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UPDATE 147 JUNE 2025

NATIONAL WORKPLACE RELATIONS

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Aaron Neal has provided the following commentary.

Fair Work Act 2009

Chapter 1 – Introduction

The employee or independent contractor is discussed in regard to *Primerano v Schisan Investments Pty Ltd (t/as Tutti Frutti Promotions)* [2025] FCA 15 and *EFEX Group Pty Ltd v Bennett* [2024] FCAFC 35. See [FWA.12.20].

Chapter 2 – Terms and conditions of employment

Re United Workers' Union [2025] FWCFB 72 is cited at [FWA.226.40].

Re United Workers' Union [2024] FWCFB 461 is cited at [FWA.243.100].

When the FWC must make a single interest employer authorisation is considered with reference to *Central Goldfields Shire Council v Australian Municipal, Administrative, Clerical and Services Union* [2025] FCAFC 59. See [FWA.249.20].

Agreed terms are looked at in regard to *United Firefighters' Union of Australia v Fire Rescue Victoria (t/as FRV)* [2024] FWCFB 43 and *United Firefighters' Union of Australia v Fire Rescue Victoria* [2025] FCAFC 16. See [FWA.270.40].

NSW Electricity Networks Operations Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia [2025] FWCFB 73 is discussed at [FWA.270A.40] and [FWA.275.20].

What an order must specify is considered with reference to *Re Driver* [2024] FWCFB 394, *Re Payne* [2024] FWC 3557, *Cherrington re Olympic Dam Mine* [2025] FWC 1158, *Re Mining and Energy Union* [2025] FWCFB 53, *Re Mining and Energy Union* [2025] FWC 866 and *Re Mining and Energy Union re Boggabri Coal Mine* [2024] FWCFB 415. See [FWA.306E.160].

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

Personal safety or the health or the welfare of the population is discussed with reference to *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Sydney Trains* [2025] FCAFC 39. See [FWA.424.100].

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Find Tabcard	Discard old pages	Insert new pages
VOLUME 1		
Fair Work Act 2009		
Chapter 1	1-6087 – 1-6088	1-6087 – 1-6088
Chapter 2	2-48203 – 2-48208	2-48203 – 2-48208
	2-52053 – 2-53078	2-52053 – 2-53078
	2-58051 – 2-59058	2-58051 – 2-59060
	2-72555 – 2-72574	2-72555 – 2-72576
Chapter 3	3-26059 – 3-26078	3-26059 – 3-26080
VOLUME 3		
Federal Circuit Court	156-21 – 156-36	156-21 – 156-36
	156-2851 – 156-2852	156-2851 – 156-2852
VOLUME 4		
State Legislation		
NSW	311-11 – 311-20	311-11 – 311-20
	311-117 – 311-118	311-117 – 311-118.2
	311-1905 – 311-1906	311-1905 – 311-1906

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	311-3151 – 311-3302	311-3151 – 311-3302
	311-3355 – 311-3356	311-3355 – 311-3358
	311-3611 – 311-3680	311-3611 – 311-3680
	311-3801 – 311-3804	311-3801 – 311-3806
Gender Equality	805-51 – 805-504	805-51 – 805-504

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In other Parts, the ordinary meanings are used because the references to "employee" and "employer" are incidental to substantive rights and obligations that arise elsewhere in the FW Act and are within power (eg Pt 4-1 Civil Remedies and Pt 5-1 Fair Work Australia).

Employee or Independent Contractor

See now s 15AA for the statutory overriding of the High Court decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

The following sets out the common law position for distinguishing an employee from an independent contractor.

The High Court in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 shifted the focus of the common law test for distinguishing an employee from an independent contractor away from a detailed examination of the totality of the relationship according to factors observed in post-contractual conduct of the parties, as has been common since *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, and emphasised that the totality of the relationship must, where the contract is in writing, be discerned from the terms of the written contract unless it is a sham, or has been varied or rendered unenforceable.

In circumstances where the employment contract is exclusively contained in a written contract it is those terms alone which must be taken into account. This is in the absence of a sham arrangement, variation or estoppel. In *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 at [43] Kiefel CJ, Keane and Edelman JJ explained:

> While there may be cases where the rights and duties of the parties are not found exclusively within a written contract, this was not such a case. In cases such as the present, where the terms of the parties' relationship are comprehensively committed to a written contract, the validity of which is not challenged as a sham nor the terms of which otherwise varied, waived or the subject of an estoppel, there is no reason why the legal rights and obligations so established should not be decisive of the character of the relationship.

It is clear that the High Court have reinforced the importance of written contractual terms over any other factors including post contractual performance of the contract. However, this approach applies where there is a comprehensive written contract in place. The High Court acknowledged that this may not be always be the case. In *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 at [42] Kiefel CJ, Keane and Edelman JJ explained:

> A contract of employment may be partly oral and partly in writing, or there may be cases where subsequent agreement or conduct effects a variation to the terms of the original contract or gives rise to an estoppel or waiver. In such cases, it may be that the imposition by a putative employer of its work practices upon the putative employee manifests the employer's contractual right of control over the work situation; or a putative employee's acceptance of the exercise of power may show that the putative employer has been ceded the right to impose such practices.

Where the contract is wholly oral see the decision of *Primerano v Schisan Investments Pty Ltd (t/as Tutti Frutti Promotions)* [2025] FCA 15 and the authorities cited therein.

Kiefel CJ, Keane and Edelman JJ in *Personnel Contracting* at [37] endorsed the approach of Windeyer J in *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 217 where Windeyer J said that the distinction between an employee and an independent contractor is:

> rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own.

Kiefel CJ, Keane and Edelman JJ at [32] – [66] discussed the principles to be applied, and the applicable authorities including *Australian Mutual Provident Society v Chaplin* (1978) 52 ALJR 407; 18 ALR 385 and *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597. Their Honours concluded at [62] that "the resolution of the question whether a person

engaged to work for another is an employee or an independent contractor" depends "upon the extent to which it can be shown that one party acts in the business of, and under the control and direction of, the other".

More recently, see the decision of the Full Court in *EFEX Group Pty Ltd v Bennett* [2024] FCAFC 35. See also the decision of the Full Court of the Federal Court in *Murphy v Chapple* [2022] FCAFC 165 at [31] to [64]. In that case an employee had part of his salary paid into a trust account arguing he was in part an employee and in part an independent contractor. The Full Court rejected that characterisation of the contractual relationship between the employee, Appellant Murphy, and his employer on an objective analysis of the contractual terms and further opined at [46] that: "We would accept the legal impossibility of a person being both an employee and an independent contractor of the same company for the same work at the same time."

See also the decision of the Federal Court in *Fair Work Ombudsman v Avert Logistics Pty Ltd* [2022] FCA 841. That was a case in which Logan J determined that delivery drivers of a delivery company were independent contractors and not employees in circumstances where the drivers offered Avert services under a contract which required the services to be provided by registered companies; where the companies invoiced for services; where the drivers where free to obtain other work qualified by a need for permission from Avert to do so; and where the principal provided a vehicle but the drivers were contractually obliged to advise the principal when servicing or maintenance of the vehicles was required.

Traditionally the courts have looked to the "right to control" to determine whether an individual is an employee subject to the control of an employer, or an independent contractor engaged in their own business. See *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561; [1956] ALR 123 where the worker, an acrobat in a circus, was considered an employee because the employer had a right to control, and *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 where the High Court acknowledged the shift in emphasis in the control test from "the actual exercise of control to the right to exercise it" per Mason J at 29 (CLR).

The right to control was referred to as an indicator of an employee arrangement by the High Court in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 even though the contract described the worker as a contractor. This was in the context of a tripartite labour hire arrangement. The High Court noted that even though the labour hire company did not supervise the day to day performance of the worker's duties they still maintained a right to control him. This was sufficient to satisfy the Court that he was an employee. See at [74], [76], [78], [89].

Some of the previous cases described below were briefly cited by the High Court – although they were not expressly overruled. They now appear to set out the preferred approach as they applied the multiple-factor test:

- *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146; 235 IR 115; [2013] FCAFC 3 where a Full Federal Court upheld an earlier decision concerning five insurance sales representatives who were described as independent contractors in their contracts, but were treated as employees by the Court. The Court was persuaded by the requirement for personal service in the workers' contracts, in order to discharge their obligations (at [38]). See at [38]–[106] where Buchanan J undertook an extensive discussion of the authorities in the area. The finding that the insurance sales representatives were employees meant that the employer was required to pay more than $500,000 in accrued entitlements. However, the last part of his Honour's conclusion at [107] (by reference to *Hollis* at [24]) would now appear to be overruled by the High Court in *Personnel Contracting*.
- See also *Tattsbet Ltd v Morrow* (2015) 233 FCR 46; 249 IR 440; 321 ALR 305; [2015] FCAFC 62 (*Tattsbet*) and the Full Bench of the FWC in *Kimber v Western Auger Drilling Pty Ltd* (2015) 252 IR 1; [2015] FWCFB 3704 (*Kimber*). A crucial factor in both those cases involved the treatment of the payment of GST by the putative employee. In *Tattsbet* this was a crucial factor in determining that the worker was an independent contractor. However, in *Kimber*, the FWC did not consider this factor as determinative of the issue and decided the worker was an employee. See also *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37.

(1A) [FWC to terminate only if satisfied it's appropriate in all circumstances]
However, the FWC must terminate the enterprise agreement under subsection (1) only if the FWC is satisfied that it is appropriate in all the circumstances to do so.

(2) [End of employment because of redundancy of role or insolvency of employer]
This subsection covers a termination of the employment of an employee:

(a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(b) because of the insolvency or bankruptcy of the employer.

(3) [Views that FWC must consider]
In deciding whether to terminate the agreement, the FWC must consider the views of the following covered by the agreement:

(a) the employees (unless there are no employees covered by the agreement);

(b) each employer;

(c) each employee organisation (if any).

Note: The President may be required to direct a Full Bench to perform a function or exercise a power in relation to the matter if any of the employers, employees, or employee organisations, covered by the agreement oppose the termination (see subsection 615A(3)).

(4) [Considerations regarding proposed enterprise agreement]
In deciding whether to terminate the agreement (the ***existing agreement***), the FWC must have regard to:

(a) whether the application was made at or after the notification time for a proposed enterprise agreement that will cover the same, or substantially the same, group of employees as the existing agreement; and

(b) whether bargaining for the proposed enterprise agreement is occurring; and

(c) whether the termination of the existing agreement would adversely affect the bargaining position of the employees that will be covered by the proposed enterprise agreement.

(5) [FWC may also have regard to any other relevant matter]
In deciding whether to terminate the agreement, the FWC may also have regard to any other relevant matter.

[S 226 subst Act 79 of 2022, s 3 and Sch 1 item 471, with effect from 7 Dec 2022; am Act 174 of 2012, s 3 and Sch 9 item 198, with effect from 1 Jan 2013]

[FWA.226.20] Fair Work Legislation (Secure Jobs Better Pay) Amendment Act 2022

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (SJBP Act) received royal assent on 6 December 2022. It contains wide ranging amendments to the *Fair Work Act 2009* (Cth) (FW Act). The amendments are the most significant since the introduction of the FW Act.

Part 12 of Schedule 1 the SJBP Act amended the FW Act to limit the circumstances in which the FWC can terminate enterprise agreements that have passed their nominal expiry date, by repealing and replacing s 226 which now requires the FWC to terminate an agreement if:

(a) the FWC is satisfied that the continued operation of the agreement would be unfair for the employees covered by the agreement; or

(b) the FWC is satisfied that the agreement does not, and is not likely to, cover any employees; or

(c) all of the following apply:

(i) the FWC is satisfied that the continued operation of the enterprise agreement would pose a significant threat to the viability of a business carried on by the employer, or employers, covered by the agreement;

(ii) the FWC is satisfied that the termination of the enterprise agreement would be likely to reduce the potential of terminations of employment of employees covered by the agreement; for the reasons of redundancy or the bankruptcy or insolvency of the employer; and

(iii) if the agreement contains terms providing entitlements relating to the termination of employees' employment—each employer covered by the agreement has given the FWC a guarantee of termination entitlements in relation to the termination of the agreement.

Section 226A defines "a guarantee of termination entitlements" for the purposes of s 226(1)(c)(iii).

There is also an overriding requirement in the new s 226(1A) that the FWC must terminate the enterprise agreement only if the FWC is satisfied that it is appropriate in all the circumstances to do so.

Amended s 615A now also provides that 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 an employee, employer or employee organisation covered by the agreement oppose the termination.

Provided that the requirement to refer to a Full Bench does not apply if the FWC Member is satisfied that the enterprise agreement does not, and is not likely to, cover any employees.

[FWA.226.40] Cases

For a recent decision under the new provision, see the decision of the Full Bench in *Re United Workers' Union* [2025] FWCFB 72.

For cases decided under s 226 prior to the amendments affected by the SJBP Act, see the decision of the Full Bench to terminate twelve enterprise agreements in *Re Aurizon Operations Ltd* [2015] FWCFB 540 (esp at [126] to [151]) and the cases discussed therein. The Agreements had passed their nominal expiry dates and were made immediately prior to privatization of what was a Queensland Government owned enterprise QR National Limited. The application to terminate was brought by the employer companies in the Aurizon Group during a stalemate in bargaining for new replacement agreements. The employer argued that a number of "legacy provisions" in the agreements were impeding productivity and put on extensive evidence on this issue. Aurizon additionally offered common law undertakings to maintain certain terms and conditions for a period of six months following termination or until new agreements had been made, whichever occurred earlier. The employees argued that termination would undermine bargaining and deliver a tremendous advantage to Aurizon who would be bargaining from a much lower base.

The union sought judicial review of the decision of the Full Bench and in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd* [2015] FCAFC 126, the Full Court dismissed the union's application, usefully observing:

> [24] … we would agree with the Commission insofar as it observed that there is no indication in the FW Act that the existence of a previously negotiated enterprise agreement should, *a priori*, be regarded as providing particular encouragement to collective bargaining …
>
> [25] … In the context of an ongoing, single-enterprise, business, the most obvious situation in which recourse might be had to s 226 of the FW Act would be where an existing agreement had passed its nominal expiry date (a jurisdictional fact under the section) but where no new agreement had been made. This is the very situation in which collective

> bargaining is likely to be proceeding; and it is the only time in which industrial action associated with such bargaining might be – subject to compliance with other statutory requirements – protected under Div 2 of Pt 3-3 of the FW Act. The proposition that, as a matter of statutory policy, there should be a predisposition towards regarding it as contrary to the public interest to terminate an enterprise agreement during a period when collective bargaining is taking place must, in the circumstances, be regarded as a most unlikely one.

Compare the decision of DP Gostencnik in *Esso Australia Pty Ltd v AMWU and CEPU* [2019] FWC 6143, upheld on appeal in *Esso Australia Pty Ltd v AMWU and CEPU* [2020] FWCFB 1077; *Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd T/a AGL Loy Yang* (2017) 266 IR 26 at [31] and [33]; *Wollongong Coal Limited T/A Wollongong Coal v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FWCFB 3676 at [73]; and *Re Wollongong Coal Limited T/A Wollongong Coal* [2021] FWCFB 2161 at [12].

See also *Re Tahmoor Coal Pty Ltd* (2010) 204 IR 243; [2010] FWA 6468, in which Lawler VP refused an application made by the employer to terminate the agreement at the same time that negotiations were occurring for a new agreement. In this case, terminating the existing agreement before a new one had been approved would have strengthened the employer's bargaining position. In these circumstances, it was considered inappropriate to terminate the existing agreement: see at [49] to [51]; [59]).

Note both the Full Bench and the Full Court in *Aurizon* rejected the reasoning of Lawler VP in *Tahmoor Coal*.

As to the meaning of 'public interest', the Full Bench in *Aurizon* (at [131]) and the Full Court at [41] accepted the following statements of principle by the Full Bench in *Re Kellogg Brown and Root, Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement 2000* (2005) 139 IR 34 as apposite to the determination of the question whether termination of an agreement is not contrary to the public interest:

> [23] The notion of public interest refers to matters that might affect the public as a whole such as the achievement or otherwise of various objects of the Act, employment levels, inflation, and the maintenance of proper industrial standards. An example of something in the last category may be a case in which there was no applicable award and the termination of the agreement would lead to an absence of award coverage for the employees. While the content of the notion of public intertest cannot be precisely defined, it is distinct in nature from the interests of the parties. And although the public interest and the interests of the parties may be simultaneously affected, that fact does not lessen the distinction between them.
>
> …
>
> [26] It is clear from this passage that the ascertainment of the public interest may involve balancing countervailing public interests. That the Commission should take all of the circumstances into account is made clear by Dawson J in *Re Australian Insurance Employees Union; Ex parte Academy Insurance Pty Ltd* [(1988) 78 ALR 466 at 467]. These authorities provide useful general guidance in the application of the test in s 170MH(3). They illustrate the types of interests which can be properly described as public interests and confirm the breadth of circumstances which may be relevant to the ascertainment of those interests.
>
> [27] It should be emphasized that the Commission's consideration of the public interest for the purpose of s 170MH(3) is directed to the consequences of terminating the agreement. In a given case, some consequences will be clearly predictable, others will be less so. For the most part the Commission should be guided by the likely foreseeable consequences of termination rather than speculation about possible consequences.

The Commission must be satisfied that termination is not contrary to the public interest not that termination is in the public interest: *Rogowsky v Western Australian Meat Marketing Co–operative Limited T/A WAMMCO International* [2019] FWCFB 4073 at [25]; *Re Wollongong Coal Limited T/A Wollongong Coal* [2021] FWCFB 2161 at [10].

