

## **Chapter 3B—Minimum standards for persons in a road transport contractual chain**

### **Part 3B-1—Core provisions for this Chapter**

#### **Division 1—Introduction**

##### **536NL Guide to this Part**

This Part is about the coverage and operation of the provisions of this Chapter.

Division 2 sets out when road transport contractual chain orders and road transport contractual chain guidelines cover persons in a road transport contractual chain.

Division 3 specifies the rules relating to the interaction of the provisions of this Chapter with State and Territory laws.

##### **536NM Meaning of *employee* and *employer***

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

##### **536NN FWC to have regard to minimum standards objective**

The FWC must have regard to the minimum standards objective in performing a function or exercising a power under this Chapter.

Note: The FWC must also have regard to the road transport objective as required by section 40D.

**Division 2—Provisions relating to coverage and operation  
of road transport contractual chain orders and  
road transport contractual chain guidelines**

**Subdivision A—Coverage and operation of road transport  
contractual chain orders and guidelines**

**536NP Contravening a road transport contractual chain order**

A person must not contravene a term of a road transport contractual chain order.

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

Note 2: A person does not contravene a term of a road transport contractual chain order unless the order applies to the person: see subsection 536NQ(1).

**536NQ The significance of a road transport contractual chain order  
applying to a person**

- (1) A road transport contractual chain order does not impose obligations on a person, and a person does not contravene a term of a road transport contractual chain order, unless the order applies to the person.
- (2) A road transport contractual chain order does not give a person an entitlement unless the order applies to the person.

**536NR When a road transport contractual chain order *applies* to a person**

*When a road transport contractual chain order **applies** to a regulated road transport contractor or a road transport employee-like worker*

- (1) A road transport contractual chain order **applies** to a regulated road transport contractor or a road transport employee-like worker in a road transport contractual chain if:
- (a) the road transport contractual chain order covers the regulated road transport contractor or road transport employee-like worker; and
  - (b) the road transport contractual chain order is in operation; and
  - (c) no other provision of this Act provides, or has the effect, that the road transport contractual chain order does not apply to the regulated road transport contractor or road transport employee-like worker.

*When a road transport contractual chain order **applies** to other persons in a road transport contractual chain*

- (2) A road transport contractual chain order **applies** to a person in a road transport contractual chain, other than a regulated road transport contractor or a road transport employee-like worker, if:
- (a) the road transport contractual chain order covers the person; and
  - (b) a regulated road transport contractor or a road transport employee-like worker to whom the road transport contractual chain order applies, or an employee, performs work for the person; and
  - (c) the road transport contractual chain order is in operation; and
  - (d) no other provision of this Act provides, or has the effect, that the road transport contractual chain order does not apply to the person.

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**536NS When a road transport contractual chain order *covers* a person in a road transport contractual chain**

- (1) A road transport contractual chain order ***covers*** a person in a road transport contractual chain if the order is expressed to cover the person.

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

- (2) A road transport contractual chain order also ***covers*** a person in a road transport contractual chain if any of the following provides, or has the effect, that the order covers the person:

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

- (3) Despite subsections (1) and (2), a road transport contractual chain order does not ***cover*** a person in a road transport contractual chain if any of the following provides, or has the effect, that the order does not cover the person:

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

*Road transport contractual chain orders that have ceased to operate*

- (4) Despite subsections (1) and (2), a road transport contractual chain order that has ceased to operate does not ***cover*** a person in a road transport contractual chain.

**536NT When a road transport contractual chain order is in operation**

*When a road transport contractual chain order comes into operation*

- (1) A road transport contractual chain order comes into operation on the day specified in the order.
- (2) The specified day must not be earlier than the day on which the road transport contractual chain order is made.
- (3) The specified day must not be earlier than 12 months after the relevant notice of intent for the order was published.
- (4) Despite subsection (3), the specified day may be a day not earlier than 6 months after the relevant notice of intent for the order was published, if the FWC is satisfied that the circumstances urgently require it.

*When a determination varying or revoking a road transport contractual chain order comes into operation*

- (5) A determination varying or revoking a road transport contractual chain order comes into operation on the day specified in the determination.
- (6) The specified day must not be earlier than the day on which the determination is made.

*Road transport contractual chain orders operate until revoked*

- (7) A road transport contractual chain order continues in operation until it is revoked.

*Notice of intent*

- (8) The **relevant notice of intent** for a road transport contractual chain order is the notice of intent published under subsection 536PG(1)

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at the same time as the draft of the road transport contractual chain order was published.

**536NU When road transport contractual chain guidelines *cover* a person in a road transport contractual chain**

- (1) Road transport contractual chain guidelines *cover* a person in a road transport contractual chain if the guidelines are expressed to cover the person.

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

- (2) Road transport contractual chain guidelines also *cover* a person in a road transport contractual chain if any of the following provides, or has the effect, that the guidelines cover the person:
- (a) a provision of this Act;
  - (b) an FWC order made under a provision of this Act;
  - (c) an order of a court.
- (3) Despite subsections (1) and (2), road transport contractual chain guidelines do not *cover* a person in a road transport contractual chain, if any of the following provides, or has the effect, that the guidelines do not cover the person:
- (a) a provision of this Act;
  - (b) an FWC order made under a provision of this Act;
  - (c) an order of a court.

*Road transport contractual chain guidelines that have ceased to operate*

- (4) Despite subsections (1) and (2), road transport contractual chain guidelines that have ceased to operate do not *cover* a person in a road transport contractual chain.

**536NV When road transport contractual chain guidelines are in operation**

*When road transport contractual chain guidelines come into operation*

- (1) Road transport contractual chain guidelines come into operation on the day specified in the guidelines.
- (2) The specified day must not be earlier than the day on which the road transport contractual chain guidelines are made.

*When a determination varying or revoking road transport contractual chain guidelines comes into operation*

- (3) A determination varying or revoking road transport contractual chain guidelines comes into operation on the day specified in the determination.
- (4) The specified day must not be earlier than the day on which the determination is made.

*Road transport contractual chain guidelines operate until revoked*

- (5) Road transport contractual chain guidelines continue in operation until they are revoked.

## **Division 3—Exclusion of certain State and Territory laws**

### **536NW Exclusion of certain State and Territory laws**

- (1) For the purposes of this Chapter, the rights, entitlements, obligations and liabilities of a person in a road transport contractual chain are not affected by a law of a State or Territory to the extent that the law would otherwise do one or more of the following:
  - (a) take or deem the person to be an employer or employee, or otherwise treat the person as if the person were an employer or employee, for the purposes of a law that relates to one or more workplace relations matters (or provide a means for the person to be so taken, deemed or treated);
  - (b) confer or impose rights, entitlements, obligations or liabilities on the person in relation to matters that, in an employment relationship, would be workplace relations matters (or provide a means for rights, entitlements, obligations or liabilities in relation to such matters to be conferred or imposed on the person);
  - (c) without limiting paragraphs (a) and (b)—expressly provide for a court, commission or tribunal to do any of the following in relation to a services contract on an unfairness ground:
    - (i) make an order or determination (however described) setting aside, or declaring to be void or otherwise unenforceable, all or part of the services contract;
    - (ii) make an order or determination (however described) amending or varying all or part of the services contract.
- Note 1: For the meaning of *workplace relations matter*, see section 536NX.
- Note 2: For the meaning of *unfairness ground*, see section 536NY.
- (2) The rights, entitlements, obligations and liabilities of a person in a road transport contractual chain are not affected by a law of a State or Territory that is specified in regulations made for the purposes of this subsection, to the extent that the law is so specified.
- (3) Subsection (1) does not apply in relation to:



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- (a) a law of a State or Territory, to the extent that the law deals with matters relating to outworkers (including entry of a representative of a trade union to premises for a purpose connected with outworkers), other than matters mentioned in paragraph (1)(c); or
  - (b) any of the following laws:
    - (i) Chapter 6 of the *Industrial Relations Act 1996* (NSW) (and any other provision of that Act to the extent that it relates to, or has effect for the purposes of, a provision of Chapter 6);
    - (ii) the *Owner Drivers and Forestry Contractors Act 2005* (Vic.); or
  - (c) a law of a State or Territory that is specified in regulations made for the purposes of this paragraph, to the extent that the law is so specified.
- (4) To avoid doubt, subsection (2) has effect even if a law specified in regulations made for the purposes of that subsection:
- (a) is a law referred to in paragraph (3)(a) or (b); or
  - (b) deals with matters that, because of section 536NX, are not workplace relations matters.

*References to State and Territory law*

- (5) Without limiting any other provision of this Act, a reference in this section to a law of a State or Territory:
- (a) includes a reference to a regulation, rule or other instrument (however described) made pursuant to, or for the purposes of, a law of a State or Territory; and
  - (b) is a reference to a law of a State or Territory as in force from time to time.

**536NX What are *workplace relations matters***

For the purposes of this Chapter, ***workplace relations matter*** has the same meaning as in section 536JQ.

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**536NY What is an *unfairness ground***

For the purposes of this Chapter, an *unfairness ground* in relation to a services contract has the same meaning as in section 536JR.

**536NZ Interaction of road transport contractual chain orders with State and Territory laws**

- (1) A road transport contractual chain order prevails over a law of a State or Territory, to the extent of any inconsistency.
- (2) Despite subsection (1), a term of a road transport contractual chain order applies subject to the following:
  - (a) a law of a State or Territory specified in regulations made for the purposes of this paragraph, to the extent that the law is so specified;
  - (b) a law of a State or Territory that provides for rights or remedies by reference to a law described in paragraph (a).

*References to State and Territory law*

- (3) Without limiting any other provision of this Act, a reference in this section to a law of a State or Territory:
  - (a) includes a reference to a regulation, rule or other instrument (however described) made pursuant to, or for the purposes of, a law of a State or Territory; and
  - (b) is a reference to a law of a State or Territory as in force from time to time.

**536P Authorisation of conduct for the purposes of the *Competition and Consumer Act 2010***

*Conduct in accordance with order or guidelines*

- (1) For the purposes of subsection 51(1) of the *Competition and Consumer Act 2010*, and the Competition Code within the meaning of that Act, anything done in accordance with a road transport contractual chain order or road transport contractual chain

guidelines by a person or entity covered by the order or guidelines is specified in and specifically authorised by this Act.

*Certain conduct not protected*

- (2) Despite subsection (1), conduct referred to in that subsection is not specified in or specifically authorised by this Act if the conduct is:
- (a) making a contract or arrangement, or arriving at an understanding, that is or contains a cartel provision that satisfies the purpose condition in either paragraph 45AD(3)(a) or (b) of the *Competition and Consumer Act 2010* or the Competition Code within the meaning of that Act; or
  - (b) boycott conduct within the meaning of subsection 87AA(2) of the *Competition and Consumer Act 2010* or the Competition Code within the meaning of that Act.

## **Part 3B-2—Minimum standards for persons in a road transport contractual chain**

### **Division 1—Introduction**

#### **536PB Guide to this Part**

This Part is about setting minimum standards for persons in a road transport contractual chain.

Division 2 empowers the FWC to make road transport contractual chain orders, which set minimum standards to which certain regulated road transport contractors, road transport employee-like workers and other persons in a road transport contractual chain are entitled in relation to certain matters.

Divisions 3 and 4 deal with deferral and suspension of road transport contractual chain orders.

Division 5 empowers the FWC to make road transport contractual chain guidelines for persons in a road transport contractual chain.

#### **536PC Meaning of employee and employer**

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

## **Division 2—Road transport contractual chain orders**

### **Subdivision A—General matters**

#### **536PD Road transport contractual chain orders**

- (1) The FWC may make an order (a ***road transport contractual chain order***) that sets standards for regulated road transport contractors, road transport employee-like workers and other persons in a road transport contractual chain.

Note: The FWC must be constituted by an Expert Panel for the purposes of making a road transport contractual chain order (see subsection 617(10B)).

- (2) A road transport contractual chain order cannot confer rights or impose obligations on a person in the capacity of an employee.
- (3) The FWC may make a road transport contractual chain order under this section:
  - (a) on its own initiative; or
  - (b) on application under subsection 536PE(1).
- (4) The FWC must not make a road transport contractual chain order that covers road transport employee-like workers unless the FWC considers it appropriate.

#### **536PE Applications for road transport contractual chain orders**

- (1) Any of the following may apply to the FWC for the making of a road transport contractual chain order:
  - (a) an organisation that is entitled to represent the industrial interests of one or more persons in a road transport contractual chain;
  - (b) a regulated business in a road transport contractual chain;
  - (c) a person who is a primary party to the first contract or arrangement in a road transport contractual chain;
  - (d) the Minister;

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(e) a person or body prescribed by the regulations.

Note: An Expert Panel can hear applications under this Act for the road transport industry together: see subsection 582(4).

*Matters to be specified in an application*

- (2) An application for the making of a road transport contractual chain order must specify the classes of persons in a road transport contractual chain to be covered by the order.
- (3) Without limiting the way in which a class may be described for the purposes of subsection (2), the class may be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work.

**Subdivision B—Matters relating to road transport contractual chain orders**

**536PF Particular matters FWC must take into account in making a decision on a road transport contractual chain order**

- (1) This section applies if:
  - (a) an application is made for a road transport contractual chain order under subsection 536PE(1) or for a variation of a road transport contractual chain order under section 536PS; or
  - (b) the FWC is considering making or varying a road transport contractual chain order on its own initiative.
- (2) The FWC:
  - (a) must not make or vary the road transport contractual chain order unless there has been genuine engagement with the parties to be covered; and
  - (b) must not make or vary the road transport contractual chain order unless the Road Transport Advisory Group has been consulted; and
  - (c) must not make or vary the road transport contractual chain order unless the consultation process set out in Subdivision C of this Division has been followed; and

- (d) in deciding whether to make or vary the road transport contractual chain order, must have regard to the commercial realities of the road transport industry, including commercial practices in relation to part load, mixed load, no load, multi-leg and return trips; and
- (e) must not make or vary the road transport contractual chain order unless the FWC is satisfied that making or varying the road transport contractual chain order will not unduly affect the viability and competitiveness of road transport businesses, owner drivers or other similar persons; and
- (f) in deciding whether to make or vary the road transport contractual chain order, must take into account any current or proposed road transport contractual chain orders and any current or proposed minimum standards orders; and
- (g) must take reasonable steps to ensure that the coverage of the road transport contractual chain order is clear.

### **Subdivision C—Consultation process for road transport contractual chain orders**

#### **536PG FWC to prepare and publish a draft of a road transport contractual chain order**

- (1) Before making a road transport contractual chain order, the FWC must:
  - (a) publish a notice (a *notice of intent*) stating that the FWC proposes to make a road transport contractual chain order; and
  - (b) publish a draft of the proposed road transport contractual chain order.
- (2) The FWC must publish the notice of intent and the draft of the road transport contractual chain order on the FWC's website and by any other means the FWC considers appropriate.

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**536PH Affected entities to have a reasonable opportunity to make submissions on a draft road transport contractual chain order**

- (1) The FWC must ensure that affected entities have a reasonable opportunity to make written submissions to the FWC for its consideration in relation to the draft of a road transport contractual chain order published under paragraph 536PG(1)(b).
- (2) The FWC must publish submissions made to the FWC.
- (3) However, if a submission made by an entity includes information that is claimed by the entity to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive, the FWC:
  - (a) may decide not to publish the information; and
  - (b) may instead publish:
    - (i) a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive); or
    - (ii) if the FWC considers that it is not practicable to prepare a summary that would comply with subparagraph (i)—a statement that confidential or commercially sensitive information in the submission has not been published.
- (4) The publishing of material under subsections (2) and (3) must be on the FWC's website and by any other means the FWC considers appropriate.
- (5) A reference in this Act (other than in this section) to a submission under this section includes a reference to a summary or statement referred to in paragraph (3)(b).
- (6) For the purposes of subsection (1), an *affected entity*, in relation to a draft road transport contractual chain order published under paragraph 536PG(1)(b), is:



- (a) a person or body likely to be affected by the making of a road transport contractual chain order based on the draft; or
  - (b) a person or body prescribed by the regulations, or included in a class prescribed by the regulations.
- (7) The FWC may, but is not required to, hold a hearing in relation to a draft road transport contractual chain order.

### **536PJ Finalising draft order**

- (1) The FWC may make any changes it thinks appropriate to a draft road transport contractual chain order.
- (2) If changes made under subsection (1) are significant, the FWC must:
  - (a) decide not to make the road transport contractual chain order based on the draft; and
  - (b) publish a subsequent notice of intent under paragraph 536PG(1)(a) in relation to the revised draft road transport contractual chain order, and publish the revised draft; and
  - (c) follow the process set out in section 536PH in relation to the revised draft road transport contractual chain order (with the period of consultation under that section to be no shorter than 12 months starting when the subsequent notice of intent and the revised draft required by paragraph (b) of this subsection were published).
- (3) Despite paragraph (2)(c), the FWC may reduce the consultation period mentioned in that paragraph to a period not shorter than 6 months if the FWC is satisfied that the circumstances urgently require it.

### **536PK Decision not to make order based on the draft**

The FWC may decide that no road transport contractual chain order is to be made based on the draft. If the FWC does so, the

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FWC must publish notice of the decision on its website and by any other means the FWC considers appropriate.

**Subdivision D—Decisions on road transport contractual chain orders and related matters**

**536PL Decisions on applications for road transport contractual chain orders**

- (1) If an application for a road transport contractual chain order is made to the FWC under subsection 536PE(1), the FWC may decide to:
  - (a) refuse to consider the application; or
  - (b) make a road transport contractual chain order under subsection 536PD(1); or
  - (c) not make a road transport contractual chain order; or
  - (d) if the FWC considers it appropriate to do so, instead make road transport contractual chain guidelines under section 536QP, as if the application had been an application under subsection 536QQ(1) for road transport contractual chain guidelines in relation to the persons in a road transport contractual chain covered by the application under subsection 536PE(1).
- (2) Without limiting subsection (1), the FWC may refuse to consider the application if it is not consistent with a direction of the President under subsection 582(4D) (prioritisation).

**536PM Terms that must be included in a road transport contractual chain order**

*Terms relating to coverage*

- (1) A road transport contractual chain order must include terms setting out in accordance with this section:
  - (a) the work in the road transport industry covered by the road transport contractual chain order; and

- (b) the persons in a road transport contractual chain covered by the road transport contractual chain order.
- (2) A road transport contractual chain order must be expressed to cover persons in a road transport contractual chain, including specified regulated road transport contractors or road transport employee-like workers.
- (3) For the purposes of subsection (2):
  - (a) persons in a road transport contractual chain other than regulated road transport contractors or road transport employee-like workers may be specified by name or by inclusion in a specified class or specified classes; and
  - (b) regulated road transport contractors and road transport employee-like workers must be specified by inclusion in a specified class or specified classes.
- (4) Without limiting the way in which a class may be described for the purposes of subsection (3), the class may be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work.

**536PN Road transport contractual chain order must include term about interaction with minimum standards orders**

A road transport contractual chain order must include a provision that specifies the extent to which it prevails over, or is subject to, a minimum standards order to the extent of any inconsistency, and the road transport contractual chain order and the minimum standards order have effect according to the provision included in the road transport contractual chain order.

**536PP Term about settling disputes must be included in a road transport contractual chain order**

A road transport contractual chain order must include a term that provides a procedure for settling disputes about any matters arising under the order.

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**536PQ Terms that may be included in a road transport contractual chain order**

- (1) A road transport contractual chain order may also include terms about any of the following matters:
  - (a) payment times;
  - (b) fuel levies;
  - (c) rate reviews;
  - (d) termination, including one way termination for convenience;
  - (e) cost recovery.
- (2) Subsection (1) does not limit the terms that may be included in a road transport contractual chain order.

**536PR Terms that must not be included in a road transport contractual chain order**

- (1) A road transport contractual chain order must not include terms about any of the following matters:
  - (a) overtime rates;
  - (b) rostering arrangements;
  - (c) a term that would change the form of the engagement or the status of a regulated road transport contractor or a road transport employee-like worker covered by the road transport contractual chain order including, but not limited to, a term that deems a regulated road transport contractor or a road transport employee-like worker to be an employee;
  - (d) a matter relating to work health and safety that is otherwise comprehensively dealt with by a law of the Commonwealth, a State or a Territory;
  - (e) a matter prescribed by the regulations, or included in a class of matter prescribed by the regulations.
- (2) A road transport contractual chain order must not include terms about any of the following matters:
  - (a) a matter relating to road transport that is otherwise comprehensively dealt with:

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- (i) by the Heavy Vehicle National Law as set out in the Schedule to the *Heavy Vehicle National Law Act 2012* (Qld); or
    - (ii) by another law of the Commonwealth, a State or a Territory;
  - (b) a matter prescribed by the regulations, or included in a class of matter prescribed by the regulations.
- (3) For the purposes of paragraph (1)(d):
- (a) the regulations may specify that a particular matter, or a matter included in a class of matters, is, or is not, dealt with comprehensively by a law of the Commonwealth, a State or a Territory; and
  - (b) the regulations may prescribe one or more laws of the Commonwealth, a State or a Territory to which that paragraph does, or does not, not apply.
- (4) For the purposes of paragraph (2)(b):
- (a) the regulations may specify that a particular matter, or a matter included in a class of matters, is, or is not, dealt with comprehensively by the Heavy Vehicle National Law as set out in the Schedule to the *Heavy Vehicle National Law Act 2012* (Qld) or another law of the Commonwealth, a State or a Territory; and
  - (b) the regulations may prescribe one or more laws of the Commonwealth, a State or a Territory to which subparagraph (2)(a)(ii) does, or does not, not apply.

**536PS Applications to vary or revoke road transport contractual chain orders**

Any of the following may apply to the FWC for a determination varying or revoking a road transport contractual chain order:

- (a) an organisation that is entitled to represent the industrial interests of one or more of the persons in the road transport contractual chain to which the order relates or to whom the order as proposed to be varied would relate;

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- (b) a regulated business in the road transport contractual chain to which the order relates or to which the order as proposed to be varied would relate;
- (c) a person who is a primary party to the first contract or arrangement in the road transport contractual chain to which the order relates;
- (d) the Minister;
- (e) a person or body prescribed by the regulations.

**536PT FWC may vary or revoke road transport contractual chain orders**

- (1) The FWC may make a determination varying or revoking a road transport contractual chain order if the FWC is satisfied that making the determination is consistent with the minimum standards objective and the road transport objective.
- (2) The FWC may make a determination varying a road transport contractual chain order in such a way that not all of the elements of the variation sought in an application under section 536PS are implemented, including by refusing to make a variation to the extent that it would result in the order covering persons who are not regulated road transport contractors or road transport employee-like workers.
- (3) The FWC may make a determination varying a road transport contractual chain order to remove an ambiguity or uncertainty or to correct an error.
- (4) The FWC may make a determination varying or revoking a road transport contractual chain order:
  - (a) on its own initiative; or
  - (b) on application under section 536PS.
- (5) The FWC must not vary or revoke a road transport contractual chain order that covers road transport employee-like workers, or in such a way that it would begin to cover or cease to cover road

transport employee-like workers, unless the FWC considers it appropriate.

- (6) The FWC may also make a determination under subsection (1) varying or revoking a road transport contractual chain order to give effect to a decision under paragraph 536QK(2)(a) or (b) to vary or revoke the road transport contractual chain order.

Note: Subsection 536QK(2) requires the FWC to consider whether to vary or revoke a road transport contractual chain order after a deferral declaration, a deferral determination, a suspension declaration or a suspension determination is made in relation to the order.

- (7) A road transport contractual chain order that is not in operation can only be revoked or varied under the process set out in Divisions 3 and 4.

## **Division 3—Deferral and suspension of road transport contractual chain orders**

### **Subdivision A—Ministerial declarations to defer or suspend road transport contractual chain orders**

#### **536PU Minister may make a declaration deferring the operation or application of a road transport contractual chain order**

- (1) If the Minister considers it is in the public interest to do so, the Minister may, by notifiable instrument, make a declaration (a ***deferral declaration***) that defers:
  - (a) the coming into operation of a road transport contractual chain order; or
  - (b) the application of:
    - (i) all of the terms of a road transport contractual chain order to a specified class or specified classes of persons; or
    - (ii) specified terms of a road transport contractual chain order to a specified class or specified classes of persons; or
    - (iii) specified terms of a road transport contractual chain order to all persons.
- (2) A deferral declaration made under paragraph (1)(a) is a ***full deferral declaration***, and a deferral declaration made under paragraph (1)(b) is a ***part deferral declaration***, in relation to the road transport contractual chain order to which the deferral declaration relates.
- (3) A deferral declaration in relation to a road transport contractual chain order:
  - (a) comes into operation on the day on which it is made; and
  - (b) ceases to be in operation on the day on which the FWC decides under subsection 536QK(2) whether or not to vary or revoke the road transport contractual chain order.



- (4) Without limiting the way in which a class may be described for the purposes of subsection (1), the class may be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work.
- (5) The Secretary of the Department must publish a deferral declaration on the Department's website as soon as practicable after the deferral declaration is made.

### **536PV Limitations on making a deferral declaration**

*No deferral of road transport contractual chain order that is in operation*

- (1) The Minister must not make a deferral declaration in relation to a road transport contractual chain order that has already come into operation.

*Only one full deferral declaration is permitted etc.*

- (2) The Minister:
  - (a) may only make one full deferral declaration in relation to a particular road transport contractual chain order; and
  - (b) must not make a full deferral declaration in relation to a particular road transport contractual chain order if a deferral determination (whether a full deferral determination or a part deferral determination) has previously been made by the FWC in relation to the road transport contractual chain order.

Note: The FWC may make deferral determinations in relation to road transport contractual chain orders under Subdivision B of this Division.

*More than one part deferral declaration is permitted*

- (3) Subject to subsection (4), the Minister may make more than one part deferral declaration in relation to a particular road transport contractual chain order.

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- (4) If more than one part deferral declaration or part deferral determination is made in relation to the same road transport contractual chain order as permitted by subsection (3) of this section or subsection 536QC(3), a later part deferral declaration must not have the effect of deferring, or purporting to defer, the application of a term or terms to any person:
- (a) to whom the terms already apply when the later part deferral declaration is made; or
  - (b) in relation to whom the application of the terms has previously been deferred.

**536PW Operation of a road transport contractual chain order during deferral**

A road transport contractual chain order:

- (a) is not in operation during any period when a full deferral declaration in relation to the road transport contractual chain order is in operation; and
- (b) is in operation during any period when a part deferral declaration in relation to the road transport contractual chain order is in operation.

**Note:** Although a road transport contractual chain order is in operation when a part deferral declaration is in operation in relation to the order, the order as a whole will not apply to specified classes of persons, or specified terms of the order will not apply to all persons or specified classes of persons, during that period.

**536PX Minister may make a declaration suspending a road transport contractual chain order**

- (1) If the Minister considers it is in the public interest to do so, the Minister may, by notifiable instrument, make a declaration (a ***suspension declaration***):
- (a) suspending the operation of a road transport contractual chain order; or
  - (b) suspending the application of:

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- (i) all of the terms of a road transport contractual chain order to a specified class or specified classes of persons; or
  - (ii) specified terms of a road transport contractual chain order to a specified class or specified classes of persons; or
  - (iii) specified terms of a road transport contractual chain order to all persons.
- (2) A suspension declaration made under paragraph (1)(a) is a **full suspension declaration**, and a suspension declaration made under paragraph (1)(b) is a **part suspension declaration**, in relation to the road transport contractual chain order to which the suspension declaration relates.

*Suspension declaration must specify period of suspension*

- (3) A suspension declaration must specify the period of the suspension, which:
- (a) must not be longer than 12 months; and
  - (b) must not start before the day on which the suspension declaration is made.

*When period of suspension ends*

- (4) Subject to subsection (5), a period of suspension specified in a suspension declaration ends immediately after the end of the period specified in the suspension declaration under subsection (3).
- (5) If a period of suspension has not already ended under subsection (3) when the FWC makes a decision under subsection 536QK(2) as to whether to vary or revoke the road transport contractual chain order, the period of suspension ends on whichever of the following days is applicable:
- (a) if the FWC decides to vary or revoke the road transport contractual chain order—on the day that the determination made under subsection 536PT(1) varying or revoking the road transport contractual chain order comes into operation,

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which must not be later than 12 months after the day on which the suspension declaration was made;

- (b) if the FWC decides not to vary or revoke the road transport contractual chain order:
  - (i) 7 days after the day on which the decision is made; or
  - (ii) if a 7-day period would result in the suspension lasting longer than 12 months—such shorter period as is specified in the decision, which must be a period that would result in the suspension lasting 12 months or less.

*Classes*

- (6) Without limiting the way in which a class may be described for the purposes of subsection (1), the class may be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work.

*Orders*

- (7) If the Minister makes a suspension declaration, the FWC may make any orders it considers appropriate to ensure that no person is unfairly affected by the suspension.

*Publication*

- (8) The Secretary of the Department must publish a suspension declaration on the Department's website as soon as practicable after the suspension declaration is made.

*Accrued rights, etc.*

- (9) The making of a suspension declaration does not affect any right or liability that a person acquired, accrued or incurred before the suspension declaration is made.

**536PY Suspension declaration must be made within 12 months of certain dates**

*Full suspension declaration timing*

- (1) A full suspension declaration in relation to a road transport contractual chain order must be made within 12 months of the day on which the road transport contractual chain order came into operation.

*Part suspension declaration timing*

- (2) A part suspension declaration in relation to a road transport contractual chain order must be made within 12 months of whichever of the following days is applicable:
  - (a) if the part suspension declaration suspends the application of all of the terms of the road transport contractual chain order to a specified class of persons—the day on which all of the terms of the road transport contractual chain order first applied to the specified class of persons;
  - (b) if the part suspension declaration suspends the application of all of the terms of the road transport contractual chain order to 2 or more specified classes of persons—the day on which all of the terms of the road transport contractual chain order first applied to at least one of the specified classes of persons (even if all of the terms of the order did not apply to all of the specified classes on that day);
  - (c) if the part suspension declaration suspends the application of specified terms of the road transport contractual chain order to a specified class of persons—the day on which the specified terms first applied to the specified class of persons;
  - (d) if the part suspension declaration suspends the application of specified terms of the road transport contractual chain order to 2 or more specified classes of persons—the day on which the specified terms of the road transport contractual chain order first applied to at least one of the specified classes of persons (even if the order did not apply to all of the specified classes on that day);

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- (e) if the part suspension declaration suspends the application of specified terms of the road transport contractual chain order to all persons—the day on which the specified terms first applied to all persons.

**536PZ Operation of a road transport contractual chain order during suspension**

A road transport contractual chain order:

- (a) is not in operation during any period when a full suspension declaration in relation to the road transport contractual chain order is in operation; and
- (b) is in operation during any period when a part suspension declaration in relation to the road transport contractual chain order is in operation.

**Note:** Although a road transport contractual chain order is in operation during a period when a part suspension declaration is in operation in relation to the order, the order as a whole will not apply to specified classes of persons, or specified terms of the order will not apply to all persons or specified classes of persons, during that period.

**536Q Consultation requirements**

The Minister is not required to consult any person or body before making a deferral declaration or a suspension declaration.

**Subdivision B—FWC may defer or suspend road transport contractual chain orders**

**536QA Applications for a deferral determination for a road transport contractual chain order**

- (1) An application may be made to the FWC for a determination under subsection 536QB(1) (a *deferral determination*) in relation to a road transport contractual chain order.
- (2) An application may be made under subsection (1) by any of the following:

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- (a) an organisation that is entitled to represent the industrial interests of one or more persons in the road transport contractual chain;
- (b) a regulated business in the road transport contractual chain;
- (c) a person who is a primary party to the first contract or arrangement in the road transport contractual chain;
- (d) a person or body prescribed by the regulations.

Note: An Expert Panel can hear applications under this Act for the road transport industry together: see subsection 582(4).

- (3) An application for a deferral determination must not be made in relation to a road transport contractual chain order that has already come into operation.

Note: If the road transport contractual chain order concerned comes into operation before the FWC considers the application, the FWC may treat it as a suspension application: see subsection 536QD(2).

**536QB FWC may make a determination deferring the operation or application of a road transport contractual chain order**

- (1) The FWC may, on application under subsection 536QA(1), make a deferral determination:
  - (a) that defers the coming into operation of a road transport contractual chain order; or
  - (b) that defers the application of:
    - (i) all of the terms of a road transport contractual chain order to a specified class or specified classes of persons; or
    - (ii) specified terms of a road transport contractual chain order to a specified class or specified classes of persons; or
    - (iii) specified terms of a road transport contractual chain order to all persons.
- (2) A deferral determination made under paragraph (1)(a) is a **full deferral determination**, and a deferral determination made under paragraph (1)(b) is a **part deferral determination**, in relation to the

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road transport contractual chain order to which the deferral determination relates.

- (3) A deferral determination in relation to a road transport contractual chain order:
  - (a) comes into operation on the day on which it is made; and
  - (b) ceases to be in operation on the day on which the FWC decides under subsection 536QK(2) whether or not to vary or revoke the road transport contractual chain order.
- (4) Without limiting the way in which a class may be described for the purposes of subsection (1), the class may be described by reference to a particular industry or sector, or part of an industry or sector.

**536QC Limitations on making a deferral determination**

*No deferral of road transport contractual chain order that is in operation*

- (1) The FWC must not make a deferral determination in relation to a road transport contractual chain order that has already come into operation.

*Only one full deferral determination is permitted, etc.*

- (2) The FWC:
  - (a) may only make one full deferral determination in relation to a particular road transport contractual chain order; and
  - (b) must not make a full deferral determination in relation to a particular road transport contractual chain order if a deferral declaration (whether a full deferral declaration or a part deferral declaration) has previously been made by the Minister in relation to the road transport contractual chain order.

Note: The Minister may make deferral declarations in relation to road transport contractual chain orders under Subdivision A of this Division.



*More than one part deferral determination is permitted*

- (3) Subject to subsection (4), the FWC may make more than one part deferral determination in relation to a particular road transport contractual chain order.
- (4) If more than one part deferral determination or part deferral declaration is made in relation to the same road transport contractual chain order as permitted by subsection (3) of this section or subsection 536PV(3), a later part deferral determination must not have the effect of deferring, or purporting to defer, the application of a term to any person or class of persons:
  - (a) to whom the term already applies when the later part deferral determination is made; or
  - (b) in relation to whom the application of the terms has previously been deferred.

**536QD Decision on an application for a deferral determination in relation to a road transport contractual chain order**

- (1) If an application for a deferral determination in relation to a road transport contractual chain order is made, the FWC must:
  - (a) consider the application as soon as practicable; and
  - (b) consult the Road Transport Advisory Group before making a decision on the application.
- (2) If the road transport contractual chain order concerned comes into operation before the FWC makes a decision on the application, the FWC may treat the application as if it were an application for a suspension determination.
- (3) The FWC may:
  - (a) make the deferral determination under subsection 536QB(1); or
  - (b) decide not to make the deferral determination.
- (4) The FWC must make the deferral determination if, and must not make the deferral determination unless, the FWC is satisfied that:

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- (a) the applicant has provided significant new facts or evidence that was not available at the time the FWC decided to make the road transport contractual chain order; and
  - (b) the significant new facts or evidence demonstrate that the road transport contractual chain order will not provide, or has not provided, an appropriate safety net of road transport contractual chain for parties in the road transport industry, having regard to the road transport contractual chain objective and the road transport objective.
- (5) In considering whether the FWC is satisfied as mentioned in subsection (4), the FWC may have regard to whether one or more previous applications for variation or revocation of the road transport contractual chain order concerned have previously been made.
- (6) The FWC must publish a deferral determination on the FWC's website and by any other means the FWC considers appropriate as soon as practicable after making the determination.

**536QE Operation of a road transport contractual chain order during deferral**

A road transport contractual chain order:

- (a) is not in operation during any period when a full deferral determination in relation to the road transport contractual chain order is in operation; and
- (b) is in operation during any period when a part deferral determination is in operation in relation to the road transport contractual chain order.

Note: Although a road transport contractual chain order is in operation during a period when a part deferral determination is in operation in relation to the order, the order as a whole will not apply to specified classes of persons, or specified terms of the order will not apply to all persons or specified classes of persons, during that period.

**536QF Applications for a suspension determination for a road transport contractual chain order**

- (1) An application may be made to the FWC for a determination (a ***suspension determination***) under subsection 536QG(1) in relation to a road transport contractual chain order.
- (2) An application may be made under subsection (1) by any of the following:
  - (a) an organisation that is entitled to represent the industrial interests of one or more persons in the road transport contractual chain;
  - (b) a regulated business in the road transport contractual chain;
  - (c) a person who is a primary party to the first contract or arrangement in the road transport contractual chain;
  - (d) a person or body prescribed by the regulations.

Note: An Expert Panel can hear applications under this Act for the road transport industry together: see subsection 582(4).

*Timing of application for full suspension determination*

- (3) An application for a full suspension determination in relation to a road transport contractual chain order must be made within 12 months of the day on which the order came into operation.

*Timing of application for part suspension determination*

- (4) An application for a part suspension determination must be made within 12 months of whichever of the following days is applicable:
  - (a) if the part suspension determination will suspend the application of all of the terms of the road transport contractual chain order to a specified class—the first day on which all of the terms of the road transport contractual chain order applied to the class of person;
  - (b) if the part suspension determination will suspend the application of all of the terms of the road transport contractual chain order to 2 or more specified classes of persons—the day on which all of the terms of the road

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transport contractual chain order first applied to at least one of the specified classes of persons (even if all of the terms of the order did not apply to all of the specified classes on that day);

- (c) if the part suspension determination will suspend the application of specified terms of the road transport contractual chain order to a specified class of persons—the first day on which the specified terms applied to the specified class of persons;
- (d) if the part suspension determination will suspend the application of specified terms of the road transport contractual chain order to 2 or more specified classes of persons—the day on which the specified terms of the road transport contractual chain order first applied to at least one of the specified classes of persons (even if the order did not apply to all of the specified classes on that day);
- (e) if the part suspension determination will suspend the application of specified terms of the road transport contractual chain order to all persons—the first day on which the specified terms applied to all persons.

**536QG FWC may make a determination suspending a road transport contractual chain order**

- (1) The FWC may, on application under subsection 536QF(1), make a suspension determination:
  - (a) suspending the operation of a road transport contractual chain order; or
  - (b) suspending:
    - (i) the application of a road transport contractual chain order to a specified class or specified classes of persons; or
    - (ii) the application of specified terms of a road transport contractual chain order to a specified class or specified classes of persons; or
    - (iii) the application of specified terms of road transport contractual chain order to all persons.

Note 1: A person may also apply under section 536PS for a variation or revocation of a road transport contractual chain order.

Note 2: Judicial review of decisions of the FWC is available: see paragraph 39B(1A)(c) of the *Judiciary Act 1903*.

- (2) A suspension determination made under paragraph (1)(a) is a **full suspension determination**, and a suspension determination made under paragraph (1)(b) is a **part suspension determination**, in relation to the road transport contractual chain order to which the suspension determination relates.

*Suspension determination must specify period of suspension*

- (3) If the FWC makes a suspension determination in relation to a road transport contractual chain order, the suspension determination must specify the period for which the order is suspended, which:
- (a) must not be a period of more than 12 months; and
  - (b) must not start before the day on which the determination is made.

*When period of suspension ends*

- (4) Subject to subsection (5), a period of suspension specified in a suspension determination ends immediately after the end of the period specified in the suspension determination under subsection (3).
- (5) If the period of suspension has not already ended under subsection (4) when the FWC makes a decision under subsection 536QK(2) as to whether to vary or revoke the road transport contractual chain order, the period of suspension ends on whichever of the following days is applicable:
- (a) if the FWC decides to vary or revoke the road transport contractual chain order—on the day that the determination made under subsection 536PT(1) varying or revoking the road transport contractual chain order comes into operation, which must not be later than 12 months after the day on which the suspension determination was made;

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- (b) if the FWC decides not to vary or revoke the road transport contractual chain order:
  - (i) 7 days after the day on which the decision is made; or
  - (ii) if a 7-day period would result in the suspension lasting longer than 12 months—such shorter period as is specified in the decision, which must be a period that would result in the suspension lasting 12 months or less.

*Classes*

- (6) Without limiting the way in which a class may be described for the purposes of subsection (1), the class may be described by reference to a particular industry or sector, or part of an industry or sector.

**536QH Decision on an application for a suspension determination in relation to a road transport contractual chain order**

- (1) If an application for a suspension determination in relation to a road transport contractual chain order is made, the FWC must:
  - (a) consider the application as soon as practicable; and
  - (b) consult the Road Transport Advisory Group before making a decision on the application.
- (2) The FWC may:
  - (a) make the suspension determination under subsection 536QG(1); or
  - (b) decide not to make the suspension determination.
- (3) The FWC must make the suspension determination if, and must not make the suspension determination unless, the FWC is satisfied that:
  - (a) the applicant has provided significant new facts or evidence that was not available at the time the FWC decided to make the road transport contractual chain order; and
  - (b) the significant new facts or evidence demonstrate that the road transport contractual chain order will not provide, or has not provided, an appropriate safety net of road transport contractual chain for parties in the road transport industry,

having regard to the road transport contractual chain objective and the road transport objective.

- (4) In considering whether the FWC is satisfied as mentioned in subsection (3), the FWC may have regard to whether one or more previous applications for variation or revocation of the road transport contractual chain order have previously been made.
- (5) If the FWC makes the suspension determination, the FWC may make any orders it considers appropriate to ensure that no person is unfairly affected by the suspension.
- (6) The FWC must publish a suspension determination on the FWC's website and by any other means the FWC considers appropriate as soon as practicable after making the determination.
- (7) The making of a suspension determination does not affect any right or liability that a person acquired, accrued or incurred before the suspension determination is made.

### **536QJ Operation of a road transport contractual chain order during suspension**

A road transport contractual chain order:

- (a) is not in operation during any period when a full suspension determination in relation to the road transport contractual chain order is in operation; and
- (b) is in operation during any period when a part suspension determination is in operation in relation to the road transport contractual chain order.

**Note:** Although a road transport contractual chain order is in operation during a period when a part deferral determination is in operation in relation to the order, the order as a whole will not apply to specified classes of persons, or specified terms of the order will not apply to all persons or specified classes of persons, during that period.

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**Subdivision C—FWC must consider and decide whether to vary or revoke a deferred or suspended road transport contractual chain order**

**536QK FWC must consider whether to vary or revoke a road transport contractual chain order that has been deferred or suspended**

- (1) This section applies if:
  - (a) the Minister makes a deferral declaration or a suspension declaration in relation to a road transport contractual chain order; or
  - (b) the FWC makes a deferral determination or a suspension determination in relation to a road transport contractual chain order.
- (2) The FWC must, as soon as practicable, consider whether or not to vary or revoke the road transport contractual chain order. The FWC must:
  - (a) vary the road transport contractual chain order under subsection 536PT(1); or
  - (b) revoke the road transport contractual chain order under subsection 536PT(1); or
  - (c) decide not to vary or revoke the road transport contractual chain order.

*General preconditions for variation or revocation*

- (3) The FWC:
  - (a) must not vary or revoke the road transport contractual chain order unless there has been genuine engagement with the parties to be covered; and
  - (b) in the case of a road transport contractual chain order—must not vary or revoke the road transport contractual chain order unless the Road Transport Advisory Group has been consulted; and



- (c) in the case of a road transport contractual chain order—must have regard to the commercial realities of the road transport industry; and
- (d) in the case of a road transport contractual chain order—must be satisfied that the variation or revocation of the road transport contractual chain order will not unduly affect the viability and competitiveness of owner drivers or other similar persons; and
- (e) in the case of a road transport contractual chain order that covers road transport employee-like workers—must have regard to choice and flexibility in working arrangements.

*Special preconditions for variation or revocation: road transport contractual chain order*

- (4) In addition to the matters mentioned in subsection (3), the FWC must not vary or revoke a road transport contractual chain order in relation to which a deferral declaration or a deferral determination has been made unless the FWC has followed the process set out in Division 4 of this Part in relation to the variation or revocation.

*Publication requirements*

- (5) The FWC must publish notice of the FWC's decision under subsection (2) on the FWC's website and by any other means the FWC considers appropriate.

*End of suspension period does not affect obligations under this section*

- (6) The end of a period of suspension of a road transport contractual chain order under subsection 536PX(4) or 536QG(4) does not affect the FWC's obligation to consider whether or not to vary or revoke the road transport contractual chain order.

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**Division 4—Consultation before varying or revoking road transport contractual chain order after a deferral declaration or deferral determination**

**536QL FWC to prepare and publish a notice relating to proposed variation or revocation of a road transport contractual chain order**

- (1) Before deciding to vary or revoke a road transport contractual chain order in relation to which a deferral declaration or a deferral determination has been made, the FWC must:
  - (a) publish a notice (a *notice of intent*) stating that the FWC proposes to vary or revoke the road transport contractual chain order; and
  - (b) if the proposal is to vary the road transport contractual chain order—publish a draft of the road transport contractual chain order as proposed to be varied.
- (2) The FWC must publish the notice of intent and the draft of the road transport contractual chain order as proposed to be varied (if applicable) on the FWC’s website and by any other means the FWC considers appropriate as soon as practicable after making the determination.

**536QM Affected entities to have a reasonable opportunity to make submissions and comment on a proposed variation or revocation of a road transport contractual chain order**

- (1) The FWC must ensure that affected entities have a reasonable opportunity to make written submissions to the FWC for its consideration in relation to the proposed variation or revocation of a road transport contractual chain order in relation to which a notice of intent has been published under paragraph 536QL(1)(a).
- (2) The FWC must publish submissions made to the FWC.

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- (3) However, if a submission made by an entity includes information that is claimed by the entity to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive, the FWC:
- (a) may decide not to publish the information; and
  - (b) may instead publish:
    - (i) a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive); or
    - (ii) if the FWC considers that it is not practicable to prepare a summary that would comply with subparagraph (i)—a statement that confidential or commercially sensitive information in the submission has not been published.
- (4) The publishing of material under subsections (2) and (3) must be on the FWC's website and by any other means the FWC considers appropriate.
- (5) A reference in this Act (other than in this section) to a submission under this section includes a reference to a summary or statement referred to in paragraph (3)(b).
- (6) For the purposes of subsection (1), an *affected entity*, in relation to a proposed variation or revocation of a road transport contractual chain order in relation to which a notice of intent has been published under paragraph 536QL(1)(a), is:
- (a) a person or body likely to be affected by the proposed variation or revocation; or
  - (b) a person or body prescribed by the regulations, or belonging to a class of persons or bodies prescribed by the regulations.
- (7) The FWC may, but is not required to, hold a hearing in relation to the following:
- (a) a draft road transport contractual chain order as proposed to be varied;

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- (b) a proposed revocation of a road transport contractual chain order.

**536QN Finalising draft order**

- (1) The FWC may make any changes it thinks appropriate to a draft road transport contractual chain order as proposed to be varied.
- (2) If changes proposed to be made under subsection (1) are significant, the FWC must:
  - (a) decide not to vary the road transport contractual chain order based on the draft; and
  - (b) publish a subsequent notice of intent under paragraph 536QL(1)(a) in relation to the revised draft road transport contractual chain order, and publish the revised draft; and
  - (c) follow the process set out in section 536QM in relation to the revised draft road transport contractual chain order (with the period of consultation under that section to be no shorter than 12 months starting when the subsequent notice of intent and the revised draft required by paragraph (b) of this subsection were published).

## **Division 5—Road transport contractual chain guidelines**

### **536QP Road transport contractual chain guidelines**

- (1) The FWC may make guidelines under this section (***road transport contractual chain guidelines***) that set standards for regulated road transport contractors, road transport employee-like workers and other persons in a road transport contractual chain.
- (2) The FWC may make road transport contractual chain guidelines under this section:
  - (a) on its own initiative; or
  - (b) on application under section 536QQ.

### **536QQ Applications for road transport contractual chain guidelines**

- (1) Any of the following may apply to the FWC for the making of road transport contractual chain guidelines:
  - (a) an organisation that is entitled to represent the industrial interests of one or more of the persons that would be covered by the proposed road transport contractual chain guidelines;
  - (b) a regulated business that would be covered by the proposed road transport contractual chain guidelines;
  - (c) a person who is a primary party to the first contract or arrangement in a road transport contractual chain that would be covered by the proposed road transport contractual chain guidelines;
  - (d) the Minister;
  - (e) a person or body prescribed by the regulations.

#### *Matters to be specified in an application*

- (2) An application for the making of road transport contractual chain guidelines must specify the class of persons in a road transport contractual chain to be covered by the guidelines.

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- (3) Without limiting the way in which a class may be described for the purposes of subsection (2), the class may be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work.

**536QR Decisions on applications for road transport contractual chain guidelines**

- (1) If an application for road transport contractual chain guidelines is made to the FWC under subsection 536QQ(1), the FWC may decide to:
- (a) refuse to consider the application; or
  - (b) make road transport contractual chain guidelines under subsection 536QP(1); or
  - (c) not make road transport contractual chain guidelines; or
  - (d) if the FWC considers it appropriate to do so, instead make a road transport contractual chain order under subsection 536PD(1), as if the application had been an application under subsection 536PE(1) for a road transport contractual chain order in relation to the persons covered by the application under subsection 536QQ(1).
- (2) Without limiting subsection (1), the FWC may refuse to consider the application if it is not consistent with a direction of the President under subsection 582(4D) (prioritisation).

**536QS Road transport contractual chain guidelines not to be made if a road transport contractual chain order is in operation**

The FWC must not make road transport contractual chain guidelines that cover the same persons in a road transport contractual chain in relation to the same matters as a road transport contractual chain order that is in operation.

**536QT Terms that must be included in road transport contractual chain guidelines**

Road transport contractual chain guidelines must include terms setting out the same matters in relation to road transport contractual chain orders as set out in section 536PM.

**536QU Terms that may be included in road transport contractual chain guidelines**

Road transport contractual chain guidelines may include terms about any of the matters that may be included in road transport contractual chain orders under section 536PQ.

**536QV Terms that must not be included in road transport contractual chain guidelines**

Road transport contractual chain guidelines must not include terms about any of the matters that must not be included in road transport contractual chain orders as set out in section 536PR.

**536QW FWC may vary or revoke road transport contractual chain guidelines**

- (1) The FWC may make a determination varying or revoking road transport contractual chain guidelines if the FWC is satisfied that making the determination is consistent with the road transport objective and the minimum standards objective.
- (2) The FWC may make a determination varying road transport contractual chain guidelines in such a way that not all of the elements of the variation sought in an application under section 536QX are implemented, including by refusing to make a variation to the extent that it would result in the guidelines covering persons who are not in a road transport contractual chain.
- (3) The FWC may make a determination varying road transport contractual chain guidelines to remove an ambiguity or uncertainty or to correct an error.

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- (4) The FWC may make a determination varying or revoking road transport contractual chain guidelines:
  - (a) on its own initiative; or
  - (b) on application under section 536QX.
- (5) If the FWC makes a road transport contractual chain order that covers the same persons in a road transport contractual chain in relation to the same matters as road transport contractual chain guidelines, the FWC must revoke the road transport contractual chain guidelines with effect on and from the day on which the road transport contractual chain order comes into operation.
- (6) If the FWC makes a road transport contractual chain order that covers some or all of the same persons in a road transport contractual chain in relation to some or all of the same matters as road transport contractual chain guidelines, the FWC must vary the road transport contractual chain guidelines so that the guidelines do not cover the persons or matters covered by the order, with effect on and from the day on which the order comes into operation.

**536QX Applications to vary or revoke road transport contractual chain guidelines**

Any of the following may apply to the FWC for a determination varying or revoking road transport contractual chain guidelines:

- (a) an organisation that is entitled to represent the industrial interests of one or more of the persons covered by the road transport contractual chain guidelines, or that would be covered by the road transport contractual chain guidelines as proposed to be varied;
- (b) a regulated business covered by the road transport contractual chain guidelines, or that would be covered by the road transport contractual chain guidelines as proposed to be varied;
- (c) a person who is a primary party to the first contract or arrangement in a road transport contractual chain covered by the road transport contractual chain guidelines, or that would



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be covered by the road transport contractual chain guidelines  
as proposed to be varied;

- (d) the Minister;
- (e) a person or body prescribed by the regulations.

## **Chapter 4—Compliance and enforcement**

### **Part 4-1—Civil remedies**

#### **Division 1—Introduction**

##### **537 Guide to this Part**

This Part is about civil remedies. Certain provisions in this Act impose obligations on certain persons. Civil remedies may be sought in relation to contraventions of these civil remedy provisions.

