



Workplace Relations Act 1996

Act No. 86 of 1988 as amended

This compilation was prepared on 28 March 2008
taking into account amendments up to Act No. 8 of 2008

Volume 1 includes: Table of Contents
Sections 1 – 919

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

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Attorney-General's Department, Canberra

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An Act relating to workplace relations, and for other purposes

Part 1—Preliminary

1 Short title [see Note 1]

This Act may be cited as the *Workplace Relations Act 1996*.

2 Commencement [see Note 1]

This Act commences on a day or days to be fixed by Proclamation.

3 Principal object

The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

- (a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and
- (b) establishing and maintaining a simplified national system of workplace relations; and
- (c) providing an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by this Act; and
- (d) ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level; and
- (e) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances; and
- (f) ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of:
 - (i) employee entitlements; and

Section 4

- (ii) the rights and obligations of employers and employees, and their organisations; and
- (g) ensuring that awards provide minimum safety net entitlements for award-reliant employees which are consistent with Australian Fair Pay Commission decisions and which avoid creating disincentives to bargain at the workplace level; and
- (ga) establishing a process for making modern awards; and
- (h) supporting harmonious and productive workplace relations by providing flexible mechanisms for the voluntary settlement of disputes; and
- (i) balancing the right to take industrial action for the purposes of collective bargaining at the workplace level with the need to protect the public interest and appropriately deal with illegitimate and unprotected industrial action; and
- (j) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and
- (k) protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment; and
- (l) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and
- (m) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and
- (n) assisting in giving effect to Australia's international obligations in relation to labour standards.

4 Definitions

- (1) In this Act, unless the contrary intention appears:

A.C.T. Consequential Provisions Act means the *A.C.T. Self-Government (Consequential Provisions) Act 1988*.

AFPC has the meaning given by section 19.

allowable award matters means the matters referred to in subsection 513(1).

Note: The matters referred to in subsection 513(1) have a meaning that is affected by section 515.

alternative dispute resolution process has the meaning given by section 698.

Anti-Discrimination Conventions means:

- (a) the Equal Remuneration Convention; and
- (b) the Convention on the Elimination of all Forms of Discrimination against Women, a copy of the English text of which is set out in the Schedule to the *Sex Discrimination Act 1984*; and
- (c) the Convention concerning Discrimination in respect of Employment and Occupation, a copy of the English text of which is set out in Schedule 1 to the *Human Rights and Equal Opportunity Commission Act 1986*; and
- (d) Articles 3 and 7 of the International Covenant on Economic, Social and Cultural Rights.

APCS has the meaning given by section 178.

applies to employment generally: a law of a State or Territory **applies to employment generally** if it applies (subject to constitutional limitations) to:

- (a) all employers and employees in the State or Territory; or
- (b) all employers and employees in the State or Territory except those identified (by reference to a class or otherwise) by a law of the State or Territory.

For this purpose, it does not matter whether or not the law also applies to other persons, or whether or not an exercise of a power under the law affects all the persons to whom the law applies.

arbitration powers means the powers of the Commission in relation to arbitration.

Section 4

Australian-based employee means:

- (a) an employee whose primary place of work is in Australia, in Australia's exclusive economic zone or in, on, or over Australia's continental shelf; or
- (b) an employee who is employed by the Commonwealth or a Commonwealth authority, except an employee engaged outside Australia and the external Territories to perform duties outside Australia and the external Territories; or
- (c) an employee who is prescribed by the regulations for the purposes of this definition.

Note: Subsection 5(1) defines *employee*.

Australian Capital Territory Government Service means the service established by the *Public Sector Management Act 1994* of the Australian Capital Territory.

Australian employer means:

- (a) an employer that is a trading corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
- (b) an employer that is a financial corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
- (c) an employer that is the Commonwealth; or
- (d) an employer that is a Commonwealth authority; or
- (e) an employer that is a body corporate incorporated in a Territory; or
- (f) an employer that carries on in Australia, in Australia's exclusive economic zone or in, on, or over Australia's continental shelf an activity (whether of a commercial, governmental or other nature) whose central management and control is in Australia; or
- (g) an employer that is prescribed by the regulations for the purposes of this definition.

Note: Subsection 6(1) defines *employer*.

Australian Fair Pay and Conditions Standard has the meaning given by subsection 171(3).

Australia's continental shelf means the continental shelf (as defined in the *Seas and Submerged Lands Act 1973*) of Australia.

Australia's exclusive economic zone means the exclusive economic zone (as defined in the *Seas and Submerged Lands Act 1973*) of Australia.

authorised stand down means a stand down of an employee that is authorised as mentioned in subsection 691B(1).

award means a pre-reform award.

award modernisation process means a process of award modernisation carried out by the Commission in accordance with an award modernisation request.

award modernisation request has the meaning given by subsection 576C(1).

award-related order means an order varying, revoking or suspending an award.

bargaining agent means:

- (a) in relation to an ITEA—a person who has been duly appointed as a bargaining agent in relation to the ITEA in accordance with section 334; or
- (b) in relation to an employee collective agreement—a person who has been requested to be a bargaining agent in relation to the agreement in accordance with section 335.

BCII Act means the *Building and Construction Industry Improvement Act 2005*.

breach includes non-observance.

Chief Justice means the Chief Justice of the Court.

civil remedy provision has the meaning given by section 727.

collective agreement means:

- (a) an employee collective agreement; or
- (b) a union collective agreement; or
- (c) an employer greenfields agreement; or
- (d) a union greenfields agreement; or
- (e) a multiple-business agreement.

Section 4

Commission means the Australian Industrial Relations Commission.

Commissioner means a Commissioner of the Commission.

committee of management, in relation to an organisation, association or branch of an organisation or association, means the group or body of persons (however described) that manages the affairs of the organisation, association or branch.

Commonwealth authority means:

- (a) a body corporate established for a public purpose by or under a law of the Commonwealth; or
- (b) a body corporate:
 - (i) incorporated under a law of the Commonwealth or a State or Territory; and
 - (ii) in which the Commonwealth has a controlling interest.

Commonwealth workplace relations legislation means:

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

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

conciliation powers means the powers of the Commission in relation to conciliation.

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.

constitutional trade or commerce means trade or commerce:

- (a) between Australia and a place outside Australia; or
- (b) among the States; or
- (c) between a State and a Territory; or
- (d) between 2 Territories; or
- (e) within a Territory.

contingency fee agreement means an agreement between a legal practitioner and a person under which:

- (a) the legal practitioner agrees to provide legal services; and
- (b) the payment of all, or a substantial proportion, of the legal practitioner's costs is contingent on the outcome of the matter in which the practitioner provides the legal services for the person.

Court means the Federal Court of Australia.

Note: For the purposes of various provisions of this Act, ***Court*** means the Federal Court of Australia or the Federal Magistrates Court. This is indicated by definitions that apply for the purposes of those provisions.

demarcation dispute includes:

- (a) a dispute arising between 2 or more organisations, or within an organisation, as to the rights, status or functions of members of the organisations or organisation in relation to the employment of those members; or
- (b) a dispute arising between employers and employees, or between members of different organisations, as to the demarcation of functions of employees or classes of employees; or
- (c) a dispute about the representation under this Act, or the Registration and Accountability of Organisations Schedule, of the industrial interests of employees by an organisation of employees.

Deputy President means a Deputy President of the Commission.

employee has a meaning affected by section 5.

employee collective agreement has the meaning given by section 327.

employer has a meaning affected by section 6.

employer greenfields agreement has the meaning given by section 330.

employing authority, in relation to a class of employees, means the person or body, or each of the persons or bodies, prescribed as the employing authority in relation to the class of employees.

Section 4

employment has a meaning affected by section 7.

Equal Remuneration Convention means the Equal Remuneration Convention, 1951.

Family Responsibilities Convention means the Workers with Family Responsibilities Convention, 1981, a copy of the English text of which is set out in Schedule 5.

flight crew officer has the meaning given by clause 1 of Schedule 2.

Full Bench means a Full Bench of the Commission.

Full Court means a Full Court of the Court.

greenfields agreement means a union greenfields agreement or an employer greenfields agreement.

individual transitional employment agreement or **ITEA** has the meaning given by section 326.

industrial action has the meaning given by section 420.

Industrial Registrar means the Industrial Registrar appointed under section 133.

Industrial Registry means the Australian Industrial Registry.

industry includes:

- (a) any business, trade, manufacture, undertaking or calling of employers; and
- (b) any calling, service, employment, handicraft, industrial occupation or vocation of employees; and
- (c) a branch of an industry and a group of industries.

inspector means a workplace inspector.

ITEA: see individual transitional employment agreement.

Judge means:

- (a) in the case of a reference to the Court or a Judge—a Judge (including the Chief Justice) sitting in Chambers; or
- (b) otherwise—a Judge of the Court (including the Chief Justice).

judgment means a judgment, decree or order, whether final or interlocutory, or a sentence.

legal practitioner means a legal practitioner (however described) of the High Court or of a Supreme Court of a State or Territory.

magistrate's court means:

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

maritime employee has the meaning given by clause 1 of Schedule 2.

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

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

model dispute resolution process means the process set out in Division 2 of Part 13.

modern award means an award made by the Commission under section 576G.

multiple-business agreement has the meaning given by section 331.

new APCS has the meaning given by section 178.

nominal expiry date of a workplace agreement has the meaning given by section 352.

Northern Territory authority means:

- (a) a body corporate established for a public purpose by or under a law of the Northern Territory; or
- (b) a body corporate:
 - (i) incorporated under a law of the Northern Territory; and
 - (ii) in which the Northern Territory has a controlling interest;other than a prescribed body.

Section 4

notional agreement preserving State awards has the meaning given by clause 1 of Schedule 8.

occupier, in relation to premises, includes a person in charge of the premises.

office, in relation to an organisation or a branch of an organisation, has the same meaning as in the Registration and Accountability of Organisations Schedule.

officer, in relation to an organisation or a branch of an organisation, means a person who holds an office in the organisation or branch.

organisation means an organisation registered under the Registration and Accountability of Organisations Schedule.

Note: An organisation that was registered under the *Workplace Relations Act 1996* immediately before the commencement of item 1 of Schedule 2 to the *Workplace Relations Legislation Amendment (Registration and Accountability of Organisations) (Consequential Provisions) Act 2002* (the ***Consequential Provisions Act***) is taken to have been registered under the Registration and Accountability of Organisations Schedule (see item 15 of Schedule 1 to the Consequential Provisions Act).

panel means a panel to which an industry has been assigned under section 95.

peak council means a national or State council or federation that is effectively representative of a significant number of organisations representing employers or employees in a range of industries.

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

person includes an organisation.

pilot has the meaning given by clause 1 of Schedule 2.

premises includes any land, building, structure, mine, mine working, ship, aircraft, vessel, vehicle or place.

pre-reform AWA has the meaning given by clause 1 of Schedule 7.

pre-reform award means an instrument that has effect after the reform commencement under item 4 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005*.

prescribed includes prescribed by Rules of the Commission made under section 124.

preserved APCS has the meaning given by subsection 208(1).

preserved award entitlement, in relation to an employee, has the meaning given by section 529.

preserved award term has the meaning given by section 527.

preserved State agreement has the meaning given by clause 1 of Schedule 8.

President means the President of the Commission.

Presidential Member means the President, a Vice President, a Senior Deputy President or a Deputy President.

previous Act means the *Conciliation and Arbitration Act 1904*, and includes any other Act so far as the other Act affects the operation of that Act.

proceeding includes a proceeding relating to an award modernisation process.

protected action has the meaning given by section 435.

protected action ballot means a ballot under Division 4 of Part 9.

public sector employment means employment of, or service by, a person in any capacity (whether permanently or temporarily and whether full-time or part-time):

- (a) under the *Public Service Act 1999* or the *Parliamentary Service Act 1999*; or
- (b) by or in the service of a Commonwealth authority; or
- (c) under a law of the Australian Capital Territory relating to employment by that Territory, including a law relating to the Australian Capital Territory Government Service; or
- (d) by or in the service of:

Section 4

- (i) an enactment authority as defined by section 3 of the A.C.T. Consequential Provisions Act; or
- (ii) a body corporate incorporated under a law of the Australian Capital Territory and in which the Australian Capital Territory has a controlling interest;
other than a prescribed authority or body; or
- (e) under a law of the Northern Territory relating to the Public Service of the Northern Territory; or
- (f) by or in the service of a Northern Territory authority; or
- (g) by or in the service of a prescribed person or under a prescribed law;

but, other than in section 116, does not include:

- (h) employment of, or service by, a person included in a prescribed class of persons; or
- (i) employment or service under a prescribed law.

reform commencement means the commencement of Schedule 1 to the *Workplace Relations Amendment (Work Choices) Act 2005*.

Registrar means the Industrial Registrar or a Deputy Industrial Registrar.

Registration and Accountability of Organisations Schedule means Schedule 1.

registry means the Principal Registry or another registry established under section 130.

regular part-time employee means an employee who:

- (a) works less than full-time ordinary hours; and
- (b) has reasonably predictable hours of work; and
- (c) receives, on a pro-rata basis, equivalent pay and conditions to those specified in an award or awards for full-time employees who do the same kind of work.

secondary office, in relation to a person who holds an office of member of the Commission and an office of member of a prescribed State industrial authority, means the office to which the person was most recently appointed.

Senior Deputy President means a Senior Deputy President of the Commission.

ship has the meaning given by clause 1 of Schedule 2.

single business has the meaning given by section 322.

special magistrate means a magistrate appointed as a special magistrate under a law of a State or Territory.

State award means an award, order, decision or determination of a State industrial authority.

State employment agreement means an agreement:

- (a) between an employer and one or more of the following:
 - (i) an employee of the employer;
 - (ii) a trade union; and
- (b) that regulates wages and conditions of employment of one or more of the employees; and
- (c) that is in force under a State or Territory industrial law; and
- (d) that prevails over an inconsistent State award.

State industrial authority means:

- (a) a board or court of conciliation or arbitration, or tribunal, body or persons, having authority under a State Act to exercise any power of conciliation or arbitration in relation to industrial disputes within the limits of the State; or
- (b) a special board constituted under a State Act relating to factories; or
- (c) any other State board, court, tribunal, body or official prescribed for the purposes of this definition.

State or Territory industrial law means:

- (a) any of the following State Acts:
 - (i) the *Industrial Relations Act 1996* of New South Wales;
 - (ii) the *Industrial Relations Act 1999* of Queensland;
 - (iii) the *Industrial Relations Act 1979* of Western Australia;
 - (iv) the *Fair Work Act 1994* of South Australia;
 - (v) the *Industrial Relations Act 1984* of Tasmania; or
- (b) an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:

Section 4

- (i) regulating workplace relations (including industrial matters, industrial disputes and industrial action, within the ordinary meaning of those expressions);
 - (ii) providing for the determination of terms and conditions of employment;
 - (iii) providing for the making and enforcement of agreements determining terms and conditions of employment;
 - (iv) providing for rights and remedies connected with the termination of employment;
 - (v) prohibiting conduct that relates to the fact that a person either is, or is not, a member of an industrial association (as defined in section 779); or
- (c) an instrument made under an Act described in paragraph (a) or (b), so far as the instrument is of a legislative character; or
- (d) a law that:
- (i) is a law of a State or Territory; and
 - (ii) is prescribed by regulations for the purposes of this paragraph.

State or Territory training authority means a body authorised by a law or award of a State or Territory for the purpose of overseeing arrangements for the training of employees.

stevedoring operations has the meaning given by clause 1 of Schedule 2.

Termination of Employment Convention means the Termination of Employment Convention, 1982, a copy of the English text of which is set out in Schedule 4.

this Act includes the regulations but does not include Schedule 1 or regulations made under that Schedule.

trade union means:

- (a) an organisation of employees; or
- (b) an association of employees that is registered or recognised as a trade union (however described) under the law of a State or Territory; or

- (c) an association of employees a principal purpose of which is the protection and promotion of the employees' interests in matters concerning their employment.

training arrangement means a combination of work and training that is subject to a training agreement or a training contract between the employee and employer that is registered:

- (a) with the relevant State or Territory training authority; or
(b) under a law of a State or Territory relating to the training of employees.

union collective agreement has the meaning given by section 328.

union greenfields agreement has the meaning given by section 329.

Vice President means a Vice President of the Commission.

vocational placement means a placement that is:

- (a) undertaken with an employer for which a person is not entitled to be paid any remuneration; and
(b) undertaken as a requirement of an education or training course; and
(c) authorised under a law or an administrative arrangement of the Commonwealth, a State or a Territory.

waterside worker has the meaning given by clause 1 of Schedule 2.

wharf has the meaning given by clause 1 of Schedule 2.

working day means a day that is not a Saturday, a Sunday or a public holiday.

workplace agreement means:

- (a) an ITEA; or
(b) a collective agreement;

and includes a document that the Court has ordered under section 412A is to have effect as a workplace agreement.

Note 1: Section 324 affects the meaning of **workplace agreement**.

Note 2: Under section 324A, some other documents are taken to be workplace agreements for certain limited purposes.

Section 4

Note 3: An order by the Court under paragraph 412A(1)(a) enables a document to which section 324A applies to have effect as a workplace agreement.

workplace agreement official means:

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

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

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

workplace determination means a determination under Division 8 of Part 9.

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

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

- (2) To avoid doubt, it is declared that a reference in this Act (except in Parts 10 and 16, and in regulations made for the purposes of paragraph 356(1)(f)) to an independent contractor is confined to a natural person.
- (3) In this Act, a reference to:
 - (a) a person who is eligible to become a member of an organisation; or
 - (b) a person who is eligible for membership of an organisation; includes a reference to a person who is eligible merely because of an agreement made under rules of the organisation made under subsection 151(1) of the Registration and Accountability of Organisations Schedule.
- (4) In this Act, a reference to a person making a statement that is to the person's knowledge false or misleading in a material particular includes a reference to a person making a statement where the

person is reckless as to whether the statement is false or misleading in a material particular.

- (5) In this Act, a reference to engaging in conduct includes a reference to being, whether directly or indirectly, a party to or concerned in the conduct.
- (6) A reference in this Act to a term of an award includes a reference to a provision of an award.

Note: Section 69B of the *Australian Federal Police Act 1979* provides that this Act does not apply to certain matters relating to AFP employees.

5 Employee

Basic definition

- (1) In this Act, unless the contrary intention appears:

employee means an individual so far as he or she is employed, or usually employed, as described in the definition of ***employer*** in subsection 6(1), by an employer, except on a vocational placement.

Note: See also Part 21 (employees and employers in Victoria).

References to employee with ordinary meaning

- (2) However, a reference to employee has its ordinary meaning (subject to subsections (3) and (4)) if the reference is listed in clause 2 of Schedule 2. This does not limit the circumstances in which a contrary intention may appear for the purposes of subsection (1).

Note: The regulations may amend clause 2 of Schedule 2. See clause 5 of Schedule 2.
- (3) In this Act, unless the contrary intention appears, a reference to employee with its ordinary meaning includes a reference to an individual who is usually an employee with that meaning.
- (4) In this Act, unless the contrary intention appears, a reference to employee with its ordinary meaning does not include a reference to an individual on a vocational placement.

6 Employer

Basic definition

(1) In this Act, unless the contrary intention appears:

employer means:

- (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or
- (b) the Commonwealth, so far as it employs, or usually employs, an individual; or
- (c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or
- (d) a person or entity (which may be an unincorporated club) so far as the person or entity, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
 - (i) a flight crew officer; or
 - (ii) a maritime employee; or
 - (iii) a waterside worker; or
- (e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
- (f) a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person or entity employs, or usually employs, an individual in connection with the activity carried on in the Territory.

Note 1: In this context, **Australia** includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands. See paragraph 17(a) of the *Acts Interpretation Act 1901*.

Note 2: See also Part 21 (employees and employers in Victoria).

References to employer with ordinary meaning

(2) However, a reference to employer has its ordinary meaning (subject to subsection (3)) if the reference is listed in clause 3 of Schedule 2. This does not limit the circumstances in which a contrary intention may appear for the purposes of subsection (1).

Note: The regulations may amend clause 3 of Schedule 2. See clause 5 of Schedule 2.

- (3) In this Act, unless the contrary intention appears, a reference to employer with its ordinary meaning includes a reference to a person or entity that is usually an employer with that meaning.

7 Employment

- (1) In this Act, unless the contrary intention appears:

employment means the employment of an employee by an employer.

Note: Subsections 5(1) and 6(1) define ***employee*** and ***employer***.

References to employment with ordinary meaning

- (2) However, a reference to employment has its ordinary meaning if the reference is listed in clause 4 of Schedule 2. This does not limit the circumstances in which a contrary intention may appear for the purposes of subsection (1).

Note: The regulations may amend clause 4 of Schedule 2. See clause 5 of Schedule 2.

8 Schedules 1, 6, 7, 7A, 7B, 8, and 9 have effect

Schedules 1, 6, 7, 7A, 7B, 8 and 9 have effect.

Note 1: Schedule 1 is about registration and accountability of organisations.

Note 2: Schedule 6 is about transitional arrangements for parties bound by federal awards.

Note 3: Schedule 7 is about transitional arrangements for existing pre-reform certified agreements.

Note 4: Schedule 7A is about transitional arrangements for existing AWAs.

Note 5: Schedule 7B is about transitional arrangements for existing collective agreements.

Note 6: Schedule 8 is about transitional treatment of State employment agreements and State awards.

Note 7: Schedule 9 is about transitional instruments and transmission of business.

9 Schedule 10 has effect

Schedule 10 has effect.

Note: Schedule 10 is about transitionally registered associations.

Section 10

10 Act binds Crown

- (1) This Act binds the Crown in each of its capacities.
- (2) However, this Act does not make the Crown liable to be prosecuted for an offence.

11 Modifications for Christmas Island and Cocos (Keeling) Islands

- (1) If the regulations prescribe modifications of this Act for its application in relation to the Territory of Christmas Island, this Act has effect as modified in relation to the Territory.
- (2) If the regulations prescribe modifications of this Act for its application in relation to the Territory of Cocos (Keeling) Islands, this Act has effect as modified in relation to the Territory.
- (3) In this section:
modifications includes additions, omissions and substitutions.

12 Exclusion of persons insufficiently connected with Australia

- (1) A provision of this Act prescribed by the regulations does not apply to a person or entity in Australia prescribed by the regulations as a person to whom, or an entity to which, the provision does not apply.
Note 1: In this context, *Australia* includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea. See section 15B and paragraph 17(a) of the *Acts Interpretation Act 1901*.
Note 2: The regulations may prescribe the person or entity by reference to a class. See subsection 13(3) of the *Legislative Instruments Act 2003*.
- (2) Before the Governor-General makes regulations for the purposes of subsection (1) prescribing either or both of the following:
 - (a) a provision of this Act that is not to apply to a person or entity;
 - (b) a person to whom, or an entity to which, a provision of this Act is not to apply;the Minister must be satisfied that the provision should not apply to the person or entity in Australia because there is not a sufficient connection between the person or entity and Australia.

(3) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

13 Extraterritorial application

(1) Each Part or Division listed in the table, and the rest of this Act so far as it relates to the Part or Division, extends to persons, acts, omissions, matters and things outside Australia as described in the relevant section listed in the table.

Extraterritorial application			
Item	This Part or Division:	Which is about this topic:	Extends to persons, acts, omissions, matters and things outside Australia as described in this section:
1	Part 7	The Australian Fair Pay and Conditions Standard	Section 174
2	Part 8	Workplace agreements	Section 325
3	Part 10	Awards	Section 512
4	Division 1 of Part 12	Meal breaks	Section 610
4A	Division 2 of Part 12	Public holidays	Section 619
5	Division 3 of Part 12	Equal remuneration for work of equal value	Section 634
6	Division 4 of Part 12	Termination of employment	Section 641
6A	Division 7 of Part 12	Stand downs	Section 691C
7	Part 15	Right of entry	Section 739
8	Part 16	Freedom of association	Section 788

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

Note 2: Provisions of section 169 giving inspectors power to enter certain premises and places and do certain things there also extend to some premises and places outside Australia, subject to Australia's

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international obligations relating to foreign-flagged ships and foreign-registered aircraft.

Note 3: Part 9 (Industrial action) and related provisions of this Act may extend in relation to Australia's exclusive economic zone, and in relation to Australia's continental shelf, as prescribed by the regulations. See section 422.

Modified application in Australia's exclusive economic zone

- (2) If the regulations prescribe modifications of this Act for its operation in relation to all or part of Australia's exclusive economic zone, then, so far as this Act extends to the zone or part apart from this subsection, it has effect as modified in relation to the zone or part.
- (3) For the purposes of subsection (2), the regulations may prescribe different modifications in relation to different parts of Australia's exclusive economic zone.

Modified application in relation to Australia's continental shelf

- (4) If the regulations prescribe modifications of this Act for its operation in relation to all or part of Australia's continental shelf, then, so far as this Act extends in relation to the continental shelf or part apart from this subsection, it has effect as modified in relation to the continental shelf or part.
- (5) For the purposes of subsection (4), the regulations may prescribe different modifications in relation to different parts of Australia's continental shelf.

Definitions

- (6) In this section:

modifications includes additions, omissions and substitutions.

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

14 Act not to apply so as to exceed Commonwealth power

- (1) Unless the contrary intention appears, if a provision of this Act:
 - (a) would, apart from this section, have an invalid application; but

- (b) also has at least one valid application;
it is the Parliament's intention that the provision is not to have the invalid application, but is to have every valid application.
- (2) Despite subsection (1), the provision is not to have a particular valid application if:
- (a) apart from this section, it is clear, taking into account the provision's context and the purpose or object underlying this Act, that the provision was intended to have that valid application only if every invalid application, or a particular invalid application, of the provision had also been within the Commonwealth's legislative power; or
 - (b) the provision's operation in relation to that valid application would be different in a substantial respect from what would have been its operation in relation to that valid application if every invalid application of the provision had been within the Commonwealth's legislative power.
- (3) Subsection (2) does not limit the cases where a contrary intention may be taken to appear for the purposes of subsection (1).
- (4) This section applies to a provision of this Act, whether enacted before, at or after the commencement of this section.
- (5) In this section:

application means an application in relation to:

- (a) one or more particular persons, things, matters, places, circumstances or cases; or
- (b) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases.

invalid application, in relation to a provision, means an application because of which the provision exceeds the Commonwealth's legislative power.

valid application, in relation to a provision, means an application that, if it were the provision's only application, would be within the Commonwealth's legislative power.

15 Application of *Criminal Code*

- (1) Chapter 2 of the *Criminal Code* (except Part 2.5) applies to all offences against this Act.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: For the purposes of this Act, corporate criminal responsibility is dealt with by section 826, rather than by Part 2.5 of the *Criminal Code*.

- (2) However, so far as Part 2.7 of the *Criminal Code* is relevant to this Act, it has effect subject to the following sections of this Act:
- (a) section 13;
 - (b) the sections mentioned in section 13;
 - (c) section 169;
 - (d) section 422.

Note: Part 2.7 of the *Criminal Code* is about geographical jurisdiction in connection with offences. Section 13, the sections mentioned there and sections 169 and 422 deal with extraterritorial operation of this Act.

16 Act excludes some State and Territory laws

- (1) This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:
- (a) a State or Territory industrial law;
 - (b) a law that applies to employment generally and deals with leave other than long service leave;
 - (c) a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value (as defined in section 623);
 - (d) a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;
 - (e) a law that entitles a representative of a trade union to enter premises.

Note: Subsection 4(1) defines *applies to employment generally*.

State and Territory laws that are not excluded

- (2) However, subsection (1) does not apply to a law of a State or Territory so far as:
- (a) the law deals with the prevention of discrimination, the promotion of EEO or both, and is neither a State or Territory industrial law nor contained in such a law; or
 - (b) the law is prescribed by the regulations as a law to which subsection (1) does not apply; or
 - (c) the law deals with any of the matters (the *non-excluded matters*) described in subsection (3).
- (3) The non-excluded matters are as follows:
- (a) superannuation;
 - (b) workers compensation;
 - (c) occupational health and safety (including entry of a representative of a trade union to premises for a purpose connected with occupational health and safety);
 - (d) matters relating to outworkers (including entry of a representative of a trade union to premises for a purpose connected with outworkers);
 - (e) child labour;
 - (f) long service leave;
 - (g) the observance of a public holiday, except the rate of payment of an employee for the public holiday;
 - (h) the method of payment of wages or salaries;
 - (i) the frequency of payment of wages or salaries;
 - (j) deductions from wages or salaries;
 - (k) industrial action (within the ordinary meaning of the expression) affecting essential services;
 - (l) attendance for service on a jury;
 - (m) regulation of any of the following:
 - (i) associations of employees;
 - (ii) associations of employers;
 - (iii) members of associations of employees or of associations of employers.

Note: Part 15 (Right of entry) sets prerequisites for a trade union representative to enter certain premises under a right given by a prescribed law of a State or Territory. The prerequisites apply even though the law deals with such entry for a purpose connected with

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occupational health and safety and paragraph (2)(c) says this Act is not to apply to the exclusion of a law dealing with that.

This Act excludes prescribed State and Territory laws

- (4) This Act is intended to apply to the exclusion of a law of a State or Territory that is prescribed by the regulations for the purposes of this subsection.
- (5) To avoid doubt, subsection (4) has effect even if the law is covered by subsection (2) (so that subsection (1) does not apply to the law). This subsection does not limit subsection (4).

Definition

- (6) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

17 Awards, agreements and Commission orders prevail over State and Territory law etc.

- (1) An award or workplace agreement prevails over a law of a State or Territory, a State award or a State employment agreement, to the extent of any inconsistency.
- (2) However, a term of an award or workplace agreement dealing with any of the following matters has effect subject to a law of a State or Territory dealing with the matter, except a law that is prescribed by the regulations as a law to which awards and workplace agreements are not subject:
 - (a) occupational health and safety;
 - (b) workers compensation;
 - (c) training arrangements;
 - (d) a matter prescribed by the regulations for the purposes of this paragraph.
- (3) An order of the Commission under Part 12 prevails over a law of a State or Territory, a State award or a State employment agreement, to the extent of any inconsistency.

Note: Part 12 is about minimum entitlements of employees.

18 Act may exclude State and Territory laws in other cases

- (1) Sections 16 and 17 are not a complete statement of the circumstances in which this Act and instruments made under it are intended to apply to the exclusion of, or prevail over, laws of the States and Territories or instruments made under those laws.

Note: Other provisions of this Act deal with its relationship with laws of the States and Territories. For example, see clause 87 of Schedule 6, which is about not excluding or limiting Victorian law that can operate concurrently with certain provisions of that Schedule.

- (2) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

Part 2—Australian Fair Pay Commission

Division 1—Preliminary

19 Definitions

In this Part:

AFPC means the Australian Fair Pay Commission established by section 20.

AFPC Chair means the AFPC Chair appointed under section 29.

AFPC Commissioner means an AFPC Commissioner appointed under section 38.

AFPC Secretariat means the AFPC Secretariat established under section 46.

Director of the Secretariat means the Director of the Secretariat appointed under section 50.

wage review means a review conducted by the AFPC to determine whether it should exercise any of its wage-setting powers.

wage-setting decision means a decision made by the AFPC in the exercise of its wage-setting powers.

wage-setting function has the meaning given by subsection 22(1).

wage-setting powers means the powers of the AFPC under Division 2 of Part 7.

Division 2—Australian Fair Pay Commission

Subdivision A—Establishment and functions

20 Establishment

- (1) The Australian Fair Pay Commission is established by this section.
- (2) The AFPC is to consist of:
 - (a) the AFPC Chair; and
 - (b) 4 AFPC Commissioners.

21 Functions of the AFPC

The functions of the AFPC are as follows:

- (a) its wage-setting function as set out in subsection 22(1);
- (b) any other functions conferred on the AFPC under this Act or any other Act;
- (c) any other functions conferred on the AFPC by regulations made under this Act or any other Act;
- (d) to undertake activities to promote public understanding of matters relevant to its wage-setting and other functions.

Subdivision B—AFPC’s wage-setting function

22 AFPC’s wage-setting function

The AFPC’s wage-setting function

- (1) The AFPC’s **wage-setting function** is to:
 - (a) conduct wage reviews; and
 - (b) exercise its wage-setting powers as necessary depending on the outcomes of wage reviews.

Note: The main wage-setting powers of the AFPC cover the following matters (within the meaning of Division 2 of Part 7):

- (a) adjusting the standard FMW (short for Federal Minimum Wage);
- (b) adjusting special FMWs for employees with a disability;
- (c) adjusting basic periodic rates of pay and basic piece rates of pay payable to employees or employees of particular classifications.

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- (2) During the period (the *interim period*) from the commencement of this Part to the commencement of Division 2 of Part 7, the AFPC has the function of gathering information (including by undertaking or commissioning research, or consulting with any person or body) for the purpose of assisting it to perform its wage-setting function after that Division has commenced. When performing its wage-setting function, the AFPC may have regard to any information so gathered during the interim period.

23 AFPC's wage-setting parameters

The objective of the AFPC in performing its wage-setting function is to promote the economic prosperity of the people of Australia having regard to the following:

- (a) the capacity for the unemployed and low paid to obtain and remain in employment;
- (b) employment and competitiveness across the economy;
- (c) providing a safety net for the low paid;
- (d) providing minimum wages for junior employees, employees to whom training arrangements apply and employees with disabilities that ensure those employees are competitive in the labour market.

24 Wage reviews and wage-setting decisions

- (1) The AFPC may determine the following:
- (a) the timing and frequency of wage reviews;
 - (b) the scope of particular wage reviews;
 - (c) the manner in which wage reviews are to be conducted;
 - (d) when wage-setting decisions are to come into effect.
- (2) For the purposes of performing its wage-setting function, the AFPC may inform itself in any way it thinks appropriate, including by:
- (a) undertaking or commissioning research; or
 - (b) consulting with any other person, body or organisation; or
 - (c) monitoring and evaluating the impact of its wage-setting decisions.
- (3) Subsections (1) and (2) have effect subject to this Act and any regulations made under this Act.

- (4) The AFPC's wage-setting decisions must:
- (a) be in writing; and
 - (b) be expressed as decisions of the AFPC as a body; and
 - (c) include reasons for the decisions, expressed as reasons of the AFPC as a body.

A wage-setting decision is not a legislative instrument.

25 Constitution of the AFPC for wage-setting powers

- (1) For the purposes of exercising its wage-setting powers, the AFPC must be constituted by:
- (a) the AFPC Chair; and
 - (b) the 4 AFPC Commissioners.
- (2) However, if the AFPC Chair considers it necessary in circumstances where AFPC Commissioners are unavailable, the AFPC Chair may determine that, for the purposes of exercising its wage-setting powers in those circumstances, the AFPC is to be constituted by:
- (a) the AFPC Chair; and
 - (b) no fewer than 2 AFPC Commissioners.

26 Publishing wage-setting decisions etc.

- (1) The AFPC must publish its wage-setting decisions.
- (2) The AFPC may, as it thinks appropriate, publish other information about wages or its wage-setting function.
- (3) Publishing under subsection (1) or (2) may be done in any way the AFPC thinks appropriate.

Subdivision C—Operation of the AFPC

27 AFPC to determine its own procedures

- (1) The AFPC may determine the procedures it will use in performing its functions.
- (2) Subsection (1) has effect subject to Subdivision B and any regulations made under subsection (3).

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- (3) The regulations may prescribe procedures to be used by the AFPC for all or for specified purposes.

28 Annual report

The AFPC must, as soon as practicable after the end of each financial year, give to the Minister a report on the operation of the AFPC for presentation to the Parliament.

Subdivision D—AFPC Chair

29 Appointment

- (1) The AFPC Chair is to be appointed by the Governor-General by written instrument.
- (2) The AFPC Chair may be appointed on a full-time or part-time basis and holds office for the period specified in his or her instrument of appointment. The period must not exceed 5 years.
- (3) To be appointed as AFPC Chair, a person must have a high level of skills and experience in business or economics.

30 Remuneration

- (1) The AFPC Chair is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the AFPC Chair is to be paid the remuneration that is prescribed.
- (2) The AFPC Chair is to be paid the allowances that are prescribed.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

31 Leave of absence

- (1) If the AFPC Chair is appointed on a full-time basis:
 - (a) the AFPC Chair has the recreation leave entitlements that are determined by the Remuneration Tribunal; and
 - (b) the Minister may grant the AFPC Chair leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

- (2) If the AFPC Chair is appointed on a part-time basis, the Minister may grant leave of absence to the AFPC Chair on the terms and conditions that the Minister determines.

32 Engaging in other paid employment

If the AFPC Chair is appointed on a full-time basis, the AFPC Chair must not engage in paid employment outside the duties of his or her office without the Minister's approval.

33 Disclosure of interests

The AFPC Chair must give written notice to the Minister of all interests (financial or otherwise) that the AFPC Chair has or acquires and that could conflict with the proper performance of his or her duties.

34 Resignation

- (1) The AFPC Chair may resign his or her appointment by giving the Governor-General a written resignation.
- (2) The resignation takes effect on the day it is received by the Governor-General or, if a later day is specified in the resignation, on that later day.

35 Termination of appointment

- (1) The Governor-General may terminate the appointment of the AFPC Chair if:
- (a) the AFPC Chair:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (b) the AFPC Chair fails, without reasonable excuse, to comply with section 33; or
 - (c) the AFPC Chair has or acquires interests (including by being an employer or employee) that the Minister considers conflict

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- unacceptably with the proper performance of the AFPC Chair's duties; or
- (d) if the AFPC Chair is appointed on a full-time basis:
- (i) the AFPC Chair engages, except with the Minister's approval, in paid employment outside the duties of his or her office; or
 - (ii) the AFPC Chair is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
- (e) if the AFPC Chair is appointed on a part-time basis—the AFPC Chair is absent, except on leave of absence, to an extent that the Minister considers excessive.
- (2) Subject to subsections (3), (4) and (5), the Governor-General may terminate the appointment of the AFPC Chair for misbehaviour or physical or mental incapacity.
- (3) If the AFPC Chair:
- (a) is an eligible employee for the purposes of the *Superannuation Act 1976*; and
 - (b) has not reached his or her maximum retiring age within the meaning of that Act;
- his or her appointment cannot be terminated for physical or mental incapacity unless the CSS Board has given a certificate under section 54C of that Act.
- (4) If the AFPC Chair:
- (a) is a member of the superannuation scheme established by deed under the *Superannuation Act 1990*; and
 - (b) is under 60 years of age;
- his or her appointment cannot be terminated for physical or mental incapacity unless the PSS Board has given a certificate under section 13 of that Act.
- (5) If the AFPC Chair:
- (a) is an ordinary employer-sponsored member of PSSAP, within the meaning of the *Superannuation Act 2005*; and
 - (b) is under 60 years of age;
- his or her appointment cannot be terminated on the ground of physical or mental incapacity unless the Board (within the meaning

of that Act) has given an approval and certificate under section 43 of that Act.

36 Other terms and conditions

The AFPC Chair holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.

37 Acting AFPC Chair

- (1) The Minister may appoint a person who meets the requirements set out in subsection 29(3) to act as the AFPC Chair:
 - (a) during a vacancy in the office of the AFPC Chair (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when the AFPC Chair is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.
- (2) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
 - (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion to act had not arisen or had ceased.

Subdivision E—AFPC Commissioners

38 Appointment

- (1) An AFPC Commissioner is to be appointed by the Governor-General by written instrument.
- (2) An AFPC Commissioner holds office on a part-time basis for the period specified in his or her instrument of appointment. The period must not exceed 4 years.
- (3) To be appointed as an AFPC Commissioner, a person must have experience in one or more of the following areas:
 - (a) business;

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- (b) economics;
- (c) community organisations;
- (d) workplace relations.

39 Remuneration

- (1) An AFPC Commissioner is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, an AFPC Commissioner is to be paid the remuneration that is prescribed.
- (2) An AFPC Commissioner is to be paid the allowances that are prescribed.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

40 Leave of absence

The AFPC Chair may grant leave of absence to an AFPC Commissioner on the terms and conditions that the AFPC Chair determines.

41 Disclosure of interests

An AFPC Commissioner must give written notice to the Minister of all interests (financial or otherwise) that the AFPC Commissioner has or acquires and that could conflict with the proper performance of his or her duties.

42 Resignation

- (1) An AFPC Commissioner may resign his or her appointment by giving the Governor-General a written resignation.
- (2) The resignation takes effect on the day it is received by the Governor-General or, if a later day is specified in the resignation, on that later day.

43 Termination of appointment

- (1) The Governor-General may terminate the appointment of an AFPC Commissioner if:

- (a) the AFPC Commissioner:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (b) the AFPC Commissioner fails, without reasonable excuse, to comply with section 41; or
 - (c) the AFPC Commissioner has or acquires interests (including by being an employer or employee) that the Minister considers conflict unacceptably with the proper performance of the AFPC Commissioner's duties; or
 - (d) the AFPC Commissioner is absent, except on leave of absence, to an extent that the Minister considers excessive.
- (2) Subject to subsections (3), (4) and (5), the Governor-General may terminate the appointment of an AFPC Commissioner for misbehaviour or physical or mental incapacity.
- (3) If an AFPC Commissioner:
- (a) is an eligible employee for the purposes of the *Superannuation Act 1976*; and
 - (b) has not reached his or her maximum retiring age within the meaning of that Act;
- his or her appointment cannot be terminated for physical or mental incapacity unless the CSS Board has given a certificate under section 54C of that Act.
- (4) If an AFPC Commissioner:
- (a) is a member of the superannuation scheme established by deed under the *Superannuation Act 1990*; and
 - (b) is under 60 years of age;
- his or her appointment cannot be terminated for physical or mental incapacity unless the PSS Board has given a certificate under section 13 of that Act.
- (5) If an AFPC Commissioner:
- (a) is an ordinary employer-sponsored member of PSSAP, within the meaning of the *Superannuation Act 2005*; and

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(b) is under 60 years of age;
his or her appointment cannot be terminated on the ground of physical or mental incapacity unless the Board (within the meaning of that Act) has given an approval and certificate under section 43 of that Act.

44 Other terms and conditions

An AFPC Commissioner holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.

45 Acting AFPC Commissioners

- (1) The Minister may appoint a person who meets the requirement set out in subsection 38(3) to act as an AFPC Commissioner:
 - (a) during a vacancy in the office of an AFPC Commissioner (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when an AFPC Commissioner is acting as AFPC Chair, is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.
- (2) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
 - (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion to act had not arisen or had ceased.

Division 3—AFPC Secretariat

Subdivision A—Establishment and function

46 Establishment

- (1) The AFPC Secretariat is established by this section.
- (2) The AFPC Secretariat is to consist of:
 - (a) the Director of the Secretariat; and
 - (b) the staff of the Secretariat.

47 Function

The function of the AFPC Secretariat is to assist the AFPC in the performance of the AFPC's functions.

Subdivision B—Operation of the AFPC Secretariat

48 AFPC Chair may give directions

- (1) The AFPC Chair may give directions to the Director of the Secretariat about the performance of the function of the AFPC Secretariat.
- (2) The Director of the Secretariat must ensure that a direction given under subsection (1) is complied with.
- (3) To avoid doubt, the AFPC Chair must not give directions under subsection (1) in relation to the performance of functions, or exercise of powers, under the *Financial Management and Accountability Act 1997* or the *Public Service Act 1999*.

49 Annual report

The Director of the Secretariat must, as soon as practicable after the end of each financial year, give to the Minister a report on the operation of the AFPC Secretariat for presentation to the Parliament.

Subdivision C—The Director of the Secretariat

50 Appointment

- (1) The Director of the Secretariat is to be appointed by the Minister by written instrument.
- (2) The Director of the Secretariat holds office on a full-time basis for the period specified in his or her instrument of appointment. The period must not exceed 5 years.

51 Remuneration

- (1) The Director of the Secretariat is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Director of the Secretariat is to be paid the remuneration that is prescribed.
- (2) The Director of the Secretariat is to be paid the allowances that are prescribed.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

52 Leave of absence

- (1) The Director of the Secretariat has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) The Minister may grant the Director of the Secretariat leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

53 Engaging in other paid employment

The Director of the Secretariat must not engage in paid employment outside the duties of his or her office without the Minister's approval.

54 Disclosure of interests

The Director of the Secretariat must give written notice to the Minister of all interests (financial or otherwise) that the Director of

the Secretariat has or acquires and that could conflict with the proper performance of his or her duties.

55 Resignation

- (1) The Director of the Secretariat may resign his or her appointment by giving the Minister a written resignation.
- (2) The resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day.

56 Termination of appointment

- (1) The Minister may terminate the appointment of the Director of the Secretariat if:
 - (a) the Director of the Secretariat:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (b) the Director of the Secretariat fails, without reasonable excuse, to comply with section 54; or
 - (c) the Director of the Secretariat has or acquires interests that the Minister considers conflict unacceptably with the proper performance of the Director of the Secretariat's duties; or
 - (d) the Director of the Secretariat engages, except with the Minister's approval, in paid employment outside the duties of his or her office; or
 - (e) the Director of the Secretariat is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months.
- (2) The Minister must terminate the appointment of the Director of the Secretariat if the Minister is of the opinion that the performance of the Director of the Secretariat has been unsatisfactory for a significant period of time.

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- (3) Subject to subsections (4), (5) and (6), the Minister may terminate the appointment of the Director of the Secretariat for misbehaviour or physical or mental incapacity.
- (4) If the Director of the Secretariat:
- (a) is an eligible employee for the purposes of the *Superannuation Act 1976*; and
 - (b) has not reached his or her maximum retiring age within the meaning of that Act;
- his or her appointment cannot be terminated for physical or mental incapacity unless the CSS Board has given a certificate under section 54C of that Act.
- (5) If the Director of the Secretariat:
- (a) is a member of the superannuation scheme established by deed under the *Superannuation Act 1990*; and
 - (b) is under 60 years of age;
- his or her appointment cannot be terminated for physical or mental incapacity unless the PSS Board has given a certificate under section 13 of that Act.
- (6) If the Director of the Secretariat:
- (a) is an ordinary employer-sponsored member of PSSAP, within the meaning of the *Superannuation Act 2005*; and
 - (b) is under 60 years of age;
- his or her appointment cannot be terminated on the ground of physical or mental incapacity unless the Board (within the meaning of that Act) has given an approval and certificate under section 43 of that Act.

57 Other terms and conditions

The Director of the Secretariat holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.

58 Acting Director of the Secretariat

- (1) The Minister may appoint a person to act as the Director of the Secretariat:

- (a) during a vacancy in the office of the Director of the Secretariat (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when the Director of the Secretariat is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.
- (2) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
- (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion to act had not arisen or had ceased.

Subdivision D—Staff and consultants

59 Staff

- (1) The staff of the AFPC Secretariat are to be persons engaged under the *Public Service Act 1999*.
- (2) For the purposes of the *Public Service Act 1999*:
 - (a) the Director of the Secretariat and the staff of the AFPC Secretariat together constitute a Statutory Agency; and
 - (b) the Director of the Secretariat is the Head of that Statutory Agency.

60 Consultants

The Director of the Secretariat may, on behalf of the Commonwealth, engage persons having suitable qualifications and experience as consultants to the AFPC or the AFPC Secretariat. The terms and conditions of the engagement of a person are those determined by the Director of the Secretariat in writing.

Part 3—Australian Industrial Relations Commission

Division 1—Establishment of Commission

61 Establishment of Commission

- (1) There is established a commission by the name of the Australian Industrial Relations Commission.
- (2) The Commission consists of:
 - (a) a President;
 - (b) 2 Vice Presidents;
 - (c) such number of Senior Deputy Presidents as, from time to time, hold office under this Act;
 - (d) such number of Deputy Presidents as, from time to time, hold office under this Act; and
 - (e) such number of Commissioners as, from time to time, hold office under this Act.

62 Functions of Commission

The functions of the Commission are the functions conferred on the Commission by this Act, the Registration and Accountability of Organisations Schedule or otherwise.

63 Appointment of Commission members etc.

- (1) The President, Vice Presidents, Senior Deputy Presidents, Deputy Presidents and Commissioners shall be appointed by the Governor-General by commission and hold office as provided by this Act.
- (2) Each Presidential Member has the same rank, status and precedence as a Judge of the Court.
- (3) A Presidential Member or former Presidential Member is entitled to be styled “The Honourable”.

- (4) A person is not entitled to be styled “The Honourable” merely because the person is acting, or has acted, as a Presidential Member.

64 Qualifications for appointment

- (1) The Governor-General may only appoint a person as the President if:
- (a) the person:
 - (i) is or has been a Judge of a court created by the Parliament; or
 - (ii) has been a Judge of a court of a State or Territory; or
 - (iii) has been enrolled as a legal practitioner of the High Court, or the Supreme Court of a State or Territory, for at least 5 years; and
 - (b) in the opinion of the Governor-General, the person is, because of skills and experience in the field of industrial relations, a suitable person to be appointed as President.
- (2) The Governor-General may only appoint a person as a Vice President, a Senior Deputy President or a Deputy President if:
- (a) the person has been a Judge of a court created by the Parliament or a court of a State or Territory, or has been enrolled as a legal practitioner of the High Court, or the Supreme Court of a State or Territory, for at least 5 years;
 - (b) the person has had experience at a high level in industry or commerce or in the service of:
 - (i) a peak council or another association representing the interests of employers or employees; or
 - (ii) a government or an authority of a government; or
 - (c) the person has, at least 5 years previously, obtained a degree of a university or an educational qualification of a similar standard after studies in the field of law, economics or industrial relations, or some other field of study considered by the Governor-General to have substantial relevance to the duties of a Vice President, a Senior Deputy President or a Deputy President;
- and, in the opinion of the Governor-General, the person is, because of skills and experience in the field of industrial relations, a

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suitable person to be appointed as a Vice President, a Senior Deputy President or a Deputy President (as the case may be).

- (3) The Governor-General may only appoint a person as a Commissioner if the person has, in the opinion of the Governor-General, appropriate skills and experience in the field of industrial relations.

65 Seniority

The members of the Commission have seniority according to the following order of precedence:

- (a) the President;
- (b) the Vice Presidents, according to the days on which their commissions took effect, or, if their commissions took effect on the same day, according to the precedence assigned to them by their commissions;
- (c) the Senior Deputy Presidents, according to the days on which their commissions took effect, or, where the commissions of 2 or more of them took effect on the same day, according to the precedence assigned to them by their commissions;
- (d) the Deputy Presidents, according to the days on which their commissions took effect, or, where the commissions of 2 or more of them took effect on the same day, according to the precedence assigned to them by their commissions;
- (e) the Commissioners, according to the days on which their commissions took effect, or, where the commissions of 2 or more of them took effect on the same day, according to the precedence assigned to them by their commissions.

66 Performance of duties on part-time basis

- (1) A member of the Commission may, with the consent of the President, perform his or her duties on a part-time basis.
- (2) If the President consents to a member performing his or her duties on a part-time basis, the President and the member are to enter into an agreement specifying the proportion of full-time duties to be worked by the member from and including a specified date.
- (3) The proportion may be varied by an agreement entered into between the President and the member.

- (4) The proportion in force in relation to a particular period is in this section called the *agreed proportion*.
- (5) If the President consents to a member performing his or her duties on a part-time basis, the member is to be paid:
 - (a) salary at an annual rate equal to the agreed proportion of the annual rate of salary that would be payable to the member if the member were performing his or her duties on a full-time basis instead of on a part-time basis; and
 - (b) such travelling allowances as are determined from time to time by the Remuneration Tribunal for travel within Australia; and
 - (c) such other allowances as are prescribed by the regulations.
- (6) If the annual rate of salary of a member mentioned in subsection (5) is not an amount of whole dollars, it is to be rounded to the nearest dollar (with 50 cents being rounded up).
- (7) If, assuming that a member or former member mentioned in subsection (5) had performed his or her duties on a full-time basis instead of on a part-time basis, the member or former member would be entitled to a payment under subsection 79(9), (10) or (11) or 81(3), the member or former member is to be paid an amount equal to the agreed proportion of that payment.
- (8) If there are different agreed proportions applicable to different periods, paragraph (5)(a) and subsection (7) apply separately to each of those periods.
- (9) In this section:

member of the Commission does not include:

 - (a) the President; or
 - (b) a person who also holds office as a member of a prescribed State industrial authority.

67 Dual federal and State appointments

A person who is a member of the Commission may be appointed as a member of a prescribed State industrial authority, and a person who is a member of a prescribed State industrial authority may, subject to section 64, be appointed as a member of the Commission, and, subject to any law of the State, a person so

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appointed may, at the same time, hold the offices of member of the Commission and member of the prescribed State industrial authority.

68 Performance of duties by dual federal and State appointees

As agreed from time to time by the President and the head of the prescribed State industrial authority, a person who holds an office of member of the Commission and an office of member of a prescribed State industrial authority:

- (a) may perform the duties of the secondary office; and
- (b) may exercise, in relation to a particular matter:
 - (i) any powers that the person has in relation to the matter as a member of the Commission; and
 - (ii) any powers that the person has in relation to the matter as a member of the State industrial authority.

69 Dual federal appointments

- (1) Nothing in this Act prevents a person who holds office as a member of the Commission from holding at the same time:
 - (a) an office as member of a prescribed Commonwealth tribunal or prescribed Territory tribunal; or
 - (b) an office under a Commonwealth or Territory law that provides for the office to be held by a member of the Commission.
- (2) A person who is a member of the Commission may, in accordance with and subject to the directions of the President, perform functions as a member of a prescribed Territory tribunal.
- (3) In this section:

tribunal does not include a court created by the Parliament.

70 Appointment of a Judge as President not to affect tenure etc.

- (1) The appointment of a Judge of a court created by the Parliament as the President, or service by such a Judge as President, does not affect:
 - (a) the Judge's tenure of office as a Judge; or

- (b) the Judge's rank, title, status, precedence, salary, annual or other allowances or other rights or privileges as the holder of his or her office as a Judge.
- (2) For all purposes, the Judge's service as the President is taken to be service as a Judge.

71 Tenure of Commission members

- (1) A member of the Commission holds office until the member resigns, is removed from office or attains the age of 65 years.
- (2) The first President of the Commission appointed after the commencement of this subsection may be appointed for a fixed term and, in that case, the person holds office as President until:
 - (a) the term ends; or
 - (b) the person dies, resigns or is removed from office;whichever first happens.
- (3) The appointment of a person who is a member of a prescribed State industrial authority as a member of the Commission may be for a fixed term and, in that case, the person holds office as a member of the Commission until:
 - (a) the term ends;
 - (b) the person ceases to be a member of the prescribed State industrial authority; or
 - (c) the person resigns or is removed from office;whichever first happens.

72 Acting President

- (1) During any period when:
 - (a) the President is absent from duty or from Australia, or is for any other reason unable to perform the duties of the office of President; or
 - (b) there is a vacancy in the office of President (whether or not an appointment has previously been made to the office);the Governor-General may appoint a person who is qualified to be appointed as the President to act in that office.

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- (2) Anything done by or in relation to a person purporting to act under subsection (1) is not invalid because:
 - (a) the occasion for the appointment had not arisen;
 - (b) there was a defect or irregularity in connection with the appointment;
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion for the person to act had not arisen or had ceased.
- (3) For the purpose of subsection (1) only, a person is not disqualified from appointment as the President merely because the person has reached the age of 65.

73 Acting Vice President

- (1) The Governor-General may appoint a person who is qualified to be appointed as a Vice President to act in an office of Vice President:
 - (a) during a vacancy in the office (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when the holder of the office is absent from duty or from Australia or is, for any other reason, unable to perform the duties of the office.
- (2) Anything done by or in relation to a person purporting to act under subsection (1) is not invalid merely because:
 - (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion for the person to act had not arisen or had ceased.
- (3) For the purpose of subsection (1) only, a person is not disqualified from appointment as a Vice President merely because the person has reached the age of 65.

74 Acting Senior Deputy President

- (1) The Governor-General may appoint a person qualified to be appointed as a Senior Deputy President to act as Senior Deputy President for a specified period (including a period that exceeds 12
-

months) if the Governor-General is satisfied that the appointment is necessary to enable the Commission to perform its functions effectively.

- (2) Anything done by or in relation to a person purporting to act under subsection (1) is not invalid merely because:
 - (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion for the person to act had not arisen or had ceased.
- (3) For the purpose of subsection (1) only, a person is not disqualified from appointment as a Senior Deputy President merely because the person has reached 65.

75 Acting Deputy Presidents

- (1) The Governor-General may appoint a person qualified to be appointed as a Deputy President to act as Deputy President for a specified period (including a period that exceeds 12 months) if the Governor-General is satisfied that the appointment is necessary to enable the Commission to perform its functions effectively.
- (2) Anything done by or in relation to a person purporting to act under subsection (1) is not invalid because:
 - (a) the occasion for the appointment had not arisen;
 - (b) there was a defect or irregularity in connection with the appointment;
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion for the person to act had not arisen or had ceased.
- (3) For the purposes of subsection (1) only, a person is not disqualified from appointment as a Deputy President merely because the person has attained the age of 65.

76 Oath or affirmation of office

A member of the Commission shall, before proceeding to discharge the duties of the office, take before the

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Governor-General, a Justice of the High Court, a Judge of the Court or a Judge of the Supreme Court of a State or Territory an oath or affirmation in accordance with the form in Schedule 3.

77 Discharge of Commission's business

The President is to be assisted by the Vice President in ensuring the orderly and quick discharge of the business of the Commission.

78 Duty of Commission members

Each member of the Commission shall keep acquainted with industrial affairs and conditions.

79 Remuneration and allowances of Presidential Members etc.

- (1) The President is to be paid:
 - (a) salary at an annual rate equal to the annual rate of salary payable to the Chief Justice of the Court; and
 - (b) such travelling allowances as are determined from time to time by the Remuneration Tribunal for travel within Australia; and
 - (c) such other allowances as are prescribed by the regulations.
- (2) If a person holds office as the President and as a Judge of a court created by the Parliament, he or she is not to be paid remuneration as President except as provided by subsection (3).
- (3) If the salary payable to the person as a Judge is less than the salary that would be payable to the President under subsection (1), the person is to be paid an allowance equal to the difference between the Judge's salary and the salary that would be payable to the President.
- (4) A Vice President is to be paid:
 - (a) salary at an annual rate equal to 103% of the annual rate of salary payable to a Judge of the Court; and
 - (b) such travelling allowances as are determined from time to time by the Remuneration Tribunal for travel within Australia; and
 - (c) such other allowances as are prescribed by the regulations.

- (5) A Senior Deputy President is to be paid:
 - (a) salary at an annual rate equal to the annual rate of salary payable to a Judge of the Court; and
 - (b) such travelling allowances as are determined from time to time by the Remuneration Tribunal for travel within Australia; and
 - (c) such other allowances as are prescribed by the regulations.
- (6) A Deputy President is to be paid:
 - (a) salary at an annual rate equal to 95% of the annual rate of salary payable to a Judge of the Court; and
 - (b) such travelling allowances as are determined from time to time by the Remuneration Tribunal for travel within Australia; and
 - (c) such other allowances as are prescribed by the regulations.
- (7) If the annual rate of salary of a Presidential Member is not an amount of whole dollars, it is to be rounded to the nearest dollar (with 50 cents being rounded up).
- (8) If, assuming that the President or a former President had held the office of Chief Justice of the Court instead of the office of President, the President or former President would be entitled to a payment under subsection 7(5E) of the *Remuneration Tribunal Act 1973*, the President or former President is to be paid an amount equal to that payment.
- (9) If, assuming that a Vice President or former Vice President had held an office of Judge of the Court instead of an office of Vice President, the Vice President or former Vice President would be entitled to a payment under subsection 7(5E) of the *Remuneration Tribunal Act 1973*, the Vice President or former Vice President is to be paid an amount equal to 103% of that payment.
- (10) If, assuming that a Senior Deputy President or former Senior Deputy President had held an office of Judge of the Court instead of the office of Senior Deputy President, the Senior Deputy President or former Senior Deputy President would be entitled to a payment under subsection 7(5E) of the *Remuneration Tribunal Act 1973*, the Senior Deputy President or former Senior Deputy President is to be paid an amount equal to that payment.

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- (11) If, assuming that a Deputy President or former Deputy President had held an office of Judge of the Court instead of the office of Deputy President, the Deputy President or former Deputy President would be entitled to a payment under subsection 7(5E) of the *Remuneration Tribunal Act 1973*, the Deputy President or former Deputy President is to be paid an amount equal to 95% of that payment.
- (12) The salary of the Presidential Members accrue from day to day and are payable monthly.
- (13) Where a person who is a member of a prescribed State industrial authority is appointed as a member of the Commission, the person shall not be remunerated in relation to the office of member of the Commission, but the person may be paid, in relation to expenses in travelling to discharge the duties of the office, such sums (if any) as the Governor-General considers reasonable.
- (14) A person who, at the same time, holds the offices of member of the Commission and member of a prescribed Commonwealth tribunal or prescribed Territory tribunal as permitted by section 69:
- (a) shall be remunerated in relation to the office of member of the tribunal only in accordance with another law of the Commonwealth or Territory relating to the remuneration of persons holding at the same time offices of member of the Commission and member of the tribunal; but
 - (b) may be paid, in relation to expenses in travelling to discharge the duties of the office of member of the tribunal, such sums (if any) as the Governor-General considers reasonable.
- (15) This section has effect subject to:
- (a) section 66; and
 - (b) any Commonwealth or Territory law making provision as mentioned in paragraph 69(1)(b).
- (16) In this section:
- Judge* does not include the Chief Justice of the Court.

80 Application of Judges' Pensions Act

- (1) The *Judges' Pensions Act 1968* does not apply in relation to a Presidential Member if:
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- (a) immediately before being appointed as a Presidential Member, he or she was:
 - (i) an eligible employee for the purposes of the *Superannuation Act 1976*; or
 - (ii) a member of the superannuation scheme established by deed under the *Superannuation Act 1990*; and
 - (b) he or she does not make an election under subsection (2).
- (2) A Presidential Member may elect to cease to be:
- (a) an eligible employee for the purposes of the *Superannuation Act 1976*; or
 - (b) a member of the superannuation scheme established by deed under the *Superannuation Act 1990*.
- (3) The election must be made:
- (a) within 3 months of the Presidential Member's appointment; and
 - (b) by notice in writing to the Minister.
- (4) If a Presidential Member makes the election:
- (a) the *Judges' Pensions Act 1968* applies in relation to him or her and is taken to have so applied immediately after he or she was appointed as a Presidential Member; and
 - (b) he or she is taken to have ceased to be:
 - (i) an eligible employee for the purposes of the *Superannuation Act 1976*; or
 - (ii) a member of the superannuation scheme established by deed under the *Superannuation Act 1990*;immediately before being appointed as a Presidential Member.

81 Remuneration and allowances of Commissioners

- (1) A Commissioner is to be paid:
- (a) salary at an annual rate equal to 70% of the annual rate of salary payable to a Deputy President; and
 - (b) such travelling allowances as are determined from time to time by the Remuneration Tribunal for travel within Australia; and
 - (c) such other allowances as are prescribed by the regulations.

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- (2) If the annual rate of salary of a Commissioner is not an amount of whole dollars, it is to be rounded to the nearest dollar (with 50 cents being rounded up).
- (3) If, assuming that a Commissioner or former Commissioner had held an office of Deputy President instead of the office of Commissioner, the Commissioner or former Commissioner would be entitled to a payment under subsection 79(11), the Commissioner or former Commissioner is to be paid an amount equal to 70% of that payment.
- (4) This section has effect subject to section 66.

82 Removal of Presidential Member from office

The Governor-General may remove a Presidential Member from office on an address praying for removal on the grounds of proved misbehaviour or incapacity being presented to the Governor-General by both Houses of the Parliament in the same session.

83 Outside employment of Commissioner

- (1) Subject to subsection (2), a Commissioner shall not, except with the consent of the Minister, engage in paid employment outside the duties of the office.
- (2) Subsection (1) does not apply in relation to the holding by a member of an office or appointment in the Defence Force.

84 Leave of absence of Commissioner

- (1) A Commissioner has such recreation leave entitlements as are determined by the Remuneration Tribunal.
- (2) The President may grant a Commissioner leave of absence, other than recreation leave, on such terms and conditions as to Remuneration or otherwise as the President determines.
- (3) In determining the recreation leave entitlements of a Commissioner under the *Remuneration Tribunal Act 1973*, the Remuneration Tribunal must have regard to:

- (a) any past employment of the Commissioner in the service of a State or an authority of a State; or
 - (b) any past service of the Commissioner as a member of an authority of a State.
- (4) In determining the terms and conditions on which leave of absence is granted to a Commissioner under subsection (2), the President must have regard to:
- (a) any past employment of the Commissioner in the service of a State or an authority of a State; or
 - (b) any past service of the Commissioner as a member of an authority of a State.

85 Disclosure of interest by Commission members

- (1) Where, for the purposes of a proceeding, the Commission is constituted by, or includes, a member of the Commission who has or acquires any interest, pecuniary or otherwise, that could conflict with the proper performance of the member's functions in relation to the proceeding:
- (a) the member shall disclose the interest to the parties to the proceeding; and
 - (b) unless all the parties consent—the member shall not take part in the proceeding or exercise any powers in relation to the proceeding.
- (2) Where the President becomes aware that, for the purposes of a proceeding, the Commission is constituted by, or includes, a member of the Commission who has or acquires any interest, pecuniary or otherwise, that could conflict with the proper performance of the member's functions in relation to the proceeding:
- (a) if the President considers that the member should not take part, or should not continue to take part, in the proceeding—the President shall give a direction to the member accordingly; or
 - (b) in any other case—the President shall cause the interest of the member to be disclosed to the parties to the proceeding and the member shall not take part in the proceeding or exercise any powers in relation to the proceeding unless all the parties to the proceeding consent.

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(3) In this section:

proceeding includes a proceeding under the Registration and Accountability of Organisations Schedule.

86 Termination of appointment of Commissioner

- (1) The Governor-General may remove a Commissioner from office on an address praying for removal on the grounds of proved misbehaviour or incapacity being presented to the Governor-General by both Houses of the Parliament in the same session.
- (2) The Governor-General shall terminate the appointment of a Commissioner who:
 - (a) becomes bankrupt, applies to take the benefit of a law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for their benefit;
 - (b) is absent from duty, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
 - (c) engages in paid employment outside the duties of the office in contravention of section 83.

87 Resignation by Commission member

A member of the Commission may resign by signed instrument delivered to the Governor-General.

Division 2—Organisation of Commission

88 Manner in which Commission may be constituted

- (1) Subject to this Act and the Registration and Accountability of Organisations Schedule, the Commission may be constituted by:
 - (a) a single member, or 2 or more members, of the Commission;
or
 - (b) a Full Bench.
- (2) A Full Bench consists of at least 3 members of the Commission, including at least 2 Presidential Members, established by the President as a Full Bench for the purposes of a proceeding.
- (3) The Commission constituted by a member or members of the Commission may exercise its powers (whether under this Act, the Registration and Accountability of Organisations Schedule or otherwise) even though the Commission constituted by another member or other members of the Commission is at the same time exercising the powers of the Commission (whether under this Act, the Registration and Accountability of Organisations Schedule or otherwise).

89 Powers exercisable by single member of Commission

Subject to this Act and the Registration and Accountability of Organisations Schedule, a function or power of the Commission may be performed or exercised by a single member of the Commission.

90 Functions and powers conferred on members

A function or power conferred by this Act or the Registration and Accountability of Organisations Schedule on a member or members of the Commission, however described, shall, where the context admits, be taken to be a function or power conferred on the Commission to be performed or exercised by the member or members.

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91 Exercise of Commission powers

- (1) The Commission may perform a function or exercise a power on its own initiative.
- (2) Despite subsection (1), the Commission must not perform a function or exercise a power under a provision of this Act on its own initiative if:
 - (a) the function is to be performed, or the power exercised, on application by a specified person or class of persons; and
 - (b) the function is not also expressed to be able to be performed, or the power exercised, on the Commission's own initiative.

92 Continuation of hearing by Commission

- (1) Where:
 - (a) the hearing of a matter has been commenced before the Commission constituted by a single member; and
 - (b) before the matter has been determined, the member becomes unavailable;the President shall appoint another member of the Commission to constitute the Commission for the purposes of the matter.
- (2) Where the hearing of a matter has been commenced before the Commission constituted by 2 or more members and, before the matter has been determined, one of the members becomes unavailable, the President:
 - (a) shall if it is necessary for the purpose of establishing a Full Bench of the Commission under section 88; and
 - (b) may in any other case;appoint a member to participate as a member of the Commission for the purposes of the matter.
- (3) A member of the Commission becomes unavailable where the member is unable to continue dealing with a matter, whether because the member has ceased to be a member of the Commission or is prevented from taking part in the proceeding by section 85 or for any other reason.
- (4) Where the Commission is reconstituted under this section for the purposes of a matter, the Commission as reconstituted shall have regard to the evidence given, the arguments adduced and any

award, order or determination made in relation to the matter before the Commission was reconstituted.

93 Commission divided in opinion

If the persons constituting the Commission for the purposes of any proceeding are divided in opinion as to the decision to be given, the decision shall be given, if there is a majority, according to the opinion of the majority, but, if the members are equally divided in opinion, the opinion that shall prevail is:

- (a) where the President is a member—the opinion of the President; and
- (b) where the President is not a member and the Vice President is a member—the opinion of the Vice President; and
- (c) where neither the President nor the Vice President is a member and only one Senior Deputy President is a member—the opinion of the Senior Deputy President; and
- (d) where neither the President nor the Vice President is a member and 2 or more Senior Deputy Presidents are members—the opinion of the Senior Deputy President who has seniority under section 65; and
- (e) where the President, the Vice President and any Senior Deputy President are not members, and only one Deputy President is a member—the opinion of the Deputy President; and
- (f) where the President, Vice President and any Senior Deputy President are not members and 2 or more Deputy Presidents are members—the opinion of the Deputy President who has seniority under section 65; and
- (g) in any other case—the opinion of the Commissioner who is a member and who has seniority under section 65.

94 Arrangement of business of Commission

- (1) The President shall direct the business of the Commission.
- (2) When exercising powers under this section and section 95, the President must have regard to the improved:
 - (a) efficiency of the Commission; and
 - (b) cooperation between the Commission and State industrial authorities;

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that may be achieved by the Commission's powers and functions being exercised and performed, in relation to a particular matter, by members of State industrial authorities who hold secondary offices as members of the Commission.

95 Panels of Commission for particular industries

- (1) The President may assign an industry or group of industries to a panel of members of the Commission consisting of at least one Presidential Member and at least one Commissioner and, subject to this Act and any direction of the President, the powers of the Commission in relation to that industry (other than powers exercisable by a Full Bench) shall, as far as practicable, be exercised by a member or members of the panel.
- (2) Even though an industry has been assigned to a panel, the President may direct that the powers of the Commission in relation to a particular matter relating to that industry are to be exercised by:
 - (a) a member of the Commission who is not a member of that panel; or
 - (b) members of the Commission, some or all of whom are not members of that panel.
- (3) If more than one Presidential Member is assigned to a panel, the President must nominate one of the Presidential Members to organise and allocate the work of the panel.
- (4) A member of the Commission may be a member of more than one panel mentioned in subsection (1).
- (5) A member of the Commission may be a member of the panel established under section 14 of the Registration and Accountability of Organisations Schedule.

96 Delegation by President

- (1) The President may, by signed instrument, delegate to a Vice President all or any of the President's powers under this Act or the Registration and Accountability of Organisations Schedule.
- (2) If the President delegates a power to only one of the Vice Presidents, he or she may, in addition, delegate that power to a

Senior Deputy President to be exercised when that Vice President is unable, for any reason, to exercise that power personally.

- (3) If the President delegates the same power to both Vice Presidents, he or she may, in addition, delegate that power to a Senior Deputy President to be exercised when, for any reason, neither Vice President is able to exercise that power personally.

97 Protection of Commission members

A member of the Commission has, in the performance of functions as a member of the Commission, the same protection and immunity as a Judge of the Court.

98 Co-operation with the States by President

The President may invite the heads of State industrial authorities to meet with the President to exchange information and discuss matters of mutual interest in relation to workplace relations.

99 Co-operation with the States by Registrar

The Industrial Registrar may invite the principal registrars of State industrial authorities to meet with the Industrial Registrar to exchange information and discuss matters of mutual interest in relation to workplace relations.

Division 3—Representation and intervention

100 Representation of parties before Commission

- (1) A party to a proceeding before the Commission may appear in person.
- (2) Subject to this and any other Act, a party to a proceeding before the Commission may be represented only as provided by this section.
- (3) A party (including an employing authority) may be represented by counsel, solicitor or agent if:
 - (a) all parties have given express consent to that representation; and
 - (b) the Commission grants leave for the party to be so represented.
- (4) A party (including an employing authority) may be represented by counsel, solicitor or agent if:
 - (a) the party applies to the Commission to be so represented; and
 - (b) the Commission grants leave for the party to be so represented.
- (5) In deciding whether or not to grant leave under subsection (3), the Commission must have regard to the following matters:
 - (a) whether being represented by counsel, solicitor or agent would assist the party concerned to bring the best case possible;
 - (b) the capacity of the particular counsel, solicitor or agent to represent the party concerned;
 - (c) the capacity of the particular counsel, solicitor or agent to assist the Commission in performing the Commission's functions under this Act.
- (6) In deciding whether or not to grant leave under subsection (4), the Commission must have regard to the following matters:
 - (a) the matters referred to in paragraphs (5)(a), (b) and (c);
 - (b) the complexity of the factual and legal issues relating to the proceeding;

- (c) whether there are special circumstances that make it desirable that the party concerned be represented by counsel, solicitor or agent;
 - (d) if the party applies to be represented by an agent—whether the agent is a person or body, or an officer or employee of a person or body, that is able to represent the interests of the party under a State or Territory industrial relations law.
- (7) An appeal to a Full Bench under section 120 may not be made in relation to a decision under subsection (3) or (4) to grant leave or not to grant leave.
- (8) A party that is an organisation may be represented by:
- (a) a member, officer or employee of the organisation; or
 - (b) an officer or employee of a peak council to which the organisation is affiliated.
- (9) An employing authority may be represented by a prescribed person.
- (10) Regulations made for the purposes of subsection (9) may prescribe different classes of persons in relation to different classes of proceedings.
- (11) A party other than an organisation or employing authority may be represented by:
- (a) an officer or employee of the party; or
 - (b) a member, officer or employee of an organisation of which the party is a member; or
 - (c) an officer or employee of a peak council to which the party is affiliated; or
 - (d) an officer or employee of a peak council to which an organisation or association of which the party is a member is affiliated; or
 - (e) a bargaining agent.
- (12) Where the Minister is a party (other than in the capacity of employing authority), the Minister may be represented by counsel or solicitor or by another person authorised for the purpose by the Minister.

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- (13) Where the Minister is a party (other than in the capacity of employing authority), another party (including an employing authority) may, with the leave of the Commission, be represented by counsel, solicitor or agent.
- (14) In this section (other than paragraph (3)(a)):
party includes an intervener.

101 Intervention generally

Where the Commission is of the opinion that an organisation, a person (including the Minister) or a body should be heard in a matter before the Commission, the Commission may grant leave to the organisation, person or body to intervene in the matter.

102 Particular rights of intervention of Minister

- (1) The Minister may, on behalf of the Commonwealth, by giving written notice to the Industrial Registrar, intervene in the public interest in a matter before a Full Bench.
- (2) The Minister may, on behalf of the Commonwealth, by giving written notice to the Industrial Registrar, intervene in the public interest in a matter before the Commission so far as the matter involves public sector employment.

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

Subdivision A—General matters Commission to take into account

103 Commission to take into account the public interest

- (1) In the performance of its functions, the Commission must take into account the public interest, and for that purpose must have regard to:
 - (a) the objects of this Act; and
 - (b) the state of the national economy and the likely effects on the national economy of any order that the Commission is considering, or is proposing to make, with special reference to likely effects on the level of employment and on inflation.
- (2) To the extent that the Commission is performing its functions in relation to matters arising under the Registration and Accountability of Organisations Schedule, the Commission must take into account the public interest, and for that purpose must have regard to:
 - (a) Parliament's intention in enacting that Schedule; and
 - (b) the state of the national economy and the likely effects on the national economy of any order that the Commission is considering, or is proposing to make, with special reference to likely effects on the level of employment and on inflation.
- (3) This section does not apply to the performance of a function under Part 9 or Part 10.

104 Commission to take into account discrimination issues

In the performance of its functions, the Commission must take into account the following:

- (a) the need to apply the principle of equal pay for work of equal value;
- (b) the need to prevent and eliminate discrimination because of, or for reasons including, race, colour, sex, sexual preference,

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age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

105 Commission to take account of Racial Discrimination Act, Sex Discrimination Act, Disability Discrimination Act and Age Discrimination Act

In the performance of its functions, the Commission must take account of the principles embodied in the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004* relating to discrimination in relation to employment.

106 Commission to take account of Family Responsibilities Convention

- (1) In performing its functions, the Commission must take account of the principles embodied in the Family Responsibilities Convention, in particular those relating to:
 - (a) preventing discrimination against workers who have family responsibilities; and
 - (b) helping workers to reconcile their employment and family responsibilities.
- (2) This section does not apply to the performance of a function under Part 9.

107 Safety, health and welfare of employees

- (1) In performing its functions, the Commission must take into account the provisions of any law of a State or Territory relating to the safety, health and welfare of employees in relation to their employment.
- (2) This section does not apply to the performance of a function under Division 3 of Part 12.

108 Commission to act quickly

The Commission must perform its functions as quickly as practicable.

109 Commission to avoid technicalities and facilitate fair conduct of proceedings

The Commission must perform its functions in a way that avoids unnecessary technicalities and facilitates the fair and practical conduct of any proceedings under this Act or the Registration and Accountability of Organisations Schedule.

Subdivision B—Particular powers and procedures of the Commission

110 Procedure of Commission

- (1) In a proceeding under this Act or the Registration and Accountability of Organisations Schedule:
 - (a) the procedure of the Commission is, subject to this Act, the Registration and Accountability of Organisations Schedule and the Rules of the Commission, within the discretion of the Commission; and
 - (b) the Commission is not bound to act in a formal manner and is not bound by any rules of evidence, but may inform itself on any matter in such manner as it considers just; and
 - (c) the Commission must act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms.
- (2) The Commission may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to the proceeding and require that the cases be presented within the respective periods.
- (3) The Commission may require evidence or argument to be presented in writing, and may decide the matters on which it will hear oral evidence or argument.

111 Particular powers of Commission

- (1) The Commission may do any of the following in relation to a proceeding under this Act or the Registration and Accountability of Organisations Schedule:
 - (a) inform itself in any manner that it thinks appropriate;

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- (b) take evidence on oath or affirmation;
 - (c) give directions orally or in writing in the course of, or for the purposes of, procedural matters relating to the proceeding;
 - (d) vary or revoke an order, direction or decision of the Commission;
 - (e) dismiss a matter or part of a matter on the ground:
 - (i) that the matter, or the part of the matter, is trivial; or
 - (ii) that further proceedings in relation to the matter are not necessary or desirable in the public interest;
 - (f) determine the proceeding in the absence of a person who has been summoned or served with a notice to appear;
 - (g) sit at any place;
 - (h) conduct the proceeding, or any part of the proceeding, in private;
 - (i) adjourn the proceeding to any time and place;
 - (j) refer any matter to an expert and accept the expert's report as evidence;
 - (k) direct a member of the Commission to consider a particular matter that is before the Full Bench and prepare a report for the Full Bench on that matter;
 - (l) allow the amendment, on any terms that it thinks appropriate, of any application or other document relating to the proceeding;
 - (m) correct, amend or waive any error, defect or irregularity whether in substance or form;
 - (n) summon before it any persons whose presence the Commission considers would assist in relation to the proceeding;
 - (o) compel the production before it of documents and other things for the purpose of reference to such entries or matters as relate to the proceeding;
 - (p) make interim decisions;
 - (q) make a final decision in respect of the matter to which the proceeding relates.
- (2) The Commission may, in writing, authorise a person (including a member of the Commission) to take evidence on its behalf, with any limitations as the Commission directs, in relation to the

proceeding, and the person has all the powers of the Commission to secure:

- (a) the attendance of witnesses; and
 - (b) the production of documents and things; and
 - (c) the taking of evidence on oath or affirmation.
- (3) The following provisions do not apply to the performance of a function under Part 9:
- (a) paragraph (1)(e);
 - (b) paragraph (1)(j);
 - (c) paragraph (1)(k).
- (4) The following provisions do not apply to the performance of a function under Division 3, 4 or 5 of Part 12:
- (a) paragraph (1)(a);
 - (b) paragraph (1)(e);
 - (c) paragraph (1)(k);
 - (d) paragraph (1)(p);
 - (e) paragraph (1)(q);
 - (f) subsection (2).
- (5) Paragraph (1)(j) does not apply to the performance of a function under Division 4 of Part 12.
- (6) If a provision of this Act specifies a time or a period in respect of any matter or thing, the Commission must not extend the time or the period specified unless this Act expressly permits the Commission to do so.
- (7) If a provision of the Registration and Accountability of Organisations Schedule specifies a time or a period in respect of any matter or thing, the Commission must not extend the time or the period specified unless the Registration and Accountability of Organisations Schedule expressly permits the Commission to do so.
- (8) For the purposes of paragraph (1)(d), **order** does not include an award or an award-related order.

112 Reference of proceedings to Full Bench

- (1) If a proceeding is before a member of the Commission, a party to the proceeding or the Minister may apply to the member to have the proceeding dealt with by a Full Bench because the subject matter of the proceeding is of such importance that, in the public interest, the proceeding should be dealt with by a Full Bench.
- (2) If an application is made under subsection (1) to a member of the Commission other than the President:
 - (a) the member must refer the application to the President to be dealt with; and
 - (b) the President must confer with the member about whether the application should be granted.
- (3) If the President is of the opinion that the subject matter of the proceeding is of such importance that, in the public interest, the proceeding should be dealt with by a Full Bench, the President must grant the application.
- (4) If the President grants an application under subsection (1), the Full Bench must (subject to subsection (5)) hear and determine the proceeding to which the application relates.
- (5) If the President grants an application under subsection (1), the Full Bench may do either or both of the following:
 - (a) have regard to any evidence given, and any arguments adduced, in the proceeding before the Full Bench began to deal with it;
 - (b) refer a part of the proceeding to a member of the Commission to hear and determine.
- (6) The President may, before a Full Bench has been established for the purpose of dealing with a proceeding under this section, authorise a member of the Commission to take evidence for the purposes of the proceeding, and the Full Bench must have regard to the evidence.
- (7) The President or a Full Bench may, in relation to the exercise of powers under this section, direct a member of the Commission to provide a report in relation to a specified matter.

- (8) The member must, after making such investigation (if any) as is necessary, provide a report to the President or the Full Bench, as required.
- (9) In this section:
proceeding includes a part of a proceeding.

113 President may deal with certain proceedings

- (1) The President may, whether or not another member of the Commission has begun to deal with a particular proceeding, decide to deal with the proceeding.
- (2) If the President decides to deal with the proceeding, the President must:
 - (a) hear and determine the proceeding; or
 - (b) refer the proceeding to a Full Bench.
- (3) If the President refers an application to a Full Bench, the Full Bench must (subject to subsection (4)) hear and determine the proceeding.
- (4) If the President refers the proceeding to a Full Bench, the Full Bench may refer a part of the proceeding to a member of the Commission to hear and determine.
- (5) The President or the Full Bench may, in dealing with the proceeding, have regard to any evidence given, and any arguments adduced, in the proceeding before the President or the Full Bench, as the case may be, began to deal with it.
- (6) The President or a Full Bench may, in relation to the exercise of powers under this section, direct a member of the Commission to provide a report in relation to a specified matter.
- (7) The member must, after making such investigation (if any) as is necessary, provide a report to the President or a Full Bench, as the case may be.
- (8) In this section:
proceeding includes a part of a proceeding.

114 Review on application by Minister

- (1) The Minister may apply to the President for a review by a Full Bench of an award or order, or a decision relating to the making of an award or order, made by a member of the Commission (whether under this Act, the Registration and Accountability of Organisations Schedule or otherwise) if it appears to the Minister that the award, order or decision is contrary to the public interest.
- (2) If an application is made to the President under subsection (1), the President must establish a Full Bench to hear and determine the application.
- (3) The Full Bench must, if in its opinion the matter is of such importance that, in the public interest, the award, order or decision should be reviewed, make such review of the award, order or decision as appears to it to be desirable having regard to the matters referred to in the application.
- (4) Subject to subsection (5) of this section, subsections 120(4) to (8) apply in relation to a review under this section in the same manner as they apply in relation to an appeal under section 120.
- (5) Subsections 121(4) to (8) apply in relation to a review under this section in relation to a matter arising under the Registration and Accountability of Organisations Schedule in the same manner as they apply in relation to an appeal under section 121.
- (6) In a review under this section:
 - (a) the Commission must take such steps as it thinks appropriate to ensure that each person and organisation bound by the award or otherwise with an interest in the review is made aware of the review; and
 - (b) the Minister may intervene in the proceeding.
- (7) Each provision of this Act relating to the performance of the Commission's functions in relation to awards extends to a review under this section.
- (8) Nothing in this section affects any right of appeal or any power of a Full Bench under section 120, and an appeal under that section and a review under this section may, if the Full Bench thinks appropriate, be dealt with together.

- (9) Nothing in this section affects any right of appeal or any power of a Full Bench under section 121, and an appeal under that section and a review under this section may, if the Full Bench thinks appropriate, be dealt with together.

115 Compulsory conferences

- (1) For the purpose of the performance of a function, or the exercise of a power, of the Commission under this Act or the Registration and Accountability of Organisations Schedule, a member of the Commission may, on the initiative of the member or on application made by a party to, or intervener in, the proceeding, direct a person to attend, at a specified time and place, a conference to be presided over by a member of the Commission or another person nominated by the President.

Note: Contravening a direction may be an offence under section 815.

- (2) A direction may be given to anyone whose presence at the conference the member considers would help in the performance of a function under this Act or the Registration and Accountability of Organisations Schedule.
- (3) The conference must be held in private except to the extent that the person presiding over the conference directs that it be held in public.
- (4) This section does not apply to the performance of a function under Part 9.

116 Power to override certain laws affecting public sector employment

- (1) In so far as the performance of its functions under this Act or the Registration and Accountability of Organisations Schedule involves public sector employment, the Commission may, where it considers it proper to do so, make an award or order that is not, or in its opinion may not be, consistent with a relevant law of the Commonwealth or of an internal Territory.
- (2) In this section:

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enactment means an ordinance made under the *Northern Territory (Administration) Act 1910* and continued in force by the *Northern Territory (Self-Government) Act 1978*.

relevant law means a law of the Commonwealth or an internal Territory relating to matters pertaining to the relationship between employers and employees in public sector employment, other than:

- (a) the *Safety, Rehabilitation and Compensation Act 1988*, the *Long Service Leave (Commonwealth Employees) Act 1976*, the *Superannuation Act 1976* or the *Superannuation Act 1990*; or
 - (b) a prescribed Act or enactment, or prescribed provisions of an Act or enactment.
- (3) This section does not apply to the performance of a function under Part 12.

117 State authorities may be restrained from dealing with matter that is before the Commission

- (1) If it appears to a Full Bench that a State industrial authority is dealing or is about to deal with a matter that is the subject of a proceeding before the Commission under this Act or the Registration and Accountability of Organisations Schedule, the Full Bench may make an order restraining the State industrial authority from dealing with the matter.
- (2) The State industrial authority must, in accordance with the order, cease dealing or not deal, as the case may be, with the matter.
- (3) An order, award, decision or determination of a State industrial authority made in contravention of the order of a Full Bench under this section is, to the extent of the contravention, void.

118 Joint sessions of Commission

If:

- (a) the President considers that a question is common to 2 or more proceedings before the Commission; and
- (b) the Commission is not constituted by the same person or persons for the purposes of each proceeding;

the President may direct that the Commission constituted by all the persons who constitute the Commission for the purposes of the proceedings may take evidence or hear argument, or take evidence and hear argument, as to the question for the purposes of both or all of the proceedings.

119 Revocation and suspension of awards and orders

- (1) An organisation, a person interested or the Minister may apply to the President, and a member of the Commission or a Registrar may refer a matter to the President, for action by a Full Bench under this section.
- (2) If an application is made to the President under subsection (1), the President must establish a Full Bench to hear and determine the application.
- (3) If a matter is referred to the President under subsection (1), the President may establish a Full Bench to hear and determine the matter.
- (4) If it appears to the Full Bench:
 - (a) that an organisation has contravened this Act, the Registration and Accountability of Organisations Schedule or an award or order of the Commission; or
 - (b) that a substantial number of the members of an organisation refuse to accept employment either at all or in accordance with existing awards or orders; or
 - (c) that for any other reason an award or order should be suspended or revoked in whole or part;the Full Bench may, subject to such conditions as it thinks appropriate, make an order revoking, or suspending for such period as it thinks appropriate, the award or order or any of the terms of the award or an order.
- (5) The Full Bench may also make such other orders as it thinks appropriate in relation to the operation of:
 - (a) if the Full Bench revokes or suspends an award or order on a ground referred to in paragraph (4)(a) or (b)—any other award or order that binds the organisation; or
 - (b) in any other case—any other award or order that applies in relation to the employment of:

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- (i) members of an organisation that is bound by the revoked or suspended award or order; or
 - (ii) persons eligible to be members of such an organisation.
- (6) The revocation or suspension of all or any of the terms of an award or order may be expressed to apply only in relation to:
 - (a) a particular organisation or person bound by the award or order; or
 - (b) a particular branch of an organisation; or
 - (c) a particular class of members of an organisation; or
 - (d) a particular locality.

Division 5—Appeals to Full Bench and references to Court

120 Appeals to Full Bench relating to matters arising other than under the Registration and Accountability of Organisations Schedule

- (1) Subject to this Act, an appeal lies to a Full Bench, with the leave of the Full Bench, against:
 - (a) an award or order made by a member of the Commission; and
 - (b) a decision of a member of the Commission not to make an award or order; and
 - (c) a decision of a member of the Commission under paragraph 111(1)(e); and
 - (d) a decision of a member of the Commission to vary, or not to vary, an award under section 812; and
 - (e) a decision of the Commission to vary, or not to vary, an award or workplace agreement that has been referred to the Commission under section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986*; and
 - (f) a decision of a member of the Commission that the member has jurisdiction, or a refusal or failure of a member of the Commission to exercise jurisdiction, in a matter arising under this Act.
- (2) A Full Bench shall grant leave to appeal under subsection (1) if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted.
- (3) An appeal under subsection (1) may be instituted:
 - (a) in the case of an appeal under paragraph (1)(a) that is not covered by paragraph (b) or (c) of this subsection—by an organisation or person bound by the award or order;
 - (b) in the case of an appeal under paragraph (1)(a) against an order under Part 12—by a person entitled under section 685 to institute the appeal; and
 - (c) in the case of an appeal under paragraph (1)(a) against an order that was made under subsection 590(1) or subclause 14(1) or 23(1) of Schedule 9—by the person who applied for

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- the order or any person who made submissions to the Commission on whether the order should be made; and
- (d) in the case of an appeal under paragraph (1)(b) against a decision not to make an order under subsection 590(1) or subclause 14(1) or 23(1) of Schedule 9—by the person who applied for the order;
 - (e) in the case of an appeal under paragraph (1)(d) in relation to an award—by:
 - (i) an employer, employee or organisation bound by the award; or
 - (ii) the Workplace Authority Director; and
 - (f) in the case of an appeal under paragraph (1)(e)—by a party to the review of the award or workplace agreement; and
 - (g) in any other case—by an organisation or person aggrieved by the decision or act concerned.
- (4) Where an appeal has been instituted under this section, a Full Bench or Presidential Member may, on such terms and conditions as the Full Bench or Presidential Member considers appropriate, order that the operation of the whole or a part of the decision or act concerned be stayed pending the determination of the appeal or until further order of a Full Bench or Presidential Member.
- (5) A Full Bench may direct that 2 or more appeals be heard together, but an organisation or person who has a right to be heard in relation to one of the appeals may be heard in relation to a matter raised in another of the appeals only with the leave of the Full Bench.
- (6) For the purposes of an appeal under this section, a Full Bench:
 - (a) may admit further evidence; and
 - (b) may direct a member of the Commission to provide a report in relation to a specified matter.
- (7) On the hearing of the appeal, the Full Bench may do one or more of the following:
 - (a) confirm, quash or vary the decision or act concerned;
 - (b) make an award, order or decision dealing with the subject-matter of the decision or act concerned;
 - (c) direct the member of the Commission whose decision or act is under appeal, or another member of the Commission, to

take further action to deal with the subject-matter of the decision or act in accordance with the directions of the Full Bench;

- (d) in the case of an appeal under paragraph (1)(c)—take any action (including making an award or order) that could have been taken if the decision under paragraph 111(1)(e) had not been made.
- (8) Where, under paragraph (6)(b), a Full Bench directs a member of the Commission to provide a report, the member shall, after making such investigation (if any) as is necessary, provide the report to the Full Bench.

121 Appeals to Full Bench relating to matters arising under the Registration and Accountability of Organisations Schedule etc.

- (1) Subject to the Registration and Accountability of Organisations Schedule and this Act, an appeal lies to a Full Bench, with the leave of the Full Bench, against:
 - (a) a decision of a member of the Commission by way of a finding in relation to a matter arising under the Registration and Accountability of Organisations Schedule; and
 - (b) an order made by a member of the Commission in proceedings under that Schedule, other than an order made by consent of the parties to the proceeding; and
 - (c) a decision of a member of the Commission under that Schedule not to make an order; and
 - (d) a decision of a member of the Commission under paragraph 111(1)(e) of this Act; and
 - (e) a decision of a member of the Commission that the member has jurisdiction, or a refusal or failure of a member of the Commission to exercise jurisdiction, in a matter arising under the Registration and Accountability of Organisations Schedule.
- (2) A Full Bench must grant leave to appeal under subsection (1) if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted.
- (3) An appeal under subsection (1) may be instituted by:

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- (a) a party to the proceeding; or
 - (b) a person bound by an order; or
 - (c) a person aggrieved by the decision.
- (4) Where an appeal has been instituted under this section, a Full Bench or Presidential Member may, on such terms and conditions as the Full Bench or Presidential Member considers appropriate, order that the operation of the whole or a part of the decision or act concerned be stayed pending the determination of the appeal or until further order of a Full Bench or Presidential Member.
- (5) A Full Bench may direct that 2 or more appeals be heard together, but an organisation or person who has a right to be heard in relation to one of the appeals may be heard in relation to a matter raised in another of the appeals only with the leave of the Full Bench.
- (6) For the purposes of an appeal under this section, a Full Bench:
- (a) may admit further evidence; and
 - (b) may direct a member of the Commission to provide a report in relation to a specified matter.
- (7) On the hearing of the appeal, the Full Bench may do one or more of the following:
- (a) confirm, quash or vary the decision or act concerned;
 - (b) make an order or decision dealing with the subject-matter of the decision or act concerned;
 - (c) direct the member of the Commission whose decision or act is under appeal, or another member of the Commission, to take further action to deal with the subject-matter of the decision or act in accordance with the directions of the Full Bench;
 - (d) in the case of an appeal under paragraph (1)(d)—take any action (including making an order) that could have been taken if the decision under paragraph 111(1)(e) had not been made.
- (8) If, under paragraph (6)(b), a Full Bench directs a member of the Commission to provide a report, the member must, after making such investigation (if any) as is necessary, provide the report to the Full Bench.

- (9) Each provision of this Act and the Registration and Accountability of Organisations Schedule relating to the hearing or determination of a matter mentioned in subsection (1) of this section extends to the hearing or determination of an appeal under this section.

122 References to Court by Commission on question of law

- (1) The Commission may refer a question of law arising in a matter before the Commission for the opinion of the Court.
- (2) If the question referred to the Court is not whether the Commission may exercise powers in relation to the matter, the Commission may, in spite of the reference, make an award, order or decision in the matter.
- (3) On the determination of the question by the Court:
- (a) if the Commission has not made an award, order or decision in the matter—the Commission may make an award, order or decision not inconsistent with the opinion of the Court; or
 - (b) if the Commission has made an award, order or decision in the matter—the Commission shall vary the award, order or decision in such a way as will make it consistent with the opinion of the Court.

Division 6—Miscellaneous

123 Seals of Commission

- (1) The Commission shall have a seal on which are inscribed the words “The Seal of the Australian Industrial Relations Commission”.
- (2) A duplicate of the seal shall be kept at each registry.
- (3) Such other seals as are required for the business of the Commission shall be kept and used at each registry, and shall be in such form and kept in such custody, as the President directs.
- (4) A document, or a copy of a document, purporting to be sealed with the seal of the Commission or a duplicate of the seal, or with a seal referred to in subsection (3), is receivable in evidence without further proof of the seal.

124 Rules of Commission

- (1) The President, after consultation with members of the Commission, may, by signed instrument, make rules, not inconsistent with this Act or the Registration and Accountability of Organisations Schedule, with respect to:
 - (a) the practice and procedure to be followed in the Commission;
or
 - (b) the conduct of business in the Commission;and, in particular:
 - (c) the manner in which, and the time within which, applications, submissions and objections may be made to the Commission;
and
 - (d) the manner in which applications, submissions and objections may be dealt with by the Commission; and
 - (e) the furnishing of security for the payment of costs in respect of an application made under section 643.
- (2) A Rule of the Commission:
 - (a) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*; and

- (b) is a statutory rule within the meaning of the *Statutory Rules Publication Act 1903*.
- (3) If Rules of the Commission have not been made under this section with respect to the practice and procedure of the Commission, and the regulations do not make provision with respect to the matter, the regulations made under the previous Act (as in force immediately before the commencement of this section) apply, so far as practicable and with all necessary modifications, with respect to the practice and procedure of the Commission in the same manner as they applied immediately before that commencement to the practice and procedure of the Australian Conciliation and Arbitration Commission.

125 President must provide certain information etc. to the Minister

- (1) The President must provide to the Minister information, and copies of documents, of the kinds that are prescribed by the regulations, being:
- (a) information that is publicly available, or derived from information that is publicly available, relating to:
 - (i) the Commission's orders, decisions or actions under this Act; or
 - (ii) notifications or applications made or given to the Commission under this Act; or
 - (b) copies of such orders, decisions, notifications or applications.
- (2) The President must provide the information or the copies by the time, and in the form, prescribed by the regulations.

126 Annual report of Commission

- (1) The President shall, as soon as practicable after the end of each financial year, prepare and provide to the Minister a report of the operations of the Commission during that year.
- (2) The Minister shall cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after its receipt by the Minister.

Part 4 Australian Industrial Registry

Division 1 Interpretation

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Part 4—Australian Industrial Registry

Division 1—Interpretation

127 Definition of *State industrial body*

In this Part:

State industrial body means a court, tribunal, board, authority or other body of a State.

Division 2—Establishment and functions of Australian Industrial Registry

128 Australian Industrial Registry

- (1) There is established a registry to be known as the Australian Industrial Registry.
- (2) There shall be an Industrial Registrar, and such Deputy Industrial Registrars as are necessary from time to time.
- (3) The Industrial Registry shall consist of the Industrial Registrar, the Deputy Industrial Registrars and the other staff referred to in section 149.
- (4) The Industrial Registrar shall direct the business of the Industrial Registry.

129 Functions of the Industrial Registry

- (1) The functions of the Industrial Registry are:
 - (a) to act as the registry for the Commission and to provide administrative support to the Commission;
 - (b) to provide advice and assistance to organisations in relation to their rights and obligations under this Act; and
 - (c) such other functions as are conferred on the Industrial Registry by this Act, the BCII Act or the Registration and Accountability of Organisations Schedule.
- (2) If an agreement made by the Minister, after consulting the President, with an appropriate authority of a State:
 - (a) provides for the Industrial Registrar or a Deputy Industrial Registrar to be appointed under an Act of the State to be the Registrar of a State industrial body; or
 - (b) provides for the Industrial Registrar or a Deputy Industrial Registrar to perform or exercise any functions, duties or powers of the Registrar of a State industrial body;subsections (3) and (4) apply subject to the agreement.

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- (3) The Industrial Registry has the following functions:
- (a) acting as the registry for the State industrial body;
 - (b) providing administrative support to the State industrial body.

(4) If:

- (a) either of the following subparagraphs applies:
 - (i) the Industrial Registrar or the Deputy Industrial Registrar is appointed under an Act of the State to be the Registrar of another State industrial body that has replaced the State industrial body referred to in the agreement;
 - (ii) an Act of the State, or the agreement, authorises the Industrial Registrar or the Deputy Industrial Registrar to perform or exercise any functions, duties or powers of another State industrial body that has replaced the State industrial body referred to in the agreement; and
- (b) the Minister, after consulting the President, has agreed to the Industrial Registry having the following functions:
 - (i) acting as the registry for the other State industrial body;
 - (ii) providing administrative support to the other State industrial body;

the Industrial Registry has those functions.

- (5) If, after consulting the President, the Minister has made an agreement with an appropriate authority of a State for the Industrial Registry to perform the functions (*State Registry functions*) of acting as the registry for, and providing administrative support to, a State industrial body referred to in the agreement and:
- (a) State Registry functions in relation to the State industrial body referred to in the agreement are expressed to be conferred on the Industrial Registry by or under an Act of the State or the agreement; or
 - (b) State Registry functions in relation to another State industrial body that has replaced the State industrial body referred to in the agreement are expressed to be conferred on the Industrial Registry by or under an Act of the State or the agreement and the Minister, after consulting the President, has agreed to the Industrial Registry performing those functions in relation to the other State industrial body;

then, subject to the agreement, the Industrial Registry has the State Registry functions in relation to the State industrial body referred to in the agreement or the other State industrial body, as the case may be.

130 Registries

- (1) The Governor-General shall cause a Principal Registry of the Industrial Registry to be established.
- (2) The Governor-General may cause other registries of the Industrial Registry to be established, but shall cause at least one registry to be established in each State, the Australian Capital Territory and the Northern Territory.

131 Seals of the Registry

- (1) The Industrial Registry shall have a seal on which are inscribed the words "The Seal of the Australian Industrial Registry".
- (2) A duplicate of the seal shall be kept at each registry.
- (3) Such other seals as are required for the business of the Industrial Registry shall be kept and used at each registry, and shall be in such form and kept in such custody, as the Industrial Registrar directs.
- (4) A document, or a copy of a document, purporting to be sealed with the seal of the Industrial Registry or a duplicate of that seal, or with a seal referred to in subsection (3), is receivable in evidence without further proof of the seal.

132 Annual report of Industrial Registry

- (1) The Industrial Registrar shall, as soon as practicable after the end of each financial year, prepare and provide to the Minister a report of the operations of the Industrial Registry under this Act, the BCII Act and the Registration and Accountability of Organisations Schedule during that year.
- (2) The Minister shall cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after its receipt by the Minister.

Division 3—Registrars

133 Industrial Registrar

- (1) The Governor-General shall appoint a person to be the Industrial Registrar.
- (2) The Industrial Registrar:
 - (a) has the powers and functions conferred on the Industrial Registrar, or on a Registrar, by or under this Act, the BCII Act, the Registration and Accountability of Organisations Schedule or an award; and
 - (b) shall perform the functions conferred on the Industrial Registry by this Act, the BCII Act or the Registration and Accountability of Organisations Schedule, and has such powers as are necessary for the performance of those functions.
- (3) If an agreement is made between the Minister and the appropriate authority of a State as mentioned in subsection 129(2), then, subject to the agreement:
 - (a) if the Industrial Registrar is appointed under an Act of the State to be the Registrar of a State industrial body referred to in the agreement, or to be the Registrar of another State industrial body as mentioned in subparagraph 129(4)(a)(i)—the Industrial Registrar has, and must perform, any functions or duties, and may exercise any powers, of the Registrar of the body concerned, whether the functions, duties or powers are conferred by or under that Act or another Act of the State; or
 - (b) if an Act of the State, or the agreement, is expressed to authorise the Industrial Registrar to perform or exercise any functions, duties or powers of the Registrar of a State industrial body referred to in the agreement or any functions, duties or powers of the Registrar of another State industrial body as mentioned in subparagraph 129(4)(a)(ii)—the Industrial Registrar has, and must perform, those functions or duties, or may exercise those powers, as the case may be.