If the Commission is satisfied that termination would not be contrary to the public interest and considers that it is appropriate to terminate the agreement taking into account all the circumstances then it must terminate the agreement. Whilst the language of s 226 must is mandatory, the two states of mind the Commission must reach, satisfied and consider, involve the exercise of a "narrow" discretion. See in this regard the decision of the Full Bench of the FWC in *Construction, Forestry, Mining and Energy Union v Peabody Energy Australia PCI Mine Management Pty Ltd* [2016] FWCFB 3591, where the Full Bench usefully observed as follows regarding s 226:

> [18] Section 226 involves the exercise of a "narrow" discretion of the type described in the last sentence of the above passage. Notwithstanding this, it remains the case that the evaluative assessments required by s 226(a) and (b) allow a degree of latitude on the part of the decision-maker as to the conclusions to be reached. For the reasons explained in *Coal and Allied Operations*, this means it is necessary in an appeal from a decision made under s 226 to demonstrate error in the decision-making process.*[footnote omitted]* The types of errors that might be demonstrated are those identified in *House v The King*.*[footnote omitted]*

Note, there is no presumption "that termination of an enterprise agreement is, of itself, in the public interest unless the Commission is satisfied to the contrary": see the decision of the Full Bench of the FWC in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Griffin Coal Mining Company Pty Ltd* [2016] FWCFB 4620 at [40]-[52].

See also the decision of Clancy DP in *AGL Loy Yang Pty Ltd t/as AGL Loy Yang* [2017] FWCA 226. In that case the relevant agreement expired on 31 December 2015, and the parties had commenced negotiations for a replacement agreement in July 2015. In April 2016, AGL Loy Yang filed a s 240 bargaining dispute application, which was followed by an unsuccessful application for bargaining orders under s 229 by the CFMEU. In May 2016, the CFMEU made an again unsuccessful application for a protected action ballot order, followed by a further application in September 2016 which was granted.

When Clancy DP reserved his decision, 11 conferences had been conducted under the s 240 application and some 23 bargaining meetings had taken place. In the circumstances, Clancy DP determined to terminate the agreement, subject to an undertaking by AGL Loy Yang to the effect that if the agreement was terminated it would, for a period of three months following the termination, maintain certain conditions from the agreement which it said were significantly better than the minimum conditions in the relevant award.

With regards to the public interest in terminating the agreement, Clancy DP see at [103] to [114].

As to the appropriateness of terminating the agreement, Clancy DP stated:

> [146] I have reviewed the evidence in relation to the clauses in the Agreement that AGL Loy Yang would like to address. Consistent with the approach taken by the Full Bench in *Aurizon*, I am satisfied the pursuit of the changes by AGL Loy Yang seems to have a rational basis. The provisions cited in evidence regulating work practices appear restrictive and prone to inefficiency. The capacity to effect operational changes that might enhance productivity and flexibility seems compromised. There is a significant incidence of overtime, a prohibition on "forced" redundancies and restrictions on the use of contractors.

The decision was appealed by the CFMEU to a Full Bench of the FWC and stayed by Hatcher VP in *Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd t/as AGL Loy Yang* [2017] FWCFB 504 (see also PR589672) pending the outcome of the appeal, on the condition that the CFMEU not organise any industrial action prior to the issue of the decision in respect of the appeal. On appeal, the Full Bench granted permission to appeal and found that the Commissioner improperly disregarded from his consideration a cl 4 in the relevant agreement guaranteeing maintenance of certain terms and conditions by the employer post any termination of the agreement (on application by AGL Loy Yang) until a replacement agreement was made, because such clause was of doubtful legal effect; but nonetheless, having received an undertaking on appeal by AGL Loy Yang that it would maintain those terms and

conditions for a period of three months, upheld the decision: *Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd t/as AGL Loy Yang* [2017] FWCFB 1019.

226A Guarantee of termination entitlements

Guarantee of termination entitlements

(1) A ***guarantee of termination entitlements*** is an undertaking given by an employer covered by an enterprise agreement that:

(a) is an undertaking that the employer will comply with subsection (3) if the agreement is terminated under section 226 and the employer terminates the employment of a protected employee for the termination of the agreement:

(i) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(ii) because of the insolvency or bankruptcy of the employer; and

(b) is in writing; and

(c) meets any requirements relating to the signing of undertakings that are prescribed by the regulations.

(2) [Protected employee]

A ***protected employee*** for a termination of an enterprise agreement under section 226 is an employee who would, but for the termination of the agreement, be covered by the agreement.

(3) [Terms of terminated enterprise agreement that employer must still comply with]

For the purposes of paragraph (1)(a), the employer complies with this subsection, in relation to the termination of the protected employee's employment, if the employer complies with the terms of the enterprise agreement that, if the agreement were still in operation, would have provided the employee with entitlements that:

(a) relate to a termination of the employee's employment:

(i) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(ii) because of the insolvency or bankruptcy of the employer; and

(b) except if the employee was an award/agreement free employee immediately before the termination of the employee's employment—are more beneficial than the entitlements under a modern award that covered the employee in relation to the employment at that time.

When guarantee is in force

(4) A guarantee of termination entitlements given in relation to the termination of an enterprise agreement:

(a) comes into force on the day on which the termination of the agreement comes into operation under section 227; and

(b) ceases to be in force at the earliest of the following times:

(i) if the guarantee specifies a period during which the guarantee is to remain in force and the FWC approves that period under subsection (5)—the end of that period;

(ii) immediately before another enterprise agreement that covers the same, or substantially the same, group of employees as the terminated agreement comes into force;

(iii) the end of the period of 4 years beginning on the day the guarantee is given to the FWC.

(5) [FWC to consider if period specified in guarantee is appropriate]
The FWC may, in its decision terminating an enterprise agreement, approve a period for the purposes of subparagraph (4)(b)(i) if it considers the period to be appropriate.

Employer must comply with guarantee

(6) An employer must comply with a guarantee of termination entitlements given by the employer to the FWC in relation to the termination of an enterprise agreement if:

(a) the agreement is terminated under section 226; and

(b) the employer terminates the employment of a protected employee for the termination of the agreement while the guarantee is in force:

(i) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(ii) because of the insolvency or bankruptcy of the employer.

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

Guarantee is a governing instrument for employment

(7) To avoid doubt, a guarantee of termination entitlements is a governing instrument for employment for the purposes of the *Fair Entitlements Guarantee Act 2012*.

[S 226A insrt Act 79 of 2022, s 3 and Sch 1 item 471, with effect from 7 Dec 2022
Cross-reference: *Fair Work Regulations 2009*: reg 2.10H prescribes the requirements relating to the signing of a guarantee of termination entitlements given by an employer covered by an enterprise agreement for s 226A.]

227 When termination comes into operation

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

[The next text page is 2-49051]

243 When the FWC must make a supported bargaining authorisation

Supported bargaining authorisation—main case

(1) The FWC must make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement if:

(a) an application for the authorisation has been made; and

(b) the FWC is satisfied that it is appropriate for the employers and employees (which may be some or all of the employers or employees specified in the application) that will be covered by the agreement to bargain together, having regard to:

(i) the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); and

(ii) whether the employers have clearly identifiable common interests; and

(iii) whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and

(iv) any other matters the FWC considers appropriate; and

(c) the FWC is satisfied that at least some of the employees who will be covered by the agreement are represented by an employee organisation.

Note: This subsection is subject to section 243A (restrictions on making supported bargaining authorisations).

Common interests

(2) For the purposes of subparagraph (1)(b)(ii), examples of common interests that employers may have include the following:

(a) a geographical location;

(b) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises;

(c) being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.

Supported bargaining authorisation—declared industry etc.

(2A) The FWC must also make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement if:

(a) an application for the authorisation has been made; and

(b) the employees specified in the application are employees in an industry, occupation or sector declared by the Minister under subsection (2B).

Note: This subsection is subject to section 243A (restrictions on making supported bargaining authorisations).

(2B) [When Minister may declare industry etc]
The Minister may, by legislative instrument, declare an industry, occupation or sector, if the Minister is satisfied that doing so is consistent with the objects of this Division set out in section 241.

What authorisation must specify etc.

(3) The authorisation must specify:

(a) the employers that will be covered by the agreement; and

(b) the employees who will be covered by the agreement; and
(c) any other matter prescribed by the procedural rules.

Operation of authorisation

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

[S 243 subst Act 79 of 2022, s 3 and Sch 1 item 611, with effect from 6 Jun 2023; am Act 174 of 2012, s 3 and Sch 9 item 240, with effect from 1 Jan 2013]

SECTION 243 COMMENTARY

When the FWC must make a supported bargaining authorisation ..... [FWA.243.20]
Coverage of supported bargaining authorisation ..... [FWA.243.40]
Cases ..... [FWA.243.100]

[FWA.243.20] When the FWC must make a supported bargaining authorisation

Once an application is made in accordance with s 242, the FWC must make a supported bargaining authorisation (a low paid authorisation prior to the SJSP Act) if it is satisfied that it is in the public interest to do so. Sub-section 243(1)(b) sets out a number of mandatory considerations that the FWC must take into account in determining the application.

[FWA.243.40] Coverage of supported bargaining authorisation

Sub-section 242(2) of the FW Act requires that an application for a supported bargaining authorisation specify the employers that will be covered by the proposed multi-enterprise agreement and the employees who will be covered by the agreement. The authorisation made by the FWC under s 243 may however specify different coverage to the parties identified by the applicant in the application. For example, consideration of the degree of commonality in the nature of the enterprises to which the proposed agreement is to relate, and the terms and conditions of employment in those enterprises under s 243(2) of the FW Act may indicate that certain employers identified in an application are not suitable for inclusion.

[FWA.243.100] Cases

For the first supported bargaining multi-employer enterprise agreement following amendment to the supported bargaining authorisation provisions made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) see *Re United Workers' Union* [2024] FWCFB 461.

Under previous provisions, in *Re United Voice Low-paid Authorisation* (2011) 207 IR 251; 63 AILR 101-351; [2011] FWAFB 2633 the first decision of the FWA issuing a low paid bargaining authorisation under s 243, for workers in the aged care industry, the Full Bench usefully observed as follows as to the public interest requirement in s 243(1) (and by extension, the factors set out in s 243(2) and (3)):

> [15] While the tribunal is required to take into account the matters specified in ss 243(2) and (3) in applying the public interest criterion, we do not think it was intended that those matters are the only ones capable of being relevant to the public interest. Other matters potentially affecting the public interest can also be taken into account. The public interest is distinguishable from the interests of the parties, although it is clear from the matters specified that there is a substantial overlap where these provisions are concerned.

As to the meaning of the "low-paid", the Full Bench held (at [17]) that "in the context of the provisions of Division 9 the phrase is intended to be a reference to employees who are paid at or around the award rate of pay and who are paid at the lower award classification levels".

As to the interaction with ss 244 and 245, and the application of the low-paid authorisation to employers who subsequently make single enterprise agreements with their employees, or

become subject to a workplace determination, the Full Bench also usefully observed:

> [38] We have made it clear that a number of our conclusions do not extend to employers and employees to whom an enterprise agreement applies. Any employers in that category should be deleted from the list of employers. It appears likely that a number of enterprise agreements do not result on balance in a great improvement in terms and conditions for the employees to whom they apply. In one sense those employees may still be "low-paid"[.] We consider, however, that it would be very difficult to analyse the terms of the agreements operating in the sector and the circumstances in which they were made with a view to deciding whether, despite the agreement, the authorisation should extend to the enterprise concerned. We have decided that employers to whom an enterprise agreement applies should be excluded from the authorisation because of the particular circumstances of the applications we are considering. There may be other cases in which a different approach could be followed consistent with the legislative provisions.
>
> ...
>
> [40] In conclusion there are two additional observations. The first is that application may be made to delete an employer's name from the authorisation and an employer's name is taken to have been deleted if an enterprise agreement applying to the employer comes into operation. These provisions indicate, among other things, that an employer wishing to pursue a single enterprise agreement in bargaining may still do so and, if successful, will not be covered by the multi-enterprise agreement. The terms of s 243(3)(e) reinforce that conclusion. Secondly, Fair Work Australia may provide assistance in relation to a proposed multi-enterprise agreement on its own motion or on application …

In *Australian Nursing Federation v IPN Medical Centres Pty Ltd* [2013] FWC 511 VP Watson dismissed an application for a low-paid authorisation in relation to nurses employed in general practice clinics and medical centres performing nursing work described in Sch B of the Nurses Award 2010. His Honour commenced by considering the approach to be taken to the application:

> [17] It will be seen that the task of determining whether to make a low-paid authorisation is based on a broad discretionary test described as the Commission being satisfied that it is in the public interest to make the determination. The specific factors required to be taken into account and the objects and scheme of the legislation are the key considerations in applying this test.

Following the decision of the Full Bench in *Re United Voice Low-paid Authorisation* (2011) 207 IR 251; 63 AILR 101-351; [2011] FWAFB 2633 and consistent with the approach of the Full Bench as to the meaning of "low-paid" in s 284 in the 2010 Annual Wage Review, his Honour concluded that "very few of the employees subject to the application fall within the definition of low-paid" (s 243(2)(a)) (at [103]). Further, his Honour found that the applicant had failed to establish that multi-employer bargaining would assist in identifying improvements in productivity (see s 243(3)(a)), and that "there is likely to be more disagreement over flexibilities and efficiencies through large multi-employer bargaining than there would be if bargaining is confined to the individual enterprises" (at [135]). As to the consideration in s 243(3)(b), whether "the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process" his Honour concluded that the process of multi-employer bargaining envisaged by the applicant would be likely "very cumbersome" and any disagreements on the employer or employee side would be likely to "lead to further dispersion of representation" (at [138]). In concluding that the public interest did not favour the grant of an authorisation his Honour held:

> [155] The consistent employer opposition to the notion of multi-enterprise bargaining combined with the diverse negotiation positions of the parties does not auger well for a possible multi-employer bargaining process. Indeed it is inevitable that such a process will face significant logistical difficulties. In my view there is a greater prospect of agreements being reached if negotiations are conducted at the enterprise level with appropriate

utilisation of the facilitative provisions of the Act. Further, there is a greater prospect of meaningful enterprise improvements being negotiated if the negotiations are conducted at the enterprise level. The factors in support of making a low-paid authorisation are not strong. On balance I am not satisfied that it is in the public interest to make a low-paid authorisation.

In *Re United Voice* [2014] FWC 6441, Deputy President Gostencnik considered an application for a low-paid authorisation in relation to a proposed multi-enterprise agreement with five security industry employers in the ACT. Having found that some of the employees the subject of the application were indeed "low paid", the Senior Deputy President went on to find that some of the respondent employers had agreements with the employees the subject of the application (one employer had reached an agreement which was subsequently not approved by the FWC as it did not pass the no-disadvantage test) and whilst it was alleged that some employers had refused to bargain, or taken different positions in bargaining, this was not evidence of the relevant employees not having access to collective bargaining, or facing substantial difficulty bargaining at the enterprise level. Further, there were mechanisms available to the applicant under the Act to ensure that the respondent employers met their good faith bargaining obligations such as a majority support determination.

243A Restrictions on making supported bargaining authorisations

Relationship between this section and section 243

(1A) Section 243 has effect subject to this section.

Employees covered by single-enterprise agreement that has not passed nominal expiry date

(1) The FWC must not make a supported bargaining authorisation specifying an employee who is covered by a single-enterprise agreement that has not passed its nominal expiry date.

(2) [Supported bargaining authorisation has no effect]
A supported bargaining authorisation has no effect to the extent that it specifies an employee who is covered by a single-enterprise agreement that has not passed its nominal expiry date.

(3) [Exception to subss (1) and (2)]
However, subsections (1) and (2) do not apply if the FWC is satisfied that the employer's main intention in making the agreement with the employees covered by it was to avoid being specified in a supported bargaining authorisation.

General building and construction work

(4) The FWC must not make a supported bargaining authorisation in relation to a proposed enterprise agreement if the agreement would cover employees in relation to general building and construction work.

[S 243A insrt Act 79 of 2022, s 3 and Sch 1 item 611, with effect from 6 Jun 2023]

244 Variation of supported bargaining authorisations—general

Variation to remove employer

(1) An employer specified in a supported bargaining authorisation may apply to the FWC for a variation of the authorisation to remove the employer's name from the authorisation.

[Subs (1) am Act 79 of 2022, s 3 and Sch 1 item 613, with effect from 6 Jun 2023; Act 174 of 2012, s 3 and Sch 9 item 246, with effect from 1 Jan 2013]

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

[Subs (2) am Act 174 of 2012, s 3 and Sch 9 item 246, with effect from 1 Jan 2013]

Variation to add employer

(3) The following may apply to the FWC for a variation of a supported bargaining authorisation to add the name of an employer that is not specified in the authorisation:

(a) the employer;

(b) a bargaining representative of an employee who will be covered by the proposed multi-enterprise agreement to which the authorisation relates;

(c) an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under that agreement.

[Subs (3) am Act 79 of 2022, s 3 and Sch 1 item 613, with effect from 6 Jun 2023; Act 174 of 2012, s 3 and Sch 9 item 246, with effect from 1 Jan 2013]

(4) [When FWC must vary]
If an application is made under subsection (3), the FWC must vary the authorisation to add the employer's name if the FWC is satisfied that it is in the public interest to do so, taking into account:

(a) if the employer's employees are in an industry, occupation or sector declared by the Minister under subsection 243(2B)—the declaration; and

(b) if paragraph (a) of this subsection does not apply—the matters set out in paragraph 243(1)(b); and

(c) any other matters the FWC considers appropriate.

[Subs (4) subst Act 79 of 2022, s 3 and Sch 1 item 614, with effect from 6 Jun 2023; am Act 174 of 2012, s 3 and Sch 9 item 246, with effect from 1 Jan 2013]

(4A) [Exception: s 243A(1)]
Despite subsection (4), the FWC must not vary the authorisation if subsection 243A(1) (employees covered by single-enterprise agreement that has not passed nominal expiry date) would prevent the FWC from making a supported bargaining authorisation specifying the employees.

