enterprise agreements, certain modern awards and certain other instruments if there is a transfer of business from an old employer to a new employer.

311 When does a transfer of business occur

Meanings of transfer of business, old employer, new employer and transferring work

- (1) There is a **transfer of business** from an employer (the **old employer**) to another employer (the **new employer**) if the following requirements are satisfied:
 - (a) the employment of an employee of the old employer has terminated;
 - (b) within 3 months after the termination, the employee becomes employed by the new employer;
 - (c) the work (the **transferring work**) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;
 - (d) there is a connection between the old employer and the new employer as described in any of subsections (3) to (6).

Meaning of transferring employee

- (2) An employee in relation to whom the requirements in paragraphs (1)(a), (b) and (c) are satisfied is a **transferring employee** in relation to the transfer of business.

Transfer of assets from old employer to new employer

- (3) There is a connection between the old employer and the new employer if, in accordance with an arrangement between:

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- (a) the old employer or an associated entity of the old employer;
and
- (b) the new employer or an associated entity of the new employer;
the new employer, or the associated entity of the new employer, owns or has the beneficial use of some or all of the assets (whether tangible or intangible):
- (c) that the old employer, or the associated entity of the old employer, owned or had the beneficial use of; and
- (d) that relate to, or are used in connection with, the transferring work.

Old employer outsources work to new employer

- (4) There is a connection between the old employer and the new employer if the transferring work is performed by one or more transferring employees, as employees of the new employer, because the old employer, or an associated entity of the old employer, has outsourced the transferring work to the new employer or an associated entity of the new employer.

New employer ceases to outsource work to old employer

- (5) There is a connection between the old employer and the new employer if:
 - (a) the transferring work had been performed by one or more transferring employees, as employees of the old employer, because the new employer, or an associated entity of the new employer, had outsourced the transferring work to the old employer or an associated entity of the old employer; and
 - (b) the transferring work is performed by those transferring employees, as employees of the new employer, because the new employer, or the associated entity of the new employer, has ceased to outsource the work to the old employer or the associated entity of the old employer.

New employer is associated entity of old employer

- (6) There is a connection between the old employer and the new employer if the new employer is an associated entity of the old employer when the transferring employee becomes employed by the new employer.

312 Instruments that may transfer

Meaning of transferable instrument

- (1) Each of the following is a **transferable instrument**:
- (a) an enterprise agreement that has been approved by the FWC;
 - (b) a workplace determination;
 - (c) a named employer award.

Meaning of named employer award

- (2) Each of the following is a **named employer award**:
- (a) a modern award (including a modern enterprise award) that is expressed to cover one or more named employers;
 - (b) a modern enterprise award that is expressed to cover one or more specified classes of employers (other than a modern enterprise award that is expressed to relate to one or more enterprises as described in paragraph 168A(2)(b)).

Note: Paragraph 168A(2)(b) deals with employers that carry on similar business activities under the same franchise.

313 Transferring employees and new employer covered by transferable instrument

- (1) If a transferable instrument covered the old employer and a transferring employee immediately before the termination of the transferring employee's employment with the old employer, then:
- (a) the transferable instrument covers the new employer and the transferring employee in relation to the transferring work after the time (the **transfer time**) the transferring employee becomes employed by the new employer; and

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- (b) while the transferable instrument covers the new employer and the transferring employee in relation to the transferring work, no other enterprise agreement or named employer award that covers the new employer at the transfer time covers the transferring employee in relation to that work.
- (2) To avoid doubt, a transferable instrument that covers the new employer and a transferring employee under paragraph (1)(a) includes any individual flexibility arrangement that had effect as a term of the transferable instrument immediately before the termination of the transferring employee's employment with the old employer.
- (3) This section has effect subject to any FWC order under subsection 318(1).

314 New non-transferring employees of new employer may be covered by transferable instrument

- (1) If:
 - (a) a transferable instrument covers the new employer because of paragraph 313(1)(a); and
 - (b) after the transferable instrument starts to cover the new employer, the new employer employs a non-transferring employee; and
 - (c) the non-transferring employee performs the transferring work; and
 - (d) at the time the non-transferring employee is employed, no other enterprise agreement or modern award covers the new employer and the non-transferring employee in relation to that work;then the transferable instrument covers the new employer and the non-transferring employee in relation to that work.
- (2) A *non-transferring employee* of a new employer, in relation to a transfer of business, is an employee of the new employer who is not a transferring employee.

- (3) This section has effect subject to any FWC order under subsection 319(1).

315 Organisations covered by transferable instrument

Employer organisation covered by named employer award

- (1) If:
- (a) a named employer award covers the new employer because of paragraph 313(1)(a); and
 - (b) the named employer award covered an employer organisation in relation to the old employer immediately before the termination of a transferring employee's employment with the old employer;
- then the named employer award covers the employer organisation in relation to the new employer.

Employee organisation covered by named employer award

- (2) If:
- (a) a named employer award covers the new employer and a transferring employee because of paragraph 313(1)(a); and
 - (b) the named employer award covered an employee organisation in relation to the transferring employee immediately before the termination of the transferring employee's employment with the old employer;
- then the named employer award covers the employee organisation in relation to:
- (c) the transferring employee; and
 - (d) any non-transferring employee of the new employer who:
 - (i) is covered by the named employer award because of a provision of this Part or an FWC order; and
 - (ii) performs the same work as the transferring employee.

Employee organisation covered by enterprise agreement

- (3) To avoid doubt, if:
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- (a) an enterprise agreement covers a transferring employee or a non-transferring employee because of a provision of this Part or an FWC order; and
 - (b) the enterprise agreement covered an employee organisation immediately before the termination of the transferring employee's employment with the old employer;
- then the enterprise agreement covers the employee organisation.

316 Transferring employees who are high income employees

- (1) This section applies if:
 - (a) the old employer had given a guarantee of annual earnings for a guaranteed period to a transferring employee; and
 - (b) the transferring employee was a high income employee immediately before the termination of the transferring employee's employment with the old employer; and
 - (c) some of the guaranteed period occurs after the time (the *transfer time*) the transferring employee becomes employed by the new employer; and
 - (d) an enterprise agreement does not apply to the transferring employee in relation to the transferring work at the transfer time.
- (2) The guarantee of annual earnings has effect after the transfer time (except as provided in this section) as if it had been given to the transferring employee by the new employer.
- (3) The new employer is not required to comply with the guarantee of annual earnings in relation to any part of the guaranteed period before the transfer time.
- (4) The new employer is not required to comply with the guarantee of annual earnings to the extent that it requires the new employer to pay an amount of earnings to the transferring employee, in relation to the part of the guaranteed period after the transfer time, at a rate that is more than the annual rate of the guarantee of annual earnings.

- (5) If:
- (a) the transferring employee is entitled to non-monetary benefits under the guarantee of annual earnings after the transfer time; and
 - (b) it is not practicable for the new employer to provide those benefits to the transferring employee;
- then the guarantee of annual earnings is taken to be varied so that, instead of the entitlement to those benefits, the transferring employee is entitled to an amount of money that is equivalent to the agreed money value of those benefits.
- (6) This section does not affect the rights and obligations of the old employer that arose before the transfer time in relation to the guarantee of annual earnings.

Division 3—Powers of the FWC

317 FWC may make orders in relation to a transfer of business

This Division provides for the FWC to make certain orders if there is, or is likely to be, a transfer of business from an old employer to a new employer.

318 Orders relating to instruments covering new employer and transferring employees

Orders that the FWC may make

- (1) The FWC may make the following orders:
 - (a) an order that a transferable instrument that would, or would be likely to, cover the new employer and a transferring employee because of paragraph 313(1)(a) does not, or will not, cover the new employer and the transferring employee;
 - (b) an order that an enterprise agreement or a named employer award that covers the new employer covers, or will cover, the transferring employee.

Who may apply for an order

- (2) The FWC may make the order only on application by any of the following:
 - (a) the new employer or a person who is likely to be the new employer;
 - (b) a transferring employee, or an employee who is likely to be a transferring employee;
 - (c) if the application relates to an enterprise agreement—an employee organisation that is, or is likely to be, covered by the agreement;
 - (d) if the application relates to a named employer award—an employee organisation that is entitled to represent the

industrial interests of an employee referred to in paragraph (b).

Matters that the FWC must take into account

- (3) In deciding whether to make the order, the FWC must take into account the following:
- (a) the views of:
 - (i) the new employer or a person who is likely to be the new employer; and
 - (ii) the employees who would be affected by the order;
 - (b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;
 - (c) if the order relates to an enterprise agreement—the nominal expiry date of the agreement;
 - (d) whether the transferable instrument would have a negative impact on the productivity of the new employer’s workplace;
 - (e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;
 - (f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;
 - (g) the public interest.

Restriction on when order may come into operation

- (4) The order must not come into operation in relation to a particular transferring employee before the later of the following:
- (a) the time when the transferring employee becomes employed by the new employer;
 - (b) the day on which the order is made.

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319 Orders relating to instruments covering new employer and non-transferring employees

Orders that the FWC may make

- (1) The FWC may make the following orders:
- (a) an order that a transferable instrument that would, or would be likely to, cover the new employer and a non-transferring employee because of subsection 314(1) does not, or will not, cover the non-transferring employee;
 - (b) an order that a transferable instrument that covers, or is likely to cover, the new employer, because of a provision of this Part, covers, or will cover, a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;
 - (c) an order that an enterprise agreement or a modern award that covers the new employer does not, or will not, cover a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer.

Note: Orders may be made under paragraphs (1)(b) and (c) in relation to a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer, whether or not the non-transferring employee became employed by the new employer before or after the transferable instrument referred to in paragraph (1)(b) started to cover the new employer.

Who may apply for an order

- (2) The FWC may make the order only on application by any of the following:
- (a) the new employer or a person who is likely to be the new employer;
 - (b) a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;
 - (c) if the application relates to an enterprise agreement—an employee organisation that is, or is likely to be, covered by the agreement;

- (d) if the application relates to a named employer award—an employee organisation that is entitled to represent the industrial interests of an employee referred to in paragraph (b).

Matters that the FWC must take into account

- (3) In deciding whether to make the order, the FWC must take into account the following:
 - (a) the views of:
 - (i) the new employer or a person who is likely to be the new employer; and
 - (ii) the employees who would be affected by the order;
 - (b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;
 - (c) if the order relates to an enterprise agreement—the nominal expiry date of the agreement;
 - (d) whether the transferable instrument would have a negative impact on the productivity of the new employer’s workplace;
 - (e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;
 - (f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;
 - (g) the public interest.

Restriction on when order may come into operation

- (4) The order must not come into operation in relation to a particular non-transferring employee before the later of the following:
 - (a) the time when the non-transferring employee starts to perform the transferring work for the new employer;
 - (b) the day on which the order is made.

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320 Variation of transferable instruments

Application of this section

- (1) This section applies in relation to a transferable instrument that covers, or is likely to cover, the new employer because of a provision of this Part.

Power to vary transferable instrument

- (2) The FWC may vary the transferable instrument:
- (a) to remove terms that the FWC is satisfied are not, or will not be, capable of meaningful operation because of the transfer of business to the new employer; or
 - (b) to remove an ambiguity or uncertainty about how a term of the instrument operates if:
 - (i) the ambiguity or uncertainty has arisen, or will arise, because of the transfer of business to the new employer; and
 - (ii) the FWC is satisfied that the variation will remove the ambiguity or uncertainty; or
 - (c) to enable the transferable instrument to operate in a way that is better aligned to the working arrangements of the new employer's enterprise.

Who may apply for a variation

- (3) The FWC may make the variation only on application by:
- (a) a person who is, or is likely to be, covered by the transferable instrument; or
 - (b) if the application is to vary a named employer award—an employee organisation that is entitled to represent the industrial interests of an employee who is, or is likely to be, covered by the named employer award.

Matters that the FWC must take into account

- (4) In deciding whether to make the variation, the FWC must take into account the following:
- (a) the views of:
 - (i) the new employer or a person who is likely to be the new employer; and
 - (ii) the employees who would be affected by the transferable instrument as varied;
 - (b) whether any employees would be disadvantaged by the transferable instrument as varied in relation to their terms and conditions of employment;
 - (c) if the transferable instrument is an enterprise agreement—the nominal expiry date of the agreement;
 - (d) whether the transferable instrument, without the variation, would have a negative impact on the productivity of the new employer's workplace;
 - (e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument, without the variation;
 - (f) the degree of business synergy between the transferable instrument, without the variation, and any workplace instrument that already covers the new employer;
 - (g) the public interest.

Restriction on when variation may come into operation

- (5) A variation of a transferable instrument under subsection (2) must not come into operation before the later of the following:
- (a) the time when the transferable instrument starts to cover the new employer;
 - (b) the day on which the variation is made.

Part 2-9—Other terms and conditions of employment

Division 1—Introduction

321 Guide to this Part

This Part deals with other terms and conditions of employment.

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.

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.

322 Meanings of *employee* and *employer*

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

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

Division 2—Payment of wages etc.

323 Method and frequency of payment

- (1) An employer must pay an employee amounts payable to the employee in relation to the performance of work:
- (a) in full (except as provided by section 324); and
 - (b) in money by one, or a combination, of the methods referred to in subsection (2); and
 - (c) at least monthly.

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

Note 2: Amounts referred to in this subsection include the following if they become payable during a relevant period:

- (a) incentive-based payments and bonuses;
- (b) loadings;
- (c) monetary allowances;
- (d) overtime or penalty rates;
- (e) leave payments.

- (2) The methods are as follows:
- (a) cash;
 - (b) cheque, money order, postal order or similar order, payable to the employee;
 - (c) the use of an electronic funds transfer system to credit an account held by the employee;
 - (d) a method authorised under a modern award or an enterprise agreement.
- (3) Despite paragraph (1)(b), if a modern award or an enterprise agreement specifies a particular method by which the money must be paid, then the employer must pay the money by that method.

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

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324 Permitted deductions

- (1) An employer may deduct an amount from an amount payable to an employee in accordance with subsection 323(1) if:
- (a) the deduction is authorised in writing by the employee and is principally for the employee's benefit; or
 - (b) the deduction is authorised by the employee in accordance with an enterprise agreement; or
 - (c) the deduction is authorised by or under a modern award or an FWC order; or
 - (d) the deduction is authorised by or under a law of the Commonwealth, a State or a Territory, or an order of a court.

Note 1: A deduction in accordance with a salary sacrifice or other arrangement, under which an employee chooses to:

- (a) forgo an amount payable to the employee in relation to the performance of work; but
- (b) receive some other form of benefit or remuneration;

will be permitted if it is made in accordance with this section and the other provisions of this Division.

Note 2: Certain terms of modern awards, enterprise agreements and contracts of employment relating to deductions have no effect (see section 326). A deduction made in accordance with such a term will not be authorised for the purposes of this section.

- (2) An authorisation for the purposes of paragraph (1)(a):
- (a) must specify the amount of the deduction; and
 - (b) may be withdrawn in writing by the employee at any time.
- (3) Any variation in the amount of the deduction must be authorised in writing by the employee.

325 Unreasonable requirements to spend or pay amount

- (1) An employer must not directly or indirectly require an employee to spend, or pay to the employer or another person, an amount of the employee's money or the whole or any part of an amount payable to the employee in relation to the performance of work, if:
- (a) the requirement is unreasonable in the circumstances; and

- (b) for a payment—the payment is directly or indirectly for the benefit of the employer or a party related to the employer.

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

- (1A) An employer (the *prospective employer*) must not directly or indirectly require another person (the *prospective employee*) to spend, or pay to the prospective employer or any other person, an amount of the prospective employee's money if:
- (a) the requirement is in connection with employment or potential employment of the prospective employee by the prospective employer; and
 - (b) the requirement is unreasonable in the circumstances; and
 - (c) the payment is directly or indirectly for the benefit of the prospective employer or a party related to the prospective employer.

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

- (2) The regulations may prescribe circumstances in which a requirement referred to in subsection (1) or (1A) is or is not reasonable.

326 Certain terms have no effect

Unreasonable deductions for benefit of employer

- (1) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work, if the deduction is:
- (a) directly or indirectly for the benefit of the employer or a party related to the employer; and
 - (b) unreasonable in the circumstances.
- (2) The regulations may prescribe circumstances in which a deduction referred to in subsection (1) is or is not reasonable.

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Unreasonable requirements to spend or pay an amount

- (3) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:
- (a) permits, or has the effect of permitting, an employer to make a requirement that would contravene subsection 325(1); or
 - (b) directly or indirectly requires an employee to spend or pay an amount, if the requirement would contravene subsection 325(1) if it had been made by an employer.

Deductions or payments in relation to employees under 18

- (4) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:
- (a) permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work; or
 - (b) requires, or has the effect of requiring, an employee to make a payment to an employer or another person;
- if the employee is under 18 and the deduction or payment is not agreed to in writing by a parent or guardian of the employee.

327 Things given or provided, and amounts required to be spent or paid, in contravention of this Division

In proceedings for recovery of an amount payable to an employee in relation to the performance of work:

- (a) anything given or provided by the employer contrary to paragraph 323(1)(b) and subsection 323(3) is taken never to have been given or provided to the employee; and
- (b) any amount that the employee has been required to spend or pay contrary to subsection 325(1), or in accordance with a term to which subsection 326(3) applies, is taken to be a deduction, from an amount payable to the employee, made by the employer otherwise than in accordance with section 324.

Division 3—Guarantee of annual earnings

328 Employer obligations in relation to guarantee of annual earnings

Employer must comply with guarantee

- (1) An employer that has given a guarantee of annual earnings to an employee must (subject to any reductions arising from circumstances in which the employer is required or entitled to reduce the employee's earnings) comply with the guarantee during any period during which the employee:
 - (a) is a high income employee of the employer; and
 - (b) is covered by a modern award that is in operation.

Note 1: Examples of circumstances in which the employer is required or entitled to reduce the employee's earnings are unpaid leave or absence, and periods of industrial action (see Division 9 of Part 3-3).

Note 2: This subsection is a civil remedy provision (see Part 4-1).

Employer must comply with guarantee for period before termination

- (2) If:
 - (a) the employment of a high income employee is terminated before the end of the guaranteed period; and
 - (b) either or both of the following apply:
 - (i) the employer terminates the employment;
 - (ii) the employee becomes a transferring employee in relation to a transfer of business from the employer to a new employer, and the guarantee of annual earnings has effect under subsection 316(2) as if it had been given to the employee by the new employer; and
 - (c) the employee is covered by a modern award that is in operation at the time of the termination;

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the employer must pay earnings to the employee in relation to the part of the guaranteed period before the termination at the annual rate of the guarantee of annual earnings.

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

Employer must give notice of consequences

- (3) Before or at the time of giving a guarantee of annual earnings to an employee covered by a modern award that is in operation, an employer must notify the employee in writing that a modern award will not apply to the employee during any period during which the annual rate of the guarantee of annual earnings exceeds the high income threshold.

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

329 High income employee

- (1) A full-time employee is a **high income employee** of an employer at a time if:
- (a) the employee has a guarantee of annual earnings for the guaranteed period; and
 - (b) the time occurs during the period; and
 - (c) the annual rate of the guarantee of annual earnings exceeds the high income threshold at that time.
- (2) An employee other than a full-time employee is a **high-income employee** of an employer at a time if:
- (a) the employee has a guarantee of annual earnings for the guaranteed period; and
 - (b) the time occurs during the period; and
 - (c) the annual rate of the guarantee of annual earnings would have exceeded the high income threshold at that time if the employee were employed on a full-time basis at the same rate of earnings.

- (3) To avoid doubt, the employee does not have a guarantee of annual earnings for the guaranteed period if the employer revokes the guarantee of annual earnings with the employee's agreement.

330 Guarantee of annual earnings and annual rate of guarantee

- (1) An undertaking given by an employer to an employee is a **guarantee of annual earnings** if:
- (a) the employee is covered by a modern award that is in operation; and
 - (b) the undertaking is an undertaking in writing to pay the employee an amount of earnings in relation to the performance of work during a period of 12 months or more; and
 - (c) the employee agrees to accept the undertaking, and agrees with the amount of the earnings; and
 - (d) the undertaking and the employee's agreement are given before the start of the period, and within 14 days after:
 - (i) the day the employee is employed; or
 - (ii) a day on which the employer and employee agree to vary the terms and conditions of the employee's employment; and
 - (e) an enterprise agreement does not apply to the employee's employment at the start of the period.
- (2) However, if:
- (a) an employee is employed for a period shorter than 12 months; or
 - (b) an employee will perform duties of a particular kind for a period shorter than 12 months;
- the undertaking may be given for that shorter period.
- (3) The **annual rate** of the guarantee of annual earnings is the annual rate of the earnings covered by the undertaking.

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331 Guaranteed period

The *guaranteed period* for a guarantee of annual earnings is the period that:

- (a) starts at the start of the period of the undertaking that is the guarantee of annual earnings; and
- (b) ends at the earliest of the following:
 - (i) the end of that period;
 - (ii) an enterprise agreement starting to apply to the employment of the employee;
 - (iii) the employer revoking the guarantee of annual earnings with the employee's agreement.

332 Earnings

- (1) An employee's *earnings* include:
 - (a) the employee's wages; and
 - (b) amounts applied or dealt with in any way on the employee's behalf or as the employee directs; and
 - (c) the agreed money value of non-monetary benefits; and
 - (d) amounts or benefits prescribed by the regulations.
- (2) However, an employee's *earnings* do not include the following:
 - (a) payments the amount of which cannot be determined in advance;
 - (b) reimbursements;
 - (c) contributions to a superannuation fund to the extent that they are contributions to which subsection (4) applies;
 - (d) amounts prescribed by the regulations.

Note: Some examples of payments covered by paragraph (a) are commissions, incentive-based payments and bonuses, and overtime (unless the overtime is guaranteed).

- (3) *Non-monetary benefits* are benefits other than an entitlement to a payment of money:
 - (a) to which the employee is entitled in return for the performance of work; and

- (b) for which a reasonable money value has been agreed by the employee and the employer;
but does not include a benefit prescribed by the regulations.
- (4) This subsection applies to contributions that the employer makes to a superannuation fund to the extent that one or more of the following applies:
- (a) the employer would have been liable to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* in relation to the person if the amounts had not been so contributed;
 - (b) the employer is required to contribute to the fund for the employee's benefit in relation to a defined benefit interest (within the meaning of section 291-175 of the *Income Tax Assessment Act 1997*) of the employee;
 - (c) the employer is required to contribute to the fund for the employee's benefit under a law of the Commonwealth, a State or a Territory.

