



Fair Work Act 2009

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Volume 1: sections 1–536H

Volume 2: sections 537–800
Schedules
Endnotes

Each volume has its own contents

This compilation includes a commenced amendment made by Act No. 93, 2017

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About this compilation

This compilation

This is a compilation of the *Fair Work Act 2009* that shows the text of the law as amended and in force on 20 September 2017 (the *compilation date*).

The notes at the end of this compilation (the *endnotes*) include information about amending laws and the amendment history of provisions of the compiled law.

Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Legislation Register (www.legislation.gov.au). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Editorial changes

For more information about any editorial changes made in this compilation, see the endnotes.

Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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An Act relating to workplace relations, and for related purposes

Chapter 1—Introduction

Part 1-1—Introduction

Division 1—Preliminary

1 Short title

This Act may be cited as the *Fair Work Act 2009*.

2 Commencement

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

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	7 April 2009
2. Sections 3 to 40	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 12 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	26 May 2009 (see F2009L01818)

Fair Work Act 2009

1

Compilation No. 33

Compilation date: 20/9/17

Registered: 3/10/17

Chapter 1 Introduction

Part 1-1 Introduction

Division 1 Preliminary

Section 2

Commencement information

Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
3. Sections 41 to 572	A day or days to be fixed by Proclamation. A Proclamation must not specify a day that occurs before the day on which the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i> receives the Royal Assent. However, if any of the provision(s) do not commence within the period of 12 months beginning on the day on which the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i> receives the Royal Assent, they commence on the first day after the end of that period.	Sections 41–43, 50–54, 58, 169–281A, 300–327, 332, 333, 334–572: 1 July 2009 (see F2009L02563) Sections 44–49, 55–57A, 59–168, 282–299, 328–331, 333A: 1 January 2010 (see F2009L02563)
4. Sections 573 to 718	At the same time as the provision(s) covered by table item 2.	26 May 2009
5. Sections 719 to 800	A day or days to be fixed by Proclamation. A Proclamation must not specify a day that occurs before the day on which the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i> receives the Royal Assent. However, if any of the provision(s) do not commence within the period of 12 months beginning on the day on which the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i> receives the Royal Assent, they commence on the first day after the end of that period.	Sections 719–740, 769–800: 1 July 2009 (see F2009L02563) Sections 741–768: 1 January 2010 (see F2009L02563)
6. Schedule 1	At the same time as the provision(s) covered by table item 2.	26 May 2009

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

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

Division 2—Object of this Act

3 Object of this Act

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

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

- good faith bargaining obligations and clear rules governing industrial action; and
- (g) acknowledging the special circumstances of small and medium-sized businesses.

Division 3—Guide to this Act

4 Guide to this Act

Overview of this Act

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

Overview of the rest of this Chapter

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

Definitions

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

Application, saving and transitional provisions for amendments

- (4) Schedule 1 contains application, saving and transitional provisions relating to amendments of this Act.

5 Terms and conditions of employment (Chapter 2)

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

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

Main terms and conditions

- (3) Part 2-2 contains the National Employment Standards, which are minimum terms and conditions that apply to all national system employees.
- (4) Part 2-3 is about modern awards. A modern award is made for a particular industry or occupation and provides additional minimum terms and conditions for those national system employees to whom it applies. A modern award can have terms that are ancillary or supplementary to the National Employment Standards.
- (5) Part 2-4 is about enterprise agreements. An enterprise agreement is made at the enterprise level and provides terms and conditions for those national system employees to whom it applies. An enterprise agreement can have terms that are ancillary or supplementary to the National Employment Standards.
- (6) Part 2-5 is about workplace determinations. A workplace determination provides terms and conditions for those national system employees to whom it applies. A workplace determination is made by the FWC if certain conditions are met.
- (7) Part 2-8 provides for the transfer of certain modern awards, enterprise agreements, workplace determinations and other

Section 6

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

Other terms and conditions

- (8) In addition, other terms and conditions of employment for national system employees include those:
- (a) provided by a national minimum wage order (see Part 2-6) or an equal remuneration order (see Part 2-7); and
 - (b) provided by Part 2-9 (which deals with the frequency and method of making payments to employees, deductions from payments and high-income employees).

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

- (1) Chapter 3 sets out rights and responsibilities of national system employees, national system employers, organisations and others (such as independent contractors and industrial associations).
- (2) Part 3-1 provides general workplace protections. It:
 - (a) protects workplace rights; and
 - (b) protects freedom of association and involvement in lawful industrial activities; and
 - (c) provides other protections, including protection from discrimination.
- (3) Part 3-2 deals with unfair dismissal of national system employees, and the granting of remedies when that happens.
- (4) Part 3-3 deals mainly with industrial action by national system employees and national system employers and sets out when industrial action is protected industrial action. No action lies under any law in force in a State or Territory in relation to protected industrial action except in certain circumstances.
- (5) Part 3-4 is about the rights of officials of organisations who hold entry permits to enter premises for purposes related to their representative role under this Act and under State or Territory OHS

laws. In exercising those rights, permit holders must comply with the requirements set out in the Part.

- (6) Part 3-5 allows a national system employer to stand down a national system employee without pay in certain circumstances.
- (7) Part 3-6 deals with other rights and responsibilities of national system employers in relation to:
 - (a) termination of employment; and
 - (b) keeping records and giving payslips.
- (8) Part 3-7 deals with offences in relation to corrupting benefits.

7 Compliance and enforcement (Chapter 4)

- (1) Chapter 4 provides for compliance with, and enforcement of, this Act.
- (2) Part 4-1 is about civil remedies. Certain provisions in this Act impose obligations on certain persons. Civil remedies may be sought in relation to contraventions of these civil remedy provisions. Part 4-1:
 - (a) deals with applications for orders for contraventions of civil remedy provisions; and
 - (b) sets out the orders the courts can make in relation to a contravention of a civil remedy provision.
- (3) Part 4-2 is about the jurisdiction and powers of the courts in relation to matters arising under this Act.

8 Administration (Chapter 5)

- (1) Chapter 5 provides for the administration of this Act by establishing the Fair Work Commission and the Office of the Fair Work Ombudsman.
- (2) Part 5-1 is about the Fair Work Commission. It:
 - (a) establishes and confers functions on the FWC; and

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- (b) sets out how matters before the FWC are to be conducted (for example, how the FWC is to deal with applications made to it).
- (3) Part 5-2 is about the Office of the Fair Work Ombudsman. It:
 - (a) establishes and confers functions on the Fair Work Ombudsman; and
 - (b) confers functions and powers on Fair Work Inspectors.

9 Miscellaneous (Chapter 6)

- (1) Chapter 6 is a collection of miscellaneous matters that relate to the other Chapters.
- (2) Part 6-1 provides rules relating to applications for remedies under this Act. It prevents certain applications if other remedies are available and prevents multiple applications or complaints in relation to the same conduct.
- (3) Part 6-2 is about dealing with disputes between national system employees and their employers under modern awards, enterprise agreements and contracts of employment.
- (4) Part 6-3 extends the National Employment Standards relating to unpaid parental leave and notice of termination to non-national system employees.
- (4A) Part 6-3A provides for the transfer of terms and conditions of employment that are provided for in particular State industrial instruments if there is a transfer of business from a non-national system employer that is a State public sector employer of the State to a national system employer.
- (5) Part 6-4 contains provisions to give effect, or further effect, to certain international agreements relating to termination of employment.
- (5A) Part 6-4A contains special provisions about TCF outworkers.

Section 9A

- (5B) Part 6-4B allows a worker who has been bullied at work to apply to the FWC for an order to stop the bullying.
- (6) Part 6-5 deals with miscellaneous matters such as delegations and regulations.

9A Application, transitional and saving provisions for amendments (Schedules)

The Schedules contain application, transitional and saving provisions relating to amendments of this Act.

Note: Application, transitional and saving provisions relating to the enactment of this Act, and States becoming referring States, are in the Transitional Act.

Part 1-2—Definitions

Division 1—Introduction

10 Guide to this Part

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

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

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

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

11 Meanings of *employee* and *employer*

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

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

Division 2—The Dictionary

12 The Dictionary

In this Act:

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

AAT presidential member means a person who is a presidential member of the Administrative Appeals Tribunal under the *Administrative Appeals Tribunal Act 1975*.

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

accommodation arrangement: see subsections 521A(1) and (2).

action includes an omission.

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

adverse action: see section 342.

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

affected employer:

- (a) in relation to an entry under Subdivision A of Division 2 of Part 3-4: see subsection 482(2); and
- (aa) in relation to an entry under section 483A other than a designated outworker terms entry: see paragraph 483B(3)(a); and
- (ab) in relation to a designated outworker terms entry under section 483A: see paragraph 483B(3)(b); and
- (b) in relation to an entry in accordance with Division 3 of Part 3-4: see paragraph 495(2)(a); and
- (c) in relation to a State or Territory OHS right to inspect or otherwise access an employee record: see paragraph 495(2)(b).

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affected member certificate: see subsection 520(1).

Age Discrimination Commissioner means the Age Discrimination Commissioner appointed under the *Age Discrimination Act 2004*.

agreed terms for a workplace determination: see section 274.

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

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

annual wage review: see subsection 285(1).

anti-discrimination law: see subsection 351(3).

apparent indirectly responsible entity: see subsection 789CC(2).

applicable agreement-derived long service leave terms: see subsection 113(5).

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

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

applies:

- (a) in relation to a modern award: see section 47; and
- (b) in relation to an enterprise agreement: see section 52; and
- (c) in relation to a copied State instrument: see section 768AM.

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

appointment of a bargaining representative means an appointment of a bargaining representative under paragraph 176(1)(c) or (d) or 177(c).

appropriate safe job: see subsection 81(3).

approved by the FWC, in relation to an enterprise agreement, means approved by the FWC under section 186 or 189.

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

Australia means the Commonwealth of Australia and, when used in a geographical sense, includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, but does not include any other external Territory.

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

Australian employer: see subsection 35(1).

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

authority documents: see subsection 489(3).

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

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

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

award modernisation process means:

- (a) the process of making modern awards under Part 10A of the *Workplace Relations Act 1996*, as continued by Part 2 of Schedule 5 of the Transitional Act; and
- (b) the enterprise instrument modernisation process provided for by Part 2 of Schedule 6 of the Transitional Act; and
- (c) the State reference public sector transitional award modernisation process provided for by Part 2 of Schedule 6A of the Transitional Act.

ballot paper: see subsection 455(2).

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bargaining order: see subsection 229(1).

bargaining related workplace determination: see subsection 269(1).

bargaining representative for a proposed enterprise agreement: see sections 176 and 177.

bargaining services: see subsection 353(3).

bargaining services fee: see subsection 353(2).

base rate of pay: see section 16.

birth-related leave: see subsection 67(4).

bullied at work: see subsection 789FD(1).

cash or in kind payment: see subsection 536F(4).

child of a person: see subsection 17(1).

civil remedy provision: see subsections 539(1) and (3).

Commissioner means a Commissioner of the FWC.

common requirements in relation to industrial action: see section 413.

Commonwealth means the Commonwealth of Australia and, when used in a geographical sense, includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, but does not include any other external Territory.

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 a Territory; and
 - (ii) in which the Commonwealth has a controlling interest.

Commonwealth Ombudsman means the person for the time being holding office as Ombudsman under the *Ombudsman Act 1976*.

Commonwealth outworker entity means an entity that is an outworker entity otherwise than because of section 30F or 30Q.

Note: Sections 30F and 30Q extend the meaning of *outworker entity* in relation to a referring State.

Commonwealth place means a place referred to in paragraph 52(i) of the Constitution, other than the seat of government.

compassionate leave means compassionate leave to which a national system employee is entitled under section 104.

complaint about an FWC Member means a complaint referred to in paragraph 581A(1)(a) or section 641A.

complaint handler means:

- (a) the President; or
- (b) a person who is authorised by the President under subsection 581A(3); or
- (c) a person who is a member of a body that is authorised by the President under subsection 581A(3).

compliance powers: see section 703.

compliance purposes: see subsection 706(1).

concurrent leave: see subsection 72(5).

conduct includes an omission.

conduct of a protected action ballot: see subsection 458(5).

connected with a Territory: an arrangement for work to be performed for a person (either directly or indirectly) is **connected with a Territory** if one or more of the following apply:

- (a) at the time the arrangement is made, one or more parties to the arrangement is in a Territory in Australia;
- (b) the work is to be performed in such a Territory;

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- (c) the person carries on an activity (whether of a commercial, governmental or other nature) in such a Territory, and the work is reasonably likely to be performed in that Territory;
- (d) the person carries on an activity (whether of a commercial, governmental or other nature) in such a Territory, and the work is to be performed in connection with that activity.

Note: In this context, *Australia* includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see the definition of *Australia*).

consent low-paid workplace determination: see subsection 260(2).

consistent with the Small Business Fair Dismissal Code: see subsection 388(2).

consolidation order:

- (a) in relation to a transferring employee—see subsection 768BD(1); and
- (b) in relation to a non-transferring employee—see subsection 768BG(1).

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

constitutionally-covered business: see subsection 789FD(3).

constitutionally-covered entity: see subsection 338(2).

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.

continental shelf means the continental shelf (as defined in the *Seas and Submerged Lands Act 1973*) of Australia (including its external Territories).

continuous service has a meaning affected by section 22.

copied State award: see subsection 768AI(1).

copied State collective employment agreement: see subsection 768AK(4).

copied State employment agreement: see subsection 768AK(1).

copied State individual employment agreement: see subsection 768AK(5).

copied State instrument: see section 768AH.

corporate MySuper product: see subsection 23A(3).

coverage terms:

- (a) in relation to a modern award (other than a modern enterprise award): see section 143; and
- (b) in relation to a modern enterprise award: see section 143A; and
- (c) in relation to a State reference public sector modern award: see section 143B.

covers:

- (a) in relation to a modern award: see section 48; and
- (b) in relation to an enterprise agreement: see section 53; and
- (c) in relation to a workplace determination: see section 277; and
- (d) in relation to a copied State instrument: see section 768AN.

day of placement: see subsection 67(6).

de facto partner of a national system employee:

- (a) means a person who, although not legally married to the employee, lives with the employee in a relationship as a couple on a genuine domestic basis (whether the employee and the person are of the same sex or different sexes); and
- (b) includes a former de facto partner of the employee.

default fund employee: see subsection 149C(2).

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default fund term: see subsection 149C(2).

Default Superannuation List: see subsection 156B(1).

defined benefit member has the meaning given by the *Superannuation Guarantee (Administration) Act 1992*.

Deputy President means a Deputy President of the FWC.

designated emergency management body: see subsections 195A(4) and (5).

designated outworker term of a modern award, enterprise agreement, workplace determination or other instrument, means any of the following terms, so far as the term relates to outworkers in the textile, clothing or footwear industry:

- (a) a term that deals with the registration of an employer or outworker entity;
- (b) a term that deals with the making and retaining of, or access to, records about work to which outworker terms of a modern award apply;
- (c) a term imposing conditions under which an arrangement may be entered into by an employer or an outworker entity for the performance of work, where the work is of a kind that is often performed by outworkers;
- (d) a term relating to the liability of an employer or outworker entity for work undertaken by an outworker under such an arrangement, including a term which provides for the outworker to make a claim against an employer or outworker entity;
- (e) a term that requires minimum pay or other conditions, including the National Employment Standards, to be applied to an outworker who is not an employee;
- (f) any other terms prescribed by the regulations.

designated outworker terms entry: see subsection 483A(5).

directly, when used in relation to TCF work: see section 17A.

Disability Discrimination Commissioner means the Disability Discrimination Commissioner appointed under the *Disability Discrimination Act 1992*.

discriminatory term of an enterprise agreement: see section 195.

dismissal remedy bargaining order application: see subsection 726(2).

dismissed: see section 386.

earnings: see subsections 332(1) and (2).

eligible community service activity: see section 109.

eligible State or Territory court means one of the following courts:

- (a) a District, County or Local Court;
- (b) a magistrates court;
- (c) the Industrial Relations Court of South Australia;
- (ca) the Industrial Court of New South Wales;
- (d) any other State or Territory court that is prescribed by the regulations.

employee is defined in the first Division of each Part (other than Part 1-1) in which the term appears.

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

Note 2: If the term has its ordinary meaning, see further subsections 15(1), 30E(1) and 30P(1).

Note 3: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

employee A, in relation to a transfer of business referred to in Part 6-3A: see subsections 768BD(1) and 768BG(1).

employee claim action: see section 409 and paragraph 471(4A)(c).

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employee couple: 2 national system employees are an **employee couple** if each of the employees is the spouse or de facto partner of the other.

employee organisation means an organisation of employees.

employee record, in relation to an employee, means:

- (a) something that is an employee record, in relation to the employee, for the purposes of the *Privacy Act 1988*; or
- (b) in the case of a TCF contract outworker who is taken to be an employee by Division 2 of Part 6-4A of this Act—something that would be an employee record, in relation to the outworker, for the purposes of the *Privacy Act 1988*, if the outworker were an employee for the purposes of that Act.

employee response action: see section 410 and paragraph 471(4A)(d).

employee with a disability means a national system 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.

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

- Note 1: The definition in the Part will define **employer** either as a national system employer or as having its ordinary meaning. However, there may be particular provisions in the Part where a different meaning for the term is specified.
- Note 2: If the term has its ordinary meaning, see further subsections 15(2), 30E(2) and 30P(2).
- Note 3: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

employer MySuper product: see subsection 23A(1B).

employer organisation means an organisation of employers.

employer response action: see section 411.

employing authority: see subsection 795(6).

engages in industrial activity: see section 347.

enterprise means a business, activity, project or undertaking.

enterprise agreement means:

- (a) a single-enterprise agreement; or
- (b) a multi-enterprise agreement.

entry notice: see subsection 487(2).

entry permit: see section 512.

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

equal remuneration order: see subsection 302(1).

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

exemption certificate: see subsection 519(1).

exempt public sector superannuation scheme has the meaning given by the *Superannuation Industry (Supervision) Act 1993*.

Expert Panel means an Expert Panel constituted under section 620.

Expert Panel Member means an Expert Panel Member of the FWC.

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

extended parental leave provisions: see subsection 744(3).

Fair Work Commission or **FWC** means the body continued in existence by section 575.

Fair Work Information Statement: see subsection 124(1).

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Fair Work Inspector means:

- (a) a person appointed as a Fair Work Inspector under section 700; or
- (b) the Fair Work Ombudsman in his or her capacity as a Fair Work Inspector under section 701.

fair work instrument means:

- (a) a modern award; or
- (b) an enterprise agreement; or
- (c) a workplace determination; or
- (d) an FWC order.

Federal Circuit Court means the Federal Circuit Court of Australia.

Federal Court means the Federal Court of Australia.

first employer, in relation to a transfer of employment: see subsection 22(7).

first stage criteria: see section 156F.

first stage test: see section 156Q.

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

flexibility term:

- (a) in relation to a modern award—see subsection 144(1); and
- (b) in relation to an enterprise agreement—see subsection 202(1).

flight crew officer means a person who performs (whether with or without other duties) duties as a pilot, navigator or flight engineer of aircraft, and includes a person being trained for the performance of such duties.

franchise has the meaning given by the *Corporations Act 2001*.

franchisee entity of a franchise: see subsection 558A(1).

Full Bench means a Full Bench of the FWC constituted under section 618.

full rate of pay: see section 18.

FWC: see *Fair Work Commission*.

FWC Member means the President, a Vice President, a Deputy President, a Commissioner or an Expert Panel Member.

FWO notice: see subsection 712A(1).

General Manager means the General Manager of the FWC.

general protections court application: see subsection 368(4).

general protections FWC application: see subsection 727(2).

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

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

genuine redundancy: see section 389.

good faith bargaining requirements: see section 228.

greenfields agreement: see subsection 172(4).

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

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

handle a complaint about an FWC Member means do one or more of the following acts relating to the complaint:

- (a) consider the complaint;
- (b) investigate the complaint;
- (c) report on an investigation of the complaint;
- (d) deal with a report of an investigation of the complaint;

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- (e) dispose of the complaint;
- (f) refer the complaint to a person or body.

high income employee: see section 329.

high income threshold: see section 333.

ILO means the International Labour Organization.

immediate family of a national system employee means:

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

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

independent contractor is not confined to an individual.

indirectly, when used in relation to TCF work: see section 17A.

indirectly responsible entity, in relation to TCF work performed by a TCF outworker: see subsections 789CA(3), (4) and (5).

individual flexibility arrangement:

- (a) in relation to a modern award—see subsection 144(1); and
- (b) in relation to an enterprise agreement—see paragraph 202(1)(a).

industrial action: see section 19.

industrial action related workplace determination: see subsection 266(1).

industrial association means:

- (a) an association of employees or independent contractors, or both, or an association of employers, that is registered or recognised as such an association (however described) under a workplace law; or

- (b) an association of employees, or independent contractors, or both (whether formed formally or informally), a 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 may be); 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:

- (d) a branch of such an association; and
- (e) an organisation; and
- (f) a branch of an organisation.

industrial body means:

- (a) the FWC; or
- (b) a court or commission (however described) performing or exercising, under an industrial law, functions and powers corresponding to those conferred on the FWC by this Act; or
- (c) a court or commission (however described) performing or exercising, under a workplace law, functions and powers corresponding to those conferred on the FWC by the Registered Organisations Act.

industrial law means:

- (a) this Act; or
- (b) the Registered Organisations Act; or
- (c) a law of the Commonwealth, however designated, that regulates the relationships between employers and employees; or
- (d) a State or Territory industrial law.

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

inspector means a Fair Work Inspector.

interim application period: see paragraph 156N(2)(b).

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involved in: see section 550.

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

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

jury service pay: see subsection 111(6).

jury service summons: see subsection 111(7).

keeping in touch day: see subsections 79A(2) and (3).

law enforcement officer has the same meaning as in subsection 30K(1).

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

local government employee has the same meaning as in subsection 30K(1).

local government employer has the same meaning as in subsection 30K(1).

lock out: see subsection 19(3).

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

- (a) the employee is a casual employee; and
- (b) the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.

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

low-paid workplace determination means:

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

made:

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

magistrates court means:

- (a) a court constituted by a police, stipendiary or special magistrate; or
- (b) a court constituted by an industrial magistrate; or
- (c) the Local Court of the Northern Territory.

majority support determination: see subsection 236(1).

maritime employee means a person who is, or whose occupation is that of, a master as defined in subsection 14(1) of the *Navigation Act 2012*, a seafarer as so defined or a pilot as so defined.

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.

membership action: see subsection 350(3).

minimum employment period: see section 383.

minimum wages objective: see subsection 284(1).

miscellaneous modern award: see subsection 163(4).

model consultation term: see subsection 205(3).

model flexibility term: see subsection 202(5).

modern award means a modern award made under Part 2-3.

modern award minimum wages: see subsection 284(3).

modern award powers: see subsection 134(2).

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modern awards objective: see subsection 134(1).

modern enterprise award: see subsection 168A(2).

modern enterprise awards objective: see subsection 168B(1).

modifications includes additions, omissions and substitutions.

multi-enterprise agreement means an enterprise agreement made as referred to in subsection 172(3).

MySuper product: see subsection 23A(1).

named employer award: see subsection 312(2).

National Employment Standards: see subsection 61(3).

national minimum wage order means a national minimum wage order made in an annual wage review.

national system employee: see section 13.

Note 1: Sections 30C and 30M extend the meaning of **national system employee** in relation to a referring State.

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

national system employer: see section 14.

Note 1: Sections 30D and 30N extend the meaning of **national system employer** in relation to a referring State.

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

new employer:

(a) in relation to a transfer of business referred to in Part 2-8—see subsection 311(1); and

(b) in relation to a transfer of business referred to in Part 6-3A—see subsection 768AD(1).

nominal expiry date:

- (a) of an enterprise agreement approved under section 186, means the date specified in the agreement as its nominal expiry date; or
- (b) of an enterprise agreement approved under section 189 (which deals with agreements that do not pass the better off overall test): see subsection 189(4); or
- (c) of a workplace determination, means the date specified in the determination as its nominal expiry date; or
- (d) of a copied State employment agreement: see subsection 768AO(5).

non-excluded matters: see subsection 27(2).

non-member record or document: see subsection 482(2A).

non-monetary benefits: see subsection 332(3).

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

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

non-transferring employee:

- (a) in relation to a transfer of business referred to in Part 2-8— see subsection 314(2); and
- (b) in relation to a transfer of business referred to in Part 6-3A— see subsection 768BG(2).

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

notified negotiation period for a proposed single-enterprise agreement that is a greenfields agreement: see section 178B.

objectionable emergency management term of an enterprise agreement: see section 195A.

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objectionable term means a term that:

- (a) requires, has the effect of requiring, or purports to require or have the effect of requiring; or
- (b) permits, has the effect of permitting, or purports to permit or have the effect of permitting;

either of the following:

- (c) a contravention of Part 3-1 (which deals with general protections);
- (d) the payment of a bargaining services fee.

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

office, in an industrial 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
- (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.

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

officer, of an industrial association, means:

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

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

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

old State employer: see subsection 768AD(1).

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

organisation means an organisation registered under the Registered Organisations Act.

original State agreement, in relation to a copied State employment agreement: see paragraph 768AK(1)(a).

original State award, in relation to a copied State award: see paragraph 768AI(1)(a).

outworker means:

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

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

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

- (a) a constitutional corporation;
- (b) the Commonwealth;
- (c) a Commonwealth authority;
- (d) a body corporate incorporated in a Territory;
- (e) a person so far as:
 - (i) the person arranges for work to be performed for the person (either directly or indirectly); and
 - (ii) the work is of a kind that is often performed by outworkers; and
 - (iii) the arrangement is connected with a Territory.

Note: Sections 30F and 30Q extend the meaning of **outworker entity** in relation to a referring State.

outworker terms: see subsection 140(3).

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

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

paid no safe job leave means paid no safe job leave to which a national system employee is entitled under section 81A.

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

paid work means work for financial gain or reward (whether as an employee, a self-employed person or otherwise).

partial work ban: see subsection 470(3).

part of a single enterprise: see subsection 168A(6).

passes the better off overall test:

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

pattern bargaining: see section 412.

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

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

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

period of employment: see section 384.

permissible occasion: see sections 102 and 104.

permit holder means a person who holds an entry permit.

permit qualification matters: see subsection 513(1).

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

piecemaker: see section 21.

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

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

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

premises includes:

- (a) any land, building, structure, mine, mine working, aircraft, ship, vessel, vehicle or place; and

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(b) a part of premises (including premises referred to in paragraph (a)).