- (4) If:
- (a) under subsection 129(5) the Industrial Registry has the functions of acting as the registry for, and providing administrative support to, a State industrial body; and
 - (b) a law of the State is expressed to authorise the Industrial Registrar, or a Registrar, to perform or exercise any functions, duties or powers relevant to the performance of the functions referred to in paragraph (a);
- then, subject to the agreement referred to in subsection 129(5), the Industrial Registrar has, and must perform, those functions or duties, or may exercise those powers, as the case may be.
- (5) The Principal Registry shall be directly controlled by the Industrial Registrar.
- (6) In exercising the powers and performing the functions of his or her office in relation to the Commission, the Industrial Registrar shall comply with any directions given by the President.
- (7) In performing or exercising any functions, duties or powers in relation to a State industrial body as mentioned in subsection (3) or (4), the Industrial Registrar must comply with any directions lawfully given by the body.
- (8) In allocating and managing the resources of the Industrial Registry, the Industrial Registrar shall have regard to the needs of the Commission and the needs of any State industrial body in respect of which the Industrial Registrar or a Deputy Industrial Registrar performs or exercises functions, duties or powers.

134 Tenure of office of Industrial Registrar

- (1) Subject to this Part, the Industrial Registrar holds office for such term (not exceeding 7 years) as is specified in the instrument of appointment, but is eligible for re-appointment.
- (2) The Industrial Registrar holds office on such terms and conditions (if any) in relation to matters not provided for by this Act as are determined by the Governor-General.

135 Remuneration and allowances of Industrial Registrar

Subject to the *Remuneration Tribunal Act 1973*, the Industrial Registrar shall be paid:

- (a) such remuneration as is determined by the Remuneration Tribunal; and
- (b) such allowances as are prescribed.

136 Outside employment of Industrial Registrar

- (1) Subject to subsection (2), the Industrial Registrar shall not, except with the consent of the Minister, engage in paid employment outside the duties of the office.
- (2) Subsection (1) does not apply in relation to the holding by the Industrial Registrar of an office or appointment in the Defence Force.

137 Disclosure of interests by Industrial Registrar

- (1) The Industrial Registrar shall give written notice to the Minister of all direct or indirect pecuniary interests that the Industrial Registrar has or acquires in any business or in any body corporate carrying on any business.
- (2) Where the Industrial Registrar has or acquires any interest (whether pecuniary or otherwise) that could conflict with the proper exercise of a power, or the proper performance of a function, in relation to a proceeding before the Industrial Registrar:
 - (a) the Industrial Registrar shall disclose the interest to the parties to the proceeding; and
 - (b) unless all the parties consent to the Industrial Registrar exercising the power or performing the function in relation to the proceeding—the Industrial Registrar shall nominate a Deputy Industrial Registrar to exercise the power or perform the function.

138 Leave of absence of Industrial Registrar

- (1) The Industrial Registrar has such recreation leave entitlements as are determined by the Remuneration Tribunal.

- (2) The Minister may grant the Industrial Registrar leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise as the Minister determines.

139 Resignation by Industrial Registrar

The Industrial Registrar may resign by signed instrument delivered to the Governor-General.

140 Termination of appointment of Industrial Registrar

- (1) The Governor-General may terminate the appointment of the Industrial Registrar for misbehaviour or physical or mental incapacity.
- (2) The Governor-General shall terminate the appointment of the Industrial Registrar if the Industrial Registrar:
- (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for their benefit;
 - (b) is absent from duty, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months;
 - (c) engages in paid employment outside the duties of the office in contravention of section 136; or
 - (d) fails, without reasonable excuse, to comply with section 137.

141 Deputy Industrial Registrars

- (1) The Governor-General shall appoint such number of persons to be Deputy Industrial Registrars as are necessary from time to time.
- (2) Each Deputy Industrial Registrar:
- (a) has the powers and functions conferred on a Registrar by or under this Act, the BCII Act, the Registration and Accountability of Organisations Schedule or an award; and
 - (b) subject to the directions of the Industrial Registrar, shall perform the functions conferred on the Industrial Registry by this Act or the Registration and Accountability of Organisations Schedule, and has such powers as are necessary for the performance of those functions.

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- (3) If an agreement is made between the Minister and the appropriate authority of a State as mentioned in subsection 129(2), then, subject to the agreement:
- (a) if a Deputy Industrial Registrar is appointed under an Act of the State to be the Registrar or a Deputy Registrar of a State industrial body referred to in the agreement, or to be the Registrar or a Deputy Registrar of another State industrial body as mentioned in subparagraph 129(4)(a)(i)—the Deputy Industrial Registrar has, and must perform, any functions or duties, and may exercise any powers, of the Registrar or Deputy Registrar, as the case may be, of the body concerned, whether the functions, duties or powers are conferred by or under that Act or another Act of the State; or
 - (b) if an Act of the State, or the agreement, is expressed to authorise a Deputy Industrial Registrar or a Deputy Registrar to perform or exercise any functions, duties or powers of the Registrar or a Deputy Registrar of a State industrial body referred to in the agreement or any functions, duties or powers of the Registrar or a Deputy Registrar of another State industrial body as mentioned in subparagraph 129(4)(a)(ii)—the Deputy Industrial Registrar has, and must perform, those functions or duties, or may exercise those powers, as the case may be.
- (4) If:
- (a) under subsection 129(5) the Industrial Registry has the functions of acting as the registry for, and providing administrative support to, a State industrial body; and
 - (b) a law of the State is expressed to authorise the Industrial Registrar, or a Registrar, to perform or exercise any functions, duties or powers relevant to the performance of the functions referred to in paragraph (a);
- then, subject to the agreement referred to in subsection 129(5), each Deputy Industrial Registrar:
- (c) has the functions, duties or powers referred to in paragraph (b); and
 - (d) must perform those functions or duties or may exercise those powers, as the case may be, subject to the directions of the Industrial Registrar.

142 Acting Industrial Registrar

- (1) The Minister may appoint a person to act in the office of Industrial Registrar:
 - (a) during any vacancy in the office (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when the Industrial Registrar is absent from duty or from Australia or is, for any other reason, unable to perform the functions of the office.
- (2) Anything done by or in relation to a person purporting to act under subsection (1) is not invalid because:
 - (a) the occasion for the appointment had not arisen;
 - (b) there was a defect or irregularity in connection with the appointment;
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion for the person to act had not arisen or had ceased.

143 Acting Deputy Industrial Registrars

- (1) The Industrial Registrar may appoint a person to act in the office of a Deputy Industrial Registrar:
 - (a) during a vacancy in the office (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when the Deputy Industrial Registrar is absent from duty or from Australia or is, for any other reason, unable to perform the duties of the office.
- (2) Anything done by or in relation to a person purporting to act under subsection (1) is not invalid because:
 - (a) the occasion for the appointment had not arisen;
 - (b) there was a defect or irregularity in connection with the appointment;
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion for the person to act had not arisen or had ceased.

144 Oath or affirmation of office of Registrar

A Registrar shall, before proceeding to discharge the duties of the office, take before the Governor-General, a Justice of the High Court, a Judge of the Court or a Judge of the Supreme Court of a State or Territory an oath or affirmation in accordance with the form in Schedule 3.

Division 4—References and appeals

145 References by Registrar to Commission

- (1) A Registrar may refer a matter, or a question (other than a question of law) arising in a matter, before the Registrar to the President for decision by the Commission.
- (2) The Commission may:
 - (a) hear and determine the matter or question; or
 - (b) refer the matter or question back to the Registrar, with such directions or suggestions as the Commission considers appropriate.
- (3) The powers of the Commission under this section are exercisable by:
 - (a) the President;
 - (b) a Presidential Member assigned by the President for the purposes of the matter or question concerned; or
 - (c) if the President directs—a Full Bench.

146 Removal of matters before Registrar

- (1) Where a matter is before a Registrar, the President may order that the matter be heard and determined by the Commission.
- (2) The powers of the Commission under this section are exercisable by:
 - (a) the President;
 - (b) a Presidential Member assigned by the President for the purposes of the matter concerned; or
 - (c) if the President directs—a Full Bench.

147 Appeals from Registrar to Commission

- (1) Subject to this and any other Act, an appeal lies to the Commission, with the leave of the Commission, against:
 - (a) the making of any decision, or the doing of any act, by a Registrar in a matter arising under this Act, the Registration

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- and Accountability of Organisations Schedule (to the extent permitted by that Schedule) or any other Act; or
- (b) the refusal or failure of a Registrar to make any decision or do any act in a matter arising under this Act, the Registration and Accountability of Organisations Schedule (to the extent permitted by that Schedule) or any other Act.
- (2) Where an appeal has been instituted under this section, the Commission may, on such terms and conditions as it considers appropriate, order that the operation of the whole or part of the decision or act concerned be stayed pending the determination of the appeal or until further order of the Commission.
- (3) For the purposes of the appeal, the Commission may take evidence.
- (4) On the hearing of the appeal, the Commission may do one or more of the following:
- (a) confirm, quash or vary the decision or act concerned;
 - (b) make a decision dealing with the subject-matter of the decision or act concerned;
 - (c) direct the Registrar whose decision or act is under appeal, or another Registrar, to take further action to deal with the subject-matter of the decision or act in accordance with the directions of the Commission.
- (5) The powers of the Commission under this section are exercisable by:
- (a) the President;
 - (b) a Presidential Member assigned by the President for the purposes of the appeal concerned; or
 - (c) if the President directs—a Full Bench.
- (6) An appeal does not lie to a Full Bench against a decision under this section.

148 References to Court by Registrar on question of law

- (1) A Registrar may refer a question of law arising in a matter before the Registrar under this Act or the Registration and Accountability of Organisations Schedule for the opinion of the Court.

- (2) On the determination of the question by the Court, the Registrar shall not give a decision or do anything in the matter that is inconsistent with the opinion of the Court.

Division 5—Staff

149 Staff

- (1) The staff of the Industrial Registry, including the Deputy Industrial Registrars, shall be persons engaged under the *Public Service Act 1999*.
- (2) For the purposes of the *Public Service Act 1999*:
 - (a) the Industrial Registrar and the APS employees assisting the Industrial Registrar together constitute a Statutory Agency;
and
 - (b) the Industrial Registrar is the Head of that Statutory Agency.

Part 5—Workplace Authority Director

Division 1—Workplace Authority Director

Subdivision A—Establishment and functions

150A Workplace Authority Director

There is to be a Workplace Authority Director.

150B Functions of Workplace Authority Director

- (1) The functions of the Workplace Authority Director are as follows:
 - (a) to promote an understanding of Commonwealth workplace relations legislation, including by making available to the public general information and guidance about the operation of the legislation;
 - (b) to provide education, assistance and advice to employees, employers and organisations in relation to their rights and obligations under Commonwealth workplace relations legislation;
 - (c) to promote the making of workplace agreements;
 - (d) to provide education, assistance and advice to employees, employers (especially employers in small business) and organisations in relation to workplace agreements;
 - (e) to accept lodgment of:
 - (i) workplace agreements; and
 - (ii) notices about transmission of instruments;
 - (f) to decide under Division 5A of Part 8 whether workplace agreements pass the no-disadvantage test;
 - (g) to authorise multiple-business agreements in accordance with the regulations;
 - (h) to analyse workplace agreements;
 - (i) to refer matters to the Workplace Ombudsman and workplace inspectors;
 - (j) to perform any other function conferred on the Workplace Authority Director by Commonwealth workplace relations

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legislation, the Registration and Accountability of Organisations Schedule or another Act.

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

150C Minister may give directions to Workplace Authority Director

- (1) The Minister may, by legislative instrument, give written directions to the Workplace Authority Director about the performance of his or her functions.
- (2) Directions given by the Minister under subsection (1) must be of a general nature only, and cannot relate to a particular case.
- (3) The Minister must not direct the Workplace Authority Director in relation to the Workplace Authority Director's performance of functions, or exercise of powers, as an Agency Head under the *Public Service Act 1999*.
- (4) The Workplace Authority Director must comply with any direction given by the Minister under subsection (1).
- (5) Section 42 (Disallowance of legislative instruments) of the *Legislative Instruments Act 2003* applies to a direction given under subsection (1) of this section, despite section 44 of that Act.

Subdivision B—Appointment and terms and conditions

151A Appointment of Workplace Authority Director

- (1) The Workplace Authority Director is to be appointed by the Governor-General by written instrument.
- (2) The Governor-General must not appoint a person as the Workplace Authority Director unless the Minister is satisfied that the person:
 - (a) has suitable qualifications or experience; and
 - (b) is of good character.
- (3) The Workplace Authority Director holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.
- (4) The Workplace Authority Director holds office on a full-time basis.

151B Remuneration

- (1) The Workplace Authority Director is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Workplace Authority Director is to be paid the remuneration that is prescribed.
- (2) The Workplace Authority Director is to be paid the allowances that are prescribed.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

151C Leave of absence

- (1) The Workplace Authority Director has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) The Minister may grant the Workplace Authority Director leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

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151D Other terms and conditions

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

151E Outside employment

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

151F Disclosure of interests

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

151G Acting appointments

- (1) The Minister may appoint a person to act as the Workplace Authority Director:
 - (a) during a vacancy in the office of Workplace Authority Director (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when the Workplace Authority Director is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.
- (2) The Minister must not appoint a person to act as the Workplace Authority Director unless the Minister is satisfied that the person:
 - (a) has suitable qualifications or experience; and
 - (b) is of good character.
- (3) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
 - (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or

- (d) the occasion to act had not arisen or had ceased.

151H Resignation

- (1) The Workplace Authority Director may resign his or her appointment by giving the Governor-General a written resignation.
- (2) The resignation takes effect on the day it is received by the Governor-General or, if a later day is specified in the resignation, on that later day.

151J Termination of appointment

- (1) The Governor-General may terminate the appointment of the Workplace Authority Director for misbehaviour or physical or mental incapacity.
- (2) The Governor-General must terminate the appointment of the Workplace Authority Director if:
 - (a) the Workplace Authority Director:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (b) the Workplace Authority Director is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
 - (c) the Workplace Authority Director engages, except with the Minister's approval, in paid employment outside the duties of his or her office; or
 - (d) the Workplace Authority Director fails, without reasonable excuse, to comply with section 151F.

Division 2—Workplace Authority Deputy Directors

152A Workplace Authority Deputy Directors

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

152B Appointment of Workplace Authority Deputy Director

- (1) A Workplace Authority Deputy Director is to be appointed by the Minister by written instrument.
- (2) The Minister must not appoint a person as a Workplace Authority Deputy Director unless the Minister is satisfied that the person:
 - (a) has suitable qualifications or experience; and
 - (b) is of good character.
- (3) A Workplace Authority Deputy Director holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.
- (4) A Workplace Authority Deputy Director is to be appointed on a full-time or part-time basis.

152C Remuneration

- (1) A Workplace Authority Deputy Director is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, a Workplace Authority Deputy Director is to be paid the remuneration that is prescribed.
- (2) A Workplace Authority Deputy Director is to be paid the allowances that are prescribed.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

152D Leave of absence

- (1) A full-time Workplace Authority Deputy Director has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) The Minister may grant a full-time Workplace Authority Deputy Director leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.
- (3) The Minister may grant a part-time Workplace Authority Deputy Director leave of absence on the terms and conditions as to remuneration or otherwise that the Minister determines.

152E Other terms and conditions

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

152F Outside employment

- (1) A full-time Workplace Authority Deputy Director must not engage in paid employment outside the duties of the Workplace Authority Deputy Director's office without the Minister's approval.
- (2) A part-time Workplace Authority Deputy Director must not engage in any paid employment that conflicts or may conflict with the proper performance of the Workplace Authority Deputy Director's duties.

152G Disclosure of interests

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

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152H Resignation

- (1) A Workplace Authority Deputy Director may resign his or her appointment by giving the Minister a written resignation.
- (2) The resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day.

152J Termination of appointment

- (1) The Minister may terminate the appointment of a Workplace Authority Deputy Director for misbehaviour or physical or mental incapacity.
- (2) The Minister must terminate the appointment of a Workplace Authority Deputy Director if:
 - (a) the Workplace Authority Deputy Director:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (b) the Workplace Authority Deputy Director is appointed on a full-time basis and is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
 - (c) the Workplace Authority Deputy Director is appointed on a full-time basis and engages, except with the Minister's approval, in paid employment outside the duties of his or her office; or
 - (d) the Workplace Authority Deputy Director is appointed on a part-time basis and engages in paid employment that conflicts or could conflict with the proper performance of the duties of his or her office; or
 - (e) the Workplace Authority Deputy Director fails, without reasonable excuse, to comply with section 152G.

Division 3—Staff, delegations etc.

153A Staff

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

153B Workplace Authority

- (1) The Workplace Authority is established by this subsection.
- (2) The Workplace Authority consists of:
 - (a) the Workplace Authority Director; and
 - (b) the Workplace Authority Deputy Directors; and
 - (c) the staff assisting the Workplace Authority Director.
- (3) For the purposes of the *Public Service Act 1999*:
 - (a) the Workplace Authority Director and the staff assisting the Workplace Authority Director together constitute a Statutory Agency; and
 - (b) the Workplace Authority Director is the Head of that Statutory Agency.

153C Delegation

- (1) The Workplace Authority Director may, in writing, delegate to a person appointed or employed by the Commonwealth any of the Workplace Authority Director's powers or functions.
- (2) In exercising powers or functions under a delegation, the delegate must comply with any directions of the Workplace Authority Director.

Division 4—Reporting and disclosing information

Subdivision A—Reporting

163A Minister may require reports

- (1) The Minister may, in writing, direct the Workplace Authority Director to give the Minister specified reports relating to the Workplace Authority Director's functions.
- (2) The Workplace Authority Director must comply with the direction.
- (3) A direction made under subsection (1) is not a legislative instrument.
- (4) If the report is made in writing, the report is not a legislative instrument.

163B Annual report

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

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

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

- (1) Information relating to the affairs of an individual must not be included in a report under section 163A or 163B if:
 - (a) the individual is named, or otherwise specifically identified, in the report as the individual to whom the information relates; or
 - (b) it is reasonably likely that people generally (other than people to whom the individual has disclosed information relating to the individual's affairs) would be able to work out the identity of the individual to whom the information relates.

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

Subdivision B—Disclosing information

164A Disclosure of information by workplace agreement officials

Disclosure that is necessary or appropriate

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

Disclosure to Minister

- (2) A workplace agreement official may:
- (a) provide aggregated statistical information to the Minister; and
 - (b) give the Minister, in accordance with the regulations, information and copies of documents.
- (3) Regulations made for the purposes of paragraph (2)(b) may require that documents given to the Minister are given with such deletions as are necessary to prevent the identification of individuals to whom the documents refer.

Disclosure to Workplace Ombudsman and workplace inspectors

- (4) A workplace agreement official may:
- (a) disclose information that relates to the functions of the Workplace Ombudsman to the Workplace Ombudsman in response to requests from the Workplace Ombudsman; and
 - (b) disclose information that relates to the functions of workplace inspectors to workplace inspectors in response to requests from workplace inspectors; and

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- (c) disclose information to the Workplace Ombudsman or workplace inspectors that the workplace agreement official considers on reasonable grounds is likely to assist the Workplace Ombudsman or workplace inspectors in performing their functions.

Disclosure authorised by regulations to prescribed persons

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

Limits on disclosure

- (6) Despite subsections (1), (2) and (4), a prescribed workplace agreement official is not authorised by whichever of those subsections is prescribed to disclose information of the prescribed kind, to persons of the prescribed kind, for prescribed purposes.
- (7) Despite subsections (1), (2) and (5), a workplace agreement official is not authorised by any of those subsections to disclose to the Minister information relating to a decision under Division 5A of Part 8 whether a particular workplace agreement passes the no-disadvantage test.

Relationship with the Privacy Act 1988

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

Relationship with section 165

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

165 Identity of parties to ITEAs not to be disclosed

- (1) A person commits an offence if:
 - (a) the person discloses information; and
 - (b) the information is protected information; and

- (c) the discloser has reasonable grounds to believe that the information will identify another person as being, or having been, a party to an ITEA; and
- (d) the disclosure is not made by the discloser in the course of performing functions or duties as a workplace agreement official; and
- (e) the disclosure is not required or permitted by this Act, by another Act, by regulations made for the purposes of this paragraph or another provision of this Act or by regulations made for the purposes of another Act; and
- (f) the person whose identity is disclosed has not, in writing, authorised the disclosure.

Penalty: Imprisonment for 6 months.

(1A) To avoid doubt, a disclosure in accordance with subsection (1) of personal information (within the meaning of the *Privacy Act 1988*) is taken, for the purposes of that Act, to be authorised by law.

(2) In this section:

protected information, in relation to a person, means information that the person acquired:

- (a) in the course of performing functions or duties, or exercising powers, as a workplace agreement official; or
- (b) from a workplace agreement official who acquired the information as mentioned in paragraph (a).

166 Publication of workplace agreements etc. by Workplace Authority Director

Subject to section 165, the Workplace Authority Director may publish or make available copies of, or extracts from, workplace agreements.

Part 5A—Workplace Ombudsman

Division 1—Establishment and functions

166A Workplace Ombudsman

There is to be a Workplace Ombudsman.

166B Functions of the Workplace Ombudsman

The functions of the Workplace Ombudsman are as follows:

- (a) to assist employees and employers to understand their rights and obligations under Commonwealth workplace relations legislation;
- (b) to promote compliance with Commonwealth workplace relations legislation, including by providing assistance and advice and disseminating information;
- (c) to monitor compliance with Commonwealth workplace relations legislation;
- (d) to investigate suspected contraventions of Commonwealth workplace relations legislation;
- (e) to inquire into any act or practice that may be contrary to Commonwealth workplace relations legislation;
- (f) to refer matters to relevant authorities;
- (g) to institute proceedings to enforce Commonwealth workplace relations legislation;
- (h) to appoint workplace inspectors;
- (i) to give, as necessary, directions relating to the exercise or performance of appointed workplace inspectors' powers or functions;
- (j) to represent employees who are, or might become, a party to proceedings under this Act, in situations where the Workplace Ombudsman considers that representing the employees will promote compliance with Commonwealth workplace relations legislation;
- (k) any other functions conferred on the Workplace Ombudsman by Commonwealth workplace relations legislation.

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

166C Minister may give directions to Workplace Ombudsman

- (1) The Minister may, by legislative instrument, give written directions to the Workplace Ombudsman about the performance of his or her functions.
- (2) Directions given by the Minister under subsection (1) must be of a general nature only, and cannot relate to a particular case.
- (3) The Minister must not direct the Workplace Ombudsman in relation to the Workplace Ombudsman's performance of functions, or exercise of powers, as an Agency Head under the *Public Service Act 1999*.
- (4) The Workplace Ombudsman must comply with any direction given by the Minister under subsection (1).
- (5) Section 42 (Disallowance of legislative instruments) of the *Legislative Instruments Act 2003* applies to a direction given under subsection (1) of this section, despite section 44 of that Act.

Division 2—Appointment and terms and conditions

166D Appointment of Workplace Ombudsman

- (1) The Workplace Ombudsman is to be appointed by the Governor-General by written instrument.
- (2) The Governor-General must not appoint a person as the Workplace Ombudsman unless the Minister is satisfied that the person:
 - (a) has suitable qualifications or experience; and
 - (b) is of good character.
- (3) The Workplace Ombudsman holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.
- (4) The Workplace Ombudsman holds office on a full-time basis.

166E Remuneration

- (1) The Workplace Ombudsman is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Workplace Ombudsman is to be paid the remuneration that is prescribed.
- (2) The Workplace Ombudsman is to be paid the allowances that are prescribed.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

166F Leave of absence

- (1) The Workplace Ombudsman has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) The Minister may grant the Workplace Ombudsman leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

166G Other terms and conditions

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

166H Outside employment

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

166J Disclosure of interests

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

166K Acting appointments

- (1) The Minister may appoint a person to act as the Workplace Ombudsman:
 - (a) during a vacancy in the office of Workplace Ombudsman (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when the Workplace Ombudsman is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.
- (2) The Minister must not appoint a person to act as the Workplace Ombudsman unless the Minister is satisfied that the person:
 - (a) has suitable qualifications or experience; and
 - (b) is of good character.
- (3) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
 - (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or

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- (d) the occasion to act had not arisen or had ceased.

166L Resignation

- (1) The Workplace Ombudsman may resign his or her appointment by giving the Governor-General a written resignation.
- (2) The resignation takes effect on the day it is received by the Governor-General or, if a later day is specified in the resignation, on that later day.

166M Termination of appointment

- (1) The Governor-General may terminate the appointment of the Workplace Ombudsman for misbehaviour or physical or mental incapacity.
- (2) The Governor-General must terminate the appointment of the Workplace Ombudsman if:
 - (a) the Workplace Ombudsman:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (b) the Workplace Ombudsman is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
 - (c) the Workplace Ombudsman engages, except with the Minister's approval, in paid employment outside the duties of his or her office; or
 - (d) the Workplace Ombudsman fails, without reasonable excuse, to comply with section 166J.

Division 3—Staff, delegations etc.

166N Staff

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

166P Office of the Workplace Ombudsman

- (1) The Office of the Workplace Ombudsman is established by this subsection.
- (2) The Office of the Workplace Ombudsman consists of:
 - (a) the Workplace Ombudsman; and
 - (b) the staff assisting the Workplace Ombudsman in the performance of the Workplace Ombudsman's functions; and
 - (c) the appointed workplace inspectors.
- (3) For the purposes of the *Public Service Act 1999*:
 - (a) the Workplace Ombudsman and the staff assisting the Workplace Ombudsman in the performance of the Workplace Ombudsman's functions together constitute a Statutory Agency; and
 - (b) the Workplace Ombudsman is the Head of that Statutory Agency.

166Q Delegation

- (1) The Workplace Ombudsman may, in writing, delegate to an SES employee, or an acting SES employee, in the Office of the Workplace Ombudsman any of the Workplace Ombudsman's functions and powers under Commonwealth workplace relations legislation.
- (2) In performing functions or exercising powers under a delegation, the delegate must comply with any directions of the Workplace Ombudsman.

Part 5A Workplace Ombudsman

Division 3 Staff, delegations etc.

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

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

Division 4—Reporting and disclosing information

Subdivision A—Reporting to Minister

166R Minister may require reports

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

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

- (2) The Workplace Ombudsman must comply with the direction.
- (3) A direction made under subsection (1) is not a legislative instrument.
- (4) If the report is made in writing, the report is not a legislative instrument.

166S Annual report

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

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

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

- (1) Information relating to the affairs of an individual must not be included in a report under section 166R or 166S if:
 - (a) the individual is named, or otherwise specifically identified, in the report as the individual to whom the information relates; or
 - (b) it is reasonably likely that people generally (other than people to whom the individual has disclosed information relating to the individual's affairs) would be able to work out the identity of the individual to whom the information relates.

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

Subdivision B—Disclosing information

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

Disclosure that is necessary or appropriate

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

Disclosure to migration officer

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

Disclosure authorised by regulations to Commonwealth officers

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

Disclosure to State workplace relations official

- (4) A member of the Office of the Workplace Ombudsman may disclose information to an officer of a State who has powers, duties or functions that relate to the administration of a workplace relations or other system relating to terms and conditions, or

incidents, of employment, if the member considers on reasonable grounds that the disclosure of the information is likely to assist the officer in the administration of that system.

Disclosure to other officials and authorities

- (5) A member of the Office of the Workplace Ombudsman may disclose information to:
- (a) a person employed by, or appointed to an office of, the Commonwealth, a State or a Territory; or
 - (b) an authority of the Commonwealth, a State or a Territory;
- if the member considers on reasonable grounds that the disclosure of the information is likely to assist the person or authority in discharging a responsibility of the person or authority relating to the administration of a law of the Commonwealth, a State or a Territory.

Relationship with other laws

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

166V Directions about exercise of powers to disclose information

- (1) The Workplace Ombudsman may, by legislative instrument, give written directions to the members of the Office of Workplace Ombudsman about the disclosure of information under section 166U.
- (2) Directions given by the Workplace Ombudsman under subsection (1) must be of a general nature only.
- (3) A member of the Office of Workplace Ombudsman must comply with any direction given by the Workplace Ombudsman under subsection (1).

Part 6—Workplace inspectors

167 Inspectors

- (1) There shall be such workplace inspectors as are necessary from time to time.
- (1A) The Workplace Ombudsman is a workplace inspector by force of this subsection.
- (2) The Workplace Ombudsman may, by instrument, appoint as a workplace inspector:
 - (a) a person who has been appointed, or who is employed, by the Commonwealth; or
 - (b) a person, other than a person mentioned in paragraph (a).
- (3) A person appointed under paragraph (2)(a) is appointed for the period specified in regulations made for the purposes of this subsection.
- (4) A person appointed under paragraph (2)(b) is appointed for the period specified in the person's instrument of appointment, which must not be longer than the period specified in regulations made for the purposes of this subsection.
- (5) Subject to subsection (6), a workplace inspector has the powers and functions conferred on a workplace inspector by this Act or by the regulations or by another Act.
- (6) A person appointed under paragraph (2)(b) to be a workplace inspector has only such of the powers and functions mentioned in subsection (5) as are specified in his or her instrument of appointment.
- (7) In exercising powers or performing functions as a workplace inspector, a workplace inspector appointed under subsection (2) must comply with any directions of the Workplace Ombudsman.
- (8) If a direction under subsection (7) is of general application, the direction is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

- (9) If a direction under subsection (7) relates to a particular case, the direction is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

168 Identity cards

- (1) The Workplace Ombudsman may issue to an inspector an identity card in a form approved by the Workplace Ombudsman.
- (2) An inspector must carry the identity card at all times when exercising powers or performing functions as an inspector.
- (3) A person commits an offence if:
- (a) the person ceases to be a workplace inspector; and
 - (b) the person does not return the person's identity card to the Workplace Ombudsman within 14 days of so ceasing.

Penalty: 1 penalty unit.

- (4) Subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

169 Powers of inspectors

Purpose for which powers of inspectors can be exercised

- (1) The powers of a workplace inspector under this section may be exercised:
- (a) for the purpose of determining whether any of the following are being, or have been, observed:
 - (i) workplace agreements;
 - (ii) awards;
 - (iii) the Australian Fair Pay and Conditions Standard;
 - (iv) minimum entitlements and orders under Part 12;
 - (v) the requirements of this Act and the regulations; or
 - (b) for the purposes of a provision of the regulations that confers powers or functions on inspectors.

Note: Workplace determinations are treated for the purposes of the Act as if they were collective agreements (see section 506). Undertakings are treated the same way (see section 394). This means that inspectors also have powers in relation to those instruments.

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Powers of inspectors

- (2) The powers of an inspector are:
- (a) to, without force, enter:
 - (i) premises on which the inspector has reasonable cause to believe that work to which an instrument or entitlement mentioned in subparagraphs (1)(a)(i) to (iv) applies is being or has been performed; or
 - (ii) a place of business in which the inspector has reasonable cause to believe that there are documents relevant to the purpose set out in subsection (1); and
 - (b) on premises or in a place referred to in paragraph (a):
 - (i) to inspect any work, material, machinery, appliance, article or facility; and
 - (ii) as prescribed, to take samples of any goods or substances; and
 - (iii) to interview any person; and
 - (iv) to require a person having the custody of, or access to, a document relevant to that purpose to produce the document to the inspector within a specified period; and
 - (v) to inspect, and make copies of or take extracts from, a document produced to him or her; and
 - (vi) to require a person to tell the inspector who has custody of a document; and
 - (c) to require a person, by notice, to produce a document to the inspector.

Note: Contravening a requirement under subparagraph (b)(iv) or paragraph (c) may be an offence under section 819.

When may the powers be exercised?

- (3) An inspector may exercise the powers in subsection (2) at any time during ordinary working hours or at any other time at which it is necessary to do so for the purpose set out in subsection (1).
- (4) If a person who is required under subparagraph (2)(b)(iv) to produce a document contravenes the requirement, an inspector may, by written notice served on the person, require the person to produce the document at a specified place within a specified period (not being less than 14 days).

Note: Contravening a requirement under this section to produce a document may be an offence under section 819.

- (5) Where a document is produced to an inspector under paragraph (2)(c) or subsection (4), the inspector may:
- (a) inspect, and make copies of or take extracts from, the document; and
 - (b) retain the document for such period as is necessary for the purpose of exercising powers or performing functions as an inspector.
- (6) During the period for which an inspector retains a document, the inspector shall permit the person otherwise entitled to possession of the document, or a person authorised by the person, to inspect, and make copies of or take extracts from, the document at all reasonable times.

Notices under paragraph (2)(c)

- (7) The notice referred to in paragraph (2)(c) must:
- (a) be in writing; and
 - (b) be served on the person; and
 - (c) require the person to produce the document at a specified place within a specified period of not less than 14 days.
- Service may be effected by sending the notice to the person's fax number.

Person must produce document even if it may incriminate them

- (8) A person is not excused from producing a document under this section on the ground that the production of the document may tend to incriminate the person.

Limited use immunity for documents produced

- (9) If an individual produces a document under this section, the document produced and any information or thing (including any document) obtained as a direct or indirect consequence of the production of the document is not admissible in evidence against the individual in any criminal proceedings unless it is proceedings for an offence against section 819.

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- (10) If an inspector proposing to enter, or being on, premises is required by the occupier to produce evidence of authority, the inspector is not entitled to enter or remain on the premises without producing to the occupier the inspector's identity card.

In Australia's exclusive economic zone

- (11) Subsection (2) extends to premises, and places of business, that:
- (a) are in Australia's exclusive economic zone; and
 - (b) are owned or occupied by an Australian employer.

This subsection has effect subject to Australia's obligations under international law concerning jurisdiction over ships that fly the flag of a foreign country and aircraft registered under the law of a foreign country.

On Australia's continental shelf outside exclusive economic zone

- (12) Subsection (2) also extends to premises, and places of business, that:
- (a) are outside the outer limits of Australia's exclusive economic zone, but in, on or over a part of Australia's continental shelf that is prescribed by the regulations for the purposes of this subsection; and
 - (b) are connected with the exploration of the continental shelf or the exploitation of its natural resources; and
 - (c) meet the requirements that are prescribed by the regulations for that part.

Note: The regulations may prescribe different requirements relating to different parts of Australia's continental shelf. The regulations may need to do so to give effect to Australia's international obligations.

Part 7—The Australian Fair Pay and Conditions Standard

Division 1—Preliminary

171 Purpose of Part

- (1) The purpose of this Part is to set out key minimum entitlements of employment.
- (2) The key minimum entitlements relate to the following matters:
 - (a) basic rates of pay and casual loadings (see Division 2);
 - (b) maximum ordinary hours of work (see Division 3);
 - (c) annual leave (see Division 4);
 - (d) personal leave (see Division 5);
 - (e) parental leave and related entitlements (see Division 6).
- (3) The provisions of Divisions 2 to 6 constitute the *Australian Fair Pay and Conditions Standard*.

172 Operation of the Australian Fair Pay and Conditions Standard

- (1) The Australian Fair Pay and Conditions Standard provides key minimum entitlements of employment for the employees to whom it applies.
- (2) The Australian Fair Pay and Conditions Standard prevails over a workplace agreement or a contract of employment that operates in relation to an employee to the extent to which, in a particular respect, the Australian Fair Pay and Conditions Standard provides a more favourable outcome for the employee.
- (3) A dispute about:
 - (a) whether the Australian Fair Pay and Conditions Standard provides a more favourable outcome for an employee in a particular respect than a workplace agreement that operates in relation to that employee; or
 - (b) what the outcome is for an employee in a particular respect under the Australian Fair Pay and Conditions Standard,

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where a workplace agreement operates in relation to that employee;

is to be resolved using the dispute settlement procedure included (or taken to be included) in the agreement.

- (4) The regulations may prescribe:
- (a) what a particular respect is or is not for the purposes of subsection (2) or (3); or
 - (b) the circumstances in which the Australian Fair Pay and Conditions Standard provides or does not provide a more favourable outcome in a particular respect.

Example 1: The way in which particular amounts of annual leave are accrued could be prescribed as a particular respect under paragraph (4)(a).

Example 2: Both the Standard and a workplace agreement require an employee to attest to certain matters in a statutory declaration made for the purposes of maternity leave. The matters required by the agreement are different in some respects from those set out in the Standard. Regulations made for the purposes of paragraph (4)(b) could prescribe the matters to be attested in a statutory declaration as a circumstance in which the Standard is not taken to provide a more favourable outcome.

173 Australian Fair Pay and Conditions Standard cannot be excluded

A term of a workplace agreement or a contract has no effect to the extent to which it purports to exclude the Australian Fair Pay and Conditions Standard or any part of it.

174 Extraterritorial extension

- (1) This Part, and the rest of this Act so far as it relates to this Part, extend:
- (a) to an employee outside Australia who meets any of the conditions in this section; and
 - (b) to the employee's employer (whether the employer is in or outside Australia); and
 - (c) to acts, omissions, matters and things relating to the employee (whether they are in or outside Australia).

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

In Australia's exclusive economic zone

- (2) One condition is that the employee is in Australia's exclusive economic zone and either:
- (a) is an employee of an Australian employer and is not prescribed by the regulations as an employee to whom this subsection does not apply; or
 - (b) is an employee prescribed by the regulations as an employee to whom this subsection applies.

Note: The regulations may prescribe the employee by reference to a class. See subsection 13(3) of the *Legislative Instruments Act 2003*.

On Australia's continental shelf outside exclusive economic zone

- (3) Another condition is that the employee:
- (a) is outside the outer limits of Australia's exclusive economic zone, but is in, on or over a part of Australia's continental shelf that is prescribed by the regulations for the purposes of this subsection, in connection with the exploration of the continental shelf or the exploitation of its natural resources; and
 - (b) meets the requirements that are prescribed by the regulations for that part.

Note: The regulations may prescribe different requirements relating to different parts of Australia's continental shelf. The regulations may need to do so to give effect to Australia's international obligations.

Outside Australia's exclusive economic zone and continental shelf

- (4) Another condition is that the employee:
- (a) is neither in Australia's exclusive economic zone nor in, on or over a part of Australia's continental shelf described in paragraph (3)(a); and
 - (b) is an employee of an Australian employer; and
 - (c) is an Australian-based employee or bound by a workplace agreement that binds the employer too; and
 - (d) is not prescribed by the regulations as an employee to whom this subsection does not apply.

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- (5) Another condition is that the employee:
- (a) is neither in Australia's exclusive economic zone nor in, on or over a part of Australia's continental shelf described in paragraph (3)(a); and
 - (b) is an Australian-based employee of an employer that is not an Australian employer; and
 - (c) is bound by a workplace agreement that binds the employer too; and
 - (d) is not prescribed by the regulations as an employee to whom this subsection does not apply.

Definition

- (6) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

175 Model dispute resolution process

The model dispute resolution process applies to a dispute about entitlements under Divisions 3 to 6.

Note: The model dispute resolution process is set out in Part 13.

Division 2—Wages

Subdivision A—Preliminary

176 AFPC's wage-setting parameters etc.

In exercising any of its powers under this Division, the AFPC must act in accordance with section 23 (AFPC's wage-setting parameters).

Note: Any additional considerations or limitations on the exercise of the AFPC's powers are set out in the various sections of this Division (including section 222).

178 Definitions

In this Division:

APCS means a preserved APCS or a new APCS.

Note: APCS is short for Australian Pay and Classification Scale.

APCS piece rate employee means an employee in relation to whom the following paragraphs are satisfied:

- (a) the employee's employment is covered by an APCS;
- (b) the rate provisions of the APCS determine one or more basic piece rates of pay that apply to the employment of the employee.

basic periodic rate of pay means a rate of pay for a period worked (however the rate is described) that does not include incentive-based payments and bonuses, loadings, monetary allowances, penalty rates or any other similar separately identifiable entitlements. The meaning of **basic periodic rate of pay** is also affected by section 210.

Note: Most of the kinds of entitlement excluded from this definition are allowable award matters (see section 513).

basic piece rate of pay means a piece rate of pay, other than a piece rate of pay that is payable, as an incentive-based payment or bonus, in addition to a basic periodic rate of pay.

Note: Incentive-based payments and bonuses are allowable award matters.

casual loading: the meaning of casual loading is affected by section 210.

casual loading provisions has the meaning given by section 179.

classification has the meaning given by section 180.

coverage provisions means:

- (a) for a pre-reform wage instrument—all provisions (whether of that instrument or of another instrument or law), as in force on the reform comparison day, that would have affected the determination of whether the employment of any particular employee was covered by the instrument on that day; or
- (b) for an APCS—provisions of the APCS that determine whether the employment of a particular employee is covered by the APCS.

Note: For a preserved APCS, the coverage provisions will (at least initially) be the coverage provisions for the pre-reform wage instrument from which the APCS is derived (see paragraph 208(1)(g)).

covered: for when the employment of a particular employee is covered by a particular APCS, see sections 204 and 205.

current circumstances of employment, in relation to an employee, includes any current circumstance of or relating to the employee's employment.

default casual loading percentage has the meaning given by section 186.

derived from: for when a preserved APCS is derived from a particular pre-reform wage instrument, see subsection 208(2).

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

FMW for an employee: for when there is an FMW for an employee, see section 194.

Note: FMW is short for Federal Minimum Wage.

frequency of payment provisions means:

- (a) for a pre-reform wage instrument—provisions (whether of that instrument or of another instrument or law), as in force on the reform comparison day, that would have determined the frequency with which an employee covered by the instrument had to be paid; or
- (b) for an APCS, a workplace agreement or a contract of employment—provisions of the APCS, workplace agreement or contract that determine the frequency with which an employee covered by the APCS, workplace agreement or contract must be paid.

Note: For a preserved APCS, the frequency of payment provisions will (at least initially) be the frequency of payment provisions (if any) for the pre-reform wage instrument from which the APCS is derived (see paragraph 208(1)(f)).

junior employee means an employee who is under the age of 21.

new APCS means an APCS determined under subsection 214(1) of this Act before the repeal of that subsection by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.

piece rate of pay means a rate of pay that is expressed as a rate for a quantifiable output or task (as opposed to being expressed as a rate for a period worked).

Note: The following are examples of piece rates of pay:

- (a) a rate of pay calculated by reference to number of articles produced;
- (b) a rate of pay calculated by reference to number of kilometres travelled;
- (c) a rate of pay calculated by reference to number of articles delivered;
- (d) a rate of pay calculated by reference to number of articles sold;
- (e) a rate of pay calculated by reference to number of tasks performed.

pre-reform federal wage instrument means:

- (a) an award (as defined in subsection 4(1) of this Act as in force immediately before the reform commencement) as in force immediately before the reform commencement, but not including:

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- (i) an order under section 120A of this Act as then in force;
or
- (ii) an award under section 170MX of this Act as then in force; or
- (b) sections 552 and 555 of this Act as in force immediately before the reform commencement; or
- (c) a law, or a provision of a law, of the Commonwealth, being a law or provision:
 - (i) as in force immediately before the reform commencement; and
 - (ii) that is specified, or is of a kind specified, in regulations made for the purposes of this paragraph; or
- (d) an instrument made under a law, or a provision of a law, of the Commonwealth, being an instrument:
 - (i) as in force immediately before the reform commencement; and
 - (ii) that is specified, or is of a kind specified, in regulations made for the purposes of this paragraph.

Note: For when regulations made for the purpose of paragraph (c) or (d) may be expressed to take effect, see section 213.

pre-reform non-federal wage instrument means a pre-reform State wage instrument or a pre-reform Territory wage instrument.

pre-reform State wage instrument means:

- (a) a State award (as defined in subsection 4(1) of this Act as in force immediately before the reform commencement) as in force immediately before the reform commencement; or
- (b) a law, or a provision of a law, of a State, being a law or provision:
 - (i) as in force immediately before the reform commencement; and
 - (ii) that entitled employees, or a particular class of employees, to payment of a particular rate of pay; or
- (c) a law, or a provision of a law, of a State, being a law or provision:
 - (i) as in force immediately before the reform commencement; and
 - (ii) that is specified, or is of a kind specified, in regulations made for the purposes of this paragraph; or

- (d) an instrument made under a law, or a provision of a law, of a State, being an instrument:
 - (i) as in force immediately before the reform commencement; and
 - (ii) that is specified, or is of a kind specified, in regulations made for the purposes of this paragraph.

Note: For when regulations made for the purpose of paragraph (c) or (d) may be expressed to take effect, see section 213.

pre-reform Territory wage instrument means:

- (a) a law, or a provision of a law, of a Territory, being a law or provision:
 - (i) as in force immediately before the reform commencement; and
 - (ii) that entitled employees, or a particular class of employees, to payment of a particular rate of pay; or
- (b) a law, or a provision of a law, of a Territory, being a law or provision:
 - (i) as in force immediately before the reform commencement; and
 - (ii) that is specified, or is of a kind specified, in regulations made for the purposes of this paragraph; or
- (c) an instrument made under a law, or a provision of a law, of a Territory, being an instrument:
 - (i) as in force immediately before the reform commencement; and
 - (ii) that is specified, or is of a kind specified, in regulations made for the purposes of this paragraph.

Note: For when regulations made for the purpose of paragraph (b) or (c) may be expressed to take effect, see section 213.

pre-reform wage instrument means a pre-reform federal wage instrument or a pre-reform non-federal wage instrument.

preserved APCS has the meaning given by subsection 208(1).

pro-rata disability pay method means a method for determining a rate of pay for employees with a disability, being a method that determines the rate by reference to the relative capacities of those employees.

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rate provisions has the meaning given by section 181.

reform comparison day means the day before the day on which the reform commencement occurs.

special FMW means a special FMW determined under section 197 of this Act before the repeal of that section by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.

standard FMW has the meaning given by section 195.

179 Meaning of *casual loading provisions*

- (1) For the purposes of this Division, *casual loading provisions*, of a pre-reform wage instrument or an APCS, are provisions of the instrument or APCS that determine a casual loading payable to an employee, or an employee of a particular classification, in addition to a basic periodic rate of pay.
- (2) The means by which such provisions may determine a casual loading include the following, or any combination of any of the following:
 - (a) direct specification of the loading;
 - (b) identification of the loading by reference to other provisions (whether or not of the same instrument or APCS);
 - (c) direct specification, or identification by reference to other provisions (whether or not of the same instrument or APCS), of a method for calculating the loading.
- (3) Subject to the regulations, a method referred to in subsection (2) may provide for a person or body to determine a loading in a particular way. For the purposes of this Division, a loading determined by the person or body in that way is taken to be a loading determined by the provisions that specify or identify the method.

180 Meaning of *classification*

- (1) For the purposes of this Division, a *classification* of employees is a classification or category of employees, however described in the pre-reform wage instrument or APCS concerned.

- (2) A classification or category of employees may be described by reference to matters including (but not limited to) any of the following, or any combination of any of the following:
- (a) the nature of work performed by employees;
 - (b) the skills or qualifications of employees;
 - (c) the level of responsibility or experience of employees;
 - (d) whether employees are junior employees, or a particular class of junior employees;
 - (e) whether employees are employees with a disability, or are a particular class of employees with a disability;
 - (f) whether employees are employees to whom training arrangements, or are a particular class of employees to whom training arrangements, apply.

181 Meaning of *rate provisions*

- (1) For the purposes of this Division, ***rate provisions***, of a pre-reform wage instrument or an APCS, are provisions of the instrument or APCS that determine a basic periodic rate of pay, or basic piece rates of pay, payable to an employee, or an employee of a particular classification.
- (2) The means by which such provisions may determine a basic periodic rate of pay, or a basic piece rate of pay, include the following, or any combination of any of the following:
- (a) direct specification of a rate;
 - (b) identification of a rate by reference to other provisions (whether or not of the same instrument or APCS);
 - (c) direct specification, or identification by reference to other provisions (whether or not of the same instrument or APCS), of a method for calculating a rate.
- (3) Subject to the regulations, a method referred to in subsection (2) may provide for a person or body to determine a rate in a particular way. For the purposes of this Division, a rate determined by the person or body in that way is taken to be a rate determined by the provisions that specify or identify the method.

Subdivision B—Guarantee of basic rates of pay

182 The guarantee

Guarantee of APCS basic periodic rates of pay

- (1) If:
- (a) the employment of an employee is covered by an APCS; and
 - (b) the employee is not an APCS piece rate employee;
- the employee must be paid a basic periodic rate of pay for each of the employee's guaranteed hours (pro-rated for part hours) that is at least equal to the basic periodic rate of pay (the ***guaranteed basic periodic rate of pay***) that is payable to the employee under the APCS.

Note: For what are the employee's guaranteed hours, see section 183.

Guarantee of APCS piece rates of pay

- (2) If:
- (a) the employment of an employee is covered by an APCS; and
 - (b) the employee is an APCS piece rate employee;
- the employee must be paid basic piece rates of pay for his or her work that are at least equal to the basic piece rates of pay (the ***guaranteed basic piece rates of pay***) that are payable to the employee under the APCS.

Guarantee of standard FMW

- (3) If:
- (a) the employment of an employee is not covered by an APCS; and
 - (b) the employee is not a junior employee, an employee with a disability, or an employee to whom a training arrangement applies;
- the employee must be paid a basic periodic rate of pay for each of the employee's guaranteed hours (pro-rated for part hours) that is at least equal to the standard FMW (the ***guaranteed basic periodic rate of pay***).

Note: For what are the employee's guaranteed hours, see section 183.

Guarantee of special FMW

- (4) If:
- (a) the employment of an employee is not covered by an APCS;
and
 - (b) there is a special FMW for the employee;
- the employee must be paid a basic periodic rate of pay for each of the employee's guaranteed hours (pro-rated for part hours) that is at least equal to that special FMW (the ***guaranteed basic periodic rate of pay***).

Note: For what are the employee's guaranteed hours, see section 183.

183 An employee's *guaranteed hours* for the purpose of section 182

Employees employed to work a specified number of hours

- (1) For the purposes of section 182, if an employee is employed to work a specified number of hours per week, the ***guaranteed hours*** for the employee, for each week, are to be worked out as follows:
- (a) start with that specified number of hours (subject to subsection (4));
 - (b) deduct all of the following:
 - (i) any hours in the week when the employee is absent from work on deductible authorised leave (as defined in subsection (6));
 - (ii) any hours in the week in relation to which the employer is prohibited by section 507 from making a payment to the employee;
 - (iii) any other hours of unauthorised absence from work by the employee in the week;
 - (iv) any hours in the week when the employee is stood down (but only if the stand down is an authorised stand down);
 - (c) if, during the week, the employee works, and is required or requested to work, additional hours that are, under the terms and conditions of the employee's employment, not counted towards the specified number of hours—add on those additional hours.

Note: The actual hours worked from week to week by an employee who is employed to work a specified number of hours per week may vary,

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due to averaging as mentioned in section 226 or to some other kind of flexible working hours scheme that applies to the employee's employment.

- (2) If an employee is employed on a full-time basis, but the terms and conditions of the employee's employment do not determine the number of hours in a period that is to constitute employment on a full-time basis for the employee, the employee is, for the purpose of subsection (1), taken to be employed to work 38 hours per week.
- (3) If an employee is employed to work a specified number (the *number of non-week specified hours*) of hours per period (the *non-week period*), but that period is not a week (for example, it is a fortnight), then, for the purpose of subsection (1), the employee is taken to be employed to work the number of hours per week determined, subject to the regulations (if any), in accordance with the formula:

$$\text{Number of non-week specified hours} \times \frac{7}{\text{Number of days in non-week period}}$$

- (4) If:
- (a) subsection (1) applies to the employment of an employee to whom a training arrangement applies; and
 - (b) an APCS includes provisions that determine, in relation to the employee's employment, that hours attending off-the-job training (including hours attending an educational institution) are hours for which a basic periodic rate of pay is payable; and
 - (c) the hours that would otherwise be the specified number of hours referred to in subsection (1) for the employee for a week do not include all the hours (the *paid training hours*) in the week that the APCS so determines are hours for which a basic periodic rate of pay is payable;

subsection (1) applies as if the specified number of hours were increased to such number of hours as includes all the paid training hours.

Employees not employed to work a specified number of hours

- (5) For the purpose of section 182, if subsection (1) of this section does not apply to the employment of an employee, the *guaranteed*

hours for the employee are the hours that the employee both is required or requested to work, and does work, for the employer, less any period in relation to which the employer is prohibited by section 507 from making a payment to the employee.

Definitions

(6) In this section:

deductible authorised leave means leave, or an absence, whether paid or unpaid, that is authorised:

- (a) by an employee's employer; or
- (b) by or under a term or condition of an employee's employment; or
- (c) by or under a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory;

but not including any leave or absence:

- (d) that is on a public holiday and that is so authorised because the day is a public holiday; or
- (e) any leave or absence that is authorised in order for the employee to attend paid training hours (within the meaning of paragraph (4)(c)) of off-the-job training.

hour includes a part of an hour.

Note: An employee's guaranteed hours may therefore be a number of hours and part of an hour.

public holiday means:

- (a) a day declared by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of that State or Territory, as a public holiday by people who work in that State, Territory or region, other than:
 - (i) a union picnic day; or
 - (ii) a day, or kind of day, that is excluded by regulations made for the purposes of this paragraph from counting as a public holiday; or
- (b) a day that, under (or in accordance with a procedure under) a law of a State or Territory, or an award or workplace agreement, is substituted for a day referred to in paragraph (a).

184 Modified operation of section 182 to continue effect of Supported Wage System for certain employees with a disability

- (1) This section applies to the employment of an employee with a disability if:
- (a) subsection 182(1) applies (disregarding this section) to the employment of the employee; and
 - (b) the APCS that covers the employee's employment does not determine the basic periodic rate of pay for the employee as a rate that is specific to employees with disabilities; and
 - (c) the employee is eligible for the Supported Wage System; and
 - (d) the employee's employment is covered by a workplace agreement; and
 - (e) the workplace agreement provides for the payment of a basic periodic rate of pay to the employee at a rate that is not less than the rate (the *SWS-compliant rate of pay*) set in accordance with the Supported Wage System.

Note: The Supported Wage System was endorsed by the Commission in the Full Bench decision dated 10 October 1994 (print L5723).

- (2) If this section applies to the employment of the employee, subsection 182(1) has effect as if the guaranteed basic periodic rate of pay under that subsection for the employment of the employee were instead a rate equal to the SWS-compliant rate of pay.

Subdivision C—Guarantee of casual loadings

185 The guarantee

- (1) This section applies to a casual employee for whom, under section 182, there is a guaranteed basic periodic rate of pay, other than a casual employee in relation to whom the following paragraphs are satisfied:
- (a) subsection 182(1) applies to the employee;
 - (b) the APCS that covers the employment of the employee does not contain casual loading provisions under which a casual loading is payable to the employee;
 - (c) the employee's employment is not covered by a workplace agreement.

- (2) The casual employee must be paid, in addition to his or her actual basic periodic rate of pay, a casual loading that is at least equal to the guaranteed casual loading percentage of that actual basic periodic rate of pay.

Note: The employee's actual basic periodic rate of pay should at least equal the guaranteed basic periodic rate of pay under section 182.

- (3) The *guaranteed casual loading percentage* is as set out in the following table:

Item	In this situation ...	the guaranteed casual loading percentage is ...
1	if: (a) subsection 182(1) applies to the employment of the employee; and (b) the employee's employment has never been subject to a workplace agreement;	the percentage that is the casual loading payable to the employee under casual loading provisions of the APCS referred to in subsection 182(1).
2	if: (a) subsection 182(1) applies to the employment of the employee; and (b) the employee's employment has been, but is no longer, subject to a workplace agreement;	the higher of: (a) the percentage that is the casual loading payable to the employee under casual loading provisions of the APCS referred to in subsection 182(1); and (b) the default casual loading percentage.
3	if: (a) subsection 182(1) applies to the employment of the employee; and (b) the employee's employment is covered by a workplace agreement;	the default casual loading percentage.
4	if subsection 182(3) or (4) applies to the employment of the employee	the default casual loading percentage.

186 Default casual loading percentage

The *default casual loading percentage* is 20%.

Subdivision D—Guarantee of frequency of payment

189 The guarantee

APCS applies and contains frequency of payment provisions

- (1) If:
- (a) the employment of an employee is covered by an APCS; and
 - (b) the APCS contains frequency of payment provisions that apply in relation to the employee's employment;
- then:
- (c) if a workplace agreement that covers the employment of the employee contains frequency of payment provisions:
 - (i) that apply in relation to the employee's employment; and
 - (ii) that provide for payments in respect of periods of one month or less;the employer must comply with those provisions in relation to the employee; or
 - (d) if paragraph (c) does not apply, and the employee's contract of employment contains frequency of payment provisions:
 - (i) that apply in relation to the employee's employment; and
 - (ii) that provide for payments in respect of periods of one month or less;the employer must comply with those provisions in relation to the employee; or
 - (e) if neither paragraph (c) nor (d) applies—the employer must comply with the frequency of payment provisions of the APCS in relation to the employee.

APCS applies but does not contain frequency of payment provisions

- (2) If:
- (a) the employment of an employee is covered by an APCS; but
 - (b) the APCS does not contain frequency of payment provisions that apply in relation to the employee's employment;
- then:

- (c) if a workplace agreement that covers the employment of the employee contains frequency of payment provisions that apply in relation to the employee's employment—the employer must comply with those provisions in relation to the employee; or
- (d) if paragraph (c) does not apply, and the employee's contract of employment contains frequency of payment provisions that apply in relation to the employee's employment—the employer must comply with those provisions in relation to the employee; or
- (e) if neither paragraph (c) nor (d) applies—the employer must pay the employee on the basis of fortnightly payments in arrears.

Other situations

- (3) If the employment of an employee is not covered by an APCS, then:
 - (a) if a workplace agreement that covers the employment of the employee contains frequency of payment provisions that apply in relation to the employee's employment—the employer must comply with those provisions in relation to the employee; or
 - (b) if paragraph (a) does not apply, and the employee's contract of employment contains frequency of payment provisions that apply in relation to the employee's employment—the employer must comply with those provisions in relation to the employee; or
 - (c) if neither paragraph (a) nor (b) applies—the employer must pay the employee on the basis of fortnightly payments in arrears.

Subdivision E—Guarantee against reductions below pre-reform commencement rates

190 The guarantee where only basic periodic rates of pay are involved

- (1) This section applies if:
 - (a) the AFPC proposes to exercise any of the following powers (subject to subsection (4)):

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- (i) adjusting the standard FMW;
 - (ii) adjusting a preserved APCS;
 - (iii) adjusting a new APCS; and
 - (b) immediately after the exercise of the power takes effect, there will, under section 182, be a guaranteed basic periodic rate of pay (the *resulting guaranteed basic periodic rate*) for a particular employee affected by the exercise of the power; and
 - (c) immediately after the reform commencement (and after any relevant adjustments mentioned in sections 209 to 212 took effect), there would, under section 182, have been a guaranteed basic periodic rate of pay (the *commencement guaranteed basic periodic rate*) for the employee if the employee had at that time been in his or her current circumstances of employment.
- (2) The AFPC must ensure that the result of the exercise of the power, so far as it affects the employee, is such that the resulting guaranteed basic periodic rate of pay for the employee will not be less than the commencement guaranteed basic periodic rate of pay for the employee.
- (3) In applying this section in relation to a particular exercise of a power by the AFPC, the effect of any other exercise of a power by the AFPC that takes effect at the same time must also be taken into account.
- (4) This section does not limit the AFPC's power to adjust APCSs made for the purpose of section 220 before the repeal of that section by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.

191 The guarantee where basic piece rates of pay are involved

- (1) This section applies if:
- (a) the AFPC proposes to exercise any of the following powers (subject to subsection (4)):
 - (i) adjusting the standard FMW;
 - (ii) adjusting a preserved APCS;
 - (iii) adjusting a new APCS; and

- (b) either or both of the following subparagraphs apply in relation to a particular employee who will be affected by the exercise of the power:
- (i) immediately after the exercise of the power takes effect, there will, under section 182, be guaranteed basic piece rates of pay for the employee;
 - (ii) immediately after the reform commencement (and after any relevant adjustments mentioned in sections 209 to 212 took effect), there would, under section 182, have been guaranteed basic piece rates of pay for the employee if the employee had at that time been in his or her current circumstances of employment.
- (2) The AFPC must exercise the power in a way that it considers will not result in an employee of average capacity, after the exercise of the power takes effect, being entitled to less basic pay per week than he or she would have been entitled to because of this Division immediately after the reform commencement if the employee had at that time been in his or her current circumstances of employment.
- (3) In applying this section in relation to a particular exercise of a power by the AFPC, the effect of any other exercise of a power by the AFPC that takes effect at the same time must also be taken into account.
- (4) This section does not limit the AFPC's power to adjust APCSSs made for the purpose of section 220 before the repeal of that section by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.

192 The guarantee for casual loadings that apply to basic periodic rates of pay

- (1) This section applies in relation to the exercise by the AFPC of any of the following powers:
- (a) adjusting a preserved APCSS;
 - (b) adjusting a new APCSS.
- (2) The AFPC must ensure that the result of the exercise of the power, so far as it affects any particular employee to whom this Division applies (other than an employee who will, after the exercise of the

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power, be an APCS piece rate employee), is such that the resulting guaranteed casual loading percentage for the employee will not be less than the commencement guaranteed casual loading percentage for the employee.

- (3) For the purposes of subsection (2):
- (a) the **resulting guaranteed casual loading percentage** for the employee is the guaranteed casual loading percentage referred to in section 185 for the employee, as it will be immediately after the exercise of the power takes effect; and
 - (b) subject to subsection (4), the **commencement guaranteed casual loading percentage** for the employee is the percentage that, immediately after the reform commencement (and after any relevant adjustments mentioned in sections 209 to 212 took effect), would have been the guaranteed casual loading percentage referred to in section 185 for the employee if the employee had, at that time, been in his or her current circumstances of employment.
- (4) If:
- (a) the employee is a casual employee; and
 - (b) the resulting guaranteed casual loading percentage is the default casual loading percentage because of item 3 of the table in subsection 185(3);
- the **commencement guaranteed casual loading percentage** for the employee is taken to be the default casual loading percentage, as it was immediately after the reform commencement.
- (5) In applying this section in relation to a particular exercise of a power by the AFPC, the effect of any other exercise of a power by the AFPC that takes effect at the same time must also be taken into account.

Subdivision F—The guarantee against reductions below Federal Minimum Wages (FMWs)

193 The guarantee

- (1) When exercising its power to adjust an APCS, the AFPC must ensure that the rate provisions in the APCS are such that the resulting APCS basic periodic rate of pay for each employee:
-

- (a) whose employment will be covered by the APCS immediately after the exercise of the power; and
- (b) for whom there will be an FMW immediately after the exercise of the power; and
- (c) who will not be an APCS piece rate employee immediately after the exercise of the power;

is not less than that FMW.

Note 1: This section does not apply to rates determined by rate provisions as initially included in a preserved APCS from a pre-reform wage instrument as mentioned paragraph 208(1)(a). However, this section does apply to any subsequent adjustment of those rate provisions.

Note 2: See also section 207 (deeming APCS rates to at least equal FMW rates after first exercise of powers under this Division by the AFPC).

- (2) For the purposes of subsection (1), the ***resulting APCS basic periodic rate of pay*** for an employee is the basic periodic rate of pay that will be payable to the employee under the APCS immediately after the exercise of the power by the AFPC takes effect.
- (4) In applying this section in relation to a particular exercise of a power by the AFPC, the effect of any other exercise of a power by the AFPC that takes effect at the same time must also be taken into account.

Subdivision G—Federal Minimum Wages (FMWs)

194 When is there an FMW for an employee?

- (1) There is an FMW for an employee if the employee is not:
 - (a) a junior employee; or
 - (b) an employee with a disability; or
 - (c) an employee to whom a training arrangement applies; or
 - (d) an APCS piece rate employee.

The FMW for the employee is the standard FMW.

- (3) There is an FMW for an employee with a disability (other than an APCS piece rate employee) if the AFPC has determined a special FMW that applies to all employees with a disability, or to a class of employees with a disability that includes the employee. The FMW for the employee is that special FMW.

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195 Standard FMW

- (1) The *standard FMW* is \$13.74 per hour, subject to the power of the AFPC to adjust the standard FMW.
- (2) Any adjustment of the standard FMW must be such that the adjusted rate is still expressed as a monetary amount per hour.

196 Adjustment of standard FMW

- (1) The AFPC may adjust the standard FMW.
- (2) The power to adjust the standard FMW is subject to:
 - (a) section 176; and
 - (b) section 190; and
 - (c) section 191; and
 - (d) subsection 195(2); and
 - (e) section 222.

199 How a special FMW is to be expressed

- (1) A special FMW is to be expressed in a way that produces a monetary amount per hour.
- (2) The means by which a special FMW may be expressed to produce a monetary amount per hour include:
 - (a) specification of a monetary amount per hour; or
 - (b) specification of a method for calculating a monetary amount per hour.
- (3) Any adjustment of a special FMW must be such that the adjusted special FMW still complies with this section.

200 Adjustment of a special FMW

- (1) The AFPC may adjust a special FMW.
- (2) The power to adjust a special FMW is subject to:
 - (a) section 176; and
 - (b) section 199; and
 - (c) section 222.

Subdivision H—Australian Pay and Classification Scales (APCSs): general provisions

201 What is an APCS?

An APCS is a set of provisions relating to pay and loadings for particular employees that complies with this Subdivision.

202 What must or may be in an APCS?

- (1) An APCS must contain:
 - (a) either or both of the following:
 - (i) rate provisions determining basic periodic rates of pay for employees whose employment is covered by the APCS;
 - (ii) rate provisions determining basic piece rates of pay for employees whose employment is covered by the APCS; and
 - (b) if the rate provisions determine different rates of pay for employees of different classifications—provisions describing those classifications; and
 - (c) coverage provisions.
- (2) An APCS may also contain:
 - (a) casual loading provisions determining casual loadings for employees whose employment is covered by the APCS and for whom there are not basic piece rates of pay; and
 - (b) if the casual loading provisions determine different casual loadings for employees of different classifications—provisions describing those classifications; and
 - (c) provisions that determine, in relation to employees to whom training arrangements apply, whether hours attending off-the-job training (including hours attending an educational institution) are hours for which a basic periodic rate of pay is payable; and
 - (d) frequency of payment provisions; and
 - (e) other incidental provisions.
- (3) Subject to subsection 208(4), rate provisions or casual loading provisions in an APCS must not include provisions under which a

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rate or casual loading provided for by the APCS will or may be increased by operation of the provisions and without anyone having to take any other action.

Note: This does not prevent an APCS, or an adjustment of an APCS, from being expressed to take effect at a future date. However, it does prevent an APCS from containing provisions under which (for example):

- (a) there will be one or more specified increases of a rate or loading at a specified future time or times; or
 - (b) rates of pay or loading are indexed periodically.
- (4) The AFPC must not adjust an APCS so that it includes provisions that:
- (a) determine whether an employer who acquires a business (whether by transfer or in some other way) is covered by the APCS; or
 - (b) give a person or body a power to make a decision that affects whether a person is covered by the APCS; or
 - (c) give the Commission a direct or indirect role in determining a rate of pay or loading.

Note: A preserved APCS may contain provisions referred to in subsection (4) that were contained in the pre-reform wage instrument from which the APCS is derived, but the effect of those provisions is limited by sections 204 and 209.

- (5) An APCS must not contain any provisions that purport to limit the duration of the APCS.
- (6) Subject to the regulations, an APCS must not contain any other provisions.

203 How pay rates and loadings are to be expressed in an APCS

- (1) Rate provisions in an APCS must be such that basic periodic rates of pay determined by the provisions are expressed as a monetary amount per hour.
- (2) Rate provisions in an APCS must be such that basic piece rates of pay determined by the provisions are expressed as a monetary amount.

- (3) Casual loading provisions in an APCS must be such that casual loadings determined by the provisions are expressed as percentages to be applied to basic periodic rates of pay.
- (4) The AFPC must ensure these rules are complied with in exercising its powers to adjust an APCS.

204 When is employment covered by an APCS?

- (1) The question whether the employment of a particular employee is covered by a particular APCS is to be determined by reference to the coverage provisions of the APCS.
- (2) If coverage provisions of a preserved APCS include provisions that determine whether an employer who acquires a business (whether by transfer or in some other way) is covered by the APCS, those provisions only have effect, for the purpose of determining whether the employment of a particular employee is covered by the APCS, in relation to acquisitions of businesses that occurred before the reform commencement.
- (3) If coverage provisions of a preserved APCS include provisions that give a person or body a power to make a decision that affects whether a person is covered by the APCS, those provisions only have effect, for the purpose of determining whether the employment of a particular employee is covered by the APCS, in relation to decisions made by the person or body before the reform commencement.

205 What if 2 or more APCSs would otherwise cover an employee?

- (1) If, but for this section, 2 or more APCSs would cover the employment of the same employee, the employment of the employee is taken to be covered only by the APCS that prevails.
- (2) Apply the following rules to work out which APCS prevails:
 - (a) the preserved APCS derived from the pre-reform federal wage instrument referred to in paragraph (b) of the definition of *pre-reform federal wage instrument* in section 178 (as that preserved APCS is adjusted from time to time) prevails over any other APCS;
 - (b) subject to paragraph (a), a new APCS determined in accordance with Subdivision M of Division 2 of Part 7 of this

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Act before the repeal of that Subdivision by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (as that APCS is adjusted from time to time) prevails over any other APCS;

- (c) subject to paragraphs (a) and (b):
 - (i) a new APCS prevails over a preserved APCS; and
 - (ii) a preserved APCS that is derived from a pre-reform federal wage instrument prevails over a preserved APCS that is derived from a pre-reform non-federal wage instrument;
 - (d) subject to paragraphs (a), (b) and (c):
 - (i) as between 2 or more APCSs that are made or adjusted on different days, the APCS that is made or adjusted on the more recent day prevails; and
 - (ii) as between 2 or more APCSs that are made or adjusted on the same day, the APCS that is more generous to the employee prevails.
- (3) For the purpose of this section, all preserved APCSs are taken to have been made on the day on which the reform commencement occurs.

207 Deeming APCS rates to at least equal FMW rates after first exercise of AFPC's powers takes effect

- (1) This section applies at all times after the first exercise of powers by the AFPC under this Division takes effect. If the first exercise of powers involves the exercise of powers taking effect at different times, this section applies at all times after the earliest of those times.
- (2) Subject to subsection (3), if:
 - (a) there is an FMW for an employee at a particular time when this section applies; and
 - (b) an APCS that covers the employment of the employee determines a basic periodic rate of pay for the employee at that time that is less than that FMW;the basic periodic rate of pay determined by the APCS for the employee at that time is taken to be equal to the rate that is the FMW for the employee at that time.

Note: This subsection ensures that the employee will, under subsection 182(1), be guaranteed a rate that equals the FMW rate, rather than the lower APCS rate.

Subdivision I—Australian Pay and Classification Scales: preserved APCSs

208 Deriving preserved APCSs from pre-reform wage instruments

- (1) If a pre-reform wage instrument contains rate provisions determining one or more basic periodic rates of pay, or basic piece rates of pay, payable to employees, then, from the reform commencement, there is taken to be a *preserved APCS* that includes (subject to this Subdivision):
 - (a) those rate provisions; and
 - (b) if those rate provisions determine different basic periodic rates of pay, or different basic piece rates of pay, for employees of different classifications—the provisions of the instrument that describe those classifications; and
 - (c) any casual loading provisions of the instrument that determine casual loadings payable to employees, other than employees for whom the instrument provides basic piece rates of pay; and
 - (d) if the casual loading provisions determine different casual loadings for employees of different classifications—the provisions of the instrument that describe those classifications; and
 - (e) any provisions of the instrument that determine, in relation to employees to whom training arrangements apply, whether hours attending off-the-job training (including hours attending an educational institution) count as hours for which a basic periodic rate of pay is payable; and
 - (f) any frequency of payment provisions for the instrument; and
 - (g) the coverage provisions for the instrument.
- (2) The preserved APCS is *derived from* the pre-reform wage instrument.
- (3) Subject to subsection (4) and the regulations, the preserved APCS is taken not to include any provision of the pre-reform wage instrument which, after the adjustments referred to in sections 209

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to 212 take effect, will not comply with the requirements of sections 202 and 203.

Note: For when regulations made for the purpose of subsection (3) may be expressed to take effect, see section 213.

(4) If:

- (a) the rate provisions referred to in paragraph (1)(a) include pay increases for particular employees, determined before the reform commencement, that are expressed to take effect at a time or times after the reform commencement; and
- (b) those increases were determined by the Commission, or by a State industrial authority, wholly or partly on the ground of work value change or pay equity;

then (despite subsection 202(3)), the preserved APCS is taken to include provisions under which those increases will take effect for those employees at that time or those times.

(5) The adjustments referred to in sections 209 to 212 are, subject to the regulations, to be made in the following order:

- (a) adjustments referred to in section 209;
- (b) adjustments referred to in section 210;
- (c) adjustments referred to in section 211;
- (d) adjustments referred to in subsection 212(1).

Note: For when regulations made for the purpose of subsection (5) may be expressed to take effect, see section 213.

209 Notional adjustment: rates and loadings determined as for reform comparison day

Rate provisions

- (1) Subject to subsections (2) and (3), if rate provisions included in a preserved APCS as mentioned in section 208 would, apart from this subsection, determine a basic periodic rate of pay otherwise than by direct specification of the monetary amount of the rate, then the APCS is taken to be adjusted as necessary immediately after the reform commencement so that those rate provisions instead directly specify, as that rate of pay, the rate as determined by the provisions for the reform comparison day.

- (2) Subsection (1) does not apply to the rate provisions included in the preserved APCS derived from the pre-reform federal wage instrument referred to in paragraph (b) of the definition of *pre-reform federal wage instrument* in section 178.
- (3) If the rate provisions included in a preserved APCS as mentioned in section 208 determine a basic periodic rate of pay by (or by referring to) a pro-rata disability pay method, subsection (1) applies to any other rate of pay that the method refers to, but does not otherwise apply to the method.
- (4) If the rate provisions included in a preserved APCS as mentioned in section 208 determine a basic piece rate of pay by (or by referring to) a method, subsection (1) does not apply to the rate provisions that determine that rate.
- (5) The regulations may provide for other situations in which subsection (1) is not to apply to rate provisions, or is to apply with specified modifications.

Note: For when regulations made for the purpose of subsection (5) may be expressed to take effect, see section 213.

Casual loading provisions

- (6) If casual loading provisions included in a preserved APCS as mentioned in section 208 would, apart from this subsection, determine a loading otherwise than by direct specification of the loading, then the APCS is taken to be adjusted as necessary immediately after the reform commencement so that those loading provisions instead directly specify, as that loading, the loading as determined by the provisions for the reform comparison day.

210 Notional adjustment: deducing basic periodic rate of pay and casual loading from composite rate

If:

- (a) a particular rate of pay determined by rate provisions included in a preserved APCS as mentioned in section 208 would, apart from this subsection, be a basic periodic rate of pay for a casual employee; and

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- (b) the rate of pay is, by an amount (the *inbuilt casual loading amount*), higher than it would have been if the employee had not been a casual employee; and
- (c) apart from this subsection, the preserved APCS does not contain casual loading provisions that determine a casual loading for the employee;

the APCS is taken to be adjusted as necessary immediately after the reform commencement so that:

- (d) the rate provisions instead determine a basic periodic rate of pay for the employee that equals the rate referred to in paragraph (a), reduced by the inbuilt casual loading amount; and
- (e) the preserved APCS contains casual loading provisions that determine a casual loading for the employee that equals the inbuilt casual loading amount.

211 Notional adjustment: how basic periodic rates and loadings are expressed

- (1) If a particular basic periodic rate of pay determined by rate provisions included in a preserved APCS as mentioned in section 208 would, apart from this subsection, be expressed as a monetary amount for a period other than an hour (for example, it would be expressed as a rate for a week), the rate provisions are taken to be adjusted as necessary immediately after the reform commencement so that they produce the result that the rate is expressed as the equivalent monetary hourly rate.
- (2) If a particular casual loading determined by casual loading provisions included in a preserved APCS as mentioned in section 208 would, apart from this subsection, be expressed as an amount of money that is to be added to a basic periodic rate of pay, the loading provisions are taken to be adjusted as necessary immediately after the reform commencement so that they produce the result that the loading is expressed as the equivalent percentage of the basic periodic rate of pay.

212 Regulations dealing with notional adjustments

- (1) The regulations may provide for other adjustments (including by determining methods for working out adjustments) that are to be taken to be made to a preserved APCS.
- (2) The regulations may determine methods for working out the adjustments mentioned in any of sections 209 to 211, or may otherwise clarify the operation of any aspect of those sections. Those sections have effect accordingly.

Note: For when regulations made for the purpose of this section may be expressed to take effect, see section 213.

213 Certain regulations relating to preserved APCSs may take effect before registration

- (1) This section applies to regulations made for the purpose of any of the following provisions:
 - (a) paragraph (c) or (d) of the definition of *pre-reform federal wage instrument* in section 178;
 - (b) paragraph (c) or (d) of the definition of *pre-reform State wage instrument* in section 178;
 - (c) paragraph (b) or (c) of the definition of *pre-reform Territory wage instrument* in section 178;
 - (d) subsection 208(3) or (5);
 - (e) subsection 209(5);
 - (f) section 212.
- (2) Despite subsection 12(2) of the *Legislative Instruments Act 2003*, regulations to which this section applies may be expressed to take effect from a date before the regulations are registered under that Act.
- (3) If regulations to which this section applies take effect before their registration under the *Legislative Instruments Act 2003*, those regulations are not to be taken into account in determining the effect of sections 182, 185, 190, 191 and 192 in relation to periods of employment before the registration of those regulations.

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**Subdivision K—Australian Pay and Classification Scales:
duration and adjustment of APCSs (preserved or
new)**

215 Duration of APCSs

An APCS continues to have effect indefinitely (subject to adjustment by the AFPC under this Subdivision, and to the rules in section 205 about when one APCS prevails over another).

216 Adjustment of APCSs

- (1) The AFPC may adjust an APCS.
- (2) The power to adjust an APCS is subject to:
 - (a) section 176; and
 - (b) section 190; and
 - (c) section 191; and
 - (d) section 192; and
 - (e) section 193; and
 - (f) section 202; and
 - (g) section 203; and
 - (h) Subdivision L; and
 - (i) section 222.

**Subdivision L—Adjustments to incorporate 2005 Safety Net
Review etc.**

218 Adjustments to incorporate 2005 Safety Net Review

- (1) This section applies in relation to a preserved APCS if:
 - (a) the APCS is derived from a pre-reform federal wage instrument referred to in paragraph (a) of the definition of *pre-reform federal wage instrument* in section 178; and
 - (b) either:
 - (i) in accordance with the Commission's wage fixing principles that applied at that time, the Commission (before the reform commencement) adjusted the instrument in accordance with the Commission's 2004 Safety Net Review decision; or

- (ii) the instrument took effect after the Commission's 2004 Safety Net Review decision; and
 - (c) the Commission did not, before the reform commencement, adjust the instrument in accordance with the Commission's 2005 Safety Net Review decision.
- (2) The AFPC must adjust the rate provisions of the preserved APCS to increase rates in accordance with the Commission's 2005 Safety Net Review decision (if applicable), except to the extent that the AFPC is satisfied it is not appropriate to do so because of the effect of subsection 208(4).
- (3) The adjustment must be made as part of the first exercise of the powers of the AFPC under this Division.
- (4) After the adjustment has been made, section 190 has effect in relation to an employee as if the adjustment had been made to the pre-reform federal wage instrument immediately before the reform commencement.

Note: This subsection ensures that the post-adjustment rate is the rate against which compliance with the guarantee in section 190 is measured.

219 Regulations may require adjustments to incorporate other decisions

- (1) The regulations may require the AFPC to adjust rate provisions in a class of preserved APCSs that are derived from non-federal pre-reform wage instruments to increase rates to take account of decisions that were made before the reform commencement but that were not given effect to in those instruments before the reform commencement.
- (2) Regulations made for the purposes of subsection (1) may also modify how section 190 applies in relation to any APCSs that are so adjusted.

Subdivision M—Special provisions relating to APCSs for employees with a disability

219A Coverage of special APCSs for employees with a disability

- (1) This section applies in relation to an APCS (the *special APCS*) that was determined in accordance with section 220 of this Act before the repeal of that section by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.
- (2) The special APCS is taken not to cover the employment of a particular employee if:
 - (a) there is another APCS that covers the employment of the employee (disregarding the effect that paragraph 205(2)(b) would otherwise have because of the special APCS); and
 - (b) that other APCS determines a basic periodic rate of pay specifically for a particular class of employees with a disability; and
 - (c) the employee's employment is covered by that other APCS because the employee is a member of that class; and
 - (d) that class is the same as, or is a subclass of, the employees whose employment would otherwise be covered by the special APCS.
- (3) Without limiting the power of the AFPC to adjust APCSs under section 216, the AFPC may adjust the special APCS under that section.

Subdivision N—Miscellaneous

222 Anti-discrimination considerations

- (1) Without limiting section 176, in exercising any of its powers under this Division, the AFPC is to:
 - (a) apply the principle that men and women should receive equal remuneration for work of equal value; and
 - (b) have regard to the need to provide pro-rata disability pay methods for employees with disabilities; and
 - (c) take account of the principles embodied in the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age*

- Discrimination Act 2004* relating to discrimination in relation to employment; and
- (d) take account of the principles embodied in the Family Responsibilities Convention, in particular those relating to:
 - (i) preventing discrimination against workers who have family responsibilities; or
 - (ii) helping workers to reconcile their employment and family responsibilities; and
 - (e) ensure that its decisions do not contain provisions that discriminate because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
- (2) For the purposes of the Acts referred to in paragraph (1)(c), and of paragraph (1)(e), the AFPC does not discriminate against an employee or employees by (in accordance with this Division):
- (a) adjusting rate provisions in an APCS that determine a basic periodic rate of pay for:
 - (i) all junior employees, or a class of junior employees; or
 - (ii) all employees with a disability, or a class of employees with a disability; or
 - (iii) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply; or
 - (b) adjusting a special FMW for all employees with a disability, or a class of employees with a disability.

Division 3—Maximum ordinary hours of work

Subdivision A—Preliminary

223 Employees to whom Division applies

This Division applies to all employees.

224 Definitions

In this Division:

authorised leave means leave, or an absence, whether paid or unpaid, that is authorised:

- (a) by an employee's employer; or
- (b) by or under a term or condition of an employee's employment; or
- (c) by or under a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory.

employee means an employee to whom this Division applies under section 223.

225 Agreement between employees and employers

Via a workplace agreement

- (1) For the purposes of this Division, an employee and an employer are taken to agree about a particular matter in a particular way if a provision of a workplace agreement binding the employee and the employer specifies that the matter is to be dealt with in that way.

Via an award

- (2) For the purposes of this Division, an employee and an employer are taken to agree about a particular matter in a particular way if a term of an award that binds the employee and the employer specifies that the matter is to be dealt with in that way.

Via other means

- (3) To avoid doubt, nothing in this section prevents employees and employers agreeing about matters by other means.

Subdivision B—Guarantee of maximum ordinary hours of work

226 The guarantee

- (1) An employee must not be required or requested by an employer to work more than:
- (a) either:
 - (i) 38 hours per week; or
 - (ii) subject to subsection (3), if the employee and the employer agree in writing that the employee's hours of work are to be averaged over a specified averaging period that is no longer than 12 months—an average of 38 hours per week over that averaging period; and
 - (b) reasonable additional hours.

Note 1: An employee and an employer may agree that the employee is to work less than 38 hours per week, or less than an average of 38 hours per week over the employee's averaging period.

Note 2: A requirement for an employee to work a particular number of hours may come, for example, from an award or a workplace agreement.

- (1A) An employer only contravenes subsection (1) if the employer requests or requires an employee to work more than the hours mentioned in subsection (1), and the employee works those hours.

Calculating the number of hours worked

- (2) For the purposes of paragraph (1)(a), in calculating the number of hours that an employee has worked in a particular week, or the average number of hours that an employee has worked per week over an averaging period, the hours worked by the employee are taken to include any hours of authorised leave taken by the employee during the week, or during that period.

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Start of averaging period

- (3) For the purpose of subparagraph (1)(a)(ii), if an employee starts to work for an employer after the start of a particular averaging period that applies to the employee, that averaging period is taken, in relation to the employee, not to include the period before the employee started to work for the employer.

Reasonable additional hours

- (4) For the purposes of paragraph (1)(b), in determining whether additional hours that an employee is required or requested by an employer to work are reasonable additional hours, all relevant factors must be taken into account. Those factors may include, but are not limited to, the following:
- (a) any risk to the employee's health and safety that might reasonably be expected to arise if the employee worked the additional hours;
 - (b) the employee's personal circumstances (including family responsibilities);
 - (c) the operational requirements of the workplace, or enterprise, in relation to which the employee is required or requested to work the additional hours;
 - (d) any notice given by the employer of the requirement or request that the employee work the additional hours;
 - (e) any notice given by the employee of the employee's intention to refuse to work the additional hours;
 - (f) whether any of the additional hours are on a public holiday;
 - (g) the employee's hours of work over the 4 weeks ending immediately before the employee is required or requested to work the additional hours.

Note: An employee and an employer may agree that the employee may take breaks during any additional hours worked by the employee.

Definition

- (5) In this section:

public holiday means:

- (a) a day declared by or under a law of a State or Territory to be observed generally within the State or Territory, or a region

of that State or Territory, as a public holiday by people who work in that State, Territory or region, other than:

- (i) a union picnic day; or
 - (ii) a day, or kind of day, that is excluded by regulations made for the purposes of this paragraph from counting as a public holiday; or
- (b) a day that, under (or in accordance with a procedure under) a law of a State or Territory, or an award or workplace agreement, is substituted for a day referred to in paragraph (a).

Division 4—Annual leave

Subdivision A—Preliminary

227 Employees to whom Division applies

This Division applies to all employees other than casual employees.

228 Definitions

(1) In this Division:

annual leave has the meaning given by subsection 232(1).

authorised leave means leave, or an absence, whether paid or unpaid, that is authorised:

- (a) by an employee's employer; or
- (b) by or under a term or condition of an employee's employment; or
- (c) by or under a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory.

basic periodic rate of pay has the meaning given by section 178.

Note: See also section 231.

continuous service, in relation to a period of an employee's service with an employer, means service with the employer as an employee (other than a casual employee) during the whole of the period, including (as a part of the period) any period of authorised leave.

employee means an employee to whom this Division applies under section 227.

nominal hours worked has the meaning given by section 229.

Note: See also section 231.

piece rate employee means an employee who is paid a piece rate of pay within the meaning of section 178.

public holiday means:

- (a) a day declared by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of that State or Territory, as a public holiday by people who work in that State, Territory or region, other than:
 - (i) a union picnic day; or
 - (ii) a day, or kind of day, that is excluded by regulations made for the purposes of this paragraph from counting as a public holiday; or
- (b) a day that, under (or in accordance with a procedure under) a law of a State or Territory, or an award or workplace agreement, is substituted for a day referred to in paragraph (a).

shift worker means:

- (a) an employee who:
 - (i) is employed in a business in which shifts are continuously rostered 24 hours a day for 7 days a week; and
 - (ii) is regularly rostered to work those shifts; and
 - (iii) regularly works on Sundays and public holidays; or
- (b) an employee of a type that is prescribed by regulations made for the purposes of this paragraph.

Note: Subsection (2) enables regulations to be made providing that an employee belonging to a specified class is not a shift worker.

- (2) The regulations may provide that an employee:
 - (a) who is covered by paragraph (a) or (b) of the definition of **shift worker** in subsection (1); and
 - (b) who belongs to a class specified in the regulations;is not a shift worker for the purposes of this Division.
- (3) Without limiting the way in which a class of employees may be described for the purposes of regulations made under subsection (2), the class may be described by reference to one or more of the following:
 - (a) a particular industry;
 - (b) a particular kind of work;
 - (c) a particular type of employment;

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- (d) a particular type of shift work (whether described by reference to the organisation or allocation of shifts or otherwise).

229 Meaning of *nominal hours worked*

Employees employed to work a specified number of hours

- (1) For the purposes of this Division, if an employee is employed by an employer to work a specified number of hours per week, the number of ***nominal hours worked***, by the employee for the employer during a week, is to be worked out as follows:
 - (a) start with:
 - (i) the specified number of hours; or
 - (ii) if the specified number of hours is more than 38 hours—38 hours;
 - (b) deduct all of the following:
 - (i) the number of hours (if any) in the week when the employee is absent from his or her work for the employer on leave which does not count as service;
 - (ii) the number of hours (if any) in the week (other than hours mentioned in subparagraph (i)) in relation to which the employer is prohibited by section 507 from making a payment to the employee.

Note: The actual hours worked from week to week by an employee who is employed to work a specified number of hours per week may vary, due to averaging as mentioned in section 226 or to some other kind of flexible working hours scheme that applies to the employee's employment.

- (2) If an employee is employed on a full-time basis, but the terms and conditions of the employee's employment do not determine the number of hours in a week that is to constitute employment on a full-time basis for the employee, the employee is, for the purpose of subsection (1), taken to be employed to work 38 hours per week.
- (3) If an employee is employed to work a specified number (the ***number of non-week specified hours***) of hours over a period (the ***non-week period***) that is not a week (for example, a fortnight), then, for the purpose of subsection (1), the employee is taken to be employed to work the number of hours per week determined, subject to the regulations (if any), in accordance with the formula:

$$\text{Number of non-week specified hours} \times \frac{7}{\text{Number of days in non-week period}}$$

Employees not employed to work a specified number of hours

- (4) For the purposes of this Division, if subsection (1) does not apply to the employment of an employee by an employer, the number of **nominal hours worked**, by the employee for the employer during a week, is the lesser of the following:
- (a) the number worked out as follows:
 - (i) start with the number of hours (if any) in the week that the employee both works, and is required or requested to work, for the employer;
 - (ii) add the number of hours (if any) in the week when the employee is absent from his or her work for the employer on leave that counts as service;
 - (iii) deduct the number of hours (if any) in the week in relation to which the employer is prohibited by section 507 from making a payment to the employee;
 - (b) the number of nominal hours the employee would be taken to have worked for the employer under subsection (1) during the week if the employee were employed to work 38 hours per week.

Certain types of leave not to count as service

- (4A) For the purposes of subparagraphs (1)(b)(i) and (4)(a)(ii), a period of authorised unpaid leave or unauthorised leave does not count as service in relation to an employee except:
- (a) as expressly provided by:
 - (i) a term or condition of the employee's employment; or
 - (ii) a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory; or
 - (b) as prescribed by the regulations.

Note: For whether leave guaranteed under this Part counts as service, see subsections 238(2) (annual leave), 260(2) (paid personal leave), 261(2) (unpaid carer's leave) and 316(2) (parental leave).

Section 230

Definition

(5) In this section:

hour includes a part of an hour.

Note 1: The regulations may prescribe a different definition of **nominal hours worked** for piece rate employees (see section 231).

Note 2: An employee's hours of work may be varied (by number or time) in accordance with a workplace agreement, award or contract of employment that binds the employee and his or her employer.

Note 4: Because of the definition of **hour** in subsection (5), an employee's nominal hours worked may be a number of hours and part of an hour.

230 Agreement between employees and employers

Via a workplace agreement

(1) For the purposes of this Division, an employee and an employer are taken to agree about a particular matter in a particular way if a provision of a workplace agreement binding the employee and the employer specifies that the matter is to be dealt with in that way.

Via other means

(2) To avoid doubt, nothing in this section prevents employees and employers agreeing about matters by other means.

231 Regulations may prescribe different definitions for piece rate employees

The regulations may prescribe:

- (a) a different definition of **basic periodic rate of pay** for the purpose of the application of this Division in relation to piece rate employees; and
- (b) a different definition of **nominal hours worked** for the purpose of the application of this Division in relation to piece rate employees.

Subdivision B—Guarantee of annual leave

232 The guarantee

- (1) For the purposes of this Division, *annual leave* means leave to which an employee is entitled under this Subdivision.

All employees to whom this Division applies

- (2) An employee is entitled to accrue an amount of paid annual leave, for each completed 4 week period of continuous service with an employer, of $\frac{1}{13}$ of the number of nominal hours worked by the employee for the employer during that 4 week period.

Example: An employee whose nominal hours worked for a 12 month period were 38 hours per week would be entitled under this subsection to 152 hours of annual leave (which would be the equivalent of 4 weeks of annual leave if his or her nominal hours worked remained unchanged).

Additional leave entitlement for shift workers

- (3) An employee is also entitled to accrue an amount of paid annual leave, for each completed 12 month period of continuous service with an employer, of $\frac{1}{52}$ of the number of nominal hours worked by the employee, for the employer, as a shift worker during that 12 month period.

Example: A shift worker whose nominal hours worked for a 12 month period were 38 hours per week, and who worked as a shift worker throughout that period, would be entitled under this subsection to an additional 38 hours of annual leave (which would be the equivalent of one week of annual leave if his or her nominal hours worked remained unchanged).

233 Entitlement to cash out annual leave

- (1) An employee is entitled to forgo an entitlement to take an amount of annual leave credited to the employee by an employer if:
- (a) a provision in a workplace agreement binding the employee and the employer entitles the employee to forgo the entitlement to the amount of annual leave; and
 - (b) the employee gives the employer a written election to forgo the amount of annual leave; and
 - (c) a provision in a workplace agreement binding the employee and the employer entitles the employee to receive pay in lieu of the amount of annual leave at a rate that is no less than the

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rate that, at the time the election is made, is the employee's basic periodic rate of pay (expressed as an hourly rate); and

- (d) the employer authorises the employee to forgo the amount of annual leave.

Note: If, under this section, an employee forgoes an entitlement to take an amount of annual leave, the employee's employer may deduct that amount from the amount of accrued annual leave credited to the employee.

- (2) However, during each 12 month period, an employee is not entitled to forgo an amount of annual leave credited to the employee by an employer that is equal to more than $\frac{1}{26}$ of the nominal hours worked by the employee for the employer during the period.
- (3) An employer must not:
- (a) require an employee to forgo an entitlement to take an amount of annual leave; or
 - (b) exert undue influence or undue pressure on an employee in relation to the making of a decision by the employee whether or not to forgo an entitlement to take an amount of annual leave.
- (4) If, under this section, an employee forgoes an entitlement to take an amount of annual leave, the employer must, within a reasonable period, give the employee the amount of pay that the employee is entitled to receive in lieu of the amount of annual leave.

Subdivision C—Annual leave rules

234 Annual leave—accrual, crediting and accumulation rules

Accrual

- (1) Annual leave accrues on a pro-rata basis.

Crediting

- (2) Each month an employer must credit to an employee of the employer the amount (if any) of annual leave accrued by the employee under subsection 232(2) since the employer last credited to the employee an amount of annual leave accrued under that subsection.

- (3) Each year an employer must credit to an employee of the employer the amount (if any) of annual leave accrued by the employee under subsection 232(3) since the employer last credited to the employee an amount of annual leave accrued under that subsection.

Accumulation

- (4) Annual leave is cumulative.

235 Annual leave—payment rules

- (1) If an employee takes annual leave during a period, the employee must be paid a rate for each hour (pro-rated for part hours) of annual leave taken that is no less than the rate that, immediately before the period begins, is the employee's basic periodic rate of pay (expressed as an hourly rate).
- (2) If the employment of an employee who has not taken an amount of accrued annual leave ends at a particular time, the employee must be paid a rate for each hour (pro-rated for part hours) of the employee's untaken accrued annual leave that is no less than the rate that, immediately before that time, is the employee's basic periodic rate of pay (expressed as an hourly rate).

236 Rules about taking annual leave

General rules

- (1) Subject to this section and section 233, an employee is entitled to take an amount of annual leave during a particular period if:
 - (a) at least that amount of annual leave is credited to the employee; and
 - (b) the employee's employer has authorised the employee to take the annual leave during that period.
- (2) To avoid doubt, there is no maximum or minimum limit on the amount of annual leave that an employer may authorise an employee to take.
- (3) Any authorisation given by an employer enabling an employee to take annual leave during a particular period is subject to the operational requirements of the workplace or enterprise in respect of which the employee is employed.

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- (4) An employer must not unreasonably:
- (a) refuse to authorise an employee to take an amount of annual leave that is credited to the employee; or
 - (b) revoke an authorisation enabling an employee to take annual leave during a particular period.

Shut downs

- (5) An employee must take an amount of annual leave during a particular period if:
- (a) the employee is directed to do so by the employee's employer because, during that period, the employer shuts down the business, or any part of the business, in which the employee works; and
 - (b) at least that amount of annual leave is credited to the employee.

Extensive accumulated annual leave

- (6) An employee must take an amount of annual leave during a particular period if:
- (a) the employee is directed to do so by his or her employer; and
 - (b) at the time that the direction is given, the employee has annual leave credited to him or her of more than $\frac{1}{13}$ of the number of nominal hours worked by the employee for the employer during the period of 104 weeks ending at the time that the direction is given; and
 - (c) the amount of annual leave that the employee is directed to take is less than, or equal to, $\frac{1}{4}$ of the amount of credited annual leave of the employee at the time that the direction is given.

Entitlement to leave for all nominal hours in a day also extends to other hours on that day

- (7) If:
- (a) an employee to whom subparagraph 229(1)(a)(ii) applies is entitled to take annual leave on a particular day; and
 - (b) the entitlement covers all the hours (or part hours) on that day that would count towards the nominal hours worked by the employee in the week that includes that day;

the employer is taken to have authorised the employee to be absent from work for any other hours (or part hours) on that day that the employee would otherwise have worked.

Example: Bianca is employed by BBB Bakers Pty Ltd. She works 40 hours per week (consisting of 38 hours plus 2 reasonable additional hours).

Under subsection 232(2), Bianca is entitled to accrue paid annual leave of 1/13 of her nominal hours worked for each completed 4 week period of continuous service with BBB Bakers. Because of subparagraph 229(1)(a)(ii), Bianca's nominal hours worked in a week are capped at 38 hours. If Bianca works her normal hours for a 12 month period, she will accrue 152 hours of paid annual leave.

The above subsection ensures that Bianca will be able to be absent from work for 4 full 40 hour weeks. Bianca's absence for the additional 8 hours will not be paid leave, and will not count as service, but it will not break her continuity of service (see subsection (8)).

- (8) An absence that is taken by subsection (7) to have been authorised:
 - (a) is not annual leave; and
 - (b) does not break the employee's continuity of service; and
 - (c) does not otherwise count as service.
- (9) For the purposes of subsection (7), if a shift (or other period of work) occurs partly on 1 day and partly on the next day, the shift (or other period of work) is taken to be a day and the remaining parts of the days are taken not to be part of the day.
- (10) For the purposes of subsection (7), the regulations may make provision for either or both of the following:
 - (a) determining what hours (or part hours) on a particular day would count towards the nominal hours worked by an employee in a week;
 - (b) determining what other hours (or part hours) on a particular day would be hours (or part hours) that an employee would otherwise have worked.

237 Annual leave and workers' compensation

This Division does not apply to the extent that it is inconsistent with a provision of a law of the Commonwealth, a State or a Territory relating to workers' compensation if the provision would (apart from this Division):

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- (a) prevent an employee from taking or accruing annual leave during a period while the employee is receiving compensation under such a law; or
- (b) restrict the amount of annual leave an employee may take or accrue during such a period.

Subdivision D—Service: annual leave

238 Annual leave—service

- (1) A period of annual leave does not break an employee's continuity of service.
- (2) Annual leave counts as service for all purposes except as prescribed by the regulations.

Division 5—Personal leave

Subdivision A—Preliminary

239 Employees to whom Division applies

- (1) Subject to this section, this Division applies to all employees other than casual employees.
- (2) This Subdivision, Subdivision C and sections 255 and 256 apply to all employees.

240 Definitions

In this Division:

authorised leave means leave, or an absence, whether paid or unpaid, that is authorised:

- (a) by an employee's employer; or
- (b) by or under a term or condition of an employee's employment; or
- (c) by or under a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory.

basic periodic rate of pay has the meaning given by section 178.

Note: See also section 243.

carer's leave has the meaning given by paragraph 244(b).

child includes the following:

- (a) an adopted child;
- (b) a stepchild;
- (c) an exnuptial child;
- (d) an adult child.

compassionate leave has the meaning given by subsection 257(1).

continuous service, in relation to a period of an employee's service with an employer, means service with the employer as an employee (other than a casual employee) during the whole of the

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period, including (as a part of the period) any period of authorised leave.

de facto spouse, of an employee, means a person of the opposite sex to the employee who lives with the employee as the employee's husband or wife on a genuine domestic basis although not legally married to the employee.

employee, when used in a provision of this Division, means an employee to whom the provision applies under section 239.

immediate family: the following are members of an employee's **immediate family**:

- (a) a spouse, child, parent, grandparent, grandchild or sibling of the employee;
- (b) a child, parent, grandparent, grandchild or sibling of a spouse of the employee.

medical certificate means a certificate signed by a registered health practitioner.

nominal hours worked has the meaning given by section 241.

Note: See also section 243.

permissible occasion, for unpaid carer's leave, has the meaning given by subsection 250(1).

personal/carer's leave has the meaning given by section 244.

piece rate employee means an employee who is paid a piece rate of pay within the meaning of section 178.

registered health practitioner means a health practitioner registered, or licensed, as a health practitioner (or as a health practitioner of a particular type) under a law of a State or Territory that provides for the registration or licensing of health practitioners (or health practitioners of that type).

sick leave has the meaning given by paragraph 244(a).

spouse includes the following:

- (a) a former spouse;
- (b) a de facto spouse;
- (c) a former de facto spouse.

241 Meaning of *nominal hours worked*

Employees employed to work a specified number of hours

- (1) For the purposes of this Division, if an employee is employed by an employer to work a specified number of hours per week, the number of ***nominal hours worked***, by the employee for the employer during a week, is to be worked out as follows:
- (a) start with:
 - (i) the specified number of hours; or
 - (ii) if the specified number of hours is more than 38 hours—38 hours;
 - (b) deduct all of the following:
 - (i) the number of hours (if any) in the week when the employee is absent from his or her work for the employer on leave which does not count as service;
 - (ii) the number of hours (if any) in the week (other than hours mentioned in subparagraph (i)) in relation to which the employer is prohibited by section 507 from making a payment to the employee.
- Note: The actual hours worked from week to week by an employee who is employed to work a specified number of hours per week may vary, due to averaging as mentioned in section 226 or to some other kind of flexible working hours scheme that applies to the employee's employment.
- (2) If an employee is employed on a full-time basis, but the terms and conditions of the employee's employment do not determine the number of hours in a week that is to constitute employment on a full-time basis for the employee, the employee is, for the purpose of subsection (1), taken to be employed to work 38 hours per week.
- (3) If an employee is employed to work a specified number (the ***number of non-week specified hours***) of hours over a period (the ***non-week period***) that is not a week (for example, a fortnight), then, for the purpose of subsection (1), the employee is taken to be employed to work the number of hours per week determined, subject to the regulations (if any), in accordance with the formula:

$$\text{Number of non-week specified hours} \times \frac{7}{\text{Number of days in non-week period}}$$

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Employees not employed to work a specified number of hours

- (4) For the purposes of this Division, if subsection (1) does not apply to the employment of an employee by an employer, the number of **nominal hours worked**, by the employee for the employer during a week, is the lesser of the following:
- (a) the number worked out as follows:
 - (i) start with the number of hours (if any) in the week that the employee both works, and is required or requested to work, for the employer;
 - (ii) add the number of hours (if any) in the week when the employee is absent from his or her work for the employer on leave that counts as service;
 - (iii) deduct the number of hours (if any) in the week in relation to which the employer is prohibited by section 507 from making a payment to the employee;
 - (b) the number of nominal hours the employee would be taken to have worked for the employer under subsection (1) during the week if the employee were employed to work 38 hours per week.

Certain types of leave not to count as service

- (4A) For the purposes of subparagraphs (1)(b)(i) and (4)(a)(ii), a period of authorised unpaid leave or unauthorised leave does not count as service in relation to an employee except:
- (a) as expressly provided by:
 - (i) a term or condition of the employee's employment; or
 - (ii) a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory; or
 - (b) as prescribed by the regulations.

Note: For whether leave guaranteed under this Part counts as service, see subsections 238(2) (annual leave), 260(2) (paid personal leave), 261(2) (unpaid carer's leave) and 316(2) (parental leave).

Definition

- (5) In this section:

hour includes a part of an hour.

Note 1: The regulations may prescribe a different definition of **nominal hours worked** for piece rate employees (see section 243).