[Subs (4A) insrt Act 79 of 2022, s 3 and Sch 1 item 614, with effect from 6 Jun 2023]

(5) [Exception: general building and construction work]
Despite subsection (4), the FWC must not vary the authorisation if, as a result of the variation, the proposed multi-enterprise agreement to which the authorisation relates would cover employees in relation to general building and construction work.

[Subs (5) insrt Act 79 of 2022, s 3 and Sch 1 item 614, with effect from 6 Jun 2023]

[S 244 am Act 79 of 2022, s 3 and Sch 1 item 612, with effect from 6 Jun 2023; Act 174 of 2012

Cross-reference: *Fair Work Commission Rules 2024*:
- r 9 and Sch 1 prescribe approved form F82A for an application for a variation of a supported bargaining authorisation to add an employer for s 244;
- r 9 and Sch 1 prescribe approved form F82B for an application for a variation of a supported bargaining authorisation to remove an employer for s 244; and
- r 51 prescribes an application under subsection 244(1) or (3) for a variation of a supported bargaining authorisation must be accompanied by a copy of the authorisation to be varied.]

245 Variation of supported bargaining authorisations—enterprise agreement etc. comes into operation

(1) [Removing employer's name]
The FWC is taken to have varied a supported bargaining authorisation to remove an employer's name when the employer and all of their employees who are specified in the authorisation are covered by an enterprise agreement, or a workplace determination, that is in operation.

[Subs (1) am Act 2 of 2024, s 3 and Sch 1 item 59, with effect from 27 Feb 2024]

(2) [Removing employee]
The FWC is taken to have varied a supported bargaining authorisation to remove an employee when the employee is covered by an enterprise agreement, or a workplace determination, that is in operation.

[Subs (2) insrt Act 2 of 2024, s 3 and Sch 1 item 60, with effect from 27 Feb 2024]

[S 245 am Act 2 of 2024; subst Act 79 of 2022, s 3 and Sch 1 item 615, with effect from 6 Jun 2023; am Act 174 of 2012, s 3 and Sch 9 item 247, with effect from 1 Jan 2013]

246 FWC's assistance

Application of this section

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

[Subs (1) am Act 79 of 2022, s 3 and Sch 1 item 619, with effect from 6 Jun 2023]

FWC's assistance

(2) The FWC may, on its own initiative, provide to the bargaining representatives for the agreement such assistance:

(a) that the FWC considers appropriate to facilitate bargaining for the agreement; and

(b) that the FWC could provide if it were dealing with a dispute.

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

[Subs (2) am Act 174 of 2012, s 3 and Sch 9 items 249–252, with effect from 1 Jan 2013]

FWC may direct a person to attend a conference

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

[Subs (3) am Act 174 of 2012, s 3 and Sch 9 items 253 and 254, with effect from 1 Jan 2013]

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

[Subs (4) am Act 174 of 2012, s 3 and Sch 9 item 255, with effect from 1 Jan 2013]

[S 246 am Act 79 of 2022, s 3 and Sch 1 item 618, with effect from 6 Jun 2023; Act 174 of 2012, s 3 and Sch 9 item 248, with effect from 1 Jan 2013]

SECTION 246 COMMENTARY

FWC's assistance for supported bargaining ..... [FWA.246.20]
The FWC may direct a person to attend a conference ..... [FWA.246.40]
Cross-reference ..... [FWA.246.60]

[FWA.246.20] FWC's assistance for supported bargaining

Section 246 provides a basis for the FWC to intervene in supported bargaining on its own initiative in order to provide assistance to the bargaining representatives. This assistance may include convening conferences, helping to identify productivity improvements to underpin an agreement and generally guiding the parties through the negotiating process. The FWC has the same powers and options as if it were dealing with a dispute. See ss 595 and 592 and [FWA.595.20] ff and [FWA.592.20] ff in relation to the powers of the Fair Work Commission in these circumstances.

Section 246 only applies if a supported bargaining authorisation is in operation in relation to a proposed multi-enterprise agreement.

[FWA.246.40] The FWC may direct a person to attend a conference

Under s 243(3)(d), when determining an application for a supported bargaining authorisation, the FWC must take into account the extent to which the terms and conditions of employment for the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, that will be covered by the agreement. Such controlling parties may include head contractors or government agencies. Section 246(3) provides a basis for involving such a party in the bargaining process. In order to do so, the FWC must be satisfied that the person exercises such a degree of control that the participation of the person in bargaining is necessary for an agreement to be made.

[FWA.246.60] Cross-reference

Bargaining representatives for a multi-enterprise agreement may also apply for assistance from the FWC under s 240 of the FW Act. See [FWA.240.20].

[The next text page is 2-53051]

Division 10 – Single interest employer authorisations

[FWA.Pt2.4.Div10.20] Overview

Two or more employers may clearly be single interest employers based on the factual circumstances (for example, the entities may be related bodies corporate). Where there is doubt about whether two or more employers will fall within the relevant factual category, the employers may wish to obtain a single interest employer authorisation under Pt 2-4, Division 10. Alternatively, two or more employers may seek to negotiate a multi-enterprise agreement.

[The next text page is 2-53073]

248 Single interest employer authorisations

(1) [Who may apply]

The following may apply to the FWC for an authorisation (a ***single interest employer authorisation***) under section 249 in relation to a proposed enterprise agreement that will cover two or more employers:

(a) those employers;

(b) a bargaining representative of an employee who will be covered by the agreement.

[Subs (1) subst Act 79 of 2022, s 3 and Sch 1 item 633, with effect from 6 Jun 2023; am Act 174 of 2012, s 3 and Sch 9 item 256, with effect from 1 Jan 2013]

(2) [What the application must specify]

The application must specify the following:

(a) the employers that will be covered by the agreement;

(b) the employees who will be covered by the agreement;

(c) the person (if any) nominated by the employers to make applications under this Act if the authorisation is made.

[S 248 am Act 79 of 2022; Act 174 of 2012
Cross-reference: *Fair Work Commission Rules 2024*: r 9 and Sch 1 prescribe approved form F83 for an application for a single interest employer authorisation for s 248; and r 52 prescribes specifications for a draft authorisation to accompany an application under section 248 for a single interest employer authorisation.]

[FWA.248.20] Single interest employer authorisations

Section 248 sets out the requirements for an application under s 249 of the FW Act for a single interest employer authorisation.

[FWA.248.40] Single interest employer authorisation is permissive not mandatory

The legislative note to s 248(1) confirms that the effect of a single interest employer authorisation is that the employers are single interest employers in relation to a proposed enterprise agreement.

In *Stuartholme School v Independent Education Union of Australia* (2010) 192 IR 29; [2010] FWAFB 1714 the Full Bench considered the effect of a single interest employer authorisation. The case concerned a number of employers in the Catholic sector of the education industry in Queensland that were involved in enterprise agreement negotiations. The employers were the subjects of single interest employer declarations made by the Minister for Employment and Workplace Relations under s 247 of the FW Act, and single interest employer authorisations made by the FWC under s 249 of the FW Act.

At all relevant times, the relevant employee organisation (the IEUA) sought to negotiate separate agreements with each of the employers. The Tribunal held that a single interest employer authorisation permits a group of employers to bargain for one enterprise agreement, but does not exclude the possibility that an agreement or agreements may be made with a scope which does not reflect that arising from the authorisation. It was open to the union to continue to pursue separate agreements, subject to complying with its other obligations under the FW Act. In this case the Full Bench did not follow some of the earlier comments made in *Ford Motor Company of Australia Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2009) 190 IR 300; [2009] FWAFB 1240.

See also *Lutheran Schools Association of SA, NT & WA Inc* [2012] FWA 5616 where four private Lutheran schools won the right to bargain for a single enterprise agreement, following a ministerial declaration under s 247 of the FW Act.

249 When the FWC must make a single interest employer authorisation

Single interest employer authorisation

(1) The FWC must make a single interest employer authorisation in relation to a proposed enterprise agreement if:

(a) an application for the authorisation has been made; and

(b) the FWC is satisfied that:

(i) at least some of the employees that will be covered by the agreement are represented by an employee organisation; and

(ii) the employers and the bargaining representatives of the employees of those employers have had the opportunity to express to the FWC their views (if any) on the authorisation; and

(iii) if the application was made by 2 or more employers under paragraph 248(1)(a)—the requirements of subsection (1A) are met; and

(iv) if the application was made by a bargaining representative under paragraph 248(1)(b)—each employer either has consented to the application or is covered by subsection (1B); and

(v) the requirements of either subsection (2) or (3) (which deal with franchisees and common interest employers) are met; and

(vi) if the requirements of subsection (3) are met—the operations and business activities of each of those employers are reasonably comparable with those of the other employers that will be covered by the agreement.

[Subs (1) subst Act 79 of 2022, s 3 and Sch 1 item 633A, with effect from 6 Jun 2023; am Act 174 of 2012, s 3 and Sch 9 items 258 and 259, with effect from 1 Jan 2013]

(1AA) [When it is presumed that operations of employer comparable with others] If:

(a) the application for the authorisation was made by a bargaining representative under paragraph 248(1)(b); and

(b) an employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;

it is presumed that the operations and business activities of the employer are reasonably comparable with those of the other employers that will be covered by the agreement, unless the contrary is proved.

[Subs (1AA) insrt Act 79 of 2022, s 3 and Sch 1 item 633A, with effect from 6 Jun 2023]

Additional requirements for application by employers

(1A) The requirements of this subsection are met if:

(a) the employers that will be covered by the agreement have agreed to bargain together; and

(b) no person coerced, or threatened to coerce, any of the employers to agree to bargain together.

[Subs (1A) insrt Act 79 of 2022, s 3 and Sch 1 item 633A, with effect from 6 Jun 2023]

Additional requirements for application by bargaining representative

(1B) An employer is covered by this subsection if:

(a) the employer employed at least 20 employees at the time that the application for the authorisation was made; and

(b) the employer has not made an application for a single interest employer authorisation that has not yet been decided in relation to the employees that will be covered by the agreement; and

(c) the employer is not named in a single interest employer authorisation or supported bargaining authorisation in relation to the employees that will be covered by the agreement; and

(d) a majority of the employees who are employed by the employer at a time determined by the FWC and who will be covered by the agreement want to bargain for the agreement; and

(e) subsection (1D) does not apply to the employer.

[Subs (1B) insrt Act 79 of 2022, s 3 and Sch 1 item 633A, with effect from 6 Jun 2023]

(1C) [How FWC may work out whether majority of employees want to bargain]
For the purposes of paragraph (1B)(d), the FWC may work out whether a majority of employees want to bargain using any method the FWC considers appropriate.

[Subs (1C) insrt Act 79 of 2022, s 3 and Sch 1 item 633A, with effect from 6 Jun 2023]

(1D) [Employer and employees covered by another agreement]
This subsection applies to an employer if:

(a) the employer and the employees of the employer that will be covered by the agreement are covered by an enterprise agreement that has not passed its nominal expiry date at the time that the FWC will make the authorisation; or

(b) the employer and an employee organisation that is entitled to represent the industrial interests of one or more of the employees of the employer that will be covered by the agreement have agreed in writing to bargain for a proposed single-enterprise agreement that would cover the employer and those employees or substantially the same group of those employees.

[Subs (1D) insrt Act 79 of 2022, s 3 and Sch 1 item 633A, with effect from 6 Jun 2023]

Franchisees

(2) The requirements of this subsection are met if the employers carry on similar business activities under the same franchise and are:

(a) franchisees of the same franchisor; or

(b) related bodies corporate of the same franchisor; or

(c) any combination of the above.

[Subs (2) am Act 79 of 2022, s 3 and Sch 1 item 634, with effect from 6 Jun 2023; Act 174 of 2012, s 3 and Sch 9 item 260, with effect from 1 Jan 2013]

Common interest employers

(3) The requirements of this subsection are met if:

(a) the employers have clearly identifiable common interests; and

(b) it is not contrary to the public interest to make the authorisation.

[Subs (3) subst Act 79 of 2022, s 3 and Sch 1 item 634A, with effect from 6 Jun 2023; am Act 174 of 2012, s 3 and Sch 9 item 260, with effect from 1 Jan 2013]

(3A) [Matters relevant to determining whether employers have common interest] For the purposes of paragraph (3)(a), matters that may be relevant to determining whether the employers have a common interest include the following:

(a) geographical location;

(b) regulatory regime;

(c) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises.

[Subs (3A) insrt Act 79 of 2022, s 3 and Sch 1 item 634A, with effect from 6 Jun 2023]

(3AB) [When it is presumed that requirements of subs (3) are met] If:

(a) the application for the authorisation was made by a bargaining representative under paragraph 248(1)(b); and

(b) an employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;

it is presumed that the requirements of subsection (3) are met in relation to that employer, unless the contrary is proved.

[Subs (3AB) insrt Act 79 of 2022, s 3 and Sch 1 item 634A, with effect from 6 Jun 2023]

Calculating number of employees

(3AC) For the purposes of calculating the number of employees referred to in paragraph (1AA)(b), (1B)(a) or (3AB)(b):

(a) ***employee*** has its ordinary meaning; and

(b) subject to paragraph (c), all employees employed by the employer at the time that the application for the authorisation was made are to be counted; and

(c) a casual employee is not to be counted unless, at that time, the employee is a regular casual employee of the employer; and

(d) associated entities of the employer are taken to be one entity.

[Subs (3AC) insrt Act 79 of 2022, s 3 and Sch 1 item 634A, with effect from 6 Jun 2023]

Operation of authorisation

(4) The authorisation:

(a) comes into operation on the day on which it is made; and

(b) ceases to be in operation at the earlier of the following:

(i) at the same time as the enterprise agreement to which the authorisation relates is made;

(ii) 12 months after the day on which the authorisation is made or, if the period is extended under section 252, at the end of that period.

[Subs (4) am Act 79 of 2022, s 3 and Sch 1 item 635, with effect from 6 Jun 2023]

[S 249 am Act 79 of 2022; Act 174 of 2012, s 3 and Sch 9 item 257, with effect from 1 Jan 2013]

[FWA.249.20] When the FWC must make a single interest employer authorisation

Under Pt 2-4, Div 10, two or more employers or a bargaining representative representing employees may apply for a **single interest employer authorisation**. By s 249, the Commission must make a single interest employer authorisation if satisfied that:

(a) at least some of the employees that will be covered by the proposed agreement are represented by a union; and

(b) employer and employee bargaining representatives have had an opportunity to express their views to the FWC on the authorisation; and
(c) employers carry on similar business activities under the same franchise and are franchisees or related bodies corporate of the same franchisor (s 249(2)); or
(d) employers have clearly identifiable common interests and it is not against the public interest to make the authorisation (s 249(3)) and the operations and business activities of each of those employers are reasonably comparable with those of the other employers that will be covered by the agreement (s 249(1)(b)(vi)).
(e) If the application for the authorisation was made by a bargaining representative and an employer that will be covered by the agreement employed 50 employees or more at the time that the application was made, it is presumed that the operations and business activities of the employer are reasonably comparable with those of the other employers that will be covered by the agreement, unless the contrary is proved (s 249(1AA)).

As to the determination of whether it is not contrary to the public interest to make the authorisation, see the decision of the Full Court in *Central Goldfields Shire Council v Australian Municipal, Administrative, Clerical and Services Union* [2025] FCAFC 59.

If two or more employers make the application, the FWC must be satisfied that the employers that will be covered by the agreement have agreed to bargain together and no person coerced, or threatened to coerce, any of the employers to agree to bargain together: s 249(1A).

If an employee bargaining representative makes the application, the FWC must also be satisfied that each employer has consented to the application and that:

(a) the employer employed at least 20 employees at the time that the application for the authorisation was made;
(b) the employer has not made an application for a single interest employer authorisation that has not yet been decided in relation to the employees that will be covered by the agreement;
(c) the employer is not named in a single interest employer authorisation or supported bargaining authorisation in relation to the employees that will be covered by the agreement;
(d) a majority of the employees who are employed by the employer at a time determined by the FWC and who will be covered by the agreement want to bargain for the agreement; and
(e) the employers and employees are not covered by an enterprise agreement that has not passed its nominal expiry date and the employer and an employee organisation that is entitled to represent the industrial interests of one or more of the employees of the employer that will be covered by the agreement have agreed in writing to bargain for a proposed single-enterprise agreement that would cover the employer and those employees or substantially the same group of those employees: s 249(1B) and (1D).

If an employer is specified in a single interest employer authorisation that is in operation, the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a single interest employer agreement and the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other kind of enterprise agreement: s 172(5).

A single interest employer authorisation operates from the day on which it is made for 12 months (unless extended under s 252), or until an enterprise agreement to which the authorisation relates is made, whichever is earlier.

[FWA.249.40] Franchisees

Sub-section 249(2) provides that the requirements for a single interest employer authorisation will be met in certain circumstances involving franchisees. Paragraph [1047] of the Explanatory Memorandum to the *Fair Work Bill 2008* makes the following comment in relation to this provision:

> Franchisees specified in a single interest employer authorisation will be single interest employers for the purpose of making a single-enterprise agreement. This is intended to

clarify any uncertainty arising from the jurisprudence about whether franchisees are engaged in a "common enterprise". The AIRC has previously found some franchisees to be engaged in a common enterprise (see, eg, *McDonald's Australia Ltd v Shop, Distributive & Allied Employees Association* (2004) 132 IR 165) and others not to be, in apparently similar circumstances (see, eg, *Re Bakers Delight Holdings Ltd* (2002) 119 IR 20).

Under s 12 of the FW Act, franchise has the meaning given by the *Corporations Act 2001* (Cth).

In *Re Molanka Pty Ltd* (2010) 194 IR 120; [2010] FWAFB 1543 the Full Bench considered the submission that applicant employers for the purposes of a similar provision dealing with the ability to make a modern enterprise award under Item 4, Sch 6 of the FW Transitional Act were agents not franchises. The transitional provisions contain a comparable test to s 249(3) of the FW Act. In that case the tribunal held that the arrangement between the Bank of Queensland and agents covered by the relevant award was a franchise within the terms of the *Corporations Act 2001* (Cth).