333 High income threshold

- (1) Subject to this section, the **high income threshold** is the amount prescribed by, or worked out in the manner prescribed by, the regulations.
- (2) A regulation made for the purposes of subsection (1) has no effect to the extent that it would have the effect of reducing the amount of the high income threshold.
- (3) If:
- (a) in prescribing a manner in which the high income threshold is worked out, regulations made for the purposes of subsection (1) specify a particular matter or state of affairs; and
 - (b) as a result of a change in the matter or state of affairs, the amount of the high income threshold worked out in that manner would, but for this subsection, be less than it was on the last occasion on which this subsection did not apply;

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the *high income threshold* is the amount that it would be if the change had not occurred.

333A Prospective employees

If:

- (a) an employer, or a person who may become an employer, gives to another person an undertaking that would have been a guarantee of annual earnings if the other person had been the employer's or person's employee; and
- (b) the other person subsequently becomes the employer's or person's employee; and
- (c) the undertaking relates to the work that the other person performs for the employer or person;

this Division applies in relation to the undertaking, after the other person becomes the employer's or person's employee, as if the other person had been the employer's or person's employee at the time the undertaking was given.

Chapter 3—Rights and responsibilities of employees, employers, organisations etc.

Part 3-1—General protections

Division 1—Introduction

334 Guide to this Part

This Part provides general workplace protections.

Division 2 sets out the circumstances in which this Part applies.

Division 3 protects workplace rights, and the exercise of those rights.

Division 4 protects freedom of association and involvement in lawful industrial activities.

Division 5 provides other protections, including protection from discrimination.

Division 6 deals with sham arrangements.

Division 7 sets out rules for the purposes of establishing contraventions of this Part.

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 the FWC.

335 Meanings of *employee* and *employer*

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

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Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

336 Objects of this Part

- (1) The objects of this Part are as follows:
 - (a) to protect workplace rights;
 - (b) to protect freedom of association by ensuring that persons are:
 - (i) free to become, or not become, members of industrial associations; and
 - (ii) free to be represented, or not represented, by industrial associations; and
 - (iii) free to participate, or not participate, in lawful industrial activities;
 - (c) to provide protection from workplace discrimination;
 - (d) to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.
- (2) The protections referred to in subsection (1) are provided to a person (whether an employee, an employer or otherwise).

Division 2—Application of this Part

337 Application of this Part

This Part applies only to the extent provided by this Division.

Note: Sections 30G and 30R extend the operation of this Part in a referring State.

338 Action to which this Part applies

- (1) This Part applies to the following action:
- (a) action taken by a constitutionally-covered entity;
 - (b) action that affects, is capable of affecting or is taken with intent to affect the activities, functions, relationships or business of a constitutionally-covered entity;
 - (c) action that consists of advising, encouraging or inciting, or action taken with intent to coerce, a constitutionally-covered entity:
 - (i) to take, or not take, particular action in relation to another person; or
 - (ii) to threaten to take, or not take, particular action in relation to another person;
 - (d) action taken in a Territory or a Commonwealth place;
 - (e) action taken by:
 - (i) a trade and commerce employer; or
 - (ii) a Territory employer;that affects, is capable of affecting or is taken with intent to affect an employee of the employer;
 - (f) action taken by an employee of:
 - (i) a trade and commerce employer; or
 - (ii) a Territory employer;that affects, is capable of affecting or is taken with intent to affect the employee's employer.
- (2) Each of the following is a *constitutionally-covered entity*:
-

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- (a) a constitutional corporation;
 - (b) the Commonwealth;
 - (c) a Commonwealth authority;
 - (d) a body corporate incorporated in a Territory;
 - (e) an organisation.
- (3) A **trade and commerce employer** is a national system employer within the meaning of paragraph 14(d).
- (4) A **Territory employer** is a national system employer within the meaning of paragraph 14(f).

339 Additional effect of this Part

In addition to the effect provided by section 338, this Part also has the effect it would have if any one or more of the following applied:

- (a) a reference to an employer in one or more provisions of this Part were a reference to a national system employer;
- (b) a reference to an employee in one or more provisions of this Part were a reference to a national system employee;
- (c) a reference to an industrial association in one or more provisions of this Part were a reference to an organisation, or another association of employees or employers, a purpose of which is the protection and promotion of the interests of national system employees or national system employers in matters concerning employment;
- (d) a reference to an officer of an industrial association in one or more provisions of this Part were a reference to an officer of an organisation;
- (e) a reference to a person, another person or a third person in one or more provisions of this Part were a reference to a constitutionally-covered entity;
- (f) a reference to a workplace law in one or more provisions of this Part were a reference to a workplace law of the Commonwealth;

- (g) a reference to a workplace instrument in one or more provisions of this Part were a reference to a workplace instrument made under, or recognised by, a law of the Commonwealth;
- (h) a reference to an industrial body in one or more provisions of this Part were a reference to an industrial body performing functions or exercising powers under a law of the Commonwealth.

Division 3—Workplace rights

340 Protection

- (1) A person must not take adverse action against another person:
 - (a) because the other person:
 - (i) has a workplace right; or
 - (ii) has, or has not, exercised a workplace right; or
 - (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
 - (b) to prevent the exercise of a workplace right by the other person.

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

- (2) A person must not take adverse action against another person (the *second person*) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

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

341 Meaning of *workplace right*

Meaning of workplace right

- (1) A person has a *workplace right* if the person:
 - (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
 - (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
 - (c) is able to make a complaint or inquiry:
 - (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

- (ii) if the person is an employee—in relation to his or her employment.

Meaning of process or proceedings under a workplace law or workplace instrument

- (2) Each of the following is a ***process or proceedings under a workplace law or workplace instrument***:
- (a) a conference conducted or hearing held by the FWC;
 - (b) court proceedings under a workplace law or workplace instrument;
 - (c) protected industrial action;
 - (d) a protected action ballot;
 - (e) making, varying or terminating an enterprise agreement;
 - (f) appointing, or terminating the appointment of, a bargaining representative;
 - (g) making or terminating an individual flexibility arrangement under a modern award or enterprise agreement;
 - (h) agreeing to cash out paid annual leave or paid personal/carer's leave;
 - (i) making a request under Division 4 of Part 2-2 (which deals with requests for flexible working arrangements);
 - (j) dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;
 - (k) any other process or proceedings under a workplace law or workplace instrument.

Prospective employees taken to have workplace rights

- (3) A prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.

Note: Among other things, the effect of this subsection would be to prevent a prospective employer making an offer of employment conditional on entering an individual flexibility arrangement.

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Exceptions relating to prospective employees

- (4) Despite subsection (3), a prospective employer does not contravene subsection 340(1) if the prospective employer makes an offer of employment conditional on the prospective employee accepting a guarantee of annual earnings.
- (5) Despite paragraph (1)(a), a prospective employer does not contravene subsection 340(1) if the prospective employer refuses to employ a prospective employee because the prospective employee would be entitled to the benefit of Part 2-8 or 6-3A (which deal with transfer of business).

342 Meaning of *adverse action*

- (1) The following table sets out circumstances in which a person takes *adverse action* against another person.

Meaning of <i>adverse action</i>		
Item	Column 1	Column 2
	<i>Adverse action is taken by ...</i>	<i>if ...</i>
1	an employer against an employee	the employer: <ul style="list-style-type: none">(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: <ul style="list-style-type: none">(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.

Meaning of adverse action

Item	Column 1 <i>Adverse action is taken by ...</i>	Column 2 <i>if ...</i>
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 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.

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Meaning of *adverse action*

Item	Column 1 <i>Adverse action is taken by ...</i>	Column 2 <i>if ...</i>
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 (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).

(2) *Adverse action* includes:

- (a) threatening to take action covered by the table in subsection (1); and
- (b) organising such action.

(3) *Adverse action* does not include action that is authorised by or under:

- (a) this Act or any other law of the Commonwealth; or
 - (b) a law of a State or Territory prescribed by the regulations.
-

- (4) Without limiting subsection (3), **adverse action** does not include an employer standing down an employee who is:
- (a) engaged in protected industrial action; and
 - (b) employed under a contract of employment that provides for the employer to stand down the employee in the circumstances.

343 Coercion

- (1) A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:
- (a) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or
 - (b) exercise, or propose to exercise, a workplace right in a particular way.

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

- (2) Subsection (1) does not apply to protected industrial action.

344 Undue influence or pressure

An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to:

- (a) make, or not make, an agreement or arrangement under the National Employment Standards; or
- (b) make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement that is permitted to be included in the award or agreement under subsection 55(2); or
- (c) agree to, or terminate, an individual flexibility arrangement; or
- (d) accept a guarantee of annual earnings; or
- (e) agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.

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

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Note 2: This section can apply to decisions whether to consent to performing work on keeping in touch days (see subsection 79A(3)).

345 Misrepresentations

- (1) A person must not knowingly or recklessly make a false or misleading representation about:
- (a) the workplace rights of another person; or
 - (b) the exercise, or the effect of the exercise, of a workplace right by another person.

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

- (2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.

Division 4—Industrial activities

346 Protection

A person must not take adverse action against another person because the other person:

- (a) is or is not, or was or was not, an officer or member of an industrial association; or
- (b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or
- (c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

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

347 Meaning of *engages in industrial activity*

A person *engages in industrial activity* if the person:

- (a) becomes or does not become, or remains or ceases to be, an officer or member of an industrial association; or
- (b) does, or does not:
 - (i) become involved in establishing an industrial association; or
 - (ii) organise or promote a lawful activity for, or on behalf of, an industrial association; or
 - (iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association; or
 - (iv) comply with a lawful request made by, or requirement of, an industrial association; or
 - (v) represent or advance the views, claims or interests of an industrial association; or
 - (vi) pay a fee (however described) to an industrial association, or to someone in lieu of an industrial association; or

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- (vii) seek to be represented by an industrial association; or
- (c) organises or promotes an unlawful activity for, or on behalf of, an industrial association; or
- (d) encourages, or participates in, an unlawful activity organised or promoted by an industrial association; or
- (e) complies with an unlawful request made by, or requirement of, an industrial association; or
- (f) takes part in industrial action; or
- (g) makes a payment:
 - (i) that, because of Division 9 of Part 3-3 (which deals with payments relating to periods of industrial action), an employer must not pay; or
 - (ii) to which an employee is not entitled because of that Division.

348 Coercion

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to engage in industrial activity.

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

349 Misrepresentations

- (1) A person must not knowingly or recklessly make a false or misleading representation about either of the following:
 - (a) another person's obligation to engage in industrial activity;
 - (b) another person's obligation to disclose whether he or she, or a third person:
 - (i) is or is not, or was or was not, an officer or member of an industrial association; or
 - (ii) is or is not engaging, or has or has not engaged, in industrial activity.

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

- (2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.

350 Inducements—membership action

- (1) An employer must not induce an employee to take, or propose to take, membership action.

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

- (2) A person who has entered into a contract for services with an independent contractor must not induce the independent contractor to take, or propose to take, membership action.

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

- (3) A person takes *membership action* if the person becomes, does not become, remains or ceases to be, an officer or member of an industrial association.

Division 5—Other protections

351 Discrimination

- (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 orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

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

- (2) However, subsection (1) does not apply to action that is:
- (a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or
 - (b) taken because of the inherent requirements of the particular position concerned; or
 - (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:
 - (i) in good faith; and
 - (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.
- (3) Each of the following is an **anti-discrimination law**:
- (aa) the *Age Discrimination Act 2004*;
 - (ab) the *Disability Discrimination Act 1992*;
 - (ac) the *Racial Discrimination Act 1975*;
 - (ad) the *Sex Discrimination Act 1984*;
 - (a) the *Anti-Discrimination Act 1977* of New South Wales;
 - (b) the *Equal Opportunity Act 2010* of Victoria;
 - (c) the *Anti-Discrimination Act 1991* of Queensland;
 - (d) the *Equal Opportunity Act 1984* of Western Australia;
 - (e) the *Equal Opportunity Act 1984* of South Australia;
 - (f) the *Anti-Discrimination Act 1998* of Tasmania;

- (g) the *Discrimination Act 1991* of the Australian Capital Territory;
- (h) the *Anti-Discrimination Act* of the Northern Territory.

352 Temporary absence—illness or injury

An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

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

353 Bargaining services fees

- (1) An industrial association, or an officer or member of an industrial association, must not:
 - (a) demand; or
 - (b) purport to demand; or
 - (c) do anything that would:
 - (i) have the effect of demanding; or
 - (ii) purport to have the effect of demanding;payment of a bargaining services fee.
- Note: This subsection is a civil remedy provision (see Part 4-1).
- (2) A ***bargaining services fee*** is a fee (however described) payable:
 - (a) to an industrial association; or
 - (b) to someone in lieu of an industrial association;wholly or partly for the provision, or purported provision, of bargaining services, but does not include membership fees.
 - (3) ***Bargaining services*** are services provided by, or on behalf of, an industrial association in relation to an enterprise agreement, or a proposed enterprise agreement (including in relation to bargaining for, or the making, approval, operation, variation or termination of, the enterprise agreement, or proposed enterprise agreement).

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Exception for fees payable under contract

- (4) Subsection (1) does not apply if the fee is payable to the industrial association under a contract for the provision of bargaining services.

354 Coverage by particular instruments

- (1) A person must not discriminate against an employer because:
- (a) employees of the employer are covered, or not covered, by:
 - (i) provisions of the National Employment Standards; or
 - (ii) a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or
 - (iii) an enterprise agreement that does, or does not, cover an employee organisation, or a particular employee organisation; or
 - (b) it is proposed that employees of the employer be covered, or not be covered, by:
 - (i) a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or
 - (ii) an enterprise agreement that does, or does not, cover an employee organisation, or a particular employee organisation.

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

- (2) Subsection (1) does not apply to protected industrial action.

355 Coercion—allocation of duties etc. to particular person

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:

- (a) employ, or not employ, a particular person; or
- (b) engage, or not engage, a particular independent contractor; or

- (c) allocate, or not allocate, particular duties or responsibilities to a particular employee or independent contractor; or
- (d) designate a particular employee or independent contractor as having, or not having, particular duties or responsibilities.

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

356 Objectionable terms

A term of a workplace instrument, or an agreement or arrangement (whether written or unwritten), has no effect to the extent that it is an objectionable term.

Division 6—Sham arrangements

357 Misrepresenting employment as independent contracting arrangement

- (1) A person (the *employer*) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

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

- (2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:
 - (a) did not know; and
 - (b) was not reckless as to whether;the contract was a contract of employment rather than a contract for services.

358 Dismissing to engage as independent contractor

An employer must not dismiss, or threaten to dismiss, an individual who:

- (a) is an employee of the employer; and
- (b) performs particular work for the employer;

in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services.

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

359 Misrepresentation to engage as independent contractor

A person (the *employer*) that employs, or has at any time employed, an individual to perform particular work must not make a statement that the employer knows is false in order to persuade or

influence the individual to enter into a contract for services under which the individual will perform, as an independent contractor, the same, or substantially the same, work for the employer.

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

Division 7—Ancillary rules

360 Multiple reasons for action

For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.

361 Reason for action to be presumed unless proved otherwise

- (1) If:
 - (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and
 - (b) taking that action for that reason or with that intent would constitute a contravention of this Part;it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.
- (2) Subsection (1) does not apply in relation to orders for an interim injunction.

362 Advising, encouraging, inciting or coercing action

- (1) If:
 - (a) for a particular reason (the *first person's reason*), a person advises, encourages or incites, or takes any action with intent to coerce, a second person to take action; and
 - (b) the action, if taken by the second person for the first person's reason, would contravene a provision of this Part;the first person is taken to have contravened the provision.
- (2) Subsection (1) does not limit section 550.

363 Actions of industrial associations

- (1) For the purposes of this Part, each of the following is taken to be action of an industrial association:
-

- (a) action taken by the committee of management of the industrial association;
 - (b) action taken by an officer or agent of the industrial association acting in that capacity;
 - (c) action taken by a member, or group of members, of the industrial association if the action is authorised by:
 - (i) the rules of the industrial association; or
 - (ii) the committee of management of the industrial association; or
 - (iii) an officer or agent of the industrial association acting in that capacity;
 - (d) action taken by a member of the industrial association who performs the function of dealing with an employer on behalf of the member and other members of the industrial association, acting in that capacity;
 - (e) if the industrial association is an unincorporated industrial association that does not have a committee of management—
action taken by a member, or group of members, of the industrial association.
- (2) Paragraphs (1)(c) and (d) do not apply if:
- (a) the committee of management of the industrial association;
or
 - (b) a person authorised by the committee; or
 - (c) an officer of the industrial association;
- has taken all reasonable steps to prevent the action.
- (3) If, for the purposes of this Part, it is necessary to establish the state of mind of an industrial association in relation to particular action, it is enough to show:
- (a) that the action was taken by a person, or a group, referred to in paragraphs (1)(a) to (e); and
 - (b) that the person, or a person in the group, had that state of mind.
- (4) Subsections (1) to (3) have effect despite subsections 793(1) and (2) (which deal with liabilities of bodies corporate).
-

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364 Unincorporated industrial associations

Person includes unincorporated industrial association

- (1) For the purposes of this Part, a reference to a person includes a reference to an unincorporated industrial association.

Liability for contraventions by unincorporated industrial associations

- (2) A contravention of this Part that would otherwise be committed by an unincorporated industrial association is taken to have been committed by each member, officer or agent of the industrial association who:
- (a) took, or took part in, the relevant action; and
 - (b) did so with the relevant state of mind.

Division 8—Compliance

Subdivision A—Contraventions involving dismissal

365 Application for the FWC to deal with a dismissal dispute

If:

- (a) a person has been dismissed; and
- (b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;

the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute.

366 Time for application

- (1) An application under section 365 must be made:
 - (a) within 21 days after the dismissal took effect; or
 - (b) within such further period as the FWC allows under subsection (2).
- (2) The FWC may allow a further period if the FWC is satisfied that there are exceptional circumstances, taking into account:
 - (a) the reason for the delay; and
 - (b) any action taken by the person to dispute the dismissal; and
 - (c) prejudice to the employer (including prejudice caused by the delay); and
 - (d) the merits of the application; and
 - (e) fairness as between the person and other persons in a like position.

367 Application fees

- (1) The application must be accompanied by any fee prescribed by the regulations.

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- (2) The regulations may prescribe:
- (a) a fee for making an application to the FWC under section 365; and
 - (b) a method for indexing the fee; and
 - (c) the circumstances in which all or part of the fee may be waived or refunded.

368 Dealing with a dismissal dispute (other than by arbitration)

- (1) If an application is made under section 365, the FWC must deal with the dispute (other than by arbitration).

Note: The FWC may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)). One of the recommendations that the FWC might make is that an application be made under Part 3-2 (which deals with unfair dismissal) in relation to the dispute.

- (2) Any conference conducted for the purposes of dealing with the dispute (other than by arbitration) must be conducted in private, despite subsection 592(3).

Note: For conferences, see section 592.

- (3) If the FWC is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then:

- (a) the FWC must issue a certificate to that effect; and
- (b) if the FWC considers, taking into account all the materials before it, that arbitration under section 369, or a general protections court application, in relation to the dispute would not have a reasonable prospect of success, the FWC must advise the parties accordingly.

- (4) A **general protections court application** is an application to a court under Division 2 of Part 4-1 for orders in relation to a contravention of this Part.

369 Dealing with a dismissal dispute by arbitration

- (1) This section applies if:
- (a) the FWC issues a certificate under paragraph 368(3)(a) in relation to the dispute; and
 - (b) the parties notify the FWC that they agree to the FWC arbitrating the dispute; and
 - (c) the notification:
 - (i) is given to the FWC within 14 days after the day the certificate is issued, or within such period as the FWC allows on an application made during or after those 14 days; and
 - (ii) complies with any requirements prescribed by the procedural rules; and
 - (d) sections 726, 728, 729, 730, 731 and 732 do not apply.

Note: Sections 726, 728, 729, 730, 731 and 732 prevent multiple applications or complaints of a kind referred to in those sections from being made in relation to the same dispute. A notification can only be made under this section where there is no such other application or complaint in relation to the dispute at the time the notification is made. Generally, once a notification is made no such application or complaint can be made in relation to the dispute (see section 727).

- (2) The FWC may deal with the dispute by arbitration, including by making one or more of the following orders:
- (a) an order for reinstatement of the person;
 - (b) an order for the payment of compensation to the person;
 - (c) an order for payment of an amount to the person for remuneration lost;
 - (d) an order to maintain the continuity of the person's employment;
 - (e) an order to maintain the period of the person's continuous service with the employer.
- (3) A person to whom an order under subsection (2) applies must not contravene a term of the order.

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

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370 Taking a dismissal dispute to court

A person who is entitled to apply under section 365 for the FWC to deal with a dispute must not make a general protections court application in relation to the dispute unless:

- (a) both of the following apply:
 - (i) the FWC has issued a certificate under paragraph 368(3)(a) in relation to the dispute;
 - (ii) the general protections court application is made within 14 days after the day the certificate is issued, or within such period as the court allows on an application made during or after those 14 days; or
- (b) the general protections court application includes an application for an interim injunction.

Note 1: Generally, if the parties notify the FWC that they agree to the FWC arbitrating the dispute (see subsection 369(1)), a general protections court application cannot be made in relation to the dispute (see sections 727 and 728).

Note 2: For the purposes of subparagraph (a)(ii), in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, the Industrial Relations Court of Australia set down principles relating to the exercise of its discretion under a similarly worded provision of the *Industrial Relations Act 1988*.

Subdivision B—Other contraventions

372 Application for the FWC to deal with a non-dismissal dispute

If:

- (a) a person alleges a contravention of this Part; and
- (b) the person is not entitled to apply to the FWC under section 365 for the FWC to deal with the dispute;

the person may apply to the FWC under this section for the FWC to deal with the dispute.

373 Application fees

- (1) The application must be accompanied by any fee prescribed by the regulations.
- (2) The regulations may prescribe:
 - (a) a fee for making an application to the FWC under section 372; and
 - (b) a method for indexing the fee; and
 - (c) the circumstances in which all or part of the fee may be waived or refunded.

374 Conferences

- (1) If:
 - (a) an application is made under section 372; and
 - (b) the parties to the dispute agree to participate;the FWC must conduct a conference to deal with the dispute.

Note 1: For conferences, see section 592.

Note 2: The FWC may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

- (2) Despite subsection 592(3), the FWC must conduct the conference in private.

375 Advice on general protections court application

If the FWC considers, taking into account all the materials before it, that a general protections court application in relation to the dispute would not have a reasonable prospect of success, it must advise the parties accordingly.