Subdivision A of Division 2 deals with applications for orders in relation to contraventions of civil remedy provisions and safety net contractual entitlements, and applications for orders to enforce entitlements arising under subsection 542(1).

Subdivision B of Division 2 sets out the orders that can be made by the Federal Court, the Federal Circuit and Family Court of Australia (Division 2) or an eligible State or Territory Court in relation to a contravention of a civil remedy provision.

Division 3 sets out when proceedings relating to a contravention of a civil remedy provision may be dealt with as small claims proceedings.

Division 4 deals with general provisions relating to civil remedies, including rules about evidence and procedure.

Division 4A imposes obligations on responsible franchisor entities in relation to certain contraventions of civil remedy provisions by franchisee entities and on holding companies in relation to certain contraventions of civil remedy provisions by subsidiaries.

Division 5 deals with unclaimed money.

### **538 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—Orders

### Subdivision A—Applications for orders

#### 539 Applications for orders in relation to contraventions of civil remedy provisions

- (1) A provision referred to in column 1 of an item in the table in subsection (2) is a *civil remedy provision*.
- (2) For each civil remedy provision, the persons referred to in column 2 of the item may, subject to sections 540 and 544 and Subdivision B, apply to the courts referred to in column 3 of the item for orders in relation to a contravention or proposed contravention of the provision, including the maximum penalty referred to in column 4 of the item.

Note 1: Civil remedy provisions within a single Part may be grouped together in a single item of the table.

Note 2: Applications cannot be made by an inspector in relation to a contravention of a civil remedy provision by a person in certain cases where an undertaking or compliance notice has been given (see subsections 715(4) and 716(4A)).

Note 3: The regulations may also prescribe persons for the purposes of an item in column 2 of the table (see subsection 540(8)).

Note 3A: The penalties referred to in column 4 of the table are adjusted for bodies corporate and for contraventions associated with underpayment amounts (see section 546).

Note 4: See section 557A in relation to a serious contravention of a civil remedy provision.

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
<b>Part 2-1—Core provisions</b>				
1	44	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
2	45 (other than in relation to a contravention or proposed contravention of an outworker term)	(a) an employee; (b) an employer; (c) an employee organisation; (d) an employer organisation; (e) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
3	45 (in relation to a contravention or proposed contravention of an outworker term)	(a) an outworker; (b) an employer; (c) an outworker entity; (d) an employee organisation; (e) an employer organisation; (f) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
4	50 (other than in relation to a contravention or proposed contravention of a term that would be an outworker term if it were included in a modern award)	(a) an employee; (b) an employer; (c) an employee organisation to which the enterprise agreement concerned applies; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units

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**Standing, jurisdiction and maximum penalties**

<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
5	50 (in relation to a contravention or proposed contravention of a term that would be an outworker term if it were included in a modern award)	(a) an employee; (b) an employer; (c) an employee organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units

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

5AA	65C(6)	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
5AAA	66MA(8)	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	300 penalty units
5AB	76C(7)	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units



## Section 539

<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
<b>Part 2-4—Enterprise agreements</b>				
5AC	177A(3)	(a) an employee; (b) a bargaining representative for the proposed enterprise agreement; (c) an inspector; (d) the General Manager; (e) the administrator of a scheme determined under subsection 323B(1) of the Registered Organisations Act	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	600 penalty units
5A	179(1) 179(5)	(a) an employee; (b) a bargaining representative for the proposed enterprise agreement; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
5B	180(4A) 180(4B) 180(4C)	(a) an employee; (b) a bargaining representative for the proposed enterprise agreement; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
5C	226A(6)	(a) an employee; (b) an employee organisation to which the enterprise agreement applied immediately before the termination of the agreement; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention —600 penalty units; or otherwise—60 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
6	233	(a) an employee who the proposed enterprise agreement will cover; (b) a bargaining representative for the proposed enterprise agreement; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
<b>Part 2-5—Workplace determinations</b>				
7	280	(a) an employee; (b) an employer; (c) an employee organisation to which the workplace determination concerned applies; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
<b>Part 2-6—Minimum wages</b>				
8	293	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
<b>Part 2-7—Equal remuneration</b>				
9	305	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
<b>Part 2-7A—Regulated labour hire arrangement orders</b>				
9A	306EC(1) 306ED(2) 306ED(4) 306EE(2) 306EE(3)	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of	for a serious contravention—600 penalty units; or otherwise—60 penalty units

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**Standing, jurisdiction and maximum penalties**

<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
	306F(2)		Australia (Division 2);	
	306H(3)		(c) an eligible	
	306N(3)		State or	
	306Q(7)		Territory	
	306S(1)		court	
	306SA(1)			
	306T			
	306U			
	306V			

**Part 2-9—Other terms and conditions of employment**

10	323(1)	(a) an employee;	(a) the Federal	for a serious
	323(3)	(b) an employee	Court;	contravention
	325(1)	organisation;	(b) the Federal	—600 penalty
	328(1)	(c) an inspector	Circuit and	units; or
	328(2)		Family	otherwise—60
	328(3)		Court of	penalty units
			Australia (Division 2);	
			(c) an eligible	
			State or	
			Territory	
			court	

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
10A	325(1A)	(a) a prospective employee; (b) an employee; (c) an employee organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
10B	333D	(a) a prospective employee; (b) an employee; (c) an employee organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
10C	333E	(a) a prospective employee; (b) an employee; (c) an employee organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
10D	333K	(a) a prospective employee; (b) an employee; (c) an employee organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
10E	333Q	(a) a person affected by the contravention; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
10F	333X(2)	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units



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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
<b>Part 3-1—General protections</b>				
11	340(1) 340(2) 343(1) 344 345(1) 346 348 349(1) 350(1) 350(2) 350(2A) 350A(1) 350B(1) 351(1) 352 353(1) 354(1) 354(3) 355 369(3)	(a) a person affected by the contravention; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
11A	357(1) 358 359	(a) a person affected by the contravention; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
11B	359B 359C	(a) a person affected by the contravention; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	300 penalty units
12	378	(a) a person to whom the costs are payable; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
<b>Part 3-2—Unfair dismissal</b>				
13	405	(a) a person affected by the contravention; (b) an employee organisation; (c) an employer organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
<b>Part 3-3—Industrial action</b>				
14	417(1)	(a) an employee; (b) an employer; (c) an employee organisation covered by the enterprise agreement or workplace determination concerned; (d) a person affected by the industrial action; (e) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
15	421(1)	(a) a person affected by the contravention; (b) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
16	434	an inspector	the Federal Court	60 penalty units
17	458(2)	(a) an employee; (b) an employer; (c) an applicant for the protected action ballot order; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	30 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
18	462(1) 462(3)	(a) an employee; (b) an employer; (c) an applicant for the protected action ballot order; (d) the protected action ballot agent (unless the protected action ballot agent is the Australian Electoral Commission); (da) if the protected action ballot agent is the Australian Electoral Commission— the Electoral Commissioner; (e) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	30 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
19	463(1) 463(2)	(a) an employee; (b) an employer; (c) an applicant for the protected action ballot order; (d) the protected action ballot agent (unless the protected action ballot agent is the Australian Electoral Commission); (da) if the protected action ballot agent is the Australian Electoral Commission— the Electoral Commissioner; (e) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
20	467(1)	(a) an employee; (b) an employer; (c) an applicant for the protected action ballot order; (d) the protected action ballot agent (unless the protected action ballot agent is the Australian Electoral Commission); (da) if the protected action ballot agent is the Australian Electoral Commission—the Electoral Commissioner; (e) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	30 penalty units
21	470(1)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
22	473(1) 473(2)	(a) an employer; (b) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
23	474(1)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
24	475(1) 475(2)	(a) an employer; (b) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
<b>Part 3-4—Right of entry</b>				
25	482(3) 483(4) 483B(4) 483C(5) 483D(4) 483E(5) 494(1) 495(1) 496 497 498 499 500 501 502(1)	(a) a person affected by the contravention; (b) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
25A	503(1)	(a) a person affected by the contravention; (b) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	for a contravention by a removed person—600 penalty units; or otherwise—60 penalty units
25B	504 506 509 521C(3) 521D(3)	(a) a person affected by the contravention; (b) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units



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**Standing, jurisdiction and maximum penalties**

<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
26	517(1)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units

**Part 3-5—Stand down**

27	527	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
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**Part 3-5A—Prohibiting sexual harassment in connection with work**

27A	527D(1)	(a) a person affected by the contravention; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2);	60 penalty units
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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
27B	527K	(a) a person affected by the contravention; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
27C	527S(4)	a person affected by the contravention;	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2);	60 penalty units
<b>Part 3-6—Other rights and responsibilities</b>				
28	530(4)	(a) an employee; (b) a registered employee association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	30 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
29	535(1) 535(2) 535(4) 536(1) 536(2) 536(3)	(a) an employee; (b) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
29AA	536AA(1) 536AA(2)	(a) an employee organisation; (b) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
<b>Part 3A-2—Minimum standards for regulated workers</b>				
29AB	536JB	(a) a regulated worker covered by the relevant minimum standards order; (b) a regulated business covered by the relevant minimum standards order; (c) an organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
<b>Part 3A-3—Unfair deactivation and unfair termination</b>				
29AC	536MG	(a) a party to the relevant services contract; (b) a digital labour platform operator that arranged or facilitated entry into the relevant services contract; (c) an organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
<b>Part 3A-4—Collective agreements</b>				
29AD	536JJ	(a) a regulated worker covered by the collective agreement; (b) a regulated business covered by the collective agreement; (c) an organisation	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
<b>Part 3A-5—Unfair contract terms of services contracts</b>				
29AE	536NK	(a) a party to the relevant services contract; (b) an organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
<b>Part 3B-2—Minimum standards for persons in a road transport contractual chain</b>				
29AF	536NP	(a) a person (the <i>first person</i> ) covered by the relevant road transport contractual chain order; (b) an organisation entitled to represent the interests of the first person; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
<b>Part 4-1—Civil remedies</b>				
29A	558B(1) 558B(2)	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
<b>Part 5-1—The Fair Work Commission</b>				
30	611(3)	(a) a person to whom the costs are payable; (b) an employee organisation; (c) an employer organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
<b>Part 5-2—Office of the Fair Work Ombudsman</b>				
30A	707A(1)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
31	711(3)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	30 penalty units

**Chapter 4** Compliance and enforcement

**Part 4-1** Civil remedies

**Division 2** Orders

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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
32	712(3)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
32A	712B(1)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	600 penalty units



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<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
33	716(5)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
33A	718A(1)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units

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## Section 539

<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
<b>Part 6-3—Extension of National Employment Standards entitlements</b>				
34	745 760	(a) an employee; (b) a registered employee association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
34AAA	757BA	(a) an employee; (b) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units

## Section 539

**Standing, jurisdiction and maximum penalties**

<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
34AA	757C	(a) an employee; (b) a registered employee association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units

**Part 6-3A—Transfer of business from a State public sector employer**

34A	768AG	(a) the transferring employee; (b) an employer; (c) an employee organisation; (d) an employer organisation; (e) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
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**Chapter 4** Compliance and enforcement**Part 4-1** Civil remedies**Division 2** Orders

## Section 539

<b>Standing, jurisdiction and maximum penalties</b>				
<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
34B	768BT	(a) the transferring employee; (b) an employer; (c) an employee organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
<b>Part 6-4—Additional provisions relating to termination of employment</b>				
35	772(1) 777(3)	(a) a person affected by the contravention; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
36	782	(a) a person to whom the costs are payable; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units

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**Standing, jurisdiction and maximum penalties**

<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
37	785(4)	(a) an employee; (b) a registered employee association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	30 penalty units

**Part 6-4B—Workers bullied at work**

38	789FG	(a) a person affected by the contravention; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
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- (3) The regulations may provide that a provision set out in the regulations is a ***civil remedy provision***.
- (4) If the regulations make provision as mentioned in subsection (3):
- (a) the regulations must set out:
- (i) the persons who would be referred to in column 2; and
  - (ii) the courts that would be referred to in column 3; and
  - (iii) the maximum penalty that would be referred to in column 4;
- of the table in subsection (2) if there were an item for the civil remedy provision in the table; and

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- (b) this Part has effect as if the matters referred to subparagraphs (a)(i) to (iii) were set out in such an item in the table.

Note: See section 798 for limits on the penalties that may be set out in the regulations.

**540 Limitations on who may apply for orders etc.**

*Employees, employers, outworkers and outworker entities*

- (1) The following persons may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if the person is affected by the contravention, or will be affected by the proposed contravention:
  - (a) an employee;
  - (aa) a prospective employee;
  - (b) an employer;
  - (c) an outworker;
  - (d) an outworker entity.

*Employee organisations and registered employee associations*

- (2) An employee organisation or a registered employee association may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision in relation to an employee, only if:
  - (a) the employee is affected by the contravention, or will be affected by the proposed contravention; and
  - (b) the organisation or association is entitled to represent the industrial interests of the employee.
- (3) However, subsection (2) does not apply in relation to:
  - (a) items 4, 7 and 14 in the table in subsection 539(2); or
  - (b) a contravention or proposed contravention of:
    - (i) an outworker term in a modern award; or
    - (ii) a term in an enterprise agreement that would be an outworker term if it were included in a modern award.

- (4) An employee organisation may apply for an order under this Division, in relation to a contravention or proposed contravention of:
- (a) an outworker term in a modern award; or
  - (b) a term in an enterprise agreement that would be an outworker term if it were included in a modern award;
- only if the employee organisation is entitled to represent the industrial interests of an outworker to whom the term relates.

*Employer organisations*

- (5) An employer organisation may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if the organisation has a member who is affected by the contravention, or who will be affected by the proposed contravention.

*Industrial associations*

- (6) An industrial association may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if:
- (a) the industrial association is affected by the contravention, or will be affected by the proposed contravention; or
  - (b) if the contravention is in relation to a person:
    - (i) the person is affected by the contravention, or will be affected by the proposed contravention; and
    - (ii) the industrial association is entitled to represent the industrial interests of the person.
- (7) If an item in column 2 of the table in subsection 539(2) refers to an industrial association then, to avoid doubt, an employee organisation, a registered employee association or an employer organisation may apply for an order, in relation to a contravention or proposed contravention of a civil remedy provision, only if the organisation or association is entitled to apply for the order under subsection (6).

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*Regulated workers and regulated businesses*

- (7A) The following persons may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if the person is affected by the contravention, or will be affected by the proposed contravention:
- (a) a regulated worker;
  - (b) a regulated business.

*Parties to services contracts*

- (7B) A person who is a party to a services contract to which an order under Division 4 of Part 3A-5 relates may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if the person is affected by the contravention, or will be affected by the proposed contravention.

*Persons in a road transport contractual chain*

- (7C) A person in a road transport contractual chain may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if:
- (a) the person is affected by the contravention, or will be affected by the proposed contravention; and
  - (b) the person is a party to a contract with another person covered by the relevant road transport contractual chain order, being a person who is alleged to have committed the contravention.

*Regulations*

- (8) The regulations may prescribe a person for the purposes of an item in column 2 of the table in subsection 539(2). The regulations may provide that the person is prescribed only in relation to circumstances specified in the regulations.



**541 Applications for orders in relation to safety net contractual entitlements**

- (1) This section applies if an inspector applies to a court for an order under this Division, in relation to an employer's contravention or proposed contravention of a provision or term referred to in subsection (3) in relation to an employee.
- (2) The inspector may also apply to the court, on behalf of the employee, for an order in relation to the employer's contravention, or proposed contravention, of a safety net contractual entitlement of the employee.
- (3) The provisions and terms are the following:
  - (a) a provision of the National Employment Standards;
  - (b) a term of a modern award;
  - (c) a term of an enterprise agreement;
  - (d) a term of a workplace determination;
  - (e) a term of a national minimum wage order;
  - (f) a term of an equal remuneration order.

**542 Entitlements under contracts**

- (1) For the purposes of this Part, a safety net contractual entitlement of a national system employer or a national system employee, as in force from time to time, also has effect as an entitlement of the employer or employee under this Act.
- (2) The entitlement has effect under this Act subject to any modifications, by a law of the Commonwealth (including this Act or a fair work instrument), a State or a Territory, of the safety net contractual entitlement.

**543 Applications for orders in relation to statutory entitlements derived from contracts**

A national system employer or a national system employee may apply to the Federal Court or the Federal Circuit and Family Court

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of Australia (Division 2) to enforce an entitlement of the employer or employee arising under subsection 542(1).

**544 Time limit on applications**

A person may apply for an order under this Division in relation to a contravention of one of the following only if the application is made within 6 years after the day on which the contravention occurred:

- (a) a civil remedy provision;
- (b) a safety net contractual entitlement;
- (c) an entitlement arising under subsection 542(1).

Note 1: This section does not apply in relation to general protections court applications, sexual harassment court applications or unlawful termination court applications (see subparagraphs 370(a)(ii), 527T(1)(a)(ii) and 778(a)(ii)).

Note 2: For time limits on orders relating to underpayments, see subsection 545(5).

**Subdivision B—Orders**

**545 Orders that can be made by particular courts**

*Federal Court and Federal Circuit and Family Court of Australia (Division 2)*

- (1) The Federal Court or the Federal Circuit and Family Court of Australia (Division 2) may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.

Note 1: For the court's power to make pecuniary penalty orders, see section 546.

Note 2: For limitations on orders in relation to costs, see section 570.

Note 3: The Federal Court and the Federal Circuit and Family Court of Australia (Division 2) may grant injunctions in relation to industrial action under subsections 417(3) and 421(3).

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Note 4: There are limitations on orders that can be made in relation to contraventions of subsection 463(1) or (2) (which deals with protected action ballot orders) (see subsection 463(3)).

- (2) Without limiting subsection (1), orders the Federal Court or Federal Circuit and Family Court of Australia (Division 2) may make include the following:
- (a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;
  - (b) an order awarding compensation for loss that a person has suffered because of the contravention;
  - (c) an order for reinstatement of a person;
  - (d) an order requiring a person to comply, either wholly or partly, with a notice (other than an infringement notice) given to the person by an inspector or the Fair Work Ombudsman.

*Eligible State or Territory courts*

- (3) An eligible State or Territory court may order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:
- (a) the employer was required to pay the amount under this Act or a fair work instrument; and
  - (b) the employer has contravened a civil remedy provision by failing to pay the amount.

Note 1: For the court's power to make pecuniary penalty orders, see section 546.

Note 2: For limitations on orders in relation to costs, see section 570.

- (3A) An eligible State or Territory court may order an outworker entity to pay an amount to, or on behalf of, an outworker if the court is satisfied that:
- (a) the outworker entity was required to pay the amount under a modern award; and
  - (b) the outworker entity has contravened a civil remedy provision by failing to pay the amount.

Note 1: For the court's power to make pecuniary penalty orders, see section 546.

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Note 2: For limitations on orders in relation to costs, see section 570.

*When orders may be made*

- (4) A court may make an order under this section:
- (a) on its own initiative, during proceedings before the court; or
  - (b) on application.

*Time limit for orders in relation to underpayments*

- (5) A court must not make an order under this section in relation to an underpayment that relates to a period that is more than 6 years before the proceedings concerned commenced.

**545A Orders relating to casual loading amounts**

- (1) This section applies if:
- (a) a person is employed by an employer in circumstances where the employment is described as casual employment; and
  - (b) the employer pays the person an identifiable amount (the **loading amount**) paid to compensate the person for not having one or more relevant entitlements during a period (the **employment period**); and
  - (c) during the employment period, the person was not a casual employee; and
  - (d) the person (or another person for the benefit of the person) makes a claim to be paid an amount for one or more of the relevant entitlements with respect to the employment period.

Note: For the purposes of paragraph (d), another person making a claim for the benefit of the person could include an inspector or an employee organisation.

- (2) When making any orders in relation to the claim, a court must reduce (but not below nil) any amount payable by the employer to the person for the relevant entitlements (the **claim amount**) by an amount equal to the loading amount.

Note: If the claim is below a certain amount, the person may choose to use the small claims procedure: see section 548.

- (3) Despite subsection (2), the court may reduce the claim amount by an amount equal to a proportion (which may be nil) of the loading amount the court considers appropriate, having regard only to:
- (a) if a term of the fair work instrument or contract of employment under which the loading amount is paid specifies the relevant entitlements the loading amount is compensating for and specifies the proportion of the loading amount attributable to each such entitlement—that term (including those proportions); or
  - (b) if a term of the fair work instrument or contract of employment under which the loading amount is paid specifies the relevant entitlements the loading amount is compensating for but does not specify the proportion of the loading amount attributable to each such entitlement—that term and what would be an appropriate proportion of the loading amount attributable to each of those entitlements in all the circumstances; or
  - (c) if paragraph (a) or (b) does not apply—the entitlements referred to in subsection (4) and what would be an appropriate proportion of the loading amount attributable to each of those entitlements in all the circumstances.
- (4) A reference in this section to a **relevant entitlement** is a reference to an entitlement under the National Employment Standards, a fair work instrument or a contract of employment to any of the following:
- (a) paid annual leave;
  - (b) paid personal/carer's leave;
  - (c) paid compassionate leave;
  - (d) payment for absence on a public holiday;
  - (e) payment in lieu of notice of termination;
  - (f) redundancy pay.
- (5) To avoid doubt, an entitlement referred to in subsection (4) includes any such entitlement that has accrued but is untaken.

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**546 Pecuniary penalty orders**

- (1) The Federal Court, the Federal Circuit and Family Court of Australia (Division 2) or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

Note 1: Pecuniary penalty orders cannot be made in relation to conduct that contravenes a term of a modern award, a national minimum wage order or an enterprise agreement only because of the retrospective effect of a determination (see subsections 167(3) and 298(2)).

Note 2: Pecuniary penalty orders cannot be made in relation to conduct that contravenes a term of an enterprise agreement only because of the retrospective effect of an amendment made under paragraph 227B(3)(b) (see subsection 227E(2)).

*Determining amount of pecuniary penalty*

- (2) Subject to this section, the pecuniary penalty must not be more than:
- (a) if the person is an individual—the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2); or
  - (b) if the person is a body corporate—5 times the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2).
- (2A) Despite paragraph (2)(b) and subsection (2AA), if:
- (a) the civil remedy provision is a selected civil remedy provision; and
  - (b) the person is a body corporate; and
  - (c) when the application for the order is made, the person is not a small business employer; and
  - (d) the contravention is associated with an underpayment amount; and
  - (e) the application specifies that the applicant wants the maximum penalty to be calculated based on a multiple of the underpayment amount; and

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- (f) the person is not taken to have contravened the civil remedy provision under section 550 (person involved in a contravention);

the pecuniary penalty must not be more than the greater of the following:

- (g) the amount worked out in accordance with subsection (2AA);
- (h) 3 times the underpayment amount.

Note: For when contravention of a civil remedy provision is associated with an underpayment amount, see section 546A.

(2AA) Despite paragraph (2)(b), if:

- (a) the civil remedy provision is a selected civil remedy provision; and
- (b) the person is a body corporate; and
- (c) when the application for the order is made, the person is not a small business employer;

the pecuniary penalty must not be more than 5 times the amount worked out in accordance with paragraph (2)(b).

*Payment of penalty*

- (3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:
  - (a) the Commonwealth; or
  - (b) a particular organisation; or
  - (c) a particular person.

*Recovery of penalty*

- (4) The pecuniary penalty may be recovered as a debt due to the person to whom the penalty is payable.

*No limitation on orders*

- (5) To avoid doubt, a court may make a pecuniary penalty order in addition to one or more orders under section 545.

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**546A Underpayment amounts associated with contravention of civil remedy provisions**

- (1) A contravention of a civil remedy provision is *associated with an underpayment amount* if:
  - (a) an employer is required to pay an amount (a *required amount*) to, on behalf of, or for the benefit of, an employee under this Act, a fair work instrument or a transitional instrument (as continued in existence by Schedule 3 to the Transitional Act); and
  - (b) the employer engages in conduct; and
  - (c) the conduct results in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment; and
  - (d) the failure is related to the contravention.
- (2) The *underpayment amount* the contravention is associated with is, to the extent it can be determined by the court, the difference between:
  - (a) the required amount mentioned in paragraph (1)(a); and
  - (b) the amount (including a nil amount) the employer actually paid to, on behalf of, or for the benefit of, the employee on account of the required amount.

**547 Interest up to judgment**

- (1) This section applies to an order (other than a pecuniary penalty order) under this Division in relation to an amount that a person was required to pay to, or on behalf of, another person under this Act or a fair work instrument.
- (2) In making the order the court must, on application, include an amount of interest in the sum ordered, unless good cause is shown to the contrary.
- (3) Without limiting subsection (2), in determining the amount of interest, the court must take into account the period between the



day the relevant cause of action arose and the day the order is made.

## **Division 3—Small claims procedure**

### **548 Plaintiffs may choose small claims procedure**

(1) Proceedings are to be dealt with as small claims proceedings under this section if:

- (a) a person applies for an order (other than a pecuniary penalty order) under Division 2 from a magistrates court or the Federal Circuit and Family Court of Australia (Division 2); and
- (b) the order relates to an amount referred to in subsection (1A); and
- (c) the person indicates, in a manner prescribed by the regulations or by the rules of the court, that he or she wants the small claims procedure to apply to the proceedings.

(1A) The amounts are as follows:

- (a) an amount that an employer was required to pay to, or on behalf of, an employee:
  - (i) under this Act or a fair work instrument; or
  - (ii) because of a safety net contractual entitlement; or
  - (iii) because of an entitlement of the employee arising under subsection 542(1);
- (b) an amount that an outworker entity was required to pay to, or on behalf of, an outworker under a modern award.

(1B) Proceedings are also to be dealt with as small claims proceedings under this section if:

- (a) a person applies for an order (other than a pecuniary penalty order) under Division 2 from a magistrates court or the Federal Circuit and Family Court of Australia (Division 2) in connection with a dispute relating to one or more of the following matters:
  - (v) whether a person has contravened subsection 333E(1) (limitations on fixed term contracts);

- (vi) whether subsection 333G(1) (effect of entering prohibited fixed term contract) applies in relation to a contract; and
  - (b) the person applying for the order indicates, in a manner prescribed by the regulations or by the rules of the court, that he or she wants the small claims procedure to apply to the proceedings.
- (1C) Proceedings are also to be dealt with as small claims proceedings under this section if:
- (a) a person applies for an order (other than a pecuniary penalty order) under Division 2 from a magistrates court or the Federal Circuit and Family Court of Australia (Division 2) in connection with a dispute; and
  - (b) the dispute relates to whether a person was a casual employee of an employer when the person commenced employment with that employer; and
  - (c) the person applying for the order indicates, in a manner prescribed by the regulations or by the rules of the court, that the person wants the small claims procedure to apply to the proceedings.

Note: Orders that a court may make under Division 2 in relation to small claims proceedings under this subsection may include a declaration that the employee was a casual employee, a part-time employee or a full-time employee when the employee commenced employment with the employer.

*Limits on award*

- (2) In small claims proceedings, the court may not award more than:
- (a) \$100,000; or
  - (b) if a higher amount is prescribed by the regulations—that higher amount.
- (2A) Interest awarded under section 547 does not count towards the maximum amount that the court may award under subsection (2) of this section.

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*Procedure*

- (3) In small claims proceedings, the court is not bound by any rules of evidence and procedure and may act:
  - (a) in an informal manner; and
  - (b) without regard to legal forms and technicalities.
- (4) At any stage of the small claims proceedings, the court may amend the papers commencing the proceedings if sufficient notice is given to any party adversely affected by the amendment.

*Legal representation*

- (5) A party to small claims proceedings may be represented in the proceedings by a lawyer only with the leave of the court.
- (6) If the court grants leave for a party to the proceedings to be represented by a lawyer, the court may, if it considers appropriate, do so subject to conditions designed to ensure that no other party is unfairly disadvantaged.
- (7) For the purposes of this section, a person is taken not to be represented by a lawyer if the lawyer is an employee or officer of the person.

*Representation by an industrial association*

- (8) The regulations may provide for a party to small claims proceedings to be represented in the proceedings, in specified circumstances, by an official of an industrial association.
- (9) However, if small claims proceedings are heard in a court of a State, the regulations may so provide only if the law of the State allows a party to be represented in that court in those circumstances by officials of bodies representing interests related to the matters in dispute.

*Costs for filing fees paid in relation to the proceedings*

- (10) If the court makes an order (the ***small claims order***) mentioned in subsection (1) against a party to small claims proceedings, the court may make an order as to costs against the party for any filing fees paid to the court by the party that applied for the small claims order.
- (11) Subsection (10) applies despite section 570.

## Division 4—General provisions relating to civil remedies

### 549 Contravening a civil remedy provision is not an offence

A contravention of a civil remedy provision is not an offence.

### 550 Involvement in contravention treated in same way as actual contravention

- (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

Note: If a person (the *involved person*) is taken under this subsection to have contravened a civil remedy provision, the involved person's contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)).

- (2) A person is *involved in* a contravention of a civil remedy provision if, and only if, the person:
- (a) has aided, abetted, counselled or procured the contravention; or
  - (b) has induced the contravention, whether by threats or promises or otherwise; or
  - (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
  - (d) has conspired with others to effect the contravention.

### 551 Civil evidence and procedure rules for proceedings relating to civil remedy provisions

A court must apply the rules of evidence and procedure for civil matters when hearing proceedings relating to a contravention, or proposed contravention, of a civil remedy provision.

### **552 Civil proceedings after criminal proceedings**

A court must not make a pecuniary penalty order against a person for a contravention of a civil remedy provision if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention.

### **553 Criminal proceedings during civil proceedings**

- (1) Proceedings for a pecuniary penalty order against a person for a contravention of a civil remedy provision are stayed if:
  - (a) criminal proceedings are commenced or have already commenced against the person for an offence; and
  - (b) the offence is constituted by conduct that is substantially the same as the conduct in relation to which the order would be made.
- (2) The proceedings for the order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings for the order are dismissed.

### **554 Criminal proceedings after civil proceedings**

Criminal proceedings may be commenced against a person for conduct that is substantially the same as conduct constituting a contravention of a civil remedy provision regardless of whether an order has been made against the person under Division 2.

### **555 Evidence given in proceedings for pecuniary penalty not admissible in criminal proceedings**

- (1) Evidence of information given, or evidence of production of documents, by an individual is not admissible in criminal proceedings against the individual if:
  - (a) the individual previously gave the information or produced the documents in proceedings for a pecuniary penalty order

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- against the individual for a contravention of a civil remedy provision (whether or not the order was made); and
- (b) the conduct alleged to constitute the offence is substantially the same as the conduct in relation to which the order was sought.
- (2) However, this does not apply to criminal proceedings in relation to the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order.

**556 Civil double jeopardy**

If a person is ordered to pay a pecuniary penalty under a civil remedy provision in relation to particular conduct, the person is not liable to be ordered to pay a pecuniary penalty under some other provision of a law of the Commonwealth in relation to that conduct.

**Note:** A court may make other orders, such as an order for compensation, in relation to particular conduct even if the court has made a pecuniary penalty order in relation to that conduct (see subsection 546(5)).

**557 Course of conduct**

- (1) For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), taken to constitute a single contravention if:
- (a) the contraventions are committed by the same person; and
- (b) the contraventions arose out of a course of conduct by the person.
- (2) The civil remedy provisions are the following:
- (a) section 44 (which deals with contraventions of the National Employment Standards);
- (b) section 45 (which deals with contraventions of modern awards);
- (c) section 50 (which deals with contraventions of enterprise agreements);



- (d) section 280 (which deals with contraventions of workplace determinations);
- (e) section 293 (which deals with contraventions of national minimum wage orders);
- (f) section 305 (which deals with contraventions of equal remuneration orders);
- (fa) subsection 306F(2) (which deals with the protected rate of pay payable to employees covered by a regulated labour hire arrangement order);
- (fb) subsection 306H(3) (which deals with the obligations of regulated hosts covered by a regulated labour hire arrangement order);
- (fc) subsection 306N(3) (which deals with the contravention of alternative protected rate of pay orders);
- (fd) subsection 306Q(7) (which deals with the contravention of arbitrated protected rate of pay orders);
- (g) subsection 323(1) (which deals with methods and frequency of payment);
- (h) subsection 323(3) (which deals with methods of payment specified in modern awards or enterprise agreements);
- (i) subsection 325(1) (which deals with unreasonable requirements on employees to spend or pay amounts);
- (ia) subsection 325(1A) (which deals with unreasonable requirements on prospective employees to spend or pay amounts);
- (j) subsection 417(1) (which deals with industrial action before the nominal expiry date of an enterprise agreement etc.);
- (k) subsection 421(1) (which deals with contraventions of orders in relation to industrial action);
- (l) section 434 (which deals with contraventions of Ministerial directions in relation to industrial action);
- (la) subsection 527D(1) (which deals with sexual harassment in connection with work);
- (m) subsection 530(4) (which deals with notifying Centrelink of certain proposed dismissals);

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- (n) subsections 535(1), (2) and (4) (which deal with employer obligations in relation to employee records);
  - (o) subsections 536(1), (2) and (3) (which deal with employer obligations in relation to pay slips);
  - (oa) subsections 536AA(1) and (2) (which deal with employer obligations in relation to advertising rates of pay);
  - (ob) section 536JB (which deals with contraventions of minimum standards orders);
  - (oc) section 536JJ (which deals with contraventions of collective agreements);
  - (od) section 536NK (which deals with contraventions of orders under Division 4 of Part 3A-5);
  - (oe) section 536NP (which deals with contraventions of road transport contractual chain orders);
  - (p) section 745 (which deals with contraventions of the extended parental leave provisions);
  - (paa) section 757BA (which deals with employer obligations in relation to pay slips relating to paid leave to which the person is entitled because of section 757B);
  - (pa) section 757C (which deals with contraventions of the extended paid family and domestic violence leave provisions);
  - (q) section 760 (which deals with contraventions of the extended notice of termination provisions);
  - (r) subsection 785(4) (which deals with notifying Centrelink of certain proposed terminations);
  - (s) any other civil remedy provisions prescribed by the regulations.
- (3) Subsection (1) does not apply to a contravention of a civil remedy provision that is committed by a person after a court has imposed a pecuniary penalty on the person for an earlier contravention of the provision.

### **557A Serious contravention of civil remedy provisions**

- (1) A contravention of a civil remedy provision by a person is a ***serious contravention*** if:
- (a) the person knowingly contravened the provision; or
  - (b) the person was reckless as to whether the contravention would occur.

Note: For the liability of bodies corporate for serious contraventions, see section 557B.

Example: Generally, subsection 323(1) requires an employer to pay an employee the full amount payable to the employee in relation to the performance of work.

A contravention of subsection 323(1) is a serious contravention if the employer knowingly does not pay the employee in full or is reckless as to whether the failure would occur. It does not matter if the employer does not know the exact amount of the underpayment.

- (2) For the purposes of subsection (1), a person is reckless as to whether a contravention would occur if:
- (a) the person is aware of a substantial risk that the contravention would occur; and
  - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

#### *Involvement in a serious contravention*

- (5A) A person (the ***involved person***) who is involved in a contravention of a civil remedy provision by another person (the ***principal***) commits a ***serious contravention*** of the provision only if:
- (a) the principal's contravention was a serious contravention; and
  - (b) the involved person knew that the principal's contravention was a serious contravention.

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*Application for a serious contravention order and alternative orders*

- (6) If a person is applying for an order in relation to a serious contravention of a civil remedy provision, the person's application under subsection 539(2) must specify the relevant serious contravention.
- (7) If, in proceedings for an order in relation to a serious contravention of a civil remedy provision, the court:
  - (a) is not satisfied that the person has committed a serious contravention against that provision; and
  - (b) is satisfied that the person has contravened that provision; the court may make a pecuniary penalty order against the person not for the serious contravention but for the contravention of that provision.

**557B Liability of bodies corporate for serious contravention**

- (1) For the purposes of subsection 557A(1), a body corporate knowingly contravenes a civil remedy provision if the body corporate expressly, tacitly or impliedly authorised the contravention.
- (2) This section does not limit section 793.

**557C Presumption where records not provided**

- (1) If:
  - (a) in proceedings relating to a contravention by an employer of a civil remedy provision referred to in subsection (3), an applicant makes an allegation in relation to a matter; and
  - (b) the employer was required:
    - (i) by subsection 535(1) or (2) to make and keep a record; or
    - (ii) by regulations made for the purposes of subsection 535(3) to make available for inspection a record; or

- (iii) by subsection 536(1) or (2) to give a pay slip;  
in relation to the matter; and
  - (c) the employer failed to comply with the requirement;  
the employer has the burden of disproving the allegation.
- (2) Subsection (1) does not apply if the employer provides a  
reasonable excuse as to why there has not been compliance with  
subsection 557C(1)(b).
- (3) The civil remedy provisions are the following:
  - (a) section 44 (which deals with contraventions of the National  
Employment Standards);
  - (b) section 45 (which deals with contraventions of modern  
awards);
  - (c) section 50 (which deals with contraventions of enterprise  
agreements);
  - (d) section 280 (which deals with contraventions of workplace  
determinations);
  - (e) section 293 (which deals with contraventions of national  
minimum wage orders);
  - (f) section 305 (which deals with contraventions of equal  
remuneration orders);
  - (g) subsection 323(1) (which deals with methods and frequency  
of payment);
  - (h) subsection 323(3) (which deals with methods of payment  
specified in modern awards or enterprise agreements);
  - (i) subsection 325(1) (which deals with unreasonable  
requirements to spend or pay amounts);
  - (j) any other civil remedy provisions prescribed by the  
regulations.

## **558 Regulations dealing with infringement notices**

- (1) The regulations may provide for a person who is alleged to have  
contravened a civil remedy provision to pay a penalty to the  
Commonwealth as an alternative to civil proceedings.

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- (2) The penalty must not exceed one-tenth of the maximum penalty that a court could have ordered the person to pay under section 546 if the court was satisfied that the person had contravened that provision.

**Division 4A—Responsibility of responsible franchisor  
entities and holding companies for certain  
contraventions**

**558A Meaning of *franchisee entity* and *responsible franchisor entity***

- (1) A person is a *franchisee entity* of a franchise if:
  - (a) the person is a franchisee (including a subfranchisee) in relation to the franchise; and
  - (b) the business conducted by the person under the franchise is substantially or materially associated with intellectual property relating to the franchise.
- (2) A person is a *responsible franchisor entity* for a franchisee entity of a franchise if:
  - (a) the person is a franchisor (including a subfranchisor) in relation to the franchise; and
  - (b) the person has a significant degree of influence or control over the franchisee entity's affairs.

**558B Responsibility of responsible franchisor entities and holding  
companies for certain contraventions**

*Responsible franchisor entities*

- (1) A person contravenes this subsection if:
  - (a) an employer who is a franchisee entity of a franchise contravenes a civil remedy provision referred to in subsection (7); and
  - (b) the person is a responsible franchisor entity for the franchisee entity; and
  - (c) the contravention by the franchisee entity occurs in the franchisee entity's capacity as a franchisee entity; and
  - (d) either:

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- (i) the responsible franchisor entity or an officer (within the meaning of the *Corporations Act 2001*) of the responsible franchisor entity knew or could reasonably be expected to have known that the contravention by the franchisee entity would occur; or
- (ii) at the time of the contravention by the franchisee entity, the responsible franchisor entity or an officer (within the meaning of the *Corporations Act 2001*) of the responsible franchisor entity knew or could reasonably be expected to have known that a contravention by the franchisee entity of the same or a similar character was likely to occur.

Note: This subsection is a civil remedy provision (see this Part).

*Holding companies*

- (2) A person contravenes this subsection if:
- (a) the person is a body corporate; and
  - (b) a subsidiary (within the meaning of the *Corporations Act 2001*) of the body corporate who is an employer contravenes a civil remedy provision referred to in subsection (7); and
  - (c) either:
    - (i) the body corporate or an officer (within the meaning of the *Corporations Act 2001*) of the body corporate knew or could reasonably be expected to have known that the contravention by the subsidiary would occur; or
    - (ii) at the time of the contravention by the subsidiary, the body corporate or an officer (within the meaning of the *Corporations Act 2001*) of the body corporate knew or could reasonably be expected to have known that a contravention by the subsidiary of the same or a similar character was likely to occur.

Note: This subsection is a civil remedy provision (see this Part).



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*Reasonable steps to prevent a contravention of the same or a similar character*

- (3) A person does not contravene subsection (1) or (2) if, as at the time of the contravention referred to in paragraph (1)(a) or (2)(b), the person had taken reasonable steps to prevent a contravention by the franchisee entity or subsidiary of the same or a similar character.
- (4) For the purposes of subsection (3), in determining whether a person took reasonable steps to prevent a contravention by a franchisee entity or subsidiary (the **contravening employer**) of the same or a similar character, a court may have regard to all relevant matters, including the following:
- (a) the size and resources of the franchise or body corporate (as the case may be);
  - (b) the extent to which the person had the ability to influence or control the contravening employer's conduct in relation to the contravention referred to in paragraph (1)(a) or (2)(b) or a contravention of the same or a similar character;
  - (c) any action the person took directed towards ensuring that the contravening employer had a reasonable knowledge and understanding of the requirements under the applicable provisions referred to in subsection (7);
  - (d) the person's arrangements (if any) for assessing the contravening employer's compliance with the applicable provisions referred to in subsection (7);
  - (e) the person's arrangements (if any) for receiving and addressing possible complaints about alleged underpayments or other alleged contraventions of this Act within:
    - (i) the franchise; or
    - (ii) the body corporate or any subsidiary (within the meaning of the *Corporations Act 2001*) of the body corporate;as the case may be;
  - (f) the extent to which the person's arrangements (whether legal or otherwise) with the contravening employer encourage or

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require the contravening employer to comply with this Act or any other workplace law.

- (5) Subsection (4) does not limit subsection (3).

*Civil proceedings in relation to contravention by franchisee entity or subsidiary not required*

- (6) To avoid doubt, a reference in paragraph (1)(a) or (2)(b) to a contravention by a franchisee entity or subsidiary includes any contravention whether or not an order has been sought or made against the franchisee entity or subsidiary under Division 2 for the contravention.

*Relevant civil remedy provisions*

- (7) The civil remedy provisions are the following:
- (a) section 44 (which deals with contraventions of the National Employment Standards);
  - (b) section 45 (which deals with contraventions of modern awards);
  - (c) section 50 (which deals with contraventions of enterprise agreements);
  - (d) section 280 (which deals with contraventions of workplace determinations);
  - (e) section 293 (which deals with contraventions of national minimum wage orders);
  - (f) section 305 (which deals with contraventions of equal remuneration orders);
  - (g) subsection 323(1) (which deals with methods and frequency of payment);
  - (h) subsection 323(3) (which deals with methods of payment specified in modern awards or enterprise agreements);
  - (i) subsection 325(1) (which deals with unreasonable requirements on employees to spend or pay amounts);

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- (ia) subsection 325(1A) (which deals with unreasonable requirements on prospective employees to spend or pay amounts);
- (j) subsection 328(1), (2) or (3) (which deal with employer obligations in relation to guarantees of annual earnings);
- (k) subsection 357(1) (which deals with misrepresenting employment as an independent contracting arrangement);
- (l) section 358 (which deals with dismissing an employee to engage as an independent contractor);
- (m) section 359 (which deals with misrepresentations to engage an individual as an independent contractor);
- (n) subsection 535(1), (2) or (4) (which deal with employer obligations in relation to employee records);
- (o) subsection 536(1), (2) or (3) (which deal with employer obligations in relation to pay slips).

**558C Right of responsible franchisor entity or holding company to recover**

- (1) This section applies if:
  - (a) a person pays an amount to, or on behalf of, an employee pursuant to an order under subsection 545(1) relating to a contravention by the person of subsection 558B(1) or (2) in relation to a franchisee entity or subsidiary (the **contravening employer**); and
  - (b) the person has not otherwise recovered from the contravening employer an amount (the **recoverable amount**) equal to the amount paid by the person.
- (2) The person may commence proceedings against the contravening employer for payment to the person of so much of the recoverable amount as has not been recovered.
- (3) The proceedings may be commenced in:
  - (a) the Federal Court; or
  - (b) the Federal Circuit and Family Court of Australia (Division 2); or

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- (c) an eligible State or Territory court.
- (4) The court may make an order requiring the contravening employer to pay the person the recoverable amount (or so much of it as has not been recovered from the contravening employer), if the court is satisfied that this section applies as referred to in subsection (1).
- (5) In making the order, the court must, on application, include an amount of interest in the sum ordered, unless good cause is shown to the contrary.
- (6) Without limiting subsection (5), in determining the amount of interest, the court must take into account the period between the day when the amount referred to in paragraph (1)(a) was paid by the person and the day when the order is made.
- (7) Proceedings cannot be commenced under this section more than 6 years after the time when the person paid the amount referred to in paragraph (1)(a).

## **Division 5—Unclaimed money**

### **559 Unclaimed money**

#### *Payment to the Commonwealth*

- (1) An employer may pay an amount to the Commonwealth if:
  - (a) the employer was required to pay the amount to an employee under this Act or a fair work instrument; and
  - (b) the employee has left the employment of the employer without having been paid the amount; and
  - (c) the employer is unable to pay the amount to the employee because the employer does not know the employee's whereabouts.

#### *Discharge of employer*

- (2) Payment of the amount to the Commonwealth is a sufficient discharge to the employer, as against the employee, for the amount paid.

#### *Payment where money later claimed*

- (3) The Fair Work Ombudsman, on behalf of the Commonwealth, must pay an amount to a person if:
  - (a) the amount has been paid to the Commonwealth under this section; and
  - (b) the person has made a claim for the amount in accordance with the form prescribed by the regulations; and
  - (c) the Fair Work Ombudsman is satisfied that the person is entitled to the amount.

#### *Interest*

- (3A) If:
  - (a) an amount is paid to a person under subsection (3) at a particular time; and

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(b) the amount is at least \$100; and

(c) the amount is attributable to an amount that was paid to the Commonwealth under subsection (1) more than 6 months before that time;

the Fair Work Ombudsman, on behalf of the Commonwealth, must also pay to the person the amount of interest (if any) worked out in accordance with an instrument under subsection (3B).

(3B) The Minister may make an instrument for the purposes of subsection (3A).

(3C) An instrument under subsection (3B) may involve different rates of interest for different periods over which the interest accrues. For this purpose, *rate* includes a nil rate.

(3D) An instrument made under subsection (3B) is a legislative instrument.

*Appropriation of Consolidated Revenue Fund*

(4) The Consolidated Revenue Fund is appropriated for the purposes of subsection (3).

## **Part 4-2—Jurisdiction and powers of courts**

### **Division 1—Introduction**

#### **560 Guide to this Part**

This Part is about the jurisdiction and powers of the courts in relation to matters arising under this Act.

Divisions 2 and 3 confer jurisdiction on the Federal Court and the Federal Circuit and Family Court of Australia (Division 2). That jurisdiction is generally required to be exercised in the Fair Work Divisions of those courts.

Division 4 deals with intervention, costs, limitation on imprisonment, and regulations, in relation to proceedings in the Federal Court, the Federal Circuit and Family Court of Australia (Division 2) and, in some cases, a court of a State or Territory.

#### **561 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—Jurisdiction and powers of the Federal Court

### 562 Conferring jurisdiction on the Federal Court

Jurisdiction is conferred on the Federal Court in relation to any matter (whether civil or criminal) arising under this Act.

### 563 Exercising jurisdiction in the Fair Work Division of the Federal Court

The jurisdiction conferred on the Federal Court under section 562 is to be exercised in the Fair Work Division of the Federal Court if:

- (a) an application is made to the Federal Court under this Act; or
- (b) a writ of mandamus or prohibition or an injunction is sought in the Federal Court against a person holding office under this Act; or
- (c) a declaration is sought under section 21 of the *Federal Court of Australia Act 1976* in relation to a matter arising under this Act; or
- (d) an injunction is sought under section 23 of the *Federal Court of Australia Act 1976* in relation to a matter arising under this Act; or
- (e) a prosecution is instituted in the Federal Court under this Act; or
- (f) an appeal is instituted in the Federal Court from a judgment of the Federal Circuit and Family Court of Australia (Division 2) or a court of a State or Territory in a matter arising under this Act; or
- (g) proceedings in relation to a matter arising under this Act are transferred to the Federal Court from the Federal Circuit and Family Court of Australia (Division 2); or
- (h) the Federal Circuit and Family Court of Australia (Division 2) or a court of a State or Territory states a case or reserves a question for the consideration of the Federal Court in a matter arising under this Act; or



- (i) the President refers, under section 608 of this Act, a question of law to the Federal Court; or
- (j) the High Court remits a matter arising under this Act to the Federal Court.

## **564 No limitation on Federal Court's powers**

To avoid doubt, nothing in this Act limits the Federal Court's powers under section 21, 22 or 23 of the *Federal Court of Australia Act 1976*.

## **565 Appeals from eligible State or Territory courts**

*Appeals from original decisions of eligible State or Territory courts*

- (1) An appeal lies to the Federal Court from a decision of an eligible State or Territory court exercising jurisdiction under this Act.
- (1A) No appeal lies from a decision of an eligible State or Territory court exercising jurisdiction under this Act, except:
  - (a) if the court was exercising summary jurisdiction—an appeal, to that court or another eligible State or Territory court of the same State or Territory, as provided for by a law of that State or Territory; or
  - (b) in any case—an appeal as provided for by subsection (1).

*Appeals from appellate decisions of eligible State or Territory courts*

- (1B) An appeal lies to the Federal Court from a decision of an eligible State or Territory court made on appeal from a decision that:
  - (a) was a decision of that court or another eligible State or Territory court of the same State or Territory; and
  - (b) was made in the exercise of jurisdiction under this Act.
- (1C) No appeal lies from a decision to which subsection (1B) applies, except an appeal as provided for by that subsection.

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*Leave to appeal not required*

- (2) It is not necessary to obtain the leave of the Federal Court, or the court appealed from, in relation to an appeal under subsection (1) or (1B).

### **Division 3—Jurisdiction and powers of the Federal Circuit and Family Court of Australia (Division 2)**

#### **566 Conferring jurisdiction on the Federal Circuit and Family Court of Australia (Division 2)**

Jurisdiction is conferred on the Federal Circuit and Family Court of Australia (Division 2) in relation to any civil matter arising under this Act.

#### **567 Exercising jurisdiction in the Fair Work Division of the Federal Circuit and Family Court of Australia (Division 2)**

Jurisdiction conferred on the Federal Circuit and Family Court of Australia (Division 2) under section 566 is to be exercised in the Fair Work Division of the Court if:

- (a) an application is made to the Court under this Act; or
- (b) an injunction is sought under section 140 of the *Federal Circuit and Family Court of Australia Act 2021* in relation to a matter arising under this Act; or
- (c) a declaration is sought under section 141 of the *Federal Circuit and Family Court of Australia Act 2021* in relation to a matter arising under this Act; or
- (d) proceedings in relation to a matter arising under this Act are transferred to the Federal Circuit and Family Court of Australia (Division 2) from the Federal Court; or
- (e) the High Court remits a matter arising under this Act to the Federal Circuit and Family Court of Australia (Division 2).

#### **568 No limitation on powers of the Federal Circuit and Family Court of Australia (Division 2)**

To avoid doubt, nothing in this Act limits the powers of the Federal Circuit and Family Court of Australia (Division 2) under

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**Division 3** Jurisdiction and powers of the Federal Circuit and Family Court of Australia  
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section 139, 140 or 141 of the *Federal Circuit and Family Court of Australia Act 2021*.

## **Division 4—Miscellaneous**

### **569 Minister's entitlement to intervene**

- (1) The Minister may intervene on behalf of the Commonwealth in proceedings before a court (including a court of a State or Territory) in relation to a matter arising under this Act if the Minister believes it is in the public interest to do so.
- (2) If the Minister intervenes, the Minister is taken to be a party to the proceedings for the purposes of instituting an appeal from a judgment given in the proceedings.
- (3) Despite section 570, a court may make an order as to costs against the Commonwealth if:
  - (a) the Minister intervenes under subsection (1); or
  - (b) the Minister institutes an appeal from a judgment as referred to in subsection (2).

### **569A State or Territory Minister's entitlement to intervene**

- (1) The Minister of a State or Territory who has responsibility for workplace relations matters may intervene on behalf of the State or Territory in proceedings before a court (including a court of a State or Territory) in relation to a matter arising under this Act if he or she believes it is in the public interest of the State or Territory to do so.
- (2) If the Minister of a State or Territory who has responsibility for workplace relations matters intervenes, he or she is taken to be a party to the proceedings for the purposes of instituting an appeal from a judgment given in the proceedings.
- (3) Despite section 570, a court may make an order as to costs against a State or Territory if:
  - (a) the Minister of a State or Territory who has responsibility for workplace relations matters intervenes under subsection (1); or

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- (b) he or she institutes an appeal from a judgment as referred to in subsection (2).