In *McDonald's Australia Pty Ltd; Re Single interest employer authorisation* [2013] FWC 2477 DP Sams made a single interest employer authorisation order in favour of McDonald's franchisees who had provided the applicant, McDonalds, with written authorisation in relation to the application. The proposed agreement there under consideration was to cover employees who were either employed by the applicant directly or by a franchisee in classifications of McDonald's Employee Levels 2 to 4. For DP Sams, the statutory requirements of the Act had been met. There was an application competently before the FWC (s 249(1)(a)). The franchisee employers, as franchisees of the applicant, had agreed to bargain together for a new agreement (s 249(1)(b)(i)); were all carrying on the same business activities as the applicant (s 249(2)(a)); there had been no coercion or threat of coercion on the franchisees to bargain together (s 249(1)(b)(ii)); the employees to be covered by the proposed agreement were employed by the franchisees or the applicant (s 248(2)(b)), and the person nominated by the franchisee employers to make applications under the Act was the applicant, McDonald's Australia Pty Ltd (s 248(2)(c)) (see at [8]).

249A Restriction on making single interest employer authorisations

The FWC must not make a single interest employer authorisation in relation to a proposed enterprise agreement if the agreement would cover employees in relation to general building and construction work.

[S 249A insrt Act 79 of 2022, s 3 and Sch 1 item 635A, with effect from 6 Jun 2023]

250 What a single interest employer authorisation must specify

What authorisation must specify

(1) A single interest employer authorisation in relation to a proposed enterprise agreement must specify the following:

(a) the employers that will be covered by the agreement;

(b) the employees who will be covered by the agreement;

(c) the person (if any) nominated by the employers to make applications under this Act if the authorisation is made;

(d) any other matter prescribed by the procedural rules.

Authorisation may relate to only some of employers or employees

(2) If the FWC is satisfied of the matters specified in subsection 249(2) or (3) (which deal with franchisees and common interest employers) in relation to only some of the

Division 4 – Intractable bargaining workplace determinations

[Div 4 heading subst Act 79 of 2022, s 3 and Sch 1 item 545, with effect from 6 Jun 2023]

269 When the FWC must make an intractable bargaining workplace determination

If an intractable bargaining declaration has been made in relation to a proposed enterprise agreement, the FWC must make a determination (an ***intractable bargaining workplace determination***) as quickly as possible:

(a) if there is a post-declaration negotiating period for the declaration under section 235A—after the end of that period; or

(b) otherwise—after making the declaration.

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

[S 269 subst Act 79 of 2022, s 3 and Sch 1 item 546, with effect from 6 Jun 2023; am Act 156 of 2015; Act 174 of 2012, s 3 and Sch 9 item 290, with effect from 1 Jan 2013]

SECTION 269 COMMENTARY

Section 269 – When the FWC must make an intractable bargaining workplace determination ..... [FWA.269.20]
Cases ..... [FWA.269.40]
Post-declaration negotiating period ..... [FWA.269.60]

[FWA.269.20] Section 269 – When the FWC must make an intractable bargaining workplace determination

The FWC must make an intractable bargaining workplace determination if an intractable bargaining declaration has been made under s 235 of the FW Act and the bargaining representatives have not settled the matters at issue at the end of the post-declaration negotiating period. See paragraph [FWA.269.60] for a discussion of the post-declaration negotiating period.

If an intractable bargaining declaration has been made in relation to a proposed enterprise agreement, the FWC must make an intractable bargaining workplace determination as quickly as possible:

- if there is a post-declaration negotiating period for the declaration under s 235A – after the end of that period; or
- otherwise – after making the declaration.

[FWA.269.40] Cases

See the decision of the Full Bench in *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd (t/as Cleanaway Operations Pty Ltd)* [2024] FWCFB 287 for the Commission's first intractable bargaining workplace determination. See also the decision of the Full Bench in *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd (t/as Cleanaway Operations Pty Ltd)* [2024] FWCFB 305 in which the Commission made an intractable bargaining workplace determination in relation to another enterprise agreement covering employees also employed by Cleanaway. Finally, see *NSW Electricity Networks Operations Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2025] FWCFB 73 (at [188] to [197] where the Commission ruled it had the power to order retrospective pay increases when making a workplace determination).

[FWA.269.60] Post-declaration negotiating period

Section 235A defines the post-declaration negotiating period. The period starts on the day the intractable bargaining declaration is made and ends on the day specified by the FWC in the declaration or any later day determined under s 235A(2). The bargaining representatives may not settle all of the matters that were at issue during bargaining for the agreement within that time. The FWC may, if it considers it appropriate to do so and taking into account any views of the bargaining representatives, extend the period referred to in subsection 235A(1) by determining a later day.

270 Terms etc of an intractable bargaining workplace determination

Basic rule

(1) An intractable bargaining workplace determination must comply with subsection (4) and include:

(a) the terms set out in this section; and

(b) the core terms set out in section 272; and

(c) the mandatory terms set out in section 273.

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

[Subs (1) subst Act 79 of 2022, s 3 and Sch 1 item 548, with effect from 6 Jun 2023; am Act 174 of 2012, s 3 and Sch 9 item 296, with effect from 1 Jan 2013]

Agreed terms

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

Terms dealing with the matters at issue

(3) The determination must include the terms that the FWC considers deal with the matters that were still at issue:

(a) if there is a post-declaration negotiating period under section 235A for the declaration concerned—after the end of that period; or

(b) otherwise—after making the declaration.

Note: Any such terms must comply with section 270A.

[Subs (3) am Act 2 of 2024, s 3 and Sch 1 item 70A, with effect from 27 Feb 2024; subst Act 79 of 2022, s 3 and Sch 1 item 548A, with effect from 6 Jun 2023; am Act 174 of 2012, s 3 and Sch 9 item 297, with effect from 1 Jan 2013]

Coverage

(4) The determination must be expressed to cover:

(a) each employer that would have been covered by the agreement; and

(b) the employees who would have been covered by that agreement; and

(c) each employee organisation (if any) that was a bargaining representative of those employees.

[Subs (4) subst Act 79 of 2022, s 3 and Sch 1 item 549, with effect from 6 Jun 2023]

(5) [Repealed]

[Subs (5) rep Act 79 of 2022, s 3 and Sch 1 item 549, with effect from 6 Jun 2023]

(6) [Repealed]

[Subs (6) rep Act 79 of 2022, s 3 and Sch 1 item 549, with effect from 6 Jun 2023]

[S 270 am Act 2 of 2024; Act 79 of 2022, s 3 and Sch 1 item 547, with effect from 6 Jun 2023; Act 174 of 2012]

SECTION 270 COMMENTARY

Cross-references – Core and mandatory terms ..... [FWA.270.20]
Agreed terms ..... [FWA.270.40]

[FWA.270.20] Cross-references – Core and mandatory terms

The intractable bargaining workplace determination must include core terms as set out in s 272 (see paragraphs [FWA.272.20] – [FWA.272.60]) and mandatory terms as set out in s 273 (see paragraph [FWA.273.20]).

[FWA.270.40] Agreed terms

The starting point for an intractable bargaining workplace determination is the terms that have already been agreed by the parties during the negotiation process. Under s 270(2), an intractable bargaining workplace determination must include the agreed terms for the determination. Section 274(3) sets out the meaning of agreed terms for an intractable bargaining workplace determination. An agreed term for an intractable bargaining workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had agreed, at the time the application for the intractable bargaining declaration concerned was made, should be included in the agreement; and any other term, that the bargaining representatives had agreed, at the time the declaration was made, should be included in the agreement; and if there is a post-declaration negotiating period for the declaration – any other term, that the bargaining representatives had agreed, at the end of the period, should be included in the agreement.

As to what is an "agreed term", see the decision of the Full Bench in *United Firefighters' Union of Australia v Fire Rescue Victoria (t/as FRV)* [2024] FWCFB 43 at [108] to [157], the Full Bench holding there were no agreed terms and on application for judicial review in *United Firefighters' Union of Australia v Fire Rescue Victoria* [2025] FCAFC 16. See the decision of the Full Bench in *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd (t/as Cleanaway Operations Pty Ltd)* [2024] FWCFB 287 for the Commission's first intractable bargaining workplace determination. See also the decision of the Full Bench in *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd (t/as Cleanaway Operations Pty Ltd)* [2024] FWCFB 305 in which the Commission made an intractable bargaining workplace determination in relation to employees covered by another enterprise agreement also employed by Cleanaway.

270A Terms dealing with matters at issue

(1) [Application]

This section applies if, immediately before the determination is made, an enterprise agreement applies to one or more employees who will be covered by the determination.

(2) [Term included in determination to comply with subsection 270(3)]

A term that is included in the determination to comply with subsection 270(3), and that deals with a particular matter, must be not less favourable to each of those employees, and any employee organisation that was a bargaining representative of any of those employees, than a term of the enterprise agreement that deals with the matter.

(3) [Term not less favourable to class of employees to which particular employee belongs]
If a term to be included in the determination is not less favourable to a class of employees to which a particular employee belongs, the FWC is entitled to assume, in the absence of evidence to the contrary, that the term is not less favourable to the employee.

(4) [Exception to subs (2)]
Subsection (2) does not apply to a term that provides for a wage increase.
[S 270A insrt Act 2 of 2024, s 3 and Sch 1 item 70B, with effect from 27 Feb 2024]

[FWA.270A.40] Generally

Section 270A was inserted by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*. The Revised Explanatory Memorandum provides:

592. New section 270A would apply to an intractable bargaining workplace determination if, immediately before the determination is made, an enterprise agreement (or multiple enterprise agreements) applies to one or more employees who will be covered by the determination.

593. New subsection 270A(2) would introduce a requirement that a term that the FWC is required to include in a determination (because it deals with a matter still at issue at the relevant time) must be not less favourable to employees or employee organisations than a corresponding term in an enterprise agreement which applies to them immediately before the determination is made and that deals with the matter.

594. New subsection 270A(3) would enable the FWC to assume that, if a particular term of a workplace determination would be not less favourable to a class of employees than a corresponding term in an existing enterprise agreement that applies to those employees, the term of the workplace determination would be not less favourable to individuals within that class. This assumption can be displaced by evidence to the contrary. New subsection 270A(3) is modelled on existing subsection 193A(7) of the FW Act which operates in relation to the application of the better off overall test.

595. New subsection 270A(4) would provide that the "not less favourable test" in new subsection 270A(2) would not apply to a term of an intractable bargaining workplace determination that provides for a wage increase. The exclusion is not intended to capture terms that provide for payment at a rate above the base rate of pay in particular circumstances, such as terms dealing with penalty rates or allowances. Rather, subsection 270A(4) is intended to apply only to terms dealing with the amount by which the base rate of pay increases. For example:

- a term would provide for a wage increase where it states that the base rate of pay will increase by 3 per cent from 1 July 2023, or by $3 from 1 July 2023;
- a term would not provide for a wage increase where it states that the base hourly rate from 1 July 2022 is $24, and the base hourly rate from 1 July 2023 is $27, or that an employee is entitled to 175 per cent of the ordinary hourly rate for all work performed on a Saturday.

596. The exclusion related to terms that provide for a wage increase is also not intended to apply to terms which:

- are about how wage increases should be paid or how often,
- provide for wages to be salary sacrificed, or
- provide for other elements of pay such as allowances, overtime rates, shift loadings, or other penalty payments.

597. The effect of subsection 270A(4) is that the amount by which wages increase year on year will not need to be equal to or greater than increases included in previous enterprise

agreements. However, wage rates under an intractable bargaining workplace determination must be not less favourable to employees than the relevant, existing enterprise agreement.

[FWA.270A.40] Cases

See the decision of the Full Bench in *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd (t/as Cleanaway Operations Pty Ltd)* [2024] FWCFB 287 for the Commission's first intractable bargaining workplace determination, including consideration of the matters set out in s 270A.

In *NSW Electricity Networks Operations Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2025] FWCFB 73, the Full Bench considered the effect of s 270A as follows:

> [66] In their initial written submissions, the Joint Unions contended that the outcome able to be determined by the Commission was constrained by s 270A of the Act. The terms of s 270A are set out above. The primary impact of the section is that s 270A(2) requires that a term of a workplace determination that deals with a particular matter must not be less favourable to employees, or any relevant employee organisation, than a term of an enterprise agreement that deals with the matter and applies to employees who will be covered by the determination. The purpose of s 270A is apparent from its terms. It is to regulate the content of terms to be included by the Commission in a workplace determination that are "still at issue" and to do so by requiring that, with respect to those terms, employees and any employee organisation that was a bargaining representative of those employees cannot be worse off than they were under a term of a current enterprise agreement.
>
> [67] The Joint Unions initially submitted in writing that s 270A(2) requires that the Commission include in the workplace determination the terms in the form they seek with respect to the commencement date of wages increases, superannuation and the nominal expiry date of the workplace determination. In closing oral submissions, the Joint Unions indicated that they did not press those submissions.
>
> [68] The Joint Unions were correct not to press the submission. We are satisfied that s 270A of the Act does not constrain the terms the Commission is able to include in a workplace determination with respect to the commencement date of wages increases, superannuation and the nominal expiry date. In relation to the commencement date of wage increases, s 270A(4) provides that subsection (2) does not apply to a term that provides for wages increases. In relation to superannuation, the workplace determination would not be less favourable to employees if it failed to provide for the same increases in superannuation contributions so long as the superannuation contributions required to be made are equal to or higher than those provided for in the 2020 Agreement. In relation to nominal expiry date, it cannot be said that a longer or shorter nominal period is necessarily less favourable to employees.

271 No other terms

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

[S 271 am Act 79 of 2022, s 3 and Sch 1 item 550, with effect from 6 Jun 2023]

[FWA.271.20] Section 271 – No other terms

The effect of s 271 is to limit the scope of the intractable bargaining workplace determination to the matters that were either agreed or at issue during the bargaining for the proposed enterprise agreement. Parties are not able to introduce additional matters in the context of

intractable bargaining workplace determination proceedings, nor is the FWC able to include additional terms in the intractable bargaining workplace determination.

[The next text page is 2-59051]

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

Modification and application: Pt 2–5 Div 5

See *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth),

- s 3; and
- Sch 13 item 8.

272 Core terms of workplace determinations

Core terms

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

Nominal expiry date

(2) The determination must include a term specifying a date as the determination's nominal expiry date, which must not be more than 4 years after the date on which the determination comes into operation.

Permitted matters etc

(3) The determination must not include:

(a) any terms that would not be about permitted matters if the determination were an enterprise agreement; or

(b) a term that would be an unlawful term if the determination were an enterprise agreement; or

(c) any designated outworker terms.

Better off overall test

(4) The determination must include terms such that the determination would, if the determination were an enterprise agreement, pass the better off overall test under section 193.

Safety net requirements

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

(a) because the term would contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc); or

(b) because of the operation of Subdivision E of Division 4 of Part 2-4 (which deals with approval requirements relating to particular kinds of employees).

[Subs (5) am Act 174 of 2012, s 3 and Sch 9 item 298, with effect from 1 Jan 2013]

[S 272 am Act 174 of 2012]

Modification and application: s 272

See *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth),

- s 3; and
- Sch 7 item 23;
- Sch 7 item 24; and
- Sch 7 item 25.

SECTION 272 COMMENTARY

Section 272 – Core terms of workplace determinations ..... [FWA.272.20]
Subsection 272(5)(a) – Compliance with s 55 ..... [FWA.272.40]
Subsection 272(5)(b) – Compliance with Subdivision E of Division 4 of Part 2-4 ..... [FWA.272.60]
Cases ..... [FWA.272.80]

[FWA.272.20] Section 272 – Core terms of workplace determinations

Section 272 sets out the core terms that must be included in a workplace determination. These terms are comparable to the requirements for an enterprise agreement and reflect the fact that, once made, the workplace determination operates as if it were an enterprise agreement. In summary, the workplace determination must include the following core terms:

- a nominal expiry date up to four years after the date on which the workplace determination comes into operation (s 272(2)); and
- terms that would enable the workplace determination to pass the better off overall test if it were an enterprise agreement (s 272(4)).

Note that the workplace determination must also include mandatory terms (see paragraph [FWA.273.20] and agreed terms).

The workplace determination must not include:

- terms that would not be about "permitted matters" if the workplace determination were an enterprise agreement (s 272(3)(a));
- terms that would be an "unlawful term" if the workplace determination were an enterprise agreement (s 272(3)(b));
- any designated outworker terms;
- nor any term that would mean that the FWC could not approve the determination if it were an enterprise agreement because the term would contravene s 55 of the FW Act or because of the operation of Subdivision E of Part 2-4 Division 4 (see paragraphs [FWA.272.40] and [FWA.272.60] in relation to these requirements).

[FWA.272.40] Subsection 272(5)(a) – Compliance with s 55

Section 55 deals with the interaction between the National Employment Standards and enterprise agreements. Section 272(5)(a) provides that a workplace determination must not include terms that would contravene s 55 if the determination were an enterprise agreement. In general terms, this means that the workplace determination:

- must not exclude the National Employment Standards or any provision of the National Employment Standards;
- may include terms expressly permitted by a provision of Part 2-2 of the FW Act or by regulations made for the purposes of s 127 (for example, terms providing for the averaging of hours of work under s 63);
- may include terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards (for example in relation to the payment of annual leave under s 90, terms to permit an employee to take twice as much

annual leave at half-pay), but only to the extent that the effect of those terms is not detrimental to the employee in any respect, when compared to the National Employment Standards; and

- may include terms that supplement the National Employment Standards (for example by providing for more annual leave that the entitlement set out in s 87), but only to the extent that the effect of those terms is not detrimental to the employee in any respect, when compared to the National Employment Standards.