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Subdivision C—Appeals and costs orders

375A Appeal rights

- (1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under subsection 369(2) (which is about arbitration of a dismissal dispute) unless the FWC considers that it is in the public interest to do so.
- (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under subsection 369(2) can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

375B Costs orders against parties

- (1) The FWC may make an order for costs against a party (the *first party*) to a dispute for costs incurred by the other party to the dispute if:
 - (a) an application for the FWC to deal with the dispute has been made under section 365; and
 - (b) the FWC is satisfied that the first party caused those costs to be incurred because of an unreasonable act or omission of the first party in connection with the conduct or continuation of the dispute.
- (2) The FWC may make an order under subsection (1) only if the other party to the dispute has applied for it in accordance with section 377.
- (3) This section does not limit the FWC's power to order costs under section 611.

376 Costs orders against lawyers and paid agents

- (1) This section applies if:
 - (a) an application for the FWC to deal with a dispute has been made under section 365 or 372; and

- (b) a person who is a party to the dispute has engaged a lawyer or paid agent (the *representative*) to represent the person in the dispute; and
 - (c) under section 596, the person is required to seek the FWC's permission to be represented by the representative.
- (2) The FWC may make an order for costs against the representative for costs incurred by the other party to the dispute if the FWC is satisfied that the representative caused those costs to be incurred because:
- (a) the representative encouraged the person to start, continue or respond to the dispute and it should have been reasonably apparent that the person had no reasonable prospect of success in the dispute; or
 - (b) of an unreasonable act or omission of the representative in connection with the conduct or continuation of the dispute.
- (3) The FWC may make an order under this section only if the other party to the dispute has applied for it in accordance with section 377.
- (4) This section does not limit the FWC's power to order costs under section 611.

377 Applications for costs orders

An application for an order for costs in relation to an application under section 365 or 372 must be made within 14 days after the FWC finishes dealing with the dispute.

377A Schedule of costs

- (1) A schedule of costs may be prescribed in relation to items of expenditure likely to be incurred in relation to matters that can be covered by an order under section 611, 375B or 376 in relation to an application under section 365, including expenses arising from the representation of a party by a person or organisation other than on a legal professional basis.

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- (2) If a schedule of costs is prescribed for the purposes of subsection (1), then, in awarding costs under section 611, 375B or 376 in relation to an application under section 365, the FWC:
- (a) is not limited to the items of expenditure appearing in the schedule; but
 - (b) if an item does appear in the schedule—must not award costs in relation to that item at a rate or of an amount that exceeds the rate or amount appearing in the schedule.

378 Contravening costs orders

A person to whom an order for costs made under section 375B or 376 applies must not contravene a term of the order.

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

Part 3-2—Unfair dismissal

Division 1—Introduction

379 Guide to this Part

This Part is about the unfair dismissal of national system employees, and the granting of remedies for unfair dismissal.

Division 2 sets out when a person is protected from unfair dismissal.

Division 3 sets out the elements that make up an unfair dismissal.

Division 4 sets out the remedies the FWC can grant for unfair dismissal.

Division 5 is about the procedural aspects of getting remedies for unfair dismissal.

380 Meanings of *employee* and *employer*

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

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

381 Object of this Part

- (1) The object of this Part is:
 - (a) to establish a framework for dealing with unfair dismissal that balances:
 - (i) the needs of business (including small business); and
 - (ii) the needs of employees; and
 - (b) to establish procedures for dealing with unfair dismissal that:

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- (i) are quick, flexible and informal; and
 - (ii) address the needs of employers and employees; and
 - (c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.
- (2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a “fair go all round” is accorded to both the employer and employee concerned.

Note: The expression “fair go all round” was used by Sheldon J in *in re Loty and Holloway v Australian Workers’ Union* [1971] AR (NSW) 95.

Division 2—Protection from unfair dismissal

382 When a person is protected from unfair dismissal

A person is *protected from unfair dismissal* at a time if, at that time:

- (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
- (b) one or more of the following apply:
 - (i) a modern award covers the person;
 - (ii) an enterprise agreement applies to the person in relation to the employment;
 - (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.

383 Meaning of *minimum employment period*

The *minimum employment period* is:

- (a) if the employer is not a small business employer—6 months ending at the earlier of the following times:
 - (i) the time when the person is given notice of the dismissal;
 - (ii) immediately before the dismissal; or
- (b) if the employer is a small business employer—one year ending at that time.

384 Period of employment

- (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.
- (2) However:

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- (a) a period of service as a casual employee does not count towards the employee's period of employment unless:
 - (i) the employment as a casual employee was on a regular and systematic basis; and
 - (ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and
- (b) if:
 - (i) the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and
 - (ii) the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and
 - (iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised;the period of service with the old employer does not count towards the employee's period of employment with the new employer.

Division 3—What is an unfair dismissal

385 What is an unfair dismissal

A person has been *unfairly dismissed* if the FWC is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

Note: For the definition of *consistent with the Small Business Fair Dismissal Code*: see section 388.

386 Meaning of *dismissed*

- (1) A person has been *dismissed* if:
 - (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
 - (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.
- (2) However, a person has not been *dismissed* if:
 - (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
 - (b) the person was an employee:
 - (i) to whom a training arrangement applied; and
 - (ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;and the employment has terminated at the end of the training arrangement; or

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- (c) the person was demoted in employment but:
 - (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and
 - (ii) he or she remains employed with the employer that effected the demotion.
- (3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part.

387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.

388 The Small Business Fair Dismissal Code

- (1) The Minister may, by legislative instrument, declare a Small Business Fair Dismissal Code.
- (2) A person's dismissal was *consistent with the Small Business Fair Dismissal Code* if:
 - (a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and
 - (b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

389 Meaning of *genuine redundancy*

- (1) A person's dismissal was a case of *genuine redundancy* if:
 - (a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
 - (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.
- (2) A person's dismissal was not a case of *genuine redundancy* if it would have been reasonable in all the circumstances for the person to be redeployed within:
 - (a) the employer's enterprise; or
 - (b) the enterprise of an associated entity of the employer.

Division 4—Remedies for unfair dismissal

390 When the FWC may order remedy for unfair dismissal

- (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
 - (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
 - (b) the person has been unfairly dismissed (see Division 3).
- (2) The FWC may make the order only if the person has made an application under section 394.
- (3) The FWC must not order the payment of compensation to the person unless:
 - (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
 - (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies.

391 Remedy—reinstatement etc.

Reinstatement

- (1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:
 - (a) reappointing the person to the position in which the person was employed immediately before the dismissal; or
 - (b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

- (a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and
- (b) that position, or an equivalent position, is a position with an associated entity of the employer;

the order under subsection (1) may be an order to the associated entity to:

- (c) appoint the person to the position in which the person was employed immediately before the dismissal; or
- (d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

- (2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:
 - (a) the continuity of the person's employment;
 - (b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

- (3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.
- (4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:
 - (a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and

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- (b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

392 Remedy—compensation

Compensation

- (1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

- (2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:
 - (a) the effect of the order on the viability of the employer's enterprise; and
 - (b) the length of the person's service with the employer; and
 - (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
 - (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
 - (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
 - (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
 - (g) any other matter that the FWC considers relevant.

Misconduct reduces amount

- (3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must

reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

- (4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

- (5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:
- (a) the amount worked out under subsection (6); and
 - (b) half the amount of the high income threshold immediately before the dismissal.
- (6) The amount is the total of the following amounts:
- (a) the total amount of remuneration:
 - (i) received by the person; or
 - (ii) to which the person was entitled;(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and
 - (b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.

393 Monetary orders may be in instalments

To avoid doubt, an order by the FWC under subsection 391(3) or 392(1) may permit the employer concerned to pay the amount required in instalments specified in the order.

Division 5—Procedural matters

394 Application for unfair dismissal remedy

- (1) A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.

Note 1: Division 4 sets out when the FWC may order a remedy for unfair dismissal.

Note 2: For application fees, see section 395.

Note 3: Part 6-1 may prevent an application being made under this Part in relation to a dismissal if an application or complaint has been made in relation to the dismissal other than under this Part.

- (2) The application must be made:
- (a) within 21 days after the dismissal took effect; or
 - (b) within such further period as the FWC allows under subsection (3).
- (3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:
- (a) the reason for the delay; and
 - (b) whether the person first became aware of the dismissal after it had taken effect; and
 - (c) any action taken by the person to dispute the dismissal; and
 - (d) prejudice to the employer (including prejudice caused by the delay); and
 - (e) the merits of the application; and
 - (f) fairness as between the person and other persons in a similar position.

395 Application fees

- (1) An application to the FWC under this Division must be accompanied by any fee prescribed by the regulations.

- (2) The regulations may prescribe:
- (a) a fee for making an application to the FWC under this Division; and
 - (b) a method for indexing the fee; and
 - (c) the circumstances in which all or part of the fee may be waived or refunded.

396 Initial matters to be considered before merits

The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:

- (a) whether the application was made within the period required in subsection 394(2);
- (b) whether the person was protected from unfair dismissal;
- (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
- (d) whether the dismissal was a case of genuine redundancy.

397 Matters involving contested facts

The FWC must conduct a conference or hold a hearing in relation to a matter arising under this Part if, and to the extent that, the matter involves facts the existence of which is in dispute.

398 Conferences

- (1) This section applies in relation to a matter arising under this Part if the FWC conducts a conference in relation to the matter.
- (2) Despite subsection 592(3), the FWC must conduct the conference in private.
- (3) The FWC must take into account any difference in the circumstances of the parties to the matter in:
 - (a) considering the application; and
 - (b) informing itself in relation to the application.

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- (4) The FWC must take into account the wishes of the parties to the matter as to the way in which the FWC:
 - (a) considers the application; and
 - (b) informs itself in relation to the application.

399 Hearings

- (1) The FWC must not hold a hearing in relation to a matter arising under this Part unless the FWC considers it appropriate to do so, taking into account:
 - (a) the views of the parties to the matter; and
 - (b) whether a hearing would be the most effective and efficient way to resolve the matter.
- (2) If the FWC holds a hearing in relation to a matter arising under this Part, it may decide not to hold the hearing in relation to parts of the matter.
- (3) The FWC may decide at any time (including before, during or after conducting a conference in relation to a matter) to hold a hearing in relation to the matter.

399A Dismissing applications

- (1) The FWC may, subject to subsection (2), dismiss an application for an order under Division 4 if the FWC is satisfied that the applicant has unreasonably:
 - (a) failed to attend a conference conducted by the FWC, or a hearing held by the FWC, in relation to the application; or
 - (b) failed to comply with a direction or order of the FWC relating to the application; or
 - (c) failed to discontinue the application after a settlement agreement has been concluded.

Note 1: For another power of the FWC to dismiss applications for orders under Division 4, see section 587.

Note 2: The FWC may make an order for costs if the applicant's failure causes the other party to the matter to incur costs (see section 400A).

- (2) The FWC may exercise its power under subsection (1) on application by the employer.
- (3) This section does not limit when the FWC may dismiss an application.

400 Appeal rights

- (1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
- (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

400A Costs orders against parties

- (1) The FWC may make an order for costs against a party to a matter arising under this Part (the *first party*) for costs incurred by the other party to the matter if the FWC is satisfied that the first party caused those costs to be incurred because of an unreasonable act or omission of the first party in connection with the conduct or continuation of the matter.
- (2) The FWC may make an order under subsection (1) only if the other party to the matter has applied for it in accordance with section 402.
- (3) This section does not limit the FWC's power to order costs under section 611.

401 Costs orders against lawyers and paid agents

- (1) This section applies if:
 - (a) an application for an unfair dismissal remedy has been made under section 394; and

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- (b) a person who is a party to the matter has engaged a lawyer or paid agent (the *representative*) to represent the person in the matter; and
 - (c) under section 596, the person is required to seek the FWC's permission to be represented by the representative.
- (1A) The FWC may make an order for costs against the representative for costs incurred by the other party to the matter if the FWC is satisfied that the representative caused those costs to be incurred because:
- (a) the representative encouraged the person to start, continue or respond to the matter and it should have been reasonably apparent that the person had no reasonable prospect of success in the matter; or
 - (b) of an unreasonable act or omission of the representative in connection with the conduct or continuation of the matter.
- (2) The FWC may make an order under this section only if the other party to the matter has applied for it in accordance with section 402.
- (3) This section does not limit the FWC's power to order costs under section 611.

402 Applications for costs orders

An application for an order for costs under section 611 in relation to a matter arising under this Part, or for costs under section 400A or 401, must be made within 14 days after:

- (a) the FWC determines the matter; or
- (b) the matter is discontinued.

403 Schedule of costs

- (1) A schedule of costs may be prescribed in relation to items of expenditure likely to be incurred in relation to matters that can be covered by an order:

- (a) under section 611 in relation to a matter arising under this Part; or
 - (b) under section 400A or 401;
including expenses arising from the representation of a party by a person or organisation other than on a legal professional basis.
- (2) If a schedule of costs is prescribed for the purposes of subsection (1), then, in awarding costs under section 611 in relation to a matter arising under this Part, or awarding costs under section 400A or 401, the FWC:
- (a) is not limited to the items of expenditure appearing in the schedule; but
 - (b) if an item does appear in the schedule—must not award costs in relation to that item at a rate or of an amount that exceeds the rate or amount appearing in the schedule.

404 Security for costs

The procedural rules may provide for the furnishing of security for the payment of costs in relation to matters arising under this Part.

405 Contravening orders under this Part

A person to whom an order under this Part applies must not contravene a term of the order.

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

Part 3-3—Industrial action

Division 1—Introduction

406 Guide to this Part

This Part deals mainly with industrial action by national system employees and national system employers.

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.

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.

Division 4 provides for the FWC to make orders, in certain circumstances, that industrial action stop, not occur or not be organised for a specified period.

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.

Division 6 provides for the FWC to make orders suspending or terminating protected industrial action for a proposed enterprise agreement in certain circumstances. If the FWC makes such an order, the action will no longer be protected industrial action.

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.

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.

407 Meanings of *employee* and *employer*

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

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

Division 2—Protected industrial action

Subdivision A—What is protected industrial action

408 Protected industrial action

Industrial action is *protected industrial action* for a proposed enterprise agreement if it is one of the following:

- (a) employee claim action for the agreement (see section 409);
- (b) employee response action for the agreement (see section 410);
- (c) employer response action for the agreement (see section 411).

409 Employee claim action

Employee claim action

- (1) *Employee claim action* for a proposed enterprise agreement is industrial action that:
 - (a) is organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, permitted matters; and
 - (b) is organised or engaged in, against an employer that will be covered by the agreement, by:
 - (i) a bargaining representative of an employee who will be covered by the agreement; or
 - (ii) an employee who is included in a group or groups of employees specified in a protected action ballot order for the industrial action; and
 - (c) meets the common requirements set out in Subdivision B; and
 - (d) meets the additional requirements set out in this section.

Protected action ballot is necessary

- (2) The industrial action must be authorised by a protected action ballot (see Division 8 of this Part).

Unlawful terms

- (3) The industrial action must not be in support of, or to advance, claims to include unlawful terms in the agreement.

Industrial action must not be part of pattern bargaining

- (4) A bargaining representative of an employee who will be covered by the agreement must not be engaging in pattern bargaining in relation to the agreement.

Industrial action must not relate to a demarcation dispute etc.

- (5) The industrial action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene an FWC order that relates to a significant extent to a demarcation dispute.

Notice requirements after suspension order must be met

- (6) If section 429 (which deals with employee claim action without a further protected action ballot after a period of suspension) applies in relation to the industrial action, the notice requirements of section 430 must be met.

Officer of an employee organisation

- (7) If an employee organisation is a bargaining representative of an employee who will be covered by the agreement, the reference to a bargaining representative of the employee in subparagraph (1)(b)(i) of this section includes a reference to an officer of the organisation.

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410 Employee response action

Employee response action

- (1) **Employee response action** for a proposed enterprise agreement means industrial action that:
- (a) is organised or engaged in as a response to industrial action by an employer; and
 - (b) is organised or engaged in, against an employer that will be covered by the agreement, by:
 - (i) a bargaining representative of an employee who will be covered by the agreement; or
 - (ii) an employee who will be covered by the agreement; and
 - (c) meets the common requirements set out in Subdivision B; and
 - (d) meets the additional requirements set out in this section.

Industrial action must not relate to a demarcation dispute etc.

- (2) The industrial action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene an FWC order that relates to a significant extent to a demarcation dispute.

Officer of an employee organisation

- (3) If an employee organisation is a bargaining representative of an employee who will be covered by the agreement, the reference to a bargaining representative of the employee in subparagraph (1)(b)(i) includes a reference to an officer of the organisation.

411 Employer response action

Employer response action for a proposed enterprise agreement means industrial action that:

- (a) is organised or engaged in as a response to industrial action by:

- (i) a bargaining representative of an employee who will be covered by the agreement; or
 - (ii) an employee who will be covered by the agreement; and
- (b) is organised or engaged in by an employer that will be covered by the agreement against one or more employees that will be covered by the agreement; and
- (c) meets the common requirements set out in Subdivision B.

412 Pattern bargaining

Pattern bargaining

- (1) A course of conduct by a person is ***pattern bargaining*** if:
- (a) the person is a bargaining representative for 2 or more proposed enterprise agreements; and
 - (b) the course of conduct involves seeking common terms to be included in 2 or more of the agreements; and
 - (c) the course of conduct relates to 2 or more employers.

Exception—genuinely trying to reach an agreement

- (2) The course of conduct, to the extent that it relates to a particular employer, is not pattern bargaining if the bargaining representative is genuinely trying to reach an agreement with that employer.
- (3) For the purposes of subsection (2), the factors relevant to working out whether a bargaining representative is genuinely trying to reach an agreement with a particular employer, include the following:
- (a) whether the bargaining representative is demonstrating a preparedness to bargain for the agreement taking into account the individual circumstances of that employer, including in relation to the nominal expiry date of the agreement;
 - (b) whether the bargaining representative is bargaining in a manner consistent with the terms of the agreement being determined as far as possible by agreement between that employer and its employees;

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- (c) whether the bargaining representative is meeting the good faith bargaining requirements.
- (4) If a person seeks to rely on subsection (2), the person has the burden of proving that the subsection applies.

Genuinely trying to reach an agreement

- (5) This section does not affect, and is not affected by, the meaning of the expression “genuinely trying to reach an agreement”, or any variant of the expression, as used elsewhere in this Act.

Subdivision B—Common requirements for industrial action to be protected industrial action

413 Common requirements that apply for industrial action to be protected industrial action

Common requirements

- (1) This section sets out the *common requirements* for industrial action to be protected industrial action for a proposed enterprise agreement.

Type of proposed enterprise agreement

- (2) The industrial action must not relate to a proposed enterprise agreement that is a greenfields agreement or multi-enterprise agreement.

Genuinely trying to reach an agreement

- (3) The following persons must be genuinely trying to reach an agreement:
 - (a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement—the bargaining representative;

- (b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement—the bargaining representative of the employee.

Notice requirements

- (4) The notice requirements set out in section 414 must have been met in relation to the industrial action.

Compliance with orders

- (5) The following persons must not have contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement:
 - (a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement—the bargaining representative;
 - (b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement—the employee and the bargaining representative of the employee.

No industrial action before an enterprise agreement etc. passes its nominal expiry date

- (6) The person organising or engaging in the industrial action must not contravene section 417 (which deals with industrial action before the nominal expiry date of an enterprise agreement etc.) by organising or engaging in the industrial action.

No suspension or termination order is in operation etc.

- (7) None of the following must be in operation:
 - (a) an order under Division 6 of this Part suspending or terminating industrial action in relation to the agreement;
 - (b) a Ministerial declaration under subsection 431(1) terminating industrial action in relation to the agreement;
 - (c) a serious breach declaration in relation to the agreement.

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414 Notice requirements for industrial action

Notice requirements—employee claim action

- (1) Before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.
- (2) The period of notice must be at least:
 - (a) 3 working days; or
 - (b) if a protected action ballot order for the employee claim action specifies a longer period of notice for the purposes of this paragraph—that period of notice.

Notice of employee claim action not to be given until ballot results declared

- (3) A notice under subsection (1) must not be given until after the results of the protected action ballot for the employee claim action have been declared.

Notice requirements—employee response action

- (4) Before a person engages in employee response action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

Notice requirements—employer response action

- (5) Before an employer engages in employer response action for a proposed enterprise agreement, the employer must:
 - (a) give written notice of the action to each bargaining representative of an employee who will be covered by the agreement; and
 - (b) take all reasonable steps to notify the employees who will be covered by the agreement of the action.

Notice requirements—content

- (6) A notice given under this section must specify the nature of the action and the day on which it will start.

Subdivision C—Significance of industrial action being protected industrial action

415 Immunity provision

- (1) No action lies under any law (whether written or unwritten) in force in a State or Territory in relation to any industrial action that is protected industrial action unless the industrial action has involved or is likely to involve:
- (a) personal injury; or
 - (b) wilful or reckless destruction of, or damage to, property; or
 - (c) the unlawful taking, keeping or use of property.
- (2) However, subsection (1) does not prevent an action for defamation being brought in relation to anything that occurred in the course of industrial action.

416 Employer response action—employer may refuse to make payments to employees

If an employer engages in employer response action against employees, the employer may refuse to make payments to the employees in relation to the period of the action.

Note: If an employee engages in protected industrial action against his or her employer, the employer must not make a payment to an employee in relation to certain periods of action (see Subdivision A of Division 9 of this Part).

416A Employer response action does not affect continuity of employment

Employer response action for a proposed enterprise agreement does not affect the continuity of employment of the employees who

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Part 3-3 Industrial action

Division 2 Protected industrial action

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will be covered by the agreement, for such purposes as are prescribed by the regulations.

Division 3—No industrial action before nominal expiry date of enterprise agreement etc.

417 Industrial action must not be organised or engaged in before nominal expiry date of enterprise agreement etc.

No industrial action

- (1) A person referred to in subsection (2) must not organise or engage in industrial action from the day on which:
- (a) an enterprise agreement is approved by the FWC until its nominal expiry date has passed; or
 - (b) a workplace determination comes into operation until its nominal expiry date has passed;
- whether or not the industrial action relates to a matter dealt with in the agreement or determination.

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

- (2) The persons are:
- (a) an employer, employee, or employee organisation, who is covered by the agreement or determination; or
 - (b) an officer of an employee organisation that is covered by the agreement or determination, acting in that capacity.