**570 Costs only if proceedings instituted vexatiously etc.**

- (1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.

Note: The Commonwealth might be ordered to pay costs under section 569.  
A State or Territory might be ordered to pay costs under section 569A.

- (2) The party may be ordered to pay the costs only if:
- (a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
  - (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or
  - (c) the court is satisfied of both of the following:
    - (i) the party unreasonably refused to participate in a matter before the FWC;
    - (ii) the matter arose from the same facts as the proceedings.

**571 No imprisonment for failure to pay pecuniary penalty**

- (1) A court (including a court of a State or Territory) may not order a person to serve a sentence of imprisonment if the person fails to pay a pecuniary penalty imposed under this Act.
- (2) This section applies despite any other law of the Commonwealth, a State or a Territory.

**572 Regulations dealing with matters relating to court proceedings**

The regulations may provide for the fees to be charged in relation to proceedings in a court (including a court of a State or Territory) under this Act.

## **Chapter 5—Administration**

### **Part 5-1—The Fair Work Commission**

#### **Division 1—Introduction**

##### **573 Guide to this Part**

This Part is about the Fair Work Commission.

Division 2 establishes and confers functions on the FWC. The FWC consists of the President, Vice Presidents, Deputy Presidents, Commissioners and Expert Panel Members. Division 2 also confers functions on the President.

Division 3 deals with the conduct of matters before the FWC (such as applications, representation by lawyers, the FWC's decisions and appeals).

Division 4 deals with the organisation of the FWC, who may perform functions of the FWC and delegation of the FWC's functions and powers. Certain functions must be performed by a Full Bench or an Expert Panel.

Division 5 deals with the appointment, terms and conditions of FWC Members.

Division 6 deals with cooperation with the States.

Division 7 deals with the FWC's seal. It also deals with other powers and functions of the President and the General Manager (including in relation to annual reports, reports on making enterprise agreements, arrangements with certain courts, and disclosing information obtained by the FWC).

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Division 8 is about the General Manager of the FWC (whose function is to assist the President), staff of the FWC and others assisting the FWC.

Division 9 contains offences in relation to the FWC.

**574 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—Establishment and functions of the Fair Work Commission**

### **Subdivision A—Establishment and functions of the Fair Work Commission**

#### **575 Establishment of the Fair Work Commission**

- (1) The body known immediately before the commencement of this subsection as Fair Work Australia is continued in existence as the Fair Work Commission.

Note: See also subsection 25B(1) of the *Acts Interpretation Act 1901*.

- (2) The Fair Work Commission consists of:
- (a) the President; and
  - (aa) 2 Vice Presidents; and
  - (b) such number of Deputy Presidents as, from time to time, hold office under this Act; and
  - (c) such number of Commissioners as, from time to time, hold office under this Act; and
  - (d) such number of Expert Panel Members as, from time to time, hold office under this Act.

Note: The Fair Work Commission also has a General Manager and staff (see Division 8).

#### **576 Functions of the FWC**

- (1) The FWC has the functions conferred by this Act in relation to the following subject matters:
- (a) the National Employment Standards (Part 2-2);
  - (b) modern awards (Part 2-3);
  - (c) enterprise agreements (Part 2-4);
  - (d) workplace determinations (Part 2-5);
  - (e) minimum wages (Part 2-6);
  - (f) equal remuneration (Part 2-7);

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- (fa) regulated labour hire arrangement orders (Part 2-7A);
  - (g) transfer of business (Part 2-8);
  - (ga) other terms and conditions of employment (Part 2-9);
  - (h) general protections (Part 3-1);
  - (i) unfair dismissal (Part 3-2);
  - (j) industrial action (Part 3-3);
  - (k) right of entry (Part 3-4);
  - (l) stand down (Part 3-5);
  - (la) prohibiting sexual harassment in connection with work (Part 3-5A);
  - (m) other rights and responsibilities (Part 3-6);
  - (ma) minimum standards for regulated workers (Part 3A-2);
  - (mb) unfair deactivation or unfair termination of regulated workers (Part 3A-3);
  - (mc) collective agreements for regulated workers (Part 3A-4);
  - (md) unfair contract terms of services contracts (Part 3A-5);
  - (me) minimum standards for persons in a road transport contractual chain (Part 3B-2);
  - (n) the extension of the National Employment Standards entitlements (Part 6-3);
  - (na) transfer of business from a State public sector employer (Part 6-3A);
  - (o) unlawful termination protections (Part 6-4);
  - (p) special provisions about TCF outworkers (Part 6-4A);
  - (q) workers bullied at work (Part 6-4B);
  - (r) Coronavirus economic response (Part 6-4C).
- (2) The FWC also has the following functions:
- (aa) promoting cooperative and productive workplace relations and preventing disputes;
  - (ab) promoting good faith bargaining and the making of enterprise agreements;
    - (a) dealing with disputes as referred to in section 595;
    - (b) providing assistance and advice about its functions and activities;

- (c) providing administrative support in accordance with an arrangement under section 650 or 653A;
- (ca) mediating any proceedings, part of proceedings or matter arising out of any proceedings that, under section 53A of the *Federal Court of Australia Act 1976* or section 169 of the *Federal Circuit and Family Court of Australia Act 2021*, have been referred by the Fair Work Division of the Federal Court or Federal Circuit and Family Court of Australia (Division 2) to the FWC for mediation;
- (d) any other function conferred on the FWC by a law of the Commonwealth.

Note: Section 13 of the Registered Organisations Act confers an additional function on the FWC.

### **577 Performance of functions etc. by the FWC**

- (1) The FWC must perform its functions and exercise its powers in a manner that:
  - (a) is fair and just; and
  - (b) is quick, informal and avoids unnecessary technicalities; and
  - (c) is open and transparent; and
  - (d) promotes harmonious and cooperative workplace relations.

Note: The President also is responsible for ensuring that the FWC performs its functions and exercises its powers efficiently etc. (see section 581).

- (2) In performing its functions under paragraph 576(2)(b), the FWC must have regard to:
  - (a) the need for guidelines and other materials to be available in multiple languages; and
  - (b) the need for community outreach in multiple languages.

### **578 Matters the FWC must take into account in performing functions etc.**

In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:

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- (a) the objects of this Act, and any objects of the part of this Act;  
and
- (b) equity, good conscience and the merits of the matter; and
- (c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin.

**579 FWC has privileges and immunities of the Crown**

The FWC has the privileges and immunities of the Crown in right of the Commonwealth.

**580 Protection of FWC Members**

An FWC Member has, in performing his or her functions or exercising his or her powers as an FWC Member, the same protection and immunity as a Justice of the High Court.

Note: See also section 584B (which deals with protection of persons involved in handling etc. complaints about FWC Members).

**Subdivision B—Functions and powers of the President**

**581 Functions of the President**

The President is responsible for ensuring that the FWC performs its functions and exercises its powers in a manner that:

- (a) is efficient; and
- (b) adequately serves the needs of employers and employees throughout Australia; and
- (c) adequately serves the needs of persons covered by Chapter 3A; and
- (d) adequately serves the needs of persons covered by Chapter 3B.

Note: The President must perform his or her own functions and exercise his or her own powers in a manner that facilitates cooperation with prescribed State industrial authorities (see section 649).

### **581A Dealing with a complaint about an FWC Member**

- (1) Without limiting section 581 (which deals with the functions of the President), the President may:
- (a) deal, in accordance with subsection (2) of this section, with a complaint about the performance by another FWC Member of his or her duties; and
  - (b) take any measures that the President believes are reasonably necessary to maintain public confidence in the FWC, including (but not limited to) temporarily restricting the duties of the FWC Member.

Note 1: The complaint is a *complaint about an FWC Member* (see section 12).

Note 2: The Minister may also handle complaints about FWC Members (see section 641A).

- (2) The President may deal with a complaint about an FWC Member referred to in paragraph (1)(a) by doing either or both of the following:
- (a) deciding whether or not to handle the complaint and then doing one of the following:
    - (i) dismissing the complaint;
    - (ii) handling the complaint if the President has a relevant belief in relation to the complaint;
    - (iii) arranging for any other person to assist the President to handle the complaint if the President has a relevant belief in relation to the complaint;
  - (b) arranging for any other complaint handlers to decide whether or not to handle the complaint and then to do one of the following:
    - (i) dismiss the complaint;
    - (ii) handle the complaint if each of the complaint handlers has a relevant belief in relation to the complaint.

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Note 1: A complaint handler (other than the President) may handle a complaint by referring it to the President. The President may then do either or both of the things referred to in paragraph (2)(a) or (b) in respect of the complaint.

Note 2: For protections for persons involved in relation to handling a complaint about an FWC Member, see section 584B.

*Authorisation of persons or bodies*

- (3) The President may authorise, in writing, a person or a body to do one or more of the following in relation to a complaint about an FWC Member referred to in paragraph (1)(a) (whether in relation to a specific complaint or generally):
- (a) assist the President to handle the complaint or complaints;
  - (b) decide whether or not to handle the complaint or complaints;
  - (c) dismiss the complaint or complaints;
  - (d) handle the complaint or complaints.

*Referral to Minister*

- (4) The President must refer a complaint about an FWC Member referred to in paragraph (1)(a) to the Minister if, after the complaint has been handled in accordance with subsection (2), the President is satisfied that:
- (a) one or more of the circumstances that gave rise to the complaint have been substantiated; and
  - (b) each House of the Parliament should consider whether to present to the Governor-General an address praying for the termination of the appointment of the FWC Member.

Note: The appointment of an FWC Member may be terminated under section 641 if each House of the Parliament presents such an address to the Governor-General.

- (5) The Minister must consider whether each House of the Parliament should consider the matter referred to in paragraph (4)(b).

### **581B Code of Conduct**

- (1) After consulting the other FWC Members, the President may determine a Code of Conduct for FWC Members.
- (2) Subsection (1) does not limit section 582 (which deals with directions by the President).
- (3) The Code of Conduct must be published on the FWC's website or by any other means that the President considers appropriate.
- (4) A determination under subsection (1) is not a legislative instrument.

### **582 Directions by the President**

*The President may give directions*

- (1) The President may give directions under subsection (2) as to the manner in which the FWC is to perform its functions, exercise its powers or deal with matters.
- (2) The President may give a direction that is of a general nature, or that relates to a particular matter, to one or more of the following persons:
  - (a) an FWC Member;
  - (b) a Full Bench;
  - (c) an Expert Panel;
  - (d) the General Manager.
- (3) The direction must not relate to a decision by the FWC.
- (4) Without limiting subsection (2), the direction may be a direction of the following kind:
  - (aa) a direction about the conduct of 4 yearly reviews of default fund terms of modern awards under Division 4A of Part 2-3;
  - (ab) a direction about the exercise of modern award powers in accordance with Division 5 of Part 2-3;

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- (ac) a direction about the exercise of powers under Part 3A-2 (which deals with minimum standards for regulated workers);
- (ad) a direction about the exercise of powers under Part 3B-2 (which deals with road transport contractual chains);
- (b) a direction about the conduct of annual wage reviews;
- (c) a direction that 2 or more matters be dealt with jointly by one or more single FWC Members, one or more Full Benches or one or more Expert Panels;
- (d) a direction about the transfer between FWC Members (including a transfer between Full Benches) of one or more matters being dealt with by the FWC;
- (e) a direction that a single FWC Member perform a function or exercise a power in relation to the variation of a modern award.

(4A) If:

- (a) the President gives a direction that 2 or more matters be dealt with jointly; and
- (b) at least one of the matters:
  - (i) must be dealt with by an Expert Panel constituted to deal with a matter that relates to the road transport industry (see subsection 617(10B)); or
  - (ii) is a matter that the President considers might relate to the road transport industry and has directed be dealt with by an Expert Panel constituted for the purpose (see subsection 617(10D));

the direction that the matters be dealt with jointly must require that all the matters be dealt with by an Expert Panel constituted to deal with a matter that relates to the road transport industry.

Note: For the constitution of an Expert Panel for that purpose, see subsection 620(1E).

- (4B) Subsection (4A) does not limit the power of the President to direct that other matters be dealt jointly with by an Expert Panel.



- (4C) The President may give a direction that an FWC member deal with a matter that the President considers might relate to the road transport industry, if the FWC member has knowledge of, or experience in, the road transport industry, whether or not the President considers that the matter might relate to another industry or sector.
- (4D) In addition to giving a direction of a general nature under subsection (2), the President must give a direction as to how the FWC is to prioritise its work under Parts 3A-2 and 3B-2 including, but not limited to, prioritising types of orders under those Parts and specified cohorts of workers.
- (4E) The FWC must publish a direction under subsection (4D) on the FWC's website, or by any other means that the FWC considers appropriate, as soon as reasonably practicable after the President gives the direction.

*Persons must comply with the President's directions*

- (5) A person to whom a direction is given must comply with the direction.

Note: For directions to the General Manager, see section 658.

*Direction is not a legislative instrument*

- (6) If a direction is in writing, the direction is not a legislative instrument.

### **583 President not subject to direction**

The President is not subject to direction by or on behalf of the Commonwealth.

### **584 Delegation of functions and powers of the President**

- (1) The President may, in writing, delegate to a Vice President or a Deputy President all or any of the President's functions or powers, other than under:

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- (aa) paragraph 581A(1)(b) (which deals with taking measures to maintain public confidence in the FWC); or
  - (a) section 620 (which deals with the constitution and decision-making of an Expert Panel); or
  - (b) section 625 (which deals with the delegation of functions and powers of the FWC).
- (2) In performing functions or exercising powers under a delegation, the delegate must comply with any directions of the President.

Note: See also sections 34AA and 34AB of the *Acts Interpretation Act 1901*.

**Subdivision C—Protection of persons involved in handling etc. complaints about FWC Members**

**584B Protection of persons involved in handling etc. complaints about FWC Members**

- (1) A person who is exercising powers or performing functions under or for the purposes of paragraph 581A(1)(a), subsections 581A(2) to (5), or section 641A, in relation to a complaint about an FWC Member, or assisting in exercising those powers or performing those functions, has the same protection and immunity as a Justice of the High Court.
- (2) A witness requested to attend, or appearing, before a complaint handler or any other person, in relation to a complaint about an FWC Member, has the same protection, and is subject to the same liabilities in proceedings, as a witness in a case tried by the High Court.
- (3) A lawyer assisting, or appearing on behalf of a person before, a complaint handler or any other person, in relation to a complaint about an FWC Member, has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.

## **Division 3—Conduct of matters before the FWC**

### **Subdivision A—Applications to the FWC**

#### **585 Applications in accordance with procedural rules**

An application to the FWC must be in accordance with the procedural rules (if any) relating to applications of that kind.

Note 1: Certain provisions might impose additional requirements in relation to particular kinds of applications (see for example subsection 185(2)).

Note 2: The FWC may, under section 587, dismiss an application that is not made in accordance with the procedural rules.

#### **586 Correcting and amending applications and documents etc.**

The FWC may:

- (a) allow a correction or amendment of any application, or other document relating to a matter before the FWC, on any terms that it considers appropriate; or
- (b) waive an irregularity in the form or manner in which an application is made to the FWC.

#### **587 Dismissing applications**

- (1) Without limiting when the FWC may dismiss an application, the FWC may dismiss an application if:
  - (a) the application is not made in accordance with this Act; or
  - (b) the application is frivolous or vexatious; or
  - (c) the application has no reasonable prospects of success.

Note: For another power of the FWC to dismiss an application for a remedy for unfair dismissal made under Division 5 of Part 3-2, see section 399A.

- (2) Despite paragraphs (1)(b) and (c), the FWC must not dismiss an application under section 365, 536LU or 773, or an application under section 527F that does not consist solely of an application

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for a stop sexual harassment order, on the ground that the application:

- (a) is frivolous or vexatious; or
  - (b) has no reasonable prospects of success.
- (3) The FWC may dismiss an application:
- (a) on its own initiative; or
  - (b) on application.

**588 Discontinuing applications**

A person who has applied to the FWC may discontinue the application:

- (a) in accordance with the procedural rules (if any); and
- (b) whether or not the matter has been settled.

**Subdivision B—Conduct of matters before the FWC**

**589 Procedural and interim decisions**

- (1) The FWC may make decisions as to how, when and where a matter is to be dealt with.
- (2) The FWC may make an interim decision in relation to a matter before it.
- (3) The FWC may make a decision under this section:
  - (a) on its own initiative; or
  - (b) on application.
- (4) This section does not limit the FWC's power to make decisions.

**590 Powers of the FWC to inform itself**

- (1) The FWC may, except as provided by this Act, inform itself in relation to any matter before it in such manner as it considers appropriate.

- (2) Without limiting subsection (1), the FWC may inform itself in the following ways:
- (a) by requiring a person to attend before the FWC;
  - (b) by inviting, subject to any terms and conditions determined by the FWC, oral or written submissions;
  - (c) by requiring a person to provide copies of documents or records, or to provide any other information to the FWC;
  - (d) by taking evidence under oath or affirmation in accordance with the regulations (if any);
  - (e) by requiring an FWC Member, a Full Bench or an Expert Panel to prepare a report;
  - (f) by conducting inquiries;
  - (g) by undertaking or commissioning research;
  - (h) by conducting a conference (see section 592);
  - (i) by holding a hearing (see section 593).

### **591 FWC not bound by rules of evidence and procedure**

The FWC is not bound by the rules of evidence and procedure in relation to a matter before it (whether or not the FWC holds a hearing in relation to the matter).

### **592 Conferences**

- (1) For the purpose of performing a function or exercising a power of the FWC (other than a function or power under Part 2-6), the FWC may direct a person to attend a conference at a specified time and place.

Note: Part 2-6 deals with minimum wages. For the conduct of annual wage reviews, see Subdivision B of Division 3 of Part 2-6.

- (2) An FWC Member (other than an Expert Panel Member), or a delegate of the FWC, is responsible for conducting the conference.
- (3) The conference must be conducted in private, unless the person responsible for conducting the conference directs that it be conducted in public.

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Note: This subsection does not apply in relation to conferences conducted in relation to unfair dismissal, general protection or sexual harassment matters (see sections 368, 374, 398, 527R and 776).

- (4) At a conference, the FWC may:
  - (a) mediate or conciliate; or
  - (b) make a recommendation or express an opinion.
- (5) Subsection (4) does not limit what the FWC may do at a conference.

**593 Hearings**

- (1) The FWC is not required to hold a hearing in performing functions or exercising powers, except as provided by this Act.
- (2) If the FWC holds a hearing in relation to a matter, the hearing must be held in public, except as provided by subsection (3).

*Confidential evidence in hearings*

- (3) The FWC may make the following orders in relation to a hearing that the FWC holds if the FWC is satisfied that it is desirable to do so because of the confidential nature of any evidence, or for any other reason:
  - (a) orders that all or part of the hearing is to be held in private;
  - (b) orders about who may be present at the hearing;
  - (c) orders prohibiting or restricting the publication of the names and addresses of persons appearing at the hearing;
  - (d) orders prohibiting or restricting the publication of, or the disclosure to some or all of the persons present at the hearing of, the following:
    - (i) evidence given in the hearing;
    - (ii) matters contained in documents before the FWC in relation to the hearing.
- (4) Subsection (3) does not apply to the publication of a submission made to the FWC for consideration in an annual wage review (see subsection 289(2)).

## **594 Confidential evidence**

- (1) The FWC may make an order prohibiting or restricting the publication of the following in relation to a matter before the FWC (whether or not the FWC holds a hearing in relation to the matter) if the FWC is satisfied that it is desirable to do so because of the confidential nature of any evidence, or for any other reason:
  - (a) evidence given to the FWC in relation to the matter;
  - (b) the names and addresses of persons making submissions to the FWC in relation to the matter;
  - (c) matters contained in documents lodged with the FWC or received in evidence by the FWC in relation to the matter;
  - (d) the whole or any part of its decisions or reasons in relation to the matter.
- (2) Subsection (1) does not apply to the publication of a submission made to the FWC for consideration in an annual wage review (see subsection 289(2)).

## **595 FWC's power to deal with disputes**

- (1) The FWC may deal with a dispute only if the FWC is expressly authorised to do so under or in accordance with another provision of this Act.
- (2) The FWC may deal with a dispute (other than by arbitration) as it considers appropriate, including in the following ways:
  - (a) by mediation or conciliation;
  - (b) by making a recommendation or expressing an opinion.
- (3) The FWC may deal with a dispute by arbitration (including by making any orders it considers appropriate) only if the FWC is expressly authorised to do so under or in accordance with another provision of this Act.

Example: Parties may consent to the FWC arbitrating a bargaining dispute (see subsection 240(4)).

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- (4) In dealing with a dispute, the FWC may exercise any powers it has under this Subdivision.

Example: The FWC could direct a person to attend a conference under section 592.

- (5) To avoid doubt, the FWC must not exercise the power referred to in subsection (3) in relation to a matter before the FWC except as authorised by this section.

**Subdivision C—Representation by lawyers and paid agents and Minister’s entitlement to make submissions**

**596 Representation by lawyers and paid agents**

- (1) Except as provided by subsection (3) or the procedural rules, a person may be represented in a matter before the FWC (including by making an application or submission to the FWC on behalf of the person) by a lawyer or paid agent only with the permission of the FWC.
- (2) The FWC may grant permission for a person to be represented by a lawyer or paid agent in a matter before the FWC only if:
- (a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
  - (b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
  - (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

Note: Circumstances in which the FWC might grant permission for a person to be represented by a lawyer or paid agent include the following:

- (a) where a person is from a non-English speaking background or has difficulty reading or writing;
- (b) where a small business is a party to a matter and has no specialist human resources staff while the other party is represented by an officer or employee of an industrial association or another person with experience in workplace relations advocacy.



- (3) The FWC's permission is not required for a person to be represented by a lawyer or paid agent in making a written submission under Part 2-3 or 2-6 (which deal with modern awards and minimum wages).
- (4) For the purposes of this section, a person is taken not to be represented by a lawyer or paid agent if the lawyer or paid agent:
  - (a) is an employee or officer of the person; or
  - (b) is an employee or officer of:
    - (i) an organisation; or
    - (ii) an association of employers that is not registered under the Registered Organisations Act; or
    - (iii) a peak council; or
    - (iv) a bargaining representative; that is representing the person; or
  - (c) is a bargaining representative.

#### **597 Minister's entitlement to make submissions**

- (1) The Minister is entitled to make a submission for consideration in relation to a matter before the FWC if:
  - (a) the matter is before a Full Bench and it is in the public interest for the Minister to make a submission; or
  - (b) the matter involves public sector employment.
- (2) Subsection (1) applies whether or not the FWC holds a hearing in relation to the matter.

#### **597A State or Territory Minister's entitlement to make submissions**

- (1) The Minister of a State or Territory who has responsibility for workplace relations matters is entitled to make a submission for consideration in relation to a matter before the FWC if:
  - (a) the matter is before a Full Bench; and
  - (b) it is in the public interest of the State or Territory for the Minister of the State or Territory to make a submission.

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- (2) Subsection (1) applies whether or not the FWC holds a hearing in relation to the matter.

**Subdivision D—Decisions of the FWC**

**598 Decisions of the FWC**

- (1) A reference in this Part to a decision of the FWC includes any decision of the FWC however described. However, to avoid doubt, a reference to a decision of the FWC does not include a statement under section 188B (which deals with principles on genuine agreement to enterprise agreements) or an outcome of a process carried out in accordance with subsection 595(2) (which deals with the FWC's power to deal with disputes).

**Note:** Examples of decisions that the FWC makes include making modern awards, approving or refusing to approve enterprise agreements, decisions as to how, when and where a matter is to be dealt with, deciding whether to grant permission to hear an appeal, and decisions in relation to appeals.

- (2) If the FWC makes a decision that makes or varies an instrument, a reference in this Part to a decision of the FWC includes the FWC's decision to make or vary the instrument in the particular terms decided.
- (3) A decision of the FWC that is described as an order must be made by order.

**Note:** An example of a decision that is described as an order is a bargaining order.

- (4) A decision of the FWC that is not described as an order may be made by order.

**599 FWC not required to decide an application in terms applied for**

Except as provided by this Act, the FWC is not required to make a decision in relation to an application in the terms applied for.

## **600 Determining matters in the absence of a person**

The FWC may determine a matter before it in the absence of a person who has been required to attend before it.

## **601 Writing and publication requirements for the FWC's decisions**

- (1) The following decisions of the FWC must be in writing:
  - (a) a decision of the FWC made under a Part of this Act other than this Part;
  - (b) an interim decision that relates to a decision to be made under a Part of this Act other than this Part;
  - (c) a decision in relation to an appeal or review.
- Note: For appeals and reviews, see sections 604 and 605.
- (2) The FWC may give written reasons for any decision that it makes.
- (3) A decision, and reasons, that are in writing must be expressed in plain English and be easy to understand in structure and content.
- (4) The FWC must publish the following, on its website or by any other means that the FWC considers appropriate:
  - (a) a decision that is required to be in writing and any written reasons that the FWC gives in relation to such a decision;
  - (b) an enterprise agreement that has been approved by the FWC under Part 2-4.

The FWC must do so as soon as practicable after making the decision or approving the agreement.

- (5) Subsection (4) does not apply to any of the following decisions or reasons in relation to such decisions:
  - (a) a decision to issue, or refuse to issue, a certificate under paragraph 368(3)(a) or 527R(3)(a);
  - (c) a decision to issue an entry permit under section 512;
  - (d) a decision to impose conditions on an entry permit under section 515;
  - (e) a decision to issue, or refuse to issue, an exemption certificate under section 519;

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- (f) a decision to issue, or refuse to issue, an affected member certificate under section 520;
  - (g) a decision or reasons in relation to which an order is in operation under paragraph 594(1)(d).
- (6) Subsections (1) and (4) do not limit the FWC's power to put decisions in writing or publish decisions.

**602 Correcting obvious errors etc. in relation to the FWC's decisions**

- (1) The FWC may correct or amend any obvious error, defect or irregularity (whether in substance or form) in relation to a decision of the FWC (other than an error, defect or irregularity in a modern award, national minimum wage order, minimum standards order, minimum standards guidelines, road transport contractual chain orders or road transport contractual chain guidelines).

Note 1: If the FWC makes a decision to make an instrument, the FWC may correct etc. the instrument under this section (see subsection 598(2)).

Note 2: The FWC corrects modern awards and national minimum wage orders under sections 160 and 296.

Note 3: The FWC corrects minimum standards orders and minimum standards guidelines under subsections 536KQ(3) and 536KZ(3) respectively, and corrects road transport contractual chain orders and road transport contractual chain guidelines under subsections 536PT(3) and 536QW(3) respectively.

- (2) The FWC may correct or amend the error, defect or irregularity:
- (a) on its own initiative; or
  - (b) on application.

**602A Validation of approval of enterprise agreement**

- (1) If:
- (a) after an enterprise agreement was made:
    - (i) an application for the approval of a draft of the enterprise agreement was erroneously made to the FWC; and

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- (ii) the FWC approved the draft of the agreement; and
  - (b) the FWC is satisfied that, assuming that the application had been an application for the approval of the enterprise agreement that was made, the FWC would have approved the enterprise agreement that was made;
- the FWC may determine in writing that the approval is as valid and effective, and is taken to have been as valid and effective, as it would have been if:
  - (c) the application had been an application for the approval of the enterprise agreement that was made instead of an application for the approval of the draft of the agreement; and
  - (d) the requirements set out in subsection 185(2) or section 185A (whichever is applicable) had been met in relation to the application; and
  - (e) the approval had been an approval of the enterprise agreement that was made instead of an approval of the draft of the agreement.
- (2) The FWC may make a determination under subsection (1):
  - (a) on its own initiative; or
  - (b) on application.
- (3) If the FWC makes a determination under subsection (1) in relation to an enterprise agreement that was made, the FWC must:
  - (a) publish the agreement on the FWC's website or by any other means that the FWC considers appropriate; and
  - (b) do so as soon as practicable after making the determination.

**602B Validation of approval of variation of enterprise agreement**

- (1) If:
  - (a) after a variation of an enterprise agreement was made:
    - (i) an application for the approval of a draft of the variation was erroneously made to the FWC; and
    - (ii) the FWC approved the draft of the variation; and
  - (b) the FWC is satisfied that, assuming that the application had been an application for the approval of the variation that was

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made, the FWC would have approved the variation that was made;

the FWC may determine in writing that the approval is as valid and effective, and is taken to have been as valid and effective, as it would have been if:

- (c) the application had been an application for the approval of the variation that was made instead of an application for the approval of the draft of the variation; and
  - (d) the requirements set out in subsection 210(2) had been met in relation to the application; and
  - (e) the approval had been an approval of the variation that was made instead of an approval of the draft of the variation.
- (2) The FWC may make a determination under subsection (1):
- (a) on its own initiative; or
  - (b) on application.

**603 Varying and revoking the FWC's decisions**

- (1) The FWC may vary or revoke a decision of the FWC that is made under this Act (other than a decision referred to in subsection (3)).

**Note:** If the FWC makes a decision to make an instrument, the FWC may vary or revoke the instrument under this subsection (see subsection 598(2)).

- (2) The FWC may vary or revoke a decision under this section:
- (a) on its own initiative; or
  - (b) on application by:
    - (i) a person who is affected by the decision; or
    - (ii) if the kind of decision is prescribed by the regulations—a person prescribed by the regulations in relation to that kind of decision.
- (3) The FWC must not vary or revoke any of the following decisions of the FWC under this section:
- (a) a decision under Part 2-3 (which deals with modern awards);

- (b) a decision under section 235 or Division 4, 7, 9 or 10 of Part 2-4 (which deal with enterprise agreements);
- (c) a decision under Part 2-5 (which deals with workplace determinations);
- (d) a decision under Part 2-6 (which deals with minimum wages);
- (e) a decision under Division 3 of Part 2-8 (which deals with transfer of business);
- (f) a decision under Division 8 of Part 3-3 (which deals with protected action ballots);
- (g) a decision under section 472 (which deals with partial work bans);
- (ga) a decision under Part 3A-2 (which deals with minimum standards orders);
- (gb) a decision under Part 3A-4 (which deals with collective agreements);
- (gc) a decision under Part 3B-2 (which deals with road transport contractual chain orders);
- (h) a decision that is prescribed by the regulations.

Note: The FWC can vary or revoke decisions, and instruments made by decisions, under other provisions of this Act (see, for example, sections 447 and 448).

## **Subdivision E—Appeals, reviews and referring questions of law**

### **604 Appeal of decisions**

- (1) A person who is aggrieved by a decision:
  - (a) made by the FWC (other than a decision of a Full Bench or an Expert Panel); or
  - (b) made under the Registered Organisations Act by the General Manager (including a delegate of the General Manager);may appeal the decision, with the permission of the FWC.
- (2) Without limiting when the FWC may grant permission, the FWC must grant permission if the FWC is satisfied that it is in the public interest to do so.

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Note: Subsection (2) does not apply in relation to an application for an unfair dismissal (see section 400) or for an unfair deactivation or an unfair termination (see section 536MA).

- (3) A person may appeal the decision by applying to the FWC.

### **605 Minister's entitlement to apply for review of a decision**

- (1) The Minister may apply to the FWC for a review to be conducted by the FWC of a decision made by the FWC (other than a decision of a Full Bench or an Expert Panel) if the Minister believes that the decision is contrary to the public interest.
- (2) Without limiting when the FWC may conduct a review, the FWC must conduct a review of the decision if the FWC is satisfied that it is in the public interest to conduct the review.

Note: The FWC must be constituted by a Full Bench to decide whether to conduct a review, and to conduct the review (see section 614).

- (3) In conducting a review:
- (a) the FWC must take such steps as it considers appropriate to ensure that each person with an interest in the review is made aware of the review; and
  - (b) the Minister is entitled to make submissions for consideration in the review.
- (4) Nothing in this section affects any right of appeal or any power of the FWC under section 604 or 607. A review of a decision and an appeal of the decision may be dealt with together if the FWC considers it appropriate.

### **606 Staying decisions that are appealed or reviewed**

- (1) If, under section 604 or 605, the FWC hears an appeal from, or conducts a review of, a decision, the FWC may (except as provided by subsection (3)) order that the operation of the whole or part of the decision be stayed, on any terms and conditions that the FWC considers appropriate, until a decision in relation to the appeal or review is made or the FWC makes a further order.



- (2) If a Full Bench is hearing the appeal or conducting the review, an order under subsection (1) in relation to the appeal or review may be made by:
  - (a) the Full Bench; or
  - (b) the President; or
  - (c) a Vice President; or
  - (d) a Deputy President.
- (3) This section does not apply in relation to a decision to make a protected action ballot order.

### **607 Process for appealing or reviewing decisions**

- (1) An appeal from, or a review of, a decision of the FWC or the General Manager may be heard or conducted without holding a hearing only if:
  - (a) it appears to the FWC that the appeal or review can be adequately determined without persons making oral submissions for consideration in the appeal or review; and
  - (b) the persons who would otherwise, or who will, make submissions (whether oral or written) for consideration in the appeal or review consent to the appeal or review being heard or conducted without a hearing.
- (2) The FWC may:
  - (a) admit further evidence; and
  - (b) take into account any other information or evidence.
- (3) The FWC may do any of the following in relation to the appeal or review:
  - (a) confirm, quash or vary the decision;
  - (b) make a further decision in relation to the matter that is the subject of the appeal or review;
  - (c) refer the matter that is the subject of the appeal or review to an FWC Member (other than an Expert Panel Member) and:
    - (i) require the FWC Member to deal with the subject matter of the decision; or

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- (ii) require the FWC Member to act in accordance with the directions of the FWC.

**608 Referring questions of law to the Federal Court**

- (1) The President may refer a question of law arising in a matter before the FWC for the opinion of the Federal Court.
- (2) A question of law referred under subsection (1) must be determined by the Full Court of the Federal Court.
- (3) The FWC may make a decision in relation to the matter even if the Federal Court is determining the question of law, except if the question is whether the FWC may exercise powers in relation to the matter.
- (4) Once the Federal Court has determined the question, the FWC may only make a decision in relation to the matter that is not inconsistent with the opinion of the Federal Court (if the FWC has not already done so).
- (5) However, if the FWC has made a decision in relation to the matter that is inconsistent with the opinion of the Federal Court, the FWC must vary the decision in such a way as to make it consistent with the opinion of the Federal Court.

**Subdivision F—Miscellaneous**

**609 Procedural rules**

- (1) After consulting the other FWC Members, the President may, by legislative instrument, make procedural rules in relation to:
  - (a) the practice and procedure to be followed by the FWC; or
  - (b) the conduct of business in relation to matters allowed or required to be dealt with by the FWC.
- (2) Without limiting subsection (1), the procedural rules may provide for the following:
  - (a) the requirements for making an application to the FWC;

- (b) the circumstances in which a lawyer or paid agent may make an application or submission to the FWC on behalf of a person who is entitled to make the application or submission;
  - (c) the form and manner in which, and the time within which, submissions may or must be made to the FWC;
  - (d) the procedural requirements for making decisions of the FWC;
  - (e) the form and manner in which the FWC gives directions and notifies persons of things;
  - (ea) the requirements for making a notification to the FWC;
  - (f) who is notified by the FWC of things;
  - (g) the manner in which conferences are to be conducted in relation to applications made under Part 3-1, 3-2, 3-5A or Part 6-4 (which deal with general protections, unfair dismissal, prohibiting sexual harassment in connection with work and unlawful termination).
- (3) To avoid doubt, subsection (1) includes the power to make procedural rules in relation to any functions conferred on the FWC by any other law of the Commonwealth.

## 610 Regulations dealing with any FWC matters

The regulations may provide for any matter that the procedural rules may provide for.

Note: Regulations made under this section prevail over procedural rules (see subsection 796(2)).

## 611 Costs

- (1) A person must bear the person's own costs in relation to a matter before the FWC.
- (2) However, the FWC may order a person (the **first person**) to bear some or all of the costs of another person in relation to an application to the FWC if:

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- (a) the FWC is satisfied that the first person made the application, or the first person responded to the application, vexatiously or without reasonable cause; or
- (b) the FWC is satisfied that it should have been reasonably apparent to the first person that the first person's application, or the first person's response to the application, had no reasonable prospect of success.

Note: The FWC can also order costs under sections 376, 400A, 401 and 780.

- (3) A person to whom an order for costs applies must not contravene a term of the order.

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

## **Division 4—Organisation of the FWC**

### **Subdivision A—Functions etc. to be performed by a single FWC Member, a Full Bench or an Expert Panel**

#### **612 FWC’s functions etc. may generally be performed by single FWC Member**

- (1) A function or power of the FWC may be performed or exercised by a single FWC Member (other than an Expert Panel Member), as directed by the President, except as provided by this Subdivision.

Note: The President gives directions under section 582.

- (2) Action taken under subsection 508(1) (which deals with misuse of rights under Part 3-4) must be taken by a Vice President or a Deputy President, except as provided by section 615.
- (3) This section does not limit the power of the President to delegate a function or power of the FWC under section 625.

#### **613 Appeal of decisions**

- (1) A Full Bench must (except as provided by subsection (2)):
  - (a) decide under section 604 whether to grant permission to appeal a decision; and
  - (b) if the Full Bench decides to grant the permission—hear the appeal in accordance with section 607.

Note: For the constitution of a Full Bench, see section 618.

- (2) The President, a Vice President or a Deputy President directed by the President, may:
  - (a) decide under section 604 whether to grant permission to appeal:
    - (i) a decision of a delegate under subsection 625(2); or

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- (ii) a decision of the General Manager (including a delegate of the General Manager) under the Registered Organisations Act; and
- (b) if the President, the Vice President or the Deputy President (as the case may be) grants the permission—hear the appeal in accordance with section 607.

Note: The President gives directions under section 582.

**614 Review of decisions by a Full Bench**

A Full Bench must:

- (a) decide under section 605 whether to conduct a review of a decision; and
- (b) if the Full Bench decides to conduct the review—conduct the review in accordance with section 607.

Note: For the constitution of a Full Bench, see section 618.

**615 The President may direct a Full Bench to perform function etc.**

- (1) A function or power of the FWC may be performed or exercised by a Full Bench if the President so directs.

Note: The President gives directions under section 582.

- (2) The President may direct that the function or power be exercised by a Full Bench generally, or in relation to a particular matter or class of matters.
- (3) To avoid doubt, a reference in this section to a Full Bench includes a reference to more than one Full Bench.

Note: For the constitution of a Full Bench, see section 618.

**615A When the President must direct a Full Bench to perform function etc.**

*Full Benches—directions on application*

- (1) The President must direct a Full Bench to perform a function or exercise a power in relation to a matter if:
  - (a) an application is made under subsection (2); and
  - (b) the President is satisfied that it is in the public interest to do so.

Note: The President gives directions under section 582.

- (2) For the purposes of paragraph (1)(a), the following persons may apply to the FWC to have a Full Bench perform a function or exercise a power in relation to a matter:
  - (a) a person who has made, or will make, submissions for consideration in the matter;
  - (b) the Minister.

*Full Benches—directions for certain terminations of enterprise agreements*

- (3) The President must direct a Full Bench to perform a function or exercise a power in relation to a matter arising under section 226 in relation to an application for the termination of an enterprise agreement if:
  - (a) the President has given a direction to an FWC Member to perform the function or exercise the power; and
  - (b) the FWC Member is satisfied that any of the following persons covered by the agreement oppose the termination:
    - (i) an employee;
    - (ii) an employer;
    - (iii) an employee organisation.
- (4) Subsection (3) does not apply if the FWC Member is satisfied that the enterprise agreement does not, and is not likely to, cover any employees.

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- (5) Subsection (3) does not prevent a power that may be delegated under subsection 625(1) from being exercised by a single FWC Member or a person to whom the power has been delegated.

Note: The powers that may be delegated under subsection 625(1) include:

- (a) the FWC's power to inform itself as it considers appropriate under section 590 (other than the FWC's power to hold a hearing); and
- (b) the FWC's power to conduct a conference in accordance with section 592.

**615B Transfer to a Full Bench from an FWC Member**

- (1) This section applies if:
- (a) the President gives a direction referred to in section 615 or 615A that a function be performed or a power be exercised by a Full Bench; and
  - (b) before the President gave the direction, the President had given a direction (the *earlier direction*) to an FWC Member to perform the function or exercise the power.
- (2) The President is taken to have revoked the earlier direction.
- (3) The Full Bench must, when performing the function or exercising the power, take into account:
- (a) everything that occurred before the FWC; and
  - (b) everything that the FWC did;
- in relation to the matter before the Full Bench began to perform the function or exercise the power.

**615C Transfer to the President from an FWC Member or a Full Bench**

- (1) This section applies if:
- (a) the President decides to perform a function or exercise a power; and
  - (b) before the President made that decision, the President had given a direction (the *earlier direction*) that the function be



performed or the power be exercised by a Full Bench or an FWC Member.

- (2) The President is taken to have revoked the earlier direction.
- (3) The President must, when performing the function or exercising the power, take into account:
  - (a) everything that occurred before the FWC; and
  - (b) everything that the FWC did;in relation to the matter before the President began to perform the function or exercise the power.

## **616 FWC's functions etc. that must be performed by a Full Bench**

### *Modern awards*

- (1) Subject to subsections 617(8) and (10B), a modern award must be made under Part 2-3 by a Full Bench.

Note: Subsection 617(8) relates to modern awards that must be made by an Expert Panel.

- (2A) A 4 yearly review of default fund terms of modern awards must be conducted under Division 4A of Part 2-3 by a Full Bench.

- (3A) A determination that varies a default fund term of a modern award made in a 4 yearly review conducted under Division 4A of Part 2-3 must be made by a Full Bench.

Note: A determination that varies a default fund term of a modern award may be made by a single FWC Member under Division 5 of Part 2-3.

- (3B) Subject to subsections 617(8) and (10B), a determination that revokes a modern award under Division 5 of Part 2-3 must be made by a Full Bench.

Note: Subsection 617(8) relates to determinations that must be made by an Expert Panel.

- (3C) Subject to subsection (3D) of this section and subsections 617(6), (8), (9), (10B) and (11), a determination that varies a modern award under Division 5 of Part 2-3 (other than a determination

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varying the default fund term of a modern award under section 159A) must be made by a Full Bench.

Note: Subsections 617(6), (8), (9), (10B) and (11) relate to determinations that must be made by an Expert Panel.

- (3D) Subject to subsections 617(6), (8), (9), (10B) and (11), the President may direct a single FWC Member to perform a function or exercise a power:
- (a) under section 159, 160 or 161 (varying a modern award); or
  - (b) in relation to any other variation under section 157 that the President considers appropriate of:
    - (i) a modern award; or
    - (ii) if 2 or more modern awards relate to the same industry or occupation—those awards.

Note 1: The President may give directions as to the manner in which the FWC is to perform its functions or exercise its powers (see section 582).

Note 2: Subsections 617(6), (8), (9), (10B) and (11) relate to determinations and modern awards that must be made by an Expert Panel.

*Workplace determinations*

- (4) A workplace determination must be made under Part 2-5 by a Full Bench.

*Model term determinations*

- (4A) A determination of any of the following model terms must be made by a Full Bench:
- (a) a model flexibility term for enterprise agreements, under subsection 202(5);
  - (b) a model consultation term for enterprise agreements, under subsection 205(3);
  - (c) a model term for enterprise agreements about dealing with disputes, under subsection 737(1);
  - (d) a model term for copied State instruments about dealing with disputes, under subsection 768BK(1A).

*Minimum standards orders*

- (4B) Subject to subsections 582(4A) and 617(10D), the following must be made under Chapter 3A by a Full Bench:
- (a) an employee-like worker minimum standards order;
  - (b) a determination under subsection 536KQ(1) varying or revoking an employee-like worker minimum standards order;
  - (c) employee-like worker minimum standards guidelines;
  - (d) a determination under subsection 536KZ(1) varying or revoking employee-like worker minimum standards guidelines.

Note 1: A determination under subsection 536KQ(3) or 536KZ(3) (which deal with minor technical variations) does not need to be made by a Full Bench.

Note 2: Subsection 617(10D) provides for the President to direct that certain matters relating to the road transport industry be dealt with by an Expert Panel for the road transport industry.

*Full Benches*

- (5) To avoid doubt, a reference in this section to a Full Bench includes a reference to more than one Full Bench.

Note: For the constitution of a Full Bench, see section 618.

**617 FWC's functions etc. that must be performed by an Expert Panel**

*Expert Panel for annual wage reviews*

- (1) An annual wage review must be conducted under Part 2-6 by an Expert Panel constituted for the purposes of the review.

Note: For the constitution of an Expert Panel for the purposes of an annual wage review, see subsection 620(1).

- (2) A national minimum wage order, or a determination, made in an annual wage review must be made by an Expert Panel constituted for the purposes of the review.

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- (3) A determination that varies a national minimum wage order must be made under Part 2-6 by an Expert Panel constituted for the purposes of the review.

*Expert Panel for 4 yearly review of default fund terms*

- (4) In a 4 yearly review of default fund terms of modern awards, the following must be made by an Expert Panel constituted for the purposes of the review:
- (a) the Default Superannuation List;
  - (b) a determination under section 156E on an application to have a standard MySuper product included on the Default Superannuation List;
  - (c) the Schedule of Approved Employer MySuper Products;
  - (d) a determination under section 156P on an application made in the standard application period to have an employer MySuper product included on the Schedule of Approved Employer MySuper Products.

Note: For the constitution of an Expert Panel for those purposes, see subsection 620(1A).

*Expert Panel for amending the Schedule of Approved Employer MySuper Products*

- (5) If an application is made in the interim application period to have an employer MySuper product included on the Schedule of Approved Employer MySuper Products, the following must be made by an Expert Panel constituted for the purposes of determining the application:
- (a) a determination under section 156P on the application;
  - (b) if the determination is to include the product on the schedule—an amendment of the schedule to specify the product.

Note: For the constitution of an Expert Panel for those purposes, see subsection 620(1A).

*Expert Panel for pay equity*

- (6) If the President considers that substantive gender pay equity matters might require the making of a determination under subsection 157(2) (other than a determination that the President considers might relate to the Care and Community Sector), the determination must be made by an Expert Panel constituted for the purpose of deciding whether to make the determination.

Note: For the constitution of an Expert Panel for that purpose, see subsection 620(1B).

- (7) An equal remuneration order made under section 302 (other than an equal remuneration order that the President considers might relate to the Care and Community Sector) must be made by an Expert Panel constituted for the purpose of deciding whether to make the equal remuneration order.

Note: For the constitution of an Expert Panel for that purpose, see subsection 620(1B).

*Expert Panel for the Care and Community Sector*

- (8) A determination or modern award made under subsection 157(1) that the President considers might relate to the Care and Community Sector must be made by an Expert Panel constituted for the purpose of deciding whether to make the determination or modern award.

Note: For the constitution of an Expert Panel for that purpose, see subsection 620(1C).

*Expert Panel for pay equity in the Care and Community Sector*

- (9) A determination made under subsection 157(2) that the President considers might relate to the Care and Community Sector must be made by an Expert Panel constituted for the purpose of deciding whether to make the determination.

Note: For the constitution of an Expert Panel for that purpose, see subsection 620(1D).

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- (10) An equal remuneration order made under section 302 that the President considers might relate to the Care and Community Sector must be made by an Expert Panel constituted for the purpose of deciding whether to make the equal remuneration order.

Note: For the constitution of an Expert Panel for that purpose, see subsection 620(1D).

*President's considerations*

- (10A) For the purposes of subsections (6), (7), (8), (9) and (10), if the President considers that an equal remuneration order, determination or modern award might relate to the Care and Community Sector, it does not matter if the President considers that the equal remuneration order, determination or modern award might also relate to another sector.

*Expert Panel for road transport industry*

- (10B) The following must be made by an Expert Panel constituted for that purpose:
- (a) a modern award made under Part 2-3 that the President considers might relate to the road transport industry;
  - (b) a determination made under subsection 157(1) varying or revoking a modern award that the President considers might relate to the road transport industry;
  - (c) a road transport minimum standards order made under paragraph 536JY(1)(b) or a determination made under subsection 536KQ(1) varying or revoking a road transport minimum standards order;
  - (ca) a deferral determination made under subsection 536KQJ(1) in relation to a road transport minimum standards order;
  - (cb) a suspension determination made under subsection 536KQP(1) in relation to a road transport minimum standards order;
  - (cc) a determination made under subsection 536KQ(1) varying or revoking a road transport minimum standards order to give effect to a decision to vary or revoke the minimum standards order under paragraph 536KQS(2)(a) or (b);

- (cd) a decision made under paragraph 536KQS(2)(a), (b) or (c) as to whether or not to vary or revoke a road transport minimum standards order;
- (d) road transport guidelines made under subsection 536KR(1) or a determination made under subsection 536KZ(1) varying or revoking road transport guidelines;
- (da) a road transport contractual chain order made under section 536PD or a determination made under 536PT varying or revoking a road transport contractual chain order;
- (db) road transport contractual chain guidelines made under section 536QP or a determination made under section 536QW varying or revoking road transport contractual chain guidelines;
- (dc) a deferral determination made under subsection 536QB(1) in relation to a road transport contractual chain order;
- (dd) a suspension determination made under subsection 536QG(1) in relation to a road transport contractual chain order;
- (de) a determination made under subsection 536PT(1) varying or revoking a road transport contractual chain order to give effect to a decision to vary or revoke the road transport contractual chain order under paragraph 536QK(2)(a) or (b);
- (df) a decision made under paragraph 536QK(2)(a), (b) or (c) as to whether or not to vary or revoke a road transport contractual chain order;
- (e) such other instruments as are prescribed that the President considers might relate to the road transport industry.

Note 1: For the constitution of an Expert Panel for that purpose, see subsection 620(1E).

Note 2: The road transport objective is relevant to the functions of an Expert Panel referred to in this subsection, see section 40D.

*President's considerations*

- (10C) For the purposes of subsection (10B), if the President considers that a determination or a modern award, or a prescribed instrument, might relate to the road transport industry, it does not matter if the

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President considers that the determination or modern award or prescribed instrument might relate to another industry or sector.

- (10D) The President may direct that the following matters be dealt with by an Expert Panel constituted for the purpose:
- (a) an employee-like worker minimum standards order or a determination varying or revoking an employee-like worker minimum standards order, if the President considers that the order might relate to the road transport industry or sector;
  - (b) employee-like guidelines or a determination varying or revoking employee-like guidelines, if the President considers that the guidelines might relate to the road transport industry;
  - (c) any other prescribed instrument or matter that the President considers might relate to the road transport industry;
- whether or not the President considers that the matter might also relate to another industry or sector.

Note: For the constitution of an Expert Panel for that purpose, see subsection 620(1E).

*Other variations of modern awards*

- (11) The President may direct an Expert Panel constituted for the purpose of performing a function or exercising a power under section 159, 160 or 161 (about variations of modern awards) to perform the function or exercise the power.

Note: For the constitution of an Expert Panel for that purpose, see subsection 620(1B), (1C) or (1D).

**617AA Full Bench and Expert Panel with identical membership**

- (1) This section applies if a Full Bench and an Expert Panel consist of the same FWC Members.
- (2) In performing its functions or exercising its powers, the Full Bench is not limited by:
  - (a) the functions or powers of the Expert Panel; or
  - (b) the purposes for which the Expert Panel was constituted.



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- (3) In performing its functions or exercising its powers, the Expert Panel is not limited by the functions or powers of the Full Bench.
- (4) Without limiting subsection (2) or (3), a reference in this section to performing a function or exercising a power includes a reference to the following:
  - (a) making a determination or modern award under subsection 157(1);
  - (b) making a determination under subsection 157(2);
  - (c) making an equal remuneration order under section 302;
  - (d) performing a function or exercising a power under section 159, 160 or 161 (about variations of modern awards);
  - (e) performing a function or exercising a power under Chapter 3A;
  - (f) dealing with a matter that the President considers might relate to the road transport industry.
- (5) This section is enacted for the avoidance of doubt.

**617A President may direct investigations and reports**

- (1) The President may give a direction under section 582 requiring that a matter that is relevant to the function of an Expert Panel constituted under subsection 620(1B), (1C), (1D) or (1E) be investigated, and that a report about the matter be prepared.

Note: Matters that may be relevant include gender pay equity, equal remuneration, the road transport industry, and the Care and Community Sector, in Australia.