- Note 2: An employee's hours of work may be varied (by number or time) in accordance with a workplace agreement, award or contract of employment that binds the employee and his or her employer.
- Note 4: Because of the definition of **hour** in subsection (5), an employee's nominal hours worked may be a number of hours and part of an hour.

242 Agreement between employees and employers

Via a workplace agreement

- (1) For the purposes of this Division, an employee and an employer are taken to agree about a particular matter in a particular way if a provision of a workplace agreement binding the employee and the employer specifies that the matter is to be dealt with in that way.

Via other means

- (2) To avoid doubt, nothing in this section prevents employees and employers agreeing about matters by other means.

243 Regulations may prescribe different definitions for piece rate employees

The regulations may prescribe:

- (a) a different definition of **basic periodic rate of pay** for the purposes of the application of this Division in relation to piece rate employees; and
- (b) a different definition of **nominal hours worked** for the purposes of the application of this Division in relation to piece rate employees.

244 Meaning of *personal/carer's leave*

For the purposes of this Division, **personal/carer's leave** is:

- (a) paid leave (**sick leave**) taken by an employee because of a personal illness, or injury, of the employee; or
- (b) paid or unpaid leave (**carer's leave**) taken by an employee to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:
- (i) a personal illness, or injury, of the member; or
- (ii) an unexpected emergency affecting the member.

Subdivision B—Guarantee of paid personal/carer’s leave

245 The guarantee

- (1) Subject to this Subdivision, an employee is entitled to paid personal/carer’s leave if the employee complies with the notice and documentation requirements under Subdivision D, to the extent to which they apply to the employee.

Note: The entitlement is subject to the restrictions in sections 246, 248 and 249.

- (2) An employee is taken not to have been entitled to a period of paid personal/carer’s leave at any time after the start of the period if:
 - (a) Subdivision D:
 - (i) required the employee to give notice or a document (the *required notice or document*) to his or her employer; and
 - (ii) allowed the employee to give the required notice or document to his or her employer after the start of the leave; and
 - (b) when the employee started the leave, the employee had not given his or her employer the required notice or document; and
 - (c) the employee did not later give the required notice or document to his or her employer within the period required under Subdivision D.

Note: Under Subdivision D, an employee may be required to give his or her employer notice, a medical certificate or a statutory declaration (depending on the circumstances).

245A Entitlement to cash out an amount of paid personal/carer’s leave

- (1) This section applies to an employee if more than the protected amount of paid personal/carer’s leave is credited to the employee.
- (2) The employee is entitled to forgo an entitlement to take any or all of the amount of paid personal/carer’s leave credited to the employee that exceeds the protected amount of paid personal/carer’s leave if:

- (a) a provision in a workplace agreement binding the employee and the employer entitles the employee to forgo the entitlement to the amount of paid personal/carer's leave; and
- (b) the employee gives the employer a written election to forgo the amount of paid personal/carer's leave; and
- (c) a provision in a workplace agreement binding the employee and the employer entitles the employee to receive pay in lieu of the amount of paid personal/carer's leave at a rate that is no less than the rate that, at the time the election is made, is the employee's basic periodic rate of pay (expressed as an hourly rate); and
- (d) the employer authorises the employee to forgo the amount of paid personal/carer's leave.

Note: If, under this section, an employee forgoes an entitlement to take an amount of paid personal/carer's leave, the employee's employer may deduct that amount from the amount of accrued paid personal/carer's leave credited to the employee.

- (3) For the purposes of subsections (1) and (2), the ***protected amount of paid personal/carer's leave*** for the employee is $\frac{3}{52}$ of the number of nominal hours worked by the employee for the employer during:
 - (a) a continuous period of 12 months of service with the employer ending immediately before the day on which the employee makes an election under paragraph (2)(b); or
 - (b) a sequence of periods totalling 12 months of service with the employer, the last of which ends immediately before the day on which the employee makes an election under paragraph (2)(b).

Note: The protected amount of paid personal/carer's leave for an employee whose nominal hours worked for an employer each week over a continuous period of 12 months service with the employer are 38 hours would be 114 hours (which would be equivalent to 15 days of paid personal/carer's leave for that employee).

- (4) An employer must not:
 - (a) require an employee to forgo an entitlement to take an amount of paid personal/carer's leave; or
 - (b) exert undue influence or undue pressure on an employee in relation to the making of a decision by the employee whether or not to forgo an entitlement to take an amount of paid personal/carer's leave.

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- (5) If, under this section, an employee forgoes an entitlement to take an amount of paid personal/carer's leave, the employer must, within a reasonable period, give the employee the amount of pay that the employee is entitled to receive in lieu of the amount of paid personal/carer's leave.

246 Paid personal/carer's leave—accrual, crediting and accumulation rules

Entitlement to take credited leave

- (1) Subject to this Subdivision, an employee is entitled to take an amount of paid personal/carer's leave if, under this section, that amount of leave is credited to the employee.

Accrual

- (2) An employee is entitled to accrue an amount of paid personal/carer's leave, for each completed 4 week period of continuous service with an employer, of $\frac{1}{26}$ of the number of nominal hours worked by the employee for the employer during that 4 week period.

Example: An employee whose nominal hours worked for an employer each week over a 12 month period are 38 hours would be entitled to accrue 76 hours paid personal/carer's leave (which would amount to 10 days of paid personal/carer's leave for that employee) over the period.

- (3) Paid personal/carer's leave accrues on a pro-rata basis.

Crediting

- (4) Each month, an employer must credit to an employee of the employer the amount (if any) of paid personal/carer's leave accrued by the employee since the employer last credited to the employee an amount of paid personal/carer's leave accrued under this section.

Accumulation

- (5) Paid personal/carer's leave is cumulative.

247 Paid personal/carer's leave—payment rule

If an employee takes paid personal/carer's leave during a period, the employee must be paid a rate for each hour (pro-rated for part hours) of paid personal/carer's leave taken that is no less than the rate that, immediately before the period begins, is the employee's basic periodic rate of pay (expressed as an hourly rate).

247A Entitlement to leave for all nominal hours in a day also extends to other hours on that day

- (1) If:
- (a) an employee to whom subparagraph 241(1)(a)(ii) applies is entitled to take paid personal/carer's leave on a particular day; and
 - (b) the entitlement covers all the hours (or part hours) on that day that would count towards the nominal hours worked by the employee in the week that includes that day;

the employer is taken to have authorised the employee to be absent from work for any other hours (or part hours) on that day that the employee would otherwise have worked.

Example: Tina is employed by Terrific Videos Pty Ltd. She works 8 hours a day for 5 days a week, giving a weekly total of 40 hours per week (consisting of 38 hours plus 2 reasonable additional hours).

Under subsection 246(2), Tina is entitled to accrue paid personal/carer's leave of $\frac{1}{26}$ of her nominal hours worked for each completed 4 week period of continuous service with Terrific Videos. Because of subparagraph 241(1)(a)(ii), Tina's nominal hours worked in a week are capped at 38 hours. If Tina works her normal hours for a 12 month period, she will accrue 76 hours of paid personal/carer's leave.

The above subsection ensures that Tina will be able (subject to the requirements of this Division relating to entitlement to paid personal/carer's leave) to be absent from work for 10 full 8 hour days. Tina's absence for the additional 4 hours over those 10 days will not be paid leave, and will not count as service, but it will not break her continuity of service (see subsection (2)).

- (2) An absence that is taken by subsection (1) to have been authorised:
- (a) is not paid personal/carer's leave; and
 - (b) does not break the employee's continuity of service; and
 - (c) does not otherwise count as service.

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- (3) For the purposes of subsection (1), if a shift (or other period of work) occurs partly on 1 day and partly on the next day, the shift (or other period of work) is taken to be a day and the remaining parts of the days are taken not to be part of the day.
- (4) For the purposes of subsection (1), the regulations may make provision for either or both of the following:
 - (a) determining what hours (or part hours) on a particular day would count towards the nominal hours worked by an employee in a week;
 - (b) determining what other hours (or part hours) on a particular day would be hours (or part hours) that an employee would otherwise have worked.

248 Paid personal/carer's leave—workers' compensation

- (1) An employee is not entitled to take paid sick leave for a period during which the employee is absent from work because of a personal illness, or injury, for which the employee is receiving compensation payable under a law of the Commonwealth, a State or a Territory relating to workers' compensation.
- (2) Subject to subsection (1), this Division does not apply to the extent that it is inconsistent with a provision of a law of the Commonwealth, a State or a Territory relating to workers' compensation if the provision would (apart from this Division):
 - (a) prevent an employee from taking or accruing paid personal/carer's leave during a period while the employee is receiving compensation under such a law; or
 - (b) restrict the amount of paid personal/carer's leave an employee may take or accrue during such a period.

249 Paid carer's leave—annual limit

- (1) This section applies to an employee if, at a particular time, the employee:
 - (a) is employed by an employer; and
 - (b) for a continuous period of at least 12 months immediately before the time, has been in continuous service with the employer.

- (2) The employee is not entitled to take paid carer's leave from his or her employment with the employer at the time if, during the period of 12 months ending at the time, the employee has already taken a total amount of paid carer's leave from that employment of $\frac{1}{26}$ of the nominal hours worked by the employee for the employer during that period.

Example: An employee whose nominal hours worked for an employer each week were 38 hours during a 12 month period of continuous service with the employer would not be entitled to take any paid carer's leave from his or her employment with the employer if the employee had, during the period, already taken 76 hours paid carer's leave (which amounted to 10 days paid carer's leave for that employee) from that employment.

Subdivision C—Guarantee of unpaid carer's leave

250 The guarantee

- (1) Subject to this Subdivision, an employee is entitled to a period of up to 2 days unpaid carer's leave for each occasion (a *permissible occasion*) when a member of the employee's immediate family, or a member of the employee's household, requires care or support during such a period because of:

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

Note 1: This entitlement extends to casual employees (see section 239).

Note 2: The entitlement is subject to the restrictions in sections 251 and 252.

- (2) An employee is entitled to unpaid carer's leave only if the employee complies with the notice and documentation requirements under Subdivision D, to the extent to which they apply to the employee.
- (3) An employee is taken not to have been entitled to a period of unpaid carer's leave at any time after the start of the period if:
- (a) Subdivision D:
 - (i) required the employee to give notice or a document (the *required notice or document*) to his or her employer; and
 - (ii) allowed the employee to give the required notice or document to his or her employer after the start of the leave; and

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- (b) when the employee started the leave, the employee had not given his or her employer the required notice or document; and
- (c) the employee did not later give the required notice or document to his or her employer within the period required under Subdivision D.

Note: Under Subdivision D, an employee may be required to give his or her employer notice, a medical certificate or a statutory declaration (depending on the circumstances).

251 Unpaid carer's leave—how taken

An employee who is entitled to a period of unpaid carer's leave under section 250 for a particular permissible occasion is entitled to take the unpaid carer's leave as:

- (a) a single, unbroken, period of up to 2 days; or
- (b) any separate periods to which the employee and his or her employer agree.

252 Unpaid carer's leave—paid personal leave exhausted

An employee is entitled to unpaid carer's leave for a particular permissible occasion during a particular period only if the employee cannot take an amount of any of the following types of paid leave during the period:

- (a) paid personal/carer's leave;
- (b) any other authorised leave of the same type as personal/carer's leave.

**Subdivision D—Notice and evidence requirements:
personal/carer's leave**

253 Sick leave—notice

- (1) To be entitled to sick leave during a period, an employee must give his or her employer notice in accordance with this section that the employee is (or will be) absent from his or her employment during the period because of a personal illness, or injury, of the employee.

- (2) The notice must be given to the employer as soon as reasonably practicable (which may be at a time before or after the sick leave has started).
- (3) The notice must be to the effect that the employee requires (or required) leave during the period because of a personal illness, or injury, of the employee.
- (4) This section does not apply to an employee who could not comply with it because of circumstances beyond the employee's control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

254 Sick leave—documentary evidence

- (1) This section applies if an employer requires an employee of the employer to give the employer documentary evidence in relation to a period of sick leave taken (or to be taken) by the employee.
- (2) To be entitled to sick leave during the period, the employee must, in accordance with this section, give the employer a document (the **required document**) of whichever of the following types applies:
 - (a) if it is reasonably practicable to do so—a medical certificate from a registered health practitioner;
 - (b) if it is not reasonably practicable for the employee to give the employer a medical certificate—a statutory declaration made by the employee.
- (3) The required document must be given to the employer as soon as reasonably practicable (which may be at a time before or after the sick leave has started).
- (4) The required document must include a statement to the effect that:
 - (a) if the required document is a medical certificate—in the registered health practitioner's opinion, the employee was, is, or will be unfit for work during the period because of a personal illness or injury; or
 - (b) if the required document is a statutory declaration—the employee was, is, or will be unfit for work during the period because of a personal illness or injury.
- (5) This section does not apply to an employee who could not comply with it because of circumstances beyond the employee's control.

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Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

255 Carer's leave—notice

- (1) To be entitled to carer's leave during a period, an employee must give his or her employer notice in accordance with this section.
- (2) The notice must be given to the employer as soon as reasonably practicable (which may be at a time before or after the carer's leave has started).
- (3) The notice must be to the effect that the employee requires (or required) leave during the period to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires (or required) care or support because of:
 - (a) a personal illness, or injury, of the member; or
 - (b) an unexpected emergency affecting the member.
- (4) This section does not apply to an employee who could not comply with it because of circumstances beyond the employee's control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

256 Carer's leave—documentary evidence

- (1) This section applies if an employer requires an employee of the employer to give the employer documentary evidence in relation to a period of carer's leave taken (or to be taken) by the employee to provide care or support to a member of the employee's immediate family or a member of the employee's household.
- (2) To be entitled to carer's leave during the period, the employee must, in accordance with this section, give the employer a document (the *relevant document*) that is:
 - (a) if the care or support is required because of a personal illness, or injury, of the member—a medical certificate from a registered health practitioner, or a statutory declaration made by the employee; or
 - (b) if the care or support is required because of an unexpected emergency affecting the member—a statutory declaration made by the employee.

- (3) The relevant document must be given to the employer as soon as reasonably practicable (which may be at a time before or after the carer's leave has started).
- (4) If the relevant document is a medical certificate, it must include a statement to the effect that, in the opinion of the registered health practitioner, the member had, has, or will have a personal illness or injury during the period.
- (5) If the relevant document is a statutory declaration, it must include a statement to the effect that the employee requires (or required) leave during the period to provide care or support to the member because the member requires (or required) care or support during the period because of:
 - (a) a personal illness, or injury, of the member; or
 - (b) an unexpected emergency affecting the member.
- (6) This section does not apply to an employee who could not comply with it because of circumstances beyond the employee's control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

Subdivision E—Guarantee of compassionate leave

257 The guarantee

- (1) For the purposes of this Division, *compassionate leave* is paid leave taken by an employee:
 - (a) for the purposes of spending time with a person who:
 - (i) is a member of the employee's immediate family or a member of the employee's household; and
 - (ii) has a personal illness, or injury, that poses a serious threat to his or her life; or
 - (b) after the death of a member of the employee's immediate family or a member of the employee's household.
- (2) Subject to this Subdivision, an employee is entitled to a period of 2 days of compassionate leave for each occasion (a *permissible occasion*) when a member of the employee's immediate family or a member of the employee's household:
 - (a) contracts or develops a personal illness that poses a serious threat to his or her life; or

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- (b) sustains a personal injury that poses a serious threat to his or her life; or
 - (c) dies.
- (3) However, the employee is entitled to compassionate leave only if the employee gives his or her employer any evidence that the employer reasonably requires of the illness, injury or death.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

258 Taking compassionate leave

- (1) An employee who is entitled to a period of compassionate leave under section 257 for a particular permissible occasion is entitled to take the compassionate leave as:
- (a) a single, unbroken period of 2 days; or
 - (b) 2 separate periods of 1 day each; or
 - (c) any separate periods to which the employee and his or her employer agree.
- (2) An employee who is entitled to a period of compassionate leave under section 257 because a member of the employee's immediate family or a member of the employee's household has contracted or developed a personal illness, or sustained a personal injury, is entitled to start to take the compassionate leave at any time while the illness or injury persists.

259 Compassionate leave—payment rule

If an employee takes compassionate leave during a period, the employee must be paid a rate for each hour (pro-rated for part hours) of compassionate leave taken that is no less than the rate that, immediately before the period begins, is the employee's basic periodic rate of pay (expressed as an hourly rate).

Subdivision F—Personal leave: service

260 Paid personal leave—service

- (1) A period of paid personal leave does not break an employee's continuity of service.

- (2) Paid personal leave counts as service for all purposes except as prescribed by the regulations.
- (3) In this section:

paid personal leave means paid personal/carer's leave or compassionate leave.

261 Unpaid carer's leave—service

- (1) A period of unpaid carer's leave does not break an employee's continuity of service.
- (2) However, a period of unpaid carer's leave does not otherwise count as service except:
 - (a) as expressly provided by or under:
 - (i) a term or condition of the employee's employment; or
 - (ii) a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory; or
 - (b) as prescribed by the regulations.

Division 6—Parental leave

Subdivision A—Preliminary

262 Employees to whom Division applies

- (1) This Division applies to all employees, other than casual employees who are not eligible casual employees.
- (2) This Division establishes minimum entitlements and so is intended to supplement, and not to override, entitlements under other Commonwealth legislation.

263 Definitions

In this Division:

adoption agency means an agency, office, court or other entity that is authorised under a law of the Commonwealth, a State, a Territory or a foreign country to perform functions in relation to adoption.

adoption leave has the meaning given by subsection 300(1).

authorised leave means leave, or an absence, whether paid or unpaid, that is authorised:

- (a) by an employee's employer; or
- (b) by or under a term or condition of an employee's employment; or
- (c) by or under a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory.

basic periodic rate of pay has the meaning given by section 178.

Note: See also section 264A.

continuous service, in relation to a period of an employee's service with an employer, means service with the employer as an employee during the whole of the period, including (as a part of the period) any of the following periods:

- (a) a period of authorised leave;

- (b) a period (the *casual period*) during which the employee was a casual employee, if:
 - (i) during the casual period, the employee was engaged on a regular and systematic basis by the employer; and
 - (ii) during the casual period, the employee had a reasonable expectation of continuing employment by the employer.

day of placement: the *day of placement* of a child with an employee for an adoption is:

- (a) subject to paragraph (b), the earlier of the following days:
 - (i) the day on which the employee first takes custody of the child for the adoption;
 - (ii) the day on which the employee starts any travel that is reasonably necessary to take custody of the child for the adoption; or
- (b) if the child's adoption by an employee is authorised by an adoption agency after the child has started living with the employee (unless the employee has travelled overseas to take custody of the child for an adoption intended to occur in Australia)—the day on which the adoption is authorised by the agency.

de facto spouse, of an employee, means a person of the opposite sex to the employee who lives with the employee as the employee's husband or wife on a genuine domestic basis although not legally married to the employee.

eligible casual employee has the meaning given by section 264.

eligible child has the meaning given by section 298.

employee means an employee to whom this Division applies under subsection 262(1).

expected date of birth, of a child of an employee who is or was pregnant, means:

- (a) if, to comply with a requirement under Subdivision C, the employee has given her employer a medical certificate stating the expected date of birth of the child or a date that would be, or would have been, the expected date of birth of the child—the stated date; or

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- (b) if the employee could not comply with a requirement mentioned in paragraph (a) because of circumstances beyond her control—the date of birth of the child that could reasonably be expected if the pregnancy were to go to full term.

long adoption leave has the meaning given by paragraph 300(1)(b).

long paternity leave has the meaning given by paragraph 282(1)(b).

maternity leave has the meaning given by subsection 265(1).

medical certificate means a certificate signed by a medical practitioner.

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

ordinary maternity leave has the meaning given by paragraph 265(1)(b).

paternity leave has the meaning given by subsection 282(1).

piece rate employee means an employee who is paid a piece rate of pay within the meaning of section 178.

placement, of a child, means:

- (a) subject to paragraph (b)—the placement, by an adoption agency, of the child into the custody of an employee for adoption; or
- (b) if the child’s adoption by an employee is authorised by an adoption agency after the child has started living with the employee—the authorisation of the adoption by the adoption agency.

Note: *Day of placement* is also defined in this section.

pre-adoption leave has the meaning given by subsection 299(2).

pregnancy-related illness means an illness related to pregnancy.

primary care-giver, of a child, means a person who assumes the principal role of providing care and attention to the child.

short adoption leave has the meaning given by paragraph 300(1)(a).

short paternity leave has the meaning given by paragraph 282(1)(a).

special maternity leave has the meaning given by paragraph 265(1)(a).

spouse includes the following:

- (a) a former spouse;
- (b) a de facto spouse;
- (c) a former de facto spouse.

264 Meaning of *eligible casual employee*

- (1) For the purposes of this Division, an *eligible casual employee* is a casual employee:
 - (a) who has been engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and
 - (b) who, but for an expected birth or an expected placement of a child, would have a reasonable expectation of continuing engagement by the employer on a regular and systematic basis.
- (2) Without limiting subsection (1), for the purposes of this Division, a casual employee is also an *eligible casual employee* if:
 - (a) the employee was engaged by a particular employer on a regular and systematic basis for a sequence of periods during a period (the *first period of employment*) of less than 12 months; and
 - (b) at the end of the first period of employment, the employee ceased, on the employer's initiative, to be so engaged by the employer; and
 - (c) the employer later again engaged the employee on a regular and systematic basis for a further sequence of periods during a period (the *second period of employment*) that started not more than 3 months after the end of the first period of employment; and

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- (d) the combined length of the first period of employment and the second period of employment is at least 12 months; and
- (e) the employee, but for an expected birth or an expected placement of a child, would have a reasonable expectation of continuing engagement by the employer on a regular and systematic basis.

264A Regulations may prescribe different definition for piece rate employees

The regulations may prescribe a different definition of *basic periodic rate of pay* for the purposes of the application of this Division in relation to piece rate employees.

Subdivision B—Guarantee of maternity leave

265 The guarantee

- (1) For the purposes of this Division, *maternity leave* is:
 - (a) unpaid leave (*special maternity leave*) taken by an employee because:
 - (i) she is pregnant, and has a pregnancy-related illness; or
 - (ii) she has been pregnant, and the pregnancy has ended within 28 weeks before the expected date of birth of the child otherwise than by the birth of a living child; or
 - (b) a single, unbroken period of unpaid leave (*ordinary maternity leave*) taken in respect of the birth, or the expected birth, of a child of an employee (other than leave taken as special maternity leave).
- (2) Subject to this Subdivision and Subdivision D, an employee is entitled to maternity leave if:
 - (a) she complies with the documentation requirements under Subdivision C, to the extent to which they apply to her; and
 - (b) immediately before the expected date of birth of the child:
 - (i) she has, or will have, completed at least 12 months continuous service with her employer; or
 - (ii) she is, or will be, an eligible casual employee.

Note: Entitlement to maternity leave is subject to the restrictions in sections 266 and 267 and Subdivision D.

- (3) An employee is taken not to have been entitled to a period of maternity leave at any time after the start of the period if:
- (a) Subdivision C:
 - (i) required the employee to give a document (the *required document*) to her employer; and
 - (ii) allowed the employee to give the required document to her employer after the start of the leave; and
 - (b) when the employee started the leave, the employee had not given her employer the required document; and
 - (c) the employee did not later give the required document to her employer within the period required under Subdivision C.
- Note: Under Subdivision C, an employee may be required to give her employer a medical certificate, an application or a statutory declaration (depending on the circumstances).
- (4) Subject to this Division, an employee may take special maternity leave, ordinary maternity leave, or both.

266 Period of maternity leave

- (1) In this section:
- related authorised leave*, in relation to maternity leave taken (or to be taken) by an employee, means any of the following types of authorised leave other than the maternity leave:
- (a) authorised leave (other than paid leave under subparagraph 268(2)(b)(i) or (ii)) taken by the employee because of any of the following:
 - (i) her pregnancy;
 - (ii) the birth of the child;
 - (iii) the end of her pregnancy otherwise than by the birth of a living child;
 - (iv) the death of the child;
 - (b) paternity leave, or any other authorised leave of the same type as paternity leave, taken by the employee's spouse because of the birth of the child.
- (2) An employee may take a period of maternity leave as part of a continuous period including any other authorised leave.

Section 267

- (3) The maximum total amount of maternity leave (including special maternity leave and ordinary maternity leave) to which an employee is entitled in relation to the birth of a child is 52 weeks, less an amount equal to the total amount of related authorised leave taken:
- (a) by the employee before or after the maternity leave; and
 - (b) by the employee's spouse before, during or after the maternity leave.

Example: Rosa is a pregnant employee entitled to maternity leave. She has taken 2 weeks of special maternity leave, but no other authorised leave. Rosa intends to take authorised leave because of the birth consisting of 4 weeks of annual leave and 12 weeks of long service leave, and a period of ordinary maternity leave.

Rosa's spouse Jim intends to take 1 week of short paternity leave.

The maximum amount of ordinary maternity leave to which Rosa is entitled is 33 weeks, worked out as follows:

- (a) the maximum entitlement of any employee to maternity leave is 52 weeks;
- (b) the maximum amount of ordinary maternity leave available to Rosa must be reduced by 2 weeks for her special maternity leave;
- (c) the maximum amount must also be reduced by 16 weeks for Rosa's annual leave and long service leave;
- (d) the maximum amount must be further reduced by 1 week for Jim's short paternity leave.

267 Period of special maternity leave

- (1) An employee is not entitled to a period of special maternity leave longer than the period stated in a medical certificate given to the employer for the purposes of section 269.

Note: Section 269 requires an employee to give her employer a medical certificate (and other documents) in order to be entitled to special maternity leave. However, the section does not apply to an employee who could not comply with the section because of circumstances beyond her control (see subsection 269(5)).

- (2) In addition, a period of special maternity leave must end before the employee starts any continuous period of leave including (or constituted by) ordinary maternity leave.

268 Transfer to a safe job

- (1) This section applies to an employee if:
 - (a) she is entitled to ordinary maternity leave; and
 - (b) she has already complied with the documentation requirements under sections 270 and 271; and
 - (c) the employee gives her employer a medical certificate from a medical practitioner containing a statement to the effect that, in the medical practitioner's opinion, the employee is fit to work, but that it is inadvisable for her to continue in her present position for a stated period because of:
 - (i) illness, or risks, arising out of her pregnancy; or
 - (ii) hazards connected with that position.

- (2) If this section applies to an employee:
 - (a) if the employee's employer thinks it to be reasonably practicable to transfer the employee to a safe job—the employer must transfer the employee to the safe job, with no other change to the employee's terms and conditions of employment; or
 - (b) if the employee's employer does not think it to be reasonably practicable to transfer the employee to a safe job:
 - (i) the employee may take paid leave immediately for a period ending at the time mentioned in paragraph (4)(b); or
 - (ii) the employer may require the employee to take paid leave immediately for a period ending at the time mentioned in paragraph (4)(b).

Note: An employer may ask an employee to give the employer a statement from a medical practitioner as to the employee's fitness to work (see subsections 274(2) and (2A)).

- (3) If the employee takes paid leave under subparagraph (2)(b)(i) or (ii) during a period, the employee must be paid a rate for each hour (pro-rated for part hours) of paid leave taken that is no less than the rate that, immediately before the period begins, is the employee's basic periodic rate of pay (expressed as an hourly rate).

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- (4) If the employee takes paid leave under subparagraph (2)(b)(i) or (ii):
- (a) the entitlement to leave is in addition to any other leave entitlement she has; and
 - (b) the period of leave ends at the earliest of whichever of the following times is applicable:
 - (i) the end of the period stated in the medical certificate;
 - (ii) if the employee's pregnancy results in the birth of a living child—the end of the day before the date of birth;
 - (iii) if the employee's pregnancy ends otherwise than with the birth of a living child—the end of the day before the end of the pregnancy.
- (5) To avoid doubt, this section applies whether the employee gives the medical certificate to the employer because of a request under subsection 274(2) or otherwise.

Subdivision C—Maternity leave: documentation

269 Special maternity leave—documentation

Requirement for application

- (1) To be entitled to special maternity leave during a period, an employee must give her employer a written application for special maternity leave, in accordance with this section, stating the first and last days of the period.

Pregnancy-related illness—medical certificate

- (2) An application for special maternity leave required because of a pregnancy-related illness must be accompanied by a medical certificate from a medical practitioner containing the following statements of the medical practitioner's opinion:
- (a) a statement that the employee is pregnant;
 - (b) a statement of the expected date of birth;
 - (c) a statement to the effect that the employee is, was, or will be unfit to work for a stated period because of a pregnancy-related illness.

End of pregnancy—medical certificate and statutory declaration

- (3) An application for special maternity leave required because of the end of the employee's pregnancy otherwise than by the birth of a living child must be accompanied by:
- (a) a medical certificate from a medical practitioner containing the following statements of the medical practitioner's opinion:
 - (i) a statement that the employee was pregnant, but that the pregnancy has ended otherwise than by the birth of a living child;
 - (ii) a statement of what the expected date of birth would have been if the pregnancy had gone to full term;
 - (iii) a statement that the pregnancy ended on a stated day within 28 weeks before the expected date of birth;
 - (iv) a statement to the effect that the employee is, was, or will be unfit for work during a stated period; and
 - (b) a statutory declaration made by the employee stating the following:
 - (i) the first and last days of the period (or periods) of any other authorised leave taken by the employee because of a pregnancy-related illness or the end of the pregnancy;
 - (ii) that the employee will not engage in any conduct inconsistent with her contract of employment while on maternity leave.

Time for giving application to employer

- (4) The application, medical certificate and statutory declaration (if required) must be given to the employer before, or as soon as reasonably practicable after, starting a continuous period of leave including (or constituted by) the special maternity leave.

Section does not apply if could not be complied with

- (5) This section does not apply to an employee who could not comply with the section because of circumstances beyond her control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

270 Ordinary maternity leave—medical certificate

Requirement for medical certificate

- (1) To be entitled to ordinary maternity leave, an employee must give her employer a medical certificate from a medical practitioner in accordance with this section.

General rules

- (2) The medical certificate must contain the following statements of the medical practitioner's opinion:
 - (a) a statement that the employee is pregnant;
 - (b) a statement of the expected date of birth.
- (3) The medical certificate mentioned in subsection (2) must be given to the employer no later than 10 weeks before the expected date of birth (as stated in the certificate).

Premature birth or other compelling reason

- (4) However, subsections (2) and (3) do not apply if it was not reasonably practicable for a medical certificate mentioned in subsection (2) to be given to the employer by the time required by subsection (3) because of:
 - (a) the premature birth of the employee's child; or
 - (b) any other compelling reason.
- (5) If subsections (2) and (3) do not apply:
 - (a) subject to paragraph (b), as soon as reasonably practicable before the birth of the child (which may be at a time before or after the maternity leave has started) the employee must give the employer a medical certificate from a medical practitioner containing the following statements of the medical practitioner's opinion:
 - (i) a statement that the employee is pregnant;
 - (ii) a statement of the expected date of birth if the pregnancy were to go to full term; or
 - (b) if it was not reasonably practicable for the employee to comply with paragraph (a) before the birth of the child—as soon as reasonably practicable after the birth of the child (which may be at a time before or after the maternity leave

has started) the employee must give the employer a medical certificate from a medical practitioner containing the following statements of the medical practitioner's opinion (or knowledge):

- (i) a statement of the actual date of birth;
- (ii) a statement of the expected date of birth as at the 70th day before the actual date of birth.

Section does not apply if could not be complied with

- (6) This section does not apply to an employee who could not comply with the section because of circumstances beyond her control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

271 Ordinary maternity leave—application

Requirement for application

- (1) To be entitled to ordinary maternity leave during a period, an employee must give her employer a written application for ordinary maternity leave in accordance with this section stating the first and last days of the period.

General rule

- (2) The application must be given to the employer no later than 4 weeks before the first day of the intended continuous period of leave including (or constituted by) ordinary maternity leave.

Premature birth or other compelling reason

- (3) However, subsection (2) does not apply if it was not reasonably practicable for the employee to comply with it because of:
 - (a) the premature birth of the employee's child; or
 - (b) any other compelling reason.
- (4) If subsection (2) does not apply, the application must be made as soon as reasonably practicable (which may be at a time before or after the maternity leave has started).

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Statutory declaration with application

- (5) The application must be accompanied by a statutory declaration made by the employee stating the following:
- (a) the first and last days of the period (or periods) of any other authorised leave (other than paid leave under subparagraph 268(2)(b)(i) or (ii)) intended to be taken (or already taken) by the employee because of her pregnancy or the expected birth;
 - (b) the first and last days of the period (or periods) of any paternity leave, or any other authorised leave of the same type as paternity leave, intended to be taken (or already taken) by the employee's spouse because of the expected birth;
 - (c) that the employee intends to be the child's primary care-giver at all times while on maternity leave;
 - (d) that the employee will not engage in any conduct inconsistent with her contract of employment while on maternity leave.

Section does not apply if could not be complied with

- (6) This section does not apply to an employee who could not comply with the section because of circumstances beyond her control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

Subdivision D—Maternity leave: from start to finish

272 Maternity leave—start of leave

Subject to section 274, an employee may start a continuous period of leave including (or constituted by) ordinary maternity leave to which she is entitled at any time within 6 weeks before the expected date of birth of the child.

273 Requirement to take leave—for 6 weeks after birth

A continuous period of leave including (or constituted by) ordinary maternity leave must include a period of leave of at least 6 weeks starting from the date of birth of the child.

274 Requirement to take leave—within 6 weeks before birth

- (1) This section applies to an employee if:
 - (a) she is entitled to ordinary maternity leave; and
 - (b) she has already complied with the documentation requirements under sections 270 and 271.

- (2) If the employee continues to work, during the period of 6 weeks before the expected date of birth, the employer may ask the employee to give the employer a medical certificate from a medical practitioner containing the following statement or statements of the medical practitioner's opinion:
 - (a) a statement of whether the employee is fit to work;
 - (b) if, in the opinion of the medical practitioner, the employee is fit to work—a statement of whether it is inadvisable for the employee to continue in her present position for a stated period because of:
 - (i) illness, or risks, arising out of the pregnancy; or
 - (ii) hazards connected with the position.

Note: Under section 268, the employee is entitled to be transferred to a safe job or to paid leave (depending on the circumstances) if the employee gives the employer a medical certificate stating that the employee is fit to work, but that illness or risks arising out of the employee's pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue in her present position.

- (2A) If the employee takes paid leave under subparagraph 268(2)(b)(i) or (ii) during the period of 6 weeks before the expected date of birth, the employer may, at any time during the period of leave, ask the employee to give the employer a medical certificate from a medical practitioner containing a statement of the medical practitioner's opinion of whether the employee is fit to work.

- (3) The employer may require the employee to start a continuous period of leave including (or constituted by) maternity leave as soon as reasonably practicable, if the employee:
 - (a) does not give the employer the requested certificate within 7 days after the request; or
 - (b) within 7 days after the request for the certificate, gives the employer a medical certificate stating that the employee is unfit to work.

275 End of pregnancy—effect on ordinary maternity leave entitlement

- (1) This section applies if the pregnancy of an employee ends otherwise than by the birth of a living child.
- (2) If, when the pregnancy ended, the employee had not yet started a period of ordinary maternity leave, the employee is not, or is no longer, entitled to ordinary maternity leave in relation to the previously expected birth.

Note: However, the employee may be entitled to take special maternity leave because of the end of the pregnancy. An application for special maternity leave may be made after the leave has started (see section 269).

- (3) If, when the pregnancy ended, the employee had started a period of ordinary maternity leave, the employee's entitlement to ordinary maternity leave in relation to the previously expected birth is not affected by the end of the pregnancy.

Note: The employee may shorten the period of ordinary maternity leave by agreement with the employer under section 278. However, to take advantage of the return to work guarantee under section 280, the employee must also give the employer at least 4 weeks written notice of the proposed day of her return to work.

276 Death of child—effect on ordinary maternity leave entitlement

- (1) This section applies if:
 - (a) an employee gives birth to a living child, but the child later dies; and
 - (b) when the child died, the employee had started a period of ordinary maternity leave in relation to the child's birth.
- (2) Subject to subsections (3) and (4), the employee's entitlement to the ordinary maternity leave is not affected by the death of the child.

Note: The employee may shorten the period of ordinary maternity leave by agreement with the employer under section 278. However, to take advantage of the return to work guarantee under section 280, the employee must also give the employer at least 4 weeks written notice of the proposed day of her return to work.

- (3) The employee's employer may give the employee written notice that, from a stated day, any untaken ordinary maternity leave that

the employee remains entitled to at the stated day is cancelled with effect from that day.

- (4) The day stated in the notice must be no earlier than the later of the following days:
 - (a) the day that is 4 weeks after the day the notice was given;
 - (b) the day that is 6 weeks after the date of birth.
- (5) The employee's entitlement to any untaken ordinary maternity leave in relation to the birth ends with effect from the day stated in the notice.

277 End of ordinary maternity leave if employee stops being primary care-giver

- (1) This section applies if:
 - (a) during a substantial period while an employee is on ordinary maternity leave after the birth of a living child, the employee is not the child's primary care-giver; and
 - (b) having regard to the length of that period and to any other relevant circumstances, it is reasonable to expect that the employee will not again become the child's primary care-giver within a reasonable period.
- (2) The employee's employer may give the employee written notice that, from a stated day no earlier than 4 weeks after the day the notice is given, any untaken ordinary maternity leave that the employee remains entitled to at the stated day is cancelled with effect from that day.
- (3) The employee's entitlement to any untaken ordinary maternity leave in relation to the birth ends with effect from the day stated in the notice.

278 Variation of period of ordinary maternity leave

- (1) This section applies after an employee has started a continuous period of leave including (or constituted by) ordinary maternity leave.
- (2) Subject to Subdivision B and sections 276 and 277:

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- (a) the employee may extend the period of maternity leave once by giving her employer 14 days written notice before the end of the period stating the period by which the leave is extended; and
 - (b) the period of maternity leave may be further extended by agreement between the employee and her employer.
- (3) Subject to section 273, the period of maternity leave may be shortened by written agreement between the employee and her employer.

Note: However, to take advantage of the return to work guarantee under section 280, the employee must also give her employer at least 4 weeks written notice of the proposed day for her return to work.

279 Employee's right to terminate employment during maternity leave

- (1) An employee may terminate her employment at any time during a period of maternity leave or leave under subparagraph 268(2)(b)(i) or (ii).
- (2) The employee's right to terminate her employment is subject to any notice required to be given by the employee by or under:
 - (a) a term or condition of her employment; or
 - (b) a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory.

280 Return to work guarantee—maternity leave

- (1) This section applies to an employee who returns to work after a period of leave including (or constituted by) maternity leave (the *maternity-related leave period*) if:
 - (a) the employee gives her employer written notice of the proposed day of her return to work no later than 4 weeks before that day; or
 - (b) the period of leave includes (or is constituted by) special maternity leave, and does not include any ordinary maternity leave; or
 - (c) the employee's entitlement to ordinary maternity leave ends under section 276 or 277.

- (2) This section also applies if an employee returns to work after a period of leave under subparagraph 268(2)(b)(i) or (ii).
- (3) Subject to subsections (4) and (5), the employee is entitled to return:
 - (a) unless paragraph (b) or (c) applies—to the position she held immediately before the start of the maternity-related leave period; or
 - (b) if she was promoted or voluntarily transferred to a new position (other than to a safe job under paragraph 268(2)(a)) during the maternity-related leave period—to the new position; or
 - (c) if paragraph (b) does not apply, and she began working part-time because of her pregnancy—to the position she held immediately before starting to work part-time.
- (4) If subsection (3) would, apart from this subsection, entitle the employee to return to a position that the employee had been transferred to under paragraph 268(2)(a), the employee is instead entitled to return to the position she held immediately before the transfer.
- (5) If the position (the *former position*) no longer exists, and the employee is qualified and able to work for her employer in another position, the employee is entitled to return to:
 - (a) that position; or
 - (b) if there are 2 or more such positions—whichever position is nearest in status and remuneration to the former position.

281 Replacement employees—maternity leave

- (1) Before an employer engages an employee (a *primary replacement*) to do the work of another employee because the other employee is taking a continuous period of leave including (or constituted by) maternity leave, the employer must tell the primary replacement:
 - (a) that the engagement to do that work is temporary; and
 - (b) what the rights of the employee taking maternity leave are under section 280 when she returns to work after the period of leave.
 - (2) Before an employer engages an employee (a *secondary replacement*) to do the work of another employee (the *primary*
-

Section 282

replacement) because the primary replacement has been temporarily promoted or transferred to do the work of a third employee while the third employee is taking a continuous period of leave including (or constituted by) maternity leave, the employer must tell the secondary replacement:

- (a) that the engagement to do that work is temporary; and
 - (b) what the rights of the employee taking maternity leave are under section 280 when she returns to work after the period of leave.
- (3) In this section:

employee has the meaning given by subsection 5(1).

Subdivision E—Guarantee of paternity leave

282 The guarantee

- (1) For the purposes of this Division, *paternity leave* is:
- (a) a single, unbroken period of unpaid leave (*short paternity leave*) of up to one week taken by a male employee within the week starting on the day his spouse begins to give birth; or
 - (b) a single, unbroken period of unpaid leave (*long paternity leave*), other than short paternity leave, taken by a male employee after his spouse gives birth to a living child so that the employee can be the child's primary care-giver.
- (2) Subject to this Subdivision and Subdivision G, an employee is entitled to paternity leave if:
- (a) he complies with the documentation requirements under Subdivision F, to the extent to which they apply to him; and
 - (b) immediately before the first day on which the paternity leave is, or is to be, taken:
 - (i) he has, or will have, completed at least 12 months continuous service with his employer; or
 - (ii) he is, or will be, an eligible casual employee.

Note: Entitlement to paternity leave is subject to the restrictions in sections 283 and 285 and Subdivision G.

- (3) An employee is taken not to have been entitled to a period of paternity leave at any time after the start of the period if:
- (a) Subdivision F:
 - (i) required the employee to give a document (the *required document*) to his employer; and
 - (ii) allowed the employee to give the required document to his employer after the start of the leave; and
 - (b) when the employee started the leave, the employee had not given his employer the required document; and
 - (c) the employee did not later give the required document to his employer within the period required under Subdivision F.

Note: Under Subdivision F, an employee may be required to give his employer a medical certificate, an application or a statutory declaration (depending on the circumstances).

- (4) Subject to this Division, an employee may take short paternity leave, long paternity leave, or both.

283 Period of paternity leave

- (1) In this section:

related authorised leave, in relation to paternity leave taken (or to be taken) by an employee because his spouse has given birth to a living child, means any of the following types of authorised leave other than the paternity leave:

- (a) authorised leave taken by the employee because of any of the following:
 - (i) the birth of the child;
 - (ii) the death of the child;
 - (b) maternity leave, or any other authorised leave of the same type as maternity leave, taken by the employee's spouse because of the birth of the child or the pregnancy.
- (2) An employee may take a period of paternity leave as part of a continuous period including any other authorised leave.
- (3) The maximum total amount of paternity leave (including short paternity leave and long paternity leave) to which an employee is entitled in relation to the birth of a child by his spouse is 52 weeks, less an amount equal to the total amount of related authorised leave taken:

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- (a) by the employee before or after the paternity leave; and
- (b) by the spouse before, during or after the paternity leave.

Example: Max's spouse Rachel is pregnant, and Max is an employee entitled to paternity leave. He intends to take 2 periods of authorised leave because of the birth of the child. The first is to consist of 5 weeks: 1 week of short paternity leave and 4 weeks of annual leave. The second is to consist of a later period of long paternity leave starting 20 weeks after the birth, when Max is to be the primary care-giver for the child after Rachel returns to work.

Rachel has not taken any special maternity leave or other authorised leave during her pregnancy. She intends to take 20 weeks of maternity leave because of the birth of the child.

The maximum amount of long paternity leave to which Max is entitled is 27 weeks, worked out as follows:

- (a) the maximum entitlement of any employee to paternity leave is 52 weeks;
- (b) the maximum amount of long paternity leave available to Max must be reduced by 1 week for his short paternity leave;
- (c) the maximum amount must also be reduced by 4 weeks for Max's annual leave;
- (d) the maximum amount must be further reduced by 20 weeks for Rachel's maternity leave.

Note: A period of long paternity leave must end within 12 months after the date of birth of the child (see section 290).

284 Short paternity leave—concurrent leave taken by spouse

An employee may take short paternity leave in relation to the birth of a child by his spouse while the spouse is taking any authorised leave, including maternity leave (if any), in relation to the birth.

285 Long paternity leave—not to be concurrent with maternity leave taken by spouse

A period of long paternity leave taken by an employee in relation to the birth of a child by his spouse must not include any period during which the spouse is taking maternity leave, or any other authorised leave of the same type as maternity leave, because of the birth.

Subdivision F—Paternity leave: documentation

286 Paternity leave—medical certificate

Requirement for medical certificate

- (1) To be entitled to paternity leave, an employee must give his employer a medical certificate from a medical practitioner in accordance with this section.
- (2) The medical certificate must contain the following statements of the medical practitioner's opinion (or knowledge):
 - (a) if the child has not yet been born:
 - (i) the name of the employee's spouse; and
 - (ii) that the employee's spouse is pregnant; and
 - (iii) the date on which the birth is expected;
 - (b) if the child has been born:
 - (i) the name of the employee's spouse; and
 - (ii) the actual date of birth of the child.

General rule

- (3) The medical certificate must be given to the employer no later than 10 weeks before the date stated in the certificate.

Premature birth or other compelling reason

- (4) However, the medical certificate must be given to the employer as soon as reasonably practicable (which may be at a time before or after the paternity leave has started) if it was not reasonably practicable for the employee to comply with subsection (3) because of:
 - (a) the premature birth of the child; or
 - (b) any other compelling reason.

Section does not apply if could not be complied with

- (5) This section does not apply to an employee who could not comply with the section because of circumstances beyond his control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

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287 Short paternity leave—application

- (1) To be entitled to short paternity leave during a period, an employee must give his employer a written application for short paternity leave, in accordance with this section, stating the first and last days of the period.
- (2) The application must be given to the employer as soon as reasonably practicable on or after the first day of the period of leave.
- (3) This section does not apply to an employee who could not comply with the section because of circumstances beyond his control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

288 Long paternity leave—documentation

Requirement for application

- (1) To be entitled to long paternity leave during a period, an employee must give his employer a written application for long paternity leave in accordance with this section stating the first and last days of the period.

General rule

- (2) The application must be given to the employer no later than 10 weeks before the first day of the intended continuous period of leave including (or constituted by) the long paternity leave.

Premature birth or other compelling reason

- (3) However, the application must be made as soon as reasonably practicable (which may be at a time before or after the long paternity leave has started) if it was not reasonably practicable for the employee to comply with subsection (2) because of:
 - (a) the premature birth of the child; or
 - (b) any other compelling reason.

Statutory declaration with application

- (4) The application must be accompanied by a statutory declaration made by the employee stating the following:
- (a) the first and last days of the period (or periods) of any other authorised leave intended to be taken (or already taken) by the employee because of the birth or the expected birth;
 - (b) the first and last days of the period (or periods) of any maternity leave, or any other authorised leave of the same type as maternity leave, intended to be taken (or already taken) by the employee's spouse because of the pregnancy, the birth or the expected birth;
 - (c) that the employee intends to be the child's primary care-giver at all times while on long paternity leave;
 - (d) that the employee will not engage in any conduct inconsistent with his contract of employment while on long paternity leave.

Section does not apply if could not be complied with

- (5) This section does not apply to an employee who could not comply with the section because of circumstances beyond his control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

Subdivision G—Paternity leave: from start to finish

289 Short paternity leave—when taken

An employee may take short paternity leave to which he is entitled at any time within the week starting on the day his spouse begins to give birth.

Note: Short paternity leave must be taken in a single, unbroken period (see section 282). The combined total of paternity leave and related authorised leave taken by the employee and his spouse must be no more than 52 weeks (see section 283). Short paternity leave may be taken concurrently with any authorised leave taken by the employee's spouse in relation to the birth of the child (see section 284).

290 Long paternity leave—when taken

An employee may take long paternity leave to which he is entitled at any time within 12 months after the date of birth of the child.

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Note: Long paternity leave must be taken in a single, unbroken period (see section 282). The combined total of paternity leave and related authorised leave taken by the employee and his spouse must be no more than 52 weeks (see section 283). Long paternity leave must not be taken concurrently with any maternity leave, or any other authorised leave of the same type as maternity leave, taken by the employee's spouse because of the birth of the child (see section 285).

291 End of pregnancy—effect on paternity leave

- (1) This section applies if the pregnancy of an employee's spouse ends otherwise than by the birth of a living child.
- (2) The employee is not, or is no longer, entitled to paternity leave in relation to the pregnancy.
- (3) To avoid doubt, this section does not affect any entitlement of an employee to short paternity leave that was taken by the employee in expectation of the birth.

292 Death of child—effect on paternity leave

- (1) This section applies if an employee's spouse gives birth to a living child, but the child later dies.
- (2) If, when the child died, the employee had not yet started a period of paternity leave in relation to the birth, the employee is not, or is no longer, entitled to that leave.
- (3) Subject to subsections (4) and (5), if, when the child died, the employee had started a period of paternity leave in relation to the birth, the employee's entitlement to the leave is not affected by the death of the child.

Note: The employee may shorten a period of long paternity leave by agreement with the employer under section 294. However, if the period of leave including (or constituted by) long paternity leave is longer than 4 weeks, to take advantage of the return to work guarantee under section 296, the employee must also give the employer at least 4 weeks written notice of the proposed day of his return to work.

- (4) The employee's employer may give the employee written notice that, from a stated day no earlier than 4 weeks after the day the notice is given, any untaken long paternity leave that the employee remains entitled to at the stated day is cancelled with effect from that day.

- (5) The employee's entitlement to any untaken long paternity leave in relation to the birth ends with effect from the day stated in the notice.

293 End of long paternity leave if employee stops being primary care-giver

- (1) This section applies if:
- (a) during a substantial period while an employee is on long paternity leave after the birth of a living child, the employee is not the child's primary care-giver; and
 - (b) having regard to the length of that period and to any other relevant circumstances, it is reasonable to expect that the employee will not again become the child's primary care-giver within a reasonable period.
- (2) The employee's employer may give the employee written notice that, from a stated day no earlier than 4 weeks after the day the notice is given, any untaken long paternity leave that the employee remains entitled to at the stated day is cancelled with effect from that day.
- (3) The employee's entitlement to any untaken long paternity leave in relation to the birth ends with effect from the day stated in the notice.

294 Variation of period of long paternity leave

- (1) This section applies after an employee has started a continuous period of leave including (or constituted by) long paternity leave.
- (2) Subject to Subdivision E and sections 290, 292 and 293:
- (a) the employee may extend the period of long paternity leave once by giving his employer 14 days written notice before the end of the period stating the period by which the leave is extended; and
 - (b) the period of long paternity leave may be further extended by agreement between the employee and his employer.
- (3) The period of long paternity leave may be shortened by written agreement between the employee and his employer.

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Note: However, if the period of leave including (or constituted by) long paternity leave is longer than 4 weeks, to take advantage of the return to work guarantee under section 296, the employee must also give his employer at least 4 weeks written notice of the proposed day of his return to work.

295 Employee's right to terminate employment during paternity leave

- (1) An employee may terminate his employment at any time during a period of paternity leave.
- (2) The employee's right to terminate his employment is subject to any notice required to be given by the employee by or under:
 - (a) a term or condition of his employment; or
 - (b) a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory.

296 Return to work guarantee—paternity leave

- (1) This section applies to an employee who returns to work after a period of leave including (or constituted by) paternity leave (the *paternity-related leave period*) if:
 - (a) the paternity-related leave period is 4 weeks or less; or
 - (b) if the paternity-related leave period is longer than 4 weeks—the employee has given his employer written notice of the proposed day of his return to work no later than 4 weeks before that day; or
 - (c) the employee's entitlement to long paternity leave ends under section 292 or 293.
- (2) The employee is entitled to return:
 - (a) unless paragraph (b) or (c) applies—to the position he held immediately before the start of the paternity-related leave period; or
 - (b) if he was promoted or voluntarily transferred to a new position during the paternity-related leave period—to the new position; or
 - (c) if paragraph (b) does not apply, and he began working part-time because of his spouse's pregnancy—to the position he held immediately before starting to work part-time.

- (3) However, if the position (the *former position*) no longer exists, and the employee is qualified and able to work for his employer in another position, the employee is entitled to return to:
 - (a) that position; or
 - (b) if there are 2 or more such positions—whichever position is nearest in status and remuneration to the former position.

297 Replacement employees—long paternity leave

- (1) Before an employer engages an employee (a *primary replacement*) to do the work of another employee because the other employee is taking a continuous period of leave including (or constituted by) paternity leave, the employer must tell the primary replacement:
 - (a) that the engagement to do that work is temporary; and
 - (b) what the rights of the employee taking paternity leave are under section 296 when he returns to work after the period of leave.
- (2) Before an employer engages an employee (a *secondary replacement*) to do the work of another employee (the *primary replacement*) because the primary replacement has been temporarily promoted or transferred to do the work of a third employee while the third employee is taking a continuous period of leave including (or constituted by) paternity leave, the employer must tell the secondary replacement:
 - (a) that the engagement to do that work is temporary; and
 - (b) what the rights of the employee taking paternity leave are under section 296 when he returns to work after the period of leave.
- (3) In this section:

employee has the meaning given by subsection 5(1).

Subdivision H—Guarantee of adoption leave

298 Meaning of *eligible child*

For the purposes of this Division, a child is an *eligible child* in relation to an employee with whom the child is, or is to be, placed for adoption, if the child:

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- (a) is (or will be) under the age of 5 years as at the day of placement or the proposed day of placement; and
- (b) has not (or will have not) previously lived continuously with the employee for a period of 6 months or more as at the day of placement or the proposed day of placement; and
- (c) is not a child or step-child of the employee or the employee's spouse.

299 The guarantee—pre-adoption leave

- (1) This section applies if an employee is seeking to obtain approval to adopt an eligible child.

Entitlement to leave

- (2) The employee is entitled to a period of up to 2 days unpaid leave (*pre-adoption leave*) to attend any interviews or examinations required to obtain the approval.
- (3) However, the employee is not entitled to take a period of pre-adoption leave if:
 - (a) the employee could take other authorised leave instead for the same period for the purpose mentioned in subsection (2); and
 - (b) the employee's employer directs the employee to take such leave for the period.
- (4) An employee who is entitled to a period of pre-adoption leave is entitled to take the leave as:
 - (a) a single, unbroken, period of up to 2 days; or
 - (b) any separate periods to which the employee and his or her employer agree.

Agreement between employees and employers

- (5) For the purposes of paragraph (4)(b), an employee and an employer are taken to agree about a particular matter in a particular way if a provision of a workplace agreement binding the employee and the employer specifies that the matter is to be dealt with in that way.

- (6) To avoid doubt, subsection (5) does not prevent employees and employers agreeing about matters by other means.

300 The guarantee—adoption leave

- (1) For the purposes of this Division, *adoption leave* is:
- (a) a single, unbroken period of unpaid leave (*short adoption leave*) of up to 3 weeks taken by an employee within the 3 weeks starting on the day of placement of an eligible child with the employee for adoption; or
 - (b) a single, unbroken period of unpaid leave (*long adoption leave*), other than short adoption leave, taken by an employee after the day of placement of an eligible child with the employee for adoption so that the employee can be the child's primary care-giver.
- (2) Subject to this Subdivision and Subdivision J, an employee is entitled to adoption leave if:
- (a) the employee complies with the applicable documentation requirements under Subdivision I; and
 - (b) immediately before the first day on which the adoption leave is, or is to be, taken:
 - (i) the employee has, or will have, completed at least 12 months continuous service with his or her employer; or
 - (ii) the employee is, or will be, an eligible casual employee.
- Note: Entitlement to adoption leave is subject to the restrictions in sections 301 and 303 and Subdivision J.
- (3) Subject to this Division, an employee may take short adoption leave, long adoption leave, or both.

301 Period of adoption leave

- (1) In this section:
- related authorised leave*, in relation to adoption leave taken (or to be taken) by an employee because of the placement of a child with the employee and the employee's spouse, means any of the following types of authorised leave other than pre-adoption leave:
- (a) authorised leave, other than adoption leave, taken by the employee because of the placement of the child with the employee;

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- (b) adoption leave, or any other authorised leave of the same type as adoption leave, taken by the spouse because of the placement of the child with the employee.
- (2) An employee may take a period of adoption leave as part of a continuous period including any other authorised leave.
- (3) The maximum total amount of adoption leave (including short adoption leave and long adoption leave) that an employee is entitled to in relation to a placement is 52 weeks, less an amount equal to the total amount of related authorised leave taken:
 - (a) by the employee before or after the adoption leave; and
 - (b) by the employee's spouse before or after the adoption leave.

Example: Susan and her spouse Ali propose to adopt a child, and both are employees entitled to adoption leave. Because of the placement of the child, Susan intends to take authorised leave consisting of 3 weeks of short adoption leave, 4 weeks of annual leave, 12 weeks of long service leave and a period of long adoption leave.

Because of the placement of the child, Ali intends to take 3 weeks of short adoption leave.

The maximum amount of long adoption leave to which Susan is entitled is 30 weeks, worked out as follows:

- (a) the maximum entitlement of any employee to adoption leave is 52 weeks;
- (b) the maximum amount of long adoption leave available to Susan must be reduced by 3 weeks for her short adoption leave;
- (c) the maximum amount must also be reduced by 16 weeks for Susan's annual leave and long service leave;
- (d) the maximum amount must also be further reduced by 3 weeks for Ali's short adoption leave.

Note: A period of long adoption leave must end within 12 months after the day of placement of the child (see section 309).

302 Short adoption leave—concurrent leave taken by spouse

An employee may take short adoption leave in relation to the placement of a child while his or her spouse is taking any authorised leave, including adoption leave (if any), in relation to the placement.

303 Long adoption leave—not to be concurrent with adoption leave taken by spouse

A period of long adoption leave taken by an employee in relation to the placement of a child with the employee and the employee's spouse must not include any period during which the spouse is taking adoption leave, or any other authorised leave of the same type as adoption leave, because of the placement.

Subdivision I—Adoption leave: documentation

304 Adoption leave—notice

Requirement for notice

- (1) To be entitled to adoption leave, an employee must give his or her employer notice in accordance with this section.

Note: After an employee has given his or her employer notice in accordance with this section, the employee will have satisfied the notice requirement in relation to the employee's entitlement to both short adoption leave and long adoption leave.

Notices to be given to the employer

- (2) An employee must give written notice to his or her employer of the employee's intention to apply for adoption leave as soon as reasonably practicable after receiving notice (a **placement approval notice**) of the approval of the placement of an eligible child with the employee.
- (3) An employee must give written notice to his or her employer of the day when the placement of an eligible child with the employee is expected to start as soon as reasonably practicable after receiving notice (a **placement notice**) of the expected day.
- (4) An employee must give written notice to his or her employer of the first and last days of the periods of short and long adoption leave (or of either type of leave) the employee intends to apply for because of the placement:
 - (a) if the employee receives a placement notice about the placement within the period of 8 weeks after receiving the placement approval notice—before the end of that 8 week period; or

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- (b) if the employee receives a placement notice about the placement after the end of the period of 8 weeks after receiving the placement approval notice—as soon as reasonably practicable after receiving the placement notice.

Adoption of a relative of the employee

- (5) If an eligible child who is to be adopted by an employee is a relative of the employee, and the employee decides to take the child into custody pending the authorisation of the placement of the child with the employee, the employee must:
 - (a) give notice to his or her employer of the employee's decision as soon as reasonably practicable after the decision is made; and
 - (b) give the notices required by subsections (2), (3) and (4) in accordance with those subsections.

Note: The employee's entitlement to adoption leave after taking the child into custody starts when the adoption is authorised (this is the *day of placement* of the child—see definition of *day of placement* in section 263).

Adoption process started before engagement with the employer

- (6) If, before starting an employee's current period of engagement with his or her employer, the employee had already received a placement approval notice or a placement notice, or had made a decision to take a child into custody as mentioned in subsection (5), the employee must give the notices required by this section to the employer as soon as reasonable practicable after starting the period of engagement.

Note: However, the employee is only entitled to take either short or long adoption leave if the employee will have completed 12 months continuous service with the employer immediately before the first day on which the leave is to be taken, or if the employee is an eligible casual employee (see section 300).

If employee cannot comply

- (7) A notice under this section must be given to the employee's employer as soon as reasonably practicable before the first day of adoption leave taken by the employee, if the employee cannot comply with subsection (2), (3), (4), (5) or (6) because of:
 - (a) the day when the placement is expected to start; or

(b) any other compelling reason.

(8) In this section:

relative, of an employee, means:

- (a) a grandchild, nephew, niece or sibling of the employee; or
- (b) a grandchild, nephew, niece or sibling of the employee's spouse.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

305 Short adoption leave—application

Requirement for application

- (1) To be entitled to short adoption leave during a period, an employee must give his or her employer a written application for short adoption leave, in accordance with this section, stating the first and last days of the period.

General rule

- (2) The application must be given to the employer no later than 14 days before the proposed day of placement of the child.

If employee cannot comply with general rule

- (3) The application must be given to the employer as soon as reasonably practicable before the first day of the short adoption leave applied for if the employee cannot comply with subsection (2) because of:
 - (a) the day when the placement is expected to start; or
 - (b) any other compelling reason.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

306 Long adoption leave—application

Requirement for application

- (1) To be entitled to long adoption leave during a period, an employee must give his or her employer a written application for long

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adoption leave, in accordance with this section, stating the first and last days of the period.

General rule

- (2) The application must be given to the employer no later than 10 weeks before the first day of the proposed continuous period of leave including (or constituted by) the long adoption leave applied for.

If employee cannot comply with general rule

- (3) The application must be given to the employer as soon as reasonably practicable before the first day of the long adoption leave applied for if the employee cannot comply with subsection (2) because of:
 - (a) the day when the placement is expected to start; or
 - (b) any other compelling reason.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

307 Adoption leave—additional documents

- (1) To be entitled to adoption leave, an employee must give his or her employer documents as required by this section.
- (2) The documents required by this section must be given to the employer:
 - (a) before the employee begins the period of adoption leave; or
 - (b) if the employee is taking both short and long adoption leave—before the employee begins the period of short adoption leave.
- (3) The employee must give his or her employer the following documents:
 - (a) a statement from an adoption agency of the day when the placement is expected to start;
 - (b) a statutory declaration in accordance with subsection (4) made by the employee.

- (4) The statutory declaration must state the following:
- (a) whether the employee is taking short adoption leave, long adoption leave, or both;
 - (b) the first and last days of the period (or periods) of any other authorised leave taken, or intended to be taken, by the employee because of the placement of the child;
 - (c) the first and last days of the period (or periods) of adoption leave, or any other authorised leave of the same type as adoption leave, taken, or intended to be taken, by the employee's spouse because of the placement of the child;
 - (d) that the child is an eligible child;
 - (e) for any period of long adoption leave to be taken by the employee—that the employee intends to be the child's primary care-giver at all times while on the long adoption leave;
 - (f) that the employee will not engage in any conduct inconsistent with his or her contract of employment while on adoption leave.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

Subdivision J—Adoption leave: from start to finish

308 Short adoption leave—when taken

An employee may take short adoption leave to which he or she is entitled at any time within the period of 3 weeks starting on the day of placement of the child.

Note: Short adoption leave must be taken in a single, unbroken period (see section 300). The combined total of adoption leave and related authorised leave taken by the employee and his or her spouse must be no more than 52 weeks (see section 301). Short adoption leave may be taken concurrently with any authorised leave taken by the employee's spouse (see section 302).

309 Long adoption leave—when taken

An employee may take long adoption leave to which he or she is entitled at any time within 12 months after the day of placement of the child.

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Note: Long adoption leave must be taken in a single, unbroken period (see section 300). The combined total of adoption and authorised leave taken by the employee and his or her spouse must be no more than 52 weeks (see section 301). Long adoption leave must not be taken concurrently with any adoption leave, or any other authorised leave of the same type as adoption leave, taken by the employee's spouse because of the placement (see section 303).

310 Placement does not proceed—effect on adoption leave

- (1) This section applies if a proposed placement of a child with an employee:
 - (a) is cancelled before it starts, whether at the initiative of an adoption agency, another body, or the employee; or
 - (b) starts but is later discontinued for any reason (including the death of the child).
- (2) If, when this section first applies, the employee had not yet started a period of adoption leave in relation to the placement, the employee is not, or is no longer, entitled to the leave.
- (3) Subject to subsections (4) and (5), if, when this section applies, the employee had started a period of adoption leave in relation to the placement, the employee's entitlement to the adoption leave is not affected by the cancellation or discontinuation of the placement.

Note: The employee may shorten a period of long adoption leave by agreement with the employer under section 312. However, if the period of leave including (or constituted by) long adoption leave is longer than 4 weeks, to take advantage of the return to work guarantee under section 314, the employee must also give the employer at least 4 weeks written notice of the proposed day of his or her return to work.

- (4) The employee's employer may give the employee written notice that, from a stated day no earlier than 4 weeks after the day the notice is given, any untaken long adoption leave that the employee remains entitled to at the stated day is cancelled with effect from that day.
- (5) The employee's entitlement to any untaken long adoption leave in relation to the placement ends with effect from the day stated in the notice.

311 End of long adoption leave if employee stops being primary care-giver

- (1) This section applies if:
 - (a) during a substantial period while an employee is on long adoption leave after the placement of a child with the employee, the employee is not the child's primary care-giver; and
 - (b) having regard to the length of that period and to any other relevant circumstances, it is reasonable to expect that the employee will not again become the child's primary care-giver within a reasonable period.
- (2) The employee's employer may give the employee written notice that, from a stated day no earlier than 4 weeks after the day the notice is given, any untaken long adoption leave that the employee remains entitled to at the stated day is cancelled with effect from that day.
- (3) The employee's entitlement to any untaken long adoption leave in relation to the placement ends with effect from the day stated in the notice.

312 Variation of period of long adoption leave

- (1) This section applies after an employee has started a continuous period of leave including (or constituted by) long adoption leave.
- (2) Subject to Subdivision H and sections 309, 310 and 311:
 - (a) the employee may extend the period of long adoption leave once by giving his or her employer 14 days written notice before the end of the period stating the period by which the leave is extended; and
 - (b) the period of long adoption leave may be further extended by agreement between the employee and his or her employer.
- (3) The period of long adoption leave may be shortened by written agreement between the employee and his or her employer.

Note: However, if the period of leave including (or constituted by) long adoption leave is longer than 4 weeks, to take advantage of the return to work guarantee under section 314, the employee must also give his or her employer at least 4 weeks written notice of the proposed day for his or her return to work.

Section 313

313 Employee's right to terminate employment during adoption leave

- (1) An employee may terminate his or her employment at any time during a period of adoption leave.
- (2) The employee's right to terminate his or her employment is subject to any notice required to be given by the employee by or under:
 - (a) a term or condition of his or her employment; or
 - (b) a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory.

314 Return to work guarantee—adoption leave

- (1) This section applies to an employee who returns to work after a period of leave including (or constituted by) adoption leave (the *adoption-related leave period*) if:
 - (a) the adoption-related leave period is 4 weeks or less; or
 - (b) if the adoption-related leave period is longer than 4 weeks—the employee has given his or her employer written notice of the proposed day of his or her return to work no later than 4 weeks before that day; or
 - (c) the employee's entitlement to long adoption leave ends under section 310 or 311.
- (2) The employee is entitled to return:
 - (a) unless paragraph (b) applies—to the position he or she held immediately before the start of the adoption-related leave period; or
 - (b) if he or she was promoted or voluntarily transferred to a new position during the adoption-related leave period—to the new position.
- (3) However, if the position (the *former position*) no longer exists, and the employee is qualified and able to work for his or her employer in another position, the employer must employ the employee in:
 - (a) that position; or
 - (b) if there are 2 or more such positions—whichever position is nearest in status and remuneration to the former position.

315 Replacement employees—long adoption leave

- (1) Before an employer engages an employee (a *primary replacement*) to do the work of another employee because the other employee is taking a continuous period of leave including (or constituted by) adoption leave, the employer must tell the primary replacement:
 - (a) that the engagement to do that work is temporary; and
 - (b) what the rights of the employee taking adoption leave are under section 314 when he or she returns to work after the period of leave.
- (2) Before an employer engages an employee (a *secondary replacement*) to do the work of another employee (the *primary replacement*) because the primary replacement has been temporarily promoted or transferred to do the work of a third employee while the third employee is taking a continuous period of leave including (or constituted by) adoption leave, the employer must tell the secondary replacement:
 - (a) that the engagement to do that work is temporary; and
 - (b) what the rights of the employee taking adoption leave are under section 314 when he or she returns to work after the period of leave.
- (3) In this section:

employee has the meaning given by subsection 5(1).

Subdivision K—Parental leave: service

316 Parental leave and service

- (1) A period of parental leave does not break an employee's continuity of service.
- (2) However, a period of parental leave does not otherwise count as service except:
 - (a) for the purpose of determining the employee's entitlement to a later period of leave under this Division; or
 - (b) as expressly provided by or under:
 - (i) a term or condition of the employee's employment; or
 - (ii) a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory; or

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(c) as prescribed by the regulations.

(3) In this section:

parental leave means any of the following:

- (a) maternity leave;
- (b) paid leave under subparagraph 268(2)(b)(i) or (ii);
- (c) paternity leave;
- (d) pre-adoption leave;
- (e) adoption leave.

Division 7—Civil remedies

317 Definition

In this Division:

Court means the Federal Court of Australia or the Federal Magistrates Court.

318 Civil remedies

- (1) An employer must not contravene a term of the Australian Fair Pay and Conditions Standard contained in Division 3, 4, 5 or 6 of this Part in relation to an employee of the employer to whom that term applies.
- (2) Subsection (1) is a civil remedy provision.
- (3) The reference in subsection (1) to Division 6 of this Part includes a reference to that Division as it applies because of section 689.

Note: For the purposes of subsection (3), **employer**, **employee** and **employment** have their ordinary meaning. See sections 5, 6 and 7 and Schedule 2.

319 Standing for civil remedies

- (1) Any of the following persons may apply to the Court for an order under this Division in relation to a contravention referred to in subsection 318(1):
 - (a) the employee concerned;
 - (b) an organisation of employees (subject to subsection (2));
 - (c) a workplace inspector.
- (2) An organisation of employees must not apply on behalf of an employee for a remedy under this Division in relation to a contravention unless:
 - (a) a member of the organisation is employed by the respondent employer; and
 - (b) the contravention relates to, or affects, the member of the organisation or work carried on by the member for the employer.

Section 320

320 Court orders

The Court may, on application by a person in accordance with section 319, make one or more of the following orders in relation to an employer who has contravened a relevant term of the Australian Fair Pay and Conditions Standard:

- (a) an order requiring the employer to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention;
- (b) any other orders (including injunctions) that the Court considers necessary to stop the contravention or rectify its effects.

Part 8—Workplace agreements

Division 1—Preliminary

321 Definitions

In this Part:

Court means the Federal Court of Australia or the Federal Magistrates Court.

new business has the meaning given by section 323.

prohibited content has the meaning given by section 356.

undertakings means undertakings mentioned in section 394.

verified copy, in relation to a document, means a copy that is certified as being a true copy of the document.

322 Single business and single employer

- (1) For the purposes of this Part, a *single business* is:
 - (a) a business, project or undertaking that is carried on by an employer; or
 - (b) the activities carried on by:
 - (i) the Commonwealth, a State or a Territory; or
 - (ii) a body, association, office or other entity established for a public purpose by or under a law of the Commonwealth, a State or a Territory; or
 - (iii) any other body in which the Commonwealth, a State or a Territory has a controlling interest.
- (2) For the purposes of this Part:
 - (a) if 2 or more employers carry on a business, project or undertaking as a joint venture or common enterprise, the employers are taken to be one employer; and
 - (b) if 2 or more corporations that are related to each other for the purposes of the *Corporations Act 2001* each carry on a single business:

Section 323

- (i) the corporations may be treated as one employer; and
 - (ii) the single businesses may be treated as one single business.
- (3) For the purposes of this Part, a part of a single business includes, for example:
- (a) a geographically distinct part of the single business; or
 - (b) a distinct operational or organisational unit within the single business.

323 New business

For the purposes of sections 329 and 330, an agreement relates to a *new business* if:

- (a) the agreement relates to:
 - (i) a new business, new project or new undertaking that the employer in relation to the agreement is proposing to establish; or
 - (ii) if the employer in relation to the agreement is an entity mentioned in paragraph 322(1)(b)—new activities proposed to be carried on by the employer; and
- (b) the business, project or undertaking is, or the activities are, a single business (or a part of a single business).

324 Extended operation of Part in relation to proposed workplace agreements

So far as the context permits:

- (a) a reference in this Part to a workplace agreement includes a reference to a proposed workplace agreement; and
- (b) a reference in this Part to an employer, in relation to a workplace agreement, includes a reference to a person who will be an employer in relation to a proposed agreement when it comes into operation; and
- (c) a reference in this Part to an employee, in relation to a workplace agreement, includes a reference to a person who will be an employee in relation to a proposed agreement when it comes into operation.

324A Documents taken to be workplace agreements etc.

If a document:

- (a) is represented (expressly or by implication) to be a workplace agreement, or a type of workplace agreement mentioned in section 326, 327, 328, 329, 330 or 331; and
- (b) could not come into operation under this Act as a workplace agreement, or as a workplace agreement of that type, even if it were to pass the no-disadvantage test;

the document is taken to be a workplace agreement, or a workplace agreement of that type, for the purposes of:

- (c) Divisions 3 and 4, Division 5 (other than section 342), Divisions 8, 9 and 10 and Division 11 (other than sections 409 to 412A); and
- (d) any other provision of this Act, to the extent that the provision relates to the operation of any of the provisions mentioned in paragraph (c).

Note: The Court can order under section 412A that a document is to have effect as a workplace agreement for the purposes of the entire Act.

325 Extraterritorial extension

- (1) This Part, and the rest of this Act so far as it relates to this Part, extends to persons, acts, omissions, matters and things outside Australia that are connected with a workplace agreement relating to an Australian-based employee or an Australian employer.

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

- (2) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

Division 2—Types of workplace agreements

326 Individual transitional employment agreements

- (1) An employer may make an agreement (an *individual transitional employment agreement* or *ITEA*) in writing with a person whose employment will be subject to the agreement.
 - (2) The agreement is not an ITEA unless:
 - (a) as at 1 December 2007 the employer employed at least one person whose employment with that employer was regulated by an agreement of a kind specified in subsection (3); and
 - (b) the person whose employment is to be subject to the ITEA:
 - (i) did not commence that employment more than 14 days before the day on which the ITEA was made, and had not previously been employed by the employer; or
 - (ia) did not commence that employment more than 14 days before the day on which the ITEA was made, and had previously been employed by the employer (not being employment that had ceased for the reason that, or for reasons that included the reason that, the employer would re-employ the person under an ITEA); or
 - (ii) is in an employment relationship with the employer and that employment relationship is regulated by an ITEA or an agreement of a kind specified in subsection (3).
- Note: Subsection 583(1A) affects the operation of paragraph (2)(b) in the case of a transmission of business.
- (3) The kinds of agreements for the purposes of paragraph (2)(a) and subparagraph (2)(b)(ii) are the following:
 - (a) an AWA within the meaning of Schedule 7A;
 - (b) a pre-reform AWA;
 - (c) a preserved individual State agreement within the meaning of Schedule 8;
 - (d) an employment agreement within the meaning of section 887.
 - (4) The fact that a period of work performed by a casual employee has ended does not of itself bring an end to the employee's

employment relationship with the employer for the purposes of subparagraph (2)(b)(ii).

- (5) An ITEA may be made before the commencement of the employment.

327 Employee collective agreements

An employer may make an agreement (an *employee collective agreement*) in writing with persons employed at the time in a single business (or part of a single business) of the employer whose employment will, or would but for the operation of an ITEA that has passed its nominal expiry date, be subject to the agreement.

328 Union collective agreements

An employer may make an agreement (a *union collective agreement*) in writing with one or more organisations of employees if, when the agreement is made, each organisation:

- (a) has at least one member whose employment in a single business (or part of a single business) of the employer will be subject to the agreement; and
- (b) is entitled to represent the industrial interests of the member in relation to work that will be subject to the agreement.

329 Union greenfields agreements

- (1) An employer may make an agreement (a *union greenfields agreement*) in writing with one or more organisations of employees if:
- (a) the agreement relates to a new business that the employer proposes to establish, or is establishing, when the agreement is made; and
 - (b) the agreement is made before the employment of any of the persons:
 - (i) who will be necessary for the normal operation of the business; and
 - (ii) whose employment will be subject to the agreement; and
 - (c) each organisation meets the requirements of subsection (2).

Section 330

- (2) When the agreement is made, each organisation must be entitled to represent the industrial interests of one or more of the persons, whose employment is likely to be subject to the agreement, in relation to work that will be subject to the agreement.

330 Employer greenfields agreements

An employer may make an agreement (an *employer greenfields agreement*) in writing if:

- (a) the agreement relates to a new business that the employer proposes to establish, or is establishing, when the agreement is made; and
- (b) the agreement is made before the employment of any of the persons:
 - (i) who will be necessary for the normal operation of the business; and
 - (ii) whose employment will be subject to the agreement.

331 Multiple-business agreements

- (1) A *multiple-business agreement* is an agreement that:
- (a) relates to any combination or combinations of the following:
 - (i) one or more single businesses;
 - (ii) one or more parts of single businesses; carried on by one or more employers; and
 - (b) would be a collective agreement of a type mentioned in section 327, 328, 329 or 330 but for the matter in paragraph (a).

Note: For civil remedy provisions dealing with the making or variation of a multiple-business agreement, see sections 343 and 376.

- (2) So far as the context permits, this Part (apart from this Division) has effect in relation to a multiple-business agreement of a particular type as if the agreement were a collective agreement (other than a multiple-business agreement) of that type.
- (3) So far as the context permits, this Part (apart from this Division) has effect in relation to a multiple-business agreement with more than one employer as if a reference to the employer in relation to an agreement were a reference to an employer in relation to the agreement.

332 Authorisation of multiple-business agreements

- (1) An employer may apply to the Workplace Authority Director for an authorisation to make or vary a multiple-business agreement.
- (2) The regulations may set out a procedure for applying to the Workplace Authority Director for the authorisation. The Workplace Authority Director need not consider an application if it is not made in accordance with the procedure.
- (3) The Workplace Authority Director must not grant the authorisation unless he or she is satisfied that it is in the public interest to do so, having regard to:
 - (a) whether the matters dealt with by the agreement (or the agreement as varied) could be more appropriately dealt with by a collective agreement other than a multiple-business agreement; and
 - (b) any other matter specified in regulations made for the purposes of this subsection.

333 When a workplace agreement is made

For the purposes of this Act, a workplace agreement is *made* at whichever of the following times is applicable:

- (a) for an ITEA—the time when the ITEA is approved in accordance with section 340;
- (b) for an employee collective agreement—the time when the agreement is approved in accordance with section 340;
- (c) for a union collective agreement—the time when the employer and the organisation or organisations agree to the terms of the agreement;
- (d) for a union greenfields agreement—the time when the employer and the organisation or organisations agree to the terms of the agreement;
- (e) for an employer greenfields agreement—the time when the employer lodges the agreement (see section 344).

Division 3—Bargaining agents

334 Bargaining agents—ITEAs

- (1) An employer or employee may appoint a person to be his or her bargaining agent in relation to the making, variation or termination of an ITEA. The appointment must be made in writing.

Note: Subsection 400(3) provides a civil remedy for coercion in relation to appointments under this subsection.

- (2) Subject to subsection (3), an employer or employee must not refuse to recognise a bargaining agent duly appointed by the other party for the purposes of subsection (1).
- (3) Subsection (2) does not apply if the person refusing has not been given a copy of the bargaining agent's instrument of appointment before the refusal.
- (4) Subsection (2) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

335 Bargaining agents—employee collective agreements

- (1) An employee whose employment is or will be subject to an employee collective agreement may request another person (the *bargaining agent*) to represent the employee in meeting and conferring with the employer about the making or variation of the agreement.

Note: Subsection 400(4) provides a civil remedy for coercion in relation to requests under this subsection.

- (2) An employee whose employment is or will be subject to an employer greenfields agreement may request another person (the *bargaining agent*) to represent the employee in meeting and conferring with the employer about the variation of the agreement.

Note: Subsection 400(4) provides a civil remedy for coercion in relation to requests under this subsection.

- (3) The employer must give the bargaining agent a reasonable opportunity to meet and confer with the employer about the agreement during the period:

- (a) beginning 7 days before the agreement or variation is approved in accordance with section 340 or section 373; and
 - (b) ending when the agreement or variation is approved.
- (4) Subsection (3) is a civil remedy provision.
- Note: See Division 11 for provisions on enforcement.
- (5) The requirement in subsection (3) ceases to apply to the employer if at any time after the request is made the employee withdraws the request.
- (6) The Workplace Authority Director may issue a certificate that he or she is satisfied of one of the following matters if he or she is so satisfied:
- (a) on application by a bargaining agent—that the employee has made a request in accordance with subsection (1) or (2) for the bargaining agent to represent the employee in meeting and conferring with the employer;
 - (b) on application by the employer—that, after the making of the request, the requirement in subsection (3) for the employer to give a reasonable opportunity to the bargaining agent to meet and confer, has, because of subsection (5), ceased to apply to the employer.
- (7) The certificate must not identify any of the employees concerned. However, it must identify the bargaining agent, the employer and the agreement.
- (8) The certificate is, for all purposes of this Act, prima facie evidence that the employee or employees made the request or that the requirement has ceased to apply.

Division 4—Pre-lodgment procedure

336 Eligible employee

For the purposes of this Division, an *eligible employee* in relation to a workplace agreement is:

- (a) in the case of an ITEA—the person whose employment will be subject to the ITEA; or
- (b) in the case of a collective agreement—a person employed by the employer whose employment will, or would but for the operation of an ITEA that has passed its nominal expiry date, be subject to the agreement.

337 Providing employees with ready access and information statement

- (1) If an employer intends to have a workplace agreement (other than a greenfields agreement) approved under section 340, the employer must take reasonable steps to ensure that all eligible employees in relation to the agreement either have, or have ready access to, the agreement in writing during the period:
 - (a) beginning 7 days before the agreement is approved; and
 - (b) ending when the agreement is approved.
- (2) The employer must take reasonable steps to ensure that all eligible employees in relation to the agreement are given an information statement at least 7 days before the agreement is approved.
- (3) Despite subsections (1) and (2), if the agreement is a collective agreement and a person becomes an eligible employee at a time during the period mentioned in subsection (1), the employer must take reasonable steps to ensure that:
 - (a) the person is given an information statement at or before that time; and
 - (b) the person either has, or has ready access to, the agreement in writing during the period:
 - (i) beginning at that time; and
 - (ii) ending when the agreement is approved under section 340.

- (4) The information statement mentioned in subsection (2) and paragraph (3)(a) must contain:
- (a) information about the time at which and the manner in which the approval will be sought under section 340; and
 - (b) if the agreement is an ITEA—information about the effect of section 334 (which deals with bargaining agents); and
 - (c) if the agreement is an employee collective agreement—information about the effect of section 335 (which deals with bargaining agents); and
 - (d) any other information that the Workplace Authority Director requires by notice published in the *Gazette*.
- (5) If a waiver has been made under section 338 in relation to the workplace agreement:
- (a) subsection (1) and paragraph (3)(b) do not apply if, before the time the waiver was made, the employer had taken reasonable steps to ensure that all eligible employees in relation to the agreement (as at that time) either had, or had ready access to, the agreement in writing; and
 - (b) subsection (2) does not apply if, before the time the waiver was made, the employer had taken reasonable steps to ensure that all eligible employees in relation to the agreement (as at that time) had been given an information statement in relation to the agreement that complies with subsection (4).
- (6) For the purposes of this section, if the workplace agreement incorporates terms from another workplace agreement or an award, the eligible employees have ready access to the workplace agreement only if they have ready access to that other workplace agreement or award in writing.
- (7) To avoid doubt, if the content of the workplace agreement is changed during the period mentioned in subsection (1), the change results in a separate workplace agreement for the purposes of this section.

Note: If the content of an agreement for which the employer intends to seek approval is changed, the procedural steps set out in subsections (1), (2) and (3) must be repeated for the resulting separate agreement.

Section 338

Contravention—ready access

- (8) An employer contravenes this subsection if:
- (a) the employer lodges a workplace agreement; and
 - (b) the employer failed to comply with subsection (1) or (if applicable) paragraph (3)(b) in relation to the agreement.

Contravention—information statement

- (9) An employer contravenes this subsection if:
- (a) the employer lodges a workplace agreement; and
 - (b) the employer failed to comply with subsection (2) or (if applicable) paragraph (3)(a) in relation to the agreement.
- (10) Subsections (8) and (9) are civil remedy provisions.

Note: See Division 11 for provisions on enforcement.

- (11) An employer cannot contravene subsection (8) or (9) more than once in relation to the lodgment of a particular workplace agreement.

338 Employees may waive 7-day period

- (1) The persons mentioned in subsection (2) may make a waiver under this section in relation to a workplace agreement.
- (2) The persons are all the eligible employees at the time the waiver is made.
- (3) The waiver must be in writing and dated.
- (4) The waiver is made when all the persons mentioned in subsection (2) sign the waiver.
- (5) The waiver takes effect when it is made.

Note: For the effect of the waiver, see subsection 337(5).

339 Prohibition on withdrawal from union collective agreement

- (1) An employer that has made a union collective agreement must take reasonable steps to seek approval for the agreement under section 340, within a reasonable period after the agreement was made.

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

Note: See Division 11 for provisions on enforcement.

340 Approval of a workplace agreement

- (1) An ITEA is *approved* if:
- (a) the ITEA is signed and dated by the employee and the employer; and
 - (b) those signatures are witnessed; and
 - (c) if the employee is under the age of 18 years:
 - (i) the ITEA is signed and dated by an appropriate person (such as a parent or guardian of the employee, but not the employer) on behalf of the employee, for the purpose of indicating that person's consent to the employee making the ITEA; and
 - (ii) that person is aged at least 18 years; and
 - (iii) that person's signature is witnessed.
- (2) An employee collective agreement or union collective agreement is *approved* if:
- (a) the employer has given all of the persons employed at the time whose employment will, or would but for the operation of an ITEA that has passed its nominal expiry date, be subject to the agreement a reasonable opportunity to decide whether they want to approve the agreement; and
 - (b) either:
 - (i) if the decision is made by a vote—a majority of those persons who cast a valid vote decide that they want to approve the agreement; or
 - (ii) otherwise—a majority of those persons decide that they want to approve the agreement.

341 Employer must not lodge unapproved agreement

- (1) An employer contravenes this subsection if:
- (a) the employer lodges a workplace agreement (other than a greenfields agreement); and
 - (b) the agreement has not been approved in accordance with section 340.

Part 8 Workplace agreements
Division 4 Pre-lodgment procedure

Section 341

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

Note: See Division 11 for provisions on enforcement.

Division 5—Lodgment

342 Employer must lodge certain workplace agreements with the Workplace Authority Director

- (1) If an ITEA, an employee collective agreement or a union collective agreement has been approved in accordance with section 340, the employer must lodge the agreement, in accordance with section 344, within 14 days after the approval.
- (2) If a union greenfields agreement has been made, the employer must lodge the agreement, in accordance with section 344, within 14 days after the agreement was made.
- (3) Subsections (1) and (2) are civil remedy provisions.

Note: See Division 11 for provisions on enforcement.

343 Lodging multiple-business agreement without authorisation

- (1) An employer contravenes this section if:
 - (a) the employer lodges a multiple-business agreement; and
 - (b) the agreement has not been authorised under section 332.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

344 Lodging of workplace agreement documents with the Workplace Authority Director

- (1) The employer in relation to a workplace agreement lodges the workplace agreement with the Workplace Authority Director if:
 - (a) the employer lodges a declaration under subsection (2); and
 - (b) the workplace agreement:
 - (i) in the case of an ITEA—meets the signature requirements of subsection 340(1); or
 - (ii) in the case of a collective agreement—meets the signature requirements of regulations made for the purposes of paragraph 418(e); and
 - (c) a copy of the signed agreement is annexed to the declaration.

Section 345

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

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

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

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

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

- (5) The Workplace Authority Director is not required to consider or determine whether any of the requirements of this Part (other than Division 5A) have been met in relation to the making or content of anything annexed to a declaration lodged in accordance with subsection (2).

345 Workplace Authority Director must issue receipt for lodgment of declaration for workplace agreement

- (1) If a declaration is lodged under subsection 344(2), the Workplace Authority Director must issue a receipt for the lodgment.
- (2) The Workplace Authority Director must give a copy of the receipt to:
- (a) the employer in relation to the workplace agreement; and
 - (b) if the workplace agreement is an ITEA—the employee; and
 - (c) if the agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.

346 Employer must notify employees after lodging workplace agreement

- (1) An employer that has received a receipt under section 345 in relation to a collective agreement must take reasonable steps to ensure that all persons whose employment is subject to the agreement when the employer receives the receipt are given a copy of the receipt within 21 days.
- (2) Subsection (1) is a civil remedy provision.
Note: See Division 11 for provisions on enforcement.
- (3) This section does not apply in relation to a greenfields agreement.

346A Employer to provide copy of lodged ITEA to employee

- (1) As soon as practicable after an employer lodges an ITEA with the Workplace Authority Director, the employer must give a copy of the ITEA to the employee whose employment is subject to the ITEA.
- (2) Subsection (1) is a civil remedy provision.
Note: See Division 11 for provisions on enforcement.

Division 5A—The no-disadvantage test

Subdivision A—Preliminary

346B Definitions

- (1) In this Division:

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

industrial instrument means any of the following:

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

reference instrument has the meaning given by subsection 346E(1).

relevant collective instrument has the meaning given by subsection 346E(2).

relevant general instrument has the meaning given by subsection 346E(4).

- (2) Unless the contrary intention appears, this Division (other than sections 346K and 346L and Subdivision D) applies to a workplace agreement as varied under Division 8 in a corresponding way to the way in which it applies to a workplace agreement.

346C Application of Division to workplace agreements

- (1) The obligations imposed on the Workplace Authority Director by this Division in relation to a workplace agreement apply irrespective of whether the workplace agreement is yet to operate, is in operation or has ceased to operate.
- (2) For the purposes of applying this Division to a workplace agreement that has ceased to operate:
 - (a) a reference to an employee whose employment is subject to the workplace agreement is taken to include a reference to an employee whose employment was at any time subject to the workplace agreement; and
 - (b) a reference to a person or organisation who is bound by the workplace agreement is taken to include a reference to a person or organisation who was at any time bound by the workplace agreement.
- (3) For the purposes of applying this Division to a workplace agreement, a reference to an employee whose employment is subject to the workplace agreement is, so far as the context permits, taken to include a reference to a person whose employment may at a future time be subject to the workplace agreement.

Subdivision B—The no-disadvantage test

346D When does an agreement pass the no-disadvantage test?

- (1) An ITEA passes the no-disadvantage test if the Workplace Authority Director is satisfied that the ITEA does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employee whose employment is subject to the agreement under any reference instrument relating to the employee.
- (2) A collective agreement passes the no-disadvantage test if the Workplace Authority Director is satisfied that the agreement does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees whose employment is subject to the agreement under any reference instrument relating to one or more of the employees.

Section 346D

- (2A) For the purposes of subsection (1) or (2):
- (a) a law of a State or Territory that:
 - (i) relates to long service leave; and
 - (ii) immediately before the agreement was lodged, applied to an employee referred to in that subsection, or would have applied to such an employee if he or she had been employed by the employer at that time;
is taken, to the extent that it provides for long service leave, to be a reference instrument relating to the employee; and
 - (b) if, apart from this subsection, the only reference instrument relating to the employee is a designated award for the employee—the designated award is to be disregarded to the extent (if any) that it provides for long service leave.
- (3) An employee collective agreement or a union collective agreement is taken to pass the no-disadvantage test if:
- (a) it does not meet the requirements of subsection (2); but
 - (b) the Workplace Authority Director is satisfied that, because of exceptional circumstances, approval of the agreement would not be contrary to the public interest.
- (4) An example of a case where the Workplace Authority Director may be satisfied that the requirements in paragraph (3)(b) are met is where making the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the employer's business.
- (5) If the Workplace Authority Director decides under subsection (3) that an agreement is taken to pass the no-disadvantage test, the Workplace Authority Director must publish his or her reasons for the decision on the Workplace Authority's website.
- (6) An ITEA is taken to pass the no-disadvantage test if there is no reference instrument in relation to the employee whose employment is subject to the agreement.
- (7) A collective agreement is taken to pass the no-disadvantage test if there is no reference instrument in relation to any of the employees whose employment is subject to the agreement.

- (8) To avoid doubt, if there is a reference instrument in relation to one or more, but not all, of the employees whose employment is subject to a collective agreement:
- (a) in a case where the agreement passes the no-disadvantage test under subsection (2)—it passes the test in relation to all employees whose employment is subject to the agreement; or
 - (b) in a case where the agreement does not pass the no-disadvantage test under subsection (2)—it does not pass the test in relation to any employees whose employment is subject to the agreement.

Note 1: In addition to the no-disadvantage test, the Australian Fair Pay and Conditions Standard prevails over a workplace agreement to the extent to which the Australian Fair Pay and Conditions Standard provides a more favourable outcome for the employee or employees—see section 172.

Note 2: This section applies to a workplace agreement as varied under Division 8 in a corresponding way to the way in which it applies to a workplace agreement—see subsection 346B(2).

Note 3: See subsection 346J(1) for how the Workplace Authority Director makes decisions under this section.

346E Reference instruments etc.

- (1) A *reference instrument* is:
- (a) in relation to an employee whose employment is subject to an ITEA:
 - (i) any relevant collective instrument; or
 - (ii) any relevant collective instrument and any relevant general instrument, to the extent that the instruments operate concurrently; or
 - (iii) if there is no relevant collective instrument—any relevant general instrument; or
 - (iv) if there is no relevant collective instrument or relevant general instrument—any designated award; for the employee; or
 - (b) in relation to employees whose employment is subject to a collective agreement:
 - (i) any relevant general instrument; or
 - (ii) if there is no relevant general instrument—any designated award; for one or more of the employees.

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- (2) A **relevant collective instrument**, for an employee whose employment is subject to a workplace agreement, is an instrument of a kind specified in subsection (3):
- (a) that regulates, or would but for an ITEA, pre-reform AWA or AWA (within the meaning of Schedule 7A) having come into operation regulate, any term or condition of employment of persons engaged in the same kind of work as that performed or to be performed by the employee under the workplace agreement; and
 - (b) that was binding, or would but for an ITEA, pre-reform AWA or AWA (within the meaning of Schedule 7A) having come into operation have been binding, on the employee's employer immediately before the day on which the workplace agreement was lodged.
- (3) The kinds of instruments for the purposes of subsection (2) are any of the following:
- (a) a collective agreement;
 - (b) a pre-reform certified agreement (within the meaning of Schedule 7);
 - (c) an old IR agreement (within the meaning of Schedule 7);
 - (d) a preserved collective State agreement (within the meaning of Schedule 8);
 - (e) a workplace determination;
 - (f) a section 170MX award (within the meaning of Schedule 7).
- (4) A **relevant general instrument**, for an employee whose employment is subject to a workplace agreement, is an instrument of a kind specified in subsection (5):
- (a) that regulates, or would but for a workplace agreement or another industrial instrument having come into operation regulate, any term or condition of employment of persons engaged in the same kind of work as that performed or to be performed by the employee under the workplace agreement; and
 - (b) that was binding, or would but for a workplace agreement or another industrial instrument having come into operation have been binding, on the employee's employer immediately before the day on which the workplace agreement was lodged.

- (5) The kinds of instruments for the purposes of subsection (4) are any of the following:
- (a) an award;
 - (b) a common rule in operation under Schedule 6;
 - (c) a transitional Victorian reference award (within the meaning of Part 7 of Schedule 6);
 - (d) a transitional award (within the meaning of Schedule 6), other than a Victorian reference award (within the meaning of that Schedule), to the extent that the award regulates excluded employers in respect of the employment of employees in Victoria;
 - (e) a notional agreement preserving State awards (within the meaning of Schedule 8).

346F Agreements to be tested as at lodgment date

- (1) In deciding whether a workplace agreement passes, or does not pass, the no-disadvantage test, the Workplace Authority Director must consider it as in existence or operation (as the case may be) immediately after lodgment.
- (2) In deciding whether a workplace agreement as varied passes, or does not pass, the no-disadvantage test, the Workplace Authority Director must consider it as in existence or operation (as the case may be) immediately after the variation was lodged.
- (3) If a variation to a workplace agreement is lodged before the Workplace Authority Director has decided whether the agreement passes the no-disadvantage test under section 346D:
 - (a) the Workplace Authority Director must consider the workplace agreement and the workplace agreement as varied as part of the same process; and
 - (b) to avoid doubt, the Workplace Authority Director must consider, and make a separate decision in respect of, both the workplace agreement and the workplace agreement as varied.
- (4) For the purposes of applying subsection 346D(1) or (2), assume that the employment relationship of the employee or employees referred to in either of those subsections was in existence immediately before the day on which the ITEA or collective agreement was lodged.

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

- (1) The Workplace Authority Director may, on application by an employer, determine that an award is a designated award for an employee or class of employees of the employer.
- (2) The Workplace Authority Director may make a determination under this section only if the Workplace Authority Director is satisfied that:
 - (a) the employee or employees are or may be employed in an industry or occupation in which the terms and conditions of the kind of work performed or to be performed by the employee or employees:
 - (i) are usually regulated by an award; or
 - (ii) would, but for a workplace agreement or another industrial instrument having come into operation, usually be regulated by an award; and
 - (b) unless there is a designated award for the employee or employees, there would be no reference instrument relating to the employee or employees; and
 - (c) there is an award that satisfies the requirements specified in subsection (4).
- (4) An award or awards determined by the Workplace Authority Director under this section:
 - (a) must be an award or awards regulating, or that would, but for a workplace agreement or another industrial instrument having come into operation, regulate, terms or conditions of employment of employees engaged in the same kind of work as the work performed or to be performed by the employee or employees; and
 - (b) must, in the opinion of the Workplace Authority Director, be an award or awards that would be appropriate for the purpose referred to in paragraph 346H(3)(b) if a workplace agreement or a variation of a workplace agreement were lodged; and
 - (c) must not be an award that regulates the terms and conditions of employment in a single business only (being the single business specified in the award).

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- (5) An award determined under this section in relation to an employee or employees is taken to be the designated award determined by the Workplace Authority Director under section 346H in relation to the employee or employees if the employer later lodges a workplace agreement, or a variation of a workplace agreement, in relation to the employee or the employees.
- (6) Despite subsection (5), the Workplace Authority Director may determine under section 346H that another award is a designated award in relation to the employee, or in relation to some or all of the employees, if:
 - (a) the Workplace Authority Director becomes aware of information that was not available to the Workplace Authority Director at the time of the determination under subsection (1); and
 - (b) the Workplace Authority Director is satisfied that, had that information been available to the Workplace Authority Director at that time, the Workplace Authority Director would have determined under subsection (1) the other award to be the designated award.
- (7) The Workplace Authority Director may determine different awards under subsection (1) in relation to different employees.
- (8) In this section, a reference to an employee or employees of an employer includes a reference to a person or persons who may become an employee or employees of the employer.
- (9) A determination made under this section is not a legislative instrument.

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

- (1) This section applies to a workplace agreement if:
 - (a) in the case of an ITEA—there is no relevant collective instrument or no relevant general instrument in relation to the employee whose employment is subject to the ITEA; or
 - (b) in the case of a collective agreement—there is no relevant general instrument in relation to an employee or class of employees whose employment is subject to the collective agreement; or

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- (c) a variation of the workplace agreement is lodged and:
 - (i) if the workplace agreement is an ITEA—there is no relevant collective instrument or no relevant general instrument in relation to the employee whose employment is subject to the ITEA as varied; or
 - (ii) if the workplace agreement is a collective agreement—there is no relevant general instrument in relation to an employee or class of employees whose employment is subject to the collective agreement as varied.
- (2) The Workplace Authority Director must determine that an award is a designated award for the employee or employees referred to in subsection (1), if the Workplace Authority Director is satisfied that:
 - (a) on the date of lodgment of the agreement or variation (as the case requires), the employee or employees are or would be employed in an industry or occupation in which the terms and conditions of the kind of work performed or to be performed by the employee or employees:
 - (i) are usually regulated by an award; or
 - (ii) would, but for a workplace agreement or another industrial instrument having come into operation, usually be regulated by an award; and
 - (b) there is an award that satisfies the requirements specified in subsection (3).
- (3) An award or awards determined by the Workplace Authority Director under this section:
 - (a) must be an award or awards regulating, or that would, but for a workplace agreement or another industrial instrument having come into operation, regulate, terms or conditions of employment of employees engaged in the same kind of work as the work performed by the employee or employees under the workplace agreement concerned; and
 - (b) must, in the opinion of the Workplace Authority Director, be appropriate for the purpose of deciding whether a workplace agreement, or a workplace agreement as varied, passes the no-disadvantage test; and
 - (c) must not be an award that regulates the terms and conditions of employment in a single business only (being the single business specified in the award).

- (4) The Workplace Authority Director may determine different awards under subsection (2) in relation to different employees.
- (5) A determination made under this section is not a legislative instrument.

346HA Effect of State awards etc.

For the purposes of paragraphs 346G(2)(a) and 346H(2)(a), an industry or occupation in which the terms and conditions of the kind of work performed or to be performed by an employee are usually regulated by an award is taken to include an industry or occupation in which the terms and conditions of the kind of work performed or to be performed by the employee:

- (a) were, immediately before the reform commencement, usually regulated by a State award, or would, but for an industrial instrument or a State employment agreement having come into operation, usually have been so regulated immediately before the reform commencement; or
- (b) are usually regulated by any of the following instruments:
 - (i) a transitional Victorian reference award (within the meaning of Part 7 of Schedule 6);
 - (ii) a common rule in operation under Schedule 6;
 - (iii) a transitional award (within the meaning of Schedule 6) other than a Victorian reference award (within the meaning of that Schedule), to the extent that the award regulates excluded employers in respect of the employment of employees in Victoria;or would, but for a workplace agreement or an industrial instrument having come into operation, usually be so regulated.

346J Matters taken into account when testing agreement etc.

- (1) In deciding under section 346D, 346Q or 346Z whether a workplace agreement, or a workplace agreement as varied, passes, or does not pass, the no-disadvantage test, the Workplace Authority Director:
 - (a) must have regard to the work obligations of the employee or employees under the workplace agreement; and

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- (b) may inform himself or herself in any way he or she considers appropriate including (but not limited to) contacting any of the following:
 - (i) the employer;
 - (ii) the employee, or some or all of the employees, whose employment is subject to the workplace agreement;
 - (iii) a bargaining agent in relation to the agreement;
 - (iv) in the case of a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.
- (2) In deciding whether to determine that an award is a designated award in relation to an employee or employees of an employer, the Workplace Authority Director may inform himself or herself in any way he or she considers appropriate including (but not limited to) contacting any of the following:
 - (a) the employer;
 - (b) the employee or employees;
 - (c) if the determination would be made under section 346H—a bargaining agent in relation to the agreement;
 - (d) if the determination would be made under section 346H in relation to a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.

Subdivision C—Agreements that operate from approval, and variations of agreements

346K Application of this Subdivision

- (1) This Subdivision applies to a workplace agreement that is:
 - (a) an ITEA to which subparagraph 326(2)(b)(ii) applies; or
 - (b) an employee collective agreement; or
 - (c) a union collective agreement; or
 - (d) a multiple-business agreement that would be an employee collective agreement or a union collective agreement but for subsection 331(1).
- (2) This Subdivision also applies to any variation of a workplace agreement under Division 8.

346L Applying the no-disadvantage test

- (1) If a workplace agreement to which this Subdivision applies is lodged with the Workplace Authority Director under Division 5, the Workplace Authority Director must decide under section 346D whether the agreement passes the no-disadvantage test.
- (2) If a variation of a workplace agreement under Division 8 is lodged with the Workplace Authority Director under that Division, the Workplace Authority Director must decide under section 346D whether the agreement as varied passes the no-disadvantage test.