[FWA.272.60] Subsection 272(5)(b) – Compliance with Subdivision E of Division 4 of Part 2-4

Subdivision E of Division 4 of Part 2-4 contains approval requirements for enterprise agreements that cover particular kinds of employees. Section 272(5)(b) provides that a workplace determination must not include terms that would be inconsistent with these requirements if the determination were an enterprise agreement. In practical terms, this means that:

- **Shiftworkers:** Where a modern award covers an employee who is covered by the workplace determination, if the modern award defines the employee as a shiftworker for the purposes of the National Employment Standards, the workplace determination must also define the employee in that manner.
- **Pieceworkers:** Where an employee is covered by both a modern award and a workplace determination, the FWC must be satisfied that the definition of pieceworkers in the workplace determination will not be detrimental to the employee in relation to entitlements under the National Employment Standards (either because they were previously a pieceworker under the award, and will not be under the workplace determination, or vice versa).
- **School-based apprentices and trainees:** Where a modern award covers the apprentice or trainee, and provides for paid loadings in lieu of certain leave and absences, the FWC must be satisfied that the paid loadings under the workplace determination will not be detrimental to the employee when compared with the award loadings.
- **Outworkers:** Where a modern award covers the outworker and includes outworker terms, the FWC must be satisfied that the terms of the workplace determination are not detriment to the employee when compared to the award outworker terms.

[FWA.272.80] Cases

Australian Licenced Aircraft Engineers Association v Qantas Airways Ltd (2012) 218 IR 165; [2012] FWAFB 236

The Commission must ensure that a workplace determination contains the core terms required by s 272, and the mandatory terms required by s 273.

273 Mandatory terms of workplace determinations

Mandatory terms

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

Term about settling disputes

(2) The determination must include a term that provides a procedure for settling disputes:

(a) about any matters arising under the determination; and

(b) in relation to the National Employment Standards.

(3) [Application of s 273(2) to determination]
Subsection (2) does not apply to the determination if the FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraphs 186(6)(a) and (b) (which deal with terms in enterprise agreements about settling disputes).

[Subs (3) am Act 174 of 2012, s 3 and Sch 9 item 299, with effect from 1 Jan 2013]

Flexibility term

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

[Subs (4) am Act 174 of 2012, s 3 and Sch 9 item 299, with effect from 1 Jan 2013]

Consultation term

(5) The determination must include the model consultation term unless the FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy subsection 205(1) (which deals with terms about consultation in enterprise agreements).

[Subs (5) am Act 174 of 2012, s 3 and Sch 9 item 299, with effect from 1 Jan 2013]

Delegates' rights term

(6) The determination must include a delegates' rights term for the workplace delegates to whom the determination applies.

Note: ***Delegates' rights term*** is defined in section 12.

[Subs (6) insrt Act 120 of 2023, s 3 and Sch 1 item 82, with effect from 15 Dec 2023]

(7) [Modern award]
The delegates' rights term must not be less favourable than the delegates' rights term in any modern award that covers a workplace delegate to whom the determination applies.

[Subs (7) insrt Act 120 of 2023, s 3 and Sch 1 item 82, with effect from 15 Dec 2023]

[S 273 am Act 120 of 2023; Act 174 of 2012]

Modification and application: s 273

See *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth),

- s 3; and
- Sch 7 item 26.

[FWA.273.20] Section 273 – Mandatory terms of workplace determinations

Section 273 sets out further requirements as to the content of workplace determinations that reflect the requirements for enterprise agreements made under the FW Act.

A workplace determination must include any agreed terms (see paragraph [FWA.267.60] in relation to an industrial action related workplace determination and paragraph [FWA.270.40] in relation to an intractable bargaining workplace determination). Section 273 deals with what mandatory terms will be added to the agreed terms. In each case, if the FWC is not satisfied that the agreed term would comply with the approval requirements if the workplace

determination were an enterprise agreement, the FWC will either include the relevant model term in the case of flexibility and consultation terms, or a term the FWC determines is suitable in relation to settling disputes.

[FWA.273.40] Cases

Australian Licenced Aircraft Engineers Association v Qantas Airways Ltd (2012) 218 IR 165; [2012] FWAFB 236

The Commission must ensure that a workplace determination contains the core terms required by s 272, and the mandatory terms required by s 273.

See also *Australian Licenced Aircraft Engineers Association v Qantas Airways Ltd* (2013) 234 IR 418; [2013] FCCA 592 for a decision concerning a breach of a consultation clause of the industrial action related workplace determination.

274 Agreed terms for workplace determinations

(1) [Repealed]

[Subs (1) rep Act 79 of 2022, s 3 and Sch 1 item 622, with effect from 6 Jun 2023]

Agreed term for an industrial action related workplace determination

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

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

Agreed term for an intractable bargaining workplace determination

(3) An ***agreed term*** for an intractable bargaining workplace determination is:

(a) a term that the bargaining representatives for the proposed enterprise agreement concerned had agreed, at the time the application for the intractable bargaining declaration concerned was made, should be included in the agreement; and

(b) any other term, in addition to a term mentioned in paragraph (a), that the bargaining representatives had agreed, at the time the declaration was made, should be included in the agreement; and

(c) if there is a post-declaration negotiating period for the declaration—any other term, in addition to a term mentioned in paragraph (a) or (b), that the bargaining representatives had agreed, at the end of the period, should be included in the agreement.

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

[Subs (3) subst Act 2 of 2024, s 3 and Sch 1 item 70C, with effect from 27 Feb 2024; Act 79 of 2022, s 3 and Sch 1 item 552, with effect from 6 Jun 2023]

[S 274 am Act 2 of 2024; Act 79 of 2022]

[FWA.274.20] Section 274 – Agreed terms for workplace determinations

This section sets out the meaning of an agreed term in relation to the two types of workplace determinations that may be made under Part 2-5. Agreed terms must be included in a workplace determination (see paragraph [FWA.267.60] in relation to an industrial action related workplace determination and paragraph [FWA.270.40] in relation to an intractable bargaining workplace determination).

[FWA.274.40] Cases

Australian Licenced Aircraft Engineers Association v Qantas Airways Ltd (2012) 218 IR 165; [2012] FWAFB 236

Before making a post-industrial action workplace determination, the commission must distinguish between any agreed terms and any matters at issue between the parties at the time of the conclusion of the post-industrial action negotiating period. Pursuant to this provision, agreed terms are those to which the bargaining representatives have agreed at the end of the negotiating period.

Community and Public Sector Union v G4S Custodial Services Pty Ltd [2014] FWCFB 9044

Following termination of protected industrial action by the Commission, at the end of the 21-day post industrial action negotiation period (see subs 266(3)), the parties had not resolved all of the matters at issue between them. Subsection 267(2) required the workplace determination to include all matters agreed to between the parties, whilst subs 267(3) required a "merits arbitration" of all matters at issue between the parties and not resolved at the end of the post industrial action negotiation period (at [11]). Following the end of the post industrial action negotiation period, but prior to the hearing by the Full Bench of the workplace determination, the parties agreed all remaining matters at issue between them and the draft determination agreed to by the parties included those matters, save for one that was the subject of a separate deed. For the Full Bench, the use of the word "include" in s 275 meant that the Tribunal is not confined to a consideration of those matters listed in the section and consent of the parties was a relevant consideration to which it should attach "considerable weight" (see at [18]). The Full Bench included all agreed matters at issue in the workplace determination, save for one amendment to the commencement date to reflect the requirement in subs 276(1) that the workplace determination "operates from the day on which it is made" (at [20]).

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

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

(a) the merits of the case;

(b) [Repealed]

[Para (b) rep Act 79 of 2022, s 3 and Sch 1 item 623, with effect from 6 Jun 2023]

(c) the interests of the employers and employees who will be covered by the determination;

[Para (c) am Act 79 of 2022, s 3 and Sch 1 item 624, with effect from 6 Jun 2023]

(ca) the significance, to those employers and employees, of any arrangements or benefits in an enterprise agreement that, immediately before the determination is made, applies to any of the employers in respect of any of the employees;

[Para (ca) insrt Act 79 of 2022, s 3 and Sch 1 item 552A, with effect from 6 Jun 2023]

(d) the public interest;

(e) how productivity might be improved in the enterprise or enterprises concerned;

(f) the extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement;

(g) the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements;

(h) incentives to continue to bargain at a later time.

[S 275 am Act 79 of 2022; Act 174 of 2012, s 3 and Sch 9 items 300 and 301, with effect from 1 Jan 2013]

SECTION 275 COMMENTARY

Section 275 – Factors the FWC must take into account in deciding terms of a workplace determination ..... [FWA.275.20]
Compliance with good faith bargaining requirements ..... [FWA.275.40]

[FWA.275.20] Section 275 – Factors the FWC must take into account in deciding terms of a workplace determination

This section sets out the factors the FWC must take into account in deciding terms of a workplace determination. The terms which the FWC will be required to be decided will be the matters still at issue at the relevant time.

Section 275 is broadly comparable to the previous factors to be considered in workplace determinations under s 504 of the WR Act, however the list no longer expressly refers to the employer's capacity to pay.

In *NSW Electricity Networks Operations Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2025] FWCFB 73, the Full Bench described its task as follows:

> [59] The matters specified in s 275 of the Act are not exhaustive of the considerations that the Commission can have regard to in deciding the terms to be included in a workplace determination. This is apparent from the word "include" in the chapeau of s 275, which allows the Commission the discretion to also have regard to any other relevant matter depending on the particular case. The determination of the Commission will be informed by ss 577 and 578 of the Act, including that the Commission must exercise its powers in a manner that achieves an outcome that is fair and just and that promotes harmonious and cooperative workplace relations. This consideration for the Commission is especially important in the context of an intractable bargaining workplace determination, where clearly bargaining relations between the parties have broken down.
>
> [60] Some of the factors in s 275 of the Act are reasonably self-explanatory. However, we make (and endorse where previously established by authority) the following observations in relation to the s 275 factors:
>
> (a) Reference to the "merits of the case" in s 275(a) requires consideration of whether the Commission considers it is appropriate to include the terms proposed in light of the evidence and contentions advanced by the parties. We emphasise, however, that the task in conducted in the context of determining the outcome of a bargaining processes and not setting minimum terms and conditions of employment for the purposes of a modern award.
>
> (b) The requirement under s 275(c) to take into account the interests of the relevant employees and employers requires that those interests be identified and taken into account and the Commission must exercise a broad judgment to produce an outcome which is a fair compromise, balancing the legitimate expectations and interests of the employees and employers.
>
> (c) Section 275(ca) is a new subclause and requires consideration to be given to the importance to the employer and employees to be covered by the workplace determination of the arrangements and benefits of an existing enterprise agreement the applies to the employer.
>
> (d) The "public interest" in s 275(d) refers to matters that may impact the public as a whole and are distinct from the interests of employees and employers who will be covered by the workplace determination and will include, for instance, the achievement (or otherwise) of the objects of the Act, including employment levels, inflation and the maintenance of appropriate industrial standards.
>
> (e) The concept of "productivity" in s 275(e) refers to the well-known economic concept of the quantity of outputs relative to the quantity of inputs. Productivity does not, as is often erroneously asserted in media and political discourse,

concern the price of inputs such as a labour. Hence, an employer does not have a more productive workplace because its labour costs are lower. The same output at a lesser cost due to reduce wage or salary levels does not equate to productivity in the sense contemplated by s 275(e).

(f) The concept of the "reasonableness" of conduct under s 275(f) requires an evaluation of the party's conduct during bargaining and whether the conduct was rational, logical or excessive. This falls to be assessed, however, against the rights conferred on bargaining parties during enterprise bargaining, including the right to engage in protected industrial action, and the fact that the parties are, to a reasonably wide degree, entitled to conduct the bargaining as they see fit.

(g) Consideration of incentives to bargain at a later time for the purposes of s 275(h), which is congruent with the encouragement of collective bargaining as an important means to achieve productivity and fairness as an object of the Act, requires an assessment of what substantive provisions are likely to encourage the parties to return to bargaining in the future. It may be relevant, for example, to consider whether the workplace determination leaves matters to be bargained about in the future.

[61] The Commission is ultimately tasked with assessing the respective positions of the parties as to the terms disputed between them and, by having regard to the mandatory considerations under s 275 of the Act and other relevant considerations, make an objective assessment and overall judgement as to the appropriate terms of a workplace determination that will cover the employees and apply to the parties. In *Parks Victoria v Australian Workers' Union* [2013] FWCFB 950; (2013) 234 IR 242, the Full Bench summarised the task of the Commission as follows:

> But the task we are presently engaged in is quite different to the making or variation of an award. As explained by the Full Bench in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Curragh Queensland Mining Ltd* the task of the Commission in a matter such as this is to assess the respective positions of the parties in relation to the matters at issue and, by reference to the relevant statutory factors, arrive at a conclusion that would be regarded as appropriate in the context of bargaining, had the bargaining concluded successfully. Such an approach does not involve a form of subjective prognostication as to the outcome of the negotiations, but rather involves an objective assessment of the statutory factors and an overall judgement as to an appropriate determination to apply to the operations concerned until the parties replace the determination with a new enterprise agreement.

[62] In an arbitration in relation to the making of a workplace determination, neither party bears an onus of proof in respect of any change from the position pertaining in the most recent enterprise agreement or to establish the desirability of any particular condition or term sought to be included. Insofar as the Commission has a discretion in setting the terms of a workplace determination, the critical factors bearing upon the exercise of that discretion are the matters required to be taken into account by s 275 and the Commission must determine what it considers to be the appropriate outcome in light of the material which is placed before it.

[FWA.275.40] Compliance with good faith bargaining requirements

Section 275(g) requires the FWC to take into account the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements. Under old s 504(5)(e) of the WR Act, the tribunal was similarly required to have regard to the extent to which the conduct of the negotiating parties during the bargaining period was reasonable.

The good faith bargaining requirements are set out in s 228 of the FW Act. The requirements include procedural conduct (for example, attending, and participating in, meetings at

reasonable times under s 228(1)(a)) as well as conduct in relation to substantive proposals made in the negotiations (for example, giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals under s 228(1)(d)). To date, there is no authority on the extent to which s 275(g) will provide a basis for considering procedural delinquency in determining the terms of a workplace determination.

[The next text page is 2-60051]

[FWA.306E.140] Performance of work or provision of a service?

Section 306E(1A) provides that the Commission must not make a regulated labour hire arrangement order unless it is satisfied the performance of work is or will not be for the provision of a service, rather than the supply of labour. In making that determination, the Commission is required to have regard to the matters in s 306E(7A).

The Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* provides as follows regarding the factors set out in s 306E(7A):

635. To the extent that each of the factors in paragraphs 307E(7A)(a) to (e) are demonstrated by submissions and evidence of the parties to the application for an order – for instance, that an employer directs, supervises or controls work being performed for the host – this would weigh in favour of the FWC finding that the arrangement is for the provision of a service rather than the supply of labour.
636. Not all the factors listed would need to be satisfied for the FWC to find that an arrangement is for the provision of a service, however the FWC must consider each of them. Where the parties do not put forward any evidence or submissions to the FWC about one or more of these factors, it would be sufficient for the FWC to note this as part of their consideration pursuant to subsection 307E(7A).
637. For the purposes of these new subsections, higher education qualifications would not be required for work to be considered specialist or expert. For example, employees of a catering service employer contracted to provide catering for a regulated host whose primary business is not the provision of catering services may be found to be undertaking work of a specialist or expert nature, even where the host's covered employment instrument provides for the performance of work of the type provided by the catering service provider.
638. These provisions allow the FWC to assess the reality of the arrangement to determine whether it is, or is not, for the provision of a service and then decide, as a jurisdictional question, whether it is prevented from making an order.

[FWA.306E.160] What an order must specify

Section 306E(9) sets out the matters a regulated labour hire arrangement order must specify whilst s 306E(10) sets out what the order may specify.

The Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* provides as follows regarding the matters in s 306E(9) and s 306E(10):

655. **What an order must specify:** New subsection 306E(9) would provide a list of matters that must be specified in a regulated labour hire arrangement order. This would include:
    - the parties covered by the order;
    - the relevant host employment instrument; and
    - the date the order commences.
656. Where the order is required to list the regulated employees covered by the order, it is not required to list each employee, but rather the class of employees that would be participating in the regulated labour hire arrangement. The orders are intended to be broad and to cover employees engaged to work as part of the regulated labour hire arrangement after the order is made. An order referenced in this section is an order made under the relevant section.
657. New note to subsection 306E(9) would clarify that for the purposes of paragraphs (b) and (c), an order may specify additional employers and regulated employees of those employers that may be covered by a determination made under new section 306EA.
658. **What an order may specify:** New subsection 306E(10) would provide that a regulated labour hire arrangement order may (but need not) specify an end date for the order, when it will cease to be in force. A regulated labour hire arrangement order could also be varied or revoked under existing section 603.

Note s 306E(9), which provides that an order comes into force:

(i) if the order is made before 1 November 2024 – that day or a later day; or
(ii) otherwise – the day the order is made or a later day.

The earliest date of operation for a regulated labour hire arrangement order is therefore 1 November 2024. See *Re Mining and Energy Union* [2024] FWCFB 299 for the first decision of the FWC to make a regulated labour hire arrangement order. Some applications have been brought by one employee: see *Re Driver* [2024] FWCFB 394 and *Re Payne* [2024] FWC 3557 and another by a group of employees: see *Cherrington re Olympic Dam Mine* [2025] FWC 1158.

See also *Re Mining and Energy Union* [2025] FWCFB 53 for a thorough consideration of s 306E generally. There the Full Bench also rejected an argument by the employer that making a regulated labour hire arrangement order would involve acquisition of property other than on just terms contrary to s 51(xxxi) of the Constitution.

In *Re Mining and Energy Union* [2025] FWC 866 (at [55] to [57]) citing *Re Mining and Energy Union re Boggabri Coal Mine* [2024] FWCFB 415, the Commission rejected an argument by the employer that an order should exclude future services being performed by labour hire employees in accordance with s 306EA(1), stating such an exclusion could create confusion over the coverage of the order and that it was not clear that such provision of services would occur in the future.