- (2) The direction may be given to:
  - (a) an Expert Panel; or
  - (b) an Expert Panel Member; or
  - (c) a Commissioner; or
  - (d) a Full Bench that includes one or more Expert Panel Members.

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**617B Research must be published**

- (1) If the President gives a direction under section 617A requiring a matter to be investigated, and a report about the matter to be prepared, the FWC must publish the report so that submissions can be made addressing issues covered by the report.
- (2) The publication may be on the FWC's website or by any other means that the FWC considers appropriate.

**Subdivision B—Constitution of the FWC by a single FWC Member, a Full Bench or an Expert Panel**

**618 Constitution and decision-making of a Full Bench**

*Constitution of a Full Bench*

- (1) A Full Bench constituted under this section consists of at least 3 FWC Members, including at least one FWC Member who is the President, a Vice President or a Deputy President.  

Note: An Expert Panel Member might form part of a Full Bench.
- (2) The President may determine which FWC Members form part of a Full Bench.

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- (3) A decision of a majority of the FWC Members on the Full Bench prevails.
- (4) However, if there is no majority, the decision of the FWC Member who has seniority under section 619 prevails.

**619 Seniority of FWC Members**

- (1) While the FWC is constituted by a Full Bench, the FWC Members on the Full Bench have seniority according to the following order:
  - (a) the President;

- (aa) the Vice Presidents, according to the days on which their appointments as Vice Presidents took effect;
  - (ab) if 2 appointments as Vice Presidents took effect on the same day—the Vice Presidents, according to the precedence assigned to them in their instruments of appointment;
  - (b) the Deputy Presidents, according to the days on which their appointments as Deputy Presidents took effect;
  - (c) if 2 or more appointments as Deputy Presidents took effect on the same day—the Deputy Presidents, according to the precedence assigned to them in their instruments of appointment.
- (2) The FWC Member on a Full Bench who has seniority under this section is responsible for managing the Full Bench in performing functions and exercising powers of the FWC.

Note: The FWC Member who has seniority also has a deciding vote if there is no majority (see subsection 618(4)).

## **620 Constitution and decision-making of an Expert Panel**

### *Constitution of an Expert Panel for annual wage reviews*

- (1) An Expert Panel constituted under this subsection for the purpose of an annual wage review conducted under Part 2-6 consists of 7 FWC Members (except as provided by section 622), and must include:
- (a) the President; and
  - (b) 3 Expert Panel Members who have knowledge of, or experience in, one or more of the following fields:
    - (i) workplace relations;
    - (ii) economics;
    - (iii) social policy;
    - (iv) business, industry or commerce.

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*Constitution of an Expert Panel for 4 yearly reviews of default fund terms etc.*

- (1A) An Expert Panel constituted under this subsection for a purpose referred to in subsection 617(4) or (5) consists of 7 FWC Members (except as provided by section 622), and must include:
- (a) the President, or a Vice President or Deputy President appointed by the President to be the Chair of the Panel; and
  - (b) 3 Expert Panel Members who have knowledge of, or experience in, one or more of the following fields:
    - (i) finance;
    - (ii) investment management;
    - (iii) superannuation.

*Constitution of Expert Panel for pay equity*

- (1B) An Expert Panel constituted under this subsection for a purpose referred to in subsection 617(6), (7) or (11) or section 617A must include (except as provided by section 622):
- (a) the President, or a Vice President or Deputy President appointed by the President to be the Chair of the Panel; and
  - (b) at least 2 Expert Panel Members or other FWC Members who have knowledge of, or experience in, one or both of the following fields:
    - (i) gender pay equity;
    - (ii) anti-discrimination; and
  - (c) subject to subsection (2A), such number (if any) of other FWC Members as the President considers appropriate.

*Constitution of Expert Panel for the Care and Community Sector*

- (1C) An Expert Panel constituted under this subsection for a purpose referred to in subsection 617(8) or (11) or section 617A must include (except as provided by section 622):
- (a) the President, or a Vice President or Deputy President appointed by the President to be the Chair of the Panel; and

- (b) at least 2 Expert Panel Members or other FWC Members who have knowledge of, or experience in, the Care and Community Sector; and
- (c) subject to subsection (2A), such number (if any) of other FWC Members as the President considers appropriate.

*Constitution of Expert Panel for pay equity in the Care and Community Sector*

- (1D) An Expert Panel constituted under this subsection for a purpose referred to in subsection 617(9), (10) or (11) or section 617A must include (except as provided by section 622):
- (a) the President, or a Vice President or Deputy President appointed by the President to be the Chair of the Panel; and
  - (b) at least one Expert Panel Member or other FWC Member who has knowledge of, or experience in, one or both of the following fields:
    - (i) gender pay equity;
    - (ii) anti-discrimination; and
  - (c) at least one Expert Panel Member or other FWC Member who has knowledge of, or experience in, the Care and Community Sector; and
  - (d) subject to subsection (2A), such number (if any) of other FWC Members as the President considers appropriate.

*Constitution of Expert Panel for the road transport industry*

- (1E) An Expert Panel constituted under this subsection for a purpose referred to in subsection 617(10B) or (10D) must include (except as provided by section 622):
- (a) the President, or a Vice President or Deputy President appointed by the President to be the Chair of the Panel; and
  - (b) at least one Expert Panel Member or other FWC Member who has knowledge of, or experience in, the road transport industry; and
  - (c) subject to subsection (2A), such number (if any) of other FWC Members as the President considers appropriate.

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*Additional requirement relating to the constitution of an Expert Panel for deferral or suspension of road transport minimum standards orders*

- (1F) If an Expert Panel is constituted under subsection (1E) for a purpose referred to in paragraph 617(10B)(ca), (cb), (cc) or (cd) in relation to a road transport minimum standards order (which deal with deferral and suspension), a majority of the members of the Expert Panel must not be members of the Expert Panel that made the road transport minimum standards order concerned.

*Additional requirement relating to the constitution of an Expert Panel for deferral or suspension of road transport contractual chain orders*

- (1G) If an Expert Panel is constituted under subsection (1E) for a purpose referred to in paragraph 617(10B)(dc), (dd), (de) or (df) in relation to a road transport contractual chain order (which deal with deferral and suspension), a majority of the members of the Expert Panel must not be members of the Expert Panel that made the road transport chain order concerned.

*President to choose FWC Members*

- (2) The President may determine which FWC Members form part of an Expert Panel.

*Expert Panels to consist of majority of qualified FWC Members*

- (2A) The President must ensure that an Expert Panel constituted under subsection (1B), (1C), (1D) or (1E) consists of a majority of FWC Members who have the knowledge or experience required under paragraph 620(1B)(b), paragraph (1C)(b), paragraphs (1D)(b) and (c) or paragraph (1E)(b) (as the case may be).

*Managing Expert Panels*

- (3) The following person is responsible for managing an Expert Panel in performing the functions and exercising the powers referred to in section 617:

- (a) if paragraph (b) does not apply—the President;
- (b) if the President has appointed a person to be the Chair of the Expert Panel under paragraph 620(1A)(a), (1B)(a), (1C)(a) or (1D)(a)—the Chair.

*Making decisions*

- (4) A decision of the majority of the FWC Members of an Expert Panel prevails.
- (5) However, if there is no majority, the decision of:
  - (a) if paragraph (b) does not apply—the President; or
  - (b) if the President has appointed a person to be the Chair of the Expert Panel under paragraph 620(1A)(a), (1B)(a), (1C)(a) or (1D)(a)—the Chair;prevails.

**621 Reconstitution of the FWC when single FWC Member becomes unavailable**

- (1) This section applies if:
  - (a) an FWC Member is dealing with a matter (other than by forming part of a Full Bench or an Expert Panel in relation to a matter); and
  - (b) the FWC Member becomes unavailable to continue dealing with the matter before the matter is completely dealt with.
- (2) The President must direct another FWC Member to constitute the FWC for the purposes of dealing with the matter.

Note: The new FWC Member must take into account everything that happened before the FWC Member began to deal with the matter (see section 623).

**622 Reconstitution of the FWC when FWC Member of a Full Bench or an Expert Panel becomes unavailable**

- (1) This section applies if:

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- (a) an FWC Member (the **unavailable member**) forms part of a Full Bench or an Expert Panel in relation to a matter; and
  - (b) the FWC Member becomes unavailable to continue dealing with the matter before the matter is completely dealt with.
- (2) The Full Bench or the Expert Panel may continue to deal with the matter without the unavailable member if the Full Bench or the Expert Panel consists of the following:
  - (a) for an Expert Panel other than an Expert Panel referred to in paragraph (aa)—the President and at least 2 Expert Panel Members;
  - (aa) for an Expert Panel constituted under subsection 620(1B), (1C), (1D) or (1E)—at least 3 FWC Members, of whom:
    - (i) at least one FWC Member is the President, a Vice President or a Deputy President; and
    - (ii) a majority of the FWC Members have the knowledge or experience required under paragraph 620(1B)(b), paragraph (1C)(b), paragraphs (1D)(b) and (c) or paragraph (1E)(b) (as the case may be);
  - (b) for a Full Bench—at least 3 FWC Members, including at least one FWC Member who is the President, a Vice President or a Deputy President.
- (3) Otherwise, the President must direct another FWC Member to form part of the Full Bench or the Expert Panel. After the President does so, the Full Bench or the Expert Panel may continue to deal with the matter without the unavailable member.

Note: The new FWC Member must take into account everything that happened before the FWC Member began to deal with the matter (see section 623).
- (4) For the purposes of subsection (3), if the President is directing an FWC member to form part of an Expert Panel constituted under subsection 620(1B), (1C), (1D) or (1E), the President must give preference to directing an FWC member that has the knowledge or experience required under paragraph 620(1B)(b), paragraph (1C)(b), paragraphs (1D)(b) and (c) or paragraph (1E)(b) (as the case may be).



### **623 When new FWC Members begin to deal with matters**

If an FWC Member begins to deal with a matter under section 621 or 622, the FWC Member must take into account everything that occurred before the FWC, and everything that the FWC did, in relation to the matter before the FWC Member began to deal with the matter.

### **624 FWC's decisions not invalid when improperly constituted**

A decision of the FWC is not invalid merely because it was made by a Full Bench, or an Expert Panel, constituted otherwise than as provided by this Division.

**Note:** If the FWC makes a decision to make an instrument while constituted otherwise than as provided by this Division, the instrument is not invalid (see subsection 598(2)).

## **Subdivision C—Delegation of the FWC's functions and powers**

### **625 Delegation by the President of functions and powers of the FWC**

- (1) The President may, in writing, delegate all or any of the following powers of the FWC to the General Manager or a member of the staff of the FWC:
  - (a) correcting or amending applications and documents, or waiving irregularities, under section 586;
  - (b) informing itself as it considers appropriate under section 590 (other than the FWC's power to hold a hearing);
  - (c) conducting a conference in accordance with section 592;
  - (d) correcting or amending obvious errors, defects or irregularities under section 602.
- (2) The President may, in writing, delegate all or any of the following functions or powers of the FWC to a person referred to in subsection (3):
  - (a) publishing varied modern awards under section 168;
  - (b) publishing submissions under section 289;
  - (c) publishing research under section 291;

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- (d) publishing varied wage rates under section 292;
  - (da) publishing the results of a protected action ballot under section 457;
  - (f) imposing conditions on entry permits, revoking or suspending entry permits, or banning the issue of any further entry permits, under section 507 or 510;
  - (g) the functions and powers of the FWC under Division 6 of Part 3-4 (which deals with entry permits, entry notices and certificates);
  - (h) publishing enterprise agreements under paragraph 601(4)(b);
  - (i) any function or power prescribed by the regulations.
- (3) The people to whom a delegation may be given under subsection (2) are any of the following:
- (a) the General Manager;
  - (b) a member of the staff of the FWC who is an SES employee or acting SES employee;
  - (c) a member of the staff of the FWC who is in a class of employees prescribed by the regulations.
- (4) In performing functions or exercising powers under a delegation under subsection (1) or (2), the delegate must comply with any directions of the President.

Note: See also sections 34AA and 34AB of the *Acts Interpretation Act 1901*.

## **Division 5—FWC Members**

### **Subdivision A—Appointment of FWC Members**

#### **626 Appointment of FWC Members**

- (1) An FWC Member is to be appointed by the Governor-General by written instrument.
- (2) The instrument of appointment must specify whether the FWC Member is the President, a Vice President, a Deputy President, a Commissioner or an Expert Panel Member.
- (3) The instrument of appointment must assign a precedence to the FWC Member if:
  - (a) the FWC Member and one other FWC Member are appointed as Vice Presidents on the same day; or
  - (b) the FWC Member and one or more other FWC Members are appointed as Deputy Presidents on the same day.

Note: Precedence is relevant to the seniority of Vice Presidents and Deputy Presidents (see paragraphs 619(1)(ab) and (c)).

- (4) The same person must not hold, at the same time, an appointment as both:
  - (a) an Expert Panel Member; and
  - (b) the President, a Vice President, a Deputy President or a Commissioner.

#### **627 Qualifications for appointment of FWC Members**

##### *President and Vice Presidents*

- (1) Before the Governor-General appoints a person as the President or a Vice President, the Minister must be satisfied that the person:
  - (a) is or has been a Judge of a court created by the Parliament; or

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- (b) is qualified for appointment because the person has knowledge of, or experience in, one or more of the following fields:
  - (i) workplace relations;
  - (ii) law;
  - (iii) business, industry or commerce.
- (1A) Paragraph (1)(a) does not apply to a person who is a Judge of the Federal Circuit and Family Court of Australia (Division 2).

*Deputy Presidents*

- (2) Before the Governor-General appoints a person as a Deputy President, the Minister must be satisfied that the person:
  - (a) either:
    - (i) is or has been a Judge of a court created by the Parliament; or
    - (ii) has been a Judge of a court of a State or Territory; or
  - (b) has a high level of experience in the field of workplace relations, including a high level of experience that has been acquired:
    - (i) through legal practice; or
    - (ii) in the service of a peak council or another association representing the interests of employers or employees; or
    - (iii) in the service of government or an authority of government; or
    - (iv) in academia.
- (2A) Subparagraph (2)(a)(i) does not apply to a person who is a Judge of the Federal Circuit and Family Court of Australia (Division 2).

*Commissioners*

- (3) Before the Governor-General appoints a person as a Commissioner, the Minister must be satisfied that the person is qualified for appointment because the person has knowledge of, or experience in, one or more of the following fields:

- (a) workplace relations;
- (b) law;
- (c) business, industry or commerce.

*Expert Panel Members*

- (4) Before the Governor-General appoints a person as an Expert Panel Member, the Minister must be satisfied that the person is qualified for appointment because the person has knowledge of, or experience in, one or more of the following fields:
  - (a) workplace relations;
  - (b) economics;
  - (c) social policy;
  - (d) business, industry or commerce;
  - (e) finance;
  - (f) investment management;
  - (g) superannuation;
  - (h) gender pay equity;
  - (i) anti-discrimination;
  - (j) the Care and Community Sector;
  - (k) the road transport industry.

## **628 Basis of appointment of FWC Members**

*President, Vice Presidents, Deputy Presidents and Commissioners*

- (1) The President, a Vice President, a Deputy President or a Commissioner holds office on a full-time basis.
- (2) A Deputy President or a Commissioner may perform his or her duties on a part-time basis, with the President's approval.

*Expert Panel Members*

- (3) An Expert Panel Member holds office on a part-time basis.

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**629 Period of appointment of FWC Members**

*President, Vice Presidents, Deputy Presidents and Commissioners*

- (1) The President, a Vice President, a Deputy President or a Commissioner holds office until the earliest of the following:
- (a) he or she attains the age of 65 years;
  - (b) he or she resigns or the appointment is terminated under this Part.

*Members of a prescribed State industrial authority*

- (2) Despite subsection (1), a person who is a member of a prescribed State industrial authority may be appointed as a Deputy President or Commissioner for a period specified in the instrument of appointment.

Note: A member of a prescribed State industrial authority may hold office as a Deputy President or Commissioner (see section 631).

- (3) If a person is so appointed, the person holds office as Deputy President or Commissioner until the earliest of the following:
- (a) the specified period ends;
  - (b) the person ceases to be a member of the prescribed State industrial authority;
  - (c) the person resigns or the appointment is terminated under this Part.

*Expert Panel Members*

- (4) An Expert Panel Member holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.

Note: An Expert Panel Member is eligible for reappointment (see subsection 33(4A) of the *Acts Interpretation Act 1901*).

## **Subdivision B—Terms and conditions of FWC Members**

### **629A Status of the President**

The President has the same status as a Judge of the Federal Court.

### **630 Appointment of a Judge not to affect tenure etc.**

- (1) The appointment of a Judge of a court created by the Parliament as an FWC Member, or service by such a Judge as an FWC Member, does not affect:
  - (a) the Judge's tenure of office as a Judge; or
  - (b) the Judge's rank, title, status, precedence, salary, annual or other allowances or other rights or privileges as the holder of his or her office as a Judge.
- (2) For all purposes, the Judge's service as the FWC Member is taken to be service as a Judge.

### **631 Dual federal and State appointments of Deputy Presidents or Commissioners**

- (1) Nothing in this Act prevents a Deputy President or Commissioner from being appointed to, and holding at the same time, an office as a member of a prescribed State industrial authority, with the President's approval.
- (2) Nothing in this Act prevents a member of a prescribed State industrial authority from being appointed to, and holding at the same time, an office as a Deputy President or Commissioner.

Note 1: A member of a prescribed State industrial authority may hold office as a Deputy President or Commissioner only if he or she is qualified for appointment (see section 627).

Note 2: For the period of appointment, and remuneration and allowances, of a Deputy President or Commissioner who is a member of a prescribed State industrial authority, see sections 629 and 637.

- (3) Subsections (1) and (2) have effect subject to any law of the relevant State.

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**632 Dual federal and Territory appointments of Deputy Presidents or Commissioners**

Nothing in this Act prevents a Deputy President or Commissioner from being appointed to, and holding at the same time, one of the following offices, with the President's approval:

- (a) an office as a member of a Commonwealth or Territory tribunal prescribed by the regulations (other than a court);
- (b) an office under a Commonwealth or Territory law.

**633 Outside work of FWC Members**

*Vice Presidents, Deputy Presidents and Commissioners*

- (1) A Vice President, Deputy President or Commissioner (whether performing duties on a full-time or part-time basis) must not engage in paid work outside the duties of his or her office without the President's approval.
- (2) However, the President's approval is not required if the paid work is an office or appointment in the Defence Force.

*Expert Panel Members*

- (3) An Expert Panel Member must not engage in any paid work that, in the President's opinion, conflicts or may conflict with the proper performance of his or her duties.

**634 Oath or affirmation of office**

Before beginning to discharge the duties of his or her office, an FWC Member must take an oath or affirmation in accordance with the regulations.



## 635 Remuneration of the President

### *Remuneration if the President is not a Judge*

- (1) The President (other than a President who is a Judge of a court created by the Parliament) is to be paid:
  - (a) salary at an annual rate equal to the annual rate of salary payable to the Chief Justice of the Federal Court; and
  - (b) such travelling allowances as are determined from time to time by the Remuneration Tribunal; and
  - (c) such other allowances as are prescribed by the regulations.

### *Remuneration if the President is a Judge*

- (2) A President who is a Judge of a court created by the Parliament must be paid an additional allowance, in accordance with subsection (3), if the salary payable to the person as a Judge is less than the salary that would be payable to the person as President under subsection (1).
- (3) The amount of the allowance is the difference between the Judge's salary and the salary that is payable to the President under subsection (1).

### *Additional amount*

- (4) The President or a former President must be paid an amount in accordance with subsection 7(5E) of the *Remuneration Tribunal Act 1973* if the President, or former President, would be entitled to that amount had the President or former President held the office of Chief Justice of the Federal Court instead of the office of President.

## 636 Application of Judges' Pensions Act to the President

- (1) The *Judges' Pensions Act 1968* does not apply to the President if:
  - (a) immediately before being appointed as the President, he or she was one of the following (a ***public sector superannuation scheme member***):

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- (i) an eligible employee for the purposes of the *Superannuation Act 1976*;
    - (ii) a member of the superannuation scheme established by deed under the *Superannuation Act 1990*;
    - (iii) an ordinary employer-sponsored member of PSSAP (within the meaning of the *Superannuation Act 2005*); and
  - (b) he or she does not make an election under subsection (2).
- (2) The President may elect to cease to be a public sector superannuation scheme member.
- (3) The election must be made:
- (a) within 3 months of the President's appointment; and
  - (b) by written notice to the Minister.
- (4) If the President makes the election:
- (a) he or she is taken to have ceased to be a public sector superannuation scheme member immediately before being appointed as the President; and
  - (b) the *Judges' Pensions Act 1968* applies to him or her, and is taken to have so applied, immediately after he or she was appointed as the President.

**637 Remuneration of FWC Members other than the President**

*Remuneration if an FWC Member is not a Judge*

- (1) An FWC Member (other than an FWC Member who is a Judge of a court created by the Parliament) is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the FWC Member is to be paid the remuneration that is prescribed by the regulations.
- (2) An FWC Member is to be paid the allowances that are prescribed by the regulations.

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- (3) Subsections (1) and (2) have effect subject to the *Remuneration Tribunal Act 1973* and to section 638 (which deals with remuneration of part-time Deputy Presidents and Commissioners).
- (4) Despite subsections (1) to (3), if a person who is a member of a prescribed State industrial authority is appointed as a Deputy President or Commissioner, the person is not to be paid any remuneration or allowances in relation to the office of Deputy President or Commissioner other than any travel allowance prescribed under subsection (2).

*Remuneration if an FWC Member is a Judge*

- (5) An FWC Member who is a Judge (other than the Chief Justice of the Federal Court) of a court created by the Parliament is to be paid an additional allowance, in accordance with subsection (6), if the salary payable to the person as a Judge is less than the salary that would be payable to the person as an FWC Member under subsection (1).
- (6) The amount of the allowance is the difference between the Judge's salary and the salary that is payable to the FWC Member under subsection (1).

*Section does not apply to the President*

- (7) This section does not apply to the President.

**638 Remuneration of Deputy Presidents or Commissioners performing duties on a part-time basis**

- (1) If the President approves a Deputy President or Commissioner (the ***part-time member***) performing his or her duties on a part-time basis, the President and the part-time member are to enter into a written agreement specifying the proportion (the ***agreed proportion***) of full-time duties to be worked by the part-time member.
- (2) The agreed proportion may be varied by a written agreement between the President and the part-time member.

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- (3) The part-time member's annual rate of salary at a particular time is equal to the agreed proportion at that time of the annual rate of salary that would be payable to the part-time member if he or she were performing his or her duties on a full-time basis.
- (4) The allowances that are to be paid to the part-time member under section 637 are not affected by this section.

**639 Leave of absence of FWC Members other than the President**

- (1) An FWC Member has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) The President may grant an FWC Member leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise as the President determines.
- (3) In making a determination in accordance with this section, the Remuneration Tribunal and the President must take into account:
  - (a) any past employment of the FWC Member in the service of a State or an authority of a State; or
  - (b) any past service of the FWC Member as a member of an authority of a State.
- (4) This section does not apply to the President.

**640 Disclosure of interests by FWC Members other than the President**

- (1) This section applies if:
  - (a) an FWC Member (other than the President) is dealing, or will deal, with a matter; and
  - (b) the FWC Member has or acquires any interest (the *potential conflict*), pecuniary or otherwise, that conflicts or could conflict with the proper performance of the FWC Member's functions in relation to the matter.
- (2) The FWC Member must disclose the potential conflict to:

- (a) a person who has made, or will make, a submission for consideration in the matter; and
  - (b) a person who the FWC Member considers is likely to make a submission for consideration in the matter; and
  - (c) the President.
- (4) The President must give a direction to the FWC Member not to deal, or to no longer deal, with the matter if:
- (a) the President becomes aware that an FWC Member has a potential conflict in relation to a matter (whether or not because of a disclosure under subsection (2)); and
  - (b) the President considers that the FWC Member should not deal, or should no longer deal, with the matter.

#### **641 Termination of appointment on grounds of misbehaviour or incapacity**

The Governor-General may terminate the appointment of an FWC Member if an address praying for the termination, on one of the following grounds, is presented to the Governor-General by each House of the Parliament in the same session:

- (a) proved misbehaviour;
- (b) the FWC Member is unable to perform the duties of his or her office because of physical or mental incapacity.

#### **641A Minister may handle complaints about FWC Members**

The Minister may handle a complaint about the performance by an FWC Member of his or her duties:

- (a) for the purpose of considering whether each House of the Parliament should consider whether to present to the Governor-General an address praying for the termination of the appointment of the FWC Member; and
- (b) for the purpose of considering whether to advise the Governor-General to suspend the FWC Member.

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- Note 1: The appointment of an FWC Member may be terminated under section 641 if each House of the Parliament presents such an address to the Governor-General.
- Note 2: The FWC Member may be suspended under section 642.
- Note 3: The complaint is a *complaint about an FWC Member* (see section 12).
- Note 4: For protections for persons involved in relation to handling a complaint about an FWC Member, see section 584B.

**641B Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***

- (1) The object of this section is to modify the application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (the *JMIPC Act*) so as to allow a Commission to be established by the Houses of Parliament to investigate and report on alleged misbehaviour or incapacity of an FWC Member, so the Houses can be well-informed to consider whether to pray for:
- (a) the termination of the FWC Member's appointment under section 641; or
  - (b) the removal of the FWC Member from office under section 82 or 86 of the WR Act (within the meaning of the Transitional Act), as those sections continue to apply because of the operation of item 2 of Schedule 18 to the Transitional Act.
- (2) The JMIPC Act applies, in addition to its general application, as if a provision of that Act referred to in an item in column 1 of the following table were amended as specified in column 2 of the item.

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**Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***

<b>Item</b>	<b>Column 1 Provision of the JMIPC Act</b>	<b>Column 2 Amendment</b>
1	Subsection 3(1)	Omit “a Commonwealth judicial officer”, substitute “an FWC Member”.
2	Subsection 3(1)	Omit all the words after “whether to”, substitute: “pray for: (a) for a non-transitioned FWC Member—the termination of the FWC Member’s appointment under section 641 of the FW Act; or (b) for a transitioned FWC Member—the removal of the FWC Member from office under section 82 or 86 of the WR Act (as those sections continue to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act).”.
3	Paragraph 3(2)(b)	Omit “removal of a Commonwealth judicial officer under paragraph 72(ii) of the Constitution”, substitute “termination of appointment or removal from office of an FWC Member under the relevant provisions referred to in subsection (1)”.
4	Section 4	Omit “a Commonwealth judicial officer (that is, a High Court judge or a judge of the Federal Court of Australia, the Federal Circuit and Family Court of Australia (Division 1) or the Federal Circuit and Family Court of Australia (Division 2))”, substitute “an FWC Member”.

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**Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***

Item	Column 1 Provision of the JMIPC Act	Column 2 Amendment
5	Section 4	Omit “removal of the judicial officer, the judicial officer may be removed by the Governor-General in Council in accordance with paragraph 72(ii) of the Constitution”, substitute “termination of appointment or removal from office of the FWC Member, the FWC Member’s appointment may be terminated, or the FWC Member may be removed from office, by the Governor-General in Council under the applicable provisions of the FW Act or the WR Act”.
6	Section 7	Insert: <b><i>FW Act</i></b> means the <i>Fair Work Act 2009</i> . <b><i>FWC Member</i></b> has the same meaning as in the FW Act and includes a transitioned FWC Member. <b><i>FW Transitional Act</i></b> means the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i> .
7	Section 7 (definition of <b><i>incapacity</i></b> )	Omit the definition (including the note), substitute: <b><i>incapacity</i></b> : (a) in relation to the termination of appointment of a non-transitioned FWC Member under section 641 of the FW Act—has the same meaning as in that section; and (b) in relation to the removal of a transitioned FWC Member from office under section 82 of the WR Act (as that section continues to apply because of the operation



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**Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***

Item	Column 1 Provision of the JMIPC Act	Column 2 Amendment
		<p>of item 2 of Schedule 18 to the FW Transitional Act)—has the same meaning as in that section; and</p> <p>(c) in relation to the removal of a transitioned FWC Member from office under section 86 of the WR Act (as that section continues to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act)—has the same meaning as in that section; and</p> <p>(d) in relation to the termination of appointment of a member of the Commission under section 73 of this Act—has its ordinary meaning.</p>
8	Section 7 (definition of <i>misbehaviour</i> )	<p>Omit the definition (including the note), substitute:</p> <p><b><i>misbehaviour:</i></b></p> <p>(a) in relation to the termination of appointment of a non-transitioned FWC Member under section 641 of the FW Act—has the same meaning as in that section; and</p> <p>(b) in relation to the removal of a transitioned FWC Member from office under section 82 of the WR Act (as that section continues to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act)—has the same meaning as in that section; and</p> <p>(c) in relation to the removal of a transitioned FWC Member from office under section 86 of the WR Act (as that section continues to apply because of the operation of item 2 of Schedule 18 to the FW</p>

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**Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***

Item	Column 1 Provision of the JMIPC Act	Column 2 Amendment
		Transitional Act)—has the same meaning as in that section; and (d) in relation to the termination of appointment of a member of the Commission under section 73 of this Act—has its ordinary meaning.
9	Section 7	Insert: <b><i>non-transitioned FWC Member</i></b> means an FWC Member who is not a transitioned FWC Member.
10	Section 7 (definition of <i>proved</i> )	Omit the definition, substitute: <b><i>proved</i></b> : (a) in relation to the termination of appointment of a non-transitioned FWC Member for misbehaviour under paragraph 641(a) of the FW Act—has the same meaning as in that paragraph; and (b) in relation to the termination of appointment of a non-transitioned FWC Member for incapacity under paragraph 641(b) of the FW Act—means the grounds referred to in that paragraph are established; and (c) in relation to the removal of a transitioned FWC Member from office for misbehaviour or incapacity under section 82 of the WR Act (as that section continues to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act)—has the same meaning as in that section; and (d) in relation to the removal of a transitioned FWC Member from office for

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**Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***

Item	Column 1 Provision of the JMIPC Act	Column 2 Amendment
		misbehaviour or incapacity under section 86 of the WR Act (as that section continues to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act)—has the same meaning as in that section.
11	Section 7	Insert:  <b><i>transitioned FWC Member</i></b> means a person who is taken to be appointed as an FWA Member under item 1 of Schedule 18 to the FW Transitional Act.  <b><i>WR Act</i></b> has the same meaning as in the FW Transitional Act.  <b><i>WR Act repeal day</i></b> has the same meaning as in the FW Transitional Act.
12	Section 8	Omit “a Commonwealth judicial officer”, substitute “an FWC Member”.
13	Section 8	Omit “removal of the judicial officer, the judicial officer may be removed by the Governor-General in Council in accordance with paragraph 72(ii) of the Constitution”, substitute “termination of appointment or removal from office of the FWC Member, the FWC Member’s appointment may be terminated, or the FWC Member may be removed from office, by the Governor-General in Council under the applicable provisions of the FW Act or the WR Act”.
14	Subsection 9(1)	Omit “Commonwealth judicial officer”, substitute “FWC Member”.

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**Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***

<b>Item</b>	<b>Column 1 Provision of the JMIPC Act</b>	<b>Column 2 Amendment</b>
15	Subsection 9(1) (note 2)	Omit “Commonwealth judicial officer”, substitute “FWC Member”.
16	Paragraph 16(1)(b)	Omit “a Commonwealth judicial officer”, substitute “an FWC Member”.
17	Subsection 19(6)	After paragraph 19(6)(c), insert: (ca) an investigation into a complaint about an FWC Member; and
18	Subsection 20(2)	Omit “a Commonwealth judicial officer”, substitute “an FWC Member”.
19	Subsection 20(2)	Omit “the Commonwealth judicial officer” (wherever occurring), substitute “the FWC Member”.
20	Section 21	Omit “a Commonwealth judicial officer” (wherever occurring), substitute “an FWC Member”.
21	Paragraph 23(3)(a)	Omit “Commonwealth judicial officer to whom the investigation relates to perform his or her duties as such an officer”, substitute “FWC Member to whom the investigation relates to perform his or her duties as an FWC Member”.
22	Paragraph 23(3)(b) and subparagraph 23(3)(c)(i)	Omit “judiciary”, substitute “Fair Work Commission”.
23	Subparagraph 23(3)(c)(ii)	Omit “Commonwealth judicial officer”, substitute “FWC Member”.
24	Subsection 24(4) (heading)	Omit “ <i>Commonwealth judicial officer</i> ”, substitute “ <i>FWC Member</i> ”.
25	Subsections 24(4) and (5)	Omit “Commonwealth judicial officer” (wherever occurring), substitute “FWC Member”.

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**Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***

<b>Item</b>	<b>Column 1 Provision of the JMIPC Act</b>	<b>Column 2 Amendment</b>
26	Paragraph 24(7)(c)	Omit “Commonwealth judicial officer”, substitute “FWC Member”.
27	Subdivision D of Division 2 of Part 3 (heading)	Omit “ <b>Commonwealth judicial officer</b> ”, substitute “ <b>FWC Member</b> ”.
28	Section 45 (heading)	Omit “ <b>Commonwealth judicial officer</b> ”, substitute “ <b>FWC Member</b> ”.
29	Subsections 45(1) and 46(2)	Omit “Commonwealth judicial officer”, substitute “FWC Member”.

**642 Suspension on grounds of misbehaviour or incapacity**

*Governor-General may suspend an FWC Member*

- (1) The Governor-General may suspend an FWC Member (other than the President) from office:
  - (a) for misbehaviour; or
  - (b) if the FWC Member is unable to perform the duties of his or her office because of physical or mental incapacity.

*Statement of grounds*

- (2) The Minister must cause to be tabled in each House of Parliament, within 7 sitting days of that House after the suspension, a statement identifying the FWC Member and setting out the ground of the suspension.

*Resolution by a House of Parliament*

- (3) A House of the Parliament may, within 15 sitting days of that House after the day on which the statement has been tabled in it,

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declare by resolution that the appointment of the FWC Member should be terminated.

*Suspension terminates*

- (4) If a House does not pass a resolution in that way, the suspension terminates.

*Appointment to be terminated*

- (5) If each House of the Parliament passes a resolution in that way, the Governor-General must terminate the appointment of the FWC Member.

*Suspension not to affect entitlements*

- (6) The suspension of an FWC Member under this section does not affect any entitlement of the FWC Member to be paid remuneration, and allowances, in accordance with this Act.

**643 Termination of appointment for bankruptcy, etc.**

The Governor-General must terminate the appointment of an FWC Member (other than the President) if:

- (a) the FWC Member becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors, or makes an assignment of his or her remuneration for the benefit of his or her creditors; or
- (b) the FWC Member is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months.

**644 Termination of appointment for outside work**

*Vice Presidents, Deputy Presidents and Commissioners*

- (1) The Governor-General must terminate the appointment of a Vice President, Deputy President or Commissioner if the Vice President, Deputy President or Commissioner engages, except with the

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President's approval, in paid work outside the duties of his or her office (see subsection 633(1)).

*Expert Panel Members*

- (2) The Governor-General must terminate the appointment of an Expert Panel Member if the Expert Panel Member engages in paid work that, in the President's opinion, conflicts or may conflict with the proper performance of his or her duties (see subsection 633(3)).

## **645 Resignation of FWC Members**

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

## **646 Other terms and conditions of FWC Members**

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

## **647 Appointment of acting President and Vice President**

*Appointment by Governor-General*

- (1) The Governor-General may, by written instrument, appoint a Vice President to act as the President:
  - (a) during a vacancy in the office of the President (whether or not an appointment has previously been made to the office); or
  - (b) during any period, or during all periods, when the President is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.

Note: See also section 33A of the *Acts Interpretation Act 1901*, which contains extra rules about acting appointments.

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- (1A) The Governor-General may, by written instrument, appoint a Deputy President to act as a Vice President:
- (a) during a vacancy in the office of a Vice President (whether or not an appointment has previously been made to the office); or
  - (b) during any period, or during all periods, when a Vice President is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.

Note: See also section 33A of the *Acts Interpretation Act 1901*, which contains extra rules about acting appointments.

*No invalidity*

- (2) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
- (a) the occasion for the appointment had not arisen; or
  - (b) there was a defect or irregularity in connection with the appointment; or
  - (c) the appointment had ceased to have effect; or
  - (d) the occasion for the person to act had not arisen or had ceased.

*Not disqualified*

- (3) A person is not disqualified from being appointed under subsection (1) or (1A) merely because the person is over 65.

**648 Appointment of acting Deputy Presidents and Commissioners**

*Appointment by Governor-General*

- (1) The Governor-General may, by written instrument, appoint a person who is qualified for appointment as a Deputy President to act as a Deputy President for a specified period (including a period that exceeds 12 months).

Note: See also section 33A of the *Acts Interpretation Act 1901*, which contains extra rules about acting appointments.



- (1A) The Governor-General may, by written instrument, appoint a person who is qualified for appointment as a Commissioner to act as a Commissioner for a specified period (including a period that exceeds 12 months).

Note: See also section 33A of the *Acts Interpretation Act 1901*, which contains extra rules about acting appointments.

- (2) Before the Governor-General appoints a person under subsection (1) or (1A), the Minister must be satisfied that the appointment is necessary to enable the FWC to perform its functions effectively.

*No invalidity*

- (3) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
- (a) the occasion for the appointment had not arisen; or
  - (b) there was a defect or irregularity in connection with the appointment; or
  - (c) the appointment had ceased to have effect; or
  - (d) the occasion for the person to act had not arisen or had ceased.

*Not disqualified*

- (4) A person is not disqualified from being appointed under subsection (1) or (1A) merely because the person is over 65.

## **Division 6—Cooperation with the States**

### **649 President to cooperate with prescribed State industrial authorities**

- (1) The President must perform his or her functions, and exercise his or her powers, in a manner that facilitates and encourages cooperation between the FWC and prescribed State industrial authorities.
- (2) Without limiting subsection (1), the President may invite the heads of prescribed State industrial authorities, or the principal registrars of prescribed State industrial authorities, to meet with the President to exchange information and discuss matters of mutual interest in relation to workplace relations.

### **650 Provision of administrative support**

The President may make a written arrangement with a prescribed State industrial authority for:

- (a) the FWC to provide administrative support to the authority;  
or
- (b) the authority to provide administrative support to the FWC.

## **Division 7—Seals and additional powers and functions of the President and the General Manager**

### **651 Seals**

#### *Seal of the FWC*

- (1) The FWC must have a seal on which are inscribed the words “The Seal of the Fair Work Commission”.

#### *Duplicate seals*

- (2) There are to be such duplicates of the seal of the FWC as the President directs.

Note: The President gives directions under section 582.

- (3) A document to which a duplicate seal of the FWC is affixed is taken to have the seal of the FWC affixed to it.

#### *Custody and use of the seal of the FWC and duplicate seals*

- (4) The seal of the FWC, and the duplicates of that seal, are to be kept in such custody as the President directs and must not be used except as authorised by the President.

Note: The President gives directions under section 582.

#### *Judicial notice of the seal of the FWC*

- (5) All courts, judges and persons acting judicially must:
  - (a) take judicial notice of the imprint of the seal of the FWC appearing on a document; and
  - (b) presume that the document was duly sealed.

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**652 Annual report**

- (1) The President must, as soon as practicable after the end of each financial year, prepare a report on the operations of the FWC during that year.

Note 1: See also section 34C of the *Acts Interpretation Act 1901*, which contains extra rules about annual reports.

Note 2: The report prepared by the General Manager and given to the Minister under section 46 of the *Public Governance, Performance and Accountability Act 2013* may be included in the report prepared under this section. Section 329D of the Registered Organisations Act sets out additional requirements for the General Manager's report.

- (1A) A report prepared after the end of a financial year must be given to the Minister by 15 October in the next financial year for presentation to the Parliament.
- (2) To avoid doubt, subsection (1) does not require or authorise the disclosure of information for the purposes of the *Privacy Act 1988*.

**653 Reports about making enterprise agreements, individual flexibility arrangements etc.**

*Review and research*

- (1) The General Manager must:
- (a) review the developments, in Australia, in making enterprise agreements; and
  - (b) conduct research into the extent to which individual flexibility arrangements under modern awards and enterprise agreements are being agreed to, and the content of those arrangements; and
  - (c) conduct research into the operation of the provisions of the National Employment Standards relating to:
    - (i) requests for flexible working arrangements under subsection 65(1); and
    - (ii) requests for extensions of unpaid parental leave under subsection 76(1); and

- (d) conduct research into:
  - (i) the circumstances in which employees make such requests; and
  - (ii) the outcome of such requests; and
  - (iii) the circumstances in which such requests are refused.
- (1A) The review and research must be conducted in relation to each of the following periods:
  - (a) the 3 year period that starts when this section commences;
  - (b) each later 3 year period.
- (2) Without limiting subsection (1), the General Manager must, in conducting the review and research, consider the effect that the matters referred to in paragraphs (1)(a) to (d) have had, during the period, on the employment (including wages and conditions of employment) of the following persons:
  - (a) women;
  - (b) part-time employees;
  - (c) persons from a non-English speaking background;
  - (d) mature age persons;
  - (e) young persons;
  - (f) any other persons prescribed by the regulations.

#### *Report*

- (3) The General Manager must give the Minister a written report of the review and research as soon as practicable, and in any event within 6 months, after the end of the period to which it relates.
- (4) The Minister must cause a copy of the report to be tabled in each House of the Parliament within 15 sitting days of that House after the Minister receives the report.
- (5) Subsections 34C(4) to (7) of the *Acts Interpretation Act 1901* apply to the report as if it were a periodic report as defined in subsection 34C(1) of that Act.

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**653A Arrangements with the Federal Court and the Federal Circuit and Family Court of Australia (Division 2)**

The General Manager may make a written arrangement with the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) for the FWC to provide administrative support to the Fair Work Division of the Court.

**654 President must provide certain information etc. to the Minister and Fair Work Ombudsman**

- (1) The President must provide to the Minister and the Fair Work Ombudsman information and copies of documents prescribed by the regulations by the time, and in the form, prescribed.
- (2) The regulations may prescribe:
  - (a) information that is publicly available, or derived from information that is publicly available, relating to:
    - (i) a decision of the FWC; or
    - (ii) a notice, notification or application given or made to the FWC; and
  - (b) a decision of the FWC that is publicly available.

**655 Disclosure of information by the FWC**

*Information to which this section applies*

- (1) This section applies to the following information:
  - (a) information acquired by the FWC, or a member of the staff of the FWC, in the course of performing functions or exercising powers as the FWC;
  - (b) information acquired by a person in the course of assisting the FWC under section 672, or in the course of performing functions, or exercising powers, as a consultant under section 673.

*Disclosure that is necessary or appropriate, or likely to assist  
administration or enforcement*

- (2) The President may disclose, or authorise the disclosure of, the information if the President reasonably believes:
- (a) that it is necessary or appropriate to do so in the course of performing functions, or exercising powers, of the FWC; or
  - (b) that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

## Division 8—General Manager, staff and consultants

### Subdivision A—Functions of the General Manager

#### 656 Establishment

There is to be a General Manager of the Fair Work Commission.

#### 657 Functions and powers of the General Manager

- (1) The General Manager is to assist the President in ensuring that the FWC performs its functions and exercises its powers.
  - (1A) The General Manager also has the following functions:
    - (a) any function conferred on him or her by a fair work instrument;
    - (b) any function conferred on him or her by a law of the Commonwealth.
- Note 1: Sections 653 and 653A confer additional functions and powers on the General Manager.
- Note 2: Section 329A of the Registered Organisations Act confers additional functions on the General Manager.
- (2) The General Manager has power to do all things necessary or convenient to be done for the purpose of performing his or her functions.

#### 658 Directions from the President

Despite the President's power of direction under section 582, the General Manager is not required to comply with a direction by the President to the extent that:

- (a) compliance with the direction would be inconsistent with the General Manager's performance of functions or exercise of powers under the *Public Governance, Performance and Accountability Act 2013* in relation to the FWC; or



- (b) the direction relates to the General Manager's performance of functions or exercise of powers under the *Public Service Act 1999* in relation to the FWC; or
- (c) the direction relates to the conduct by the General Manager of the review and research, and the preparation of the report, under section 653; or
- (d) the direction relates to the General Manager's performance of functions or exercise of powers under the Registered Organisations Act.

### **659 General Manager not otherwise subject to direction**

Except as provided by this or any other Act, the General Manager is not subject to direction by or on behalf of the Commonwealth.

## **Subdivision B—Appointment and terms and conditions of the General Manager**

### **660 Appointment of the General Manager**

- (1) The General Manager is to be appointed by the Governor-General by written instrument on the nomination of the President.
- (2) The General Manager holds office on a full-time basis.
- (3) The General Manager holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.

Note: The General Manager is eligible for reappointment (see subsection 33(4A) of the *Acts Interpretation Act 1901*).

### **661 Remuneration of the General Manager**

- (1) The General Manager is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the General Manager is to be paid the remuneration that is prescribed by the regulations.

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- (2) The General Manager is to be paid the allowances that are prescribed by the regulations.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

**662 Leave of absence of the General Manager**

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

**663 Outside work of the General Manager**

The General Manager must not engage in paid work outside the duties of his or her office without the President's approval.

**664 Disclosure of interests to the President**

- (1) The General Manager must give written notice to the President of all material personal interests that the General Manager has or acquires that relate to the affairs of the FWC.
- (2) Section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) does not apply to the General Manager.

**665 Resignation of the General Manager**

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

### **666 Termination of appointment of the General Manager**

- (1) The Governor-General may terminate the appointment of the General Manager:
  - (a) for misbehaviour; or
  - (b) if the General Manager is unable to perform the duties of his or her office because of physical or mental incapacity.
- (2) The Governor-General must terminate the appointment of the General Manager if:
  - (a) the General Manager becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors, or makes an assignment of his or her remuneration for the benefit of his or her creditors; or
  - (b) the General Manager is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
  - (c) the General Manager engages, except with the President's approval, in paid work outside the duties of his or her office (see section 663); or
  - (d) the General Manager fails, without reasonable excuse, to comply with section 664 (which deals with disclosure of interests to the President).

### **667 Other terms and conditions of the General Manager**

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

### **668 Appointment of acting General Manager**

- (1) The Minister may, by written instrument, appoint a person who is nominated by the President to act as the General Manager:
  - (a) during a vacancy in the office of the General Manager (whether or not an appointment has previously been made to the office); or

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- (b) during any period, or during all periods, when the General Manager is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.

Note: See also section 33A of the *Acts Interpretation Act 1901*, which contains extra rules about acting appointments.

- (2) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
  - (a) the occasion for the appointment had not arisen; or
  - (b) there was a defect or irregularity in connection with the appointment; or
  - (c) the appointment had ceased to have effect; or
  - (d) the occasion to act had not arisen or had ceased.

**669 Minister to consult the President**

The Minister must consult the President before terms and conditions are determined under section 667.

**Subdivision C—Staff and consultants**

**670 Staff**

- (1) The staff of the FWC must be persons engaged under the *Public Service Act 1999*.
- (2) For the purposes of the *Public Service Act 1999*:
  - (a) the General Manager and the staff of the FWC together constitute a Statutory Agency; and
  - (b) the General Manager is the Head of that Statutory Agency.

**671 Delegation by General Manager to staff**

- (1) The General Manager may, in writing, delegate all or any of his or her functions or powers to:
  - (a) a member of the staff of the FWC who is an SES employee or acting SES employee; or

- (b) a member of the staff of the FWC who is in a class of employees prescribed by the regulations.
- (2) In performing functions or exercising powers under a delegation, the delegate must comply with any directions of the General Manager.

Note: See also sections 34AA and 34AB of the *Acts Interpretation Act 1901*.

## **672 Persons assisting the FWC**

The FWC may also be assisted:

- (a) by employees of Agencies (within the meaning of the *Public Service Act 1999*); or
- (b) by officers and employees of a State or Territory; or
- (c) by officers and employees of authorities of the Commonwealth, a State or a Territory;

whose services are made available to the FWC in connection with the performance of any of its functions.

## **673 Consultants**

The General Manager may engage persons having suitable qualifications and experience as consultants to the FWC.

## **Subdivision D—Application of the finance law**

### **673A Application of the finance law**

For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):

- (a) the following group of persons is a listed entity:
  - (i) the General Manager;
  - (ii) the staff of the FWC referred to in section 670;
  - (iii) persons whose services are made available to the FWC under section 672;
  - (iv) consultants engaged under section 673; and

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- (b) the listed entity is to be known as the Fair Work Commission; and
- (c) the General Manager is the accountable authority of the listed entity; and
- (d) the persons referred to in paragraph (a) are officials of the listed entity; and
- (e) the purposes of the listed entity include the functions of the General Manager referred to in section 657.

## **Division 9—Offences relating to the Fair Work Commission**

### **674 Offences in relation to the FWC**

#### *Insulting or disturbing an FWC Member*

- (1) A person commits an offence if:
- (a) the person engages in conduct; and
  - (b) the person's conduct insults or disturbs an FWC Member in the performance of functions, or the exercise of powers, as an FWC Member.

Penalty: Imprisonment for 12 months.

#### *Using insulting language*

- (2) A person commits an offence if:
- (a) the person uses insulting language towards another person; and
  - (b) the person is reckless as to whether the language is insulting; and
  - (c) the other person is an FWC Member performing functions, or exercising powers, as an FWC Member.

Penalty: Imprisonment for 12 months.

#### *Interrupting matters before the FWC*

- (3) A person commits an offence if:
- (a) the person engages in conduct; and
  - (b) the person's conduct interrupts a matter before the FWC.

Penalty: Imprisonment for 12 months.

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*Creating or continuing a disturbance*

- (4) A person commits an offence if:
- (a) the person engages in conduct; and
  - (b) the person's conduct creates, or contributes to creating or continuing, a disturbance; and
  - (c) the disturbance is in or near a place where the FWC is dealing with a matter.

Penalty: Imprisonment for 12 months.

*Improper influence of FWC Members etc.*

- (5) A person commits an offence if:
- (a) the person uses words (whether by writing or speech) that are intended to improperly influence another person; and
  - (b) the other person is an FWC Member or a person attending before the FWC.

Penalty: Imprisonment for 12 months.

*Delegates of the FWC*

- (6) A reference in subsections (1) to (5) to the FWC or an FWC Member includes a delegate of the FWC.

*Adversely affecting public confidence in the FWC*

- (7) A person commits an offence if:
- (a) the person publishes a statement; and
  - (b) the statement implies or states that an FWC Member (whether identified or not) has engaged in misconduct in relation to the performance of functions, or the exercise of powers, as an FWC Member; and
  - (c) the FWC Member has not engaged in that misconduct; and
  - (d) the publication is likely to have a significant adverse effect on public confidence that the FWC is properly performing its functions and exercising its powers.



Penalty: 12 months imprisonment.

Note 1: Sections 135.1, 135.4, 139.1, 141.1 and 142.1 of the *Criminal Code* create offences of using various dishonest means to influence a Commonwealth public official.

Note 2: Sections 676 and 678 of this Act and sections 36A, 37, 38 and 40 of the *Crimes Act 1914* create offences relating to interference with a witness. Section 39 of that Act makes it an offence to destroy anything that may be required in evidence.

## **675 Contravening an FWC order**

- (1) A person commits an offence if:
  - (a) the FWC has made an order under this Act; and
  - (b) either of the following applies:
    - (i) the order applies to the person;
    - (ii) a term of the order applies to the person; and
  - (c) the person engages in conduct; and
  - (d) the conduct contravenes:
    - (i) a term of the order referred to in subparagraph (b)(i); or
    - (ii) the term referred to in subparagraph (b)(ii).
- (2) However, subsection (1) does not apply to the following orders:
  - (aa) an order under subsection 65C(1) (which deals with arbitration of disputes relating to requests for flexible working arrangements);
  - (ab) an order under subsection 76C(1) (which deals with the extension of periods of unpaid parental leave);
  - (ac) an order under subsection 66MA(1) (which deals with casual employment);
  - (a) an order under Part 2-3 (which deals with modern awards);
  - (aaa) an order under subsection 177A(7) (certificate to be a bargaining representative);
  - (b) a bargaining order;
  - (c) a scope order;
  - (d) an order under Part 2-6 (which deals with minimum wages);
  - (e) an equal remuneration order;

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- (f) an order under Part 2-8 (which deals with transfer of business);
- (fa) an order under Division 6 of Part 2-9 (which deals with the employee right to disconnect);
- (g) an order under Division 6 of Part 3-3 (which deals with the suspension or termination of protected industrial action);
- (h) a protected action ballot order, or an order in relation to a protected action ballot order or a protected action ballot;
- (i) an order under Part 3-5 (which deals with stand down);
- (ia) an order under Part 3-5A (which deals with sexual harassment in connection with work);
- (j) an order under Part 6-4B (which deals with workers bullied at work);
- (k) an order under Part 6-4C (which deals with the Coronavirus economic response);
- (l) a minimum standards order;
- (m) a road transport contractual chain order.