Injunctions and other orders

- (3) If a person contravenes subsection (1), the Federal Court or Federal Circuit Court may do either or both of the following:
- (a) grant an injunction under this subsection;
 - (b) make any other order under subsection 545(1);
- that the court considers necessary to stop, or remedy the effects of, the contravention.
- (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).

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Division 3 No industrial action before nominal expiry date of enterprise agreement etc.

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- (5) Despite subsection 545(4), the court may make any other order under subsection 545(1) only on application by a person referred to in column 2 of item 14 of the table in subsection 539(2).

Note: Section 539 deals with applications for orders in relation to contraventions of civil remedy provisions.

Division 4—FWC orders stopping etc. industrial action

418 FWC must order that industrial action by employees or employers stop etc.

- (1) If it appears to the FWC that industrial action by one or more employees or employers that is not, or would not be, protected industrial action:
 - (a) is happening; or
 - (b) is threatened, impending or probable; or
 - (c) is being organised;the FWC must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period (the *stop period*) specified in the order.

Note: For interim orders, see section 420.
- (2) The FWC may make the order:
 - (a) on its own initiative; or
 - (b) on application by either of the following:
 - (i) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action;
 - (ii) an organisation of which a person referred to in subparagraph (i) is a member.
- (3) In making the order, the FWC does not have to specify the particular industrial action.
- (4) If the FWC is required to make an order under subsection (1) in relation to industrial action and a protected action ballot authorised the industrial action:
 - (a) some or all of which has not been taken before the beginning of the stop period specified in the order; or
 - (b) which has not ended before the beginning of that stop period; or
 - (c) beyond that stop period;

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the FWC may state in the order whether or not the industrial action may be engaged in after the end of that stop period without another protected action ballot.

419 FWC must order that industrial action by non-national system employees or non-national system employers stop etc.

Stop orders etc.

- (1) If it appears to the FWC that industrial action by one or more non-national system employees or non-national system employers:
- (a) is:
 - (i) happening; or
 - (ii) threatened, impending or probable; or
 - (iii) being organised; and
 - (b) will, or would, be likely to have the effect of causing substantial loss or damage to the business of a constitutional corporation;

the FWC must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period specified in the order.

Note: For interim orders, see section 420.

- (2) The FWC may make the order:
- (a) on its own initiative; or
 - (b) on application by either of the following:
 - (i) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action;
 - (ii) an organisation of which a person referred to in subparagraph (i) is a member.
- (3) In making the order, the FWC does not have to specify the particular industrial action.

420 Interim orders etc.

Application must be determined within 2 days

- (1) As far as practicable, the FWC must determine an application for an order under section 418 or 419 within 2 days after the application is made.

Interim orders

- (2) If the FWC is unable to determine the application within that period, the FWC must, within that period, make an interim order that the industrial action to which the application relates stop, not occur or not be organised (as the case may be).
- (3) However, the FWC must not make the interim order if the FWC is satisfied that it would be contrary to the public interest to do so.
- (4) In making the interim order, the FWC does not have to specify the particular industrial action.
- (5) An interim order continues in operation until the application is determined.

421 Contravening an order etc.

Contravening orders

- (1) A person to whom an order under section 418, 419 or 420 applies must not contravene a term of the order.

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

- (2) However, a person is not required to comply with an order if:
 - (a) the order is an order under section 418, or an order under section 420 that relates to an application for an order under section 418; and
 - (b) the industrial action to which the order relates is, or would be, protected industrial action.

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Injunctions

- (3) The Federal Court or Federal Circuit Court may grant an injunction, under this subsection, on such terms as the court considers appropriate if:
- (a) a person referred to in column 2 of item 15 of the table in subsection 539(2) has applied for the injunction; and
 - (b) the court is satisfied that another person to whom the order applies has contravened, or proposes to contravene, a term of the order.

Note: Section 539 deals with applications for orders in relation to contraventions of civil remedy provisions.

No other orders

- (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.

Division 5—Injunction against industrial action if pattern bargaining is being engaged in

422 Injunction against industrial action if a bargaining representative is engaging in pattern bargaining

- (1) The Federal Court or Federal Circuit Court may grant an injunction on such terms as the court considers appropriate if:
 - (a) a person has applied for the injunction; and
 - (b) the requirement set out in subsection (2) is met.
- (2) The court is satisfied that:
 - (a) employee claim action for a proposed enterprise agreement is being engaged in, or is threatened, impending or probable; and
 - (b) a bargaining representative of an employee who will be covered by the agreement is engaging in pattern bargaining in relation to the agreement.

Division 6—Suspension or termination of protected industrial action by the FWC

423 FWC may suspend or terminate protected industrial action—significant economic harm etc.

Suspension or termination of protected industrial action

- (1) The FWC 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.

Requirement—significant economic harm

- (2) If the protected industrial action is employee claim action, the FWC must be satisfied that the action is causing, or is threatening to cause, significant economic harm to:
 - (a) the employer, or any of the employers, that will be covered by the agreement; and
 - (b) any of the employees who will be covered by the agreement.
- (3) If the protected industrial action is:
 - (a) employee response action; or
 - (b) employer response action;the FWC 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.
- (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:
 - (a) the source, nature and degree of harm suffered or likely to be suffered;
 - (b) the likelihood that the harm will continue to be caused or will be caused;

- (c) the capacity of the person to bear the harm;
- (d) the views of the person and the bargaining representatives for the agreement;
- (e) whether the bargaining representatives for the agreement have met the good faith bargaining requirements and have not contravened any bargaining orders in relation to the agreement;
- (f) if the FWC is considering terminating the protected industrial action:
 - (i) whether the bargaining representatives for the agreement are genuinely unable to reach agreement on the terms that should be included in the agreement; and
 - (ii) whether there is no reasonable prospect of agreement being reached;
- (g) the objective of promoting and facilitating bargaining for the agreement.

Requirement—harm is imminent

- (5) If the protected industrial action is threatening to cause significant economic harm as referred to in subsection (2) or (3), the FWC must be satisfied that the harm is imminent.

Requirement—protracted action etc.

- (6) The FWC must be satisfied that:
 - (a) the protected industrial action has been engaged in for a protracted period of time; and
 - (b) the dispute will not be resolved in the reasonably foreseeable future.

Order may be made on own initiative or on application

- (7) The FWC may make the order:
 - (a) on its own initiative; or
 - (b) on application by any of the following:
 - (i) a bargaining representative for the agreement;

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- (ii) the Minister;
- (ia) if the industrial action is being engaged in in a State that is a referring State as defined in section 30B or 30L—the Minister of the State who has responsibility for workplace relations matters in the State;
- (ib) if the industrial action is being engaged in in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory;
- (iii) a person prescribed by the regulations.

424 FWC must suspend or terminate protected industrial action—endangering life etc.

Suspension or termination of protected industrial action

- (1) The FWC must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that:
 - (a) is being engaged in; or
 - (b) is threatened, impending or probable;if the FWC is satisfied that the protected industrial action has threatened, is threatening, or would threaten:
 - (c) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or
 - (d) to cause significant damage to the Australian economy or an important part of it.
- (2) The FWC may make the order:
 - (a) on its own initiative; or
 - (b) on application by any of the following:
 - (i) a bargaining representative for the agreement;
 - (ii) the Minister;
 - (ia) if the industrial action is being engaged in, or is threatened, impending or probable, in a State that is a referring State as defined in section 30B or 30L—the

- Minister of the State who has responsibility for workplace relations matters in the State;
- (iib) if the industrial action is being engaged in, or is threatened, impending or probable, in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory;
 - (iii) a person prescribed by the regulations.

Application must be determined within 5 days

- (3) If an application for an order under this section is made, the FWC must, as far as practicable, determine the application within 5 days after it is made.

Interim orders

- (4) If the FWC is unable to determine the application within that period, the FWC must, within that period, make an interim order suspending the protected industrial action to which the application relates until the application is determined.
- (5) An interim order continues in operation until the application is determined.

425 FWC must suspend protected industrial action—cooling off

- (1) The FWC must make an order suspending protected industrial action for a proposed enterprise agreement that is being engaged in if the FWC is satisfied that the suspension is appropriate taking into account the following matters:
 - (a) whether the suspension would be beneficial to the bargaining representatives for the agreement because it would assist in resolving the matters at issue;
 - (b) the duration of the protected industrial action;
 - (c) whether the suspension would be contrary to the public interest or inconsistent with the objects of this Act;
 - (d) any other matters that the FWC considers relevant.

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- (2) The FWC may make the order only on application by:
- (a) a bargaining representative for the agreement; or
 - (b) a person prescribed by the regulations.

426 FWC must suspend protected industrial action—significant harm to a third party

Suspension of protected industrial action

- (1) The FWC must make an order suspending protected industrial action for a proposed enterprise agreement that is being engaged in if the requirements set out in this section are met.

Requirement—adverse effect on employers or employees

- (2) The FWC must be satisfied that the protected industrial action is adversely affecting:
- (a) the employer, or any of the employers, that will be covered by the agreement; or
 - (b) any of the employees who will be covered by the agreement.

Requirement—significant harm to a third party

- (3) The FWC must be satisfied that the protected industrial action is threatening to cause significant harm to any person other than:
- (a) a bargaining representative for the agreement; or
 - (b) an employee who will be covered by the agreement.
- (4) For the purposes of subsection (3), the FWC may take into account any matters it considers relevant including the extent to which the protected industrial action threatens to:
- (a) damage the ongoing viability of an enterprise carried on by the person; or
 - (b) disrupt the supply of goods or services to an enterprise carried on by the person; or
 - (c) reduce the person’s capacity to fulfil a contractual obligation; or

(d) cause other economic loss to the person.

Requirement—suspension is appropriate

- (5) The FWC must be satisfied that the suspension is appropriate taking into account the following:
- (a) whether the suspension would be contrary to the public interest or inconsistent with the objects of this Act;
 - (b) any other matters that the FWC considers relevant.

Order may only be made on application by certain persons

- (6) The FWC may make the order only on application by:
- (a) an organisation, person or body directly affected by the protected industrial action other than:
 - (i) a bargaining representative for the agreement; or
 - (ii) an employee who will be covered by the agreement; or
 - (b) the Minister; or
 - (ba) if the industrial action is being engaged in in a State that is a referring State as defined in section 30B or 30L—the Minister of the State who has responsibility for workplace relations matters in the State; or
 - (bb) if the industrial action is being engaged in in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory; or
 - (c) a person prescribed by the regulations.

427 FWC must specify the period of suspension

Application of this section

- (1) This section applies if the FWC is required or permitted by this Division to make an order suspending protected industrial action.

Suspension period

- (2) The FWC must specify, in the order, the period for which the protected industrial action is suspended.

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Notice period

- (3) The FWC 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 the FWC is satisfied that there are exceptional circumstances justifying that longer period of notice.

428 Extension of a period of suspension

- (1) The FWC 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:
 - (a) the person who applied, or a person who could have applied, for the suspension order, applies for the extension; and
 - (b) the FWC has not previously made an order under this section in relation to the suspension order; and
 - (c) the FWC is satisfied that the extension is appropriate taking into account any matters the FWC considers relevant including the matters specified in the provision under which the suspension order was made.
- (2) If the FWC is permitted to make an order under this section:
 - (a) the FWC must specify, in the order, the period of extension; and
 - (b) the FWC 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 the FWC is satisfied that there are exceptional circumstances justifying that longer period of notice.

429 Employee claim action without a further protected action ballot after a period of suspension etc.

Application of this section

- (1) This section applies in relation to employee claim action for a proposed enterprise agreement if:

- (a) an order suspending the employee claim action has been made; and
- (b) a protected action ballot authorised the employee claim action:
 - (i) some or all of which had not been taken before the beginning of the period (the *suspension period*) of suspension specified in the order; or
 - (ii) which had not ended before the beginning of the suspension period; or
 - (iii) beyond the suspension period; and
- (c) the suspension period (including any extension under section 428) ends, or the order is revoked before the end of that period.

Further protected action ballot not required to engage in employee claim action

- (2) A person may engage in the employee claim action without another protected action ballot.
- (3) For the purposes of working out when the employee claim action may be engaged in, the suspension period (including any dates authorised by the protected action ballot as dates on which employee claim action is to be engaged in) must be disregarded.
- (4) Nothing in this section authorises employee claim action that is different in type or duration from the employee claim action that was authorised by the protected action ballot.

430 Notice of employee claim action engaged in after a period of suspension etc.

- (1) Before a person engages in employee claim action for a proposed enterprise agreement as permitted by subsection 429(2), a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

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- (2) The period of notice must be at least:
 - (a) 3 working days; or
 - (b) if, under subsection 427(3) or paragraph 428(2)(b), the FWC specified, for the purposes of this paragraph, a longer period of notice in an order relating to the employee claim action—that period of notice.
- (3) The notice must state the nature of the employee claim action and the day on which it will start.

Division 7—Ministerial declarations

431 Ministerial declaration terminating industrial action

- (1) The Minister may make a declaration, in writing, terminating protected industrial action for a proposed enterprise agreement if the Minister is satisfied that:
 - (a) the industrial action is being engaged in, or is threatened, impending or probable; and
 - (b) the industrial action is threatening, or would threaten:
 - (i) to endanger the life, the personal safety or health, or the welfare, of the population or a part of it; or
 - (ii) to cause significant damage to the Australian economy or an important part of it.
- (2) The declaration comes into operation on the day that it is made.
- (3) A declaration under subsection (1) is not a legislative instrument.

432 Informing people of declaration

- (1) This section applies if the Minister makes a declaration under subsection 431(1).
- (2) The declaration must be published in the *Gazette*.
- (3) The Minister must inform the FWC of the making of the declaration.
- (4) The Minister must, as soon as practicable, take all reasonable steps to ensure that the bargaining representatives for the proposed enterprise agreement concerned are made aware:
 - (a) of the making of the declaration; and
 - (b) of the effect of Part 2-5 (which deals with workplace determinations).

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433 Ministerial directions to remove or reduce threat

- (1) If a declaration under subsection 431(1) is in operation in relation to a proposed enterprise agreement, the Minister may give directions, in writing, requiring the following persons to take, or refrain from taking, specified actions:
 - (a) specified bargaining representatives for the agreement;
 - (b) specified employees who will be covered by the agreement.
- (2) The Minister may only give directions that the Minister is satisfied are reasonably directed to removing or reducing the threat referred to in paragraph 431(1)(b).
- (3) A direction under subsection (1) is not a legislative instrument.

434 Contravening a Ministerial direction

A person to whom a direction under subsection 433(1) applies must not contravene the direction.

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

Division 8—Protected action ballots

Subdivision A—Introduction

435 Guide to this Division

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.

Subdivision B provides for the FWC 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.

Subdivision C deals with the conduct of a protected action ballot.

Subdivision D deals with the effect of a protected action ballot.

Subdivision E deals with compliance matters in relation to a protected action ballot.

Subdivision F deals with the liability for the costs of a protected action ballot.

Subdivision G deals with records and other miscellaneous matters.

436 Object of this Division

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.

Note: Under Division 2, industrial action by employees for a proposed enterprise agreement (other than employee response action) is not

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protected industrial action unless it has been authorised in advance by a protected action ballot.

Subdivision B—Protected action ballot orders

437 Application for a protected action ballot order

Who may apply for a protected action ballot order

- (1) A bargaining representative of an employee who will be covered by a proposed enterprise agreement, or 2 or more such bargaining representatives (acting jointly), may apply to the FWC for an order (a **protected action ballot order**) requiring a protected action ballot to be conducted to determine whether employees wish to engage in particular protected industrial action for the agreement.
- (2) Subsection (1) does not apply if the proposed enterprise agreement is:
 - (a) a greenfields agreement; or
 - (b) a multi-enterprise agreement.
- (2A) Subsection (1) does not apply unless there has been a notification time in relation to the proposed enterprise agreement.

Note: For **notification time**, see subsection 173(2). Protected industrial action cannot be taken until after bargaining has commenced (including where the scope of the proposed enterprise agreement is the only matter in dispute).

Matters to be specified in application

- (3) The application must specify:
 - (a) the group or groups of employees who are to be balloted; and
 - (b) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action.
- (4) If the applicant wishes a person other than the Australian Electoral Commission to be the protected action ballot agent for the

protected action ballot, the application must specify the name of the person.

Note: The protected action ballot agent will be the Australian Electoral Commission unless the FWC specifies another person in the protected action ballot order as the protected action ballot agent (see subsection 443(4)).

- (5) A group of employees specified under paragraph (3)(a) is taken to include only employees who:
- (a) will be covered by the proposed enterprise agreement; and
 - (b) either:
 - (i) are represented by a bargaining representative who is an applicant for the protected action ballot order; or
 - (ii) are bargaining representatives for themselves but are members of an employee organisation that is an applicant for the protected action ballot order.

Documents to accompany application

- (6) The application must be accompanied by any documents and other information prescribed by the regulations.

438 Restriction on when application may be made

- (1) If one or more enterprise agreements cover the employees who will be covered by the proposed enterprise agreement, an application for a protected action ballot order must not be made earlier than 30 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be).
- (2) To avoid doubt, making an application for a protected action ballot order does not constitute organising industrial action.

439 Joint applications

Without limiting section 609, the procedural rules may provide for the following:

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- (a) how a provision of this Act that applies in relation to an applicant for a protected action ballot order is to apply in relation to joint applicants for such an order;
- (b) the joinder, with the consent of each existing applicant, of one or more bargaining representatives to an application for a protected action ballot order;
- (c) the withdrawal of one or more applicants from a joint application for a protected action ballot order.

440 Notice of application

Within 24 hours after making an application for a protected action ballot order, the applicant must give a copy of the application to the employer of the employees who are to be balloted, and:

- (a) if the application specifies a person that the applicant wishes to be the protected action ballot agent—that person; or
- (b) otherwise—the Australian Electoral Commission.

441 Application to be determined within 2 days after it is made

- (1) The FWC must, as far as practicable, determine an application for a protected action ballot order within 2 working days after the application is made.
- (2) However, the FWC must not determine the application unless it is satisfied that each applicant has complied with section 440.

442 Dealing with multiple applications together

The FWC may deal with 2 or more applications for a protected action ballot order at the same time if:

- (a) the applications relate to industrial action by:
 - (i) employees of the same employer; or
 - (ii) employees at the same workplace; and
- (b) the FWC is satisfied that dealing with the applications at the same time will not unreasonably delay the determination of any of the applications.

443 When the FWC must make a protected action ballot order

- (1) The FWC must make a protected action ballot order in relation to a proposed enterprise agreement if:
 - (a) an application has been made under section 437; and
 - (b) the FWC is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.
- (2) The FWC must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).
- (3) A protected action ballot order must specify the following:
 - (a) the name of each applicant for the order;
 - (b) the group or groups of employees who are to be balloted;
 - (c) the date by which voting in the protected action ballot closes;
 - (d) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action.
- (3A) For the purposes of paragraph (3)(c), the FWC must specify a date that will enable the protected action ballot to be conducted as expeditiously as practicable.
- (4) If the FWC decides that a person other than the Australian Electoral Commission is to be the protected action ballot agent for the protected action ballot, the protected action ballot order must also specify:
 - (a) the person that the FWC decides, under subsection 444(1), is to be the protected action ballot agent; and
 - (b) the person (if any) that the FWC decides, under subsection 444(3), is to be the independent advisor for the ballot.
- (5) If the FWC is satisfied, in relation to the proposed industrial action that is the subject of the protected action ballot, that there are exceptional circumstances justifying the period of written notice

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referred to in paragraph 414(2)(a) being longer than 3 working days, the protected action ballot order may specify a longer period of up to 7 working days.

Note: Under subsection 414(1), before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

444 FWC may decide on ballot agent other than the Australian Electoral Commission and independent advisor

Alternative ballot agent

- (1) The FWC may decide that a person other than the Australian Electoral Commission is to be the protected action ballot agent for a protected action ballot only if:
 - (a) the person is specified in the application for the protected action ballot order as the person the applicant wishes to be the protected action ballot agent; and
 - (b) the FWC is satisfied that:
 - (i) the person is a fit and proper person to conduct the ballot; and
 - (ii) any other requirements prescribed by the regulations are met.
- (2) The regulations may prescribe:
 - (a) conditions that a person must meet in order to satisfy the FWC that the person is a fit and proper person to conduct a protected action ballot; and
 - (b) factors that the FWC must take into account in determining whether a person is a fit and proper person to conduct a protected action ballot.

Independent advisor

- (3) The FWC may decide that a person (the **other person**) is to be the independent advisor for a protected action ballot if:

- (a) the FWC has decided that a person other than the Australian Electoral Commission is to be the protected action ballot agent for the ballot; and
- (b) the FWC considers it appropriate that there be an independent advisor for the ballot; and
- (c) the FWC is satisfied that:
 - (i) the other person is sufficiently independent of each applicant for the protected action ballot order; and
 - (ii) any other requirements prescribed by the regulations are met.

445 Notice of protected action ballot order

As soon as practicable after making a protected action ballot order, the FWC must give a copy of the order to:

- (a) each applicant for the order; and
- (b) the employer of the employees who are to be balloted; and
- (c) the protected action ballot agent for the protected action ballot.

446 Protected action ballot order may require 2 or more protected action ballots to be held at the same time

- (1) This section applies if:
 - (a) the FWC has made a protected action ballot order; and
 - (b) the FWC proposes to make another protected action ballot order or orders; and
 - (c) the orders would require a protected action ballot to be held in relation to industrial action by employees of the same employer or employees at the same workplace.
- (2) The FWC may make, or vary, the protected action ballot orders so as to require the protected action ballots to be held at the same time if the FWC is satisfied:
 - (a) that the level of disruption of the employer's enterprise, or at the workplace, could be reduced if the ballots were held at the same time; and

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- (b) that requiring the ballots to be held at the same time will not unreasonably delay either ballot.

447 Variation of protected action ballot order

- (1) An applicant for a protected action ballot order may apply to the FWC to vary the order.
- (2) The protected action ballot agent for a protected action ballot may apply to the FWC to vary the protected action ballot order to change the date by which voting in the ballot closes.
- (3) An application may be made under subsection (1) or (2):
 - (a) at any time before the date by which voting in the protected action ballot closes; or
 - (b) if the ballot has not been held before that date and the FWC consents—after that time.
- (4) If an application is made under subsection (1) or (2), the FWC may vary the protected action ballot order.

448 Revocation of protected action ballot order

- (1) An applicant for a protected action ballot order may apply to the FWC, at any time before voting in the protected action ballot closes, to revoke the order.
- (2) If an application to revoke a protected action ballot order is made, the FWC must revoke the order.