346M Workplace Authority Director must notify of decision

- (1) If the Workplace Authority Director decides under section 346D that the agreement passes the no-disadvantage test, then:
 - (a) the Workplace Authority Director must notify the following of the decision:
 - (i) the employer in relation to the agreement;
 - (ii) if the agreement is an ITEA—the employee whose employment is subject to the ITEA;
 - (iii) if the agreement is a union collective agreement or a multiple-business agreement that would be a union collective agreement but for subsection 331(1)—the organisation or organisations bound by the agreement; and
 - (b) the notice must also state that the agreement comes into operation on the seventh day after the date of issue specified in the notice.
- (2) If the Workplace Authority Director decides under section 346D that the agreement does not pass the no-disadvantage test, then:
 - (a) the Workplace Authority Director must notify the following of the decision:
 - (i) the employer in relation to the agreement;
 - (ii) if the agreement is an ITEA—the employee whose employment is subject to the ITEA;
 - (iii) if the agreement is a union collective agreement or a multiple-business agreement that would be a union collective agreement but for subsection 331(1)—the

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- organisation or organisations bound by the agreement;
and
- (b) the notice must also:
 - (i) state that the agreement has not come into operation because it does not pass the no-disadvantage test; and
 - (ii) contain advice as to how the agreement could be varied to pass the no-disadvantage test.
 - (3) If subsection 346F(3) requires the Workplace Authority Director to consider, and make a separate decision in respect of, both a workplace agreement and the workplace agreement as varied, the notice under this section must deal with both agreements.
 - (4) A notice under this section:
 - (a) must be in writing; and
 - (b) must specify the date of issue of the notice.

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

346N Agreement does not pass no-disadvantage test

- (1) If the Workplace Authority Director decides under section 346D that the agreement does not pass the no-disadvantage test, the employer who is bound by the agreement may lodge a variation of the agreement with the Workplace Authority Director.
- (2) For the purposes of subsection (1), Division 8 does not apply to the variation of an agreement, except for sections 367, 368, 368A, 372, 373 and 374, paragraph 377(1)(b) and section 380A.

346P Lodging of variation documents with the Workplace Authority Director

- (1) An employer lodges a variation with the Workplace Authority Director under section 346N if:
 - (a) the employer lodges a declaration under subsection (2); and
 - (b) a copy of the variation is annexed to the declaration.
- (2) An employer lodges a declaration with the Workplace Authority Director if:

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- (a) the employer gives it to the Workplace Authority Director;
and
- (b) it meets the form requirements mentioned in subsection (3).

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

- (3) The Workplace Authority Director may, by notice published in the *Gazette*, set out requirements for the form of a declaration for the purposes of paragraph (2)(b).
- (4) A declaration is given to the Workplace Authority Director for the purposes of subsection (2) only if the declaration is actually received by the Workplace Authority Director.

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

346Q Workplace Authority Director must test varied agreement

- (1) If an employer lodges a variation of a workplace agreement under section 346N, the Workplace Authority Director must decide under this section whether the workplace agreement as varied passes the no-disadvantage test set out in section 346D.
- (2) If the Workplace Authority Director decides under subsection (1) that a workplace agreement as varied passes the no-disadvantage test, or that it does not pass the no-disadvantage test, the Workplace Authority Director must notify the following of the decision:
 - (a) the employer in relation to the workplace agreement;
 - (b) if the workplace agreement is an ITEA—the employee whose employment is subject to the ITEA;
 - (c) if the agreement is a union collective agreement, or a multiple-business agreement that would be a union collective agreement but for subsection 331(1)—the organisation or organisations bound by the agreement.
- (3) The notice must be in writing and must specify:
 - (a) the date of issue of the notice; and
 - (b) if the workplace agreement as varied passes the no-disadvantage test—that the agreement as varied will come

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into operation on the seventh day after the date of issue specified in the notice; and

- (c) if the workplace agreement as varied does not pass the no-disadvantage test—that the agreement has not come into operation because it does not pass the no-disadvantage test.

Note 1: Section 346ZH requires the employer to inform the employees concerned of the contents of the notice under this section in relation to a collective agreement.

Note 2: See subsection 346J(1) for how the Workplace Authority Director makes decisions under this section.

346R Operation of section 346N variations

If:

- (a) an employer lodges a variation of a workplace agreement under section 346N; and
(b) the Workplace Authority Director decides under subsection 346Q(1) that the agreement as varied passes the no-disadvantage test set out in section 346D;

the agreement as varied comes into operation on the seventh day after the date of issue specified in the notice under section 346Q that advises the agreement as varied passes the no-disadvantage test.

Subdivision D—Agreements that operate from lodgment

346S Application of this Subdivision

This Subdivision applies to a workplace agreement that is:

- (a) an ITEA to which subparagraph 326(2)(b)(i) or (ia) applies; or
(b) a union greenfields agreement; or
(c) an employer greenfields agreement; or
(d) a multiple-business agreement that would be a union greenfields agreement or an employer greenfields agreement but for subsection 331(1).

Note: Subdivision C, and not this Subdivision, will apply to a variation of any of these workplace agreements under Division 8.

346T Applying the no-disadvantage test

If a workplace agreement to which this Subdivision applies is lodged with the Workplace Authority Director under Division 5, the Workplace Authority Director must decide under section 346D whether the agreement passes the no-disadvantage test.

346U Workplace Authority Director must notify of decision

- (1) If the Workplace Authority Director decides under section 346D that the agreement passes the no-disadvantage test the Workplace Authority Director must notify the following of the decision:
 - (a) the employer in relation to the agreement;
 - (b) if the agreement is an ITEA—the employee whose employment is subject to the ITEA;
 - (c) if the agreement is a union greenfields agreement or a multiple-business agreement that would be a union greenfields agreement but for subsection 331(1)—the organisation or organisations bound by the agreement.
- (2) If the Workplace Authority Director decides under section 346D that the agreement does not pass the no-disadvantage test, then:
 - (a) the Workplace Authority Director must notify the following of the decision:
 - (i) the employer in relation to the agreement;
 - (ii) if the agreement is an ITEA—the employee whose employment is subject to the ITEA;
 - (iii) if the agreement is a union greenfields agreement or a multiple-business agreement that would be a union greenfields agreement but for subsection 331(1)—the organisation or organisations bound by the agreement; and
 - (b) the notice must also contain advice as to how the agreement could be varied to pass the no-disadvantage test.
- (3) If subsection 346F(3) requires the Workplace Authority Director to consider, and make a separate decision in respect of, both a workplace agreement and the workplace agreement as varied, the notice under this section must deal with both agreements.
- (4) A notice under this section:

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- (a) must be in writing; and
- (b) must specify the date of issue of the notice.

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

346V Agreement does not pass no-disadvantage test—agreement not in operation

If:

- (a) the Workplace Authority Director decides under section 346D that the agreement does not pass the no-disadvantage test; and
- (b) the agreement is not in operation in relation to any employee immediately before the date of the decision;

the employee or employees whose employment was at any time subject to the agreement are, on and from the seventh day after the date of issue specified in the notice under section 346U in relation to the agreement, entitled to any compensation payable to the employee or employees under section 346ZG.

346W Agreement does not pass no-disadvantage test—agreement in operation

- (1) This section applies if:
 - (a) the Workplace Authority Director decides under section 346D that the agreement does not pass the no-disadvantage test; and
 - (b) the agreement is in operation immediately before the date of the decision.
- (2) The employer who is bound by the agreement may:
 - (a) lodge a variation of the agreement with the Workplace Authority Director; or
 - (b) in the case of an employer greenfields agreement—lodge a variation of the agreement by giving to the Workplace Authority Director a written undertaking in relation to the agreement.

- (3) If the employer does not take the action referred to in subsection (2) within the relevant period in relation to the agreement, then at the end of that period:
- (a) the workplace agreement ceases to operate; and
 - (b) the employee or employees whose employment was at any time subject to the agreement are, after the end of the relevant period in relation to the agreement, entitled to any compensation payable to the employee or employees under section 346ZG.
- (4) Despite subsection (3), if:
- (a) because of subsection 346F(3), the Workplace Authority Director considered, and made a separate decision in respect of, both the workplace agreement and the workplace agreement as varied; and
 - (b) the agreement did not pass the no-disadvantage test, but the agreement as varied passed the no-disadvantage test;
- the agreement as varied continues in operation, and the employee or employees whose employment was at any time subject to the agreement, whether before or after the variation was lodged, are, after the end of the relevant period in relation to the agreement, entitled to any compensation payable to the employee or employees under section 346ZG.
- (5) For the purposes of paragraph (2)(a), Division 8 does not apply to the variation of an agreement, except for sections 367, 368, 368A, 372, 373 and 374, paragraph 377(1)(b) and section 380A.
- (6) For the purposes of paragraph 2(b), Division 8 does not apply to an undertaking given to the Workplace Authority Director in relation to an employer greenfields agreement.
- (7) In this section:
- relevant period**, in relation to a workplace agreement, means:
- (a) the period of 30 days beginning on the seventh day after the date of issue specified in the notice under section 346U in relation to the workplace agreement; or
 - (b) if a longer period is prescribed by the regulations for the purposes of this paragraph—that period; or

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- (c) if the period referred to in paragraph (a) or (b) is extended under subsection (8) in relation to the workplace agreement—the period as extended.
- (8) The Workplace Authority Director may extend the period referred to in paragraph (7)(a) or (b), as the case requires, in relation to a particular workplace agreement in circumstances prescribed by the regulations.

346X Lodging of variation documents with the Workplace Authority Director

- (1) An employer lodges a variation with, or gives an undertaking to, the Workplace Authority Director under section 346W if:
 - (a) the employer lodges a declaration under subsection (2); and
 - (b) a copy of the variation or undertaking is annexed to the declaration.
- (2) An employer lodges a declaration with the Workplace Authority Director if:
 - (a) the employer gives it to the Workplace Authority Director; and
 - (b) it meets the form requirements mentioned in subsection (3).

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

- (3) The Workplace Authority Director may, by notice published in the *Gazette*, set out requirements for the form of a declaration for the purposes of paragraph (2)(b). The requirements may be different for variations and undertakings.
- (4) A declaration is given to the Workplace Authority Director for the purposes of subsection (2) only if the declaration is actually received by the Workplace Authority Director.

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

346Y Operation of section 346W variations

- (1) A variation of an agreement under paragraph 346W(2)(a) comes into operation when the variation is lodged with the Workplace
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Authority Director under that subsection in accordance with section 346X.

- (2) A variation of an employer greenfields agreement by way of an undertaking under paragraph 346W(2)(b) comes into operation when the undertaking is given to the Workplace Authority Director under that paragraph in accordance with section 346X.
- (3) For the purposes of this Act, an undertaking given by an employer to the Workplace Authority Director under paragraph 346W(2)(b) in relation to an employer greenfields agreement is taken to be a variation of the agreement lodged by the employer under section 346W.

346Z Workplace Authority Director must test varied agreement

- (1) If an employer lodges a variation of a workplace agreement under section 346W, the Workplace Authority Director must decide under this section whether the workplace agreement as varied passes the no-disadvantage test set out in section 346D.

Note: See subsection 346J(1) for how the Workplace Authority Director makes decisions under this section.

- (2) If the Workplace Authority Director decides under subsection (1) that a workplace agreement as varied passes the no-disadvantage test, or that it does not pass the no-disadvantage test, the Workplace Authority Director must notify the following of the decision:
 - (a) the employer in relation to the workplace agreement;
 - (b) if the workplace agreement is an ITEA—the employee whose employment is subject to the ITEA;
 - (c) if the agreement is a union greenfields agreement, or a multiple-business agreement that would be a union greenfields agreement but for subsection 331(1)—the organisation or organisations bound by the agreement.
- (3) The notice must be in writing and must specify:
 - (a) the date of issue of the notice; and
 - (b) if the workplace agreement as varied passes the no-disadvantage test:
 - (i) that the workplace agreement continues in operation; and

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- (ii) that the workplace agreement was varied by way of a variation or a written undertaking, as the case may be; and
 - (iii) that the employee or employees whose employment is, or was at any time, subject to the workplace agreement are, on and from the seventh day after the date of issue specified in the notice, entitled to any compensation payable to the employee or employees under section 346ZG; and
- (c) if the workplace agreement as varied does not pass the no-disadvantage test:
- (i) that, if the workplace agreement was in operation immediately before the seventh day after the date of issue specified in the notice—the agreement ceases to operate on that day; and
 - (ii) that the employee or employees whose employment was at any time subject to the workplace agreement are, on and from that day, entitled to any compensation payable to the employee or employees under section 346ZG.

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

346ZA Effect of decision on no-disadvantage test

- (1) If the Workplace Authority Director decides under subsection 346Z(1) that a workplace agreement as varied passes, or does not pass, the no-disadvantage test:
- (a) if the workplace agreement passes the no-disadvantage test—it continues in operation; and
 - (b) if the workplace agreement does not pass the no-disadvantage test—it ceases to operate on and from the seventh day after the date of issue specified in the notice under section 346Z in respect of the workplace agreement; and
 - (c) the employee or employees whose employment is, or was at any time, subject to the agreement are, on and from that day, entitled to any compensation payable to the employee or employees under section 346ZG.

Note: Even though the workplace agreement has been varied so that it passes the no-disadvantage test, compensation may be payable in

respect of the period when the agreement did not pass the no-disadvantage test.

- (2) Paragraphs (1)(a) and (b) do not apply if the workplace agreement is not in operation in relation to any employee immediately before the date of the decision.

346ZB Employment arrangements that apply if a workplace agreement ceases to operate because it does not pass no-disadvantage test

- (1) This section applies if, on a particular day (the *cessation day*), a workplace agreement (the *original agreement*) ceases to operate under section 346W or 346ZA because the original agreement does not pass the no-disadvantage test.
- (2) The employer and the employee or employees who were bound by the original agreement immediately before the cessation day are taken, on and from the cessation day, to be bound by:
- (a) the instrument or instruments that, but for the original agreement having come into operation, would have bound the employer and the employee or employees on and from the cessation day; or
 - (b) if there is no instrument of a kind referred to in paragraph (a) in relation to the employer and one or more of the employees—the designated award in relation to that employee or those employees.
- Note 1: A workplace agreement binds all persons whose employment is, at any time when the agreement is in operation, subject to the agreement (see paragraph 351(b)). A collective agreement may therefore bind an employer in relation to existing and future employees.
- Note 2: See section 601D for the employment arrangements that would apply in a transmission of business context.
- (3) If the original agreement is a workplace agreement as varied under Division 8, the workplace agreement as in force before the variation was lodged is, despite section 346ZE, capable of being an instrument described in paragraph (2)(a).
- (4) An instrument that has ceased to operate in relation to an employee or employees is capable of being an instrument described in paragraph (2)(a) only if the reason it ceased to operate was because

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the original agreement came into operation in relation to the employee or employees.

(5) In this section:

instrument means any of the following:

- (a) a workplace agreement;
- (b) an award;
- (c) a workplace determination;
- (d) an employment agreement within the meaning of section 887;
- (e) a pre-reform certified agreement (within the meaning of Schedule 7);
- (f) a common rule continued in operation under Schedule 6;
- (g) a transitional Victorian reference award (within the meaning of Part 7 of Schedule 6);
- (h) a transitional award (within the meaning of Schedule 6) other than a Victorian reference award (within the meaning of that Schedule) to the extent that the award regulates excluded employers in respect of the employment of employees in Victoria;
- (i) a section 170MX award (within the meaning of Schedule 7);
- (j) an old IR agreement (within the meaning of Schedule 7);
- (k) a preserved State agreement (within the meaning of Schedule 8);
- (l) a notional agreement preserving State awards (within the meaning of Schedule 8).

346ZC Effect of section 346ZB in relation to instruments

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

Note 1: The following provisions operate in a similar way for other instruments:

- (a) subclause 3(5A) of Schedule 7 (pre-reform certified agreements);
- (b) subclause 25(4) of Schedule 7 (section 170MX awards);

- (c) subclause 28(5) of Schedule 7 (old IR agreements).

Note 2: An award has no effect in relation to an employee while a workplace agreement operates in relation to the employee (see section 349), but once the workplace agreement has ceased to operate, the award is capable of operating again.

346ZD Redundancy provisions and section 394 undertakings

- (1) This section applies if, on a particular day (the *cessation day*), a workplace agreement (the *original agreement*) ceases to operate under section 346W or 346ZA because the original agreement does not pass the no-disadvantage test.
- (2) If, immediately before the day on which the original agreement was lodged, the employer was bound, under a designated provision relating to the agreement, by a redundancy provision in relation to an employee whose employment was subject to the original agreement, the employer is taken:
 - (a) to be bound, under the designated provision, by the redundancy provision in relation to the employee on and from the cessation day; and
 - (b) to continue to be so bound until the earliest of the following:
 - (i) the end of the period of 24 months beginning on the first day on which the employer became bound, under the designated provision, by the redundancy provision;
 - (ii) the time when the employee ceases to be employed by the employer;
 - (iii) the time when another workplace agreement comes into operation in relation to the employee and the employer.
- (3) If, immediately before the day on which the original agreement was lodged, the employer was bound by an undertaking under subsection 394(1) in relation to an employee whose employment was subject to the original agreement, the employer is taken:
 - (a) to be bound under section 394 by the undertaking in relation to the employee on and from the cessation day; and
 - (b) to continue to be so bound until the earlier of the following:
 - (i) the time when the employee ceases to be employed by the employer;
 - (ii) the time when another workplace agreement comes into operation in relation to the employee and the employer.

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(4) In this section:

designated provision, in relation to a workplace agreement, means any of the following:

- (a) section 399A;
- (b) clause 6A of Schedule 7;
- (c) clause 20A of Schedule 7;
- (d) clause 21A of Schedule 8;
- (e) clause 21D of Schedule 8;

that, after the agreement is terminated, continues the effect of a redundancy provision that was included in the agreement.

redundancy provision means a redundancy provision within the meaning of any of the following:

- (a) section 399A;
- (b) clause 6A of Schedule 7;
- (c) clause 20A of Schedule 7;
- (d) clause 21A of Schedule 8;
- (e) clause 21D of Schedule 8.

346ZE Operation of workplace agreements

A workplace agreement that has ceased to operate because it does not pass the no-disadvantage test can never operate again.

Note: This rule is subject to subsection 346ZB(3), which deals with the situation where a workplace agreement as varied under Division 8 does not pass the no-disadvantage test.

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

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

Subdivision E—Entitlement to compensation

346ZG Employee is entitled to compensation in respect of no-disadvantage test period

- (1) This section applies to an employee who is entitled to compensation under this section on and from a particular day because a workplace agreement to which Subdivision D applies that was binding on the employee's employer did not pass the no-disadvantage test.
- Note 1: Sections 346V, 346W and 346ZA specify the day on which an employee's entitlement to compensation takes effect.
- Note 2: An employee may be able to recover compensation even where a workplace agreement that initially does not pass the no-disadvantage test is varied so that it subsequently passes the no-disadvantage test—see section 346ZA.
- (2) If the amount worked out under paragraph (a) is less than the amount worked out under paragraph (b), the employer must pay to the employee the amount of the shortfall:
- (a) the total value of the entitlements to which the employee was entitled, under the workplace agreement, and under any other applicable law, agreement or arrangement that operated in conjunction with the workplace agreement, in respect of one or more periods of employment during the no-disadvantage test period for the workplace agreement;
 - (b) the total value of the entitlements to which the employee would have been entitled, in respect of one or more periods of employment of the employee during the no-disadvantage test period, worked out in accordance with the assumptions set out in subsection (3).
- (3) For the purposes of working out the total value of the entitlements to which the employee would have been entitled, in respect of one or more periods of employment of the employee during the no-disadvantage test period, it is to be assumed that, during that period or those periods of employment:
- (a) the employee's employment was subject to:
 - (i) the instrument or instruments that, but for the workplace agreement, would have bound the employer in relation to that period or those periods of employment of the employee; or

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- (ii) if there is no such instrument—the designated award in relation to the employee; and
 - (b) the employer was bound, under a designated provision relating to the agreement, by a redundancy provision that, but for the workplace agreement having come into operation, would have bound the employer in relation to the employee; and
 - (c) the employer was bound under section 394 by any undertaking that, but for the workplace agreement having come into operation, would have bound the employer in relation to the employee; and
 - (d) the employee’s employment was subject to any other applicable law, agreement or arrangement that would have operated in conjunction with the instrument or instruments referred to in subparagraph (a)(i), or the designated award referred to in subparagraph (a)(ii), as the case requires.
- (4) An employer breaches this section if the employer does not pay to the employee the amount of the shortfall calculated under subsection (2) within whichever of the following periods is applicable:
 - (a) if the employee is entitled to compensation because of the operation of section 346V in respect of the workplace agreement—the period of 14 days beginning on the seventh day after the date of issue specified in the notice under section 346U in relation to the workplace agreement;
 - (b) if the employee is entitled to compensation because of the operation of section 346W in respect of the workplace agreement—the period of 14 days beginning at the end of the relevant period (within the meaning of section 346W) in relation to the workplace agreement;
 - (c) if the employee is entitled to compensation because of the operation of section 346ZA in respect of the workplace agreement—the period of 14 days beginning on the seventh day after the date of issue specified in the notice under section 346Z in relation to the workplace agreement.

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

(5) In this section:

designated provision has the same meaning as in section 346ZD.

instrument has the same meaning as in section 346ZB.

no-disadvantage test period, in relation to a workplace agreement, means:

(a) the period:

- (i) beginning on the day on which the workplace agreement was lodged; and
- (ii) ending on the day on which the workplace agreement ceased to operate (whether because of the operation of this Division or otherwise); or

(b) if the workplace agreement is continued in operation because of the operation of subsection 346W(4) or section 346ZA—the period:

- (i) beginning on the day on which the workplace agreement was lodged; and
- (ii) ending on the day on which the variation of the workplace agreement was lodged under section 346W or, if the workplace agreement had been varied before that day in such a way as to pass the no-disadvantage test, on that earlier day.

redundancy provision has the same meaning as in section 346ZD.

Subdivision F—Civil remedy provisions

346ZH Employer must notify employees

- (1) An employer that has received a notice under section 346M, 346Q, 346U or 346Z in relation to a collective agreement must take reasonable steps to ensure that all persons whose employment is subject to the agreement when the employer receives the notice are given a copy of the notice as soon as practicable.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

Section 346ZJ

346ZJ Employer not to dismiss etc. employee because agreement does not pass the no-disadvantage test

- (1) An employer must not:
- (a) dismiss an employee; or
 - (b) threaten to dismiss an employee;
- if the sole or dominant reason for the employer dismissing, or threatening to dismiss, the employee is that a workplace agreement does not, or may not, pass the no-disadvantage test.

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

Note 1: An employee may still be entitled to compensation under section 346ZG if his or her workplace agreement does not pass the no-disadvantage test.

Note 2: A contravention of subsection (1) is enforceable by a workplace inspector—see Division 11 for provisions on enforcement.

- (3) In proceedings alleging a contravention of subsection (1) it is presumed that the employer's sole or dominant reason was that the workplace agreement did not, or may not, pass the no-disadvantage test, unless the employer proves otherwise.

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

346ZK Other remedies for the contravention of section 346ZJ

- (1) The Court, on application by an eligible person, may make one or more of the following orders in relation to an employer who has contravened subsection 346ZJ(1):
- (a) an order requiring the employer to pay a specified amount to the employee as compensation for damage suffered by the employee as a result of the contravention;
 - (b) any other order that the Court considers appropriate.

Note: The employee may still be entitled to compensation under section 346ZG if his or her workplace agreement does not pass the no-disadvantage test.

- (2) The orders that may be made under paragraph (1)(b) include:
- (a) injunctions; and
 - (b) any other orders that the Court considers necessary to stop the conduct or remedy its effects.

(3) In this section:

eligible person means any of the following:

- (a) a workplace inspector;
 - (b) an employee affected by the contravention;
 - (c) an organisation of employees that:
 - (i) has been requested in writing, by the employee concerned, to apply on the employee's behalf; and
 - (ii) is entitled, under its eligibility rules, to represent the industrial interests of the employee in relation to work carried on by the employee for the employer;
 - (d) a person prescribed by the regulations for the purposes of this paragraph.
- (4) A regulation prescribing persons for the purposes of paragraph (d) of the definition of *eligible person* in subsection (3) may provide that a person is prescribed only in relation to circumstances specified in the regulation.

Division 6—Operation of workplace agreements and persons bound

347 When a workplace agreement is in operation

- (1) A workplace agreement comes into operation at whichever of the following times is applicable:
 - (a) for an ITEA to which subparagraph 326(2)(b)(i) or (ia) applies, a union greenfields agreement, an employer greenfields agreement or a multiple-business agreement that would be such an agreement but for subsection 331(1)—the day the agreement is lodged;
 - (b) for an ITEA to which subparagraph 326(2)(b)(ii) applies, an employee collective agreement, a union collective agreement or a multiple-business agreement that would be such an agreement but for subsection 331(1)—the seventh day after the date of issue specified in the notice under subsection 346M(1) or 346Q(2) in relation to the agreement.
- (3) A multiple-business agreement comes into operation only if it has been authorised under section 332.
- (4) A workplace agreement ceases to be in operation if:
 - (a) it is terminated in accordance with Division 9; or
 - (b) in the case of an ITEA—it is replaced by another ITEA; or
 - (ba) in the case of an agreement to which paragraph (1)(a) applies—the Workplace Authority Director decides under section 346D that the agreement does not pass the no-disadvantage test and the employer who is bound by the agreement does not take the action referred to in subsection 346W(2) within the relevant period (as defined in subsection 346W(7)) in relation to the agreement; or
 - (bb) the Workplace Authority Director decides under section 346Z that the agreement as varied does not pass the no-disadvantage test; or
 - (c) the Court declares it to be void under paragraph 409(a).
- (5) A collective agreement ceases to be in operation in relation to an employee if it has:

- (a) passed its nominal expiry date; and
- (b) been replaced by another collective agreement in relation to that employee.

Note: Part 11 sets out the circumstances in which a workplace agreement binding an employer because of transmission of business will cease to operate.

- (6) A multiple-business agreement ceases to operate in relation to a single business (or a part of a single business) if:
 - (a) the multiple-business agreement came into operation on a particular day; and
 - (b) a collective agreement (other than a multiple-business agreement) was lodged on a later day; and
 - (c) the multiple-business agreement and the collective agreement apply in relation to the same single business (or the same part of the single business).

Example: Employers A, B and C lodge a multiple-business agreement which has a nominal expiry date 5 years after it is lodged. Six months later employer B lodges a collective agreement that applies in relation to its single business. This means that the multiple-business agreement ceases to operate in relation to that single business.

- (7) If a workplace agreement has ceased operating under subsection (4), it can never operate again.

Note: However, a redundancy provision that was included in a workplace agreement that has ceased operating might be preserved for a period of up to 24 months (see section 399A).

- (8) If a workplace agreement has ceased operating in relation to an employee because of subsection (5), the agreement can never operate again in relation to that employee.
- (9) If a multiple-business agreement has ceased operating in relation to a single business (or a part of a single business), the agreement can never operate again in relation to that single business (or part of a business).
- (10) If:
 - (a) a person or entity is the employer bound by a workplace agreement; and
 - (b) the person or entity ceases to be an employer within the meaning of subsection 6(1);the agreement ceases to be in operation.

Section 347A

- (11) Despite subsection (10), if the agreement mentioned in that subsection is a multiple-business agreement, it ceases to be in operation only in relation to a single business or part of a single business carried on by the person or entity.

347A Whether certain non-compliance affects the operation of a workplace agreement

- (1) Despite section 347, a workplace agreement does not come into operation unless the requirements in Division 2 and section 340 have been met in relation to the agreement.
- (2) However, failure to comply with any or all of the following in relation to a workplace agreement:
- (a) the requirements in Division 3;
 - (b) the requirements in Division 4 (apart from section 340);
 - (c) the requirements in section 342;
- does not prevent the agreement coming into operation.

Note: Under Division 11, penalties apply to a person who contravenes a civil remedy provision in Division 3 or 4 or section 342.

348 Relationship between overlapping workplace agreements

- (1) Only one workplace agreement can have effect at a particular time in relation to a particular employee.
- (2) A collective agreement has no effect in relation to an employee while an ITEA operates in relation to the employee.
- (3) If:
- (a) a collective agreement (the *first agreement*) binding an employee is in operation; and
 - (b) another collective agreement (the *later agreement*) binding the employee is lodged before the nominal expiry date of the first agreement;

the later agreement has no effect in relation to the employee until the nominal expiry date of the first agreement.

Note: After that date, the first agreement ceases operating in relation to the employee (see subsection 347(5)), and the later agreement takes effect in relation to the employee.

349 Effect of awards while workplace agreement is in operation

- (1) An award has no effect in relation to an employee while a workplace agreement operates in relation to the employee.
- (2) Despite subsection (1), if:
 - (a) a person's employment is subject to a workplace agreement; and
 - (b) but for the workplace agreement, an award would have effect in relation to the person's employment;the terms of the award have effect to the extent that they are about outworker conditions, despite any terms of the workplace agreement that provide, in a particular respect, a less favourable outcome for that person.
- (3) In this section:

outworker means an employee who, for the purposes of the business of the employer, performs work at private residential premises or at other premises that are not business or commercial premises of the employer.

outworker conditions means conditions (other than pay) for outworkers, but only to the extent necessary to ensure that their overall conditions of employment are fair and reasonable in comparison with the conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises.

350 Workplace agreement displaces certain Commonwealth laws

- (1) To the extent of any inconsistency, a workplace agreement displaces prescribed conditions of employment specified in a Commonwealth law that is prescribed by the regulations.
- (2) In this section:

Commonwealth law means an Act or any regulations or other instrument made under an Act.

prescribed conditions means conditions that are identified by the regulations.

351 Persons bound by workplace agreements

A workplace agreement that is in operation binds:

- (a) the employer in relation to the agreement; and
- (b) all persons whose employment is, at any time when the agreement is in operation, subject to the agreement; and
- (c) if the agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations of employees with which the employer made the agreement.

Note: A person can be bound by a workplace agreement because of Part 11 (which deals with transmission of business).

Division 7—Content of workplace agreements

Subdivision A—Required content

Note: For the operation of the Australian Fair Pay and Conditions Standard, see Part 7.

352 Nominal expiry date

- (1) The *nominal expiry date* of a workplace agreement is:
 - (aa) in the case of an ITEA:
 - (i) if a date is specified in the agreement as its nominal expiry date, and that date is no later than 31 December 2009—that specified date; or
 - (ii) otherwise—31 December 2009; or
 - (ab) in the case of an employee collective agreement or a union collective agreement that is taken to pass the no-disadvantage test under subsection 346D(3):
 - (i) if a date is specified in the agreement as its nominal expiry date, and that date is no later than the second anniversary of the seventh day after the date of issue specified in the notice under subsection 346M(1)—that specified date; or
 - (ii) otherwise—the second anniversary of the seventh day after the date of issue specified in the notice under subsection 346M(1); or
 - (a) in the case of an employer greenfields agreement:
 - (i) if a date is specified in the agreement as its nominal expiry date, and that date is no later than the first anniversary of the date on which the agreement was lodged—that specified date; or
 - (ii) otherwise—the first anniversary of the date on which the agreement was lodged; or
 - (b) otherwise:
 - (i) if a date is specified in the agreement as its nominal expiry date, and that date is no later than the fifth anniversary of the date on which the agreement was lodged—that specified date; or
 - (ii) otherwise—the fifth anniversary of the date on which the agreement was lodged.

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Note: Subsection 346D(3) is about workplace agreements that are taken to pass the no-disadvantage test because of exceptional circumstances.

- (2) However, if the agreement has been varied to extend its nominal expiry date, the *nominal expiry date* of the agreement is:
- (aa) in the case of an ITEA—the earlier of the following dates:
 - (i) the date specified in the agreement as varied as its nominal expiry date;
 - (ii) 31 December 2009; or
 - (ab) in the case of an employee collective agreement or a union collective agreement that is taken to pass the no-disadvantage test under subsection 346D(3)—the earlier of the following dates:
 - (i) the date specified in the agreement as varied as its nominal expiry date;
 - (ii) the second anniversary of the seventh day after the date of issue specified in the notice under subsection 346M(1); or
 - (a) in the case of an employer greenfields agreement—the earlier of the following dates:
 - (i) the date specified in the agreement as varied as its nominal expiry date;
 - (ii) the first anniversary of the date on which the agreement was lodged; or
 - (b) otherwise—the earlier of the following dates:
 - (i) the date specified in the agreement as varied as its nominal expiry date;
 - (ii) the fifth anniversary of the date on which the agreement was lodged.

353 Workplace agreement to include dispute settlement procedures

- (1) A workplace agreement must include procedures for settling disputes (*dispute settlement procedures*) about matters arising under the agreement between:
- (a) the employer; and
 - (b) the employees whose employment will be subject to the agreement.

- (2) If a workplace agreement does not include dispute settlement procedures, the agreement is taken to include the model dispute resolution process mentioned in Part 13.

Subdivision B—Prohibited content

356 Prohibited content

- (1) For the purposes of this Act, each of the following is *prohibited content*:
- (a) a provision that requires or permits any conduct that would contravene Part 16, or that would contravene that Part if Division 2 of that Part were disregarded;
 - (b) a provision that directly or indirectly requires a person:
 - (i) to encourage another person to become, or remain, a member of an industrial association; or
 - (ii) to discourage another person from becoming, or remaining, a member of an industrial association;
 - (c) a provision that indicates support for persons being members of an industrial association;
 - (d) a provision that indicates opposition to persons being members of an industrial association;
 - (e) a provision that requires or permits payment of a bargaining services fee;
 - (f) a matter specified in the regulations.
- (2) An expression used in paragraph (1)(a), (b), (c), (d) or (e) that is also used in section 810 has the same meaning in that paragraph as it has in that section.

357 Employer must not lodge agreement containing prohibited content

- (1) An employer contravenes this subsection if:
- (a) the employer lodges a workplace agreement (or a variation to a workplace agreement); and
 - (b) the agreement (or the agreement as varied) contains prohibited content; and
 - (c) the employer was reckless as to whether the agreement (or the agreement as varied) contains prohibited content.

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- (2) Subsection (1) does not apply if:
- (a) before the agreement (or variation) was lodged, the Workplace Authority Director advised the employer that the agreement (or the agreement as varied) did not contain prohibited content; and
 - (b) that advice was in the form specified in regulations made for the purposes of this subsection.
- (3) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

358 Prohibited content in workplace agreement is void

A term of a workplace agreement is void to the extent that it contains prohibited content.

Note 1: The Workplace Authority Director can vary the workplace agreement to remove prohibited content (see section 363).

Note 2: For civil remedy provisions relating to including prohibited content in a workplace agreement, see sections 357, 365 and 366.

359 Initiating consideration of removal of prohibited content

- (1) The Workplace Authority Director may exercise his or her power under section 363 to vary a workplace agreement to remove prohibited content:
- (a) on his or her own initiative; or
 - (b) on application by any person.
- (2) This section and sections 360, 361 and 363 are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the Workplace Authority Director's decision whether to make a variation under section 363.

360 Workplace Authority Director must give notice that he or she is considering variation

- (1) If the Workplace Authority Director is considering making a variation to a workplace agreement under section 363, the Workplace Authority Director must give the persons mentioned in subsection (2) a written notice meeting the requirements in subsection 361(1).

- (2) The persons are:
- (a) the employer in relation to the workplace agreement; and
 - (b) if the workplace agreement is an ITEA—the employee; and
 - (c) if the agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.

361 Matters to be contained in notice

- (1) The requirements mentioned in subsection 360(1) are that the notice must:
- (a) be dated; and
 - (b) state that the Workplace Authority Director is considering making the variation; and
 - (c) state the reasons why the Workplace Authority Director is considering making the variation; and
 - (d) set out the terms of the variation; and
 - (e) invite each person mentioned in subsection (2) to make a written submission to the Workplace Authority Director about whether the Workplace Authority Director should make the variation; and
 - (f) state that any submission must be made within the period (the *objection period*) of 28 days after the date of the notice.
- (2) The persons are:
- (a) the employer in relation to the workplace agreement; and
 - (b) each person whose employment is subject to the agreement at the date of the notice; and
 - (c) if the agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.

362 Employer must ensure employees have ready access to notice

- (1) An employer that has received a notice under section 360 in relation to a collective agreement must take reasonable steps to ensure that all persons whose employment is subject to the agreement at a time during the objection period are given a copy of the notice as soon as practicable.

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

Note: See Division 11 for provisions on enforcement.

363 Workplace Authority Director must remove prohibited content from agreement

- (1) If the Workplace Authority Director is satisfied that a term of the workplace agreement contains prohibited content, the Workplace Authority Director must vary the agreement so as to remove that content.
- (2) In making a decision under subsection (1), the Workplace Authority Director must consider all written submissions (if any) received within the objection period from persons mentioned in subsection 361(2).
- (3) The Workplace Authority Director must not make the variation before the end of the objection period.
- (4) If the Workplace Authority Director decides to make the variation, he or she must:
- (a) give the persons mentioned in subsection 360(2) written notice of the decision, including the terms of the variation; and
 - (b) if the workplace agreement is a collective agreement—publish a notice in the *Gazette* stating that the variation has been made and setting out particulars of the variation.

364 Employer must give employees notice of removal of prohibited content

- (1) An employer that has received a notice under subsection 363(4) in relation to a collective agreement must take reasonable steps to ensure that all persons whose employment is subject to the agreement when the employer receives the notice are given a copy of the notice within 21 days.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

365 Seeking to include prohibited content in an agreement

- (1) A person contravenes this subsection if:
 - (a) the person seeks to include a term:
 - (i) in a workplace agreement in the course of negotiations for the agreement; or
 - (ii) in a variation to a workplace agreement in the course of negotiations for the variation; and
 - (b) that term contains prohibited content; and
 - (c) the person is reckless as to whether the term contains prohibited content.

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

Note: See Division 11 for provisions on enforcement.

366 Misrepresentations about prohibited content

- (1) A person contravenes this subsection if:
 - (a) the person makes a misrepresentation in relation to a workplace agreement (or a variation to a workplace agreement) that a particular term does not contain prohibited content; and
 - (b) the person is reckless as to whether the term contains prohibited content.

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

Note: See Division 11 for provisions on enforcement.

Division 8—Varying a workplace agreement

Subdivision A—General

367 Varying a workplace agreement

- (1) The following persons may make a variation, in writing, to a workplace agreement that is in operation:
 - (a) in the case of an ITEA—the employer and the employee;
 - (b) in the case of an employee collective agreement or an employer greenfields agreement—the employer and the persons whose employment will, or would but for the operation of an ITEA that has passed its nominal expiry date, be subject to the agreement as varied;
 - (c) in the case of a union collective agreement or a union greenfields agreement—the employer and the one or more organisations of employees that are bound by the agreement.

Example: A workplace agreement may be varied to provide additional pay.

- (2) A workplace agreement cannot be varied except in accordance with:
 - (a) this Division; or
 - (aa) section 346N or 346W (which deal with agreements that do not pass the no-disadvantage test); or
 - (b) section 363 (which deals with prohibited content); or
 - (c) section 831 (which deals with discriminatory agreements); or
 - (d) an order of the Court under section 410.

Note: Subsection (2) would not apply where the obligations under the agreement can change because of the terms of the agreement itself.

368 When a variation to a workplace agreement is made

For the purposes of this Act, a variation to a workplace agreement is *made* at whichever of the following times is applicable:

- (a) for an ITEA—the time when the variation is approved in accordance with section 373;
- (b) for an employee collective agreement—the time when the variation is approved in accordance with section 373;

- (c) for a union collective agreement—the time when the employer and the organisation or organisations agree to the terms of the variation;
- (d) for a union greenfields agreement—the time when the employer and the organisation or organisations agree to the terms of the variation;
- (e) for an employer greenfields agreement—the time when the variation is approved in accordance with section 373.

368A Documents taken to be variations of workplace agreements etc.

If a document:

- (a) is represented (expressly or by implication) to be a variation of a workplace agreement, or of a type of workplace agreement mentioned in section 326, 327, 328, 329, 330 or 331; and
- (b) could not come into operation under this Act as a variation of a workplace agreement, or as a variation of a workplace agreement of that type, even if the agreement as varied were to pass the no-disadvantage test;

the document is taken to be a variation of a workplace agreement, or of a workplace agreement of that type, for the purposes of:

- (c) Division 3, Subdivisions B and C of this Division (other than section 375), Division 10 and Division 11 (other than sections 409 to 412A); and
- (d) any other provision of this Act, to the extent that the provision relates to the operation of any of the provisions mentioned in paragraph (c).

Note: The Court can order under section 412A that a document is to have effect as a variation for the purposes of the entire Act.

Subdivision B—Pre-lodgment procedure for variations

369 Eligible employee in relation to variation of workplace agreement

For the purposes of this Subdivision, an *eligible employee* in relation to a variation to a workplace agreement is:

- (a) in the case of an ITEA—the employee; or

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- (b) in the case of a collective agreement:
 - (i) a person whose employment is subject to the agreement; or
 - (ii) a person employed by the employer whose employment will, or would but for the operation of an ITEA that has passed its nominal expiry date, be subject to the agreement as varied.

370 Providing employees with ready access and information statement

- (1) If an employer intends to have a variation to a workplace agreement approved under section 373, the employer must take reasonable steps to ensure that all eligible employees in relation to the variation either have, or have ready access to, the variation in writing during the period:
 - (a) beginning 7 days before the variation is approved; and
 - (b) ending when the variation is approved.
- (2) The employer must take reasonable steps to ensure that all eligible employees in relation to the variation are given an information statement at least 7 days before the variation is approved.
- (3) Despite subsections (1) and (2), if the variation is to a collective agreement and a person becomes an eligible employee at a time during the period mentioned in subsection (1), the employer must take reasonable steps to ensure that:
 - (a) the person is given an information statement at or before that time; and
 - (b) the person either has, or has ready access to, the variation in writing during the period:
 - (i) beginning at that time; and
 - (ii) ending when the variation is approved under section 373.
- (4) The information statement mentioned in subsection (2) and paragraph (3)(a) must contain:
 - (a) information about the time at which and the manner in which the approval will be sought under section 373; and

- (b) if the relevant workplace agreement is an ITEA—
information about the effect of section 334 (which deals with bargaining agents); and
 - (c) if the relevant workplace agreement is an employee collective agreement or employer greenfields agreement—
information about the effect of section 335 (which deals with bargaining agents); and
 - (d) any other information that the Workplace Authority Director requires by notice published in the *Gazette*.
- (5) If a waiver has been made under section 371 in relation to the variation to the workplace agreement:
- (a) subsection (1) and paragraph (3)(b) do not apply if, before the time the waiver was made, the employer had taken reasonable steps to ensure that all eligible employees in relation to the agreement (as at that time) either had, or had ready access to, the variation in writing; and
 - (b) subsection (2) does not apply if, before the time the waiver was made, the employer had taken reasonable steps to ensure that all eligible employees in relation to the agreement (as at that time) had been given an information statement in relation to the variation that complies with subsection (4).
- (6) For the purposes of this section, if, because of the variation, the agreement as varied would incorporate terms from another workplace agreement or an award, the eligible employees have ready access to the variation only if they have ready access to that other workplace agreement or award in writing.
- (7) To avoid doubt, if the content of the variation is changed during the period mentioned in subsection (1), the change results in a separate variation for the purposes of this section.

Note: If the content of a variation for which the employer intends to seek approval is changed, the procedural steps set out in subsections (1), (2) and (3) must be repeated for the resulting separate variation.

Contravention—ready access

- (8) An employer contravenes this subsection if:
- (a) the employer lodges a variation to a workplace agreement; and

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- (b) the employer failed to comply with subsection (1) or (if applicable) paragraph (3)(b) in relation to the variation.

Contravention—information statement

- (9) An employer contravenes this subsection if:
 - (a) the employer lodges a variation to a workplace agreement; and
 - (b) the employer failed to comply with subsection (2) or (if applicable) paragraph (3)(a) in relation to the variation.
- (10) Subsections (8) and (9) are civil remedy provisions.

Note: See Division 11 for provisions on enforcement.
- (11) An employer cannot contravene subsection (8) or (9) more than once in relation to the lodgment of a particular variation.

371 Employees may waive 7-day period

- (1) The persons mentioned in subsection (2) may make a waiver under this section in relation to a variation to a workplace agreement.
- (2) The persons are all the eligible employees at the time the waiver is made.
- (3) The waiver must be in writing and dated.
- (4) The waiver is made when all the persons mentioned in subsection (2) sign the waiver.
- (5) The waiver takes effect when it is made.

Note: For the effect of the waiver, see subsection 370(5).

372 Prohibition on withdrawal from variation to union collective agreement or union greenfields agreement

- (1) An employer that has made a variation to a union collective agreement or a union greenfields agreement must take reasonable steps to seek approval for the variation under section 373, within a reasonable period after the variation was made.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

373 Approval of a variation to a workplace agreement

- (1) A variation to an ITEA is *approved* if:
 - (a) the variation is signed and dated by the employee and the employer; and
 - (b) those signatures are witnessed; and
 - (c) if the employee is under the age of 18 years:
 - (i) the variation is signed and dated by an appropriate person (such as a parent or guardian of the employee, but not the employer) on behalf of the employee, for the purpose of indicating that person's consent to the employee making the variation; and
 - (ii) that person is aged at least 18 years; and
 - (iii) that person's signature is witnessed.
- (2) A variation to a collective agreement is *approved* if:
 - (a) the employer has given all of the persons employed at the time whose employment:
 - (i) is subject to the agreement; or
 - (ii) will, or would but for the operation of an ITEA that has passed its nominal expiry date, be subject to the agreement as varied;
a reasonable opportunity to decide whether they want to approve the variation; and
 - (b) either:
 - (i) if the decision is made by a vote—a majority of those persons who cast a valid vote decide that they want to approve the variation; or
 - (ii) otherwise—a majority of those persons decide that they want to approve the variation.

374 Employer must not lodge unapproved variation

- (1) An employer contravenes this section if:
 - (a) the employer lodges a variation to a workplace agreement; and
 - (b) the variation has not been approved in accordance with section 373.
- (2) Subsection (1) is a civil remedy provision.

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Note: See Division 11 for provisions on enforcement.

Subdivision C—Lodgment of variations

375 Employer must lodge variations with the Workplace Authority Director

- (1) If a variation has been approved in accordance with section 373, the employer must lodge the variation, in accordance with section 377, within 14 days after the variation was approved.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

376 Lodging variation to multiple-business agreement without authorisation

- (1) An employer contravenes this subsection if:
 - (a) the employer lodges a variation to a multiple-business agreement; and
 - (b) the variation has not been authorised under section 332.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

377 Lodging of variation documents with the Workplace Authority Director

- (1) The employer in relation to a variation to a workplace agreement lodges the variation with the Workplace Authority Director if:
 - (a) the employer lodges a declaration under subsection (2); and
 - (b) the workplace agreement:
 - (i) in the case of a variation of an ITEA—meets the signature requirements of subsection 373(1); or
 - (ii) in the case of a variation of a collective agreement—meets the signature requirements of regulations made for the purposes of paragraph 418(ea); and
 - (c) a copy of the signed variation is annexed to the declaration.

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

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

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

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

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

- (5) The Workplace Authority Director is not required to consider or determine whether any of the requirements of this Part (other than Division 5A) have been met in relation to the making or content of anything annexed to a declaration lodged in accordance with subsection (2).

378 Workplace Authority Director must issue receipt for lodgment of declaration for variation

- (1) If a declaration is lodged under subsection 377(2), the Workplace Authority Director must issue a receipt for the lodgment.
- (2) The Workplace Authority Director must give a copy of the receipt to:
- (a) the employer in relation to the relevant workplace agreement; and
 - (b) if the relevant workplace agreement is an ITEA—the employee; and
 - (c) if the relevant workplace agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.

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379 Employer must notify employees after lodging variation

- (1) An employer that has received a receipt under section 378 in relation to a collective agreement must take reasonable steps to ensure that all persons whose employment is subject to the agreement when the employer receives the receipt are given a copy of the receipt within 21 days.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

Subdivision D—When a variation comes into operation

380 When a variation comes into operation

- (1) A variation to a workplace agreement under this Division comes into operation on the seventh day after the date of issue specified in the notice under subsection 346M(1) in relation to the agreement as varied.
- (3) A variation to a multiple-business agreement comes into operation only if the variation has been authorised under section 332.

Note: Section 346R sets out when variations of workplace agreements under Division 5A come into operation.

380A Whether certain non-compliance affects the operation of a variation

- (1) A variation to a workplace agreement does not come into operation unless the requirements in Subdivision A and section 373 have been met in relation to the variation.
- (2) However, failure to comply with any or all of the following in relation to a variation to a workplace agreement:
 - (a) the requirements in Division 3;
 - (b) the requirements in Subdivision B of this Division (apart from section 373);
 - (c) the requirements in section 375;does not prevent the variation coming into operation.

Note: Under Division 11, penalties apply to a person who contravenes a civil remedy provision in Division 3, Subdivision B of this Division or section 375.

Division 9—Terminating a workplace agreement

Subdivision A—General

381 Types of termination

- (1) A workplace agreement may be terminated:
 - (a) by approval (see Subdivisions B and C); or
 - (b) unilaterally (see Subdivision D); or
 - (c) by the Commission (see Subdivision DA).
- (2) A workplace agreement is terminated when:
 - (a) a termination of the agreement is lodged with the Workplace Authority Director in accordance with section 389; or
 - (b) a declaration to terminate the agreement in accordance with subsection 392(2) is lodged with the Workplace Authority Director in accordance with section 395; or
 - (c) in the case of an ITEA—a declaration to terminate the agreement in accordance with subsection 393(2) is lodged with the Workplace Authority Director in accordance with section 395; or
 - (d) in the case of a collective agreement—an order by the Commission under section 397A takes effect.

381A Documents taken to be terminations of workplace agreements etc.

If a document:

- (a) is represented (expressly or by implication) to be a termination of a workplace agreement, or of a type of workplace agreement mentioned in section 326, 327, 328, 329, 330 or 331; and
- (b) could not come into operation under this Act as a termination of a workplace agreement, or as a termination of a workplace agreement of that type;

the document is taken to be a termination of a workplace agreement, or of a workplace agreement of that type, for the purposes of:

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- (c) Division 3, Subdivisions B and C of this Division (other than section 388), Division 10 and Division 11 (other than sections 409 to 412A); and
- (d) any other provision of this Act, to the extent that the provision relates to the operation of any of the provisions mentioned in paragraph (c).

Note: The Court can order under section 412A that a document is to have effect as a termination for the purposes of the entire Act.

Subdivision B—Termination by approval (pre-lodgment procedure)

382 Terminating a workplace agreement by approval

A workplace agreement may be terminated in accordance with this Subdivision by the following:

- (a) in the case of an ITEA—the employer and the employee;
- (b) in the case of an employee collective agreement or an employer greenfields agreement—the employer and the employees whose employment is subject to the agreement;
- (c) in the case of a union collective agreement or a union greenfields agreement—the employer and the one or more organisations of employees that are bound by the agreement.

383 Eligible employee in relation to termination of workplace agreement

For the purposes of this Subdivision, an *eligible employee* in relation to a termination of a workplace agreement in accordance with this Subdivision is:

- (a) in the case of an ITEA—the employee; or
- (b) in the case of a collective agreement—a person employed at the time whose employment is subject to the agreement.

384 Providing employees with information statement

- (1) If an employer intends to have the termination of a workplace agreement approved under section 386, the employer must take reasonable steps to ensure that all eligible employees in relation to the termination are given an information statement at or before the

start of the period of 7 days ending when the termination is approved.

- (2) Despite subsection (1), if the relevant workplace agreement is a collective agreement and a person becomes an eligible employee at a time during the period mentioned in subsection (1), the employer must take reasonable steps to ensure that the person is given an information statement at or before that time.
- (3) The information statement mentioned in subsections (1) and (2) must contain:
 - (a) information about the time at which and the manner in which the approval will be sought under section 386; and
 - (b) if the relevant workplace agreement is an ITEA—information about the effect of section 334 (which deals with bargaining agents); and
 - (c) any other information that the Workplace Authority Director requires by notice published in the *Gazette*.

Contravention—information statement

- (4) An employer contravenes this subsection if:
 - (a) the employer lodges a declaration to terminate a workplace agreement; and
 - (b) the employer failed to comply with subsection (1) or (if applicable) subsection (2) in relation to the termination.
- (5) Subsection (4) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.
- (6) An employer cannot contravene subsection (4) more than once in relation to the lodgment of a particular termination.

385 Prohibition on withdrawal from termination of union collective agreement or union greenfields agreement

- (1) An employer that has agreed to terminate a union collective agreement or a union greenfields agreement with the organisation or organisations bound by the agreement must take reasonable steps to seek approval for the termination under section 386, within a reasonable period after agreeing to do so.

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

Note: See Division 11 for provisions on enforcement.

386 Approval of a termination

- (1) A termination of an ITEA is *approved* if:
- (a) the employer and employee make a written termination agreement to terminate the ITEA; and
 - (b) the termination agreement is signed and dated by the employee and the employer; and
 - (c) those signatures are witnessed; and
 - (d) if the employee is under the age of 18 years:
 - (i) the termination agreement is signed and dated by an appropriate person (such as a parent or guardian of the employee, but not the employer) on behalf of the employee, for the purpose of indicating that person's consent to the employee terminating the ITEA; and
 - (ii) that person is aged at least 18 years; and
 - (iii) that person's signature is witnessed.
- (2) A termination of a collective agreement is *approved* if:
- (a) the employer has given all of the persons employed at the time whose employment is subject to the agreement a reasonable opportunity to decide whether they want to approve the termination; and
 - (b) either:
 - (i) if the decision is made by a vote—a majority of those persons who cast a valid vote decide that they want to approve the termination; or
 - (ii) otherwise—a majority of those persons decide that they want to approve the termination.

387 Employer must not lodge unapproved termination

- (1) An employer contravenes this subsection if:
- (a) the employer lodges a termination of a workplace agreement; and
 - (b) the termination has not been approved in accordance with section 386.

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

Note: See Division 11 for provisions on enforcement.

Subdivision C—Termination by approval (lodgment)

388 Employer must lodge termination with the Workplace Authority Director

- (1) If a termination has been approved in accordance with section 386, the employer must lodge the termination, in accordance with section 389, within 14 days after the termination was approved.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

389 Lodging termination documents with the Workplace Authority Director

- (1) The employer in relation to a workplace agreement to be terminated lodges the termination with the Workplace Authority Director if:
- (a) the employer lodges a declaration under subsection (2) for the termination of the workplace agreement; and
 - (b) if the workplace agreement is an ITEA:
 - (i) the termination agreement meets the signature requirements of subsection 386(1); and
 - (ii) a copy of the signed termination agreement is annexed to the declaration.
- (2) An employer lodges a declaration with the Workplace Authority Director if:
- (a) the employer gives it to the Workplace Authority Director; and
 - (b) it meets the form requirements mentioned in subsection (3).

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

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

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

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

- (5) The Workplace Authority Director is not required to consider or determine whether any of the requirements of this Division (other than this section) have been met in relation to the termination.

390 Workplace Authority Director must issue receipt for lodgment of declaration for termination

- (1) If a declaration is lodged under subsection 389(2), the Workplace Authority Director must issue a receipt for the lodgment.
- (2) The Workplace Authority Director must give a copy of the receipt to:
- (a) the employer in relation to the relevant workplace agreement; and
 - (b) if the relevant workplace agreement is an ITEA—the employee; and
 - (c) if the relevant workplace agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.

391 Employer must notify employees after lodging termination

- (1) An employer that has received a receipt under section 390 in relation to a collective agreement must take reasonable steps to ensure that all persons whose employment was subject to the agreement just before the declaration was lodged are given a copy of the receipt within 21 days.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

Subdivision D—Unilateral termination after nominal expiry date

392 Unilateral termination in a manner provided for in workplace agreement

- (1) This section applies if a workplace agreement provides for a manner of terminating the agreement after its nominal expiry date.
- (2) Any of the following persons may terminate the agreement by lodging a declaration in accordance with section 395:
 - (a) the employer in relation to the agreement;
 - (b) a majority of the employees whose employment is subject to the agreement when the notice mentioned in subsection (4) is given;
 - (ba) in the case of an ITEA—the employee whose employment is subject to the agreement;
 - (c) in the case of an ITEA—a bargaining agent at the request of the employer or the employee;
 - (d) an organisation of employees that is bound by the agreement.

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

- (3) However, this may be done only if:
 - (a) the nominal expiry date of the workplace agreement has passed; and
 - (b) all the requirements in the agreement for terminating the agreement are met.
- (4) At least 14 days before the lodgment, and after the nominal expiry date of the agreement has passed, the person or persons intending to lodge the declaration must take reasonable steps to ensure that the following are given written notice of the termination:
 - (a) the employer in relation to the agreement;
 - (b) each employee whose employment is subject to the agreement when the notice is given;
 - (c) an organisation of employees that is bound by the agreement.
- (5) The notice must:
 - (a) state that the workplace agreement is to be terminated in the manner provided for by the agreement; and

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- (b) be in the form (if any) that the Workplace Authority Director requires by notice published in the *Gazette*; and
 - (c) contain the information (if any) that the Workplace Authority Director requires by notice published in the *Gazette*.
- (6) A person contravenes this subsection if:
- (a) the person lodges a declaration to terminate a workplace agreement under subsection (2); and
 - (b) the person failed to comply with subsection (4) or (5).
- (7) Subsection (6) is a civil remedy provision.
- Note: See Division 11 for provisions on enforcement.
- (8) This section does not apply in relation to a multiple-business agreement.

393 Unilateral termination of ITEA with 90 days written notice

- (1) This section applies whether or not an ITEA provides for a manner of terminating the agreement after its nominal expiry date.
- (2) Any of the following persons may terminate the ITEA by lodging a declaration in accordance with section 395:
- (a) the employer in relation to the ITEA;
 - (b) the employee whose employment is subject to the ITEA;
 - (c) a bargaining agent at the request of the employer or the employee.
- Note: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.
- (3) However, this may be done only if the nominal expiry date of the ITEA has passed.
- (4) At least 90 days before the lodgment, and after the nominal expiry date of the ITEA has passed, the person intending to lodge the declaration must take reasonable steps to ensure that:
- (a) written notice of the termination is given to:
 - (i) if the employer, or a bargaining agent at the employer's request, is intending to lodge the declaration—the employer; or

- (ii) if the employee, or a bargaining agent at the employee's request, is intending to lodge the declaration—the employer; and
 - (b) if the person giving the notice is the employer in relation to the ITEA, or is a bargaining agent doing so at the request of the employer—a written copy of the undertakings (if any) made by the employer under section 394 is given to the employee.
- (5) The notice must:
 - (a) state that the ITEA is to be terminated; and
 - (b) specify the day on which the person proposes to lodge the notice; and
 - (c) be in the form (if any) that the Workplace Authority Director requires by notice published in the *Gazette*; and
 - (d) contain the information (if any) that the Workplace Authority Director requires by notice published in the *Gazette*; and
 - (e) if the person giving the notice is the employer in relation to the ITEA, or is a bargaining agent doing so at the request of the employer—state whether the parties to the ITEA will, under section 399A, continue to be bound by one or more redundancy provisions included in the ITEA; and
 - (f) if the parties to the ITEA will continue to be so bound—include an annexed copy of the provision or the provisions.
- (6) A person contravenes this subsection if:
 - (a) the person lodges a declaration to terminate an ITEA under subsection (2); and
 - (b) the person failed to comply with subsection (4) or (5).

Note: See Division 11 for provisions on enforcement.

- (7) Subsection (6) is a civil remedy provision.

394 Undertakings about post-termination conditions

- (1) An employer intending to terminate an ITEA under subsection 393(2) may make undertakings as to the terms and conditions of employment of employees who were bound by the ITEA just before it was terminated.

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- (2) The undertakings come into operation on the day that the ITEA is terminated.
- (3) The undertakings cease to operate in relation to an employee when the employee's employment becomes subject to a later workplace agreement.
- (4) Subject to this section, the following provisions apply to the undertakings as if they were an ITEA in operation:
 - (a) Part 14;
 - (b) Part 6;
 - (c) any other provision of this Act specified in the regulations.
- (5) An employer contravenes this subsection if:
 - (a) the employer lodges, or a bargaining agent lodges at the request of the employer, a declaration to terminate an ITEA under subsection (2); and
 - (b) the employer has made undertakings in relation to that termination; and
 - (c) a copy of the undertakings was not annexed to the declaration.
- (6) Subsection (5) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.
- (7) If undertakings have ceased operating in relation to an employee because of subsection (3), they can never operate again in relation to that employee.

395 Lodging unilateral termination documents with the Workplace Authority Director

- (1) A person lodges a declaration to terminate a workplace agreement under section 392 with the Workplace Authority Director if:
 - (a) the person gives it to the Workplace Authority Director; and
 - (b) it meets the form requirements mentioned in subsection (3).
 - (1A) A person lodges a declaration to terminate an ITEA under section 393 with the Workplace Authority Director if:
 - (a) the person gives it to the Workplace Authority Director; and
 - (b) it meets the form requirements mentioned in subsection (3); and
-

- (c) if the employer in relation to the ITEA, or a bargaining agent at the request of the employer in relation to the ITEA, lodges the declaration to terminate the ITEA—the declaration states whether the parties to the ITEA will, under section 399A, continue to be bound by one or more redundancy provisions included in the ITEA.

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

- (2) If the employer in relation to the ITEA, or a bargaining agent at the request of the employer in relation to the ITEA, lodges the declaration to terminate the ITEA under section 393, undertakings are lodged in relation to the termination if a copy of the undertakings is annexed to the declaration.
- (3) The Workplace Authority Director may, by notice published in the *Gazette*, set out requirements for the form of a declaration for the purposes of paragraph (1)(b) or (1A)(b).
- (4) A declaration is given to the Workplace Authority Director for the purposes of subsection (1) or (1A) only if the declaration is actually received by the Workplace Authority Director.

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

- (5) The Workplace Authority Director is not required to consider or determine whether any of the requirements of this Subdivision (apart from this section) have been met in relation to the termination.

396 Workplace Authority Director must issue receipt for lodgment of declaration for notice of termination

- (1) If a declaration is lodged under subsection 395(1) the Workplace Authority Director must issue a receipt for the lodgment.
- (1A) If the employer in relation to an ITEA, or a bargaining agent at the request of the employer in relation to an ITEA, lodged a declaration under subsection 395(1A) to terminate the ITEA under section 393, the receipt must state whether:

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- (a) the declaration so lodged states that the parties to the ITEA will continue to be bound by one or more redundancy provisions included in the ITEA that was terminated; and
 - (b) a copy of the provision or provisions was annexed to the declaration.
- (2) The Workplace Authority Director must give a copy of the receipt to:
- (a) the person that lodged the declaration; and
 - (b) the employer in relation to the relevant workplace agreement; and
 - (c) if the relevant workplace agreement is an ITEA—the employee; and
 - (d) if the relevant workplace agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.

397 Employer must notify employees after lodging notice of termination

- (1) An employer that has received a receipt under section 396 in relation to a collective agreement must take reasonable steps to ensure that all persons whose employment was subject to the agreement just before the declaration was lodged are given a copy of the receipt within 21 days.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

Subdivision DA—Termination by the Commission

397A Termination by the Commission

- (1) The Commission may, by order, terminate a collective agreement that has passed its nominal expiry date on application under subsection (2) if it is satisfied that it would not be contrary to the public interest to terminate the agreement.
- (2) Any of the following persons may apply for an order under subsection (1):
- (a) the employer;

- (b) a majority of the employees whose employment is subject to the agreement;
 - (c) an organisation of employees that is bound by the agreement.
- (3) In deciding whether it would be contrary to the public interest to terminate the agreement, the Commission must have regard to all circumstances of the case, including:
- (a) the views of each party bound by the agreement (including the employees) about whether it should be terminated; and
 - (b) the circumstances of each such party, including the likely effect on each such party of the termination of the agreement.

Subdivision E—Effect of termination

398 Whether a termination takes effect if certain non-compliance occurs

- (1) Failure to comply with the requirements in Division 3 in relation to a termination does not prevent the termination taking effect.
- (2) Failure to comply with any or all of the following:
 - (a) the requirements in Subdivision B (apart from sections 382 and 386);
 - (b) the requirements in section 388;does not prevent a termination of a kind mentioned in paragraph 381(1)(a) taking effect.
- (3) However, a termination of that kind does not take effect unless the requirements in sections 382 and 386 have been met in relation to the termination.
- (4) Failure to comply with any or all of the requirements in subsections 392(4) and (5) and 393(4) and (5) does not prevent a termination of a kind mentioned in paragraph 381(1)(b) taking effect.

399A Preservation of redundancy provisions in certain circumstances

- (1) This section applies if an ITEA is terminated unilaterally, in accordance with section 393, by the employer in relation to the

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ITEA or by a bargaining agent at the request of the employer in relation to the ITEA.

- (2) Any party who was bound by the ITEA immediately before it ceased operating continues to be bound, immediately after that time, by any redundancy provision that was included in the ITEA as if the ITEA had continued operating.
- (2A) Parts 6 and 14 of this Act apply to a redundancy provision referred to in subsection (2) as if the provision was an ITEA in operation.
- (3) A party continues to be bound by a redundancy provision referred to in subsection (2), in relation to an employee who is bound by the redundancy provision, until the earliest of the following:
 - (a) the end of the period of 24 months from the time that the ITEA ceased operating;
 - (b) the time when the employee ceases to be employed by the employer;
 - (c) the time when another workplace agreement comes into operation in relation to the employee and the employer.

- (4) In this section:

redundancy provision means any of the following kinds of provisions:

- (a) a provision relating to redundancy pay in relation to a termination of employment;
- (b) a provision that is incidental to a provision relating to redundancy pay in relation to a termination of employment;
- (c) a machinery provision that is in respect of a provision relating to redundancy pay in relation to a termination of employment;

where the termination is at the initiative of the employer and on the grounds of operational requirements, or because the employer is insolvent.

Division 10—Prohibited conduct

400 Coercion and duress

- (1) A person must not:
 - (a) engage in or organise, or threaten to engage in or organise, any industrial action; or
 - (b) take, or threaten to take, other action; or
 - (c) refrain, or threaten to refrain, from taking any action;with intent to coerce another person to agree, or not to agree, to make, approve, lodge, vary or terminate a collective agreement.
- (2) Subsection (1) does not apply to protected action (within the meaning of section 435).
- (3) A person must not coerce, or attempt to coerce, an employer or employee in relation to an ITEA:
 - (a) to appoint, or not to appoint, a particular person as a bargaining agent under subsection 334(1); or
 - (b) to terminate the appointment of a bargaining agent appointed under subsection 334(1).
- (4) A person must not coerce, or attempt to coerce, an employee of an employer:
 - (a) not to make a request mentioned in subsection 335(1) or (2) in relation to a collective agreement; or
 - (b) to withdraw such a request.
- (5) A person must not apply duress to an employer or employee in connection with an ITEA.
- (6) To avoid doubt, a person does not apply duress for the purposes of subsection (5) merely because the person requires another person to make an ITEA as a condition of engagement, other than in the circumstance described in subsection (6A).
- (6A) The circumstance referred to in subsection (6) is that:
 - (a) the first person mentioned in subsection (6) is a new employer; and

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- (b) the new employer requires another person to make an ITEA;
and
 - (c) the other person would, if employed by the new employer, be a transferring employee; and
 - (d) the requirement to make the ITEA is a condition of the other person becoming employed in the business being transferred.
- (7) Subsections (1), (3), (4) and (5) are civil remedy provisions.

Note: See Division 11 for provisions on enforcement.

- (8) In this section:

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

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

transferring employee has the same meanings as in section 579 and clause 3 of Schedule 9, and includes a transferring transitional employee within the meaning of clause 72C of Schedule 6.

401 False or misleading statements

- (1) A person contravenes this section if:
- (a) the person makes a false or misleading statement to another person; and
 - (b) the person is reckless as to whether the statement is false or misleading; and
 - (c) the making of that statement causes the other person:
 - (i) to make, approve, lodge, vary or terminate a workplace agreement; or
 - (ii) not to make, approve, lodge, vary or terminate a workplace agreement.

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

Note: See Division 11 for provisions on enforcement.

402 Employers not to discriminate between unionist and non-unionist

- (1) An employer must not, in negotiating a collective agreement, or a variation to a collective agreement, discriminate between employees of the employer:
 - (a) because some of those employees are members of an organisation of employees while others are not members of such an organisation; or
 - (b) because some of those employees are members of a particular organisation of employees, while others are not members of that organisation or are members of a different organisation of employees.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

Division 11—Contravention of civil remedy provisions

Note: For other rules about civil remedy provisions, see Division 3 of Part 14.

Subdivision A—General

403 General powers of Court not affected by this Division

This Division does not affect the following:

- (a) the powers of the Court under Part 20;
- (b) any other powers of the Court.

404 Workplace inspector may take over proceeding

- (1) A workplace inspector may take over a proceeding that was instituted or is being carried on by another person for an order under this Division.
- (2) If a workplace inspector takes over such a proceeding, he or she may:
 - (a) carry it on further; or
 - (b) decline to carry it on further (whether immediately or at a later stage of the proceeding).

405 Standing for civil remedies

- (1) Any of the following persons may apply to the Court for an order under this Division in relation to a workplace agreement:
 - (a) an employee who is or will be bound by the agreement;
 - (b) if the person who contravened the civil remedy provision was not the employer in relation to the agreement, and the provision is mentioned in subsection (2)—the employer;
 - (c) an organisation of employees that is or will be bound by the agreement;
 - (d) an organisation of employees that represents an employee who is or will be bound by the agreement (subject to subsection (3));
 - (e) if the agreement is an ITEA—a bargaining agent of the employee or of the employer;
 - (f) a workplace inspector;

- (g) a person specified in regulations made for the purposes of this paragraph.
- (2) The provisions are as follows:
 - (a) subsection 334(2);
 - (b) subsection 365(1);
 - (c) subsection 366(1);
 - (d) subsection 392(6);
 - (e) subsection 393(6);
 - (f) subsection 400(1);
 - (g) subsection 400(3);
 - (h) subsection 400(5);
 - (i) subsection 401(1).
- (3) An organisation of employees that represents an employee (as mentioned in paragraph (1)(d)) must not apply on behalf of an employee for a penalty or other remedy under this Division in relation to a contravention of a civil remedy provision unless:
 - (a) the employee has requested the organisation to apply on the employee's behalf; and
 - (b) a member of the organisation is employed by the employee's employer; and
 - (c) the organisation is entitled, under its eligibility rules, to represent the industrial interests of the employee.

Subdivision B—Pecuniary penalty for contravention of civil remedy provisions

406 Application of Subdivision

This Subdivision applies to a contravention by a person of a civil remedy provision in this Part or Division 7A of Part 11.

407 Court may order pecuniary penalty

- (1) The Court may order the person who contravened the civil remedy provision to pay a pecuniary penalty of up to:
 - (a) if the person is an individual—the maximum number of penalty units specified in subsection (2); or

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- (b) if the person is a body corporate—5 times the maximum number of penalty units specified in subsection (2).
- (2) The maximum number of penalty units is as follows:
- (a) for subsection 334(2)—30 penalty units;
 - (b) for subsection 335(3)—30 penalty units;
 - (c) for subsection 337(8)—30 penalty units;
 - (d) for subsection 337(9)—30 penalty units;
 - (e) for subsection 339(1)—30 penalty units;
 - (f) for subsection 341(1)—60 penalty units;
 - (g) for subsection 342(1)—30 penalty units;
 - (h) for subsection 342(2)—30 penalty units;
 - (i) for subsection 343(1)—60 penalty units;
 - (j) for subsection 346(1)—30 penalty units;
 - (ja) for subsection 346A(1)—30 penalty units;
 - (jb) for subsection 346ZH(1)—30 penalty units;
 - (jc) for subsection 346ZJ(1)—60 penalty units;
 - (k) for subsection 357(1)—60 penalty units;
 - (l) for subsection 362(1)—30 penalty units;
 - (m) for subsection 364(1)—30 penalty units;
 - (n) for subsection 365(1)—60 penalty units;
 - (o) for subsection 366(1)—60 penalty units;
 - (p) for subsection 370(8)—30 penalty units;
 - (q) for subsection 370(9)—30 penalty units;
 - (r) for subsection 372(1)—30 penalty units;
 - (s) for subsection 374(1)—60 penalty units;
 - (t) for subsection 375(1)—30 penalty units;
 - (u) for subsection 376(1)—60 penalty units;
 - (v) for subsection 379(1)—30 penalty units;
 - (w) for subsection 384(4)—30 penalty units;
 - (x) for subsection 385(1)—30 penalty units;
 - (y) for subsection 387(1)—60 penalty units;
 - (z) for subsection 388(1)—30 penalty units;
 - (za) for subsection 391(1)—30 penalty units;
 - (zb) for subsection 392(6)—60 penalty units;
 - (zc) for subsection 393(6)—60 penalty units;
 - (zd) for subsection 394(5)—30 penalty units;

- (ze) for subsection 397(1)—30 penalty units;
- (zf) for subsection 400(1)—60 penalty units;
- (zg) for subsection 400(3)—60 penalty units;
- (zh) for subsection 400(4)—60 penalty units;
- (zi) for subsection 400(5)—60 penalty units;
- (zj) for subsection 401(1)—60 penalty units;
- (zk) for subsection 402(1)—60 penalty units;
- (zl) for subsection 601H(2)—30 penalty units.

Subdivision C—Other remedies for contravention of certain civil remedy provisions

408 Application of Subdivision

This Subdivision applies to a contravention by a person of any of the following civil remedy provisions in relation to a workplace agreement:

- (a) subsection 341(1);
- (b) subsection 374(1);
- (c) subsection 387(1);
- (d) subsection 392(6);
- (e) subsection 393(6);
- (f) subsection 400(1);
- (g) subsection 400(5);
- (h) subsection 401(1).

409 Court may declare workplace agreement or part of workplace agreement void

The Court may make an order:

- (a) declaring that the workplace agreement is void; or
- (b) declaring that specified terms of the workplace agreement are void.

410 Court may vary terms of workplace agreement

The Court may make an order varying the terms of the workplace agreement.

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411 Court may order that workplace agreement continues to operate despite termination

- (1) This section applies if the workplace agreement has been terminated as a result of the contravention mentioned in section 408.
- (2) The Court may make an order declaring that the workplace agreement continues to operate despite the termination.

412 Date of effect and preconditions for orders under sections 409, 410 and 411

- (1) An order under section 409, 410 or 411 takes effect from the date of the order or a later date specified in the order.
- (2) The Court may make an order under section 409, 410 or 411 only to the extent that the Court considers appropriate to remedy the following:
 - (a) all or part of any loss or damage resulting from the contravention mentioned in section 408;
 - (b) prevention or reduction of all or part of that loss or damage.

412A Court may give effect to purported workplace agreements etc.

- (1) The Court may order that:
 - (a) a document to which section 324A applies that was lodged with the Workplace Authority Director is to have effect as a workplace agreement for the purposes of this Act; or
 - (b) a document to which section 368A applies that was lodged with the Workplace Authority Director is to have effect as a variation of a workplace agreement for the purposes of this Act; or
 - (c) a document to which section 381A applies that was lodged with the Workplace Authority Director is to have effect as a termination of a workplace agreement for the purposes of this Act.
- (2) However, the Court must not make an order under this section unless it is satisfied that the order would not reduce any employee's overall terms and conditions of employment.

- (3) In deciding for the purposes of subsection (2) whether an order will disadvantage an employee, the Court is to take into account any reference instruments (within the meaning of Division 5A) that relate to the employee.
- (4) An order under this section:
 - (a) is taken to have had effect from a date specified in the order that is earlier than the date of the order; or
 - (b) has effect from a date specified in the order that is later than the date of the order; or
 - (c) otherwise—has effect from the date of the order.
- (5) The date specified in the order must not be earlier than the date of lodgment of the document to which section 324A, 368A or 381A applies.

413 Court may order compensation

The Court may make an order that the person mentioned in section 408 pay compensation of such amount as the Court considers appropriate for any loss or damage resulting from the contravention suffered by an employee whose employment is subject to the agreement.

414 Court may order injunction

- (1) The Court may grant an injunction requiring the person mentioned in section 408 to cease contravening (or not to contravene) the civil remedy provision.
- (2) Subsection (1) also applies in relation to a contravention of subsection 402(1).

Division 12—Miscellaneous

415 ITEAs with Commonwealth employees

- (1) An Agency Head (within the meaning of the *Public Service Act 1999*) may act on behalf of the Commonwealth in relation to ITEAs with persons in the Agency who are engaged under the *Public Service Act 1999*.
- (2) A Secretary of a Department (within the meaning of the *Parliamentary Service Act 1999*) may act on behalf of the Commonwealth in relation to ITEAs with persons in the Department who are engaged under the *Parliamentary Service Act 1999*.

416 Evidence—verified copies

- (1) The Workplace Authority Director may issue a verified copy of any of the following:
 - (a) a declaration lodged under subsection 344(2), 346X(2), 377(2), 389(2) or 395(1) or (1A) in relation to a workplace agreement;
 - (b) a document annexed to a declaration mentioned in paragraph (a);
 - (c) a receipt issued by the Workplace Authority Director under section 345, 378, 390 or 396 in relation to a workplace agreement;
 - (d) a written notice given by the Workplace Authority Director under subsection 346M(1) or (2), 346U(1) or (2), 346Z(2) or 360(1) or paragraph 363(4)(a) in relation to a workplace agreement;
 - (e) an authorisation granted by the Workplace Authority Director under section 332 for a workplace agreement that is a multiple-business agreement;
 - (f) a written advice in relation to a workplace agreement given by the Workplace Authority Director to an employer for the purposes of paragraph 357(2)(a);

- (g) a determination that an award is a designated award made by the Workplace Authority Director under section 346G or 346H.

Note: For the definition of *verified copy*, see section 321.

- (2) The verified copy may only be issued to a person who is or was bound by the workplace agreement to which the verified copy relates.
- (3) In the Court and in proceedings in the Court, a verified copy issued by the Workplace Authority Director under subsection (1) is prima facie evidence of the document of which it is a verified copy.
- (4) A document that purports to be a verified copy issued by the Workplace Authority Director under subsection (1) is taken to be such a copy, unless evidence to the contrary is adduced.

417 Evidence—certificates

- (1) The Workplace Authority Director may issue a certificate stating any one or more of the following in relation to one or more workplace agreements:
- (a) that a particular person lodged a particular declaration under subsection 344(2), 346X(2), 377(2), 389(2) or 395(1) or (1A) with the Workplace Authority Director on a particular day;
 - (b) if the certificate states that a declaration was lodged with the Workplace Authority Director as mentioned in paragraph (a)—that a particular document was annexed to the declaration;
 - (c) that particular declarations lodged with the Workplace Authority Director as mentioned in paragraph (a) in relation to a particular workplace agreement are the only such declarations that were so lodged in relation to that workplace agreement before a particular day;
 - (d) if the certificate states that particular documents were annexed to declarations lodged with the Workplace Authority Director as mentioned in paragraph (b)—that those documents were the only documents annexed to those declarations;
 - (e) that the Workplace Authority Director issued a receipt under section 345, 378, 390 or 396 to a particular person on a particular day for such a lodgment;

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- (f) if the certificate states that particular receipts were issued by the Workplace Authority Director as mentioned in paragraph (e) in relation to a particular workplace agreement—that those receipts were the only receipts so issued in relation to the workplace agreement before a particular day;
 - (g) that the Workplace Authority Director gave a particular advice for the purposes of paragraph 346M(2)(b), 346U(2)(b) or 357(2)(a) to a particular person on a particular day;
 - (h) if the certificate states that particular advices were given by the Workplace Authority Director as mentioned in paragraph (g) in relation to a particular workplace agreement—that those advices were the only advices so given in relation to the workplace agreement before a particular day;
 - (i) that the Workplace Authority Director granted an authorisation under section 332 on a particular day for a particular employer to make or vary a particular multiple-business agreement;
 - (j) if the certificate states that particular authorisations were granted by the Workplace Authority Director as mentioned in paragraph (i) in relation to a particular multiple-business agreement—that those authorisations were the only authorisations so granted in relation to the multiple-business agreement before a particular day;
 - (k) that the Workplace Authority Director gave a particular notice under subsection 346M(1) or (2), 346U(1) or (2), 346Z(2) or 360(1) or paragraph 363(4)(a) on a particular day to a particular employer;
 - (l) if the certificate states that particular notices were given by the Workplace Authority Director as mentioned in paragraph (k) in relation to a particular workplace agreement—that those notices were the only notices so given in relation to that workplace agreement before a particular day.
- (2) The certificate may only be issued to a person who is or was bound by the workplace agreement or all of the workplace agreements to which the certificate relates.

- (3) In the Court and in proceedings in the Court, a certificate issued by the Workplace Authority Director under subsection (1) is prima facie evidence of the matters stated in the certificate.
- (4) A document that purports to be a certificate issued by the Workplace Authority Director under subsection (1) is taken to be such a certificate, unless evidence to the contrary is adduced.

418 Regulations relating to workplace agreements

The regulations may make provision in relation to the following matters:

- (a) requiring an employer who is bound by a workplace agreement to supply copies of prescribed documents to the employee or employees bound by the workplace agreement;
- (b) the qualifications and appointment of bargaining agents;
- (c) the required form of workplace agreements (including a requirement that documents be in the English language);
- (d) the witnessing of signatures on ITEAs;
- (e) the signing of workplace agreements by persons bound by those agreements, or representatives of those persons;
- (ea) the signing of variations of workplace agreements by persons bound by those agreements, or representatives of those persons;
- (f) the retention by employers of signed workplace agreements (including the manner and period of retention);
- (g) prescribing fees for the issue by the Workplace Authority Director of certificates and verified copies.

Note: See section 846 for the types of sanctions that the regulations may provide for a breach of the regulations.

Part 9—Industrial action

Division 1—Preliminary

419 Definitions

(1) In this Part:

authorised ballot agent means an authorised ballot agent as defined in section 450 for the purpose of Division 4.

bargaining period has the meaning given by section 423.

Court means the Federal Court of Australia or the Federal Magistrates Court.

industrial action has the meaning given by section 420.

initiating notice has the meaning given by section 423.

initiating party has the meaning given by section 423.

negotiating party has the meaning given by section 423.

pattern bargaining has the meaning given by section 421.

proposed collective agreement has the meaning given by section 423.

protected action has the meaning given by section 435.

protected action ballot means a ballot under Division 4.

(2) Expressions used in this Part that are also used in Part 8 have the same meanings in this Part as they have in that Part.

420 Meaning of *industrial action*

(1) For the purposes of this Act, *industrial action* means any action of the following kinds:

- (a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee,

the result of which is a restriction or limitation on, or a delay in, the performance of the work;

- (b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;
- (c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;
- (d) the lockout of employees from their employment by the employer of the employees;

but does not include the following:

- (e) action by employees that is authorised or agreed to by the employer of the employees;
- (f) action by an employer that is authorised or agreed to by or on behalf of employees of the employer;
- (g) action by an employee if:
 - (i) the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and
 - (ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

Note 1: See also subsection (4), which deals with the burden of proof of the exception in subparagraph (g)(i) of this definition.

Note 2: The issue of whether action that is not industrial in character is industrial action was considered by the Commission in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited*, PR946290. In that case, the Full Bench of the Commission drew a distinction between an employee who does not attend for work in support of a collective demand that the employer agree to alteration of the conditions of employment as being clearly engaged in industrial action and an employee who does not attend for work on account of illness.

(2) For the purposes of this Act:

- (a) conduct is capable of constituting industrial action even if the conduct relates to part only of the duties that employees are required to perform in the course of their employment; and
- (b) a reference to industrial action includes a reference to a course of conduct consisting of a series of industrial actions.

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Meaning of lockout

- (3) For the purposes of this section, an employer **locks out** employees from their employment if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts (except to the extent that this would be an expansion of the ordinary meaning of that expression).

Burden of proof

- (4) Whenever a person seeks to rely on subparagraph (g)(i) of the definition of **industrial action** in subsection (1), that person has the burden of proving that subparagraph (g)(i) applies.

421 Meaning of pattern bargaining

What is pattern bargaining?

- (1) For the purposes of this Part, a course of conduct by a person is **pattern bargaining** if:
- (a) the person is a negotiating party to 2 or more proposed collective agreements; and
 - (b) the course of conduct involves seeking common wages or conditions of employment for 2 or more of those proposed collective agreements; and
 - (c) the course of conduct extends beyond a single business.

Exception: terms or conditions determined as national standards

- (2) The course of conduct is not pattern bargaining to the extent that the negotiating party is seeking, for 2 or more of the proposed collective agreements, terms or conditions of employment determined by the Full Bench in a decision establishing national standards.

Exception: genuinely trying to reach an agreement for a single business or part of a single business

- (3) The course of conduct, to the extent that it relates to a particular single business or part of a single business, is not pattern bargaining if the negotiating party is genuinely trying to reach an agreement for the business or part.

- (4) For the purposes of subsection (3), factors relevant to working out whether the negotiating party is genuinely trying to reach an agreement for a single business or part of a single business include (but are not limited to) the following:
- (a) demonstrating a preparedness to negotiate an agreement which takes into account the individual circumstances of the business or part;
 - (b) demonstrating a preparedness to negotiate a workplace agreement with a nominal expiry date which takes into account the individual circumstances of the business or part;
 - (c) negotiating in a manner consistent with wages and conditions of employment being determined as far as possible by agreement between the employer and its employees at the level of the single business or part;
 - (d) agreeing to meet face-to-face at reasonable times proposed by another negotiating party;
 - (e) considering and responding to proposals made by another negotiating party within a reasonable time;
 - (f) not capriciously adding or withdrawing items for bargaining.
- (5) Whenever a person seeks to rely on subsection (3), the person has the burden of proving that subsection (3) applies.
- (6) This section does not affect, and is not affected by, the meaning of the term “genuinely trying to reach an agreement”, or any variant of the term, as used elsewhere in this Act.

422 Extraterritorial extension

Australia’s exclusive economic zone

- (1) This Part, and the rest of this Act so far as it relates to this Part, extend in relation to Australia’s exclusive economic zone in the way prescribed by the regulations (if any).
- (2) If the regulations prescribe modifications of this Act (other than this section) for its operation in relation to Australia’s exclusive economic zone under subsection (1), this Act has effect (in accordance with that subsection) as modified in relation to Australia’s exclusive economic zone.

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Australia's continental shelf

- (3) This Part, and the rest of this Act so far as it relates to this Part, extend, in the way prescribed by the regulations (if any), in relation to a part of Australia's continental shelf that is prescribed by the regulations.
- (4) If the regulations prescribe modifications of this Act (other than this section) for its operation in relation to a prescribed part of Australia's continental shelf under subsection (3), this Act has effect (in accordance with that subsection) as modified in relation to that part.

Note: The regulations may prescribe different modifications relating to different parts of Australia's continental shelf. The regulations may need to do so to give effect to Australia's international obligations.

Definitions

- (5) In this section:

modifications includes additions, omissions and substitutions.

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

Division 2—Bargaining periods

423 Initiation of bargaining period

- (1) This section applies in relation to a collective agreement that a person referred to in subsection (2) wants to try to make if the agreement, if made:
- (a) will be made under section 327 or 328; and
 - (b) will not be:
 - (i) a multiple-business agreement; or
 - (ii) an agreement with 2 or more corporations that are treated as one employer because of paragraph 322(2)(b).
- (2) If:
- (a) an employer; or
 - (b) an organisation of employees; or
 - (c) an employee acting on his or her own behalf and on behalf of other employees;
- wants to try to make a collective agreement to which this section applies in relation to employees who are employed in a single business or a part of a single business, the employer, organisation or employee (the *initiating party*) may initiate a period (the *bargaining period*) for negotiating the agreement.
- Note: This subsection has effect subject to subsections 429(2), 430(12) and (13), 431(6) and (7) and 498(6).
- (3) The bargaining period is initiated by the initiating party giving written notice (the *initiating notice*) to each other negotiating party and to the Commission stating that the initiating party intends to try to make a collective agreement to which this section applies (the *proposed collective agreement*) with the other negotiating parties under section 327 or 328.
- (4) Each of the following is a *negotiating party* in relation to the proposed collective agreement:
- (a) the initiating party;
 - (b) if the initiating party is an employer who intends to try to make the proposed collective agreement under section 327—

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the employees at the time whose employment will be subject to the proposed collective agreement;

- (c) if the initiating party is an employer who intends to try to make the proposed collective agreement under section 328—the organisation or organisations who are proposed to be bound by the proposed collective agreement;
- (d) if the initiating party is an organisation of employees—the employer who is proposed to be bound by the proposed collective agreement;
- (e) if the initiating party is an employee acting on his or her own behalf and on behalf of other employees—the employer who is proposed to be bound by the proposed collective agreement and the employees whose employment will be subject to the proposed collective agreement.

424 Employee may appoint agent to initiate bargaining period

- (1) A person referred to in paragraph 423(2)(c) who wishes to initiate a bargaining period under section 423, without disclosing the person's identity to the person's employer, may appoint an agent to initiate the bargaining period on the person's behalf.
- (2) If a person has appointed an agent under subsection (1), the notice to the Commission under subsection 423(3) must be accompanied by a document containing the person's name.
- (3) The regulations may make provision in relation to the qualifications and appointment of agents appointed under this section.

425 Identity of person who has appointed agent not to be disclosed

Disclosure by Commission prohibited

- (1) The Commission must not disclose information that the Commission has reasonable grounds to believe will identify a person who has appointed an agent under section 424 as a person who has initiated a bargaining period under section 423.
- (2) Each of the following is an exception to subsection (1):
 - (a) the disclosure is required or authorised by this Act or by another Act, by regulations made for the purposes of another

provision of this Act, or by regulations made for the purposes of another Act;

- (b) the person whose identity is disclosed has, in writing, authorised the disclosure.

Disclosure by person prohibited

- (3) A person commits an offence if:
- (a) the person discloses information; and
 - (b) the information is protected information; and
 - (c) the person has reasonable grounds to believe that the information will identify another person as a person referred to in subsection (1); and
 - (d) the disclosure is not made by the person in the course of performing functions or duties:
 - (i) as a Registry official; or
 - (ii) as, or on behalf of, an authorised ballot agent; and
 - (e) the disclosure is not required or authorised by this Act or by another Act, by regulations made for the purposes of another provision of this Act, or by regulations made for the purposes of another Act; and
 - (f) the person whose identity is disclosed has not, in writing, authorised the disclosure.

Penalty: Imprisonment for 6 months.

- (4) In this section:

protected information, in relation to a person, means information that the person acquired:

- (a) in the course of performing functions or duties as a Registry official; or
- (b) in the course of performing functions or duties as, or on behalf of, an authorised ballot agent; or
- (c) from a person referred to in paragraph (a) or (b) who acquired the information as mentioned in paragraph (a) or (b).

Registry official means:

- (a) the Industrial Registrar; or

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- (b) a member of the staff of the Industrial Registry (including a Deputy Industrial Registrar).

426 Particulars to accompany notice

An initiating notice is to be accompanied by particulars of:

- (a) the single business or part of the single business to be covered by the proposed collective agreement; and
- (b) the types of employees whose employment will be subject to the proposed collective agreement and the other persons who will be bound by the proposed collective agreement; and
- (c) the matters that the initiating party proposes should be dealt with by the proposed collective agreement; and
- (d) the proposed nominal expiry date of the proposed collective agreement; and
- (e) any other matters prescribed by the regulations.

427 When bargaining period begins

A bargaining period begins at the end of 7 days after:

- (a) the day on which the initiating notice was given; or
- (b) if the notice was given to different persons on different days—the later or latest of those days.

428 When bargaining period ends

A bargaining period ends if any of the following events occurs:

- (a) a collective agreement under section 327 or 328 is made by the employer and any one or more of the other negotiating parties;
- (b) the initiating party tells the other negotiating party or each of the other negotiating parties in writing that the initiating party no longer wants to reach a collective agreement under section 327 or 328 with that other party or those other parties;
- (c) the bargaining period is terminated under section 430, 431 or 498.

429 Power of Commission to restrict initiation of new bargaining periods

- (1) This section applies if a bargaining period (the *former bargaining period*) in relation to a proposed collective agreement has ended because a negotiating party (the *former negotiating party*) has given a notice under paragraph 428(b).
- (2) Subject to this section, the Commission may, by order, declare that, during a specified period, a specified former negotiating party, or a specified employee of the employer:
 - (a) is not allowed to initiate a new bargaining period in relation to specified matters that were dealt with by the proposed collective agreement; or
 - (b) may initiate a bargaining period only on conditions specified in the order.
- (3) The Commission must not make an order under subsection (2) unless:
 - (a) the Commission has given the former negotiating parties an opportunity to be heard; and
 - (b) the Commission considers that it is in the public interest to make the order; and
 - (c) either subsection (4) or (5) applies.
- (4) The Commission may make an order under subsection (2):
 - (a) on application by a former negotiating party; and
 - (b) if, assuming the former bargaining period had not ended, the Commission could make an order under subsection 430(1) because a circumstance set out in subsection 430(2), (7) or (8) exists or existed.
- (5) The Commission may make an order under subsection (2):
 - (a) on its own initiative, or on application by a former negotiating party; and
 - (b) if, assuming the former bargaining period had not ended, the Commission could make an order under subsection 430(1) because a circumstance set out in subsection 430(3) exists or existed.

430 Suspension and termination of bargaining periods—general powers of Commission

Suspension or termination required if certain circumstances exist

- (1) Subject to subsection (9), the Commission must, by order, suspend or terminate a bargaining period if, after giving the negotiating parties an opportunity to be heard, it is satisfied that any of the circumstances set out in subsections (2), (3) (7) and (8) exists or existed.

Circumstance—failing to genuinely try to reach agreement etc.

- (2) A circumstance for the purposes of subsection (1) is that a negotiating party (not being the applicant for the order) that, before or during the bargaining period, has organised or taken, or is organising or taking, industrial action to support or advance claims in respect of the proposed collective agreement:
- (a) did not genuinely try to reach an agreement with the other negotiating parties before organising or taking the industrial action; or
 - (b) is not genuinely trying to reach an agreement with the other negotiating parties; or
 - (c) has failed to comply with any orders or directions of the Commission made during the bargaining period that relate to, or that relate to industrial action relating to, the making of the proposed collective agreement or to a matter that has arisen in the negotiations for the proposed collective agreement.

Note: The issue of whether or not a negotiating party is genuinely trying to reach agreement with the other negotiating parties was considered by Justice Munro in *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*, Print T1982.

Circumstance—industrial action endangering life etc.

- (3) A circumstance for the purposes of subsection (1) is that:
- (a) industrial action to support or advance claims in respect of the proposed collective agreement is being taken, or is threatened, impending or probable; and

- (b) that industrial action is adversely affecting, or would adversely affect, the employer or employees of the employer; and
- (c) that industrial action is threatening, or would threaten:
 - (i) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or
 - (ii) to cause significant damage to the Australian economy or an important part of it.

Note: See also Division 8 (about workplace determinations once a bargaining period has been terminated).

- (4) If an application is made to the Commission for an order under subsection (1) on the grounds of or including a circumstance set out in subsection (3), the Commission must, as far as practicable, hear and determine the application within 5 days after the application is made.
- (5) If subsection (4) applies to an application and the Commission is unable to determine the application within the period referred to in that subsection, the Commission must, within that period, make an interim order suspending the bargaining period until the application is determined.
- (6) If the Commission makes an order under subsection (1) terminating a bargaining period in a circumstance set out in subsection (3), the Commission must send each of the negotiating parties a notice:
 - (a) setting out the effect of Division 8; and
 - (b) informing the negotiating parties that they may agree to submit the matters at issue to an alternative dispute resolution process conducted by the Commission or another provider (see Divisions 4 and 6 of Part 13).

Circumstance—organisations and employees who are not members

- (7) A circumstance for the purposes of subsection (1) is that industrial action is being organised or taken by:
 - (a) an organisation that is a negotiating party; or
 - (b) a member of such an organisation who is employed by the employer; or
 - (c) an officer or employee of such an organisation acting in that capacity;

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against an employer to support or advance claims in respect of employees:

- (d) whose employment will be subject to the agreement; and
- (e) who are neither members, nor eligible to become members, of the organisation.

Circumstance—demarcation disputes

- (8) A circumstance for the purposes of subsection (1) is that industrial action that is being organised or taken by an organisation that is a negotiating party:
 - (a) relates, to a significant extent, to a demarcation dispute; or
 - (b) contravenes an order of the Commission that relates, to a significant extent, to a demarcation dispute.

Orders on application or Commission's initiative

- (9) The Commission:
 - (a) may not make an order under subsection (1), in a circumstance set out in subsection (2), (7) or (8), except on application by a negotiating party; but
 - (b) may make an order under subsection (1), in a circumstance set out in subsection (3):
 - (i) on its own initiative; or
 - (ii) on application by a negotiating party or the Minister.

Application does not have to identify bargaining periods

- (10) An application may be made to the Commission for an order under subsection (1) for the suspension or termination of whatever bargaining periods apply to:
 - (a) a specified business, or any part of that business; or
 - (b) a specified part of a specified business;without specifically identifying the bargaining periods. The application has effect as if it were an application for the suspension or termination of the bargaining period, or each of the bargaining periods, that applies to the specified business (or any part of it), or to the specified part of the business, as the case requires.

Note: The other requirements of this section must still be complied with in relation to the application.

- (11) If subsection (10) applies to an application, the Commission must satisfy itself as to which bargaining periods the application has effect in relation to.

Restrictions on initiating new bargaining periods

- (12) An order under subsection (1) suspending a bargaining period may, if the Commission considers it to be appropriate, contain a declaration that, during some or all of the period while the suspension has effect, a specified negotiating party or employee of the employer:
- (a) is not allowed to initiate a new bargaining period in relation to specified matters that are dealt with by the proposed collective agreement; or
 - (b) may initiate such a bargaining period only on conditions specified in the declaration.
- (13) An order under subsection (1) terminating a bargaining period may, if the Commission considers it to be appropriate, contain a declaration that, during a specified period beginning at the time of the termination, a specified negotiating party or employee of the employer:
- (a) is not allowed to initiate a new bargaining period in relation to specified matters that are dealt with by the proposed collective agreement; or
 - (b) may initiate such a bargaining period only on conditions specified in the declaration.

Extension of notice period required by subsection 434(3)

- (14) In an order under subsection (1), the Commission may, if it is satisfied, in relation to any industrial action that might be taken (by virtue of section 434) after the end of the period of suspension, that there are exceptional circumstances justifying the period of written notice required by subsection 434(3) being longer than 3 days, specify a longer period, of up to 7 days.

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431 Suspension and termination of bargaining periods—pattern bargaining

Suspension or termination required for pattern bargaining

- (1) The Commission must, by order, suspend a bargaining period for a period specified in the order, or terminate the bargaining period, if:
- (a) a negotiating party, or a person prescribed by the regulations, applies to the Commission for an order under this section; and
 - (b) another negotiating party is engaged in pattern bargaining in relation to the proposed collective agreement.

Note: For other provisions relating to pattern bargaining, see:

- (a) section 439; and
- (b) section 461; and
- (c) section 497.

Negotiating parties must be given the opportunity to be heard

- (2) The Commission must not make an order under subsection (1) unless it has given the negotiating parties the opportunity to be heard.

Commission may suspend or terminate as it considers appropriate

- (3) If the Commission is required by subsection (1) to make an order under that subsection, then regardless of the order applied for:
- (a) the order may be for the suspension or termination of the bargaining period, as the Commission considers appropriate; and
 - (b) any period of suspension specified in the order must be such a period as the Commission considers appropriate.

Application does not have to identify bargaining periods

- (4) An application may be made to the Commission for an order under subsection (1) for the suspension or termination of whatever bargaining periods apply to:
- (a) a specified business, or any part of that business; or
 - (b) a specified part of a specified business;

without specifically identifying the bargaining periods. The application has effect as if it were an application for the suspension or termination of the bargaining period, or each of the bargaining periods, that applies to the specified business (or any part of it), or to the specified part of the business, as the case requires.

Note: The other requirements of this section must still be complied with in relation to the application.

- (5) If subsection (4) applies to an application, the Commission must satisfy itself as to which bargaining periods the application has effect in relation to.

Restrictions on initiating new bargaining periods

- (6) An order under subsection (1) suspending a bargaining period may, if the Commission considers it to be appropriate, contain a declaration that, during some or all of the period while the suspension has effect, a specified negotiating party or employee of the employer:
- (a) is not allowed to initiate a new bargaining period in relation to specified matters that are dealt with by the proposed collective agreement; or
 - (b) may initiate such a bargaining period only on conditions specified in the declaration.
- (7) An order under subsection (1) terminating a bargaining period may, if the Commission considers it to be appropriate, contain a declaration that, during a specified period beginning at the time of the termination, a specified negotiating party or employee of the employer:
- (a) is not allowed to initiate a new bargaining period in relation to specified matters that are dealt with by the proposed collective agreement; or
 - (b) may initiate such a bargaining period only on conditions specified in the declaration.

Extension of notice period required by subsection 434(3)

- (8) In an order under subsection (1) suspending a bargaining period, the Commission may, if it is satisfied, in relation to any industrial action that might be taken (by virtue of section 434) after the end of the period of suspension, that there are exceptional

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circumstances justifying the period of written notice required by subsection 434(3) being longer than 3 days, specify a longer period, of up to 7 days.

432 Suspension of bargaining periods—cooling off

Suspension if would assist in resolving matters at issue

- (1) The Commission must, by order, suspend a bargaining period for a period specified in the order if:
 - (a) a negotiating party applies to the Commission for the bargaining period to be suspended under this section; and
 - (b) protected action is being taken in respect of the proposed collective agreement; and
 - (c) the Commission considers that the suspension is appropriate, having regard to:
 - (i) whether suspending the bargaining period would be beneficial to the negotiating parties because it would assist in resolving the matters at issue; and
 - (ii) the duration of the action; and
 - (iii) whether suspending the bargaining period would be contrary to the public interest or inconsistent with the objects of this Act; and
 - (iv) any other matters that the Commission considers relevant.

Period of suspension

- (2) The period of suspension specified in the order must be a period that the Commission considers appropriate.

Extension of suspension

- (3) The Commission must, by order, extend the period of suspension by a specified period that the Commission considers appropriate if:
 - (a) a negotiating party applies to the Commission for the period of suspension to be extended; and
 - (b) the Commission considers that the extension is appropriate, having regard to:
 - (i) the matters referred to in paragraph (1)(c); and

- (ii) whether the negotiating parties, during the period of suspension, genuinely tried to reach an agreement.
- (4) The Commission must not make an order under subsection (3) extending the period of suspension if that period has previously been extended.

Negotiating parties must be given opportunity to be heard

- (5) The Commission must not make an order under subsection (1) or (3) unless it has given the negotiating parties the opportunity to be heard.

Commission to inform negotiating parties that they may submit matters at issue for alternative dispute resolution

- (6) If the Commission makes an order under subsection (1) or (3), the Commission must send each of the negotiating parties a notice informing the negotiating parties that they may agree to submit the matters at issue to an alternative dispute resolution process conducted by the Commission or another provider (see Part 13).

Extension of notice period required by subsection 434(3)

- (7) In an order under subsection (1) or (3), the Commission may, if it is satisfied, in relation to any industrial action that might be taken (by virtue of section 434) after the end of the period of suspension, that there are exceptional circumstances justifying the period of written notice required by subsection 434(3) being longer than 3 days, specify a longer period, of up to 7 days.

433 Suspension of bargaining periods—significant harm to third party

Suspension if industrial action threatens significant harm to a person

- (1) The Commission must, by order, suspend a bargaining period for a period specified in the order if:
- (a) industrial action is being taken in respect of the proposed collective agreement; and

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- (b) an application for the bargaining period to be suspended under this section is made to the Commission by or on behalf of:
 - (i) an organisation, person or body directly affected by the action (other than a negotiating party); or
 - (ii) the Minister; and
 - (c) the Commission considers that the action is adversely affecting the employer or employees of the employer; and
 - (d) the Commission considers that the action is threatening to cause significant harm to any person (other than a negotiating party); and
 - (e) the Commission considers that the suspension is appropriate, having regard to:
 - (i) whether suspending the bargaining period would be contrary to the public interest or inconsistent with the objects of this Act; and
 - (ii) any other matters that the Commission considers relevant.
- (2) For the purposes of paragraph (1)(d), in considering whether the action is threatening to cause significant harm to a person, the Commission may have regard to the following:
- (a) if the person is an employee—the extent to which the action affects the interests of the person as an employee;
 - (b) the extent to which the person is particularly vulnerable to the effects of the action;
 - (c) the extent to which the action threatens to:
 - (i) damage the ongoing viability of a business carried on by the person; or
 - (ii) disrupt the supply of goods or services to a business carried on by the person; or
 - (iii) reduce the person's capacity to fulfil a contractual obligation; or
 - (iv) cause other economic loss to the person;
 - (d) any other matters that the Commission considers relevant.