Penalty: Imprisonment for 12 months.

- (3) Strict liability applies to paragraphs (1)(a) and (b).

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

**676 Intimidation etc.**

A person commits an offence if:

- (a) the person threatens, intimidates, coerces or prejudices another person; and
- (b) the person does so because the other person has given, or proposes to give, information or documents to the FWC.

Penalty: Imprisonment for 12 months.

Note: A person may also contravene a civil remedy provision by threatening etc. a person who has given, or proposes to give, information or documents to the FWC (see section 343).

## **677 Offences in relation to attending before the FWC**

### *Required to attend*

- (1) A person commits an offence if:
- (a) the person has been required to attend before the FWC; and
  - (b) the person fails to attend as required.

Penalty: Imprisonment for 6 months.

### *Oath or affirmation*

- (2) A person commits an offence if:
- (a) the person attends before the FWC; and
  - (b) the FWC requires the person to take an oath or make an affirmation; and
  - (c) the person refuses or fails to be sworn or to make an affirmation as required.

Penalty: Imprisonment for 6 months.

### *Questions or documents*

- (3) A person commits an offence if:
- (a) the person attends before the FWC; and
  - (b) the FWC requires the person to answer a question or produce a document; and
  - (c) the person refuses or fails to answer the question or produce the document.

Penalty: Imprisonment for 6 months.

### *Reasonable excuse*

- (4) Subsection (1), (2) or (3) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

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- (5) A reference in this section to the FWC or an FWC Member includes a delegate of the FWC.

**678 False or misleading evidence**

*Giving false or misleading evidence*

- (1) A person (the **witness**) commits an offence if:
- (a) the witness gives sworn or affirmed evidence; and
  - (b) the witness gives the evidence as a witness:
    - (i) in a matter before the FWC; or
    - (ii) before a person taking evidence on behalf of the FWC for use in a matter that the witness will start by application to the FWC; and
  - (c) the evidence is false or misleading.

Penalty: Imprisonment for 12 months.

Note: A person will not commit an offence if the person carries out the conduct constituting the offence under duress (see section 10.2 of the *Criminal Code*).

*Inducing or coercing another person to give false or misleading evidence*

- (2) A person (the **offender**) commits an offence if:
- (a) another person (the **witness**) has been, or will be, required to appear as a witness in a matter before the FWC (whether the person is to appear before the FWC or a delegate of the FWC); and
  - (b) the offender induces, threatens or intimidates the witness to give false or misleading evidence in the matter.

Penalty: Imprisonment for 12 months.

## **Part 5-2—Office of the Fair Work Ombudsman**

### **Division 1—Introduction**

#### **679 Guide to this Part**

This Part is about the Office of the Fair Work Ombudsman.

Division 2 is about the Fair Work Ombudsman. The Fair Work Ombudsman's functions include promoting and monitoring compliance with this Act, and providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations.

Division 3 is about the Office of the Fair Work Ombudsman. The Office of the Fair Work Ombudsman consists of the Fair Work Ombudsman, Fair Work Inspectors and staff.

The inspectors exercise compliance powers for purposes including determining whether this Act is being complied with. The compliance powers include the power to enter certain premises, and to inspect and make copies of documents on the premises.

#### **680 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—Fair Work Ombudsman**

### **Subdivision A—Establishment and functions and powers of the Fair Work Ombudsman**

#### **681 Establishment**

There is to be a Fair Work Ombudsman.

#### **682 Functions of the Fair Work Ombudsman**

- (1) The Fair Work Ombudsman has the following functions:
- (a) to promote:
    - (i) harmonious, productive and cooperative workplace relations; and
    - (ii) compliance with this Act and fair work instruments; including by providing education, assistance and advice to employees, employers, regulated workers, regulated businesses, persons in a road transport contractual chain, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices;
  - (b) to monitor compliance with this Act and fair work instruments;
  - (c) to inquire into, and investigate, any conduct or practice that may be contrary to this Act, a related offence provision, a fair work instrument or a safety net contractual entitlement;
  - (d) to commence proceedings in a court, or to make applications to the FWC, to enforce this Act, fair work instruments and safety net contractual entitlements;
  - (da) to publish a compliance and enforcement policy, including guidelines relating to the circumstances in which the Fair Work Ombudsman will, or will not:
    - (i) accept or consider accepting undertakings under section 715; or

- (ii) enter or consider entering into cooperation agreements under section 717B;
- (e) to refer matters to relevant authorities;
- (f) to represent employees, regulated workers, or outworkers who are, or may become, a party to proceedings in a court, or a party to a matter before the FWC, under this Act or a fair work instrument, if the Fair Work Ombudsman considers that representing the employees, regulated workers, or outworkers will promote compliance with this Act or the fair work instrument;
- (g) any other functions conferred on the Fair Work Ombudsman by any Act.

Note 1: The Fair Work Ombudsman also has the functions of an inspector (see section 701).

Note 2: In performing functions under paragraph (a), the Fair Work Ombudsman might, for example, produce a best practice guide to achieving productivity through bargaining.

- (1A) In performing functions under paragraph (1)(a), the Fair Work Ombudsman must have regard to:
  - (a) the need for guidelines and other materials to be available in multiple languages; and
  - (b) the need for community outreach in multiple languages.
- (2) The Fair Work Ombudsman must consult with the FWC in producing guidance material that relates to the functions of the FWC.
- (3) Before publishing a compliance and enforcement policy under paragraph (1)(da), the Fair Work Ombudsman must consult with the National Workplace Relations Consultative Council about the guidelines referred to in that paragraph.
- (3) The Fair Work Ombudsman has the functions of:
  - (a) providing education, assistance and advice to regulated workers, regulated businesses and organisations, and persons in a road transport contractual chain, in relation to minimum

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- standards guidelines and road transport contractual chain guidelines; and
- (b) producing best practice guides in relation to minimum standards guidelines and road transport contractual chain guidelines.

**683 Delegation by the Fair Work Ombudsman**

- (1) The Fair Work Ombudsman may, in writing, delegate to a member of the staff of the Office of the Fair Work Ombudsman or to an inspector all or any of the Fair Work Ombudsman's functions or powers under any Act (subject to subsections (1A) and (1B)).
- (1A) The Fair Work Ombudsman must not delegate his or her functions or powers as an inspector.
- (1B) The Fair Work Ombudsman may delegate to a member of the staff of the Office of the Fair Work Ombudsman who is an SES employee or an acting SES employee:
  - (a) the power under subsection 712AA(1) to apply for the issue of an FWO notice; and
  - (b) the power under subsection 712AD(1) to give an FWO notice; and
  - (c) the power under subsections 712AD(3) and (4) to give notice of a later time.

Note: **SES employee** and **acting SES employee** are defined in the *Acts Interpretation Act 1901*.

- (2) In performing functions or exercising powers under a delegation, the delegate must comply with any directions of the Fair Work Ombudsman.

**684 Directions from the Minister**

- (1) The Minister may, by legislative instrument, give written directions to the Fair Work Ombudsman about the performance of his or her functions.



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Note: Section 42 (disallowance) and Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* do not apply to the direction (see regulations made for the purposes of paragraphs 44(2)(b) and 54(2)(b) of that Act).

- (2) The direction must be of a general nature only.
- (3) The Fair Work Ombudsman must comply with the direction.
- (4) The Fair Work Ombudsman is not required to comply with the direction to the extent that it relates to the Fair Work Ombudsman's performance of functions, or exercise of powers, under the *Public Service Act 1999* in relation to the Office of the Fair Work Ombudsman.

### **685 Minister may require reports**

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

Note: A report must not include information relating to an individual's affairs (see section 714A).

- (2) The Fair Work Ombudsman must comply with the direction.
- (3) The direction, or the report (if made in writing), is not a legislative instrument.

### **686 Annual report**

To avoid doubt, the requirement on the Fair Work Ombudsman to give an annual report to the Minister under section 46 of the *Public Governance, Performance and Accountability Act 2013* does not require or authorise the disclosure of information for the purposes of the *Privacy Act 1988*.

Note: An annual report must not include information relating to an individual's affairs (see section 714A).

## **Subdivision B—Appointment and terms and conditions of the Fair Work Ombudsman**

### **687 Appointment of the Fair Work Ombudsman**

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

Note: The Fair Work Ombudsman is eligible for reappointment (see subsection 33(4A) of the *Acts Interpretation Act 1901*).

### **688 Remuneration of the Fair Work Ombudsman**

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

### **689 Leave of absence of the Fair Work Ombudsman**

- (1) The Fair Work Ombudsman has the recreation leave entitlements that are determined by the Remuneration Tribunal.

- (2) The Minister may grant the Fair Work Ombudsman leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

## **690 Outside work of the Fair Work Ombudsman**

The Fair Work Ombudsman must not engage in paid work outside the duties of his or her office without the Minister's approval.

## **692 Resignation of the Fair Work Ombudsman**

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

## **693 Termination of appointment of the Fair Work Ombudsman**

- (1) The Governor-General may terminate the appointment of the Fair Work Ombudsman:
  - (a) for misbehaviour; or
  - (b) if the Fair Work Ombudsman is unable to perform the duties of his or her office because of physical or mental incapacity.
- (2) The Governor-General must terminate the appointment of the Fair Work Ombudsman if:
  - (a) the Fair Work Ombudsman becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors, or makes an assignment of his or her remuneration for the benefit of his or her creditors; or
  - (b) the Fair Work Ombudsman is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or

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- (c) the Fair Work Ombudsman engages, except with the Minister's approval, in paid work outside the duties of his or her office (see section 690); or
- (d) the Fair Work Ombudsman fails, without reasonable excuse, to comply with section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) or rules made for the purposes of that section.

**694 Other terms and conditions of the Fair Work Ombudsman**

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

**695 Appointment of acting Fair Work Ombudsman**

- (1) The Minister may, by written instrument, appoint a person who is qualified for appointment as the Fair Work Ombudsman to act as the Fair Work Ombudsman:
  - (a) during a vacancy in the office of Fair Work Ombudsman (whether or not an appointment has previously been made to the office); or
  - (b) during any period, or during all periods, when the Fair Work Ombudsman is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.

Note: See also section 33A of the *Acts Interpretation Act 1901*, which contains extra rules about acting appointments.

- (2) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
  - (a) the occasion for the appointment had not arisen; or
  - (b) there was a defect or irregularity in connection with the appointment; or
  - (c) the appointment had ceased to have effect; or
  - (d) the occasion to act had not arisen or had ceased.

## **Division 3—Office of the Fair Work Ombudsman**

### **Subdivision A—Establishment of the Office of the Fair Work Ombudsman**

#### **696 Establishment of the Office of the Fair Work Ombudsman**

- (1) The Office of the Fair Work Ombudsman is established by this section.
- (2) The Office of the Fair Work Ombudsman consists of:
  - (a) the Fair Work Ombudsman; and
  - (b) the staff of the Office of the Fair Work Ombudsman; and
  - (c) the inspectors appointed under section 700.
- (3) For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):
  - (a) the Office of the Fair Work Ombudsman is a listed entity; and
  - (b) the Fair Work Ombudsman is the accountable authority of the Office of the Fair Work Ombudsman; and
  - (c) the following persons are officials of the Office of the Fair Work Ombudsman:
    - (i) the Fair Work Ombudsman;
    - (ii) the staff of the Office of the Fair Work Ombudsman;
    - (iii) the inspectors appointed under section 700;
    - (iv) persons whose services are made available to the Fair Work Ombudsman under section 698;
    - (v) consultants engaged under section 699; and
  - (d) the purposes of the Office of the Fair Work Ombudsman include:
    - (i) the functions of the Fair Work Ombudsman referred to in section 682; and
    - (ii) the functions of inspectors under Subdivision D.

## **Subdivision B—Staff and consultants etc.**

### **697 Staff**

- (1) The staff of the Office of the Fair Work Ombudsman must be persons engaged under the *Public Service Act 1999*.
- (2) For the purposes of the *Public Service Act 1999*:
  - (a) the Fair Work Ombudsman and the staff of the Office of the Fair Work Ombudsman together constitute a Statutory Agency; and
  - (b) the Fair Work Ombudsman is the Head of that Statutory Agency.

### **698 Persons assisting the Fair Work Ombudsman**

The Fair Work Ombudsman may also be assisted:

- (a) by employees of Agencies (within the meaning of the *Public Service Act 1999*); or
- (b) by officers and employees of a State or Territory; or
- (c) by officers and employees of authorities of the Commonwealth, a State or a Territory;

whose services are made available to the Fair Work Ombudsman in connection with the performance of any of his or her functions.

**Note:** For example, State or Territory employees could be made available to assist the Fair Work Ombudsman in providing education in a particular region.

### **699 Consultants**

The Fair Work Ombudsman may engage persons having suitable qualifications and experience as consultants to the Office of the Fair Work Ombudsman.

## **Subdivision C—Appointment of Fair Work Inspectors**

### **700 Appointment of Fair Work Inspectors**

- (1) The Fair Work Ombudsman may, in writing, appoint as a Fair Work Inspector:
  - (a) a person who has been appointed, or who is employed, by the Commonwealth; or
  - (b) a person who is employed by a State or Territory.
- (2) The Fair Work Ombudsman may appoint a person as a Fair Work Inspector only if the Fair Work Ombudsman is satisfied that the person is of good character.
- (3) A Fair Work Inspector is appointed for the period specified in the instrument of appointment. The period must not exceed 4 years.

Note: A Fair Work Inspector is eligible for reappointment (see subsection 33(4A) of the *Acts Interpretation Act 1901*).

### **701 Fair Work Ombudsman is a Fair Work Inspector**

The Fair Work Ombudsman is a Fair Work Inspector by force of this section.

### **702 Identity cards**

- (1) The Fair Work Ombudsman must issue an identity card to an inspector appointed under section 700.
- (2) The Minister must issue an identity card to the Fair Work Ombudsman.

#### *Form of identity card*

- (3) The identity card must:
  - (a) be in the form approved by the Fair Work Ombudsman; and
  - (b) contain a recent photograph of the inspector.

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*Inspector must carry card*

- (4) An inspector must carry the identity card at all times when performing functions or exercising powers as an inspector.

*Offence*

- (5) A person commits an offence if:
- (a) the person ceases to be an inspector; and
  - (b) the person does not, within 14 days of so ceasing, return the person's identity card to the Fair Work Ombudsman or the Minister (as the case may be).

Penalty: 1 penalty unit.

- (6) Subsection (5) is an offence of strict liability.

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

*Defence—card lost or destroyed*

- (7) Subsection (5) does not apply if the identity card was lost or destroyed.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

**Subdivision D—Functions and powers of Fair Work  
Inspectors—general**

**703 Conditions and restrictions on functions and powers**

- (1) The functions, and powers (***compliance powers***), conferred on an inspector are subject to such conditions and restrictions as are specified in his or her instrument of appointment.
- (2) To avoid doubt, the power to apply for the issue of an FWO notice under section 712AA and the power to give an FWO notice under section 712AD are not compliance powers.



#### **704 General directions by the Fair Work Ombudsman**

- (1) The Fair Work Ombudsman may, by legislative instrument, give a written direction to inspectors relating to the performance of their functions or the exercise of their powers as inspectors.
- (2) The direction must be of a general nature only, and cannot relate to a particular case.
- (3) An inspector must comply with the direction.

#### **705 Particular directions by the Fair Work Ombudsman**

- (1) The Fair Work Ombudsman may give a direction to an inspector relating to the performance of the inspector's functions or the exercise of the inspector's powers as an inspector.
- (2) The inspector must comply with the direction.
- (3) If a direction is in writing, the direction is not a legislative instrument.

#### **706 Purpose for which powers of inspectors may be exercised**

- (1) An inspector may exercise compliance powers (other than a power under section 715 or 716) for one or more of the following purposes (*compliance purposes*):
  - (a) determining whether this Act, a related offence provision or a fair work instrument is being, or has been, complied with;
  - (b) subject to subsection (2), determining whether a safety net contractual entitlement is being, or has been, contravened by a person;
  - (c) the purposes of a provision of the regulations that confers functions or powers on inspectors;
  - (d) the purposes of a provision of another Act that confers functions or powers on inspectors.

Note: The powers in sections 715 (which deals with enforceable undertakings) and 716 (which deals with compliance notices) may be

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exercised for the purpose of remedying the effects of certain contraventions.

- (2) An inspector may exercise compliance powers for the purpose referred to in paragraph (1)(b) only if the inspector reasonably believes that the person has contravened one or more of the following:
- (a) a provision of the National Employment Standards;
  - (b) a term of a modern award;
  - (c) a term of an enterprise agreement;
  - (d) a term of a workplace determination;
  - (e) a term of a national minimum wage order;
  - (f) a term of an equal remuneration order.

**707 When powers of inspectors may be exercised**

An inspector may exercise compliance powers:

- (a) at any time during working hours; or
- (b) at any other time, if the inspector reasonably believes that it is necessary to do so for compliance purposes.

**707A Hindering or obstructing the Fair Work Ombudsman and inspectors etc.**

- (1) A person must not intentionally hinder or obstruct:
- (a) the Fair Work Ombudsman or an inspector in the performance of his or her functions or the exercise of his or her powers as the Fair Work Ombudsman or an inspector; or
  - (b) an assistant referred to in section 710 assisting an inspector on premises; or
  - (c) a member of the staff of the Office of the Fair Work Ombudsman in the performance of his or her functions or the exercise of his or her powers in relation to an FWO notice.

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

- (2) Subsection (1) does not apply if:
- (a) the person has a reasonable excuse; or

- (b) if the Fair Work Ombudsman or inspector referred to in paragraph (1)(a) or (b) (as the case requires) was required to show his or her identity card to the person under subsection 708(3) or paragraph 711(3)(b)—the Fair Work Ombudsman or inspector:
  - (i) failed to do so; or
  - (ii) failed to tell the person of the effect of this section.
- (3) A reference in subsection (1) to the Fair Work Ombudsman includes a reference to a delegate of the Fair Work Ombudsman.

### **Subdivision DA—Power to enter premises**

#### **708 Power of inspectors to enter premises**

- (1) An inspector may, without force:
  - (a) enter premises, if the inspector reasonably believes that this Act or a fair work instrument applies to work that is being, or applied to work that has been, performed on the premises; or
  - (b) enter business premises, if the inspector reasonably believes that there are records or documents relevant to compliance purposes on the premises, or accessible from a computer on the premises.
- (2) Despite paragraph (1)(a), an inspector must not enter a part of premises that is used for residential purposes unless the inspector reasonably believes that the work referred to in that paragraph is being performed on that part of the premises.
- (3) The inspector must, either before or as soon as practicable after entering premises, show his or her identity card to the occupier, or another person who apparently represents the occupier, if the occupier or other person is present at the premises.

#### **709 Powers of inspectors while on premises**

The inspector may exercise one or more of the following powers while on the premises:

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- (a) inspect any work, process or object;
- (b) interview any person;
- (c) require a person to tell the inspector who has custody of, or access to, a record or document;
- (d) require a person who has the custody of, or access to, a record or document to produce the record or document to the inspector either while the inspector is on the premises, or within a specified period;
- (e) inspect, and make copies of, any record or document that:
  - (i) is kept on the premises; or
  - (ii) is accessible from a computer that is kept on the premises;
- (f) take samples of any goods or substances in accordance with any procedures prescribed by the regulations.

Note: See also sections 713, 713A and 714 (which deal with self-incrimination and produced documents etc.).

**710 Persons assisting inspectors**

- (1) A person (the *assistant*) may accompany the inspector onto the premises to assist the inspector if the Fair Work Ombudsman is satisfied that:
  - (a) the assistance is necessary and reasonable; and
  - (b) the assistant has suitable qualifications and experience to properly assist the inspector.
- (2) The assistant:
  - (a) may do such things on the premises as the inspector requires to assist the inspector to exercise compliance powers; but
  - (b) must not do anything that the inspector does not have power to do.
- (3) Anything done by the assistant is taken for all purposes to have been done by the inspector.

**Subdivision DB—Powers to ask questions and require records and documents**

**711 Power to ask for person's name and address**

- (1) An inspector may require a person to tell the inspector the person's name and address if the inspector reasonably believes that the person has contravened this Act.
- (2) If the inspector reasonably believes that the name or address is false, the inspector may require the person to give evidence of its correctness.
- (3) A person must comply with a requirement under subsection (1) or (2) if:
  - (a) the inspector advises the person that he or she may contravene a civil remedy provision if he or she fails to comply with the requirement; and
  - (b) the inspector shows his or her identity card to the person.

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

- (4) Subsection (3) does not apply if the person has a reasonable excuse.

**712 Power to require persons to produce records or documents**

- (1) An inspector may require a person, by notice, to produce a record or document to the inspector.
- (2) The notice must:
  - (a) be in writing; and
  - (b) be served on the person; and
  - (c) require the person to produce the record or document at a specified place within a specified period of at least 14 days.

The notice may be served by sending the notice to the person's fax number.

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- (3) A person who is served with a notice to produce must not fail to comply with the notice.

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

- (4) Subsection (3) does not apply if the person has a reasonable excuse.

**712A Minister may nominate ART President or Deputy President to issue FWO notices**

- (1) The Minister may, by writing, nominate an ART President or Deputy President to issue written notices (***FWO notices***) under section 712AB.
- (2) The Minister may nominate an ART President or Deputy President who is a Judge to issue FWO notices under section 712AB only if the Judge has consented, by writing, to the nomination.
- (3) A nomination ceases to have effect if:
- (a) the nominated ART President or Deputy President ceases to be an ART President or Deputy President; or
  - (b) the Minister, by writing, withdraws the nomination.
- (4) A nominated ART President or Deputy President has, in performing a function of or connected with issuing an FWO notice under this Subdivision, the same protection and immunity as a Justice of the High Court has in relation to proceedings in the High Court.

**712AA Fair Work Ombudsman may apply to nominated ART President or Deputy President for FWO notice**

*General requirements*

- (1) The Fair Work Ombudsman may apply, in writing, to a nominated ART President or Deputy President for the issue of an FWO notice referred to in subsection (2) if the Fair Work Ombudsman believes on reasonable grounds that a person:

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- (a) has information or documents relevant to an investigation by an inspector into a suspected contravention of a provision of this Act, a related offence provision, a fair work instrument or a safety net contractual entitlement that relates, directly or indirectly, to:
    - (i) the underpayment of wages, or other monetary entitlements, of employees; or
    - (ii) the unreasonable deduction of amounts from amounts owed to employees; or
    - (iii) the placing of unreasonable requirements on employees to spend or pay amounts paid, or payable, to employees; or
    - (iv) the unfair dismissal of an employee; or
    - (v) the bullying of a worker at work; or
    - (va) the sexual harassment of a person who is a worker in a business or undertaking, seeking to become a worker in a particular business or undertaking, or conducting a business or undertaking; or
    - (vi) the unlawful discrimination of a person in relation to employment; or
    - (vii) a contravention of a provision of the National Employment Standards; or
    - (viiia) the underpayment of monetary entitlements under a minimum standards order or a road transport contractual chain order; or
    - (viiib) the unfair deactivation of an employee-like worker or the unfair termination of a regulated road transport contractor; or
    - (viii) the coercion of an employee by an employer; and
  - (b) is capable of giving evidence that is relevant to such an investigation.
- (2) The FWO notice may require the person:
- (a) to give information to the Fair Work Ombudsman, or a specified member of the staff of the Office of the Fair Work Ombudsman; or

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- (b) to produce documents to the Fair Work Ombudsman, or a specified member of the staff of the Office of the Fair Work Ombudsman; or
- (c) to attend before the Fair Work Ombudsman, or a specified member of the staff of the Office of the Fair Work Ombudsman who is an SES employee or an acting SES employee, and answer questions relevant to the investigation.

*Form and content of application*

- (3) An application for an FWO notice must:
  - (a) if a form is prescribed by the regulations—be in that form; and
  - (b) include any information prescribed by the regulations.
- (4) An application for an FWO notice must not relate to more than one person, but may relate to more than one investigation.

*Application must be accompanied by affidavit*

- (5) An application for an FWO notice must be accompanied by an affidavit by the Fair Work Ombudsman including the following:
  - (a) the name of the person to whom the application relates;
  - (b) details of the investigation (or investigations) to which the application relates;
  - (c) the grounds on which the Fair Work Ombudsman believes the person has information or documents, or is capable of giving evidence, relevant to the investigation (or investigations) referred to in paragraph (b);
  - (d) details of other methods used to attempt to obtain the information, documents or evidence;
  - (e) the number (if any) of previous applications for an FWO notice that the Fair Work Ombudsman has made in relation to the person in respect of the investigation (or investigations) referred to in paragraph (b);
  - (f) information about whether the Fair Work Ombudsman has made, or expects to make, any other applications for an FWO notice in relation to the investigation (or investigations)



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referred to in paragraph (b) and, if so, the persons to whom those applications relate.

*Further information*

- (6) A nominated ART President or Deputy President to whom an application for an FWO notice is made may request the Fair Work Ombudsman to give the ART President or Deputy President further information in relation to the application.
- (7) If a request for further information is made under subsection (6), the Fair Work Ombudsman must give the further information in writing as soon as practicable after receiving the request.

**712AB Issue of FWO notice**

- (1) A nominated ART President or Deputy President to whom an application for an FWO notice has been made must issue the FWO notice if the ART President or Deputy President is satisfied of the following:
  - (a) that an inspector has commenced the investigation (or investigations) to which the application relates;
  - (b) that there are reasonable grounds to believe that the person to whom the application relates has information or documents, or is capable of giving evidence, relevant to the investigation (or investigations);
  - (c) that any other method of obtaining the information, documents or evidence:
    - (i) has been attempted and has been unsuccessful; or
    - (ii) is not appropriate;
  - (d) that the information, documents or evidence would be likely to be of assistance in the investigation (or investigations);
  - (e) that, having regard to all the circumstances, it would be appropriate to issue the FWO notice;
  - (f) any other matter prescribed by the regulations.

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- (2) A nominated ART President or Deputy President must not issue an FWO notice except in the circumstances referred to in subsection (1).
- (3) An FWO notice must not be issued in relation to more than one person, but may be issued in relation to more than one investigation.
- (4) If:
  - (a) an application for an FWO notice is made in relation to more than one investigation; and
  - (b) the nominated ART President or Deputy President to whom the application is made is not satisfied of the matters referred to in subsection (1) in relation to each of those investigations;the nominated ART President or Deputy President must issue the FWO notice in relation to the investigation (or investigations) in relation to which the nominated ART President or Deputy President is satisfied of the matters referred to in subsection (1).

**712AC Form and content of FWO notice**

An FWO notice must:

- (a) if a form is prescribed by the regulations—be in that form; and
- (b) if the notice requires a person to give information under paragraph 712AA(2)(a)—specify the time by which, and the manner and form in which, the information is to be given; and
- (c) if the notice requires a person to produce documents under paragraph 712AA(2)(b)—specify the time by which, and the manner in which, the documents are to be produced; and
- (d) if the notice requires a person to attend to answer questions relevant to an investigation—specify the time and place for the attendance; and
- (e) be signed by the nominated ART President or Deputy President who issued it; and
- (f) include any other information prescribed by the regulations.

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**712AD Fair Work Ombudsman may give FWO notice to person in relation to whom it is issued and vary time for compliance**

*Fair Work Ombudsman may give FWO notice to person in relation to whom it is issued*

- (1) If a nominated ART President or Deputy President issues an FWO notice, the Fair Work Ombudsman may give the notice to the person in relation to whom it is issued.
- (2) If an FWO notice is not given to the person in relation to whom it is issued within 3 months after the day on which it was issued, the notice ceases to have effect at the end of that period.

*Variation of time for compliance with FWO notice*

- (3) If:
  - (a) the Fair Work Ombudsman gives an FWO notice to a person under subsection (1); and
  - (b) the time specified in the notice under paragraph 712AC(b), (c) or (d) is not at least 14 days after the notice is given to the person;the Fair Work Ombudsman must, at the same time as the FWO notice is given to the person, also give notice to the person of a time later than the time specified in the notice.
- (4) The Fair Work Ombudsman may, at any time after giving an FWO notice to the person in relation to whom it is issued, give notice to the person of a time later than the time:
  - (a) specified in the notice under paragraph 712AC(b), (c) or (d); or
  - (b) notified under subsection (3).
- (5) A later time notified under subsection (3) or (4) must be at least 14 days after the FWO notice is given to the person.
- (6) If the person is notified of a later time under subsection (3) or (4), the FWO notice has effect as if the later time (or the latest of those times) were the time specified in the FWO notice.

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**712AE Conduct of examination**

*Legal representation*

- (1) A person attending before the Fair Work Ombudsman, or a member of the staff mentioned in paragraph 712AA(2)(c), may be represented by a lawyer if the person chooses.

*Oath or affirmation*

- (2) The Fair Work Ombudsman, or a member of the staff mentioned in paragraph 712AA(2)(c), may require the information or answers to be verified by, or given on, oath or affirmation, and either orally or in writing. For that purpose, the Fair Work Ombudsman, or any member of the staff of the Office of the Fair Work Ombudsman, may administer the oath or affirmation.
- (3) The oath or affirmation is an oath or affirmation that the information or answers are or will be true.

**712B Requirement to comply with FWO notice**

- (1) A person who has been given an FWO notice must do the following (as applicable):
  - (a) give information or produce a document in accordance with the notice;
  - (b) attend to answer questions in accordance with the notice;
  - (c) take an oath or make an affirmation when required to do so under subsection 712AE(2);
  - (d) answer questions relevant to the investigation while attending as required by the FWO notice.

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

- (2) Subsection (1) does not apply to the extent that the person is not capable of complying with the requirement.

**712C Payment for expenses incurred in attending as required by an FWO notice**

- (1) A person who attends as required by an FWO notice is (subject to subsection (2)) entitled to be paid fees and allowances, fixed by or calculated in accordance with the regulations, for reasonable expenses (including legal expenses) incurred by the person in so attending.
- (2) The person is not entitled to be paid for expenses under this section unless the person:
  - (a) applies, in writing, to the Fair Work Ombudsman for payment of the expenses within 3 months after the attendance; and
  - (b) provides to the Fair Work Ombudsman sufficient evidence to establish that the person incurred the expenses.
- (3) An application under paragraph (2)(a) must:
  - (a) if a form is prescribed by the regulations—be in that form; and
  - (b) include any information prescribed by the regulations.

**712D Protection from liability relating to FWO notices**

A person who, in good faith, gives information, produces a record or document, or answers a question, when required to do so under an FWO notice is not liable to:

- (a) any proceedings for contravening any other law because of that conduct; or
- (b) civil proceedings for loss, damage or injury of any kind suffered by another person because of that conduct.

**712E Fair Work Ombudsman must notify Commonwealth Ombudsman of issue of FWO notice**

- (1) As soon as practicable after an FWO notice has been issued, the Fair Work Ombudsman must:

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- (a) notify the Commonwealth Ombudsman that the FWO notice has been issued; and
  - (b) give the Commonwealth Ombudsman a copy of:
    - (i) the FWO notice; and
    - (ii) the affidavit that accompanied the application for the FWO notice; and
    - (iii) any other information in relation to the FWO notice that was given to the nominated ART President or Deputy President who issued the notice.
- (2) If notice under subsection 712AD(3) or (4) is given to a person, the Fair Work Ombudsman must notify the Commonwealth Ombudsman as soon as practicable after giving notice.

**712F Review and report by Commonwealth Ombudsman**

*Fair Work Ombudsman to give report etc. to Commonwealth Ombudsman*

- (1) As soon as practicable after an examination of a person under paragraph 712AA(2)(c) is completed, the Fair Work Ombudsman must give the Commonwealth Ombudsman:
  - (a) a report about the examination; and
  - (b) a video recording of the examination; and
  - (c) a transcript of the examination.
- (2) The report under paragraph (1)(a) must include:
  - (a) a copy of the FWO notice under which the examination was conducted; and
  - (b) the following information:
    - (i) the time and place at which the examination was conducted;
    - (ii) the name of each person who was present at the examination;
    - (iii) any other information prescribed by the rules.

*Review of exercise of powers under this Subdivision*

- (3) The Commonwealth Ombudsman:
  - (a) must review the exercise of powers under this Subdivision by the Fair Work Ombudsman and any member of the staff of the Office of the Fair Work Ombudsman; and
  - (b) may do anything incidental or conducive to the performance of that function.
- (4) The Commonwealth Ombudsman's powers under the *Ombudsman Act 1976* extend to a review by the Ombudsman under this section as if the review were an investigation by the Ombudsman under that Act.
- (5) The exercise of those powers in relation to a review by the Ombudsman under this section is taken, for all purposes, to be an exercise of powers under the *Ombudsman Act 1976*.

*Commonwealth Ombudsman to report to Parliament*

- (6) As soon as practicable after the end of each quarter of each financial year, the Commonwealth Ombudsman must prepare and present to the Parliament a report about examinations conducted during that quarter. The report must include the results of reviews conducted under this section during that quarter.
- (7) The Commonwealth Ombudsman may prepare and present to the Parliament any other reports about the results of reviews conducted under this section the Commonwealth Ombudsman considers appropriate.

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**Subdivision DC—Other rules relating to answers, records and documents**

**713 Self-incrimination etc.**

*Excuses that are not available*

- (1) A person is not excused from giving information, producing a record or document, or answering a question, under paragraph 709(d) or subsection 712(1), or under an FWO notice, on the ground that to do so might tend to incriminate the person or otherwise expose the person to a penalty or other liability.

*Use/derivative use indemnity in relation to requirement under paragraph 709(d) or subsection 712(1)*

- (2) In the case of an individual who produces a record or document, under paragraph 709(d) or subsection 712(1), none of the following:
- (a) the record or document produced;
  - (b) producing the record or document;
  - (c) any information, document or thing obtained as a direct or indirect consequence of producing the record or document; is admissible in evidence against the individual in criminal proceedings, other than:
  - (d) proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to this Act (false or misleading information or documents); and
  - (e) proceedings for an offence against section 149.1 of the *Criminal Code* that relates to this Act (obstruction of Commonwealth officials).

*Use indemnity in relation to FWO notices*

- (3) In the case of an individual who gives information, produces a record or document, or answers a question, under an FWO notice, any information or answer given, or record or document produced,



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is not admissible in evidence against the individual in proceedings, other than:

- (a) proceedings for a contravention of section 712B or 718A (requirement to comply with FWO notice and false or misleading information or documents); and
- (b) proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to this Act (false or misleading information or documents); and
- (c) proceedings for an offence against section 149.1 of the *Criminal Code* that relates to this Act (obstruction of Commonwealth officials).

*Employee records and pay slips*

- (4) Subsections (2) and (3) do not apply to:
  - (a) an employee record in relation to an employee that is made under section 535; or
  - (b) a copy of a pay slip created in relation to an employee.

**713A Certain records and documents are inadmissible**

- (1) The following are not admissible in evidence in criminal proceedings against an individual:
  - (a) any record or document inspected or copied under paragraph 709(e) of which the individual had custody, or to which the individual had access, when it was inspected or copied;
  - (b) any information, document or thing obtained as a direct or indirect consequence of inspecting or copying a record or document of which the individual had custody, or to which the individual had access, when it was inspected or copied under paragraph 709(e).
- (2) Subsection (1) does not apply to:
  - (a) an employee record in relation to an employee that is made under section 535; or
  - (b) a copy of a pay slip created in relation to an employee.

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**713AA Legal professional privilege**

Nothing in this Part requires a person to produce a document that would disclose information that is the subject of legal professional privilege.

**714 Power to keep records or documents**

- (1) If a record or document is produced to the Fair Work Ombudsman, an inspector or any other person in accordance with this Subdivision, he or she may:
  - (a) inspect, and make copies of, the record or document; and
  - (b) keep the record or document for such period as is necessary.
- (2) While the Fair Work Ombudsman, an inspector or any other person keeps a record or document, he or she must allow the following persons to inspect, or make copies of, the record or document at all reasonable times:
  - (a) the person who produced the record or document;
  - (b) any person otherwise entitled to possession of the record or document;
  - (c) a person authorised by the person referred to in paragraph (b).

**714A Reports not to include information relating to an individual's affairs**

- (1) Information relating to the affairs of an individual must not be included in a report under section 685 (which allows the Minister to require reports) or in a report referred to in section 686 (which deals with annual reports) if:
  - (a) the individual is named, or otherwise specifically identified, in the report as the individual to whom the information relates; or
  - (b) it is reasonably likely that people generally (other than people to whom the individual has disclosed information relating to the individual's affairs) would be able to work out the identity of the individual to whom the information relates.

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

### **Subdivision DD—Enforceable undertakings and compliance notices**

#### **715 Enforceable undertakings relating to contraventions of civil remedy provisions**

##### *Application of this section*

- (1) This section applies if the Fair Work Ombudsman reasonably believes that a person has contravened a civil remedy provision.

##### *Accepting an undertaking*

- (2) The Fair Work Ombudsman may accept a written undertaking given by the person in relation to the contravention, except as provided by subsection (5).

##### *Withdrawing or varying an undertaking*

- (3) The person may withdraw or vary the undertaking at any time, but only with the Fair Work Ombudsman's consent.

##### *Relationship with orders in relation to contraventions of civil remedy provisions*

- (4) An inspector must not apply for an order under Division 2 of Part 4-1 in relation to a contravention of a civil remedy provision by a person if an undertaking given by the person under this section in relation to the contravention has not been withdrawn.

Note: A person other than an inspector who is otherwise entitled to apply for an order in relation to the contravention may do so.

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*Relationship with compliance notices*

- (5) The Fair Work Ombudsman must not accept an undertaking in relation to a contravention if the person has been given a notice in relation to the contravention under section 716.

*Enforcement of undertakings*

- (6) If the Fair Work Ombudsman considers that the person who gave the undertaking has contravened any of its terms, the Fair Work Ombudsman may apply to the Federal Court, the Federal Circuit and Family Court of Australia (Division 2) or an eligible State or Territory Court for an order under subsection (7).
- (7) If the court is satisfied that the person has contravened a term of the undertaking, the court may make one or more of the following orders:
- (a) an order directing the person to comply with the term of the undertaking;
  - (b) an order awarding compensation for loss that a person has suffered because of the contravention;
  - (c) any other order that the court considers appropriate.

**716 Compliance notices**

*Application of this section*

- (1) This section applies if an inspector reasonably believes that a person has contravened one or more of the following:
- (a) a provision of the National Employment Standards;
  - (b) a term of a modern award;
  - (c) a term of an enterprise agreement;
  - (d) a term of a workplace determination;
  - (e) a term of a national minimum wage order;
  - (f) a term of an equal remuneration order;
  - (fa) subsection 536AA(1) or (2) (which deal with employer obligations in relation to advertising rates of pay);

- (fb) a term of a minimum standards order;
- (fc) a term of a road transport contractual chain order;
- (g) a provision of Part 6-4C (which deals with the Coronavirus economic response);
- (h) a jobkeeper enabling direction (within the meaning of Part 6-4C);
- (i) a provision of an agreement authorised by Part 6-4C.

*Giving a notice*

- (2) The inspector may, except as provided by subsection (4), give the person a notice requiring the person to do either or both of the following within such reasonable time as is specified in the notice:
  - (a) take specified action to remedy the direct effects of the contravention referred to in subsection (1) (including to calculate and pay the amount of any underpayment);
  - (b) produce reasonable evidence of the person's compliance with the notice.
- (3) The notice must also:
  - (a) set out the name of the person to whom the notice is given; and
  - (b) set out the name of the inspector who gave the notice; and
  - (c) set out brief details of the contravention; and
  - (d) explain that a failure to comply with the notice may contravene a civil remedy provision; and
  - (e) explain that the person may apply to the Federal Court, the Federal Circuit and Family Court of Australia (Division 2) or an eligible State or Territory Court for a review of the notice on either or both of the following grounds:
    - (i) the person has not committed a contravention set out in the notice;
    - (ii) the notice does not comply with subsection (2) or this subsection; and
  - (f) set out any other matters prescribed by the regulations.

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*Relationship with enforceable undertakings*

- (4) An inspector must not give a person a notice in relation to a contravention if:
- (a) the person has given an undertaking under section 715 in relation to the contravention; and
  - (b) the undertaking has not been withdrawn.

*Relationship with civil remedy provisions*

- (4A) An inspector must not apply for an order under Division 2 of Part 4-1 in relation to a contravention of a civil remedy provision by a person if:
- (a) the inspector has given the person a notice in relation to the contravention; and
  - (b) either of the following subparagraphs applies:
    - (i) the notice has not been withdrawn, and the person has complied with the notice;
    - (ii) the person has made an application under section 717 in relation to the notice that has not been completely dealt with.

Note: A person other than an inspector who is otherwise entitled to apply for an order in relation to the contravention may do so.

- (4B) A person who complies with a notice in relation to a contravention of a civil remedy provision is not taken:
- (a) to have admitted to contravening the provision; or
  - (b) to have been found to have contravened the provision.

*Person must not fail to comply with notice*

- (5) A person must not fail to comply with a notice given under this section.

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

- (6) Subsection (5) does not apply if the person has a reasonable excuse.

## **717 Review of compliance notices**

- (1) A person who has been given a notice under section 716 may apply to the Federal Court, the Federal Circuit and Family Court of Australia (Division 2) or an eligible State or Territory Court for a review of the notice on either or both of the following grounds:
  - (a) the person has not committed a contravention set out in the notice;
  - (b) the notice does not comply with subsection 716(2) or (3).
- (2) At any time after the application has been made, the court may stay the operation of the notice on the terms and conditions that the court considers appropriate.
- (3) The court may confirm, cancel or vary the notice after reviewing it.

## **Subdivision DE—Cooperation agreements**

### **717A Effect of cooperation agreement**

- (1) While a cooperation agreement is in force between the Fair Work Ombudsman and a person, the Fair Work Ombudsman must not refer conduct engaged in by the person that is covered by the agreement to the Director of Public Prosecutions or the Australian Federal Police for action in relation to a possible offence.

Note: See subsection 717B(1) for the definition of *cooperation agreement*.

- (2) Subsection (1) does not prevent:
  - (a) an inspector instituting or continuing civil proceedings in relation to the conduct; or
  - (b) conduct engaged in by any other person from being referred to the Director of Public Prosecutions or the Australian Federal Police for action in relation to a possible offence.

### **717B Entry into cooperation agreement**

- (1) The Fair Work Ombudsman may enter into a written agreement (a *cooperation agreement*) with a person covering specified conduct

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engaged in by the person that the person has reported to the Fair Work Ombudsman as amounting to the possible commission by the person of an offence, or at least the physical elements of an offence, against either or both of the following:

- (a) subsection 327A(1) (failing to pay amounts as required);
  - (b) a related offence provision, to the extent that the offence created by the provision relates to an offence against subsection 327A(1).
- (2) The Fair Work Ombudsman must have regard to the following matters in deciding whether to enter into a cooperation agreement with a person in relation to conduct:
- (a) whether in the Fair Work Ombudsman's view the person has made a voluntary, frank and complete disclosure of the conduct, and the nature and level of detail of the disclosure;
  - (b) whether in the Fair Work Ombudsman's view the person has cooperated with the Fair Work Ombudsman in relation to the conduct;
  - (c) the Fair Work Ombudsman's assessment of the person's commitment to continued cooperation in relation to the conduct, including by way of providing the Fair Work Ombudsman with comprehensive information to enable the effectiveness of the person's actions and approach to remedying the effects of the conduct to be assessed;
  - (d) the nature and gravity of the conduct;
  - (e) the circumstances in which the conduct occurred;
  - (f) the person's history of compliance with this Act;
  - (g) any other matters prescribed by the regulations.
- (3) The regulations may prescribe matters in relation to the content of cooperation agreements.

**717C When a cooperation agreement is in force**

A cooperation agreement is in force:

- (a) from the time it is entered into or any later time specified in the agreement; and



- (b) until the earliest of the following:
  - (i) the Fair Work Ombudsman terminates the agreement in accordance with section 717D;
  - (ii) the person withdraws from the agreement in accordance with section 717E;
  - (iii) the expiry date (if any) specified in the agreement.

#### **717D Termination of cooperation agreement by Fair Work Ombudsman**

- (1) The Fair Work Ombudsman may terminate a cooperation agreement with a person at any time, by written notice to the person, if the Fair Work Ombudsman is satisfied that any of the following grounds exist:
  - (a) the person has contravened a term of the agreement;
  - (b) the person has, in relation to the agreement, given information or produced a document to the Fair Work Ombudsman, an inspector, or a person referred to in subsection 712AA(2) that:
    - (i) is false or misleading; or
    - (ii) for information—omits any matter or thing without which the information is misleading;whether the person gave the information or produced the document before the agreement was entered into or since;
  - (c) any other ground prescribed by the regulations.
- (2) If the Fair Work Ombudsman is satisfied that a ground exists for terminating a cooperation agreement with a person, the Fair Work Ombudsman may, instead of terminating the agreement, apply to the Federal Court, the Federal Circuit and Family Court of Australia (Division 2) or an eligible State or Territory Court for an order under subsection (3).
- (3) If the court is satisfied that the ground exists, the court may make one or more of the following orders:

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- (a) an order directing the person to comply with a term of the cooperation agreement, or to give or produce correct and complete information or documents;
- (b) an order awarding compensation for loss that a person has suffered because of matters constituting the ground for terminating the agreement;
- (c) any other order that the court considers appropriate.

**717E Withdrawal from cooperation agreement**

A person that is party to a cooperation agreement with the Fair Work Ombudsman may withdraw from the agreement, but only with the consent of the Fair Work Ombudsman.

**717F Variation of cooperation agreement**

The parties to a cooperation agreement may vary the agreement, by mutual consent and in writing.

**717G Relationship with other powers**

- (1) Whether a cooperation agreement is in force in relation to particular conduct does not affect:
  - (a) the power of the Fair Work Ombudsman to accept an enforceable undertaking under section 715 in relation to the conduct; or
  - (b) the power of an inspector to give a notice under section 716 in relation to the conduct; or
  - (c) any other power or function of the Fair Work Ombudsman or an inspector that is not mentioned in subsection 717A(1).
- (2) However:
  - (a) an enforceable undertaking has no effect to the extent that it is inconsistent with a cooperation agreement; and
  - (b) a compliance notice has no effect to the extent that an action specified in the notice is inconsistent with a cooperation agreement.

This subsection has effect regardless of whether the undertaking or notice was given before or after the cooperation agreement comes into force.

### **Subdivision E—Disclosure of information by the Office of the Fair Work Ombudsman**

#### **718 Disclosure of information by the Office of the Fair Work Ombudsman**

*Information to which this section applies*

- (1) This section applies to the following information:
- (a) information acquired by the Fair Work Ombudsman in the course of performing functions, or exercising powers, as the Fair Work Ombudsman;
  - (b) information acquired by an inspector in the course of performing functions, or exercising powers, as an inspector;
  - (c) information acquired by a member of the staff of the Office of the Fair Work Ombudsman in the course of performing functions, or exercising powers, as a member of that staff;
  - (d) information acquired by a person in the course of assisting the Fair Work Ombudsman under section 698, or in the course of performing functions, or exercising powers, as a consultant under section 699;
  - (e) information acquired by a person in the course of assisting an inspector under section 710.

*Disclosure that is necessary or appropriate, or likely to assist administration or enforcement*

- (2) The Fair Work Ombudsman may disclose, or authorise the disclosure of, the information if the Fair Work Ombudsman reasonably believes:
- (a) that it is necessary or appropriate to do so in the course of performing functions, or exercising powers, under this Act; or

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- (b) that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

*Disclosure to the Minister*

- (3) The Fair Work Ombudsman may disclose, or authorise the disclosure of, the information to the Minister if the Fair Work Ombudsman reasonably believes that the disclosure is likely to assist the Minister to consider a complaint or issue in relation to a matter arising under this Act.

*Disclosure to the Department*

- (4) The Fair Work Ombudsman may disclose, or authorise the disclosure of, the information to:
  - (a) the Secretary of the Department; or
  - (b) an SES employee, or an APS employee, in the Department; for the purpose of briefing, or considering briefing, the Minister if the Fair Work Ombudsman reasonably believes the disclosure is likely to assist the Minister to consider a complaint or issue in relation to a matter arising under this Act.

**Subdivision F—False or misleading information or documents**

**718A False or misleading information or documents**

- (1) A person must not give information or produce a document to the Fair Work Ombudsman, an inspector, or a person referred to in subsection 712AA(2), (the *official*) exercising powers or performing functions under, or in connection with, a law of the Commonwealth if the person knows, or is reckless as to whether, the information or the document:
  - (a) is false or misleading; or
  - (b) for information—omits any matter or thing without which the information is misleading.

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

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

- (2) Subsection (1) does not apply as a result of paragraph (1)(a) if the information or the document is not false or misleading in a material particular.
- (3) Subsection (1) does not apply as a result of paragraph (1)(b) if the information did not omit any matter or thing without which the information is misleading in a material particular.
- (4) Subsection (1) does not apply to a person who produces a document if the document is accompanied by a written statement signed by the person or, in the case of a body corporate, by a competent officer of the body corporate:
  - (a) stating that the document is, to the knowledge of the person, false or misleading in a material particular; and
  - (b) setting out, or referring to, the material particular in which the document is, to the knowledge of the person, false or misleading.
- (5) Subsection (1) does not apply if, before the information was given or the document was produced by a person to the official, the official did not take reasonable steps to inform the person that the person may be liable to a civil remedy for contravening subsection (1).
- (6) For the purposes of subsection (5), it is sufficient if the following form of words is used:

“You may be liable to a civil remedy for giving false or misleading information or producing false or misleading documents”.

## **Chapter 6—Miscellaneous**

### **Part 6-1—Multiple actions**

#### **Division 1—Introduction**

##### **719 Guide to this Part**

This Part provides rules relating to applications for remedies under this Act.

Division 2 prevents certain applications where other remedies are available.

Division 3 prevents multiple applications or complaints in relation to the same conduct.

##### **720 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—Certain actions not permitted if alternative action can be taken**

### **721 Equal remuneration applications**

- (1) The FWC must not deal with an application for an equal remuneration order if the FWC is satisfied that there is available to the employees to whom the order will apply, an adequate alternative remedy that:
  - (a) exists under a law of the Commonwealth (other than Part 2-7) or a law of a State or Territory; and
  - (b) will ensure equal remuneration for work of equal or comparable value for those employees.
- (2) A remedy that:
  - (a) exists under a law of the Commonwealth, a State or a Territory relating to discrimination in relation to employment; and
  - (b) consists solely of compensation for past actions;is not an adequate alternative remedy for the purposes of this section.

### **722 Notification and consultation requirements applications**

The FWC must not make an order under subsection 532(1) or 787(1) if the FWC is satisfied that there is available to the applicant, or to the employees represented by the applicant, an alternative remedy that:

- (a) exists under a law of the Commonwealth (other than Division 2 of Part 3-6 or Division 3 of Part 6-4) or a law of a State or Territory; and
- (b) will give effect, in relation to the employees and registered employee associations concerned, to the requirements of Article 13 of the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer, done at Geneva on 22 June 1982 ([1994] ATS 4).

**Chapter 6** Miscellaneous

**Part 6-1** Multiple actions

**Division 2** Certain actions not permitted if alternative action can be taken

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Note: In 2009, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website ([www.austlii.edu.au](http://www.austlii.edu.au)).

**723 Unlawful termination applications**

A person must not make an unlawful termination application in relation to conduct if the person is entitled to make a general protections court application in relation to the conduct.