Subdivision C—Conduct of protected action ballot

449 Protected action ballot to be conducted by Australian Electoral Commission or other specified ballot agent

- (1) A protected action ballot must be conducted by:
 - (a) if a person is specified in the protected action ballot order as the protected action ballot agent for the ballot—that person; or

- (b) otherwise—the Australian Electoral Commission.
- (2) The protected action ballot agent must conduct the protected action ballot expeditiously and in accordance with the following:
 - (a) the protected action ballot order;
 - (b) the timetable for the ballot;
 - (c) this Subdivision;
 - (d) any directions given by the FWC;
 - (e) any procedures prescribed by the regulations.

450 Directions for conduct of protected action ballot

- (1) This section applies if the protected action ballot agent is not the Australian Electoral Commission.
- (2) The FWC must give the protected action ballot agent written directions in relation to the following matters relating to the protected action ballot:
 - (a) the development of a timetable;
 - (b) the voting method, or methods, to be used (which cannot be a method involving a show of hands);
 - (c) the compilation of the roll of voters;
 - (d) the addition of names to, or removal of names from, the roll of voters;
 - (e) any other matter in relation to the conduct of the ballot that the FWC considers appropriate.

Note 1: For the purposes of paragraph (2)(b), examples of voting methods are attendance voting, electronic voting and postal voting.

Note 2: A protected action ballot agent must not contravene a term of a direction given by the FWC in relation to a protected action ballot (see subsection 463(2)).

- (3) A direction given under subsection (2) may require the protected action ballot agent to comply with a provision of this Subdivision (other than subsection 454(5)) in relation to a particular matter.

Note: Subsection 454(5) provides for the Australian Electoral Commission to vary the roll of voters on its own initiative.

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- (4) To enable the roll of voters to be compiled, the FWC may direct, in writing, either or both of the following:
- (a) the employer of the employees who are to be balloted;
 - (b) the applicant for the protected action ballot order;
- to give to the FWC or the protected action ballot agent:
- (c) the names of the employees included in the group or groups of employees specified in the protected action ballot order; and
 - (d) any other information that it is reasonable for the FWC or the protected action ballot agent to require to assist in compiling the roll of voters.

451 Timetable for protected action ballot

- (1) This section applies if:
- (a) the protected action ballot agent is the Australian Electoral Commission; or
 - (b) the FWC has directed the protected action ballot agent to comply with this section.

Note: If this section does not apply, the protected action ballot agent must comply with directions given by the FWC in relation to the matters dealt with by this section (see section 450).

- (2) As soon as practicable after receiving a copy of the protected action ballot order, the protected action ballot agent must, in consultation with each applicant for the order and the employer of the employees who are to be balloted:
- (a) develop a timetable for the conduct of the protected action ballot; and
 - (b) determine the voting method, or methods, to be used for the ballot (which cannot be a method involving a show of hands).

Note: For the purposes of paragraph (2)(b), examples of voting methods are attendance voting, electronic voting and postal voting.

452 Compilation of roll of voters

- (1) This section applies if:
- (a) the protected action ballot agent is the Australian Electoral Commission; or
 - (b) the FWC has directed the protected action ballot agent to comply with this section.

Note: If this section does not apply, the protected action ballot agent must comply with directions given by the FWC in relation to the matters dealt with by this section (see section 450).

- (2) As soon as practicable after receiving a copy of the protected action ballot order, the protected action ballot agent must compile the roll of voters for the protected action ballot.
- (3) For the purpose of compiling the roll of voters, the protected action ballot agent may direct, in writing, the employer of the employees who are to be balloted, or the applicant for the order (or both), to give to the ballot agent:
- (a) the names of the employees included in the group or groups of employees specified in the protected action ballot order; and
 - (b) any other information that it is reasonable for the protected action ballot agent to require to assist in compiling the roll of voters.

453 Who is eligible to be included on the roll of voters

An employee is eligible to be included on the roll of voters for the protected action ballot only if:

- (a) the employee will be covered by the proposed enterprise agreement to which the ballot relates; and
- (b) the employee is included in a group of employees specified in the order and either:
 - (i) is represented by a bargaining representative who was an applicant for the order; or

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- (ii) is the bargaining representative for himself or herself but is a member of an employee organisation that was an applicant for the order.

454 Variation of roll of voters

Variation by protected action ballot agent on request

- (1) Subsections (2) to (4) apply if:
 - (a) the protected action ballot agent is the Australian Electoral Commission; or
 - (b) the FWC has directed the protected action ballot agent to comply with those subsections.

Note: If subsections (2) to (4) do not apply, the protected action ballot agent must comply with directions given by the FWC in relation to the matters dealt with by those subsections (see section 450).

Adding names to the roll of voters

- (2) The protected action ballot agent must include an employee's name on the roll of voters for the protected action ballot if:
 - (a) the protected action ballot agent is requested to do so by:
 - (i) an applicant for the protected action ballot order; or
 - (ii) the employee; or
 - (iii) the employee's employer; and
 - (b) the protected action ballot agent is satisfied that the employee is eligible to be included on the roll of voters; and
 - (c) the request is made before the end of the working day before the day on which voting in the ballot starts.

Removing names from the roll of voters

- (3) The protected action ballot agent must remove an employee's name from the roll of voters for the protected action ballot if:
 - (a) the protected action ballot agent is requested to do so by:
 - (i) an applicant for the protected action ballot order; or
 - (ii) the employee; or

- (iii) the employee's employer; and
 - (b) the protected action ballot agent is satisfied that the employee is not eligible to be included on the roll of voters; and
 - (c) the request is made before the end of the working day before the day on which voting in the ballot starts.
- (4) The protected action ballot agent must remove a person's name from the roll of voters for the protected action ballot if:
- (a) the person (the *former employee*) is no longer employed by the employer (the *former employer*) of the employees who are to be balloted; and
 - (b) the protected action ballot agent is requested to do so by:
 - (i) an applicant for the protected action ballot order; or
 - (ii) the former employee; or
 - (iii) the former employer; and
 - (c) the request is made before the end of the working day before the day on which voting in the ballot starts.

Variation by Australian Electoral Commission on its own initiative

- (5) If the protected action ballot agent is the Australian Electoral Commission, the Commission may, on its own initiative and before the end of the working day before the day on which voting in the ballot starts:
- (a) include an employee's name on the roll of voters for the protected action ballot if the Commission is satisfied that the employee is eligible to be included on the roll of voters; or
 - (b) remove an employee's name from the roll of voters for the protected action ballot if the Commission is satisfied that the employee is not eligible to be included on the roll of voters; or
 - (c) remove a person's name from the roll of voters for the protected action ballot if the person is no longer employed by the employer of the employees who are to be balloted.

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455 Protected action ballot papers

- (1) The ballot paper for the protected action ballot must:
 - (a) if a form is prescribed by the regulations—be in that form; and
 - (b) include any information prescribed by the regulations.
- (2) *Ballot paper* means:
 - (a) for a voting method that is not an electronic voting method—a paper ballot paper; and
 - (b) for an electronic voting method—an electronic ballot paper.

456 Who may vote in protected action ballot

An employee may vote in the protected action ballot only if the employee's name is on the roll of voters for the ballot.

457 Results of protected action ballot

- (1) As soon as practicable after voting in the protected action ballot closes, the protected action ballot agent must, in writing:
 - (a) make a declaration of the results of the ballot; and
 - (b) inform the following persons of the results:
 - (i) each applicant for the protected action ballot order;
 - (ii) the employer of the employees who were balloted;
 - (iii) the FWC.
- (2) The FWC must publish the results of the protected action ballot, on its website or by any other means that the FWC considers appropriate, as soon as practicable after it is informed of them.

458 Report about conduct of protected action ballot

Protected action ballot conducted by the Australian Electoral Commission

- (1) If:

- (a) the protected action ballot agent is the Australian Electoral Commission; and
- (b) the Commission:
 - (i) receives any complaints about the conduct of the protected action ballot; or
 - (ii) becomes aware of any irregularities in relation to the conduct of the ballot;

the Commission must prepare a written report about the conduct of the ballot and give it to the FWC.

Protected action ballot conducted by person other than the Australian Electoral Commission

- (2) If:
 - (a) the protected action ballot agent is not the Australian Electoral Commission; and
 - (b) the protected action ballot agent or the independent advisor (if any) for the protected action ballot:
 - (i) receives any complaints about the conduct of the ballot; or
 - (ii) becomes aware of any irregularities in relation to the conduct of the ballot;

the protected action ballot agent or the independent advisor (as the case may be) must prepare a report about the conduct of the ballot and give it to the FWC.

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

- (3) If:
 - (a) the protected action ballot agent is not the Australian Electoral Commission; and
 - (b) the FWC:
 - (i) receives any complaints about the conduct of the protected action ballot; or
 - (ii) becomes aware of any irregularities in relation to the conduct of the ballot;

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the FWC must, in writing, direct the protected action ballot agent or the independent advisor (if any) for the ballot (or both) to prepare a report about the conduct of the ballot and give it to the FWC.

- (4) A report under subsection (2) or (3) must be prepared in accordance with the regulations.

*Meaning of **conduct** of a protected action ballot*

- (5) **Conduct** of a protected action ballot includes, but is not limited to, the compilation of the roll of voters for the ballot.

*Meaning of **irregularity** in relation to the conduct of a protected action ballot*

- (6) An **irregularity**, in relation to the conduct of a protected action ballot, includes, but is not limited to, an act or omission by means of which the full and free recording of votes by all employees entitled to vote in the ballot, and by no other persons is, or is attempted to be, prevented or hindered.

Subdivision D—Effect of protected action ballot

459 Circumstances in which industrial action is authorised by protected action ballot

- (1) Industrial action by employees is authorised by a protected action ballot if:
- (a) the action was the subject of the ballot; and
 - (b) at least 50% of the employees on the roll of voters for the ballot voted in the ballot; and
 - (c) more than 50% of the valid votes were votes approving the action; and
 - (d) the action commences:
 - (i) during the 30-day period starting on the date of the declaration of the results of the ballot; or

- (ii) if the FWC has extended that period under subsection (3)—during the extended period.

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.

- (2) If:
- (a) the nature of the proposed industrial action specified in the question or questions put to the employees in the protected action ballot included periods of industrial action of a particular duration; and
 - (b) the question or questions did not specify that consecutive periods of that industrial action may be organised or engaged in;
- then only the first period in a series of consecutive periods of that industrial action is the subject of the ballot for the purposes of paragraph (1)(a).
- (3) The FWC may extend the 30-day period referred to in subparagraph (1)(d)(i) by up to 30 days if:
- (a) an applicant for the protected action ballot order applies to the FWC for the period to be extended; and
 - (b) the period has not previously been extended.

460 Immunity for persons who act in good faith on protected action ballot results

- (1) This section applies if:
- (a) the results of a protected action ballot, as declared by the protected action ballot agent for the ballot, purported to authorise particular industrial action; and
 - (b) an organisation or a person, acting in good faith on the declared ballot results, organised or engaged in that industrial action; and
 - (c) either:

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- (i) it later becomes clear that that industrial action was not authorised by the ballot; or
 - (ii) the decision to make the protected action ballot order is quashed or varied on appeal, or on review by the FWC, after the industrial action is organised or engaged in.
- (2) No action lies against the organisation or person under any law (whether written or unwritten) in force in a State or a Territory in relation to the industrial action unless the action involved:
 - (a) personal injury; or
 - (b) intentional or reckless destruction of, or damage to, property; or
 - (c) the unlawful taking, keeping or use of property.
- (3) This section does not prevent an action for defamation being brought in relation to anything that occurred in the course of the industrial action.

461 Validity of protected action ballot etc. not affected by technical breaches

A technical breach of a provision of this Division does not affect the validity of any of the following:

- (a) a protected action ballot order;
- (b) an order, direction or decision of the FWC in relation to a protected action ballot order or a protected action ballot;
- (c) a direction or decision of the protected action ballot agent in relation to a protected action ballot order or a protected action ballot;
- (d) a protected action ballot;
- (e) the conduct of a protected action ballot;
- (f) the declaration of the results of a protected action ballot.

Subdivision E—Compliance

462 Interferences etc. with protected action ballot

General

- (1) A person (the **first person**) must not do any of the following in relation to a protected action ballot:
- (a) hinder or obstruct the holding of the ballot;
 - (b) use any form of intimidation to prevent a person entitled to vote in the ballot from voting, or to influence the vote of such a person;
 - (c) threaten, offer or suggest, or use, cause or inflict, any violence, injury, punishment, damage, loss or disadvantage because of, or to induce:
 - (i) any vote or omission to vote; or
 - (ii) any support of, or opposition to, voting in a particular manner;
 - (d) offer an advantage (whether financial or otherwise) to a person entitled to vote in the ballot because of or to induce:
 - (i) any vote or omission to vote; or
 - (ii) any support of, or opposition to, voting in a particular manner;
 - (e) counsel or advise a person entitled to vote to refrain from voting;
 - (f) impersonate another person to obtain a ballot paper to which the first person is not entitled, or impersonate another person for the purpose of voting;
 - (g) do an act that results in a ballot paper or envelope being destroyed, defaced, altered, taken or otherwise interfered with;
 - (h) fraudulently put a paper ballot paper or other paper:
 - (i) into a repository that serves to receive or hold paper ballot papers; or
 - (ii) into the post;

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- (ha) fraudulently deliver or send an electronic ballot paper or other document to a repository that serves to receive or hold electronic ballot papers;
- (i) fraudulently deliver or send a ballot paper or other paper to a person receiving ballot papers for the purposes of the ballot;
- (j) record a vote that the first person is not entitled to record;
- (k) record more than one vote;
- (l) forge a ballot paper or envelope, or utter a ballot paper or envelope that the first person knows to be forged;
- (m) provide a ballot paper without authority;
- (n) obtain or have possession of a ballot paper to which the first person is not entitled;
- (o) request, require or induce another person:
 - (i) to show a ballot paper to the first person; or
 - (ii) to permit the first person to see a ballot paper in such a manner that the first person can see the vote; while the vote is being made, or after the vote has been made, on the ballot paper;
- (p) do an act that results in a repository that serves to receive or hold ballot papers being destroyed, taken, opened or otherwise interfered with.

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

*Meaning of **utter***

- (2) A person is taken to **utter** a forged document if the person:
 - (a) uses or deals with it; or
 - (b) attempts to use or deal with it; or
 - (c) attempts to induce another person to use, deal with, act upon, or accept it.

Obligations of person performing functions or exercising powers for the purposes of a protected action ballot

- (3) A person (the **first person**) who is performing functions or exercising powers for the purposes of a protected action ballot

must not show to another person, or permit another person to have access to, a ballot paper used in the ballot, except in the course of performing those functions or exercising those powers.

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

463 Contravening a protected action ballot order etc.

- (1) A person must not contravene:
 - (a) a term of a protected action ballot order; or
 - (b) a term of an order made by the FWC in relation to a protected action ballot order or a protected action ballot.

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

- (2) A person must not contravene a direction given by the FWC, or a protected action ballot agent, in relation to a protected action ballot order or a protected action ballot.

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

- (3) However, an order cannot be made under Division 2 of Part 4-1 in relation to a contravention (or alleged contravention) of subsection (1) or (2) by the Australian Electoral Commission.

Subdivision F—Liability for costs of protected action ballot

464 Costs of protected action ballot conducted by the Australian Electoral Commission

- (1) This section applies if the protected action ballot agent for a protected action ballot is the Australian Electoral Commission.
- (2) The Commonwealth is liable for the costs incurred by the Australian Electoral Commission in relation to the protected action ballot, whether or not the ballot is completed.
- (3) However, except as provided by regulations made for the purposes of subsection 466(1), the Commonwealth is not liable for any costs incurred by the Australian Electoral Commission in relation to

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legal challenges to matters connected with the protected action ballot.

465 Costs of protected action ballot conducted by protected action ballot agent other than the Australian Electoral Commission

- (1) This section applies if the protected action ballot agent for a protected action ballot is not the Australian Electoral Commission.
- (2) The applicant for the protected action ballot order is liable for the costs of conducting the protected action ballot, whether or not the ballot is completed.
- (3) If the application for the protected action ballot order was made by joint applicants, each applicant is jointly and severally liable for the costs of conducting the protected action ballot, whether or not the ballot is completed.
- (4) The *costs of conducting a protected action ballot* are:
 - (a) if the protected action ballot agent is an applicant for the protected action ballot order—the costs incurred by the applicant in relation to the ballot; or
 - (b) otherwise—the amount the protected action ballot agent charges to the applicant or applicants in relation to the ballot.
- (5) However, the *costs of conducting a protected action ballot* do not include any costs incurred by the protected action ballot agent in relation to legal challenges to matters connected with the ballot.

466 Costs of legal challenges

- (1) The regulations may provide for who is liable for costs incurred in relation to legal challenges to matters connected with a protected action ballot.
- (2) Regulations made for the purposes of subsection (1) may also provide for a person who is liable for costs referred to in that

subsection to be indemnified by another person for some or all of those costs.

Subdivision G—Miscellaneous

467 Information about employees on roll of voters not to be disclosed

- (1) A person who:
- (a) is the protected action ballot agent for a protected action ballot (other than the Australian Electoral Commission); or
 - (b) is the independent advisor for a protected action ballot; or
 - (c) acquires information from, or on behalf of, a person referred to in paragraph (a) or (b) in the course of performing functions or exercising powers for the purposes of the ballot;
- must not disclose to any other person information about an employee who is on the roll of voters for the ballot if the information will identify whether or not the employee is a member of an employee organisation.

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

- (2) Subsection (1) does not apply if:
- (a) the disclosure is made in the course of performing functions or exercising powers for the purposes of the protected action ballot; or
 - (b) the disclosure is required or authorised by or under a law; or
 - (c) the employee has consented, in writing, to the disclosure.

Note 1: Personal information given to the FWC, the Australian Electoral Commission or another protected action ballot agent under this Division may be regulated under the *Privacy Act 1988*.

Note 2: The President of the FWC may, in certain circumstances, disclose, or authorise the disclosure of, information acquired by the FWC or a member of the staff of the FWC, in the course of performing functions or exercising powers as the FWC (see section 655).

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468 Records

- (1) The protected action ballot agent for a protected action ballot must keep the following ballot material:
 - (a) the roll of voters for the ballot;
 - (b) the ballot papers, envelopes and other documents and records relating to the ballot;
 - (c) any other material prescribed by the regulations.
- (2) The ballot material must be kept for one year after the day on which the protected action ballot closed.
- (3) The protected action ballot agent must comply with any requirements prescribed by the regulations relating to how the ballot material is to be kept.

469 Regulations

The regulations may provide for the following matters:

- (a) the requirements that must be satisfied for a person (other than the Australian Electoral Commission) to be:
 - (i) the protected action ballot agent for a protected action ballot; or
 - (ii) the independent advisor for a protected action ballot;
- (b) the procedures to be followed in relation to the conduct of a protected action ballot;
- (c) the form and content of the ballot paper for a protected action ballot;
- (d) the qualifications, appointment, powers and duties of scrutineers for a protected action ballot;
- (e) the preparation of reports under subsection 458(2) or (3);
- (f) the records that the protected action ballot agent must keep in relation to a protected action ballot and how those records are to be kept.

Division 9—Payments relating to periods of industrial action

Subdivision A—Protected industrial action

470 Payments not to be made relating to certain periods of industrial action

- (1) If an employee engaged, or engages, in protected industrial action against an employer on a day, the employer must not make a payment to an employee in relation to the total duration of the industrial action on that day.

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

- (2) However, this section does not apply to a partial work ban.

Note: For payments relating to periods of partial work bans, see section 471.

- (3) A **partial work ban** is industrial action that is not:

- (a) a failure or refusal by an employee to attend for work; or
- (b) a failure or refusal by an employee who attends for work to perform any work at all; or
- (c) an overtime ban.

- (4) If the industrial action is, or includes, an overtime ban, this section does not apply, in relation to a period of overtime to which the ban applies, unless:

- (a) the employer requested or required the employee to work the period of overtime; and
- (b) the employee refused to work the period of overtime; and
- (c) the refusal was a contravention of the employee's obligations under a modern award, enterprise agreement or contract of employment.

- (5) If:

- (a) the industrial action is, or includes, an overtime ban; and

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(b) this section applies in relation to a period of overtime to which the ban applies;

then for the purposes of this section, the total duration of the industrial action is, or includes, the period of overtime to which the ban applies.

471 Payments relating to partial work bans

Employer gives notice of reduction in payments

(1) If:

- (a) an employee engaged, or engages, in protected industrial action against an employer on a day; and
- (b) the industrial action is a partial work ban; and
- (c) the employer gives to the employee a written notice stating that, because of the ban, the employee's payments will be reduced by a proportion specified in the notice;

then the employee's payments are reduced in accordance with subsection (2) in relation to the period (the ***industrial action period***) referred to in subsection (5).

(2) The employee's payments in relation to the industrial action period are reduced:

- (a) by the proportion specified in the notice; or
- (b) if the FWC has ordered a different proportion under section 472—by the proportion specified in the order; and the modern award, enterprise agreement or contract of employment that applies to the employee's employment has effect accordingly.

(3) The regulations may prescribe how the proportion referred to in paragraph (2)(a) is to be worked out.

Employer gives notice of non-payment

(4) If:

- (a) an employee engaged, or engages, in protected industrial action against an employer on a day; and

- (b) the industrial action is a partial work ban; and
- (c) the employer gives to the employee a written notice stating that, because of the ban:
 - (i) the employee will not be entitled to any payments; and
 - (ii) the employer refuses to accept the performance of any work by the employee until the employee is prepared to perform all of his or her normal duties;

then the employee is not entitled to any payments in relation to the period (the *industrial action period*) referred to in subsection (5).

(4A) If:

- (a) an employer has given an employee a notice under paragraph (4)(c); and
- (b) the employee fails or refuses to attend for work, or fails or refuses to perform any work at all if he or she attends for work, during the industrial action period;

then:

- (c) the failure or refusal is *employee claim action*, even if it does not satisfy subsections 409(2) and 413(4), if the related industrial action referred to in paragraph (4)(a) is employee claim action; or
- (d) the failure or refusal is *employee response action*, even if it does not satisfy subsection 413(4), if the related industrial action referred to in paragraph (4)(a) is employee response action.

The industrial action period

- (5) The *industrial action period* is the period:
 - (a) starting at the later of:
 - (i) the start of the first day on which the employee implemented the partial work ban; or
 - (ii) the start of the next day, after the day on which the notice was given, on which the employee performs work; and
 - (b) ending at the end of the day on which the ban ceases.