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

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

President means the President of the FWC.

procedural rules means the procedural rules of the FWC made under section 609.

process or proceedings under a workplace law or workplace instrument: see subsection 341(2).

prohibited beneficiary: see subsection 536F(5).

prospective award covered employee for an enterprise agreement: see subsection 193(5).

protected action ballot means a ballot conducted under Division 8 of Part 3-3.

protected action ballot agent for a protected action ballot means the person that conducts the protected action ballot.

protected action ballot order: see subsection 437(1).

protected from unfair dismissal: see section 382.

protected industrial action: see section 408.

public holiday: see section 115.

public sector employment: see subsections 795(4) and (5).

public sector employment law: see subsection 40(3).

recognised emergency management body: see subsection 109(3).

reduction in take-home pay: see subsection 768BR(3).

re-employment time, in relation to a transferring employee covered by a transfer of business referred to in Part 6-3A: see subsection 768AE(3).

registered employee association means:

- (a) an employee organisation; or
- (b) an association of employees or independent contractors, or both, that is registered or recognised as such an association (however described) under a State or Territory industrial law.

Registered Organisations Act means the *Fair Work (Registered Organisations) Act 2009*.

registered organisations officer or employee: see section 536E.

reinstatement includes appointment by an associated entity in the circumstances provided for in an order to which subsection 391(1A) applies.

related body corporate has the meaning given by the *Corporations Act 2001*.

related party has the same meaning as in the Registered Organisations Act.

relevant affairs, in relation to a registered organisations officer or employee, means the affairs of:

- (a) if the registered organisations officer or employee is an officer or employee of an organisation—the organisation and any branch of the organisation, including the affairs of the members of the organisation or any of those branches; or
- (b) if the registered organisations officer or employee is an officer or employee of a branch of an organisation—the branch, including the affairs of the members of the branch.

relevant belief: a person has a **relevant belief** in relation to a complaint about an FWC Member if:

- (a) the person believes that if one or more of the circumstances that gave rise to the complaint were substantiated, the circumstances would justify considering:

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- (i) terminating the appointment of the FWC Member in accordance with section 641; or
- (ii) (other than if the FWC Member is the President) suspending the FWC Member from office in accordance with section 642; or
- (b) the person believes that if one or more of the circumstances that gave rise to the complaint were substantiated, the circumstances may:
 - (i) adversely affect, or have adversely affected, the performance of duties by the FWC Member; or
 - (ii) have the capacity to adversely affect, or have adversely affected, the reputation of the FWC.

Note: Sections 641 and 642 deal with termination of appointment and suspension on the grounds of misbehaviour or incapacity.

relevant employee organisation, in relation to a greenfields agreement, means an employee organisation that is entitled to represent the industrial interests of one or more of the employees who will be covered by the agreement, in relation to work to be performed under the agreement.

responsible franchisor entity for a franchisee entity: see subsection 558A(2).

responsible person, in relation to TCF work performed by a TCF outworker: see subsection 789CA(1).

risk period: see subsections 81(1) and (5).

safety net contractual entitlement means an entitlement under a contract between an employee and an employer that relates to any of the subject matters described in:

- (a) subsection 61(2) (which deals with the National Employment Standards); or
- (b) subsection 139(1) (which deals with modern awards).

Schedule of Approved Employer MySuper Products: see paragraph 156L(1)(a).

school age, for a child, means the age at which the child is required by a law of the State or Territory in which the child lives to attend school.

school-based apprentice means a national system employee who is an apprentice to whom a school-based training arrangement applies.

school-based trainee means a national system employee (other than a school-based apprentice) to whom a school-based training arrangement applies.

school-based training arrangement means a training arrangement undertaken as part of a course of secondary education.

scope order: see subsection 238(1).

second employer, in relation to a transfer of employment: see subsection 22(7).

second stage test:

- (a) in relation to a standard MySuper product—see subsection 156H(2); and
- (b) in relation to an employer MySuper product—see section 156S.

section 179A disclosable benefit: see subsection 179A(4).

section 179 disclosable benefit: see subsection 179(6).

serious breach declaration: see section 234.

serious contravention has the meaning given by section 557A.

serious misconduct has the meaning prescribed by the regulations.

service: see section 22.

setting modern award minimum wages: see subsection 284(4).

Sex Discrimination Commissioner means the Sex Discrimination Commissioner appointed under the *Sex Discrimination Act 1984*.

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ship includes a barge, lighter, hulk or other vessel.

single enterprise: see section 168A.

single-enterprise agreement means an enterprise agreement made as referred to in subsection 172(2).

single interest employer authorisation: see subsection 248(1).

small business employer: see section 23.

Small Business Fair Dismissal Code means the Small Business Fair Dismissal Code declared under subsection 388(1).

special low-paid workplace determination: see subsection 260(4).

spouse includes a former spouse.

standard application period: see paragraph 156N(2)(a).

standard MySuper product: see subsection 23A(1A).

State award: see section 768AJ.

State collective employment agreement: see subsection 768AL(3).

State employment agreement: see subsections 768AL(1) and (2).

State individual employment agreement: see subsection 768AL(4).

State industrial instrument means an award, an agreement (whether individual or collective), or another industrial instrument or order, that:

- (a) is made under, or recognised by, a law of a State that is a State or Territory industrial law; and
- (b) determines terms and conditions of employment.

State industrial law means a law of a State that is a State or Territory industrial law.

state of mind: see subsection 793(3).

State or Territory industrial law: see subsection 26(2).

State or Territory OHS law: see subsection 494(3).

State or Territory OHS right: see subsection 494(2).

State public sector employee, of a State, means:

- (a) an employee of a State public sector employer of the State; or
- (b) any other non-national system employee in the State of a kind specified in the regulations;

and includes a law enforcement officer of the State but does not include a local government employee of the State.

State public sector employer, of a State, means a non-national system employer that is:

- (a) the State, the Governor of the State or a Minister of the State; or
- (b) a body corporate that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or
- (c) a body corporate in which the State has a controlling interest; or
- (d) a person who employs individuals for the purposes of an unincorporated body that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or
- (e) any other employer in the State of a kind specified in the regulations;

and includes a non-national system employer of a law enforcement officer of the State but does not include a local government employer of the State.

State reference public sector employee: see subsection 168E(3).

State reference public sector employer: see subsection 168E(4).

State reference public sector modern award: see subsection 168E(2).

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State reference public sector modern awards objective: see section 168F.

step-child: without limiting who is a step-child of a person, someone who is a child of the person's de facto partner is a ***step-child*** of a person, if he or she would be the person's step-child except that the person is not legally married to the de facto partner.

superannuation fund means a superannuation fund or a superannuation scheme.

tailored MySuper product: see subsection 23A(2).

take-home pay: see subsection 768BR(2).

take-home pay order: see subsection 768BS(1).

TCF award means an instrument prescribed by the regulations for the purposes of this definition.

TCF award worker: see subsection 483A(1A).

TCF contract outworker: see subsection 789BB(2).

TCF outwork code: see section 789DA.

TCF outworker means an outworker in the textile, clothing or footwear industry.

TCF work means work in the textile, clothing or footwear industry.

termination of industrial action instrument: see subsection 266(2).

termination time, in relation to a transferring employee covered by a transfer of business referred to in Part 6-3A: see subsection 768AE(2).

territorial sea, in relation to Australia, has the meaning given by Division 1 of Part II of the *Seas and Submerged Lands Act 1973*.

Territory employer: see subsection 338(4).

test time: see subsection 193(6).

this Act includes the regulations.

trade and commerce employer: see subsection 338(3).

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

transferable instrument: see subsection 312(1).

transfer of business:

- (a) for a transfer of business between a national system employer and another national system employer—see subsection 311(1); and
- (b) for a transfer of business between a non-national system employer that is a State public sector employer and a national system employer—see subsection 768AD(1).

transfer of employment: see subsection 22(7).

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

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

transferring employee:

- (a) in relation to a transfer of business referred to in Part 2-8—see subsection 311(2); and
- (b) in relation to a transfer of business referred to in Part 6-3A—see subsection 768AE(1).

transferring work:

- (a) in relation to a transfer of business referred to in Part 2-8—see paragraph 311(1)(c); and
- (b) in relation to a transfer of business referred to in Part 6-3A—see paragraph 768AD(1)(c).

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Transitional Act means the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

transport arrangement: see subsections 521B(1) and (2).

unfair dismissal application: see subsection 729(2).

unfairly dismissed: see section 385.

unlawful term of an enterprise agreement: see section 194.

unlawful termination court application: see subsection 776(4).

unlawful termination FWC application: see subsection 730(2).

unpaid amount, in relation to TCF work performed by a TCF outworker: see subsections 789CA(1) and (4).

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

unpaid no safe job leave means unpaid no safe job leave to which a national system employee is entitled under section 82A.

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

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

unpaid special maternity leave means unpaid special maternity leave to which a national system employee is entitled under section 80.

varying modern award minimum wages: see subsection 284(4).

Vice President means a Vice President of the FWC.

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.

voluntary emergency management activity: see subsection 109(2).

volunteer of a designated emergency management body: see subsection 195A(6).

waters above the continental shelf means any part of the area in, on or over the continental shelf.

waterside worker has the meaning given by clause 1 of Schedule 2 to the *Workplace Relations Act 1996* as in force immediately before the commencement of this section.

worker:

- (a) in Part 6-4B—see subsection 789FC(2); and
- (b) otherwise—has its ordinary meaning.

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

workplace determination means:

- (a) a low-paid workplace determination; or
- (b) an industrial action related workplace determination; or
- (c) a bargaining related workplace determination.

workplace instrument means an instrument that:

- (a) is made under, or recognised by, a workplace law; and
- (b) concerns the relationships between employers and employees.

workplace law means:

- (a) this Act; or
- (b) the Registered Organisations Act; or
- (c) the *Independent Contractors Act 2006*; or

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

workplace right: see subsection 341(1).

work value reasons: see subsection 156(4).

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

13 Meaning of *national system employee*

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

Note: Sections 30C and 30M extend the meaning of *national system employee* in relation to a referring State.

14 Meaning of *national system employer*

- (1) A *national system employer* is:
- (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 so far as the person, 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 who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

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Note 1: In this context, *Australia* includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see the definition of *Australia* in section 12).

Note 2: Sections 30D and 30N extend the meaning of *national system employer* in relation to a referring State.

Particular employers declared not to be national system employers

- (2) Despite subsection (1) and sections 30D and 30N, a particular employer is not a national system employer if:
- (a) that employer:
 - (i) is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or
 - (ii) is a body established for a local government purpose by or under a law of a State or Territory; or
 - (iii) is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, an employer to which subparagraph (ii) applies; and
 - (b) that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and
 - (c) an endorsement by the Minister under paragraph (4)(a) is in force in relation to the employer.
- (3) Paragraph (2)(b) does not apply to an employer that is covered by a declaration by or under such a law only because it is included in a specified class or kind of employer.

Endorsement of declarations

- (4) The Minister may, in writing:
- (a) endorse, in relation to an employer, a declaration referred to in paragraph (2)(b); or
 - (b) revoke or amend such an endorsement.

- (5) An endorsement, revocation or amendment under subsection (4) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the endorsement, revocation or amendment.

Note: Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* does not apply to the endorsement, revocation or amendment (see regulations made for the purposes of paragraph 54(2)(b) of that Act).

Employers that cannot be declared

- (6) Subsection (2) does not apply to an employer that:
- (a) generates, supplies or distributes electricity; or
 - (b) supplies or distributes gas; or
 - (c) provides services for the supply, distribution or release of water; or
 - (d) operates a rail service or a port;
- unless the employer is a body established for a local government purpose by or under a law of a State or Territory, or is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, such a body.
- (7) Subsection (2) does not apply to an employer if the employer is an Australian university (within the meaning of the *Higher Education Support Act 2003*) that is established by or under a law of a State or Territory.

14A Transitional matters relating to employers etc. becoming, or ceasing to be, national system employers etc.

- (1) The regulations may make provisions of a transitional, application or saving nature in relation to any of the following:
- (a) an employer ceasing to be a national system employer because subsection 14(2) applies to the employer;
 - (b) an individual ceasing to be a national system employee because an employer ceases to be a national system employer for the reason referred to in paragraph (a);

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- (c) an employer becoming a national system employer because subsection 14(2) ceases to apply to the employer;
 - (d) an individual becoming a national system employee because an employer becomes a national system employer for the reason referred to in paragraph (c).
- (2) Without limiting subsection (1), regulations made for the purpose of that subsection may:
- (a) modify provisions of this Act or the Transitional Act; or
 - (b) provide for the application (with or without modifications) of provisions of this Act, or the Transitional Act, to matters to which they would otherwise not apply.

15 Ordinary meanings of *employee* and *employer*

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

Note: Subsections 30E(1) and 30P(1) extend the meaning of *employee* in relation to a referring State.

- (2) A reference in this Act to an employer with its ordinary meaning includes a reference to a person who is usually such an employer.

Note: Subsections 30E(2) and 30P(2) extend the meaning of *employer* in relation to a referring State.

Division 4—Other definitions

16 Meaning of *base rate of pay*

General meaning

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

Meaning for pieceworkers in relation to entitlements under National Employment Standards

- (2) Despite subsection (1), if one of the following paragraphs applies to a national system employee who is a pieceworker, the employee's ***base rate of pay***, in relation to entitlements under the National Employment Standards, is the base rate of pay referred to in that paragraph:
 - (a) a modern award applies to the employee and specifies the employee's base rate of pay for the purposes of the National Employment Standards;
 - (b) an enterprise agreement applies to the employee and specifies the employee's base rate of pay for the purposes of the National Employment Standards;
 - (c) the employee is an award/agreement free employee, and the regulations prescribe, or provide for the determination of, the employee's base rate of pay for the purposes of the National Employment Standards.

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Meaning for pieceworkers for the purpose of section 206

- (3) The regulations may prescribe, or provide for the determination of, the base rate of pay, for the purpose of section 206, of an employee who is a pieceworker. If the regulations do so, the employee's **base rate of pay**, for the purpose of that section, is as prescribed by, or determined in accordance with, the regulations.

Note: Section 206 deals with an employee's base rate of pay under an enterprise agreement.

17 Meaning of *child* of a person

- (1) A **child** of a person includes:
- (a) someone who is a child of the person within the meaning of the *Family Law Act 1975*; and
 - (b) an adopted child or step-child of the person.

It does not matter whether the child is an adult.

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

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

- (a) the other person is the parent of the child, and so is a member of the child's immediate family; and
- (b) the child, and any other children, of the other person are siblings, and so are members of each other's immediate family.

17A Meaning of *directly* and *indirectly* (in relation to TCF work)

- (1) If there is a chain or series of 2 or more arrangements for the supply or production of goods produced by TCF work performed by a person (the **worker**), the following provisions have effect:
- (a) the work is taken to be performed **directly** for the person (the **direct principal**) who employed or engaged the worker (and the direct principal is taken to have arranged for the work to be performed **directly** for the direct principal);

- (b) the work is taken to be performed *indirectly* for each other person (an *indirect principal*) who is a party to any of the arrangements in the chain or series (and each indirect principal is taken to have arranged for the work to be performed *indirectly* for the indirect principal).
- (2) This section does not limit the circumstances in which TCF work is performed *directly* or *indirectly* for a person (or in which a person arranges for TCF work to be performed *directly* or *indirectly* for the person).
- (3) This section does not apply for the purposes of Division 2A or 2B of Part 1-3.

18 Meaning of *full rate of pay*

General meaning

- (1) The *full rate of pay* of a national system employee is the rate of pay payable to the employee, including all the following:
 - (a) incentive-based payments and bonuses;
 - (b) loadings;
 - (c) monetary allowances;
 - (d) overtime or penalty rates;
 - (e) any other separately identifiable amounts.

Meaning for pieceworkers in relation to entitlements under National Employment Standards

- (2) However, if one of the following paragraphs applies to a national system employee who is a pieceworker, the employee's *full rate of pay*, in relation to entitlements under the National Employment Standards, is the full rate of pay referred to in that paragraph:
 - (a) a modern award applies to the employee and specifies the employee's full rate of pay for the purposes of the National Employment Standards;

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

19 Meaning of *industrial action*

- (1) ***Industrial action*** means action of any 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.

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

- (2) However, ***industrial action*** does not include the following:
 - (a) action by employees that is authorised or agreed to by the employer of the employees;
 - (b) action by an employer that is authorised or agreed to by, or on behalf of, employees of the employer;
 - (c) action by an employee if:

- (i) the action was based on a reasonable concern of 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.
- (3) 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.

Note: In this section, **employee** and **employer** have their ordinary meanings (see section 11).

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

Agreed ordinary hours of work

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

If there is no agreement

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

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If the agreed hours are less than usual weekly hours

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

Regulations may prescribe usual weekly hours

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

21 Meaning of *piecemaker*

- (1) A **piecemaker** is:
- (a) a national system employee to whom a modern award applies and who is defined or described in the award as a piecemaker; or
 - (b) a national system employee to whom an enterprise agreement applies and who is defined or described in the agreement as a piecemaker; or
 - (c) an award/agreement free employee who is in a class of employees prescribed by the regulations as piecemakers.

- Note: Sections 197 and 198 affect whether the FWC may approve an enterprise agreement covering a national system employee that includes a term that:
- (a) defines or describes the employee as a piecemaker, if the employee is covered by a modern award that is in operation and does not include such a term; or
 - (b) does not define or describe the employee as a piecemaker, if the employee is covered by a modern award that is in operation and includes such a term.

- (2) Without limiting the way in which a class may be described for the purposes of paragraph (1)(c), the class may be described by reference to one or more of the following:
- (a) a particular industry or part of an industry;
 - (b) a particular kind of work;
 - (c) a particular type of employment.

22 Meanings of *service* and *continuous service*

General meaning

- (1) A period of *service* by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include any period (an ***excluded period***) that does not count as service because of subsection (2).
- (2) The following periods do not count as service:
- (a) any period of unauthorised absence;
 - (b) any period of unpaid leave or unpaid authorised absence, other than:
 - (i) a period of absence under Division 8 of Part 2-2 (which deals with community service leave); or
 - (ii) a period of stand down under Part 3-5, under an enterprise agreement that applies to the employee, or under the employee's contract of employment; or
 - (iii) a period of leave or absence of a kind prescribed by the regulations;
 - (c) any other period of a kind prescribed by the regulations.
- (3) An excluded period does not break a national system employee's ***continuous service*** with his or her national system employer, but does not count towards the length of the employee's continuous service.
- (3A) Regulations made for the purposes of paragraph (2)(c) may prescribe different kinds of periods for the purposes of different provisions of this Act (other than provisions to which
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subsection (4) applies). If they do so, subsection (3) applies accordingly.

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

- (4) For the purposes of Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2:
- (a) a period of **service** by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include:
 - (i) any period of unauthorised absence; or
 - (ii) any other period of a kind prescribed by the regulations; and
 - (b) a period referred to in subparagraph (a)(i) or (ii) does not break a national system employee's **continuous service** with his or her national system employer, but does not count towards the length of the employee's continuous service; and
 - (c) subsections (1), (2) and (3) do not apply.

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

- (4A) Regulations made for the purposes of subparagraph (4)(a)(ii) may prescribe different kinds of periods for the purposes of different provisions to which subsection (4) applies. If they do so, paragraph (4)(b) applies accordingly.

When service with one employer counts as service with another employer

- (5) If there is a transfer of employment (see subsection (7)) in relation to a national system employee:
- (a) any period of service of the employee with the first employer counts as service of the employee with the second employer; and

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

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

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

Note: For example:

- (a) the accrued paid annual leave to which the employee is entitled as an employee of the second employer does not include any period of paid annual leave that the employee has already taken as an employee of the first employer; and
- (b) if an employee receives notice of termination or payment in lieu of notice in relation to a period of service with the first employer, that period of service is not counted again in calculating the amount of notice of termination, or payment in lieu, to which the employee is entitled as an employee of the second employer.

Meaning of transfer of employment etc.

- (7) There is a ***transfer of employment*** of a national system employee from one national system employer (the ***first employer***) to another national system employer (the ***second employer***) if:
- (a) the following conditions are satisfied:

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- (i) the employee becomes employed by the second employer not more than 3 months after the termination of the employee's employment with the first employer;
- (ii) the first employer and the second employer are associated entities when the employee becomes employed by the second employer; or
- (b) the following conditions are satisfied:
 - (i) the employee is a transferring employee in relation to a transfer of business from the first employer to the second employer;
 - (ii) the first employer and the second employer are not associated entities when the employee becomes employed by the second employer.

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

- (8) A transfer of employment:
 - (a) is a ***transfer of employment between associated entities*** if paragraph (7)(a) applies; and
 - (b) is a ***transfer of employment between non-associated entities*** if paragraph (7)(b) applies.

23 Meaning of *small business employer*

- (1) A national system employer is a ***small business employer*** at a particular time if the employer employs fewer than 15 employees at that time.
- (2) For the purpose of calculating the number of employees employed by the employer at a particular time:
 - (a) subject to paragraph (b), all employees employed by the employer at that time are to be counted; and
 - (b) a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis.

- (3) For the purpose of calculating the number of employees employed by the employer at a particular time, associated entities are taken to be one entity.
- (4) To avoid doubt, in determining whether a national system employer is a ***small business employer*** at a particular time in relation to the dismissal of an employee, or termination of an employee's employment, the employees that are to be counted include (subject to paragraph (2)(b)):
 - (a) the employee who is being dismissed or whose employment is being terminated; and
 - (b) any other employee of the employer who is also being dismissed or whose employment is also being terminated.

23A Terms relating to superannuation

- (1) ***MySuper product*** has the meaning given by the *Superannuation Industry (Supervision) Act 1993*.
- (1A) A ***standard MySuper product*** is a MySuper product that is not an employer MySuper product.
- (1B) An ***employer MySuper product*** is a tailored MySuper product or a corporate MySuper product.
- (2) A ***tailored MySuper product*** is a MySuper product in relation to which section 29TB of the *Superannuation Industry (Supervision) Act 1993* is satisfied.
- (3) A ***corporate MySuper product*** is a MySuper product that is offered by a superannuation fund that:
 - (a) is a standard employer-sponsored fund (within the meaning of the *Superannuation Industry (Supervision) Act 1993*); and
 - (b) is not a public offer superannuation fund (within the meaning of that Act); and
 - (c) has:
 - (i) one standard employer-sponsor (within the meaning of that Act); or

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- (ii) 2 or more standard employer-sponsors (within the meaning of that Act) that are associates of each other for the purposes of that Act.
- (4) A reference in this Act to a superannuation fund doing a thing in relation to a matter (for example, offering a MySuper product or making an application or submission) is a reference to the RSE licensee (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of the fund doing that thing.

Part 1-3—Application of this Act

Division 1—Introduction

24 Guide to this Part

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

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

Divisions 2A and 2B are about the extended application of this Act in States that have referred to the Parliament of the Commonwealth matters relating to this Act.

Division 3 is about the geographical application of this Act.

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

25 Meanings of *employee* and *employer*

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

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances). However, that Division does not apply for the purposes of Divisions 2A and 2B of this Part.

Division 2—Interaction with State and Territory laws

26 Act excludes State or Territory industrial laws

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

order in relation to equal remuneration for work of equal or comparable value; or

- (e) a law of a State or Territory 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; or
 - (f) a law of a State or Territory that entitles a representative of a trade union to enter premises; or
 - (g) an instrument made under a law described in paragraph (a), (b), (c), (d), (e) or (f), so far as the instrument is of a legislative character; or
 - (h) either of the following:
 - (i) a law that is a law of a State or Territory;
 - (ii) an instrument of a legislative character made under such a law;
- that is prescribed by the regulations.

(3) Each of the following is a **general State industrial law**:

- (a) the *Industrial Relations Act 1996* of New South Wales;
- (b) the *Industrial Relations Act 1999* of Queensland;
- (c) the *Industrial Relations Act 1979* of Western Australia;
- (d) the *Fair Work Act 1994* of South Australia;
- (e) the *Industrial Relations Act 1984* of Tasmania.

(4) A law or an Act 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.

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

- (1A) Section 26 does not apply to any of the following laws:
- (a) the *Anti-Discrimination Act 1977* of New South Wales;
 - (b) the *Equal Opportunity Act 2010* of Victoria;
 - (c) the *Anti-Discrimination Act 1991* of Queensland;
 - (d) the *Equal Opportunity Act 1984* of Western Australia;
 - (e) the *Equal Opportunity Act 1984* of South Australia;
 - (f) the *Anti-Discrimination Act 1998* of Tasmania;
 - (g) the *Discrimination Act 1991* of the Australian Capital Territory;
 - (h) the *Anti-Discrimination Act* of the Northern Territory.

- (1) Section 26 does not apply to a law of a State or Territory so far as:
- (b) the law is prescribed by the regulations as a law to which section 26 does not apply; or
 - (c) the law deals with any non-excluded matters; or
 - (d) the law deals with rights or remedies incidental to:
 - (i) any law referred to in subsection (1A); or
 - (ii) any matter dealt with by a law to which paragraph (b) applies; or
 - (iii) any non-excluded matters.

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

- (2) The ***non-excluded matters*** are as follows:
- (a) superannuation;
 - (b) workers compensation;
 - (c) occupational health and safety;
 - (d) matters relating to outworkers (within the ordinary meaning of the term);
 - (e) child labour;
 - (f) training arrangements, except in relation to terms and conditions of employment to the extent that those terms and

conditions are provided for by the National Employment Standards or may be included in a modern award;

- (g) long service leave, except in relation to an employee who is entitled under Division 9 of Part 2-2 to long service leave;
- (h) leave for victims of crime;
- (i) attendance for service on a jury, or for emergency service duties;

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

- (j) declaration, prescription or substitution of public holidays, except in relation to the rights and obligations of an employee or employer in relation to public holidays;
- (k) the following matters relating to provision of essential services or to situations of emergency:
 - (i) directions to perform work (including to perform work at a particular time or place, or in a particular way);
 - (ii) directions not to perform work (including not to perform work at a particular time or place, or in a particular way);
- (l) regulation of any of the following:
 - (i) employee associations;
 - (ii) employer associations;
 - (iii) members of employee associations or of employer associations;
- (m) workplace surveillance;
- (n) business trading hours;
- (o) claims for enforcement of contracts of employment, except so far as the law in question provides for a matter to which paragraph 26(2)(e) applies;
- (p) any other matters prescribed by the regulations.

28 Act excludes prescribed State and Territory laws

- (1) This Act is intended to apply to the exclusion of a law of a State or Territory that is prescribed by the regulations.

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

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

- (1) A modern award or enterprise agreement prevails over a law of a State or Territory, to the extent of any inconsistency.
- (2) Despite subsection (1), a term of a modern award or enterprise agreement applies subject to the following:
 - (a) any law covered by subsection 27(1A);
 - (b) any law of a State or Territory so far as it is covered by paragraph 27(1)(b), (c) or (d).