306EA Regulated labour hire arrangement order may cover additional arrangements

Determination that application covers additional employers and employees

(1) If an application for a regulated labour hire arrangement order is made in relation to a regulated host, an employer and one or more employees of the employer, the FWC may determine that the application is taken to also relate to:

(a) one or more other employers (each of which is an ***additional employer***) that the FWC is satisfied supply or will supply, in the manner referred to in paragraph 306E(1)(a), one or more employees to perform work, for the regulated host, of the kind in relation to which the application was made; and

(b) the employees referred to in paragraph (a) of this subsection (each of whom is an ***additional regulated employee***).

Note: The employees referred to in paragraph (a) of this subsection are ***regulated employees*** (see subsection 306E(5)).

(2) [FWC's determination on own initiative or on application]

The FWC may make the determination:

(a) on its own initiative; or

(b) on application by any of the following:

(i) the applicant for the order or any other person who could have applied for the order (see subsection 306E(7));

(ii) the employer mentioned in paragraph 306E(1)(a);

(iii) an employer that supplies or will supply employees as referred to in paragraph (1)(a) of this section;

(iv) a person who is such an employee;

(v) an employee organisation that is entitled to represent the industrial interests of such an employee.

(3) [Views FWC must seek]
If the FWC makes such a determination, the FWC must seek the views of the following before deciding whether to make the regulated labour hire arrangement order:

(a) the additional regulated employees;
(b) employee organisations that are entitled to represent the industrial interests of the additional regulated employees;
(c) the additional employers.

Additional employers and employees in regulated labour hire arrangement order

(4) Subject to subsections (5) and (6), if the FWC makes a determination under subsection (1) in relation to an application for a regulated labour hire arrangement order, the FWC may specify in the regulated labour hire arrangement order (if made) that, in addition to the persons referred to in paragraphs 306E(9)(b) and (c), the order also covers:

(a) any or all of the additional employers; and
(b) additional regulated employees of those employers.

(5) [Matters of which FWC must be satisfied]
The FWC must not specify an additional employer or additional regulated employees of the employer under subsection (4) unless:

(a) the FWC is satisfied of the matters mentioned in subsection 306E(1) in relation to the additional employer and the additional regulated employees; and
(b) the FWC is satisfied that the covered employment instrument that would apply to the additional regulated employees, as referred to in paragraph 306E(1)(b), is the host employment instrument covered by the order; and
(c) the FWC is satisfied that the performance of the work by the additional regulated employees is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters in subsection 306E(7A) in relation to the additional employer and the additional regulated employees.

(6) [FWC's satisfaction that specifying is fair and reasonable]
The FWC must not specify an additional employer or additional regulated employees of the employer under subsection (4) if the FWC is satisfied that it is not fair and reasonable in all the circumstances to do so, having regard to:

(a) the views (if any) of persons referred to in subsection (3); and
(b) any matters mentioned in subsection 306E(8) in relation to which submissions are made, to the extent the submissions relate to the additional employer and the additional regulated employees.

[S 306EA insrt Act 120 of 2023, s 3 and Sch 1 item 73, with effect from 15 Dec 2023]

306EB Application of regulated labour hire arrangement order to new covered employment instrument

(1) [Application]
This section applies if:

(a) a regulated labour hire arrangement order is in force; and
(b) the host employment instrument covered by the order ceases to apply to the regulated host covered by the order, or to a class of employees of the regulated host covered by the order, in connection with another covered employment instrument (the ***new instrument***) starting to apply to the regulated host or those employees; and

(c) the new instrument would apply to the regulated employees covered by the order if the regulated host were to employ the employees to perform work of a kind to which the order relates.

(2) [Order has effect as if new instrument were host employment instrument covered by order]
From the time the new instrument starts to apply to the regulated host or the class of employees mentioned in paragraph (1)(b), the order has effect (and may be dealt with) as if the new instrument were the host employment instrument covered by the order.

(3) [Determining whether covered employment instrument would apply to employees]
For the purposes of paragraph (1)(c), in determining whether a covered employment instrument would apply to the employees, it does not matter on what basis the employees are or would be employed.

[S 306EB insrt Act 120 of 2023, s 3 and Sch 1 item 73, with effect from 15 Dec 2023]

[FWA.306EB.20] Application of regulated labour hire arrangement order to new covered employment instrument

The Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* provides at [665] that s 306EB covers circumstances where an employment instrument (including an enterprise agreement) of a regulated host is referred to as the covered employment instrument for the purposes of a regulated labour hire arrangement order, and a new covered employment instrument is made that applies to the host and its employees. In such a circumstance, the order will be taken to refer to the new covered employment instrument from the time the new instrument starts to apply to the host's employees.

306EC Notification requirements in relation to new covered employment instrument

Notification by regulated host

(1) If a regulated labour hire arrangement order in force covers a regulated host and an event mentioned in subsection (2) occurs, the regulated host must, as soon as practicable after the event occurs, give written notice to any employers covered by the order of:

(a) the event; and

(b) the effect that the event will have or would have in relation to the order.

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

(2) [Event]
The events are the following:

(a) approval, by employees, of a covered employment instrument that will, if it comes into operation, become the host employment instrument covered by the order because of section 306EB;

(b) any other approval or making of a covered employment instrument that will, if it comes into operation, become the host employment instrument covered by the order because of section 306EB, other than an approval by the FWC of an enterprise agreement (see subsection (3) of this section).

Notification by FWC

(3) If the FWC approves an enterprise agreement that, because of section 306EB, will become the host employment instrument covered by a regulated labour hire arrangement order, the FWC must, as soon as practicable after the approval, give written notice to any employers covered by the order of:

(a) the approval of the enterprise agreement; and

(b) the effect of the approval in relation to the order.

[S 306EC insrt Act 120 of 2023, s 3 and Sch 1 item 73, with effect from 15 Dec 2023]

306ED Varying regulated labour hire arrangement order to cover new employers

(1) [Application]

This section applies if:

(a) a regulated labour hire arrangement order that covers a regulated host and one or more employers, and relates to a kind of work, is in force or has been made but is not yet in force; and

(b) one or more other employers (each of which is a ***new employer***) start or will start to supply employees (each of whom is a ***relevant regulated employee***) to perform work of that kind for the regulated host, in a manner referred to in paragraph 306E(1)(a); and

(c) the new employers are not covered by any regulated labour hire arrangement order (whether in force, or made but not yet in force) that covers or will cover the relevant regulated employees in relation to the performance of that work; and

(d) the FWC did not make a determination under subsection 306EA(1) in relation to the new employers and the application for the regulated labour hire arrangement order.

Note: The employees referred to in paragraph (b) of this subsection are ***regulated employees*** (see subsection 306E(5)).

Regulated host must make application

(2) As soon as practicable after the regulated host becomes aware of the circumstances referred to in paragraph (1)(b), the regulated host must apply to the FWC for an order under this section varying the regulated labour hire arrangement order to cover the new employers and the relevant regulated employees of those employers.

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

(3) [Section 588 (discontinuing applications)]

Section 588 (discontinuing applications) does not apply in relation to the application unless the circumstances referred to in paragraph (1)(b) of this section no longer exist.

(4) [Written notice of application]

As soon as possible after the application is made, the regulated host must give written notice of the following to each of the new employers:

(a) that the application has been made;

(b) the effect of subsection (11) in relation to the application.

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

FWC must decide whether to make variation order

(5) The FWC must:

(a) decide whether to make an order under this section varying the regulated labour hire arrangement order in accordance with subsection (6) or (7) to cover:
  (i) any or all of the new employers; and
  (ii) relevant regulated employees of those employers; and
(b) take all reasonable steps to make the decision before the time any of those employees start to perform the work referred to in paragraph (1)(b).

(6) [When host and employer agree to variation]
The FWC must vary the regulated labour hire arrangement order to cover a new employer and the relevant regulated employees of the employer if the regulated host and the new employer notify the FWC that the regulated host and the new employer agree to the making of the variation.

(7) [S 306E(1) re regulated host, new employer, relevant regulated employees]
Subject to subsections (8) and (9), the FWC must also vary the regulated labour hire arrangement order to cover a new employer and the relevant regulated employees of the employer if the FWC is satisfied of the matters referred to in subsection 306E(1) in relation to the regulated host, the new employer and the relevant regulated employees.

(8) [FWC's satisfaction work by employees is not for provision of service]
The FWC must not vary the regulated labour hire arrangement order in accordance with subsection (7) unless the FWC is satisfied that the performance of the work by the relevant regulated employees is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters referred to in subsection 306E(7A) in relation to the new employer and the relevant regulated employees.

(9) [FWC's satisfaction order is fair and reasonable]
The FWC must not vary the regulated labour hire arrangement order in accordance with subsection (7) if the FWC is satisfied that it is not fair and reasonable in all the circumstances to make the variation, having regard to any matters referred to in subsection 306E(8) in relation to which submissions have been made in respect of the variation.

When variation order comes into force

(10) An order under this section comes into force on a day specified in the order.

Interim arrangements before FWC decides application

(11) If the FWC does not decide whether to make an order under this section by the time referred to in paragraph (5)(b), the regulated labour hire arrangement order is taken (so long as it is in force) to cover the new employers and the relevant regulated employees from the time the application for the order under this section is made until:
(a) if the FWC decides not to make an order under this section—the time the FWC makes that decision; or
(b) if the FWC decides to make an order under this section—the time that order comes into force.

[S 306ED insrt Act 120 of 2023, s 3 and Sch 1 item 73, with effect from 15 Dec 2023]

[FWA.306ED.20] Varying regulated labour hire arrangement order to cover new employers

Section 306ED provides that if a new employer starts or will start to supply employees to perform work of the kind covered by the order for the regulated host, and the host becomes aware of those circumstances, the host must apply to the FWC for an order varying the regulated labour hire arrangement order to cover the new employer/s and the relevant regulated employees of those employers.

The Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* at [672]-[678] provides the following information.

Section 306ED(5) provides that the FWC must take all reasonable steps to make a decision on the variation application before the new employer supplies any employees to the regulated host to commence work.

Section 306ED(6) provides that the FWC must make the variation order if the host and the new employer inform the FWC that they agree to the order being made.

Section 306ED(7) provides that, subject to requirements in subsections 306ED(8) and (9), the FWC must also make the variation order if it is satisfied of the matters referred to in subsection 306E(1) in relation to the regulated host, the new employer, and employees of the new employer engaged to supply labour for the purposes of the order.

Section 306ED(8) provides that the FWC must not make a variation order under subsection (7) unless it is satisfied that the performance of the work is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters referred to in subsection 306E(7A).

Section 306ED(9) provides that the FWC must not make the variation order if it is satisfied that it is not fair and reasonable in all the circumstances to make the variation, having regard to any matters referred to in subsection 306E(8) in relation to which parties have made submissions.

Section 306ED(10) would provide that the variation order would come into effect on a day specified in the order.

Section 306ED(11) provides that, if the FWC does not decide whether to make the variation order before the new employer supplies employees to the regulated host, the regulated labour hire arrangement order is taken to apply to the new employer and employees it supplies to the host on an interim basis from the time the application is made, until it is determined. During this time, the new employer will be subject to the requirements of the existing order in relation to employees supplied to work for the host in respect of work of a type covered by the order, including the requirement to pay those employees the protected rate of pay in respect of that work.

306EE Notifying tenderers etc. of regulated labour hire arrangement order

(1) [Application]

This section applies if:

(a) a regulated host is covered by a regulated labour hire arrangement order that is in force or has been made but is not yet in force; and

(b) a tender process is conducted:

(i) by or on behalf of the regulated host; or

(ii) for the purposes of a joint venture or common enterprise engaged in by the regulated host and one or more other persons.

(2) [Matters on which host must advise prospective tender]
If it could reasonably be expected that one or more employers would, as a result of the tender process, become covered by the regulated labour hire arrangement order because of section 306ED, the regulated host must ensure that, from the start of the tender process, all prospective tenderers are advised, in writing, that if one or more tenderers are successful in the process:

(a) one or more employers could become covered by the regulated labour hire arrangement order; and

(b) the employers could be required to pay employees of the employers who perform work for the regulated host, in accordance with this Part, in connection with the work.

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

(3) [Matters on which host must advise successful tender]
If the regulated host is required to apply to the FWC in relation to one or more employers under subsection 306ED(2) as a result of the tender process, the regulated host must, as soon as practicable after the end of the tender process, advise the successful tenderer or tenderers in that process (whether or not they are the employers), in writing, of the following:

(a) that the regulated host is required to make the application;

(b) the effect of subsection 306ED(11) in relation to the application;

(c) that if the FWC decides to vary the order under section 306ED to cover those employers, and the order is in force or comes into force, the employers will be required to pay employees of the employers who perform work for the regulated host, in accordance with this Part, in connection with the work.

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

[S 306EE insrt Act 120 of 2023, s 3 and Sch 1 item 73, with effect from 15 Dec 2023]

Subdivision B – Obligations of employers and regulated hosts etc. when a regulated labour hire arrangement order is in force

306F Protected rate of pay payable to employees if a regulated labour hire arrangement order is in force

Application of section

(1) This section applies if a regulated labour hire arrangement order is in force that covers a regulated host, an employer and a regulated employee of the employer.

Employer must not pay less than protected rate of pay

(2) The employer must pay the regulated employee at no less than the protected rate of pay for the employee in connection with the work performed by the employee for the regulated host.

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

Exceptions

(3) The employer does not contravene subsection (2) if the employer pays the regulated employee at less than the protected rate of pay because:

(a) the regulated host provides information to the employer under section 306H (which deals with information about the protected rate of pay); and

(b) the employer reasonably relies on the information for the purposes of working out the protected rate of pay for the regulated employee; and
(c) the information is incorrect in a material particular.

(3A) [Subsection 306ED(11)]
The employer does not contravene subsection (2) if:
(a) the regulated labour hire arrangement order covers the employer because of the operation of subsection 306ED(11); and
(b) the employer pays the regulated employee at less than the protected rate of pay because the employer has not been either:
(i) notified that the regulated host has made an application under subsection 306ED(2) (which deals with certain variation orders); or
(ii) for an employer who was a successful tenderer in a tender process—advised under subsection 306EE(2) or (3) (which deal with notifying tenderers) in relation to the regulated labour hire arrangement order.

Meaning of ***protected rate of pay***

(4) Unless subsection (5) applies, the ***protected rate of pay*** for the regulated employee is the full rate of pay that would be payable to the employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee.

(5) [Casual employee]
If the regulated employee is a casual employee, and there is no covered employment instrument that applies to the regulated host that provides for work of that kind to be performed by casual employees, the ***protected rate of pay*** for the regulated employee is the full rate of pay that would be payable to the employee if:
(a) the employee were an employee other than a casual employee and the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee; and
(b) the base rate of pay that would be payable to the employee, in the circumstances referred to in paragraph (a), were increased by 25%.

(6) [If employer is national system employer only because of s 30D or 30N]
Despite subsections (4) and (5), if the employer is a national system employer only because of section 30D or 30N, the ***protected rate of pay*** for the regulated employee does not include any amount that relates to an excluded subject matter within the meaning of subsection 30A(1) or 30K(1).
Note: Sections 30D and 30N extend the meaning of ***national system employer***.

(7) [Pieceworker: application of paragraph 16(2)(b)]
If the regulated employee is a pieceworker and paragraph 16(2)(b) would apply to the employee were the host employment instrument to apply to the employee, the base rate of pay that would be payable to the employee for the purposes of subsection (5) of this section is taken to be the base rate of pay that would be referred to in that paragraph.

(8) [Pieceworker: application of paragraph 18(2)(b)]
If the regulated employee is a pieceworker and paragraph 18(2)(b) would apply to the employee were the host employment instrument to apply to the employee, the full rate of pay that would be payable to the employee for the purposes of subsections (4) and (5) of this section is taken to be the full rate of pay that would be referred to in that paragraph.

(9) [When regulated employee required to be deemed employee other than casual] To avoid doubt, this section does not require that a regulated employee referred to in subsection (5) be taken to be an employee other than a casual employee for the purposes of determining entitlements to kinds of leave, or any other purpose, except determining the protected rate of pay for the regulated employee.

Requirement to pay no less than protected rate of pay applies despite other fair work instruments etc.

(10) Subsection (2) applies despite any provision of:

(a) a fair work instrument (other than an instrument made by the FWC under this Part) that applies to the regulated employee; or

(b) a covered employment instrument (other than a fair work instrument) that applies to the regulated employee; or

(c) the regulated employee's contract of employment;

that provides for a rate of pay for the regulated employee that is less than the protected rate of pay for the regulated employee.

Note: See also section 306N (effect of alternative protected rate of pay order) and subsection 306Q(6) (effect of arbitrated protected rate of pay order).

[S 306F insrt Act 120 of 2023, s 3 and Sch 1 item 73, with effect from 15 Dec 2023]

[FWA.306F.20] Protected rate of pay

By s 306F(2) of the FW Act, an employer covered by a regulated labour hire arrangement order must pay a regulated employee *at no less than the protected rate of pay* for the employee in connection with the work performed by the employee for the regulated host.

By s 306F(4), the protected rate of pay for the regulated employee is the full rate of pay that would be payable to the employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the regulated employee.

Section 18 of the FW Act defines full rate of pay for a national system employee as the rate of pay payable to the employee, including all of the following:

(a) incentive – based payments and bonuses;

(b) loadings;

(c) monetary allowances;

(d) overtime or penalty rates;

(e) any other separately identifiable amounts.

The Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* at [684] provides as follows regarding the obligation of an employer covered by a regulated labour hire arrangement order to pay *at no less than* the protected rate of pay in accordance with s 306E FW Act:

> The obligation to pay no less than the protected rate of pay requires employers to ensure that the total overall amount paid to the regulated employee is no less than the protected rate of pay. In accordance with the definition of protected rate of pay set out in subsections (4)–(9), it does not:
>
> - require a strict line-by-line comparison of entitlements;
> - require the application of entitlements from the host instrument to the regulated employees;
> - require all employees to be paid the same amount, irrespective of their length of service, skills or experience, unless this is also a requirement of the host's covered employment instrument; or

- prevent the regulated employee being paid more than the protected rate of pay, if, for example, their employer's enterprise agreement is more generous than the host's agreement.