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Form and content of notice

- (6) The regulations may prescribe requirements relating to one or both of the following:
- (a) the form of a notice given under paragraph (1)(c) or (4)(c);
 - (b) the content of such a notice.

Manner of giving notice

- (7) Without limiting paragraph (1)(c) or (4)(c), the employer is taken to have given a notice in accordance with that paragraph to the employee if the employer:
- (a) has taken all reasonable steps to ensure that the employee, and the employee's bargaining representative (if any), receives the notice; and
 - (b) has complied with any requirements, relating to the giving of the notice, prescribed by the regulations.

Employer does not give notice

- (8) If:
- (a) an employee engaged, or engages, in protected industrial action against an employer on a day; and
 - (b) the industrial action is a partial work ban; and
 - (c) the employer does not give the employee a notice in accordance with paragraph (1)(c) or (4)(c);
- then the employee's payments for the day are not to be reduced because of the ban.

472 Orders by the FWC relating to certain partial work bans

- (1) The FWC may make an order varying the proportion by which an employee's payments are reduced.
- (2) The FWC may make the order only if a person has applied for it under subsection (4).

- (3) In considering making such an order, the FWC must take into account:
- (a) whether the proportion specified in the notice given under paragraph 471(1)(c) was reasonable having regard to the nature and extent of the partial work ban to which the notice relates; and
 - (b) fairness between the parties taking into consideration all the circumstances of the case.
- (4) An employee, or the employee's bargaining representative, may apply to the FWC for an order under subsection (2) if a notice has been given under paragraph 471(1)(c) stating that the employee's payments will be reduced.

473 Accepting or seeking payments relating to periods of industrial action

- (1) An employee must not:
- (a) accept a payment from an employer if the employer would contravene section 470 by making the payment; or
 - (b) ask the employer to make such a payment.
- Note 1: This subsection is a civil remedy provision (see Part 4-1).
- Note 2: Acts of coercion, or misrepresentations, relating to such payments may also contravene section 348 or 349.
- (2) An employee organisation, or an officer or member of an employee organisation, must not ask an employer to make a payment to an employee if the employer would contravene section 470 by making the payment.
- Note 1: This subsection is a civil remedy provision (see Part 4-1).
- Note 2: Acts of coercion, or misrepresentations, relating to such payments may also contravene section 348 or 349.

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Subdivision B—Industrial action that is not protected industrial action

474 Payments not to be made relating to certain periods of industrial action

- (1) If an employee engaged, or engages, in industrial action that is not protected industrial action against an employer on a day, the employer must not make a payment to an employee in relation to:
- (a) if the total duration of the industrial action on that day is at least 4 hours—the total duration of the industrial action on that day; or
 - (b) otherwise—4 hours of that day.

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

- (2) However, if the industrial action is, or includes, an overtime ban, this section does not apply, in relation to a period of overtime to which the ban applies, unless:
- (a) the employer requested or required the employee to work the period of overtime; and
 - (b) the employee refused to work the period of overtime; and
 - (c) the refusal was a contravention of the employee's obligations under a modern award, enterprise agreement or contract of employment.

Note: An employee is able to refuse to work additional hours if they are unreasonable (see subsection 62(2)). There may be other circumstances in which an employee can lawfully refuse to work additional hours.

(2A) If:

- (a) the industrial action is, or includes, an overtime ban; and
- (b) this section applies in relation to a period of overtime to which the ban applies;

then, for the purposes of this section:

- (c) the total duration of the industrial action is, or includes, the period of overtime to which the ban applies; and

(d) if paragraph (1)(b) applies—the period of 4 hours mentioned in that paragraph includes the period of overtime to which the ban applies.

(3) If:

(a) the industrial action is during a shift (or other period of work); and

(b) the shift (or other period of work) occurs partly on one day and partly on the next day;

then, for the purposes of this section, the shift is taken to be a day and the remaining parts of the days are taken not to be part of that day.

Example: An employee, who is working a shift from 10 pm on Tuesday until 7 am on Wednesday, engages in industrial action that is not protected industrial action from 11 pm on Tuesday until 1 am on Wednesday. That industrial action would prevent the employer making a payment to the employee in relation to 4 hours of the shift, but would not prevent the employer from making a payment in relation to the remaining 5 hours of the shift.

(4) For the purposes of subsection (3), overtime is taken not to be a separate shift.

475 Accepting or seeking payments relating to periods of industrial action

(1) An employee must not:

(a) accept a payment from an employer if the employer would contravene section 474 by making the payment; or

(b) ask the employer to make such a payment.

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

Note 2: Acts of coercion, or misrepresentations, relating to such payments may also contravene section 348 or 349.

(2) An employee organisation, or an officer or member of an employee organisation, must not ask an employer to make a payment to an employee if the employer would contravene section 474 by making the payment.

Chapter 3 Rights and responsibilities of employees, employers, organisations etc.

Part 3-3 Industrial action

Division 9 Payments relating to periods of industrial action

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

Note 2: Acts of coercion, or misrepresentations, relating to such payments may also contravene section 348 or 349.

Subdivision C—Miscellaneous

476 Other responses to industrial action unaffected

If an employee engaged, or engages, in industrial action against an employer, this Division does not affect any right of the employer, under this Act or otherwise, to do anything in response to the industrial action that does not involve payments to the employee.

Division 10—Other matters

477 Applications by bargaining representatives

Application of this section

- (1) This section applies if a provision of this Part permits an application to be made by a bargaining representative of an employer that will be covered by a proposed single-enterprise agreement.

Persons who may make applications

- (2) If the agreement will cover more than one employer, the application may be made by:
 - (a) in the case of a proposed single-enterprise agreement in relation to which a single interest employer authorisation is in operation—the person (if any) specified in the authorisation as the person who may make applications under this Act; or
 - (b) in any case—a bargaining representative of an employer that will be covered by the agreement, on behalf of one or more other such bargaining representatives, if those other bargaining representatives have agreed to the application being made on their behalf.

Part 3-4—Right of entry

Division 1—Introduction

478 Guide to this Part

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.

Division 2 allows permit holders to enter premises to investigate suspected contraventions of this Act and fair work instruments. The Division makes special provision in relation to TCF award workers. Division 2 also allows permit holders to enter premises to hold discussions with certain employees and TCF award workers. In exercising rights under Division 2, permit holders must comply with the requirements set out in the Division.

Division 3 sets out requirements for exercising rights under State or Territory OHS laws.

Division 4 prohibits certain action in relation to the operation of this Part.

Division 5 sets out powers of the FWC in relation to the operation of this Part.

Division 6 deals with entry permits, entry notices and certificates.

Division 7 deals with accommodation and transport arrangements in remote areas.

479 Meanings of *employee* and *employer*

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

480 Object of this Part

The object of this Part is to establish a framework for officials of organisations to enter premises that balances:

- (a) the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of:
 - (i) this Act and fair work instruments; and
 - (ii) State or Territory OHS laws; and
- (b) the right of employees and TCF award workers to receive, at work, information and representation from officials of organisations; and
- (c) the right of occupiers of premises and employers to go about their business without undue inconvenience.

Division 2—Entry rights under this Act

Subdivision A—Entry to investigate suspected contravention

481 Entry to investigate suspected contravention

- (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:
- (a) whose industrial interests the organisation is entitled to represent; and
 - (b) who performs work on the premises.

Note 1: Particulars of the suspected contravention must be specified in an entry notice or exemption certificate (see subsections 518(2) and 519(2)).

Note 2: The FWC 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)).

Note 3: A permit holder, or the organisation to which the permit holder belongs, may be subject to an order by the FWC under section 508 if rights under this Subdivision are misused.

Note 4: A person must not refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder, exercising rights under this Subdivision (see sections 501 and 502).

- (2) The fair work instrument must apply or have applied to the member.
- (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.

Note: A permit holder who seeks to exercise rights under this Part without reasonably suspecting that a contravention has occurred, or is occurring, is liable to be penalised under subsection 503(1) (which deals with misrepresentations about things authorised by this Part).

482 Rights that may be exercised while on premises

Rights that may be exercised while on premises

- (1) While on the premises, the permit holder may do the following:
- (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;
 - (c) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, any record or document (other than a non-member record or document) that is directly relevant to the suspected contravention and that:
 - (i) is kept on the premises; or
 - (ii) is accessible from a computer that is kept on the premises.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988*.

- (1A) However, an occupier or affected employer is not required under paragraph (1)(c) to allow the permit holder to inspect, or make copies of, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

Meaning of affected employer

- (2) A person is an **affected employer**, in relation to an entry onto premises under this Subdivision, if:
- (a) the person employs a member of the permit holder's organisation whose industrial interests the organisation is entitled to represent; and
 - (b) the member performs work on the premises; and

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- (c) the suspected contravention relates to, or affects, the member.

Meaning of non-member record or document

- (2A) A **non-member record or document** is a record or document that:
- (a) relates to the employment of a person who is not a member of the permit holder's organisation; and
 - (b) does not also substantially relate to the employment of a person who is a member of the permit holder's organisation;
- but does not include a record or document that relates only to a person or persons who are not members of the permit holder's organisation if the person or persons have consented in writing to the record or document being inspected or copied by the permit holder.

Occupier and affected employer must not contravene requirement

- (3) An occupier or affected employer must not contravene a requirement under paragraph (1)(c).

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

483 Later access to record or document

Later access to record or document

- (1) The permit holder may, by written notice, require an affected employer to produce, or provide access to, a record or document (other than a non-member record or document) that is directly relevant to the suspected contravention on a later day or days specified in the notice.
- (1A) However, an affected employer is not required under subsection (1) to produce, or provide access to, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

Other rules relating to notices

- (2) The day or days specified in the notice must not be earlier than 14 days after the notice is given.
- (3) The notice may be given:
 - (a) while the permit holder is on the premises; or
 - (b) within 5 days after the entry.

Affected employer must not contravene requirement

- (4) An affected employer must not contravene a requirement under subsection (1).

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

Where record or document may be inspected or copied

- (5) The permit holder may inspect, and make copies of, the record or document at:
 - (a) the premises; or
 - (b) if another place is agreed upon by the permit holder and the affected employer—that other place.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988*.

483AA Application to the FWC for access to non-member records

- (1) The permit holder may apply to the FWC for an order allowing the permit holder to do either or both of the following:
 - (a) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, specified non-member records or documents (or parts of such records or documents) under paragraph 482(1)(c);
 - (b) require an affected employer to produce, or provide access to, specified non-member records or documents (or parts of such records or documents) under subsection 483(1).

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- (2) The FWC may make the order if it is satisfied that the order is necessary to investigate the suspected contravention. Before doing so, the FWC must have regard to any conditions imposed on the permit holder's entry permit.
- (3) If the FWC makes the order, this Subdivision has effect accordingly.
- (4) An application for an order under this section:
 - (a) must be in accordance with the regulations; and
 - (b) must set out the reason for the application.

Subdivision AA—Entry to investigate suspected contravention relating to TCF award workers

483A Entry to investigate suspected contravention relating to TCF award workers

- (1) Subject to subsection (6), a permit holder may enter premises and exercise a right under section 483B or 483C for the purpose of investigating a suspected contravention of:
 - (a) this Act, or a term of a fair work instrument, that relates to, or affects, a TCF award worker:
 - (i) whose industrial interests the permit holder's organisation is entitled to represent; and
 - (ii) who performs work on the premises; or
 - (b) a designated outworker term that is in an instrument that relates to TCF award workers whose industrial interests the permit holder's organisation is entitled to represent.

Note 1: Particulars of the suspected contravention must be specified in an entry notice, unless the entry is a designated outworker terms entry (see subsection 518(2)).

Note 2: A permit holder, or the organisation to which the permit holder belongs, may be subject to an order by the FWC under section 508 if rights under this Subdivision are misused.

Note 3: A person must not refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder, exercising rights under this Subdivision (see sections 501 and 502).

- (1A) A **TCF award worker** is:
- (a) an employee whose work is covered by a TCF award; or
 - (b) an individual who, for the purpose of a contract for the provision of services, performs work that is covered by a TCF award.
- (2) The permit holder must reasonably suspect that the contravention has occurred, or is occurring.
- (3) The burden of proving that the suspicion is reasonable lies on the person asserting that fact.
- (4) Subsections (2) and (3) do not apply in relation to a designated outworker terms entry.
- (5) A **designated outworker terms entry** is an entry under paragraph (1)(b) for the purpose of investigating a suspected contravention of a designated outworker term.
- (6) Particular premises of a person cannot be entered under paragraph (1)(a) if:
- (a) the person is accredited (however described) by a person or body specified by name in the regulations; and
 - (b) the accreditation is in writing and is in force; and
 - (c) the premises are identified in the accreditation as being the principal place of business of the accredited person.
- Note: The fact that this subsection may result in certain premises not being able to be entered under paragraph (1)(a) for the purpose of investigating a particular suspected contravention does not:
- (a) prevent the premises being entered for that purpose under Subdivision A; or
 - (b) prevent the premises being entered under paragraph (1)(b) of this section.
- (7) Before the Governor-General makes a regulation specifying a particular person or body for the purposes of paragraph (6)(a), the Minister must be satisfied that the person or body:
- (a) has aims that are consistent with the objects of Part 6-4A; and

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- (b) has the endorsement of:
 - (i) at least one employee organisation that is entitled to represent the industrial interests of TCF award workers; and
 - (ii) at least one employer organisation that is entitled to represent the industrial interests of persons who employ or engage TCF award workers.

483B Rights that may be exercised while on premises

Rights that may be exercised while on premises

- (1) While on the premises, the permit holder may do the following:
 - (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;
 - (c) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, any record or document that is directly relevant to the suspected contravention and that:
 - (i) is kept on the premises; or
 - (ii) is accessible from a computer that is kept on the premises.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988*.

- (2) However, an occupier or affected employer is not required under paragraph (1)(c) to allow the permit holder to inspect, or make copies of, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

Meaning of affected employer

- (3) A person is an *affected employer*:
- (a) in relation to an entry onto premises under section 483A other than a designated outworker terms entry, if:
 - (i) the person employs or engages a TCF award worker whose industrial interests the permit holder's organisation is entitled to represent; and
 - (ii) the TCF award worker performs work on the premises; and
 - (iii) the suspected contravention relates to, or affects, the TCF award worker; or
 - (b) in relation to a designated outworker terms entry under section 483A, if the person is covered by a TCF award.

Occupier and affected employer must not contravene requirement

- (4) An occupier or affected employer must not contravene a requirement under paragraph (1)(c).

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

483C Later access to record or document

Later access to record or document

- (1) The permit holder may, by written notice, require the occupier or an affected employer to produce, or provide access to, a record or document that is directly relevant to the suspected contravention on a later day or days specified in the notice.
- (2) However, an occupier or affected employer is not required under subsection (1) to produce, or provide access to, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

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Other rules relating to notices

- (3) The day or days specified in the notice must not be earlier than 14 days after the notice is given.
- (4) The notice may be given:
 - (a) while the permit holder is on the premises; or
 - (b) within 5 days after the entry.

Occupier and affected employer must not contravene requirement

- (5) An occupier or affected employer must not contravene a requirement under subsection (1).

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

Where record or document may be inspected or copied

- (6) The permit holder may inspect, and make copies of, the record or document at:
 - (a) the premises; or
 - (b) if another place is agreed upon by the permit holder and the occupier or affected employer—that other place.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988*.

483D Entry onto other premises to access records and documents

- (1) A permit holder who may enter premises under paragraph 483A(1)(a) for the purpose of investigating a suspected contravention may enter other premises and exercise a right under subsection (2) or section 483E if the permit holder reasonably suspects that records or documents that are directly relevant to the suspected contravention:
 - (a) are kept on the other premises; or
 - (b) are accessible from a computer that is kept on the other premises.

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Note: Particulars of the suspected contravention must be specified in an entry notice (see subsection 518(2)).

Rights that may be exercised while on premises

- (2) While on the other premises, the permit holder may require the occupier to allow the permit holder to inspect, and make copies of, any such record or document.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988*.

- (3) However, an occupier is not required under subsection (2) to allow the permit holder to inspect, or make copies of, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

Occupier must not contravene requirement

- (4) An occupier must not contravene a requirement under subsection (2).

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

483E Later access to record or document—other premises

Later access to record or document

- (1) The permit holder may, by written notice, require the occupier of the other premises to produce, or provide access to, a record or document that is directly relevant to the suspected contravention on a later day or days specified in the notice.
- (2) However, an occupier is not required under subsection (1) to produce, or provide access to, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

Section 484

Other rules relating to notices

- (3) The day or days specified in the notice must not be earlier than 14 days after the notice is given.
- (4) The notice may be given:
 - (a) while the permit holder is on the other premises; or
 - (b) within 5 days after the entry.

Occupier must not contravene requirement

- (5) An occupier must not contravene a requirement under subsection (1).

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

Where record or document may be inspected or copied

- (6) The permit holder may inspect, and make copies of, the record or document at:
 - (a) the other premises; or
 - (b) if another place is agreed upon by the permit holder and the occupier—that other place.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988*.

Subdivision B—Entry to hold discussions

484 Entry to hold discussions

A permit holder may enter premises for the purposes of holding discussions with one or more employees or TCF award workers:

- (a) who perform work on the premises; and
- (b) whose industrial interests the permit holder's organisation is entitled to represent; and
- (c) who wish to participate in those discussions.

- Note 1: A permit holder, or the organisation to which the permit holder belongs, may be subject to an order by the FWC under section 508 if rights under this Subdivision are misused.
- Note 2: A person must not refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder, exercising rights under this Subdivision (see sections 501 and 502).
- Note 3: Under paragraph 487(1)(b), the permit holder must give the occupier of the premises notice for the entry. Having given that notice, the permit holder may hold discussions with any person on the premises described in this section.

Subdivision C—Requirements for permit holders

486 Permit holder must not contravene this Subdivision

Subdivisions A, AA and B do not authorise a permit holder to enter or remain on premises, or exercise any other right, if he or she contravenes this Subdivision, or regulations prescribed under section 521, in exercising that right.

487 Giving entry notice or exemption certificate

Entry under Subdivision A or B

- (1) Unless the FWC has issued an exemption certificate for the entry, the permit holder must:
 - (a) before entering premises under Subdivision A—give the occupier of the premises and any affected employer an entry notice for the entry; and
 - (b) before entering premises under Subdivision B—give the occupier of the premises an entry notice for the entry.
- (2) An **entry notice** for an entry is a notice that complies with section 518.
- (3) An entry notice for an entry under Subdivision A or B must be given during working hours at least 24 hours, but not more than 14 days, before the entry.

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- (4) If the FWC has issued an exemption certificate for the entry, the permit holder must, either before or as soon as practicable after entering the premises, give a copy of the certificate to:
- (a) the occupier of the premises or another person who apparently represents the occupier; and
 - (b) any affected employer or another person who apparently represents the employer;
- if the occupier, employer or other person is present at the premises.

Entry under Subdivision AA

- (5) If the permit holder enters premises under Subdivision AA, the permit holder must, either before or as soon as practicable after entering the premises, give an entry notice for the entry to the occupier of the premises or another person who apparently represents the occupier if the occupier or other person is present at the premises.

488 Contravening entry permit conditions

The permit holder must not contravene a condition imposed on the entry permit.

489 Producing authority documents

- (1) If the permit holder has entered premises under Subdivision A or AA, the permit holder must produce his or her authority documents for inspection by the occupier of the premises, or an affected employer:
- (a) on request; and
 - (b) before making a requirement under:
 - (i) paragraph 482(1)(c) or 483B(1)(c), or subsection 483D(2); or
 - (ii) subsection 483(1), 483C(1) or 483E(1).

Note: Paragraphs 482(1)(c) and 483B(1)(c) and subsection 483D(2) deal with access to records and documents while the permit holder is on the premises. Subsections 483(1), 483C(1) and 483E(1) deal with access to records and documents at later times.

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- (2) If the permit holder has entered premises under Subdivision B, the permit holder must produce his or her authority documents for inspection by the occupier of the premises on request.
- (3) **Authority documents**, for an entry under Subdivision A, AA or B, means:
 - (a) the permit holder's entry permit; and
 - (b) either:
 - (i) a copy of the entry notice for the entry; or
 - (ii) if the FWC has issued an exemption certificate for the entry—the certificate.

490 When right may be exercised

- (1) The permit holder may exercise a right under Subdivision A, AA or B only during working hours.
- (2) The permit holder may hold discussions under section 484 only during mealtimes or other breaks.
- (3) The permit holder may only enter premises under Subdivision A, AA or B on a day specified in the entry notice or exemption certificate for the entry.

491 Occupational health and safety requirements

The permit holder must comply with any reasonable request by the occupier of the premises for the permit holder to comply with an occupational health and safety requirement that applies to the premises.

Note: The FWC may deal with a dispute about whether the request is reasonable (see subsection 505(1)).

492 Location of interviews and discussions

- (1) The permit holder must conduct interviews or hold discussions in the rooms or areas of the premises agreed with the occupier of the premises.

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- (2) Subsection (3) applies if the permit holder and the occupier cannot agree on the room or area of the premises in which the permit holder is to conduct an interview or hold discussions.
- (3) The permit holder may conduct the interview or hold the discussions in any room or area:
 - (a) in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks; and
 - (b) that is provided by the occupier for the purpose of taking meal or other breaks.

Note 1: The permit holder may be subject to an order by the FWC under section 508 if rights under this section are misused.

Note 2: A person must not intentionally hinder or obstruct a permit holder exercising rights under this section (see section 502).

492A Route to location of interview and discussions

- (1) The permit holder must comply with any reasonable request by the occupier of the premises to take a particular route to reach a room or area of the premises determined under section 492.

Note: The FWC may deal with a dispute about whether the request is reasonable (see subsection 505(1)).

- (2) A request under subsection (1) is not unreasonable only because the route is not that which the permit holder would have chosen.
- (3) The regulations may prescribe circumstances in which a request under subsection (1) is or is not reasonable.

493 Residential premises

The permit holder must not enter any part of premises that is used mainly for residential purposes.

Division 3—State or Territory OHS rights

494 Official must be permit holder to exercise State or Territory OHS right

Official must be permit holder

- (1) An official of an organisation must not exercise a State or Territory OHS right unless the official is a permit holder.