## **Division 3—Preventing multiple actions**

### **Subdivision A—Equal remuneration applications**

#### **724 Equal remuneration applications**

- (1) The FWC must not deal with an application for an equal remuneration order in relation to an employee if proceedings for an alternative remedy:
  - (a) to ensure equal remuneration for work of equal or comparable value for the employee; or
  - (b) against unequal remuneration for work of equal or comparable value for the employee;have commenced under a law of the Commonwealth (other than Part 2-7) or a law of a State or Territory.
- (2) Subsection (1) does not prevent the FWC from dealing with the application if the proceedings for the alternative remedy:
  - (a) have been discontinued by the party who commenced the proceedings; or
  - (b) have failed for want of jurisdiction.
- (3) If an application has been made to the FWC for an equal remuneration order in relation to an employee, a person is not entitled to commence proceedings for an alternative remedy under a law of the Commonwealth (other than Part 2-7) or a law of a State or Territory:
  - (a) to ensure equal remuneration for work of equal or comparable value for the employee; or
  - (b) against unequal remuneration for work of equal or comparable value for the employee.
- (4) Subsection (3) does not prevent a person from commencing proceedings for an alternative remedy if:
  - (a) the applicant has discontinued the application for the equal remuneration order; or

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- (b) the application has failed for want of jurisdiction.
- (5) A remedy that:
  - (a) exists under a law of the Commonwealth, a State or a Territory relating to discrimination in relation to employment; and
  - (b) consists solely of compensation for past actions; is not an alternative remedy for the purposes of this section.

**Subdivision B—Applications and complaints relating to dismissal**

**725 General rule**

A person who has been dismissed must not make an application or complaint of a kind referred to in any one of sections 726 to 732 in relation to the dismissal if any other of those sections applies.

**726 Dismissal remedy bargaining order applications**

- (1) This section applies if:
  - (a) a dismissal remedy bargaining order application has been made by, or on behalf of, the person in relation to the dismissal; and
  - (b) the application has not:
    - (i) been withdrawn by the person who made the application; or
    - (ii) failed for want of jurisdiction.
- (2) A *dismissal remedy bargaining order application* is an application for a bargaining order made on the ground that the person was dismissed in contravention of the good faith bargaining requirement in paragraph 228(1)(e).

**727 General protections FWC applications**

- (1) This section applies if:
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- (a) a general protections FWC application has been made by, or on behalf of, the person in relation to the dismissal; and
  - (b) the application has not:
    - (i) been withdrawn by the person who made the application; or
    - (ii) failed for want of jurisdiction; or
    - (iii) resulted in the issue of a certificate under paragraph 368(3)(a) (which provides for the FWC to issue a certificate if the FWC is satisfied that all reasonable attempts to resolve a dispute (other than by arbitration) have been, or are likely to be, unsuccessful).
- (1A) This section also applies if:
- (a) a general protections FWC application has been made by, or on behalf of, the person in relation to the dismissal; and
  - (b) the application has not:
    - (i) been withdrawn by the person who made the application; or
    - (ii) failed for want of jurisdiction; and
  - (c) a certificate in relation to the dispute has been issued by the FWC under paragraph 368(3)(a) (which provides for the FWC to issue a certificate if the FWC is satisfied that all reasonable attempts to resolve a dispute (other than by arbitration) have been, or are likely to be, unsuccessful); and
  - (d) a notification of the parties' agreement to the FWC arbitrating the dispute has been made as referred to in paragraphs 369(1)(b) and (c).
- (2) A **general protections FWC application** is an application under section 365 for the FWC to deal with a dispute that relates to dismissal.

## 728 General protections court applications

This section applies if:

- (a) a general protections court application has been made by, or on behalf of, the person in relation to the dismissal; and
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- (b) the application has not:
  - (i) been withdrawn by the person who made the application; or
  - (ii) failed for want of jurisdiction.

**729 Unfair dismissal applications**

- (1) This section applies if:
  - (a) an unfair dismissal application has been made by the person in relation to the dismissal; and
  - (b) the application has not:
    - (i) been withdrawn by the person who made the application; or
    - (ii) failed for want of jurisdiction; or
    - (iii) failed because the FWC was satisfied that the dismissal was a case of genuine redundancy.
- (2) An *unfair dismissal application* is an application under subsection 394(1) for a remedy for unfair dismissal.

**730 Unlawful termination FWC applications**

- (1) This section applies if:
  - (a) an unlawful termination FWC application has been made by, or on behalf of, the person in relation to the dismissal; and
  - (b) the application has not:
    - (i) been withdrawn by the person who made the application; or
    - (ii) failed for want of jurisdiction; or
    - (iii) resulted in the issue of a certificate under paragraph 776(3)(a) (which provides for the FWC to issue a certificate if the FWC is satisfied that all reasonable attempts to resolve a dispute (other than by arbitration) have been, or are likely to be, unsuccessful).
- (1A) This section also applies if:

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- (a) an unlawful termination FWC application has been made by, or on behalf of, the person in relation to the dismissal; and
  - (b) the application has not:
    - (i) been withdrawn by the person who made the application; or
    - (ii) failed for want of jurisdiction; and
  - (c) a certificate in relation to the dispute has been issued by the FWC under paragraph 776(3)(a) (which provides for the FWC to issue a certificate if the FWC is satisfied that all reasonable attempts to resolve a dispute (other than by arbitration) have been, or are likely to be, unsuccessful); and
  - (d) a notification of the parties' agreement to the FWC arbitrating the dispute has been made as referred to in paragraphs 777(1)(b) and (c).
- (2) An **unlawful termination FWC application** is an application under section 773 for the FWC to deal with a dispute that relates to dismissal.

### 731 Unlawful termination court applications

This section applies if:

- (a) an unlawful termination court application has been made by, or on behalf of, the person in relation to the dismissal; and
- (b) the application has not:
  - (i) been withdrawn by the person who made the application; or
  - (ii) failed for want of jurisdiction.

### 732 Applications and complaints under other laws

- (1) This section applies if:
  - (a) an application or complaint under another law has been made by, or on behalf of, the person in relation to the dismissal; and
  - (b) the application or complaint has not:

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- (i) been withdrawn by the person who made the application; or
  - (ii) failed for want of jurisdiction.
- (2) An **application or complaint under another law** is an application or complaint made under:
  - (a) a law of the Commonwealth (other than this Act); or
  - (b) a law of a State or Territory.
- (3) For the purposes of this Subdivision, if a complaint under the *Australian Human Rights Commission Act 1986* relates to a dismissal only as a result of an amendment of the complaint, the complaint is taken to be made when the complaint is amended.

**733 Dismissal does not include failure to provide benefits**

For the purposes of this Subdivision, a reference to an application or complaint made in relation to a dismissal does not include a reference to an application or complaint made only in relation to failure by the employer concerned to provide a benefit to which the dismissed person is entitled as a result of the dismissal.

**Subdivision C—General protections applications that do not relate to dismissal**

**734 General rule**

- (1) A person must not make a general protections court application in relation to conduct that does not involve the dismissal of the person if:
  - (a) an application or complaint under an anti-discrimination law or the *Australian Human Rights Commission Act 1986* has been made by, or on behalf of, the person in relation to the conduct; and
  - (b) the application or complaint has not:
    - (i) been withdrawn by the person who made the application; or

- (ii) failed for want of jurisdiction.
- (2) A person must not make an application or complaint under an anti-discrimination law or the *Australian Human Rights Commission Act 1986* in relation to conduct that does not involve the dismissal of the person if:
  - (a) a general protections court application has been made by, or on behalf of, the person in relation to the conduct; and
  - (b) the application has not:
    - (i) been withdrawn by the person who made the application; or
    - (ii) failed for want of jurisdiction.

### **Subdivision D—Sexual harassment applications**

#### **734A Sexual harassment court applications—interaction with sexual harassment FWC applications**

- (1) A person (the **first person**) who alleges they have been sexually harassed in contravention of Division 2 of Part 3-5A by another person (the **second person**) must not (subject to subsection (2)) make a sexual harassment court application in relation to particular conduct if:
  - (a) a sexual harassment FWC application has been made by, or on behalf of, the first person in relation to the conduct; and
  - (b) a certificate in relation to the dispute has been issued by the FWC under paragraph 527R(3)(a) (which provides for the FWC to issue a certificate if the FWC is satisfied that all reasonable attempts to resolve a dispute (other than by arbitration) have been, or are likely to be, unsuccessful); and
  - (c) 2 or more of the parties (the **notifying parties**) have jointly notified the FWC as mentioned in paragraph 527S(1)(b) that they agree to the FWC arbitrating the dispute; and
  - (d) paragraphs 527S(1)(c), (d) and (e) apply in relation to the notification; and
  - (e) the notifying parties include both the first person and the second person.

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- (2) Subsection (1) does not apply in relation to a sexual harassment court application that includes an application for an interim injunction.
- (3) A *sexual harassment FWC application* is an application under section 527F for the FWC to deal with a dispute that relates to a contravention of Division 2 of Part 3-5A.

**734B Sexual harassment FWC applications and sexual harassment court applications—interaction with anti-discrimination laws**

- (1) A person who alleges they have been sexually harassed in contravention of Division 2 of Part 3-5A must not make either of the following applications:
  - (a) a sexual harassment FWC application (other than an application that consists solely of an application for a stop sexual harassment order);
  - (b) a sexual harassment court application;in relation to particular conduct if:
  - (c) an application or complaint under an anti-discrimination law or the *Australian Human Rights Commission Act 1986* has been made by, or on behalf of, the person in relation to the conduct; and
  - (d) the application or complaint has not:
    - (i) been withdrawn by the person who made the application; or
    - (ii) failed for want of jurisdiction.
- (2) A person who alleges they have been sexually harassed in contravention of Division 2 of Part 3-5A must not make an application or complaint under an anti-discrimination law or the *Australian Human Rights Commission Act 1986* in relation to particular conduct if:
  - (a) either of the following applications has been made by, or on behalf of, the person in relation to the conduct:



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- (i) a sexual harassment FWC application (other than an application that consists solely of an application for a stop sexual harassment order);
- (ii) a sexual harassment court application; and
- (b) the application referred to in paragraph (a) has not:
  - (i) been withdrawn by the person who made the application; or
  - (ii) failed for want of jurisdiction.

**Subdivision DA—Actions relating to unfair deactivation or unfair termination**

**734BA Limitation on applications for remedy for unfair deactivation—other proceedings in progress**

- (1) An application under Division 5 of Part 3A-3 (unfair deactivation or unfair termination of regulated workers) in relation to deactivation of a person from a digital labour platform must not be made if other deactivation proceedings have been commenced in relation to the person and the digital labour platform, unless the other deactivation proceedings:
  - (a) have been discontinued by the person who commenced them; or
  - (b) have failed for want of jurisdiction.
- (2) If an application under Division 5 of Part 3A-3 has been made in relation to deactivation of a person (the **relevant worker**) from a digital labour platform, a person must not commence other deactivation proceedings in relation to the relevant worker and the digital labour platform unless:
  - (a) the application has been discontinued by the person who made it; or
  - (b) the proceedings in relation to the application have failed for want of jurisdiction.
- (3) In this section:

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*other deactivation proceedings* means proceedings (if any) specified in regulations made for the purposes of this definition.

**734BB Limitation on applications for remedy for unfair termination—other proceedings in progress**

- (1) An application under Division 5 of Part 3A-3 (unfair deactivation or unfair termination of regulated workers) in relation to termination of a services contract must not be made if other termination proceedings have been commenced in relation to the services contract, unless the other termination proceedings:
  - (a) have been discontinued by the person who commenced them; or
  - (b) have failed for want of jurisdiction.
- (2) A person must not commence other termination proceedings in relation to a services contract if an application under Division 5 of Part 3A-3 has been made in relation to termination of the services contract unless:
  - (a) the application has been discontinued by the person who made it; or
  - (b) the proceedings in relation to the application have failed for want of jurisdiction.
- (3) In this section:

*other termination proceedings* means proceedings (if any) specified in regulations made for the purposes of this definition.

**Subdivision E—Services contract actions**

**734C Limitation on applications for review of services contracts—other proceedings in progress**

- (1) An application to review a services contract under Division 4 of Part 3A-5 (unfair contract terms) must not be made if other review proceedings have been commenced in relation to the services contract, unless the other review proceedings:

- (a) have been discontinued by the person who commenced them;  
or
  - (b) have failed for want of jurisdiction.
- (2) A person must not commence other review proceedings in relation to a services contract if an application to review the contract has been made under Division 4 of Part 3A-5, unless:
  - (a) the application has been discontinued by the person who made it; or
  - (b) the proceedings in relation to the application have failed for want of jurisdiction.
- (3) In this section:  
*other review proceedings* means:
  - (a) proceedings under a provision of a law of a State or Territory that makes provision as mentioned in paragraph 536JP(1)(c) and is not affected by the exclusion provisions; or;
  - (b) proceedings in relation to a services contract under a provision of a law of the Commonwealth, or of a State or Territory, that is specified in regulations made for the purposes of this paragraph.

## Part 6-2—Dealing with disputes

### Division 1—Introduction

#### 735 Guide to this Part

This Part is about dealing with disputes between national system employees and their employers, regulated workers and regulated businesses, and persons in a road transport contractual chain.

Division 2 deals with the powers of the FWC and other persons to deal with a dispute if a modern award, enterprise agreement, instrument made under Chapter 3A or 3B or contract of employment includes a term that provides for the FWC or the person to deal with the dispute.

#### 736 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—Dealing with disputes**

### **Subdivision A—Model term about dealing with disputes**

#### **737 Model term about dealing with disputes**

- (1) The FWC must determine a model term for dealing with disputes for enterprise agreements.
- (2) In determining the model term, the FWC must:
  - (a) ensure that the model term is consistent with the requirements set out in subsection 186(6); and
  - (b) take into account the following matters:
    - (i) whether the model term is broadly consistent with comparable terms in modern awards;
    - (ii) best practice workplace relations as determined by the FWC;
    - (iii) whether all persons and bodies have had a reasonable opportunity to be heard and make submissions to the FWC for consideration in determining the model term;
    - (iv) the operation of subsections 739(3), (4), (5) and (6) and 740(3) and (4);
    - (v) the object of this Act (see section 3);
    - (vi) any other matters the FWC considers relevant.

Note 1: The FWC must be constituted by a Full Bench to make the model term dealing with disputes (see subsection 616(4A)).

Note 2: For the variation of a determination, see subsection 33(3) of the *Acts Interpretation Act 1901*.

- (3) A determination under subsection (1) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination.

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**Subdivision B—Dealing with disputes**

**738 Application of this Division**

This Division applies if:

- (a) a modern award includes a term that provides a procedure for dealing with disputes, including a term in accordance with section 146; or
- (b) an enterprise agreement includes a term that provides a procedure for dealing with disputes, including a term referred to in subsection 186(6); or
- (ba) a minimum standards order includes a term that provides a procedure for dealing with disputes; or
- (bb) a collective agreement includes a term that provides a procedure for dealing with disputes; or
- (bc) a road transport contractual chain order includes a term that provides a procedure for dealing with disputes; or
- (c) a contract of employment or other written agreement includes a term that provides a procedure for dealing with disputes between the employer and the employee, to the extent that the dispute is about any matters in relation to the National Employment Standards or a safety net contractual entitlement; or
- (d) a determination under the *Public Service Act 1999* includes a term that provides a procedure for dealing with disputes arising under the determination or in relation to the National Employment Standards.

**739 Disputes dealt with by the FWC**

- (1) This section applies if a term referred to in section 738 requires or allows the FWC to deal with a dispute.
- (3) In dealing with a dispute, the FWC must not exercise any powers limited by the term.

- (4) If, in accordance with the term, the parties have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.

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

- (5) Despite subsection (4), the FWC must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.
- (6) The FWC may deal with a dispute only on application by a party to the dispute.

#### **740 Dispute dealt with by persons other than the FWC**

- (1) This section applies if a term referred to in section 738 requires or allows a person other than the FWC to deal with a dispute.
- (3) If, in accordance with the term, the parties have agreed that the person may arbitrate (however described) the dispute, the person may do so.
- (4) Despite subsection (3), the person must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.

## **Part 6-3—Extension of National Employment Standards entitlements**

### **Division 1—Introduction**

#### **741 Guide to this Part**

This Part contains Divisions that extend some National Employment Standards entitlements to non-national system employees.

Division 2 extends the entitlements to unpaid parental leave, and related entitlements.

Division 2A extends the entitlements to paid family and domestic violence leave.

Division 3 extends the entitlements to notice of termination or payment in lieu of notice.

#### **742 Meanings of *employee* and *employer***

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



## **Division 2—Extension of entitlement to unpaid parental leave and related entitlements**

### **Subdivision A—Main provisions**

#### **743 Object of this Division**

The object of this Division is to give effect, or further effect, to:

- (a) the ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, done at Geneva on 23 June 1981 ([1991] ATS 7); and
- (b) the Workers with Family Responsibilities Recommendation, 1981 (Recommendation No. R165) which the General Conference of the ILO adopted on 23 June 1981;

by providing for a system of unpaid parental leave and related entitlements, that will help men and women workers who have responsibilities in relation to their dependent children:

- (c) to prepare for, enter, participate in or advance in economic activity; and
- (d) to reconcile their employment and family responsibilities.

Note 1: In 2009, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website ([www.austlii.edu.au](http://www.austlii.edu.au)).

Note 2: In 2009, the text of a Recommendation adopted by the General Conference of the ILO was accessible through the ILO website ([www.ilo.org](http://www.ilo.org)).

#### **744 Extending the entitlement to unpaid parental leave and related entitlements**

*Extension of Division 5 of Part 2-2 and related provisions*

- (1) The provisions of Division 5 of Part 2-2, and the related provisions identified in subsection (2), apply in relation to a non-national system employee as if:

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- (a) any reference in the provisions to a national system employee also included a reference to a non-national system employee; and
- (b) any reference in the provisions to a national system employer also included a reference to a non-national system employer.

Note 1: Division 5 of Part 2-2 provides for unpaid parental leave and related entitlements.

Note 2: This subsection applies to express references to national system employees and national system employers, and to references that are to national system employees and national system employers because of section 60 or another similar section.

- (2) The related provisions are the following, so far as they apply in relation to Division 5 of Part 2-2 as it applies because of subsection (1):
  - (a) the provisions of Divisions 2 and 13 of Part 2-2;
  - (b) any other provisions of this Act prescribed by the regulations;
  - (c) any provisions of this Act that define expressions that are used (directly or indirectly) in provisions of Division 5 of Part 2-2, or in provisions referred to in paragraph (a) or (b) of this subsection.

*Modifications are set out in Subdivision B*

- (3) The extended parental leave provisions have effect subject to the modifications provided for in Subdivision B. The ***extended parental leave provisions*** are the provisions of Division 5 of Part 2-2, and the related provisions identified in subsection (2) of this section, as they apply because of this section.

*Regulations made for the purpose of provisions*

- (4) Subsection (1) also applies to any regulations made for the purpose of a provision to which that subsection applies, other than a provision that is modified by Subdivision B.

**745 Contravening the extended parental leave provisions**

A non-national system employer must not contravene the extended parental leave provisions.

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

**746 References to the National Employment Standards include extended parental leave provisions**

A reference in this Act, or another law of the Commonwealth, to the National Employment Standards includes a reference to the extended parental leave provisions.

**747 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 the birth or adoption of children, to the extent that those laws:

- (a) apply to non-national system employees; and
- (b) provide entitlements for those employees that are more beneficial than the entitlements under the extended parental leave provisions.

**Subdivision B—Modifications of the extended parental leave provisions**

**748 Non-national system employees are not award/agreement free employees**

A non-national system employee is not an award/agreement free employee for the purpose of the extended parental leave provisions.

**749 Modification of meaning of *base rate of pay* for pieceworkers**

Section 16 has effect as if the following paragraph were added at the end of subsection 16(2):

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- (d) the employee is a non-national system employee, and the regulations prescribe, or provide for the determination of, the employee's base rate of pay for the purposes of the extended parental leave provisions.

**750 Modification of meaning of *full rate of pay* for pieceworkers**

Section 18 has effect as if the following paragraph were added at the end of subsection 18(2):

- (d) the employee is a non-national system employee, and the regulations prescribe, or provide for the determination of, the employee's full rate of pay for the purposes of the extended parental leave provisions.

**751 Modification of meaning of *ordinary hours of work*—if determined by State industrial instrument**

Section 20 has effect as if the following subsection were inserted before subsection 20(1):

- (1A) If a State industrial instrument applies to a non-national system employee and specifies, or provides for the determination of, the employee's ordinary hours of work, the employee's ***ordinary hours of work*** are as specified in, or determined in accordance with, that instrument.

**752 Modification of meaning of *ordinary hours of work*—if not determined by State industrial instrument**

Section 20 has effect as if references in subsections 20(1), (2) and (3) to an award/agreement free employee also included references to a non-national system employee to whom either of the following paragraphs applies:

- (a) a State industrial instrument applies to the employee, but it does not specify, or provide for the determination of, the employee's ordinary hours of work;
- (b) no State industrial instrument applies to the employee.

**753 Modification of meaning of *ordinary hours of work*—regulations may prescribe usual weekly hours**

Section 20 has effect as if the following subsection were added at the end:

- (5) For a non-national system employee:
    - (a) who is not a full-time employee; and
    - (b) who does not have usual weekly hours of work; and
    - (c) to whom either of the following subparagraphs applies:
      - (i) a State industrial instrument applies to the employee, but it does not specify, or provide for the determination of, the employee's ordinary hours of work;
      - (ii) no State industrial instrument applies to the employee;
- 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 the extended parental leave provisions.

**754 Modification of meaning of *piecemaker***

Section 21 has effect as if the following paragraph were added at the end of subsection 21(1):

- (d) a non-national system employee who is in a class of employees prescribed by the regulations as piecemakers for the purpose of the extended parental leave provisions.

**755 Modification of provision about interaction with paid leave**

Section 79 applies as if subsections 79(2) and (3) were omitted.

**756 Modification of provision about relationship between National Employment Standards and agreements**

Section 128 has effect as if references to an award/agreement free employee also included references to a non-national system employee.

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**757 Modification of power to make regulations**

Section 129 has effect as if the following subsection were added at the end:

- (2) The regulations may:
  - (a) permit non-national system employers and non-national system employees to agree on matters that would or might otherwise be contrary to an extended parental leave provision; and
  - (b) prohibit such employers and employees from agreeing on matters, or prohibit such employers from making requirements of such employees, that would or might otherwise be permitted by an extended parental leave provision.

## **Division 2A—Extension of entitlement to paid family and domestic violence leave**

### **Subdivision A—Main provisions**

#### **757A Object of this Division**

The object of this Division is to give effect, or further effect, to:

- (a) paragraph (f) of Article 10 of the ILO Convention (No. 190) concerning Violence and Harassment, done at Geneva on 21 June 2019; and
- (b) the Violence and Harassment Recommendation, 2019 (Recommendation No. 206), which the General Conference of the ILO adopted on 21 June 2019;

by providing employees with an entitlement to paid family and domestic violence leave that will help mitigate the impact of domestic violence in the world of work.

Note: The Convention and the Recommendation could in 2022 be viewed on the ILO website (<http://www.ilo.org>).

#### **757B Extending the entitlement to paid family and domestic violence leave**

##### *Extension to non-national system employees*

- (1) The provisions of Subdivision CA of Division 7 of Part 2-2, and the related provisions identified in subsection (3), apply in relation to a non-national system employee as if:
  - (a) any reference in the provisions to a national system employee also included a reference to a non-national system employee; and
  - (b) any reference in the provisions to a national system employer also included a reference to a non-national system employer.

Note 1: Subdivision CA of Division 7 of Part 2-2 provides for paid family and domestic violence leave.

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Note 2: This subsection applies to express references to national system employees and national system employers, and to references that are to national system employees and national system employers because of section 60 or another similar section.

*Extension to sections 30C and 30M national system employees for victims of crime leave*

- (2) To the extent that a person would not be entitled to leave under Subdivision CA of Division 7 of Part 2-2 because of subsection 106D(3), the provisions of Subdivision CA of Division 7 of Part 2-2, and the related provisions identified in subsection (3), apply in relation to the person, and the person's employer, as if subsection 106D(3) were omitted.

Note: Subsection 106D(3) has the effect that a person who is a national system employee only because of section 30C or 30M is not entitled to leave under the Subdivision to the extent that the leave would constitute leave for victims of crime.

*Related provisions*

- (3) The related provisions are the following, so far as they apply in relation to Subdivision CA of Division 7 of Part 2-2 as it applies because of subsections (1) and (2):
- (a) Subdivision D of Division 7 of Part 2-2;
  - (b) Divisions 2 and 13 of Part 2-2;
  - (c) sections 89 and 98;
  - (d) any other provisions of this Act prescribed by the regulations;
  - (e) any provisions of this Act that define expressions that are used (directly or indirectly) in provisions of Subdivision CA of Division 7 of Part 2-2, or in provisions referred to in paragraph (a), (b), (c) or (d) of this subsection.

*Extended paid family and domestic violence leave provisions*

- (4) The ***extended paid family and domestic violence leave provisions*** are the provisions of Subdivision CA of Division 7 of Part 2-2, and



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the related provisions identified in subsection (3) of this section, as they apply because of this section.

*Modifications are set out in Subdivision B of this Division*

- (4A) The extended paid family and domestic violence leave provisions have effect subject to the modifications provided for in Subdivision B.

*Regulations made for the purpose of provisions*

- (5) Subsections (1) and (2) also apply to any regulations made for the purpose of a provision to which those subsections apply, other than a provision that is modified by Subdivision B.

**757BA Employer obligations in relation to pay slips**

If an employer gives a person a pay slip relating to paid leave to which the person is entitled because of section 757B, the employer:

- (a) must not include on the pay slip any information prescribed by regulations made for the purposes of paragraph 536(2)(c); and
- (b) must comply with any requirements prescribed by regulations made for the purposes of paragraph 536(2)(d).

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

**757C Contravening the extended paid family and domestic violence leave provisions**

An employer must not contravene the extended paid family and domestic violence leave provisions.

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

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**757D References to the National Employment Standards include extended paid family and domestic violence leave provisions**

A reference in this Act, or another law of the Commonwealth, to the National Employment Standards includes a reference to the extended paid family and domestic violence leave provisions.

**757E 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 family and domestic violence, to the extent that those laws:

- (a) apply to non-national system employees; and
- (b) provide entitlements for those employees that are more beneficial than the entitlements under the extended paid family and domestic violence leave provisions.

**Subdivision B—Modifications of the extended paid family and domestic violence leave provisions**

**757F Non-national system employees are not award/agreement free employees**

A non-national system employee is not an award/agreement free employee for the purpose of the extended paid family and domestic violence leave provisions.

**757G Modification of meaning of full rate of pay for pieceworkers**

Section 18 has effect as if the following paragraph were added at the end of subsection 18(2):

- (d) the employee is a non-national system employee, and the regulations prescribe, or provide for the determination of, the employee's full rate of pay for the purposes of the extended paid family and domestic violence leave provisions.

**757H Modification of meaning of pieceworker**

Section 21 has effect as if the following paragraph were added at the end of subsection 21(1):

- (d) a non-national system employee who is in a class of employees prescribed by the regulations as pieceworkers for the purpose of the extended paid family and domestic violence leave provisions.

**757J Modification of provision about relationship between National Employment Standards and agreements**

Section 128 has effect as if references to an award/agreement free employee also included references to a non-national system employee.

**757K Modification of power to make regulations**

Section 129 has effect as if the following subsection were added at the end:

- (2) The regulations may:
  - (a) permit non-national system employers and non-national system employees to agree on matters that would or might otherwise be contrary to an extended paid family and domestic violence leave provision; and
  - (b) prohibit such employers and employees from agreeing on matters, or prohibit such employers from making requirements of such employees, that would or might otherwise be permitted by an extended paid family and domestic violence leave provision.

## **Division 3—Extension of entitlement to notice of termination or payment in lieu of notice**

### **Subdivision A—Main provisions**

#### **758 Object of this Division**

The object of this Division is to give effect, or further effect, to:

- (a) the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer, done at Geneva on 22 June 1982 ([1994] ATS 4); and
- (b) the Termination of Employment Recommendation, 1982 (Recommendation No. R166) which the General Conference of the ILO adopted on 22 June 1982.

Note 1: In 2009, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website ([www.austlii.edu.au](http://www.austlii.edu.au)).

Note 2: In 2009, the text of a Recommendation adopted by the General Conference of the ILO was accessible through the ILO website ([www.ilo.org](http://www.ilo.org)).

#### **759 Extending entitlement to notice of termination or payment in lieu of notice**

*Extension of Subdivision A of Division 11 of Part 2-2 and related provisions*

- (1) The provisions of Subdivision A of Division 11 of Part 2-2, and the related provisions identified in subsection (2), apply in relation to a non-national system employee as if:
  - (a) any reference in the provisions to a national system employee also included a reference to a non-national system employee; and
  - (b) any reference in the provisions to a national system employer also included a reference to a non-national system employer.

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Note 1: Subdivision A of Division 11 of Part 2-2 provides for notice of termination or payment in lieu of notice.

Note 2: This subsection applies to express references to national system employees and national system employers, and to references that are to national system employees and national system employers because of section 60 or another similar section.

- (2) The related provisions are the following, so far as they apply in relation to Subdivision A of Division 11 of Part 2-2 as it applies because of subsection (1):
- (a) the provisions of Division 2, Subdivision C of Division 11, and Division 13, of Part 2-2;
  - (b) any other provisions of this Act prescribed by the regulations;
  - (c) any provisions of this Act that define expressions that are used (directly or indirectly) in provisions of Subdivision A of Division 11 of Part 2-2, or in provisions referred to in paragraph (a) or (b) of this subsection.

*Modifications are set out in Subdivision B*

- (3) The extended notice of termination provisions have effect subject to the modifications provided for in Subdivision B. The ***extended notice of termination provisions*** are the provisions of Subdivision A of Division 11 of Part 2-2, and the related provisions identified in subsection (2) of this section, as they apply because of this section.

*Regulations made for the purpose of provisions*

- (4) Subsection (1) also applies to any regulations made for the purpose of a provision to which that subsection applies, other than a provision that is modified by Subdivision B.

## **760 Contravening the extended notice of termination provisions**

A non-national system employer must not contravene the extended notice of termination provisions.

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

**761 References to the National Employment Standards include extended notice of termination provisions**

A reference in this Act, or another law of the Commonwealth, to the National Employment Standards includes a reference to the extended notice of termination provisions.

**762 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 relating to notice of termination of employment (or payment in lieu of notice), to the extent that those laws:

- (a) apply to non-national system employees; and
- (b) provide entitlements for those employees that are more beneficial than the entitlements under the extended notice of termination provisions.

**Subdivision B—Modifications of the extended notice of termination provisions**

**763 Non-national system employees are not award/agreement free employees**

A non-national system employee is not an award/agreement free employee for the purpose of the extended notice of termination provisions.

**764 Modification of meaning of *full rate of pay* for pieceworkers**

Section 18 has effect as if the following paragraph were added at the end of subsection 18(2):

- (d) the employee is a non-national system employee, and the regulations prescribe, or provide for the determination of, the

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employee's full rate of pay for the purposes of the extended notice of termination provisions.

**765 Modification of meaning of *piecemaker***

Section 21 has effect as if the following paragraph were added at the end of subsection 21(1):

- (d) a non-national system employee who is in a class of employees prescribed by the regulations as piecemarkers for the purpose of the extended notice of termination provisions.

**766 Modification of provision about notice of termination by employee**

Section 118 has effect as if the following subsection were added at the end:

- (2) A State industrial instrument may include terms specifying the period of notice a non-national system employee must give in order to terminate his or her employment.

**767 Modification of provision about relationship between National Employment Standards and agreements**

Section 128 has effect as if references to an award/agreement free employee also included references to a non-national system employee.

**768 Modification of power to make regulations**

Section 129 has effect as if the following subsection were added at the end:

- (2) The regulations may:
  - (a) permit non-national system employers and non-national system employees to agree on matters that would or might otherwise be contrary to an extended notice of termination provision; and

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- (b) prohibit such employers and employees from agreeing on matters, or prohibit such employers from making requirements of such employees, that would or might otherwise be permitted by an extended notice of termination provision.



## **Part 6-3A—Transfer of business from a State public sector employer**

### **Division 1—Introduction**

#### **768AA Guide to this Part**

This Part provides for the transfer of certain terms and conditions of employment when there is a transfer of business from a non-national system employer that is a State public sector employer (called “the old State employer”) to a national system employer (called “the new employer”).

A transfer of business involves the transfer of employment of one or more employees of the old State employer to the new employer. Each of those employees is a “transferring employee”.

If there is a transfer of business, then this Part provides for certain terms and conditions of employment with the old State employer to be transferred to the employment of the transferring employee with the new employer.

This Part achieves the transfer of those terms and conditions by creating a new instrument—a “copied State instrument”—for each transferring employee. The new instrument is a federal instrument and is enforceable under this Act.

#### **768AB Meanings of *employee* and *employer***

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

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## Division 2—Copying terms of State instruments when there is a transfer of business

### 768AC What this Division is about

This Division sets out when there is a transfer of business from the old State employer to the new employer.

### 768AD When does a transfer of business occur?

*When there is a transfer of business*

- (1) There is a ***transfer of business*** from a non-national system employer that is a State public sector employer of a State (the ***old State employer***) to a national system employer (the ***new employer***) if the following requirements are satisfied:
  - (a) the employment of a person who is a State public sector employee of the old State employer has terminated;
  - (b) within 3 months after the termination, the person becomes employed by the new employer;
  - (c) the work (the ***transferring work***) the person performs for the new employer is the same, or substantially the same, as the work the person performed for the old State employer;
  - (d) there is a connection between the old State employer and the new employer as described in subsection (2), (3) or (4).

*Transfer of assets from old State employer to new employer*

- (2) There is a connection between the old State employer and the new employer if, in accordance with an arrangement between:
  - (a) the old State employer or an associated entity of the old State employer; and
  - (b) the new employer or an associated entity of the new employer;

the new employer, or the associated entity of the new employer, owns or has the beneficial use of some or all of the assets (whether tangible or intangible):

- (c) that the old State employer, or the associated entity of the old State employer, owned or had the beneficial use of; and
- (d) that relate to, or are used in connection with, the transferring work.

*Old State employer outsources work to new employer*

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

*New employer is an associated entity of old employer*

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

#### **768AE Meaning of *transferring employee*, *termination time* and *re-employment time***

- (1) The person referred to in paragraph 768AD(1)(a) is a ***transferring employee*** in relation to the transfer of business.
- (2) The ***termination time*** of a transferring employee is the start of the day the employment of the employee is terminated by the old State employer.
- (3) The ***re-employment time*** of a transferring employee is the start of the day the employee becomes employed by the new employer.

## **Division 3—Copied State instruments**

### **Subdivision A—Guide to this Division**

#### **768AF What this Division is about**

If there is a transfer of business, then this Division provides for certain terms and conditions of a transferring employee's employment with the old State employer to be transferred to the employment with the new employer.

The transfer of those terms and conditions is achieved by creating a new instrument—called a “copied State instrument”—for the transferring employee. The new instrument is a federal instrument that is enforceable under this Act.

There are 2 types of copied State instruments—a copied State award and a copied State employment agreement.

A copied State award copies the terms of a State award that covered the transferring employee and the old State employer immediately before the termination of the employee's employment with the old State employer.

A copied State employment agreement copies the terms of a State employment agreement that covered the transferring employee and the old State employer immediately before the termination of the employee's employment with the old State employer.

### **Subdivision B—Copied State instruments**

#### **768AG Contravening a copied State instrument**

A person must not contravene a term of a copied State instrument for a transferring employee that applies to the person.

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

Note 2: For when a copied State instrument for a transferring employee applies to a person, see section 768AM.

### **768AH What is a copied State instrument?**

A *copied State instrument* for a transferring employee is the following:

- (a) a copied State award for the employee;
- (b) a copied State employment agreement for the employee.

### **768AI What is a copied State award?**

- (1) If, immediately before the termination time of a transferring employee:
- (a) a State award (the *original State award*) was in operation under the State industrial law of the State; and
  - (b) the original State award covered (however described in the original State award or a relevant law of the State) the old State employer and the transferring employee (whether or not the original State award also covered other persons);
- then a *copied State award* for the transferring employee is taken to come into operation immediately after the termination time.

Note 1: Even though a copied State award comes into operation in relation to the transferring employee, it will not be enforceable by the employee or another person (for example, the new employer) unless and until it applies to the employee or other person. In particular, it will not apply to the employee or new employer before the employee becomes employed by the new employer. For when the copied State award applies to a person, see section 768AM.

Note 2: A copied State employment agreement for the transferring employee may also come into operation immediately after the termination time, see subsection 768AK(1). If it does, then the State's interaction rules that were in force immediately before the termination time apply for the purposes of working out the interaction between the copied State award and the copied State employment agreement (see item 11 of Schedule 3A to the Transitional Act as that item applies in a modified way because of section 768BY).

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- (2) The copied State award is taken to include the same terms as were in the original State award immediately before the termination time.

Note: The State's instrument content rules that were in force immediately before the termination time apply to the copied State award (see item 10 of Schedule 3A to the Transitional Act as that item applies in a modified way because of section 768BY).

- (3) If the terms of the original State award were affected by an order, a decision or a determination of a State industrial body or a court of the State that was in operation immediately before the termination time, the terms of the copied State award are taken to be similarly affected by the terms of that order, decision or determination.

**768AJ What is a State award?**

- (1) A ***State award*** is an instrument in relation to which the following conditions are satisfied:
- (a) the instrument regulates terms and conditions of employment;
  - (b) the instrument was made under a State industrial law by a State industrial body;
  - (c) the instrument is referred to in that law as an award.
- (2) However, the regulations may provide that an instrument of a specified kind:
- (a) is a ***State award***; or
  - (b) is not a ***State award***.

**768AK What is a copied State employment agreement?**

- (1) If, immediately before the termination time of a transferring employee:
- (a) a State employment agreement (the ***original State agreement***) was in operation under a State industrial law of the State; and
  - (b) the original State agreement covered (however described in the original State agreement or a relevant law of the State)

the old State employer and the transferring employee  
(whether or not the original State agreement also covered  
other persons);

then a ***copied State employment agreement*** for the transferring  
employee is taken to come into operation immediately after the  
termination time.

Note 1: Even though a copied State employment agreement comes into  
operation for the transferring employee, it will not be enforceable by  
the employee or another person (for example, the new employer)  
unless and until it applies to the employee or other person. In  
particular, it will not apply to the employee or new employer before  
the employee becomes employed by the new employer. For when the  
copied State employment agreement applies to a person, see  
section 768AM.

Note 2: A copied State award for the transferring employee may also come  
into operation immediately after the termination time, see  
subsection 768AI(1). If it does, then the State's interaction rules that  
were in force immediately before the termination time apply for the  
purposes of working out the interaction between the copied State  
employment agreement and the copied State award (see item 11 of  
Schedule 3A to the Transitional Act as that item applies in a modified  
way because of section 768BY).

- (2) The copied State employment agreement is taken to include the  
same terms as were in the original State agreement immediately  
before the termination time.

Note: The State's instrument content rules that were in force immediately  
before the termination time apply to the copied State employment  
agreement (see item 10 of Schedule 3A to the Transitional Act as that  
item applies in a modified way because of section 768BY).

- (3) If the terms of the original State employment agreement were  
affected by an order, a decision or a determination of a State  
industrial body or a court of the State that was in operation  
immediately before the termination time, the terms of the copied  
State employment agreement are taken to be similarly affected by  
the terms of that order, decision or determination.

- (4) If the original State agreement is a collective State employment  
agreement, the copied State employment agreement is a ***copied  
State collective employment agreement***.

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- (5) If the original State agreement is an individual State employment agreement, the copied State employment agreement is a ***copied State individual employment agreement***.

**768AL What is a State employment agreement?**

- (1) A ***State employment agreement*** is:
- (a) an agreement in relation to which the following conditions are satisfied:
    - (i) the agreement is between a non-national system employer and one or more of the employees of the employer, or between a non-national system employer and an association of employees registered under a State industrial law;
    - (ii) the agreement determines terms and conditions of employment of one or more employees of the employer;
    - (iii) the agreement was made under a State industrial law; or
  - (b) a determination in relation to which the following conditions are satisfied:
    - (i) the determination determines terms and conditions of employment;
    - (ii) the determination was made under a State industrial law by a State industrial body;
    - (iii) the determination was made in a situation in which parties who were negotiating for the making of an agreement of a kind described in paragraph (a) had not been able to reach an agreement;
    - (iv) the purpose of the determination was to resolve the matters that were at issue in those negotiations.
- (2) However, the regulations may provide that an instrument of a specified kind:
- (a) is a ***State employment agreement***; or
  - (b) is not a ***State employment agreement***.
- (3) A State employment agreement is a ***State collective employment agreement*** unless:
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- (a) it is an agreement of a kind that, under the relevant State industrial law, could only be entered into by a single employee and a single employer; or
  - (b) the agreement is of a kind prescribed by the regulations.
- (4) A State employment agreement referred to in paragraph (3)(a) or (b) is a ***State individual employment agreement***.

**768AM When does a copied State instrument apply to a person?**

*Transferring employee and organisations*

- (1) A copied State instrument for a transferring employee ***applies*** to the transferring employee or an organisation if:
- (a) the instrument covers the employee or organisation; and
  - (b) the instrument is in operation; and
  - (c) no other provision of this Act provides, or has the effect, that the instrument does not apply to the employee or organisation; and
  - (d) immediately before the employee's termination time, the employee or organisation would have been:
    - (i) required by the law of the State to comply with terms of the original State award or original State agreement for the instrument; or
    - (ii) entitled under the law of the State to enforce terms of the original State award or original State agreement for the instrument.

*New employer and other employers*

- (2) A copied State instrument for a transferring employee ***applies*** to an employer (whether the new employer or another employer) if:
- (a) the instrument covers the employer; and
  - (b) the instrument is in operation; and
  - (c) no other provision of this Act provides, or has the effect, that the instrument does not apply to the employer; and

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- (d) immediately before the employee's termination time, the old State employer would have been:
  - (i) required by the law of the State to comply with terms of the original State award or original State agreement for the instrument; or
  - (ii) entitled under the law of the State to enforce terms of the original State award or original State agreement for the instrument.

Note: This subsection may operate in relation to an employer that is not the new employer in the situation where there has been a later transfer of business by the new employer (see Part 2-8).

*Other circumstances when instrument applies*

- (3) A copied State instrument for a transferring employee also ***applies*** to a person if an FWC order made under a provision of this Act provides, or has the effect, that the instrument applies to the person.

*Instrument only applies in relation to transferring work*

- (4) A reference in this Act to a copied State instrument for a transferring employee applying to the employee is a reference to the instrument applying to the employee in relation to the transferring work of the employee.

**768AN When does a copied State instrument cover a person?**

*Transferring employee and new employer*

- (1) A copied State instrument for a transferring employee ***covers*** the employee and the new employer in relation to the transferring work from the employee's re-employment time.

*Employee organisation*

- (2) A copied State instrument for a transferring employee ***covers*** an employee organisation in relation to the employee if:

- (a) the instrument covers the employee because of subsection (1); and
- (b) immediately before the employee's termination time, the original State award or original State agreement for the instrument covered (however described in the original State award or original State agreement or in a relevant law of the State) the organisation in relation to the employee.

*Employer organisation*

- (3) A copied State instrument for a transferring employee **covers** an employer organisation in relation to the new employer if:
  - (a) the instrument covers the new employer because of subsection (1); and
  - (b) immediately before the employee's termination time, the original State award or original State agreement for the instrument covered (however described in the original State award or original State agreement or in a relevant law of the State) the organisation in relation to the old State employer.

*Other circumstances when a person is covered*

- (4) A copied State instrument for a transferring employee also **covers** a person if any of the following provides, or has the effect, that the instrument covers the person:
  - (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.

Example: The FWC may make a consolidation order specifying that the instrument covers a person specified in the order (see subsections 768BE(1) and 768BH(1)).

*Circumstances when a person is not covered*

- (5) Despite subsections (1), (2), (3) and (4), a copied State instrument for a transferring employee does not **cover** a person if any of the

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following provides, or has the effect, that the instrument does not cover the person:

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

Example: If, after the transferring employee's re-employment time, an enterprise agreement starts to cover the employee, subsection 768AU(2) provides that a copied State instrument for the employee ceases to cover the employee.

- (6) Despite subsections (1), (2), (3) and (4), a copied State instrument for a transferring employee that has ceased to operate does not **cover** a person.

*Covered only in relation to transferring work*

- (7) A reference to a copied State instrument for a transferring employee covering the employee is a reference to the instrument covering the employee in relation to the transferring work of the employee.

**768AO When is a copied State instrument in operation?**

*When instrument comes into operation*

- (1) A copied State instrument for a transferring employee comes into operation immediately after the employee's termination time.

*When copied State award ceases to operate*

- (2) A copied State award for a transferring employee ceases to operate at the following time:
  - (a) unless paragraph (b) applies—the end of the period (the **default period**) that is 5 years or such longer period as is prescribed by the regulations, starting on the day the employee's termination time occurred;
  - (b) if the regulations allow the FWC to make an order to extend the period of operation of a copied State award for a transferring employee and, in accordance with those

regulations, the FWC makes an order that the award operates for a period that is longer than the default period—the end of that period.

- (3) The regulations may:
- (a) prescribe circumstances in which the FWC may make an order for the purposes of paragraph (2)(b); and
  - (b) prescribe a maximum period that the order may specify; and
  - (c) otherwise make provision in relation to the making of the order.

*When copied State agreement ceases to operate*

- (4) A copied State employment agreement for a transferring employee ceases to operate when it is terminated, which may happen before or after the nominal expiry date of the agreement.

Note 1: See section 768AY for how the copied State employment agreement can be terminated.

Note 2: If, after the transferring employee's re-employment time with the new employer, an enterprise agreement is made that covers the employee and the new employer, then the copied State employment agreement will cease to cover the employee and the new employer and will never cover them again, see section 768AU.

- (5) The ***nominal expiry date*** of a copied State employment agreement for a transferring employee is:
- (a) the day the original State agreement would nominally have expired under the State industrial law of the State; or
  - (b) if that day falls after the end of 4 years beginning on the day the employee's termination time occurs—the last day of that 4-year period.

*Once instrument ceases operation, can never operate again*

- (6) A copied State instrument for a transferring employee that has ceased to operate can never operate again.

## **Division 4—Interaction between copied State instruments and the NES, modern awards and enterprise agreements**

### **Subdivision A—Guide to this Division**

#### **768AP What this Division is about**

This Division provides for how copied State instruments interact with the National Employment Standards, modern awards and enterprise agreements.

### **Subdivision B—Interaction with the NES**

#### **768AQ Interaction between the NES and a copied State instrument**

To the extent that a term of a copied State instrument for a transferring employee is detrimental to the employee, in any respect, when compared to an entitlement of the employee under the National Employment Standards, the term of the instrument is of no effect.

#### **768AR Provisions of the NES that allow instruments to contain particular kinds of terms**

*Application of particular provisions of the NES*

- (1) The following provisions have effect, on and after the re-employment time of a transferring employee, as if a reference to a modern award or an enterprise agreement included a reference to a copied State instrument for the transferring employee:
  - (a) section 63 (which allows terms dealing with averaging of hours of work);

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- (b) section 93 (which allows terms dealing with cashing out and taking paid annual leave);
- (c) section 101 (which allows terms dealing with cashing out paid personal/carer's leave);
- (d) subsection 107(5) (which allows terms dealing with evidence requirements for paid personal/carer's leave etc.);
- (e) subsection 115(3) (which allows terms dealing with substitution of public holidays);
- (f) section 118 (which allows terms dealing with an employee giving notice to terminate his or her employment);
- (g) subsections 121(2) and (3) (which allow terms specifying situations in which the redundancy pay entitlement under section 119 does not apply);
- (h) section 126 (which allows terms providing for school-based apprentices and trainees to be paid loadings in lieu).

*Terms about paid annual leave and personal/carer's leave*

- (2) If a copied State instrument for a transferring employee:
  - (a) includes terms referred to in subsection 93(1) but the terms do not include the requirements referred to in subsection 93(2); or
  - (b) includes terms referred to in subsection 101(1) but the terms do not include the requirements referred to in subsection 101(2);

then the instrument is taken to include terms that include the requirements.

*Shiftworker annual leave entitlement*

- (3) If a copied State instrument for a transferring employee applies to the employee, then subsections 87(3) to (5) have effect, on and after the employee's re-employment time, in the same way as they apply to an award/agreement free employee.

Note: If the transferring employee qualifies for the shiftworker annual leave entitlement under those subsections, the employee will be entitled to 5 (rather than 4) weeks of paid annual leave.

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**Subdivision C—Interaction with modern awards**

**768AS Modern awards and copied State awards**

- (1) While a copied State award for a transferring employee:
  - (a) covers the employee, or an employer (whether the new employer or another national system employer) or other person in relation to the employee; and
  - (b) is in operation;a modern award does not cover the employee, or the employer or other person in relation to the employee.

Note 1: When the copied State award for a transferring employee ceases to cover the employee, a modern award will start to cover the employee, or an employer or other person in relation to the employee.

Note 2: This subsection may operate in relation to an employer that is not the new employer in the situation where there has been a later transfer of business by the new employer (see Part 2-8).
- (2) Subsection (1) does not apply for the purposes of section 193 (which is about the better off overall test for enterprise agreements).

Note: For the purposes of determining whether an enterprise agreement that covers a transferring employee passes the better off overall test, subsection (2) allows the enterprise agreement to be compared against a modern award that covers the employee.
- (3) This section has effect subject to any FWC order about coverage under subsection 768BA(1).

**768AT Modern awards and copied State employment agreements**

*Copied State collective employment agreements*

- (1) If a copied State collective employment agreement for a transferring employee and a modern award both apply:
  - (a) to the employee; or



- (b) to an employer (whether the new employer or another national system employer) or another person in relation to the employee;

then the copied State collective employment agreement for the employee prevails over the modern award, to the extent of any inconsistency.

Note 1: This subsection has effect subject to item 17 of Schedule 9 to the Transitional Act as that item applies in a modified way because of section 768BY. That item, as modified, requires that the base rate of pay under the copied State employment agreement must not be less than the modern award rate.

Note 2: This subsection may operate in relation to an employer that is not the new employer in the situation where there has been a later transfer of business by the new employer (see Part 2-8).

*Copied State individual employment agreements*

- (2) While a copied State individual employment agreement for a transferring employee applies:

- (a) to the employee; or

- (b) to an employer (whether the new employer or another national system employer) or another person in relation to the employee;

a modern award does not apply to the employee, or to the employer or other person in relation to the employee.

Note 1: However, a modern award can cover the transferring employee while the copied State individual employment agreement applies.

Note 2: This subsection has effect subject to item 17 of Schedule 9 to the Transitional Act as that item applies in a modified way because of section 768BY. That item, as modified, requires that the base rate of pay under the copied State employment agreement must not be less than the modern award rate.

Note 3: This subsection may operate in relation to an employer that is not the new employer in the situation where there has been a later transfer of business by the new employer (see Part 2-8).

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*FWC coverage orders*

- (3) This section has effect subject to any FWC order about coverage under subsection 768BA(1).

**Subdivision D—Interaction with enterprise agreements**

**768AU Enterprise agreements and copied State instruments**

- (1) While a copied State instrument for a transferring employee covers the employee and the new employer in relation to the transferring work, an enterprise agreement that covers the new employer at the employee's re-employment time does not cover the employee in relation to that work.

Note 1: The fact that a copied State collective employment agreement for a transferring employee covers the employee does not prevent the employee and the new employer from replacing that agreement at any time with an enterprise agreement, regardless of whether the employee's copied State collective employment agreement has passed its nominal expiry date.

Note 2: Industrial action must not be taken before the nominal expiry date of a copied State collective employment agreement for a transferring employee (see item 4 of Schedule 13 to the Transitional Act as that item applies in a modified way because of section 768BY).

- (2) However, if after the re-employment time, another enterprise agreement starts to cover the employee and the new employer in relation to the transferring work, then the copied State instrument for the employee ceases to cover the employee and the new employer and can never cover them again.
- (3) This section has effect subject to any FWC order about coverage under subsection 768BA(1).

## **Division 5—Variation and termination of copied State instruments**

### **Subdivision A—Guide to this Division**

#### **768AV What this Division is about**

<p>This Division sets out when a copied State instrument may be varied or terminated.</p>
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### **Subdivision B—Variation of copied State instruments**

#### **768AW Variation in limited circumstances**

A copied State instrument for a transferring employee cannot be varied except under:

- (a) section 768AX; or
- (b) item 20 of Schedule 3A to the Transitional Act (which deals with variation of discriminatory instruments) as that item has effect because of section 768BY; or
- (c) item 20 of Schedule 9 to the Transitional Act (which deals with variation of instruments in annual wage reviews) as that item has effect because of section 768BY; or
- (d) Division 4 of Part 3 of Schedule 11 to the Transitional Act (which deals with transfer of business) as that Division has effect because of section 768BY.