The obligation under the order is that the employer pay its employees no less than the protected rate of pay. If the full rate of pay of regulated employees were greater under the enterprise agreement applying to their employer than the full rate of pay or protected rate of pay applicable under the enterprise agreement covering the regulated host, the making of the regulated labour hire arrangement order does not prevent such employees being paid the full rate of pay payable under the enterprise agreement covering their employer.

[FWA.306F.40] Protected rate of pay and casual employees

Section 306F(5) provides that if the regulated employee is a casual employee, and there is no covered employment instrument that applies to the regulated host that provides for work of that kind to be performed by casual employees, the protected rate of pay for the regulated employee is the full rate of pay that would be payable to the employee if the employee were an employee other than a casual employee and the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee and the base rate of pay that would be payable to the employee were increased by 25%.

Section 306F(9) provides that s 306F(5) does not require that a regulated employee referred to in s 306F(5) be taken to be an employee other than a casual employee for the purposes of determining entitlements to kinds of leave, or any other purpose, except determining the protected rate of pay for the regulated employee.

306G Exceptions from requirement to pay protected rate of pay

Training arrangements

(1) Section 306F does not apply to a regulated employee if a training arrangement applies to the employee in respect of the work performed for the regulated host.

Certain short-term arrangements

(2) Section 306F does not apply to a regulated employee if:

(a) no determination for the purposes of paragraph 306J(2)(a) (no exemption period) that applies to the employee in respect of the work performed for the regulated host is in force; and

(b) the employee performs, or is to perform, the work for the regulated host during:

(i) if neither subparagraph (ii) nor (iii) applies—a period of no longer than 3 months; or

(ii) if a determination in force under section 306J specifies a period as the exemption period for the regulated host, the employer and the work—a period of no longer than the period specified; or

(iii) if subparagraph (ii) does not apply and the work commences during a recurring extended exemption period for work of the kind performed by the employee for the regulated host—a period of no longer than the remainder of the extended exemption period, or a period of no longer than 3 months, whichever ends later.

(3) [Exception]

However, if the regulated employee does in fact perform the work for longer than the maximum period applicable under paragraph (2)(b), as a result of a variation to or the making of one or more agreements, section 306F applies to the regulated employee on and after the day the agreements are varied or made.

[S 306G insrt Act 120 of 2023, s 3 and Sch 1 item 73, with effect from 15 Dec 2023]

[FWA.306G.20] Exceptions from requirement to pay protected rate of pay

Section 306G(1) of the FW Act provides that there is no requirement to pay the protected rate of pay where a *training arrangement* applies in respect of a regulated employee. The Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* states at [695] that this provision is intended to apply to all workers employed on an apprentice or trainee contract. The term *training arrangement* is defined in the Dictionary at s 12 of the FW Act as a "combination of work and training that is subject to a training agreement, or a training contract, that takes effect under a law of a State or Territory relating to the training of employees".

As to the exclusion of certain short-term arrangements by ss 306G(2) and (3), the Revised Explanatory Memorandum provides:

> 697. **Certain short-term arrangements:** New subsection 306G(2) would provide for circumstances in which there is no requirement to pay the protected rate of pay to a regulated employee because the regulated employee performs work for the regulated host during a short-term arrangement. Unless the FWC makes a determination extending, removing or shortening this exempt period, the exemption period will generally be where an employee performs work for a period of three months or less. This exception would recognise that businesses may need to respond quickly to short- term increases in demand for services, or to rapid deadlines. The exception would reduce barriers to rapidly increasing a workforce to satisfy surges in demand over a short-term period. Employers may need to engage employees for short-term periods to back fill positions for employees on leave or who are unwell, or to respond to a temporary surge in demand. Employers may have a discrete role or task that needs completion in the short term and may choose to engage employees through a labour hire agreement to meet that requirement. Employers may need to engage labour hire employees while they conduct a formal hiring process. In these circumstances, the provision would facilitate the employers' need to respond rapidly to staffing requirements by providing an exception to the requirements set out in this Part.
>
> 698. The exception would also act to protect employees by limiting the time the exception can operate for. New subsection 306G(3) would provide that the exception to new section 306F in relation to short-term arrangements would only apply until such time as the agreement or agreements under which the regulated employee is engaged to work are varied, or a new agreement or agreements are made that result in the employee continuing to perform work of the kind for the regulated host for longer than the three month period (or another exempt period as specified by a FWC determination under new sections 306J or 306K). The requirement to pay the employee the protected rate of pay would be enlivened from the date their contract is varied or a new contract is entered into, that would require them to work for longer than the exempt period.

306H Obligations of regulated hosts covered by a regulated labour hire arrangement order

Application of this section

(1) This section applies to a regulated host and an employer if the regulated host and employer are covered by a regulated labour hire arrangement order that is in force.

Ability to request information regarding protected rate of pay

(2) If the employer reasonably considers that the employer does not have all of the information needed regarding what is the protected rate of pay for one or more regulated employees of the employer covered by the order, the employer may request, in writing, that the regulated host provide the employer with specified information needed.

(3) [When regulated host must comply with request]
The regulated host must comply with the request:

(a) as soon as reasonably practicable; and

(b) in any event, within such a period as would reasonably enable the employer to comply with its obligations under section 306F (protected rate of pay payable to employees if a regulated labour hire arrangement order is in force) in relation to the employees.

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

Manner of complying with request

(4) The regulated host may comply with the request by:

(a) providing the employer with the information requested; or

(b) providing information, for each relevant pay period of the employees, setting out the protected rate of pay for each employee for the period.

[S 306H insrt Act 120 of 2023, s 3 and Sch 1 item 73, with effect from 15 Dec 2023]

Subdivision C – Short-term arrangements

306J Determination altering exemption period for short-term arrangements

(1) [Application]
This section applies if:

(a) a regulated labour hire arrangement order is in force that covers a regulated host, an employer and one or more regulated employees of the employer performing work for the regulated host; or

(b) a regulated labour hire arrangement order has been made but is not yet in force that covers a regulated host, an employer and one or more regulated employees of the employer performing work for the regulated host; or

(c) an application for a regulated labour hire arrangement order that would cover a regulated host, an employer and one or more regulated employees of the employer performing work for the regulated host has been made to the FWC under section 306E but has not been finally determined.

(2) [What FWC may determine]
The FWC may determine that, in relation to the regulated host, the employer and work to be performed by one or more regulated employees of the employer:

(a) there is no exemption period for the purposes of section 306G; or

(b) a specified period of less than 3 months is the exemption period for the purposes of that section; or

(c) a specified period of more than 3 months is the exemption period for the purposes of that section.

Note: The exemption period is used in determining whether the exception to pay the protected rate of pay in the case of short-term arrangements in subsection 306G(2) applies.

[S 306J insrt Act 120 of 2023, s 3 and Sch 1 item 73, with effect from 15 Dec 2023]

306K Determination of recurring extended exemption period

(1) [Application]

This section applies if:

(a) a regulated labour hire arrangement order is in force that covers a regulated host, one or more employers and one or more regulated employees performing work for the regulated host; or

(b) a regulated labour hire arrangement order has been made but is not yet in force that covers a regulated host, one or more employers and one or more regulated employees performing work for the regulated host; or

(c) an application for a regulated labour hire arrangement order that would cover a regulated host, one or more employers and one or more regulated employees performing work for the regulated host has been made to the FWC under section 306E but has not been finally determined.

(2) [What FWC may determine]

The FWC may determine that a specified period of more than 3 months, starting on a specified day of the year in specified consecutive years, is a ***recurring extended exemption period*** for the regulated host in relation to a specified kind of work to which the regulated labour hire arrangement order relates.

[S 306K insrt Act 120 of 2023, s 3 and Sch 1 item 73, with effect from 15 Dec 2023]

306L Making and effect of determinations under this Subdivision

Who may apply for determination

(1) The FWC may make a determination under this Subdivision only on application by:

(a) the regulated host, an employer covered by the regulated labour hire arrangement order or a regulated employee covered by the order who is performing or is to perform work for the regulated host; or

(b) an organisation entitled to represent the industrial interests of any of those persons.

Time for making determination

(2) The FWC must decide whether or not to make the determination as quickly as possible after the application is made.

Requirements for making determination

(3) Before deciding whether or not to make the determination, the FWC must seek the views of any person or organisation that, apart from the applicant, could have applied for the determination under subsection (1).

(4) [Determining whether there are exceptional circumstances]

The FWC may make the determination only if satisfied that there are exceptional circumstances that justify making it, having regard to:

(a) whether the purpose of the proposed exemption period or recurring extended exemption period relates to satisfying a seasonal or short-term need for workers; and
(b) the industry in which the work is performed or is to be performed; and
(c) the circumstances of:
(i) the regulated host; and
(ii) any relevant employers covered by the regulated labour hire arrangement order; and
(d) the views (if any) of any persons or organisations mentioned in subsection (1); and
(e) for a determination made for the purposes of paragraph 306J(2)(c)—the principle that the longer the period to be specified in the determination, the greater the justification required; and
(f) for a determination that a period is a recurring extended exemption period for a regulated host for a kind of work—the principle that the longer the period to be specified in the determination, and the greater the number of recurrences of that period to be specified, the greater the justification required; and
(g) any other matter the FWC considers relevant.

When determination comes into force

(5) The determination comes into force on the later of the day the regulated labour hire arrangement order comes into force, and the following:
(a) for a determination under section 306J that there is no exemption period for the purposes of section 306G—the day it is made;
(b) for a determination under section 306J that there is an exemption period of more than, or less than, 3 months for the purposes of section 306G—the day it is made or a later day specified in the determination;
(c) for a determination under section 306K (which deals with recurring extended exemption periods)—the day it is made or a later day specified in the determination.

[S 306L insrt Act 120 of 2023, s 3 and Sch 1 item 73, with effect from 15 Dec 2023]

Subdivision D – Alternative protected rate of pay orders

306M Making an alternative protected rate of pay order

Application of this section

(1) This section applies if:
(a) a regulated labour hire arrangement order is in force that covers a regulated host, an employer and a regulated employee of the employer performing work for the regulated host; or
(b) a regulated labour hire arrangement order has been made but is not yet in force that covers a regulated host, an employer and a regulated employee of the employer performing work for the regulated host; or
(c) an application for a regulated labour hire arrangement order that would cover a regulated host, an employer and a regulated employee of the employer performing work for the regulated host has been made to the FWC under section 306E but has not been finally determined.

Alternative protected rate of pay order

(2) The FWC may make an order (an ***alternative protected rate of pay order***) specifying:

(a) how the rate of pay at which the employer must pay the regulated employee in connection with the work is to be worked out; and

(b) that the employer must pay the rate of pay worked out in that way to the regulated employee in connection with the work.

Rate of pay

(3) The rate of pay for the purposes of paragraph (2)(a) must be the protected rate of pay for the regulated employee that would apply if the references in section 306F to the host employment instrument covered by the regulated labour hire arrangement order were instead references to a specified covered employment instrument that:

(a) applies to a related body corporate of the regulated host and would apply to a person employed by the related body corporate to perform work of that kind; or

(b) applies to the regulated host and would apply to a person employed by the regulated host to perform work of that kind in circumstances that do not apply in relation to the employee.

Who may apply

(4) The FWC may make an alternative protected rate of pay order only on application by the employee, the employer, the regulated host or an organisation entitled to represent the industrial interests of any of those persons.

Time for making

(5) The FWC must decide whether or not to make the order as quickly as possible after the application is made.

Criteria for making etc.

(6) The FWC must not make the order unless satisfied that:

(a) it would be unreasonable for the requirement in section 306F, that the employer pay the regulated employee at no less than the protected rate of pay, to apply in connection with that work (including, for example, because the rate would be insufficient or would be excessive); and

(b) there is a covered employment instrument of the kind referred to in paragraph (3)(a) or (b).

(7) [Views FWC must seek]

Before deciding whether to make the order, the FWC must seek the views of the following:

(a) the employer;

(b) the regulated host;

(c) the employer to which a covered employment instrument to be specified in the order for the purposes of subsection (3) applies (if not the regulated host);

(d) the employee;

(e) employees to whom the covered employment instrument to be specified in the order for the purposes of subsection (3) applies;

(f) organisations entitled to represent the industrial interests of any of the persons referred to in paragraphs (a) to (e).

(8) [Matters FWC must have regard to]

In deciding whether to make the order, the FWC must have regard to:

(a) whether the host employment instrument covered by the regulated labour hire arrangement order applies only to a particular class or group of employees; and

(b) whether, in practice, the host employment instrument has ever applied to an employee at a classification, job level or grade that would be applicable to the regulated employee; and

(c) the views (if any) of any persons or organisations mentioned in subsection (7);

(d) the rate of pay that would be payable to the regulated employee in connection with the work if the order were made; and

(e) any other matter the FWC considers relevant.

Exception for short-term arrangements

(9) In making an order under this section, the FWC must ensure that, if an exception in section 306G would apply to the requirement to pay the regulated employee at no less than the protected rate of pay, the exception also applies in relation to the requirement to pay the employee at the rate worked out under the alternative protected rate of pay order.

[S 306M insrt Act 120 of 2023, s 3 and Sch 1 item 73, with effect from 15 Dec 2023]

[FWA.306M.20] Making an alternative protected rate of pay order

Section 306M provides for the making of an alternative protected rate of pay order where an order is in force or has been made but is not yet in force or where an application for an order has been made but not yet determined.

The Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* provides:

718. **Application of this section:** Subdivision D would set out the process for making alternative protected rate of pay orders and the effect of such orders. This Subdivision is intended to apply where parties consider that the host employment instrument that applies (or would apply) under a regulated labour hire arrangement order should not apply to certain regulated employees, and that an alternative covered employment instrument should apply instead. This may be the case where the alternative covered employment instrument better reflects the type of work or classification of work to be performed under the regulated labour hire arrangement. Such an application could also arise where the rate of pay specified under the alternative covered employment instrument more fairly compensates for work of the type to be performed under the regulated labour hire arrangement.

719. **Alternative protected rate of pay order:** New section 306M would set out the process for making an alternative protected rate of pay order. An application for an order under this section could be made where a regulated labour hire arrangement order had been made (whether or not it is yet in force) or where an application for such an order had been made but not finally determined.

720. An alternative rate of pay order would specify how the alternative protected rate of pay would be calculated and that the employer must pay the rate of pay worked out in that way to the regulated employee (new subsection 306M(2)).

721. **Rate of pay:** New subsection 306M(3) would provide that the method for determining the alternative protected rate of pay must be set by reference to the protected rate of pay that would apply if an alternative covered employment

instrument applied to the employee. The alternative covered employment instrument specified would be required to be either:

- an instrument that applies to a related body corporate of the regulated host and would apply to a person employed by the related body corporate to perform work of that kind; or
- an instrument that applies to the regulated host and would apply to a person employed by the regulated host to perform work of that kind, in circumstances that do not apply in relation to the employee.

722. The latter condition is intended to apply in situations where the regulated host has multiple enterprise agreements covering the same kinds of work, that apply to different employees in different circumstances (for example, in different locations, or by reference to when they commenced employment).

723. The intention of the provision is to allow the FWC to make an order specifying an alternative covered employment instrument only in circumstances where that instrument would be more appropriately applied to a regulated employee's employment as part of a labour hire arrangement, and where the alternative instrument applies to one of the parties participating in or arranging for the labour hire arrangement. An instrument that is unrelated to the employment obligations of the regulated host or its related bodies corporate will not apply.

By s 306M(4), the FWC may make an alternative protected rate of pay order only on application by the employee, the employer, the regulated host or an organisation entitled to represent the industrial interests of any of those persons.

By s 306M(6), the FWC must not make the order unless satisfied that:

(a) it would be unreasonable for the requirement in s 306F, that the employer pay the regulated employee at no less than the protected rate of pay, to apply in connection with that work (including, for example, because the rate would be insufficient or would be excessive); and

(b) there is a covered employment instrument of the kind referred to in paragraph (3)(a) or (b).

Section 306(7) sets out the parties whose views the FWC must seek before deciding whether to make the order, whilst s 306(8) sets out the matters the FWC must have regard to before deciding whether to make the order.

The Revised Explanatory Memorandum relevantly provides:

727. New subsection 306M(7) would require that, before making the order, the FWC seek submissions from relevant parties listed in the subsection, including the employer and employees to whom the alternative covered employment instrument to be specified in the order applies for the purposes of subsection (3) (if that employer is not the regulated host).

728. New subsection 306M(8) would require that the FWC have regard to whether the host employment instrument covered by the regulated labour hire arrangement order applies only to a particular class of employees (including whether it applies to all of the relevant regulated employees to be engaged under a regulated labour hire arrangement) in deciding whether to make the order. It must also have regard to whether the host employment instrument has ever applied to an employee at a classification that would be applicable to the relevant regulated employee or group of regulated employees. Where the host employment instrument has previously applied to employees at the same classification as the regulated employee, it may weigh against the making of an alternative protected rate of pay order. Where the host employment instrument would apply to a class of employees that would not generally include the regulated employee, it may support the view that an alternative covered employment instrument might be more appropriately applied to the regulated employee.

306N Effect of alternative protected rate of pay order

When alternative protected rate of pay order comes into force

(1) An alternative protected rate of pay order comes into force:

(a) if the order is made before the regulated labour hire arrangement order to which the order relates comes into force:

(i) on the day the regulated labour hire arrangement order comes into force; or

(ii) on a later day specified in the alternative protected rate of pay order; or

(b) otherwise—on the day the alternative protected rate of pay order is made, or on a later day specified in the order.