Note: In addition, a term of an enterprise agreement could be an unlawful term and of no effect if it requires or permits a designated emergency management body to act other than in accordance with a State or Territory law and this affects or could affect the body's volunteers (see paragraphs 194(baa), 195A(1)(d) and 253(1)(b)).

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

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

This Division is 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.

Division 2A—Application of this Act in States that refer matters before 1 July 2009

30A Meaning of terms used in this Division

(1) In this Division:

amendment reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30B(4).

excluded subject matter means any of the following matters:

- (a) a matter dealt with in a law referred to in subsection 27(1A) of this Act;
- (b) superannuation;
- (c) workers compensation;
- (d) occupational health and safety;
- (e) matters relating to outworkers (within the ordinary meaning of the term);
- (f) child labour;
- (g) training arrangements;
- (h) long service leave;
- (i) leave for victims of crime;
- (j) attendance for service on a jury, or for emergency service duties;
- (k) declaration, prescription or substitution of public holidays;
- (l) the following matters relating to provision of essential services or to situations of emergency:
 - (i) directions to perform work (including to perform work at a particular time or place, or in a particular way);
 - (ii) directions not to perform work (including not to perform work at a particular time or place, or in a particular way);
- (m) regulation of any of the following:
 - (i) employee associations;

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- (ii) employer associations;
- (iii) members of employee associations or of employer associations;
- (n) workplace surveillance;
- (o) business trading hours;
- (p) claims for enforcement of contracts of employment, except so far as a law of a State provides 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;
- (q) rights or remedies incidental to a matter referred to in a preceding paragraph of this definition;

except to the extent that this Act as originally enacted deals with the matter (directly or indirectly), or requires or permits instruments made or given effect under this Act so to deal with the matter.

express amendment means the direct amendment of the text of this Act (whether by the insertion, omission, repeal, substitution or relocation of words or matter), but does not include the enactment by a Commonwealth Act of a provision that has, or will have, substantive effect otherwise than as part of the text of this Act.

fundamental workplace relations principles: see subsection 30B(9).

initial reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30B(3).

law enforcement officer means:

- (a) a member of a police force or police service; or
- (b) a person appointed to a position for the purpose of being trained as a member of a police force or police service; or
- (c) a person who has the powers and duties of a member of a police force or police service;

and, without limiting paragraphs (a), (b) and (c), includes a police reservist, a police recruit, a police cadet, a junior constable, a

police medical officer, a special constable, an ancillary constable or a protective services officer.

local government employee, of a State, means:

- (a) an employee of a local government employer of the State; or
- (b) any other employee in the State of a kind specified in the regulations.

local government employer, of a State, means an employer that is:

- (a) a body corporate that is established for a local government purpose by or under a law of a State; or
- (b) a body corporate in which a body to which paragraph (a) applies has, or 2 or more such bodies together have, a controlling interest; or
- (c) a person who employs individuals for the purposes of an unincorporated body that is established for a local government purpose by or under a law of a State; or
- (d) any other body corporate that is a local government body in the State of a kind specified in the regulations; or
- (e) any other person who employs individuals for the purposes of an unincorporated body that is a local government body in the State of a kind specified in the regulations.

referral law, of a State, means the law of the State that refers matters, as mentioned in subsection 30B(1), to the Parliament of the Commonwealth.

referred provisions means the provisions of this Division to the extent to which they deal with matters that are included in the legislative powers of the Parliaments of the States.

referred subject matters means any of the following:

- (a) terms and conditions of employment, including any of the following:
 - (i) minimum terms and conditions of employment, (including employment standards and minimum wages);

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- (ii) terms and conditions of employment contained in instruments (including instruments such as awards, determinations and enterprise-level agreements);
 - (iii) bargaining in relation to terms and conditions of employment;
 - (iv) the effect of a transfer of business on terms and conditions of employment;
 - (b) terms and conditions under which an outworker entity may arrange for work to be performed for the entity (directly or indirectly), if the work is of a kind that is often performed by outworkers;
 - (c) rights and responsibilities of persons, including employees, employers, independent contractors, outworkers, outworker entities, associations of employees or associations of employers, being rights and responsibilities relating to any of the following:
 - (i) freedom of association in the context of workplace relations, and related protections;
 - (ii) protection from discrimination relating to employment;
 - (iii) termination of employment;
 - (iv) industrial action;
 - (v) protection from payment of fees for services related to bargaining;
 - (vi) sham independent contractor arrangements;
 - (vii) standing down employees without pay;
 - (viii) union rights of entry and rights of access to records;
 - (d) compliance with, and enforcement of, this Act;
 - (e) the administration of this Act;
 - (f) the application of this Act;
 - (g) matters incidental or ancillary to the operation of this Act or of instruments made or given effect under this Act;
- but does not include any excluded subject matter.

referring State: see section 30B.

State public sector employee, of a State, means:

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- (a) an employee of a State public sector employer of the State; or
- (b) any other employee in the State of a kind specified in the regulations;

and includes a law enforcement officer to whom subsection 30E(1) applies.

State public sector employer, of a State, means an employer that is:

- (a) the State, the Governor of the State or a Minister of the State;
or
- (b) a body corporate that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or
- (c) a body corporate in which the State has a controlling interest;
or
- (d) a person who employs individuals for the purposes of an unincorporated body that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or
- (e) any other employer in the State of a kind specified in the regulations;

and includes a holder of an office to whom subsection 30E(2) applies.

transition reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30B(5).

- (2) Words or phrases in the definition of ***excluded subject matter*** in subsection (1), or in the definition of ***referred subject matters*** in subsection (1), that are defined in this Act (other than in this Division) have, in that definition, the meanings set out in this Act as in force on 1 July 2009.

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30B Meaning of *referring State*

Reference of matters by State Parliament to Commonwealth Parliament

- (1) A State is a ***referring State*** if the Parliament of the State has, before 1 July 2009, referred the matters covered by subsections (3), (4) and (5) in relation to the State to the Parliament of the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution:
- (a) if and to the extent that the matters are not otherwise included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference under paragraph 51(xxxvii) of the Constitution); and
 - (b) if and to the extent that the matters are included in the legislative powers of the Parliament of the State.

This subsection has effect subject to subsection (6).

- (2) A State is a ***referring State*** even if:
- (a) the State's referral law provides that the reference to the Parliament of the Commonwealth of any or all of the matters covered by subsections (3), (4) and (5) is to terminate in particular circumstances; or
 - (b) the State's referral law provides that particular matters, or all matters, relating to State public sector employees, or State public sector employers, of the State are not included in any or all of the matters covered by subsections (3), (4) and (5); or
 - (c) the State's referral law provides that particular matters, or all matters, relating to local government employees, or local government employers, of the State are not included in any or all of the matters covered by subsections (3), (4) and (5).

Reference covering referred provisions

- (3) This subsection covers the matters to which the referred provisions relate to the extent of making laws with respect to those matters by

amending this Act, as originally enacted, to include the referred provisions.

Reference covering amendments

- (4) This subsection covers the referred subject matters to the extent of making laws with respect to those matters by making express amendments of this Act.

Reference covering transitional matters

- (5) This subsection covers making laws with respect to the transition from the regime provided for by:
- (a) the *Workplace Relations Act 1996*; or
 - (b) a law of a State relating to workplace relations;
- to the regime provided for by this Act.

Effect of termination of reference

- (6) Despite anything to the contrary in a referral law of a State, a State ceases to be a **referring State** if any or all of the following occurs:
- (a) the State's initial reference terminates;
 - (b) the State's amendment reference terminates, and neither of subsections (7) and (8) apply to the termination;
 - (c) the State's transition reference terminates.
- (7) A State does not cease to be a **referring State** because of the termination of its amendment reference if:
- (a) the termination is effected by the Governor of that State fixing a day by proclamation as the day on which the reference terminates; and
 - (b) the day fixed is no earlier than the first day after the end of the period of 6 months beginning on the day on which the proclamation is published; and
 - (c) that State's amendment reference, and the amendment reference of every other referring State (other than a referring State that has terminated its amendment reference in the

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circumstances referred to in subsection (8)), terminate on the same day.

- (8) A State does not cease to be a *referring State* because of the termination of its amendment reference if:
- (a) the termination is effected by the Governor of that State fixing a day by proclamation as the day on which the reference terminates; and
 - (b) the day fixed is no earlier than the first day after the end of the period of 3 months beginning on the day on which the proclamation is published; and
 - (c) the Governor of that State, as part of the proclamation by which the termination is to be effected, declares that, in the opinion of the Governor, this Act:
 - (i) is proposed to be amended (by an amendment introduced into the Parliament by a Minister); or
 - (ii) has been amended;in a manner that is inconsistent with one or more of the fundamental workplace relations principles.
- (9) The following are the *fundamental workplace relations principles*:
- (a) that this Act should provide for, and continue to provide for, the following:
 - (i) a strong, simple and enforceable safety net of minimum employment standards;
 - (ii) genuine rights and responsibilities to ensure fairness, choice and representation at work, including the freedom to choose whether or not to join and be represented by a union or participate in collective activities;
 - (iii) collective bargaining at the enterprise level with no provision for individual statutory agreements;
 - (iv) fair and effective remedies available through an independent umpire;
 - (v) protection from unfair dismissal;

- (b) that there should be, and continue to be, in connection with the operation of this Act, the following:
 - (i) an independent tribunal system;
 - (ii) an independent authority able to assist employers and employees within a national workplace relations system.

30C Extended meaning of *national system employee*

- (1) A *national system employee* includes:
 - (a) any individual in a State that is a referring State because of this Division so far as he or she is employed, or usually employed, as described in paragraph 30D(1)(a), except on a vocational placement; and
 - (b) a law enforcement officer of the State to whom subsection 30E(1) applies.
- (2) This section does not limit the operation of section 13 (which defines a national system employee).

Note: Section 30H may limit the extent to which this section extends the meaning of *national system employee*.

30D Extended meaning of *national system employer*

- (1) A *national system employer* includes:
 - (a) any person in a State that is a referring State because of this Division so far as the person employs, or usually employs, an individual; and
 - (b) a holder of an office to whom subsection 30E(2) applies.
- (2) This section does not limit the operation of section 14 (which defines a national system employer).

Note: Section 30H may limit the extent to which this section extends the meaning of *national system employer*.

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30E Extended ordinary meanings of *employee* and *employer*

- (1) A reference in this Act to an employee with its ordinary meaning includes a reference to a law enforcement officer of a State that is a referring State because of this Division if the State's referral law so provides for the purposes of that law.
- (2) A reference in this Act to an employer with its ordinary meaning includes a reference to a holder of an office of a State that is a referring State because of this Division if the State's referral law provides, for the purposes of that law, that the holder of the office is taken to be the employer of a law enforcement officer of the State.
- (3) This section does not limit the operation of section 15 (which deals with references to employee and employer with their ordinary meanings).

Note: Section 30H may limit the extent to which this section extends the meanings of *employee* and *employer*.

30F Extended meaning of *outworker entity*

- (1) An *outworker entity* includes a person, other than in the person's capacity as a national system employer, so far as:
 - (a) the person arranges for work to be performed for the person (either directly or indirectly); and
 - (b) the work is of a kind that is often performed by outworkers; and
 - (c) one or more of the following applies:
 - (i) at the time the arrangement is made, one or more parties to the arrangement is in a State that is a referring State because of this Division;
 - (ii) the work is to be performed in a State that is a referring State because of this Division;
 - (iii) the person referred to in paragraph (a) carries on an activity (whether of a commercial, governmental or other nature) in a State that is a referring State because

of this Division, and the work is reasonably likely to be performed in that State;

- (iv) the person referred to in paragraph (a) carries on an activity (whether of a commercial, governmental or other nature) in a State that is a referring State because of this Division, and the work is to be performed in connection with that activity.

- (2) This section does not limit the operation of the definition of *outworker entity* in section 12.

Note: Section 30H may limit the extent to which this section extends the meaning of *outworker entity*.

30G General protections

- (1) Part 3-1 (which deals with general protections) applies to action taken in a State that is a referring State because of this Division.
- (2) This section applies despite section 337 (which limits the application of Part 3-1), and does not limit the operation of sections 338 and 339 (which set out the application of that Part).

Note: Section 30H may limit the extent to which this section extends the application of Part 3-1.

30H Division only has effect if supported by reference

A provision of this Division has effect in relation to a State that is a referring State because of this Division only to the extent that the State's referral law refers to the Parliament of the Commonwealth the matters mentioned in subsection 30B(1) that result in the Parliament of the Commonwealth having sufficient legislative power for the provision so to have effect.

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Division 2B—Application of this Act in States that refer matters after 1 July 2009 but on or before 1 January 2010

30K Meaning of terms used in this Division

(1) In this Division:

amendment reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30L(4).

excluded subject matter means any of the following matters:

- (a) a matter dealt with in a law referred to in subsection 27(1A) of this Act;
- (b) superannuation;
- (c) workers compensation;
- (d) occupational health and safety;
- (e) matters relating to outworkers (within the ordinary meaning of the term);
- (f) child labour;
- (g) training arrangements;
- (h) long service leave;
- (i) leave for victims of crime;
- (j) attendance for service on a jury, or for emergency service duties;
- (k) declaration, prescription or substitution of public holidays;
- (l) the following matters relating to provision of essential services or to situations of emergency:
 - (i) directions to perform work (including to perform work at a particular time or place, or in a particular way);
 - (ii) directions not to perform work (including not to perform work at a particular time or place, or in a particular way);

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- (m) regulation of any of the following:
 - (i) employee associations;
 - (ii) employer associations;
 - (iii) members of employee associations or of employer associations;
- (n) workplace surveillance;
- (o) business trading hours;
- (p) claims for enforcement of contracts of employment, except so far as a law of a State provides 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;
- (q) rights or remedies incidental to a matter referred to in a preceding paragraph of this definition;

except to the extent that this Act as originally enacted deals with the matter (directly or indirectly), or requires or permits instruments made or given effect under this Act so to deal with the matter.

express amendment means the direct amendment of the text of this Act (whether by the insertion, omission, repeal, substitution or relocation of words or matter), but does not include the enactment by a Commonwealth Act of a provision that has, or will have, substantive effect otherwise than as part of the text of this Act.

fundamental workplace relations principles: see subsection 30L(9).

initial reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30L(3).

law enforcement officer means:

- (a) a member of a police force or police service; or
- (b) a person appointed to a position for the purpose of being trained as a member of a police force or police service; or

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(c) a person who has the powers and duties of a member of a police force or police service;

and, without limiting paragraphs (a), (b) and (c), includes a police reservist, a police recruit, a police cadet, a junior constable, a police medical officer, a special constable, an ancillary constable or a protective services officer.

local government employee, of a State, means:

- (a) an employee of a local government employer of the State; or
- (b) any other employee in the State of a kind specified in the regulations.

local government employer, of a State, means an employer that is:

- (a) a body corporate that is established for a local government purpose by or under a law of a State; or
- (b) a body corporate in which a body to which paragraph (a) applies has, or 2 or more such bodies together have, a controlling interest; or
- (c) a person who employs individuals for the purposes of an unincorporated body that is established for a local government purpose by or under a law of a State; or
- (d) any other body corporate that is a local government body in the State of a kind specified in the regulations; or
- (e) any other person who employs individuals for the purposes of an unincorporated body that is a local government body in the State of a kind specified in the regulations.

referral law, of a State, means the law of the State that refers matters, as mentioned in subsection 30L(1), to the Parliament of the Commonwealth.

referred provisions means the provisions of this Division to the extent to which they deal with matters that are included in the legislative powers of the Parliaments of the States.

referred subject matters means any of the following:

- (a) terms and conditions of employment, including any of the following:

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- (i) minimum terms and conditions of employment, (including employment standards and minimum wages);
 - (ii) terms and conditions of employment contained in instruments (including instruments such as awards, determinations and enterprise-level agreements);
 - (iii) bargaining in relation to terms and conditions of employment;
 - (iv) the effect of a transfer of business on terms and conditions of employment;
- (b) terms and conditions under which an outworker entity may arrange for work to be performed for the entity (directly or indirectly), if the work is of a kind that is often performed by outworkers;
- (c) rights and responsibilities of persons, including employees, employers, independent contractors, outworkers, outworker entities, associations of employees or associations of employers, being rights and responsibilities relating to any of the following:
- (i) freedom of association in the context of workplace relations, and related protections;
 - (ii) protection from discrimination relating to employment;
 - (iii) termination of employment;
 - (iv) industrial action;
 - (v) protection from payment of fees for services related to bargaining;
 - (vi) sham independent contractor arrangements;
 - (vii) standing down employees without pay;
 - (viii) union rights of entry and rights of access to records;
- (d) compliance with, and enforcement of, this Act;
- (e) the administration of this Act;
- (f) the application of this Act;
- (g) matters incidental or ancillary to the operation of this Act or of instruments made or given effect under this Act;
- but does not include any excluded subject matter.

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referring State: see section 30L.

State public sector employee, of a State, means:

- (a) an employee of a State public sector employer of the State; or
- (b) any other employee in the State of a kind specified in the regulations;

and includes a law enforcement officer of the State.

State public sector employer, of a State, means an employer that is:

- (a) the State, the Governor of the State or a Minister of the State; or
- (b) a body corporate that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or
- (c) a body corporate in which the State has a controlling interest; or
- (d) a person who employs individuals for the purposes of an unincorporated body that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or
- (e) any other employer in the State of a kind specified in the regulations;

and includes a holder of an office of the State whom the State's referral law provides is to be taken, for the purposes of this Act, to be an employer of law enforcement officers of the State.

transition reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30L(5).

- (2) Words or phrases in the definition of *excluded subject matter* in subsection (1), or in the definition of *referred subject matters* in subsection (1), that are defined in this Act (other than in this Division) have, in that definition, the meanings set out in this Act as in force on 1 July 2009.

30L Meaning of *referring State*

Reference of matters by State Parliament to Commonwealth Parliament

- (1) A State is a ***referring State*** if the Parliament of the State has, after 1 July 2009 but on or before 1 January 2010, referred the matters covered by subsections (3), (4) and (5) in relation to the State to the Parliament of the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution:
- (a) if and to the extent that the matters are not otherwise included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference under paragraph 51(xxxvii) of the Constitution); and
 - (b) if and to the extent that the matters are included in the legislative powers of the Parliament of the State.

This subsection has effect subject to subsection (6).

- (2) A State is a ***referring State*** even if:
- (a) the State's referral law provides that the reference to the Parliament of the Commonwealth of any or all of the matters covered by subsections (3), (4) and (5) is to terminate in particular circumstances; or
 - (b) the State's referral law provides that particular matters, or all matters, relating to State public sector employees, or State public sector employers, of the State are not included in any or all of the matters covered by subsections (3), (4) and (5); or
 - (c) the State's referral law provides that particular matters, or all matters, relating to local government employees, or local government employers, of the State are not included in any or all of the matters covered by subsections (3), (4) and (5).

Reference covering referred provisions

- (3) This subsection covers the matters to which the referred provisions relate to the extent of making laws with respect to those matters by amending this Act, as originally enacted, and as subsequently

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amended by amendments enacted at any time before the State's referral law commenced, to include the referred provisions.

Reference covering amendments

- (4) This subsection covers the referred subject matters to the extent of making laws with respect to those matters by making express amendments of this Act.

Reference covering transitional matters

- (5) This subsection covers making laws with respect to the transition from the regime provided for by:
- (a) the *Workplace Relations Act 1996* (as it continues to apply because of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*); or
 - (b) a law of a State relating to workplace relations or industrial relations;
- to the regime provided for by this Act.

Effect of termination of reference

- (6) Despite anything to the contrary in a referral law of a State, a State ceases to be a **referring State** if any or all of the following occurs:
- (a) the State's initial reference terminates;
 - (b) the State's amendment reference terminates, and neither of subsections (7) and (8) apply to the termination;
 - (c) the State's transition reference terminates.
- (7) A State does not cease to be a **referring State** because of the termination of its amendment reference if:
- (a) the termination is effected by the Governor of that State fixing a day by proclamation as the day on which the reference terminates; and
 - (b) the day fixed is no earlier than the first day after the end of the period of 6 months beginning on the day on which the proclamation is published; and

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- (c) that State's amendment reference, and the amendment reference of every other referring State (other than a referring State that has terminated its amendment reference in the circumstances referred to in subsection (8)), terminate on the same day.
- (8) A State does not cease to be a *referring State* because of the termination of its amendment reference if:
- (a) the termination is effected by the Governor of that State fixing a day by proclamation as the day on which the reference terminates; and
 - (b) the day fixed is no earlier than the first day after the end of the period of 3 months beginning on the day on which the proclamation is published; and
 - (c) the Governor of that State, as part of the proclamation by which the termination is to be effected, declares that, in the opinion of the Governor, this Act:
 - (i) is proposed to be amended (by an amendment introduced into the Parliament by a Minister); or
 - (ii) has been amended;in a manner that is inconsistent with one or more of the fundamental workplace relations principles.
- (9) The following are the *fundamental workplace relations principles*:
- (a) that this Act should provide for, and continue to provide for, the following:
 - (i) a strong, simple and enforceable safety net of minimum employment standards;
 - (ii) genuine rights and responsibilities to ensure fairness, choice and representation at work, including the freedom to choose whether or not to join and be represented by a union or participate in collective activities;
 - (iii) collective bargaining at the enterprise level with no provision for individual statutory agreements;

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- (iv) fair and effective remedies available through an independent umpire;
- (v) protection from unfair dismissal;
- (b) that there should be, and continue to be, in connection with the operation of this Act, the following:
 - (i) an independent tribunal system;
 - (ii) an independent authority able to assist employers and employees within a national workplace relations system.

30M Extended meaning of *national system employee*

- (1) A *national system employee* includes:
 - (a) any individual in a State that is a referring State because of this Division so far as he or she is employed, or usually employed, as described in paragraph 30N(1)(a), except on a vocational placement; and
 - (b) a law enforcement officer of the State to whom subsection 30P(1) applies.
- (2) This section does not limit the operation of section 13 (which defines a national system employee).

Note: Section 30S may limit the extent to which this section extends the meaning of *national system employee*.

30N Extended meaning of *national system employer*

- (1) A *national system employer* includes:
 - (a) any person in a State that is a referring State because of this Division so far as the person employs, or usually employs, an individual; and
 - (b) a holder of an office to whom subsection 30P(2) applies.
- (2) This section does not limit the operation of section 14 (which defines a national system employer).

Note: Section 30S may limit the extent to which this section extends the meaning of *national system employer*.

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30P Extended ordinary meanings of *employee* and *employer*

- (1) A reference in this Act to an employee with its ordinary meaning includes a reference to a law enforcement officer of a referring State if the State's referral law so provides for the purposes of that law.
- (2) A reference in this Act to an employer with its ordinary meaning includes a reference to a holder of an office of a State if the State's referral law provides, for the purposes of that law, that the holder of the office is taken to be the employer of a law enforcement officer of the State.
- (3) This section does not limit the operation of section 15 (which deals with references to employee and employer with their ordinary meanings).

Note: Section 30S may limit the extent to which this section extends the meanings of *employee* and *employer*.

30Q Extended meaning of *outworker entity*

- (1) An *outworker entity* includes a person, other than in the person's capacity as a national system employer, so far as:
 - (a) the person arranges for work to be performed for the person (either directly or indirectly); and
 - (b) the work is of a kind that is often performed by outworkers; and
 - (c) one or more of the following applies:
 - (i) at the time the arrangement is made, one or more parties to the arrangement is in a State that is a referring State because of this Division;
 - (ii) the work is to be performed in a State that is a referring State because of this Division;
 - (iii) the person referred to in paragraph (a) carries on an activity (whether of a commercial, governmental or other nature) in a State that is a referring State because

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of this Division, and the work is reasonably likely to be performed in that State;

- (iv) the person referred to in paragraph (a) carries on an activity (whether of a commercial, governmental or other nature) in a State that is a referring State because of this Division, and the work is to be performed in connection with that activity.

- (2) This section does not limit the operation of the definition of *outworker entity* in section 12.

Note: Section 30S may limit the extent to which this section extends the meaning of *outworker entity*.

30R General protections

- (1) Part 3-1 (which deals with general protections) applies to action taken in a State that is a referring State because of this Division.
- (2) This section applies despite section 337 (which limits the application of Part 3-1), and does not limit the operation of sections 338 and 339 (which set out the application of that Part).

Note: Section 30S may limit the extent to which this section extends the application of Part 3-1.

30S Division only has effect if supported by reference

A provision of this Division has effect in relation to a State that is a referring State because of this Division only to the extent that the State's referral law refers to the Parliament of the Commonwealth the matters mentioned in subsection 30L(1) that result in the Parliament of the Commonwealth having sufficient legislative power for the provision so to have effect.

Division 3—Geographical application of this Act

31 Exclusion of persons etc. 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 Norfolk Island, the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea (see the definition of *Australia* in section 12 of this Act and section 15B 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 *Legislation 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.

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

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

- (a) all the waters of the sea on the landward side of the outer limits of the territorial sea of Australia, including:
 - (i) such waters within the limits of a State or Territory; and
 - (ii) the airspace over, and the seabed and sub-soil beneath, such waters;

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- (b) the Territory of Christmas Island;
 - (c) the Territory of Cocos (Keeling) Islands;
- then this Act has effect as so modified in relation to any such area or part.

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

32A Rules may modify application of this Act in Norfolk Island

- (1) The Minister may, by legislative instrument, make rules prescribing modifications of this Act for its application in relation to Norfolk Island.
- (2) To avoid doubt, the rules may not do the following:
 - (a) create an offence or civil penalty;
 - (b) provide powers of:
 - (i) arrest or detention; or
 - (ii) entry, search or seizure;
 - (c) impose a tax;
 - (d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
 - (e) directly amend the text of this Act.
- (3) If the rules prescribe modifications of this Act for its application in relation to Norfolk Island, then this Act has effect as so modified in relation to Norfolk Island.

Note: This Act would, in the absence of any such rules, apply in relation to Norfolk Island in the same way as it applies in relation to the rest of Australia.

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

Extension to Australian ships etc.

- (1) Without limiting subsection (3), this Act extends to or in relation to:
 - (a) any Australian ship in the exclusive economic zone or in the waters above the continental shelf; and
 - (b) any fixed platform in the exclusive economic zone or in the waters above the continental shelf; and
 - (c) any ship, in the exclusive economic zone or in the waters above the continental shelf, that:
 - (i) supplies, services or otherwise operates in connection with a fixed platform in the exclusive economic zone or in the waters above the continental shelf; and
 - (ii) operates to and from an Australian port; and
 - (d) any ship, in the exclusive economic zone or in the waters above the continental shelf, that:
 - (i) is operated or chartered by an Australian employer; and
 - (ii) uses Australia as a base.
- (2) For the purposes of extending this Act in accordance with paragraph (1)(d):
 - (a) any reference in a provision of this Act to an employer is taken to include a reference to an Australian employer; and
 - (b) any reference in a provision of this Act to an employee is taken to include a reference to an employee of an Australian employer.