#### **768AX Variation of copied State instruments**

##### *Application of this section*

- (1A) This section applies if there is, or is likely to be, a transfer of business.

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*Variations that may be made*

- (1) The FWC may vary a copied State instrument for a transferring employee:
- (a) to remove terms that the FWC is satisfied are not, or will not be, capable of meaningful operation or to vary those terms so that they are capable of meaningful operation; or
  - (b) to remove an ambiguity or uncertainty in the instrument; or
  - (c) to enable the instrument to operate in a way that is better aligned to the working arrangements of the new employer's enterprise; or
  - (d) to resolve an uncertainty or difficulty relating to the interaction between the instrument and the National Employment Standards, or to make the instrument operate effectively with the National Employment Standards; or
  - (e) if the instrument is a copied State employment agreement—to resolve an uncertainty or difficulty relating to the interaction between the instrument and a modern award; or
  - (f) to remove terms that are inconsistent with Part 3-1 (which deals with general protections), or to vary terms to make them consistent with that Part.

Note: Paragraph (d) does not affect a term of the copied State instrument that is permitted by a provision of the National Employment Standards as the provision has effect under section 768AR.

*Who may apply for a variation*

- (2) The FWC may make a variation under subsection (1):
- (a) on its own initiative; or
  - (b) on application by a person who is, or is likely to be, covered by the copied State instrument; or
  - (c) on application by an employee organisation that is entitled to represent the industrial interests of an employee who is, or is likely to be, covered by the copied State instrument.

Note: The copied State instrument for the transferring employee may also cover another transferring employee or a non-transferring employee if a consolidation order is made.

*Matters that the FWC must take into account*

- (3) In deciding whether to make a variation under subsection (1), the FWC must take into account the following:
- (a) the views of:
    - (i) the employees who would be affected by the copied State instrument as varied; and
    - (ii) the new employer or a person who is likely to be the new employer;
  - (b) whether any employees would be disadvantaged by the copied State instrument as varied in relation to their terms and conditions of employment;
  - (c) if the copied State instrument is a copied State employment agreement—the nominal expiry date of the agreement;
  - (d) whether the copied State instrument, without the variation, would have a negative impact on the productivity of the new employer’s workplace;
  - (e) whether the new employer would incur significant economic disadvantage as a result of the copied State instrument, without the variation;
  - (f) the degree of business synergy between the copied State instrument, without the variation, and any workplace instrument that already covers the new employer;
  - (g) the public interest.

*Variation relating to the NES*

- (4) If there is a dispute about the making of a variation for the purposes of paragraph (1)(d), the FWC may compare the entitlements that are in dispute:
- (a) on a “line-by-line” basis, comparing individual terms; or
  - (b) on a “like-by-like” basis, comparing entitlements according to particular subject areas; or
  - (c) using any combination of the above approaches the FWC sees fit.

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- (5) The regulations may make provisions that apply to determining, for the purposes of paragraph (1)(d), whether terms of a copied State instrument for a transferring employee are, or are not, detrimental in any respect when compared to entitlements under the National Employment Standards.

*When variation may be made*

- (6) A variation may be made under subsection (1) in relation to a copied State instrument of a transferring employee:
- (a) before the copied State instrument comes into operation, if it is likely that the instrument will come into operation; and
  - (b) before the employee is a transferring employee, if it is likely that the employee will become a transferring employee.

*Restriction on when variation may come into operation*

- (7) A variation under subsection (1) operates from the day specified in the variation, which may be a day before the variation is made.

**Subdivision C—Termination of copied State instruments**

**768AY Termination in limited circumstances**

- (1) A copied State instrument for a transferring employee cannot be terminated except under items 22, 23, 24, 25 and 26 of Schedule 3A to the Transitional Act (which deal with termination of State employment agreements) as those items have effect because of section 768BY.
- (2) A copied State instrument for a transferring employee that has been terminated ceases to operate and can never operate again.

Note: A copied State instrument that does not operate cannot cover a person (see subsection 768AN(6)).

## **Division 6—FWC orders about coverage of copied State instruments and other instruments**

### **Subdivision A—Guide to this Division**

#### **768AZ What this Division is about**

This Division allows the FWC to make an order that a copied State instrument for a transferring employee does not, or will not, cover the employee and that an enterprise agreement or named employer award that covers the new employer covers, or will cover, the employee instead.

It also allows the FWC to make an order that a copied State instrument for a transferring employee does not, or will not, cover an employee organisation but instead covers, or will cover, another employee organisation.

#### **768AZA Orders in relation to a transfer of business**

- (1) This Division provides for orders to be made if there is, or is likely to be, a transfer of business.
- (2) An order may be made under this Division in relation to a copied State instrument of a transferring employee:
  - (a) before the copied State instrument comes into operation, if it is likely that the instrument will come into operation; and
  - (b) before the employee is a transferring employee, if it is likely that the employee will become a transferring employee.

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**Subdivision B—Coverage orders**

**768BA FWC orders about coverage for transferring employees**

*Orders that the FWC may make*

- (1) The FWC may make the following orders:
  - (a) an order that a copied State instrument for a transferring employee that would, or would be likely to, cover the transferring employee and the new employer because of subsection 768AN(1) does not, or will not, cover the transferring employee and the new employer;
  - (b) an order that an enterprise agreement or named employer award that covers the new employer at the transferring employee's re-employment time covers, or will cover, the transferring employee.

*Who may apply for an order*

- (2) The FWC may make an order under subsection (1):
  - (a) on its own initiative; or
  - (b) on application by any of the following:
    - (i) a transferring employee or an employee who is likely to be a transferring employee;
    - (ii) the new employer or a person who is likely to be the new employer;
    - (iii) an employee organisation that is entitled to represent the industrial interests of an employee referred to in subparagraph (i);
    - (iv) if the application relates to an enterprise agreement—an employee organisation that is, or is likely to be, covered by the agreement.

*Matters that the FWC must take into account*

- (3) In deciding whether to make an order under subsection (1), the FWC must take into account the following:



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

*Restriction on when order may come into operation*

- (4) An order under subsection (1) must not come into operation in relation to a particular transferring employee before the later of the following:
  - (a) the transferring employee's re-employment time;
  - (b) the day on which the order is made.

**768BB FWC orders about coverage for employee organisations**

- (1) The FWC may make an order that:
  - (a) a copied State instrument for a transferring employee that would, or would be likely to, cover an employee organisation (the ***first employee organisation***) in relation to the transferring employee because of subsection 768AN(2) does not, or will not, cover the organisation; and

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- (b) another employee organisation (the ***second employee organisation***) is, or will be, covered by the copied State instrument in relation to the employee.
- (2) When making an order under subsection (1), the FWC must consider whether the second employee organisation is a federal counterpart (within the meaning of section 9A of the Registered Organisations Act) of the first employee organisation.
- (3) The regulations may:
  - (a) prescribe circumstances in which the FWC may make an order for the purposes of subsection (1); and
  - (b) otherwise make provision in relation to the making of the order.
- (4) An order under subsection (1) must be made in accordance with any regulations that are made for the purposes of subsection (3).

## **Division 7—FWC orders about consolidating copied State instruments etc.**

### **Subdivision A—Guide to this Division**

#### **768BC What this Division is about**

This Division allows the FWC to consolidate the various workplace instruments that may apply in the new employer's workplace. It achieves this by allowing the FWC to make an order that a copied State instrument for a particular transferring employee is also a copied State instrument for one or more other transferring employees or non-transferring employees.

Subdivision B deals with consolidating copied State instruments for transferring employees. Under that Subdivision, the FWC may make an order that the copied State instrument for a transferring employee ("employee A") is also the copied State instrument for one or more other transferring employees. If the FWC makes a consolidation order for those other transferring employees, then this Act is modified so that the copied State instrument for employee A is also the copied State instrument for those other transferring employees (see section 768BF).

Subdivision C deals with non-transferring employees. Under that Subdivision, the FWC may make an order that the copied State instrument for employee A (who is a transferring employee) is also the copied State instrument for one or more non-transferring employees. If the FWC makes a consolidation order for those non-transferring employees, then this Act is modified so that the copied State instrument for employee A is also the copied State instrument for those non-transferring employees (see section 768BI).

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**768BCA Orders in relation to a transfer of business**

- (1) This Division provides for orders to be made if there is, or is likely to be, a transfer of business.
- (2) An order may be made under this Division in relation to a copied State instrument of a transferring employee:
  - (a) before the copied State instrument comes into operation, if it is likely that the instrument will come into operation; and
  - (b) before the employee is a transferring employee, if it is likely that the employee will become a transferring employee.

**Subdivision B—Consolidation orders in relation to transferring employees**

**768BD Consolidation orders in relation to transferring employees**

*Consolidation order*

- (1) The FWC may make an order (a ***consolidation order***) that a copied State instrument for a transferring employee (***employee A***) is also a copied State instrument for one or more other transferring employees.

*Who may apply for order*

- (2) The FWC may make a consolidation order under subsection (1):
  - (a) on its own initiative; or
  - (b) on application by any of the following:
    - (i) a transferring employee, or an employee who is likely to be a transferring employee;
    - (ii) the new employer or a person who is likely to be the new employer;
    - (iii) an employee organisation that is entitled to represent the industrial interests of an employee referred to in subparagraph (i).

*Matters that the FWC must take into account*

- (3) In deciding whether to make a consolidation order under subsection (1), the FWC must take into account the following:
- (a) the views of:
    - (i) the employees who would be affected by the order; and
    - (ii) the new employer or a person who is likely to be the new employer;
  - (b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;
  - (c) if the order relates to a copied State employment agreement—the nominal expiry date of the agreement;
  - (d) whether the copied State instrument for employee A would have a negative impact on the productivity of the new employer’s workplace;
  - (e) whether the new employer would incur significant economic disadvantage if the order were not made;
  - (f) the degree of business synergy between the copied State instrument for employee A and any workplace instrument that already covers the new employer;
  - (g) the public interest.

*Restriction on when order may come into operation*

- (4) A consolidation order under subsection (1) must not come into operation in relation to a particular transferring employee (other than employee A) before the later of the following:
- (a) the transferring employee’s re-employment time;
  - (b) the day on which the order is made.

**768BE Consolidation order to deal with application and coverage**

- (1) A consolidation order under subsection 768BD(1) must specify when the copied State instrument for employee A applies to, and covers:
- (a) another transferring employee; and

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- (b) the new employer in relation to the other transferring employee; and
  - (c) an employee organisation in relation to the other transferring employee;
- which must not be before the other transferring employee's re-employment time.
- (2) Once the consolidation order comes into operation in relation to the other transferring employee, the copied State instrument for the other transferring employee ceases to operate.

**768BF Effect of this Act after a consolidation order is made**

If the FWC makes a consolidation order under subsection 768BD(1), then this Act has effect in relation to a particular transferring employee (other than employee A), from the time the order comes into operation in relation to that employee, as if a reference in relation to that employee to the copied State instrument for that employee were a reference to the copied State instrument for employee A.

**Subdivision C—Consolidation orders in relation to non-transferring employees**

**768BG Consolidation orders in relation to non-transferring employees**

*Consolidation order*

- (1) The FWC may make an order (a **consolidation order**) that a copied State instrument for a transferring employee (**employee A**) also is, or will be, a copied State instrument for one or more non-transferring employees who perform, or are likely to perform, the transferring work.

*Non-transferring employees*

- (2) A **non-transferring employee** of a new employer is a national system employee of the new employer who is not a transferring employee.

*Who may apply for order*

- (3) The FWC may make a consolidation order under subsection (1):
- (a) on its own initiative; or
  - (b) on application by any of the following:
    - (i) a non-transferring employee who performs, or is likely to perform, the transferring work;
    - (ii) the new employer or a person who is likely to be the new employer;
    - (iii) an employee organisation that is entitled to represent the industrial interests of an employee referred to in subparagraph (i);
    - (iv) if the application relates to an enterprise agreement—an employee organisation that is, or is likely to be, covered by the agreement.

*Matters that the FWC must take into account*

- (4) In deciding whether to make a consolidation order under subsection (1), the FWC must take into account the following:
- (a) the views of:
    - (i) the employees who would be affected by the order; and
    - (ii) the new employer or a person who is likely to be the new employer;
  - (b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;
  - (c) if the order relates to a copied State employment agreement or an enterprise agreement—the nominal expiry date of the agreement;

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- (d) whether the copied State instrument for employee A would have a negative impact on the productivity of the new employer's workplace;
- (e) whether the new employer would incur significant economic disadvantage if the order were not made;
- (f) the degree of business synergy between the copied State instrument for employee A and any workplace instrument that already covers the new employer;
- (g) the public interest.

*Restriction on when order may come into operation*

- (5) A consolidation order under subsection (1) must not come into operation in relation to a particular non-transferring employee before the later of the following:
  - (a) the time when the non-transferring employee starts to perform the transferring work for the new employer;
  - (b) the day on which the order is made.

**768BH Consolidation order to deal with application and coverage**

- (1) A consolidation order under subsection 768BG(1) must specify when the copied State instrument for employee A applies to, and covers:
  - (a) a non-transferring employee; and
  - (b) the new employer in relation to the non-transferring employee; and
  - (c) an employee organisation in relation to the non-transferring employee;in relation to the transferring work.
- (2) If an enterprise agreement covers the non-transferring employee and the new employer, the order must also specify that the agreement does not cover:
  - (a) the non-transferring employee; or
  - (b) the new employer in relation to the non-transferring employee; or



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- (c) an employee organisation in relation to the non-transferring employee;  
in relation to that work.

**768BI Effect of this Act after a consolidation order is made**

If the FWC makes a consolidation order under subsection 768BG(1), then this Act has effect in relation to a particular non-transferring employee, from the time the order comes into operation in relation to that employee, as if:

- (a) the copied State instrument for employee A were also the copied State instrument for that employee; and
- (b) that employee were a transferring employee in relation to that copied State instrument.

## **Division 8—Special rules for copied State instruments**

### **Subdivision A—Guide to this Division**

#### **768BJ What this Division is about**

This Division has a collection of special rules for copied State instruments for transferring employees.

Subdivision B deals with the case where a copied State instrument for a transferring employee does not have a term about settling disputes about matters arising under the instrument. In that case, the model term prescribed by the regulations is taken to be a term of the instrument.

Subdivision C is about working out service and entitlements of a transferring employee. This is particularly relevant for working out the employee's entitlements under the National Employment Standards and the copied State instrument for the employee.

Subdivision D deals with the case where a copied State award for a transferring employee ceases to operate and the employee suffers a reduction in take home pay. That Subdivision allows the FWC to make a take-home pay order to compensate the employee.

Subdivision E modifies particular provisions of this Act in relation to copied State instruments.

Subdivision F modifies particular provisions of the Transitional Act in relation to copied State instruments.

Subdivision G modifies particular provisions of the Registered Organisations Act in relation to copied State instruments.

## **Subdivision B—Terms about disputes**

### **768BK Where no term dealing with disputes**

#### *Model term required*

- (1) If a copied State instrument for a transferring employee does not include a term that provides a procedure for settling disputes about matters arising under the instrument, then the instrument is taken to include the model term that is determined under subsection (1A) for settling disputes about matters arising under a copied State instrument for a transferring employee.

Note: This section deals with the situation where the original State award or original State agreement for the copied State instrument did not include a term about settling disputes about matters arising under the award or agreement.

#### *Model term determined by FWC*

- (1A) The FWC must determine a model term for the purposes of subsection (1).
- (2) For the purposes of subsection (1A), the model term determined for a copied State award for a transferring employee may be the same or different from the model term determined for a copied State employment agreement for a transferring employee.
- (3) In determining the model term, the FWC must take into account the following matters:
- (a) whether the model term is broadly consistent with comparable terms in modern awards;
  - (b) best practice workplace relations as determined by the FWC;
  - (c) whether all persons and bodies have had a reasonable opportunity to be heard and make submissions to the FWC for consideration in determining the model term;
  - (d) the operation of subsections 739(3), (4), (5) and (6) and 740(3) and (4);
  - (e) the object of this Act (see section 3);

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(f) any other matters the FWC considers relevant.

Note 1: The FWC must be constituted by a Full Bench to make the model term for settling disputes (see subsection 616(4A)).

Note 2: For the variation of a determination, see subsection 33(3) of the *Acts Interpretation Act 1901*.

- (4) A determination under subsection (1A) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination.

**Subdivision C—Service and entitlements of a transferring employee**

**768BL Service for the purposes of this Act**

*General rule*

- (1) Service of a transferring employee with the old State employer that occurred before the employee's termination time also counts as service of the employee with the new employer for the purposes of this Act (including for the purposes of determining the employee's entitlements under the National Employment Standards) after the employee's re-employment time.

*Gap between termination time and re-employment time*

- (2) If there is a period of time between the employee's termination time with the old State employer and the employee's re-employment time with the new employer, then that period:
- (a) does not break the employee's continuous service with the new employer (taking account of the effect of subsection (1)); but
  - (b) does not count towards the length of the employee's continuous service with the new employer.

## **768BM NES—working out non-accruing entitlements**

### *Application of this section*

- (1) This section applies for the purposes of determining the entitlements of a transferring employee under the National Employment Standards, other than entitlements to:
  - (a) paid annual leave; or
  - (b) paid personal/carer's leave.

Note: For entitlements to paid annual leave and paid personal/carer's leave under the National Employment Standards, see section 768BN.

### *No double entitlement*

- (2) If, before or after the employee's termination time, the employee has the benefit of an entitlement, the amount of which is calculated by reference to a period of service, then subsection 768BL(1) does not result in that period of service with the old State employer being counted again when calculating the employee's entitlements of that kind under the National Employment Standards.
- (3) To avoid doubt, subsection (2) does not require the employee to serve any initial qualifying period of service for long service leave again.

### *Limitation on application of general rule to redundancy pay*

- (4) If the terms and conditions of employment that applied to the employee's employment by the old State employer immediately before the employee's termination time did not provide for an entitlement to redundancy pay, then subsection 768BL(1) does not apply in relation to the employee and the new employer for the purposes of Subdivision B of Division 11 of Part 2-2 (which deals with redundancy pay).
- (5) If a State industrial body could have made an order giving the employee an entitlement to redundancy pay (however described), had the employee's employment been terminated for redundancy (however described) before the employee's termination time, then:

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- (a) the terms and conditions of the employee's employment referred to in subsection (4) are taken to have provided for an entitlement to redundancy pay; and
- (b) paragraph 121(1)(b) does not apply in relation to the employee during the 12 months starting at the employee's re-employment time.

**Note:** Because of paragraph (b), the employee may therefore be entitled to redundancy pay under section 119 if the employee's employment is terminated by the new employer during the 12-month period starting at the employee's termination time, even if the new employer is a small business employer.

**768BN NES—working out accruing entitlements**

*Application of this section*

- (1) This section applies for the purposes of determining the entitlements of a transferring employee under the National Employment Standards to:
  - (a) paid annual leave; or
  - (b) paid personal/carer's leave;if the employee had, immediately before the employee's termination time, an accrued entitlement to an amount of:
  - (c) paid annual leave (however described); or
  - (d) paid personal or carer's leave (however described).

**Note:** For other entitlements under the National Employment Standards, see section 768BM.

*Leave accrued for purposes of the NES*

- (2) The provisions of the National Employment Standards relating to:
  - (a) taking that kind of leave (including rates of pay while taking leave); or
  - (b) cashing-out that kind of leave;apply as a minimum standard to the accrued leave, after the employee's re-employment time, as if it had accrued under the National Employment Standards.

*No double entitlement*

- (3) However, if before or after the employee's termination time, the old State employer paid the employee an amount in relation to some or all of the accrued leave, then for the purposes of subsection (2), the amount of accrued leave is reduced accordingly.

*Working out whether leave accrued*

- (4) For the purposes of subsection (1), it does not matter whether the entitlement to leave accrued under:
- (a) the original State award or original State agreement for the copied State instrument for the employee; or
  - (b) a State industrial law of the State.

**768BO Copied State instrument—service**

*General rule*

- (1) Service of a transferring employee with the old State employer that:
- (a) occurred before the employee's termination time; and
  - (b) counted for the purposes of the application to the employee of the original State award or original State agreement for the copied State instrument for the employee;
- also counts as service of the employee with the new employer for the purposes of the application to the employee of the copied State instrument after the employee's re-employment time.

*Gap between termination time and re-employment time*

- (2) If there is a period of time between the employee's termination time with the old State employer and the employee's re-employment time with the new employer, then that period:
- (a) does not break the employee's continuous service with the new employer (taking account of the effect of subsection (1)); but

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- (b) does not count towards the length of the employee's continuous service with the new employer.

*Effect of consolidation order*

- (3) If the FWC makes a consolidation order under subsection 768BD(1), then, despite section 768BF, the original State award or original State agreement referred to in paragraph (1)(b) of this section is the original State award or original State agreement for the copied State instrument for the employee before the consolidation order was made.

**768BP Copied State instrument—working out non-accruing entitlements**

*Application of this section*

- (1) This section applies for the purposes of determining the entitlements of a transferring employee under a copied State instrument for the employee, other than entitlements to:
  - (a) annual leave (however described); or
  - (b) personal leave or carer's leave (however described).

Note: For entitlements to annual leave or personal leave or carer's leave under the copied State instrument, see section 768BQ.

*No double entitlement*

- (2) If, before or after the employee's termination time, the employee has the benefit of an entitlement, the amount of which is calculated by reference to a period of service, then subsection 768BO(1) does not result in that period of service with the old State employer being counted again when calculating the employee's entitlements of that kind under the copied State instrument for the employee.
- (3) To avoid doubt, subsection (2) does not require the employee to serve any initial qualifying period of service for long service leave again.



## **768BQ Copied State instrument—working out accruing entitlements**

### *Application of this section*

- (1) This section applies for the purposes of determining the entitlements of a transferring employee under the copied State instrument for the employee to:
- (a) annual leave (however described); or
  - (b) personal leave or carer's leave (however described).

Note: For other entitlements under the copied State instrument, see section 768BP.

### *Leave accrued for purposes of the instrument*

- (2) If the employee had, immediately before the employee's termination time, an accrued entitlement to an amount of:
- (a) annual leave (however described); or
  - (b) personal leave or carer's leave (however described);
- then the accrued leave is taken to have accrued under the copied State instrument for the employee.

### *No double entitlement*

- (3) However, if before or after the employee's termination time, the old State employer paid the employee an amount in relation to some or all of the accrued leave, then for the purposes of subsection (2), the amount of accrued leave is reduced accordingly.

### *Working out whether leave accrued*

- (4) For the purposes of subsection (2), it does not matter whether the leave accrued under:
- (a) the original State award or original State agreement for the copied State instrument; or
  - (b) a State industrial law of the State.

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**Subdivision D—Cessation of copied State awards: avoiding reductions in take-home pay**

**768BR Cessation not intended to result in reduction in take-home pay**

- (1) If a copied State award for a transferring employee ceases to operate because of subsection 768AO(2), the cessation is not intended to result in a reduction in the take-home pay of the employee.
- (2) A transferring employee's *take-home pay* is the pay the employee actually receives:
  - (a) including wages and incentive-based payments, and additional amounts such as allowances and overtime; but
  - (b) disregarding the effect of any deductions that are made as permitted by section 324.

Note: Deductions permitted by section 324 may (for example) include deductions under salary sacrificing arrangements.

- (3) A transferring employee suffers a *reduction in take-home pay* if, and only if:
  - (a) when the copied State award for the employee ceases to operate because of subsection 768AO(2), the employee becomes a person to whom a modern award applies; and
  - (b) the employee is employed in the same position as (or a position that is comparable to) the position he or she was employed in immediately before the cessation of the copied State award; and
  - (c) the amount of the employee's take-home pay for working particular hours or for a particular quantity of work after the cessation of the copied State award is less than what would have been the employee's take-home pay for those hours or that quantity of work immediately before the cessation; and
  - (d) that reduction in the employee's take-home pay is attributable to the cessation of the copied State award.

**768BS Orders remedying reductions in take-home pay**

- (1) If the FWC is satisfied that a transferring employee to whom a modern award applies has suffered a reduction in take-home pay, the FWC may make any order (a ***take-home pay order***) requiring, or relating to, the payment of an amount or amounts to the employee that the FWC considers appropriate to remedy the situation.
- (2) The FWC may make a take-home pay order:
  - (a) on its own initiative; or
  - (b) on application by either of the following:
    - (i) a transferring employee who has suffered a reduction in take-home pay;
    - (ii) an organisation that is entitled to represent the industrial interests of the employee.
- (3) The FWC must not make a take-home pay order if:
  - (a) the FWC considers that the reduction in take-home pay is minor or insignificant; or
  - (b) the FWC is satisfied that the employee has been adequately compensated in other ways for the reduction.
- (4) The FWC must ensure that a take-home pay order is expressed so that:
  - (a) it does not apply to a transferring employee unless the employee has actually suffered a reduction in take-home pay; and
  - (b) if the take-home pay payable to the employee under the modern award increases after the order is made, there is a corresponding reduction in any amount payable to the employee under the order.
- (5) If the FWC is satisfied that an application for a take-home pay order has already been made in relation to a transferring employee, the FWC may dismiss any later application that is made under these provisions in relation to the same employee.

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**768BT Contravening a take-home pay order**

A person must not contravene a term of a take-home pay order that applies to the person.

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

**768BU How long a take-home pay order continues to apply**

A take-home pay order made in relation to a transferring employee to whom a particular modern award applies continues to apply in relation to the employee (subject to the terms of the order) for so long as the modern award continues to cover the employee.

Note: It does not matter if the modern award stops applying to the employee because an enterprise agreement starts to apply.

**768BV Interaction of take-home pay orders with modern awards and enterprise agreements**

A term of a modern award or an enterprise agreement has no effect in relation to a transferring employee to the extent that it is less beneficial to the employee than a term of a take-home pay order that applies to the employee.

**768BW Application of this Act to take-home pay orders**

This Act applies as if the following provisions included a reference to a take-home pay order:

- (a) subsection 675(2) (which is about FWC orders);
- (b) subsection 706(2) (which is about powers of inspectors).

**Subdivision E—Modification of this Act**

**768BX Modification of this Act for copied State instruments**

This Act has effect in relation to a transferring employee on and after the employee's re-employment time as if a reference in a provision referred to in column 1 to a term referred to in column 2 included a reference to the term referred to in column 3.

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<b>Modification of this Act for copied State instruments</b>			
<b>Item</b>	<b>Column 1 Provision of this Act</b>	<b>Column 2 Current term</b>	<b>Column 3 New term</b>
1	Division 2 of Part 2-9 (payment of wages)	modern award	copied State award for the transferring employee
2	Division 2 of Part 2-9 (payment of wages)	enterprise agreement	copied State employment agreement for the transferring employee
3	Division 3 of Part 2-9 (guarantee of annual earnings)	modern award	copied State award for the transferring employee
4	Division 3 of Part 2-9 (guarantee of annual earnings)	enterprise agreement	copied State employment agreement for the transferring employee
5	Part 3-2 (unfair dismissal)	modern award	copied State award for the transferring employee
6	Part 3-2 (unfair dismissal)	enterprise agreement	copied State employment agreement for the transferring employee
7	Division 9 of Part 3-3 (payments relating to periods of industrial action)	modern award	copied State award for the transferring employee
8	Division 9 of Part 3-3 (payments relating to periods of industrial action)	enterprise agreement	copied State employment agreement for the transferring employee
9	subsection 481(1) (right of entry)	fair work instrument	copied State instrument for the transferring employee
10	subsection 524(2) (stand down)	enterprise agreement	copied State instrument for the transferring employee
11	Part 4-1 (compliance)	fair work instrument	copied State instrument for the transferring employee
12	section 657 (General	fair work	copied State instrument for the

## Chapter 6 Miscellaneous

### Part 6-3A Transfer of business from a State public sector employer

#### Division 8 Special rules for copied State instruments

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<b>Modification of this Act for copied State instruments</b>			
<b>Item</b>	<b>Column 1 Provision of this Act</b>	<b>Column 2 Current term</b>	<b>Column 3 New term</b>
	Manager)	instrument	transferring employee
13	Part 5-2 (Fair Work Ombudsman)	fair work instrument	copied State instrument for the transferring employee
14	Part 5-2 (Fair Work Ombudsman)	modern award	copied State award for the transferring employee
15	Part 5-2 (Fair Work Ombudsman)	enterprise agreement	copied State employment agreement for the transferring employee
16	Part 6-2 (dealing with disputes)	modern award	copied State award for the transferring employee
17	Part 6-2 (dealing with disputes)	enterprise agreement	copied State employment agreement for the transferring employee
18	Part 6-2 (dealing with disputes)	fair work instrument	copied State instrument for the transferring employee

#### Subdivision F—Modification of the Transitional Act

##### 768BY Modification of the Transitional Act for copied State instruments

- (1) Each relevant transitional provision (see subsection (2)) has effect in relation to a transferring employee as if a reference to a term referred to in column 1 were a reference to the term referred to in column 2. The provision has effect from the time specified in column 3 of the table in subsection (2).

<b>Modification of the Transitional Act and regulations for copied State instruments</b>		
<b>Item</b>	<b>Column 1 Current term</b>	<b>Column 2 New term</b>
1	Division 2B State instrument	copied State instrument for the transferring

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<b>Modification of the Transitional Act and regulations for copied State instruments</b>		
<b>Item</b>	<b>Column 1 Current term</b>	<b>Column 2 New term</b>
		employee
2	Division 2B State award	copied State award for the transferring employee
3	Division 2B State award applying (within the meaning of the Transitional Act) to a person	copied State award for the transferring employee applying (within the meaning of this Act) to a person
4	Division 2B State award covering (within the meaning of the Transitional Act) a person	copied State award for the transferring employee covering (within the meaning of this Act) a person
5	Division 2B State employment agreement	copied State employment agreement for the transferring employee
6	collective Division 2B State employment agreement	copied State collective employment agreement for the transferring employee
7	individual Division 2B State employment agreement	copied State individual employment agreement for the transferring employee
8	Division 2B State employment agreement applying (within the meaning of the Transitional Act) to a person	copied State employment agreement for the transferring employee applying (within the meaning of this Act) to a person
9	Division 2B State employment agreement covering (within the meaning of the Transitional Act) a person	copied State employment agreement for the transferring employee covering (within the meaning of this Act) a person
10	nominal expiry date of a Division 2B State employment agreement	nominal expiry date of a copied State employment agreement for the transferring employee
11	Division 2B referral commencement	transferring employee's termination time
12	Division 2B State reference employee	transferring employee

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**Modification of the Transitional Act and regulations for copied State instruments**

Item	Column 1 Current term	Column 2 New term
13	Division 2B referring State	the State of the old State employer
14	source State	the State of the old State employer

(2) For the purposes of subsection (1), the **relevant transitional provisions** are:

- (a) the provisions of the Transitional Act that are listed in column 1; and
- (b) the regulations made for the purposes of those provisions.

**Modification of the Transitional Act and regulations for copied State instruments**

Item	Column 1 Relevant transitional provision	Column 2 Which is about	Column 3 Relevant time
1	item 10 of Schedule 3A	instrument content rules	the transferring employee's termination time
2	item 11 of Schedule 3A	instrument interaction rules	the transferring employee's termination time
3	item 13 (other than note 1 and note 2) of Schedule 3A	references to State industrial bodies	the transferring employee's termination time
4	item 17 of Schedule 3A	no loss of accrued rights etc. when instrument terminates	the transferring employee's re-employment time
5	item 20 of Schedule 3A	variation of discriminatory instruments	the transferring employee's termination time
6	item 22 of Schedule 3A	collective agreements—termination by agreement	the transferring employee's



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<b>Modification of the Transitional Act and regulations for copied State instruments</b>			
<b>Item</b>	<b>Column 1 Relevant transitional provision</b>	<b>Column 2 Which is about</b>	<b>Column 3 Relevant time</b>
			re-employment time
7	item 23 of Schedule 3A	collective agreements— termination by the FWC	the transferring employee's re-employment time
8	item 24 of Schedule 3A	individual agreements— termination by agreement	the transferring employee's re-employment time
9	item 25 of Schedule 3A	individual agreements— termination conditional on enterprise agreement	the transferring employee's re-employment time
10	item 26 of Schedule 3A	individual agreements— unilateral termination by the FWC	the transferring employee's re-employment time
11	item 47 of Schedule 3A	employee not award/agreement free	the transferring employee's re-employment time
12	item 48 of Schedule 3A	calculating an employee's ordinary hours of work	the transferring employee's re-employment time
13	items 19, 20 and 21 of Schedule 4	interaction with the NES	the transferring employee's re-employment time
14	Part 5 of Schedule 9	base rates of pay	the transferring employee's re-employment time
15	Division 4 of Part 3 of Schedule 11	transfer of business	the transferring employee's re-employment time
16	item 4 of Schedule 12	general protections	the transferring employee's termination time

**Chapter 6** Miscellaneous

**Part 6-3A** Transfer of business from a State public sector employer

**Division 8** Special rules for copied State instruments

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**Modification of the Transitional Act and regulations for copied State instruments**

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<b>Item</b>	<b>Column 1 Relevant transitional provision</b>	<b>Column 2 Which is about</b>	<b>Column 3 Relevant time</b>
17	items 2, 3, 4 and 17 of Schedule 13	industrial action	the transferring employee's re-employment time
18	item 4B of Schedule 16 (as that item relates to subitems 25(6) and (7) of Schedule 3A) and item 16 of Schedule 16 (as that item relates to item 4B of Schedule 16)	compliance relating to conditional terminations of individual employment agreements	the transferring employee's re-employment time
19	items 12 and 13 of Schedule 16 and item 16 of Schedule 16 (as that item relates to those items)	compliance relating to non-disclosure obligations	the transferring employee's re-employment time

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**Subdivision G—Modification of the Registered Organisations Act**

**768BZ Modification of the Registered Organisations Act for copied State instruments**

- (1) The Registered Organisations Act has effect in relation to a transferring employee on and after the employee's termination time as if:
- (a) a reference in that Act to a modern award included a reference to a copied State award for the employee; and
  - (b) a reference in that Act to an enterprise agreement included a reference to a copied State employment agreement for the employee.

- (2) The regulations may deal with other matters relating to how the Registered Organisations Act applies in relation to a transferring employee.

## **Division 9—Regulations**

### **768CA Regulations**

- (1) The regulations may:
  - (a) make provision in relation to the transition from State awards and State employment agreements to copied State instruments; and
  - (b) make provision in relation to the transition from copied State instruments to modern awards and enterprise agreements; and
  - (c) deal with how this Act applies in relation to copied State instruments for transferring employees; and
  - (d) provide that provisions of this Act or the Transitional Act apply in relation to transferring employees or new employers with specified modifications; and
  - (e) otherwise make provision relating to how provisions of this Act or the Transitional Act apply in relation to transferring employees or new employers; and
  - (f) make provision in relation to non-transferring employees of the new employer; and
  - (g) provide that provisions of this Act or the Transitional Act apply in relation to the non-transferring employees with specified modifications; and
  - (h) make other provision in relation to the matters dealt with in this Part.
- (2) Without limiting subsection (1), the regulations may:
  - (a) modify provisions of this Act or the Transitional Act, or 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; and
  - (b) provide differently for the purposes of different provisions, or in relation to different situations.
- (3) However, this section does not allow regulations to:

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- (a) modify a provision so as to impose an obligation which, if contravened, constitutes an offence; or
  - (b) include new provisions that create offences.
- (4) The provisions of this Part (including this section) that provide for regulations to deal with matters do not limit each other.

## **Part 6-4—Additional provisions relating to termination of employment**

### **Division 1—Introduction**

#### **769 Guide to this Part**

This Part contains provisions to give effect, or further effect, to certain international agreements relating to discrimination and termination of employment.

Division 2 makes it unlawful for an employer to terminate an employee's employment for certain reasons. Division 2 also deals with compliance. In most cases, a dispute that involves the termination of an employee's employment will be dealt with by a court only if the dispute has not been resolved by the FWC.

Division 3 sets out notification and consultation requirements in relation to certain terminations of employment.

#### **770 Meanings of *employee* and *employer***

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

## **Division 2—Termination of employment**

### **771 Object of this Division**

The object of this Division is to give effect, or further effect, to:

- (a) the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation, done at Geneva on 25 June 1958 ([1974] ATS 12); and
- (b) the ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, done at Geneva on 23 June 1981 ([1991] ATS 7); and
- (c) the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer, done at Geneva on 22 June 1982 ([1994] ATS 4); and
- (d) the Termination of Employment Recommendation, 1982 (Recommendation No. R166) which the General Conference of the ILO adopted on 22 June 1982; and
- (e) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9); and
- (f) article 26 of the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23); and
- (g) paragraph 2 of article 2, and articles 6 and 7, of the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5).

Note 1: In 2009, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website ([www.austlii.edu.au](http://www.austlii.edu.au)).

Note 2: In 2009, the text of a Recommendation adopted by the General Conference of the ILO was accessible through the ILO website ([www.ilo.org](http://www.ilo.org)).

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**772 Employment not to be terminated on certain grounds**

- (1) An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons:
- (a) temporary absence from work because of illness or injury of a kind prescribed by the regulations;
  - (b) trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;
  - (c) non-membership of a trade union;
  - (d) seeking office as, or acting or having acted in the capacity of, a representative of employees;
  - (e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
  - (f) race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin;
  - (g) absence from work during parental leave;
  - (h) temporary absence from work for the purpose of engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.

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

- (2) However, subsection (1) does not prevent a matter referred to in paragraph (1)(f) from being a reason for terminating a person's employment if:
- (a) the reason is based on the inherent requirements of the particular position concerned; or
  - (b) if the person is 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—the employment is terminated:



- (i) in good faith; and
  - (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.
- (3) To avoid doubt, if:
  - (a) an employer terminates an employee's employment; and
  - (b) the reason, or a reason, for the termination is that the position held by the employee no longer exists, or will no longer exist; and
  - (c) the reason, or a reason, that the position held by the employee no longer exists, or will no longer exist, is the employee's absence, or proposed or probable absence, during parental leave;the employee's employment is taken, for the purposes of paragraph (1)(g), to have been terminated for the reason, or for reasons including the reason, of absence from work during parental leave.
- (4) For the purposes of subsection (1), subsection 109(2) (which deals with the meaning of *voluntary emergency management activity*) has effect as if the word employee had its ordinary meaning.

### **773 Application for the FWC to deal with a dispute**

If:

- (a) an employer has terminated an employee's employment; and
- (b) the employee, or an industrial association that is entitled to represent the industrial interests of the employee, alleges that the employee's employment was terminated in contravention of subsection 772(1);

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

### **774 Time for application**

- (1) An application under section 773 must be made:
  - (a) within 21 days after the employment was terminated; or

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- (b) within such further period as the FWC allows under subsection (2).
- (2) The FWC may allow a further period if the FWC is satisfied that there are exceptional circumstances, taking into account:
  - (a) the reason for the delay; and
  - (b) any action taken by the employee to dispute the termination; and
  - (c) prejudice to the employer (including prejudice caused by the delay); and
  - (d) the merits of the application; and
  - (e) fairness as between the person and other persons in a like position.

**775 Application fees**

- (1) The application must be accompanied by any fee prescribed by the regulations.
- (2) The regulations may prescribe:
  - (a) a fee for making an application to the FWC under section 773; and
  - (b) a method for indexing the fee; and
  - (c) the circumstances in which all or part of the fee may be waived or refunded.

**776 Dealing with a dispute (other than by arbitration)**

- (1) If an application is made under section 773, the FWC must deal with the dispute (other than by arbitration).

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

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

**Note:** For conferences, see section 592.

- (3) If the FWC is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then:
  - (a) the FWC must issue a certificate to that effect; and
  - (b) if the FWC considers, taking into account all the materials before it, that arbitration under section 777, or an unlawful termination court application, in relation to the dispute would not have a reasonable prospect of success, the FWC must advise the parties accordingly.
- (4) An ***unlawful termination court application*** is an application to a court under Division 2 of Part 4-1 for orders in relation to a contravention of subsection 772(1).

### **777 Dealing with a dispute by arbitration**

- (1) This section applies if:
  - (a) the FWC issues a certificate under paragraph 776(3)(a) in relation to the dispute; and
  - (b) the parties notify the FWC that they agree to the FWC arbitrating the dispute; and
  - (c) the notification:
    - (i) is given to the FWC within 14 days after the day the certificate is issued, or within such period as the FWC allows on an application made during or after those 14 days; and
    - (ii) complies with any requirements prescribed by the procedural rules; and
  - (d) sections 726, 727, 728, 729, 731 and 732 do not apply.

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

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

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

**778 Taking a dispute to court**

A person who is entitled to apply under section 773 for the FWC to deal with a dispute must not make an unlawful termination court application in relation to the dispute unless:

- (a) both of the following apply:
- (i) the FWC has issued a certificate under paragraph 776(3)(a) in relation to the dispute;
  - (ii) the unlawful termination court application is made within 14 days after the day the certificate is issued, or within such period as the court allows on an application made during or after those 14 days; or
- (b) the unlawful termination court application includes an application for an interim injunction.

Note 1: Generally, if the parties notify the FWC that they agree to the FWC arbitrating the dispute (see subsection 777(1)), an unlawful termination court application cannot be made in relation to the dispute (see sections 730 and 731).

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

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under a similarly worded provision of the *Industrial Relations Act 1988*.

**779 Appeal rights**

- (1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under subsection 777(2) (which is about arbitration of a dispute) unless the FWC considers that it is in the public interest to do so.
- (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under subsection 777(2) can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

**779A Costs orders against parties**

- (1) The FWC may make an order for costs against a party (the ***first party***) to a dispute for costs incurred by the other party to the dispute if:
  - (a) an application for the FWC to deal with the dispute has been made under section 773; and
  - (b) the FWC is satisfied that the first party caused those costs to be incurred because of an unreasonable act or omission of the first party in connection with the conduct or continuation of the dispute.
- (2) The FWC may make an order under subsection (1) only if the other party to the dispute has applied for it in accordance with section 781.
- (3) This section does not limit the FWC's power to order costs under section 611.

**780 Costs orders against lawyers and paid agents**

- (1) This section applies if:
  - (a) an application for the FWC to deal with a dispute has been made under section 773; and

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- (b) a person who is a party to the dispute has engaged a lawyer or paid agent (the *representative*) to represent the person in the dispute; and
  - (c) under section 596, the person is required to seek the FWC's permission to be represented by the representative.
- (2) The FWC may make an order for costs against the representative for costs incurred by the other party to the dispute if the FWC is satisfied that the representative caused those costs to be incurred because:
  - (a) the representative encouraged the person to start, continue or respond to the dispute and it should have been reasonably apparent that the person had no reasonable prospect of success in the dispute; or
  - (b) of an unreasonable act or omission of the representative in connection with the conduct or continuation of the dispute.
- (3) The FWC may make an order under this section only if the other party to the dispute has applied for it in accordance with section 781.
- (4) This section does not limit the FWC's power to order costs under section 611.

**781 Applications for costs orders**

An application for an order for costs in relation to an application under section 773 must be made within 14 days after the FWC finishes dealing with the dispute.

**781A Schedule of costs**

- (1) A schedule of costs may be prescribed in relation to items of expenditure likely to be incurred in relation to matters that can be covered by an order under section 611, 779A or 780 in relation to an application under section 773, including expenses arising from the representation of a party by a person or organisation other than on a legal professional basis.

- (2) If a schedule of costs is prescribed for the purposes of subsection (1), then, in awarding costs under section 611, 779A or 780 in relation to an application under section 773, the FWC:
- (a) is not limited to the items of expenditure appearing in the schedule; but
  - (b) if an item does appear in the schedule—must not award costs in relation to that item at a rate or of an amount that exceeds the rate or amount appearing in the schedule.

### **782 Contravening costs orders**

A person to whom an order for costs made under section 779A or 780 applies must not contravene a term of the order.

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

### **783 Reason for action to be presumed unless proved otherwise**

- (1) If:
- (a) in an application in relation to a contravention of subsection 772(1), it is alleged that a person took, or is taking, action for a particular reason; and
  - (b) taking that action for that reason would constitute a contravention of subsection 772(1);
- it is presumed that the action was, or is being, taken for that reason, unless the person proves otherwise.
- (2) Subsection (1) does not apply in relation to orders for an interim injunction.

**Division 3—Notification and consultation requirements  
relating to certain terminations of employment**

**Subdivision A—Object of this Division**

**784 Object of this Division**

The object of this Division is to give effect, or further effect, to:

- (a) the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer, done at Geneva on 22 June 1982 ([1994] ATS 4); and
- (b) the Termination of Employment Recommendation, 1982 (Recommendation No. R166) which the General Conference of the ILO adopted on 22 June 1982.

Note 1: In 2009, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website ([www.austlii.edu.au](http://www.austlii.edu.au)).

Note 2: In 2009, the text of a Recommendation adopted by the General Conference of the ILO was accessible through the ILO website ([www.ilo.org](http://www.ilo.org)).

**Subdivision B—Requirement to notify Centrelink**

**785 Employer to notify Centrelink of certain proposed terminations**

- (1) If an employer decides to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons, the employer must give a written notice about the proposed terminations to the Chief Executive Officer of the Commonwealth Services Delivery Agency (Centrelink).
- (2) The notice must be in the form (if any) prescribed by the regulations and set out:
  - (a) the reasons for the terminations; and



- (b) the number and categories of employees likely to be affected;  
and
  - (c) the time when, or the period over which, the employer  
intends to carry out the terminations.
- (3) The notice must be given:
- (a) as soon as practicable after making the decision; and
  - (b) before terminating an employee's employment in accordance  
with the decision.
- (4) The employer must not terminate an employee's employment in  
accordance with the decision unless the employer has complied  
with this section.
- Note: This subsection is a civil remedy provision (see Part 4-1).
- (5) The orders that may be made under subsection 545(1) in relation to  
a contravention of subsection (4) of this section:
- (a) include an order requiring the employer not to terminate the  
employment of employees in accordance with the decision,  
except as permitted by the order; but
  - (b) do not include an order granting an injunction.

### **Subdivision C—Failure to notify or consult registered employee associations**

#### **786 FWC may make orders where failure to notify or consult registered employee associations about terminations**

- (1) The FWC may make an order under subsection 787(1) if it is  
satisfied that:
- (a) an employer has decided to terminate the employment of 15  
or more employees for reasons of an economic,  
technological, structural or similar nature, or for reasons  
including such reasons; and
  - (b) the employer has not complied with subsection (2) (which  
deals with notifying relevant registered employee

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associations) or subsection (3) (which deals with consulting relevant registered employee associations); and

- (c) the employer could reasonably be expected to have known, when he or she made the decision, that one or more of the employees were members of a registered employee association.

*Notifying relevant registered employee associations*

- (2) An employer complies with this subsection if:
  - (a) the employer notifies each registered employee association of which any of the employees was a member, and that was entitled to represent the industrial interests of that member, of the following:
    - (i) the proposed terminations and the reasons for them;
    - (ii) the number and categories of employees likely to be affected;
    - (iii) the time when, or the period over which, the employer intends to carry out the terminations; and
  - (b) the notice is given:
    - (i) as soon as practicable after making the decision; and
    - (ii) before terminating an employee's employment in accordance with the decision.

*Consulting relevant registered employee associations*

- (3) An employer complies with this subsection if:
  - (a) the employer gives each registered employee association of which any of the employees was a member, and that was entitled to represent the industrial interests of that member, an opportunity to consult the employer on:
    - (i) measures to avert or minimise the proposed terminations; and
    - (ii) measures (such as finding alternative employment) to mitigate the adverse effects of the proposed terminations; and

- (b) the opportunity is given:
  - (i) as soon as practicable after making the decision; and
  - (ii) before terminating an employee's employment in accordance with the decision.

### **787 Orders that the FWC may make**

- (1) The FWC may make whatever orders it considers appropriate, in the public interest, to put:
  - (a) the employees; and
  - (b) each registered employee association referred to in paragraph 786(2)(a) or (3)(a);in the same position (as nearly as can be done) as if the employer had complied with subsections 786(2) and (3).
- (2) The FWC must not, under subsection (1), make orders for any of the following:
  - (a) reinstatement of an employee;
  - (b) withdrawal of a notice of termination if the notice period has not expired;
  - (c) payment of an amount in lieu of reinstatement;
  - (d) payment of severance pay;
  - (e) disclosure of confidential information or commercially sensitive information relating to the employer, unless the recipient of such information gives an enforceable undertaking not to disclose the information to any other person;
  - (f) disclosure of personal information relating to a particular employee, unless the employee has given written consent to the disclosure of the information and the disclosure is in accordance with that consent.

### **788 Application to the FWC for order**

The FWC may make the order only on application by:

- (a) one of the employees; or

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- (b) a registered employee association referred to in paragraph 786(2)(a) or (3)(a); or
- (c) any other registered employee association that is entitled to represent the industrial interests of one of the employees.

**Subdivision D—Limits on scope of this Division**

**789 Limits on scope of this Division**

- (1) This Division does not apply in relation to any of the following employees:
  - (a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;
  - (b) an employee 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) a daily hire employee working in the building and construction industry (including working in connection with the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures);
  - (f) a daily hire employee working in the meat industry in connection with the slaughter of livestock;
  - (g) a weekly hire employee working in connection with the meat industry and whose termination of employment is determined solely by seasonal factors;
  - (h) an employee prescribed by the regulations as an employee in relation to whom this Division does not apply.
- (2) Paragraph (1)(a) does not prevent this Division from applying in relation to an employee if a substantial reason for employing the employee as described in that paragraph was to avoid the application of this Division.

## **Part 6-4A—Special provisions about TCF outworkers**

### **Division 1—Introduction**

#### **789AA Guide to this Part**

This Part contains special provisions about TCF outworkers.

Division 2 provides for TCF contract outworkers to be taken to be employees in certain circumstances for the purposes of most of the provisions of this Act.

Division 3 provides for TCF outworkers (whether employees or contractors) to recover unpaid remuneration from entities that are indirectly responsible for work done by the outworkers.

Division 4 allows the regulations to prescribe a code dealing with standards of conduct and practice relating to TCF outwork.

Division 5 contains miscellaneous provisions.

#### **789AB Meanings of *employee* and *employer***

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

#### **789AC Objects of this Part**

The objects of this Part are to eliminate exploitation of outworkers in the textile, clothing and footwear industry, and to ensure that those outworkers are employed or engaged under secure, safe and fair systems of work, by:

- (a) providing nationally consistent rights and protections for those outworkers, regardless of whether they are employees or contractors; and

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- (b) establishing an effective mechanism by which those outworkers can recover amounts owing to them in relation to their work from other parties in a supply chain; and
- (c) providing for a code dealing with standards of conduct and practice to be complied with by parties in a supply chain.

## **Division 2—TCF contract outworkers taken to be employees in certain circumstances**

### **789BA Provisions covered by this Division**

- (1) This Division covers the provisions of this Act, other than the following provisions (and other than regulations made for the purposes of the following provisions):
  - (a) Division 1, and this Division, of this Part;
  - (b) Divisions 2A and 2B of Part 1-3 (application of this Act in referring States);
  - (c) Part 3-4 (right of entry);
  - (d) Part 3-5 (stand down);
  - (e) Part 6-3 (extension of National Employment Standards entitlements);
  - (ea) Part 6-3A (transfer of business from a State public sector employer);
  - (f) Part 6-4 (additional provisions relating to termination of employment);
  - (g) Part 1 of Schedule 1.
- (2) Provisions of this Act that are not covered by this Division are to be interpreted disregarding the effect of this Division in relation to other provisions of this Act.

Note: For example, references to national system employees and national system employers, in provisions of this Act that are not covered by this Division, are to be interpreted disregarding the effect of this Division in relation to the definitions of those expressions in sections 13 and 14.
- (3) References in provisions that are covered by this Division to matters dealt with in, or occurring under, provisions of this Act that are not covered by this Division (the *excluded provisions*) are to be interpreted having regard to the fact that this Division does not apply for the purposes of the excluded provisions.

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**789BB TCF contract outworkers taken to be employees in certain circumstances**

- (1) For the purposes of the provisions covered by this Division:
- (a) a TCF contract outworker is taken to be an employee (within the ordinary meaning of that expression), and to be a national system employee, in relation to particular TCF work performed by the outworker, if:
    - (i) the work is performed directly or indirectly for a Commonwealth outworker entity; and
    - (ii) if the entity is a constitutional corporation—the work is performed for the purposes of a business undertaking of the corporation; and
  - (b) the person (whether a Commonwealth outworker entity referred to in subparagraph (a)(i) or another person) that engages the outworker is taken to be the employer (within the ordinary meaning of that expression), and to be a national system employer, of the outworker in relation to the TCF work.