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

Meaning of State or Territory OHS right

- (2) A right to enter premises, or to inspect or otherwise access an employee record of an employee that is on premises, is a **State or Territory OHS right** if the right is conferred by a State or Territory OHS law, and:
- (a) the premises are occupied or otherwise controlled by any of the following:
 - (i) a constitutional corporation;
 - (ii) a body corporate incorporated in a Territory;
 - (iii) the Commonwealth;
 - (iv) a Commonwealth authority; or
 - (b) the premises are located in a Territory; or
 - (c) the premises are, or are located in, a Commonwealth place; or
 - (d) the right relates to requirements to be met, action taken, or activity undertaken or controlled, by any of the following in its capacity as an employer:
 - (i) a constitutional corporation;
 - (ii) a body corporate incorporated in a Territory;
 - (iii) the Commonwealth;
 - (iv) a Commonwealth authority; or
 - (e) the right relates to requirements to be met, action taken, or activity undertaken or controlled, by an employee of, or an

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independent contractor providing services for, any of the following:

- (i) a constitutional corporation;
 - (ii) a body corporate incorporated in a Territory;
 - (iii) the Commonwealth;
 - (iv) a Commonwealth authority; or
- (f) the exercise of the right will have a direct effect on any of the following in its capacity as an employer:
- (i) a constitutional corporation;
 - (ii) a body corporate incorporated in a Territory;
 - (iii) the Commonwealth;
 - (iv) a Commonwealth authority; or
- (g) the exercise of the right will have a direct effect on a person who is employed by, or who is an independent contractor providing services for, any of the following:
- (i) a constitutional corporation;
 - (ii) a body corporate incorporated in a Territory;
 - (iii) the Commonwealth;
 - (iv) a Commonwealth authority.

Meaning of State or Territory OHS law

- (3) A **State or Territory OHS law** is a law of a State or a Territory prescribed by the regulations.

495 Giving notice of entry

- (1) A permit holder must not exercise a State or Territory OHS right to inspect or otherwise access an employee record of an employee, unless:
- (a) he or she has given the occupier of the premises, and any affected employer, a written notice setting out his or her intention to exercise the right, and reasons for doing so; and
 - (b) the notice is given at least 24 hours before exercising the right.

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

Meaning of affected employer

- (2) A person is an *affected employer*:
- (a) in relation to an entry onto premises in accordance with this Division—if one or more of the person's employees perform work on the premises; and
 - (b) in relation to a right to inspect or otherwise access an employee record in accordance with this Division—if the person employs the employee to whom the record relates.

496 Contravening entry permit conditions

In exercising a State or Territory OHS right, a permit holder must not contravene a condition imposed on his or her entry permit.

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

497 Producing entry permit

A permit holder must not exercise a State or Territory OHS right unless the permit holder produces his or her entry permit for inspection when requested to do so by the occupier of the premises or an affected employer.

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

498 When right may be exercised

A permit holder may exercise a State or Territory OHS right only during working hours.

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

499 Occupational health and safety requirements

A permit holder must not exercise a State or Territory OHS right unless he or she complies with any reasonable request by the occupier of the premises to comply with an occupational health and safety requirement that applies to the premises.

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

Chapter 3 Rights and responsibilities of employees, employers, organisations etc.

Part 3-4 Right of entry

Division 3 State or Territory OHS rights

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Note 2: The FWC may deal with a dispute about whether the request is reasonable (see subsection 505(1)).

Division 4—Prohibitions

500 Permit holder must not hinder or obstruct

A permit holder exercising, or seeking to exercise, rights in accordance with this Part must not intentionally hinder or obstruct any person, or otherwise act in an improper manner.

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

Note 2: A permit holder, or the organisation to which the permit holder belongs, may also be subject to an order by the FWC under section 508 if rights under this Part are misused.

Note 3: A person must not intentionally hinder or obstruct a permit holder, exercising rights under this Part (see section 502).

501 Person must not refuse or delay entry

A person must not refuse or unduly delay entry onto premises by a permit holder who is entitled to enter the premises in accordance with this Part.

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

502 Person must not hinder or obstruct permit holder

- (1) A person must not intentionally hinder or obstruct a permit holder exercising rights in accordance with this Part.

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

- (2) To avoid doubt, a failure to agree on a place as referred to in paragraph 483(5)(b), 483C(6)(b) or 483E(6)(b) does not constitute hindering or obstructing a permit holder.

- (3) Without limiting subsection (1), that subsection extends to hindering or obstructing that occurs after an entry notice is given but before a permit holder enters premises.

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503 Misrepresentations about things authorised by this Part

- (1) A person must not take action:
- (a) with the intention of giving the impression; or
 - (b) reckless as to whether the impression is given;
- that the doing of a thing is authorised by this Part if it is not so authorised.

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

- (2) Subsection (1) does not apply if the person reasonably believes that the doing of the thing is authorised.

504 Unauthorised use or disclosure of information or documents

A person must not use or disclose information or a document obtained under section 482, 483, 483B, 483C, 483D or 483E in the investigation of a suspected contravention for a purpose that is not related to the investigation or rectifying the suspected contravention, unless:

- (a) the person reasonably believes that the use or disclosure is necessary to lessen or prevent:
 - (i) a serious and imminent threat to an individual's life, health or safety; or
 - (ii) a serious threat to public health or public safety; or
- (b) the person has reason to suspect that unlawful activity has been, is being or may be engaged in, and uses or discloses the information or document as a necessary part of an investigation of the matter or in reporting concerns to relevant persons or authorities; or
- (c) the use or disclosure is required or authorised by or under law; or
- (d) the person reasonably believes that the use or disclosure is reasonably necessary for one or more of the following by, or on behalf of, an enforcement body (within the meaning of the *Privacy Act 1988*):
 - (i) the prevention, detection, investigation, prosecution or punishment of criminal offences, breaches of a law

- imposing a penalty or sanction or breaches of a prescribed law;
- (ii) the enforcement of laws relating to the confiscation of the proceeds of crime;
 - (iii) the protection of the public revenue;
 - (iv) the prevention, detection, investigation or remedying of seriously improper conduct or prescribed conduct;
 - (v) the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal; or
- (e) if the information is, or the document contains, personal information (within the meaning of the *Privacy Act 1988*)—the use or disclosure is made with the consent of the individual to whom the information relates.

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

Division 5—Powers of the FWC

Subdivision A—Dealing with disputes

505 FWC may deal with a dispute about the operation of this Part

- (1) The FWC may deal with a dispute about the operation of this Part, including a dispute about:
 - (a) whether a request under section 491, 492A or 499 is reasonable; or
 - (b) when a right of the kind referred to in section 490 may be exercised by a permit holder on premises of a kind mentioned in subsection 521C(1) or 521D(1), despite that section; or
 - (c) whether accommodation is reasonably available as mentioned in subsection 521C(1) or premises reasonably accessible as mentioned in subsection 521D(1); or
 - (d) whether providing accommodation or transport, or causing accommodation or transport to be provided, would cause the occupier of premises undue inconvenience as mentioned in paragraph 521C(2)(a) or 521D(2)(a); or
 - (e) whether a request to provide accommodation or transport is made within a reasonable period as mentioned in paragraph 521C(2)(c) or 521D(2)(c).

Note 1: Sections 491 and 499 deal with requests for permit holders to comply with occupational health and safety requirements.

Note 2: Section 492A deals with requests for a permit holder to take a particular route to a room or area in which an interview is to be conducted or discussions held.

Note 3: Section 490 deals with when rights under Subdivision A, AA or B of Division 2 of this Part may be exercised.

Note 4: Sections 521C and 521D deal with accommodation in and transport to remote areas for the purpose of exercising rights under this Part.

- (2) The FWC may deal with the dispute by arbitration, including by making one or more of the following orders:
 - (a) an order imposing conditions on an entry permit;

- (b) an order suspending an entry permit;
- (c) an order revoking an entry permit;
- (d) an order about the future issue of entry permits to one or more persons;
- (e) any other order it considers appropriate.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

- (3) The FWC may deal with the dispute:
 - (a) on its own initiative; or
 - (b) on application by any of the following to whom the dispute relates:
 - (i) a permit holder;
 - (ii) a permit holder's organisation;
 - (iii) an employer;
 - (iv) an occupier of premises.
- (4) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.
- (5) In dealing with the dispute, the FWC must not confer rights on a permit holder that are additional to, or inconsistent with, rights exercisable in accordance with Division 2, 3 or 7 of this Part, unless the dispute is about:
 - (a) whether a request under section 491, 492A or 499 is reasonable; or
 - (b) when a right of the kind referred to in section 490 may be exercised by the permit holder on premises of a kind mentioned in subsection 521C(1) or 521D(1), despite that section; or
 - (c) whether accommodation is reasonably available as mentioned in subsection 521C(1) or premises reasonably accessible as mentioned in subsection 521D(1); or
 - (d) whether providing accommodation or transport, or causing accommodation or transport to be provided, would cause the

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occupier of premises undue inconvenience as mentioned in paragraph 521C(2)(a) or 521D(2)(a); or

- (e) whether a request to provide accommodation or transport is made within a reasonable period as mentioned in paragraph 521C(2)(c) or 521D(2)(c).

505A FWC may deal with a dispute about frequency of entry to hold discussions

- (1) This section applies if:
- (a) a permit holder or permit holders of an organisation enter premises under section 484 for the purposes of holding discussions with one or more employees or TCF award workers; and
 - (b) an employer of the employees or the TCF award workers, or occupier of the premises, disputes the frequency with which the permit holder or permit holders of the organisation enter the premises.
- (2) The FWC may deal with a dispute about the frequency with which a permit holder or permit holders of an organisation enter premises under section 484.
- (3) The FWC may deal with the dispute by arbitration, including by making one or more of the following orders:
- (a) an order imposing conditions on an entry permit;
 - (b) an order suspending an entry permit;
 - (c) an order revoking an entry permit;
 - (d) an order about the future issue of entry permits to one or more persons;
 - (e) any other order it considers appropriate.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

- (4) However, the FWC may only make an order under subsection (3) if the FWC is satisfied that the frequency of entry by the permit

holder or permit holders of the organisation would require an unreasonable diversion of the occupier's critical resources.

- (5) The FWC may deal with the dispute:
- (a) on its own initiative; or
 - (b) on application by any of the following to whom the dispute relates:
 - (i) a permit holder;
 - (ii) a permit holder's organisation;
 - (iii) an employer;
 - (iv) an occupier of premises.
- (6) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

506 Contravening order made to deal with dispute

A person must not contravene a term of an order under subsection 505(2) or subsection 505A(3).

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

Subdivision B—Taking action against permit holder

507 FWC may take action against permit holder

- (1) The FWC may, on application by an inspector or a person prescribed by the regulations, take the following action against a permit holder:
- (a) impose conditions on any entry permit issued to the permit holder;
 - (b) suspend any entry permit issued to the permit holder;
 - (c) revoke any entry permit issued to the permit holder.
- (2) In deciding whether to take action under subsection (1), the FWC must take into account the permit qualification matters.

Note: For *permit qualification matters*, see subsection 513(1).

**Subdivision C—Restricting rights of organisations and officials
where misuse of rights**

**508 FWC may restrict rights if organisation or official has misused
rights**

- (1) The FWC may restrict the rights that are exercisable under this Part by an organisation, or officials of an organisation, if the FWC is satisfied that the organisation, or an official of the organisation, has misused those rights.

Note: Only a Vice President, Deputy President or Full Bench may take action under this subsection (see subsections 612(2) and 615(1)).

- (2) The action that the FWC may take under subsection (1) includes the following:
- (a) imposing conditions on entry permits;
 - (b) suspending entry permits;
 - (c) revoking entry permits;
 - (d) requiring some or all of the entry permits that might in future be issued in relation to the organisation to be issued subject to specified conditions;
 - (e) banning, for a specified period, the issue of entry permits in relation to the organisation, either generally or to specified persons;
 - (f) making any order it considers appropriate.
- (3) The FWC may take action under subsection (1):
- (a) on its own initiative; or
 - (b) on application by an inspector.
- (4) Without limiting subsection (1), an official misuses rights exercisable under this Part if:
- (a) the official exercises those rights repeatedly with the intention or with the effect of hindering, obstructing or otherwise harassing an occupier or employer; or
 - (b) in exercising a right under Subdivision B of Division 2 of this Part, the official encourages a person to become a

member of an organisation and does so in a way that is unduly disruptive:

- (i) because the exercise of the right is excessive in the circumstances; or
- (ii) for some other reason.

509 Contravening order made for misuse of rights

A person must not contravene a term of an order under subsection 508(1).

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

Subdivision D—When the FWC must revoke or suspend entry permits

510 When the FWC must revoke or suspend entry permits

When the FWC must revoke or suspend entry permits

- (1) The FWC must, under this subsection, revoke or suspend each entry permit held by a permit holder if it is satisfied that any of the following has happened since the first of those permits was issued:
 - (a) the permit holder was found, in proceedings under this Act, to have contravened subsection 503(1) (which deals with misrepresentations about things authorised by this Part);
 - (b) the permit holder has contravened section 504 (which deals with unauthorised use or disclosure of information or documents);
 - (c) the Information Commissioner has, under paragraph 52(1)(b) of the *Privacy Act 1988*, found substantiated a complaint relating to action taken by the permit holder in relation to information or documents obtained under section 482, 483, 483B, 483C, 483D or 483E;
 - (d) the permit holder, or another person, was ordered to pay a pecuniary penalty under this Act in relation to a contravention of this Part by the permit holder;

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- (e) a court, or other person or body, under a State or Territory industrial law:
 - (i) cancelled or suspended a right of entry for industrial purposes that the permit holder had under that law; or
 - (ii) disqualified the permit holder from exercising, or applying for, a right of entry for industrial purposes under that law;
 - (f) the permit holder has, in exercising a right of entry under a State or Territory OHS law, taken action that was not authorised by that law.
- (2) Despite subsection (1), the FWC is not required to suspend or revoke an entry permit under paragraph (1)(d) or (f) if the FWC is satisfied that the suspension or revocation would be harsh or unreasonable in the circumstances.
- (3) Subsection (1) does not apply in relation to a circumstance referred to in a paragraph of that subsection if the FWC took the circumstance into account when taking action under that subsection on a previous occasion.

Minimum suspension period

- (4) A suspension under subsection (1) must be for a period that is at least as long as the period (the **minimum suspension period**) specified in whichever of the following paragraphs applies:
- (a) if the FWC has not previously taken action under subsection (1) against the permit holder—3 months;
 - (b) if the FWC has taken action under subsection (1) against the permit holder on only one occasion—12 months;
 - (c) if the FWC has taken action under subsection (1) against the permit holder on more than one occasion—5 years.

Banning issue of future entry permits

- (5) If the FWC takes action under subsection (1), it must also ban the issue of any further entry permit to the permit holder for a specified period (the **ban period**).

- (6) The ban period must:
- (a) begin when the action is taken under subsection (1); and
 - (b) be no shorter than the minimum suspension period.

Subdivision E—General rules for suspending entry permits

511 General rules for suspending entry permits

If the FWC suspends an entry permit, the suspension:

- (a) must be for a specified period; and
- (b) does not prevent the revocation of, or the imposition of conditions on, the entry permit during the suspension period; and
- (c) does not alter the time at which the entry permit would otherwise expire.

Division 6—Entry permits, entry notices and certificates

Subdivision A—Entry permits

512 FWC may issue entry permits

The FWC may, on application by an organisation, issue a permit (an *entry permit*) to an official of the organisation if the FWC is satisfied that the official is a fit and proper person to hold the entry permit.

513 Considering application

- (1) In deciding whether the official is a fit and proper person, the FWC must take into account the following *permit qualification matters*:
 - (a) whether the official has received appropriate training about the rights and responsibilities of a permit holder;
 - (b) whether the official has ever been convicted of an offence against an industrial law;
 - (c) whether the official has ever been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving:
 - (i) entry onto premises; or
 - (ii) fraud or dishonesty; or
 - (iii) intentional use of violence against another person or intentional damage or destruction of property;
 - (d) whether the official, or any other person, has ever been ordered to pay a penalty under this Act or any other industrial law in relation to action taken by the official;
 - (e) whether a permit issued to the official under this Part, or under a similar law of the Commonwealth (no matter when in force), has been revoked or suspended or made subject to conditions;
 - (f) whether a court, or other person or body, under a State or Territory industrial law or a State or Territory OHS law, has:

- (i) cancelled, suspended or imposed conditions on a right of entry for industrial or occupational health and safety purposes that the official had under that law; or
 - (ii) disqualified the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under that law;
 - (g) any other matters that the FWC considers relevant.
- (2) Despite paragraph 85ZZH(c) of the *Crimes Act 1914*, Division 3 of Part VIIC of that Act applies in relation to the disclosure of information to or by, or the taking into account of information by, the FWC for the purpose of making a decision under this Part.

Note: Division 3 of Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them.

514 When the FWC must not issue permit

The FWC must not issue an entry permit to an official at a time when a suspension or disqualification, imposed by a court or other person or body:

- (a) applies to the official's exercise of; or
- (b) prevents the official from exercising or applying for, a right of entry for industrial or occupational health and safety purposes under a State or Territory industrial law or a State or Territory OHS law.

515 Conditions on entry permit

- (1) The FWC may impose conditions on an entry permit when it is issued.
- (2) In deciding whether to impose conditions under subsection (1), the FWC must take into account the permit qualification matters.
- (3) The FWC must record on an entry permit any conditions that have been imposed on its use (whether under subsection (1) or any other provision of this Part).

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- (4) If the FWC imposes a condition on an entry permit after it has been issued, the permit ceases to be in force until the FWC records the condition on the permit.
- (5) To avoid doubt, a permit holder does not contravene an FWC order merely because the permit holder contravenes a condition imposed on his or her permit by order (whether the condition is imposed at the time the entry permit is issued or at any later time).

516 Expiry of entry permit

- (1) Unless it is revoked, an entry permit expires at the earlier of the following times:
 - (a) at the end of the period of 3 years beginning on the day it is issued, or that period as extended under subsection (2);
 - (b) when the permit holder ceases to be an official of the organisation that applied for the permit.
- (2) The FWC may extend the period of 3 years referred to in paragraph (1)(a) by a specified period if:
 - (a) the organisation that applied for the permit (the *old permit*) has applied for another entry permit for the permit holder; and
 - (b) the application was made at least 1 month before the old permit would otherwise have expired under that paragraph; and
 - (c) the FWC is satisfied that the old permit is likely to expire before the FWC determines the application.
- (3) The period specified must not be longer than the period that the FWC considers necessary for it to determine the application.
- (4) The FWC must not extend the period under subsection (2) if:
 - (a) the FWC has requested or required the organisation or permit holder to provide copies of records or documents, or to provide any other information, in relation to the application; and

- (b) the organisation or permit holder has not complied with the request or requirement; and
- (c) the FWC is satisfied that the organisation or permit holder does not have a reasonable excuse.

517 Return of entry permits to the FWC

When permit holder must return entry permit to the FWC

- (1) A permit holder must return an entry permit to the FWC within 7 days of any of the following things happening:
 - (a) the permit is revoked or suspended;
 - (b) conditions are imposed on the permit after it is issued;
 - (c) the permit expires.

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

FWC to return entry permit to permit holder after suspension

- (2) After the end of a suspension period, the FWC must return the entry permit to the permit holder if:
 - (a) the permit holder, or the permit holder's organisation, applies to the FWC for the return of the entry permit; and
 - (b) the entry permit has not expired.

Subdivision B—Entry notices

518 Entry notice requirements

Requirements for all entry notices

- (1) An entry notice must specify the following:
 - (a) the premises that are proposed to be entered;
 - (b) the day of the entry;
 - (c) the organisation of which the permit holder for the entry is an official.

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Requirements for entry notice for entry to investigate suspected contravention

- (2) An entry notice given for an entry under section 481, 483A or 483D must:
- (a) specify that section as the provision that authorises the entry; and
 - (b) unless the entry is a designated outworker terms entry under section 483A—specify the particulars of the suspected contravention, or contraventions; and
 - (c) for an entry under section 481—contain a declaration by the permit holder for the entry that the permit holder’s organisation is entitled to represent the industrial interests of a member, who performs work on the premises, and:
 - (i) to whom the suspected contravention or contraventions relate; or
 - (ii) who is affected by the suspected contravention or contraventions; and
 - (ca) for an entry under section 483A other than a designated outworker terms entry—contain a declaration by the permit holder for the entry that the permit holder’s organisation is entitled to represent the industrial interests of a TCF award worker, who performs work on the premises, and:
 - (i) to whom the suspected contravention or contraventions relate; or
 - (ii) who is affected by the suspected contravention or contraventions; and
 - (cb) for a designated outworker terms entry under section 483A—contain a declaration by the permit holder for the entry that the permit holder’s organisation is entitled to represent the industrial interests of TCF award workers; and
 - (cc) for an entry under section 483D—contain a declaration by the permit holder for the entry that the permit holder’s organisation is entitled to represent the industrial interests of a TCF award worker:
 - (i) to whom the suspected contravention or contraventions relate; or
-

- (ii) who is affected by the suspected contravention or contraventions; and
- (d) specify the provision of the organisation's rules that entitles the organisation to represent the member or TCF award worker.

Requirements for entry notice for entry to hold discussions

- (3) An entry notice given for an entry under section 484 (which deals with entry to hold discussions) must:
 - (a) specify that section as the provision that authorises the entry; and
 - (b) contain a declaration by the permit holder for the entry that the permit holder's organisation is entitled to represent the industrial interests of an employee or TCF award worker who performs work on the premises; and
 - (c) specify the provision of the organisation's rules that entitles the organisation to represent the employee or TCF award worker.

Note: See section 503 (which deals with misrepresentations about things authorised by this Part).

Subdivision C—Exemption certificates

519 Exemption certificates

- (1) The FWC must issue a certificate (an *exemption certificate*) to an organisation for an entry under section 481 (which deals with entry to investigate suspected contraventions) if:
 - (a) the organisation has applied for the certificate; and
 - (b) the FWC reasonably believes that advance notice of the entry given by an entry notice might result in the destruction, concealment or alteration of relevant evidence.
- (2) An exemption certificate must specify the following:
 - (a) the premises to which it relates;
 - (b) the organisation to which it relates;

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- (c) the day or days on which the entry may occur;
- (d) particulars of the suspected contravention, or contraventions, to which the entry relates;
- (e) section 481 as the provision that authorises the entry.

Subdivision D—Affected member certificates

520 Affected member certificates

- (1) The FWC must, on application by an organisation, issue a certificate (an *affected member certificate*) to the organisation if the FWC is satisfied that:
 - (a) a member of the organisation performs work on particular premises; and
 - (b) the organisation is entitled to represent the industrial interests of the member; and
 - (c) a suspected contravention of a kind referred to in subsection 481(1) relates to, or affects, the member.
- (2) An affected member certificate must state the following:
 - (a) the premises to which it relates;
 - (b) the organisation to which it relates;
 - (c) particulars of the suspected contravention, or contraventions, to which it relates;
 - (d) that the FWC is satisfied of the matters referred to in paragraphs (1)(a), (b) and (c).
- (3) An affected member certificate must not reveal the identity of the member or members to whom it relates.