Extensions prescribed by regulations

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

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Modifications relating to extended application

- (4) Despite subsections (1) and (3), if the regulations prescribe modifications of this Act, or specified provisions of this Act, for its operation under subsection (1) or (3) in relation to one or both of the following:
- (a) all or part of the exclusive economic zone;
 - (b) all or part of the continental shelf;
- then, so far as this Act would, apart from this subsection, extend to the zone or part, or to the continental shelf or part, it has effect as so modified.
- (5) For the purposes of subsection (4), the regulations may prescribe different modifications in relation to different parts of the exclusive economic zone or continental shelf.

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

Extension to Australian ships etc.

- (1) Without limiting subsection (3), this Act extends to or in relation to:
- (a) any Australian ship outside the outer limits of the exclusive economic zone and the continental shelf; and
 - (b) any ship, outside the outer limits of the exclusive economic zone and the continental shelf, that:
 - (i) is operated or chartered by an Australian employer; and
 - (ii) uses Australia as a base.
- (2) For the purposes of extending this Act in accordance with paragraph (1)(b):
- (a) any reference in a provision of this Act to an employer is taken to include a reference to an Australian employer; and
 - (b) any reference in a provision of this Act to an employee is taken to include a reference to an employee of an Australian employer.

Extensions prescribed by regulations

- (3) Without limiting subsection (1), if the regulations prescribe further extensions of this Act, or specified provisions of this Act, in relation to all or part of the area outside the outer limits of the exclusive economic zone and the continental shelf, then this Act, or the specified provisions, extend accordingly to:
- (a) any Australian employer; and
 - (b) any Australian-based employee.
- (3A) For the purposes of extending this Act in accordance with subsection (3):
- (a) any reference in a provision of this Act to an employer is taken to include a reference to:
 - (i) an Australian employer; and
 - (ii) an employer of an Australian-based employee; and
 - (b) any reference in a provision of this Act to an employee is taken to include a reference to:
 - (i) an employee of an Australian employer; and
 - (ii) an Australian-based employee.

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

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

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

- (1) An *Australian employer* is an employer that:
 - (a) is a trading corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
 - (b) is a financial corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
 - (c) is the Commonwealth; or
 - (d) is a Commonwealth authority; or
 - (e) is a body corporate incorporated in a Territory; or
 - (f) carries on in Australia, in the exclusive economic zone or in the waters above the continental shelf an activity (whether of a commercial, governmental or other nature), and whose central management and control is in Australia; or
 - (g) is prescribed by the regulations.
- (2) An *Australian-based employee* is an employee:
 - (a) whose primary place of work is in Australia; or
 - (b) who is employed by an Australian employer (whether the employee is located in Australia or elsewhere); or
 - (c) who is prescribed by the regulations.
- (3) However, paragraph (2)(b) does not apply to an employee who is engaged outside Australia and the external Territories to perform duties outside Australia and the external Territories.

35A Regulations excluding application of Act

- (1) Regulations made for the purposes of section 32 or subsection 33(4) or 34(4) may exclude the application of the whole of this Act in relation to all or a part of an area referred to in section 32 or subsection 33(4) or 34(4) (as the case may be).
- (2) If subsection (1) applies, this Act has effect as if it did not apply in relation to that area or that part of that area.

36 Geographical application of offences

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

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

Division 4—Miscellaneous

37 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.

38 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 application (an *invalid application*) in relation to:
 - (i) one or more particular persons, things, matters, places, circumstances or cases; or
 - (ii) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases; because of which the provision exceeds the Commonwealth's legislative power; and
 - (b) also has at least one application (a *valid application*) in relation to:
 - (i) one or more particular persons, things, matters, places, circumstances or cases; or
 - (ii) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases; that, if it were the provision's only application, would be within the Commonwealth's legislative power;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.

39 Acquisition of property

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

40 Interaction between fair work instruments and public sector employment laws

Generally, public sector employment laws prevail

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

When fair work instruments or their terms prevail

- (2) However, a fair work instrument, or a term of a fair work instrument, that deals with public sector employment prevails over a public sector employment law, to the extent of any inconsistency, if:

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

Meaning of public sector employment law

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

Laws that fair work instruments never prevail over

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

Relationship with section 29

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

40A Application of the *Acts Interpretation Act 1901*

- (1) The *Acts Interpretation Act 1901*, as in force on 25 June 2009, applies to this Act.
- (2) Amendments of the *Acts Interpretation Act 1901* made after that day do not apply to this Act.

Chapter 2—Terms and conditions of employment

Part 2-1—Core provisions for this Chapter

Division 1—Introduction

41 Guide to this Part

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

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

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

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

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

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

Chapter 2 Terms and conditions of employment

Part 2-1 Core provisions for this Chapter

Division 1 Introduction

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42 Meanings of *employee* and *employer*

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

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

Division 2—Core provisions for this Chapter

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

43 Terms and conditions of employment provided under this Act

Main terms and conditions

- (1) The main terms and conditions of employment of an employee that are provided under this Act are those set out in:
- (a) the National Employment Standards (see Part 2-2); and
 - (b) a modern award (see Part 2-3), an enterprise agreement (see Part 2-4) or a workplace determination (see Part 2-5) that applies to the employee.

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

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

Note 3: Copied State instruments provide the main terms and conditions of employment for an employee to whom the instrument applies. See Part 6-3A generally for the rules about those instruments.

Other terms and conditions

- (2) In addition, other terms and conditions of employment include:
- (a) those terms and conditions arising from:
 - (i) a national minimum wage order (see Part 2-6); or
 - (ii) an equal remuneration order (see Part 2-7); and
 - (b) those terms and conditions provided by Part 2-9.

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

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

44 Contravening the National Employment Standards

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

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

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

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

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

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

45 Contravening a modern award

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

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

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

46 The significance of a modern award applying to a person

- (1) A modern award does not impose obligations on a person, and a person does not contravene a term of a modern award, unless the award applies to the person.
- (2) A modern award does not give a person an entitlement unless the award applies to the person.

Note: Subsection (2) does not affect the ability of outworker terms in a modern award to be enforced under Part 4-1 in relation to outworkers who are not employees.

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

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

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

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

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

Modern awards do not apply to high income employees

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

Modern awards apply to employees in relation to particular employment

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

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

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

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

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

Effect of other provisions of this Act, FWC orders or court orders on coverage

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

- (a) a provision of this Act or of the Registered Organisations Act;
- (b) an FWC order made under a provision of this Act;
- (c) an order of a court.

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

- (a) a provision of this Act;
- (b) an FWC order made under a provision of this Act;
- (c) an order of a court.

Modern awards that have ceased to operate

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

Modern awards cover employees in relation to particular employment

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

49 When a modern award is in operation

When a modern award comes into operation

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

Note: For when a State reference public sector modern award comes into operation, see section 168J.

When a determination revoking a modern award comes into operation

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

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

- (6) A modern award, or a determination revoking a modern award, does not take effect in relation to a particular employee until the

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start of the employee's first full pay period that starts on or after the day the award or determination comes into operation.

Modern awards operate until revoked

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

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

50 Contravening an enterprise agreement

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

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

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

51 The significance of an enterprise agreement applying to a person

- (1) An enterprise agreement does not impose obligations on a person, and a person does not contravene a term of an enterprise agreement, unless the agreement applies to the person.
- (2) An enterprise agreement does not give a person an entitlement unless the agreement applies to the person.

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

When an enterprise agreement applies to an employee, employer or organisation

- (1) An enterprise agreement *applies* to an employee, employer or employee organisation if:
- (a) the agreement is in operation; and
 - (b) the agreement covers the employee, employer or organisation; and

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

Enterprise agreements apply to employees in relation to particular employment

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

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

Employees and employers

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

Employee organisations

- (2) An enterprise agreement ***covers*** an employee organisation:
- (a) for an enterprise agreement that is not a greenfields agreement—if the FWC has noted in its decision to approve the agreement that the agreement covers the organisation (see subsection 201(2)); or
 - (b) for a greenfields agreement—if the agreement is made by the organisation.

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

- (3) An enterprise agreement also ***covers*** an employee, employer or employee organisation if any of the following provides, or has the effect, that the agreement covers the employee, employer or organisation:
- (a) a provision of this Act or of the Registered Organisations Act;

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

Enterprise agreements that have ceased to operate

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

Enterprise agreements cover employees in relation to particular employment

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

54 When an enterprise agreement is in operation

- (1) An enterprise agreement approved by the FWC operates from:
- (a) 7 days after the agreement is approved; or
 - (b) if a later day is specified in the agreement—that later day.
- (2) An enterprise agreement ceases to operate on the earlier of the following days:
- (a) the day on which a termination of the agreement comes into operation under section 224 or 227;
 - (b) the day on which section 58 first has the effect that there is no employee to whom the agreement applies.

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

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

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

Subdivision A—Interaction between the National Employment Standards and a modern award or an enterprise agreement

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

National Employment Standards must not be excluded

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

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

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

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

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

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

Ancillary and supplementary terms may be included

- (4) A modern award or enterprise agreement may also include the following kinds of terms:
- (a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;
 - (b) terms that supplement the National Employment Standards; but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

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

- (a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or
- (b) that specify when payment under section 90 for paid annual leave must be made.

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

- (a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or
- (b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

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

Enterprise agreements may include terms that have the same effect as provisions of the National Employment Standards

- (5) An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).

Chapter 2 Terms and conditions of employment

Part 2-1 Core provisions for this Chapter

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

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Effect of terms that give an employee the same entitlement as under the National Employment Standards

- (6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the **award or agreement entitlement**) that is the same as an entitlement (the **NES entitlement**) of the employee under the National Employment Standards:
- (a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and
 - (b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.

Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave.

Terms permitted by subsection (4) or (5) do not contravene subsection (1)

- (7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

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

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

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

Subdivision B—Interaction between modern awards and enterprise agreements

57 Interaction between modern awards and enterprise agreements

- (1) A modern award does not apply to an employee in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.
- (2) If a modern award does not apply to an employee in relation to particular employment because of subsection (1), the award does not apply to an employer, or an employee organisation, in relation to the employee.

57A Designated outworker terms of a modern award continue to apply

- (1) This section applies if, at a particular time:
 - (a) an enterprise agreement applies to an employer; and
 - (b) a modern award covers the employer (whether the modern award covers the employer in the employer's capacity as an employer or an outworker entity); and
 - (c) the modern award includes one or more designated outworker terms.
- (2) Despite section 57, the designated outworker terms of the modern award apply at that time to the following:
 - (a) the employer;
 - (b) each employee who is both:
 - (i) a person to whom the enterprise agreement applies; and
 - (ii) a person who is covered by the modern award;
 - (c) each employee organisation that is covered by the modern award.
- (3) To avoid doubt:

Chapter 2 Terms and conditions of employment

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- (a) designated outworker terms of a modern award can apply to an employer under subsection (2) even if none of the employees of the employer is an outworker; and
- (b) to the extent to which designated outworker terms of a modern award apply to an employer, an employee or an employee organisation because of subsection (2), the modern award applies to the employer, employee or organisation.

Subdivision C—Interaction between one or more enterprise agreements

58 Only one enterprise agreement can apply to an employee

Only one enterprise agreement can apply to an employee

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

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

- (2) If:
 - (a) an enterprise agreement (the **earlier agreement**) applies to an employee in relation to particular employment; and
 - (b) another enterprise agreement (the **later agreement**) that covers the employee in relation to the same employment comes into operation; and
 - (c) subsection (3) (which deals with a single-enterprise agreement replacing a multi-enterprise agreement) does not apply;

then:

- (d) if the earlier agreement has not passed its nominal expiry date:
 - (i) the later agreement cannot apply to the employee in relation to that employment until the earlier agreement passes its nominal expiry date; and

- (ii) the earlier agreement ceases to apply to the employee in relation to that employment when the earlier agreement passes its nominal expiry date, and can never so apply again; or
- (e) if the earlier agreement has passed its nominal expiry date—the earlier agreement ceases to apply to the employee when the later agreement comes into operation, and can never so apply again.

Special rule—single-enterprise agreement replaces multi-enterprise agreement

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

Part 2-2—The National Employment Standards

Division 1—Introduction

59 Guide to this Part

This Part contains the National Employment Standards.

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

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

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

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

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

60 Meanings of *employee* and *employer*

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

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

Division 2—The National Employment Standards

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

- (1) This Part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5).

Note: Subsection 55(5) allows enterprise agreements to include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards.

- (2) The minimum standards relate to the following matters:
- (a) maximum weekly hours (Division 3);
 - (b) requests for flexible working arrangements (Division 4);
 - (c) parental leave and related entitlements (Division 5);
 - (d) annual leave (Division 6);
 - (e) personal/carer's leave and compassionate leave (Division 7);
 - (f) community service leave (Division 8);
 - (g) long service leave (Division 9);
 - (h) public holidays (Division 10);
 - (i) notice of termination and redundancy pay (Division 11);
 - (j) Fair Work Information Statement (Division 12).
- (3) Divisions 3 to 12 constitute the *National Employment Standards*.

Division 3—Maximum weekly hours

62 Maximum weekly hours

Maximum weekly hours of work

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

Employee may refuse to work unreasonable additional hours

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

Determining whether additional hours are reasonable

- (3) In determining whether additional hours are reasonable or unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:
 - (a) any risk to employee health and safety from working the additional hours;
 - (b) the employee's personal circumstances, including family responsibilities;
 - (c) the needs of the workplace or enterprise in which the employee is employed;
 - (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

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

Authorised leave or absence treated as hours worked

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

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

- (1) A modern award or enterprise agreement may include terms providing for the averaging of hours of work over a specified period. The average weekly hours over the period must not exceed:
 - (a) for a full-time employee—38 hours; or
 - (b) for an employee who is not a full-time employee—the lesser of:
 - (i) 38 hours; and

- (ii) the employee's ordinary hours of work in a week.
- (2) The terms of a modern award or enterprise agreement may provide for average weekly hours that exceed the hours referred to in paragraph (1)(a) or (b) if the excess hours are reasonable for the purposes of subsection 62(1).

Note: Hours in excess of the hours referred to in paragraph (1)(a) or (b) that are worked in a week in accordance with averaging terms in a modern award or enterprise agreement (whether the terms comply with subsection (1) or (2)) will be treated as additional hours for the purposes of section 62. The averaging terms will be relevant in determining whether the additional hours are reasonable (see paragraph 62(3)(i)).

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

- (1) An employer and an award/agreement free employee may agree in writing to an averaging arrangement under which hours of work over a specified period of not more than 26 weeks are averaged. The average weekly hours over the specified period must not exceed:
- (a) for a full-time employee—38 hours; or
 - (b) for an employee who is not a full-time employee—the lesser of:
 - (i) 38 hours; and
 - (ii) the employee's ordinary hours of work in a week.
- (2) The agreed averaging arrangement may provide for average weekly hours that exceed the hours referred to in paragraph (1)(a) or (b) if the excess hours are reasonable for the purposes of subsection 62(1).

Note: Hours in excess of the hours referred to in paragraph (1)(a) or (b) that are worked in a week in accordance with an agreed averaging arrangement (whether the arrangement complies with subsection (1) or (2)) will be treated as additional hours for the purposes of section 62. The averaging arrangement will be relevant in determining whether the additional hours are reasonable (see paragraph 62(3)(i)).

Division 4—Requests for flexible working arrangements

65 Requests for flexible working arrangements

Employee may request change in working arrangements

- (1) If:
- (a) any of the circumstances referred to in subsection (1A) apply to an employee; and
 - (b) the employee would like to change his or her working arrangements because of those circumstances;
- then the employee may request the employer for a change in working arrangements relating to those circumstances.

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

- (1A) The following are the circumstances:
- (a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
 - (b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);
 - (c) the employee has a disability;
 - (d) the employee is 55 or older;
 - (e) the employee is experiencing violence from a member of the employee's family;
 - (f) the employee provides 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 the member is experiencing violence from the member's family.
- (1B) To avoid doubt, and without limiting subsection (1), an employee who:
- (a) is a parent, or has responsibility for the care, of a child; and

- (b) is returning to work after taking leave in relation to the birth or adoption of the child;
may request to work part-time to assist the employee to care for the child.
- (2) The employee is not entitled to make the request unless:
- (a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or
 - (b) for a casual employee—the employee:
 - (i) is a long term casual employee of the employer immediately before making the request; and
 - (ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Formal requirements

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

Agreeing to the request

- (4) The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.
- (5) The employer may refuse the request only on reasonable business grounds.
- (5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:
- (a) that the new working arrangements requested by the employee would be too costly for the employer;

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- (b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
 - (c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
 - (d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
 - (e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.
- (6) If the employer refuses the request, the written response under subsection (4) must include details of the reasons for the refusal.

66 State and Territory laws that are not excluded

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

Division 5—Parental leave and related entitlements

Subdivision A—General

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

Employees other than casual employees

- (1) An employee, other than a casual employee, is not entitled to leave under this Division (other than unpaid pre-adoption leave or unpaid no safe job leave) unless the employee has, or will have, completed at least 12 months of continuous service with the employer immediately before the date that applies under subsection (3).

Casual employees

- (2) A casual employee, is not entitled to leave (other than unpaid pre-adoption leave or unpaid no safe job leave) under this Division unless:
 - (a) the employee is, or will be, a long term casual employee of the employer immediately before the date that applies under subsection (3); and
 - (b) but for:
 - (i) the birth or expected birth of the child; or
 - (ii) the placement or the expected placement of the child; or
 - (iii) if the employee is taking a period of unpaid parental leave that starts under subsection 71(6) or paragraph 72(3)(b) or 72(4)(b)—the taking of the leave; the employee would have a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Date at which employee must have completed 12 months of service

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

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

Meaning of birth-related leave

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

Meaning of adoption-related leave

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

Meaning of day of placement

- (6) The **day of placement**, in relation to the adoption of a child by an employee, means the earlier of the following days:
 - (a) the day on which the employee first takes custody of the child for the adoption;

- (b) the day on which the employee starts any travel that is reasonably necessary to take custody of the child for the adoption.

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

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

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

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

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

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

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

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

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

Subdivision B—Parental leave

70 Entitlement to unpaid parental leave

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

- (a) the leave is associated with:
 - (i) the birth of a child of the employee or the employee's spouse or de facto partner; or
 - (ii) the placement of a child with the employee for adoption; and
- (b) the employee has or will have a responsibility for the care of the child.

Note: Entitlement is also affected by:

- (a) section 67 (which deals with length of the employee's service); and
- (b) for pregnancy and birth—subsection 77A(3) (which applies if the pregnancy ends other than by the child being born alive, or if the child dies after birth); and
- (c) for adoption—section 68 (which deals with the age etc. of the adopted child).

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

Application of this section

- (1) This section applies to an employee who intends to take unpaid parental leave if:
 - (a) the employee is not a member of an employee couple; or
 - (b) the employee is a member of an employee couple, but the other member of the couple does not intend to take unpaid parental leave.

Leave must be taken in single continuous period

- (2) The employee must take the leave in a single continuous period.
- Note 1: An employee may take a form of paid leave at the same time as he or she is on unpaid parental leave (see section 79).
- Note 2: Periods of unpaid parental leave can include keeping in touch days on which an employee performs work (see section 79A).
- (3) If the leave is birth-related leave for a female employee who is pregnant with, or gives birth to, the child, the period of leave may start:
- (a) up to 6 weeks before the expected date of birth of the child;
or
 - (b) earlier, if the employer and employee so agree;
- but must not start later than the date of birth of the child.
- Note 1: If the employee is not fit for work, she may be entitled to:
- (a) paid personal leave under Subdivision A of Division 7; or
 - (b) unpaid special maternity leave under section 80.
- Note 2: If it is inadvisable for the employee to continue in her present position, she may be entitled:
- (a) to be transferred to an appropriate safe job under section 81; or
 - (b) to paid no safe job leave under section 81A; or
 - (c) to unpaid no safe job leave under section 82A.
- Note 3: Section 344 prohibits the exertion of undue influence or undue pressure on the employee in relation to a decision by the employee whether to agree as mentioned in paragraph (3)(b) of this section.
- (4) If the leave is birth-related leave but subsection (3) does not apply, the period of leave must start on the date of birth of the child.

When adoption-related leave must start

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

Section 72

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

- (6) Despite subsections (3) to (5), the period of leave may start at any time within 12 months after the date of birth or day of placement of the child if:
- (a) the employee has a spouse or de facto partner who is not an employee; and
 - (b) the spouse or de facto partner has a responsibility for the care of the child for the period between the date of birth or day of placement of the child and the start date of the leave.

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

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

Application of this section

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

Leave must be taken in single continuous period

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

Note 1: An employee may take a form of paid leave at the same time as he or she is on unpaid parental leave (see section 79).

Note 2: Periods of unpaid parental leave can include keeping in touch days on which an employee performs work (see section 79A).

When birth-related leave must start

- (3) If the leave is birth-related leave:
- (a) one employee's period of leave must start first, in accordance with the following rules:

- (i) if the member of the employee couple whose period of leave starts first is a female employee who is pregnant with, or gives birth to, the child—the period of leave may start up to 6 weeks before the expected date of birth of the child, or earlier if the employer and employee so agree, but must not start later than the date of birth of the child;
- (ii) if subparagraph (i) does not apply—the period of leave must start on the date of birth of the child; and
- (b) the other employee’s period of leave must start immediately after the end of the first employee’s period of leave (or that period as extended under section 75 or 76).

When adoption-related leave must start

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

Limited entitlement to take concurrent leave

- (5) If one of the employees takes a period (the **first employee’s period of leave**) of unpaid parental leave in accordance with paragraph (3)(a) or (4)(a), the other employee may take a period of unpaid parental leave (the **concurrent leave**) during the first employee’s period of leave, if the concurrent leave complies with the following requirements:
 - (a) the concurrent leave must not be longer than 8 weeks in total;
 - (b) the concurrent leave may be taken in separate periods, but, unless the employer agrees, each period must not be shorter than 2 weeks;
 - (c) unless the employer agrees, the concurrent leave must not start before:

Section 73

- (i) if the leave is birth-related leave—the date of birth of the child; or
 - (ii) if the leave is adoption-related leave—the day of placement of the child.
- (6) Concurrent leave taken by an employee:
- (a) is an exception to the rule that the employee must take his or her leave in a single continuous period (see subsection (2)); and
 - (b) is an exception to the rules about when the employee’s period of unpaid parental leave must start (see subsection (3) or (4)).

Note: The concurrent leave is unpaid parental leave and so comes out of the employee’s entitlement to 12 months of unpaid parental leave under section 70.

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

Employer may ask employee to provide a medical certificate

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

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

Employer may require employee to take unpaid parental leave

- (2) The employer may require the employee to take a period of unpaid parental leave (the ***period of leave***) as soon as practicable if:
- (a) the employee does not give the employer the requested certificate within 7 days after the request; or
 - (b) within 7 days after the request, the employee gives the employer a medical certificate stating that the employee is not fit for work; or
 - (c) the following subparagraphs are satisfied:
 - (i) within 7 days after the request, the employee gives the employer a medical certificate stating that the employee is fit for work, but that it is inadvisable for the employee to continue in her present position for a stated period for a reason referred to in subparagraph (1)(b)(i) or (ii);
 - (ii) the employee has not complied with the notice and evidence requirements of section 74 for taking unpaid parental leave.

Note: If the medical certificate contains a statement as referred to in subparagraph (c)(i) and the employee has complied with the notice and evidence requirements of section 74, then the employee is entitled to be transferred to a safe job (see section 81) or to paid no safe job leave (see section 81A).

When the period of leave must end

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

Special rules about the period of leave

- (4) The period of leave:

Section 74

- (a) is an exception to the rule that the employee must take her unpaid parental leave in a single continuous period (see subsection 71(2) or 72(2)); and
- (b) is an exception to the rules about when the employee's period of unpaid parental leave must start (see subsections 71(3) and (6), or subsection 72(3)).

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

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

74 Notice and evidence requirements

Notice

- (1) An employee must give his or her employer written notice of the taking of unpaid parental leave under section 71 or 72 by the employee.
- (2) The employee must give the notice to the employer:
 - (a) at least:
 - (i) 10 weeks before starting the leave, unless subparagraph (ii) applies; or
 - (ii) if the leave is to be taken in separate periods of concurrent leave (see paragraph 72(5)(b)) and the leave is not the first of those periods of concurrent leave—4 weeks before starting the period of concurrent leave; or
 - (b) if that is not practicable—as soon as practicable (which may be a time after the leave has started).
- (3) The notice must specify the intended start and end dates of the leave.

Confirmation or change of intended start and end dates

- (4) At least 4 weeks before the intended start date specified in the notice given under subsection (1), the employee must:

- (a) confirm the intended start and end dates of the leave; or
 - (b) advise the employer of any changes to the intended start and end dates of the leave;
- unless it is not practicable to do so.
- (4A) Subsection (4) does not apply to a notice for a period of concurrent leave referred to in subparagraph (2)(a)(ii).

Evidence

- (5) An employee who has given his or her employer notice of the taking of unpaid parental leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person:
- (a) if the leave is birth-related leave—of the date of birth, or the expected date of birth, of the child; or
 - (b) if the leave is adoption-related leave:
 - (i) of the day of placement, or the expected day of placement, of the child; and
 - (ii) that the child is, or will be, under 16 as at the day of placement, or the expected day of placement, of the child.
- (6) Without limiting subsection (5), an employer may require the evidence referred to in paragraph (5)(a) to be a medical certificate.

Compliance

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

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

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

Application of this section

- (1) This section applies if:
-

Section 75

- (a) an employee has, in accordance with section 74, given notice of the taking of a period of unpaid parental leave (the ***original leave period***); and
 - (b) the original leave period is less than the employee's available parental leave period; and
 - (c) the original leave period has started.
- (2) The employee's ***available parental leave period*** is 12 months, less any periods of the following kinds:
- (a) a period of concurrent leave that the employee has taken in accordance with subsection 72(5);
 - (b) a period of unpaid parental leave that the employee has been required to take under subsection 73(2) or 82(2);
 - (c) a period by which the employee's entitlement to unpaid parental leave is reduced under paragraph 76(6)(c).

First extension by giving notice to employer

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

Further extensions by agreement with employer

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

No entitlement to extension beyond available parental leave period

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

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

Employee may request further period of leave

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

Note: Extended periods of unpaid parental leave can include keeping in touch days on which an employee performs work (see section 79A).

Making the request

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

Agreeing to the requested extension

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

Discussion

- (5A) The employer must not refuse the request unless the employer has given the employee a reasonable opportunity to discuss the request.