Period of suspension

- (3) The period of suspension specified in the order must be a period that the Commission considers appropriate. The period of

suspension (as extended under subsection (4), if applicable) must not exceed 3 months.

Extension of suspension

- (4) The Commission must, by order, extend the period of suspension by a specified period that the Commission considers appropriate if:
- (a) an application for the period of suspension to be extended is made to the Commission by or on behalf of:
 - (i) an organisation, person or body directly affected by the action (other than a negotiating party); or
 - (ii) the Minister; and
 - (b) the Commission considers that the extension is appropriate, having regard to the matters referred to in paragraphs (1)(c), (d) and (e).
- (5) The Commission must not make an order under subsection (4) extending the period of suspension if that period has previously been extended.

Negotiating parties must be given opportunity to be heard

- (6) The Commission must not make an order under subsection (1) or (4) unless it has given the negotiating parties the opportunity to be heard.

Commission to inform negotiating parties that they may submit matters at issue for alternative dispute resolution

- (7) If the Commission makes an order under subsection (1) or (4), the Commission must send each of the negotiating parties a notice informing the negotiating parties that they may agree to submit the matters at issue to an alternative dispute resolution process conducted by the Commission or another provider (see Part 13).

Extension of notice period required by subsection 434(3)

- (8) In an order under subsection (1) or (4), the Commission may, if it is satisfied, in relation to any industrial action that might be taken (by virtue of section 434) after the end of the period of suspension, that there are exceptional circumstances justifying the period of written notice required by subsection 434(3) being longer than 3 days, specify a longer period, of up to 7 days.

434 Industrial action without further protected action ballot after end of suspension of bargaining period

- (1) This section applies if:
 - (a) before a bargaining period was suspended under subsection 430(1), 431(1), 432(1) or 433(1), industrial action was authorised by a protected action ballot; and
 - (b) the ballot authorised industrial action:
 - (i) some or all of which had not been taken before the period of suspension began; or
 - (ii) that had not ended before the period of suspension began; or
 - (iii) beyond the period of suspension.
- (2) After the period of suspension, as extended under subsection 432(3) or 433(4) (if applicable), has ceased (whether because the period ended or was revoked):
 - (a) a relevant employee (within the meaning of Division 4) may organise, or engage in, that industrial action without another protected action ballot; and
 - (b) a negotiating party that is an organisation of employees may organise, or engage in, that industrial action without another protected action ballot.

For the purposes of working out when that industrial action may be organised, or engaged in, the period of suspension (including any dates authorised by a protected action ballot as dates on which action is to be taken) is to be ignored.
- (3) However, that industrial action is not protected action unless, after the period of suspension, the organisation, or the employee, gives the employer at least the required written notice of the intention to take the action. The notice must state the nature of the intended action and the day when it will begin.
- (4) For the purposes of subsection (3), the *required written notice* is:
 - (a) 3 working days' written notice; or
 - (b) if the Commission, in the order under subsection 430(1), 431(1), 432(1) or 433(1) suspending the bargaining period, or an order under subsection 432(3) or 433(4) extending the period of suspension, specifies a higher number of days—that number of days' written notice.

Note: For the maximum number of days the suspension order can specify, see subsection 430(14), 431(8), 432(7) or 433(8).

- (5) Nothing in this section authorises industrial action after the end of the period of suspension that is different in type or duration from the industrial action that was authorised by the protected action ballot.

Example 1: A protected action ballot authorised strike action for 20 consecutive working days from a specified date. Fourteen working days into the strike, the bargaining period was suspended for one month.

Under this section, once the period of suspension ends, the initiating party could give the required written notice, without another protected action ballot, of 6 further consecutive working days of strike action (the balance of the strike action authorised).

Example 2: A protected action ballot authorised the imposition of certain work bans every Monday, for a period of 8 consecutive weeks starting from a specified date. After 3 weeks, the bargaining period was suspended for a period of 2 weeks.

Under this section, once the period of suspension ends, the initiating party could give the required written notice, without another protected action ballot, that the work bans authorised by the ballot will be imposed for 5 further consecutive Mondays (the balance of the industrial action authorised).

Division 3—Protected action

Subdivision A—What is protected action?

435 Protected action

General

- (1) Action by a person is *protected action* if:
- (a) the action is protected action under subsection (2) or (3); and
 - (b) no provision of Subdivision B excludes the action from being protected action; and
 - (c) subsection 434(3) does not exclude the action from being protected action.

Employee and employee organisation actions

- (2) During a bargaining period:
- (a) an organisation of employees that is a negotiating party; or
 - (b) a member of such an organisation who is employed by the employer; or
 - (c) an officer or employee of such an organisation acting in that capacity; or
 - (d) an employee who is a negotiating party;
- is entitled, for the purpose of:
- (e) supporting or advancing claims made in respect of the proposed collective agreement; or
 - (f) responding to industrial action by the employer against employees whose employment will be subject to the proposed collective agreement;
- to organise or engage in industrial action against the employer and, if the organisation, member, officer or employee does so, the organising of, or engaging in, that industrial action is protected action.

Employer actions

- (3) Subject to subsection (5), during a bargaining period, the employer is entitled, for the purpose of:

- (a) supporting or advancing claims made by the employer in respect of the proposed collective agreement; or
- (b) responding to industrial action by any of the employees whose employment will be subject to the proposed collective agreement;

to engage in industrial action against all or any of the employees whose employment will be subject to the agreement and, if the employer does so, the organising of, or engaging in, that industrial action is protected action.

Note 1: The existence of this entitlement does not affect any right of the employer to refuse to pay the employee where, under the common law, the employer is permitted to do so because the employee has not performed work as directed.

Note 2: The existence of this entitlement also does not affect any authorisation of the employer to stand-down the employee under an award.

- (4) If the employer engages in industrial action against employees in accordance with subsection (3), the employer is entitled to refuse to pay any remuneration to the employees in respect of the period of the industrial action.
- (5) The employer is not entitled to engage in industrial action against employees under subsection (3) (and so the industrial action will not be protected action) unless the continuity of the employees' employment, for such purposes as are prescribed by the regulations, is not affected by the industrial action.

Subdivision B—Exclusions from protected action

436 Exclusion—claims in support of inclusion of prohibited content

Engaging in industrial action in relation to a proposed collective agreement is not protected action if it is to support or advance claims to include prohibited content in the agreement.

437 Exclusion—industrial action while bargaining period is suspended

Engaging in industrial action in relation to a proposed collective agreement is not protected action if it is engaged in while the bargaining period is suspended.

438 Exclusion—industrial action must not involve persons who are not protected for that industrial action

- (1) Engaging in industrial action in relation to a proposed collective agreement is not protected action if:
 - (a) it is engaged in in concert with one or more persons who are not protected persons for the industrial action; or
 - (b) it is organised other than solely by one or more protected persons for the industrial action.
- (2) Organising industrial action in relation to a proposed collective agreement is not protected action if:
 - (a) it is organised in concert with one or more persons who are not protected persons for the industrial action; or
 - (b) it is intended to be engaged in other than solely by one or more protected persons for the industrial action.
- (3) In this section:

protected person, for industrial action in relation to a proposed collective agreement, means:

- (a) an organisation of employees that is a negotiating party to the proposed collective agreement; or
- (b) a member of such an organisation who is employed by the employer and whose employment will be subject to the proposed collective agreement; or
- (c) an officer or employee of such an organisation acting in that capacity; or
- (d) an employee who is a negotiating party to the proposed collective agreement; or
- (e) an employer who is a negotiating party to the proposed collective agreement.

439 Exclusion—industrial action must not be in support of pattern bargaining claims

Engaging in or organising industrial action is not protected action if:

- (a) the industrial action is for the purpose of supporting or advancing claims made by a negotiating party to a proposed collective agreement; and

- (b) the party is engaged in pattern bargaining in relation to the proposed collective agreement.

Note: For other provisions relating to pattern bargaining, see:

- (a) section 431; and
- (b) section 461; and
- (c) section 497.

440 Exclusion—industrial action must not be taken until after nominal expiry date of workplace agreements or workplace determinations

Engaging in or organising industrial action in contravention of section 494 or 495 is not protected action.

441 Exclusion—notice of action to be given

Notice of employee and employee organisation actions

- (1) Any action taken as mentioned in subsection 435(2) by:

- (a) an organisation of employees; or
- (b) a member of such an organisation; or
- (c) an officer or employee of such an organisation acting in that capacity; or
- (d) an employee who is a negotiating party;

is not protected action unless the requirements set out in subsection (2) are met.

- (2) The requirements are that:

- (a) if the action is in response to, and is taken after the start of, industrial action against employees by the employer in respect of the proposed collective agreement—the organisation, or the employee who is a negotiating party, has given the employer written notice of the intention to take the action; or
- (b) in any other case—the organisation, or the employee who is a negotiating party, has given the employer at least the required written notice of the intention to take the action.

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- (3) For the purposes of paragraph (2)(b), the *required written notice* is:
- (a) 3 working days' written notice; or
 - (b) if a ballot order made under section 462 in respect of the action specifies a higher number of days—that number of days' written notice.

Note: For the maximum number of days the ballot order can specify, see subsection 463(5).

Notice of employer actions

- (4) If one or more of the negotiating parties is an organisation of employees, any action taken as mentioned in subsection 435(3) by the employer:
- (a) is not protected action unless the employer has given the other negotiating party or each of the other negotiating parties:
 - (i) if the industrial action is in response to, and takes place after the start of, industrial action organised or engaged in by an organisation that is a negotiating party in respect of the proposed collective agreement—written notice of the intended industrial action; or
 - (ii) in any other case—at least 3 working days' written notice of the intended industrial action; and
 - (b) is not protected action in so far as it relates to a particular employee unless:
 - (i) if subparagraph (a)(i) applies—before the industrial action begins; or
 - (ii) in any other case—at least 3 working days before the industrial action begins;the employer has given written notice to the particular employee, or has taken other reasonable steps to notify the particular employee, of the intended industrial action.
- (5) If one or more of the negotiating parties is an employee whose employment will be subject to the proposed collective agreement, any action taken as mentioned in subsection 435(3) by the employer is not protected action in so far as it relates to a particular employee unless:
- (a) if the industrial action is in response to, and takes place after the start of, industrial action organised or engaged in by any

of the employees who are negotiating parties in respect of the proposed collective agreement—before the industrial action begins; or

- (b) in any other case—at least 3 working days before the industrial action begins;

the employer has given written notice to the particular employee, or has taken other reasonable steps to notify the particular employee, of the intended industrial action.

Notice to state nature of intended action and start day

- (6) A written notice or other notification under this section must state the nature of the intended action and the day when it will begin.

Limitations on when notice may be given

- (7) A written notice or other notification under this section cannot be given:
- (a) if the notification relates to action that must, in order to be protected action, be authorised by a protected action ballot—before the declaration of the results of the ballot (see section 476); or
 - (b) if the notification relates to industrial action by an employer (whether the notification is to be given by the employer, an organisation of employees or an employee)—before the start of the bargaining period.

442 Employee may appoint agent to give notice under section 441

If:

- (a) a person referred to in paragraph 441(1)(d) has appointed an agent under section 424 to initiate a bargaining period in relation to a proposed collective agreement; and
 - (b) the person wishes to give notice to an employer under section 441 of intention to take industrial action relating to the proposed collective agreement without disclosing the person's identity to the person's employer;
- the notice may be given by the agent on the person's behalf.

443 Exclusion—requirement that employee organisation or employee comply with Commission orders and directions

(1) If:

- (a) an organisation of employees is a negotiating party to a proposed collective agreement; and
- (b) the Commission has, during the bargaining period, made or given orders or directions that relate to, or that relate to industrial action relating to, the making of the proposed collective agreement or to a matter that has arisen in the negotiations for the proposed collective agreement;

industrial action engaged in by a person who is a member of the organisation is not protected action unless, before the person begins to engage in the industrial action, the organisation has complied with the order or direction so far as it applies to the organisation.

(2) If:

- (a) an employee is a negotiating party to a proposed collective agreement; and
- (b) the Commission has, during the bargaining period, made or given orders or directions that relate to, or that relate to industrial action relating to, the making of the proposed collective agreement or to a matter that has arisen in the negotiations for the proposed collective agreement;

industrial action engaged in by the employee is not protected action unless, before the employee begins to engage in the industrial action, the employee has complied with the order or direction so far as it applies to the employee.

444 Exclusion—requirement that employer genuinely try to reach agreement etc.

Industrial action engaged in by an employer against employees is not protected action unless the employer has, before the employer begins to engage in the industrial action:

- (a) if the employees are members of an organisation or organisations that are negotiating parties—genuinely tried to reach agreement with the organisation or organisations; and
- (b) if the employees are negotiating parties—genuinely tried to reach agreement with the employees; and

- (c) complied with all orders or directions made or given by the Commission during the bargaining period that relate to, or that relate to industrial action relating to, the making of the proposed collective agreement or to a matter that has arisen in the negotiations for the proposed collective agreement, so far as the orders or directions apply to the employer.

445 Exclusion—employee and employee organisation action to be authorised by secret ballot or be in response to employer action

Any action taken as mentioned in subsection 435(2) by:

- (a) an organisation of employees; or
- (b) a member of such an organisation; or
- (c) an officer or employee of such an organisation acting in that capacity; or
- (d) an employee who is a negotiating party;

is not protected action unless:

- (e) the action is in response to industrial action by the employer against employees whose employment will be subject to the proposed collective agreement; or
- (f) the action has been authorised by a protected action ballot (see section 478).

Note: The question whether industrial action is authorised by a protected action ballot is also affected by section 434.

446 Exclusion—employee organisation action must be duly authorised

- (1) Engaging in industrial action by members of an organisation of employees that is a negotiating party is not protected action unless, before the industrial action begins:
 - (a) the industrial action is duly authorised by a committee of management of the organisation or by someone authorised by such a committee to authorise the industrial action; and
 - (b) if the rules of the organisation provide for the way in which the industrial action is to be authorised—the industrial action is duly authorised under those rules; and
 - (c) written notice of the giving of the authorisation is given to a Registrar.

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- (2) Industrial action is taken, for the purposes of this section, to be duly authorised under the rules of an organisation of employees even though a technical breach has occurred in authorising the industrial action, so long as the person or persons who committed the breach acted in good faith.
- (3) Examples of a technical breach in authorising industrial action are as follows:
 - (a) a contravention of the rules of the organisation;
 - (b) an error or omission in complying with the requirements of this Act;
 - (c) participation, by a person not eligible to do so, in the making of a decision by a committee of management, or by members, of the organisation.
- (4) Industrial action is taken, for the purposes of this section, to have been duly authorised under the rules of an organisation of employees, and to have been so authorised before the industrial action began, unless:
 - (a) the Court declares in a proceeding that the industrial action was not duly authorised under those rules; and
 - (b) the proceeding was brought in the Court within 6 months after the notification in relation to the industrial action was given to a Registrar under paragraph (1)(c).
- (5) In so far as the rules of an organisation of employees provide for the way in which industrial action that section 435 entitles the organisation to organise or engage in is to be authorised, the rules do not contravene section 159 of the Registration and Accountability of Organisations Schedule unless the manner provided for contravenes that section.

Subdivision C—Significance of action being protected action

447 Immunity provisions

- (1) Subject to subsection (2), no action lies under any law (whether written or unwritten) in force in a State or Territory in respect of any industrial action that is protected 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) Subsection (1) does not prevent an action for defamation being brought in respect of anything that occurred in the course of industrial action.

Note: Subsection 496(13) provides that an order under subsection 496(1) or (6) directing that industrial action stop or not occur does not apply to protected action.

448 Employer not to dismiss employee etc. for engaging in protected action

- (1) An employer must not:
- (a) dismiss an employee, injure an employee in his or her employment or alter the position of an employee to the employee's prejudice; or
 - (b) threaten to dismiss an employee, injure an employee in his or her employment or alter the position of an employee to the employee's prejudice;
- wholly or partly because the employee is proposing to engage, is engaging, or has engaged, in protected action.
- (2) Subsection (1) does not apply to any of the following actions taken by the employer:
- (a) standing-down the employee;
 - (b) refusing to pay the employee, if:
 - (i) the refusal is in accordance with section 507; or
 - (ii) under the common law, the employer is permitted to do so because the employee has not performed work as directed;
 - (c) action that is itself protected action.

Civil remedy provisions

- (3) Subsection (1) is a civil remedy provision.
- (4) The Court may make one or more of the following orders in relation to a person who has contravened subsection (1):
- (a) an order imposing a pecuniary penalty on the person;

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- (b) injunctions, and any other orders, that the Court considers necessary to stop the contravention or remedy its effects.
- (5) The pecuniary penalty under paragraph (4)(a) cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (6) Other orders the Court may make under paragraph (4)(b) include (but are not limited to):
 - (a) if the contravention was constituted by dismissing an employee—an order to reinstate the person dismissed to the position that the person occupied immediately before the dismissal or to a position no less favourable than that position; and
 - (b) in any case—to pay, to the person dismissed, injured or prejudiced, compensation for loss suffered as a result of the dismissal, injury or prejudice.
- (7) An application for an order under subsection (4) may be made by:
 - (a) the employee concerned; or
 - (b) an organisation of employees of which that employee is a member; or
 - (c) a workplace inspector; or
 - (d) any other person prescribed by the regulations.
- (8) In proceedings for an order under subsection (4), it is to be presumed, unless the employer proves otherwise, that the alleged conduct of the employer was carried out wholly or partly because the employee was proposing to engage, was engaging, or had engaged, in protected action.

Note: For other provisions about civil remedy provisions, see Division 3 of Part 14.

Division 4—Secret ballots on proposed protected action

Subdivision A—General

449 Object of Division and overview of Division

Object

- (1) The object of this Division is to establish a transparent process which allows employees directly concerned to choose, by means of a fair and democratic secret ballot, whether to authorise industrial action supporting or advancing claims by organisations of employees, or by employees.

Overview of Division

- (2) Under Division 3, industrial action by employees is not protected action unless it has been authorised in advance by a secret ballot held under this Division (a ***protected action ballot***). This Division establishes the steps that organisations of employees, or employees, who wish to organise or engage in protected action must take in order to:
 - (a) obtain an order from the Commission that will authorise a protected action ballot to be held; and
 - (b) hold a protected action ballot that may authorise the industrial action.
- (3) The rule that industrial action by employees is not protected action unless it has been authorised by a protected action ballot does not apply to action in response to an employer engaging in industrial action against the employees (see section 445).

450 Definitions

In this Division:

applicant means an applicant for a ballot order.

applicant's agent means an agent appointed by an employee, or by a group of employees, under subsection 451(5).

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authorised ballot agent, in relation to a protected action ballot, means the person authorised by the Commission in the ballot order to conduct the ballot.

authorised independent adviser, in relation to a protected action ballot, means the person authorised by the Commission in the ballot order to be the independent adviser for the ballot.

ballot order means an order made under section 462 requiring a protected action ballot to be held.

declaration envelope means an envelope in the form prescribed by the regulations on which a voter is required to make a declaration containing the information prescribed by the regulations.

joint applicant means a person who is participating, or has participated, in making a joint application under section 455.

party, in relation to an application for a ballot order, means either of the following:

- (a) the applicant;
- (b) the employer of the relevant employees.

prescribed number, in relation to relevant employees, means:

- (a) if there are fewer than 80 relevant employees—4; or
- (b) if there are at least 80, but not more than 5,000, relevant employees—5% of the number of such employees; or
- (c) if there are more than 5,000 relevant employees—250.

protected action ballot means a ballot under this Division.

relevant employee, in relation to proposed industrial action against an employer in respect of a proposed collective agreement, means:

- (a) if an organisation of employees is a negotiating party to the agreement—any member of the organisation who is employed by the employer and whose employment will be subject to the agreement; and
- (b) if an employee is a negotiating party to the agreement—any employee who is a negotiating party to the agreement;

but does not include an employee who is bound by an ITEA whose nominal expiry date has not passed.

roll of voters means a list compiled:

- (a) by the Commission under section 466; or
- (b) by an authorised ballot agent in compliance with an order of the Commission under section 466.

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

451 Who may apply for a ballot order etc.

When application can be made

- (1) A person referred to in subsection (3) may, during a bargaining period, apply to the Commission for an order for a ballot to be held to determine whether proposed industrial action has the support of relevant employees.

Note: For the duration of a bargaining period, see sections 427 (when it begins) and 428 (when it ends).

- (2) However, if there are one or more existing collective agreements binding on relevant employees, the application must not be made before:
 - (a) if there is only one existing collective agreement—the nominal expiry date of the existing collective agreement; or
 - (b) if there are 2 or more existing collective agreements—whichever is the last occurring of the nominal expiry dates of those existing collective agreements.

Who can apply

- (3) The following people may apply:
 - (a) if the bargaining period was initiated by an organisation of employees—that organisation;
 - (b) if the bargaining period was initiated by an employee or employees—any employee who is a negotiating party to the proposed collective agreement, or a group of such employees acting jointly.

Note: For joint applications, see section 455.

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Employee applications need support of prescribed number of employees

- (4) An employee, or a group of such employees acting jointly, cannot make an application unless the application has the support of at least the prescribed number of relevant employees.

Note: *Prescribed number* is defined in section 450.

Employee applicants can appoint agent

- (5) A person or persons referred to in paragraph (3)(b) who wish to make an application under this section without disclosing their identities to their employer may appoint an agent to represent them for all purposes connected with the application.

452 Contents of application

- (1) The application must include the following:
- (a) the question or questions to be put to the relevant employees in the ballot, including the nature of the proposed industrial action;
 - (b) details of the types of employees who are to be balloted;
 - (c) any details required by Rules of the Commission (see subsection (3)).

- (2) The application may include the name of a person nominated by the applicant to conduct the ballot.

Note: The question of who conducts the ballot is ultimately decided by the Commission—see paragraph 463(1)(e) and section 480.

- (3) Without limiting the generality of section 124, Rules of the Commission made under that section may deal with:
- (a) the matters to be included in an application for a ballot order; and
 - (b) the form in which the application is to be made.

453 Material to accompany application

- (1) The application must be accompanied by:
- (a) a copy of the notice given under subsection 423(3) to initiate the relevant bargaining period; and

- (b) a copy of the particulars that accompanied that notice as required by section 426; and
 - (c) a declaration by the applicant under subsection (4) of this section.
- (2) If the applicant is an organisation of employees, the application must be accompanied by a written notice showing that the application has been duly authorised by a committee of management of the organisation or by someone authorised by such a committee to authorise the application.
 - (3) If the applicant is an employee, or a group of employees, represented by an applicant's agent, the application must be accompanied by a document containing the name of the employee, or each of those employees.
 - (4) The applicant's declaration must state that the industrial action to which the application relates is not for the purpose of supporting or advancing claims to include in the proposed collective agreement any prohibited content.
 - (5) The declaration must be in the form prescribed by the regulations.
 - (6) A person commits an offence if:
 - (a) the person makes, or joins in making, a declaration under subsection (4); and
 - (b) the declaration contains a statement that is false or misleading in a material particular.

Penalty for contravention of this subsection: 30 penalty units.

454 Notice of application

The applicant must give a copy of the application (but not the material referred to in section 453) to:

- (a) the other party; and
 - (b) any person nominated in the application to conduct the ballot;
- within 24 hours after lodging the application with the Commission.

455 Joint applications

- (1) If the bargaining period for the proposed collective agreement was initiated by an employee, 2 or more employees who are negotiating parties may make a joint application for a ballot order.
- (2) An employee who has participated in making a joint application may withdraw his or her name from the application before the application is determined but cannot do so after the application is determined by the Commission.
- (3) If employees have made a joint application, the name of another employee who is a negotiating party may, before the application is determined, be joined to the application if the other applicants consent.
- (4) Without limiting the generality of section 124, Rules of the Commission made under that section may deal with:
 - (a) in the case of a provision of this Act permitting an applicant for a ballot order to do any thing—how the provision is to apply to joint applicants; and
 - (b) in the case of a provision of this Act requiring an applicant for a ballot order to be given notice, or otherwise informed, of any thing—how the requirement is to be fulfilled in relation to joint applicants.

Subdivision C—Determination of application and order for ballot to be held

456 Commission may notify parties etc. of procedure

If:

- (a) an application for a ballot order is lodged with the Commission; and
- (b) the Commission considers that notifying the parties, or a person who may become the authorised ballot agent, of the procedure to be followed by the Commission in dealing with that application will not delay, and may expedite, the determination of the application;

the Commission may notify the parties or person concerned accordingly.

457 Commission to act quickly in relation to application etc.

- (1) In exercising its powers under this Division, the Commission:
 - (a) must act as quickly as is practicable; and
 - (b) must, as far as is reasonably possible, determine all applications made under this Division within 2 working days after the application is made.

Note: In exercising its powers, the Commission is also required to act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms (see paragraph 110(1)(c)). It is not bound by the rules of evidence, and may inform itself in any manner it considers just (see paragraph 110(1)(b)).

- (2) However, the Commission must not determine an application for a ballot order until it is satisfied that:
 - (a) the applicant has complied with section 454; and
 - (b) the persons referred to in subsections 458(1) and (2) have had a reasonable opportunity to make submissions in relation to the application.

458 Parties and relevant employees may make submissions and apply for directions

- (1) A party or a relevant employee may make submissions, and may apply for directions, relating to:
 - (a) an application for a ballot order; or
 - (b) any aspect of the conduct of a protected action ballot.
- (2) A person nominated in an application to conduct a ballot may make submissions, and apply for directions, relating to the application.
- (3) An authorised ballot agent may make submissions, and apply for directions, relating to any aspect of a protected action ballot.
- (4) The Commission may decline to consider a person's submission if the Commission is satisfied that the submission is vexatious, frivolous, misconceived or lacking in substance.

459 Commission may make orders or give directions

- (1) The Commission may make orders, or give directions, in connection with:
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- (a) an application for a ballot order; or
 - (b) any aspect of the conduct of a protected action ballot.
- (2) Without limiting subsection (1), the Commission may make orders, or give directions, aimed at ensuring that a protected action ballot is conducted expeditiously.
- (3) In deciding whether to make an order, or give a direction, under this section, and in deciding the content of any such order or direction, the Commission must have regard to the desirability of the ballot results being available to the parties within 10 days after the ballot order is made.

460 Commission procedure regarding multiple applications

- (1) If:
- (a) more than one application for a ballot order is before the Commission for determination; and
 - (b) the applications relate to industrial action by employees of the same employer or by employees at the same place of work; and
 - (c) the Commission considers that determining the applications at the same time will not unreasonably delay the determination of any of the applications;
- the Commission may determine the applications at the same time.
- (2) If:
- (a) the Commission has made an order requiring a ballot to be held in relation to industrial action by employees of an employer, or by employees at a place of work; and
 - (b) the Commission proposes to make another order requiring a ballot to be held in relation to industrial action against that employer, or at the same place of work; and
 - (c) the Commission considers that the level of disruption of the employer's business, or at the place of work (as the case requires), could be reduced if the ballots were held at the same time; and
 - (d) the Commission considers that requiring the ballots to be held at the same time will not unreasonably delay the conduct of either ballot;

the Commission may make, or vary, the relevant orders so as to require the ballots to be held at the same time.

461 Application not to be granted unless certain conditions are met

Commission must be satisfied of various matters

- (1) The Commission must grant an application for a ballot order if, and must not grant the application unless, it is satisfied that:
 - (a) during the bargaining period, the applicant genuinely tried to reach agreement with the employer of the relevant employees; and
 - (b) the applicant is genuinely trying to reach agreement with the employer; and
 - (c) the applicant is not engaged in pattern bargaining.

Note 1: An application for a ballot order must comply with the requirements set out in Subdivision B.

Note 2: To work out when a bargaining period began, see section 427.

Note 3: For other provisions relating to pattern bargaining, see:

- (a) section 431; and
- (b) section 439; and
- (c) section 497.

When Commission has discretion to refuse application

- (2) Despite subsection (1), the Commission may refuse the application if it is satisfied:
 - (a) that granting the application would be inconsistent with the object of this Division (see section 449); or
 - (b) that the applicant, or a relevant employee, has at any time contravened a provision of this Division or an order made, or direction given, under this Division.

462 Grant of application—order for ballot to be held

If the Commission grants the application, the Commission must order the applicant to hold a protected action ballot.

463 Matters to be included in order

- (1) An order for a protected action ballot to be held must specify the following:
 - (a) the name of:
 - (i) if the applicant is an organisation of employees—the organisation; or
 - (ii) if the applicant is an employee, or a group of employees, represented by an applicant’s agent—the applicant’s agent; or
 - (iii) if the applicant is an employee, or a group of employees, not represented by an applicant’s agent—the employee or employees;
 - (b) the types of employees who are to be balloted;
 - (c) the voting method;
 - (d) the timetable for the ballot, including:
 - (i) the day on which the roll of voters is to close, which must be a day at least 2 working days before the day on which the ballot is to be held, or is to start to be held; and
 - (ii) the day on which the ballot is to close, and the time (the *voting closing time*) on that day by which votes must be received (if the order specifies a postal ballot) or by which votes must be cast (if the order specifies an attendance ballot);
 - (e) the name of the person authorised by the Commission to conduct the ballot;
 - (f) the name of the person (if any) authorised by the Commission to be the independent adviser for the ballot;
 - (g) the question or questions to be put to the relevant employees in the ballot, including the nature of the proposed industrial action.
- Note 1: Section 480 specifies who may be authorised by the Commission to conduct protected action ballots.
- Note 2: Section 481 specifies who may be authorised by the Commission to be the independent adviser for a protected action ballot.
- (2) The order must specify a postal ballot as the voting method unless:
 - (a) the order specifies another voting method; and

- (b) the Commission is satisfied that the other voting method is more efficient and expeditious than a postal ballot.
- (3) If the order specifies a postal ballot as the voting method, it must specify that the voting must take place by way of declaration voting. For this purpose, a person votes by way of *declaration voting* if the person:
 - (a) marks his or her vote on a ballot paper; and
 - (b) places the ballot paper in a declaration envelope; and
 - (c) seals that envelope and signs his or her name in the space provided on the back flap of that envelope; and
 - (d) places that envelope in an outer envelope that is addressed to the authorised ballot agent; and
 - (e) posts the outer envelope so that it reaches the authorised ballot agent before the voting closing time on the day on which the ballot is to close.
- (4) If the order specifies an attendance ballot as the voting method, then:
 - (a) votes must be cast before the voting closing time on the day on which the ballot is to close; and
 - (b) subject to paragraph (a):
 - (i) the order must specify that the voting must take place during the voters' meal-time or other breaks, or outside their hours of employment; and
 - (ii) the order may also specify other rules about the times when voters may vote.
- (5) If the Commission is satisfied, in relation to the proposed industrial action that is the subject of the order, that there are exceptional circumstances justifying the period of written notice referred to in paragraph 441(2)(b) being longer than 3 days, the order may specify a longer period, of up to 7 days.

464 Guidelines for ballot timetables

- (1) The President may develop guidelines in relation to appropriate timetables for the conduct of protected action ballots. The President may consult the Australian Electoral Commission, and any other person, in developing guidelines.

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- (2) Guidelines developed under this section are not legislative instruments.

465 Power of Commission to require information relevant to roll of voters

- (1) The Commission may order the employer of the relevant employees, or the applicant, or both, to provide:
- (a) a list of employees of the type described in the application; and
 - (b) any other information that it is reasonable for the Commission to require in order to assist in the compilation of a roll of voters for the proposed ballot.
- (2) The order may require the list, or other information, to be provided to the Commission or to the authorised ballot agent.
- (3) The order may require the list, or other information, to be provided in whatever form the Commission considers appropriate.

466 Roll to be compiled by Commission or ballot agent

If the Commission makes a ballot order, it must:

- (a) compile a list of the names of the persons who are eligible to be included on the roll of voters for the ballot and provide that list, as the roll of voters, to the authorised ballot agent; or
- (b) order, by separate order, the authorised ballot agent to compile the roll of voters for the ballot.

467 Eligibility to be included on the roll

- (1) A person is eligible to be included on the roll of voters for the ballot if, and only if:
- (a) if the applicant is an organisation of employees—the person:
 - (i) was a member of the organisation on the day the ballot order was made; and
 - (ii) was employed by the employer on the day the ballot order was made; and
 - (iii) will, or would but for the operation of an ITEA that has passed its nominal expiry date, be subject to the proposed collective agreement; or

- (b) if the applicant is an employee, or a group of employees—the person:
 - (i) was employed by the employer on the day the ballot order was made; and
 - (ii) will, or would but for the operation of an ITEA that has passed its nominal expiry date, be subject to the proposed collective agreement.
- (2) A person is not eligible to be included on the roll of voters for the ballot if, on the day the ballot order was made, the person was bound by an ITEA whose nominal expiry date had not passed.

468 Adding or removing names from the roll

- (1) If:
 - (a) a person requests the authorised ballot agent to include the person's name on the roll of voters for a protected action ballot; and
 - (b) the ballot agent is satisfied that the person is eligible to be included on the roll; and
 - (c) the request is made before the day on which the roll of voters is to close;the ballot agent must add the person's name to the roll.
- (2) If:
 - (a) a person applies to the Commission for a declaration that the person is eligible to be included on the roll of voters for the ballot; and
 - (b) the Commission is satisfied that the person is eligible to be included on the roll; and
 - (c) the application is made before the day on which the roll of voters is to close;the Commission must make the declaration and direct the authorised ballot agent to include the person's name on the roll.
- (3) If:
 - (a) a party, the authorised ballot agent, or a person whose name is on the roll of voters for a protected action ballot, applies to the Commission for a declaration that a person whose name has been included on the roll of voters for the ballot is not eligible to be so included; and

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- (b) the application is made before the day on which the roll of voters is to close; and
 - (c) the Commission is satisfied that the person is not eligible to be so included;
- the Commission must make the declaration and direct the authorised ballot agent to remove the person's name from the roll.
- (4) A person's name cannot be added to, or removed from, the roll of voters for a protected action ballot after the day on which the roll of voters is to close.

469 Variation of order

Variation sought by applicant

- (1) An applicant for a ballot order may apply to the Commission, at any time before the order expires, to vary the ballot order.

Variation sought by ballot agent

- (2) The authorised ballot agent for a particular ballot may apply to the Commission, at any time before the ballot has closed, to vary:
- (a) the voting method specified in the ballot order; or
 - (b) the timetable for the ballot specified in the ballot order.

470 Expiry and revocation of order

- (1) If a ballot has not been held within the period specified in the ballot order, the order expires at the end of that period.
- (2) An applicant for a ballot order may apply to the Commission, at any time before the order expires, to revoke the ballot order.
- (3) If the applicant makes an application under subsection (2), the Commission must revoke the order.

471 Compliance with orders and directions

- (1) A person to whom an order or a direction under this Division is expressed to apply must comply with the order or direction.

Civil remedy provisions

- (2) Subsection (1) is a civil remedy provision.
- (3) The Court may order a person who has contravened subsection (1) to pay a pecuniary penalty.
- (4) The pecuniary penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (5) An application for an order under subsection (3) may be made by:
 - (a) an employee who is eligible to be included on the roll of voters for the protected action ballot concerned; or
 - (b) an employer of employees referred to in paragraph (a); or
 - (c) an applicant for the order for the protected action ballot concerned to be held; or
 - (d) a workplace inspector; or
 - (e) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 3 of Part 14.

472 Commission to notify parties and authorised ballot agent

- (1) As soon as practicable after making a ballot order, the Commission must ensure that a copy of the order is given to each party and to the authorised ballot agent.
- (2) As soon as practicable after varying a ballot order, the Commission must ensure that a copy of the variation is given to each party and to the authorised ballot agent.
- (3) As soon as practicable after revoking a ballot order, the Commission must ensure that a copy of the revocation is given to each party and to the authorised ballot agent.

Subdivision D—Conduct and results of protected action ballot

473 Conduct of ballot

A ballot is not a protected action ballot unless it is conducted by the authorised ballot agent for the ballot.

474 Form of ballot paper

The ballot paper must be in the prescribed form and must include the following:

- (a) the name of the applicant or the applicant's agent (as the case requires);
- (b) the types of employees who are to be balloted;
- (c) the name of the ballot agent authorised to conduct the ballot;
- (d) the question or questions to be put to the relevant employees in the ballot, including the nature of the proposed industrial action;
- (e) a statement that the voter's vote is secret and that the voter is free to choose whether or not to support the proposed industrial action;
- (f) instructions to the voter on how to complete the ballot paper;
- (g) the day on which the ballot is to close.

475 Who can vote

A person cannot vote in a protected action ballot unless the person's name is on the roll of voters for the ballot.

476 Declaration of ballot results

As soon as practicable after the day on which the ballot closes, the authorised ballot agent must, in writing:

- (a) make a declaration of the results of the ballot; and
- (b) inform the parties and the Industrial Registrar of the result.

477 Ballot reports

Report by authorised ballot agent

- (1) As soon as practicable after the day on which the ballot closes, the authorised ballot agent must give the Industrial Registrar a written report about the conduct of the ballot.

Note: This subsection is a civil remedy provision: see subsection (7).

- (2) A report under subsection (1) must set out details of:
 - (a) any complaints made to the authorised ballot agent about the conduct of the ballot; and

(b) any irregularities in relation to the conduct of the ballot that have come to the attention of the authorised ballot agent.

(3) Subsection (2) does not limit subsection (1).

Report by authorised independent adviser

(4) As soon as practicable after the end of the voting, the authorised independent adviser (if any) must give the Industrial Registrar a written report about the conduct of the ballot.

Note: This subsection is a civil remedy provision: see subsection (7).

(5) A report under subsection (4) must set out details of:

- (a) any complaints made to the authorised independent adviser about the conduct of the ballot; and
- (b) any irregularities in relation to the conduct of the ballot that have come to the attention of the authorised independent adviser.

(6) Subsection (5) does not limit subsection (4).

Civil remedy provisions

(7) Subsections (1) and (4) are civil remedy provisions.

(8) The Court may order a person who has contravened subsection (1) or (4) to pay a pecuniary penalty.

(9) The pecuniary penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.

(10) An application for an order under subsection (8) may be made by:

- (a) an employee who is eligible to be included on the roll of voters for the protected action ballot concerned; or
- (b) an employer of employees referred to in paragraph (a); or
- (c) an applicant for the order for the protected action ballot concerned to be held; or
- (d) a workplace inspector; or
- (e) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 3 of Part 14.

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Definitions

(11) In this section:

conduct, in relation to a protected action ballot, includes, but is not limited to, the compilation of the roll of voters for the ballot.

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 persons entitled to record votes and by no other persons is, or is attempted to be, prevented or hindered.

478 Effect of ballot

(1) Industrial action is authorised by a protected action ballot if:

- (a) the action was the subject of a protected action ballot; and
- (b) at least 50% of persons on the roll of voters for the ballot voted in the ballot; and
- (c) more than 50% of the votes validly cast were votes approving the action; and
- (d) the action commences during the 30-day period beginning on the date of the declaration of the results of the ballot.

Note: Industrial action must be authorised under this Division if it is to be protected action under Division 3 (unless the action is in response to industrial action by the employer)—see section 445.

(2) However, the action is not authorised to the extent that it occurs after the end of the bargaining period referred to in section 451.

Note: If another bargaining period is initiated later, and industrial action is proposed for that later period, it can only be authorised if a fresh application for a ballot order is granted, and the other steps required by this Division are completed, during that later period.

(3) The Commission may, by order, extend the 30-day period mentioned in paragraph (1)(d) by up to 30 days if the employer and the applicant for the ballot order jointly apply to the Commission for the period to be extended.

(4) The Commission must not make an order under subsection (3) extending the 30-day period if that period has previously been extended.

479 Registrar to record questions put in ballot, and to publish results of ballot

- (1) The Industrial Registrar must, in relation to each protected action ballot that has been held, keep a record of:
 - (a) the questions put to voters in the ballot; and
 - (b) the results of the ballot declared by the authorised ballot agent under section 476.
- (2) The Industrial Registrar must, as soon as practicable after being informed of the results of a ballot by the authorised ballot agent under section 476, publish the results.

Subdivision E—Authorised ballot agents and authorised independent advisers

480 Who may be an authorised ballot agent?

- (1) In a ballot order, the Commission may name as the authorised ballot agent:
 - (a) the Australian Electoral Commission; or
 - (b) another person.
- (2) The Commission must not name a person other than the Australian Electoral Commission as the authorised ballot agent for the ballot unless the Commission is satisfied that the person:
 - (a) is capable of ensuring the secrecy and security of votes cast in the ballot; and
 - (b) is capable of ensuring that the ballot will be fair and democratic; and
 - (c) will conduct the ballot expeditiously; and
 - (d) is otherwise a fit and proper person to conduct the ballot.
- (3) The Commission must not name the applicant as the authorised ballot agent for the ballot unless:
 - (a) the applicant nominates another person to be the authorised independent adviser for the ballot; and
 - (b) the Commission names the other person as the authorised independent adviser for the ballot.

Note: Section 481 specifies who may be authorised by the Commission to be the independent adviser for a protected action ballot.

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- (4) If the Commission is satisfied that a person is not sufficiently independent of the applicant, the Commission must not name the person as the authorised ballot agent for the ballot unless:
- (a) the applicant nominates a third person as the authorised independent adviser for the ballot; and
 - (b) the Commission names the third person as the authorised independent adviser for the ballot.

Note: Section 481 specifies who may be authorised by the Commission to be the independent adviser for a protected action ballot.

- (5) The regulations may prescribe:
- (a) conditions that a person must meet in order to satisfy the Commission that the person is a fit and proper person to conduct a ballot; and
 - (b) factors to be taken into account by the Commission in determining whether a person is a fit and proper person to conduct a ballot.

481 Who may be an authorised independent adviser?

- (1) In a ballot order, the Commission may name a person nominated by the applicant as the authorised independent adviser.
- (2) The Commission must not name a person as the authorised independent adviser for the ballot unless the Commission is satisfied that the person:
 - (a) is sufficiently independent of the applicant; and
 - (b) is capable of giving the authorised ballot agent:
 - (i) advice that is; and
 - (ii) recommendations that are; directed towards ensuring that the ballot will be fair and democratic; and
 - (c) has consented to be so named.
- (3) The regulations may prescribe factors to be taken into account by the Commission in determining whether a person is capable of giving an authorised ballot agent:
 - (a) advice that is; and
 - (b) recommendations that are;

directed towards ensuring that a protected action ballot will be fair and democratic.

Subdivision F—Funding of ballots

482 Liability for cost of ballot

- (1) The applicant for a ballot order is liable for the cost of holding the ballot, whether or not the ballot is completed.
- (2) If the application for the ballot order was made by joint applicants, each applicant is jointly and severally liable for the cost of holding the ballot, whether or not the ballot is completed.
- (3) Subsections (1) and (2) are, in relation to completed ballots, subject to subsections 483(3) and (6).
- (4) In this section:

cost of holding the ballot means:

- (a) if the applicant, or one of the applicants, is the authorised ballot agent—the costs incurred by the authorised ballot agent in relation to the holding of the ballot; or
- (b) otherwise—the amount the authorised ballot agent charges to the applicant or applicants in relation to the holding of the ballot.

483 Commonwealth has partial liability for cost of completed ballot

Authorised ballot agent someone other than the Australian Electoral Commission

- (1) If:
 - (a) the authorised ballot agent for the ballot is not the Australian Electoral Commission; and
 - (aa) the ballot has been completed; and
 - (b) the applicant notifies the Industrial Registrar of the cost of holding the ballot; and
 - (c) the applicant does so within a reasonable time after the day on which the ballot closed;

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the Industrial Registrar must determine how much (if any) of that cost was reasonably and genuinely incurred in relation to the holding of the ballot.

- (2) If subsection (1) applies, the Commonwealth is liable to pay to the authorised ballot agent 80% of the amount determined under that subsection.
- (3) The applicant is, to the extent of the Commonwealth's liability under subsection (2), discharged from liability under section 482 for the cost of holding the ballot.
- (4) The regulations may prescribe matters to be taken into account by the Industrial Registrar in determining whether costs are reasonably and genuinely incurred in relation to the holding of the ballot.

Authorised ballot agent the Australian Electoral Commission

- (5) If the authorised ballot agent for the ballot is the Australian Electoral Commission, the Australian Electoral Commission must certify, within a reasonable time after the completion of the ballot, the amount of the reasonable costs charged by the Australian Electoral Commission to the applicant in relation to holding the ballot.
- (6) The applicant is, to the extent of 80% of the amount certified under subsection (5), discharged from liability under section 482 for the cost of holding the ballot.

Definition

- (7) In this section:

cost of holding the ballot has the same meaning as in section 482.

484 Liability for cost of legal challenges

- (1) The regulations may make provision for who is liable for costs incurred in relation to legal challenges to matters connected with protected action ballots.

- (2) The regulations may also make provision for a person who is liable for costs referred to in subsection (1) to be indemnified by another person for some or all of those costs.
- (3) For the purposes of sections 482 and 483, *costs of holding the ballot* do not include costs referred to in subsection (1) of this section.

Subdivision G—Miscellaneous

485 Identity of certain persons not to be disclosed by Commission

- (1) The Commission must not disclose information that the Commission has reasonable grounds to believe will identify a person as:
 - (a) an applicant who is represented by an applicant's agent; or
 - (b) a relevant employee who was one of the prescribed number of employees supporting an application for a ballot order (as required by subsection 451(4)); or
 - (c) a person whose name appears on the roll of voters for a protected action ballot; or
 - (d) a person who is a party to an ITEA.
- (2) Each of the following is an exception to subsection (1):
 - (a) the disclosure is required or authorised by this Act or by another Act, by regulations made for the purposes of another provision of this Act, or by regulations made for the purposes of another Act;
 - (b) the person whose identity is disclosed has, in writing, authorised the disclosure.

486 Persons not to disclose identity of certain persons

- (1) A person commits an offence if:
 - (a) the person discloses information; and
 - (b) the information is protected information; and
 - (c) the person has reasonable grounds to believe that the information will identify another person as a person referred to in paragraph 485(1)(a), (b), (c) or (d); and
 - (d) the disclosure is not made by the person in the course of performing functions or duties:

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- (i) as a Registry official; or
- (ii) as, or on behalf of, an authorised ballot agent; or
- (iii) as an authorised independent adviser; and
- (e) the disclosure is not required or authorised by this Act or by another Act, by regulations made for the purposes of another provision of this Act, or by regulations made for the purposes of another Act; and
- (f) the person whose identity is disclosed has not, in writing, authorised the disclosure.

Penalty: Imprisonment for 6 months.

- (2) In this section:

protected information, in relation to a person, means information that the person acquired:

- (a) in the course of performing functions or duties as a Registry official; or
- (b) in the course of performing functions or duties as, or on behalf of, an authorised ballot agent; or
- (c) from a person referred to in paragraph (a) or (b) who acquired the information as mentioned in paragraph (a) or (b).

Registry official means:

- (a) the Industrial Registrar; or
- (b) a member of the staff of the Industrial Registry (including a Deputy Industrial Registrar).

487 Immunity if person acted in good faith on ballot results

- (1) If:

- (a) the results of a protected action ballot, as declared by the authorised ballot agent, purported to authorise particular industrial action; and
- (b) an organisation or person, acting in good faith on the declared ballot results, organised or engaged in that industrial action; and
- (c) it is subsequently determined that the action was not authorised by the ballot;

no action lies against the organisation or person under any law (whether written or unwritten) in force in a State or Territory in respect of the action unless the action involved:

- (d) personal injury; or
 - (e) wilful or reckless destruction of, or damage to, property; or
 - (f) the unlawful taking, keeping or use of property.
- (2) Subsection (1) does not prevent an action for defamation being brought in respect of anything that occurred in the course of industrial action.

488 Limits on challenges etc. to ballot orders etc.

- (1) An order of the Commission that a person hold a protected action ballot, and any order, direction or decision of the Commission in connection with the order:
- (a) is final and conclusive; and
 - (b) must not be challenged, appealed against, reviewed, quashed, set aside or called in question in any court on any ground; and
 - (c) is not subject to mandamus, prohibition, certiorari or injunction, or the making of a declaratory or other order, in any court on any ground;
- unless subsection (2) applies to the order or decision.
- (2) This subsection applies to an order for a protected action ballot, or to an order, direction or decision of the Commission in connection with the order, if:
- (a) in proceedings relating to the order, direction or decision, as the case requires, a person claims that another person or persons:
 - (i) contravened this Division, or an order or direction of the Commission under this Division, if the contravention is not merely a technical breach; or
 - (ii) misled the Commission (whether by a false statement or by an omission) in such a way as to affect the order, direction or decision; and
 - (b) the court is satisfied that there are reasonable grounds for the claim.

489 Limits on challenges etc. to ballots

- (1) If a protected action ballot has been conducted, or has purportedly been conducted:
 - (a) the declaration of the results of the ballot is final and conclusive; and
 - (b) the declaration of the results of the ballot must not be quashed or set aside by any court on any ground; and
 - (c) the conduct of the ballot, and the declaration of the results of the ballot, must not be challenged, appealed against, reviewed or called in question, as applicable, in any court on any ground; and
 - (d) the conduct of the ballot, and the declaration of the results of the ballot, are not subject to mandamus, prohibition, certiorari or injunction, or the making of a declaratory or other order, as applicable, in any court on any ground;unless subsection (2) applies to the conduct or declaration.
- (2) This subsection applies to the conduct of a protected action ballot, and to the declaration of the results of a ballot, if:
 - (a) in proceedings relating to the conduct or declaration, as the case requires, a person claims that another person or persons:
 - (i) contravened this Division, or an order or direction of the Commission under this Division, if the contravention is not merely a technical breach; or
 - (ii) acted fraudulently in relation to the conduct or declaration; or
 - (iii) acted in such a way as to cause an irregularity in relation to the conduct or declaration, being an irregularity that affected the outcome of the ballot; and
 - (b) the court is satisfied that there are reasonable grounds for the claim.
- (3) In this section:

conduct, in relation to a protected action ballot, includes, but is not limited to, the compilation of the roll of voters for the ballot.

irregularity, in relation to the conduct or declaration of a protected action ballot, includes, but is not limited to, an act or omission by means of which:

- (a) the full and free recording of votes by all persons entitled to record votes and by no other persons; or
 - (b) a correct ascertainment or declaration of the results of the voting;
- is, or is attempted to be, prevented or hindered.

490 Penalties not affected

Nothing in section 488 or 489 is to be taken to prevent a penalty being imposed upon a person for a contravention of this Act.

491 Preservation of roll of voters, ballot papers etc.

A person commits an offence if:

- (a) the person has conducted a protected action ballot; and
- (b) the person was the authorised ballot agent for the ballot; and
- (c) the person fails to keep the following for a period of one year after the day on which the ballot closed:
 - (i) the roll of voters;
 - (ii) all the ballot papers, envelopes and other documents and records relevant to the ballot.

Penalty: Imprisonment for 6 months.

492 Conferral of function on Australian Electoral Commission

- (1) If the Australian Electoral Commission is the authorised ballot agent for a protected action ballot, it is a function of the Australian Electoral Commission to conduct the ballot.
- (2) If the Australian Electoral Commission is:
 - (a) the ballot agent nominated in an application for a ballot order; or
 - (b) the authorised ballot agent for such a ballot;the Australian Electoral Commission cannot make a submission or an application to the Commission seeking to cease having that status in relation to the ballot.

493 Regulations

The regulations may make provision in relation to the following matters:

- (a) the qualifications and appointment of applicants' agents;
- (b) procedures to be followed in relation to the conduct of a ballot, or class of ballot, under this Division;
- (c) the qualifications, appointment, powers and duties of scrutineers;
- (d) the powers and duties of authorised independent advisers;
- (e) the manner in which ballot results are to be published under section 479.

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

494 Industrial action etc. must not be taken before nominal expiry date of collective agreement or workplace determinations

(1) From the day when:

- (a) a collective agreement; or
- (b) a workplace determination;

comes into operation until its nominal expiry date has passed, an employee, organisation or officer covered by subsection (2) must not organise or engage in industrial action (whether or not that action relates to a matter dealt with in the agreement or determination).

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

Note 2: Action that contravenes this subsection is not protected action (see section 440).

(2) For the purposes of subsection (1), the following are covered by this subsection:

- (a) an employee who is bound by the agreement or determination;
- (b) an organisation of employees that is bound by the agreement or determination;
- (c) an officer or employee of such an organisation acting in that capacity.

(3) From the time when:

- (a) a collective agreement; or
- (b) a workplace determination;

is made until its nominal expiry date has passed, the employer must not engage in industrial action against an employee whose employment is subject to the agreement or determination (whether or not that industrial action relates to a matter dealt with in the agreement or determination).

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

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Note 2: Action that contravenes this subsection is not protected action (see section 440).

Civil remedy provisions

- (4) Subsections (1) and (3) are civil remedy provisions.
- (5) The Court may make one or more of the following orders in relation to a person who has contravened subsection (1) or (3):
 - (a) an order imposing a pecuniary penalty on the person;
 - (b) injunctions, and any other orders, that the Court considers necessary to stop the contravention or remedy its effects.
- (6) The pecuniary penalty under paragraph (5)(a) cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (7) An application for an order under subsection (5), in relation to a contravention of subsection (1), may be made by:
 - (a) the employer concerned; or
 - (b) a workplace inspector; or
 - (c) any person affected by the industrial action; or
 - (d) any other person prescribed by the regulations.
- (8) An application for an order under subsection (5), in relation to a contravention of subsection (3), may be made by:
 - (a) the employee concerned; or
 - (b) an organisation of employees if:
 - (i) a member of the organisation is employed by the employer concerned; and
 - (ii) the contravention relates to, or affects, the member of the organisation or work carried on by the member for that employer; or
 - (c) a workplace inspector; or
 - (d) any person affected by the industrial action; or
 - (e) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 3 of Part 14.

495 Industrial action must not be taken before nominal expiry date of ITEA

- (1) From the day when an ITEA comes into operation until its nominal expiry date, the employee must not engage in industrial action in relation to the employment to which the ITEA relates.

Note 1: This subsection is a civil remedy provision: see subsection (3).

Note 2: Action that contravenes this subsection is not protected action: see section 440.

- (2) From the day when an ITEA comes into operation until its nominal expiry date, the employer must not engage in industrial action against the employee.

Note 1: This subsection is a civil remedy provision: see subsection (3).

Note 2: Action that contravenes this subsection is not protected action (see section 440).

Civil remedy provisions

- (3) Subsections (1) and (2) are civil remedy provisions.
- (4) The Court may make one or more of the following orders in relation to a person who has contravened subsection (1) or (2):
- (a) an order imposing a pecuniary penalty on the person;
 - (b) injunctions, and any other orders, that the Court considers necessary to stop the contravention or remedy its effects.
- (5) The pecuniary penalty under paragraph (4)(a) cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (6) An application for an order under subsection (4), in relation to a contravention of subsection (1), may be made by:
- (a) the employer concerned; or
 - (b) a workplace inspector; or
 - (c) any other person prescribed by the regulations.
- (7) An application for an order under subsection (4), in relation to a contravention of subsection (2), may be made by:
- (a) the employee concerned; or

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- (b) an organisation of employees that represents that employee if:
 - (i) that employee has requested the organisation to apply on that employee's behalf; and
 - (ii) a member of the organisation is employed by that employee's employer; and
 - (iii) the organisation is entitled, under its eligibility rules, to represent the industrial interests of that employee in relation to work carried on by that employee for the employer; or
- (c) a workplace inspector; or
- (d) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 3 of Part 14.

Division 6—Orders and injunctions against industrial action

496 Orders and injunctions against industrial action—general

Orders relating to action by federal-system employees and employers

- (1) If it appears to the Commission that industrial action by an employee or employees, or by an employer, that is not, or would not be, protected action:
 - (a) is happening; or
 - (b) is threatened, impending or probable; or
 - (c) is being organised;the Commission must make an order that the industrial action stop, not occur and not be organised.

Orders relating to action by non-federal system employees and employers

- (2) If it appears to the Commission that industrial action by a non-federal system employee or non-federal system employees, or by a non-federal system employer:
 - (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 Commission must make an order that the relevant industrial action stop, not occur and not be organised.
- (3) For the purposes of subsection (2), and other provisions of this Act as they relate to orders under that subsection:
 - (a) ***non-federal system employee*** means a person who is an employee, within the ordinary meaning of that word, but who is not covered by the definition of ***employee*** in subsection 5(1); and

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- (b) *non-federal system employer* means a person who is an employer, within the ordinary meaning of that word, but who is not covered by the definition of *employer* in subsection 6(1); and
- (c) section 420 (which defines *industrial action*) applies as if references in that section to employees and employers were instead references to non-federal system employees and non-federal system employers.

Order may be made on application or on Commission's own initiative

- (4) The Commission may make an order under subsection (1) or (2) on its own initiative, or on the application of:
 - (a) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action; or
 - (b) an organisation of which a person referred to in paragraph (a) is a member.

Applications generally to be heard and determined within 48 hours

- (5) As far as practicable, the Commission must hear and determine an application for an order under subsection (1) or (2) within 48 hours after the application is made.

Interim orders if applications cannot be heard and determined within 48 hours

- (6) If the Commission is unable to determine an application for an order under subsection (1) or (2) within the period referred to in subsection (5), the Commission must (within that period) make an interim order to stop and prevent engagement in, and organisation of, the industrial action referred to in subsection (1) or (2).
- (7) However, the Commission must not make such an interim order if the Commission is satisfied that it would be contrary to the public interest to do so.
- (8) An interim order is to have effect until the application is determined.

Commission does not have to specify the industrial action

- (9) In ordering under subsection (1), (2) or (6) that industrial action stop, not occur and not be organised, the Commission does not have to specify the particular industrial action.

Obligation to comply with orders

- (10) A person to whom an order under subsection (1), (2) or (6) is expressed to apply must comply with the order.
- (11) Subsection (10) is a civil remedy provision.
- (12) The Court may, on application by a person affected by an order of the Commission under subsection (1), (2) or (6), grant an injunction on such terms as the Court considers appropriate if it is satisfied that another person:
- (a) has engaged in conduct that constitutes a contravention of subsection (10); or
 - (b) is proposing to engage in conduct that would constitute such a contravention.

Note: For other provisions about civil remedy provisions, see Division 3 of Part 14.

Orders do not apply to protected action

- (13) An order under subsection (1), or under subsection (6) that relates to an application for an order under subsection (1), does not apply to protected action.

497 Injunction against industrial action if pattern bargaining engaged in in relation to proposed collective agreement

The Court may grant an injunction in such terms as the Court considers appropriate if, on application by any person, the Court is satisfied that:

- (a) industrial action in relation to a proposed collective agreement is being engaged in, or is threatened, impending or probable; and
- (b) the industrial action is or would be for the purpose of supporting or advancing claims made by a negotiating party to the proposed collective agreement; and

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- (c) the party is engaged in pattern bargaining in relation to the proposed collective agreement.

Note: For other provisions relating to pattern bargaining, see:

- (a) section 431; and
- (b) section 439; and
- (c) section 461.

Division 7—Ministerial declarations terminating bargaining periods

498 Minister's declaration

Making of declaration

- (1) The Minister may make a written declaration terminating a specified bargaining period, or specified bargaining periods, if the Minister is satisfied that:
 - (a) industrial action is being taken, or is threatened, impending or probable; and
 - (b) the industrial action is adversely affecting, or would adversely affect, the employer or employers who are negotiating parties, or employees of the employer or employers; and
 - (c) 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 of part of it; or
 - (ii) to cause significant damage to the Australian economy or an important part of it.

Note: See also Division 8 (about workplace determinations once a bargaining period has been terminated).

- (2) The declaration takes effect on the day that it is made.

Making persons aware of the declaration

- (3) The Minister must publish the declaration in the *Gazette*.
- (4) The Minister must inform the Commission of the making of the declaration.
- (5) The Minister must, as soon as reasonably practicable, take all reasonable steps to make the negotiating parties to the proposed collective agreement or agreements concerned aware:
 - (a) of the making of the declaration; and
 - (b) of the effect of Division 8 (about workplace determinations once a bargaining period has been terminated); and

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- (c) that the negotiating parties may agree to submit the matters at issue to an alternative dispute resolution process conducted by the Commission or another provider (see Divisions 4 and 6 of Part 13).

Restriction on initiating new bargaining period

- (6) The Minister may specify in the declaration that, during a specified period beginning on the day that the declaration is made, a specified person:
 - (a) is not allowed to initiate a new bargaining period in relation to specified matters that are dealt with by the proposed collective agreement or agreements concerned; or
 - (b) may initiate such a bargaining period only on specified conditions.

Declaration not a legislative instrument

- (7) A declaration made under subsection (1) is not a legislative instrument.

499 Minister's directions to remove or reduce the threat

- (1) If the Minister makes a declaration under 498, the Minister may make the following kinds of written directions if the Minister is satisfied that they are reasonably directed to removing or reducing the threat referred to in paragraph 498(1)(c):
 - (a) directions requiring specified negotiating parties, or specified employees of an employer who is a negotiating party, to take specified actions;
 - (b) directions requiring specified negotiating parties, or specified employees of an employer who is a negotiating party, to refrain from taking specified actions.

Making persons aware of the directions

- (2) The Minister must, as soon as reasonably practicable, take all reasonable steps to make the specified persons concerned aware of the directions.

Directions not legislative instruments

- (3) Directions made under subsection (1) are not legislative instruments.

Compliance with directions

- (4) A person must comply with a direction under this section.

Civil remedy provisions

- (5) Subsection (4) is a civil remedy provision.
- (6) The Court may order a person who has contravened subsection (4) to pay a pecuniary penalty.
- (7) The pecuniary penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (8) An application for an order under subsection (6) may be made by a workplace inspector.

Note: For other provisions about civil remedy provisions, see Division 3 of Part 14.

Division 8—Workplace determinations

500 Application of Division

This Division applies if a bargaining period has been terminated:

- (a) on the ground set out in subsection 430(3); or
- (b) because a declaration has been made under Division 7.

501 Definitions

In this Division:

matters at issue means the matters that were at issue during the bargaining period.

negotiating period has the meaning given by section 502.

502 Negotiating period

- (1) The *negotiating period* is the period that:
 - (a) starts on the day on which the bargaining period was terminated; and
 - (b) ends:
 - (i) if the Commission has not extended the period under subsection (2)—21 days after that day; or
 - (ii) if the Commission has so extended the period—42 days after that day.
- (2) The Commission must extend the period if:
 - (a) all of the negotiating parties apply to the Commission for an extension under this subsection within 21 days after the day on which the bargaining period was terminated; and
 - (b) the negotiating parties have not settled the matters at issue (whether or not by making a workplace agreement).

503 When Full Bench must make workplace determination

- (1) The Commission must make a determination (a *workplace determination*) under this section if:
 - (a) the negotiating period has ended; and
-

- (b) the negotiating parties have not settled the matters at issue (whether or not by making a workplace agreement).
- (2) The workplace determination can be made only by a Full Bench.
- (3) The Full Bench must make the workplace determination as quickly as practicable after the end of the negotiating period.
- (4) For the purposes of paragraph (1)(b), the negotiating parties are taken not to have settled the matters at issue if:
 - (a) the negotiating parties make a workplace agreement purporting to settle the matters at issue; and
 - (b) the workplace agreement is not approved in accordance with section 340.
- (5) Workplace determinations are not legislative instruments.

504 Content of workplace determination

- (1) The workplace determination must contain terms that, in the opinion of the Full Bench, deal with the matters at issue.
- (2) The workplace determination comes into operation on the day on which it is made.
- (3) The workplace determination must contain a term specifying a nominal expiry date for the determination that is no later than 5 years after the date on which the determination commences operating.
- (4) The workplace determination must not contain prohibited content.
- (5) In deciding which terms to include in the workplace determination, the Full Bench must have regard to the following factors only:
 - (a) the matters at issue;
 - (b) the merits of the case;
 - (c) the interests of the negotiating parties and the public interest;
 - (d) how productivity might be improved in the business or part of the business concerned;
 - (e) the extent to which the conduct of the negotiating parties during the bargaining period was reasonable;
 - (f) incentives to encourage parties to pursue negotiated outcomes at a later stage;

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- (g) the employer's capacity to pay;
 - (h) decisions of the AFPC;
 - (i) any other factors specified in the regulations.
- (6) The workplace determination must require disputes about matters arising under the determination to be dealt with in accordance with the model dispute resolution process (see Part 13).
- (7) The workplace determination must not contain any terms other than those required by this section.

505 Who is bound by a workplace determination?

A workplace determination binds:

- (a) the negotiating parties referred to in subsection 503(1)(b);
and
- (b) all employees whose employment is subject to the determination.

506 Act applies to workplace determination as if it were a collective agreement

- (1) Subject to this section, this Act applies to the workplace determination as if it were a collective agreement in operation.
- (2) The following provisions do not apply to the workplace determination:
- (a) section 351 (persons bound by workplace agreements);
 - (b) Subdivision A of Division 7 of Part 8 (content of workplace agreements);
 - (c) Division 8 of Part 8 (varying workplace agreements).
- (3) Subdivision B of Division 9 of Part 8 (termination by approval (pre-lodgment procedures)) applies in relation to the workplace determination, but only after the determination has passed its nominal expiry date.
- (4) Despite subsection 347(5), the workplace determination ceases to be in operation in relation to an employee if a collective agreement that binds the employee comes into operation, even if this happens before the nominal expiry date of the determination.

Division 9—Payments in relation to periods of industrial action

507 Payments not to be made or accepted in relation to periods of industrial action

- (1) This section applies if an employee engaged, or engages, in industrial action (whether or not protected action) in relation to an employer on a day.
- (2) 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 less than 4 hours—4 hours of that day; or
 - (b) otherwise—the total duration of the industrial action on that day.

Note: This subsection is a civil remedy provision: see subsection (6).

- (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 1 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 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.
- (5) An employee must not accept a payment from an employer if the employer would contravene subsection (2) by making the payment.

Note: This subsection is a civil remedy provision: see subsection (6).

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Civil remedy provisions

- (6) Subsections (2) and (5) are civil remedy provisions.
 - (7) The Court may make one or more of the following orders in relation to a person who has contravened subsection (2) or (5):
 - (a) an order imposing a pecuniary penalty on the person;
 - (b) injunctions, and any other orders, that the Court considers necessary to stop the contravention or remedy its effects;
 - (c) any other consequential orders.
 - (8) The pecuniary penalty under paragraph (7)(a) cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
 - (9) An application for an order under subsection (7) may be made by:
 - (a) a workplace inspector; or
 - (b) a person who has an interest in the matter; or
 - (c) any other person prescribed by the regulations.
- Note: For other provisions about civil remedy provisions, see Division 3 of Part 14.
- (10) A regulation prescribing persons for the purposes of paragraph (9)(c) may limit its application to specified circumstances.

508 Organisations not to take action for payments in relation to periods of industrial action

- (1) An organisation, or an officer, member or employee of an organisation, must not:
 - (a) make a claim for an employer to make a payment to an employee in relation to a day during which the employee engaged, or engages, in industrial action; or
 - (b) organise or engage in, or threaten to organise or engage in, industrial action against an employer with intent to coerce the employer to make such a payment.
- Note: This subsection is a civil remedy provision: see subsection (4).
- (2) For the purposes of subsection (1), action done by one of the following bodies or persons is taken to have been done by an organisation:

- (a) the committee of management of the organisation;
 - (b) an officer, employee or agent of the organisation acting in that capacity;
 - (c) a member or group of members of the organisation acting under the rules of the organisation;
 - (d) a member of the organisation, who performs the function of dealing with an employer on behalf of the member and other members of the organisation, acting in that capacity.
- (3) Paragraphs (2)(c) and (d) do not apply if:
- (a) a committee of management of the organisation; or
 - (b) a person authorised by the committee; or
 - (c) an officer of the organisation;
- has taken reasonable steps to prevent the action.

Civil remedy provisions

- (4) Subsection (1) is a civil remedy provision.
- (5) The Court may make one or more of the following orders in relation to a person who has contravened subsection (1):
- (a) an order imposing a pecuniary penalty on the person;
 - (b) an order requiring the person to pay to the employer concerned compensation of such amount as the Court thinks appropriate;
 - (c) injunctions, and any other orders, that the Court considers necessary to stop the contravention or remedy its effects;
 - (d) any other consequential orders.
- (6) The pecuniary penalty under paragraph (5)(a) cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (7) The Court must not make an order under paragraph (5)(b) if the employer concerned has contravened subsection 507(2) in connection with the contravention of subsection (1) of this section.
- (8) An application for an order under subsection (5) may be made by:
- (a) the employer concerned; or
 - (b) a workplace inspector; or
 - (c) a person who has an interest in the matter; or

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(d) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 3 of Part 14.

(9) A regulation prescribing persons for the purposes of paragraph (8)(d) may limit its application to specified circumstances.

509 Persons not to coerce people for payments in relation to periods of industrial action

(1) A person must not take, or threaten to take, action that would have the effect of directly or indirectly prejudicing the engagement, or possible engagement, of another person as an independent contractor with the intention of coercing the other person to make a payment to an employee of the other person in relation to a day on which the employee engaged or engages in industrial action (whether or not protected action).

Civil remedy provisions

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

(3) The Court may make one or more of the following orders in relation to a person who has contravened subsection (1):

- (a) an order imposing a pecuniary penalty on the person;
- (b) injunctions, and any other orders, that the Court considers necessary to stop the contravention or remedy its effects;
- (c) any other consequential orders.

(4) The pecuniary penalty under paragraph (3)(a) cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.

(5) An application for an order under subsection (3) may be made by:

- (a) the other person referred to in subsection (1); or
- (b) a workplace inspector; or
- (c) a person who has an interest in the matter; or
- (d) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 3 of Part 14.

- (6) A regulation prescribing persons for the purposes of paragraph (5)(d) may limit its application to specified circumstances.

Interpretation

- (7) In this section, a reference to an independent contractor is not confined to a natural person.

Part 10—Awards

Division 1—Preliminary

510 Objects of Part

The objects of this Part are:

- (a) to ensure that minimum safety net entitlements are protected through a system of enforceable awards maintained by the Commission; and
- (c) to ensure that the Commission performs its functions under this Part in a way that:
 - (i) encourages the making of agreements between employers and employees at the workplace or enterprise level; and
 - (ii) protects the competitive position of young people in the labour market, promotes youth employment, youth skills and community standards, and assists in reducing youth unemployment.

511 Performance of functions by the Commission

- (1) The Commission must perform its functions under this Part in a way that furthers the objects of this Act and, in particular, the objects of this Part.
- (2) In performing its functions under this Part, the Commission must have regard to:
 - (a) the desirability of high levels of productivity, low inflation, creation of jobs and high levels of employment; and
 - (b) decisions of the AFPC, and, in particular, the need to ensure that Commission decisions are not inconsistent with AFPC decisions; and
 - (c) the importance of providing minimum safety net entitlements that do not act as a disincentive to bargaining at the workplace level.

512 Extraterritorial extension

- (1) This Part, and the rest of this Act so far as it relates to this Part, extend:
- (a) to an employee outside Australia who meets any of the conditions in this section; and
 - (b) to the employee's employer (whether the employer is in or outside Australia); and
 - (c) to acts, omissions, matters and things relating to the employee (whether they are in or outside Australia).

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

In Australia's exclusive economic zone

- (2) One condition is that the employee is in Australia's exclusive economic zone and either:
- (a) is an employee of an Australian employer and is not prescribed by the regulations as an employee to whom this subsection does not apply; or
 - (b) is an employee prescribed by the regulations as an employee to whom this subsection applies.

Note: The regulations may prescribe the employee by reference to a class. See subsection 13(3) of the *Legislative Instruments Act 2003*.

On Australia's continental shelf outside exclusive economic zone

- (3) Another condition is that the employee:
- (a) is outside the outer limits of Australia's exclusive economic zone, but is in, on or over a part of Australia's continental shelf prescribed by the regulations for the purposes of this subsection, in connection with the exploration of the continental shelf or the exploitation of its natural resources; and
 - (b) meets the requirements that are prescribed by the regulations for that part.

Note: The regulations may prescribe different requirements relating to different parts of Australia's continental shelf. The regulations may need to do so to give effect to Australia's international obligations.

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Outside Australia's exclusive economic zone and continental shelf

- (4) Another condition is that the employee:
- (a) is neither in Australia's exclusive economic zone nor in, on or over a part of Australia's continental shelf described in paragraph (3)(a); and
 - (b) is an Australian-based employee of an Australian employer; and
 - (c) is not prescribed by the regulations as an employee to whom this subsection does not apply.

Definition

- (5) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

Division 2—Terms that may be included in awards

Subdivision A—Allowable award matters

513 Allowable award matters

- (1) Subject to this Part, an award may include terms about the following matters (*allowable award matters*) only:
 - (a) ordinary time hours of work and the time within which they are performed, rest breaks, notice periods and variations to working hours;
 - (b) incentive-based payments and bonuses;
 - (c) annual leave loadings;
 - (d) ceremonial leave;
 - (e) leave for the purpose of seeking other employment after the giving of a notice of termination by an employer to an employee;
 - (f) observance of days declared by or under a law of a State or Territory to be observed generally within that State or Territory, or a region of that State or Territory, as public holidays by employees who work in that State, Territory or region, and entitlements of employees to payment in respect of those days;
 - (g) days to be substituted for, or a procedure for substituting, days referred to in paragraph (f);
 - (h) monetary allowances for:
 - (i) expenses incurred in the course of employment; or
 - (ii) responsibilities or skills that are not taken into account in rates of pay for employees; or
 - (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;
 - (i) loadings for working overtime or for shift work;
 - (j) penalty rates;
 - (k) redundancy pay, within the meaning of subsection (4);
 - (l) stand-down provisions;
 - (m) dispute settling procedures, but only as provided by section 514;

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- (n) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work;
- (o) conditions for outworkers, but only to the extent necessary to ensure that their overall conditions of employment are fair and reasonable in comparison with the conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises.

Note 1: The matters referred to in subsection 513(1) have a meaning that is affected by section 515.

Note 2: Entitlements relating to certain matters that were allowable award matters immediately before the reform commencement are preserved under Division 3.

- (2) A matter referred to in subsection (1) is an allowable award matter only to the extent that the matter pertains to the relationship between employers bound by the award and employees of those employers.
- (3) An award may include terms about the matters referred to in subsection (1) only to the extent that the terms provide minimum safety net entitlements.
- (4) For the purposes of paragraph (1)(k), **redundancy pay** means redundancy pay in relation to a termination of employment that is:
 - (a) by an employer of 15 or more employees; and
 - (b) either:
 - (i) at the initiative of the employer and on the grounds of operational requirements; or
 - (ii) because the employer is insolvent.
- (5) For the purposes of paragraph (4)(a):
 - (a) whether an employer employs 15 or more employees, or fewer than 15 employees, is to be worked out as at the time (the **relevant time**):
 - (i) when notice of the redundancy is given; or
 - (ii) when the redundancy occurs;whichever happens first; and
 - (b) a reference to employees includes a reference to:

- (i) the employee who becomes redundant and any other employee who becomes redundant at the relevant time; and
 - (ii) any casual employee who, at the relevant time, has been engaged by the employer on a regular and systematic basis for at least 12 months (but not including any other casual employee).
- (6) For the purposes of paragraph (1)(o):

conditions does not include pay.

outworker means an employee who, for the purposes of the business of the employer, performs work at private residential premises or at other premises that are not business or commercial premises of the employer.

514 Dispute settling procedures

- (1) Each award is taken to include a term that specifies a model dispute resolution process in the same terms as the model dispute resolution process set out in Division 1 of Part 13, and a term providing for any other dispute settling process or procedure is taken not to be about an allowable award matter for the purposes of paragraph 513(1)(m).
- (2) The dispute settling process included in an award may only be used to resolve disputes:
 - (a) about matters arising under the award; and
 - (b) between persons bound by the award.

515 Matters that are not allowable award matters

- (1) For the purposes of subsection 513(1), matters that are not allowable award matters within the meaning of that subsection include, but are not limited to, the following:
 - (a) rights of an organisation of employers or employees to participate in, or represent an employer or employee in, the whole or part of a dispute settling procedure, unless the organisation is the representative of the employer's or employee's choice;

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- (b) conversion from casual employment to another type of employment;
 - (c) the number or proportion of employees that an employer may employ in a particular type of employment;
 - (d) prohibitions (whether direct or indirect) on an employer employing employees in a particular type of employment;
 - (e) the maximum or minimum hours of work for regular part-time employees;
 - (f) restrictions on the range or duration of training arrangements;
 - (g) restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement;
 - (h) restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency;
 - (i) union picnic days;
 - (j) tallies in the meat industry;
 - (k) dispute resolution training leave;
 - (l) trade union training leave.
- (2) Paragraph (1)(e) does not prevent any of the following being included in an award:
- (a) terms setting a minimum number of consecutive hours that an employer may require a regular part-time employee to work;
 - (b) terms facilitating a regular pattern in the hours worked by regular part-time employees.
- (3) Paragraph (1)(g) does not limit the operation of paragraph 513(1)(o).
- (4) In this section:

labour hire agency means an entity or a person who conducts a business that includes the employment or engagement of workers for the purpose of supplying those workers to another entity or person under a contract with that other entity or person.

labour hire worker means a person:

- (a) who:
 - (i) is employed by a labour hire agency; or
 - (ii) is engaged by a labour hire agency as an independent contractor; and
- (b) who performs work for another entity or person under a contract between that entity or person and the labour hire agency.

Note: In this Part, references to independent contractors are not confined to natural persons (see subsection 4(2)).

516 Matters provided for by the Australian Fair Pay and Conditions Standard

- (1) A matter for which provision is made by the Australian Fair Pay and Conditions Standard is not an allowable award matter, except as mentioned in subsection (2).
- (2) Despite subsection (1), an award may include a term about ordinary time hours of work.

Note: An award may also include preserved award terms (see section 520).

517 Awards may not include terms involving discrimination and preference

To the extent that a term of an award requires or permits, or has the effect of requiring or permitting, any conduct that would contravene Part 16, it is taken not to be about allowable award matters.

518 Awards may not include certain terms about rights of entry

To the extent that a term of an award requires or authorises an officer or employee of an organisation:

- (a) to enter premises:
 - (i) occupied by an employer that is bound by the award; or
 - (ii) in which work to which the award applies is being carried on; or
- (b) to inspect or view any work, material, machinery, appliance, article, document or other thing on such premises; or
- (c) to interview an employee on such premises;

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it is taken not to be about allowable award matters.

519 Awards may not include enterprise flexibility provisions

To the extent that a term of an award is an enterprise flexibility provision within the meaning of section 113A of this Act as in force immediately before the reform commencement, it is taken not to be about allowable award matters.

Subdivision B—Other terms that are permitted to be in awards

520 Preserved award terms

An award may include preserved award terms (see Division 3).

521 Facilitative provisions

- (1) An award may include a facilitative provision that allows agreement at the workplace or enterprise level, between employers and employees (including individual employees), on how a term in the award about an allowable award matter or a preserved award term is to operate.
- (2) A facilitative provision must not require agreement between a majority of employees and an employer, but must permit agreement between an individual employee and an employer, on how a term in an award about an allowable award matter or a preserved award term is to operate.
- (3) A facilitative provision may only operate in respect of an allowable award matter or a preserved award term.
- (4) A facilitative provision is of no effect to the extent that it does not comply with subsections (2) and (3).

522 Incidental and machinery terms

- (1) An award may include terms that are:
 - (a) incidental to an allowable award matter about which there is a term in the award; and
 - (b) essential for the purpose of making a particular term operate in a practical way.

- (2) For the purposes of this section, to the extent that a term of an award is about a matter that is not an allowable award matter because of the operation of section 515, 517, 518 or 519, the term is not, and cannot be, incidental to an allowable award matter, and is of no effect to that extent.
- (3) However, to avoid doubt, paragraph 515(1)(g) does not limit the operation of subsections (1) and (4) to the extent that those subsections relate to the matter referred to in paragraph 513(1)(o).
- (4) An award may include machinery provisions including, but not limited to, provisions about the following:
 - (a) commencement;
 - (b) definitions;
 - (c) titles;
 - (d) arrangement;
 - (e) employers, employees and organisations;
 - (f) term of the award.

523 Anti-discrimination clauses

An award may include a model anti-discrimination clause.

524 Boards of reference

- (1) An award may include, in accordance with subsection (2), a term:
 - (a) appointing, or giving power to appoint, for the purposes of the award, a board of reference consisting of a person or 2 or more persons; and
 - (b) assigning to the board of reference functions as described in subsection (4).
- (2) A term of an award that appoints, or gives power to appoint, a board of reference is taken:
 - (a) to continue in effect after the reform commencement, to the extent that it complies with subsection (4); and
 - (b) to cease to have effect after the reform commencement, to the extent that it does not comply with subsection (4).
- (4) A term of an award that appoints, or gives power to appoint, a board of reference:

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- (a) may confer upon the board of reference an administrative function in respect of allowing, approving, fixing or dealing with, in the manner and subject to the conditions specified in the award, a matter or thing that, under the award, may from time to time be required to be allowed, approved, fixed or dealt with; and
 - (b) must not confer upon the board of reference a function of settling or determining disputes about any matter arising under the award.
- (5) A function conferred under subsection (4) may relate only to allowable award matters or terms permitted by this Subdivision to be included in the award.
- (6) A board of reference may consist of or include a Commissioner.
- (7) Subject to this section, the regulations may make provision in relation to:
- (a) a particular board of reference; or
 - (b) boards of reference in general;
- including, but not limited to, the functions and powers of the board or boards.

Subdivision C—Terms in awards that cease to have effect

525 Terms in awards that cease to have effect after the reform commencement

- (1) Immediately after the reform commencement, a term of an award ceases to have effect to the extent that it is about matters that are not allowable award matters, except to the extent (if any) that the term is permitted by Subdivision B to be included in the award.
- (2) This section does not affect the operation of preserved award terms.

Subdivision D—Regulations relating to part-time employees

526 Award conditions for part-time employees

- (1) The regulations may do either or both of the following in relation to an award:
 - (a) provide for the award to have effect so that a part-time employee is entitled to conditions to which a full-time employee is entitled under the award;
 - (b) provide for the award to have effect so that conditions to which a part-time employee is otherwise entitled under the award (including because of paragraph (a)) are adjusted (in accordance with the regulations or a method set out in the regulations) in proportion to the hours worked by the part-time employee.
- (2) The award has effect accordingly.

Division 3—Preserved award entitlements

527 Preservation of certain award terms

(1) A term, or more than one term, of an award is a *preserved award term* if:

- (a) the term or terms are about a matter referred to in subsection (2); and
- (b) the term or terms were in effect immediately before the reform commencement.

Note: Section 525, which provides for certain terms of awards to cease immediately after the reform commencement, does not affect the operation of preserved award terms—see subsection 525(2).

(2) For the purposes of paragraph (1)(a), the matters are as follows:

- (a) annual leave;
- (b) personal/carer's leave;
- (c) parental leave, including maternity and adoption leave;
- (d) long service leave;
- (e) notice of termination;
- (f) jury service;
- (g) superannuation.

(3) If a term of an award referred to in subsection (1) is about both matters referred to in subsection (2) and other matters, it is taken to be a preserved award term only to the extent that it is about the matters referred to in subsection (2).

(4) If more than one term of an award is about a matter referred to in subsection (2), then those terms, taken together, constitute the preserved award term of that award about that matter.

(6) A preserved award term continues to have effect for the purposes of this Act.

Note: Preserved award terms may not be varied.

(7) In this section:

personal/carer's leave includes war service sick leave, infectious diseases sick leave and other like forms of sick leave.

- (8) The regulations may provide that for the purposes of subsection (2):
- (a) the matter referred to in paragraph (2)(c) does not include one or both of the following:
 - (i) special maternity leave (within the meaning of section 265);
 - (ii) the entitlement under section 268 to transfer to a safe job or to take paid leave; and
 - (b) *personal/carer's leave* does not include one or both of the following:
 - (i) compassionate leave (within the meaning of section 257);
 - (ii) unpaid carer's leave (within the meaning of section 244).

Note: The effect of excluding a form of leave or an entitlement in relation to a matter is that the entitlement in relation to that form of leave or matter under the Australian Fair Pay and Conditions Standard will automatically apply.

- (9) Regulations under subsection (8) may be expressed to apply generally or in respect of employees engaged in specified types of employment, such as full-time employment, part-time employment, casual employment, regular part-time employment or shift work.

529 When preserved award entitlements have effect

- (1) This section applies to an employee if:
- (a) the employee's employment is regulated by an award that includes a preserved award term about a matter; and
 - (b) the employee has an entitlement (the *preserved award entitlement*) in relation to that matter under the preserved award term.
- (2) If:
- (a) the preserved award term is about a matter referred to in paragraph 527(2)(a), (b) or (c); and
 - (b) the employee's preserved award entitlement in relation to the matter is more generous than the employee's entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard;

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the employee's entitlement under the Australian Fair Pay and Conditions Standard is excluded, and the employee's preserved award entitlement has effect in accordance with the preserved award term. Otherwise, the employee's entitlement under the Australian Fair Pay and Conditions Standard has effect.

Note: See section 530 for the meaning of *more generous*.

(3) If:

- (a) the preserved award term is about a matter referred to in paragraph 527(2)(a), (b) or (c) and the employee has no entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard; or
- (b) the preserved award term is about a matter referred to in paragraph 527(2)(d), (e), (f) or (g);

the employee's preserved award entitlement has effect in accordance with the preserved award term.

Note: Subsection 16(2) provides that State laws dealing with long service leave, jury service or superannuation (among other things) are not excluded by this Act, but section 17 provides that awards prevail over State laws to the extent of any inconsistency.

530 Meaning of *more generous*

- (1) Whether an employee's entitlement under a preserved award term in relation to a matter is *more generous* than the employee's entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard:
 - (a) is as specified in, or as worked out in accordance with a method specified in, regulations made under this paragraph; or
 - (b) to the extent that regulations made under paragraph (a) do not so specify—is to be ascertained in accordance with the ordinary meaning of the term *more generous*.
- (2) If a matter to which an entitlement under a preserved award term relates does not correspond directly to a matter to which the Australian Fair Pay and Conditions Standard relates, regulations made under paragraph (1)(a) may nevertheless specify that the matters correspond for the purposes of this Division.

531 Modifications that may be prescribed—personal/carer’s leave

- (1) The regulations may provide that a preserved award term about personal/carer’s leave is to be treated as a separate preserved award term about separate matters, to the extent that the preserved award term is about any of the following:
 - (a) war service sick leave;
 - (b) infectious diseases sick leave;
 - (c) any other like form of sick leave.
- (2) If the regulations so provide, sections 527, 529 and 530 have effect in relation to each separate matter.

Note: There is no entitlement in relation to war service sick leave, infectious diseases sick leave or any other like form of sick leave under the Australian Fair Pay and Conditions Standard, so there is no corresponding matter for the purposes of subsection 529(3).

532 Modifications that may be prescribed—parental leave

- (1) The regulations may provide that a preserved award term about parental leave is to be treated as being about separate matters to the extent that it is about paid and unpaid parental leave.
- (2) If the regulations provide that a preserved award term about parental leave is to be treated as being about separate matters to the extent that it is about paid and unpaid parental leave:
 - (a) sections 527 and 529 have effect in relation to each separate matter; and
 - (b) in accordance with section 266, the entitlement that an employee would have to unpaid parental leave under the Australian Fair Pay and Conditions Standard is reduced by any amount of paid parental leave to which the employee is entitled under the preserved award term.

Note 1: There is no entitlement in relation to paid parental leave under the Australian Fair Pay and Conditions Standard, so there is no corresponding matter for the purposes of subsection 529(3).

Note 2: Paragraph (b) does not have the effect of reducing entitlements. It simply ensures that the operation of section 266 is not affected by treating paid and unpaid parental leave separately under the regulations.

533 Preserved award terms—employers bound after reform commencement

An employer that was not bound by a particular award immediately before the reform commencement, but is subsequently bound by the award under section 557, is not bound by any preserved award terms included in the award.

Division 5—Variation and revocation of awards

Subdivision A—Variation of awards

552 Variation of awards—general

- (1) The Commission must not make an order varying an award except:
 - (c) if the variation is essential to the maintenance of minimum safety net entitlements (see section 553); or
 - (d) on a ground set out in section 554; or
 - (e) to bind additional employers, employees or organisations in accordance with section 557; or
 - (f) under section 812; or
 - (g) in circumstances prescribed by the regulations for the purposes of this paragraph.
- (2) The Commission must not vary a preserved award term.
- (3) The Commission must not vary a facilitative provision within the meaning of section 521 except on a ground set out in section 554.
- (4) The Commission must not vary a term taken to be included in an award by section 514 (which deals with dispute settling procedures).

553 Variation of awards if essential to maintain minimum safety net entitlements

- (1) An employer, employee or organisation bound by an award may apply to the Commission for an order varying the award on the ground that that the variation is essential to the maintenance of minimum safety net entitlements.
- (2) If an application is made under subsection (1), the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award, and any other interested persons and bodies, are made aware of the application.
- (3) The Minister may intervene in relation to the application.

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- (4) The Commission may make an order under this subsection varying the award only if the Commission is satisfied that:
- (a) the variation is essential to the maintenance of minimum safety net entitlements; and
 - (b) all of the following conditions are met:
 - (i) the award as varied would not be inconsistent with decisions of the AFPC;
 - (ii) the award as varied would provide only minimum safety net entitlements for employees bound by the award;
 - (iv) the making of the variation would not operate as a disincentive to agreement-making at the workplace level;
 - (v) such other requirements prescribed by the regulations (if any) for the purposes of this paragraph have been satisfied.

554 Variation of awards—other grounds

- (1) The Commission may, if it considers that an award or a term of an award is ambiguous or uncertain, make an order varying the award so as to remove the ambiguity or uncertainty.
- (2) If an award is referred to the Commission under section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986*, the Commission must convene a hearing to review the award.
- (3) In a review under subsection (2):
 - (a) the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award is made aware of the hearing; and
 - (b) the Sex Discrimination Commissioner may intervene in the proceeding.
- (4) If the Commission considers that an award reviewed under subsection (2) is a discriminatory award, the Commission must take the necessary action to remove the discrimination by making an order varying the award.
- (5) The Commission may, on application by an employer or organisation bound by an award, make an order varying a term of the award referring by name to an employer or organisation bound by the award:

- (a) to reflect a change in the name of the employer or organisation; or
- (b) if:
 - (i) the registration of the organisation has been cancelled; or
 - (ii) the employer or organisation has ceased to exist; to omit the reference to its name.
- (6) The onus of demonstrating that an award should be varied as set out in an application under subsection (5) rests with the applicant.
- (7) In this section:

discriminatory award means an award that:

- (a) has been referred to the Commission under section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986*; and
- (b) requires a person to do any act that would be unlawful under Part II of the *Sex Discrimination Act 1984*, except for the fact that the act would be done in direct compliance with the award.

For the purposes of this definition, the fact that an act is done in direct compliance with the award does not of itself mean that the act is reasonable.

Subdivision B—Revocation of awards

556 Revocation of awards—award obsolete or no longer capable of operating

- (1A) The Commission must not make an order revoking an award except in accordance with this section.
- (1) An employer, employee or organisation bound by an award may apply to the Commission to have the award revoked on the ground that the award is obsolete or is no longer capable of operating.
- (2) If an application is made under subsection (1), the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award is made aware of the application.

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- (3) The Commission must make an order revoking the award if it is satisfied that:
- (a) the award is obsolete or is no longer capable of operating;
and
 - (b) revocation of the award would not be contrary to the public interest.

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

557 Binding additional employers, employees and organisations to an award

- (1) The Commission may make an order varying an award to bind an employer, employee or organisation to the award.

Note 1: Item 4 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005* provides for the employers, employees and organisations bound by awards.

Note 2: An award may also be varied to bind eligible entities and employers under Division 7.

- (2) The Commission may make an order varying an award under subsection (1) only in accordance with this Division.

558 Application to be bound by an award—agreement between employer and employees

- (1) An employer may apply to the Commission for an order varying a specified award to bind the employer and a specified class or specified classes of employees of the employer.
- (2) If an application is made under subsection (1), the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award is made aware of the application.
- (3) The Commission may make an order varying the award as specified in the application if it is satisfied that:
 - (a) a valid majority of the employees of the employer who would be bound by the award support the application; and
 - (b) the award is appropriate to regulate the terms and conditions of employment of those employees; and
 - (c) the employer is not already bound by an award that regulates the terms and conditions of employment of those employees.
- (4) The Commission may make the order without holding a hearing unless the Commission considers that it cannot be satisfied of the

matters referred to in paragraphs (3)(a) and (b) based on the information provided.

559 Application to be bound by an award—no agreement between employer and employees

- (1) An employer, or an employee or employees of an employer, may apply to the Commission for an order varying an award specified in the application to bind the employer and a specified class or specified classes of employees of the employer.
- (2) An employer may make an application under subsection (1) even if a valid majority of the employees of the employer who would be bound by the award do not support the application.
- (3) An employee or employees of an employer may make an application under subsection (1) even if the employer does not support the application.
- (4) If an application is made under subsection (1), the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award is made aware of the application.
- (5) The Commission may make an order varying the award as specified in the application only if the Commission is satisfied:
 - (a) that the employer, and the employees of the employer who would be bound by the award, have been unable to make a workplace agreement, despite having made reasonable efforts to do so; and
 - (b) the award is appropriate to govern the terms and conditions of employment of those employees; and
 - (c) the employer is not already bound by an award that regulates the terms and conditions of employment of those employees.
- (6) An organisation may make an application under subsection (1) on behalf of an employee or employees, and may represent the employee or employees in proceedings relating to the application, if:
 - (a) the employee or employees have requested that the organisation do so; and

(b) the organisation is entitled (under its eligibility rules) to represent the interests of the employee or employees.

(7) In this section:

protected action has the meaning given by section 435.

reasonable efforts does not require the taking of protected action.

560 Application to be bound by an award—new organisations

- (1) A new organisation may apply to the Commission for an order varying an award to bind the organisation.
- (2) If an application is made under subsection (1), the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award, and any other interested persons and bodies, are made aware of the application.
- (3) The Minister may intervene in relation to the application.
- (4) The Commission may make the order if the Commission is satisfied that:
 - (a) the new organisation has at least one member bound by the award whose industrial interests the new organisation is entitled (under its eligibility rules) to represent; and
 - (b) the making of the order is necessary to enable the new organisation to represent properly the industrial interests of those of its members who are bound by the award; and
 - (c) the award regulates an industry in respect of which the new organisation has traditionally been entitled to represent the industrial interests of its members.

(5) In this section:

new organisation means:

- (a) an association granted registration as an organisation under the Registration and Accountability of Organisations Schedule on or after the reform commencement; or
- (b) a transitionally registered association registered under clause 2 of Schedule 10.

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**561 Application by new organisation to be bound by an award—
when application may be made**

An application under subsection 560(1) must be made within the period of one year commencing on the day on which the new organisation was registered under the Registration and Accountability of Organisations Schedule or Schedule 10.

562 Process for valid majority of employees

The regulations may prescribe the meaning of, or the method for establishing what constitutes, a valid majority of the employees of an employer or of a class of employees of an employer, for the purposes of this Division.

563 General provisions

- (1) Without limiting the way in which a class of employees may be described for the purposes of this Division, the class may be described by reference to a particular industry or particular kinds of work.
- (2) For the purposes of making an order binding an employer, employee or organisation to an award:
 - (a) employers may be specified by name or by inclusion in a specified class or specified classes; and
 - (b) employees must be specified by inclusion in a specified class or specified classes; and
 - (c) organisations must be specified by name.

Division 7—Outworkers

564 Definitions

In this Division:

eligible entity means any of the following entities, other than in the entity's capacity as an employer:

- (a) a constitutional corporation;
- (b) the Commonwealth;
- (c) a Commonwealth authority;
- (d) a body corporate incorporated in a Territory;
- (e) a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, in connection with the activity carried on in the Territory.

outworker term means a term of an award that is:

- (a) about the matter referred to in paragraph 513(1)(o); or
- (b) incidental to such a matter, and included in the award as permitted by section 522; or
- (c) a machinery provision in respect of such a matter included in the award as permitted by section 522.

566 Binding additional eligible entities and employers

- (1) An organisation, an eligible entity or an employer may apply to the Commission for an order varying an award that includes outworker terms to bind an eligible entity or an employer to the award, but only in relation to the outworker terms.
- (2) If an application is made under subsection (1), the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award, and any other interested persons and bodies, are made aware of the application.
- (3) The Minister may intervene in relation to the application.

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- (4) If an application is made under subsection (1), the Commission may make the order if it is satisfied that:
- (a) the eligible entity or employer operates in an industry to which the award relates; and
 - (b) the eligible entity or employer is not already bound by an award that includes outworker terms in respect of such an industry in relation to those terms; and
 - (c) making the order is consistent with the objective of protecting the overall conditions of employment of outworkers.

Division 8—Technical matters

567 Making and publication of awards and award-related orders

- (1) An award or award-related order must:
 - (a) be reduced to writing; and
 - (b) be signed by:
 - (i) in the case of an award or order made by a Full Bench—at least one member of the Full Bench; or
 - (ii) in the case of any other order—at least one member of the Commission; and
 - (c) show the day on which it is signed.
- (2) If the Commission makes an award or an award-related order, the Commission must promptly give to a Registrar:
 - (a) a copy of the award or order; and
 - (b) written reasons for the award or order; and
 - (c) a list specifying the employers, employees and organisations bound by the award or order.
- (3) A Registrar who receives a copy of an award or an award-related order under subsection (2) must promptly:
 - (a) make available a copy of the award or order and the written reasons received by a Registrar in respect of the making of the award or order to each employer, employee and organisation shown on the list given to the Registrar under paragraph (2)(c); and
 - (b) ensure that a copy of the award or order and the written reasons received by the Registrar in respect of the making of the award or order are available for inspection at each registry; and
 - (c) ensure that the award or order and any written reasons received by the Registrar in respect of the making of the award or order are published as soon as practicable.

568 Awards and award-related orders must meet certain requirements

- (1) The Commission must, when making an award or an award-related order, if it considers it appropriate, ensure that the award or order:
 - (a) does not include matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level; and
 - (b) does not prescribe work practices or procedures that restrict or hinder the efficient performance of work; and
 - (c) does not include terms that have the effect of restricting or hindering productivity, having regard to fairness to employees.

- (2) The Commission must, when making an award or an award-related order, ensure that the award or order:
 - (a) where appropriate, includes facilitative provisions that allow agreement at the workplace or enterprise level, between employers and employees (including individual employees), on how the award terms are to apply; and
 - (b) includes terms providing for the employment of regular part-time employees; and

Note: Clauses 15.3.1 to 15.3.5 of the Hospitality Industry—Accommodation, Hotels, Resorts and Gaming Award 1998 provide a model (see the Award Simplification Decision at P7500).

 - (c) is expressed in plain English and is easy to understand in structure and content; and
 - (d) does not include terms that are obsolete or that need updating; and
 - (e) does not include terms that discriminate against an employee because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

- (3) An award or an award-related order does not discriminate against an employee for the purposes of paragraph (2)(e) merely because:
 - (a) it discriminates, in respect of particular employment, on the basis of the inherent requirements of that employment; or

- (b) it discriminates, in respect of employment as a member of the staff of an institution that is conducted in accordance with the teachings or beliefs of a particular religion or creed:
 - (i) on the basis of those teachings or beliefs; and
 - (ii) in good faith.

569 Registrar's powers if member ceases to be a member

If:

- (a) a member of the Commission ceases to be a member at a time after an award or an award-related order has been made by the Commission constituted by the member; and
- (b) at that time, the award or order has not yet been reduced to writing or has been reduced to writing but has not yet been signed by the member;

the Registrar must reduce the award or order to writing, sign it and seal it with the seal of the Commission, and the award or order has effect as if it had been signed by the member of the Commission.

570 Form of awards

An award or an award-related order is to be framed so as best to express the decision of the Commission and to avoid unnecessary technicalities.

571 Date of awards

The date of an award or an award-related order is the day on which the award or order was signed under section 567.

572 Commencement of awards

- (1) An award or an award-related order is to be expressed to come into force on a specified day.
- (2) Unless the Commission is satisfied that there are exceptional circumstances, the day specified in an award or an award-related order for the purposes of subsection (1) must not be earlier than the date of the award or order.

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573 Continuation of awards

An award continues in force until it is revoked under section 556.

574 Awards of Commission are final

- (1) Subject to this Act, an award or an award-related order (including an award or order made on appeal):
 - (a) is final and conclusive; and
 - (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
 - (c) is not subject to prohibition, mandamus or injunction in any court on any account.
- (2) An award or an award-related order is not invalid because it was made by the Commission constituted otherwise than as provided by this Act.

575 Reprints of awards as varied

A document purporting to be a copy of a reprint of an award as varied, and purporting to have been printed by the Government Printer, is in all courts evidence of the award as varied.

576 Expressions used in awards

Unless the contrary intention appears in an award or an award-related order, an expression used in the award or order has the same meaning as it has in an Act because of the *Acts Interpretation Act 1901* or as it has in this Act.

Part 10A—Award modernisation

Division 1—Preliminary

576A Object of Part

- (1) The object of this Part is to provide for the Commission to make modern awards in accordance with an award modernisation request.
- (2) Modern awards:
 - (a) must be simple to understand and easy to apply, and must reduce the regulatory burden on business; and
 - (b) together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees; and
 - (c) must be economically sustainable, and promote flexible modern work practices and the efficient and productive performance of work; and
 - (d) must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements; and
 - (e) must result in a certain, stable and sustainable modern award system for Australia.

Division 2—Award modernisation process

576B Commission's award modernisation function

- (1) It is a function of the Commission to carry out one or more award modernisation processes.
- (2) In performing its functions under this Part, the Commission must have regard to the following factors:
 - (a) promoting the creation of jobs, high levels of productivity, low inflation, high levels of employment and labour force participation, national and international competitiveness, the development of skills and a fair labour market;
 - (b) protecting the position in the labour market of young people, employees with a disability and employees to whom training arrangements apply;
 - (c) the needs of the low-paid;
 - (d) the desirability of reducing the number of awards operating in the workplace relations system;
 - (e) the need to help prevent and eliminate discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, and to promote the principle of equal remuneration for work of equal value;
 - (f) the need to assist employees to balance their work and family responsibilities effectively, and to improve retention and participation of employees in the workforce;
 - (g) the safety, health and welfare of employees;
 - (h) relevant rates of pay in Australian Pay and Classification Scales and transitional awards;
 - (i) minimum wage decisions of the Australian Fair Pay Commission;
 - (j) the representation rights, under this Act or the Registration and Accountability of Organisations Schedule, of organisations and transitionally registered associations.

(3) In this section:

transitional award has the same meaning as in Schedule 6.

transitionally registered association has the same meaning as in Schedule 10.

576C Award modernisation request

- (1) An award modernisation process must be carried out in accordance with a written request (an *award modernisation request*) made to the President by the Minister.
- (2) An award modernisation request must specify:
 - (a) the award modernisation process that is to be carried out; and
 - (b) the time by which the award modernisation process must be completed, which must not be later than 2 years after the making of the request; and
 - (c) any other matter relating to the award modernisation process that the Minister considers appropriate.
- (3) Without limiting subsection (2), an award modernisation request may also do any of the following:
 - (a) require the Commission to prepare progress reports on specified matters relating to the award modernisation process and make them available as required by the request;
 - (b) specify matters (in addition to those referred to in subsection 576J(1) and sections 576K and 576M) about which terms may be included in modern awards;
 - (c) require the Commission to include in a modern award terms about particular matters, being matters about which terms may be included in a modern award;
 - (d) give directions about how, or whether, the Commission is to deal with particular matters about which terms may be included in a modern award.
- (4) The Minister may, by written instrument, vary or revoke an award modernisation request.
- (5) If the Minister makes an instrument varying an award modernisation request, the instrument may also specify a later time

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for the completion of the award modernisation process requested.