Note 1: See section 17A for when TCF work is performed *directly* or *indirectly* for a person.

Note 2: See also section 789BC, which allows regulations to deal with matters relating to TCF contract outworkers who are taken by this section to be employees.

- (2) A **TCF contract outworker** is a TCF outworker who performs work other than as an employee.
- (3) In interpreting any of the following for the purposes of the provisions covered by this Division:
- (a) provisions of this Act;
  - (b) any instrument that is relevant to the relationship between the TCF contract outworker and the person referred to in paragraph (1)(b);
- an interpretation that is consistent with the objective stated in subsection (4) is to be preferred to an interpretation that is not consistent with that objective.



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- (4) The objective is that a TCF contract outworker who is taken to be an employee in relation to TCF work should have the same rights and obligations in relation to the work as an employee would have if he or she were employed by the person referred to in paragraph (1)(b) to do the work.
- (5) This section has effect subject to regulations made for the purposes of section 789BC.

**789BC Regulations relating to TCF outworkers who are taken to be employees**

- (1) For the purpose of furthering the objective stated in subsection 789BB(4), the regulations may do either or both of the following in relation to TCF outworkers (*deemed employees*) who are taken by section 789BB to be employees of other persons (*deemed employers*) in relation to TCF work:
  - (a) provide that provisions covered by this Division apply in relation to deemed employees and deemed employers with specified modifications;
  - (b) otherwise make provision relating to how provisions covered by this Division apply in relation to deemed employees and deemed employers.
- (2) Regulations made for the purposes of subsection (1) may provide differently:
  - (a) for the purposes of different provisions; or
  - (b) in relation to different situations.
- (3) This section does not allow regulations to:
  - (a) modify a provision that creates an offence, or that imposes an obligation which, if contravened, constitutes an offence; or
  - (b) include new provisions that create offences.

## Division 3—Recovery of unpaid amounts

### 789CA When this Division applies

*Outworker not paid for TCF work in certain circumstances*

- (1) This Division applies if:
- (a) a TCF outworker performs TCF work for a person (the **responsible person**):
    - (i) as an employee of the responsible person; or
    - (ii) under a contract for the provision of services to the responsible person; and
  - (b) the responsible person does not pay an amount (the **unpaid amount**) that is payable, in relation to the TCF work, by the responsible person:
    - (i) to the outworker; or
    - (ii) to another person, for the benefit of the outworker; on or before the day when the amount is due for payment; and
  - (c) the unpaid amount is payable under:
    - (i) a contract; or
    - (ii) this Act, or an instrument made under or in accordance with this Act; or
    - (iii) another law of the Commonwealth; or
    - (iv) a transitional instrument as continued in existence by Schedule 3 to the Transitional Act; or
    - (v) a State or Territory industrial law, or a State industrial instrument.
- Note: For the purpose of this Division, the effect of Division 2 must be taken into account in determining whether a TCF outworker performs work as a national system employee of a national system employer.
- (2) Without limiting paragraph (1)(b), the unpaid amount may (subject to paragraph (1)(c)) be an amount of any of the following kinds that relates to (or is attributable to) the TCF work:

- (a) an amount payable by way of remuneration or commission;
- (b) an amount payable in respect of leave;
- (c) an amount payable by way of contributions to a superannuation fund;
- (d) an amount payable by way of reimbursement for expenses incurred.

*Meaning of indirectly responsible entity*

- (3) Subject to subsections (4) and (5), a person is an **indirectly responsible entity** in relation to the TCF work if:
- (a) the person is a Commonwealth outworker entity; and
  - (b) the TCF work was performed indirectly:
    - (i) for the entity; and
    - (ii) if the entity is a constitutional corporation—for the purposes of a business undertaking of the corporation.

Note: See section 17A for when TCF work is performed **indirectly** for a person.

*Extent of liability of indirectly responsible entity*

- (4) If subsection (3) is satisfied in relation to a Commonwealth outworker entity and part only of the TCF work:
- (a) the entity is an **indirectly responsible entity** in relation to that part of the TCF work; and
  - (b) for the purposes of applying this Division in relation to the entity and that part of the TCF work, the **unpaid amount** is so much only of the amount referred to in paragraph (1)(b) as is attributable to that part of the TCF work.

*Retailer of goods not an indirectly responsible entity in certain circumstances*

- (5) If:
- (a) a Commonwealth outworker entity, as a retailer, sells goods produced by the TCF work; and

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- (b) the entity does not have any right to supervise or otherwise control the performance of the work before the goods are delivered to the entity;

the entity is not an *indirectly responsible entity* in relation to the TCF work.

**789CB Liability of indirectly responsible entity for unpaid amount**

- (1) Each indirectly responsible entity (or the indirectly responsible entity, if there is only one) is liable to pay the unpaid amount.
- (3) If there are 2 or more indirectly responsible entities, those entities are jointly and severally liable for the payment of the unpaid amount.
- (4) Subject to subsection 789CE(1A), this section does not affect the liability of the responsible person to pay the unpaid amount.

**789CC Demand for payment from an apparent indirectly responsible entity**

- (1) The TCF outworker, or a person acting on behalf of the outworker, may give an apparent indirectly responsible entity a written demand for payment of the amount that the outworker reasonably believes the entity is liable for under section 789CB.
- (2) An entity is an *apparent indirectly responsible entity* in relation to the TCF work if the TCF outworker reasonably believes that the entity is an indirectly responsible entity in relation to the TCF work.
- (3) The demand must:
  - (a) specify the amount, and identify the responsible person; and
  - (b) include particulars of the TCF work to which the amount relates, and why the amount is payable by the entity to which the demand is given; and
  - (c) state that if the specified amount is not paid by a specified time, proceedings may be commenced against the entity under section 789CD.

- (4) The time specified for the purpose of paragraph (3)(c) must not be less than 14 days after the demand is given to the entity.

**789CD Court order for entity to pay amount demanded**

- (1) If:
- (a) in accordance with section 789CC, an apparent indirectly responsible entity has been given a demand for payment of a specified amount; and
  - (b) the amount has not been paid in full by the time specified in the demand;
- a person or organisation specified in subsection (2) (the *applicant*) may commence proceedings for an order requiring the entity to pay the specified amount.
- (2) The proceedings may be commenced:
- (a) by the TCF outworker; or
  - (b) on the TCF outworker's behalf, by:
    - (i) an organisation that is entitled to represent the industrial interests of the outworker; or
    - (ii) an inspector.
- (3) The proceedings may be commenced in:
- (a) the Federal Court; or
  - (b) the Federal Circuit and Family Court of Australia (Division 2); or
  - (c) an eligible State or Territory court.
- (4) Subject only to subsections (5) and (6), the court may make an order requiring the entity to pay, to the outworker or to another person on the outworker's behalf, the specified amount (or so much of that amount as the applicant alleges is still owing).
- (5) The court must not make an order under subsection (4) if the entity satisfies the court that the entity is not liable under section 789CB to pay any of the specified amount.

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- (6) If the entity satisfies the court that the amount of the entity's liability under section 789CB is less than the specified amount (or is less than so much of that amount as the applicant alleges is still owing), the court must not make an order under subsection (4) requiring the entity to pay more than that lesser amount.
- (7) In making the order, the court must, on application, include an amount of interest in the sum ordered, unless good cause is shown to the contrary.
- (8) Without limiting subsection (7), in determining the amount of interest, the court must take into account the period between the day when the unpaid amount was due for payment by the responsible person and the day when the order is made.
- (9) Proceedings cannot be commenced under this section more than 6 years after the time when the unpaid amount became due for payment by the responsible person.

**789CE Effect of payment by entity (including entity's right to recover from responsible person)**

- (1) This section applies if an entity pays an amount in discharge of a liability of the entity under section 789CB, or pursuant to an order under section 789CD.
- (1A) The payment discharges the liability of the responsible person for the unpaid amount, to the extent of the payment. This does not affect any right that the entity has to recover an equivalent amount from the responsible person (under this section or otherwise) or from another person, or to be otherwise indemnified in relation to the making of the payment.
- (2) The entity may, in accordance with this section, recover from the responsible person an amount (the **recoverable amount**) equal to the sum of:
  - (a) the amount paid by the entity as mentioned in subsection (1);
  - and

- (b) any interest paid by the entity in relation to that amount pursuant to an order under section 789CD.
- (3) The entity may recover the recoverable amount:
  - (a) by offsetting it against any amount that the entity owes to the responsible person; or
  - (b) by action against the responsible person under subsection (4).
- (4) The entity may commence proceedings against the responsible person for payment to the entity of the recoverable amount. The proceedings may be commenced in:
  - (a) the Federal Court; or
  - (b) the Federal Circuit and Family Court of Australia (Division 2); or
  - (c) an eligible State or Territory court.
- (5) The court may make an order requiring the responsible person to pay the entity the recoverable amount (or so much of it as is still owing) if the court is satisfied that:
  - (a) this section applies as mentioned in subsection (1); and
  - (b) the entity has not otherwise recovered the recoverable amount in full from the responsible person.
- (6) In making the order the court must, on application, include an amount of interest in the sum ordered, unless good cause is shown to the contrary.
- (7) Without limiting subsection (6), in determining the amount of interest, the court must take into account the period between the day when the recoverable amount was paid by the entity and the day when the order is made.
- (8) Proceedings cannot be commenced under this section more than 6 years after the time when the entity paid the recoverable amount.

**789CF Division does not limit other liabilities or rights**

Nothing in this Division limits any other liability or right in respect of the entitlement of the TCF outworker to the unpaid amount (or

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to have the unpaid amount paid to another person for the outworker's benefit).



## **Division 4—Code of practice relating to TCF outwork**

### **789DA Regulations may provide for a code**

For the purpose of furthering the objects of this Part, the regulations may prescribe a code (the ***TCF outwork code***) dealing with standards of conduct and practice to be complied with in relation to any of the following:

- (a) the employment or engagement of TCF outworkers;
- (b) arranging for TCF work to be performed, if the work:
  - (i) is to be performed by TCF outworkers; or
  - (ii) is of a kind that is often performed by TCF outworkers;
- (c) the sale of goods produced by TCF work.

Note 1: In situations where there is a chain or series of arrangements for the supply or production of goods, the TCF outwork code may (subject to section 789DC) impose obligations on any persons that are parties to arrangements in that chain or series.

Note 2: References in other provisions to “this Act” include the code, because the code is in the regulations and is therefore within the definition of ***this Act*** in section 12.

### **789DB Matters that may be dealt with in TCF outwork code**

- (1) The matters that may be dealt with in the TCF outwork code include (but are not limited to) the following:
  - (a) record keeping requirements;
  - (b) reporting on compliance with record keeping requirements, or with other requirements of the code;
  - (c) general matters relating to the operation and administration of the code.
- (2) The TCF outwork code must not specify wages or other entitlements for TCF outworkers.

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**789DC Persons on whom obligations may be imposed by TCF outwork code**

- (1) The TCF outwork code may only impose obligations on a person if one or more of subsections (2) to (5) applies to the person.

Note: See also subsection (6), which limits the matters in relation to which obligations may be imposed.

- (2) This subsection applies to a person if the person is a national system employer that employs TCF outworkers.

Note: For the purpose of this Division, the effect of Division 2 must be taken into account in determining whether a person is a national system employer that employs TCF outworkers.

- (3) This subsection applies to a person if:

- (a) the person is a Commonwealth outworker entity; and
- (b) the person arranges for TCF work to be performed (directly or indirectly):
  - (i) for the person; and
  - (ii) if the person is a constitutional corporation—for the purposes of a business undertaking of the corporation; and
- (c) the work:
  - (i) is to be performed by TCF outworkers; or
  - (ii) is of a kind often performed by TCF outworkers.

Note: See section 17A for when a person arranges for TCF work to be performed *directly* or *indirectly* for the person.

- (4) This subsection applies to a person if:

- (a) the person arranges for TCF work to be performed; and
- (b) the work:
  - (i) is to be performed by TCF outworkers; or
  - (ii) is of a kind often performed by TCF outworkers; and
- (c) the work is to be performed indirectly:
  - (i) for another person, being a Commonwealth outworker entity; and

- (ii) if that Commonwealth outworker entity is a constitutional corporation—for the purposes of a business undertaking of that corporation.
- (5) This subsection applies to a person if the person is a constitutional corporation that sells goods produced by TCF work.
- (6) The capacity for the TCF outwork code to impose obligations on a person is subject to the following limitations:
  - (a) the obligations that may be imposed on a person because subsection (2) applies to the person are limited to obligations relating to the person's employment of TCF outworkers;
  - (b) the obligations that may be imposed on a person because subsection (3) applies to the person are limited to obligations relating to TCF work (or an arrangement for TCF work) because of which that subsection applies to the person;
  - (c) the obligations that may be imposed on a person because subsection (4) applies to the person are limited to obligations relating to TCF work (or an arrangement for TCF work) because of which that subsection applies to the person;
  - (d) the obligations that may be imposed on a person because subsection (5) applies to the person are limited to obligations relating to the person being a seller of goods as referred to in that subsection.

#### **789DD Other general matters relating to content of TCF outwork code**

- (1) The TCF outwork code may be expressed to apply in relation to:
  - (a) all persons covered by section 789DC, or specified classes of those persons; and
  - (b) all TCF work, or specified classes of TCF work.

Note: A class of person or TCF work may (for example) be identified by reference to a particular sector of the textile, clothing or footwear industry.

- (2) The TCF outwork code may provide differently for:
  - (a) different classes of persons covered by section 789DC; or

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- (b) different classes of TCF work; or
- (c) different situations.

**789DE Relationship between the TCF outwork code and other instruments**

- (1) A TCF award prevails over the TCF outwork code, to the extent of any inconsistency.
- (2) The TCF outwork code prevails over any of the following, to the extent of any inconsistency:
  - (a) an enterprise agreement;
  - (b) a workplace determination;
  - (c) an agreement-based transitional instrument, as continued in existence by Schedule 3 to the Transitional Act.
- (3) Subject to subsection (5), the TCF outwork code may:
  - (a) make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time; or
  - (b) make provision to the effect that compliance with a specified term of an instrument or other writing as in force or existing from time to time is taken to satisfy a particular requirement of the code.
- (4) The kinds of instrument or other writing by reference to which the TCF outwork code may make provision as mentioned in subsection (3) include (but are not limited to) the following:
  - (a) a TCF award;
  - (b) a code (however described), dealing with matters relating to outworkers, that is made under a law of a State or Territory.
- (5) The TCF outwork code cannot make provision as mentioned in subsection (3) by reference to any of the following:
  - (a) an enterprise agreement;
  - (b) a workplace determination;

- (c) an agreement-based transitional instrument, as continued in existence by Schedule 3 to the Transitional Act.
- (6) Subsections (3) and (4) have effect despite subsection 14(2) of the *Legislation Act 2003*.

## **Division 5—Miscellaneous**

### **789EA Part not intended to exclude or limit State or Territory laws relating to outworkers**

- (1) This Part is not intended to exclude or limit the operation of a law of a State or Territory (or an instrument made under a law of a State or Territory), to the extent that the law (or instrument) relates to outworkers and is capable of operating concurrently with this Part.
- (2) A reference in subsection (1) to this Part includes a reference to any regulations made for the purposes of this Part.

## **Part 6-4B—Workers bullied at work**

### **Division 1—Introduction**

#### **789FA Guide to this Part**

This Part allows a worker who has been bullied at work to apply to the FWC for an order to stop the bullying.

#### **789FB Meanings of *employee* and *employer***

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

## Division 2—Stopping workers being bullied at work

### 789FC Application for an FWC order to stop bullying

- (1) A worker who reasonably believes that he or she has been bullied at work may apply to the FWC for an order under section 789FF.
- (2) For the purposes of this Part, **worker** has the same meaning as in the *Work Health and Safety Act 2011*, but does not include a member of the Defence Force.  
  

Note: Broadly, for the purposes of the *Work Health and Safety Act 2011*, a worker is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer.
- (3) The application must be accompanied by any fee prescribed by the regulations.
- (4) The regulations may prescribe:
  - (a) a fee for making an application to the FWC under this section; and
  - (b) a method for indexing the fee; and
  - (c) the circumstances in which all or part of the fee may be waived or refunded.

### 789FD When is a worker *bullied at work*?

- (1) A worker is **bullied at work** if:
  - (a) while the worker is at work in a constitutionally-covered business:
    - (i) an individual; or
    - (ii) a group of individuals;repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
  - (b) that behaviour creates a risk to health and safety.



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- (2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.
- (3) If a person conducts a business or undertaking (within the meaning of the *Work Health and Safety Act 2011*) and either:
  - (a) the person is:
    - (i) a constitutional corporation; or
    - (ii) the Commonwealth; or
    - (iii) a Commonwealth authority; or
    - (iv) a body corporate incorporated in a Territory; or
  - (b) the business or undertaking is conducted principally in a Territory or Commonwealth place;then the business or undertaking is a ***constitutionally-covered business***.

**789FE FWC to deal with applications promptly**

- (1) The FWC must start to deal with an application under section 789FC within 14 days after the application is made.
  - Note: For example, the FWC may start to inform itself of the matter under section 590, it may decide to conduct a conference under section 592, or it may decide to hold a hearing under section 593.
- (2) However, the FWC may dismiss an application under section 789FC if the FWC considers that the application might involve matters that relate to:
  - (a) Australia's defence; or
  - (b) Australia's national security; or
  - (c) an existing or future covert operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police; or
  - (d) an existing or future international operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police.
  - Note: For another power of the FWC to dismiss applications under section 789FC, see section 587.

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**789FF FWC may make orders to stop bullying**

- (1) If:
- (a) a worker has made an application under section 789FC; and
  - (b) the FWC is satisfied that:
    - (i) the worker has been bullied at work by an individual or a group of individuals; and
    - (ii) there is a risk that the worker will continue to be bullied at work by the individual or group;
- then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work by the individual or group.
- (2) In considering the terms of an order, the FWC must take into account:
- (a) if the FWC is aware of any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body—those outcomes; and
  - (b) if the FWC is aware of any procedure available to the worker to resolve grievances or disputes—that procedure; and
  - (c) if the FWC is aware of any final or interim outcomes arising out of any procedure available to the worker to resolve grievances or disputes—those outcomes; and
  - (d) any matters that the FWC considers relevant.

**789FG Contravening an order to stop bullying**

A person to whom an order under section 789FF applies must not contravene a term of the order.

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

**789FH Actions under work health and safety laws permitted**

Section 115 of the *Work Health and Safety Act 2011* and corresponding provisions of corresponding WHS laws (within the

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meaning of that Act) do not apply in relation to an application under section 789FC.

Note: Ordinarily, if a worker makes an application under section 789FC for an FWC order to stop the worker from being bullied at work, then section 115 of the *Work Health and Safety Act 2011* and corresponding provisions of corresponding WHS laws would prohibit a proceeding from being commenced, or an application from being made or continued, under those laws in relation to the bullying. This section removes that prohibition.

**789FI This Part is not to prejudice Australia's defence, national security etc.**

Nothing in this Part requires or permits a person to take, or to refrain from taking, any action if the taking of the action, or the refraining from taking the action, would be, or could reasonably be expected to be, prejudicial to:

- (a) Australia's defence; or
- (b) Australia's national security; or
- (c) an existing or future covert operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police; or
- (d) an existing or future international operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police.

**789FJ Declarations by the Chief of the Defence Force**

- (1) Without limiting section 789FI, the Chief of the Defence Force may, by legislative instrument, declare that all or specified provisions of this Part do not apply in relation to a specified activity.
- (2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.

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**789FK Declarations by the Director-General of Security**

- (1) Without limiting section 789FI, the Director-General of Security may, by legislative instrument, declare that all or specified provisions of this Part do not apply in relation to a person carrying out work for the Director-General.
- (2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.

**789FL Declarations by the Director-General of ASIS**

- (1) Without limiting section 789FI, the Director-General of the Australian Secret Intelligence Service may, by legislative instrument, declare that all or specified provisions of this Part do not apply in relation to a person carrying out work for the Director-General.
- (2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.

## **Part 6-4C—Coronavirus economic response**

### **Division 1—Introduction**

#### **789GC Definitions**

In this Part:

*10% decline in turnover certificate* has the meaning given by section 789GCD.

*10% decline in turnover test* means the test set out in section 789GCB.

*current GST turnover* has the same meaning as in the jobkeeper payment rules.

*decline in turnover test* has the same meaning as in the jobkeeper payment rules.

*designated employment provision* means:

- (a) a provision of this Act (other than a provision of this Part or a provision mentioned in section 789GZ); or
- (b) a provision of:
  - (i) a fair work instrument; or
  - (ii) a contract of employment; or
  - (iii) a transitional instrument (within the meaning of item 2 of Schedule 3 to the Transitional Act).

*designated quarter* applicable to a time has the meaning given by section 789GCC.

*eligible financial service provider* means:

- (b) a registered tax agent or BAS agent; or
- (c) a qualified accountant.

*employee* means a national system employee.

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

**employer** means a national system employer.

**fortnight** means a 14-day period beginning on a Monday.

**hourly rate of pay guarantee** has the meaning given by section 789GDB.

**jobkeeper enabling direction** means a direction authorised by repealed section 789GDC, 789GE, 789GF, 789GJA, 789GJB or 789GJC.

**jobkeeper payment** means a payment that:

- (a) is payable by the Commonwealth in accordance with the jobkeeper payment rules; and
- (b) is known as jobkeeper payment.

**jobkeeper payment rules** means rules made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.

**licence** includes:

- (a) registration; and
- (b) permit.

**minimum payment guarantee** has the meaning given by section 789GDA.

**qualified accountant** has the same meaning as in the *Corporations Act 2001*.

**qualifies for the jobkeeper scheme** has the meaning given by section 789GCA.

**quarter** means a period of 3 months ending on 31 March, 30 June, 30 September or 31 December.

**registered tax agent or BAS agent** has the same meaning as in the *Tax Agent Services Act 2009*.

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**wage condition** means the wage condition set out in the jobkeeper payment rules.

**789GCA When employer qualifies for the jobkeeper scheme**

For the purposes of this Part, an employer qualifies for the jobkeeper scheme at a time if, under the jobkeeper payment rules, the employer qualifies for the jobkeeper scheme for the fortnight in which the time occurs.

**789GCB 10% decline in turnover test**

- (1) For the purposes of this Part, an employer satisfies the **10% decline in turnover test** for a quarter if the employer would satisfy the decline in turnover test at a time in the quarter if:
  - (a) the turnover test period were the quarter, instead of the period determined under paragraph 8(7)(a) or (aa) of the jobkeeper payment rules; and
  - (b) instead of projected GST turnover, current GST turnover were used (including in subsection 8A(3) of the jobkeeper payment rules, and in applying an alternative decline in turnover test determined under subsection 8(6) of the jobkeeper payment rules); and
  - (c) the specified percentage for the employer was 10%, instead of the percentage worked out under subsection 8(2) of the jobkeeper payment rules; and
  - (d) the decline in turnover test was subject to such modifications (if any) as are prescribed by the regulations.
- (2) The regulations must not prescribe modifications for the purposes of paragraph (1)(d) unless:
  - (a) the jobkeeper payment rules are amended after the commencement of this section; and
  - (b) the modifications relate to those amendments.

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**789GCC Designated quarter**

For the purposes of this Part, the *designated quarter* applicable to a time is set out in the table.

Designated quarter applicable to a time		
Item	If the time occurs:	the designated quarter applicable to the time is the quarter ending on:
1	before 28 October 2020	30 June 2020
2	during the period: (a) beginning at the start of 28 October 2020; and (b) ending at the end of 27 February 2021	30 September 2020
3	on or after 28 February 2021	31 December 2020

**789GCD 10% decline in turnover certificate**

- (1) An eligible financial service provider may issue a written certificate that:
  - (a) relates to a specified employer; and
  - (b) confirms that the employer satisfied the 10% decline in turnover test for the designated quarter applicable to a specified time.
- (2) However, an eligible financial service provider is not entitled to issue a certificate under subsection (1) in relation to an employer if the eligible financial service provider is:
  - (a) a director or employee of the employer; or
  - (b) an associated entity of the employer; or
  - (c) a director or employee of an associated entity of the employer.
- (3) A certificate under subsection (1) is to be known as a **10% decline in turnover certificate** that covers the employer specified in the



certificate for the designated quarter applicable to the time specified in the certificate.

(4) If:

- (a) an employer is a small business employer; and
- (b) an individual who:
  - (i) is, or is authorised by, the employer; and
  - (ii) has knowledge of the financial affairs of the employer; makes a statutory declaration to the effect that the employer satisfied the 10% decline in turnover test for the designated quarter applicable to a specified time;

the statutory declaration is taken to be a **10% decline in turnover certificate** that covers the employer for the designated quarter applicable to the time specified in the statutory declaration.

Note: For *small business employer*, see section 23.

## **Division 7—Service**

### **789GR Service**

- (1) For the purposes of this Act, if an employee is subject to a jobkeeper enabling direction during a period, that period counts as service.
- (2) Subsection (1) has effect in addition to section 22.

## **Division 8—Accrual rules**

### **789GS Accrual rules**

- (1) If a jobkeeper enabling direction under repealed section 789GDC or 789GJA (jobkeeper enabling stand down) applies to an employee, the employee accrues leave entitlements as if the direction had not been given.
- (2) If a jobkeeper enabling direction under repealed section 789GDC or 789GJA (jobkeeper enabling stand down) applies to an employee, the following are to be calculated as if the direction had not been given:
  - (a) redundancy pay;
  - (b) payment in lieu of notice of termination.
- (3) If an employee takes paid annual leave in accordance with an agreement under repealed subsection 789GJ(2), the employee accrues leave entitlements as if the agreement had not been made.
- (4) If an employee takes paid annual leave in accordance with an agreement under repealed subsection 789GJ(2), the following are to be calculated as if the agreement had not been made:
  - (a) redundancy pay;
  - (b) payment in lieu of notice of termination.

## Division 10—Dealing with disputes

### 789GV FWC may deal with a dispute about the operation of this Part

- (1) The FWC may deal with a dispute about the operation of this Part.
- (2) The FWC may deal with a dispute by arbitration.

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

- (3) The FWC may deal with a dispute only on application by any of the following:
  - (a) an employee;
  - (b) an employer;
  - (c) an employee organisation;
  - (d) an employer organisation.
- (4) The FWC may make any of the following orders:
  - (a) an order that the FWC considers desirable to give effect to a jobkeeper enabling direction;
  - (b) an order setting aside a jobkeeper enabling direction;
  - (c) an order:
    - (i) setting aside a jobkeeper enabling direction; and
    - (ii) substituting a different jobkeeper enabling direction;
  - (d) any other order that the FWC considers appropriate.
- (5) The FWC must not make an order under paragraph (4)(a) or (c) on or after 29 March 2021.
- (6) An order made by the FWC under paragraph (4)(a) ceases to have effect at the start of 29 March 2021.
- (7) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

**789GW Contravening an FWC order dealing with a dispute about the operation of this Part**

A person must not contravene a term of an FWC order dealing with a dispute about the operation of this Part.

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

## Division 12—Protections

### 789GXA Misuse of jobkeeper enabling direction

An employer must not purport to give a jobkeeper enabling direction if:

- (a) the direction is not authorised by this Part; and
- (b) the employer knows that the direction is not authorised by this Part.

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

### 789GXB 10% decline in turnover test—prohibited conduct

- (1) An employer must not purport to give a jobkeeper enabling direction under section 789GJA, 789GJB or 789GJC if, at the time when the direction was given:
  - (a) the employer did not satisfy the 10% decline in turnover test for the designated quarter applicable to that time; and
  - (b) the employer knew that, or was reckless as to whether, the employer did not satisfy the 10% decline in turnover test for the designated quarter applicable to that time.

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

- (2) An employer must not purport to give a request under subsection 789GJD(1) if, at the time when the request was given:
  - (a) the employer did not satisfy the 10% decline in turnover test for the designated quarter applicable to that time; and
  - (b) the employer knew that, or was reckless as to whether, the employer did not satisfy the 10% decline in turnover test for the designated quarter applicable to that time.

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

- (3) An employer must not give information to an eligible financial service provider if:

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- (a) the information is given in connection with the issue of a 10% decline in turnover certificate that covers the employer for the designated quarter applicable to a particular time; and
- (b) the information:
  - (i) is false or misleading; or
  - (ii) omits any matter or thing without which the information is misleading; and
- (c) the employer knows that the information:
  - (i) is false or misleading; or
  - (ii) omits any matter or thing without which the information is misleading.

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

**789GXC False statutory declaration**

- (1) A person must not make a false statement in a statutory declaration covered by subsection 789GCD(3) if the person knows that the statement is false.

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

- (2) The following laws:
  - (a) a law of the Commonwealth, other than:
    - (i) subsection (1) of this section; or
    - (ii) the remaining provisions of this Act so far as they relate to subsection (1) of this section;
  - (b) a law of a State or Territory;do not apply to making a false statement in a statutory declaration covered by subsection 789GCD(3).

**789GXD Federal Court may terminate a jobkeeper enabling direction if employer does not satisfy the 10% decline in turnover test**

If:

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- (a) a jobkeeper enabling direction given by an employer to an employee of the employer under section 789GJA, 789GJB or 789GJC is in force at a particular time; and
  - (b) the Federal Court is satisfied that the employer did not satisfy the 10% decline in turnover test for the designated quarter applicable to that time;
- the Federal Court may, on application made by:
- (c) the employee; or
  - (d) an employee organisation; or
  - (e) an inspector;
- make either or both of the following orders:
- (f) an order terminating the direction;
  - (g) any other order that the court considers appropriate.

**789GXE Federal Court may terminate a subsection 789GJD(2) agreement if employer does not satisfy the 10% decline in turnover test**

If:

- (a) an agreement made by an employer and an employee of the employer under subsection 789GJD(2) is in force at a particular time; and
  - (b) the Federal Court is satisfied that the employer did not satisfy the 10% decline in turnover test for the designated quarter applicable to that time;
- the Federal Court may, on application made by:
- (c) the employee; or
  - (d) an employee organisation; or
  - (e) an inspector;
- make either or both of the following orders:
- (f) an order terminating the agreement;
  - (g) any other order that the court considers appropriate.



### **789GY Protection of workplace rights**

For the avoidance of doubt, each of the following is a workplace right within the meaning of Part 3-1:

- (a) the benefit that an employee of an employer has or derives because of an obligation of the employer under repealed section 789GD to satisfy the wage condition;
- (b) agreeing, or not agreeing, to perform duties:
  - (i) on different days; or
  - (ii) at different times;in accordance with repealed subsection 789GG(2) or 789GJD(2);
- (c) agreeing, or not agreeing, to take paid annual leave in compliance with a request under repealed subsection 789GJ(1);
- (d) agreeing, or not agreeing, to take paid annual leave in accordance with repealed subsection 789GJ(2);
- (e) making a request under repealed section 789GU (secondary employment, training etc.).

### **789GZ Relationship with other laws etc.**

- (1) This Part will at all times operate subject to the following:
  - (a) Division 2 of Part 2-9 (payment of wages etc.);
  - (b) Part 3-1 (general protections);
  - (c) Part 3-2 (unfair dismissal);
  - (d) section 772 (employment not to be terminated on certain grounds);
  - (e) an anti-discrimination law;
  - (f) a law of the Commonwealth, a State or a Territory, so far as the law deals with health and safety obligations of employers or employees;
  - (g) a law of the Commonwealth, a State or a Territory, so far as the law deals with workers' compensation.

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- (2) This Part has effect subject to a person's right to be represented, or collectively represented, by an employee organisation or employer organisation.

**789GZA Redundancy**

The giving of a jobkeeper enabling direction does not amount to a redundancy.

## **Division 13—Review of this Part**

### **789GZB Review of this Part**

- (1) The Minister must cause an independent review to be conducted of the operation of this Part.
- (2) The review must start on or before:
  - (a) 28 July 2020; or
  - (b) if a later day is specified in the regulations—that later day.
- (3) The persons who conduct the review must:
  - (a) complete the review; and
  - (b) give the Minister a written report of the review;on or before:
  - (c) 8 September 2020; or
  - (d) if a later day is specified in the regulations—that later day.
- (4) The Minister must cause a copy of the report to be tabled in each House of the Parliament within 5 sitting days of that House after the report is given to the Minister.

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## **Part 6-4D—The National Construction Industry Forum**

### **789GZC Establishment**

The National Construction Industry Forum is established by this section.

### **789GZD Function of the Forum**

- (1) The function of the National Construction Industry Forum is to provide advice to the Government in relation to work in the building and construction industry.
- (2) The matters in relation to which the Forum may provide advice include, but are not limited to, the following:
  - (a) workplace relations;
  - (b) skills and training;
  - (c) safety;
  - (d) productivity;
  - (e) diversity and gender equity;
  - (f) industry culture.
- (3) Matters for advice may be:
  - (a) raised by the Government; or
  - (b) agreed between the members of the Forum.

### **789GZE Membership**

- (1) The members of the National Construction Industry Forum are:
  - (a) the Minister; and
  - (b) the Infrastructure Minister; and
  - (c) the Industry Minister; and
  - (d) the members appointed by the Minister.

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- (2) The Minister must appoint:
  - (a) one or more members who have experience representing employees in the building and construction industry; and
  - (b) an equal number of members who have experience representing employers in the building and construction industry, including at least one member who has experience representing contractors in the building and construction industry, and one member with experience in small to medium sized enterprises in the residential building sector.
- (3) The Minister may appoint any other person.

**789GZF Appointment by the Minister**

A member of the National Construction Industry Forum appointed by the Minister:

- (a) is to be appointed by written instrument; and
- (b) holds office:
  - (i) on a part-time basis; and
  - (ii) for the period specified in the instrument, which must not exceed 3 years.

Note: A member is eligible for reappointment (see section 33AA of the *Acts Interpretation Act 1901*).

**789GZG Chair of the Forum**

- (1) The Minister is the Chair of the National Construction Industry Forum.
- (2) If the Minister is unable to preside at a meeting, or considers it appropriate for any other reason, the Minister may nominate another Minister to preside at the meeting.

**789GZH Meetings**

- (1) The Chair of the National Construction Industry Forum must convene at least 2 meetings of the Forum in each calendar year.

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- (2) One meeting must be held in the first 6 months of the year and another must be held in the second 6 months of the year.
- (3) Otherwise, the timing of meetings is to be determined by the Chair in consultation with the members.
- (4) The procedure to be followed at a meeting is to be determined by the Chair in consultation with the members.

**789GZJ Confidentiality**

- (1) The views expressed at meetings of the National Construction Industry Forum are to be kept confidential.
- (2) However, this does not prevent members from:
  - (a) reporting to the persons, bodies or organisations they represent; or
  - (b) making announcements the members agree are in the public interest.
- (3) Within 14 working days of a meeting, the National Construction Industry Forum must publish on the Department's website a public communique.

**789GZK Substitute members**

- (1) If a member of the National Construction Industry Forum is unable to be present at a meeting, the member may nominate a person to attend the meeting in the member's place.
- (2) If the Chair agrees, the person may attend the meeting in the place of the member.
- (3) A person attending a meeting in the place of a member has all the rights and responsibilities of the member at, and in relation to, the meeting.

Note: For example, a substitute member must comply with the confidentiality requirement in section 789GZJ.

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Section 789GZL

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**789GZL Invited participants**

- (1) The Chair may, after consulting the members of the National Construction Industry Forum, invite a person, body or organisation to participate in a meeting.
- (2) The Chair may terminate the invitation at any time, including during a meeting.
- (3) The participation of a person in a meeting does not make the person a member.
- (4) A person invited to participate in a meeting:
  - (a) is entitled to payment of travel allowance as if the person were a member; and
  - (b) must comply with subsection 789GZJ(1) (confidentiality).

**789GZM Remuneration**

- (1) A member of the National Construction Industry Forum is not entitled to be paid remuneration or allowances, other than travel allowance in accordance with subsection (2).
- (2) A member who is not a Minister or a member of the Parliament is entitled to be paid travel allowance at the rate prescribed by the regulations.
- (3) To avoid doubt, this section does not affect any entitlements of a Minister or a member of the Parliament under the *Parliamentary Business Resources Act 2017*.

**789GZN Resignation**

- (1) A member of the National Construction Industry Forum appointed by the Minister may resign the member's appointment by giving the Minister a written resignation.
- (2) The resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day.

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**789GZP Disclosure of interests**

- (1) A member of the National Construction Industry Forum who has a material personal interest that relates to a matter being considered by the Forum must disclose the interest to the Chair.
- (2) The member must not participate in any part of a meeting during which the matter is dealt with.

**789GZQ Termination of appointment**

The Minister may terminate the appointment of a member of the National Construction Industry Forum appointed by the Minister:

- (a) for misbehaviour; or
- (b) if the member is unable to perform the duties of the member's office because of physical or mental incapacity; or
- (c) if the member:
  - (i) becomes bankrupt; or
  - (ii) takes steps to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
  - (iii) compounds with one or more of the member's creditors; or
  - (iv) makes an assignment of the member's remuneration for the benefit of one or more of the member's creditors; or
- (d) for a member appointed because the member held a particular position or qualification, or represented a particular group—  
if the member no longer holds the position or qualification, or represents that group; or
- (e) the member fails, without reasonable excuse, to comply with section 789GZJ (confidentiality) or section 789GZP (disclosure of interests); or
- (f) if the member is absent, except on leave of absence granted by the Minister, from 3 consecutive meetings of the Forum.



## **Part 6-4E—Extension of anti-discrimination rules**

### **Division 1—Breastfeeding, gender identity and intersex status**

#### **789HA Constitutional basis of this Division**

This Division relies on the Commonwealth's legislative powers under paragraph 51(xxix) (external affairs) of the Constitution as it relates to giving effect to Australia's obligations under:

- (a) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9); and
- (b) article 26 of the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23); and
- (c) paragraph 2 of article 2, and articles 6 and 7, of the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5).

Note: The Conventions and the Covenant could in 2022 be viewed in the Australian Treaties Library on the AustLII website (<http://www.austlii.edu.au>).

#### **789HB Extension of anti-discrimination rules**

- (1) Subsection (3) applies for the purposes of the operation of the provisions identified in subsection (2) in relation to breastfeeding, gender identity or intersex status.
- (2) The provisions are as follows:
  - (a) section 153;
  - (b) section 172A;
  - (c) section 195;
  - (d) section 351.

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- (3) In applying sections 30H and 30S in relation to that operation of the provisions identified in subsection (2), assume that:
  - (a) the matter to which that operation of those provisions relates is not an excluded subject matter for the purposes of:
    - (i) the State's referral law mentioned in sections 30H and 30S; and
    - (ii) Divisions 2A and 2B of Part 1-3; and
  - (b) the referral of that matter by that referral law results in the Parliament of the Commonwealth having sufficient legislative power for those provisions (to the extent of that operation) to have effect.

## **Division 2—Family and domestic violence**

### **789HC Constitutional basis of this Division**

This Division relies on the Commonwealth's legislative powers under paragraph 51(xxix) (external affairs) of the Constitution as it relates to giving effect to Australia's obligations under:

- (a) the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation, done at Geneva on 25 June 1958; and
- (b) the ILO Convention (No. 190) concerning the elimination of violence and harassment in the world of work, done at Geneva on 21 June 2019.

Note: The Conventions could in 2023 be viewed in the Australian Treaties Library on the AustLII website (<http://www.austlii.edu.au>).

### **789HD Extension of anti-discrimination rules**

- (1) Subsection (3) applies for the purposes of the operation of the provisions identified in subsection (2) in relation to family and domestic violence.
- (2) The provisions are as follows:
  - (a) section 153;
  - (b) section 172A;
  - (c) section 195;
  - (d) section 351.
- (3) In applying sections 30H and 30S in relation to that operation of the provisions identified in subsection (2), assume that:
  - (a) the matter to which that operation of those provisions relates is not an excluded subject matter for the purposes of:
    - (i) the State's referral law mentioned in sections 30H and 30S; and
    - (ii) Divisions 2A and 2B of Part 1-3; and

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- (b) the referral of that matter by that referral law results in the Parliament of the Commonwealth having sufficient legislative power for those provisions (to the extent of that operation) to have effect.

## **Part 6-5—Miscellaneous**

### **Division 1—Introduction**

#### **790 Guide to this Part**

This Part deals with miscellaneous matters such as delegations and regulations.

#### **791 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—Miscellaneous

### 792 Delegation by Minister

- (1) The Minister may, in writing, delegate all or any of his or her functions or powers under this Act (except under section 32A) to:
  - (a) the Secretary of the Department; or
  - (b) an SES employee, or acting SES employee, in the Department.
- (2) In performing functions or exercising powers under a delegation, the delegate must comply with any directions of the Minister.

Note: See also sections 34AA and 34AB of the *Acts Interpretation Act 1901*.

### 793 Liability of bodies corporate

#### *Conduct of a body corporate*

- (1) Any conduct engaged in on behalf of a body corporate:
  - (a) by an officer, employee or agent (an **official**) of the body within the scope of his or her actual or apparent authority; or
  - (b) by any other person at the direction or with the consent or agreement (whether express or implied) of an official of the body, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the official;

is taken, for the purposes of this Act (subject to subsection (3A)) and the procedural rules, to have been engaged in also by the body.

#### *State of mind of a body corporate*

- (2) If, for the purposes of this Act (subject to subsection (3A)) or the procedural rules, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is enough to show:

- (a) that the conduct was engaged in by a person referred to in paragraph (1)(a) or (b); and
- (b) that the person had that state of mind.

*Meaning of state of mind*

- (3) The **state of mind** of a person includes:
  - (a) the knowledge, intention, opinion, belief or purpose of the person; and
  - (b) the person's reasons for the intention, opinion, belief or purpose.

*Exception—offence relating to failure to pay amounts*

- (3A) Subsections (1) and (2) do not apply for the purposes of:
  - (a) subsection 327A(1) (offence for failing to pay amounts as required); or
  - (b) a related offence provision, to the extent that the related offence provision relates to an offence against subsection 327A(1).

*Disapplication of Part 2.5 of the Criminal Code*

- (4) Part 2.5 of Chapter 2 of the *Criminal Code* does not apply to an offence against this Act, other than an offence against a provision referred to in paragraph (3A)(a) or (b) of this section.

Note: Part 2.5 of the *Criminal Code* deals with corporate criminal responsibility.

- (5) In this section, **employee** has its ordinary meaning.

## **794 Signature on behalf of body corporate**

For the purposes of this Act, a document may be signed on behalf of a body corporate by an authorised officer of the body and need not be made under the body's seal.

Section 794A

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**794A Liability of Australian governments under civil remedy provisions**

*Scope*

- (1) This section applies for the purposes of applying a civil remedy provision, or any other provision of this Act in so far as it relates to a civil remedy provision, in relation to an Australian government.
- (2) Each of the following is an **Australian government**:
  - (a) the Commonwealth;
  - (b) a State;
  - (c) the Australian Capital Territory;
  - (d) the Northern Territory.

*Conduct of Australian governments*

- (3) Any conduct engaged in on behalf of an Australian government by an officer, employee or agent (an **official**) of the government within the scope of the official's actual or apparent authority is taken, for the purposes of this Act and the procedural rules, to have been engaged in also by the government.

*State of mind of Australian governments*

- (4) If, for the purposes of this Act or the procedural rules, it is necessary to establish the state of mind of an Australian government in relation to particular conduct, it is enough to show:
  - (a) that the conduct was engaged in by an official of the government; and
  - (b) that the official had that state of mind.

Note: For **state of mind**, see subsection 793(3).

*Determining penalty amounts for Australian governments*

- (5) If an Australian government contravenes a civil remedy provision, the pecuniary penalty that government may be ordered to pay



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Section 794B

under a pecuniary penalty order is the penalty applicable to a body corporate.

*Modifications*

- (6) This section applies in relation to an Australian government subject to any modifications prescribed by the regulations.

*Meaning of **employee***

- (7) In this section, **employee** has its ordinary meaning.

**794B Liability of the Commonwealth for certain offences**

- (1) Part 2.5 of the *Criminal Code* applies in relation to the Commonwealth, for the purposes of an offence against:
- (a) subsection 327A(1) (offence for failing to pay amounts as required) of this Act; or
  - (b) a related offence provision, to the extent that the related offence provision relates to an offence against subsection 327A(1) of this Act;
- in the same way as that Part applies in relation to a body corporate.
- (2) It so applies:
- (a) as if sections 12.4 and 12.5 of the *Criminal Code* were omitted; and
  - (b) with the following modifications:
    - (i) the modifications set out in the following table (subject to subparagraph (iii));
    - (ii) such other modifications as are made necessary by the fact that criminal liability is being imposed on a body politic rather than a body corporate (subject to subparagraph (iii));
    - (iii) any modifications prescribed by the regulations.

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**Application of Part 2.5 of the *Criminal Code* to the Commonwealth**

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Item	Part 2.5 of the <i>Criminal Code</i> applies as if a reference to ...	were a reference to ...
1	a body corporate's board of directors	the governing body of the agency of the Commonwealth (the <b>relevant agency</b> ) whose officer, employee or agent engaged in conduct constituting a physical element of the offence
2	a high managerial agent of a body corporate	a person who is an officer, employee or agent of the Commonwealth with duties of such responsibility that the person's conduct may fairly be assumed to represent the policy of the relevant agency
3	the corporate culture of a body corporate	one or more attitudes, policies, rules, courses of conduct or practices existing within the relevant agency or a part of the relevant agency

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*Determining penalty amounts for the Commonwealth*

- (3) If the Commonwealth is guilty of an offence against a provision mentioned in paragraph (1)(a) or (b), the penalty to be imposed on the Commonwealth is the penalty applicable to a body corporate.

*Meaning of **employee***

- (4) In this section, **employee** has its ordinary meaning.

*Meaning of **governing body***

- (5) The **governing body** of an agency of the Commonwealth is the body, or group of members of the agency, with primary responsibility for the governance of the agency.

**794C Responsible agencies for Australian governments**

- (1) If proceedings are brought against:
- (a) an Australian government in relation to a contravention of a civil remedy provision of this Act; or
  - (b) the Commonwealth for an offence against:
    - (i) subsection 327A(1) (offence for failing to pay amounts as required); or
    - (ii) a related offence provision, to the extent that the related offence provision relates to an offence against subsection 327A(1);
- the responsible agency in relation to the contravention, or the commission of the offence, may be specified in any document initiating, or relating to, the proceedings.
- (2) The responsible agency in relation to the contravention, or the commission of the offence, is entitled to act in the proceedings and, subject to any relevant rules of court, the procedural rights and obligations of:
- (a) if paragraph (1)(a) applies—the Australian government as the respondent in the proceedings; or
  - (b) if paragraph (1)(b) applies—the Commonwealth as the accused in the proceedings;
- are conferred or imposed on the responsible agency.
- (3) With the court's leave, the following person may change the responsible agency during the proceedings:
- (a) if paragraph (1)(a) applies—the person bringing the proceedings;
  - (b) if paragraph (1)(b) applies—the person prosecuting the offence.
- (4) The **responsible agency** in relation to a contravention of a civil remedy provision by an Australian government, or the commission of an offence by the Commonwealth, is:
- (a) for a contravention of a civil remedy provision by an Australian government—the agency of that government

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whose officer, employee or agent engaged in conduct constituting the contravention; or

- (b) for the commission of an offence by the Commonwealth—the agency of the Commonwealth whose officer, employee or agent engaged in conduct constituting a physical element of the offence; or
- (c) if the agency referred to in paragraph (a) or (b) has ceased to exist—the agency of the Australian government or the Commonwealth (as the case requires) that is the successor of that agency; or
- (d) if there is no responsible agency under whichever of paragraph (a) or (b) applies, or paragraph (c)—the agency of the Australian government or the Commonwealth (as the case requires) that the court declares to be the responsible agency.

(5) This section applies in relation to:

- (a) an Australian government in relation to a contravention of a civil remedy provision; and
- (b) the Commonwealth in relation to the commission of an offence;

subject to any modifications that are prescribed by the regulations.

**794D Liability of the Commonwealth to pay civil and criminal penalties**

(1) This section applies if:

- (a) the Commonwealth contravenes a civil remedy provision and a court makes a pecuniary penalty order that the Commonwealth pay all or part of a pecuniary penalty to itself; or
- (b) the Commonwealth is given an infringement notice under the regulations in relation to an alleged contravention of a civil remedy provision; or
- (c) the Commonwealth is convicted of an offence against either of the following provisions and the court imposes a pecuniary penalty on the Commonwealth in respect of the offence:

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- (i) subsection 327A(1) (offence for failing to pay amounts as required);
  - (ii) a related offence provision, to the extent that the related offence provision relates to an offence against subsection 327A(1).
- (2) While the Commonwealth is not liable to pay a pecuniary penalty to itself, it is the Parliament's intention that the Commonwealth should be notionally liable to pay such a penalty.
- (3) The Finance Minister may give such written directions as are necessary or convenient for carrying out or giving effect to subsection (2) and, in particular, may give directions in relation to the transfer of money from an account operated by the responsible agency under section 794C for the contravention or for the commission of the offence to another account operated by the Commonwealth.
- (4) Directions under subsection (3) have effect, and must be complied with, despite any other Commonwealth law.

**795 Public sector employer to act through employing authority***Employer to act through employing authority*

- (1) For the purposes of this Act and the procedural rules, the employer of an employee (a **public sector employee**) employed in public sector employment must act only through the employee's employing authority acting on behalf of the employer.

*Acts done by or to employing authority*

- (2) For the purposes of this Act and the procedural rules, anything done by or to a public sector employee's employing authority acting on behalf of the employee's employer is taken to have been done by or to the employer (as the case may be).

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*Application of subsections (1) and (2)*

- (3) Subsections (1) and (2) apply despite any other law of the Commonwealth, a State or a Territory.

*Meaning of public sector employment*

- (4) **Public sector employment** means employment of, or service by, a person in any capacity (whether permanently or temporarily, and whether full-time or part-time):
- (a) under the *Public Service Act 1999* or the *Parliamentary Service Act 1999*; or
  - (b) by or in the service of a Commonwealth authority; or
  - (c) under a law of the Australian Capital Territory relating to employment by that Territory, including a law relating to the Australian Capital Territory Government Service; or
  - (d) by or in the service of:
    - (i) an enactment authority as defined by section 3 of the *A.C.T. Self-Government (Consequential Provisions) Act 1988*; or
    - (ii) a body corporate incorporated by or under a law of the Australian Capital Territory and in which the Australian Capital Territory has a controlling interest;  
other than an authority or body prescribed by the regulations;  
or
  - (e) under a law of the Northern Territory relating to the Public Service of the Northern Territory; or
  - (f) by or in the service of a Northern Territory authority; or
  - (g) by or in the service of a person prescribed by the regulations;  
or
  - (h) under a law prescribed by the regulations.
- (5) However, **public sector employment** does not include:
- (a) employment of, or service by, a person prescribed by the regulations; or
  - (b) employment or service under a law prescribed by the regulations.

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Section 795A

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This subsection does not apply for the purposes of section 40.

Note: Section 40 deals with the interaction between fair work instruments and public sector employment laws.

*Meaning of **employing authority***

- (6) An **employing authority** of an employee is the person prescribed by the regulations as the employee's employing authority.

**795A The Schedules**

The Schedules have effect.

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

**796 Regulations—general**

- (1) The Governor-General may make regulations prescribing matters:
- (a) required or permitted by this Act to be prescribed; or
  - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) Regulations made under this Act prevail over procedural rules made under this Act, to the extent of any inconsistency.

**796A Regulations conferring functions**

The regulations may confer functions on the following:

- (a) the FWC;
- (b) the General Manager.

**797 Regulations dealing with offences**

- (1) The regulations may provide for offences against the regulations.
- (2) The penalties for offences must not be more than 20 penalty units.

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**798 Regulations dealing with civil penalties**

- (1) The regulations may provide for civil penalties for contravention of the regulations.
- (2) The penalties for contravention must not be more than:
  - (a) 20 penalty units for an individual; or
  - (b) 100 penalty units for a body corporate.

**799 Regulations dealing with infringement notices**

*Infringement notices for offences*

- (1) The regulations may provide for a person who is alleged to have committed an offence against the regulations to pay a penalty to the Commonwealth as an alternative to prosecution.
- (2) The penalty must not exceed one-fifth of the maximum penalty prescribed by the regulations for that offence.

**800 Regulations dealing with exhibiting fair work instruments**

The regulations may provide for the exhibiting, on the premises of an employer, of a fair work instrument or a term of a fair work instrument.