Section 77

Special rules for employee couples

- (6) The following paragraphs apply in relation to a member of an employee couple extending a period of unpaid parental leave in relation to a child under this section:
- (a) the request must specify any amount of unpaid parental leave that the other member of the employee couple has taken, or will have taken, in relation to the child before the extension starts;
 - (b) the period of the extension cannot exceed 12 months, less any period of unpaid parental leave that the other member of the employee couple has taken, or will have taken, in relation to the child before the extension starts;
 - (c) the amount of unpaid parental leave to which the other member of the employee couple is entitled under section 70 in relation to the child is reduced by the period of the extension.

No extension beyond 24 months after birth or placement

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

77 Reducing period of unpaid parental leave

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

77A Pregnancy ends (other than by birth of a living child) or child born alive dies

Application of this section

- (1) This section applies to unpaid parental leave, if:
- (a) the leave is birth-related leave; and
 - (b) either:

- (i) the pregnancy ends other than by the child being born alive; or
- (ii) the child dies after being born.

Cancellation of leave

- (2) Before the leave starts:
 - (a) the employee may give the employer written notice cancelling the leave; or
 - (b) the employer may give the employee written notice cancelling the leave.

Example: Subsections (2) and (3) do not apply if:

- (a) the child dies after being born; and
- (b) the employee is the female employee who gave birth to the child.

This is because in this case the leave must not start later than the date of birth of the child (see subsection 71(3)).

- (3) If the employee or employer does so, the employee is not entitled to unpaid parental leave in relation to the child.

Note: If the employee is the female employee who was pregnant with the child and the employee is not fit for work, she may be entitled to:

- (a) paid personal leave under Subdivision A of Division 7; or
- (b) unpaid special maternity leave under section 80.

Return to work

- (4) The employee may give the employer written notice that the employee wishes to return to work:
 - (a) after the start of the period of leave, but before its end; and
 - (b) within 4 weeks after the employer receives the notice.
- (5) The employer:
 - (a) may give the employee written notice requiring the employee to return to work on a specified day; and
 - (b) must do so if the employee gives the employer written notice under subsection (4);unless the leave has not started and the employer cancels it under subsection (2).

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- (6) The specified day must be after the start of the period of leave, and:
 - (a) if subsection (4) applies—within 4 weeks after the employer receives the notice under that subsection; or
 - (b) otherwise—at least 6 weeks after the notice is given to the employee under subsection (5).
- (7) The employee’s entitlement to unpaid parental leave in relation to the child ends immediately before the specified day.

Interaction with section 77

- (8) This section does not limit section 77 (which deals with the employee ending the period of unpaid parental leave with the agreement of the employer).

78 Employee who ceases to have responsibility for care of child

- (1) This section applies to an employee who has taken unpaid parental leave in relation to a child if the employee ceases to have any responsibility for the care of the child.
- (1A) However, this section does not apply if section 77A applies to the unpaid parental leave (because the unpaid parental leave is birth-related leave and either the pregnancy ends other than by the child being born alive or the child dies after being born).
- (2) The employer may give the employee written notice requiring the employee to return to work on a specified day.
- (3) The specified day:
 - (a) must be at least 4 weeks after the notice is given to the employee; and
 - (b) if the leave is birth-related leave taken by a female employee who has given birth—must not be earlier than 6 weeks after the date of birth of the child.
- (4) The employee’s entitlement to unpaid parental leave in relation to the child ends immediately before the specified day.

79 Interaction with paid leave

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

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

- (2) An employee is not entitled to take paid personal/carer's leave or compassionate leave while he or she is taking unpaid parental leave.
- (3) An employee is not entitled to any payment under Division 8 (which deals with community service leave) in relation to activities the employee engages in while taking unpaid parental leave.

79A Keeping in touch days

- (1) This Subdivision does not prevent an employee from performing work for his or her employer on a keeping in touch day while he or she is taking unpaid parental leave. If the employee does so, the performance of that work does not break the continuity of the period of unpaid parental leave.
- (2) A day on which the employee performs work for the employer during the period of leave is a **keeping in touch day** if:
- (a) the purpose of performing the work is to enable the employee to keep in touch with his or her employment in order to facilitate a return to that employment after the end of the period of leave; and
 - (b) both the employee and the employer consent to the employee performing work for the employer on that day; and
 - (c) the day is not within:
 - (i) if the employee suggested or requested that he or she perform work for the employer on that day—14 days

Section 79B

after the date of birth, or day of placement, of the child to which the period of leave relates; or

- (ii) otherwise—42 days after the date of birth, or day of placement, of the child; and
- (d) the employee has not already performed work for the employer or another entity on 10 days during the period of leave that were keeping in touch days.

The duration of the work the employee performs on that day is not relevant for the purposes of this subsection.

Note: The employer will be obliged, under the relevant contract of employment or industrial instrument, to pay the employee for performing work on a keeping in touch day.

- (3) The employee's decision whether to give the consent mentioned in paragraph (2)(b) is taken, for the purposes of section 344 (which deals with undue influence or pressure), to be a decision to make, or not make, an arrangement under the National Employment Standards.
- (4) For the purposes of paragraph (2)(d), treat as 2 separate periods of unpaid parental leave:
 - (a) a period of unpaid parental leave taken during the employee's available parental leave period; and
 - (b) a period of unpaid parental leave taken as an extension of the leave referred to in paragraph (a) for a further period immediately following the end of the available parental leave period.

Note: Performance of work on keeping in touch days is also dealt with, for the purposes of parental leave pay, in sections 49 and 50 of the *Paid Parental Leave Act 2010*.

79B Unpaid parental leave not extended by paid leave or keeping in touch days

If, during a period of unpaid parental leave, an employee:

- (a) takes paid leave; or
- (b) performs work for his or her employer on a keeping in touch day;

taking that leave or performing that work does not have the effect of extending the period of unpaid parental leave.

Subdivision C—Other entitlements

80 Unpaid special maternity leave

Entitlement to unpaid special maternity leave

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

Note 1: Entitlement is also affected by section 67 (which deals with the length of the employee's service).

Note 2: If a female employee has an entitlement to paid personal/carer's leave (see section 96), she may take that leave instead of taking unpaid special maternity leave under this section.

Notice and evidence

- (2) An employee must give her employer notice of the taking of unpaid special maternity leave by the employee.
- (3) The notice:
 - (a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
 - (b) must advise the employer of the period, or expected period, of the leave.
- (4) An employee who has given her employer notice of the taking of unpaid special maternity leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason specified in subsection (1).
- (5) Without limiting subsection (4), an employer may require the evidence referred to in that subsection to be a medical certificate.

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- (6) An employee is not entitled to take unpaid special maternity leave unless the employee complies with subsections (2) to (4).

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

81 Transfer to a safe job

- (1) This section applies to a pregnant employee if she gives her employer evidence that would satisfy a reasonable person that she is fit for work, but that it is inadvisable for her to continue in her present position during a stated period (the **risk period**) because of:
- (a) illness, or risks, arising out of her pregnancy; or
 - (b) hazards connected with that position.

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

- (2) If there is an appropriate safe job available, then the employer must transfer the employee to that job for the risk period, with no other change to the employee's terms and conditions of employment.

Note: If there is no appropriate safe job available, then the employee may be entitled to paid no safe job leave under section 81A or unpaid no safe job leave under 82A.

- (3) An **appropriate safe job** is a safe job that has:
- (a) the same ordinary hours of work as the employee's present position; or
 - (b) a different number of ordinary hours agreed to by the employee.
- (4) If the employee is transferred to an appropriate safe job for the risk period, the employer must pay the employee for the safe job at the employee's full rate of pay (for the position she was in before the transfer) for the hours that she works in the risk period.
- (5) If the employee's pregnancy ends before the end of the risk period, the **risk period** ends when the pregnancy ends.
- (6) Without limiting subsection (1), an employer may require the evidence to be a medical certificate.

81A Paid no safe job leave

- (1) If:
 - (a) section 81 applies to a pregnant employee but there is no appropriate safe job available; and
 - (b) the employee is entitled to unpaid parental leave; and
 - (c) the employee has complied with the notice and evidence requirements of section 74 for taking unpaid parental leave;then the employee is entitled to paid no safe job leave for the risk period.
- (2) If the employee takes paid no safe job leave for the risk period, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the risk period.

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

Employer may ask employee to provide a medical certificate

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

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

Employer may require employee to take unpaid parental leave

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

Section 82A

Entitlement to paid no safe job leave ends

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

When the period of leave must end etc.

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

82A Unpaid no safe job leave

- (1) If:
- (a) section 81 applies to a pregnant employee but there is no appropriate safe job available; and
 - (b) the employee is not entitled to unpaid parental leave; and
 - (c) if required by the employer—the employee has given the employer evidence that would satisfy a reasonable person of the pregnancy;
- then the employee is entitled to unpaid no safe job leave for the risk period.
- (2) Without limiting subsection (1), an employer may require the evidence referred to in paragraph (1)(c) to be a medical certificate.

83 Consultation with employee on unpaid parental leave

- (1) If:
- (a) an employee is on unpaid parental leave; and
 - (b) the employee's employer makes a decision that will have a significant effect on the status, pay or location of the employee's pre-parental leave position;
- the employer must take all reasonable steps to give the employee information about, and an opportunity to discuss, the effect of the decision on that position.
- (2) The employee's *pre-parental leave position* is:
- (a) unless paragraph (b) applies, the position the employee held before starting the unpaid parental leave; or

- (b) if, before starting the unpaid parental leave, the employee:
 - (i) was transferred to a safe job because of her pregnancy;
or
 - (ii) reduced her working hours due to her pregnancy;
the position the employee held immediately before that
transfer or reduction.

84 Return to work guarantee

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

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

84A Replacement employees

Before an employer engages an employee to perform the work of another employee who is going to take, or is taking, unpaid parental leave, the employer must notify the replacement employee:

- (a) that the engagement to perform that work is temporary; and
- (b) of the rights:
 - (i) the employer; and
 - (ii) the employee taking unpaid parental leave;
have under subsections 77A(2) and (3) (which provide a right to cancel the leave if the pregnancy ends other than by the birth of a living child or if the child dies after birth); and
- (c) of the rights the employee taking unpaid parental leave has under:
 - (i) subsections 77A(4) to (6) (which provide a right to end the leave early if the pregnancy ends other than by the birth of a living child or if the child dies after birth); and
 - (ii) section 84 (which deals with the return to work guarantee); and

Section 85

- (d) of the effect of section 78 (which provides the employer with a right to require the employee taking unpaid parental leave to return to work if the employee ceases to have any responsibility for the care of the child).

85 Unpaid pre-adoption leave

Entitlement to unpaid pre-adoption leave

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

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

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

Notice and evidence

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

- (6) An employee who has given his or her employer notice of the taking of unpaid pre-adoption leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken to attend an interview or examination as referred to in subsection (1).
- (7) An employee is not entitled to take unpaid pre-adoption leave unless the employee complies with subsections (4) to (6).

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

Division 6—Annual leave

86 Division applies to employees other than casual employees

This Division applies to employees, other than casual employees.

87 Entitlement to annual leave

Amount of leave

- (1) For each year of service with his or her employer, an employee is entitled to:
 - (a) 4 weeks of paid annual leave; or
 - (b) 5 weeks of paid annual leave, if:
 - (i) a modern award applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or
 - (ii) an enterprise agreement applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or
 - (iii) the employee qualifies for the shiftworker annual leave entitlement under subsection (3) (this relates to award/agreement free employees).

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

Accrual of leave

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

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

Award/agreement free employees who qualify for the shiftworker entitlement

- (3) An award/agreement free employee qualifies for the shiftworker annual leave entitlement if:
- (a) the employee:
 - (i) is employed in an enterprise 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) the employee is in a class of employees prescribed by the regulations as shiftworkers for the purposes of the National Employment Standards.
- (4) However, an employee referred to in subsection (3) does not qualify for the shiftworker annual leave entitlement if the employee is in a class of employees prescribed by the regulations as not being qualified for that entitlement.
- (5) Without limiting the way in which a class may be described for the purposes of paragraph (3)(b) or subsection (4), the class may be described by reference to one or more of the following:
- (a) a particular industry or part of an industry;
 - (b) a particular kind of work;
 - (c) a particular type of employment.

88 Taking paid annual leave

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

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

Public holidays

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

Other periods of leave

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

90 Payment for annual leave

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

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

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

- (1) Subsection 22(5) does not apply (for the purpose of this Division) to a transfer of employment between non-associated entities in relation to an employee, if the second employer decides not to

recognise the employee's service with the first employer (for the purpose of this Division).

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

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

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

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

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

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

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

Terms about cashing out paid annual leave

- (1) A modern award or enterprise agreement may include terms providing for the cashing out of paid annual leave by an employee.
- (2) The terms must require that:
 - (a) paid annual leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks; and

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- (b) each cashing out of a particular amount of paid annual leave must be by a separate agreement in writing between the employer and the employee; and
- (c) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

Terms about requirements to take paid annual leave

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

Terms about taking paid annual leave

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

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

Agreements to cash out paid annual leave

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

Requirements to take paid annual leave

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

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

- (a) the employee has accrued an excessive amount of paid annual leave; or
- (b) the employer's enterprise is being shut down for a period (for example, between Christmas and New Year).

Agreements about taking paid annual leave

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

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

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

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Division 7—Personal/carer's leave and compassionate leave

Subdivision A—Paid personal/carer's leave

95 Subdivision applies to employees other than casual employees

This Subdivision applies to employees, other than casual employees.

96 Entitlement to paid personal/carer's leave

Amount of leave

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

Accrual of leave

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

97 Taking paid personal/carer's leave

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

- (a) because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee;
or
- (b) 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 personal injury, affecting the member; or
 - (ii) an unexpected emergency affecting the member.

Note 1: The notice and evidence requirements of section 107 must be complied with.

Note 2: If a female employee has an entitlement to paid personal/carer's leave, she may take that leave instead of taking unpaid special maternity leave under section 80.

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

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

99 Payment for paid personal/carer's leave

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

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

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

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

- (1) A modern award or enterprise agreement may include terms providing for the cashing out of paid personal/carer's leave by an employee.
- (2) The terms must require that:
 - (a) paid personal/carer's leave must not be cashed out if the cashing out would result in the employee's remaining

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accrued entitlement to paid personal/carer's leave being less than 15 days; and

- (b) each cashing out of a particular amount of paid personal/carer's leave must be by a separate agreement in writing between the employer and the employee; and
- (c) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

Subdivision B—Unpaid carer's leave

102 Entitlement to unpaid carer's leave

An employee is entitled to 2 days of 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 because of:

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

103 Taking unpaid carer's leave

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

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

Subdivision C—Compassionate leave

104 Entitlement to compassionate leave

An employee is entitled to 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
- (b) sustains a personal injury that poses a serious threat to his or her life; or
- (c) dies.

105 Taking compassionate leave

- (1) An employee may take compassionate leave for a particular permissible occasion if the leave is taken:
 - (a) to spend time with the member of the employee's immediate family or household who has contracted or developed the personal illness, or sustained the personal injury, referred to in section 104; or
 - (b) after the death of the member of the employee's immediate family or household referred to in section 104.
- (2) An employee may take compassionate leave for a particular permissible occasion as:
 - (a) a single continuous 2 day period; or
 - (b) 2 separate periods of 1 day each; or
 - (c) any separate periods to which the employee and his or her employer agree.
- (3) If the permissible occasion is the contraction or development of a personal illness, or the sustaining of a personal injury, the employee may take the compassionate leave for that occasion at any time while the illness or injury persists.

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

106 Payment for compassionate leave (other than for casual employees)

If, in accordance with this Subdivision, an employee, other than a casual employee, takes a period of compassionate leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

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

Subdivision D—Notice and evidence requirements

107 Notice and evidence requirements

Notice

- (1) An employee must give his or her employer notice of the taking of leave under this Division by the employee.
- (2) The notice:
 - (a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
 - (b) must advise the employer of the period, or expected period, of the leave.

Evidence

- (3) An employee who has given his or her employer notice of the taking of leave under this Division must, if required by the employer, give the employer evidence that would satisfy a reasonable person that:
 - (a) if it is paid personal/carer's leave—the leave is taken for a reason specified in section 97; or
 - (b) if it is unpaid carer's leave—the leave is taken for a permissible occasion in circumstances specified in subsection 103(1); or

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

Compliance

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

Modern awards and enterprise agreements may include evidence requirements

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

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

Division 8—Community service leave

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

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

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

109 Meaning of *eligible community service activity*

General

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

Voluntary emergency management activities

- (2) An employee engages in a ***voluntary emergency management activity*** if, and only if:
 - (a) the employee engages in an activity that involves dealing with an emergency or natural disaster; and

- (b) the employee engages in the activity on a voluntary basis (whether or not the employee directly or indirectly takes or agrees to take an honorarium, gratuity or similar payment wholly or partly for engaging in the activity); 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 engage in 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.
- (3) A **recognised emergency management body** is:
- (a) a body, or part of a body, that has a role or function under a plan that:
 - (i) is for coping with emergencies and/or disasters; and
 - (ii) is prepared by the Commonwealth, a State or a Territory; or
 - (b) a fire-fighting, civil defence or rescue body, or part of such a body; or
 - (c) any other body, or part of a 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, or part of a body, prescribed by 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 entitling one or more employees to be absent from their employment under this Division.

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Regulations may prescribe other activities

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

110 Notice and evidence requirements

Notice

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

Evidence

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

Compliance

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

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

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

Application of this section

- (1) This section applies if:
-

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

Employee to be paid base rate of pay

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

Evidence

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

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

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

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Payment only required for first 10 days of absence

- (5) If an employee is absent because of jury service in relation to a particular jury service summons for a period, or a number of periods, of more than 10 days in total:
- (a) the employer is only required to pay the employee for the first 10 days of absence; and
 - (b) the evidence provided in response to a requirement under subsection (3) need only relate to the first 10 days of absence; and
 - (c) the reference in subsection (4) to the total amount of jury service pay as disclosed in evidence is a reference to the total amount so disclosed for the first 10 days of absence.

Meaning of jury service pay

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

Meaning of jury service summons

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

112 State and Territory laws that are not excluded

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

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

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

Division 9—Long service leave

113 Entitlement to long service leave

Entitlement in accordance with applicable award-derived long service leave terms

- (1) If there are applicable award-derived long service leave terms (see subsection (3)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.

Note: This Act does not exclude State and Territory laws that deal with long service leave, except in relation to employees who are entitled to long service leave under this Division (see paragraph 27(2)(g)), and except as provided in subsection 113A(3).

- (2) However, subsection (1) does not apply if:
- (a) a workplace agreement, or an AWA, that came into operation before the commencement of this Part applies to the employee; or
 - (b) one of the following kinds of instrument that came into operation before the commencement of this Part applies to the employee and expressly deals with long service leave:
 - (i) an enterprise agreement;
 - (ii) a preserved State agreement;
 - (iii) a workplace determination;
 - (iv) a pre-reform certified agreement;
 - (v) a pre-reform AWA;
 - (vi) a section 170MX award;
 - (vii) an old IR agreement.

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

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

- (a) terms of an award, or a State reference transitional award, that (disregarding the effect of any instrument of a kind referred to in subsection (2)):
 - (i) would have applied to the employee at the test time (see subsection (3A)) if the employee had, at that time, been in his or her current circumstances of employment; and
 - (ii) would have entitled the employee to long service leave; and
 - (b) any terms of the award, or the State reference transitional award, that are ancillary or incidental to the terms referred to in paragraph (a).
- (3A) For the purpose of subparagraph (3)(a)(i), the test time is:
- (a) immediately before the commencement of this Part; or
 - (b) if the employee is a Division 2B State reference employee (as defined in Schedule 2 to the Transitional Act)—immediately before the Division 2B referral commencement (as defined in that Schedule).

Entitlement in accordance with applicable agreement-derived long service leave terms

- (4) If there are applicable agreement-derived long service leave terms (see subsection (5)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.
- (5) There are ***applicable agreement-derived long service leave terms***, in relation to an employee if:
 - (a) an order under subsection (6) is in operation in relation to terms of an instrument; and
 - (b) those terms of the instrument would have applied to the employee immediately before the commencement of this Part if the employee had, at that time, been in his or her current circumstances of employment; and
 - (c) there are no applicable award-derived long service leave terms in relation to the employee.
- (6) If the FWC is satisfied that:

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- (a) any of the following instruments that was in operation immediately before the commencement of this Part contained terms entitling employees to long service leave:
 - (i) an enterprise agreement;
 - (ii) a collective agreement;
 - (iii) a pre-reform certified agreement;
 - (iv) an old IR agreement; and
- (b) those terms constituted a long service leave scheme that was applying in more than one State or Territory; and
- (c) the scheme, considered on an overall basis, is no less beneficial to the employees than the long service leave entitlements that would otherwise apply in relation to the employees under State and Territory laws;

the FWC may, on application by, or on behalf of, a person to whom the instrument applies, make an order that those terms of the instrument (and any terms that are ancillary or incidental to those terms) are applicable agreement-derived long service leave terms.

References to instruments

- (7) References in this section to a kind of instrument (other than an enterprise agreement) are references to a transitional instrument of that kind, as continued in existence by Schedule 3 to the Transitional Act.

113A Enterprise agreements may contain terms discounting service under prior agreements etc. in certain circumstances

- (1) This section applies if:
 - (a) an instrument (the *first instrument*) of one of the following kinds that came into operation before the commencement of this Part applies to an employee on or after the commencement of this Part:
 - (i) an enterprise agreement;
 - (ii) a workplace agreement;
 - (iii) a workplace determination;

- (iv) a preserved State agreement;
 - (v) an AWA;
 - (vi) a pre-reform certified agreement;
 - (vii) a pre-reform AWA;
 - (viii) an old IR agreement;
 - (ix) a section 170MX award; and
 - (b) the instrument states that the employee is not entitled to long service leave; and
 - (c) the instrument ceases, for whatever reason, to apply to the employee; and
 - (d) immediately after the first instrument ceases to apply, an enterprise agreement (the **replacement agreement**) starts to apply to the employee.
- (2) The replacement agreement may include terms to the effect that an employee's service with the employer during a specified period (the **excluded period**) (being some or all of the period when the first instrument applied to the employee) does not count as service for the purpose of determining whether the employee is qualified for long service leave, or the amount of long service leave to which the employee is entitled, under this Division or under a law of a State or Territory.
- (3) If the replacement agreement includes terms as permitted by subsection (2), the excluded period does not count, and never again counts, as service for the purpose of determining whether the employee is qualified for long service leave, or the amount of long service leave to which the employee is entitled, under this Division or under a law of a State or Territory, unless a later agreement provides otherwise. This subsection has effect despite sections 27 and 29.
- (4) References in this section to a kind of instrument (other than an enterprise agreement) are references to a transitional instrument of that kind, as continued in existence by Schedule 3 to the Transitional Act.

Division 10—Public holidays

114 Entitlement to be absent from employment on public holiday

Employee entitled to be absent on public holiday

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

Reasonable requests to work on public holidays

- (2) However, an employer may request an employee to work on a public holiday if the request is reasonable.
- (3) If an employer requests an employee to work on a public holiday, the employee may refuse the request if:
 - (a) the request is not reasonable; or
 - (b) the refusal is reasonable.
- (4) In determining whether a request, or a refusal of a request, to work on a public holiday is reasonable, the following must be taken into account:
 - (a) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;
 - (b) the employee's personal circumstances, including family responsibilities;
 - (c) whether the employee could reasonably expect that the employer might request work on the public holiday;
 - (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday;
 - (e) the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork);

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

115 Meaning of *public holiday*

The public holidays

- (1) The following are **public holidays**:
 - (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) the Queen's birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);
 - (vii) 25 December (Christmas Day);
 - (viii) 26 December (Boxing Day);
 - (b) any other day, or part-day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day or part-day, or a kind of day or part-day, that is excluded by the regulations from counting as a public holiday.

Substituted public holidays under State or Territory laws

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

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Substituted public holidays under modern awards and enterprise agreements

- (3) A modern award or enterprise agreement may include terms providing for an employer and employee to agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

Substituted public holidays for award/agreement free employees

- (4) An employer and an award/agreement free employee may agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

Note: This Act does not exclude State and Territory laws that deal with the declaration, prescription or substitution of public holidays, but it does exclude State and Territory laws that relate to the rights and obligations of an employee or employer in relation to public holidays (see paragraph 27(2)(j)).

116 Payment for absence on public holiday

If, in accordance with this Division, an employee is absent from his or her employment on a day or part-day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day.

Note: If the employee does not have ordinary hours of work on the public holiday, the employee is not entitled to payment under this section. For example, the employee is not entitled to payment if the employee is a casual employee who is not rostered on for the public holiday, or is a part-time employee whose part-time hours do not include the day of the week on which the public holiday occurs.

Division 11—Notice of termination and redundancy pay

Subdivision A—Notice of termination or payment in lieu of notice

117 Requirement for notice of termination or payment in lieu

Notice specifying day of termination

- (1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).

Note 1: Section 123 describes situations in which this section does not apply.

Note 2: Sections 28A and 29 of the *Acts Interpretation Act 1901* provide how a notice may be given. In particular, the notice may be given to an employee by:

- (a) delivering it personally; or
- (b) leaving it at the employee's last known address; or
- (c) sending it by pre-paid post to the employee's last known address.

Amount of notice or payment in lieu of notice

- (2) The employer must not terminate the employee's employment unless:
- (a) the time between giving the notice and the day of the termination is at least the period (the ***minimum period of notice***) worked out under subsection (3); or
 - (b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.
- (3) Work out the minimum period of notice as follows:

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(a) first, work out the period using the following table:

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	Period
1	Not more than 1 year	1 week
2	More than 1 year but not more than 3 years	2 weeks
3	More than 3 years but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

(b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

118 Modern awards and enterprise agreements may provide for notice of termination by employees

A modern award or enterprise agreement may include terms specifying the period of notice an employee must give in order to terminate his or her employment.

Subdivision B—Redundancy pay

119 Redundancy pay

Entitlement to redundancy pay

- (1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:
- (a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
 - (b) because of the insolvency or bankruptcy of the employer.

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Note: Sections 121, 122 and 123 describe situations in which the employee does not have this entitlement.

Amount of redundancy pay

- (2) The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee's base rate of pay for his or her ordinary hours of work:

Redundancy pay period	Employee's period of continuous service with the employer on termination	Redundancy pay period
1	At least 1 year but less than 2 years	4 weeks
2	At least 2 years but less than 3 years	6 weeks
3	At least 3 years but less than 4 years	7 weeks
4	At least 4 years but less than 5 years	8 weeks
5	At least 5 years but less than 6 years	10 weeks
6	At least 6 years but less than 7 years	11 weeks
7	At least 7 years but less than 8 years	13 weeks
8	At least 8 years but less than 9 years	14 weeks
9	At least 9 years but less than 10 years	16 weeks
10	At least 10 years	12 weeks

120 Variation of redundancy pay for other employment or incapacity to pay

- (1) This section applies if:
- (a) an employee is entitled to be paid an amount of redundancy pay by the employer because of section 119; and
 - (b) the employer:
 - (i) obtains other acceptable employment for the employee; or
 - (ii) cannot pay the amount.