The later time:

- (a) may be more than 2 years after the making of the award modernisation request; but
 - (b) must not be more than 2 years after the making of the instrument varying the award modernisation request.
- (6) Neither of the following is a legislative instrument:
- (a) an award modernisation request;
 - (b) an instrument made under subsection (4).

576D Award modernisation request to be published

- (1) As soon as practicable after receiving an award modernisation request, or an instrument varying or revoking an award modernisation request, the President must give a copy of the request or instrument to a Registrar.
- (2) As soon as practicable after a Registrar receives a copy of a request or an instrument under subsection (1), the Registrar must publish the request or instrument as follows:
 - (a) if requirements relating to publication are prescribed by the regulations—in accordance with those requirements;
 - (b) if no such requirements are prescribed—in such manner as the Registrar thinks appropriate.

576E Procedure for carrying out award modernisation process

- (1) As soon as practicable after receiving an award modernisation request, the President must establish one or more Full Benches to carry out the award modernisation process requested.
- (2) For the purpose of enabling the award modernisation process to be carried out, the President may, at any time while the award modernisation process is being carried out:
 - (a) give each Full Bench established under subsection (1) directions for carrying out the award modernisation process; and
 - (b) allocate specified tasks in relation to the award modernisation process to any member of the Commission, and give directions about how those tasks are to be carried out.

- (3) For the purpose of carrying out the award modernisation process and subject to any directions given by the President under subsection (2), the procedure of a Full Bench is within the absolute discretion of the Full Bench.
- (4) Without limiting subsection (3), a Full Bench may inform itself in any way it thinks appropriate, including by:
 - (a) undertaking or commissioning research; or
 - (b) consulting with any other person, body or organisation in any manner it considers appropriate.
- (5) To avoid doubt, subsection (4) does not limit the powers of a Full Bench under other provisions of this Act.

Note: For example, Division 4 of Part 3 confers powers on the Commission that may be applicable in the context of award modernisation.

576F Completion of award modernisation process

The Commission must complete an award modernisation process by the time allowed by the award modernisation request relating to the award modernisation process.

Note: The time by which an award modernisation process must be completed may be varied under subsection 576C(5).

576G Full Bench must make modern awards

- (1) A Full Bench must make one or more modern awards to give effect to the outcome of an award modernisation process.
 - Note 1: A modern award must comply with Divisions 3, 4 and 5.
 - Note 2: Section 576Y deals with the commencement of a modern award.
- (2) A modern award must be consistent with the award modernisation request to which the modern award relates.
- (3) The Commission must not make a modern award other than under subsection (1).
- (4) A modern award is not a legislative instrument.

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576H Commission may vary modern awards

The Commission may make an order varying a modern award if the variation is consistent with the award modernisation request to which the modern award relates.

Division 3—Terms of modern awards

Subdivision A—Terms that may be included in modern awards

576J Matters that may be dealt with by modern awards

General

- (1) A modern award may include terms about any of the following matters:
- (a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:
 - (i) skill-based classifications and career structures; and
 - (ii) incentive-based payments, piece rates and bonuses;
- Note: *Employee with a disability* and *junior employee* are defined in subsection (3).
- (b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;
 - (c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;
 - (d) overtime rates;
 - (e) penalty rates, including for any of the following:
 - (i) employees working unsocial, irregular or unpredictable hours;
 - (ii) employees working on weekends or public holidays;
 - (iii) shift workers;
 - (f) annualised wage or salary arrangements that:
 - (i) have regard to the patterns of work in an occupation, industry or enterprise; and
 - (ii) provide an alternative to the separate payment of wages, or salaries, and other monetary entitlements; and
 - (iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;

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- (g) allowances, including for any of the following:
 - (i) expenses incurred in the course of employment;
 - (ii) responsibilities or skills that are not taken into account in rates of pay;
 - (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;
- (h) leave, leave loadings and arrangements for taking leave;
- (i) superannuation;
- (j) procedures for consultation, representation and dispute settlement.

Other matters

- (2) A modern award may also include terms about any other matter specified in the award modernisation request to which the modern award relates.

Definitions

- (3) In this section:

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

Note: This definition includes employees under the Supported Wage System endorsed by the Commission in the Full Bench decision dated 10 October 1994 (print L5723).

junior employee means an employee who is under the age of 21.

576K Terms providing for outworkers

- (1) In this section:

outworker means:

- (a) an employee who, for the purposes of the business of the employer, performs work at private residential premises or at other premises that are not business or commercial premises of the employer; or

- (b) an individual who is a party to a contract for services, and who, for the purposes of the contract, performs work:
 - (i) in the textile, clothing or footwear industry; and
 - (ii) at private residential premises or at other premises that are not business or commercial premises of the other party to the contract or (if there are 2 or more other parties to the contract) of any of the other parties to the contract.
- (2) A modern award may include either or both of the following:
 - (a) terms relating to the conditions under which an employer may employ employees who are outworkers (including terms relating to the pay or conditions of the outworkers);
 - (b) terms relating to the conditions under which an eligible entity (within the meaning of Division 4) may arrange for work to be carried out for the entity (either directly or indirectly) by outworkers (including terms relating to the pay or conditions of the outworkers).

Note: In paragraph (2)(a), *employee* and *employer* have the meanings given by subsections 5(1) and 6(1).

576L Terms may only provide a fair minimum safety net

A modern award may include terms about the matters referred to in subsection 576J(1) or (2) or section 576K only to the extent that the terms provide a fair minimum safety net.

576M Incidental and machinery terms

- (1) A modern award may include terms that are:
 - (a) incidental to a term that is required or permitted to be in the modern award; and
 - (b) essential for the purpose of making a particular term operate in a practical way.
- (2) A modern award may include machinery provisions including, but not limited to, provisions about the following:
 - (a) commencement;
 - (b) definitions;
 - (c) titles;
 - (d) arrangement;

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- (e) employers, employees and organisations;
- (f) duration of the modern award.

576N Terms must be in accordance with award modernisation request

- (1) A modern award must include a term about a matter referred to in subsection 576J(1) or (2) or section 576K or 576M if the award modernisation request to which the modern award relates requires the modern award to include a term about that matter.
- (2) A term of a modern award about a matter referred to in subsection 576J(1) or (2) or section 576K or 576M must be consistent with any directions in relation to the matter specified in the award modernisation request to which the modern award relates.

Subdivision B—Terms that must not be included in modern awards

576P Terms not permitted by Subdivision A

A modern award must not include terms other than those permitted or required by Subdivision A.

576Q Terms that breach freedom of association provisions

A modern award must not include a term that requires or permits, or has the effect of requiring or permitting, any conduct that would contravene Part 16 (Freedom of association).

576R Terms about right of entry

A modern award must not include a term that requires or authorises an officer or employee of an organisation to do any of the following:

- (a) enter premises:
 - (i) occupied by an employer that is bound by the modern award; or
 - (ii) in which work to which the modern award applies is being carried on;

- (b) inspect or view any work, material, machinery, appliance, article, document or other thing on such premises;
- (c) interview an employee on such premises.

576S Terms that are discriminatory

- (1) A modern award must not include terms that discriminate against an employee because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
- (2) A modern award does not discriminate against an employee for the purposes of subsection (1) merely because:
 - (a) it discriminates, in respect of particular employment, on the basis of the inherent requirements of that employment; or
 - (b) it discriminates, in respect of employment as a member of the staff of an institution that is conducted in accordance with the teachings or beliefs of a particular religion or creed:
 - (i) on the basis of those teachings or beliefs; and
 - (ii) in good faith.
- (3) A modern award does not discriminate against an employee for the purposes of subsection (1) merely because it includes terms providing for minimum 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.
- (4) In this section:

employee with a disability has the same meaning as in section 576J.

junior employee has the same meaning as in section 576J.

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576T Terms that contain State-based differences

- (1) A modern award must not include terms and conditions of employment that:
 - (a) are determined by reference to State or Territory boundaries;
or
 - (b) do not have effect in each State and Territory.
- (2) Despite subsection (1), a modern award may include terms and conditions of employment of the kind referred to in subsection (1) for a period of up to 5 years starting on the day on which the modern award commences.
- (3) If, at the end of the period of 5 years starting on the day on which a modern award commences, the modern award includes terms and conditions of employment of the kind referred to in subsection (1), those terms and conditions of employment cease to have effect at the end of that period.

Division 4—Who is bound by modern awards

576U Definitions

In this Division:

eligible entity means any of the following entities, other than in the entity's capacity as an employer:

- (a) a constitutional corporation;
- (b) the Commonwealth;
- (c) a Commonwealth authority;
- (d) a body corporate incorporated in a Territory;
- (e) a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, in connection with the activity carried on in the Territory.

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

enterprise award means an award that regulates the terms and conditions of employment in a single business only (being the single business specified in the award).

outworker term means a term of a modern award that is:

- (a) about a matter referred to in section 576K; or
- (b) incidental to such a matter, and included in the modern award as permitted by subsection 576M(1); or
- (c) a machinery provision in respect of such a matter, and included in the modern award as permitted by subsection 576M(2).

576V Who is bound by a modern award

Modern award binds employers, employees etc. that it is expressed to bind

- (1) A modern award binds, in accordance with its terms, the employers, employees, organisations and eligible entities that it is expressed to bind.

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Modern award must be expressed to bind specified employers and employees

- (2) A modern award must be expressed to bind the following:
- (a) specified employers;
 - (b) specified employees of employers bound by the modern award, in respect of work that is expressed to be regulated by the modern award.

Modern award must be expressed not to bind employers bound by enterprise awards

- (3) A modern award must be expressed not to bind an employer who is bound by an enterprise award in respect of an employee to whom the enterprise award applies.

Modern award may be expressed to bind organisations

- (4) A modern award may be expressed to bind one or more specified organisations in respect of all or specified employees or employers who are bound by the modern award.

Modern award may be expressed to bind eligible entities or employers in relation to outworker terms

- (5) In addition to the employers, employees and organisations that a modern award is expressed to bind, the modern award may be expressed to bind, but only in relation to outworker terms included in the modern award, an eligible entity or an employer that operates in an industry:
- (a) to which the modern award relates; or
 - (b) in respect of which the outworker terms are applicable.

Modern award must be in accordance with award modernisation request

- (6) The power of the Commission under subsections (2), (3), (4) and (5) must be exercised in accordance with the award modernisation request to which the modern award relates.

Specification of employers, employees etc. by name or class

- (7) For the purposes of subsections (2), (3), (4) and (5):
- (a) employers may be specified by name or by inclusion in a specified class or specified classes; and
 - (b) employees must be specified by inclusion in a specified class or specified classes; and
 - (c) organisations must be specified by name; and
 - (d) eligible entities may be specified by name or by inclusion in a specified class or specified classes.
- (8) Without limiting the way in which a class may be described for the purposes of subsection (7), the class may be described by reference to a particular industry or particular kinds of work.

Division 5—Technical matters

576W Formal requirements of modern awards and variation orders

- (1) A modern award or an order varying a modern award must:
 - (a) be in writing; and
 - (b) be signed by:
 - (i) if the President is a member of the Full Bench making the modern award or order—the President; or
 - (ii) if the President is not a member of the Full Bench making the modern award or order—the member of the Full Bench who has seniority under section 65; and
 - (c) state the day on which it is signed.
- (2) A modern award must:
 - (a) have a unique title; and
 - (b) have a table of contents; and
 - (c) be expressed in plain English and be easy to understand in structure and content; and
 - (d) not include terms that are obsolete.

576X When is a modern award or variation order made

A modern award or an order varying a modern award is made on the day on which the modern award or order is signed under paragraph 576W(1)(b).

576Y Commencement of modern awards and variation orders

- (1) A modern award or an order varying a modern award must be expressed to commence on:
 - (a) if the modern award or order is made before the start-up day—the start-up day; or
 - (b) in any other case—a day that is not earlier than the day on which the modern award or order is made.

Note: *Start-up day* is defined in subsection (3).

- (2) A modern award, or an order varying a modern award, that has not yet commenced must include a statement to this effect.

- (3) For the purposes of this section, the *start-up day* is:
- (a) unless paragraph (b) applies, 1 January 2010; or
 - (b) if a later date is prescribed by the regulations—that later date.

576Z Modern awards and variation orders must be published

- (1) As soon as practicable after the Commission makes a modern award or an order varying a modern award, the Commission must give to a Registrar:
- (a) a copy of the modern award or order; and
 - (b) written reasons for the modern award or order; and
 - (c) a statement specifying the employers, employees, organisations and eligible entities bound by the modern award or order.
- (2) As soon as practicable after a Registrar receives a copy of a modern award or an order varying a modern award under subsection (1), the Registrar must:
- (a) give notice to the employers, employees, organisations and eligible entities specified in the statement referred to paragraph (1)(c) of the making of the modern award or order; and
 - (b) ensure that a copy of the modern award or order, and the written reasons for the modern award or order, are available for inspection at each registry; and
 - (c) ensure that the modern award or order, and the written reasons for the modern award or order, are published.
- (3) The Registrar must give the notice required by paragraph (2)(a):
- (a) in accordance with any requirements prescribed by the regulations; or
 - (b) if no such requirements are prescribed—in such manner as the Registrar thinks appropriate.
- (4) In this section:
- eligible entity* has the same meaning as in section 576U.

576ZA Modern awards and variation orders are final

- (1) A modern award or an order varying a modern award:
 - (a) is final and conclusive; and
 - (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
 - (c) is not subject to prohibition, mandamus or injunction in any court on any account.
- (2) A modern award or an order varying a modern award is not invalid because it was made by the Commission constituted otherwise than as provided by this Act.

576ZB Expressions used in modern awards and variation orders

Unless the contrary intention appears in a modern award or an order varying a modern award, an expression used in the modern award or order has the same meaning as it has in an Act because of the *Acts Interpretation Act 1901* or as it has in this Act.

Part 11—Transmission of business rules

Division 1—Introductory

577 Object

The object of this Part is to provide for the transfer of employer obligations under certain instruments when the whole, or a part, of a person's business is transmitted to another person.

578 Simplified outline

- (1) Division 2 describes the transmission of business situation this Part is designed to deal with. It identifies the *old employer*, the *new employer*, the *business being transferred*, the *time of transmission* and the *transferring employees*.
- (2) Divisions 3 to 6 deal with the transmission of particular instruments as follows:
 - (a) Division 3 deals with the transmission of ITEAs;
 - (b) Division 4 deals with the transmission of collective agreements;
 - (c) Division 5 deals with the transmission of awards;
 - (d) Division 6 deals with the transmission of APCs.
- (3) Division 7 deals with what happens with entitlements under the Australian Fair Pay and Conditions Standard when there is a transmission of business.
- (4) Division 8 deals with notification requirements, the lodgment of notices with the Workplace Authority Director and the enforcement of employer obligations by pecuniary penalties.
- (5) Division 9 allows regulations to be made to deal with other transmission of business issues.

579 Definitions

In this Part:

business being transferred has the meaning given by subsection 580(2).

Court means the Federal Court of Australia or the Federal Magistrates Court.

instrument means:

- (a) an ITEA; or
- (b) a collective agreement; or
- (c) an award; or
- (d) an APCS.

new employer has the meaning given by subsection 580(1).

old employer has the meaning given by subsection 580(1).

operational reasons has the meaning given by subsection 643(9).

parental leave has the same meaning as in subsection 316(3).

time of transmission has the meaning given by subsection 580(3).

transferring employee has the meaning given by sections 581 and 582.

transmission period has the meaning given by subsection 580(4).

Division 2—Application of Part

580 Application of Part

- (1) This Part applies if a person (the *new employer*) becomes the successor, transmittee or assignee of the whole, or a part, of a business of another person (the *old employer*).
- (2) The business, or the part of the business, to which the new employer is successor, transmittee or assignee is the *business being transferred* for the purposes of this Part.
- (3) The time at which the new employer becomes the successor, transmittee or assignee of the business being transferred is the *time of transmission* for the purposes of this Part.
- (4) The period of 12 months after the time of transmission is the *transmission period* for the purposes of this Part.

581 Transferring employees

- (1) A person is a *transferring employee* for the purposes of this Part if:
 - (a) the person is employed by the old employer immediately before the time of transmission; and
 - (b) the person:
 - (i) ceases to be employed by the old employer; and
 - (ii) becomes employed by the new employer in the business being transferred;within 2 months after the time of transmission.
- (2) A person is also a *transferring employee* for the purposes of this Part if:
 - (a) the person is employed by the old employer at any time within the period of 1 month before the time of transmission; and
 - (b) the person's employment with the old employer is terminated by the old employer before the time of transmission for genuine operational reasons or for reasons that include genuine operational reasons; and

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- (c) the person becomes employed by the new employer in the business being transferred within 2 months after the time of transmission.
- (3) In applying section 582 and Divisions 3 to 7 in relation to a person who is a transferring employee under subsection (2) of this section, a reference in those provisions to a particular state of affairs existing immediately before the time of transmission is to be read as a reference to that state of affairs existing immediately before the person last ceased to be an employee of the old employer.

582 Transferring employees in relation to particular instrument

- (1) A transferring employee is a *transferring employee* in relation to a particular instrument if:
 - (a) the instrument applied to the transferring employee's employment with the old employer immediately before the time of transmission; and
 - (b) when the transferring employee becomes employed by the new employer, the nature of the transferring employee's employment with the new employer is such that the instrument is capable of applying to employment of that nature.
- (2) The transferring employee ceases to be a *transferring employee* in relation to the instrument if:
 - (a) the transferring employee ceases to be employed by the new employer after the time of transmission; or
 - (b) the nature of the transferring employee's employment with the new employer changes so that the instrument is no longer capable of applying to employment of that nature; or
 - (c) the transmission period ends.Paragraph (c) does not apply if the instrument is an APCS.
- (3) This section applies to a preserved APCS as if it were an instrument.

Division 3—Transmission of ITEA

583 Transmission of ITEA

New employer bound by ITEA in operation

- (1) If:
- (a) immediately before the time of transmission:
 - (i) the old employer; and
 - (ii) an employee;were bound by an ITEA that was in operation; and
 - (b) the employee is a transferring employee in relation to the ITEA;
- the new employer is bound by the ITEA by force of this section.

Note: The new employer must notify the transferring employee and lodge a copy of the notice with the Workplace Authority Director (see sections 602 and 603).

Transferring employee considered an existing employee for the purposes of eligibility to make an ITEA

- (1A) For the purposes of applying section 326 to a transferring employee in relation to a new employer:
- (a) treat the employee as being in an employment relationship with the employer; and
 - (b) assume that subparagraphs 326(2)(b)(i) and (ia) do not apply to the employee.

Period for which new employer remains bound

- (2) The new employer remains bound by the ITEA, by force of this section, until whichever of the following first occurs:
- (a) the ITEA is terminated (see Division 9 of Part 8 as modified by section 584);
 - (b) the ITEA ceases to be in operation because it is replaced by another ITEA between the new employer and the transferring employee (see paragraph 347(4)(b));
 - (c) the transferring employee ceases to be a transferring employee in relation to the ITEA;

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(d) the transmission period ends.

Old employer's rights and obligations that arose before time of transmission not affected

(3) This section does not affect the rights and obligations of the old employer that arose before the time of transmission.

584 Termination of transmitted ITEA

The ITEA cannot be terminated under subsection 392(2) or 393(2) during the transmission period (even if the ITEA has passed its nominal expiry date).

Division 4—Transmission of collective agreement

Subdivision A—General

585 Transmission of collective agreement

New employer bound by collective agreement in operation

- (1) If:
- (a) immediately before the time of transmission:
 - (i) the old employer; and
 - (ii) employees of the old employer;were bound by a collective agreement that was in operation; and
 - (b) there is at least one transferring employee in relation to the collective agreement;
- the new employer is bound by the collective agreement by force of this section.

Note 1: The new employer must notify transferring employees and lodge a copy of a notice with the Workplace Authority Director (see sections 602 and 603).

Note 2: See also section 586 for the interaction between the collective agreement and other industrial instruments.

Period for which new employer remains bound

- (2) The new employer remains bound by the collective agreement, by force of this section, until whichever of the following first occurs:
- (a) the collective agreement is terminated (see Division 9 of Part 8 as modified by section 588);
 - (b) there cease to be any transferring employees in relation to the collective agreement;
 - (c) the new employer ceases to be bound by the collective agreement in relation to all the transferring employees in relation to the collective agreement;
 - (d) the transmission period ends.

Note: Paragraph (c)—see subsection (3).

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Period for which new employer remains bound in relation to particular transferring employee

- (3) The new employer remains bound by the collective agreement in relation to a particular transferring employee, by force of this section, until whichever of the following first occurs:
- (b) the collective agreement ceases to be in operation in relation to the transferring employee's employment with the new employer because it has been replaced by another collective agreement in relation to the transferring employee's employment with the new employer (see subsection 347(5) as modified by subsection 587(3));
 - (c) the employer ceases to be bound by the collective agreement under subsection (2).

New employer bound only in relation to employment of transferring employees in the business being transferred

- (4) The new employer is bound by the collective agreement, by force of this section, only in relation to the employment, in the business being transferred, of employees who are transferring employees in relation to the collective agreement.

New employer bound subject to Commission order

- (5) Subsections (1), (2) and (3) have effect subject to any order of the Commission under section 590.

Old employer's rights and obligations that arose before time of transmission not affected

- (6) This section does not affect the rights and obligations of the old employer that arose before the time of transmission.

586 Interaction rules

Transmitted agreement

- (1) This section applies if subsection 585(1) applies to a collective agreement (the *transmitted collective agreement*).

Existing collective agreement

- (2) If:
- (a) the new employer is bound by a collective agreement (the *existing collective agreement*) immediately before the time of transmission; and
 - (b) a person is a transferring employee in relation to the transmitted collective agreement; and
 - (c) the existing collective agreement would, but for this subsection, apply, according to its terms, to the transferring employee when the transferring employee becomes employed by the new employer;
- the existing collective agreement does not apply to the transferring employee.
- (3) Subsection (2) ceases to apply at the end of the transmission period.

587 Transmitted collective agreement ceasing in relation to transferring employee

Transmitted agreement

- (1) This section applies if subsection 585(1) applies to a collective agreement (the *transmitted collective agreement*).

Replacement collective agreement

- (3) Despite subsection 347(5), the transmitted collective agreement ceases to be in operation in relation to a transferring employee if the transmitted collective agreement has been replaced by another collective agreement in relation to the employee (even if the transmitted collective agreement has not passed its nominal expiry date).

588 Termination of transmitted collective agreement

Transmitted agreement

- (1) This section applies if subsection 585(1) applies to a collective agreement (the *transmitted collective agreement*).

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Modified operation of subsection 392(2)

- (2) The transmitted collective agreement cannot be terminated under subsection 392(2) during the transmission period (even if the transmitted collective agreement has passed its nominal expiry date).

Special rule for transmitted workplace determination

- (4) If the transmitted collective agreement is a workplace determination, subsection 506(3) ceases to apply to the transmitted collective agreement at the time of transmission.

Note 1: Subsection 506(1) provides that this Act generally applies to a workplace determination as if it were a collective agreement.

Note 2: Subsection 506(3) would otherwise prevent the transmitted workplace determination from being terminated under Subdivision B of Division 9 of Part 8 before it had passed its nominal expiry date.

Subdivision B—Commission’s powers

589 Application and terminology

- (1) The Subdivision applies if:
- (a) a person is bound by a collective agreement; and
 - (b) another person:
 - (i) becomes at a later time; or
 - (ii) is likely to become at a later time;the successor, transmittee or assignee of the whole, or a part, of the business of the person referred to in paragraph (a).
- (2) For the purposes of this Subdivision:
- (a) the ***outgoing employer*** is the person referred to in paragraph (1)(a); and
 - (b) the ***incoming employer*** is the person first referred to in paragraph (1)(b); and
 - (c) the ***business concerned*** is the business, or the part of the business, to which the incoming employer becomes, or is likely to become, the successor, transmittee or assignee; and
 - (d) the ***transfer time*** is the time at which the incoming employer becomes, or is likely to become, the successor, transmittee or assignee of the business concerned.

590 Commission may make order

- (1) The Commission may make an order that the incoming employer:
 - (a) is not, or will not be, bound by the collective agreement; or
 - (b) is, or will be, bound by the collective agreement, but only to the extent specified in the order.

The order must specify the day from which the order takes effect. That day must not be before the day on which the order is made or before the transfer time.

- (2) Without limiting paragraph (1)(b), the Commission may make an order under that paragraph that the incoming employer is, or will be, bound by the collective agreement but only for the period specified in the order.
- (3) To avoid doubt, the Commission cannot make an order under subsection (1) that would have the effect of extending the transmission period.

591 When application for order can be made

An application for an order under subsection 590(1) may be made before, at or after the transfer time.

592 Who may apply for order

- (1) Before the transfer time, an application for an order under subsection 590(1) may be made only by the outgoing employer.
- (2) At or after the transfer time, an application for an order under subsection 590(1) may be made only by:
 - (a) the incoming employer; or
 - (b) a transferring employee in relation to the collective agreement; or
 - (c) an organisation of employees that is bound by the collective agreement; or
 - (d) an organisation of employees that:
 - (i) is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee; and

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- (ii) has been requested by the transferring employee to apply for the order on the transferring employee's behalf.

593 Applicant to give notice of application

The applicant for an order under subsection 590(1) must take reasonable steps to give written notice of the application to the persons who may make submissions in relation to the application (see section 594).

594 Submissions in relation to application

- (1) Before deciding whether to make an order under subsection 590(1) in relation to the collective agreement, the Commission must give the following an opportunity to make submissions:
 - (a) the applicant;
 - (b) before the transfer time—the persons covered by subsection (2);
 - (c) at and after the transfer time—the persons covered by subsection (3).
- (2) For the purposes of paragraph (1)(b), this subsection covers:
 - (a) an employee of the outgoing employer:
 - (i) who is bound by the collective agreement; and
 - (ii) who is employed in the business concerned; and
 - (b) the incoming employer; and
 - (c) an organisation of employees that is bound by the collective agreement; and
 - (d) an organisation of employees that:
 - (i) is entitled, under its eligibility rules, to represent the industrial interests of an employee referred to in paragraph (a); and
 - (ii) has been requested by the employee to make submissions on the employee's behalf in relation to the application for the order under subsection 590(1).

- (3) For the purposes of paragraph (1)(c), this subsection covers:
- (a) the incoming employer; and
 - (b) a transferring employee in relation to the collective agreement; and
 - (c) an organisation of employees that is bound by the collective agreement; and
 - (d) an organisation of employees that:
 - (i) is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee; and
 - (ii) has been requested by the transferring employee to make submissions on the transferring employee's behalf in relation to the application for the order under subsection 590(1).

Division 5—Transmission of award

595 Transmission of award

New employer bound by award

(1) If:

- (a) the old employer was, immediately before the time of transmission, bound by an award that regulated the employment of employees of the old employer; and
- (b) there is at least one transferring employee in relation to the award; and
- (c) but for this section, the new employer would not be bound by the award in relation to the transferring employees in relation to the award;

the new employer is bound by the award by force of this section.

Note 1: Paragraph (c)—the award might already bind the new employer, for example, because the new employer happens to be a respondent to the award.

Note 2: The new employer must notify transferring employees and lodge a copy of a notice with the Workplace Authority Director (see sections 602 and 603).

Note 3: See also section 596 for the interaction between the award and other industrial instruments.

Period for which new employer remains bound

(2) The new employer remains bound by the award, by force of this section, until whichever of the following first occurs:

- (a) the award is revoked;
- (b) there cease to be any transferring employees in relation to the award;
- (c) the new employer ceases to be bound by the award in relation to all the transferring employees in relation to the award;
- (d) the transmission period ends.

Note: Paragraph (c)—see subsection (3).

Period for which new employer remains bound in relation to particular transferring employee

- (3) The new employer remains bound by the award in relation to a particular transferring employee, by force of this section, until whichever of the following first occurs:
- (b) the award ceases to be in operation in relation to the transferring employee's employment with the new employer because a collective agreement comes into operation, after the time of transmission, in relation to the transferring employee's employment with the new employer (see subsection 597(3));
 - (c) the employer ceases to be bound by the award under subsection (2).

New employer bound only in relation to employment of transferring employees

- (4) The new employer is bound by the award, by force of this section, only in relation to the employment of employees who are transferring employees in relation to the award.

Commission order

- (5) Subsections (1), (2) and (3) have effect subject to any order of the Commission.
- (6) To avoid doubt, the Commission cannot make an order under subsection (5) that would have the effect of extending the transmission period.

Old employer's rights and obligations that arose before time of transmission not affected

- (7) This section does not affect the rights and obligations of the old employer that arose before the time of transmission.

596 Interaction rules

Transmitted award

- (1) This section applies if subsection 595(1) applies to an award (the *transmitted award*).

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Collective agreement

- (2) Despite section 349 but subject to subsection (3), a collective agreement that is in operation at the time of transmission does not have effect in relation to an employee's employment while the transmitted award operates, in accordance with subsection 595(1), in relation to that employment.

Note 1: But for subsection (2), section 349 would have the effect that the transmitted award would not have effect in relation to the employee's employment while a collective agreement operates in relation to that employment.

Note 2: Section 597 modifies the operation of section 349 in relation to collective agreements that come into operation after the time of transmission.

- (3) Despite subsection 595(1), if the employee agrees that the collective agreement is to operate in relation to that employment:
- (a) the collective agreement comes into operation in relation to that employment; and
 - (b) the transmitted award ceases to be in operation in relation to that employment in accordance with subsection 597(3).

597 Transmitted award ceasing in relation to transferring employee

Transmitted award

- (1) This section applies if subsection 595(1) applies to an award (the *transmitted award*).

Collective agreement

- (3) Despite section 349, the transmitted award ceases to be in operation in relation to a transferring employee's employment with the new employer if a collective agreement comes into operation in relation to the transferring employee's employment with the new employer after the time of transmission.

Note: Section 349 provides that an award is normally only suspended while a collective agreement is in operation. The effect of subsection (3) of this section is to terminate the operation of the transmitted award in relation to the transferring employee when the collective agreement is made.

Division 6—Transmission of APCS

598 Transmission of APCS

New employer bound by APCS

- (1) If:
- (a) immediately before the time of transmission, an employee's employment with the old employer was covered by an APCS; and
 - (b) the employee is a transferring employee in relation to the APCS; and
 - (c) but for this section, the transferring employee's employment with the new employer would not be covered by the APCS; the transferring employee's employment with the new employer is covered by the APCS by force of this section.

Employee ceasing to be transferring employee

- (2) The transferring employee's employment with the new employer ceases to be covered by the APCS, by force of this section, if the employee ceases to be a transferring employee in relation to the APCS.

Old employer's rights and obligations that arose before time of transmission not affected

- (3) This section does not affect the rights and obligations of the old employer that arose before the time of transmission.

Division 6A—Transmission of preserved redundancy provisions from workplace agreements

598A Transmission of preserved redundancy provisions from workplace agreements

- (1) If:
- (a) immediately before the time of transmission:
 - (i) the old employer; and
 - (ii) an employee;were bound, under section 399A or because of a previous application of this section, by a redundancy provision that was previously included in a workplace agreement that was terminated; and
 - (b) the employee is a transferring employee;
the new employer is bound by the redundancy provision in relation to the transferring employee by force of this section.

Note: The new employer must notify the transferring employee and lodge a copy of the notice with the Workplace Authority Director (see sections 603A and 603B).

- (2) Subject to subsection (3), the redundancy provision prevails over any other redundancy provision included in any other instrument that would otherwise have effect, to the extent of any inconsistency.

Period for which new employer remains bound

- (3) The new employer remains bound by the redundancy provision in relation to the transferring employee, by force of this section, until the earliest of the following:
- (a) the end of the period of 24 months from the time that the workplace agreement referred to in paragraph (1)(a) ceased operating;
 - (b) the time when the transferring employee ceases to be employed by the new employer;

- (c) the time when another workplace agreement comes into operation in relation to the new employer and the transferring employee.

Old employer's rights and obligations that arose before time of transmission not affected

- (4) This section does not affect the rights and obligations of the old employer that arose before the time of transmission.

Definitions

- (5) In this section:

instrument means any of the following:

- (a) a workplace agreement;
- (b) a pre-reform certified agreement (within the meaning of Schedule 7);
- (c) a preserved State agreement;
- (d) a notional agreement preserving State awards;
- (e) an award.

redundancy provision means any of the following kinds of provisions:

- (a) a provision relating to redundancy pay in relation to a termination of employment;
- (b) a provision that is incidental to a provision relating to redundancy pay in relation to a termination of employment;
- (c) a machinery provision that is in respect of a provision relating to redundancy pay in relation to a termination of employment;

where the termination is at the initiative of the employer and on the grounds of operational requirements, or because the employer is insolvent.

Division 7—Entitlements under the Australian Fair Pay and Conditions Standard

599 Parental leave entitlements

- (1) At the time of transmission:
 - (a) the new employer becomes liable for a transferring employee's entitlements (if any) in relation to parental leave that are:
 - (i) entitlements under the Australian Fair Pay and Conditions Standard; and
 - (ii) entitlements for which the old employer was liable immediately before the time of transmission; and
 - (b) the old employer ceases to be liable for those entitlements.
 - (2) The following count as service with the new employer for the purpose of working out a transferring employee's entitlement to parental leave under the Australian Fair Pay and Conditions Standard:
 - (a) the transferring employee's service with the old employer that counted for the purposes of working out the transferring employee's entitlement to parental leave;
 - (b) any service with a previous employer that the old employer recognised as service with the old employer for the purposes of working out the transferring employee's entitlement to parental leave.
 - (3) If:
 - (a) documentation for parental leave, required under Division 6 of Part 7, is given to the old employer by a transferring employee before the time of transmission; and
 - (b) the leave applied for has not started before the time of transmission; and
 - (c) the entitlement to that leave arises under the Australian Fair Pay and Conditions Standard; and
 - (d) the old employer notifies the new employer of the documentation under subsection (4);the documentation is treated as if it had been given to the new employer.
-

- (4) The old employer must notify the new employer of:
- (a) any person who:
 - (i) is, or who is likely to be, a transferring employee; and
 - (ii) is on parental leave at the time of transmission on the basis of an entitlement under the Australian Fair Pay and Conditions Standard; and
 - (b) documentation for parental leave that is given to the old employer before the time of transmission by a person who is, or is likely to be, a transferring employee if the documentation was given to the old employer on the basis of an entitlement under the Australian Fair Pay and Conditions Standard.

The notification must be given in writing within 14 days after the time of transmission.

Note: This is a civil remedy provision, see section 605.

600 New employer assuming liability for particular entitlements

- (1) This section applies if the new employer agrees, in writing, before the time of transmission:
- (a) to assume liability for; or
 - (b) to recognise continuity of service in relation to;
- a transferring employee's entitlements in relation to a particular matter.
- (2) At the time of transmission:
- (a) the new employer becomes liable for the transferring employee's entitlements (if any):
 - (i) that accrued under the Australian Fair Pay and Conditions Standard in relation to that matter before the time of transmission; and
 - (ii) that are not entitlements in relation to parental leave; and
 - (iii) for which the old employer was liable immediately before the time of transmission; and
 - (b) the old employer ceases to be liable for those accrued entitlements.
- (3) The following count as service with the new employer for the purpose of working out the transferring employee's entitlements
-

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under the Australian Fair Pay and Conditions Standard in relation to that matter:

- (a) the transferring employee's service with the old employer that counted for the purposes of working out the transferring employee's entitlements in relation to that matter;
- (b) any service with a previous employer that the old employer recognised as service with the old employer for the purposes of working out the transferring employee's entitlements in relation to that matter.

601 New employer assuming entitlements generally

- (1) This section also applies if the new employer agrees in writing before the time of transmission:
 - (a) to assume liability for a transferring employee's entitlements generally; or
 - (b) to recognise continuity of service in relation to a transferring employee generally.
 - (2) At the time of transmission:
 - (a) the new employer becomes liable for the transferring employee's entitlements (if any):
 - (i) that accrued under the Australian Fair Pay and Conditions Standard before the time of transmission; and
 - (ii) that are not entitlements in relation to parental leave; and
 - (iii) for which the old employer was liable immediately before the time of transmission; and
 - (b) the old employer ceases to be liable for those accrued entitlements.
 - (3) The following count as service with the new employer for the purpose of working out the transferring employee's entitlements under the Australian Fair Pay and Conditions Standard in relation to a particular matter:
 - (a) the transferring employee's service with the old employer that counted for the purposes of working out the transferring employee's entitlements in relation to that matter;
 - (b) any service with a previous employer that the old employer recognised as service with the old employer for the purposes
-

of working out the transferring employee's entitlements in relation to that matter.

Division 7A—Application of no-disadvantage test

601A No decision under section 346D at time of transmission

- (1) This section applies if a workplace agreement that is in operation becomes binding upon a new employer and a transferring employee or transferring employees, because of the operation of section 583 or 585, before the Workplace Authority Director has decided whether the agreement passes the no-disadvantage test under section 346D.
- (2) Subject to subsection (4), for the purposes of deciding under section 346D whether the workplace agreement passes the no-disadvantage test, references to the employer in the following provisions:
 - (a) section 346D;
 - (b) the definitions of *relevant collective instrument* and *relevant general instrument* in section 346E;
 - (c) section 346J;are taken to be references to the old employer.
- (3) If:
 - (a) the Workplace Authority Director has been notified that the workplace agreement is binding on the new employer and the transferring employee or transferring employees; and
 - (b) the Workplace Authority Director is required to give a notice under section 346M, 346U or 346Z to the employer in relation to the workplace agreement;the Workplace Authority Director must give the notice to both the old employer and the new employer.
- (4) If the Workplace Authority Director decides under section 346D that the workplace agreement does not pass the no-disadvantage test:
 - (a) references in section 346W to the employer bound by the workplace agreement are taken to be references to the new employer; and
 - (b) to avoid doubt, if the new employer subsequently lodges a variation of the workplace agreement under section 346W

then, for the purposes of deciding under section 346Z whether the workplace agreement as varied passes the no-disadvantage test, references to the employer in the following provisions:

- (i) section 346D;
 - (ii) the definitions of *relevant collective instrument* and *relevant general instrument* in section 346E;
 - (iii) section 346J;
- are taken to be references to the old employer.

Note 1: The employment arrangements that have effect in relation to the new employer and the transferring employee or transferring employees are as set out in section 601D.

Note 2: The compensation payable to the transferring employees under section 346ZG by both the old employer and the new employer is as specified in subsections 346ZG(2), (3) and 601G(1).

601B No decision on a varied agreement under section 346Z at time of transmission

- (1) This section applies if a workplace agreement as varied becomes binding upon a new employer and a transferring employee or transferring employees, because of the operation of section 583 or 585, before the Workplace Authority Director has decided whether the agreement as varied passes the no-disadvantage test under section 346Z.
- (2) For the purposes of deciding under section 346Z whether the workplace agreement as varied passes the no-disadvantage test, references to the employer in the following provisions:
 - (a) section 346D;
 - (b) the definitions of *relevant collective instrument* and *relevant general instrument* in section 346E;
 - (c) section 346J;are taken to be references to the old employer.
- (3) If:
 - (a) the Workplace Authority Director has been notified that the workplace agreement is binding upon the new employer and a transferring employee or transferring employees; and

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- (b) the Workplace Authority Director is required to give a notice under section 346Z to the employer in relation to the workplace agreement;
- the Workplace Authority Director must give the notice to both the old employer and the new employer.

601C Employees still employed by old employer

To avoid doubt, if a workplace agreement becomes binding upon a new employer and a transferring employee or transferring employees because of the operation of section 583 or 585, Division 5A of Part 8 has effect, to the extent that the workplace agreement continues to bind:

- (a) the old employer; and
 - (b) an employee or employees who are not transferring employees;
- according to its terms.

601D Employment arrangements if a workplace agreement ceases to operate because it does not pass no-disadvantage test

- (1) This section applies if:
 - (a) on a particular day (the *cessation day*), a workplace agreement (the *original agreement*) ceases to operate under section 346W or 346ZA because the original agreement does not pass the no-disadvantage test; and
 - (b) during the period beginning when the original agreement was lodged and ending on the cessation day, the original agreement became binding upon a new employer and a transferring employee or transferring employees because of the operation of section 583 or 585 in relation to a business being transferred; and
 - (c) the cessation day occurs during the transmission period in relation to the business being transferred.

Note: If the cessation day occurs after the transmission period ends, the rules in Divisions 3, 4, 5 and 6 of this Part will have effect according to their terms.

- (2) Despite subsection 346ZB(2), the new employer and the transferring employee or transferring employees who were bound

by the original agreement immediately before the cessation day are taken, on and from the cessation day, to be bound by:

- (a) the instrument:
 - (i) that, but for the original agreement having come into operation, would have bound the old employer and the transferring employee or transferring employees immediately before the time of transmission; and
 - (ii) that was capable of binding the new employer after the time of transmission under this Part, Schedule 6 or Schedule 9; or
 - (b) if there is no instrument of a kind referred to in paragraph (a) in relation to the old employer and one or more of the transferring employees—the designated award (within the meaning of Division 5A of Part 8) in relation to that employee or those employees.
- (3) If, but for the original agreement having come into operation, the old employer would have been bound, immediately before the time of transmission, under a designated provision relating to the agreement, by a redundancy provision in relation to a transferring employee or transferring employees whose employment was subject to the original agreement, the new employer is taken:
- (a) to be bound under section 598A or clause 27A of Schedule 9, as the case requires, on and from the cessation day, by the redundancy provision in relation to the transferring employee or transferring employees; and
 - (b) to continue to be so bound until the earliest of the following:
 - (i) the end of the period of 24 months beginning on the first day on which the old employer became bound, under the designated provision, by the redundancy provision;
 - (ii) the time when the employee ceases to be employed by the new employer;
 - (iii) the time when another workplace agreement comes into operation in relation to the transferring employee or the transferring employees and the new employer.
- (4) If the original agreement is a workplace agreement as varied under Division 8 of Part 8, the workplace agreement as in force before the variation was lodged is, despite section 346ZE, capable of being an instrument described in paragraph (2)(a).

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(5) In this section:

designated provision has the same meaning as in section 346ZD.

instrument means any of the following:

- (a) a workplace agreement;
- (b) an award;
- (c) a pre-reform certified agreement (within the meaning of Schedule 7);
- (d) a transitional Victorian reference award (within the meaning of Part 7 of Schedule 6);
- (e) a transitional award (within the meaning of Schedule 6) other than a Victorian reference award (within the meaning of that Schedule) to the extent that the award regulates excluded employers in respect of the employment of employees in Victoria;
- (f) a preserved State agreement (within the meaning of Schedule 8);
- (g) a notional agreement preserving State awards (within the meaning of Schedule 8).

redundancy provision has the same meaning as in section 346ZD.

601E Effect of section 601D in relation to instruments

If, because of the operation of section 601D, a new employer and a transferring employee or transferring employees are taken to be bound by an instrument, the instrument is taken, despite any other provision of this Act, to have effect in relation to the new employer and the transferring employee or employees throughout the period:

- (a) beginning on the cessation day; and
- (b) ending at the end of the transmission period in relation to the business being transferred;

as if the new employer and the transferring employee or transferring employees had become bound by the instrument under Division 3, 4, 5 or 6 of this Part or Schedule 6 or Schedule 9, as the case requires.

601F Regulations may make provision for operation of revived instruments

The regulations may make provision for and in relation to the operation of instruments that are taken to bind an employer and the employees because of the operation of section 601D.

601G Compensation in respect of no-disadvantage test period

- (1) If, because of the operation of section 583 or 585, a workplace agreement to which section 346ZG applies bound an old employer and a new employer in relation to the employment of a transferring employee during the no-disadvantage test period for that agreement, section 346ZG applies with the following modifications:
 - (a) the transferring employee is entitled to be paid compensation by the old employer in respect of the period or periods during which the employee was employed by the old employer, worked out in accordance with the assumptions set out in subsection 346ZG(3); and
 - (b) the transferring employee is entitled to be paid compensation by the new employer in respect of the period or periods during which the employee was employed by the new employer, worked out in accordance with the assumptions set out in subsection 346ZG(3), subject to the following modifications:
 - (i) subparagraph 346ZG(3)(a)(i) is taken to refer to the instrument described in paragraph 601D(2)(a); and
 - (ii) a reference in paragraph 346ZG(3)(b) to a designated provision is taken to be a reference to section 598A or clause 27A of Schedule 9, as the case requires.
- (2) In this section:

no-disadvantage test period has the same meaning as in section 346ZG.

Section 601H

601H Notice requirements in relation to transmission of business

- (1) This section applies if:
 - (a) a new employer is bound by a workplace agreement (the *transmitted workplace agreement*) in relation to a transferring employee because of section 583 or 585; and
 - (b) as at the time of transmission, the Workplace Authority Director has not yet decided whether the transmitted workplace agreement passes the no-disadvantage test under section 346D or 346Z.
- (2) The old employer must take reasonable steps to give a written notice to the Workplace Authority Director that:
 - (a) identifies the transmitted workplace agreement; and
 - (b) states whether or not the old employer remains bound by the transmitted workplace agreement in relation to the employment of any employees; and
 - (c) specifies the date on which the transmission period in relation to the business being transferred ends; and
 - (d) specifies the name and address of the new employer.
- (3) Subsection (2) is a civil remedy provision.

Note: See Division 11 of Part 8 for provisions on enforcement.

Division 8—Notice requirements and enforcement

602 Informing transferring employees about transmission of instrument

- (1) This section applies if:
- (a) an employer is bound by an instrument (the *transmitted instrument*) in relation to a transferring employee by force of:
 - (i) section 583 (ITEA); or
 - (ii) section 585 (collective agreement); or
 - (iii) section 595 (award); and
 - (b) a person is a transferring employee in relation to the transmitted instrument.

The provision referred to in paragraph (a) is the *transmission provision*.

- (2) Within 28 days after the transferring employee starts being employed by the employer, the employer must take reasonable steps to give the transferring employee a written notice that complies with subsection (3).

Note: This is a civil remedy provision, see section 605.

- (3) The notice must:
- (a) identify the transmitted instrument; and
 - (b) state that the employer is bound by the transmitted instrument; and
 - (c) specify the date on which the transmission period for the transmitted instrument ends; and
 - (d) state that the employer will remain bound by the transmitted instrument until the end of the transmission period unless the transmitted instrument is terminated, or otherwise ceases to be in operation, before the end of that period; and
 - (e) specify the kinds of instruments (if any) that can replace, or exclude the operation of, the transmitted instrument; and
 - (f) identify:
 - (i) any provisions of the Australian Fair Pay and Conditions Standard; or

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- (ii) any other instrument;
that the employer intends to be the source for terms and conditions that will apply to the matters that are dealt with by the transmitted instrument when the transmitted instrument ceases to bind the employer; and
 - (g) identify any collective agreement or award that binds:
 - (i) the employer; and
 - (ii) employees of the employer who are not transferring employees in relation to the transmitted instrument;and that would bind the transferring employee but for the transmission provision.
- (4) Subject to subsection (5), if the notice under subsection (3) identifies an instrument under paragraph (3)(g), the employer must give the transferring employee a copy of the instrument together with the notice.

Note: This is a civil remedy provision, see section 605.
- (5) Subsection (4) does not apply if:
 - (a) the transferring employee is able to easily access a copy of the instrument in a particular way; and
 - (b) the notice under subsection (3) tells the transferring employee that a copy of the instrument is accessible in that way.

Note: Paragraph (a)—the copy may be available, for example, on the Internet.
- (6) Subsection (2) does not apply if:
 - (a) the transmitted instrument is an award and the new employer and the transferring employee become bound by a collective agreement at the time of transmission or within 14 days after the time of transmission; or
 - (b) the transmitted instrument is an ITEA and the new employer and the transferring employee become bound by an ITEA within 14 days after the time of transmission.

603 Lodging copy of notice with Workplace Authority Director

Only one transferring employee

- (1) If an employer:
- (a) gives a notice under subsection 602(2) to a transferring employee in relation to an ITEA; or
 - (b) gives a notice under subsection 602(2) to the only person who is a transferring employee in relation to a collective agreement or award;

the employer must lodge a copy of the notice with the Workplace Authority Director within 14 days after the notice is given to the transferring employee. The copy must be lodged in accordance with subsection (4).

Note 1: This is a civil remedy provision, see section 605.

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

Multiple transferring employees and notices all given on the one day

- (2) If:
- (a) an employer gives a number of notices under subsection 602(2) to people who are transferring employees in relation to a collective agreement or award; and
 - (b) all of those notices are given on the one day;

the employer must lodge a copy of one of those notices with the Workplace Authority Director within 14 days after that notice is given. The copy must be lodged in accordance with subsection (4).

Note 1: This is a civil remedy provision, see section 605.

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

Multiple transferring employees and notices given on different days

- (3) If:
- (a) an employer gives a number of notices under subsection 602(2) to people who are transferring employees in relation to a collective agreement or award; and

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(b) the notices are given on different days;
the employer must lodge a copy of the notice, or one of the notices that was given on the earliest of those days, with the Workplace Authority Director within 14 days after that notice is given. The copy must be lodged in accordance with subsection (4).

Note 1: This is a civil remedy provision, see section 605.

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

Lodgment with Workplace Authority Director

- (4) A notice is lodged with the Workplace Authority Director in accordance with this subsection only if it is actually received by the Workplace Authority Director.

Note: This means that section 29 of the *Acts Interpretation Act 1901* (to the extent that it deals with the time of service of documents) does not apply to lodgment of a notice.

603A Informing transferring employees about transmission of preserved redundancy provisions

- (1) This section applies if an employer is bound, by force of section 598A, by one or more redundancy provisions (within the meaning of that section) in relation to a transferring employee.
- (2) Within 28 days after the transferring employee starts being employed by the employer, the employer must take reasonable steps to give the transferring employee a written notice that complies with subsection (3).

Note: This is a civil remedy provision, see section 605.

- (3) The notice must:
- (a) identify the redundancy provision or redundancy provisions; and
 - (b) state that the employer is bound by the provision or provisions; and
 - (c) specify the date that is 24 months after the time that the workplace agreement that included the provision or provisions ceased operating; and

- (d) state that the employer will remain bound by the provision or provisions until that date, or an earlier date in accordance with subsection 598A(3).
- (4) Subsection (2) does not apply if a workplace agreement comes into operation in relation to the employer and the transferring employee within 14 days of the time of transmission.

603B Lodging copy of notice about preserved redundancy provisions with Workplace Authority Director

- (1) If an employer gives a notice under section 603A to a transferring employee, the employer must lodge a copy of the notice with the Workplace Authority Director within the period specified in subsection (2). The copy must be lodged in accordance with subsection (3).

Note 1: This is a civil remedy provision, see section 605.

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

- (2) The notice must be lodged within 14 days after the day specified in paragraph (a) or (b):
 - (a) if the employer gives a notice to an employee in respect of a redundancy provision that was included in an ITEA—the day on which that notice is given; or
 - (b) if the employer gives one or more notices to one or more employees in respect of a redundancy provision that was included in a collective agreement—the earliest day on which a notice was given.

Lodgment with Workplace Authority Director

- (3) A notice is lodged with the Workplace Authority Director in accordance with this subsection only if it is actually received by the Workplace Authority Director.

Note: This means that section 29 of the *Acts Interpretation Act 1901* (to the extent that it deals with the time of service of documents) does not apply to lodgment of a notice.

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604 Workplace Authority Director must issue receipt for lodgment

- (1) If a notice is lodged under section 603 or 603B, the Workplace Authority Director must issue a receipt for the lodgment.
- (2) The receipt must state that the notice was lodged under section 603 or 603B (as the case requires) on a particular day.
- (3) The Workplace Authority Director must give a copy of the receipt to the person who lodged the notice under section 603 or 603B.

605 Civil penalties

- (1) The following are *civil remedy provisions* for the purposes of this section:
 - (a) subsection 599(4);
 - (b) subsections 602(2) and (4);
 - (c) subsections 603(1), (2) and (3);
 - (d) subsection 603A(2);
 - (e) subsection 603B(1).

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

- (2) The Court may order a person who has contravened a civil remedy provision to pay a pecuniary penalty.
- (3) The penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in other cases.
- (4) An application for an order under subsection (2) in relation to subsection 599(4) (parental leave entitlements) may be made by:
 - (a) a transferring employee mentioned in that subsection; or
 - (b) an organisation of employees that is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee mentioned in that subsection and has been requested by the transferring employee to apply for the order on the transferring employee's behalf; or
 - (c) a workplace inspector; or
 - (d) the new employer mentioned in that subsection.

- (5) An application for an order under subsection (2) in relation to an instrument, or in relation to a preserved redundancy provision that was previously included in an instrument, listed in the following table may be made by a person specified in the item of the table relating to that kind of instrument:

Item	Instrument	People with standing to apply for order
1	ITEA	(a) the transferring employee; or (b) an organisation of employees that is entitled, under its eligibility rules, to represent the industrial interests of the transferring employee and has been requested by the transferring employee to apply for the order on the transferring employee's behalf; or (c) a workplace inspector
2	collective agreement	(a) the transferring employee; or (b) an organisation of employees that is bound by the agreement or the redundancy provision; or (c) an organisation of employees that is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee and has been requested by the transferring employee to apply for the order on the transferring employee's behalf; or (d) a workplace inspector
3	award	(a) a transferring employee; or (b) an organisation of employees that is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee; or (c) a workplace inspector

Division 9—Miscellaneous

606 Regulations

The regulations may make provision in relation to the effects that the succession, transmission or assignment of a business, or a part of a business, have on the obligations of employers and the terms and conditions of employees.

Part 12—Minimum entitlements of employees

Division 1—Entitlement to meal breaks

607 Meal breaks

An employer must not require an employee to work for more than 5 hours continuously without an unpaid interval of at least 30 minutes for a meal.

Note: Compliance with this section is dealt with in Part 14.

608 Displacement of entitlement to meal breaks

Section 607 does not apply in relation to particular employment of an employee while any of the following operates in relation to the employee in relation to the employment:

- (a) an award;
- (b) a workplace agreement;
- (c) an industrial instrument prescribed by the regulations.

609 Model dispute resolution process

The model dispute resolution process applies to a dispute under this Division.

Note: The model dispute resolution process is set out in Part 13.

610 Extraterritorial extension

- (1) This Division, and the rest of this Act so far as it relates to this Division, extend:
 - (a) to an employee outside Australia who meets any of the conditions in this section; and
 - (b) to the employee's employer (whether the employer is in or outside Australia); and
 - (c) to acts, omissions, matters and things relating to the employee (whether they are in or outside Australia).

Part 12 Minimum entitlements of employees

Division 1 Entitlement to meal breaks

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

Employee in Australia's exclusive economic zone

- (2) One condition is that the employee is in Australia's exclusive economic zone and either:
- (a) is an employee of an Australian employer and is not prescribed by the regulations as an employee to whom this subsection does not apply; or
 - (b) is an employee prescribed by the regulations as an employee to whom this subsection applies.

Note: The regulations may prescribe the employee by reference to a class. See subsection 13(3) of the *Legislative Instruments Act 2003*.

On Australia's continental shelf outside exclusive economic zone

- (3) Another condition is that the employee:
- (a) is outside the outer limits of Australia's exclusive economic zone, but is in, on or over a part of Australia's continental shelf prescribed by the regulations for the purposes of this subsection, in connection with the exploration of the continental shelf or the exploitation of its natural resources; and
 - (b) meets the requirements that are prescribed by the regulations for that part.

Note: The regulations may prescribe different requirements relating to different parts of Australia's continental shelf. The regulations may need to do so to give effect to Australia's international obligations.

Outside Australia's exclusive economic zone and continental shelf

- (4) Another condition is that the employee:
- (a) is neither in Australia's exclusive economic zone nor in, on or over a part of Australia's continental shelf described in paragraph (3)(a); and
 - (b) is an Australian-based employee of an Australian employer; and
 - (c) is not prescribed by the regulations as an employee to whom this subsection does not apply.

Definition

(5) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

Division 2—Entitlement to public holidays

611 Definition of *public holiday*

In this Division:

public holiday means:

- (a) each of these days:
 - (i) 1 January (New Year's Day);
 - (ii) 26 January (Australia Day);
 - (iii) Good Friday;
 - (iv) Easter Monday;
 - (v) 25 April (Anzac Day);
 - (vi) 25 December (Christmas Day);
 - (vii) 26 December (Boxing Day); and
- (aa) a day that, under (or in accordance with a procedure under) a law of a State or Territory, is substituted for a day referred to in paragraph (a); and
- (b) any other day declared by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of that State or Territory, as a public holiday by people who work in that State, Territory or region, other than:
 - (ii) a union picnic day; or
 - (iii) a day, or kind of day, that is excluded by regulations made for the purposes of this paragraph from counting as a public holiday.

612 Entitlement to public holidays

- (1) An employee is entitled to a day off on a public holiday, subject to subsections (2) and (3).
- (2) An employer may request an employee to work on a particular public holiday.
- (3) The employee may refuse the request (and take the day off) if the employee has reasonable grounds for doing so.

- (4) A term to the contrary in:
- (a) a workplace agreement; or
 - (b) an award;
- has no effect.

Note: Compliance with this section is dealt with in Part 14.

613 Reasonableness of refusal

In determining whether an employee has reasonable grounds for refusing a request to work on a public holiday, regard must be had to:

- (a) the nature of the work performed by the employee; and
- (b) the type of employment (for example, whether full-time, part-time, casual or shift work); and
- (c) the nature of the employer's workplace or enterprise (including its operational requirements); and
- (d) the employee's reasons for refusing the request; and
- (e) the employee's personal circumstances (including family responsibilities); and
- (f) whether the employee is entitled to additional remuneration or other benefits as a consequence of working on the public holiday; and
- (g) whether a workplace agreement, award, other industrial instrument, contract of employment or written guideline or policy that regulates the employee's employment contemplates that the employer might require work on public holidays, or particular public holidays; and
- (h) whether the employee has acknowledged or could reasonably expect that the employer might require work on public holidays, or particular public holidays; and
- (i) the amount of notice in advance of the public holiday given by the employer when making the request; and
- (j) the amount of notice in advance of the public holiday given by the employee in refusing the request; and
- (k) whether an emergency or other unforeseen circumstances are involved; and
- (l) any other relevant factors.

Section 614

614 Model dispute resolution process

The model dispute resolution process applies to a dispute under this Division.

Note: The model dispute resolution process is set out in Part 13.

615 Employer not to prejudice employee for reasonable refusal

- (1) An employer must not, for the reason, or for reasons including the reason, that an employee has refused on reasonable grounds to work on a particular public holiday, do or threaten to do any of the following:
 - (a) dismiss an employee;
 - (b) injure an employee in his or her employment;
 - (c) alter the position of an employee to the employee's prejudice.
- (2) Subsection (1) is a civil remedy provision.

616 Penalties etc. for contravention of section 615

- (1) The Court, or the Federal Magistrates Court, on application by an eligible person, may make one or more of the following orders in relation to an employer who has contravened section 615:
 - (a) an order imposing a pecuniary penalty on the employer;
 - (b) an order requiring the employer to pay a specified amount to the employee as compensation for damage suffered by the employee as a result of the contravention;
 - (c) any other order that the court considers appropriate.
- (2) The maximum pecuniary penalty under paragraph (1)(a) is 300 penalty units if the employer is a body corporate and otherwise 60 penalty units.
- (3) The orders that may be made under paragraph (1)(c) include:
 - (a) injunctions; and
 - (b) any other orders that the court considers necessary to stop the conduct or remedy its effects.
- (4) In this section:

eligible person means any of the following:

 - (a) a workplace inspector;

- (b) an employee affected by the contravention;
 - (c) an organisation of employees that:
 - (i) has been requested in writing, by the employee concerned, to apply on the employee's behalf; and
 - (ii) has a member employed by the employee's employer; and
 - (iii) is entitled, under its eligibility rules, to represent the industrial interests of the employee in relation to work carried on by the employee for the employer;
 - (d) a person prescribed by the regulations for the purposes of this paragraph.
- (5) A regulation prescribing persons for the purposes of paragraph (d) of the definition of *eligible person* may provide that a person is prescribed only in relation to circumstances specified in the regulation.

617 Burden of proof in relation to reasonableness of refusal

In establishing, for the purposes of an application under section 616, whether an employee's refusal to work on a particular public holiday was on reasonable grounds, the burden of proof lies on the applicant.

618 Proof not required of the reason for conduct

- (1) If:
- (a) in an application under section 616 relating to a person's conduct, it is alleged that the conduct was, or is being, carried out for a particular reason; and
 - (b) for the person to carry out the conduct for that reason would constitute a contravention of section 615;
- it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason, unless the person proves otherwise.
- (2) This section does not apply in relation to the granting of an interim injunction.

Note: See section 838 for interim injunctions.

Section 619

619 Extraterritorial extension

(1) This Division, and the rest of this Act so far as it relates to this Division, extend:

- (a) to an employee outside Australia who meets any of the conditions in this section; and
- (b) to the employee's employer (whether the employer is in or outside Australia); and
- (c) to acts, omissions, matters and things relating to the employee (whether they are in or outside Australia).

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

In Australia's exclusive economic zone

(2) One condition is that the employee is in Australia's exclusive economic zone and either:

- (a) is an employee of an Australian employer and is not prescribed by the regulations as an employee to whom this subsection does not apply; or
- (b) is an employee prescribed by the regulations as an employee to whom this subsection applies.

Note: The regulations may prescribe the employee by reference to a class. See subsection 13(3) of the *Legislative Instruments Act 2003*.

On Australia's continental shelf outside exclusive economic zone

(3) Another condition is that the employee:

- (a) is outside the outer limits of Australia's exclusive economic zone, but is in, on or over a part of Australia's continental shelf that is prescribed by the regulations for the purposes of this subsection, in connection with the exploration of the continental shelf or the exploitation of its natural resources; and
- (b) meets the requirements that are prescribed by the regulations for that part.

Note: The regulations may prescribe different requirements relating to different parts of Australia's continental shelf. The regulations may need to do so to give effect to Australia's international obligations.

Definition

(4) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

Division 3—Equal remuneration for work of equal value

620 Object

The object of this Division is to give effect, or further effect, to:

- (a) the Anti-Discrimination Conventions; and
- (b) the Equal Remuneration Recommendation, 1951, which the General Conference of the International Labour Organisation adopted on 29 June 1951 and is also known as Recommendation No. 90; and
- (c) the Discrimination (Employment and Occupation) Recommendation, 1958, which the General Conference of the International Labour Organisation adopted on 25 June 1958 and is also known as Recommendation No. 111.

Note: *Employer, employee* and *employment* have their ordinary meaning in this Division. See sections 5, 6 and 7 and Schedule 2.

621 Relationship of this Division to other laws providing alternative remedies

- (1) The Commission must not deal with an application under this Division if the Commission is satisfied that there is available to the applicant, or to the employees whom the applicant represents, an adequate alternative remedy that:
 - (a) exists under a law of the Commonwealth (other than this Division) or under a law of a State or Territory; and
 - (b) will ensure, for the employees concerned, equal remuneration for work of equal value.
- (2) The Commission must not deal with an application under this Division for an order to secure equal remuneration for work of equal value for an employee if proceedings for an alternative remedy:
 - (a) to secure such remuneration for the employee; or
 - (b) against unequal remuneration for work of equal value for the employee;have begun:
 - (c) under another provision of this Act; or
 - (d) under another law of the Commonwealth; or

- (e) under a law of a State or Territory.
- (3) Subsection (2) does not prevent the Commission from dealing with an application under this Division if the proceedings for the alternative remedy:
 - (a) have been discontinued by the party who initiated the proceedings; or
 - (b) have failed for want of jurisdiction.
- (4) If an application has been made for an order under this Division to secure equal remuneration for work of equal value for an employee, a person is not entitled to take proceedings for an alternative remedy under a provision or law of a kind referred to in subsection (2):
 - (a) to secure such remuneration for the employee; or
 - (b) against unequal remuneration for work of equal value for the employee.
- (5) Subsection (4) does not prevent the taking of proceedings for an alternative remedy if the proceedings under this Division:
 - (a) have been discontinued by the party who initiated the proceedings; or
 - (b) have failed for want of jurisdiction.
- (6) A remedy under a law of the Commonwealth, a State or a Territory relating to discrimination in relation to employment, that consists solely of compensation for past actions, is not an alternative remedy, or an adequate alternative remedy, for the purposes of this section.

622 Relationship of this Division to AFPC decisions and the Australian Fair Pay and Conditions Standard

- (1) The Commission is to have regard to decisions of the AFPC in making orders under this Division.
- (2) The Commission must not deal with an application for an order under this Division, to the extent to which the application is for an order relating to a basic periodic rate of pay, a basic piece rate of pay or casual loading, if:
 - (a) the group of employees who would be covered by the order applied for; and

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- (b) the comparator group of employees;
are both entitled to a rate of pay that is equal to the applicable guaranteed rate of pay under the provisions of the Australian Fair Pay and Conditions Standard contained in Division 2 of Part 7.
- (3) To avoid doubt, subsection (2) does not apply if employees in one or both of the groups are entitled to a rate of pay higher than the applicable guaranteed rate.
- (4) The Commission must not deal with an application for an order under this Division, to the extent to which the application is for an order relating to a basic periodic rate of pay, a basic piece rate of pay or casual loading, if:
- (a) the group of employees who would be covered by the order applied for is entitled to a rate of pay that is higher than the rate of pay the group would be entitled to under the provisions of the Australian Fair Pay and Conditions Standard contained in Division 2 of Part 7; and
- (b) the comparator group of employees is entitled to a rate of pay that is equal to the applicable guaranteed rate of pay under the provisions of the Australian Fair Pay and Conditions Standard contained in Division 2 of Part 7.
- (5) To avoid doubt, subsection (4) does not apply if the comparator group of employees is entitled to a rate of pay higher than the applicable guaranteed rate.
- (6) To avoid doubt, subsections (2) and (4) apply regardless of the source of the employee's entitlement to be paid the rate of pay.
- (7) In this section:

basic periodic rate of pay has the same meaning as in Division 2 of Part 7.

basic piece rate of pay has the same meaning as in Division 2 of Part 7.

casual loading has the same meaning as in Division 2 of Part 7.

comparator group of employees means employees whom the applicant contends are performing work of equal value to the work performed by the employees to whom the application relates.

623 Equal remuneration for work of equal value

- (1) A reference in this Division to **equal remuneration for work of equal value** is a reference to equal remuneration for men and women workers for work of equal value.
- (2) An expression has in subsection (1) the same meaning as in the Equal Remuneration Convention.

Note: Article 1 of the Convention provides that the term “equal remuneration for men and women workers for work of equal value” refers to rates of remuneration established without discrimination based on sex.

624 Orders requiring equal remuneration

- (1) Subject to this Division, the Commission may make such orders as it considers appropriate to ensure that, for employees covered by the orders, there will be equal remuneration for work of equal value.
- (2) Without limiting subsection (1), an order under this Division may provide for such increases in rates (other than those set by the AFPC) of remuneration (within the meaning of the Equal Remuneration Convention) as the Commission considers appropriate to ensure that, for employees covered by the order, there will be equal remuneration for work of equal value.
- (3) However, the Commission may make an order under this Division only if:
 - (a) the Commission is satisfied that, for the employees to be covered by the order, there is not equal remuneration for work of equal value; and
 - (b) the order can reasonably be regarded as appropriate and adapted to giving effect to one or more of the following:
 - (i) the Anti-Discrimination Conventions;
 - (ii) the provisions of Recommendations referred to in paragraphs 620(b) and (c).

625 Orders only on application

The Commission must only make such an order if it has received an application for the making of an order under this Division from:

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- (a) an employee, or a trade union whose rules entitle it to represent the industrial interests of employees, to be covered by the order; or
- (b) the Sex Discrimination Commissioner.

626 Conciliation or mediation

- (1) If an application is made for an order under this Division, the Commission must, before starting to hear and determine the matter to which the application relates:
 - (a) attempt to settle the matter by conciliation; or
 - (b) at the request or with the consent of both the applicant and any employer of employees who, if the order applied for were made, would be covered by it—refer the matter for mediation by an independent person specified in the request or consent.
- (2) The Commission may order:
 - (a) the applicant, or a representative of the applicant; and
 - (b) each employer of employees who, if the order applied for were made, would be covered by it, or a representative of those employers;to attend the conciliation or mediation.
- (3) The Commission may order that the employees who, if the order applied for were made, would be covered by it, or a representative of those employees, be allowed to attend the conciliation or mediation.
- (4) The Commission may order that:
 - (a) the applicant; or
 - (b) each employer of employees who, if the order applied for were made, would be covered by it;inform the employees concerned of:
 - (c) the making of the application for an order under this Division; and
 - (d) the details of the application and the order applied for; and
 - (e) the time and place at which conciliation or mediation will take place.

627 If conciliation or mediation is unsuccessful

- (1) If:
 - (a) the Commission forms the view that all reasonable attempts to settle the matter, or part of the matter, to which the application relates by conciliation have been unsuccessful; or
 - (b) if the Commission referred the matter to an independent person for mediation—the independent person informs the Commission that all reasonable attempts to settle the matter, or part of the matter, by mediation have been unsuccessful;the Commission must advise accordingly the applicant and each employer of employees who, if the order applied for were made, would be covered by it.
- (2) The Commission may order that:
 - (a) the applicant; or
 - (b) each employer of employees who, if the order applied for were made, would be covered by it;inform the employees concerned of the Commission's advice under subsection (1).
- (3) If the Commission advises persons under subsection (1), the Commission is to proceed to hear and determine the matter, or part, that was not settled.

628 Hearing of matter by member who conducted conciliation

- (1) If a member of the Commission has exercised conciliation powers under section 626 in relation to a matter, the member must not hear or determine, or take part in the hearing or determination of, the matter if a person who was present at the conciliation objects.
- (2) The member is not taken to have exercised conciliation powers in relation to the matter merely because:
 - (a) the member arranged for a conference of the parties or their representatives to be presided over by the member, but the conference did not take place or was not presided over by the member; or
 - (b) the member arranged for the parties or their representatives to confer among themselves at a conference at which the member was not present.

629 Immediate or progressive introduction of equal remuneration

The order may implement equal remuneration for work of equal value when the order takes effect. However, if it is not deemed feasible to implement it immediately, the order may implement it in stages (as provided in the order).

630 Employer not to reduce remuneration

- (1) An employer must not reduce an employee's remuneration (within the meaning of the Equal Remuneration Convention) for the reason, or for reasons including the reason, that an application or order has been made under this Division.
- (2) If subsection (1) is contravened, the purported reduction is of no effect.

631 Employer not to prejudice employee

- (1) An employer must not, for the reason, or for reasons including the reason, that an application or order has been made under this Division, do or threaten to do any of the following:
 - (a) dismiss an employee;
 - (b) injure an employee in his or her employment;
 - (c) alter the position of an employee to the employee's prejudice.
- (2) Subsection (1) is a civil remedy provision.

632 Penalties etc. for contravention of section 631

- (1) The Court, or the Federal Magistrates Court, on application by an eligible person, may make one or more of the following orders in relation to a person (the *defendant*) who has contravened section 631:
 - (a) an order imposing a pecuniary penalty on the defendant;
 - (b) an order requiring the defendant to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention;
 - (c) any other order that the court considers appropriate.

- (2) The maximum pecuniary penalty under paragraph (1)(a) is 300 penalty units if the defendant is a body corporate and otherwise 60 penalty units.
- (3) The orders that may be made under paragraph (1)(c) include:
- (a) injunctions; and
 - (b) any other orders that the court considers necessary to stop the conduct or remedy its effects.
- (4) In this section:
- eligible person* means any of the following:
- (a) a workplace inspector;
 - (b) a person affected by the contravention;
 - (c) an organisation of employees that:
 - (i) has been requested in writing, by the employee concerned, to apply on the employee's behalf; and
 - (ii) has a member employed by the employee's employer; and
 - (iii) is entitled, under its eligibility rules, to represent the industrial interests of the employee in relation to work carried on by the employee for the employer;
 - (d) the Sex Discrimination Commissioner;
 - (e) a person prescribed by the regulations for the purposes of this paragraph.
- (5) A regulation prescribing persons for the purposes of paragraph (e) of the definition of *eligible person* may provide that a person is prescribed only in relation to circumstances specified in the regulation.

633 Proof not required of the reason for conduct

- (1) If:
- (a) in an application under section 632 relating to a person's conduct, it is alleged that the conduct was, or is being, carried out for a particular reason; and
 - (b) for the person to carry out the conduct for that reason would constitute a contravention of section 631;

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it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason, unless the person proves otherwise.

- (2) This section does not apply in relation to the granting of an interim injunction.

Note: See section 838 for interim injunctions.

634 Extraterritorial extension

- (1) This Division, and the rest of this Act so far as it relates to this Division, extends to an employee whose remuneration is determined by or under this Act, a law of a State or Territory or a contract of employment made in Australia, even though one or both of the following apply:
- (a) the employee is employed wholly or partly in work outside Australia;
 - (b) the employee's employer operates, exists, is incorporated, or is otherwise established, outside Australia.

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

- (2) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

Division 4—Termination of employment

Subdivision A—Object, application and definitions

635 Object

- (1) The principal object of this Division is:
 - (a) to establish procedures for conciliation in relation to certain matters relating to the termination or proposed termination of an employee’s employment in certain circumstances; and
 - (b) to provide, if the conciliation process is unsuccessful, for recourse to arbitration or to a court depending on the grounds on which the conciliation was sought; and
 - (c) to provide for remedies appropriate to a case where, on arbitration, a termination is found to be harsh, unjust or unreasonable; and
 - (d) to provide for sanctions where, on recourse to a court, a termination or proposed termination is found to be unlawful; and
 - (e) by those procedures, remedies and sanctions, and by orders made in the circumstances set out in Subdivision D, to assist in giving effect to the Termination of Employment Convention.
- (2) The procedures and remedies referred to in paragraphs (1)(a) and (b), and the manner of deciding on and working out such remedies, are intended to ensure that, in the consideration of an application in respect of a termination of employment, 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.

636 Meaning of *employee, employer and employment*

In this Division, unless the contrary intention appears:

employee means:

- (a) to the extent that a provision applies to, or in relation to, the termination of employment of an employee within the

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meaning of subsection 5(1)—an employee within the meaning of that subsection; or

- (b) otherwise—an employee within the ordinary meaning of the expression.

employer means:

- (a) to the extent that a provision applies to, or in relation to, the termination of employment of an employee within the meaning of subsection 5(1)—an employer within the meaning of subsection 6(1); or
- (b) otherwise—an employer within the ordinary meaning of the expression.

employment means:

- (a) to the extent that a provision applies to, or in relation to, the termination of employment of an employee within the meaning of subsection 5(1)—employment within the meaning of subsection 7(1); or
- (b) otherwise—the employment of an employee (within the ordinary meaning of the expression) by an employer (within the ordinary meaning of the expression).

637 Application

- (1) Subdivision B applies, in so far as it relates to an application to the Commission for relief in relation to the termination of employment of an employee on the ground that that termination was harsh, unjust or unreasonable, if the employee concerned was, before the termination, an employee within the meaning of subsection 5(1).
- (2) Subdivision B applies, in so far as it relates to an application to the Commission for relief in relation to the termination of employment of an employee on the ground of a contravention of all or any of sections 659, 660 and 661, if the employee concerned is an employee in relation to whose termination of employment Subdivision C applies in accordance with this section.
- (3) Subdivisions C and D apply in relation to the termination of employment of an employee.
- (4) Without prejudice to their effect apart from this subsection, Subdivisions C and D also apply in relation to the termination of

employment of an employee within the meaning of subsection 5(1).

- (5) Without prejudice to their effect apart from this subsection, Subdivisions C and D also apply in relation to the termination of employment of an employee for the purpose of assisting in giving effect to the Termination of Employment Convention.
- (6) Without prejudice to its effect apart from this subsection, section 659 also applies in relation to the termination of employment of an employee for the purpose of giving effect to the conventions and recommendation referred to in that section.

638 Exclusions

Exclusions from Subdivisions B, D and E and sections 660 and 661

- (1) The following kinds of employee are excluded from the operation of Subdivisions B, D and E and sections 660 and 661:
 - (a) an employee engaged under a contract of employment for a specified period of time;
 - (b) an employee engaged under a contract of employment for a specified task;
 - (c) an employee serving a period of probation, if the duration of the period or the maximum duration of the period, as the case may be, is determined in advance and, either:
 - (i) the period, or the maximum duration, is 3 months or less; or
 - (ii) the period, or the maximum duration:
 - (A) is more than 3 months; and
 - (B) is reasonable, having regard to the nature and circumstances of the employment;
 - (d) a casual employee engaged for a short period, within the meaning of subsection (4);
 - (e) a trainee whose employment under a traineeship agreement or an approved traineeship:
 - (i) is for a specified period; or
 - (ii) is, for any other reason, limited to the duration of the agreement;

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- (f) an employee:
 - (i) who is not employed under award-derived conditions (see subsection 642(6)); and
 - (ii) to whom subsection (6) or (7) applies;
- (g) an employee engaged on a seasonal basis, within the meaning of subsection (8).

Note 1: The expression *employee engaged under a contract of employment for a specified period of time* (used in paragraph (a)) has been addressed in a number of cases before the Industrial Relations Court of Australia, including, in particular, *Cooper v Darwin Rugby League Inc* (1994) 57 IR 238, *Andersen v Umbakumba Community Council* (1994) 126 ALR 121, *D'Lima v Board of Management, Princess Margaret Hospital for Children* (1995-1996) 64 IR 19 and *Fisher v Edith Cowan University* (unreported judgment of Madgwick J, 12 November 1996, No. WI 1061 of 1996).

Note 2: An employee who is excluded from the provisions of the Act specified in this subsection may still be eligible to apply for a remedy in relation to the termination of employment under a provision of a State law that is not excluded under section 16.

Note 3: The definitions in section 642 apply for the purposes of this section.

- (2) Despite the exclusion of an employee from the operation of Subdivisions B and E because of subsection (1):
 - (a) the employee may make an application under section 643 for relief in respect of the termination of his or her employment on the ground of an alleged contravention of section 659; and
 - (b) if the employee does so, those Subdivisions have effect, in so far as they relate to that application, as if the employee had not been excluded from their operation.
- (3) Subsection (1) does not apply to an employee engaged under a contract of a kind mentioned in paragraph (1)(a) or (b) if a substantial purpose of the engagement of the employee under a contract of that kind is, or was at the time of the employee's engagement, to avoid the employer's obligations under Subdivision B or D or section 660 or 661.
- (4) For the purpose of paragraph (1)(d), a casual employee is taken to be engaged for a short period unless:
 - (a) subject to subsection (5)—the employee is engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and

- (b) the employee has, or but for a decision by the employer to terminate the employee's employment, would have had, a reasonable expectation of continuing employment by the employer.
- (5) If:
- (a) a casual employee was engaged by a particular employer on a regular and systematic basis for a sequence of periods during a period (the *first period of employment*) of less than 12 months; and
 - (b) at the end of the first period of employment, the casual employee ceased, on the employer's initiative, to be so engaged by the employer; and
 - (c) the employer subsequently again engages the employee on a regular and systematic basis for a further sequence of periods during a period (the *second period of employment*) that starts not more than 3 months after the end of the first period of employment; and
 - (d) the total length of the first period of employment and the second period of employment is at least 12 months;
- paragraph (4)(a) is taken to be satisfied in relation to the employment of the employee.
- (6) For the purposes of subparagraph (1)(f)(ii), this subsection applies to an employee if:
- (a) the employee's remuneration immediately before the termination of employment was not wholly or partly determined on the basis of commission or piece rates; and
 - (b) the rate of remuneration applicable to the employee immediately before the termination exceeds a rate specified, or worked out in a manner specified, in the regulations (the *specified rate*).
- (7) For the purposes of subparagraph (1)(f)(ii), this subsection applies to an employee if:
- (a) the employee's remuneration immediately before the termination of employment was wholly or partly determined on the basis of commission or piece rates; and
 - (b) in accordance with the regulations, the rate of remuneration that is taken to be applicable to the employee immediately before the termination exceeds the specified rate.

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- (8) For the purposes of paragraph (1)(g), an employee is engaged on a seasonal basis if the employee is engaged to perform work for the duration of a specified season.
- (9) For the purposes of subsection (8), a *season* is a period that:
- (a) is determined at the commencement of the employee's engagement (the *commencement time*); and
 - (b) begins at the commencement time; and
 - (c) ends at a time in the future that:
 - (i) is uncertain at the commencement time; and
 - (ii) is related to the nature of the work to be performed by the employee; and
 - (iii) is objectively ascertainable when it occurs.
- Note: Examples of seasons are:
- (a) the part of a year characterised by particular conditions of weather or temperature;
 - (b) the part of a year when a product is best or available;
 - (c) the part of a year marked by certain conditions, festivities or other activities.
- (10) The regulations may provide that a particular period is, or is not, a *season* for the purposes of subsection (8).

Exclusions from sections 660 and 661 and Subdivision D

- (11) The following kinds of employee are excluded from the operation of sections 660 and 661 and Subdivision D:
- (a) a casual employee, except a casual employee engaged for a short period within the meaning of subsection (4);
 - (b) a daily hire employee:
 - (i) who is performing work in the building and construction industry (including work in, or in connection with, the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures); or
 - (ii) who is performing work in the meat industry in, or in connection with, the slaughter of livestock;
 - (c) a weekly hire employee who is performing work in, or in connection with, the meat industry and whose termination of employment is determined solely by seasonal factors.

Note 1: An employee who is excluded from the provisions of the Act specified in this subsection may still be eligible to apply for a remedy in relation to the termination of employment under a provision of a State law that is not excluded under section 16.

Note 2: The definitions in section 642 apply for the purposes of this section.

Relationship between subsections (1) and (11)

- (12) If, but for this subsection, an employee would be covered by both subsections (1) and (11), the employee is taken only to be covered by subsection (1) (and so is subject to the broader range of exclusions provided for by that subsection).

639 Regulations may provide for additional exclusions

The regulations may exclude from the operation of specified provisions of this Division specified classes of employees included in any of the following classes:

- (a) employees whose terms and conditions of employment are governed by special arrangements providing particular protection in respect of termination of employment either generally or in particular circumstances;
- (b) employees in relation to whom the operation of the provisions causes or would cause substantial problems because of:
 - (i) their particular conditions of employment; or
 - (ii) the size or nature of the undertakings in which they are employed.

640 People's rights, liabilities and obligations the same as if certain provisions of the regulations had been valid

- (1) In this section:

invalid provisions means paragraph 30B(1)(d), and subregulation 30B(3), of the Workplace Relations Regulations as purportedly amended by the relevant amending regulations.

relevant amending regulations means the Workplace Relations Regulations (Amendment), Statutory Rules 1996 No. 307.

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- (2) Subject to subsection (3), the rights and liabilities of all persons are, by force of this section, declared to be, and always to have been, the same as if:
- (a) section 170CC of this Act, as in force during the period (the *validation period*):
 - (i) starting immediately before the time when the relevant amending regulations purported to commence; and
 - (ii) ending on the commencement of this section;had authorised the making of regulations containing the invalid provisions (in addition to what that section actually authorised to be dealt with in regulations); and
 - (b) a regulation in the same terms as regulation 30B of the Workplace Relations Regulations, as purportedly amended by the relevant amending regulations:
 - (i) had been made, and had commenced, immediately after the start of the validation period for the purposes of section 170CC as having effect as mentioned in paragraph (a); and
 - (ii) had been amended by regulations in the same terms as, and commencing at the same time as, the provisions of the Workplace Relations Regulations (Amendment), Statutory Rules 1997 No. 101, that purported to amend regulation 30B; and
 - (iii) had not subsequently been amended during the validation period.
- (3) This section does not affect rights or liabilities arising between parties to proceedings heard and finally determined by the Commission or a court at or before the commencement of this section, to the extent that those rights or liabilities arose from, or were affected by, the invalidity of the invalid provisions.

641 Extraterritorial extension

- (1) This Division, and the rest of this Act so far as it relates to this Division, extend to the termination, or proposed termination, of the employment of an Australian-based employee even though one or both of the following apply:
- (a) the employee was employed outside Australia at the time of the termination, the proposed time of termination or the time of the making of the proposal to terminate;

- (b) the act causing termination, or the proposal to terminate, occurred outside Australia.

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

- (2) However, subsection (1) does not apply in relation to the employee if either:
- (a) all the following conditions are met at the time of the termination, the proposed time of termination or the time of the making of the proposal to terminate:
 - (i) the employee's employer is not an Australian employer;
 - (ii) the employee's primary place of work is in Australia's exclusive economic zone or Australia's continental shelf;
 - (iii) the employee is not prescribed by the regulations as an employee in relation to whom subsection (1) applies despite this subsection; or
 - (b) the employee is prescribed by the regulations as an employee in relation to whom subsection (1) does not apply.

- (3) In this section:

Australian-based employee means a person who would be an Australian-based employee (as defined in subsection 4(1)) if the definition of *employee* in section 636 applied to the definition of *Australian-based employee* in that subsection.

Australian employer means a person who would be an Australian employer (as defined in subsection 4(1)) if the definition of *employer* in section 636 applied to the definition of *Australian employer* in that subsection.

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

642 Definitions

- (1) In this Division:

Court means the Federal Court of Australia or the Federal Magistrates Court.

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daily hire employee means an employee:

- (a) whose employment:
 - (i) is regulated by an award or a workplace agreement; and
 - (ii) under the award or workplace agreement is, or is normally, apart from the application to the employee of this Division:
 - (A) terminated at the end of each day or shift; or
 - (B) able to be terminated by the employer giving to the employee not more than 1 day's notice; and
- (b) who is working in an industry or occupation which, on 16 November 1994, was subject to an award, State award, State employment agreement or old IR agreement which provided for the termination of an employee's employment in the circumstances referred to in sub-subparagraph (a)(ii)(A) or (B).

relevant training award, in relation to an agreement, means:

- (a) if the agreement commenced before the commencement of this definition—the award known as the National Training Wage Interim Award 1994, as in force on 16 November 1994; or
- (b) if the agreement commences on or after the commencement of this definition—whichever of the following is in force when the agreement commences:
 - (i) the award known as the National Training Wage Award 2000; or
 - (ii) a later award that covers substantially the same subject matter as is covered by the award referred to in subparagraph (i).

termination or **termination of employment** means termination of employment at the initiative of the employer.

Territory employee means any person employed in a Territory other than Norfolk Island.

trainee means an employee (other than an apprentice) who is bound by a traineeship agreement.

traineeship agreement means an agreement between an employer and an employee:

- (a) that is consistent with the relevant training award; and
 - (b) that is registered:
 - (i) with the relevant State or Territory training authority; or
 - (ii) under a law of a State or Territory relating to the training of employees.
- (2) For the purposes of paragraph (b) of the definition of ***daily hire employee*** in subsection (1), ***award, old IR agreement, State award*** and ***State employment agreement*** have the meanings given by subsection 4(1) of this Act as in force immediately before the reform commencement.
- (3) For the purposes of this Division, ***termination*** or ***termination of employment*** does not include demotion in employment if:
- (a) the demotion does not involve a significant reduction in the remuneration or duties of the demoted employee; and
 - (b) the demoted employee remains employed with the employer who effected the demotion.
- (4) For the purposes of this Division, the resignation of an employee is taken to constitute the termination of the employment of that employee at the initiative of the employer if the employee can prove, on the balance of probabilities, that the employee did not resign voluntarily but was forced to do so because of conduct, or a course of conduct, engaged in by the employer.
- (5) An expression used in this Subdivision or Subdivision C or D has the same meaning as in the Termination of Employment Convention.
- (6) For the purposes of this Division, an employee is taken to be employed under award-derived conditions if the employer is bound:
- (a) in relation to the employee's wages and conditions of employment—by an award or a workplace agreement; or
 - (b) in relation to:
 - (i) the employee's wages—by an APCS; and
 - (ii) in relation to the employee's conditions of employment—by an award or a workplace agreement.

Subdivision B—Application to Commission for relief in respect of termination of employment

643 Application to Commission to deal with termination under this Subdivision

- (1) Subject to subsections (5), (6), (8) and (10), an employee whose employment has been terminated by the employer may apply to the Commission for relief in respect of the termination of that employment:
 - (a) on the ground that the termination was harsh, unjust or unreasonable; or
 - (b) on the ground of an alleged contravention of section 659, 660 or 661; or
 - (c) on any combination of grounds in paragraph (b) or on a ground or grounds in paragraph (b) and the ground in paragraph (a).
- (2) Subject to subsection (13), an employee whose employment is proposed to be terminated by the employer may apply to the Commission for relief on the ground of an alleged contravention of section 660.
- (3) Subject to subsection (13), if:
 - (a) an employee's employment has been terminated by the employer; and
 - (b) a trade union's rules entitle it to represent the industrial interests of the employee;the union may, on behalf of the employee, apply to the Commission for relief on the ground or grounds of an alleged contravention of one or more of sections 659 and 661.
- (4) Subject to subsection (13), if an employee's employment has been terminated, or is proposed to be terminated, by the employer:
 - (a) an inspector; or
 - (b) a trade union:
 - (i) whose members include the employee; and
 - (ii) whose rules entitle it to represent the industrial interests of the employee; or

- (c) an officer or employee of such a union—if the union’s rules authorise the officer or employee to act on the union’s behalf; may apply to the Commission for relief on the ground of an alleged contravention of section 660.
- (5) An application under subsection (1) may not be made:
- (a) on the ground referred to in paragraph (1)(a) or on grounds that include that ground—unless, under subsection 637(1), Subdivision B applies to that application; or
 - (b) on a ground referred to in paragraph (1)(b)—unless Subdivision C applies to that application.
- (6) An application under subsection (1) must not be made on the ground referred to in paragraph (1)(a), or on grounds that include that ground, unless the employee concerned had completed the qualifying period of employment with the employer at the earlier of the following times:
- (a) the time when the employer gave the employee the notice of termination;
 - (b) the time when the employer terminated the employee’s employment.
- (7) For the purposes of subsection (6), the *qualifying period of employment* is:
- (a) 6 months; or
 - (b) a shorter period, or no period, determined by written agreement between the employee and employer before the commencement of the employment; or
 - (c) a longer period determined by written agreement between the employee and employer before the commencement of the employment, being a reasonable period having regard to the nature and circumstances of the employment.
- (8) An application under subsection (1) must not be made on the ground referred to in paragraph (1)(a), or on grounds that include that ground, if the employee’s employment was terminated for genuine operational reasons or for reasons that include genuine operational reasons.
- (9) For the purposes of subsection (8), *operational reasons* are reasons of an economic, technological, structural or similar nature relating to the employer’s undertaking, establishment, service or business,
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or to a part of the employer's undertaking, establishment, service or business.

- (10) An application under subsection (1) must not be made on the ground referred to in paragraph (1)(a), or on grounds that include that ground, if, at the relevant time, the employer employed 100 employees or fewer, including:
- (a) the employee whose employment was terminated; and
 - (b) any casual employee who had been engaged by the employer on a regular and systematic basis for at least 12 months; but not including any other casual employee.
- (11) For the purposes of calculating the number of employees employed by an employer as mentioned in subsection (10), related bodies corporate (within the meaning of section 50 of the *Corporations Act 2001*) are taken to be one entity.
- (12) For the purposes of subsection (10):
- (a) the **relevant time** is the time when the employer gave the employee the notice of termination, or the time when the employer terminated the employee's employment, whichever happened first; and
 - (b) for the purposes of calculating the number of employees employed by the employer, **employee** has the same meaning as in paragraph (b) of the definition of that term in section 636.
- (13) An application under subsection (2), (3) or (4) may not be made on a ground referred to in that subsection unless Subdivision C applies to that application.
- (14) An application under subsection (1) or (3) must be lodged within 21 days after the day on which the termination took effect, or within such period as the Commission allows on an application made during or after those 21 days.
- (15) An application under subsection (2) or (4) must be lodged within 21 days after the employee is given notice of the decision to terminate the employee's employment, or within such period as the Commission allows on an application made during or after those 21 days.

Note: 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*.

- (16) An application under subsection (1), (2), (3) or (4) may be discontinued by the applicant in accordance with rules made under section 124. The applicant may do so whether or not the employer and the employee have agreed to settle the matter.

644 Fees for lodging applications under section 643

Applications in respect of which a fee is payable

- (1) A fee is payable for the lodging of an application under subsection 643(1), (2), (3) or (4).

Note: This has effect subject to subsection (7) (which deals with hardship).

Amount of fee if application is lodged in first financial year

- (2) If the application is lodged at a time that is:
- (a) after the commencement of this section; and
 - (b) in the first financial year that ends after that commencement;
- the amount of the fee is \$50.

Amount of fee if application is lodged in later financial year

- (3) If the application is lodged in a later financial year (the **year of lodgment**), the amount of the fee is to be worked out by:
- (a) taking the amount of the fee for an application lodged in the previous financial year; and
 - (b) multiplying that amount by the indexation factor for the year of lodgment (see subsection (4)); and
 - (c) rounding the result to the nearest multiple of 10 cents (rounding up if the result is exactly half-way in between).
- (4) For the purposes of subsection (3), the **indexation factor** for the year of lodgment is worked out using the following formula (then rounded under subsection (5)):

$$\frac{\text{Sum of index numbers for quarters in most recent March year}}{\text{Sum of index numbers for quarters in previous March year}}$$

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where:

index number, for a quarter, means the All Groups Consumer Price Index Number (being the weighted average of the 8 capital cities) published by the Australian Statistician for that quarter.

most recent March year means the period of 12 months ending on 31 March in the financial year that occurred immediately before the year of lodgment.

previous March year means the period of 12 months immediately preceding the most recent March year.

quarter means a period of 3 months ending on 31 March, 30 June, 30 September or 31 December.

- (5) The result under subsection (4) must be rounded up or down to 3 decimal places (rounding up if the result is exactly half-way in between).
- (6) Calculations under subsection (4):
- (a) are to be made using only the index numbers published in terms of the most recently published reference base for the Consumer Price Index; and
 - (b) are to be made disregarding index numbers that are published in substitution for previously published index numbers (unless the substituted numbers are published to take account of changes in the reference base).

Fee not payable in case of hardship

- (7) If a Registrar is satisfied that the person lodging the application will suffer serious hardship if the person is required to pay the fee, no fee is payable for lodging the application.

Refund of fee if application discontinued in certain circumstances

- (8) If:
- (a) the fee has been paid; and
 - (b) the application is subsequently discontinued as mentioned in subsection 643(16); and

(c) either:

- (i) at the time the application is discontinued, the application has not yet been listed for attention by the Commission; or
- (ii) if the application has, at or before that time, been listed for attention by the Commission on a specified date or dates—the discontinuance occurs at least 2 days before that date or the earlier of those dates;

an amount equal to the fee is to be repaid by the Commonwealth to the person who paid it.

645 Motions for dismissal of application for want of jurisdiction

- (1) A respondent may move for the dismissal of an application under section 643 on the ground that the application is outside the jurisdiction of the Commission at any time, including a time before the Commission has begun dealing with the application.
- (2) If:
 - (a) the respondent moves for the dismissal of an application on such a ground and has not previously so moved; and
 - (b) the respondent so moves before the matter is referred for conciliation by the Commission;the Commission must deal with the motion before taking any action, or any further action, on that application, unless the respondent indicates that the matter may be dealt with at a later time.
- (3) If the respondent moves for the dismissal of an application on such a ground, having already so moved on a previous occasion, the Commission must deal with the motion but may do so at any time it considers appropriate.
- (4) If a respondent has moved for the dismissal of an application made, or purported to have been made, under subsection 643(1):
 - (a) on the ground referred to in paragraph 643(1)(a); or
 - (b) on grounds that include that ground;subsection (5) applies to the application.

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- (5) If the Commission is satisfied that an application to which this subsection applies cannot be made under subsection 643(1) on the ground referred to in paragraph 643(1)(a):
- (a) because the employee is excluded from the operation of Subdivision B by section 638; or
 - (b) because of the operation of subsection 643(6) (which relates to qualifying periods); or
 - (c) because of the operation of subsection 643(10) (which relates to employers of 100 employees or fewer);
- the Commission must:
- (d) if paragraph (4)(a) applies—make an order dismissing the application; or
 - (e) if paragraph (4)(b) applies—make an order dismissing the application to the extent that it is made on the ground referred to in paragraph 643(1)(a).
- (6) If:
- (a) a respondent has moved for the dismissal of an application to which subsection (5) applies; and
 - (b) the Commission is not satisfied as mentioned in paragraph (5)(a), (b) or (c) in relation to the application;
- the Commission must make an order refusing the motion for dismissal.
- (7) The Commission is not required to hold a hearing in relation to the making of an order under subsection (5) or (6).

646 Applications that are frivolous, vexatious or lacking in substance

- (1) If:
- (a) an application is made, or purported to have been made, under subsection 643(1):
 - (i) on the ground referred to in paragraph 643(1)(a); or
 - (ii) on grounds that include that ground; and
 - (b) the respondent moves for dismissal of the application on the ground that it is frivolous, vexatious or lacking in substance; and

- (c) the Commission is satisfied that the application is frivolous, vexatious or lacking in substance, in relation to the ground referred to in paragraph 643(1)(a);
the Commission must:
 - (d) if subparagraph (a)(i) applies—make an order dismissing the application; or
 - (e) if subparagraph (a)(ii) applies—make an order dismissing the application to the extent that it is made on the ground referred to in paragraph 643(1)(a).
- (2) If:
 - (a) an application is made, or purported to have been made, under subsection 643(1):
 - (i) on the ground referred to in paragraph 643(1)(a); or
 - (ii) on grounds that include that ground; and
 - (b) the respondent moves for dismissal of the application on the ground that it is frivolous, vexatious or lacking in substance; and
 - (c) the Commission is not satisfied that the application is frivolous, vexatious or lacking in substance, in relation to the ground referred to in paragraph 643(1)(a);
the Commission must:
 - (d) if subparagraph (a)(i) applies—make an order refusing the motion for dismissal; or
 - (e) if subparagraph (a)(ii) applies—make an order refusing the motion for dismissal, to the extent that the application is made on the ground referred to in paragraph 643(1)(a).
- (3) The Commission is not required to hold a hearing in relation to the making of an order under subsection (1) or (2).

647 Extension of time applications may be decided without a hearing

- If:
- (a) an employee whose employment has been terminated by an employer makes an application (the *extension of time application*) under subsection 643(14) requesting the Commission to allow an application to be lodged under

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subsection 643(1) after the period of 21 days after the termination took effect; and

(b) the proposed application under subsection 643(1) is an application:

(i) on the ground referred to in paragraph 643(1)(a); or

(ii) on grounds that include that ground;

the Commission is not required to hold a hearing in relation to the extension of time application.

648 Matters that do not require a hearing

(1) The Commission must, in deciding whether or not to hold a hearing for the purposes of deciding:

(a) whether to make an order under subsection 645(5) or (6) or 646(1) or (2); or

(b) whether to grant an extension of time application within the meaning of section 647;

take into account the cost that would be caused to the business of the employer concerned by requiring the employer to attend a hearing.

(2) If the Commission decides not to hold a hearing, the Commission must, before making a decision:

(a) invite the employee and the employer concerned to provide further information that relates to whether the order should be made or the extension of time granted; and

(b) take account of any such information.

(3) If, as a result of information provided as mentioned in subsection (2), the Commission considers that it would be desirable to hold a hearing, the Commission may do so.

(4) An invitation under paragraph (2)(a) must:

(a) be given by notice in writing to the employee and the employer concerned; and

(b) specify the time by which the information referred to in the invitation is to be provided.

649 Dismissal of application relating to termination for operational reasons

- (1) If:
- (a) an application is made, or is purported to have been made, under subsection 643(1):
 - (i) on the ground referred to in paragraph 643(1)(a); or
 - (ii) on grounds that include that ground; and
 - (b) either:
 - (i) the respondent has moved for the dismissal of the application on the ground that the application is outside the jurisdiction of the Commission because the employee's employment was terminated for genuine operational reasons or for reasons that include genuine operational reasons; or
 - (ii) it appears to the Commission, on the face of all the materials before it, that the employee's employment may have been terminated for genuine operational reasons or for reasons that include genuine operational reasons;

the Commission must hold a hearing to deal with the operational reasons issue before taking any further action in relation to the application, other than dealing with a matter on the papers as provided by section 645, 646, 647 or 648.

- (2) If, as a result of the hearing, the Commission is satisfied that the operational reasons relied on by the respondent were genuine, the Commission must:
- (a) if subparagraph (1)(a)(i) applies—make an order dismissing the application; or
 - (b) if subparagraph (1)(a)(ii) applies—make an order dismissing the application to the extent that it is made on the ground referred to in paragraph 643(1)(a).
- (3) Subject to any right of appeal to a Full Bench of the Commission, a finding by the Commission that it is not satisfied that the operational reasons relied on by the respondent were genuine is final and binding between the parties in any proceedings before the Commission.

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- (4) To avoid doubt, this section does not require the Commission to hold a hearing in relation to an application that has been dismissed under subsection 645(5) or 646(1).
- (5) In this section:
 - operational reasons* has the meaning given by subsection 643(9).

650 Conciliation

- (1) When an application is lodged with the Commission, the Commission must attempt to settle the matter to which the application relates by conciliation.
- (2) If the Commission is satisfied that all reasonable attempts to settle the matter by conciliation are, or are likely to be, unsuccessful so far as concerns at least one ground of the application, the Commission:
 - (a) must issue a certificate in writing stating that it is so satisfied in respect of that ground or each such ground; and
 - (b) must indicate to the parties the Commission's assessment of the merits of the application in so far as it relates to that ground or to each such ground; and
 - (c) if the Commission thinks fit, may recommend that the applicant elect not to pursue a ground or grounds of the application (whether or not also recommending other means of resolving the matter); and
 - (d) if the Commission considers, having regard to all the materials before the Commission, that the application has no reasonable prospect of success, it must advise the parties accordingly.
- (3) If:
 - (a) the ground or one of the grounds of the application is the ground referred to in paragraph 643(1)(a); and
 - (b) the Commission has indicated that the applicant's claim in respect of the ground so referred has no reasonable prospect of success;the Commission must invite the applicant to provide further information in support of that ground within a period specified by the Commission.

- (4) If, in relation to an application to which subsection (3) applies:
- (a) the applicant does not provide further information regarding the applicant's claim in respect of the ground referred to in paragraph 643(1)(a); or
 - (b) after consideration of the original application and the further material provided by the applicant in support of that ground; the Commission concludes that the application has no reasonable prospect of success at arbitration, it must issue a certificate to that effect.
- (5) If the Commission issues a certificate under subsection (4) in respect of an applicant's claim in respect of the ground referred to in paragraph 643(1)(a), the application is dismissed, insofar as it relates to that ground, with effect from the date of issue of the certificate.

651 Elections to proceed to arbitration or to begin court proceedings

- (1) If the certificate given by the Commission under subsection 650(2) identifies only the ground referred to in paragraph 643(1)(a) as a ground where conciliation is, or is likely to be, unsuccessful, the applicant must elect either to proceed to arbitration to determine whether the termination was harsh, unjust or unreasonable or not to proceed.

Note: If a certificate under subsection 650(2) identifies both the ground in paragraph 643(1)(a) and a ground or grounds of an alleged contravention of Subdivision C, and the Commission has issued a certificate under subsection 650(4) in relation to the ground in paragraph 643(1)(a), an applicant must make an election as if the certificate under subsection 650(2) identified only the ground or grounds in Subdivision C.