Subdivision E—Miscellaneous

521 Regulations dealing with instruments under this Part

The regulations may provide for, and in relation to, the following:

- (a) the form of entry permits, entry notices, exemption certificates and affected member certificates;

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- (b) additional information to be included on, or given with, entry permits, entry notices, exemption certificates and affected member certificates;
- (c) the manner in which entry permits, entry notices, exemption certificates and affected member certificates are to be given;
- (d) any other matter in relation to entry permits, entry notices, exemption certificates and affected member certificates.

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Division 7—Accommodation and transport arrangements in remote areas

521A Meaning of *accommodation arrangement*

- (1) If:
- (a) an occupier of premises enters into an arrangement with an organisation; and
 - (b) under the terms of the arrangement, a permit holder is provided with accommodation for the purpose of assisting him or her to exercise rights under this Part;
- the arrangement is an *accommodation arrangement*.
- (2) If:
- (a) an occupier of premises enters into an arrangement with a permit holder; and
 - (b) under the terms of the arrangement, the permit holder is provided with accommodation for the purpose of assisting him or her to exercise rights under this Part;
- the arrangement is an *accommodation arrangement*.

521B Meaning of *transport arrangement*

- (1) If:
- (a) an occupier of premises enters into an arrangement with an organisation; and
 - (b) under the terms of the arrangement, a permit holder is provided with transport for the purpose of assisting him or her to exercise rights under this Part;
- the arrangement is a *transport arrangement*.
- (2) If:
- (a) an occupier of premises enters into an arrangement with a permit holder; and

- (b) under the terms of the arrangement, the permit holder is provided with transport for the purpose of assisting him or her to exercise rights under this Part;
the arrangement is a *transport arrangement*.

521C Accommodation arrangements for remote areas

This section applies only in remote areas

- (1) This section applies if rights under this Part are to be exercised by a permit holder on premises that are located in a place where accommodation is not reasonably available to the permit holder unless the occupier of the premises on which the rights are to be exercised provides the accommodation, or causes it to be provided.

Where parties cannot agree on an accommodation arrangement

- (2) If all of the following are satisfied:
- (a) to provide accommodation, or cause accommodation to be provided, to the permit holder would not cause the occupier undue inconvenience;
 - (b) the permit holder, or the organisation of which the permit holder is an official, requests the occupier to provide, or cause to be provided, accommodation for the purpose of assisting the permit holder to exercise rights under this Part on the premises;
 - (c) the request is made within a reasonable period before accommodation is required;
 - (d) the permit holder, and the organisation of which the permit holder is an official, have been unable to enter into an accommodation arrangement with the occupier by consent;
- the occupier must enter into an accommodation arrangement for the purpose of assisting the permit holder to exercise rights under this Part.

Note: The FWC may deal with disputes about whether accommodation is reasonably available, whether providing accommodation or causing it to be provided would cause the occupier undue inconvenience and

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whether a request to provide accommodation is made within a reasonable period (see subsection 505(1)).

Costs

- (3) If an accommodation arrangement is entered into under subsection (2), the occupier must not charge an organisation or a permit holder a fee for accommodation under the arrangement that is more than is necessary to cover the cost to the occupier of providing the accommodation, or causing it to be provided.

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

FWC's powers if rights misused whilst in accommodation

- (4) For the purposes of this Part, the FWC may treat the conduct of the permit holder whilst in accommodation under an accommodation arrangement to which the occupier is a party, whether entered into under subsection (2) or by consent, as conduct engaged in as part of the exercise of rights by the permit holder under this Part.

521D Transport arrangements for remote areas

This section applies only in remote areas

- (1) This section applies if rights under this Part are to be exercised by a permit holder on premises that are located in a place that is not reasonably accessible to the permit holder unless the occupier of the premises on which the rights are to be exercised provides transport, or causes it to be provided.

Where parties cannot agree on transport arrangement

- (2) If all of the following are satisfied:
- (a) to provide transport to the premises for the permit holder, or cause that transport to be provided, would not cause the occupier undue inconvenience;
 - (b) the permit holder, or the organisation of which the permit holder is an official, requests the occupier to provide, or cause to be provided, transport to the premises for the

purpose of assisting the permit holder to exercise rights under this Part;

- (c) the request is made within a reasonable period before transport is required;
- (d) the permit holder, and the organisation of which the permit holder is an official, have been unable to enter into a transport arrangement with the occupier by consent;

the occupier must enter into a transport arrangement for the purpose of assisting the permit holder to exercise rights under this Part.

Note: The FWC may deal with disputes about whether premises are reasonably accessible, whether providing transport or causing it to be provided would cause the occupier undue inconvenience and whether a request to provide transport is made within a reasonable period (see subsection 505(1)).

Costs

- (3) If a transport arrangement is entered into under subsection (2), the occupier must not charge an organisation or a permit holder a fee for transport under the arrangement that is more than is necessary to cover the cost to the occupier of providing the transport, or causing it to be provided.

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

FWC's powers if rights misused whilst in transport

- (4) For the purposes of this Part, the FWC may treat the conduct of the permit holder whilst in transport under a transport arrangement to which the occupier is a party, whether entered into under subsection (2) or by consent, as conduct engaged in as part of the exercise of rights by the permit holder under this Part.

Part 3-5—Stand down

Division 1—Introduction

522 Guide to this Part

This Part provides for a national system employer to stand down a national system employee without pay in certain circumstances.

Division 2 sets out the circumstances in which an employer may stand down an employee without pay.

Division 3 provides for the FWC to deal with disputes about the operation of this Part.

523 Meanings of *employee* and *employer*

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

Division 2—Circumstances allowing stand down

524 Employer may stand down employees in certain circumstances

- (1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:
 - (a) industrial action (other than industrial action organised or engaged in by the employer);
 - (b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;
 - (c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

 - (2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:
 - (a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and
 - (b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.
- Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.
- Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).
- (3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.

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525 Employee not stood down during a period of authorised leave or absence

An employee is not taken to be stood down under subsection 524(1) during a period when the employee:

- (a) is taking paid or unpaid leave that is authorised by the employer; or
- (b) is otherwise authorised to be absent from his or her employment.

Note: An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the employee would otherwise be stood down under subsection 524(1).

Division 3—Dealing with disputes

526 FWC may deal with a dispute about the operation of this Part

- (1) The FWC may deal with a dispute about the operation of this Part.
- (2) The FWC may deal with the dispute by arbitration.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

- (3) The FWC may deal with the dispute only on application by any of the following:
 - (a) an employee who has been, or is going to be, stood down under subsection 524(1) (or purportedly under subsection 524(1));
 - (b) an employee in relation to whom the following requirements are satisfied:
 - (i) the employee has made a request to take leave to avoid being stood down under subsection 524(1) (or purportedly under subsection 524(1));
 - (ii) the employee's employer has authorised the leave;
 - (c) an employee organisation that is entitled to represent the industrial interests of an employee referred to in paragraph (a) or (b);
 - (d) an inspector.
- (4) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

527 Contravening an FWC order dealing with a dispute about the operation of this Part

A person must not contravene a term of an FWC order dealing with a dispute about the operation of this Part.

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

Part 3-6—Other rights and responsibilities

Division 1—Introduction

528 Guide to this Part

This Part deals with other rights and responsibilities.

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.

Subdivision A of Division 2 deals with notifying the Chief Executive Officer of the Commonwealth Services Delivery Agency (Centrelink) about the proposed dismissals.

Subdivision B of Division 2 provides for the FWC to make orders if the employer fails to notify and consult relevant industrial associations.

Subdivision C of Division 2 provides that that Division does not apply in relation to certain employees.

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.

529 Meanings of *employee* and *employer*

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

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

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

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- (b) do not include an order granting an injunction.

Subdivision B—Failure to notify or consult registered employee associations

531 FWC may make orders where failure to notify or consult registered employee associations about dismissals

- (1) The FWC may make an order under subsection 532(1) if it is satisfied that:
- (a) an employer has decided to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons; and
 - (b) the employer has not complied with subsection (2) (which deals with notifying relevant registered employee associations) or subsection (3) (which deals with consulting relevant registered employee associations); and
 - (c) the employer could reasonably be expected to have known, when he or she made the decision, that one or more of the employees were members of a registered employee association.

Notifying relevant registered employee associations

- (2) An employer complies with this subsection if:
- (a) the employer notifies each registered employee association of which any of the employees was a member, and that was entitled to represent the industrial interests of that member, of the following:
 - (i) the proposed dismissals and the reasons for them;
 - (ii) the number and categories of employees likely to be affected;
 - (iii) the time when, or the period over which, the employer intends to carry out the dismissals; and
 - (b) the notice is given:
 - (i) as soon as practicable after making the decision; and

- (ii) before dismissing an employee in accordance with the decision.

Consulting relevant registered employee associations

- (3) An employer complies with this subsection if:
 - (a) the employer gives each registered employee association of which any of the employees was a member, and that was entitled to represent the industrial interests of that member, an opportunity to consult the employer on:
 - (i) measures to avert or minimise the proposed dismissals; and
 - (ii) measures (such as finding alternative employment) to mitigate the adverse effects of the proposed dismissals; and
 - (b) the opportunity is given:
 - (i) as soon as practicable after making the decision; and
 - (ii) before dismissing an employee in accordance with the decision.

532 Orders that the FWC may make

- (1) The FWC may make whatever orders it considers appropriate, in the public interest, to put:
 - (a) the employees; and
 - (b) each registered employee association referred to in paragraph 531(2)(a) or (3)(a);in the same position (as nearly as can be done) as if the employer had complied with subsections 531(2) and (3).
- (2) The FWC must not, under subsection (1), make orders for any of the following:
 - (a) reinstatement of an employee;
 - (b) withdrawal of a notice of dismissal if the notice period has not expired;
 - (c) payment of an amount in lieu of reinstatement;
 - (d) payment of severance pay;

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- (e) disclosure of confidential information or commercially sensitive information relating to the employer, unless the recipient of such information gives an enforceable undertaking not to disclose the information to any other person;
- (f) disclosure of personal information relating to a particular employee, unless the employee has given written consent to the disclosure of the information and the disclosure is in accordance with that consent.

533 Application for an FWC order

The FWC may make the order only on application by:

- (a) one of the employees; or
- (b) a registered employee association referred to in paragraph 531(2)(a) or (3)(a); or
- (c) any other registered employee association that is entitled to represent the industrial interests of one of the employees.

Subdivision C—Limits on scope of this Division

534 Limits on scope of this Division

- (1) This Division does not apply in relation to any of the following employees:
 - (a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;
 - (b) an employee who is dismissed because of serious misconduct;
 - (c) a casual employee;
 - (d) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement;
 - (e) a daily hire employee working in the building and construction industry (including working in connection with

- the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures);
- (f) a daily hire employee working in the meat industry in connection with the slaughter of livestock;
 - (g) a weekly hire employee working in connection with the meat industry and whose dismissal is determined solely by seasonal factors;
 - (h) an employee prescribed by the regulations as an employee in relation to whom this Division does not apply.
- (2) Paragraph (1)(a) does not prevent this Division from applying in relation to an employee if a substantial reason for employing the employee as described in that paragraph was to avoid the application of this Division.

Division 3—Employer obligations in relation to employee records and pay slips

535 Employer obligations in relation to employee records

- (1) An employer must make, and keep for 7 years, employee records of the kind prescribed by the regulations in relation to each of its employees.

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

- (2) The records must:
- (a) if a form is prescribed by the regulations—be in that form; and
 - (b) include any information prescribed by the regulations.

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

- (3) The regulations may provide for the inspection of those records.

Note: If an employer fails to comply with subsection (1), (2) or (3), the employer may bear the burden of disproving allegations in proceedings relating to a contravention of certain civil remedy provisions: see section 557C.

- (4) An employer must not make or keep a record for the purposes of this section that the employer knows is false or misleading.

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

- (5) Subsection (4) does not apply if the record is not false or misleading in a material particular.

536 Employer obligations in relation to pay slips

- (1) An employer must give a pay slip to each of its employees within one working day of paying an amount to the employee in relation to the performance of work.

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

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Note 2: Section 80 of the *Paid Parental Leave Act 2010* requires an employer to give information to an employee to whom the employer pays an instalment under that Act.

- (2) The pay slip must:
- (a) if a form is prescribed by the regulations—be in that form;
and
 - (b) include any information prescribed by the regulations.

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

Note 2: If an employer fails to comply with subsection (1) or (2), the employer may bear the burden of disproving allegations in proceedings relating to a contravention of certain civil remedy provisions: see section 557C.

- (3) An employer must not give a pay slip for the purposes of this section that the employer knows is false or misleading.

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

- (4) Subsection (3) does not apply if the pay slip is not false or misleading in a material particular.

Part 3-7—Corrupting benefits

Division 1—Introduction

536A Guide to this Part

This Part is about corrupting benefits provided to or in relation to organisations.

Division 2 prohibits benefits intended to influence an officer or employee of an organisation.

Division 3 prohibits national system employers providing cash or in kind payments to employee organisations and related persons, other than certain legitimate benefits specified in the Division.

536B Meanings of employee and employer

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

536C Concurrent operation of State and Territory laws

- (1) This Part does not exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Part.
- (2) Without limiting subsection (1), this Part does not exclude or limit the concurrent operation of a law of a State or Territory to the extent that:
 - (a) the law makes an act or omission:
 - (i) an offence; or
 - (ii) subject to a civil penalty; and
 - (b) that (or any similar) act or omission is also an offence against a provision of this Part.

- (3) Subsection (2) applies even if the law of the State or Territory does any one or more of the following, in relation to the offence or civil penalty:
- (a) provides for a penalty that differs from the penalty provided for in this Part;
 - (b) provides for fault elements that differ from the fault elements applicable to the offence created by this Part;
 - (c) provides for defences or exceptions that differ from the defences or exceptions applicable to the offence created by this Part.

536CA Dishonesty

- (1) For the purposes of this Part, *dishonest* means:
- (a) dishonest according to the standards of ordinary people; and
 - (b) known by the defendant to be dishonest according to the standards of ordinary people.
- (2) In a prosecution for an offence against this Part, the determination of dishonesty is a matter for the trier of fact.

Division 2—Giving, receiving or soliciting corrupting benefits

536D Giving, receiving or soliciting a corrupting benefit

Giving a corrupting benefit

- (1) A person (the *defendant*) commits an offence if:
- (a) the defendant dishonestly:
 - (i) provides a benefit to another person; or
 - (ii) causes a benefit to be provided to another person; or
 - (iii) offers to provide, or promises to provide, a benefit to another person; or
 - (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
 - (b) the defendant does so with the intention of influencing a registered organisations officer or employee (who may be the other person):
 - (i) in the performance of his or her duties or functions as such an officer or employee; or
 - (ii) in the exercise of his or her powers or performance of his or her functions under this Act or the Registered Organisations Act; or
 - (iii) to give an advantage of any kind in connection with the relevant affairs, which would not be legitimately due, to the defendant, a spouse (within the meaning of the Registered Organisations Act) or associated entity of the defendant, or a person who has a prescribed connection with the defendant.

Penalty:

- (a) for an individual—imprisonment for 10 years or 5,000 penalty units, or both; or
- (b) for a body corporate—25,000 penalty units.

Receiving or soliciting a corrupting benefit

- (2) A person (the **defendant**) commits an offence if:
- (a) the defendant dishonestly:
 - (i) requests (whether or not expressly and whether or not by threats); or
 - (ii) receives or obtains; or
 - (iii) agrees to receive or obtain;
a benefit from a person (the **provider**) for the defendant or another person; and
 - (b) the defendant does so with the intention that, or the intention that the provider believes that, the receipt, or expectation of the receipt, of the benefit will influence a registered organisations officer or employee (who may be the defendant):
 - (i) in the performance of his or her duties or functions as such an officer or employee; or
 - (ii) in the exercise of his or her powers or performance of his or her functions under this Act or the Registered Organisations Act; or
 - (iii) to give an advantage of any kind in connection with the relevant affairs, which would not be legitimately due, to the provider, a spouse (within the meaning of the Registered Organisations Act) or associated entity of the provider, or a person who has a prescribed connection with the provider.

Penalty:

- (a) for an individual—imprisonment for 10 years or 5,000 penalty units, or both; or
- (b) for a body corporate—25,000 penalty units.

No need for actual influence etc.

- (3) For the purposes of paragraphs (1)(b) and (2)(b):
- (a) the defendant's intention does not need to be in relation to a particular registered organisations officer or employee; and

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- (b) the defendant's intention does not need to be in relation to a registered organisations officer or employee performing or exercising duties, functions or powers in a particular way, or giving a particular advantage to a particular person; and
- (c) the provider mentioned in subsection (2) does not need to actually believe anything; and
- (d) it is not necessary that any person actually be influenced.

Giving an advantage which would not be legitimately due

- (4) In a prosecution for an offence against subsection (1) or (2), the determination of whether an advantage would not be legitimately due is a matter for the trier of fact.
- (5) For the purposes of subparagraphs (1)(b)(iii) and (2)(b)(iii), an advantage may be given in any way, including by doing or not doing a thing, or causing or influencing another person to do or not do a thing.
- (6) In working out whether an advantage would not be legitimately due to a person, disregard:
 - (a) whether the advantage might be, or be perceived to be, customary, necessary or required in the situation; and
 - (b) the value of the advantage; and
 - (c) any official tolerance of the advantage.

Meaning of benefit in this section

- (7) In this section:

benefit includes any advantage and is not limited to property.

536E Meaning of registered organisations officer or employee

Each of the following is a **registered organisations officer or employee**:

- (a) an officer (within the meaning of the Registered Organisations Act) of an organisation or branch of an organisation;

(b) an employee of an organisation or branch of an organisation.

Division 3—Cash or in kind payments to employee organisations etc.

536F Giving a cash or in kind payment

Giving a cash or in kind payment

- (1) A person (the *defendant*) commits an offence if:
- (a) the defendant is a national system employer other than an employee organisation; and
 - (b) the defendant:
 - (i) provides a cash or in kind payment to another person; or
 - (ii) causes a cash or in kind payment to be provided to another person; or
 - (iii) offers to provide, or promises to provide, a cash or in kind payment to another person; or
 - (iv) causes an offer of the provision of a cash or in kind payment, or a promise of the provision of a cash or in kind payment, to be made to another person; and
 - (c) the other person is an employee organisation or a prohibited beneficiary in relation to an employee organisation; and
 - (d) the defendant, a spouse (within the meaning of the Registered Organisations Act) or associated entity of the defendant, or a person who has a prescribed connection with the defendant, employs a person who is, or is entitled to be, a member of the organisation and whose industrial interests the organisation is entitled to represent.

Penalty:

- (a) for an individual—imprisonment for 2 years or 500 penalty units, or both; or
 - (b) for a body corporate—2,500 penalty units.
- (3) Subsection (1) does not apply to the following cash or in kind payments:
- (a) a payment to the organisation:

- (i) made by deduction from the wages of an employee of the defendant who has agreed in writing to become a member of the organisation; and
- (ii) made for a membership fee payable by the employee;
- (b) a benefit provided and used for the sole or dominant purpose of benefiting the defendant's employees, or the defendant's former employees in relation to their former employment;
- (c) a gift or contribution deductible under section 30-15 of the *Income Tax Assessment Act 1997* and used in accordance with the law;
- (ca) a benefit of nominal value (meaning no more than 2 penalty units) associated with travel or hospitality during consultation, negotiation or bargaining;
- (cb) a benefit of nominal value (meaning no more than 2 penalty units) that is:
 - (i) a token gift, an event invitation or a similar benefit; and
 - (ii) given in accordance with common courteous practice among employers and organisations;
- (d) a payment made, at no more than market value, for goods or services supplied to the defendant in the ordinary course of the organisation's business;
- (e) a payment made under or in accordance with a law of the Commonwealth, or a law of a State or Territory;
- (f) a benefit provided in accordance with an order, judgment or award of a court or tribunal, or in settlement of a matter before the FWC or a genuine legal dispute;
- (g) a non-corrupting benefit prescribed by, or provided in circumstances prescribed by, the regulations.

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3) of the *Criminal Code*).

Meaning of cash or in kind payment

- (4) A **cash or in kind payment** is a benefit that is:
 - (a) in cash or any other money form; or
 - (b) goods or services; or

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- (c) prescribed by the regulations for the purposes of this paragraph.

Meaning of prohibited beneficiary

- (5) A person is a **prohibited beneficiary** in relation to an employee organisation if the person is any of the following:
 - (a) an entity controlled by the organisation;
 - (b) a registered organisations officer or employee in relation to the organisation;
 - (c) a spouse of, or entity controlled by, such an officer or employee;
 - (d) a person or entity to whom the organisation or a prohibited beneficiary of the organisation requests or directs the defendant to provide a cash or in kind payment;
 - (e) a person who has a prescribed connection with the organisation or a prohibited beneficiary of the organisation.
- (6) In subsection (5), **control**, **entity** and **spouse** have the same meanings as in the Registered Organisations Act.

Meaning of national system employer

- (7) Sections 30D and 30N do not apply to extend the meaning of **national system employer** in this section.

536G Receiving or soliciting a cash or in kind payment

- (1) A person (the **defendant**) commits an offence if:
 - (a) the defendant:
 - (i) requests (whether or not expressly and whether or not by threats); or
 - (ii) receives or obtains; or
 - (iii) agrees to receive or obtain;a cash or in kind payment from a person (the **provider**) for the defendant or another person; and

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- (b) the defendant is an employee organisation or an officer (within the meaning of the Registered Organisations Act) or employee of an employee organisation; and
- (c) the provider is a national system employer other than an employee organisation; and
- (d) the provider, a spouse (within the meaning of the Registered Organisations Act) or associated entity of the provider, or a person who has a prescribed connection with the provider, employs a person who is, or is entitled to be, a member of the organisation and whose industrial interests the organisation is entitled to represent.

Penalty:

- (a) for an individual—imprisonment for 2 years or 500 penalty units, or both; or
 - (b) for a body corporate—2,500 penalty units.
- (2) Subsection (1) does not apply to a cash or in kind payment mentioned in subsection 536F(3).

536H Implied freedom of political communication

- (1) This Division does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.
- (2) Subsection (1) does not limit the application of section 15A of the *Acts Interpretation Act 1901*.