Section 121

- (2) On application by the employer, the FWC may determine that the amount of redundancy pay is reduced to a specified amount (which may be nil) that the FWC considers appropriate.
- (3) The amount of redundancy pay to which the employee is entitled under section 119 is the reduced amount specified in the determination.

121 Exclusions from obligation to pay redundancy pay

- (1) Section 119 does not apply to the termination of an employee's employment if, immediately before the time of the termination, or at the time when the person was given notice of the termination as described in subsection 117(1) (whichever happened first):
 - (a) the employee's period of continuous service with the employer is less than 12 months; or
 - (b) the employer is a small business employer.
- (2) A modern award may include a term specifying other situations in which section 119 does not apply to the termination of an employee's employment.
- (3) If a modern award that is in operation includes such a term (the **award term**), an enterprise agreement may:
 - (a) incorporate the award term by reference (and as in force from time to time) into the enterprise agreement; and
 - (b) provide that the incorporated term covers some or all of the employees who are also covered by the award term.

122 Transfer of employment situations that affect the obligation to pay redundancy pay

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

- (1) Subsection 22(5) does not apply (for the purpose of this Subdivision) to a transfer of employment between non-associated entities in relation to an employee if the second employer decides

not to recognise the employee's service with the first employer (for the purpose of this Subdivision).

Employee is not entitled to redundancy pay if service with first employer counts as service with second employer

- (2) If subsection 22(5) applies (for the purpose of this Subdivision) to a transfer of employment in relation to an employee, the employee is not entitled to redundancy pay under section 119 in relation to the termination of his or her employment with the first employer.

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

Employee not entitled to redundancy pay if refuses employment in certain circumstances

- (3) An employee is not entitled to redundancy pay under section 119 in relation to the termination of his or her employment with an employer (the **first employer**) if:
- (a) the employee rejects an offer of employment made by another employer (the **second employer**) that:
 - (i) is on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than, the employee's terms and conditions of employment with the first employer immediately before the termination; and
 - (ii) recognises the employee's service with the first employer, for the purpose of this Subdivision; and
 - (b) had the employee accepted the offer, there would have been a transfer of employment in relation to the employee.
- (4) If the FWC is satisfied that subsection (3) operates unfairly to the employee, the FWC may order the first employer to pay the employee a specified amount of redundancy pay (not exceeding the amount that would be payable but for subsection (3)) that the FWC considers appropriate. The first employer must pay the employee that amount of redundancy pay.

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Subdivision C—Limits on scope of this Division

123 Limits on scope of this Division

Employees not covered by this Division

- (1) This Division does not apply to any of the following employees:
 - (a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;
 - (b) an employee whose employment is terminated because of serious misconduct;
 - (c) a casual employee;
 - (d) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement;
 - (e) an employee prescribed by the regulations as an employee to whom this Division does not apply.
- (2) Paragraph (1)(a) does not prevent this Division from applying to an employee if a substantial reason for employing the employee as described in that paragraph was to avoid the application of this Division.

Other employees not covered by notice of termination provisions

- (3) Subdivision A does not apply to:
 - (b) a daily hire employee working in the building and construction industry (including working in connection with the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures); or
 - (c) a daily hire employee working in the meat industry in connection with the slaughter of livestock; or
 - (d) a weekly hire employee working in connection with the meat industry and whose termination of employment is determined solely by seasonal factors; or

- (e) an employee prescribed by the regulations as an employee to whom that Subdivision does not apply.

Other employees not covered by redundancy pay provisions

- (4) Subdivision B does not apply to:
 - (a) an employee who is an apprentice; or
 - (b) an employee to whom an industry-specific redundancy scheme in a modern award applies; or
 - (c) an employee to whom a redundancy scheme in an enterprise agreement applies if:
 - (i) the scheme is an industry-specific redundancy scheme that is incorporated by reference (and as in force from time to time) into the enterprise agreement from a modern award that is in operation; and
 - (ii) the employee is covered by the industry-specific redundancy scheme in the modern award; or
 - (d) an employee prescribed by the regulations as an employee to whom that Subdivision does not apply.

Division 12—Fair Work Information Statement

124 Fair Work Ombudsman to prepare and publish Fair Work Information Statement

- (1) The Fair Work Ombudsman must prepare a *Fair Work Information Statement*. The Fair Work Ombudsman must publish the Statement in the *Gazette*.

Note: If the Fair Work Ombudsman changes the Statement, the Fair Work Ombudsman must publish the new version of the Statement in the *Gazette*.

- (2) The Statement must contain information about the following:
 - (a) the National Employment Standards;
 - (b) modern awards;
 - (c) agreement-making under this Act;
 - (d) the right to freedom of association;
 - (e) the role of the FWC and the Fair Work Ombudsman;
 - (f) termination of employment;
 - (g) individual flexibility arrangements;
 - (h) right of entry (including the protection of personal information by privacy laws).
- (3) The Fair Work Information Statement is not a legislative instrument.
- (4) The regulations may prescribe other matters relating to the content or form of the Statement, or the manner in which employers may give the Statement to employees.

125 Giving new employees the Fair Work Information Statement

- (1) An employer must give each employee the Fair Work Information Statement before, or as soon as practicable after, the employee starts employment.

- (2) Subsection (1) does not require the employer to give the employee the Statement more than once in any 12 months.

Note: This is relevant if the employer employs the employee more than once in the 12 months.

Division 13—Miscellaneous

126 Modern awards and enterprise agreements may provide for school-based apprentices and trainees to be paid loadings in lieu

A modern award or enterprise agreement may provide for school-based apprentices or school-based trainees to be paid loadings in lieu of any of the following:

- (a) paid annual leave;
- (b) paid personal/carer's leave;
- (c) paid absence under Division 10 (which deals with public holidays).

Note: Section 199 affects whether the FWC may approve an enterprise agreement covering an employee who is a school-based apprentice or school-based trainee, if the employee is covered by a modern award that is in operation and provides for the employee to be paid loadings in lieu of paid annual leave, paid personal/carer's leave or paid absence under Division 10.

127 Regulations about what modern awards and enterprise agreements can do

The regulations may:

- (a) permit modern awards or enterprise agreements or both to include terms that would or might otherwise be contrary to this Part or section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement); or
- (b) prohibit modern awards or enterprise agreements or both from including terms that would or might otherwise be permitted by a provision of this Part or section 55.

128 Relationship between National Employment Standards and agreements etc. permitted by this Part for award/agreement free employees

The National Employment Standards have effect subject to:

- (a) an agreement between an employer and an award/agreement free employee or a requirement made by an employer of an award/agreement free employee, that is expressly permitted by a provision of this Part; or
- (b) an agreement between an employer and an award/agreement free employee that is expressly permitted by regulations made for the purpose of section 129.

Note 1: In determining what matters are permitted to be agreed or required under paragraph (a), any regulations made for the purpose of section 129 that expressly prohibit certain agreements or requirements must be taken into account.

Note 2: See also the note to section 64 (which deals with the effect of averaging arrangements).

129 Regulations about what can be agreed to etc. in relation to award/agreement free employees

The regulations may:

- (a) permit employers, and award/agreement free employees, to agree on matters that would or might otherwise be contrary to this Part; or
- (b) prohibit employers and award/agreement free employees from agreeing on matters, or prohibit employers from making requirements of such employees, that would or might otherwise be permitted by a provision of this Part.

130 Restriction on taking or accruing leave or absence while receiving workers' compensation

- (1) An employee is not entitled to take or accrue any leave or absence (whether paid or unpaid) under this Part during a period (a *compensation period*) when the employee is absent from work because of a personal illness, or a personal injury, for which the

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employee is receiving compensation payable under a law (a ***compensation law***) of the Commonwealth, a State or a Territory that is about workers' compensation.

- (2) Subsection (1) does not prevent an employee from taking or accruing leave during a compensation period if the taking or accruing of the leave is permitted by a compensation law.
- (3) Subsection (1) does not prevent an employee from taking unpaid parental leave during a compensation period.

131 Relationship with other Commonwealth laws

This Part establishes minimum standards and so is intended to supplement, and not to override, entitlements under other laws of the Commonwealth.

Part 2-3—Modern awards

Division 1—Introduction

132 Guide to this Part

This Part provides for the FWC to make, vary and revoke modern awards. Modern awards may set minimum terms and conditions for national system employees in particular industries or occupations. Modern awards can have terms that are ancillary or supplementary to the National Employment Standards (see Part 2-1).

Division 2 provides for the modern awards objective. This requires the FWC to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account certain social and economic factors. Division 2 also contains special provisions about modern award minimum wages.

Division 3 deals with the terms of modern awards.

Division 4 provides for the FWC to conduct 4 yearly reviews of modern awards (other than in relation to default fund terms of modern awards).

Division 4A provides for the FWC to conduct 4 yearly reviews of default fund terms of modern awards.

It also sets out the process for making the Schedule of Approved Employer MySuper products in a 4 yearly review, and amending the schedule after it is made to include other employer MySuper products. If an employer MySuper product is on the schedule, an employer covered by a modern award can make contributions, for the benefit of a default fund employee, to a superannuation fund that offers the product (see subsection 149D(1A)).

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Division 5 provides for the FWC to exercise modern award powers outside the system of 4 yearly reviews in certain circumstances.

Division 6 contains some general provisions relating to modern award powers.

Division 7 contains additional provisions relating to modern enterprise awards.

Division 8 contains additional provisions relating to State reference public sector modern awards.

The obligation to comply with a modern award is in section 45 (in Part 2-1).

In relation to minimum wages in modern awards, the FWC has powers both under this Part and under Part 2-6 (which deals with minimum wages). The following is a summary of the FWC's powers under the 2 Parts:

- (a) the initial making of a modern award setting modern award minimum wages can only occur under this Part;
- (b) the main power to vary modern award minimum wages is in annual wage reviews under Part 2-6;
- (c) modern award minimum wages can also be varied under this Part, but only for work value reasons or in other limited circumstances;
- (d) modern award minimum wages can be set (otherwise than in the initial making of a modern award) or revoked either under this Part or in annual wage reviews under Part 2-6.

133 Meanings of *employee* and *employer*

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

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

Division 2—Overarching provisions

134 The modern awards objective

What is the modern awards objective?

- (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
 - (a) relative living standards and the needs of the low paid; and
 - (b) the need to encourage collective bargaining; and
 - (c) the need to promote social inclusion through increased workforce participation; and
 - (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
 - (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts; and
 - (e) the principle of equal remuneration for work of equal or comparable value; and
 - (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
 - (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
 - (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the *modern awards objective*.

When does the modern awards objective apply?

- (2) The modern awards objective applies to the performance or exercise of the FWC's *modern award powers*, which are:
- (a) the FWC's functions or powers under this Part; and
 - (b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).

135 Special provisions relating to modern award minimum wages

- (1) Modern award minimum wages cannot be varied under this Part except as follows:
- (a) modern award minimum wages can be varied if the FWC is satisfied that the variation is justified by work value reasons (see subsections 156(3) and 157(2));
 - (b) modern award minimum wages can be varied under section 160 (which deals with variation to remove ambiguities or correct errors) or section 161 (which deals with variation on referral by the Australian Human Rights Commission).

Note 1: The main power to vary modern award minimum wages is in annual wage reviews under Part 2-6. Modern award minimum wages can also be set or revoked in annual wage reviews.

Note 2: For the meanings of *modern award minimum wages*, and *setting* and *varying* such wages, see section 284.

- (2) In exercising its powers under this Part to set, vary or revoke modern award minimum wages, the FWC must take into account the rate of the national minimum wage as currently set in a national minimum wage order.

Division 3—Terms of modern awards

Subdivision A—Preliminary

136 What can be included in modern awards

Terms that may or must be included

- (1) A modern award must only include terms that are permitted or required by:
 - (a) Subdivision B (which deals with terms that may be included in modern awards); or
 - (b) Subdivision C (which deals with terms that must be included in modern awards); or
 - (c) section 55 (which deals with interaction between the National Employment Standards and a modern award or enterprise agreement); or
 - (d) Part 2-2 (which deals with the National Employment Standards).

Note 1: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards.

Note 2: Part 2-2 includes a number of provisions permitting inclusion of terms about particular matters.

Terms that must not be included

- (2) A modern award must not include terms that contravene:
 - (a) Subdivision D (which deals with terms that must not be included in modern awards); or
 - (b) section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement).

Note: The provisions referred to in subsection (2) limit the terms that can be included in modern awards under the provisions referred to in subsection (1).

137 Terms that contravene section 136 have no effect

A term of a modern award has no effect to the extent that it contravenes section 136.

138 Achieving the modern awards objective

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

Subdivision B—Terms that may be included in modern awards

139 Terms that may be included in 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;
 - (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 arrangements that:

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- (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 and other monetary entitlements; and
 - (iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;
 - (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.
- (2) Any allowance included in a modern award must be separately and clearly identified in the award.

140 Outworker terms

- (1) 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;
 - (b) terms relating to the conditions under which an outworker entity may arrange for work to be performed for the entity (either directly or indirectly), if the work is of a kind that is often performed by outworkers.

Note: A person who is an employer may also be an outworker entity (see the definition of *outworker entity* in section 12).

- (2) Without limiting subsection (1), terms referred to in that subsection may include terms relating to the pay or conditions of outworkers.
- (3) The following terms of a modern award are *outworker terms*:
- (a) terms referred to in subsection (1);

- (b) terms that are incidental to terms referred to in subsection (1), included in the modern award under subsection 142(1);
- (c) machinery terms in relation to terms referred to in subsection (1), included in the modern award under subsection 142(2).

141 Industry-specific redundancy schemes

When can a modern award include an industry-specific redundancy scheme?

- (1) A modern award may include an industry-specific redundancy scheme if the scheme was included in the award:
 - (a) in the award modernisation process; or
 - (b) in accordance with subsection (2).

Note: An employee to whom an industry-specific redundancy scheme in a modern award applies is not entitled to the redundancy entitlements in Subdivision B of Division 11 of Part 2-2.

Coverage of industry-specific redundancy schemes must not be extended

- (2) If:
 - (a) a modern award includes an industry-specific redundancy scheme; and
 - (b) the FWC is making or varying another modern award under Division 4 or 5 so that it (rather than the modern award referred to in paragraph (a)) will cover some or all of the classes of employees who are covered by the scheme;the FWC may include the scheme in that other modern award. However, the FWC must not extend the coverage of the scheme to classes of employees that it did not previously cover.

Varying industry-specific redundancy schemes

- (3) The FWC may only vary an industry-specific redundancy scheme in a modern award under Division 4 or 5:

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- (a) by varying the amount of any redundancy payment in the scheme; or
 - (b) in accordance with a provision of Subdivision B of Division 5 (which deals with varying modern awards in some limited situations).
- (4) In varying an industry-specific redundancy scheme as referred to in subsection (3), the FWC:
- (a) must not extend the coverage of the scheme to classes of employees that it did not previously cover; and
 - (b) must retain the industry-specific character of the scheme.

Omitting industry-specific redundancy schemes

- (5) The FWC may vary a modern award under Division 4 or 5 by omitting an industry-specific redundancy scheme from the award.

142 Incidental and machinery terms

Incidental terms

- (1) A modern award may include terms that are:
- (a) incidental to a term that is permitted or required to be in the modern award; and
 - (b) essential for the purpose of making a particular term operate in a practical way.

Machinery terms

- (2) A modern award may include machinery terms, including formal matters (such as a title, date or table of contents).

Subdivision C—Terms that must be included in modern awards

143 Coverage terms of modern awards other than modern enterprise awards and State reference public sector modern awards

Coverage terms must be included

- (1) A modern award must include terms (*coverage terms*) setting out the employers, employees, organisations and outworker entities that are covered by the award, in accordance with this section.

Employers and employees

- (2) A modern award must be expressed to cover:
 - (a) specified employers; and
 - (b) specified employees of employers covered by the modern award.

Organisations

- (3) A modern award may be expressed to cover one or more specified organisations, in relation to all or specified employees or employers that are covered by the award.

Outworker entities

- (4) A modern award may be expressed to cover, but only in relation to outworker terms included in the award, specified outworker entities.

How coverage is expressed

- (5) For the purposes of subsections (2) to (4):
 - (a) employers may be specified by name or by inclusion in a specified class or specified classes; and

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- (b) employees must be specified by inclusion in a specified class or specified classes; and
 - (c) organisations must be specified by name; and
 - (d) outworker entities may be specified by name or by inclusion in a specified class or specified classes.
- (6) Without limiting the way in which a class may be described for the purposes of subsection (5), the class may be described by reference to a particular industry or part of an industry, or particular kinds of work.

Employees not traditionally covered by awards etc.

- (7) A modern award must not be expressed to cover classes of employees:
- (a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or
 - (b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.

Note: For example, in some industries, managerial employees have traditionally not been covered by awards.

Modern enterprise awards

- (8) A modern award (other than a modern enterprise award) must be expressed not to cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the Transitional Act), or employers in relation to those employees.
- (9) This section does not apply to modern enterprise awards.

State reference public sector modern awards

- (10) A modern award (other than a State reference public sector modern award) must be expressed not to cover employees who are covered by a State reference public sector modern award, or a State

reference public sector transitional award (within the meaning of the Transitional Act), or employers in relation to those employees.

- (11) This section does not apply to State reference public sector modern awards.

143A Coverage terms of modern enterprise awards

Coverage terms must be included

- (1) A modern enterprise award must include terms (***coverage terms***) setting out, in accordance with this section:
- (a) the enterprise or enterprises to which the modern enterprise award relates; and
 - (b) the employers, employees and organisations that are covered by the modern enterprise award.

Enterprises

- (2) A modern enterprise award must be expressed to relate:
- (a) to a single enterprise (or a part of a single enterprise) only; or
 - (b) to one or more enterprises, but only if the employers all carry on similar business activities under the same franchise and are:
 - (i) franchisees of the same franchisor; or
 - (ii) related bodies corporate of the same franchisor; or
 - (iii) any combination of the above.

Employers and employees

- (3) A modern enterprise award must be expressed to cover:
- (a) a specified employer that carries on, or specified employers that carry on, the enterprise or enterprises referred to in subsection (2); and
 - (b) specified employees of employers covered by the modern enterprise award.

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Organisations

- (4) A modern enterprise award may be expressed to cover one or more specified organisations, in relation to:
- (a) all or specified employees covered by the award; or
 - (b) the employer, or all or specified employers, covered by the award.

Outworker entities

- (5) A modern enterprise award must not be expressed to cover outworker entities.

How coverage etc. is expressed

- (6) For the purposes of subsection (2), an enterprise must be specified:
- (a) if paragraph (2)(a) applies to the enterprise—by name; or
 - (b) if paragraph (2)(b) applies to the enterprise—by name, or by the name of the franchise.
- (7) For the purposes of subsections (3) and (4):
- (a) an employer or 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.

Employees not traditionally covered by awards etc.

- (8) A modern enterprise award must not be expressed to cover classes of employees:
- (a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or
 - (b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.

Note: For example, in some industries, managerial employees have traditionally not been covered by awards.

143B Coverage terms of State reference public sector modern awards

Coverage terms must be included

- (1) A State reference public sector modern award must include terms (*coverage terms*) setting out, in accordance with this section, the employers, employees and organisations that are covered by the modern award.

Employers and employees

- (2) The coverage terms must be such that:
- (a) the only employers that are expressed to be covered by the modern award are one or more specified State reference public sector employers; and
 - (b) the only employees who are expressed to be covered by the modern award are specified State reference public sector employees of those employers.

Organisations

- (3) A State reference public sector modern award may be expressed to cover one or more specified organisations, in relation to:
- (a) all or specified employees covered by the modern award; or
 - (b) the employer, or all or specified employers, covered by the modern award.

Outworker entities

- (4) A State reference public sector modern award must not be expressed to cover outworker entities.

How coverage etc. is expressed

- (5) For the purposes of this section:
- (a) an employer or employers may be specified by name or by inclusion in a specified class or specified classes; and

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- (b) employees must be specified by inclusion in a specified class or specified classes; and
- (c) organisations must be specified by name.

144 Flexibility terms

Flexibility terms must be included

- (1) A modern award must include a term (a **flexibility term**) enabling an employee and his or her employer to agree on an arrangement (an **individual flexibility arrangement**) varying the effect of the award in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer.

Effect of individual flexibility arrangements

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

Requirements for flexibility terms

- (4) The flexibility term must:
 - (a) identify the terms of the modern award the effect of which may be varied by an individual flexibility arrangement; and
 - (b) require that the employee and the employer genuinely agree to any individual flexibility arrangement; and
 - (c) require the employer to ensure that any individual flexibility arrangement must result in the employee being better off

- overall than the employee would have been if no individual flexibility arrangement were agreed to; and
- (d) set out how any flexibility arrangement may be terminated by the employee or the employer; and
 - (e) require the employer to ensure that any individual flexibility arrangement must be in writing and signed:
 - (i) in all cases—by the employee and the employer; and
 - (ii) if the employee is under 18—by a parent or guardian of the employee; and
 - (f) require the employer to ensure that a copy of any individual flexibility arrangement must be given to the employee.
- (5) Except as required by subparagraph (4)(e)(ii), the flexibility term must not require that any individual flexibility arrangement agreed to by an employer and employee under the term must be approved, or consented to, by another person.

145 Effect of individual flexibility arrangement that does not meet requirements of flexibility term

Application of this section

- (1) This section applies if:
 - (a) an employee and employer agree to an arrangement that purports to be an individual flexibility arrangement under a flexibility term in a modern award; and
 - (b) the arrangement does not meet a requirement set out in section 144.

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

Arrangement has effect as if it were an individual flexibility arrangement

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

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Employer contravenes flexibility term in specified circumstances

- (3) If subsection 144(4) requires the employer to ensure that the arrangement meets the requirement, the employer contravenes the flexibility term of the award.

Flexibility arrangement may be terminated by agreement or notice

- (4) The flexibility term is taken to provide (in addition to any other means of termination of the arrangement that the term provides) that the arrangement can be terminated:
- (a) by either the employee, or the employer, giving written notice of not more than 28 days; or
 - (b) by the employee and the employer at any time if they agree, in writing, to the termination.

145A Consultation about changes to rosters or hours of work

- (1) Without limiting paragraph 139(1)(j), a modern award must include a term that:
- (a) requires the employer to consult employees about a change to their regular roster or ordinary hours of work; and
 - (b) allows for the representation of those employees for the purposes of that consultation.
- (2) The term must require the employer:
- (a) to provide information to the employees about the change; and
 - (b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and
 - (c) to consider any views about the impact of the change that are given by the employees.

146 Terms about settling disputes

Without limiting paragraph 139(1)(j), a modern award must include a term that provides a procedure for settling disputes:

- (a) about any matters arising under the award; and
- (b) in relation to the National Employment Standards.

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

147 Ordinary hours of work

A modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award.

Note: An employee's ordinary hours of work are significant in determining the employee's entitlements under the National Employment Standards.

148 Base and full rates of pay for pieceworkers

If a modern award defines or describes employees covered by the award as pieceworkers, the award must include terms specifying, or providing for the determination of, base and full rates of pay for those employees for the purposes of the National Employment Standards.

Note: An employee's base and full rates of pay are significant in determining the employee's entitlements under the National Employment Standards.

149 Automatic variation of allowances

If a modern award includes allowances that the FWC considers are of a kind that should be varied when wage rates in the award are varied, the award must include terms providing for the automatic variation of those allowances when wage rates in the award are varied.

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149B Term requiring avoidance of liability to pay superannuation guarantee charge

A modern award must include a term that requires an employer covered by the award to make contributions to a superannuation fund for the benefit of an employee covered by the award so as to avoid liability to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* in relation to the employee.

149C Default fund terms

- (1) A modern award must include a default fund term that complies with section 149D.
- (2) A **default fund term** is a term of a modern award that requires, permits or prohibits an employer covered by the award to make contributions to a superannuation fund for the benefit of an employee (a **default fund employee**) who:
 - (a) is covered by the award; and
 - (b) has no chosen fund (within the meaning of the *Superannuation Guarantee (Administration) Act 1992*).

149D Default fund term must provide for contributions to be made to certain funds

Specified superannuation fund offering standard MySuper product

- (1) A default fund term of a modern award must require an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund that:
 - (a) offers a standard MySuper product; and
 - (b) is specified in the default fund term of the award in relation to that product;if:
 - (c) the employer will be liable to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* in relation to the employee if the employer does not

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make contributions to a superannuation fund for the benefit of the employee; and

- (d) the employer is not making contributions to a superannuation fund referred to in subsection (1A), (2), (3), (4) or (5) for the benefit of the employee.

Note: If a superannuation fund is specified in the default fund term of a modern award in relation to a standard MySuper product and, in addition to offering the standard MySuper product, the fund offers a tailored MySuper product that a default fund employee is entitled to hold, then any contributions made by the employer to the fund for the benefit of that employee will be paid into the tailored MySuper product instead of the standard MySuper product (see section 29WB of the *Superannuation Industry (Supervision) Act 1993*).

Superannuation funds offering employer MySuper products on the schedule

- (1A) A default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund that offers an employer MySuper product that:
- (a) relates to the employer; and
 - (b) is on the Schedule of Approved Employer MySuper Products.

Note: The Schedule of Approved Employer MySuper Products is made during a 4 yearly review of default fund terms of modern awards under Division 4A of Part 2-3.

Defined Benefits Scheme

- (2) A default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund in relation to which a default fund employee is a defined benefit member.

Exempt public sector superannuation scheme

- (3) A default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a

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default fund employee, to a superannuation fund that is an exempt public sector superannuation scheme.

State public sector superannuation scheme

- (4) A default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund that:
- (a) is a public sector superannuation scheme (within the meaning of the *Superannuation Industry (Supervision) Act 1993*); and
 - (b) a law of a State requires the employer to make contributions to for the benefit of the employee.

Transitionally authorised superannuation fund

- (5) A default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund in relation to which a transitional authorisation is in operation under section 156K.

Subdivision D—Terms that must not be included in modern awards

150 Objectionable terms

A modern award must not include an objectionable term.

151 Terms about payments and deductions for benefit of employer etc.

A modern award must not include a term that has no effect because of:

- (a) subsection 326(1) (which deals with unreasonable deductions for the benefit of an employer); or
- (b) subsection 326(3) (which deals with unreasonable requirements to spend or pay an amount); or

- (c) subsection 326(4) (which deals with deductions or payments in relation to employees under 18).