- (2) If the certificate given by the Commission under subsection 650(2) identifies only:
- (a) the ground referred to in paragraph 643(1)(a); and
 - (b) the ground of an alleged contravention of section 661;
- as grounds where conciliation is, or is likely to be, unsuccessful, the applicant must elect to do either, both, or neither of the following:
- (c) to proceed to arbitration to determine whether the termination was harsh, unjust or unreasonable;

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- (d) to begin proceedings in a court of competent jurisdiction for an order under section 665 in respect of the alleged contravention of section 661.
- (3) If the certificate given by the Commission under subsection 650(2) identifies:
- (a) the ground referred to in paragraph 643(1)(a); and
 - (b) a ground or grounds of an alleged contravention of one or more of sections 659 and 660;
- as grounds where conciliation is, or is likely to be, unsuccessful, the applicant must elect to do either or neither of the following:
- (c) to proceed to arbitration to determine whether the termination was harsh, unjust or unreasonable;
 - (d) to begin proceedings in the Court for an order under section 665 in respect of the alleged contravention, or of any one or more of the alleged contraventions.
- (4) If the certificate given by the Commission under subsection 650(2) identifies only a ground or grounds of an alleged contravention of one or more of sections 659, 660 and 661 as the ground or grounds where conciliation is, or is likely to be, unsuccessful, the applicant must elect to do either, both or neither of the following:
- (a) so far as concerns an alleged contravention of a section or sections other than section 661—to begin proceedings in the Court for an order under section 665 in respect of the alleged contravention, or of any one or more of the alleged contraventions;
 - (b) so far as concerns an alleged contravention of section 661—to begin proceedings in a court of competent jurisdiction for an order under section 665 in respect of the alleged contravention.
- (5) If the certificate given by the Commission under subsection 650(2) identifies:
- (a) the ground referred to in paragraph 643(1)(a); and
 - (b) the ground of an alleged contravention of section 661; and
 - (c) a ground or grounds of an alleged contravention of one or more of sections 659 and 660;
- as grounds where conciliation is, or is likely to be, unsuccessful, the applicant must elect:

- (d) to do either or both of the things permitted in subsection (2);
or
 - (e) to do either or both of the things permitted in subsection (4);
or
 - (f) to do none of those things.
- (6) An election under subsection (1), (2), (3), (4) or (5) must:
- (a) be made in writing; and
 - (b) be lodged with the Commission:
 - (i) if the certificate given by the Commission under subsection 650(2) identifies the ground of an alleged contravention of section 659 as a ground on which conciliation is, or is likely to be, unsuccessful (whether or not one or more other grounds are so identified)—not later than 28 days after the day of issue of the certificate; or
 - (ii) in any other case—not later than 7 days after the day of issue of the certificate.
- (7) If an applicant fails to lodge with the Commission an election under subsection (1), (2), (3), (4) or (5) within the period required under subsection (6), the application concerned is taken to have been discontinued by the applicant at the end of that period.
- (8) The Commission must not, under any provision of this Act, extend the period within which an election is required by subsection (6) to be lodged, other than as mentioned in subsection (9).
- (9) The Commission may accept an election referred to in subparagraph (6)(b)(i) that is lodged out of time if the Commission considers that it would be unfair not to do so, and, if the Commission accepts such an election, the original application is taken not to have been discontinued in spite of subsection (7).
- (10) An appeal to a Full Bench under section 120 may not be made in relation to the discontinuance of an application under subsection (7).

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652 Arbitration

- (1) If:
 - (a) the Commission has issued a certificate under subsection 650(2) regarding conciliation of an application relating to a termination of employment; and
 - (b) the applicant has made an election under subsection 651(1), (2), (3) or (5) to proceed to arbitration to determine whether the termination was harsh, unjust or unreasonable;the Commission may so proceed to arbitrate the matter.
- (2) Neither the making of an election under subsection 651(1), (2), (3) or (5) to proceed to arbitration nor the commencement of that arbitration prevents further conciliation of the matter being attempted, or the parties from settling the matter, at any time before an order is made under section 654.
- (3) In determining, for the purposes of the arbitration, whether a termination was harsh, unjust or unreasonable, the Commission must have regard to:
 - (a) whether there was a valid reason for the termination related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees); and
 - (b) whether the employee was notified of that reason; and
 - (c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and
 - (d) if the termination related to unsatisfactory performance by the employee—whether the employee had been warned about that unsatisfactory performance before the termination; and
 - (e) the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and
 - (f) the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and
 - (g) any other matters that the Commission considers relevant.

653 Exercise of arbitration powers by member who has exercised conciliation powers

- (1) If a member of the Commission has exercised conciliation powers in relation to an application under this Division, the member must not exercise, or take part in the exercise of, arbitration powers in relation to the application if a party to the arbitration proceeding objects.
- (2) The member is not taken to have exercised conciliation powers in relation to the application merely because:
 - (a) the member arranged for a conference of the parties or their representatives to be presided over by the member, but the conference did not take place or was not presided over by the member; or
 - (b) the member arranged for the parties or their representatives to confer among themselves at a conference at which the member was not present.

654 Remedies on arbitration

- (1) Subject to this section, the Commission may, on completion of the arbitration, make an order that provides for a remedy of a kind referred to in subsection (3), (4) or (7) if it has determined that the termination was harsh, unjust or unreasonable.
- (2) The Commission must not make an order under subsection (1) unless the Commission is satisfied, having regard to all the circumstances of the case including:
 - (a) the effect of the order on the viability of the employer's undertaking, establishment or service; and
 - (b) the length of the employee's service with the employer; and
 - (c) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated; and
 - (d) the efforts of the employee (if any) to mitigate the loss suffered by the employee as a result of the termination; and
 - (e) any other matter that the Commission considers relevant;that the remedy ordered is appropriate.

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- (3) If the Commission considers it appropriate, the Commission may make an order requiring the employer to reinstate the employee by:
 - (a) reappointing the employee to the position in which the employee was employed immediately before the termination.
 - (b) appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination.
- (4) If the Commission makes an order under subsection (3) and considers it appropriate to do so, the Commission may also make:
 - (a) any order that the Commission thinks appropriate to maintain the continuity of the employee's employment; and
 - (b) subject to subsections (5) and (6)—any order that the Commission thinks appropriate to cause the employer to pay to the employee an amount in respect of the remuneration lost, or likely to have been lost, by the employee because of the termination.
- (5) In determining an amount for the purposes of an order under paragraph (4)(b), the Commission must have regard to:
 - (a) the amount of any income earned by the employee from employment or other work during the period between the termination and the making of the order for reinstatement; and
 - (b) the amount of any income reasonably likely to be so earned by the employee during the period between the making of the order for reinstatement and the actual reinstatement.
- (6) If, as a result of an application under section 663, a court has awarded an amount of damages for a failure to give notice of a termination as required by section 661, any amount ordered to be paid by the Commission under paragraph (4)(b) in respect of the termination is to be reduced accordingly.
- (7) If the Commission thinks that the reinstatement of the employee is inappropriate, the Commission may, if the Commission considers it appropriate in all the circumstances of the case, make an order requiring the employer to pay the employee an amount ordered by the Commission in lieu of reinstatement.
- (8) Subject to subsections (9), (10), (11) and (12), in determining an amount for the purposes of an order under subsection (7), the

Commission must have regard to all the circumstances of the case including:

- (a) the effect of the order on the viability of the employer's undertaking, establishment or service; and
 - (b) the length of the employee's service with the employer; and
 - (c) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated; and
 - (d) the efforts of the employee (if any) to mitigate the loss suffered by the employee as a result of the termination; and
 - (e) any misconduct of the employee that contributed to the employer's decision to terminate the employee's employment; and
 - (f) any other matter that the Commission considers relevant.
- (9) An amount ordered by the Commission under subsection (4) or (7) to be paid to an employee may not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the employee by the manner of terminating the employee's employment.
- (10) If the Commission is satisfied that misconduct of the employee contributed to the employer's decision to terminate the employee's employment, the Commission must reduce the amount it would otherwise fix under subsection (7) by an appropriate amount on account of the misconduct.
- (11) In fixing an amount under subsection (7) for an employee who was employed under award-derived conditions (see subsection 642(6)) immediately before the termination, the Commission must not fix an amount that exceeds the total of the following amounts:
- (a) the total amount of remuneration:
 - (i) received by the employee; or
 - (ii) to which the employee was entitled;(whichever is higher) for any period of employment with the employer during the period of 6 months immediately before the termination (other than any period of leave without full pay); 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

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employee for the period of leave in accordance with the regulations.

- (12) In fixing an amount under subsection (7) for an employee who was not employed under award-derived conditions (see subsection 642(6)) immediately before the termination, the Commission must not fix an amount that exceeds:
- (a) the total of the amounts determined under subsection (11) if the employee were an employee covered by the subsection; or
 - (b) the amount of \$32,000, as indexed from time to time in accordance with a formula prescribed by the regulations; whichever is the lower amount.
- (13) For the avoidance of doubt, an order by the Commission under paragraph (4)(b) or under subsection (7) may permit the employer concerned to pay the amount required in instalments specified in the order.

655 Orders made on arbitration are binding

Subject to any right of appeal to a Full Bench of the Commission, an order made by the Commission under section 654 is final and binding between the parties.

656 Representatives to disclose contingency fee agreements

Representatives other than legal practitioners

- (1) In a proceeding before the Commission, the Commission must ask a representative appearing on behalf of a party to the proceeding if the representative has been retained by the party under a costs arrangement as to the representative's costs.

Legal practitioners

- (2) In a proceeding before the Commission, the Commission must ask a legal practitioner appearing on behalf of a party to the proceeding if the practitioner has been retained by the party under a contingency fee agreement as to the practitioner's costs.

Obligation of representative or practitioner

- (3) If the representative or legal practitioner has been retained under a costs arrangement or contingency fee agreement (as the case may be), the representative or practitioner must inform the Commission of that fact.

No effect on law relating to legal professional privilege

- (4) This section does not affect the law relating to legal professional privilege.

Definitions in this section

- (5) In this section:

costs arrangement means an arrangement between people under which:

- (a) a person agrees to provide representation for another person before the Commission; and
- (b) the payment of all, or a substantial proportion, of the representative's costs is contingent on the outcome of the proceeding before the Commission in which the representative represents the person.

proceeding before the Commission means one of the following proceedings in respect of an application under section 643 by an employee whose employment has been terminated on the ground, or on grounds that include the ground, that the termination was harsh, unjust or unreasonable:

- (a) a proceeding for dismissal of the application on the ground that the application is outside jurisdiction;
- (b) conciliation proceedings under section 650;
- (c) arbitration proceedings under section 652.

representative means a person, other than a legal practitioner, appearing on behalf of a party to a proceeding before the Commission.

657 Commission may dismiss application if applicant fails to attend

If an applicant in a proceeding relating to an application under section 643 fails to attend the proceeding, the Commission, after

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giving the applicant reasonable notice and a reasonable opportunity to be heard, may dismiss the application under section 643.

658 Commission may order payment of costs

(1) If the Commission is satisfied:

(a) that a person (*first party*):

(i) made an application under section 643; or

(ii) began proceedings relating to an application; and

(b) the first party did so in circumstances where it should have been reasonably apparent to the first party that he or she had no reasonable prospect of success in relation to the application or proceeding;

the Commission may, on application under this section by the other party to the application or proceeding, make an order for costs against the first party.

(2) If the Commission is satisfied that a party (*first party*) to a proceeding relating to an application under section 643 has acted unreasonably in failing:

(a) to discontinue the proceeding; or

(b) to agree to terms of settlement that could lead to the discontinuance of the application;

the Commission may, on an application under this section by the other party to the proceeding, make an order for costs against the first party.

(3) If the Commission is satisfied:

(a) that a party (*first party*) to a proceeding relating to an application made under section 643 caused costs to be incurred by the other party to the proceeding; and

(b) that the first party caused the costs to be incurred because of the first party's unreasonable act or omission in connection with the conduct of the proceeding;

the Commission may, on an application by the other party under this section, make an order for costs against the first party.

(4) If the Commission is satisfied:

(a) that a person (the *representative*) representing a party to a proceeding relating to an application made under section 643

- caused costs to be incurred by the other party to the proceeding; and
- (b) that the representative caused the costs to be incurred because of the representative's unreasonable act or omission in connection with the conduct of the proceeding;
- the Commission may, on an application by the other party, make an order for costs against the representative.
- (5) In making a decision under this section, the Commission may have regard to any certificate issued or advice given under section 650 and whether a party pursued a course of action contrary to any such certificate or advice.
- (6) An application for an order for costs under this section must be made within 14 days after the determination, discontinuance, settlement or dismissal of the application under section 643 or proceeding relating to an application under section 643 (as the case may be).
- (7) A schedule of costs may be prescribed in relation to items of expenditure likely to be incurred in respect of:
- (a) an application to the Commission under section 643; and
 - (b) a proceeding in respect of an application under section 643.
- (8) Without limiting, by implication, the generality of the items of expenditure for which the schedule may provide, those items may include:
- (a) legal and professional costs and disbursements; and
 - (b) expenses arising from the representation of a party by a person or organisation other than on a legal professional basis; and
 - (c) expenses of witnesses.
- (9) If a schedule of costs is prescribed for the purposes of subsection (7), then, in awarding costs under this section, the Commission:
- (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 respect of that item at a rate or of an amount in excess of the rate or amount appearing in the schedule.

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- (10) For the purposes of this section, the following proceedings are examples of *proceedings relating to an application under section 643* in respect of which the Commission may make an order for costs:
- (a) a proceeding for dismissal of an application under section 643 on the ground that the application is outside jurisdiction;
 - (b) conciliation proceedings under section 650;
 - (c) arbitration proceedings under section 652;
 - (d) an appeal to the Full Bench from an order of the Commission under section 654 or a costs order under section 658;
 - (e) a proceeding concerning an application for costs by one party in respect of another party's application for costs.

Subdivision C—Unlawful termination of employment by employer

659 Employment not to be terminated on certain grounds

- (1) In addition to the principal object of this Division set out in section 635, the additional object of this section is to make provisions that are intended to assist in giving effect to:
- (a) the Convention concerning Discrimination in respect of Employment and Occupation, a copy of the English text of which is set out in Schedule 1 to the *Human Rights and Equal Opportunity Commission Act 1986*; and
 - (b) the Family Responsibilities Convention; and
 - (c) the Termination of Employment Recommendation, 1982, which the General Conference of the International Labour Organisation adopted on 22 June 1982 and is also known as Recommendation No. 166.
- (2) Except as provided by subsection (3) or (4), an employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons:
- (a) temporary absence from work because of illness or injury within the meaning of the regulations;

- (b) trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;
 - (c) non-membership of a trade union;
 - (d) seeking office as, or acting or having acted in the capacity of, a representative of employees;
 - (e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
 - (f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
 - (g) refusing to negotiate in connection with, make, sign, extend, vary or terminate an ITEA;
 - (h) absence from work during maternity leave or other parental leave;
 - (i) temporary absence from work because of the carrying out of a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.
- (3) Subsection (2) does not prevent a matter referred to in paragraph (2)(f) from being a reason for terminating employment if the reason is based on the inherent requirements of the particular position concerned.
- (4) Subsection (2) does not prevent a matter referred to in paragraph (2)(f) from being a reason for terminating a person's employment 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, if the employer terminates the employment in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.
- (5) To avoid doubt, if:
- (a) an employer terminates an employee's employment; and
 - (b) the reason, or a reason, for the termination is that the position held by the employee no longer exists, or will no longer exist; and

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- (c) the reason, or a reason, that the position held by the employee no longer exists, or will no longer exist, is the employee's absence, or proposed or probable absence, during maternity leave or other parental leave;
- the employee's employment is taken, for the purposes of paragraph (2)(h), to have been terminated for the reason, or for reasons including the reason, of absence from work during maternity leave or other parental leave.
- (6) For the purposes of this section, an employee *carries out a voluntary emergency management activity* if, and only if:
- (a) the employee carries out an activity that involves dealing with an emergency or natural disaster; and
 - (b) the employee carries out the activity on a voluntary basis; and
 - (c) the employee is a member of, or has a member-like association with, a recognised emergency management body; and
 - (d) either:
 - (i) the employee was requested by or on behalf of the body to carry out the activity; or
 - (ii) no such request was made, but it would be reasonable to expect that, if the circumstances had permitted the making of such a request, it is likely that such a request would have been made.
- (7) For the purposes of paragraph (6)(b), an employee carries out an activity on a voluntary basis even if the employee directly or indirectly takes or agrees to take:
- (a) an honorarium; or
 - (b) a gratuity; or
 - (c) a similar payment;
- wholly or partly for carrying out the activity.
- (8) In this section:
- body* includes a part of a body.
- designated disaster plan* means a plan that:
- (a) is for coping with emergencies and/or disasters; and
 - (b) is prepared by the Commonwealth, a State or a Territory.

recognised emergency management body means:

- (a) a body that has a role or function under a designated disaster plan; or
- (b) a fire-fighting, civil defence or rescue body; or
- (c) any other body a substantial purpose of which involves:
 - (i) securing the safety of persons or animals in an emergency or natural disaster; or
 - (ii) protecting property in an emergency or natural disaster; or
 - (iii) otherwise responding to an emergency or natural disaster; or
- (d) a body specified in the regulations;

but does not include a body that was established, or is continued in existence, for the purpose, or for purposes that include the purpose, of enabling one or more employees to obtain the protection of subsection (2).

660 Employer to notify CES of proposed terminations in certain cases

- (1) This section applies if an employer decides to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons.
- (2) As soon as practicable after so deciding and before terminating an employee's employment because of the decision, the employer must give to the body (if any) prescribed by regulations made for the purposes of this subsection or, failing the prescription of such a body, to the Secretary of the Department, a written notice of the intended terminations, in a form prescribed by the regulations, that sets out:
 - (a) the reasons for the terminations; and
 - (b) the number and categories of employees likely to be affected; and
 - (c) the time when, or the period over which, the employer intends to carry out the terminations.

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- (3) The employer must not terminate an employee's employment pursuant to the decision unless the employer has complied with subsection (2).

661 Employer to give notice of termination

- (1) Subject to subsection (8), an employer must not terminate an employee's employment unless:
- (a) the employee has been given the required period of notice (see subsections (2) and (3)); or
 - (b) the employee has been paid the required amount of compensation instead of notice (see subsections (4) and (5)); or
 - (c) the employee is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue the employment of the employee concerned during the required period of notice (see subsection (7)).
- (2) The required period of notice is to be worked out as follows:
- (a) first work out the period of notice using the table at the end of this subsection; and
 - (b) then increase the period of notice by 1 week if the employee:
 - (i) is over 45 years old; and
 - (ii) has completed at least 2 years of continuous service with the employer.

Employee's period of continuous service with the employer	Period of notice
Not more than 1 year	At least 1 week
More than 1 year but not more than 3 years	At least 2 weeks
More than 3 years but not more than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

- (3) For the purposes of subsection (2), the regulations may prescribe events or other matters that must be disregarded, or must in prescribed circumstances be disregarded, in ascertaining a period of continuous service.

- (4) The required amount of compensation instead of notice must equal or exceed the total of all amounts that, if the employee's employment had continued until the end of the required period of notice, the employer would have become liable to pay to the employee because of the employment continuing during that period.
- (5) That total must be worked out on the basis of:
 - (a) the employee's ordinary hours of work (even if they are not standard hours); and
 - (b) the amounts ordinarily payable to the employee in respect of those hours, including (for example) allowances, loading and penalties; and
 - (c) any other amounts payable under the employee's contract of employment.
- (6) The regulations may make provision for or in relation to amounts that are taken to be payable under a contract of employment for the purposes of paragraph (5)(c) in relation to an employee whose remuneration before the termination was determined wholly or partly on the basis of commission or piece rates.
- (7) Without limiting the generality of the reference to serious misconduct in paragraph (1)(c), the regulations may identify:
 - (a) particular conduct; or
 - (b) conduct in particular circumstances;that falls within that reference.
- (8) The regulations may exclude from the operation of this section terminations of employment occurring in specified circumstances that relate to the succession, assignment or transmission of the business of the employer concerned.

662 Contravention of this Subdivision not an offence

A contravention of section 659, 660 or 661 is not an offence.

663 Application to courts in relation to alleged contravention of section 659, 660 or 661

- (1) Subject to subsection (5), an employee may apply under this section to the Court for an order under section 665 in respect of an

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alleged contravention of one or more of sections 659 and 660 by his or her employer.

- (2) Subject to subsection (5), an employee may apply under this section to the Court or to an eligible court as defined in section 717 for an order under section 665 in respect of an alleged contravention of section 661 by his or her employer.
- (3) Subject to subsection (5), a trade union that has made an application under section 643 on behalf of an employee on the ground of an alleged contravention of one or more of sections 659 and 661 may apply to a court under this section for an order under section 665 in respect of that alleged contravention or each of those alleged contraventions.
- (4) Subject to subsection (5), an inspector, a trade union, or a trade union officer or employee who has made an application under section 643 in respect of an alleged contravention of section 660 may apply to the Court under this section for an order under section 665 in respect of that alleged contravention.
- (5) An application under subsection (1), (2), (3) or (4) in respect of an alleged contravention of section 659, 660 or 661 may not be made to a court unless the applicant:
 - (a) has received a certificate under subsection 650(2) regarding conciliation of an application made wholly or partly on the ground of the alleged contravention; and
 - (b) has elected under section 651 to begin proceedings in that court for an order under section 665 in respect of the alleged contravention.
- (6) The application must be made within 14 days after the lodgment of an election under subsection 651(6), or within such period as a court allows on an application made during or after those 14 days.

Note: 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*.

664 Proof of issues in relation to alleged contravention of section 659

In any proceedings under section 663 relating to a termination of employment in contravention of section 659 for a reason (a

proscribed reason) set out in a paragraph of subsection (2) of that section:

- (a) it is not necessary for the employee to prove that the termination was for a proscribed reason; but
- (b) it is a defence in the proceedings if the employer proves that the termination was for a reason or reasons that do not include a proscribed reason (other than a proscribed reason to which subsection 659(3) or (4) applies).

665 Orders available to courts

- (1) If the Court is satisfied that an employer has contravened section 659 in relation to the termination of employment of an employee, the Court may make one or more of the following orders:
 - (a) an order imposing on the employer a penalty of not more than \$10,000;
 - (b) an order requiring the employer to reinstate the employee;
 - (c) subject to subsections (2), (3), (4) and (5), an order requiring the employer to pay to the employee compensation of such amount as the Court thinks appropriate;
 - (d) any other order that the Court thinks necessary to remedy the effect of such a termination;
 - (e) any other consequential orders.
- (2) An amount of compensation ordered by the Court under paragraph (1)(c) or (d) to be paid to an employee may not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the employee by the manner of terminating the employee's employment.
- (3) In fixing an amount under paragraph (1)(c) for an employee who was employed under award-derived conditions immediately before the termination, the Court must not fix an amount that exceeds the total of the following amounts:
 - (a) the total amount of remuneration:
 - (i) received by the employee; or
 - (ii) to which the employee was entitled;(whichever is higher) for any period of employment with the employer during the period of 6 months immediately before

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- the termination (other than any period of leave without full pay); 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.
- (4) In fixing an amount under paragraph (1)(c) for an employee who was not employed under award-derived conditions immediately before the termination, the Court must not fix an amount that exceeds:
- (a) the total of the amounts determined under subsection (3) if the employee were an employee covered by the subsection; or
- (b) the amount of \$32,000, as indexed from time to time in accordance with a formula prescribed by the regulations; whichever is the lower amount.
- (5) For the avoidance of doubt, an order by the Court under paragraph (1)(c) or (d) may permit the employer concerned to pay the amount required in instalments specified in the order.
- (6) If the Court is satisfied that an employer has contravened section 660 in relation to a decision to terminate the employment of employees, the Court may make either or both of the following orders:
- (a) an order imposing on the employer a penalty of not more than \$1,000;
- (b) an order requiring the employer not to terminate the employment of employees pursuant to the decision, except as permitted by the order.
- (7) Subject to subsection (8), if a court to which an application is made under subsection 663(2) or (3) is satisfied that an employer has contravened section 661 in relation to the termination of the employment of an employee, that court may make an order requiring the employer to pay to the employee an amount of damages equal to the amount which, if it had been paid by the employer to the employee when the employment was terminated, would have resulted in the employer not contravening that section.

- (8) If the Commission has made an order under subsection 654(4) requiring the employer to pay to the employee an amount in respect of the remuneration lost, or likely to have been lost, by the employee because of the termination, an order under subsection (7) of this section must not be made.
- (9) A court to which an application is made under section 663 must not grant an injunction in respect of a proposed contravention of section 659, 660 or 661.

Note: As well as the remedies provided in this Subdivision for contravention of section 659, 660 or 661, there are provisions in other parts of the Act that relate, in part, to termination of employment. See, in particular, sections 448 and 792.

666 Costs

- (1) Subject to this section, a party to a proceeding under section 663 must not be ordered to pay costs incurred by any other party to the proceeding unless the court hearing the matter is satisfied that the first-mentioned party:
- (a) instituted the proceeding vexatiously or without reasonable cause; or
 - (b) caused the costs to be incurred by that other party because of an unreasonable act or omission of the first-mentioned party in connection with the conduct of the proceeding.
- (2) Subsection (1) does not empower a court to award costs in circumstances specified in that subsection if the court does not have the power to do so.

- (3) In this section:

costs includes all legal and professional costs and disbursements and expenses of witnesses.

667 Small claims procedure

Section 724 applies to a proceeding under section 663 in respect of an alleged contravention of section 661 that is started by a person or a trade union in a magistrate's court in the same way as section 724 applies to an action under section 720 that is started in a magistrate's court.

Subdivision D—Commission orders after employer fails to consult trade union about terminations

668 Orders by Commission where employer fails to consult trade union about terminations

- (1) Subsection (2) applies if the Commission is satisfied that an employer has, on or after 26 February 1994, decided to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons, and that:
 - (a) the employer did not, as soon as practicable after so deciding and in any event before terminating an employee's employment pursuant to the decision, inform each trade union of which any of the employees was a member, and which represented the industrial interests of such of those employees as were members, about:
 - (i) the terminations and the reasons for them; and
 - (ii) the number and categories of employees likely to be affected; and
 - (iii) the time when, or the period over which, the employer intended to carry out the terminations; or
 - (b) the employer did not, as soon as practicable after so deciding and in any event before terminating an employee's employment pursuant to the decision, give each such trade union an opportunity to consult with the employer on:
 - (i) measures to avert the termination, or avert or minimise the terminations; and
 - (ii) measures (such as finding alternative employment) to mitigate the adverse effects of the termination or terminations.
- (2) Subject to subsection (3), the Commission may make whatever orders it thinks appropriate, in the public interest, in order to put the employees whose employment was terminated pursuant to the decision, and each such trade union, in the same position (as nearly as can be done) as if:
 - (a) if paragraph (1)(a) applies—the employer had so informed the trade union; and

- (b) if paragraph (1)(b) applies—the employer had so given the trade union such an opportunity.
- (3) The power to make orders under subsection (2) does not include the power to make orders for any of the following:
 - (a) reinstatement of an employee;
 - (b) withdrawal of a notice of termination if the notice period has not expired;
 - (c) payment of an amount in lieu of reinstatement;
 - (d) payment of severance pay;
 - (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.
- (4) Subsections (1) and (2) do not apply in relation to a trade union if the employer could not reasonably be expected to have known at the time of the decision that one or more of the employees were members of the trade union.
- (5) For the purposes of subsection (3), *commercially sensitive information*, *confidential information* and *personal information* have their ordinary meanings unless the regulations provide otherwise.

669 Orders only on application

The Commission must not make an order under section 668 unless it has received an application for the making of the order from:

- (a) an employee or trade union whose position is to be affected by the order as mentioned in subsection 668(2); or
- (b) a trade union whose rules entitle it to represent the industrial interests of such employees.

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670 Powers and procedures of Commission for dealing with applications

The Commission may, in relation to an application for an order under section 668, attempt to settle the matter to which the application relates by conciliation.

671 No order if alternative remedy exists

The Commission must refrain from considering an application, or from determining it, if the Commission is satisfied that there is available to the applicant, or to the employees whom the applicant represents, an alternative remedy under machinery:

- (a) that exists under a law of the Commonwealth (other than this Division) or under a law of a State or Territory; and
- (b) by which effect will be given to the requirements of Article 13 of the Termination of Employment Convention in relation to the employees and trade unions concerned.

Subdivision E—Rights relating to termination of employment

672 Limitation on applications alleging termination on paragraph 643(1)(a) grounds

- (1) An application under subsection 643(1) alleging termination of employment on the ground referred to in paragraph 643(1)(a), or grounds that include that ground, must not be made if other termination proceedings have already been commenced in respect of the termination of employment, unless the other termination proceedings:
 - (a) have been discontinued by the employee who commenced the proceedings; or
 - (b) have failed for want of jurisdiction.

Note: Subsection (3) defines *other termination proceedings*.

- (2) An employee must not commence other termination proceedings in respect of a termination of employment if an application under subsection 643(1) alleging termination of employment on the ground referred to in paragraph 643(1)(a), or on grounds that include that ground, has already been made, unless the application:
 - (a) has been discontinued by the employee; or

(b) has failed for want of jurisdiction.

(3) In this section:

other termination proceedings means proceedings, in respect of a termination of the employment of an employee:

- (a) for a remedy in respect of the termination:
 - (i) under a provision of this Act other than section 643; or
 - (ii) under another law of the Commonwealth; or
 - (iii) under a provision of a law of a State or Territory that is not excluded by section 16; and
- (b) that allege that the termination was unlawful for any reason (other than a failure by the employer to provide a benefit to which the employee was entitled on the termination).

Note: Section 16 provides for the exclusion of certain State and Territory laws.

(4) Without limiting subsection (3), ***other termination proceedings*** includes an inquiry in respect of a complaint (the ***HREOC complaint***):

- (a) made under the *Human Rights and Equal Opportunity Commission Act 1986*; and
- (b) that relates to the termination of employment of an employee (whether or not as a result of an amendment of the complaint).

(5) For the purposes of this section, an employee commences other termination proceedings of a kind referred to in subsection (4):

- (a) unless paragraph (b) applies—when the employee makes the HREOC complaint; or
- (b) if the HREOC complaint constitutes, or would constitute, other termination proceedings only as a result of an amendment of the complaint—when the complaint is amended.

(6) For the avoidance of doubt, a proceeding seeking compensation, or the imposition of a penalty, because an employer has failed, in relation to a termination of employment, to meet an obligation:

- (a) to give adequate notice of the termination; or
- (b) to provide a severance payment as a result of the termination;
or

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- (c) to provide any other entitlement payable as a result of the termination;

is taken to be a proceeding alleging that the termination was unlawful because of a failure to provide a benefit to which the employee was entitled on the termination.

673 No second applications under section 643 concerning same termination to be made

An application must not be made under section 643 in relation to a termination of employment of an employee where a previous application under section 643 was made in respect of the same termination unless the second application corrects an error in the previous application, or the Commission considers that it would be fair to accept the second application.

674 Limitation on applications alleging unlawful termination

- (1) An application alleging unlawful termination of employment must not be made by an employee if other termination proceedings have already been commenced in respect of the termination of employment, unless the other termination proceedings:
 - (a) have been discontinued by the employee; or
 - (b) have failed for want of jurisdiction.

Note: Subsection (3) defines an *application alleging unlawful termination* and *other termination proceedings*.

- (2) An employee must not commence other termination proceedings in respect of a termination of employment if an application alleging unlawful termination of the employment has already been made, unless the application:
 - (a) has been discontinued by the employee; or
 - (b) has failed for want of jurisdiction.

- (3) In this section:

application alleging unlawful termination means an application under section 643, in respect of a termination of employment, on the ground that the termination constitutes a contravention of section 659 because it was done for a reason set out in subsection 659(2).

other termination proceedings means proceedings, in respect of a termination of employment:

- (a) for a remedy in respect of the termination:
 - (i) under a provision of this Act other than section 643; or
 - (ii) under another law of the Commonwealth; or
 - (iii) under a provision of a law of a State or Territory that is not excluded by section 16; and
- (b) that allege that the termination was:
 - (i) harsh, unjust or unreasonable (however described); or
 - (ii) unlawful;for any reason (other than a failure by the employer to provide a benefit to which the employee was entitled on the termination).

Note: Section 16 provides for the exclusion of certain State or Territory laws.

- (4) Without limiting subsection (3), ***other termination proceedings*** includes an inquiry in respect of a complaint (the ***HREOC complaint***):
 - (a) made under the *Human Rights and Equal Opportunity Commission Act 1986*; and
 - (b) that relates to the termination of employment of an employee (whether or not as a result of an amendment of the complaint).
- (5) For the purposes of this section, an employee commences other termination proceedings of a kind referred to in subsection (4):
 - (a) unless paragraph (b) applies—when the employee makes the HREOC complaint; or
 - (b) if the HREOC complaint constitutes, or would constitute, other termination proceedings as a result of an amendment of the complaint—when the complaint is amended.

Subdivision F—Unmeritorious or speculative proceedings

675 Definitions

In this Subdivision:

adviser means:

- (a) a person or body engaged for fee or reward to represent an applicant or a respondent in an unfair termination application, including a person or body so engaged under a contingency fee agreement, or under a costs arrangement within the meaning of subsection 656(5); or
- (b) a person who is an employee, official or agent of a registered organisation of employees and who represents an applicant or a respondent in an unfair termination application in that capacity.

encourage, in relation to a course of action, means the promotion of that course of action as distinct from a failure to dissuade from that course of action.

unfair termination application means an application for relief under section 643 by an employee whose employment has been terminated, on the ground, or on grounds that include the ground, that the termination was harsh, unjust or unreasonable.

676 Advisers not to encourage applicants to make, or to pursue, certain applications

- (1) An adviser must not encourage an employee to make or pursue an unfair termination application if, on the facts that have been disclosed or that ought reasonably to have been apparent to the adviser, the adviser should have been, or should have become, aware that there was no reasonable prospect of success in respect of the application.
- (2) An adviser must not encourage an employer to continue to oppose an unfair termination application if, on the facts that have been disclosed or that ought reasonably to have been apparent to the adviser, the adviser should have been, or should have become, aware that there was no reasonable prospect of the respondent defending the action.

677 Applications to the Court

- (1) An application may be made to the Court for an order under section 679 in respect of a contravention of section 676.
- (2) The application may be made by:
 - (a) the applicant in respect of an unfair termination application; or
 - (b) a respondent to such an application; or
 - (c) the Minister; or
 - (d) the Registrar; or
 - (e) an organisation of employees or employers that represented a party in proceedings at first instance in respect of the unfair termination application.
- (3) An application under this section for an order in respect of a contravention of section 676 may only be made after the relevant unfair termination application has been determined, dismissed or discontinued.
- (4) Nothing in this Subdivision implies that, for the purposes of an application under this section, the law relating to legal professional privilege is abrogated, or in any way affected.

678 Evidentiary matters

In any proceeding for an order in respect of a contravention of section 676 in respect of an unfair termination application, the Court must not determine that there was no reasonable prospect of success in respect of the application or no reasonable prospect of the respondent defending the action unless it has had regard:

- (a) to the outcome of the application before the Commission; and
- (b) to the contents of any certificate issued by the Commission under subsection 650(2) and, where applicable, subsection (4).

679 Order that the Court may make

In respect of contraventions of section 676, the Court may, if the Court considers it appropriate in all the circumstances of the case,

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make an order imposing on the adviser who contravened that section a penalty:

- (a) if the adviser is a body corporate—of not more than \$10,000;
or
- (b) if the adviser is not a body corporate—of not more than \$2,000.

Division 5—Orders and proceedings

680 Orders to be in writing

An order of the Commission under this Part must be in writing.

681 When orders take effect

An order of the Commission under this Part takes effect from the date of the order or a later date specified in the order.

682 Compliance with orders

- (1) An order under this Part is, unless the order provides otherwise, taken to bind all employers and employees of the kind covered by the order (whether or not named or described in the order).
- (2) In addition to any other right that an employee covered by an order under this Part may have under Part 14:
 - (a) the employee may apply to the Court or the Federal Magistrates Court to enforce the order by injunction or otherwise as the Court or the Federal Magistrates Court thinks fit; and
 - (b) if the order is an order under Subdivision B of Division 4—the employee may apply to an eligible court as defined in section 717 to enforce the order by injunction.

683 Variation and revocation of orders

- (1) The Commission may vary or revoke an order under this Part on application by:
 - (a) any employer, or representative of an employer, covered by the order (whether or not named or described in the order); or
 - (b) any employee, or representative of any employee, to whom the order relates (whether or not named or described in the order).
- (2) If the Commission is satisfied, on an application under this section, that an order under Division 3 should be varied or revoked because

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of a change in circumstances, the Commission must vary or revoke the order accordingly.

- (3) Subsection (2) does not limit the Commission's powers under subsection (1).
- (4) This section does not apply to an order under subsection 645(5) or section 646 or to a decision on an extension of time application within the meaning of section 647.

684 Representation of employers

Without limiting the operation of paragraphs 100(11)(b) and 854(10)(b), an employer that is a party to a proceeding under this Part before the Commission, the Court or the Federal Magistrates Court may be represented by a member, officer or employee of an association of employers of which the employer is a member.

685 Appeals to Full Bench

- (1) An appeal to a Full Bench under section 120 may be instituted by any person who is entitled under section 683 to apply for the variation or revocation of an order under this Part.
- (2) For the avoidance of doubt, an appeal to a Full Bench under section 120 in relation to an order made by the Commission under Subdivision B of Division 4 may be made only on the grounds that the Commission was in error in deciding to make the order.
- (3) An appeal to a Full Bench under section 120 may not be made in relation to an order under subsection 645(5) or section 646 or in relation to a decision on an extension of time application within the meaning of section 647.

686 Inconsistency with awards or other orders of Commission

Any award or order of the Commission or workplace agreement that is inconsistent with an order under this Part does not have effect to the extent of the inconsistency.

687 Meaning of *employee* and *employer*

To avoid doubt, the expression *employee* or *employer*, when used in a provision of this Division, is taken to have the same meaning as in the provision of this Act to which the provision of this Division relates.

Division 6—Parental leave

688 Object and application of Division

The object of this Division is to give effect, or further effect, to:

- (a) the Family Responsibilities Convention; and
- (b) the Workers with Family Responsibilities Recommendation, 1981, which the General Conference of the International Labour Organisation adopted on 23 June 1981 and is also known as Recommendation No. 165;

by providing for a system of unpaid parental leave, and a system of unpaid adoption leave, that will help men and women workers who have responsibilities in relation to their dependent children:

- (c) to prepare for, enter, participate in or advance in economic activity; and
- (d) to reconcile their employment and family responsibilities.

Note: *Employer, employee* and *employment* have their ordinary meaning in this Division. See sections 5, 6 and 7 and Schedule 2.

689 Entitlement to parental leave

The provisions of Division 6 of Part 7 are taken to apply in relation to an employee:

- (a) who is not an employee within the meaning of subsection 5(1); and
- (b) if the employee is a casual employee—who would be an eligible casual employee within the meaning of Division 6 of Part 7, if he or she were an employee within the meaning of subsection 5(1);

as if he or she were an employee to whom Division 6 of Part 7 applied.

Note 1: Employees within the meaning of subsection 5(1) are entitled to the key minimum entitlements of employment provided by the Australian Fair Pay and Conditions Standard. These include an entitlement to parental leave (see Division 6 of Part 7).

Note 2: Compliance with this section is dealt with in Part 14.

690 Division supplements other laws

This Division is intended to supplement, not to override, entitlements under other Commonwealth, State and Territory legislation and awards.

691 Model dispute resolution process

The model dispute resolution process applies to a dispute under this Division.

Note: The model dispute resolution process is set out in Part 13.

Division 7—Stand downs

691A Employer may stand down employees in certain circumstances

- (1) This section applies if:
 - (a) an employee employed by an employer cannot usefully be employed during a period because of a particular circumstance; and
 - (b) that circumstance is:
 - (i) a strike; or
 - (ii) a breakdown of machinery; or
 - (iii) a stoppage of work for any cause for which the employer cannot reasonably be held responsible; and
 - (c) either:
 - (i) there is no contract of employment, and no industrial instrument, that binds the employer in respect of the employment of the employee and that contains provision for the standing down of the employee during that period because of that circumstance; or
 - (ii) a contract of employment, or industrial instrument, that binds the employer in respect of the employment of the employee contains provision for the standing down of the employee during that period because of that circumstance, but the employer's right to stand down the employee is dependent on the employer having to apply to the Commission, a State industrial authority or another person or body for an order or determination (however described) authorising the employer to stand down the employee.
- (2) If this section applies, the employer:
 - (a) may stand down the employee during the period referred to in paragraph (1)(a) because of the circumstance referred to in that paragraph; and
 - (b) if the employer stands down the employee under paragraph (a) of this subsection—may deduct payment for the period during which the employee is stood down.

- (3) A period during which an employee is stood down under subsection (2) does not break the employee's continuity of service.
- (4) A period during which an employee is stood down under subsection (2) counts as service for all purposes.
- (5) A provision of a contract of employment or an industrial instrument that provides as mentioned in subparagraph (1)(c)(ii) has no effect. However, this section does not otherwise affect the operation of any provision of a contract of employment or industrial instrument that provides for the standing down of employees.
- (6) In this section:
industrial instrument means any of the following:
 - (a) a workplace agreement;
 - (b) an award;
 - (c) a pre-reform AWA;
 - (d) a pre-reform certified agreement (within the meaning of Schedule 7);
 - (e) a preserved State agreement;
 - (f) a notional agreement preserving State awards;
 - (g) a workplace determination;
 - (h) an employment agreement (within the meaning of Division 12 of Part 21);
 - (i) an exceptional matters order (within the meaning of Schedule 7);
 - (j) a section 170MX award (within the meaning of Schedule 7);
 - (k) an old IR agreement (within the meaning of Schedule 7);
 - (l) an AWA (within the meaning of Schedule 7A).

691B Prohibition of unauthorised stand downs

- (1) An employer must not stand down an employee from his or her employment if the stand down is not authorised by:
 - (a) subsection 691A(2); or
 - (b) a provision of a contract of employment, or an industrial instrument (within the meaning of section 691A), that is binding on the employer in respect of the employment of the

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employee (other than a provision that is rendered of no effect by subsection 691A(5)).

Note 1: Compliance with this subsection is dealt with as follows:

- (a) the model dispute resolution process applies (see subsection (2));
- (b) the Court may grant an injunction (see subsection (3));
- (c) the compliance provisions of Part 14 apply.

Note 2: If the standing down of an employee is not authorised as mentioned in this subsection, the employee may recover any lost wages by taking appropriate enforcement action (whether under this Act or otherwise).

- (2) The model dispute resolution process (other than section 697) applies to a dispute under subsection (1).

Note: The model dispute resolution process is set out in Part 13.

- (3) The Court, or the Federal Magistrates Court, on application by an employee who has been stood down or by an inspector, may grant an injunction requiring the employer of the employee to cease contravening (or not to contravene) subsection (1).

691C Extraterritorial extension

- (1) This Division, and the rest of this Act so far as it relates to this Division, extend:

- (a) to an employee outside Australia who meets any of the conditions in this section; and
- (b) to the employee's employer (whether the employer is in or outside Australia); and
- (c) to acts, omissions, matters and things relating to the employee or the employee's employment (whether those acts, omissions, matters or things are in or outside Australia).

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

Employee in Australia's exclusive economic zone

- (2) One condition is that the employee is in Australia's exclusive economic zone and either:
 - (a) is an employee of an Australian employer and is not prescribed by the regulations as an employee to whom this subsection does not apply; or

- (b) is an employee prescribed by the regulations as an employee to whom this subsection applies.

Note: The regulations may prescribe the employee by reference to a class. See subsection 13(3) of the *Legislative Instruments Act 2003*.

On Australia's continental shelf outside exclusive economic zone

- (3) Another condition is that the employee:
- (a) is outside the outer limits of Australia's exclusive economic zone, but is in, on or over a part of Australia's continental shelf prescribed by the regulations for the purposes of this subsection, in connection with the exploration of the continental shelf or the exploitation of its natural resources; and
 - (b) meets the requirements that are prescribed by the regulations for that part.

Note: The regulations may prescribe different requirements relating to different parts of Australia's continental shelf. The regulations may need to do so to give effect to Australia's international obligations.

Outside Australia's exclusive economic zone and continental shelf

- (4) Another condition is that the employee:
- (a) is neither in Australia's exclusive economic zone nor in, on or over a part of Australia's continental shelf described in paragraph (3)(a); and
 - (b) is an Australian-based employee of an Australian employer; and
 - (c) is not prescribed by the regulations as an employee to whom this subsection does not apply.

- (5) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

Part 13—Dispute resolution processes

Division 1—Preliminary

692 Object

The objects of this Part are:

- (a) to encourage employers and employees who are parties to a dispute to resolve it at the workplace level; and
- (b) to introduce greater flexibility for the resolution of disputes by allowing the parties to determine the best forum in which to resolve them.

693 Court process

The fact that the model dispute resolution process, an alternative dispute resolution process or any other dispute resolution process applies in relation to a dispute does not affect any right of a party to the dispute to take court action to resolve it.

Division 2—Model dispute resolution process

694 Model dispute resolution process

- (1) This Division sets out the *model dispute resolution process*.
- (2) The model dispute resolution process does not apply in relation to a particular dispute, unless it applies in relation to that dispute because of a provision of this Act, other than one contained in this Division, or a term of an award, a workplace agreement or a workplace determination.

Note: The model dispute resolution process applies in relation to a variety of disputes, including:

- (a) disputes about entitlements under the Australian Fair Pay and Conditions Standard (see section 175); and
- (b) disputes about the terms of a workplace agreement, where the agreement itself includes the model dispute resolution process or is taken to include that process (see section 353); and
- (c) disputes about the application of a workplace determination (see section 504); and
- (d) disputes about the application of awards (see section 514); and
- (e) disputes under Division 1 of Part 12, which deals with meal breaks (see section 609); and
- (f) disputes under Division 2 of Part 12, which deals with public holidays (see section 614); and
- (g) disputes under Division 6 of Part 12, which deals with parental leave (see section 691).

695 Resolving dispute at workplace level

The parties to a dispute must genuinely attempt to resolve the dispute at the workplace level.

Note: This may involve an affected employee first discussing the matter in dispute with his or her supervisor, then with more senior management.

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696 Where dispute cannot be resolved at workplace level

Alternative dispute resolution process using an agreed provider

- (1) If a matter in dispute cannot be resolved at the workplace level, a party to the dispute may elect to use an alternative dispute resolution process in an attempt to resolve the matter.
- (2) The alternative dispute resolution process is to be conducted by a person agreed between the parties in dispute on the matter.

Where parties cannot agree on a provider

- (3) If the parties cannot reach agreement on who is to conduct the alternative dispute resolution process, a party to the dispute on the matter may notify the Industrial Registrar of that fact.
- (4) On receiving notification under subsection (3), the Industrial Registrar must provide the parties with the prescribed information.
- (5) If the parties cannot agree on who is to conduct the alternative dispute resolution process within the consideration period, a party to the dispute on the matter may apply to the Commission to have the alternative dispute resolution process conducted by the Commission.
- (6) If an alternative dispute resolution process is used to resolve a dispute on a matter, the parties to the dispute must genuinely attempt to resolve the dispute using that process.
- (7) In this section:

consideration period is a period beginning on the last day on which the Industrial Registrar gives the prescribed information to a party to the dispute on the matter and ending 14 days later.

697 Conduct during dispute

- (1) An employee who is a party to a dispute must, while the dispute is being resolved:
 - (a) continue to work in accordance with his or her contract of employment, unless the employee has a reasonable concern about an imminent risk to his or her health or safety; and

- (b) comply with any reasonable direction given by his or her employer to perform other available work, either at the same workplace or at another workplace.
- (2) In directing an employee to perform other available work, an employer must have regard to:
- (a) the provisions (if any) of the law of the Commonwealth or of a State or Territory dealing with occupational health and safety that apply to that employee or that other work; and
 - (b) whether that work is appropriate for the employee to perform.

**Division 3—Alternative dispute resolution process
conducted by Commission under model dispute
resolution process**

698 Alternative dispute resolution process

An *alternative dispute resolution process* is a procedure for the resolution of disputes, and includes:

- (a) conferencing; and
- (b) mediation; and
- (c) assisted negotiation; and
- (d) neutral evaluation; and
- (e) case appraisal; and
- (f) conciliation; and
- (g) arbitration, or other determination of the rights and obligations of the parties in dispute; and
- (h) a procedure or service specified in the regulations.

699 Application

- (1) A person may apply to the Commission to have an alternative dispute resolution process conducted by the Commission under this Division in relation to a matter or matters in dispute if:
 - (a) the dispute is one that may (whether under an award, a workplace determination, a workplace agreement, a provision of this Act or otherwise) be resolved using the model dispute resolution process; and
 - (b) the parties to the dispute on the matter or matters have been unable to resolve the dispute at the workplace level.
- (2) An application to have an alternative dispute resolution process conducted by the Commission under this Division must:
 - (a) be in the form (if any) prescribed by the regulations; and
 - (b) describe the matter, or matters, in dispute in relation to which the alternative dispute resolution process is to be conducted; and

- (c) be signed by the party to the dispute on that matter or those matters who is making the application; and
 - (d) specify that the alternative dispute resolution process is to be conducted under the model dispute resolution process.
- (3) The Commission may request the parties to provide further information about:
- (a) the matter or matters in dispute; and
 - (b) the steps taken to resolve the matter at the workplace level.
- (4) The Commission may do either of the following in relation to an application under this section:
- (a) allow the amendment, on any terms that it thinks appropriate, of the application;
 - (b) correct, amend or waive any error, defect or irregularity whether in substance or form in the application.

700 Refusing application

- (1) The Commission must refuse to conduct an alternative dispute resolution process under this Division in relation to a matter if:
- (a) the dispute is not one that may be resolved using the model dispute resolution process; or
 - (b) the matter is the subject of proceedings or has already been settled as a result of proceedings, whether before a court or another body, under a law of the Commonwealth or of a State or Territory relating to the prevention of discrimination or to equal opportunity.
- (2) The Commission may refuse to conduct an alternative dispute resolution process under this Division if the parties in dispute on the matter have not made a genuine attempt:
- (a) to resolve the dispute at the workplace level; or
 - (b) to reach agreement on who would conduct the alternative dispute resolution process.

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701 Commission's powers

- (1) If the Commission conducts an alternative dispute resolution process under this Division, the Commission must take such action as is appropriate to assist the parties to resolve the matter.
- (2) The action that the Commission may take includes:
 - (a) arranging conferences of the parties or their representatives at which the Commission is present; and
 - (b) arranging for the parties or their representatives to confer among themselves at conferences at which the Commission is not present.
- (3) The Commission must, as far as is practicable, act:
 - (a) quickly; and
 - (b) in a way that avoids unnecessary technicalities and legal forms; and
 - (c) if the parties have agreed that an aspect of the process is to be conducted in a particular way—subject to subsection (4), in accordance with that agreement.
- (4) The Commission does not have power:
 - (a) to compel a person to do anything; or
 - (b) to arbitrate the matter, or matters, in dispute; or
 - (c) to otherwise determine the rights or obligations of a party to the dispute; or
 - (d) to make an award in relation to the matter, or matters, in dispute; or
 - (e) to make an order in relation to the matter, or matters, in dispute; or
 - (f) to appoint a board of reference.
- (5) The Commission does not have the power to do any of the things mentioned in paragraph (4)(a), (d), (e) or (f), even if the parties agree that the Commission should do it.
- (6) The Commission may, subject to any reasonable limitations imposed by the Commission, permit a party to the dispute on the matter to be represented in the alternative dispute resolution process.

- (7) If the parties request the Commission to make recommendations about particular aspects of a matter about which they are unable to reach agreement, then the Commission may make recommendations about those aspects of the matter.
- (8) Subdivision B of Division 4 of Part 3 of this Act does not apply in relation to the conduct of the alternative dispute resolution process by the Commission under this Division.

702 Privacy

- (1) The Commission must conduct the alternative dispute resolution process in private.
- (2) The Commission must not disclose or use any information or document that is given to the Commission in the course of conducting the alternative dispute resolution process to any person, unless:
 - (a) the information or document is disclosed or used for the purpose of conducting the process; or
 - (b) the parties to the process consent to the disclosure or use; or
 - (c) the information or document is disclosed or used in circumstances specified in regulations made for the purposes of this paragraph; or
 - (d) the disclosure or use is otherwise required or authorised by law.
- (3) Evidence of anything said, or any act done, in the alternative dispute resolution process is not admissible in proceedings relating to the dispute:
 - (a) in any court; or
 - (b) before a person authorised by a law of the Commonwealth or of a State or Territory to hear evidence; or
 - (c) before a person authorised by the consent of the parties to hear evidence;unless:
 - (d) the parties agree to the evidence being admissible; or
 - (e) the evidence is admitted in circumstances specified in regulations made for the purposes of this paragraph.

Part 13 Dispute resolution processes

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

Section 703

703 When alternative dispute resolution process complete

The alternative dispute resolution process is completed when:

- (a) the parties agree that the matters in dispute are resolved; or
- (b) the party who elected to use the alternative dispute resolution process has informed the Commission that the party no longer wishes to continue with the process.

Division 4—Alternative dispute resolution process used to resolve other disputes

704 Application

- (1) A person may apply to the Commission to have an alternative dispute resolution process conducted by the Commission under this Division in relation to a matter or matters in dispute if:
 - (a) the dispute on the matter or matters arises in the course of bargaining in relation to a proposed collective agreement (as defined for the purposes of Part 9); and
 - (b) all parties to the dispute agree that the process is to be conducted by the Commission.
- (2) An application to have an alternative dispute resolution process conducted by the Commission under this Division must:
 - (a) be in the form (if any) prescribed by the regulations; and
 - (b) describe the matter, or matters, in dispute in relation to which the alternative dispute resolution process is to be conducted; and
 - (c) be signed by the party to the dispute on that matter or those matters who is making the application; and
 - (d) specify that the alternative dispute resolution process is to be conducted in relation to a dispute on a matter or matters arising in the course of bargaining in relation to a proposed collective agreement (as defined for the purposes of Part 9).
- (3) The Commission may request the parties to provide further information about the matter or matters in dispute.

705 Grounds on which Commission must refuse application

The Commission must refuse to conduct the alternative dispute resolution process if the circumstances mentioned in subsection 704(1) do not exist.

Section 706

706 Powers of the Commission

- (1) If the Commission conducts an alternative dispute resolution process under this Division, the Commission must take such action as is appropriate to assist the parties to resolve the matter.
- (2) The action that the Commission may take includes:
 - (a) arranging conferences of the parties or their representatives at which the Commission is present; and
 - (b) arranging for the parties or their representatives to confer among themselves at conferences at which the Commission is not present.
- (3) The Commission must, as far as is practicable, act:
 - (a) quickly; and
 - (b) in a way that avoids unnecessary technicalities and legal forms; and
 - (c) if the parties have agreed that an aspect of the process is to be conducted in a particular way—subject to subsection (4), in accordance with that agreement.
- (4) The Commission does not have power:
 - (a) to compel a person to do anything; or
 - (b) to arbitrate the matter, or matters, in dispute; or
 - (c) to otherwise determine the rights or obligations of a party to the dispute; or
 - (d) to make an award in relation to the matter, or matters, in dispute; or
 - (e) to make an order in relation to the matter, or matters, in dispute; or
 - (f) to appoint a board of reference.
- (5) The Commission does not have power to do any of the things mentioned in subsection (4), even if the parties agree that the Commission should do it.
- (6) The Commission may, subject to any reasonable limitations imposed by the Commission, permit a party to the dispute on the matter to be represented in the alternative dispute resolution process.

- (7) If the parties request the Commission to make recommendations about particular aspects of a matter about which they are unable to reach agreement, then the Commission may make recommendations about those aspects of the matter.
- (8) Subdivision B of Division 4 of Part 3 of this Act does not apply in relation to the conduct of the alternative dispute resolution process by the Commission under this Division.

707 Privacy

- (1) The Commission must conduct the alternative dispute resolution process in private.
- (2) The Commission must not disclose or use any information or document that is given to the Commission in the course of conducting the alternative dispute resolution process to any person, unless:
 - (a) the information or document is disclosed or used for the purpose of conducting the process; or
 - (b) the parties to the process consent to the disclosure or use; or
 - (c) the information or document is disclosed or used in circumstances specified in regulations made for the purposes of this paragraph; or
 - (d) the disclosure or use is otherwise required or authorised by law.
- (3) Evidence of anything said, or any act done, in the alternative dispute resolution process is not admissible in proceedings relating to the dispute:
 - (a) in any court; or
 - (b) before a person authorised by a law of the Commonwealth or of a State or Territory to hear evidence; or
 - (c) before a person authorised by the consent of the parties to hear evidence;unless:
 - (d) the parties agree to the evidence being admissible; or
 - (e) the evidence is admitted in circumstances specified in regulations made for the purposes of this paragraph.

Part 13 Dispute resolution processes

Division 4 Alternative dispute resolution process used to resolve other disputes

Section 708

708 When alternative dispute resolution process complete

The alternative dispute resolution process is completed when the parties agree that the matters in dispute are resolved.

Division 5—Dispute resolution process conducted by the Commission under workplace agreement

709 Application

- (1) A person may apply to the Commission to have a dispute resolution process conducted by the Commission under this Division in relation to a matter or matters in dispute if:
 - (a) the dispute is one that, under the terms of a workplace agreement, may be resolved using a dispute resolution process conducted by the Commission; and
 - (b) any steps that, under the terms of agreement, must be taken before the matter is referred to the Commission have been taken.
- (2) An application to have a dispute resolution process conducted by the Commission under this Division must:
 - (a) be in the form (if any) prescribed by the regulations; and
 - (b) describe the matter, or matters, in dispute in relation to which the dispute resolution process is to be conducted; and
 - (c) be signed by the party to the dispute on that matter or those matters who is making the application; and
 - (d) specify that the dispute resolution process is to be conducted under the terms of a workplace agreement and not under the model dispute resolution process.
- (3) The Commission may request the parties to provide further information about:
 - (a) the matter or matters in dispute; and
 - (b) the steps that have been taken to resolve the dispute.

Note: Under section 353, a workplace agreement must include a dispute resolution process. That process may be something other than the model dispute resolution process, and may involve applying to have the Commission conduct an alternative dispute resolution process.

Section 710

710 Grounds on which Commission must refuse application

The Commission must refuse to conduct a dispute resolution process under this Division in relation to a matter in dispute if:

- (a) the dispute is not one that, under the terms of the workplace agreement, may be resolved using a dispute resolution process conducted by the Commission; or
- (b) any of the steps that, under the terms of agreement, must be taken before the matter is referred to the Commission have not been taken; or
- (c) the matter is the subject of proceedings or has already been settled as a result of proceedings, whether before a court or another body, under a law of the Commonwealth or of a State or Territory relating to the prevention of discrimination or to equal opportunity.

711 Commission's powers

- (1) In conducting the dispute resolution process under this Division, the Commission has, subject to subsection (2), the functions and powers:
 - (a) given to it under the workplace agreement; or
 - (b) otherwise agreed by the parties.
- (2) The Commission does not have the power to make orders.
- (3) The Commission must, as far as is practicable, act:
 - (a) quickly; and
 - (b) in a way that avoids unnecessary technicalities and legal forms; and
 - (c) if the parties have agreed, either in the workplace agreement or otherwise, that an aspect of the process is to be conducted in a particular way—in accordance with that agreement.
- (4) Subdivision B of Division 4 of Part 3 of this Act does not apply in relation to the conduct of the dispute resolution process by the Commission under this Division.

712 Privacy

- (1) The Commission must conduct the dispute resolution process in private.
- (2) The Commission must not disclose or use any information or document that is given to the Commission in the course of conducting the dispute resolution process to any person, unless:
 - (a) the information or document is disclosed or used for the purpose of conducting the process; or
 - (b) the parties to the process consent to the disclosure or use; or
 - (c) the information or document is disclosed or used in circumstances specified in regulations made for the purposes of this paragraph; or
 - (d) the disclosure or use is otherwise required or authorised by law.
- (3) Evidence of anything said, or any act done, in the dispute resolution process is not admissible in any proceedings relating to the dispute:
 - (a) in any court; or
 - (b) before a person authorised by a law of the Commonwealth or of a State or Territory to hear evidence; or
 - (c) before a person authorised by the consent of the parties to hear evidence;unless:
 - (d) the parties agree to the evidence being admissible; or
 - (e) the evidence is admitted in circumstances specified in regulations made for the purposes of this paragraph.

Division 6—Dispute resolution process conducted by another provider

713 Application of this Division

This Division applies to a dispute resolution process in relation to a dispute on a matter or matters that is not conducted by the Commission.

714 Representation

- (1) If the dispute resolution process is an alternative dispute resolution process, the person conducting the process may allow a party to be represented in the process if the person conducting the process believes that it is appropriate to do so.
- (2) The person conducting the dispute resolution process may set reasonable limits on the conduct of the representative in relation to the process.
- (3) If:
 - (a) the dispute resolution process is conducted under the terms of a workplace agreement; and
 - (b) the agreement makes provision for a party to the dispute to be represented in the process;the person conducting the dispute resolution process must allow the party to be represented in accordance with the agreement.

715 Privacy

- (1) The person conducting the dispute resolution process must do so in private.
- (2) A person who is conducting, or has conducted, a dispute resolution process must not disclose or use any information or document that is given to the person in the course of conducting that process to any person, unless:
 - (a) the information or document is disclosed or used for the purpose of conducting the process; or
 - (b) the parties to the process consent to the disclosure or use; or

- (c) the information or document is disclosed or used in circumstances specified in regulations made for the purposes of this paragraph; or
 - (d) the disclosure or use is otherwise required or authorised by law.
- (3) Subsections (1) and (2) are civil remedy provisions.
- (4) Evidence of anything said, or any act done, in the dispute resolution process is not admissible in proceedings relating to the dispute:
- (a) in any court; or
 - (b) before a person authorised by a law of the Commonwealth or of a State or Territory to hear evidence; or
 - (c) before a person authorised by the consent of the parties to hear evidence;
- unless:
- (d) the parties agree to the evidence being admissible; or
 - (e) the evidence is admitted in circumstances specified in regulations made for the purposes of this paragraph.
- (5) The Court may make an order imposing a pecuniary penalty on a person who has contravened subsection (1) or (2).
- (6) The pecuniary penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (7) An application for an order under subsection (5) may be made by:
- (a) a party to the dispute in relation to which the dispute resolution process is conducted; or
 - (b) an organisation that has at least one member who is an employee bound by the agreement, and that is entitled to represent the industrial interests of at least one such employee; or
 - (c) a workplace inspector; or
 - (d) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 3 of Part 14.

Section 716

716 Where anti-discrimination or equal opportunity proceedings in progress

A person must not conduct an alternative dispute resolution process in relation to a dispute on a matter if the matter is the subject of proceedings or has already been settled as a result of proceedings, whether before a court or another body, under a law of the Commonwealth or of a State or Territory relating to the prevention of discrimination or to equal opportunity.

Part 14—Compliance

Division 1—Definitions

717 Definitions

In this Part:

applicable provision, in relation to a person, means:

- (a) a term of one of these that applies to the person:
 - (i) an ITEA;
 - (ii) the Australian Fair Pay and Conditions Standard;
 - (iii) an award;
 - (iv) a collective agreement;
 - (v) an order of the Commission (except one made under Division 4 of Part 9); and
- (aa) section 346ZG (no-disadvantage test compensation); and
- (b) section 607 (meal breaks); and
- (c) section 612 (public holidays); and
- (d) section 689 (extended entitlement to parental leave); and
- (e) subsection 691B(1) (prohibition of unauthorised stand downs).

Note 1: Workplace determinations are treated for the purposes of the Act as if they were collective agreements (see section 506). Undertakings are treated the same way (see section 394). Preserved redundancy provisions are treated as if they were workplace agreements (see for example section 399A). This means that a term of one of these is an applicable provision for the purposes of this Part.

Note 2: Division 4 of Part 9 deals with protected action ballots. Breaches of orders made under that Division are dealt with under section 471.

eligible court means:

- (a) the Court; or
- (b) the Federal Magistrates Court; or
- (c) a District, County or Local Court; or
- (d) a magistrate's court; or
- (e) the Industrial Relations Court of South Australia; or

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- (f) any other State or Territory court that is prescribed by the regulations.

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

718 Standing to apply for penalties or remedies under this Division

[see Note 2]

- (1) The table sets out the persons who may apply for a penalty or other remedy under this Division in relation to a breach of an applicable provision.

Standing		
Item	If the applicable provision is...	These persons may apply...
1	a term of an ITEA	(a) an employer that is bound by the ITEA; (b) an employee who is bound by the ITEA; (c) an organisation of employees that represents an employee who is bound by the ITEA (subject to subsection (5)); (d) an inspector
2	a term of the Australian Fair Pay and Conditions Standard	(a) an employee whose employment is subject to the Standard; (b) an organisation of employees (subject to subsection (6)); (c) an inspector

Part 14 Compliance

Division 2 Penalties and other remedies for contravention of applicable provisions

Section 718

Standing

Item	If the applicable provision is...	These persons may apply...
3	a term of an award	(a) an employer that is bound by the award; (b) an employee whose employment is subject to the award; (c) an organisation of employers that has a member affected by the breach; (d) an organisation of employees, a member of which is employed by the respondent employer and whose industrial interests the organisation is entitled, under its eligibility rules, to represent in relation to work carried on by the member for the employer; (da) if the term is an outworker term (within the meaning of Division 7 of Part 10)—a person or eligible entity (within the meaning of Division 7 of Part 10) that is bound by the award; (e) an inspector
4	a term of a collective agreement	(a) an employer that is bound by the agreement; (b) an employee who is bound by the agreement; (c) an organisation of employees (subject to subsection (6)); (d) an inspector
5	a term of an order of the Commission	(a) a person who is bound by the order; (b) an organisation of employers that has a member affected by the breach; (c) an organisation of employees, a member of which is employed by the respondent employer and whose industrial interests the organisation is entitled, under its eligibility rules, to represent in relation to work carried on by the member for the employer; (d) an inspector

Standing

Item	If the applicable provision is...	These persons may apply...
5A	section 346ZG (no-disadvantage test compensation)	(a) an employee to whom section 346ZG applies; (b) an organisation of employees (subject to subsection (6)); (c) an inspector
6	section 607 (meal breaks)	(a) an employee to whom section 607 applies; (b) an organisation of employees (subject to subsection (6)); (c) an inspector
6A	section 612 (public holidays)	(a) an employee to whom section 612 applies; (b) an organisation of employees (subject to subsection (6)); (c) an inspector
7	section 689 (extended entitlement to parental leave)	(a) an employee to whom section 689 applies; (b) an organisation of employees (subject to subsection (6)); (c) an inspector
8	subsection 691B(1) (prohibition of unauthorised stand downs)	(a) an employee to whom subsection 691B(1) applies; (b) an inspector

Note 1: Workplace determinations are treated for the purposes of this Act as if they were collective agreements (see section 506). Undertakings are treated the same way (see section 394). This means that they are covered by table item 4.

- (2) For the purposes of table items 2, 3, 4, 5A, 6, 6A and 7 in subsection (1), a reference to an employee is a reference to an employee who is affected by the breach of the applicable provision.
- (3) For the purposes of table items 3 and 4 in subsection (1), a reference to an employer is a reference to an employer that is affected by the breach of the applicable provision.
- (4) For the purposes of table item 5 in subsection (1), a reference to a person bound by the order is a reference to a person bound by the order who is affected by the breach of the order.

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Division 2 Penalties and other remedies for contravention of applicable provisions

Section 719

- (5) An organisation of employees that represents an employee who is bound by an ITEA must not apply on behalf of the employee for a penalty or other remedy under this Division in relation to a breach of an applicable provision of the ITEA unless:
- (a) the employee has requested, in writing, the organisation to apply on the employee's behalf; and
 - (b) a member of the organisation is employed by the employee's employer; and
 - (c) the organisation is entitled, under its eligibility rules, to represent the industrial interests of the employee in relation to work carried on by the employer for the employer.
- (6) An organisation of employees must not apply for a penalty or other remedy under this Division in relation to a breach of an applicable provision that is:
- (a) a term of the Australian Fair Pay and Conditions Standard; or
 - (b) a term of a collective agreement; or
 - (ba) section 346ZG; or
 - (c) section 607; or
 - (d) section 612; or
 - (e) section 689;
- unless:
- (f) a member of the organisation is employed by the respondent employer; and
 - (g) the breach relates to, or affects, the member of the organisation or work carried on by the member for the employer.

719 Imposition and recovery of penalties

- (1) An eligible court may impose a penalty in accordance with this Division on a person if:
- (a) the person is bound by an applicable provision; and
 - (b) the person breaches the provision.
- (2) Subject to subsection (3), where:
- (a) 2 or more breaches of an applicable provision are committed by the same person; and
 - (b) the breaches arose out of a course of conduct by the person;

the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term.

- (3) Subsection (2) does not apply to a breach of an applicable provision that is committed by a person after an eligible court has imposed a penalty on the person for an earlier breach of the provision.
- (4) The maximum penalty that may be imposed under subsection (1) for a breach of an applicable provision is:
 - (a) 60 penalty units for an individual; or
 - (b) 300 penalty units for a body corporate.
- (5) If, in a proceeding under this section in relation to an ITEA, it appears to the eligible court that a party to the ITEA has suffered loss or damage as a result of a breach of the ITEA by the other party, the court may order the other party to pay the amount of the loss or damage to the first-mentioned party.
- (6) Where, in a proceeding against an employer under this section, it appears to the eligible court that an employee of the employer has not been paid an amount that the employer was required to pay under an applicable provision (except a term of an ITEA), the court may order the employer to pay to the employee the amount of the underpayment.
- (7) Where, in a proceeding against an employer under this section, it appears to the eligible court that the employer has not paid an amount to a superannuation fund that the employer was required, under an applicable provision (except a term of an ITEA), to pay on behalf of a person, the court may order the employer to make a payment to or in respect of that person for the purpose of restoring the person, as far as practicable, to the position that the person would have been in had the employer not failed to pay the amount to the superannuation fund.
- (8) Without limiting the generality of subsection (7), the eligible court may order that the employer pay to the superannuation fund referred to in subsection (7), or another superannuation fund, an amount equal to the amount (in this subsection called the ***unpaid amount***) that the employer failed to pay together with such additional amount as, in the opinion of the court, represents the

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Division 2 Penalties and other remedies for contravention of applicable provisions

Section 720

return that would have accrued in respect of the unpaid amount had it been duly paid by the employer.

- (9) An order must not be made under subsection (6) or (7) in relation to so much of an underpayment as relates to any period more than 6 years before the commencement of the proceeding.
- (10) A proceeding under this section in relation to a breach of an applicable provision must be commenced not later than 6 years after the commission of the breach.

720 Recovery of wages etc.

If an employer is required by an applicable provision (except a term of an ITEA) to pay an amount to an employee or to pay an amount to a superannuation fund on behalf of an employee, the employee, or an inspector on behalf of the employee, may, not later than 6 years after the employer was required to make the payment to the employee or fund, sue for the amount of the payment in an eligible court.

721 Damages for breach of ITEA

- (1) A party to an ITEA who suffers loss or damage as a result of a breach of the ITEA by the other party may recover the amount of the loss or damage in an eligible court.
- (2) The action must be brought within 6 years after the date on which the cause of action arose.

722 Interest up to judgment

- (1) In exercising its powers under subsection 719(5) or (6) or in a proceeding under section 720 or 721, the eligible court must, upon application, unless good cause is shown to the contrary, either:
 - (a) order that there be included in the sum for which an order is made or judgment given, interest at such rate as the eligible court thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date on which the order is made or judgment entered; or

- (b) without proceeding to calculate interest in accordance with paragraph (a), order that there be included in the sum for which an order is made or judgment given, a lump sum instead of any such interest.
- (2) Subsection (1) does not:
- (a) authorise the giving of interest upon interest or of a sum instead of such interest; or
 - (b) apply in relation to any debt upon which interest is payable as of right whether by virtue of an agreement or otherwise; or
 - (c) authorise the giving of interest, or a sum instead of interest, otherwise than by consent, upon any sum for which judgment is given by consent.

723 Interest on judgment

A debt under a judgment or order of an eligible court made under subsection 719(5) or (6) or section 720 or 721 carries interest from the date on which the judgment is entered or order made at such rate as would apply under section 52 of the *Federal Court of Australia Act 1976* if the debt were a judgment debt to which that section applies.

724 Plaintiffs may choose small claims procedure in magistrates' courts

If:

- (a) a person starts an action under section 720 or 721 in a magistrate's court; and
- (b) the person indicates, in a manner prescribed by the regulations under this Act or by rules of court relating to that court, that he or she wants a small claims procedure to apply; the action is to be dealt with under section 725.

725 Small claims procedure

- (1) If an action is to be dealt with under this section, subsections (2), (3) and (4) apply in relation to the action.

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- (2) The procedure is governed by the following conditions:
- (a) the court may not award an amount exceeding \$5,000 or such higher amount as is prescribed;
 - (b) the court may act in an informal manner, is not bound by any rules of evidence, and may act without regard to legal forms and technicalities;
 - (c) at any stage of the action, the court may amend the papers initiating the action if sufficient notice is given to any party adversely affected by the amendment;
 - (d) a person is not entitled to be represented by counsel or solicitor unless the court permits;
 - (e) if the court permits a party to be represented by counsel or solicitor, the court may, if it thinks fit, do so subject to conditions designed to ensure that no other party is unfairly disadvantaged.
- (3) In a case heard in a court of a Territory:
- (a) despite paragraphs (2)(d) and (e), the regulations made under this Act may prohibit or restrict legal representation of the parties; and
 - (b) the regulations made under this Act may provide for the representation of a party in specified circumstances by an officer or employee of an organisation of employees or of an organisation or association of employers.
- (4) In a case heard in a court of a State:
- (a) despite paragraphs (2)(d) and (e), if, in a particular proceeding in that court (whatever the nature of the proceeding), the law of the State prohibits or restricts legal representation of the parties—the regulations made under this Act may prohibit or restrict legal representation of the parties to the same extent as that law; and
 - (b) if, in a particular proceeding in that court (whatever the nature of the proceeding), the law of the State allows representation of a party in that court in some circumstances by officials of bodies representing interests related to the matters in dispute—the regulations made under this Act may provide for representation of a party in specified circumstances by an officer or employee of an organisation of employees or of an organisation or association of employers.

726 Unclaimed moneys

- (1) Where:
 - (a) an employee has left the employment of an employer without having been paid an amount to which the employee is entitled under an applicable provision; and
 - (b) the employer is unable to pay the amount to the former employee because the employer does not know the former employee's whereabouts;the employer may pay the amount to the Commonwealth.
- (2) The Commonwealth holds the amount in trust for the former employee.
- (3) Payment of the amount to the Commonwealth is a sufficient discharge to the employer, as against the former employee, for the amount paid.

Division 3—General provisions relating to civil remedies

727 Operation of this Division

- (1) This Division sets out rules that apply for the purposes of these provisions:
 - (a) section 719; and
 - (b) another provision of this Act that is declared (whether by that provision or by another provision of this Act) to be a civil remedy provision (whether or not for the purposes of a particular segment of this Act); and
 - (c) another provision of this Act that provides a remedy for a contravention of a provision referred to in paragraph (b).
- (2) Those provisions are called the *civil remedy provisions*.

728 Involvement in contravention treated in same way as actual contravention

- (1) A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision.
- (2) For this purpose, a person is *involved in* a contravention of a civil remedy provision if, and only if, the person:
 - (a) has aided, abetted, counselled or procured the contravention; or
 - (b) has induced the contravention, whether by threats or promises or otherwise; or
 - (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
 - (d) has conspired with others to effect the contravention.

729 Civil evidence and procedure rules for civil remedy orders

A court hearing a proceeding under a civil remedy provision must apply the rules of evidence and procedure for civil matters.

730 Recovery of pecuniary penalties

A pecuniary penalty payable under a civil remedy provision may be recovered as a debt due to the person to whom the penalty is payable.

731 Civil proceedings after criminal proceedings

A court must not make an order under a civil remedy provision requiring a person to pay a pecuniary penalty if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct in relation to which the order would be made.

732 Criminal proceedings during civil proceedings

- (1) Proceedings for an order under a civil remedy provision requiring a person to pay a pecuniary penalty are stayed if:
 - (a) criminal proceedings are started or have already been started against the person for an offence; and
 - (b) the offence is constituted by conduct that is substantially the same as the conduct in relation to which the order would be made.
- (2) The proceedings for the order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings for the order are dismissed.

733 Criminal proceedings after civil proceedings

Criminal proceedings may be started against a person for conduct that is substantially the same as conduct in relation to which an order under a civil remedy provision requiring the person to pay a pecuniary penalty could be made regardless of whether such an order has been made against the person.

734 Evidence given in proceedings for pecuniary penalty not admissible in criminal proceedings

Evidence of information given or evidence of production of documents by an individual is not admissible in criminal proceedings against the individual if:

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Division 3 General provisions relating to civil remedies

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- (a) the individual previously gave the evidence or produced the documents in proceedings for an order under a civil remedy provision requiring the individual to pay a pecuniary penalty (whether or not the order was made); and
- (b) the conduct alleged to constitute the offence is substantially the same as the conduct in relation to which the order was sought.

However, this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings under the civil remedy provision.

735 Civil double jeopardy

If a person is ordered to pay a pecuniary penalty under a civil remedy provision in respect of particular conduct, the person is not liable to be ordered to pay a pecuniary penalty under some other provision of a law of the Commonwealth law in respect of that conduct.

Part 15—Right of entry

Division 1—Preliminary

736 Objects of this Part

In addition to the object set out in section 3, this Part has the following objects:

- (a) to establish a framework that balances:
 - (i) the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected breaches of industrial laws, industrial instruments and OHS laws; and
 - (ii) the right of occupiers of premises and employers to conduct their businesses without undue interference or harassment;
- (b) to ensure that permits to enter premises and inspect records are only held by persons who understand their rights and obligations under this Part and who are fit and proper persons to exercise those rights;
- (c) to ensure that occupiers of premises and employers understand their rights and obligations under this Part;
- (d) to ensure that permits are suspended or revoked where rights granted under this Part are misused.

737 Definitions

In this Part:

affected employee means:

- (a) in relation to the entry onto premises under section 747 to investigate a suspected breach—an employee for whom all the following are satisfied:
 - (i) the employee carries out work on the premises;
 - (ii) the employee is a member of the permit holder's organisation;
 - (iii) the suspected breach relates to, or affects, the employee or the work; and

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- (b) in relation to the entry onto premises under section 760 to hold discussions—an employee for whom all the following are satisfied:
 - (i) the employee carries out work on the premises;
 - (ii) the employee is a member of the permit holder's organisation or is eligible to become a member of that organisation;
 - (iii) the employee is one of the employees with whom the discussions are to be held.

affected employer means an employer of affected employees.

authority documents, in relation to the entry onto premises by a permit holder, means:

- (a) if the permit holder entered the premises in reliance on an entry notice:
 - (i) the permit holder's permit; and
 - (ii) the entry notice; or
- (b) if the permit holder entered the premises in reliance on an exemption certificate:
 - (i) the permit holder's permit; and
 - (ii) the exemption certificate; or
- (c) if the permit holder entered the premises in reliance on an order of the Commission:
 - (i) the permit holder's permit; and
 - (ii) the order.

Commonwealth place means a place referred to in paragraph 52(i) of the Constitution, other than the seat of government.

conduct includes an omission.

Court means the Federal Court of Australia or the Federal Magistrates Court.

entry notice means an entry notice in the form approved under section 738.

exemption certificate means an exemption certificate under section 750.

industrial law means:

- (a) this Act; or
- (b) the Registration and Accountability of Organisations Schedule; or
- (c) a law of the Commonwealth, however designated, that regulates the relationships between employers and employees; or
- (d) a State or Territory industrial law.

official, in relation to an organisation, means an officer or employee of the organisation.

OHS law means a law of a State or Territory prescribed by the regulations for the purposes of this definition.

permit means a permit under this Part.

permit holder means a person who holds a permit.

permit holder's organisation, in relation to a permit, means the organisation in respect of which the permit was issued.

repealed Part IX means Part IX of this Act, as in force at any time before the reform commencement.

738 Form of entry notice

- (1) The Industrial Registrar must, in writing, approve a form of entry notice for the purposes of this section.
- (2) The form:
 - (a) must require the following matters to be specified by the person using the form:
 - (i) the premises that are proposed to be entered;
 - (ii) the organisation in respect of which the relevant permit was issued;
 - (iii) any other matters prescribed by the regulations; and
 - (b) must include any other information prescribed by the regulations.
- (3) Subsection (2) does not, by implication, limit the matters that may be contained in, or required by, the form.

739 Extraterritorial extension

In Australia's exclusive economic zone

- (1) This Part, and the rest of this Act so far as it relates to this Part, extend to premises that:
- (a) are in Australia's exclusive economic zone; and
 - (b) are owned or occupied by an Australian employer.

This subsection has effect subject to Australia's obligations under international law concerning jurisdiction over ships that fly the flag of a foreign country and aircraft registered under the law of a foreign country.

On Australia's continental shelf outside exclusive economic zone

- (2) This Part, and the rest of this Act so far as it relates to this Part, extend to premises that:
- (a) are outside the outer limits of Australia's exclusive economic zone, but in, on or over a part of Australia's continental shelf prescribed for the purposes of this subsection; and
 - (b) are connected with the exploration of the continental shelf or the exploitation of its natural resources; and
 - (c) meet the requirements that are prescribed by the regulations for that part.

Note: The regulations may prescribe different requirements relating to different parts of Australia's continental shelf. The regulations may need to do so to give effect to Australia's international obligations.

Definition

- (3) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

Division 2—Issue of permits

740 Issue of permit

- (1) An organisation may apply to a Registrar for the issue of a permit to an official of the organisation. The application must be in writing.
- (2) The Registrar may issue a permit to the official named in the application.
- (3) The permit:
 - (a) must include any conditions that are imposed by the Registrar under section 741; and
 - (b) must include any conditions that are applicable under section 770 at the time of issue.
- (4) The regulations may make provision in relation to the following matters:
 - (a) the form of an application for a permit;
 - (b) the declarations and other documents that must accompany the application;
 - (c) verification, by statutory declaration, of those documents;
 - (d) the form of a permit.

Note: Under the *Criminal Code* and the *Statutory Declarations Act 1959*, penalties apply to false statements etc.

741 Imposition of permit conditions at time of issue

- (1) At the time of issuing a permit, a Registrar may impose conditions that limit the circumstances in which the permit has effect.

Note: For example, the conditions could limit the premises to which the permit applies or the time of day when the permit operates.

- (2) In deciding whether to impose conditions, a Registrar must have regard to the matters specified in subsection 742(2).

742 Permit not to be issued in certain cases

Official not a fit and proper person

- (1) A Registrar must not issue a permit to an official unless the Registrar is satisfied that the official is a fit and proper person to hold the permit.
- (2) For the purposes of subsection (1), the Registrar must have regard to the following 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 respect of conduct of the official;
 - (e) whether any permit issued to the official under this Part, or under the repealed Part IX, 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 an OHS law, has 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;
 - (g) whether a court, or other person or body, under a State or Territory industrial law or an OHS law, has disqualified the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under that law;
 - (h) any other matters that the Registrar considers relevant.

Note: 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.

Banning order or disqualification applies under this Part

- (3) A Registrar must not issue a permit to an official:
- (a) during a disqualification period specified by a Registrar under section 744; or
 - (b) if the issue is prevented by a Commission order under section 770 or 772.

Disqualification etc. applies under State law

- (4) A Registrar must not issue a permit to an official at a time when:
- (a) a suspension, imposed by a court or other person or body, applies under a State or Territory industrial law or an OHS law to a right of entry for industrial or occupational health and safety purposes that the official has under that law; or
 - (b) a disqualification, imposed by a court or other person or body, 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 an OHS law.

Division 3—Expiry, revocation, suspension etc. of permits

743 Expiry of permit

Unless earlier revoked, a permit expires at the earlier of the following times:

- (a) at the end of the third anniversary of the date of issue;
- (b) when the permit holder ceases to be an official of the organisation that applied for the permit.

744 Revocation, suspension etc. by Registrar

- (1) A workplace inspector, or a person prescribed by the regulations, may apply to a Registrar to take action under this section against a permit holder. The application must be made in accordance with the regulations.
- (2) On application made under subsection (1), the Registrar may do any of the following in relation to one or more permits held by the permit holder:
 - (a) revoke the permit (whether or not the permit is already suspended);
 - (b) suspend the permit for a specified period;
 - (c) impose conditions on the permit (whether or not the permit is already suspended).
- (3) In exercising powers under subsection (2), the Registrar must have regard to the matters specified in subsection 742(2).

Registrar must revoke or suspend in certain circumstances

- (4) If the Registrar is satisfied that any of the things mentioned in subsection (5) has happened since the first of the permits was issued, then the Registrar must take the following action in relation to each permit held by the permit holder:
 - (a) if the permit expires before the end of the minimum disqualification period—the Registrar must revoke the permit;

- (b) if the permit does not expire before the end of the minimum disqualification period—the Registrar must either:
 - (i) revoke the permit; or
 - (ii) suspend the permit for a period that does not end earlier than the end of the minimum disqualification period.

The Registrar must also specify a disqualification period for the purposes of section 742. The disqualification period cannot be shorter than the minimum disqualification period.

- (5) The things are:
 - (a) the permit holder was found, in proceedings under this Act, to have contravened section 768; or
 - (b) the permit holder, or another person, was ordered to pay a penalty under this Act in respect of a contravention of this Part by the permit holder; or
 - (c) a court, or other person or body, under a State or Territory industrial law, cancelled or suspended a right of entry for industrial purposes that the permit holder had under that law; or
 - (d) a court, or other person or body, under a State or Territory industrial law, disqualified the permit holder from exercising, or applying for, a right of entry for industrial purposes under that law; or
 - (e) the holder has, in exercising a right of entry under an OHS law, engaged in conduct that was not authorised by that law.
- (6) The Commission may make an order quashing or varying the revocation or suspension of a permit if:
 - (a) the permit was revoked or suspended on grounds set out in paragraph (5)(b) or (e); and
 - (b) the Commission is satisfied, on application by the permit holder, that the revocation or suspension was harsh or unreasonable in the circumstances.

Definition

- (7) In this section:

minimum disqualification period, in relation to action by a Registrar under subsection (4) (the ***current action***), means:

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- (a) if a Registrar has never previously taken action against the permit holder under that subsection—the period of 3 months starting when the current action is taken; or
- (b) if a Registrar has previously taken action against the permit holder under that subsection on only one occasion—the period of 12 months starting when the current action is taken; or
- (c) if a Registrar has previously taken action against the permit holder under that subsection on at least 2 occasions—the period of 5 years starting when the current action is taken.

745 Revoked etc. permit must be returned to Registrar

- (1) If any of the following happens to a permit, then the permit holder must within 7 days return the permit to a Registrar:
 - (a) the permit is revoked;
 - (b) the permit expires;
 - (c) the permit is suspended;
 - (d) conditions are imposed on the permit after it is issued.

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

Note: See Division 8 for enforcement.

- (3) In the case of a suspended permit, a Registrar must, on application by the permit holder or the permit holder's organisation, return the permit to the permit holder after the end of the suspension period if the Registrar is satisfied that the permit is then still in force.

Note: In the meantime the permit might have been revoked or might have expired.

746 Extra conditions to be endorsed on permit

If conditions are imposed on a permit by a Registrar under section 744 or by the Commission under section 770, then the permit ceases to have effect until the Registrar endorses those conditions on the permit.

Division 4—Right of entry to investigate suspected breaches

747 Right of entry to investigate breach

Right of entry for breach of Commonwealth industrial law etc.

- (1) If a permit holder for an organisation suspects, on reasonable grounds, that a breach has occurred, or is occurring, of:
 - (a) this Act; or
 - (b) an ITEA; or
 - (c) an award or collective agreement or an order of the Commission under this Act, being an award, collective agreement or order that is binding on the permit holder's organisation; or
 - (d) an employee collective agreement, or an employer greenfields agreement, that is binding on an employee who is a member of the permit holder's organisation;then, for the purpose of investigating the suspected breach, the permit holder may, during working hours, enter premises if:
 - (e) work is being carried out on the premises by one or more employees who are members of the permit holder's organisation; and
 - (f) the suspected breach relates to, or affects, that work or any of those employees.

No right to investigate ITEA breach unless employee requests

- (2) Paragraph (1)(b) does not apply unless the employee who is a party to the ITEA makes a written request to the organisation to investigate the breach.

748 Rights of permit holder after entering premises

- (1) This section applies if a permit holder has entered premises under section 747 for the purpose of investigating a suspected breach.

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Inspection of work etc. and interviewing employees

- (2) While on the premises, the permit holder may, for the purpose of investigating the suspected breach:
 - (a) during working hours, inspect or view any work, material, machinery, or appliance, that is relevant to the suspected breach; and
 - (b) during working hours, interview the following persons about the suspected breach:
 - (i) employees who are members of the permit holder's organisation;
 - (ii) employees who are eligible to become members of the permit holder's organisation.
- (3) For the avoidance of doubt, a refusal or failure by a person to participate in an interview under this section is not to be treated as conduct covered by section 149.1 of the *Criminal Code*.

Inspection of records while on the premises

- (4) While on the premises, the permit holder may, for the purpose of investigating the suspected breach, require an affected employer to allow the permit holder, during working hours, to inspect and make copies of, any records relevant to the suspected breach (other than non-member records) that:
 - (a) are kept on the premises by the employer; or
 - (b) are accessible from a computer that is kept on the premises by the employer.

Inspection of records at later time

- (5) The permit holder may, for the purpose of investigating the suspected breach, by notice in writing, require an affected employer, on a later day or days specified in the notice:
 - (a) to produce, or allow access to, all records, or particular records, relevant to the suspected breach (other than non-member records), either at the premises or at another place that is agreed between the permit holder and the employer; and
 - (b) to allow the permit holder, during working hours, to inspect and make copies of, any of those records.

The permit holder may give the notice while on the premises or within 5 days after the day on which the permit holder entered the premises.

- (6) A day specified in a notice to an employer under subsection (5) cannot be earlier than 14 days after the notice is given to the employer.
- (7) Before issuing a requirement to an affected employer under subsection (4) or (5), the permit holder must produce the permit holder's authority documents for inspection by the employer.
- (8) If a permit holder has given a notice to an employer under subsection (5) requiring the employer to produce, or allow access to, records at the premises, then the permit holder is entitled to enter the premises during working hours for the purpose of inspecting and copying the records in accordance with the notice.

Note: The *Privacy Act 1998* has rules about the disclosure of personal information.

Application to Commission for access to non-member records

- (9) The permit holder may, for the purposes of investigating the suspected breach, apply to the Commission for either or both of the following orders:
 - (a) an order to allow the permit holder to enter the premises and to inspect and make copies of non-member records that are relevant to the suspected breach;
 - (b) an order to require an affected employer to produce, or allow access to, such records for inspection and copying.
- (10) The Commission may make such an order if it is satisfied that the order is necessary to investigate the suspected breach. Before doing so, the Commission must have regard to the conditions (if any) that apply to the permit holder's permit.
- (11) An application for an order under subsection (9):
 - (a) must be in accordance with the regulations; and
 - (b) must set out the grounds on which the application is made.

Section 749

Definitions

(12) In this section:

non-member record means a record 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 relate to the employment of a person who is a member of the permit holder's organisation.

record relevant to the suspected breach means a record:

- (a) that is relevant to the suspected breach; and
- (b) that is of the following kind:
 - (i) a time sheet;
 - (ii) a pay sheet;
 - (iii) any other record or document, other than an ITEA.

749 Limitation on rights—entry notice or exemption certificate

(1) Section 747 does not authorise entry to premises unless:

- (a) the conditions in subsection (2) of this section are satisfied; or
- (b) the conditions in subsection (3) of this section are satisfied.

(2) The conditions are:

- (a) the permit holder gave an entry notice to the occupier of the premises and gave the notice during working hours at least 24 hours, but not more than 14 days, before the entry; and
- (b) the entry notice specifies section 747 as the section that authorises the entry; and
- (c) the entry notice specifies particulars of the suspected breach or breaches; and
- (d) the entry is on a day specified in the entry notice.

(3) The conditions are:

- (a) the entry is on a day specified in an exemption certificate under section 750 and the premises are the premises specified in the exemption certificate; and
- (b) the permit holder gave a copy of the exemption certificate to the occupier of the premises not more than 14 days before the entry.

- (4) Conduct after entry is not authorised by section 748 unless the conduct is for the purpose of investigating a suspected breach identified in the permit holder's authority documents.

750 Exemption from requirement to provide entry notice

- (1) An organisation may apply to a Registrar for an exemption certificate in respect of the entry onto premises under section 747 to investigate a suspected breach.
- (2) If the Registrar is satisfied that there are reasonable grounds for believing that advance notice of entry onto the premises under section 747 might result in the destruction, concealment or alteration of relevant evidence, then the Registrar must issue an exemption certificate in respect of entry onto those premises.
- (3) An exemption certificate must:
- (a) specify the premises to which it applies; and
 - (b) specify the organisation to which it relates; and
 - (c) specify the day or days on which it operates; and
 - (d) specify particulars of the suspected breach or breaches to which it relates; and
 - (e) specify section 747 as the section that authorises the entry.
- (4) The regulations may make provision in relation to the following matters:
- (a) the form of an application for an exemption certificate;
 - (b) the form of an exemption certificate.

751 Limitation on rights—failure to comply with requests of occupier or affected employer

- (1) This Division does not authorise a permit holder to enter, or remain on, premises if the permit holder fails to produce the permit holder's authority documents for inspection when requested to do so by an affected employer or by the occupier of the premises.
- (2) This Division does not authorise a permit holder to enter, or remain on, premises if:
- (a) an affected employer or the occupier of the premises requests the permit holder to comply with an occupational health and safety requirement that applies to the premises; and

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- (b) the request is a reasonable request; and
- (c) the permit holder fails to comply with the request.

Note: The Commission may make an order under section 771 if the request is unreasonable.

- (3) This Division does not authorise a permit holder to enter, or remain on, premises if:

- (a) an affected employer or the occupier of the premises requests the permit holder to do either or both of the following:
 - (i) to conduct interviews in a particular room or area of the premises;
 - (ii) to take a particular route to reach a particular room or area of the premises; and
- (b) the request is a reasonable request; and
- (c) the permit holder fails to comply with the request.

Note: The Commission may make an order under section 771 if the request is unreasonable.

- (4) For the purposes of subsection (3), if an affected employer or the occupier requests the permit holder to hold discussions in a particular room or area, or to take a particular route to reach a particular room or area, the request is not unreasonable only because it is not the room, area or route that the permit holder would have chosen.

752 Limitation on rights—residential premises

This Division does not authorise a person to enter any part of premises that is used for residential purposes.

753 Limitation on rights—permit conditions

- (1) A permit holder's rights under this Division in respect of a permit are subject to any conditions that apply to the permit.
- (2) Subsection (1) does not apply to rights of a permit holder under an order by the Commission under section 748.

754 Burden of proving reasonable grounds for suspecting breach

Whenever it is relevant to determine whether a permit holder had reasonable grounds for suspecting a breach, as mentioned in

section 747, the burden of proving the existence of reasonable grounds lies on the person asserting the existence of those grounds.

Division 5—Entry for OHS purposes

755 OHS entries to which this Division applies

- (1) This Division has effect in relation to a right to enter premises under an OHS law if:
 - (a) the premises are occupied or otherwise controlled by:
 - (i) a constitutional corporation; or
 - (ii) the Commonwealth; 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 by:
 - (i) a constitutional corporation or the Commonwealth in its capacity as an employer; or
 - (ii) an employee of a constitutional corporation or the Commonwealth; or
 - (iii) a contractor providing services for a constitutional corporation or the Commonwealth; or
 - (e) the right relates to conduct engaged in, or activity undertaken or controlled, by:
 - (i) a constitutional corporation or the Commonwealth in its capacity as an employer; or
 - (ii) an employee of a constitutional corporation or the Commonwealth; or
 - (iii) a contractor providing services for a constitutional corporation or the Commonwealth; or
 - (f) the exercise of the right will have a direct effect on:
 - (i) a constitutional corporation or the Commonwealth in its capacity as an employer; or
 - (ii) an employee of a constitutional corporation or the Commonwealth; or
 - (iii) a contractor providing services for a constitutional corporation or the Commonwealth.

(2) In this section:

constitutional corporation includes:

- (a) a Commonwealth authority; and
- (b) a body corporate incorporated in a Territory.

756 Permit required for OHS entry

- (1) An official of an organisation who has a right under an OHS law to enter premises must not exercise that right unless the official:
 - (a) holds a permit under this Part; and
 - (b) exercises the right during working hours.

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

Note: See Division 8 for enforcement.

757 Rights to inspect employment records after entering premises

- (1) A person who:
 - (a) is required to enter premises under an OHS law in accordance with section 756; and
 - (b) has a right under the OHS law to inspect or otherwise access employment records on the premises;must not exercise the right unless he or she has complied with subsection (2).

(2) At least 24 hours before the entry, the person must have given the occupier of the premises written notice of his or her intention to exercise the right and the reasons for doing so.

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

Note: See Division 8 for enforcement.

Definition

(4) In this section:

employment record means a record relating to the employment of an employee:

- (a) that relates to any of the following matters:
 - (i) hours of work;

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- (ii) overtime;
 - (iii) remuneration or other benefits;
 - (iv) leave;
 - (v) superannuation contributions;
 - (vi) termination of employment;
 - (vii) type of employment (for example, permanent, temporary, casual, full-time or part-time);
 - (viii) personal details of the employee;
 - (ix) any other matter prescribed by the regulations; or
- (b) that sets out the kind of industrial instrument that regulates the employment of the employee (for example, an ITEA, a collective agreement, an award or a contract of employment).

758 Limitation on OHS entry—failure to comply with requests of occupier

- (1) A permit holder must not enter, or remain on, premises under an OHS law unless the permit holder produces his or her permit for inspection when requested to do so by the occupier of the premises.
- (2) Subsection (1) is a civil remedy provision.
- Note: See Division 8 for enforcement.
- (3) A permit holder must not enter, or remain on, premises under an OHS law if:
- (a) the occupier of the premises requests the permit holder to comply with an occupational health and safety requirement that applies to the premises; and
 - (b) the request is a reasonable request; and
 - (c) the permit holder fails to comply with the request.
- Note: The Commission may make an order under section 771 if the request is unreasonable.
- (4) Subsection (3) is a civil remedy provision.
- Note: See Division 8 for enforcement.

759 Limitation on OHS entry—permit conditions

A permit holder's right to enter premises under an OHS law in accordance with section 756 is subject to any conditions that apply to the permit.

Division 6—Right of entry to hold discussions with employees

760 Right of entry to hold discussions with employees

A permit holder for an organisation may enter premises for the purposes of holding discussions with any eligible employees who wish to participate in those discussions. For this purpose, *eligible employee* means any employee who:

- (a) on the premises, carries out work that is covered by an award or collective agreement that is binding on the permit holder's organisation; and
- (b) is a member of the permit holder's organisation or is eligible to become a member of that organisation.

761 Limitation on rights—times of entry and discussions

The permit holder may only enter the premises under section 760 during working hours and may only hold the discussions during the employees' mealtime or other breaks.

762 Limitation on rights—conscientious objection certificates

- (1) This Division does not authorise entry to premises, or subsequent conduct on the premises, if all of the following conditions are satisfied:
 - (a) no more than 20 employees are employed to work at the premises;
 - (b) all the employees at the premises are employed by an employer who is the holder of a conscientious objection certificate in force under section 180 of the Registration and Accountability of Organisations Schedule, that has been endorsed by a Registrar under subsection (2) of this section, or under section 285C of the repealed Part IX;
 - (c) none of the employees employed at the premises is a member of an organisation.
- (2) A Registrar may, on the application of an employer, endorse a certificate issued to that employer under section 180 of the

Registration and Accountability of Organisations Schedule if the Registrar is satisfied that the employer is a practising member of a religious society or order whose doctrines or beliefs preclude membership of an organisation or body other than the religious society or order of which the employer is a member.

- (3) An application under subsection (2) may be made at the time of an application under section 180 of the Registration and Accountability of Organisations Schedule or at any later time.
- (4) The endorsement of a Registrar under subsection (2) remains in force for the period that the certificate remains in force.

Note: A certificate issued under section 180 of the Registration and Accountability of Organisations Schedule remains in force for the period (not exceeding 12 months) specified in the certificate, but may be renewed. A Registrar's endorsement under subsection (2) does not remain in force when a certificate is renewed, but a new application for endorsement may be made.

763 Limitation on rights—entry notice

This Division does not authorise entry to premises, or subsequent conduct on the premises, unless all the following conditions are satisfied:

- (a) the permit holder gave an entry notice to the occupier of the premises at least 24 hours, but not more than 14 days, before the entry;
- (b) the entry notice specifies section 760 as the section that authorises the entry;
- (c) the entry is on a day specified in the entry notice.

764 Limitation on rights—residential premises

This Division does not authorise a person to enter any part of premises that is used for residential purposes.

765 Limitation on rights—failure to comply with requests of occupier or affected employer

- (1) This Division does not authorise a permit holder to enter, or remain on, premises if the permit holder fails to produce the permit holder's authority documents for inspection when requested to do so by an affected employer or by the occupier of the premises.

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- (2) This Division does not authorise a permit holder to enter, or remain on, premises if:
- (a) an affected employer or the occupier of the premises requests the permit holder to comply with an occupational health and safety requirement that applies to the premises; and
 - (b) the request is a reasonable request; and
 - (c) the permit holder fails to comply with the request.

Note: The Commission may make an order under section 771 if the request is unreasonable.

- (3) This Division does not authorise a permit holder to enter, or remain on, premises if:
- (a) an affected employer or the occupier of the premises requests the permit holder to do either or both of the following:
 - (i) to hold discussions in a particular room or area of the premises;
 - (ii) to take a particular route to reach a particular room or area of the premises; and
 - (b) the request is a reasonable request; and
 - (c) the permit holder fails to comply with the request.

Note: The Commission may make an order under section 771 if the request is unreasonable.

- (4) For the purposes of subsection (3), if an affected employer or the occupier requests the permit holder to hold discussions in a particular room or area, or to take a particular route to reach a particular room or area, the request is not unreasonable only because it is not the room, area or route that the permit holder would have chosen.

766 Limitation on rights—permit conditions

A permit holder's rights under this Division in respect of a permit are subject to any conditions that apply to the permit.

Division 7—Prohibitions

767 Hindering, obstruction etc. in relation to this Part

- (1) A permit holder exercising, or seeking to exercise, rights:
 - (a) under section 747, 748 or 760; or
 - (b) under an OHS law in accordance with section 756 or 757;must not intentionally hinder or obstruct any person, or otherwise act in an improper manner.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 8 for enforcement.
- (3) A person must not refuse or unduly delay entry to premises by a permit holder who is entitled to enter the premises:
 - (a) under section 747, subsection 748(8) or (10) or section 760; or
 - (b) under an OHS law in accordance with section 756.
- (4) Subsection (3) is a civil remedy provision.

Note: See Division 8 for enforcement.
- (5) An employer must not refuse or fail to comply with a requirement under subsection 748(4) or (5).
- (6) Subsection (5) is a civil remedy provision.

Note: See Division 8 for enforcement.
- (7) A person must not otherwise intentionally hinder or obstruct a permit holder exercising rights:
 - (a) under section 747, 748 or 760; or
 - (b) under an OHS law in accordance with section 756 or 757.
- (8) Subsection (7) is a civil remedy provision.

Note: See Division 8 for enforcement.
- (9) To avoid doubt, a failure to agree on a place as mentioned in paragraph 748(5)(a) does not constitute hindering or obstructing a permit holder exercising rights under section 748.

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- (10) Without limiting subsection (7), that subsection:
- (a) extends to hindering or obstructing that occurs after the entry notice is given but before the permit holder enters the premises; and
 - (b) applies whether or not the person who is hindering or obstructing knows at the time which permit holder will be exercising the rights in respect of the entry notice.

Note: For example, if an entry notice is given to the occupier and a person then destroys, conceals or manufactures evidence relating to the suspected breach, that conduct would amount to hindering or obstructing.

768 Misrepresentations about right of entry

- (1) A person must not, in the circumstances mentioned in subsection (2), engage in conduct:
- (a) with the intention of giving a second person the impression;
or
 - (b) reckless as to whether a second person would get the impression;
- that the first person, or a third person, is authorised by this Part to do a particular thing.
- (2) The circumstances are:
- (a) the first person or the third person (as the case requires) is not authorised by this Part to do that thing; and
 - (b) the first person knows, or has reasonable grounds to believe, that the first person or the third person (as the case requires) is not authorised by this Part to do that thing.
- (3) Subsection (1) is a civil remedy provision.

Note: See Division 8 for enforcement.