152 Terms about right of entry

A modern award must not include terms that require or authorise an official of an organisation to enter premises:

- (a) to hold discussions with, or interview, an employee; or
- (b) to inspect any work, process or object.

153 Terms that are discriminatory

Discriminatory terms must not be included

- (1) A modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Certain terms are not discriminatory

- (2) A term of a modern award does not discriminate against an employee:
- (a) if the reason for the discrimination is the inherent requirements of the particular position held by the employee; or
 - (b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:
 - (i) in good faith; and
 - (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.
- (3) A term of a modern award does not discriminate against an employee merely because it provides for minimum wages for:

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- (a) all junior employees, or a class of junior employees; or
- (b) all employees with a disability, or a class of employees with a disability; or
- (c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.

154 Terms that contain State-based differences

General rule—State-based difference terms must not be included

- (1) A modern award must not include terms and conditions of employment (***State-based difference terms***) that:
 - (a) are determined by reference to State or Territory boundaries; or
 - (b) are expressed to operate in one or more, but not every, State and Territory.

When State-based difference terms may be included

- (2) However, a modern award may include State-based difference terms if the terms were included in the award:
 - (a) in the award modernisation process; or
 - (b) in accordance with subsection (3);but only for up to 5 years starting on the day on which the first modern award that included those terms came into operation.
- (3) If:
 - (a) a modern award includes State-based difference terms as permitted under subsection (2); and
 - (b) the FWC is making or varying another modern award so that it (rather than the modern award referred to in paragraph (a)) will cover some or all of the classes of employees who are covered by those terms;the FWC may include those terms in that other modern award. However, the FWC must not extend the coverage of those terms to classes of employees that they did not previously cover.

155 Terms dealing with long service leave

A modern award must not include terms dealing with long service leave.

Division 4—4 yearly reviews of modern awards

156 4 yearly reviews of modern awards to be conducted

Timing of 4 yearly reviews

- (1) The FWC must conduct a **4 yearly review of modern awards** starting as soon as practicable after each 4th anniversary of the commencement of this Part.

Note 1: The FWC must be constituted by a Full Bench to conduct 4 yearly reviews of modern awards, and to make determinations and modern awards in those reviews (see subsections 616(1), (2) and (3)).

Note 2: The President may give directions about the conduct of 4 yearly reviews of modern awards (see section 582).

What has to be done in a 4 yearly review?

- (2) In a 4 yearly review of modern awards, the FWC:
- (a) must review all modern awards; and
 - (b) may make:
 - (i) one or more determinations varying modern awards; and
 - (ii) one or more modern awards; and
 - (iii) one or more determinations revoking modern awards; and
 - (c) must not review, or make a determination to vary, a default fund term of a modern award.

Note 1: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 2: For reviews of default fund terms of modern awards, see Division 4A.

Variation of modern award minimum wages must be justified by work value reasons

- (3) In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the

FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.

- (4) **Work value reasons** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
- (a) the nature of the work;
 - (b) the level of skill or responsibility involved in doing the work;
 - (c) the conditions under which the work is done.

Each modern award to be reviewed in its own right

- (5) A 4 yearly review of modern awards must be such that each modern award is reviewed in its own right. However, this does not prevent the FWC from reviewing 2 or more modern awards at the same time.

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Division 4A—4 yearly reviews of default fund terms of modern awards

Subdivision A—4 yearly reviews of default fund terms

156A 4 yearly reviews of default fund terms

Timing of 4 yearly reviews

- (1) The FWC must conduct a 4 yearly review of default fund terms of modern awards starting as soon as practicable after each 4th anniversary of the commencement of this Part.

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

Two stages of the 4 yearly reviews

- (2) There are 2 stages of the 4 yearly review.

First stage—the Default Superannuation List

- (3) In the first stage, the FWC must make the Default Superannuation List for the purposes of the review.

Note: In the first stage, the FWC must be constituted by an Expert Panel for the purposes of making the list and determining applications to include standard MySuper products on the list (see paragraphs 617(4)(a) and (b)).

Second stage—reviewing and varying default fund terms

- (4) In the second stage, the FWC:
 - (a) must review the default fund term of each modern award; and
 - (b) must make a determination varying the term in accordance with section 156H; and
 - (c) if section 156J applies—must make a determination varying the term in accordance with that section.

Note: For the second stage, the FWC must be constituted by a Full Bench (see subsections 616(2A) and (3A)).

The Schedule of Approved Employer MySuper Products

- (5) In the 4 yearly review, the FWC must also make the Schedule of Approved Employer MySuper Products.

Note: The FWC must be constituted by an Expert Panel for the purposes of making the schedule and determining applications to include employer MySuper products on the schedule (see paragraphs 617(4)(c) and (d)).

Subdivision B—The first stage of the 4 yearly review

156B Making the Default Superannuation List

- (1) In the 4 yearly review, the FWC must make and publish the *Default Superannuation List*.
- (2) The Default Superannuation List must specify each standard MySuper product that the FWC has determined under section 156E is to be included on the list.
- (3) The Default Superannuation List must not specify any other product.

156C Applications to list a standard MySuper product

- (1) Before making the Default Superannuation List, the FWC must publish a notice that invites superannuation funds that offer a standard MySuper product to apply to the FWC to have the product included on the list.
- (2) The notice must specify the period in which an application may be made.
- (3) After the notice is published, a superannuation fund that offers a standard MySuper product may make a written application to have the product included on the list.
- (4) The application must:

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- (a) be made in the period specified in the notice; and
 - (b) be accompanied by any fees that are prescribed by the regulations; and
 - (c) provide information relating to the first stage criteria.
- (5) The FWC must publish any application made under subsection (3).
- (6) However, if an application includes information that is claimed by the superannuation fund to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive:
- (a) the FWC may decide not to publish the information; and
 - (b) if it does so, it must instead publish a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive).
- (7) A reference in this Act (other than in this section) in relation to an application made under subsection (3) includes a reference to a summary referred to in paragraph (6)(b).

156D Submissions on applications to list a standard MySuper product

- (1) The FWC must ensure that all persons and bodies have a reasonable opportunity to make written submissions to the FWC in relation to an application made under subsection 156C(3).
- (2) If:
- (a) a person or body makes a written submission in relation to an application made under subsection 156C(3); and
 - (b) the person or body has an interest in relation to:
 - (i) the superannuation fund that made the application; or
 - (ii) if the person or body refers to another superannuation fund in the submission—that superannuation fund;
- then the person or body must disclose that interest in the submission.

- (3) The FWC must publish any submission that is made.

156E Determining applications to list a standard MySuper product

- (1) If an application is made under subsection 156C(3) to have a standard MySuper product included on the Default Superannuation List, the FWC must make a determination about whether to include the product on the list.
- (2) The FWC must not determine that the product is to be included on the list unless, taking into account:
- (a) the information provided in the application; and
 - (b) the first stage criteria; and
 - (c) any submissions that were made in relation to the application;
- the FWC is satisfied that including the product on the list would be in the best interests of default fund employees to whom modern awards apply or a particular class of those employees.

156F First stage criteria

The *first stage criteria* are as follows:

- (a) the appropriateness of the MySuper product's long term investment return target and risk profile;
- (b) the superannuation fund's expected ability to deliver on the MySuper product's long term investment return target, given its risk profile;
- (c) the appropriateness of the fees and costs associated with the MySuper product, given:
 - (i) its stated long term investment return target and risk profile; and
 - (ii) the quality and timeliness of services provided;
- (d) the net returns on contributions invested in the MySuper product;
- (e) whether the superannuation fund's governance practices are consistent with meeting the best interests of members of the

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- fund, including whether there are mechanisms in place to deal with conflict of interest;
- (f) the appropriateness of any insurance offered in relation to the MySuper product;
 - (g) the quality of advice given to a member of the superannuation fund relating to the member's existing interest in the fund and products offered by the fund;
 - (h) the administrative efficiency of the superannuation fund;
 - (i) any other matters the FWC considers relevant.

Subdivision C—Second stage of the 4 yearly review

156G Review of the default fund term of modern awards

- (1) As soon as practicable after the Default Superannuation List is made, the FWC must review the default fund term of each modern award.
- (2) The FWC must ensure that the following persons have a reasonable opportunity to make written submissions (including submissions requesting that a particular superannuation fund be specified in the term in relation to a standard MySuper product) to the FWC in relation to the default fund term of the award:
 - (a) an employee and employer that are covered by the modern award;
 - (b) an organisation that is entitled to represent the industrial interests of one or more employees or employers that are covered by the award;
 - (c) if the award includes an outworker term—an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker term relates.
- (3) If:
 - (a) a person or body (whether or not a person referred to in subsection (2)) makes a written submission in relation to the default fund term of a modern award; and

- (b) the person or body refers to a particular superannuation fund in the submission; and
 - (c) the person or body has an interest in relation to that superannuation fund;
- then the person or body must disclose that interest in the submission.
- (4) The FWC must publish any submission that is made.

156H Default fund term must specify certain superannuation funds

- (1) After reviewing the default fund term of a modern award, the FWC must make a determination varying the term:
- (a) to remove every superannuation fund that is specified in the term; and
 - (b) to specify at least 2, but no more than 15, superannuation funds in relation to standard MySuper products that satisfy the second stage test.

Note: See subsection (3) for when the default fund term may specify more than 15 superannuation funds.

- (2) A standard MySuper product satisfies the *second stage test* if:
- (a) it is on the Default Superannuation List; and
 - (b) the FWC is satisfied that specifying a superannuation fund in relation to the product in the default fund term of the modern award would be in the best interests of the default fund employees to whom the modern award applies, taking into account:
 - (i) any submissions that were made in relation to the default fund term of the award; and
 - (ii) any other matter the FWC considers relevant.
- (3) The default fund term may specify more than 15 superannuation funds in relation to standard MySuper products that satisfy the second stage test if, taking into account the range of occupations of employees covered by the modern award, the FWC is satisfied it is warranted.

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156J Variation to comply with section 149D

If, at the time of the 4 yearly review, the default fund term of a modern award does not comply with section 149D, the FWC must make a determination varying the term so that it does.

156K Transitional authorisation for certain superannuation funds

- (1) The FWC may make a transitional authorisation in relation to a superannuation fund (other than a superannuation fund referred to in subsection 149D(1), (1A), (2), (3) or (4)) if, at the time of the 4 yearly review, the FWC is satisfied that it is appropriate to make the authorisation.
- (2) The transitional authorisation comes into operation on the day it is made and ceases to be in operation on the day specified in the authorisation.

Subdivision D—The Schedule of Approved Employer MySuper Products

156L The Schedule of Approved Employer MySuper Products

- (1) In the 4 yearly review, the FWC must:
 - (a) make and publish the *Schedule of Approved Employer MySuper Products*; and
 - (b) revoke any previous Schedule of Approved Employer MySuper Products.

Note: If an employer MySuper product is on the schedule, an employer covered by a modern award can make contributions, for the benefit of a default fund employee, to a superannuation fund that offers the product (see subsection 149D(1A)).

- (2) When the schedule is made, it must specify any employer MySuper product that the FWC has determined under section 156P is to be included on the schedule.

- (3) After the schedule is made, it must be amended to specify any employer MySuper product that the FWC has determined under section 156P is to be included on the schedule.

Note: The FWC must be constituted by an Expert Panel for the purposes of amending the schedule (see paragraph 617(5)(b)).

- (4) If the schedule is amended as referred to in subsection (3), the FWC must publish the schedule as amended.
- (5) The schedule must not specify any other product.

156M FWC to invite applications to include employer MySuper products on schedule

- (1) Before making the schedule, the FWC must publish a notice that invites:
- (a) superannuation funds that offer an employer MySuper product; and
 - (b) employers to which an employer MySuper product relates; to apply to the FWC to have the product included on the schedule.
- (2) The notice must specify the period in which an application may be made.

156N Making applications to include employer MySuper products on schedule

- (1) The following may apply to the FWC to have an employer MySuper product included on the schedule:
- (a) a superannuation fund that offers the product;
 - (b) an employer to which the product relates.
- (2) The application must be made:
- (a) in the period (the *standard application period*) specified in the notice under section 156M; or
 - (b) in the period (the *interim application period*) that:
 - (i) starts immediately after the schedule is made under paragraph 156L(1)(a); and

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- (ii) ends immediately before the next 4th anniversary of the commencement of this Part.

Note: Paragraph (2)(a) deals with applications that are made in a 4 yearly review of default fund terms, and paragraph (2)(b) deals with applications that are made outside a 4 yearly review.

- (3) The application must also:
 - (a) be accompanied by any fees that are prescribed by the regulations; and
 - (b) provide information relating to the first stage criteria.
- (4) The FWC must publish any application made under subsection (1).
- (5) However, if an application includes information that is claimed by the applicant to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive:
 - (a) the FWC may decide not to publish the information; and
 - (b) if it does so, it must instead publish a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive).
- (6) A reference in this Act (other than in this section) in relation to an application made under subsection (1) includes a reference to a summary referred to in paragraph (5)(b).
- (7) Only one application in relation to an employer MySuper product may be made under subsection (1) in the period that:
 - (a) starts at the start of the standard application period; and
 - (b) ends at the end of the interim application period.

156P FWC to determine applications

- (1) If an application is made under subsection 156N(1) to have an employer MySuper product included on the schedule, the FWC must make a determination about whether to include the product on the schedule.

Note: The FWC must be constituted by an Expert Panel for the purposes of making this determination (see paragraphs 617(4)(d) and (5)(a)).

- (2) The FWC must not determine that the product is to be included on the schedule unless the product satisfies the first stage test and the second stage test.

156Q The first stage test

An employer MySuper product satisfies the *first stage test* if the FWC is satisfied that including the product on the Schedule of Approved Employer MySuper Products would be in the best interests of default fund employees, or a particular class of those employees, taking into account:

- (a) the information provided in the application; and
- (b) the first stage criteria; and
- (c) any submissions that were made in relation to whether the product satisfies the first stage test.

156R Submissions about the first stage test

- (1) The FWC must ensure that all persons and bodies have a reasonable opportunity to make written submissions to the FWC about whether an employer MySuper product satisfies the first stage test.
- (2) If:
 - (a) a person or body makes a written submission in relation to whether an employer MySuper product satisfies the first stage test; and
 - (b) the person or body has an interest in relation to:
 - (i) the superannuation fund that offers the product; or
 - (ii) if the person or body refers to another superannuation fund in the submission—that superannuation fund;then the person or body must disclose that interest in the submission.
- (3) The FWC must publish any submission that is made.

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156S The second stage test

An employer MySuper product satisfies the *second stage test* if the FWC is satisfied that including the product on the Schedule of Approved Employer MySuper Products would be in the best interests of default fund employees of an employer to which the product relates, or a particular class of those employees, taking into account:

- (a) any submissions that were made in relation to whether the product satisfies the second stage test; and
- (b) any other matter the FWC considers relevant.

156T Submissions about the second stage test

- (1) The FWC must ensure that the following persons have a reasonable opportunity to make written submissions to the FWC about whether an employer MySuper product satisfies the second stage test:
 - (a) an employee of an employer to which the product relates;
 - (b) an employer to which the product relates;
 - (c) an organisation that is entitled to represent the industrial interests of a person referred to in paragraph (a) or (b).
- (2) If:
 - (a) a person or body (whether or not a person referred to in subsection (1)) makes a written submission in relation to whether an employer MySuper product satisfies the second stage test; and
 - (b) the person or body has an interest in relation to:
 - (i) the superannuation fund that offers the product; or
 - (ii) if the person or body refers to another superannuation fund in the submission—that superannuation fund;then the person or body must disclose that interest in the submission.
- (3) The FWC must publish any submission that is made.

Subdivision E—Publishing documents under this Division

156U Publishing documents under this Division

If the FWC is required by this Division to publish a document, the FWC must publish the document on its website or by any other means that the FWC considers appropriate.

Division 5—Exercising modern award powers outside 4 yearly reviews and annual wage reviews

Subdivision A—Exercise of powers if necessary to achieve modern awards objective

157 FWC may vary etc. modern awards if necessary to achieve modern awards objective

- (1) The FWC may:
- (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or
 - (b) make a modern award; or
 - (c) make a determination revoking a modern award;
- if the FWC is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

Note 1: The FWC must be constituted by a Full Bench to make a modern award (see subsection 616(1)).

Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 3: If the FWC is setting modern award minimum wages, the minimum wages objective also applies (see section 284).

- (2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:
- (a) the variation of modern award minimum wages is justified by work value reasons; and
 - (b) making the determination outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

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- (3) The FWC may make a determination or modern award under this section:
- (a) on its own initiative; or
 - (b) on application under section 158.

158 Applications to vary, revoke or make modern award

- (1) The following table sets out who may apply for the making of a determination varying or revoking a modern award, or for the making of a modern award, under section 157:

Who may make an application?		
Item	Column 1 This kind of application ...	Column 2 may be made by ...
1	an application to vary, omit or include terms (other than outworker terms or coverage terms) in a modern award	<ul style="list-style-type: none"> (a) an employer, employee or organisation that is covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award.
2	an application to vary, omit or include outworker terms in a modern award	<ul style="list-style-type: none"> (a) an employer, employee or outworker entity that is or would be covered by the outworker terms; or (b) an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate or would relate.

Chapter 2 Terms and conditions of employment

Part 2-3 Modern awards

Division 5 Exercising modern award powers outside 4 yearly reviews and annual wage reviews

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Who may make an application?

Item	Column 1 This kind of application ...	Column 2 may be made by ...
3	an application to vary or include coverage terms in a modern award to increase the range of employers, employees or organisations that are covered by the award	(a) an employer, employee or organisation that would become covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that would become covered by the modern award.
4	an application to vary or include coverage terms in a modern award to increase the range of outworker entities that are covered by outworker terms	(a) an outworker entity that would become covered by the outworker terms; or (b) an organisation that is entitled to represent the industrial interests of one or more outworkers who would become outworkers to whom the outworker terms relate.
5	an application to vary or omit coverage terms in a modern award to reduce the range of employers, employees or organisations that are covered by the award	(a) an employer, employee or organisation that would stop being covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that would stop being covered by the modern award.
6	an application to vary or omit coverage terms in a modern award to reduce the range of outworker entities that are covered by outworker terms	(a) an outworker entity that would stop being covered by the outworker terms; or (b) an organisation that is entitled to represent the industrial interests of one or more outworkers who would stop being outworkers to whom the outworker terms relate.

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Who may make an application?

Item	Column 1 This kind of application ...	Column 2 may be made by ...
7	an application for the making of a modern award	(a) an employee or employer that would be covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that would be covered by the modern award.
8	an application to revoke a modern award	(a) an employer, employee or organisation that is covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award.

Note: The FWC may dismiss an application to vary, revoke or make a modern award in certain circumstances (see section 587).

- (2) Subject to the requirements of the table about who can make what kind of application, an applicant may make applications for 2 or more related things at the same time.

Note: For example, an applicant may apply for the making of a modern award and for the related revocation of an existing modern award.

Subdivision B—Other situations

159 Variation of modern award to update or omit name of employer, organisation or outworker entity

- (1) The FWC may make a determination varying a modern award:
- (a) to reflect a change in the name of an employer, organisation or outworker entity; or

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- (b) to omit the name of an organisation, employer or outworker entity from the modern award, if:
 - (i) the registration of the organisation has been cancelled under the *Workplace Relations Act 1996*; or
 - (ii) the employer, organisation or outworker entity has ceased to exist; or
 - (c) if the modern award is a named employer award and the named employer is the old employer in a transfer of business—to reflect the transfer of business to the new employer.
- (2) The FWC may make a determination under this section:
- (a) in any case—on its own initiative; or
 - (b) if paragraph (1)(a) or (b) applies—on application by the employer, organisation or outworker entity referred to in that paragraph; or
 - (c) if paragraph (1)(c) applies—on application by:
 - (i) the old employer or the new employer; or
 - (ii) a transferring employee who was covered by the modern award as an employee of the old employer; or
 - (iii) an organisation that is entitled to represent the industrial interests of the old employer, the new employer, or one or more employees referred to in subparagraph (ii).

159A Variation of default fund term of modern award

- (1) The FWC may make a determination varying the default fund term of a modern award in relation to a superannuation fund specified in the term in relation to a standard MySuper product (the *specified product*) in the following circumstances:
- (a) to reflect a change in the name of the fund or the specified product;
 - (b) if the fund has ceased to exist—to omit the name of the fund and the specified product;

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- (c) if the specified product has ceased to exist and no other MySuper product is specified in relation to the fund—to omit the name of the fund and the specified product;
 - (d) if the specified product has ceased to exist and another MySuper product is specified in relation to the fund—to omit the name of the specified product;
 - (e) if the Australian Prudential Regulation Authority gives the FWC notice under subsection 29U(4) of the *Superannuation Industry (Supervision) Act 1993* that the fund no longer offers the specified product and no other MySuper product is specified in relation to the fund—to omit the name of the fund and the specified product;
 - (f) if the Australian Prudential Regulation Authority gives the FWC notice under subsection 29U(4) of the *Superannuation Industry (Supervision) Act 1993* that the fund no longer offers the specified product and another MySuper product is specified in relation to the fund—to omit the name of the specified product.
- (2) The FWC may make a determination under this section:
- (a) in any case—on its own initiative; or
 - (b) on application by an employee, employer, organisation or outworker entity covered by the modern award.

160 Variation of modern award to remove ambiguity or uncertainty or correct error

- (1) The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.
- (2) The FWC may make the determination:
- (a) on its own initiative; or
 - (b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award; or
 - (c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or

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- (d) if the modern award includes outworker terms—on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.

161 Variation of modern award on referral by Australian Human Rights Commission

- (1) The FWC must review a modern award if the award is referred to it under section 46PW of the *Australian Human Rights Commission Act 1986* (which deals with discriminatory industrial instruments).
- (2) The following are entitled to make submissions to the FWC for consideration in the review:
 - (a) if the referral relates to action that would be unlawful under Part 4 of the *Age Discrimination Act 2004*—the Age Discrimination Commissioner;
 - (b) if the referral relates to action that would be unlawful under Part 2 of the *Disability Discrimination Act 1992*—the Disability Discrimination Commissioner;
 - (c) if the referral relates to action that would be unlawful under Part II of the *Sex Discrimination Act 1984*—the Sex Discrimination Commissioner.
- (3) If the FWC considers that the modern award reviewed requires a person to do an act that would be unlawful under any of the Acts referred to in subsection (2) (but for the fact that the act would be done in direct compliance with the modern award), the FWC must make a determination varying the modern award so that it no longer requires the person to do an act that would be so unlawful.

Note: Special criteria apply to changing coverage of modern awards (see section 163).

Division 6—General provisions relating to modern award powers

162 General

This Division contains some specific provisions relevant to the exercise of modern award powers. For other provisions relevant to the exercise of modern award powers, see the general provisions about the FWC's processes in Part 5-1.

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

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

163 Special criteria relating to changing coverage of modern awards

Special rule about reducing coverage

- (1) The FWC must not make a determination varying a modern award so that certain employers or employees stop being covered by the award unless the FWC is satisfied that they will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate for them.

Special rule about making a modern award

- (2) The FWC must not make a modern award covering certain employers or employees unless the FWC has considered whether it should, instead, make a determination varying an existing modern award to cover them.

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Special rule about covering organisations

- (3) The FWC must not make a modern award, or make a determination varying a modern award, so that an organisation becomes covered by the award, unless the organisation is entitled to represent the industrial interests of one or more employers or employees who are or will be covered by the award.

The miscellaneous modern award

- (4) The ***miscellaneous modern award*** is the modern award that is expressed to cover employees who are not covered by any other modern award.

164 Special criteria for revoking modern awards

The FWC must not make a determination revoking a modern award unless the FWC is satisfied that:

- (a) the award is obsolete or no longer capable of operating; or
- (b) all the employees covered by the award are covered by a different modern award (other than the miscellaneous modern award) that is appropriate for them, or will be so covered when the revocation comes into operation.

165 When variation determinations come into operation, other than determinations setting, varying or revoking modern award minimum wages

Determinations come into operation on specified day

- (1) A determination under this Part that varies a modern award (other than a determination that sets, varies or revokes modern award minimum wages) comes into operation on the day specified in the determination.

Note 1: For when a modern award, or a revocation of a modern award, comes into operation, see section 49.

Note: For when a determination under this Part setting, varying or revoking modern award minimum wages comes into operation, see section 166.

- (2) The specified day must not be earlier than the day on which the determination is made, unless:
- (a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and
 - (b) the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

Determinations take effect from first full pay period

- (3) The determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.

166 When variation determinations setting, varying or revoking modern award minimum wages come into operation

Determinations generally come into operation on 1 July

- (1) A determination under this Part that sets, varies or revokes modern award minimum wages comes into operation:
- (a) on 1 July in the next financial year after it is made; or
 - (b) if it is made on 1 July in a financial year—on that day.

Note: Modern award minimum wages can also be set, varied or revoked by determinations made in annual wage reviews. For when those determinations come into operation, see section 286.

FWC may specify another day of operation if appropriate

- (2) However, if the FWC specifies another day in the determination as the day on which it comes into operation, the determination comes into operation on that other day. The FWC must not specify another day unless it is satisfied that it is appropriate to do so.
- (3) The specified day must not be earlier than the day on which the determination is made, unless:
- (a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and

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- (b) the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

Determinations may take effect in stages

- (4) The FWC may specify in the determination that changes to modern award minimum wages made by the determination take effect in stages if the FWC is satisfied that it is appropriate to do so.

Determinations take effect from first full pay period

- (5) A change to modern award minimum wages made by the determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after:
 - (a) unless paragraph (b) applies—the day the determination comes into operation; or
 - (b) if the determination takes effect in stages under subsection (4)—the day the change to modern award minimum wages is specified to take effect.

167 Special rules relating to retrospective variations of awards

Application of this section

- (1) This section applies if a determination varying a modern award has a retrospective effect because it comes into operation under subsection 165(2) or 166(3) on a day before the day on which the determination is made.

No effect on past approval of enterprise agreement or variation

- (2) If, before the determination was made, an enterprise agreement or a variation of an enterprise agreement was approved by the FWC, the validity of the approval is not affected by the retrospective effect of the determination.

No creation of liability to pay pecuniary penalty for past conduct

- (3) If:
- (a) a person engaged in conduct before the determination was made; and
 - (b) but for the retrospective effect of the determination, the conduct would not have contravened a term of the modern award or an enterprise agreement;
- a court must not order the person to pay a pecuniary penalty under Division 2 of Part 4-1 in relation to the conduct, on the grounds that the conduct contravened a term of the modern award or enterprise agreement.

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

Note 2: A determination varying a modern award could result in a contravention of a term of an enterprise agreement because of the effect of subsection 206(2).