Division 8—Enforcement

769 Penalties etc. for contravention of civil remedy provisions

- (1) The Court, on application by an eligible person, may make one or more of the following orders in relation to a person (the *defendant*) who has contravened a civil remedy provision of this Part:
 - (a) an order imposing a pecuniary penalty on the defendant;
 - (b) an order requiring the defendant to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention;
 - (c) any other order that the Court considers appropriate.
- (2) The maximum pecuniary penalty under paragraph (1)(a) is 300 penalty units if the defendant is a body corporate and otherwise 60 penalty units.
- (3) The orders that may be made under paragraph (1)(c) include:
 - (a) injunctions; and
 - (b) any other orders that the Court considers necessary to stop the conduct or remedy its effects.
- (4) Each of the following is an *eligible person* for the purposes of this section:
 - (a) a workplace inspector;
 - (b) a person affected by the contravention;
 - (c) a person prescribed by the regulations for the purposes of this paragraph.
- (5) A regulation prescribing persons for the purposes of paragraph (4)(c) may provide that a person is prescribed only in relation to circumstances specified in the regulation.

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

Division 9—Powers of the Commission

770 Orders by Commission for abuse of system

- (1) If the Commission is satisfied that an organisation, or any official of an organisation, has abused the rights conferred by this Part, then the Commission may make whatever orders it considers appropriate to restrict the rights of the organisation, or officials of the organisation, under this Part.
- (2) The Commission may make the orders:
 - (a) on its own initiative; or
 - (b) on application by a workplace inspector.
- (3) The orders may include:
 - (a) an order that revokes or suspends some or all of the permits that have been issued in respect of the organisation; and
 - (b) an order that imposes limiting conditions on some or all of the permits that have been issued in respect of the organisation or that might in future be issued in respect of the organisation; and
 - (c) an order that bans, for a specified period, the issue of permits in respect of the organisation, either generally or to specified persons.

For the purposes of this subsection, *limiting condition* means a condition that limits the circumstances in which a permit has effect.

- (4) An organisation, or an official of an organisation, who is subject to an order under this section must comply with the order.
- (5) Subsection (4) is a civil remedy provision.

Note: See Division 8 for enforcement.
- (6) The powers of the Commission under this section are exercisable by:
 - (a) the President; or
 - (b) a Presidential Member assigned by the President for the purposes of the matter concerned; or
 - (c) a Full Bench, if the President so directs.

- (7) Without limiting subsection (1), a permit holder abuses rights conferred by this Part if, in exercising rights under Division 6, the permit holder engages in recruitment conduct that is unduly disruptive, either because the permit holder's exercise of powers of entry is excessive in the circumstances or for some other reason.
- (8) In this section:
- recruitment conduct* means encouraging employees to become members of an organisation.

771 Unreasonable requests by occupier or affected employer

- (1) If the Commission is satisfied that:
- (a) an affected employer or the occupier of premises has made a request to a permit holder as mentioned in section 751, 758 or 765; and
 - (b) the request is not a reasonable request;
- then the Commission may make whatever orders it considers appropriate in respect of the rights of the organisation, or officials of the organisation, to investigate breaches as mentioned in section 747, to enter premises under an OHS law in accordance with section 756 or to hold discussions with employees as mentioned in section 760, as the case requires.
- Note: Unreasonable requests might amount to a breach of subsection 767(7).
- (2) Without limiting subsection (1), the Commission may order that, for a specified period, the permit holder who was exercising or seeking to exercise rights under section 748 or 760 or under an OHS law in accordance with section 756 or 757 is entitled to enter specified premises, or a specified part of specified premises, for a specified period, and exercise those rights.
- (3) The powers of the Commission under this section are exercisable by:
- (a) the President; or
 - (b) a Presidential Member assigned by the President for the purposes of the matter concerned; or
 - (c) a Full Bench, if the President so directs.
- (4) The Commission may make an order under this section on its own initiative or on application in accordance with the regulations.

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772 Disputes about the operation of this Part

- (1) The Commission may make orders for the purposes of settling disputes about the operation of this Part.
- (2) The Commission may make orders under subsection (1) on application by:
 - (a) a permit holder; or
 - (b) a permit holder's organisation; or
 - (c) an affected employer; or
 - (d) an occupier of, or an employer who employs employees who carry out work on, OHS premises.
- (3) In making orders under subsection (1), the Commission:
 - (a) must have regard to fairness between the parties concerned; and
 - (b) must not confer rights that are additional to, or inconsistent with, rights exercisable under this Part.
- (4) However, the Commission does have power, under subsection (1), to:
 - (a) revoke or suspend a permit issued to a person under this Part; or
 - (b) impose limiting conditions on a permit issued to a person under this Part.

If the Commission does so, it may make any order that it considers appropriate, for the purpose of settling the dispute, about the issue of any further permit to the person, or of any permit or further permit to any other person, under this Part.

- (5) In this section:

limiting condition means a condition that limits the circumstances in which a permit has effect.

OHS premises means premises in relation to which a person must hold a permit in order to exercise a right of entry under an OHS law.

773 Powers of inspection

- (1) For the purposes of dealing with a proceeding under this Part, a member of the Commission may at any time during working hours do one or more of the following:
 - (a) enter prescribed premises;
 - (b) inspect or view any work, material, machinery, appliance, article, document or other thing on the prescribed premises;
 - (c) interview, on the prescribed premises, any employee who is usually engaged in work on the prescribed premises.
- (2) In this section:

prescribed premises means premises in relation to which a person must hold a permit in order to exercise a right of entry under:

- (a) this Part; or
- (b) an OHS law.

774 Parties to proceedings

The Commission may direct that parties be joined or struck out as parties to proceedings under this Part.

775 Kinds of orders

The orders that the Commission may make under this Part include the following:

- (a) orders by consent of the parties to the proceedings;
- (b) provisional or interim orders;
- (c) orders including, or varying orders to include, a provision to the effect that engaging in conduct in breach of a specified term of the order is to be taken to constitute the commission of a separate breach of the term on each day on which the conduct continues.

776 Relief not limited to claim

In making an order in proceedings under this Part, the Commission is not restricted to the specific relief claimed by the parties concerned, but may include in the order anything which the

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Commission considers necessary or expedient for the purposes of dealing with the proceeding.

777 Publishing orders

- (1) If the Commission makes an order under this Part, the Commission must promptly:
 - (a) reduce the order to writing that:
 - (i) is signed by at least one member of the Commission; and
 - (ii) shows the day on which it is signed; and
 - (b) give to a Registrar:
 - (i) a copy of the order; and
 - (ii) a list specifying each party who appeared at the hearing of the proceeding concerned.
- (2) The Commission must ensure that an order under this Part is expressed in plain English and is easy to understand in structure and content.
- (3) A Registrar who receives a copy of an order under subsection (1) must promptly:
 - (a) provide a copy of:
 - (i) the order; and
 - (ii) any written reasons received by the Registrar for the order;to each party shown on the list given to the Registrar under subparagraph (1)(b)(ii); and
 - (b) ensure that copies of each of the following are available for inspection at each registry:
 - (i) the order;
 - (ii) any written reasons received by the Registrar for the order.
- (4) The Industrial Registrar must ensure that the following are published as soon as practicable:
 - (a) an order under this Part;
 - (b) any written reasons for the order that are received by a Registrar.

- (5) If a member of the Commission ceases to be a member:
- (a) after an order under this Part has been made by the Commission constituted by the member; but
 - (b) before the order has been reduced to writing or before it has been signed by the member;
- a Registrar must reduce the order to writing, sign it and seal it with the seal of the Commission, and the order has effect as if it had been signed by the member of the Commission.

Part 16—Freedom of association

Division 1—Preliminary

778 Objects of Part

In addition to the object set out in section 3, this Part has the following objects:

- (a) to ensure that employers, employees and independent contractors are free to become, or not become, members of industrial associations;
- (b) to ensure that employers, employees and independent contractors are not discriminated against or victimised because they are, or are not, members or officers of industrial associations;
- (c) to provide effective relief to employers, employees and independent contractors who are prevented or inhibited from exercising their rights to freedom of association;
- (d) to provide effective remedies to penalise and deter persons who engage in conduct which prevents or inhibits employers, employees or independent contractors from exercising their rights to freedom of association.

779 Definitions

- (1) In this Part:

bargaining services means services provided by (or on behalf of) an industrial association in relation to an agreement, or a proposed agreement, under Part 8 (including the negotiation, making, approval, lodgment, operation, extension, variation or termination of the agreement).

bargaining services fee means a fee (however described) payable:

- (a) to an industrial association; or
- (b) to someone else in lieu of an industrial association; wholly or partly for the provision, or purported provision, of bargaining services, but does not include membership dues.

Commonwealth place means a place referred to in paragraph 52(i) of the Constitution, other than the seat of government.

conduct includes an omission.

Court means the Federal Court of Australia or the Federal Magistrates Court.

industrial association means:

- (a) an association of employees and/or independent contractors, or an association of employers, that is registered or recognised as such an association (however described) under an industrial law; or
 - (b) an association of employees and/or independent contractors a principal purpose of which is the protection and promotion of their interests in matters concerning their employment, or their interests as independent contractors, as the case requires; or
 - (c) an association of employers a principal purpose of which is the protection and promotion of their interests in matters concerning employment and/or independent contractors;
- and includes a branch of such an association, and an organisation.

industrial body means:

- (a) the Commission; or
- (b) a court or commission, however designated, exercising under an industrial law powers and functions corresponding to those conferred on the Commission by this Act; or
- (c) a court or commission, however designated, exercising under an industrial law powers and functions corresponding to those conferred on the Commission by the Registration and Accountability of Organisations Schedule.

industrial instrument means an award or agreement, however designated, that:

- (a) is made under or recognised by an industrial law; and
- (b) concerns the relationship between an employer and the employer's employees, or provides for the prevention or settlement of a dispute between an employer and the employer's employees.

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industrial law means this Act, the Registration and Accountability of Organisations Schedule or a law, however designated, of the Commonwealth or of a State or Territory that regulates the relationships between employers and employees or provides for the prevention or settlement of disputes between employers and employees.

objectionable provision has the meaning given by section 810.

office, in relation to an organisation or industrial association or a branch of an organisation or industrial association, has the meaning given by section 781.

officer, in relation to an industrial association, means:

- (a) a person who holds an office in the association; or
- (b) a delegate or other representative of the association; or
- (c) an employee of the association.

organisation includes a branch of an organisation.

threat means a threat of any kind, whether direct or indirect and whether express or implied.

- (2) For the purposes of this Part, the following conduct is taken to be conduct of an industrial association:
 - (a) conduct of the committee of management of the industrial association;
 - (b) conduct of an officer or agent of the industrial association acting in that capacity;
 - (c) conduct of a member, or group of members, of the industrial association where the conduct 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) conduct of 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.

- (3) Paragraphs (2)(c) and (d) do not apply if:
- (a) a 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 reasonable steps to prevent the action.
- (4) A reference in this Part, or in regulations made for the purposes of this Part, to an independent contractor is not confined to a natural person.

780 Meaning of industrial action

For the purposes of this Part, section 420 has effect as if the words *employer*, *employee* and *employment* had their ordinary meaning.

781 Meaning of office

- (1) In this Part:

office, in relation to an association, means:

- (a) an office of president, vice president, secretary or assistant secretary of the association; or
- (b) the office of a voting member of a collective body of the association, being a collective body that has power in relation to any of the following functions:
 - (i) the management of the affairs of the association;
 - (ii) the determination of policy for the association;
 - (iii) the making, alteration or rescission of rules of the association;
 - (iv) the enforcement of rules of the association, or the performance of functions in relation to the enforcement of such rules; or
- (c) an office the holder of which is, under the rules of the association, entitled to participate directly in any of the functions referred to in subparagraphs (b)(i) and (iv), other than an office the holder of which participates only in accordance with directions given by a collective body or another person for the purpose of implementing:
 - (i) existing policy of the association; or
 - (ii) decisions concerning the association; or

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- (d) an office the holder of which is, under the rules of the association, entitled to participate directly in any of the functions referred to in subparagraphs (b)(ii) and (iii); or
 - (e) the office of a person holding (whether as trustee or otherwise) property:
 - (i) of the association; or
 - (ii) in which the association has a beneficial interest.
- (2) In subsection (1):
- association* means an organisation or branch of an organisation, or an industrial association or branch of an industrial association.
- (3) A reference in this Part to an office in an organisation or industrial association includes a reference to an office in a branch of the organisation or association.

Division 2—Conduct to which this Part applies

782 Application

Divisions 3 to 8 of this Part apply only to the extent provided in this Part.

783 Organisations

This Part applies to:

- (a) conduct by an organisation; and
- (b) conduct by an officer of an organisation acting in that capacity; and
- (c) conduct carried out with a purpose or intent relating to a person's membership or non-membership of an organisation.

784 Matters arising under this Act or the Registration and Accountability of Organisations Schedule

- (1) This Part applies to conduct carried out with a purpose or intent relating to a person's participation or non-participation (in any capacity) in:
 - (a) any proceedings under this Act; or
 - (b) any other activity provided for by this Act; or
 - (c) any proceedings under the Registration and Accountability of Organisations Schedule; or
 - (d) any other activity provided for by the Registration and Accountability of Organisations Schedule.
- (2) This Part applies to conduct carried out with a purpose or intent relating to:
 - (a) the fact that an award or a workplace agreement applies to a person's employment; or
 - (b) the fact that a person is bound by an award or a workplace agreement.

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785 Constitutional corporations

- (1) This Part applies to the following conduct:
- (a) conduct by a constitutional corporation;
 - (b) conduct against a constitutional corporation;
 - (c) conduct that adversely affects a constitutional corporation;
 - (d) conduct carried out with intent to adversely affect a constitutional corporation;
 - (e) conduct that directly affects a person in the capacity of:
 - (i) an employee, or prospective employee, of a constitutional corporation; or
 - (ii) a contractor, or prospective contractor, of a constitutional corporation;
 - (f) conduct carried out with intent to directly affect a person in the capacity of:
 - (i) an employee, or prospective employee, of a constitutional corporation; or
 - (ii) a contractor, or prospective contractor, of a constitutional corporation;
 - (g) conduct that consists of advising, encouraging or inciting a constitutional corporation:
 - (i) to take, or not to take, particular action in relation to another person; or
 - (ii) to threaten to take, or not to take, particular action in relation to another person.

- (2) In this section:

constitutional corporation includes a body corporate incorporated in a Territory.

786 Commonwealth and Commonwealth authorities

This Part applies to the following conduct:

- (a) conduct by the Commonwealth or a Commonwealth authority;
- (b) conduct that affects, or is carried out with intent to affect, the Commonwealth, or a Commonwealth authority, in its relationships with its employees or contractors;

- (c) conduct that affects, or is carried out with intent to affect, a person in the capacity of an employee or contractor of the Commonwealth or of a Commonwealth authority.

787 Territories and Commonwealth places

This Part applies to conduct in a Territory or a Commonwealth place.

788 Extraterritorial extension

In Australia's exclusive economic zone

- (1) This Part, and the rest of this Act so far as it relates to this Part, extend to the following conduct in Australia's exclusive economic zone:
 - (a) conduct that:
 - (i) is by an organisation, an Australian-based employee or a group of persons including either an organisation or an Australian-based employee; and
 - (ii) affects adversely, or is intended to affect adversely, an Australian employer;
 - (b) conduct that:
 - (i) is by an Australian employer or a group including an Australian employer; and
 - (ii) affects adversely, or is intended to affect adversely, an Australian-based employee, whether alone or with other persons;
 - (c) conduct that affects adversely, or is intended to affect adversely, either an independent contractor who has a connection with Australia that is prescribed for the purposes of this paragraph or a group including such an independent contractor.

On Australia's continental shelf outside exclusive economic zone

- (2) This Part, and the rest of this Act so far as it relates to this Part, extend to the following conduct outside the outer limits of Australia's exclusive economic zone and in, on or over a part of Australia's continental shelf prescribed by the regulations for the purposes of this subsection:

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- (a) conduct that:
 - (i) is by an organisation, an Australian-based employee or a group of persons including either an organisation or an Australian-based employee; and
 - (ii) affects adversely, or is intended to affect adversely, an Australian employer; and
 - (iii) meets the requirements prescribed by the regulations for that part of Australia's continental shelf;
- (b) conduct that:
 - (i) is by an Australian employer or a group including an Australian employer; and
 - (ii) affects adversely, or is intended to affect adversely, an Australian-based employee, whether alone or with other persons; and
 - (iii) meets the requirements prescribed by the regulations for that part of Australia's continental shelf;
- (c) conduct that:
 - (i) affects adversely, or is intended to affect adversely, either an independent contractor who has a connection with Australia that is prescribed for the purposes of this subparagraph or a group including such an independent contractor; and
 - (ii) meets the requirements prescribed by the regulations for that part of Australia's continental shelf.

Note: The regulations may prescribe different requirements relating to different parts of Australia's continental shelf. The regulations may need to do so to give effect to Australia's international obligations.

Outside Australia's exclusive economic zone and continental shelf

- (3) This Part, and the rest of this Act so far as it relates to this Part, extend to the following conduct outside Australia and neither in Australia's exclusive economic zone nor in, on or over a part of Australia's continental shelf described in subsection (2):
 - (a) conduct that:
 - (i) is by an organisation, an Australian-based employee or a group of persons including either an organisation or an Australian-based employee; and
 - (ii) affects adversely, or is intended to affect adversely, an Australian employer;

- (b) conduct that:
 - (i) is by an Australian employer or a group including an Australian employer; and
 - (ii) affects adversely, or is intended to affect adversely, an Australian-based employee, whether alone or with other persons;
- (c) conduct that affects adversely, or is intended to affect adversely, either an independent contractor who has a connection with Australia that is prescribed for the purposes of this paragraph or a group including such an independent contractor.

Definition

- (4) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

Division 3—General prohibitions relating to freedom of association

789 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:
 - (a) to become, or not become, an officer or member of an industrial association; or
 - (b) to remain, or cease to be, an officer or member of an industrial association.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

790 False or misleading statements about membership

- (1) A person must not make a false or misleading representation about:
 - (a) another person's obligation:
 - (i) to be, or become, an officer or member of an industrial association; or
 - (ii) not to be, not to become or to cease to be, an officer or member of an industrial association; or
 - (b) another person's obligation to disclose whether he or she, or a third person, is, or has been, an officer or member of an industrial association or of a particular industrial association; or
 - (c) the need for another person to be, or not to be, an officer or member of an industrial association, or of a particular industrial association, in order for the other person to obtain the benefit of an industrial instrument.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

791 Industrial action for reasons relating to membership

- (1) A person must not organise or take, or threaten to organise or take, industrial action against another person for the reason that, or for reasons that include the reason that, a person:
- (a) is, has been, proposes to become or has at any time proposed to become an officer or member of an industrial association;
or
 - (b) is not, does not propose to become or proposes to cease to be, an officer or member of an industrial association.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

Division 4—Conduct by employers etc.

792 Dismissal etc. of members of industrial associations etc.

- (1) An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:
 - (a) dismiss an employee;
 - (b) injure an employee in his or her employment;
 - (c) alter the position of an employee to the employee's prejudice;
 - (d) refuse to employ another person as an employee;
 - (e) discriminate against another person in the terms or conditions on which the employer offers to employ the other person as an employee.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.
- (3) For the purposes of paragraph (1)(d), an employer does not refuse to employ another person if the employer does not intend to employ anyone.
- (4) An employer does not contravene subsection (1) because of paragraph 793(1)(i) unless the entitlement described in that paragraph is the sole or dominant reason for the employer doing any of the things described in paragraphs (1)(a), (b), (c), (d) and (e) of this section.
- (5) A person must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:
 - (a) terminate a contract for services that he or she has entered into with an independent contractor;
 - (b) injure the independent contractor in relation to the terms and conditions of the contract for services;
 - (c) alter the position of the independent contractor to the independent contractor's prejudice;
 - (d) refuse to engage another person as an independent contractor;

- (e) discriminate against another person in the terms or conditions on which the person offers to engage the other person as an independent contractor.
- (6) Subsection (5) is a civil remedy provision.
Note: See Division 9 for enforcement.
- (7) For the purposes of paragraph (5)(d), a person does not refuse to engage another person if the person does not intend to engage anyone.
- (8) A person does not contravene subsection (5) because of paragraph 793(1)(i) unless the entitlement described in that paragraph is the sole or dominant reason for the person doing any of the things described in paragraphs (5)(a), (b), (c), (d) and (e) of this section.

793 Prohibited reasons

- (1) Conduct referred to in subsection 792(1) or (5) is for a *prohibited reason* if it is carried out because the employee, independent contractor or other person concerned:
 - (a) is, has been, proposes to become or has at any time proposed to become an officer, delegate or member of an industrial association; or
 - (b) is not, does not propose to become or proposes to cease to be, a member of an industrial association; or
 - (c) in the case of a refusal to engage another person as an independent contractor—has one or more employees who are not, or do not propose to become, members of an industrial association; or
 - (d) has not paid, or does not propose to pay, a fee (however described) to an industrial association; or
 - (e) has refused or failed to join in industrial action; or
 - (f) in the case of an employee—has refused or failed to agree or consent to, or vote in favour of, the making of an agreement to which an industrial association of which the employee is a member would be a party; or
 - (g) has made, proposes to make or has at any time proposed to make an application to an industrial body for an order under an industrial law for the holding of a secret ballot; or

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- (h) has participated in, proposes to participate in or has at any time proposed to participate in a secret ballot ordered by an industrial body under an industrial law; or
- (i) is entitled to the benefit of an industrial instrument, an order of an industrial body or the Australian Fair Pay and Conditions Standard; or
- (j) has made or proposes to make any inquiry or complaint to a person or body having the capacity under an industrial law to seek:
 - (i) compliance with that law; or
 - (ii) the observance of a person's rights under an industrial instrument; or
- (k) has participated in, proposes to participate in or has at any time proposed to participate in a proceeding under an industrial law; or
- (l) has given or proposes to give evidence in a proceeding under an industrial law; or
- (m) in the case of an employee, or an independent contractor, who is a member of an industrial association that is seeking better industrial conditions—is dissatisfied with his or her conditions; or
- (n) in the case of an employee or an independent contractor—has absented himself or herself from work without leave if:
 - (i) the absence was for the purpose of carrying out duties or exercising rights as an officer of an industrial association; and
 - (ii) the employee or independent contractor applied for leave before absenting himself or herself and leave was unreasonably refused or withheld; or
- (o) as an officer or member of an industrial association, has done, or proposes to do, an act or thing for the purpose of furthering or protecting the industrial interests of the industrial association, being an act or thing that is:
 - (i) lawful; and
 - (ii) within the limits of an authority expressly conferred on the employee, independent contractor or other person by the industrial association under its rules; or

- (p) in the case of an employee or independent contractor—has not paid, has not agreed to pay, or does not propose to pay, a bargaining services fee.
- (2) If:
- (a) a threat is made to engage in conduct referred to in subsection 792(1) or (5); and
 - (b) one of the prohibited reasons in subsection (1) of this section refers to a person doing or proposing to do a particular act, or not doing or proposing not to do a particular act; and
 - (c) the threat is made with the intent of dissuading or preventing the person from doing the act, or coercing the person to do the act, as the case requires;
- the threat is taken to have been made for that prohibited reason.

794 Inducements to cease membership etc. of industrial associations etc.

- (1) An employer, or a person who has engaged an independent contractor, must not (whether by threats or promises or otherwise) induce an employee, or the independent contractor, as the case requires:
- (a) to become an officer or member of an industrial association; or
 - (b) to remain an officer or member of an industrial association; or
 - (c) not to become an officer or member of an industrial association; or
 - (d) to cease to be an officer or member of an industrial association.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

Division 5—Conduct by employees etc.

795 Cessation of work

- (1) An employee or independent contractor must not cease work in the service of his or her employer, or of the person who engaged the independent contractor, as the case requires, because the employer or person:
 - (a) is an officer or member of an industrial association; or
 - (b) is entitled to the benefit of an industrial instrument or an order of an industrial body; or
 - (c) has made or proposes to make any inquiry or complaint to a person or body having the capacity under an industrial law to seek:
 - (i) compliance with that law; or
 - (ii) the observance of a person's rights under an industrial instrument; or
 - (d) has participated in, proposes to participate in or has at any time proposed to participate in any proceedings under an industrial law; or
 - (e) has given evidence in a proceeding under an industrial law.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

Division 6—Conduct by industrial associations etc.

796 Industrial associations acting against employers

- (1) An industrial association, or an officer or member of an industrial association, must not organise or take, or threaten to organise or take, industrial action against an employer because the employer is an officer or member of an industrial association.
- (2) Subsection (1) is a civil remedy provision.
Note: See Division 9 for enforcement.
- (3) An industrial association, or an officer or member of an industrial association, must not organise or take, or threaten to organise or take, industrial action against an employer with intent to coerce the employer:
 - (a) to become an officer or member of an industrial association;
or
 - (b) to remain an officer or member of an industrial association;
or
 - (c) not to become an officer or member of an industrial association; or
 - (d) to cease to be an officer or member of an industrial association; or
 - (e) to pay a fee (however described) to an industrial association.
- (4) Subsection (3) is a civil remedy provision.
Note: See Division 9 for enforcement.
- (5) An industrial association, or an officer or member of an industrial association, must not:
 - (a) advise, encourage or incite an employer; or
 - (b) organise or take, or threaten to organise or take, industrial action against an employer with intent to coerce the employer;to take action in relation to a person that would, if taken, contravene subsection 792(1).
- (6) Subsection (5) is a civil remedy provision.

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Division 6 Conduct by industrial associations etc.

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Note: See Division 9 for enforcement.

- (7) An industrial association, or an officer or member of an industrial association, must not, because a member of the association has refused or failed to comply with a direction given by the association:

- (a) advise, encourage or incite an employer; or
- (b) organise or take, or threaten to organise or take, industrial action against an employer with intent to coerce the employer;

to prejudice the member in the member's employment or possible employment.

- (8) Subsection (7) is a civil remedy provision.

Note: See Division 9 for enforcement.

797 Industrial associations acting against employees etc.

- (1) An industrial association, or an officer or member of an industrial association, must not take, or threaten to take, action having the effect, directly or indirectly, of prejudicing a person in the person's employment, or prospective employment, with intent:

- (a) to coerce the person to join in industrial action; or
- (b) to dissuade or prevent the person from making an application to an industrial body for an order under an industrial law for the holding of a secret ballot.

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

Note: See Division 9 for enforcement.

- (3) An industrial association, or an officer or member of an industrial association, must not:

- (a) take, or threaten to take, action having the effect, directly or indirectly, of prejudicing a person in the person's employment or prospective employment; or
- (b) advise, encourage or incite a person to take action having the effect, directly or indirectly, of prejudicing another person in the other person's employment or prospective employment;

for any of the following reasons, or for reasons that include any of the following reasons:

- (c) the person has not paid, has not agreed to pay, or does not propose to pay, a bargaining services fee;
 - (d) the person is, has been, proposes to become, or has at any time proposed to become, an officer or member of an industrial association;
 - (e) the person is not, does not propose to become or proposes to cease to be, a member of an industrial association;
 - (f) the person has not paid, has not agreed to pay, or does not propose to pay, a fee (however described) to an industrial association;
 - (g) the person has refused or failed to join in industrial action;
 - (h) the person has made, or proposes to make, any inquiry or complaint to a person or body having the capacity under an industrial law to seek:
 - (i) compliance with that law; or
 - (ii) the observance of a person's rights under an industrial instrument.
- (4) Subsection (3) is a civil remedy provision.

Note: See Division 9 for enforcement.

798 Industrial associations acting against members

- (1) An industrial association, or an officer or member of an industrial association, must not impose, or threaten to impose, a penalty, forfeiture or disability of any kind on a member of the association:
- (a) with intent to coerce the member to join in industrial action;
or
 - (b) because the member has refused or failed to join in industrial action; or
 - (c) because the member has made, proposes to make, or has at any time proposed to make, an application to an industrial body for an order under an industrial law for the holding of a secret ballot; or
 - (d) because the member has participated in, proposes to participate in, or has at any time proposed to participate in, a secret ballot ordered by an industrial body under an industrial law; or

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- (e) because the member has made, or proposes to make, any inquiry or complaint to a person or body having the capacity under an industrial law to seek:
 - (i) compliance with that law; or
 - (ii) the observance of a person's rights under an industrial instrument; or
 - (f) because the member has refused or failed to agree or consent to, or vote in favour of, the making of an agreement to which the industrial association would be a party; or
 - (g) because the member has participated in, proposes to participate in, or has at any time proposed to participate in, a proceeding under an industrial law; or
 - (h) because the member has given, or proposes to give, evidence in a proceeding under an industrial law.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

799 Industrial associations acting against independent contractors etc.

- (1) In this section:

discriminatory action, in relation to an eligible person, means:

- (a) a refusal to make use of, or to agree to make use of, services offered by the eligible person; or
- (b) a refusal to supply, or to agree to supply, goods or services to the eligible person; or
- (c) threatening to refuse as mentioned in paragraph (a) or (b).

eligible person means a person who is not an employee, but who:

- (a) is eligible to become a member of an industrial association; or
- (b) would be eligible to become a member of an industrial association if he or she were an employee.

- (2) An industrial association, or an officer or member of an industrial association, must not:
- (a) advise, encourage or incite a person (whether an employer or not) to take discriminatory action against an eligible person

because the eligible person, or any person employed or engaged by the eligible person:

- (i) is, has been, proposes to become or has at any time proposed to become, a member of an industrial association; or
 - (ii) is not, proposes not to become or proposes to cease to be, a member of an industrial association; or
 - (iii) is a member of an industrial association who has refused or failed to comply with a direction given by the association; or
 - (iv) has not paid, or does not propose to pay, a fee (however described) to an industrial association; or
 - (v) has made or proposes to make any inquiry or complaint to a person or body having the capacity under an industrial law to seek compliance with that law; or
 - (vi) has made or proposes to make any inquiry or complaint to a person or body having the capacity under an industrial law to seek the observance of a person's rights under an industrial instrument; or
- (b) take, or threaten to take, industrial action against a person (whether an employer or not) with intent to coerce the person to take discriminatory action against an eligible person because the eligible person, or any person employed or engaged by the eligible person:
- (i) is, has been, proposes to become or has at any time proposed to become, a member of an industrial association; or
 - (ii) is not, proposes not to become or proposes to cease to be, a member of an industrial association; or
 - (iii) is a member of an industrial association who has refused or failed to comply with a direction given by the association; or
 - (iv) has not paid, or does not propose to pay, a fee (however described) to an industrial association; or
 - (v) has made or proposes to make any inquiry or complaint to a person or body having the capacity under an industrial law to seek compliance with that law; or
 - (vi) has made or proposes to make any inquiry or complaint to a person or body having the capacity under an

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industrial law to seek the observance of a person's rights under an industrial instrument; or

- (c) take, or threaten to take, industrial action against an eligible person with intent to coerce the eligible person, or any person employed or engaged by the eligible person:
 - (i) to become, or to remain, a member of an industrial association; or
 - (ii) not to become, or not to remain, a member of an industrial association; or
 - (iii) to comply with a direction given by the association.

- (3) Subsection (2) is a civil remedy provision.

Note: See Division 9 for enforcement.

- (4) For the avoidance of doubt, nothing in subsection (2) prevents an industrial association from entering into an agreement or arrangement with another person for the supply of goods or services to members of the industrial association (including the supply on particular terms or conditions).

- (5) An industrial association, or an officer or member of an industrial association, must not:

- (a) advise, encourage or incite a person (whether an employer or not) to take discriminatory action against an eligible person for a prohibited reason; or
- (b) take, or threaten to take, industrial action against a person (whether an employer or not) with intent to coerce the person to take discriminatory action against an eligible person for a prohibited reason; or
- (c) take, or threaten to take, industrial action against an eligible person for a prohibited reason.

- (6) Subsection (5) is a civil remedy provision.

Note: See Division 9 for enforcement.

- (7) Conduct mentioned in subsection (5) is carried out for a ***prohibited reason*** if it is carried out because the eligible person concerned has not paid, has not agreed to pay, or does not propose to pay, a bargaining services fee.

800 Industrial associations acting against independent contractors etc. to encourage contraventions

- (1) An industrial association, or an officer or member of an industrial association, must not:
 - (a) advise, encourage or incite a person; or
 - (b) organise or take, or threaten to organise or take, industrial action against a person with intent to coerce the person; to take action in relation to another person that would, if taken, contravene subsection 792(5).
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

801 Industrial associations not to demand bargaining services fee

- (1) An industrial association, or an officer or member of an industrial association, must not demand (whether orally or in writing) payment of a bargaining services fee from another person.
- (2) Subsection (1) is a civil remedy provision.
- (3) Nothing in this section prevents an industrial association from demanding payment of a bargaining services fee that is payable to the association under a contract for the provision of bargaining services.
- (4) In this section:

demand includes:

- (a) purport to demand; and
- (b) have the effect of demanding; and
- (c) purport to have the effect of demanding.

802 Action to coerce person to pay bargaining services fee

- (1) An industrial association, or an officer or member of an industrial association, must not take, or threaten to take, action against another person with intent to coerce the person, or a third person, to pay a bargaining services fee.

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

Note: See Division 9 for enforcement.

803 Industrial associations not prevented from entering contracts

To avoid doubt, nothing in this Division prevents an industrial association from entering into a contract for the provision of bargaining services with a person who is not a member of the association.

Division 7—Conduct in relation to industrial instruments

804 Discrimination against employer in relation to industrial instruments

- (1) A person (the *first person*) must not discriminate against another person (the *second person*) on the ground that:
 - (a) the employment of the second person's employees is covered, or is not covered, by:
 - (i) the Australian Fair Pay and Conditions Standard; or
 - (ii) a particular kind of industrial instrument; or
 - (iii) an industrial instrument made with a particular person;
or
 - (b) it is proposed that the employment of the second person's employees be covered, or not be covered, by:
 - (i) a particular kind of industrial instrument; or
 - (ii) an industrial instrument made with a particular person.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.
- (3) Subsection (1) does not apply to conduct that is protected action (within the meaning of section 435).

Division 8—False or misleading representations about bargaining services fees etc.

805 False or misleading representations about bargaining services fees etc.

- (1) A person must not make a false or misleading representation about:
 - (a) another person's liability to pay a bargaining services fee; or
 - (b) another person's obligation to enter into an agreement to pay a bargaining services fee; or
 - (c) another person's obligation to become a member of an industrial association.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

Division 9—Enforcement

806 Definition

In this Division:

person, in relation to a contravention of a civil remedy provision, includes an industrial association.

Note: A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision: see section 728.

807 Penalties etc. for contravention of civil remedy provisions

- (1) The Court, on application by an eligible person, may make one or more of the following orders in relation to a person (the **defendant**) who has contravened a civil remedy provision of this Part:
 - (a) an order imposing a pecuniary penalty on the defendant;
 - (b) an order requiring the defendant to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention;
 - (c) any other order that the Court considers appropriate.
- (2) The maximum pecuniary penalty under paragraph (1)(a) is 300 penalty units if the defendant is a body corporate and otherwise 60 penalty units.
- (3) The orders that may be made under paragraph (1)(c) include:
 - (a) injunctions; and
 - (b) any other orders that the Court considers necessary to stop the conduct or remedy its effects.
- (4) Each of the following is an **eligible person** for the purposes of this section:
 - (a) a workplace inspector;
 - (b) a person affected by the contravention;
 - (c) a person prescribed by the regulations for the purposes of this paragraph.

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

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

808 Conduct that contravenes Division 3 and another Division of this Part

If:

- (a) a person engages in conduct; and
- (b) the conduct contravenes both Division 3 and another Division of this Part;

the Court may make orders under section 807 in relation to only one of those contraventions.

809 Proof not required of the reason for, or the intention of, conduct

(1) If:

- (a) in an application under section 807 relating to a person's conduct, it is alleged that the conduct was, or is being, carried out for a particular reason or with a particular intent; and
- (b) for the person to carry out the conduct for that reason or with that intent would constitute a contravention of this Part;

it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason or with that intent, unless the person proves otherwise.

(2) This section does not apply in relation to the granting of an interim injunction.

Note: See section 838 for interim injunctions.

Division 10—Objectionable provisions

810 Meaning of *objectionable provision*

- (1) For the purposes of this Division, each of the following provisions (however it is described in the document concerned) is an ***objectionable provision***:
 - (a) a provision that requires or permits any conduct that would contravene this Part, or that would contravene this Part if Division 2 were disregarded;
 - (b) a provision that directly or indirectly requires a person:
 - (i) to encourage another person to become, or remain, a member of an industrial association; or
 - (ii) to discourage another person from becoming, or remaining, a member of an industrial association;
 - (c) a provision that indicates support for persons being members of an industrial association;
 - (d) a provision that indicates opposition to persons being members of an industrial association;
 - (e) a provision that requires or permits payment of a bargaining services fee to an industrial association.
- (2) For the purpose of determining whether a provision is an objectionable provision, it does not matter whether that provision is void because of section 811.
- (3) In this section:

permits includes:

 - (a) purports to permit; and
 - (b) has the effect of permitting; and
 - (c) purports to have the effect of permitting.

requires includes:

 - (a) purports to require; and
 - (b) has the effect of requiring; and
 - (c) purports to have the effect of requiring.

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811 Objectionable provisions etc. in industrial instruments etc.

- (1) A provision of an award is void to the extent that it is an objectionable provision.
- (2) A provision of an industrial instrument, or an agreement or arrangement (whether written or unwritten), is void to the extent that it requires or permits, or has the effect of requiring or permitting, any conduct that would contravene this Part.

812 Removal of objectionable provisions from awards

- (1) Where, on application by a person mentioned in subsection (2), the Commission is satisfied that an award contains objectionable provisions, the Commission must vary the award so as to remove the objectionable provisions.
- (2) The application may be made by:
 - (a) an employer, employee or an organisation bound by the award; or
 - (b) an employee whose employment is subject to the award; or
 - (c) a workplace inspector.

Division 11—Miscellaneous

813 Freedom of association not dependent on certificate

- (1) A person's rights under this Part do not depend on whether the person is the holder of a conscientious objection certificate in force under section 180 of Schedule 1 to this Act.
- (2) This section is enacted for the avoidance of doubt.

Part 17—Offences

814 Offences in relation to Commission

General offences

- (1) A person shall not:
- (a) insult or disturb a member of the Commission in the exercise of powers, or the performance of functions, as a member; or
 - (b) interrupt the proceedings of the Commission; or
 - (c) use insulting language towards a member of the Commission exercising powers, or performing functions, as a member; or
 - (d) by writing or speech use words calculated to influence improperly a member of the Commission or a witness before the Commission.

Penalty: Imprisonment for 12 months.

- (2) A reference in subsection (1) to the Commission or a member of the Commission includes a reference to a person authorised to take evidence on behalf of the Commission.

Note 1: This section is not the only provision creating an offence relating to improper influence on a member of the Commission. Sections 135.1, 135.4, 139.1, 141.1 and 142.1 of the *Criminal Code* create offences of using various dishonest means (including bribery, providing benefits and making demands with menaces) to influence a Commonwealth public official in the performance of his or her duties.

Note 2: This section is not the only provision creating an offence relating to interference with a witness in a proceeding before the Commission. Sections 816 and 818 of this Act and sections 36A, 37, 38 and 40 of the *Crimes Act 1914* also do so. Section 39 of that Act also makes it an offence to destroy evidence that may be required in such a proceeding.

Contravening an order of the Commission

- (3) A person commits an offence if:
- (a) the Commission has made an order under this Act (other than an order under Part 10 (Awards)) or the Registration and Accountability of Organisations Schedule; and
 - (b) the order binds the person; and

- (c) the person engages in conduct; and
- (d) the conduct contravenes the order.

Penalty: Imprisonment for 12 months.

- (4) In subsection (3):

engage in conduct means:

- (a) do an act; or
- (b) omit to perform an act.

Publishing false allegation of misconduct affecting Commission

- (5) A person commits an offence if:

- (a) the person publishes a statement; and
- (b) the statement implies or expressly states there was misconduct by a member (whether identified or not) of the Commission in relation to the performance of the functions, or exercise of the powers, of the Commission; and
- (c) there was not such misconduct as implied or stated by the statement; and
- (d) the publication is likely to have a significant adverse effect on public confidence that the Commission is properly performing its functions and exercising its powers.

Penalty: Imprisonment for 12 months.

815 Attendance at compulsory conferences

A person directed under subsection 115(1) to attend a conference shall attend the conference, and continue to attend, as directed by the person presiding over the conference.

Penalty: 20 penalty units.

816 Intimidation etc.

A person who:

- (a) threatens, intimidates or coerces another person; or
- (b) prejudices another person;

because the other person:

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- (c) provided, or proposed to provide, information to the Commission;
- (d) produced, or proposed to produce, documents to the Commission; or
- (e) appeared, or proposed to appear, as a witness before the Commission;

is guilty of an offence punishable on conviction by imprisonment for not more than 12 months.

817 Creating disturbance near Commission

A person shall not create or continue a disturbance, or take part in creating or continuing a disturbance, in or near a place at which the Commission is sitting.

Penalty: Imprisonment for 6 months.

818 Offences relating to witnesses

Contravention of requirement by witness

- (1) A person who has been summoned to appear, or who has appeared, before the Commission as a witness shall not:
 - (a) disobey the summons to appear;
 - (b) refuse or fail to be sworn or make an affirmation;
 - (c) refuse or fail to answer a question that the person is required by the Commission to answer; or
 - (d) refuse or fail to produce a document that the person is required by the Commission to produce.

Penalty: Imprisonment for 6 months.

- (2) For the purposes of an offence against subsection (1), strict liability applies to the physical element, that the person fails as mentioned in paragraph (1)(b), (c) or (d).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (3) Subsection (1) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

- (4) A reference in subsection (1) to the Commission includes a reference to a person authorised to take evidence on behalf of the Commission.

Giving false evidence

- (5) A person (the **witness**) is guilty of an offence if:
- (a) the witness gives false sworn or affirmed evidence touching any matter material to that proceeding; and
 - (b) either:
 - (i) the evidence is given in a proceeding before the Commission; or
 - (ii) the evidence is given before a person taking evidence on behalf of the Commission either in a proceeding that has been instituted in the Commission by anyone or for use in a proceeding that will be instituted in the Commission by the witness.

Penalty: Imprisonment for 12 months.

Note: Section 10.2 of the *Criminal Code Act 1995* states that a person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.

Inducing or coercing another person to give false evidence

- (6) A person (the **offender**) is guilty of an offence if:
- (a) another person (the **witness**) has been called or is to be called as a witness in a proceeding before the Commission (whether the person is to appear before the Commission or before someone taking evidence on behalf of the Commission in the proceeding); and
 - (b) the offender induces, threatens or intimidates the witness to give false evidence in the proceeding.

Penalty: Imprisonment for 12 months.

819 Non-compliance with requirement made by an inspector

- (1) A person is guilty of an offence if the person contravenes a requirement made by an inspector under subparagraph 169(2)(b)(iv), paragraph 169(2)(c) or subsection 169(4).

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Penalty: Imprisonment for 6 months.

- (2) Subsection (1) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

820 False statement in application for protected action ballot order

A person commits an offence if:

- (a) the person makes, or joins with other persons in making, an application for a protected action ballot order under Division 4 of Part 9; and
- (b) the application contains a statement that is false or misleading in a material particular.

Penalty: 30 penalty units.

821 Offences in relation to secret ballots ordered under Division 4 of Part 9

- (1) A person shall not, in relation to a ballot ordered under Division 4 of Part 9:
- (a) personate another person to secure a ballot paper to which the personator is not entitled or personate another person for the purpose of voting;
 - (b) do an act that results in a ballot paper or envelope being destroyed, defaced, altered, taken or otherwise interfered with;
 - (c) fraudulently put or deliver a ballot paper or other paper:
 - (i) into a ballot box or other ballot receptacle;
 - (ii) into the post; or
 - (iii) to a person receiving ballot papers for the purposes of the ballot;
 - (d) record a vote that the person is not entitled to record;
 - (e) record more than one vote;
 - (f) forge a ballot paper or envelope, or utter a ballot paper or envelope that the person knows to be forged;
 - (g) provide a ballot paper without authority;

- (h) obtain or have possession of a ballot paper to which the person is not entitled; or
- (i) do an act that results in a ballot box or other ballot receptacle being destroyed, taken, opened or otherwise interfered with.

Penalty: 30 penalty units.

- (2) A person shall not, in relation to a ballot ordered under Division 4 of Part 9:
- (a) hinder or obstruct the taking of the ballot;
 - (b) use any form of intimidation to prevent from voting, or to influence the vote of, a person entitled to vote at the ballot;
 - (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;
 - (ii) any support of, or opposition to, voting in a particular manner; or
 - (iii) any promise of any vote, omission, support or opposition; or
 - (d) counsel or advise a person entitled to vote to refrain from voting.

Penalty: 30 penalty units.

- (3) A person (in this subsection called the *relevant person*) shall not, in relation to a ballot ordered under Division 4 of Part 9:
- (a) request, require or induce another person to show a ballot paper to the relevant person, or permit the relevant person to see a ballot paper, in such a manner that the relevant person can see the vote, while the ballot paper is being marked or after it has been marked; or
 - (b) if the relevant person is a person performing duties for the purposes of the ballot, show to another person, or permit another person to have access to, a ballot paper used in the ballot, otherwise than in the performance of the duties.

Penalty: 30 penalty units.

822 Contracts entered into by agents of employers

A person carrying on the business of an employment agency shall not, as agent for an employer, make an agreement for the employment of an employee on terms and conditions less favourable to the employee than the terms and conditions of an award, an order of the Commission, or a collective agreement, binding on the employer and employee.

Penalty: 20 penalty units.

823 Publication of trade secrets etc.

- (1) A person commits an offence if:
 - (a) the person gives information as evidence or publishes information; and
 - (b) giving or publishing the information:
 - (i) contravenes section 839; or
 - (ii) contravenes a direction given under section 839.

Penalty: 20 penalty units.

- (2) Strict liability applies to subparagraph (1)(b)(i).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Part 18—Costs

Division 1—Costs

824 Costs only where proceeding instituted vexatiously etc.

- (1) A party to a proceeding (including an appeal) in a matter arising under this Act (other than an application under section 663) must not be ordered to pay costs incurred by any other party to the proceeding unless the first-mentioned party instituted the proceeding vexatiously or without reasonable cause.
- (2) Despite subsection (1), if a court hearing a proceeding (including an appeal) in a matter arising under this Act (other than an application under section 663) is satisfied that a party to the proceeding has, by an unreasonable act or omission, caused another party to the proceeding to incur costs in connection with the proceeding, the court may order the first-mentioned party to pay some or all of those costs.
- (3) In subsections (1) and (2):

costs includes all legal and professional costs and disbursements and expenses of witnesses.

Part 19—Miscellaneous

825 Delegation by Minister

The Minister may, by signed instrument, delegate to a person occupying a specified office in the Department all or any of the Minister's powers under this Act.

826 Conduct by officers, directors, employees or agents

- (1) Where it is necessary to establish, for the purposes of this Act or the BCII Act, the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:
 - (a) that the conduct was engaged in by an officer, director, employee or agent of the body corporate within the scope of his or her actual or apparent authority; and
 - (b) that the officer, director, employee or agent had the state of mind.
- (2) Any conduct engaged in on behalf of a body corporate by:
 - (a) an officer, director, employee or agent of the body corporate within the scope of his or her actual or apparent authority; or
 - (b) any other person at the direction or with the consent or agreement (whether express or implied) of an officer, director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the officer, director, employee or agent;shall be taken, for the purposes of this Act or the BCII Act (as the case requires), to have been engaged in also by the body corporate.
- (3) A reference in this section to the state of mind of a person includes a reference to the knowledge, intent, opinion, belief or purpose of the person and the person's reasons for the intent, opinion, belief or purpose.

827 Signature on behalf of body corporate

For the purposes of this Act, a document may be signed on behalf of a body corporate by a duly authorised officer of the body corporate and need not be made under the body corporate's seal.

828 No imprisonment in default

In spite of the provisions of any other law, a court may not direct that a person shall serve a sentence of imprisonment in default of the payment of a fine or other pecuniary penalty imposed under this Act or the BCII Act.

829 Jurisdiction of courts limited as to area

- (1) For the purposes of this Act, a court of a State or Territory whose jurisdiction is limited, as to subject matter or parties, to any part of a State or Territory shall be taken to have jurisdiction throughout the State or Territory.
- (2) On the hearing of a proceeding in a court for the recovery of a penalty, fine, fee, levy or due, the court may, if in the interests of justice it considers appropriate, adjourn the hearing to a court of competent jurisdiction to be held at some other place in the same State or Territory.

830 Public sector employer to act through employing authority

In spite of anything to the contrary in this Act, the BCII Act or any other law, the employer of an employee engaged in public sector employment shall, for the purposes of this Act, the BCII Act and the Rules of the Commission, act only by an employing authority of the employee acting on behalf of the employer and, in particular:

- (a) anything done by an employing authority of an employee has effect, for those purposes, as if it had been done by the employer of the employee; and
- (b) anything served on, or otherwise given or notified to, an employing authority of an employee has effect, for those purposes, as if it had been served on, or given or notified to, the employer of the employee.

Section 831

831 Variation of workplace agreements on grounds of sex discrimination

- (1) Subsections 554(2), (3), (4) and (7) apply in relation to a workplace agreement, as if a reference in those subsections to an award or a term of an award were a reference to a workplace agreement or a term of a workplace agreement.
- (2) Before taking action under subsections 554(2) or (4) as applied by force of subsection (1) of this section, the Commission must give the persons bound by the agreement and the employees whose employment is subject to the agreement an opportunity to amend the agreement so as to remove the discrimination.

835 Proceedings by and against unincorporated clubs

- (1) For the purposes of this Act, the treasurer of a club shall be taken to be the employer of a person employed for the purposes or on behalf of the club, and any proceeding that may be taken under this Act by or against the club may be taken by or against the treasurer on behalf of the club.
- (2) The treasurer is authorised to retain out of the funds of the club sufficient money to meet payments made by the treasurer on behalf of the club under this section.
- (3) In this section:

club means an unincorporated club.

treasurer includes a person having possession or control of any funds of a club.

836 Records relating to employees

- (1) The regulations may make provision in relation to:
 - (a) the making and retention by employers of records relating to the employment of employees; and
 - (b) the inspection of such records.
- (2) The regulations may require employers of employees to issue pay slips to those employees at such times, and containing such particulars, as are prescribed.

837 Inspection of documents etc.

All documents and other things produced in evidence before the Commission may be inspected by the Commission or by such other parties as the Commission allows.

838 Interim injunctions

If, under a provision of this Act, a court may grant an injunction, the court may, if in its opinion it is desirable to do so, grant an interim injunction pending its decision on the granting of an injunction.

839 Trade secrets etc. tendered as evidence

- (1) In a proceeding before the Court or the Commission:
 - (a) the person entitled to a trade secret may object that information tendered as evidence relates to the trade secret; or
 - (b) a witness or party may object that information tendered as evidence relates to the profits or financial position of the witness or party.
- (2) Where an objection is made under subsection (1) to information tendered as evidence, the information may only be given as evidence under a direction of the Court or Commission.
- (3) If information is given as evidence under subsection (2), it shall not be published in any newspaper, or otherwise, unless the Court or Commission, by order, permits the publication.
- (4) Where the Court or Commission directs that information relating to a trade secret or to the profits or financial position of a witness or party shall be given in evidence, the evidence shall be taken in private if the person entitled to the trade secret, or the witness or party, requests.
- (5) The Court or Commission may direct that evidence given in a proceeding before it, or the contents of a document produced for inspection, shall not be published.

Note: Giving information as evidence, or publishing information, in contravention of this section or a direction under this section may be an offence under section 823.

840 Powers of courts

A provision of this Act conferring a power on a court does not affect any other power of the court conferred by this Act or otherwise.

841 Application of penalty

A court that imposes a pecuniary penalty under this Act (other than a penalty for an offence) may order that the penalty, or a part of the penalty, be paid:

- (a) to the Commonwealth; or
- (b) to a particular organisation or person.

842 Enforcement of penalties etc.

- (1) Where a court has:
 - (a) imposed a pecuniary penalty under this Act or the BCII Act (other than a penalty for an offence); or
 - (b) under subsection 719(5) or (6), ordered the payment of an amount; or
 - (c) under subsection 719(7) or (8), ordered the payment of an amount; or
 - (d) ordered the payment of costs or expenses;a certificate signed by a Registrar, specifying the amount payable and by whom and to whom respectively it is payable, may be filed in the Court or in any other court of competent jurisdiction.
- (2) A certificate filed in a court under subsection (1) is enforceable in all respects as a final judgment of the court in which it is filed.
- (3) Where there are 2 or more creditors under a certificate, process may be issued separately by each creditor for the enforcement of the certificate as if there were separate judgments.

843 Appropriation for payment of certain salaries and allowances

The Consolidated Revenue Fund is appropriated to the extent necessary for payment of salaries, allowances (including travelling allowance) and other amounts under section 66, 79 or 81.

844 Reports about developments in making agreements

- (1) For:
 - (a) the period of 3 years beginning on 1 January 2004; and
 - (b) the period of 3 years beginning on 1 January 2007; and
 - (c) the period of 5 years beginning on 1 January 2010 and each subsequent period of 5 years;the Minister must cause a person to review and report to the Minister in writing about:
 - (d) developments, in Australia during that period, in bargaining for the making of workplace agreements; and
 - (e) in particular, the effects that such bargaining has had in Australia during that period on the employment (including wages and conditions of employment) of women, part-time employees, persons from a non-English speaking background, mature age persons, young persons and such other persons as are prescribed by the regulations.
- (2) The person who reviews and reports as mentioned in subsection (1) must be someone who, in the Minister's opinion, is suitably qualified and appropriate to do so.
- (3) The person preparing the report must give it to the Minister as soon as practicable, and in any event within 6 months, after the end of the period to which it relates.
- (4) The Minister must cause a copy of the report to be tabled in each House of the Parliament within 15 sitting days of that House after the Minister receives the report.
- (5) Subsections 34C(4) to (7) of the *Acts Interpretation Act 1901* apply to a report under this section as if it were a periodic report as defined in subsection 34C(1) of that Act.

845 Acquisition of property

- (1) The following laws and instruments:
 - (a) this Act;
 - (b) regulations, or any other instrument, made under this Act;
 - (c) Schedule 1;
 - (d) regulations, or any other instrument, made under Schedule 1;

Section 845

- (e) regulations made under item 1 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005*;
- (f) Part 2 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005*;

do not apply, and are taken never to have applied, to the extent that the operation of the law or instrument would result in an acquisition of property from a person otherwise than on just terms.

- (2) The repeals and amendments made by the following laws and instruments:
 - (a) the *Workplace Relations Amendment (Work Choices) Act 2005*;
 - (b) any other Act, so far as it repeals or amends a provision of:
 - (i) this Act; or
 - (ii) regulations, or any other instrument, made under this Act; or
 - (iii) Schedule 1; or
 - (iv) regulations, or any other instrument, made under Schedule 1;
 - (c) regulations made under item 2 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005*;
 - (d) any other regulation or instrument, so far as it repeals or amends a provision of:
 - (i) this Act; or
 - (ii) regulations, or any other instrument, made under this Act; or
 - (iii) Schedule 1; or
 - (iv) regulations, or any other instrument, made under Schedule 1;

do not apply, and are taken never to have applied, to the extent that the repeals or amendments would result in an acquisition of property from a person otherwise than on just terms.

- (3) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

846 Regulations

- (1) The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters:
 - (a) required or permitted by this Act to be prescribed; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) The matters in relation to which the Governor-General may make regulations include, but are not limited to:
 - (a) the manner in which, and the time within which, applications, submissions and objections under this Act may be made and dealt with; and
 - (b) the practice and procedure of the Commission; and
 - (c) the fees to be charged in relation to proceedings under this Act; and
 - (d) the duties of the Industrial Registrar, the Deputy Industrial Registrars and any officers of the Commission; and
 - (e) the exhibiting, on the premises of an employer bound by an award, an order of the Commission or a workplace agreement, of any of the terms of the award, order or agreement; and
 - (f) penalties for offences against the regulations, not exceeding 10 penalty units; and
 - (g) civil penalties for contraventions of the regulations, not exceeding:
 - (i) 10 penalty units for an individual; or
 - (ii) 50 penalty units for a body corporate.
- (3) The power conferred by subsection (1) to make regulations with respect to the matter referred to in paragraph (2)(b) includes power to make regulations with respect to that matter in relation to any jurisdiction conferred on the Commission by or under any other Act, whether passed before or after this Act.
- (4) If jurisdiction in relation to a provision of this Act relating to a civil remedy provision referred to in section 727 is conferred on the Court or the Federal Magistrates Court, the regulations may confer jurisdiction in relation to that provision on a specified court of a State or Territory.

Section 846

- (5) The regulations may provide for a person who is alleged to have committed an offence against the regulations to pay a penalty to the Commonwealth as an alternative to prosecution.
- (6) A penalty under subsection (5) must not exceed one-fifth of the maximum fine that a court could impose on the person as a penalty for that offence.
- (7) The regulations may make provision enabling a person who is alleged to have contravened a civil remedy provision the remedy for which consists of or includes a pecuniary penalty to pay to the Commonwealth, as an alternative to proceedings against the person, a specified penalty.
- (8) A penalty under subsection (7) must not exceed one-tenth of the maximum pecuniary penalty that could have been imposed on the person for contravening that civil remedy provision.

Part 20—Jurisdiction of the Federal Court of Australia and Federal Magistrates Court

Division 1—Original jurisdiction

847 Jurisdiction of Court

- (1) The Court has jurisdiction with respect to matters arising under this Act in relation to which:
- (a) applications may be made to it under this Act; or
 - (b) actions may be brought in it under this Act; or
 - (c) questions may be referred to it under this Act; or
 - (d) appeals lie to it under section 853; or
 - (e) penalties may be sued for and recovered under this Act; or
 - (f) prosecutions may be instituted for offences against this Act.

- (2) For the purposes of section 44 of the *Judiciary Act 1903*, the Court is taken to have jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth holding office under this Act or the *Coal Industry Act 1946*.

Note: Section 44 of the *Judiciary Act 1903* gives the High Court of Australia power to remit a matter to a federal court that has jurisdiction with respect to that matter.

- (3) The Court has jurisdiction with respect to matters remitted to it under section 44 of the *Judiciary Act 1903*.

- (4) The Federal Magistrates Court has jurisdiction with respect to matters arising under this Act in relation to which:
- (a) applications may be made to it under this Act; or
 - (b) actions may be brought in it under this Act; or
 - (c) questions may be referred to it under this Act; or
 - (d) penalties may be sued for and recovered under this Act; or
 - (e) prosecutions may be instituted for offences against this Act.

Note: A proceeding pending in the Federal Magistrates Court may be transferred to the Federal Court: see Part 5 of the *Federal Magistrates Act 1999*.

Section 848

848 Interpretation of awards

- (1) The Court or the Federal Magistrates Court may give an interpretation of an award on application by:
 - (a) the Minister; or
 - (b) an organisation or person bound by the award.
- (2) The decision of the Court or the Federal Magistrates Court is final and conclusive and is binding on the organisations and persons bound by the award who have been given an opportunity of being heard by the Court or the Federal Magistrates Court.

849 Interpretation of certified agreements

- (1) The Court or the Federal Magistrates Court may give an interpretation of a collective agreement on application by:
 - (a) the Minister; or
 - (b) an organisation or person bound by the agreement; or
 - (c) an employee whose employment is subject to the agreement.
- (2) The decision of the Court or the Federal Magistrates Court is final and conclusive and is binding on:
 - (a) the organisations and persons bound by the agreement; and
 - (b) the employees whose employment is subject to the agreement;who have been given an opportunity of being heard by the Court or the Federal Magistrates Court.

850 Exclusive jurisdiction

- (1) Subject to this Act, the jurisdiction of the Court and the Federal Magistrates Court in relation to an act or omission for which an organisation or member of an organisation is liable to be sued, or to be proceeded against for a pecuniary penalty, is exclusive of the jurisdiction of any other court created by the Parliament or any court of a State or Territory.

Note: The regulations can confer jurisdiction on a specified court of a State or Territory in relation to a civil remedy provision: see subsection 846(4).

- (2) The jurisdiction of the Court under section 853 is exclusive of the jurisdiction of any court of a State or Territory to hear and

determine an appeal from a judgment from which an appeal may be brought to the Court under that section.

851 Exercise of Court's original jurisdiction

- (1) The jurisdiction of the Court under this Act is to be exercised by a Full Court in relation to matters in which a writ of mandamus or prohibition or an injunction is sought against:
 - (a) a Presidential member; or
 - (b) officers of the Commonwealth at least one of whom is a Presidential member.
- (2) Subsection (1) does not require the jurisdiction of the Court to be exercised by a Full Court in relation to a prosecution for an offence merely because the offence relates to a matter to which that subsection applies.
- (3) Subsection (1) does not, in relation to matters referred to in that subsection, require the jurisdiction of the Court to be exercised by a Full Court to:
 - (a) join or remove a party; or
 - (b) make an order (including an order for costs) by consent disposing of a matter; or
 - (c) make an order that a matter be dismissed for want of prosecution; or
 - (d) make an order that a matter be dismissed for:
 - (i) failure to comply with a direction of the Court; or
 - (ii) failure of the applicant to attend a hearing relating to the matter; or
 - (e) vary or set aside an order under paragraph (c) or (d); or
 - (f) give directions about the conduct of a matter, including directions about:
 - (i) the use of written submissions; and
 - (ii) limiting the time for oral argument.
- (4) The Rules of Court may make provision enabling the powers mentioned in subsection (3) to be exercised, subject to conditions prescribed by the Rules, without an oral hearing.

Section 852

852 Reference of proceedings to Full Court

- (1) At any stage of a proceeding in a matter arising under this Act, a single Judge exercising the jurisdiction of the Court:
 - (a) may refer a question of law for the opinion of a Full Court;
and
 - (b) may, of the Judge's own motion or on the application of a party, refer the matter to a Full Court to be heard and determined.
- (2) If a Judge refers a matter to a Full Court under subsection (1), the Full Court may have regard to any evidence given, or arguments adduced, in the proceeding before the Judge.

Division 2—Appellate jurisdiction

853 Appeals from State and Territory courts

- (1) An appeal lies to the Court from a judgment of a court of a State or Territory in a matter arising under this Act or the BCII Act.
- (2) It is not necessary to obtain the leave of the Court or the court appealed from in relation to an appeal under subsection (1).
- (3) An appeal does not lie to the High Court from a judgment from which an appeal may be made to the Court under subsection (1).

Division 3—Representation and intervention

854 Representation of parties before the Court or the Federal Magistrates Court

- (1) A party to a proceeding before the Court in a matter arising under this Act, the BCII Act or the Registration and Accountability of Organisations Schedule may appear in person.
- (2) A party to a proceeding before the Federal Magistrates Court in a matter arising under this Act or the BCII Act may appear in person.
- (3) Subject to this and any other Act, a party to a proceeding before the Court or the Federal Magistrates Court in a matter arising under this Act may be represented only as provided by this section.
- (4) Subject to this Act, the Registration and Accountability of Organisations Schedule and any other Act, a party to a proceeding before the Court in a matter arising under the Registration and Accountability of Organisations Schedule may be represented only as provided by this section.
- (5) Subject to this Act, the BCII Act and any other Act, a party to a proceeding before the Court or the Federal Magistrates Court in a matter arising under the BCII Act may be represented only as provided by this section.
- (6) A party (including an employing authority) may be represented by counsel or solicitor.
- (7) An employing authority may be represented by a prescribed person.
- (8) Regulations made for the purposes of subsection (7) may prescribe different classes of persons in relation to different classes of proceedings.
- (9) Subject to subsections (11) and (12), a party that is an organisation may be represented by:
 - (a) a member, officer or employee of the organisation; or
 - (b) a member, officer or employee of a peak council to which the organisation is affiliated.

- (10) Subject to subsections (11) and (12), a party other than an organisation or employing authority may be represented by:
- (a) an officer or employee of the party; or
 - (b) a member, officer or employee of an organisation of which the party is a member; or
 - (c) an officer or employee of a peak council to which the party is affiliated; or
 - (d) an officer or employee of a peak council to which an organisation or association of which the party is a member is affiliated.
- (11) Subsections (9) and (10) do not apply in relation to:
- (a) proceedings under section 853; or
 - (b) proceedings in relation to offences against this Act, the BCII Act or the Registration and Accountability of Organisations Schedule.
- (12) In a relevant proceeding, a party may be represented as provided by subsection (9) and (10) only with the leave of the Court or the Federal Magistrates Court.
- (13) In this section:
- party* includes an intervener.
- relevant proceeding* means proceedings under section 122, 148, 848 or 849.

855 Intervention generally

- (1) If the Court is of the opinion that an organisation, person or body should be heard in a proceeding before the Court in a matter arising under this Act, the BCII Act or the Registration and Accountability of Organisations Schedule, the Court may grant leave to the organisation, person or body to intervene in the proceeding.
- (2) If the Federal Magistrates Court is of the opinion that an organisation, person or body should be heard in a proceeding before that court in a matter arising under this Act or the BCII Act, that court may grant leave to the organisation, person or body to intervene in the proceeding.

856 Particular rights of intervention of Minister

- (1) The Minister may, on behalf of the Commonwealth, by giving written notice to the Registrar of the Court, intervene in the public interest in a proceeding before the Court in a matter arising under this Act, the BCII Act or the Registration and Accountability of Organisations Schedule.
- (2) The Minister may, on behalf of the Commonwealth, by giving written notice to a Registrar of the Federal Magistrates Court, intervene in the public interest in a proceeding before that court in a matter arising under this Act or the BCII Act.
- (3) If the Minister intervenes in a proceeding before the Court or the Federal Magistrates Court, that court may, despite section 824, make an order as to costs against the Commonwealth.
- (4) If the Minister intervenes in a proceeding before the Court or the Federal Magistrates Court, then, for the purposes of the institution and prosecution of an appeal from a judgment given in the proceeding, the Minister is taken to be a party to the proceeding.
- (5) If, under subsection (4), the Minister institutes an appeal from a judgment, a court hearing the appeal may, despite section 824, make an order as to costs against the Commonwealth.

Part 21—Matters referred by Victoria

Division 1—Introduction

857 Objects

The main objects of this Part are:

- (a) to extend certain provisions of this Act; and
- (b) to include additional provisions in this Act;

as a result of the referral of certain matters to the Parliament of the Commonwealth by the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

858 Definitions

In this Part (other than Division 12):

employee has the same meaning as in section 3 of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria, but does not include:

- (a) a person who is undertaking a vocational placement; or
- (b) a person so far as the definition of **employee** in subsection 5(1) of this Act covers the person.

employer has the same meaning as in section 3 of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria, but does not include an employer so far as the definition of **employer** in subsection 6(1) of this Act covers the employer.

employment means employment of an employee, and **employed** has a corresponding meaning.

859 Part only has effect if supported by reference

A provision of this Part (other than paragraph 862(b) or Division 11 or 12) has effect only for so long, and in so far, as the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria refers to the Parliament of the Commonwealth a matter or matters that result in the Parliament of the Commonwealth having sufficient legislative power for the provision so to have effect.

Division 2—Pay and conditions

860 Additional effect of Act—AFPC’s powers

- (1) Without affecting its operation apart from this section, Part 2 also has effect in relation to the employment of any employee in Victoria, and for this purpose, each reference in paragraph 23(d) to an employee (within the meaning of that paragraph) is to be read as a reference to an employee (within the meaning of this Division) in Victoria.
- (2) Subsection (1) has effect subject to:
 - (a) sections 864, 865, 866, 867 and 896; and
 - (b) clause 30 of Schedule 7.

861 Additional effect of Act—Australian Fair Pay and Conditions Standard

- (1) Without affecting its operation apart from this section, Part 7 also has effect in relation to the employment of any employee in Victoria, and for this purpose:
 - (a) each reference in that Part to an employer (within the meaning of that Part) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
 - (b) each reference in that Part to an employee (within the meaning of that Part) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
 - (c) each reference in that Part to employment (within the meaning of that Part) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria; and
 - (ca) Division 2 of Part 7 has effect as if the definition of *APCS* in section 178 were modified by omitting “or a new *APCS*”; and
 - (d) Division 2 of Part 7 has effect as if the following provisions had not been enacted:
 - (i) Subdivisions E, F, G, L and M of that Division;

- (ii) sections 205, 207 and 216;
 - (iii) subsections 182(3) and (4);
 - (iv) item 3 of the table in subsection 185(3); and
 - (e) Division 2 of Part 7 has effect as if an order that was in force under repealed section 501 or 501A on the reform comparison day (within the meaning of that Division) were a pre-reform federal wage instrument (within the meaning of that Division); and
 - (f) section 175 has effect as if Part 13 had been modified in a corresponding way to the way in which Part 7 is modified by paragraphs (a), (b) and (c); and
 - (g) Part 7 has effect as if Division 6 of that Part had not been enacted.
- (2) Subsection (1) has effect subject to:
- (a) sections 864, 865, 866, 867 and 896; and
 - (b) clause 30 of Schedule 7.
- (3) The repeal of sections 501 and 501A by the *Workplace Relations Amendment (Work Choices) Act 2005* does not affect the continuity of an APCS (within the meaning of Part 7) derived from an order under either of those sections.

862 Application of the Australian Fair Pay and Conditions Standard to employees in Victoria

For the purposes of the application of a provision of this Act (other than this Division or Divisions 3 to 11) to an employee in Victoria, a reference in the provision to the Australian Fair Pay and Conditions Standard:

- (a) is to be read as a reference to the Australian Fair Pay and Conditions Standard that applies to the employee because of section 861; and
- (b) includes a reference to the provisions of Division 6 of Part 7 as they apply to the employee because of section 689.

863 Additional provisions of the Australian Fair Pay and Conditions Standard

For the purposes of this Act, sections 864, 865, 866 and 867 are additional provisions of the Australian Fair Pay and Conditions

Section 864

Standard that applies to an employee in Victoria because of section 861.

864 Adjustment of APCSs

- (1) The AFPC may adjust an APCS if the adjustment:
 - (a) relates to the employment of one or more employees in Victoria; and
 - (b) is of a rate provision (within the meaning of Division 2 of Part 7).
- (2) The power to adjust an APCS under subsection (1) is subject to:
 - (a) section 176; and
 - (b) section 202; and
 - (c) section 203; and
 - (d) section 222; and
 - (e) sections 865, 866 and 867.
- (3) For the purposes of section 215, an adjustment under subsection (1) of this section is taken to be an adjustment under Subdivision K of Division 2 of Part 7.

865 Limitation on application of minimum wage standards

- (1) If the AFPC exercises its wage-setting powers so as to adjust a minimum wage for employees in Victoria:
 - (a) the adjustment has no effect unless the employees are within a work classification; and
 - (b) the adjustment has no effect, in relation to a particular employee, while the employee is subject to an award or agreement under this Act.
- (2) If a provision of the Australian Fair Pay and Conditions Standard adjusts a minimum wage for employees in Victoria:
 - (a) the adjustment has no effect unless the employees are within a work classification; and
 - (b) the adjustment has no effect, in relation to a particular employee, while the employee is subject to an award or agreement under this Act.

(3) In this section:

minimum wage has the same meaning as in subsection 4(7) of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

work classification means a work classification that, immediately before the commencement of subsection 4(7) of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria:

- (a) was a declared work classification under the *Employee Relations Act 1992* of Victoria; or
- (b) had been declared by the Employee Relations Commission of Victoria to be an interim work classification.

Note: See also clauses 89, 95 and 102 of Schedule 6 (extended meaning of award).

866 Guarantee against reductions below pre-reform basic periodic rates of pay

(1) This section applies if:

- (a) the AFPC proposes to exercise its power under subsection 864(1) to adjust a preserved APCS; and
- (b) immediately after the exercise of the power takes effect, there will, under section 182, be a guaranteed basic periodic rate of pay (the **resulting guaranteed basic periodic rate**) for a particular employee (within the meaning of this Division) in Victoria who is affected by the exercise of the power; and
- (c) immediately after the reform commencement (and after any relevant adjustments mentioned in sections 209 to 212 took effect), there would, under section 182, have been a guaranteed basic periodic rate of pay (the **commencement guaranteed basic periodic rate**) for the employee if the employee had at that time been in his or her current circumstances of employment.

(2) The AFPC must ensure that the result of the exercise of the power, so far as it affects the employee, is such that the resulting guaranteed basic periodic rate of pay for the employee will not be less than the commencement guaranteed basic periodic rate of pay for the employee.

Section 867

(3) In this section:

basic periodic rate of pay has the same meaning as in Division 2 of Part 7.

867 Guarantee against reductions below pre-reform casual loadings that apply to basic periodic rates of pay

- (1) This section applies in relation to the exercise by the AFPC of its power under subsection 864(1) to adjust a preserved APCS.
- (2) The AFPC must ensure that the result of the exercise of the power, so far as it affects a particular casual employee (within the meaning of this Division) in Victoria, is such that the resulting guaranteed casual loading percentage for the employee will not be less than the commencement guaranteed casual loading percentage for the employee.
- (3) For the purposes of subsection (2):
 - (a) the *resulting guaranteed casual loading percentage* for the employee is the guaranteed casual loading percentage referred to in section 185 for the employee, as it will be immediately after the exercise of the power takes effect; and
 - (b) the *commencement guaranteed casual loading percentage* for the employee is the percentage that, immediately after the reform commencement (and after any relevant adjustments mentioned in sections 209 to 212 took effect), would have been the guaranteed casual loading percentage referred to in section 185 for the employee if the employee had, at that time, been in his or her current circumstances of employment.

868 Additional effect of Act—enforcement of, and compliance with, the Australian Fair Pay and Conditions Standard

Without affecting its operation apart from this section, Part 14 also has effect in relation to a term of the Australian Fair Pay and Conditions Standard that applies to an employee in Victoria because of section 861, and for this purpose:

- (a) each reference in that Part to an employer (within the meaning of that Part) is to be read as a reference to an

- employer (within the meaning of this Division) in Victoria;
and
- (b) each reference in that Part to an employee (within the meaning of that Part) is to be read as a reference to an employee (within the meaning of this Division) in Victoria;
and
 - (c) each reference in that Part to employment (within the meaning of that Part) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria; and
 - (d) each reference in that Part to the Australian Fair Pay and Conditions Standard (within the meaning of that Part) is to be read as a reference to the Australian Fair Pay and Conditions Standard as that Standard applies to an employee in Victoria because of section 861.

Division 3—Workplace agreements

869 Additional effect of Act—workplace agreements

- (1) In addition to the effect that Part 8 and related provisions of this Act (other than Part 11) have in relation to agreements about matters pertaining to the relationship between:
 - (a) an employer, or employers, within the meaning of that Part; and
 - (b) an employee, or employees, within the meaning of that Part; that Part and those provisions also have effect as mentioned in this section.
- (2) That Part and those provisions have effect in the same way as mentioned in subsection (1) in relation to agreements about matters pertaining to the relationship between:
 - (a) an employer or employers in Victoria; and
 - (b) an employee or employees in Victoria;and for this purpose:
 - (c) each reference in that Part and those provisions to an employer (within the meaning of that Part) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
 - (d) each reference in that Part and those provisions to an employee (within the meaning of that Part) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
 - (e) each reference in that Part and those provisions to employment (within the meaning of that Part) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria by an employer (within the meaning of this Division) in Victoria.
- (3) The regulations may provide that a specified provision of this Act is taken to be a related provision for the purposes of this section.
- (4) The regulations may provide that a specified provision of this Act is taken not to be a related provision for the purposes of this section.

Note: See also section 885 (transmission of business).

870 Workplace agreements—mandatory term about basic periodic rate of pay

- (1) This section applies to an agreement under Part 8 (as that Part has effect because of section 869).
- (2) The agreement must contain an express term to the effect that, for so long as an employee is subject to the agreement, the basic periodic rate of pay that is payable to the employee must not be less than:
 - (a) if a basic periodic rate of pay would have been applicable to the employee under the Australian Fair Pay and Conditions Standard if the employee had not been subject to an award or the agreement—the basic periodic rate of pay that would so have been applicable; or
 - (b) if:
 - (i) paragraph (a) does not apply to the employee; and
 - (ii) the employee is a junior employee, an employee with a disability, or an employee to whom a training arrangement applies;
the rate of pay specified in, or worked out in accordance with a method specified in, regulations made for the purposes of this paragraph; or
 - (c) if neither paragraph (a) nor (b) applies to the employee—the standard FMW.
- (3) The agreement is void if the requirement in subsection (2) is not satisfied.
- (4) In this section:

basic periodic rate of pay has the same meaning as in Division 2 of Part 7.

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

junior employee means an employee who is under the age of 21.

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standard FMW has the same meaning as in Division 2 of Part 7.

871 Workplace agreements—mandatory term about casual loading

- (1) This section applies to an agreement under Part 8 (as that Part has effect because of section 869) if a casual employee is subject to the agreement.
- (2) The agreement must contain an express term to the effect that, for so long as the casual employee is subject to the agreement, the casual loading that is payable to the employee must not be less than the default casual loading percentage (within the meaning of Division 2 of Part 7).
- (3) The agreement is void if the requirement in subsection (2) is not satisfied.

Division 4—Industrial action

872 Additional effect of Act—industrial action

Without affecting its operation apart from this section, Part 9 also has the effect it would have if:

- (a) each reference in that Part to an employer (within the meaning of that Part) were read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that Part to an employee (within the meaning of that Part) were read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that Part to employment (within the meaning of that Part) were read as a reference to the employment of an employee (within the meaning of this Division) in Victoria by an employer (within the meaning of this Division) in Victoria; and
- (d) Division 8 of that Part had not been enacted; and
- (e) subsections 420(1) to (4) were replaced by the following subsections:
 - (1) For the purposes of this Act (other than Part 16), ***industrial action*** means any action of the following kind:
 - (a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
 - (b) a ban, limitation or restriction on the performance of work by an employee or on acceptance of or offering for work by an employee;
 - (c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;
 - (d) the lockout of employees from their employment by the employer of the employees;

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but does not include the following:

- (e) action that is not agreement-related (as defined by subsection (3));
- (f) action by employees that is authorised or agreed to by the employer of the employees;
- (g) action by an employer that is authorised or agreed to by or on behalf of employees of the employer;
- (h) action by an employee if:
 - (i) the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and
 - (ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

Note 1: See also subsection (5), which deals with the burden of proof of the exception in paragraph (e) of this definition.

Note 2: See also subsection (6), which deals with the burden of proof of the exception in subparagraph (h)(i) of this definition.

- (2) For the purposes of this Act (other than Part 16):
 - (a) conduct is capable of constituting industrial action even if the conduct relates to part only of the duties that employees are required to perform in the course of their employment; and
 - (b) a reference to industrial action includes a reference to a course of conduct consisting of a series of industrial actions.

Meaning of agreement-related

- (3) For the purposes of this section, action is **agreement-related** if:
 - (a) it relates to the negotiation or proposed negotiation of an agreement under Part 8 (as that Part has effect because of section 869); or
 - (b) it affects or relates to work that is regulated by an agreement under Part 8 (as that Part has effect because of section 869).

Meaning of lockout

- (4) For the purposes of this section, an employer **locks out** employees from their employment if the employer prevents the employees

from performing work under their contracts of employment without terminating those contracts (except to the extent that this would be an expansion of the ordinary meaning of that expression).

Burden of proof

- (5) Whenever a person seeks to rely on paragraph (e) of the definition of *industrial action* in subsection (1), that person has the burden of proving that paragraph (e) applies.
- (6) Whenever a person seeks to rely on subparagraph (h)(i) of the definition of *industrial action* in subsection (1), that person has the burden of proving that subparagraph (h)(i) applies.

873 Intervention in proceedings under Part 9

- (1) The Commission must, on application, grant to a Minister of Victoria, on behalf of the Government of Victoria, leave to intervene in proceedings under Division 2 of Part 9 if one or more of the employees to be covered by the proposed agreement is an employee in Victoria.
- (2) The Full Bench must, on application, grant to a Minister of Victoria, on behalf of the Government of Victoria, leave to intervene in an appeal against a decision of a member of the Commission if:
 - (a) the decision is made under Division 2 of Part 9 in relation to a bargaining period for negotiating a proposed agreement; and
 - (b) one or more of the employees to be covered by the proposed agreement is an employee in Victoria.

874 Additional effect of Act—enforcement of, and compliance with, orders under Part 9

Without affecting its operation apart from this section, Part 14 also has effect in relation to an order of the Commission under Part 9 as Part 9 applies because of section 872, and for this purpose:

- (a) each reference in Part 14 to an employer (within the meaning of Part 14) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and

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- (b) each reference in Part 14 to an employee (within the meaning of Part 14) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in Part 14 to employment (within the meaning of Part 14) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria.

Division 5—Meal breaks

875 Additional effect of Act—meal breaks

Without affecting its operation apart from this section, Division 1 of Part 12 also has effect in relation to the employment of any employee in Victoria, and for this purpose:

- (a) each reference in that Division to an employer (within the meaning of that Division) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that Division to an employee (within the meaning of that Division) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that Division to employment (within the meaning of that Division) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria; and
- (d) section 609 has effect as if Part 13 had been modified in a corresponding way to the way in which Division 1 of Part 12 is modified by paragraphs (a), (b) and (c).

876 Additional effect of Act—enforcement of, and compliance with, section 607

Without affecting its operation apart from this section, Part 14 also has effect in relation to section 607 as that section applies because of section 875, and for this purpose:

- (a) each reference in that Part to an employer (within the meaning of that Part) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that Part to an employee (within the meaning of that Part) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that Part to employment (within the meaning of that Part) is to be read as a reference to the

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employment of an employee (within the meaning of this Division) in Victoria; and

- (d) each reference in that Part to section 607 is to be read as a reference to section 607 as that section has effect because of section 875.

Division 6—Public holidays

877 Additional effect of Act—public holidays

Without affecting its operation apart from this section, Division 2 of Part 12 also has effect in relation to the employment of any employee in Victoria, and for this purpose:

- (a) each reference in that Division to an employer (within the meaning of that Division) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that Division to an employee (within the meaning of that Division) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that Division to employment (within the meaning of that Division) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria; and
- (d) section 614 has effect as if Part 13 had been modified in a corresponding way to the way in which Division 2 of Part 12 is modified by paragraphs (a), (b) and (c).

878 Additional effect of Act—enforcement of, and compliance with, section 612

Without affecting its operation apart from this section, Part 14 also has effect in relation to section 612 as that section applies because of section 877, and for this purpose:

- (a) each reference in that Part to an employer (within the meaning of that Part) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that Part to an employee (within the meaning of that Part) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that Part to employment (within the meaning of that Part) is to be read as a reference to the

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employment of an employee (within the meaning of this Division) in Victoria; and

- (d) each reference in that Part to section 612 is to be read as a reference to section 612 as that section has effect because of section 877.

Division 7—Termination of employment

879 Additional effect of Act—termination of employment

Without affecting its operation apart from this section, Division 4 of Part 12 also has effect in relation to the termination of employment, at the initiative of the employer, of any employee in Victoria, and for this purpose:

- (a) each reference in that Division to an employer within the meaning of subsection 6(1) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that Division to an employee within the meaning of subsection 5(1) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that Division to employment within the meaning of subsection 7(1) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria.

880 Additional effect of Act—enforcement of, and compliance with, orders under Division 4 of Part 12

Without affecting its operation apart from this section, Part 14 also has effect in relation to an order of the Commission under Division 4 of Part 12 as that Division applies because of section 879, and for this purpose:

- (a) each reference in Part 14 to an employer (within the meaning of Part 14) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in Part 14 to an employee (within the meaning of Part 14) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in Part 14 to employment (within the meaning of Part 14) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria.

Division 7A—Stand downs

880A Additional effect of Act—stand downs

Without affecting its operation apart from this section, Division 7 of Part 12 also has effect in relation to the employment of any employee in Victoria, and for this purpose:

- (a) each reference in that Division to an employer (within the meaning of that Division) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that Division to an employee (within the meaning of that Division) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that Division to employment (within the meaning of that Division) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria.

Division 8—Freedom of association

881 Additional effect of Act—freedom of association

- (1) Without affecting its operation apart from this section, Part 16 also has effect in relation to conduct in Victoria.
- (2) Subsection (1) has effect despite section 782.

Division 9—Right of entry

882 Right of entry

Part 15 has effect, in relation to premises of an employer in Victoria, as if:

- (a) Division 4 of that Part did not authorise entering any such premises for the purposes of investigating a suspected breach unless the suspected breach relates to:
 - (i) a provision of this Act (as that provision has effect because of this Part); or
 - (ii) an agreement under Part 8 (as Part 8 has effect because of section 869); and
- (b) Division 6 of that Part did not authorise entering any such premises for the purposes of holding discussions unless the discussions relate to:
 - (i) an agreement under Part 8 (as Part 8 has effect because of section 869); or
 - (ii) a proposed agreement under Part 8 (as Part 8 has effect because of section 869).

883 Additional effect of Act—enforcement of, and compliance with, orders under Part 15

Without affecting its operation apart from this section, Part 14 also has effect in relation to an order of the Commission under Part 15 in relation to premises of an employer in Victoria, and for this purpose:

- (a) each reference in Part 14 to an employer (within the meaning of Part 14) includes a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in Part 14 to an employee (within the meaning of Part 14) includes a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in Part 14 to employment (within the meaning of Part 14) includes a reference to the employment of an employee (within the meaning of this Division) in Victoria.

Division 10—Employee records and pay slips

884 Additional effect of Act—employee records and pay slips

Without affecting its operation apart from this section, section 836 also has effect in relation to the employment of any employee in Victoria, and for this purpose:

- (a) each reference in that section to an employer (within the meaning of that section) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that section to an employee (within the meaning of that section) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that section to employment (within the meaning of that section) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria.

Division 11—Transmission of business

885 Additional effect of Act—transmission of business

- (1) Without affecting its operation apart from this section, Part 11 also has the effect it would have if:
 - (a) each reference in that Part to an employer (within the meaning of that Part) included a reference to an employer (within the meaning of this Division) in Victoria; and
 - (b) each reference in that Part to an employee (within the meaning of that Part) included a reference to an employee (within the meaning of this Division) in Victoria; and
 - (c) each reference in that Part to employment (within the meaning of that Part) included a reference to the employment of an employee (within the meaning of this Division) in Victoria by an employer (within the meaning of this Division) in Victoria; and
 - (d) each reference in that Part to employed (within the meaning of that Part) included a reference to employed (within the meaning of this Division) in Victoria by an employer (within the meaning of this Division) in Victoria; and
 - (e) Division 5 of that Part had not been enacted; and
 - (f) each reference in that Part to an ITEA (within the meaning of that Part) included a reference to an ITEA made under Part 8 (as Part 8 has effect because of section 869); and
 - (h) each reference in that Part to a collective agreement (within the meaning of that Part) included a reference to a collective agreement made under Part 8 (as Part 8 has effect because of section 869); and
 - (i) each reference in that Part to a workplace agreement (within the meaning of that Part) included a reference to a workplace agreement made under Part 8 (as Part 8 has effect because of section 869); and
 - (j) each reference in that Part to the Australian Fair Pay and Conditions Standard (within the meaning of that Part) included a reference to the Australian Fair Pay and Conditions Standard as that Standard has effect because of section 861; and

- (k) each reference in that Part to an APCS (within the meaning of that Part) included a reference to an APCS in force under Part 7 (as Part 7 has effect because of section 861).
- (2) To the extent to which Part 11 (as it has effect because of subsection (1)) applies if an employer (within the meaning of this Division) in Victoria becomes the successor, transmittee or assignee of the whole, or a part, of a business of:
- (a) another employer (within the meaning of subsection 6(1)); or
 - (b) another employer (within the meaning of this Division) in Victoria;
- that Part has effect only for so long, and in so far, as the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria refers to the Parliament of the Commonwealth a matter or matters that result in the Parliament of the Commonwealth having sufficient legislative power for that Part so to have effect.
- (3) To the extent to which Subdivision B of Division 4 of Part 11 (as it has effect because of subsection (1)) applies if an employer (within the meaning of this Division) in Victoria is likely to become the successor, transmittee or assignee of the whole, or a part, of a business of:
- (a) another employer (within the meaning of subsection 6(1)); or
 - (b) another employer (within the meaning of this Division) in Victoria;
- that Subdivision has effect only for so long, and in so far, as the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria refers to the Parliament of the Commonwealth a matter or matters that result in the Parliament of the Commonwealth having sufficient legislative power for that Subdivision so to have effect.

886 Additional effect of Act—enforcement of, and compliance with, orders under Part 11

Without affecting its operation apart from this section, Part 14 also has effect in relation to an order of the Commission under Part 11 as Part 11 applies because of section 885, and for this purpose:

- (a) each reference in Part 14 to an employer (within the meaning of Part 14) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and

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- (b) each reference in Part 14 to an employee (within the meaning of Part 14) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in Part 14 to employment (within the meaning of Part 14) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria.

Division 11A—Sham arrangements

886A Additional effect of Act—sham arrangements

Without affecting its operation apart from this section, section 902 also has effect in relation to the dismissal, or threatened dismissal, by an employer of an employee in Victoria, and for this purpose:

- (a) each reference in that section to an employer (within the meaning of that section) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that section to an employee (within the meaning of that section) is to be read as a reference to an employee (within the meaning of this Division) in Victoria.

Division 12—Employment agreements

887 Definitions

In this Division:

employee has the same meaning as in section 3 of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria, but does not include a person who is undertaking a vocational placement.

employer has the same meaning as in section 3 of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

employment means employment of an employee, and **employed** has a corresponding meaning.

employment agreement means an agreement that, immediately before the reform commencement, was continued in force by Subdivision E of Division 3 of Part XV of this Act.

Note: These agreements were entered into under Part 2 of the *Employee Relations Act 1992* of Victoria before 1 January 1997.

888 Application of this Division

- (1) This Division applies to an employment agreement about matters pertaining to the relationship between an employer (within the meaning of this Division) in Victoria and an employee (within the meaning of this Division) in Victoria if:
 - (a) both:
 - (i) the employer is also an employer within the meaning of Division 1; and
 - (ii) the employee is also an employee within the meaning of Division 1; or
 - (b) both:
 - (i) the employer is also an employer within the meaning of subsection 6(1); and
 - (ii) the employee is also an employee within the meaning of subsection 5(1).

- (2) This Division, to the extent to which it applies to an employment agreement because of paragraph (1)(a), has effect only for so long, and in so far, as the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria refers to the Parliament of the Commonwealth a matter or matters that result in the Parliament of the Commonwealth having sufficient legislative power for this Division so to have effect.

889 Inconsistency with other Commonwealth laws

Subject to clause 39 of Schedule 7, this Division does not have effect to the extent of any inconsistency with a law of the Commonwealth other than this Act.

890 Continued operation of employment agreements

- (1) Subject to subsection (2), for the purposes of this Act, an employment agreement continues in force as if Part 2 of the *Employee Relations Act 1992* of Victoria had not been repealed.
- (2) For the purposes of this Act, an employment agreement ceases to be in force in relation to an employee if the employment of the employee is subject to an ITEA, a collective agreement or a workplace determination.

892 Model dispute resolution process

- (1) An employment agreement is taken to include a term requiring disputes about the application of the agreement to be resolved using the model dispute resolution process.
- Note: The model dispute resolution process is set out in Part 13.
- (2) Any term of the employment agreement that would otherwise deal with the resolution of those disputes is void to that extent.
- (3) Without affecting its operation apart from this subsection, Part 13 also has effect in relation to an employment agreement, and for this purpose:
- (a) each reference in that Part to an employer (within the meaning of that Part) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and

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- (b) each reference in that Part to an employee (within the meaning of that Part) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that Part to a contract of employment (within the meaning of that Part) is to be read as a reference to an employment agreement; and
- (d) each reference in that Part to a workplace agreement is to be read as a reference to an employment agreement.

893 Additional effect of Act—enforcing employment agreements

Without affecting its operation apart from this section, Part 14 also has effect in relation to an employment agreement, and for this purpose:

- (a) each reference in that Part to an employer (within the meaning of that Part) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that Part to an employee (within the meaning of that Part) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that Part to employment (within the meaning of that Part) is to be read as a reference to the employment of a person under an employment agreement; and
- (d) each reference in that Part to an ITEA is to be read as a reference to an employment agreement.

894 Employer to give copy of employment agreement

Each employer bound by an employment agreement must, on being requested to do so by the employee bound by the agreement, give a copy of the agreement to the employee as soon as possible.

895 Registrar not to divulge information in employment agreements

If a Registrar has a copy of an employment agreement, the Registrar must not allow the information in the copy to become available to any person other than:

- (a) a party to the agreement; or
- (b) a person with authority to enforce the provisions of the agreement.

896 Relationship between employment agreements and Australian Fair Pay and Conditions Standard

- (1) An employment agreement that operates in relation to an employee prevails over the Australian Fair Pay and Conditions Standard to the extent to which, in a particular respect, the employment agreement provides a more favourable outcome for the employee.
- (2) The Australian Fair Pay and Conditions Standard prevails over an employment agreement that operates in relation to an employee to the extent to which, in a particular respect, the Australian Fair Pay and Conditions Standard provides a more favourable outcome for the employee.
- (3) The regulations may prescribe:
 - (a) what a particular respect is for the purposes of this section; or
 - (b) the circumstances in which an employment agreement provides or does not provide a more favourable outcome in a particular respect; or
 - (c) the circumstances in which the Australian Fair Pay and Conditions Standard provides or does not provide a more favourable outcome in a particular respect.

897 Relationship between employment agreements and awards

An award prevails to the extent of any inconsistency with an employment agreement.

Note: See also clauses 89, 95 and 102 of Schedule 6 (extended meaning of award).

Division 13—Exclusion of Victorian laws

898 Additional effect of Act—exclusion of Victorian laws

- (1) This Act is intended to apply to the exclusion of all the following laws of Victoria so far as they would otherwise apply in relation to an employee or employer:
- (a) a law of Victoria that applies to employment generally and relates to one or more of the following matters:
 - (i) agreements about matters pertaining to the relationship between an employer or employers in Victoria and an employee or employees in Victoria;
 - (ii) minimum terms and conditions of employment (other than minimum wages) for employees in Victoria;
 - (iii) setting and adjusting of minimum wages for employees in Victoria within a work classification;
 - (iv) termination, or proposed termination, of the employment of an employee in Victoria;
 - (v) freedom of association;
 - (b) a law of Victoria that is prescribed by regulations made for the purposes of this paragraph.

Victorian laws that are not excluded

- (2) However, subsection (1) does not apply to a law of Victoria so far as:
- (a) the law deals with the prevention of discrimination and is neither a State or Territory industrial law nor contained in such a law; or
 - (b) the law is prescribed by the regulations as a law to which subsection (1) does not apply.

Definitions

- (3) In this section:
- freedom of association*** has the same meaning as in subsection 4(6) of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

minimum terms and conditions of employment has the same meaning as in subsection 4(4) of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

minimum wage has the same meaning as in subsection 4(7) of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

work classification has the same meaning as in section 865.

Note: See also clause 87 of Schedule 6 (common rules in Victoria), which has effect despite any other provision of this Act.

Part 21 Matters referred by Victoria

Division 14 Additional effect of other provisions of this Act

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Division 14—Additional effect of other provisions of this Act

899 Additional effect of other provisions of this Act

The regulations may provide that, without affecting the operation of specified provisions of this Act apart from those regulations, those provisions also have a specified effect.

Note: The regulations must deal with matters referred by Victoria (see section 859).

Part 22—Sham arrangements

900 Misrepresenting an employment relationship as an independent contracting arrangement

- (1) A person contravenes this subsection if:
- (a) the person is a party to a contract with an individual; and
 - (b) the person makes a representation to the individual that the contract is a contract for services under which the individual performs work, or is to perform work, for the person as an independent contractor; and
 - (c) the contract, as in force at the time of the representation, is a contract of employment under which the person is the employer of the individual, rather than a contract for services under which the individual performs work as an independent contractor.

Note: In this subsection, *employer* and *employment* have the meanings given by subsections 6(1) and 7(1) respectively.

- (2) A person does not contravene subsection (1) if the person proves that, at the time the person made the representation concerned, the person did not know that, and was not reckless as to whether, the contract was a contract of employment rather than a contract for services.

Note: In this subsection, *employment* has its ordinary meaning—see paragraph 4(2)(pa) of Schedule 2.

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

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

901 Misrepresenting a proposed employment relationship as a proposed independent contract arrangement

- (1) A person contravenes this subsection if:
- (a) the person offers to enter into a contract with an individual; and
 - (b) the person makes a representation to the individual that the contract, if entered into, would be a contract for services

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under which the individual would perform work for the person as an independent contractor; and

- (c) the contract, if entered into, would be a contract of employment under which the person would be the employer of the individual, rather than a contract for services under which the individual would perform work as an independent contractor.

Note: In this subsection, *employer* and *employment* have the meanings given by subsections 6(1) and 7(1) respectively.

- (2) A person does not contravene subsection (1) if the person proves that, at the time the person made the representation concerned, the person did not know that, and was not reckless as to whether, if the contract were entered into, the contract would be a contract of employment rather than a contract for services.

Note: In this subsection, *employment* has its ordinary meaning—see paragraph 4(2)(pb) of Schedule 2.

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

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

902 Dismissal etc. for purpose of engaging certain persons as independent contractors

- (1) An employer contravenes this subsection if:
 - (a) the employer dismisses, or threatens to dismiss, an individual who:
 - (i) is an employee of the employer; and
 - (ii) performs particular work for the employer; and
 - (b) the employer's sole or dominant purpose in dismissing or threatening to dismiss the individual is to engage the individual as an independent contractor to perform the same work, or substantially the same work, under a contract for services.

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

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

- (3) In proceedings alleging a contravention of subsection (1) it is presumed, other than in relation to the granting of an interim

injunction, that the employer's sole or dominant purpose was the purpose referred to in paragraph (1)(b), unless the employer proves otherwise.

Note: Subsection 904(2A) permits the Court to grant an injunction for a breach of this section, and section 838 deals with interim injunctions.

903 Prohibited conduct for purpose of engaging certain persons as independent contractors

- (1) A person who employs, or has at any time employed, an individual to perform particular work contravenes this subsection if:
 - (a) the person makes a statement that the person knows is false; and
 - (b) the person's intention in making the statement is 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 work, or substantially the same work, for the person.
- (2) Subsection (1) is a civil remedy provision.

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

904 Penalty for contravention

- (1) The Court may, on application by an eligible person, make an order imposing a pecuniary penalty on a person who has contravened subsection 900(1), 901(1), 902(1) or 903(1).
- (2) The maximum penalty that may be imposed under subsection (1) is:
 - (a) 60 penalty units for an individual; or
 - (b) 300 penalty units for a body corporate.
- (2A) If a person has contravened subsection 902(1), the Court may, on application by an eligible person, grant an injunction and make any other orders that the Court considers necessary to stop the contravention or remedy its effects.
- (2B) Other orders the Court may make under subsection (2A) include (but are not limited to):

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- (a) if the contravention was constituted by dismissing an employee—an order to reinstate the person dismissed to the position that the person occupied immediately before the dismissal or to a position no less favourable than that position; and
 - (b) in any case—to pay to the person dismissed, or threatened with dismissal, compensation for loss suffered as a result of the dismissal or threatened dismissal.
- (2C) The Court may make orders under subsection (2A) in addition to, or instead of, imposing a pecuniary penalty.
- (3) Each of the following is an *eligible person* for the purposes of this section:
- (a) a workplace inspector;
 - (b) an individual affected by the contravention;
 - (c) an organisation of employees of which the individual affected by the contravention is (or has applied to become) a member, if it is acting with the written consent of the individual.

905 Meaning of Court

In this Part:

Court means the Federal Court of Australia or the Federal Magistrates Court.

Part 23—School-based apprentices and trainees

Division 1—Preliminary

914 Definitions

In this Part:

additional condition means a condition under an award or notional agreement preserving State awards.

full-time apprentice means a person employed on a full-time basis who is recognised, under the award or notional agreement preserving State awards that covers his or her employment, as an apprentice.

full-time trainee means a person employed on a full-time basis under a training arrangement who is not a full-time apprentice.

school-based apprentice means an employee:

- (a) whose employment is part of a school-based training arrangement; and
- (b) who would, if employed full-time under a training arrangement to do the same kind of work, in the same location and for the same employer, be a full-time apprentice.

school-based trainee means an employee, other than a school-based apprentice, whose employment is part of a school-based training arrangement.

school-based training arrangement means a training arrangement undertaken as part of a course of secondary education.

work on-the-job, in relation to a school-based apprentice or school-based trainee, means work that contributes directly to the productive output of the employer of the school-based apprentice or school-based trainee.

Note: So, for example, time spent studying or in other off-the-job training or education would not be ***work on-the-job*** for the purposes of this Part.

Division 2—School-based apprentices

915 Additional conditions for school-based apprentices

Additional conditions adjusted as necessary

- (1) A school-based apprentice is entitled, in accordance with subsection (2), to any additional conditions (the ***full-time conditions***) to which a full-time apprentice doing the same kind of work, in the same location and for the same employer would be entitled.
- (2) The school-based apprentice is entitled to the full-time conditions adjusted as necessary in proportion to the hours worked on-the-job by the school-based apprentice.
- (3) For the purposes of subsection (2), the regulations may determine, or make provision for determining, either or both of the following:
 - (a) whether particular full-time conditions should be adjusted in proportion to the hours worked on-the-job by the school-based apprentice;
 - (b) the method for adjusting particular full-time conditions in proportion to the hours worked on-the-job by the school-based apprentice.

This section does not limit additional conditions

- (4) To avoid doubt, this section does not operate to prevent the school-based apprentice from receiving conditions more generous than those provided by this section.

School-based apprentices not covered by this section

- (5) This section does not apply to a school-based apprentice if:
 - (a) an award or notional agreement preserving State awards covers the employment of the school-based apprentice; and
 - (b) the award or notional agreement preserving State awards specifies additional conditions for the school-based apprentice; and

- (c) the award or notional agreement preserving State awards does so by making specific provision for school-based apprentices.

916 Pay for apprentices who were school-based apprentices

- (1) Subsection (2) applies for the purposes of determining the rate of pay under an APCS for a full-time apprentice doing the same kind of work he or she did as a school-based apprentice.
- (2) The person's time as a full-time apprentice is taken to include the period calculated using the formula:

$$\text{Time as a school-based apprentice} \times \frac{1}{2}$$

where:

time as a school-based apprentice means the time for which the person was a school-based apprentice.

Division 3—School-based trainees

917 Additional conditions for school-based trainees

Additional conditions adjusted as necessary

- (1) A school-based trainee is entitled, in accordance with subsection (2), to any additional conditions (the ***full-time conditions***) to which a full-time trainee doing the same kind of work, in the same location and for the same employer would be entitled.
- (2) The school-based trainee is entitled to the full-time conditions adjusted as necessary in proportion to the hours worked on-the-job by the school-based trainee.
- (3) For the purposes of subsection (2), the regulations may determine, or make provision for determining, either or both of the following:
 - (a) whether particular full-time conditions should be adjusted in proportion to the hours worked on-the-job by the school-based trainee;
 - (b) the method for adjusting particular full-time conditions in proportion to the hours worked on-the-job by the school-based trainee.
- (4) Subsection (2) has effect subject to section 918.

This section does not limit additional conditions

- (5) To avoid doubt, this section does not operate to prevent a school-based trainee from receiving conditions more generous than those provided by this section.

School-based trainees not covered by this section

- (6) This section does not apply to a school-based trainee if:
 - (a) an award or notional agreement preserving State awards covers the employment of the school-based trainee; and
 - (b) the award or notional agreement preserving State awards specifies additional conditions for the school-based trainee; and

- (c) the award or notional agreement preserving State awards does so by making specific provision for school-based trainees.

918 Loading in lieu of certain conditions

- (1) The employer of a school-based trainee may, with the written agreement of the school-based trainee, pay the school-based trainee a loading in lieu of paid annual leave, paid sick leave, paid personal leave and payment for public holidays.
- (2) The loading is payable for all hours worked on-the-job and is calculated using the formula:

$$\text{Hourly rate} \times \frac{20}{100}$$

where:

hourly rate means the hourly rate paid to the school-based trainee apart from this section.

Note: The loading does not compensate for work done on a public holiday. A school-based trainee who works on a public holiday would be paid the applicable hourly rate for such work.

- (3) This section has effect as if it were a provision of the Australian Fair Pay and Conditions Standard.

Division 4—Enforcement

919 Enforcement

Part 14 has effect, in relation to a school-based apprentice or a school-based trainee who is entitled to be provided additional conditions in accordance with subsection 915(2) or 917(2), as if the subsection were a term of an award:

- (a) that bound the employer of the school-based apprentice or school-based trainee; and
- (b) to which the employment of the school-based apprentice or school-based trainee was subject.