168 Varied modern award must be published

- (1) If the FWC makes a determination under this Part or Part 2-6 (which deals with minimum wages) varying a modern award, the FWC must publish the award as varied as soon as practicable.
- (2) The publication may be on the FWC's website or by any other means that the FWC considers appropriate.

Division 7—Additional provisions relating to modern enterprise awards

168A Modern enterprise awards

- (1) This Division contains additional provisions that relate to modern enterprise awards. The provisions in this Division have effect despite anything else in this Part.
- (2) A *modern enterprise award* is a modern award that is expressed to relate to:
 - (a) a single enterprise (or a part of a single enterprise) only; or
 - (b) one or more enterprises, if the employers all carry on similar business activities under the same franchise and are:
 - (i) franchisees of the same franchisor; or
 - (ii) related bodies corporate of the same franchisor; or
 - (iii) any combination of the above.
- (3) A *single enterprise* 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.
- (4) For the purposes of subsection (3), 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.
- (5) For the purposes of subsection (3), if 2 or more related bodies corporate each carry on a single enterprise:
 - (a) the bodies corporate are taken to be one employer; and

(b) the single enterprises are taken to be one single enterprise.

Note: However, a modern enterprise award could just relate to a part of that single enterprise.

- (6) A **part of a single enterprise** includes, for example:
- (a) a geographically distinct part of the single enterprise; or
 - (b) a distinct operational or organisational unit within the single enterprise.

168B The modern enterprise awards objective

What is the modern enterprise awards objective?

- (1) The FWC must recognise that modern enterprise awards may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to the relevant enterprises. This is the **modern enterprise awards objective**.

When does the modern enterprise awards objective apply?

- (2) The modern enterprise awards objective applies to the performance of the FWC's functions or powers under this Act, so far as they relate to modern enterprise awards.

References to the modern awards objective

- (3) A reference to the modern awards objective in this Act, other than section 134, is taken to include a reference to the modern enterprise awards objective.

168C Rules about making and revoking modern enterprise awards

Making modern enterprise awards

- (1) The FWC must not, under this Part:
- (a) make a modern enterprise award; or
 - (b) make a determination varying a modern award so that it becomes a modern enterprise award.

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Division 7 Additional provisions relating to modern enterprise awards

Section 168C

Note: Modern enterprise awards can be made only in accordance with the enterprise instrument modernisation process provided for by Part 2 of Schedule 6 of the Transitional Act.

Revoking modern enterprise awards

- (2) The FWC may make a determination revoking a modern enterprise award only on application under section 158.
- (3) The FWC must not make a determination revoking a modern enterprise award unless the FWC is satisfied that:
 - (a) the award is obsolete or no longer capable of operating; or
 - (b) all the employees covered by the award will, when the revocation comes into operation, be covered by a different modern award (other than the miscellaneous modern award or a modern enterprise award) that is appropriate for them.
- (4) In deciding whether to make a determination revoking a modern enterprise award the FWC must take into account the following:
 - (a) the circumstances that led to the making of the modern enterprise award;
 - (b) the content of the modern award referred to in paragraph (3)(b);
 - (c) the terms and conditions of employment applying in the industry in which the persons covered by the modern enterprise award operate, and the extent to which those terms and conditions are reflected in the modern enterprise award;
 - (d) the extent to which the modern enterprise award provides enterprise-specific terms and conditions of employment;
 - (e) the likely impact on the persons covered by the modern enterprise award, and the persons covered by the modern award referred to in paragraph (3)(b), of a decision to revoke, or not revoke, the modern enterprise award, including any impact on the ongoing viability or competitiveness of any enterprise carried on by those persons;
 - (f) the views of the persons covered by the modern enterprise award;
 - (g) any other matter prescribed by the regulations.

168D Rules about changing coverage of modern enterprise awards

- (1) The FWC must not make a determination varying a modern enterprise award so as to extend the coverage of the modern enterprise award so that it ceases to be a modern enterprise award.
- (2) In deciding whether to make a determination varying the coverage of a modern enterprise award in some other way, the FWC must take into account the following:
 - (a) the circumstances that led to the making of the modern enterprise award;
 - (b) whether there is a modern award (other than the miscellaneous modern award or a modern enterprise award) that would, but for the modern enterprise award, cover the persons covered, or proposed to be covered, by the modern enterprise award;
 - (c) the content of the modern award referred to in paragraph (b);
 - (d) the terms and conditions of employment applying in the industry in which the persons covered, or proposed to be covered, by the modern award operate, and the extent to which those terms and conditions are reflected in the modern enterprise award;
 - (e) the extent to which the modern enterprise award provides enterprise-specific terms and conditions of employment;
 - (f) the likely impact on the persons covered, or proposed to be covered, by the modern enterprise award, and the persons covered by the modern award referred to in paragraph (b), of a decision to make, or not make, the variation, including any impact on the ongoing viability or competitiveness of any enterprise carried on by those persons;
 - (g) the views of the persons covered, or proposed to be covered, by the modern enterprise award;
 - (h) any other matter prescribed by the regulations.

Division 8—Additional provisions relating to State reference public sector modern awards

168E State reference public sector modern awards

- (1) This Division contains additional provisions that relate to State reference public sector modern awards. The provisions in this Division have effect despite anything else in this Part.
- (2) A *State reference public sector modern award* is a modern award in relation to which the following conditions are satisfied:
 - (a) the only employers that are expressed to be covered by the modern award are one or more specified State reference public sector employers;
 - (b) the only employees who are expressed to be covered by the modern award are specified State reference public sector employees of those employers.
- (3) A *State reference public sector employee* is an employee:
 - (a) who is a national system employee only because of section 30C or 30M; and
 - (b) who is a State public sector employee as defined in section 30A or 30K.
- (4) A *State reference public sector employer* is an employer:
 - (a) that is a national system employer only because of section 30D or 30N; and
 - (b) that is a State public sector employer as defined in section 30A or 30K.

168F The State reference public sector modern awards objective

The State reference public sector modern awards objective

- (1) The FWC must recognise:

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- (a) the need to facilitate arrangements for State reference public sector employers and State reference public sector employees that are appropriately adapted to the effective administration of a State; and
- (b) that State reference public sector modern awards may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to State reference public sector employers and State reference public sector employees.

This is the *State reference public sector modern awards objective*.

When does the State reference public sector modern awards objective apply?

- (2) The State reference public sector modern awards objective applies to the performance of the FWC's functions or powers under this Act, so far as they relate to State reference public sector modern awards.

References to the modern awards objective

- (3) A reference to the modern awards objective in this Act, other than section 134, is taken to include a reference to the State reference public sector modern awards objective.

168G Making State reference public sector modern awards on application

- (1) The FWC may make a State reference public sector modern award (the *proposed award*) only on application under section 158 by:
 - (a) a State reference public sector employer; or
 - (b) an organisation that is entitled to represent the industrial interests of a State reference public sector employer or of a State reference public sector employee.
- (2) The application must specify the employers, employees and organisations (the *proposed parties*) proposed to be covered by the proposed award.

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Division 8 Additional provisions relating to State reference public sector modern awards

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- (3) The FWC must consider the application, and must make a State reference public sector modern award covering the proposed parties if the FWC is satisfied that:
- (a) the employers and organisations that are proposed parties have agreed to the making of the application; and
 - (b) either:
 - (i) none of the employers and employees that are proposed parties are already covered by a State reference public sector modern award; or
 - (ii) if there are employers and employees that are proposed parties and that are already covered by a State reference public sector modern award (the *current award*)—it is appropriate (in accordance with section 168L) to vary the coverage of the current award so that the employers or employees cease to be covered by the current award.
- (4) The FWC must not make a State reference public sector modern award otherwise than in accordance with this Division or in accordance with Part 2 of Schedule 6A to the Transitional Act.

168H State reference public sector modern awards may contain State-based differences

Section 154 (which deals with terms that contain State-based differences) does not apply in relation to State reference public sector modern awards.

168J When State reference public sector modern awards come into operation

Section 49 does not apply for the purpose of determining when a State reference public sector modern award comes into operation. Instead, the modern award comes into operation on the day on which it is expressed to commence, being a day that is not earlier than the day on which the modern award is made.

168K Rules about revoking State reference public sector modern awards

- (1) The FWC may make a determination revoking a State reference public sector modern award only on application under section 158 by:
 - (a) a State reference public sector employer; or
 - (b) an organisation that is entitled to represent the industrial interests of a State reference public sector employer or of a State reference public sector employee.
- (2) The FWC must not make a determination revoking a State reference public sector modern award unless the FWC is satisfied that:
 - (a) the modern award is obsolete or no longer capable of operating; or
 - (b) all the employees covered by the modern award will, when the revocation comes into operation, be covered by a different modern award (other than the miscellaneous modern award) that is appropriate for them.
- (3) In deciding whether to revoke a State reference public sector modern award, the FWC must take into account the following:
 - (a) the circumstances that led to the making of the modern award;
 - (b) the terms and conditions of employment applying in the industry or occupation in which the persons covered by the modern award operate, and the extent to which those terms and conditions are reflected in the modern award;
 - (c) the extent to which the modern award facilitates arrangements, and provides terms and conditions of employment, referred to in paragraphs 168F(1)(a) and (b);
 - (d) the likely impact on the persons covered by the modern award of a decision to revoke, or not to revoke, the modern award;
 - (e) the views of the persons covered by the modern award;
 - (f) any other matter prescribed by the regulations.

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168L Rules about varying coverage of State reference public sector modern awards

- (1) The FWC may make a determination varying the coverage of a State reference public sector modern award only on application under section 158 by:
 - (a) a State reference public sector employer; or
 - (b) an organisation that is entitled to represent the industrial interests of a State reference public sector employer or of a State reference public sector employee.
- (2) The FWC must not make a determination varying the coverage of a State reference public sector modern award so that it ceases to be a State reference public sector modern award.
- (3) In deciding whether to make a determination varying the coverage of a State reference public sector modern award in some other way, the FWC must take into account the following:
 - (a) the circumstances that led to the making of the modern award;
 - (b) the terms and conditions of employment applying in the industry or occupation in which the persons covered, or proposed to be covered, by the modern award operate, and the extent to which those terms and conditions are reflected in the modern award;
 - (c) the likely impact on the persons covered, or proposed to be covered, by the modern award of a decision to make, or not make, the variation;
 - (d) if the variation would result in the modern award covering one or more additional classes of employers or employees—whether it is appropriate for that modern award to cover those classes of employers or employees, as well as the classes of employers and employees that it already covers;
 - (e) the views of the persons covered, or proposed to be covered, by the modern award;
 - (f) any other matter prescribed by the regulations.

Part 2-4—Enterprise agreements

Division 1—Introduction

169 Guide to this Part

This Part is about enterprise agreements. An enterprise agreement is made at the enterprise level and provides terms and conditions for those national system employees to whom it applies. An enterprise agreement can have terms that are ancillary or supplementary to the National Employment Standards.

Division 2 deals with the making of enterprise agreements about permitted matters. An enterprise agreement (including a greenfields agreement) may be a single-enterprise agreement or a multi-enterprise agreement.

Division 3 deals with the right of employees to be represented by a bargaining representative during bargaining for a proposed enterprise agreement. It also sets out the persons who are bargaining representatives for such agreements.

Subdivision A of Division 4 deals with the approval of proposed enterprise agreements by employees and sets out when an enterprise agreement is made.

Subdivision B of Division 4 deals with the approval of enterprise agreements by the FWC. The remaining Subdivisions of the Division deal with certain approval requirements, including in relation to genuine agreement by employees and the better off overall test.

Division 5 deals with the mandatory terms of enterprise agreements relating to individual flexibility arrangements and consultation requirements.

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Division 6 deals with the base rate of pay under an enterprise agreement.

Division 7 deals with the variation and termination of enterprise agreements.

Division 8 provides for the FWC to facilitate bargaining by making bargaining orders, serious breach declarations, majority support determinations and scope orders. It also permits bargaining representatives to apply for the FWC to deal with bargaining disputes.

Division 9 provides for the making of low-paid authorisations in relation to proposed multi-enterprise agreements. The effect of such an authorisation is that specified employers are subject to certain rules that would not otherwise apply (for example, bargaining orders that would not usually be available for multi-enterprise agreements will be available). It also permits the FWC to assist the bargaining representatives for such agreements.

Division 10 deals with single interest employer authorisations. The effect of such an authorisation is that the employers specified in the authorisation are single interest employers in relation to a proposed enterprise agreement.

Division 11 deals with other matters relating to enterprise agreements.

170 Meanings of *employee* and *employer*

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

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

171 Objects of this Part

The objects of this Part are:

- (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and
- (b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:
 - (i) making bargaining orders; and
 - (ii) dealing with disputes where the bargaining representatives request assistance; and
 - (iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.

Division 2—Employers and employees may make enterprise agreements

172 Making an enterprise agreement

Enterprise agreements may be made about permitted matters

- (1) An agreement (an **enterprise agreement**) that is about one or more of the following matters (the **permitted matters**) may be made in accordance with this Part:
- (a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;
 - (b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;
 - (c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;
 - (d) how the agreement will operate.

Note 1: For when an enterprise agreement **covers** an employer, employee or employee organisation, see section 53.

Note 2: An employee organisation that was a bargaining representative for a proposed enterprise agreement that is not a greenfields agreement will be covered by the agreement if the organisation notifies the FWC under section 183 that it wants to be covered.

Single-enterprise agreements

- (2) An employer, or 2 or more employers that are single interest employers, may make an enterprise agreement (a **single-enterprise agreement**):
- (a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or
 - (b) with one or more relevant employee organisations if:

- (i) the agreement relates to a genuine new enterprise that the employer or employers are establishing or propose to establish; and
- (ii) the employer or employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

Note: The expression genuine new enterprise includes a genuine new business, activity, project or undertaking (see the definition of *enterprise* in section 12).

Multi-enterprise agreements

- (3) Two or more employers that are not all single interest employers may make an enterprise agreement (a ***multi-enterprise agreement***):
 - (a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or
 - (b) with one or more relevant employee organisations if:
 - (i) the agreement relates to a genuine new enterprise that the employers are establishing or propose to establish; and
 - (ii) the employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

Note: The expression genuine new enterprise includes a genuine new business, activity, project or undertaking (see the definition of *enterprise* in section 12).

Greenfields agreements

- (4) A single-enterprise agreement made as referred to in paragraph (2)(b), or a multi-enterprise agreement made as referred to in paragraph (3)(b), is a ***greenfields agreement***.

Single interest employers

- (5) Two or more employers are ***single interest employers*** if:

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- (a) the employers are engaged in a joint venture or common enterprise; or
- (b) the employers are related bodies corporate; or
- (c) the employers are specified in a single interest employer authorisation that is in operation in relation to the proposed enterprise agreement concerned.

Requirement that there be at least 2 employees

- (6) An enterprise agreement cannot be made with a single employee.

Division 3—Bargaining and representation during bargaining

173 Notice of employee representational rights

Employer to notify each employee of representational rights

- (1) An employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who:
 - (a) will be covered by the agreement; and
 - (b) is employed at the notification time for the agreement.

Note: For the content of the notice, see section 174.

Notification time

- (2) The **notification time** for a proposed enterprise agreement is the time when:
 - (a) the employer agrees to bargain, or initiates bargaining, for the agreement; or
 - (b) a majority support determination in relation to the agreement comes into operation; or
 - (c) a scope order in relation to the agreement comes into operation; or
 - (d) a low-paid authorisation in relation to the agreement that specifies the employer comes into operation.

Note: The employer cannot request employees to approve the agreement under section 181 until 21 days after the last notice is given (see subsection 181(2)).

When notice must be given

- (3) The employer must give the notice as soon as practicable, and not later than 14 days, after the notification time for the agreement.

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Notice need not be given in certain circumstances

- (4) An employer is not required to give a notice to an employee under subsection (1) in relation to a proposed enterprise agreement if the employer has already given the employee a notice under that subsection within a reasonable period before the notification time for the agreement.

How notices are given

- (5) The regulations may prescribe how notices under subsection (1) may be given.

174 Content and form of notice of employee representational rights

Application of this section

- (1) This section applies if an employer that will be covered by a proposed enterprise agreement is required to give a notice under subsection 173(1) to an employee.

Notice requirements

- (1A) The notice must:
- (a) contain the content prescribed by the regulations; and
 - (b) not contain any other content; and
 - (c) be in the form prescribed by the regulations.
- (1B) When prescribing the content of the notice for the purposes of paragraph (1A)(a), the regulations must ensure that the notice complies with this section.

Content of notice—employee may appoint a bargaining representative

- (2) The notice must specify that the employee may appoint a bargaining representative to represent the employee:
- (a) in bargaining for the agreement; and

- (b) in a matter before the FWC that relates to bargaining for the agreement.

Content of notice—default bargaining representative

- (3) If subsection (4) does not apply, the notice must explain that:
- (a) if the employee is a member of an employee organisation that is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement; and
 - (b) the employee does not appoint another person as his or her bargaining representative for the agreement;
- the organisation will be the bargaining representative of the employee.

Content of notice—bargaining representative if a low-paid authorisation is in operation

- (4) If a low-paid authorisation in relation to the agreement that specifies the employer is in operation, the notice must explain the effect of paragraph 176(1)(b) and subsection 176(2) (which deal with bargaining representatives for such agreements).

Content of notice—copy of instrument of appointment to be given

- (5) The notice must explain the effect of paragraph 178(2)(a) (which deals with giving a copy of an instrument of appointment of a bargaining representative to an employee's employer).

176 Bargaining representatives for proposed enterprise agreements that are not greenfields agreements

Bargaining representatives

- (1) The following paragraphs set out the persons who are **bargaining representatives** for a proposed enterprise agreement that is not a greenfields agreement:

Section 176

- (a) an employer that will be covered by the agreement is a bargaining representative for the agreement;
- (b) an employee organisation is a bargaining representative of an employee who will be covered by the agreement if:
 - (i) the employee is a member of the organisation; and
 - (ii) in the case where the agreement is a multi-enterprise agreement in relation to which a low-paid authorisation is in operation—the organisation applied for the authorisation;unless the employee has appointed another person under paragraph (c) as his or her bargaining representative for the agreement, or has revoked the status of the organisation as his or her bargaining representative for the agreement under subsection 178A(2); or
- (c) a person is a bargaining representative of an employee who will be covered by the agreement if the employee appoints, in writing, the person as his or her bargaining representative for the agreement;
- (d) a person is a bargaining representative of an employer that will be covered by the agreement if the employer appoints, in writing, the person as his or her bargaining representative for the agreement.

Bargaining representatives for a proposed multi-enterprise agreement if a low-paid authorisation is in operation

- (2) If:
- (a) the proposed enterprise agreement is a multi-enterprise agreement in relation to which a low-paid authorisation is in operation; and
 - (b) an employee organisation applied for the authorisation; and
 - (c) but for this subsection, the organisation would not be a bargaining representative of an employee who will be covered by the agreement;

the organisation is taken to be a ***bargaining representative*** of such an employee unless:

- (d) the employee is a member of another employee organisation that also applied for the authorisation; or
 - (e) the employee has appointed another person under paragraph (1)(c) as his or her bargaining representative for the agreement; or
 - (f) the employee has revoked the status of the organisation as his or her bargaining representative for the agreement under subsection 178A(2).
- (3) Despite subsections (1) and (2):
- (a) an employee organisation; or
 - (b) an official of an employee organisation (whether acting in that capacity or otherwise);
- cannot be a bargaining representative of an employee unless the organisation is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement.

Employee may appoint himself or herself

- (4) To avoid doubt and despite subsection (3), an employee who will be covered by the agreement may appoint, under paragraph (1)(c), himself or herself as his or her bargaining representative for the agreement.

Note: Section 228 sets out the good faith bargaining requirements. Applications may be made for bargaining orders that require bargaining representatives to meet the good faith bargaining requirements (see section 229).

177 Bargaining representatives for proposed enterprise agreements that are greenfields agreements

The following paragraphs set out the persons who are ***bargaining representatives*** for a proposed single-enterprise agreement that is a greenfields agreement:

- (a) an employer that will be covered by the agreement;
- (b) an employee organisation:

Section 178

- (i) that is entitled to represent the industrial interests of one or more of the employees who will be covered by the agreement, in relation to work to be performed under the agreement; and
- (ii) with which the employer agrees to bargain for the agreement;
- (c) a person who is a bargaining representative of an employer that will be covered by the agreement if the employer appoints, in writing, the person as his or her bargaining representative for the agreement.

178 Appointment of bargaining representatives—other matters

When appointment of a bargaining representative comes into force

- (1) An appointment of a bargaining representative comes into force on the day specified in the instrument of appointment.

Copies of instruments of appointment must be given

- (2) A copy of an instrument of appointment of a bargaining representative for a proposed enterprise agreement must:
 - (a) for an appointment made by an employee who will be covered by the agreement—be given to the employee’s employer; and
 - (b) for an appointment made by an employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement—be given, on request, to a bargaining representative of an employee who will be covered by the agreement; and
 - (c) for an appointment made by an employer that will be covered by a proposed single-enterprise agreement that is a greenfields agreement—be given, on request, to an employee organisation that is a bargaining representative for the agreement.

Regulations may prescribe matters relating to qualifications and appointment

- (3) The regulations may prescribe matters relating to the qualifications or appointment of bargaining representatives.

178A Revocation of appointment of bargaining representatives etc.

- (1) The appointment of a bargaining representative for an enterprise agreement may be revoked by written instrument.
- (2) If a person would, apart from this subsection, be a bargaining representative of an employee for an enterprise agreement because of the operation of paragraph 176(1)(b) or subsection 176(2) (which deal with employee organisations), the employee may, by written instrument, revoke the person's status as the employee's bargaining representative for the agreement.
- (3) A copy of an instrument under subsection (1) or (2):
- (a) for an instrument made by an employee who will be covered by the agreement—must be given to the employee's employer; and
 - (b) for an instrument made by an employer that will be covered by a proposed enterprise agreement, other than a single-enterprise agreement that is a greenfields agreement—must be given to the bargaining representative and, on request, to a bargaining representative of an employee who will be covered by the agreement.
- (3A) A copy of an instrument under subsection (1) made by an employer that will be covered by a proposed single-enterprise agreement that is a greenfields agreement must be given to the bargaining representative and, on request, to an employee organisation that is a bargaining representative for the agreement.
- (4) The regulations may prescribe matters relating to the content or form of the instrument of revocation, or the manner in which the copy of the instrument may be given.

Section 178B

178B Notified negotiation period for a proposed single-enterprise agreement that is a greenfields agreement

- (1) If a proposed single-enterprise agreement is a greenfields agreement, an employer that is a bargaining representative for the agreement may give written notice:
 - (a) to each employee organisation that is a bargaining representative for the agreement; and
 - (b) stating that the period of 6 months beginning on a specified day is the *notified negotiation period* for the agreement.
- (2) The specified day must be later than:
 - (a) if only one employee organisation is a bargaining representative for the agreement—the day on which the employer gave the notice to the organisation; or
 - (b) if 2 or more employee organisations are bargaining representatives for the agreement—the last day on which the employer gave the notice to any of those organisations.

Multiple employers—agreement to giving of notice

- (3) If 2 or more employers are bargaining representatives for the agreement, the notice has no effect unless the other employer or employers agree to the giving of the notice.

Division 4—Approval of enterprise agreements

Subdivision A—Pre-approval steps and applications for the FWC’s approval

179 Disclosure by organisations that are bargaining representatives

- (1) If:
- (a) an organisation is a bargaining representative for a proposed enterprise agreement that is not a greenfields agreement; and
 - (b) the organisation is not an employer that will be covered by the agreement; and
 - (c) as a direct or indirect consequence of the operation of one or more terms of the agreement (the *beneficial terms*), the organisation or a person mentioned in subsection (2) will, or can reasonably be expected to, receive or obtain (directly or indirectly) a section 179 disclosable benefit (each such person is a *beneficiary*);

the organisation must take all reasonable steps to ensure that, in the time required by subsection (3), each employer that will be covered by the agreement is given a document in accordance with subsection (4).

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

- (2) For the purposes of paragraph (1)(c), the persons are any of the following:
- (a) a related party of the organisation (other than a related party prescribed by the regulations);
 - (b) a person or body prescribed by the regulations for the purposes of this paragraph.
- (3) The document must be given to the employers no later than the end of the fourth day of the access period referred to in subsection 180(4) for the agreement.
- (4) The document must:

Section 179A

- (a) itemise the beneficial terms; and
 - (b) describe the nature and (as far as reasonably practicable) amount of each section 179A disclosable benefit in relation to each beneficiary; and
 - (c) name each beneficiary; and
 - (d) be in accordance with any other requirements prescribed by the regulations for the purposes of this paragraph; and
 - (e) be given in a manner (if any) prescribed by the regulations.
- (5) An organisation that gives a document under subsection (1) must not knowingly or recklessly make a false or misleading representation in the document.

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

- (6) A **section 179A disclosable benefit** is any financial benefit, other than a financial benefit that is:
- (a) payable to an individual as an employee covered by the agreement; or
 - (b) payment of a membership fee for membership of an organisation; or
 - (c) prescribed by the regulations for the purposes of this paragraph.

179A Disclosure by employers

- (1) If:
- (a) an employer will be covered by a proposed enterprise agreement that is not a greenfields agreement; and
 - (b) as a direct or indirect consequence of the operation of one or more terms of the agreement (the **beneficial terms**), the employer or a person mentioned in subsection (2) will, or can reasonably be expected to, receive or obtain (directly or indirectly) a section 179A disclosable benefit (each such person is a **beneficiary**);
- the employer must prepare a document in accordance with subsection (3).

- (2) For the purposes of paragraph (1)(b), the persons are any of the following:
- (a) an associated entity of the employer (other than an associated entity prescribed by the regulations);
 - (b) a person or body prescribed by the regulations for the purposes of this paragraph.
- (3) The document must:
- (a) itemise the beneficial terms; and
 - (b) describe the nature and (as far as reasonably practicable) amount of each section 179A disclosable benefit in relation to each beneficiary; and
 - (c) name each beneficiary; and
 - (d) be in accordance with any other requirements prescribed by the regulations for the purposes of this paragraph.
- (4) A **section 179A disclosable benefit** is any financial benefit, other than a financial benefit that is:
- (a) received or obtained in the ordinary course of the employer's business; or
 - (b) prescribed by the regulations for the purposes of this paragraph.

180 Employees must be given a copy of a proposed enterprise agreement etc.

Pre-approval requirements

- (1) Before an employer requests under subsection 181(1) that employees approve a proposed enterprise agreement by voting for the agreement, the employer must comply with the requirements set out in this section.

Employees must be given copy of the agreement etc.

- (2) The employer must take all reasonable steps to ensure that:
- (a) during the access period for the agreement, the employees (the **relevant employees**) employed at the time who will be