Effect of alternative protected rate of pay order

(2) If:

(a) a regulated labour hire arrangement order is in force that covers a regulated host, an employer and work performed by a regulated employee of the employer; and

(b) an alternative protected rate of pay order is made in relation to the regulated labour hire arrangement order;

then:

(c) the alternative protected rate of pay order applies in relation to so much of the work as is performed during the period that the alternative protected rate of pay order is in force; and

(d) during that period, the alternative protected rate of pay order has effect despite section 306F (protected rate of pay payable to employees if a regulated labour hire arrangement order is in force), and despite any provision of the following that provides for a lower rate of pay than that worked out in accordance with the order:

(i) a fair work instrument that applies to the regulated employee;

(ii) a covered employment instrument (other than a fair work instrument) that applies to the regulated employee;

(iii) the regulated employee's contract of employment.

Person must not contravene an alternative protected rate of pay order

(3) A person must not contravene a term of an alternative protected rate of pay order.

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

[S 306N insrt Act 120 of 2023, s 3 and Sch 1 item 73, with effect from 15 Dec 2023]

[FWA.306N.20] Effect of alternative protected rate of pay order

New subsection 306N(2) provides that where a regulated labour hire arrangement order is already in force at the time the alternative protected rate of pay order is made, then the alternative protected rate of pay order applies only to work performed once that order comes into force.

The Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* provides at [733] that employers will not be required to backpay regulated employees where an alternative rate of pay order comes into force after a regulated labour hire arrangement order is already in force. Similarly, employers will not be entitled to

recover money from employees for wages paid in respect of work undertaken under a regulated labour hir arrangement order that is already in force, when an alternative protected rate of pay order is made that decreases the protected rate of pay.

Subdivision E – Termination payments

306NA Determining amounts of payments relating to termination of employment

Application of this section

(1) This section applies if:

(a) a regulated employee's employment is or is to be terminated; and

(b) the employee is or has been covered by a regulated labour hire arrangement order.

Determining amounts of payments relating to termination of employment

(2) Subject to subsection (5), if an amount that the employee's employer is required to pay to the employee (or to a person on the employee's behalf) in relation to the termination of the employment is to be determined wholly or partly on the basis of a rate of pay in relation to the employee, the rate of pay for the purposes of determining the amount is:

(a) if the employee is covered by subsection (3) in relation to the amount—the applicable rate of pay that results from the operation of this Part; or

(b) in any other case—the applicable rate of pay to which the employee is entitled apart from the operation of this Part.

(3) [When this subsection covers employee in relation to amount]

This subsection covers the employee in relation to the amount if:

(a) immediately before the termination of the employment occurs or is to occur, the employee is or will be covered by a regulated labour hire arrangement order in force in relation to work performed by the employee for a regulated host; and

(b) the termination of the employment occurs or is to occur during a period in which the employee is performing work for the regulated host, including a period when the employee is taking paid or unpaid leave, or is absent, in connection with that work and the leave or absence is authorised:

(i) by the employee's employer; or

(ii) by or under a term or condition of the employee's employment; or

(iii) by or under a law of the Commonwealth, a State or a Territory, or an instrument in force under such a law; and

(c) the rate of pay mentioned in paragraph (2)(a) is higher than the rate mentioned in paragraph (2)(b); and

(d) unless the amount is a payment in lieu of notice of termination—the employee has not performed work for any other regulated host in relation to the employee's employment with the employer.

(4) [If work for host relates to joint venture or common enterprise]

If the performance of the work for the regulated host relates to a joint venture or common enterprise engaged in by the regulated host and one or more other persons, then for the purposes of paragraph (3)(d), disregard any work that is taken to be performed for those other persons because of the operation of paragraph 306D(2)(c).

Excluded subject matters

(5) If the employer is a national system employer only because of section 30D or 30N, nothing in this Part, including the determination of any rate of pay under or in accordance with this Part, affects any amount:

(a) that the employer is required to pay to the employee (or to a person on the employee's behalf) in relation to the termination of the employment; and

(b) which relates to an excluded subject matter within the meaning of subsection 30A(1) or 30K(1).

Interaction with fair work instruments etc.

(6) This section applies despite:

(a) a fair work instrument that applies to the employee; or

(b) a covered employment instrument (other than a fair work instrument) that applies to the employee; or

(c) the employee's contract of employment.

[S 306NA insrt Act 120 of 2023, s 3 and Sch 1 item 73, with effect from 15 Dec 2023]

[The next text page is 2-73051]

s 424(1)(c). Section 424(1) required that the Deputy President consider whether that conduct would be protected industrial action. There is nothing in the decision which suggests the Deputy President turned his mind to that question. Accordingly, the Deputy President failed to address the statutory question posed by s 424(1) of the FW Act.

[64] Another way in which the error may be characterised is that the Deputy President took into account an irrelevant matter. The only protected industrial action the Deputy President considered was threatened, impending or probable was the action set out in the notices issued by the CEPU on 9 August 2024. Those notified forms of industrial action were expressly subject to the Extended Safety Commitment set out in the notices. In those circumstances, the possibility of non-compliance with the Extended Safety Commitment was irrelevant to the question posed by s 424(1), namely, whether protected industrial action was threatening or would threaten to have consequences of the type set out in s 424(1)(c) or (d). To the extent that such a possibility was considered, the Deputy President's state of satisfaction was formed having regard to an irrelevant matter.

See also the decision of the Court in *Sydney Trains v Australian Rail, Tram and Bus Industry Union* [2024] FCA 1479 refusing Sydney Trains' application for a declaration that the industrial action was not protected industrial action within the meaning of ss 408 and 415. In *Sydney Trains v Australian Rail, Tram and Bus Industry Union* [2024] FCA 1411, the Court had earlier granted an interlocutory injunction restraining the Unions from continuing industrial action relating to the Sydney rail network. The RTBU and Sydney Trains were not in agreement as to whether the various rail agencies involved in bargaining were related employers within the meaning of s 172(5A), and so were not in agreement as to whether the proposed enterprise agreement should be a single-enterprise agreement or a multi-enterprise agreement. The NERR described the proposed agreement as a single enterprise agreement and following protected action ballot orders, notified protected industrial action in support of the proposed agreement. Subsequently, in *Australian Rail, Tram and Bus Industry Union v Sydney Trains* [2024] FWC 3419, the FWC issued a single interest employer authorisation, which by force of s 172(5), required Sydney Trains not to bargain for any enterprise agreement other than a single interest employer agreement, being a multi-enterprise agreement. In the Court, Sydney Trains argued that the effect of the making of the single interest employer authorisation was that the proposed industrial action was no longer protected because it was not "authorised by a protected action ballot" within the meaning of s 409(2). The Court held (at [81] to [98]) that the statutory expression "proposed enterprise agreement" is a generic expression, which does not require a level of specificity that includes a fixed or immutable type of enterprise agreement. The making of the single interest employer authorisation did not affect the character of the "proposed enterprise agreement" and so the industrial action was protected and could continue. Hatcher VP of the Commission subsequently issued an interim order under s 424 suspending the industrial action by the RTBU and in *Re Sydney Trains* [2025] FWCFB 38 the Full Bench suspended industrial action by the Rail Unions until 1 July 2025. In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Sydney Trains* [2025] FCAFC 39, the Full Court subsequently dismissed an application for judicial review of the decision of the Full Bench.

[FWA.424.120] Significant damage to the Australian economy

See the decision *Hobart Clinic Association Ltd (t/as Hobart Clinic) v Health Services Union* [2024] FWC 146. In that case, the Commission suspended industrial action at a mental health facility which included the employee's taken action speaking to patients about the industrial action and providing them with union materials. The Commission held (at [84]) that there was insufficient evidence that the action would threaten to "endanger the life, the personal safety or health, or the welfare, of the population or of part of it", namely that of the patients of the clinic.

See also *Re Svitzer Australia Pty Limited* [2022] FWCFB 213. In that case, Svitzer gave notice to the bargaining representatives pursuant to s 414(5) of the *Fair Work Act 2009* (Cth) (FW Act) of employer response action in the form of an indefinite lockout of all harbour towage

employees covered by the 2016 Agreement commencing at midday on 18 November 2022. A media release issued by Svitzer stated "When the lockout becomes effective, no shipping vessels will be towed in or out of 17 Australian ports otherwise serviced by Svitzer". Following the notification and press release, on 15 November 2022 a member of the Commission (Riordan C) engaged in a conciliation process with Svitzer and the three unions in an endeavour to avoid the lockout proceeding. This was unsuccessful. Following the completion of this conciliation process, the Commission Svitzer's announcement caused the Commission to consider making an order under s 424 of the FW Act) on its own initiative to suspend or terminate protected industrial action by Svitzer. Following a formal hearing in which the Commonwealth Minister for Workplace Relations intervened, the Commission suspended protected industrial action found endangerment to welfare requirement in s 424(1)(c) had been satisfied because it significantly reduced emergency towage response capacity and would disrupt the import of pharmaceutical goods. The Commission also found that the significant damage to the Australian economy requirement in s 424(1)(d) had been satisfied finding:

> [37] Approximately $1.1 billion's worth of goods pass through these 17 ports each day. Australia's ports are critical economic infrastructure, facilitating exports to global markets and imports that are key components of production processes and bringing goods to our shores that will be on-sold through retail stores. Given the limited availability of alternative freight options, the cessation of towage operations would cause significant economic harm to many sectors of the Australian economy. The threatened lockout would have implications for other parts of the supply chain. An ongoing lockout by Svitzer is likely to cause significant harm to many sectors of the Australian economy, especially those that are reliant on imports as business inputs, are likely to exacerbate supply chain pressures that are already significant, and are likely to put considerable upward pressure on business costs. Export sectors affected include coal and grain, and all containerised trade will be disrupted. An economic impact assessment conducted in February 2022 commissioned by NSW Ports estimates that disruptions to port operations at Port Botany and Port Kembla in NSW alone could cost the economy $14 million for a 24-hour stoppage and $193 million for a two-week temporary closure of the two ports. There are also more specific effects: for example, the only source of liquid fuels (petrol, diesel and jet fuels) in Western Australia is via the Kwinana port and refinery, and this will cease as a result of the lockout. At the time of the hearing, vessels were already being turned away from or leaving Australian ports in anticipation of the lockout.

The Commission suspended protected industrial action for a period of six months finding:

> [43] We also note the submission advanced on behalf of Svitzer (without any admission) that it is entitled "just as Qantas did" to "bring bargaining to an end using the legal tools available to it to facilitate the end of the bargaining". While it has been recognised that employer response action may be used in an opportunistic way to attract the operation of s 424(1) and thereby to bring industrial action to an end, we do not accept the proposition that s 424(1) is to be construed and applied on the basis that it constitutes a legitimate avenue for an employer, or any bargaining representative, to bring about the end of a bargaining process. As earlier stated, s 424(1) is to be approached on the basis that its purpose is to protect the population from endangerment and the economy from significant damage that is threatened to be caused by protected industrial action. That Svitzer, as we infer, has threatened an indefinite lockout of its employees, with full knowledge of the damaging consequences for the community which would ensue, in the expectation that this might bring about an end to bargaining via s 424(1) is a matter which, we consider, weighs against making a termination order that negates the bargaining rights of other parties under the FW Act.

> [44] We reject the position advanced by the unions that we should make a suspension order that endures only until the New Year — that is, a period of only about six weeks. That period is not sufficient to engender certainty and confidence as to the orderly functioning of Australia's ports, which must necessarily be a fundamental consideration in the exercise of our discretion having regard to the protective purpose of s 424(1). On a fine balance, we consider that a termination order is also not appropriate since, for the reasons earlier stated, we do not consider the parties should be deprived of their collective bargaining rights in circumstances where there is still some basis to think that the parties can either reach an agreement or engage in consent arbitration of outstanding matters pursuant to s 240.
>
> [45] The appropriate course in all the circumstances is to suspend Svitzer's protected industrial action for a period of six months. This will, in our view, provide sufficient certainty as to the operation of Australian ports and will also allow the parties sufficient time to attempt to reach an agreement or engage in consent arbitration without the distraction of industrial action. In the event that no outcome is achieved by the end of the six-month period, the Commission will again be vigilant to ensure that any repetition of Svitzer's regrettable threat of economy-damaging protected industrial action is not permitted to come to fruition.

In *Minister for Tertiary Education Skills, Jobs and Workplace Relations* (2011) 214 IR 367; [2011] FWAFB 7444 the Minister applied for and was granted an order under s 424(1) in relation to protected industrial action being engaged in and/or threatened, impending or probable by Qantas, QCatering, ALAEA, TWU and AIPA. In making an order to terminate the protected industrial action in relation to the relevant industrial action, FWA took into account evidence in relation into the effect the action Qantas proposed to take would have on the tourism and transport industries and indirectly to industry generally because of the effect on consumers of air passenger and cargo services.

The decision was upheld by a Full Court of the Federal Court in *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200; 127 ALD 453; [2012] FCAFC 65.

Qantas had been negotiating for new enterprise agreements with each of three unions, the Transport Workers' Union, the Australian and International Pilots' Association and the Australian License Aircraft Engineers Association. Members of the three unions had taken protected industrial action between April 2011 and October 2011. In the case of AIPA members, long haul pilots had taken protected industrial action in the form of wearing ties different in colour from the official Qantas uniform and making on board announcements different to those mandated by Qantas.

On 29 October 2011, Qantas gave notice under s 414(5) to all three unions that at 8 pm on 31 October 2011 Qantas would lock out its employees who were members of any of the three unions. By the fact and terms of the Notice, Qantas purported to lock its employees out as employer response action in accordance with s 411, thereby making the lockout protected industrial action. Qantas simultaneously announced that it would ground its fleet completely, but this action was separate to the proposed lockout.

Also on 29 October 2011, following the Qantas notice and announcement, the Commonwealth Minister for Tertiary Education, Skills, Jobs and Workplace Relations applied to FWA under s 424 for orders suspending or terminating protected industrial action being engaged in by all of Qantas, TWU, AIPA and ALAEU, claiming in accordance with s 424(1)(d) that the protected industrial action was threatening to cause significant damage to the Australian economy or an important part of it.

At 2.10 am on 31 October 2011 the Full Bench of FWA issued an order under s 424 terminating all protected industrial action in relation to any or all of the three proposed agreements being negotiated between Qantas and each of the three unions. Importantly, the Full Bench observed as follows in its decision (see *Minister for Tertiary Education Skills, Jobs and Workplace Relations* (2011) 214 IR 367; [2011] FWAFB 7444 at [10]):

> [10] It is unlikely that the protected industrial action taken by the three unions, even taken together, is threatening to cause significant damage to the tourism and air transport industries. The response industrial action of which Qantas has given notice, if taken, threatens to cause significant damage to the tourism and air transport industries and indirectly to industry generally because of the effect on consumers of air passenger and cargo services. The Qantas evidence was that the cost to it alone is $20 million per day.

On application for judicial review in the Full Federal Court, AIPA argued that its members' protected industrial action was not so significant as to give rise to a finding that its members protected industrial action was threatening or would threaten to cause significant damage to the Australian economy. It also argued that FWA did not consider whether Qantas' action in locking out its employees was in truth employer response action in response to protected industrial action by AIPA's members and therefore protected industrial action capable of being terminated in accordance with s 424, remembering that if this were not the case, and Qantas and the AIPA protected industrial action was not terminated, AIPA would be free to continue to seek an agreement with Qantas, continue to take protected industrial action and perhaps most importantly, avoid the consequence of termination of protected industrial action under s 424 of a compulsory workplace determination under s 266(1) (see the subsequent decision of the FWC making a workplace determination in *Australian and International Pilots Association v Qantas Airways Ltd* (2013) 230 IR 238; [2013] FWCFB 317 at s 266).

As to the argument that Qantas' lockout was not employer response action and therefore not protected action, in separate judgments, all members of the court were satisfied that the FWA was not in error when it found on the evidence that the Qantas lockout was in response to employee claim action by all three unions including AIPA.

Similarly, all members of the court found that FWA was in error by making an order terminating the industrial action organised or engaged in by AIPA as it could not be said to have been threatening significant damage to the Australian economy (see at [67]-[70] per Lander J; [129] per Buchanan J; and [179]-[180] per Perram J). Indeed, at [10] of its decision the Full Bench of FWA acknowledged that "[i]t is unlikely that the protected industrial action taken by the three unions, even taken together, is threatening to cause significant damage to the tourism and air transport industries". In this regard, Perram J observed (at [179]):

> The respondents then submitted that s 424(1), once enlivened, permitted an order to be made stopping not only the protected industrial action which was harming the national economy (or important parts of it) but also any other protected industrial action to which it was a response. I reject this submission too. It is clear that the "protected industrial action" which is referred to in the first part of s 424(1) is the same as that which is referred to in the second part. The only protected industrial action which Fair Work Australia may order be stopped is that which meets the requirements of subsections (c) or (d).

However, given that FWA did not err in finding that the Qantas' lockout was employer response action and therefore protected industrial action which was "threaten(ing) to cause significant damage to the tourism and air transport industries and indirectly to industry generally because of the effect on consumers of air passenger and cargo services", the Qantas protected industrial action was rightly terminated by FWA, one consequence of which was that one of the common requirements for protected industrial action under s 413(7)(a) of the FW Act, namely that an order under s 424 has not issued, could not be met and so all bargaining representatives for the three proposed agreements (and their members), including AIPA, could no longer take protected industrial action and the "legal position would have been the same" (see Buchanan J at [130]).

In the event, the Full Court dismissed the application for judicial review and consistent with the observations of Perram J (at [152]) "(i)f such an order is made then the effect of s 266 is to require Fair Work Australia to arbitrate the competing industrial claims of the parties following the cessation of the protected industrial action", AIPA and Qantas were subject to a workplace

determination under s 266 by the FWC in *Australian and International Pilots Association v Qantas Airways Ltd* (2013) 230 IR 238; [2013] FWCFB 317.

Note this end result for AIPA and Qantas and the following apposite observations of Lander J in the Full Federal Court:

> [94] An employer who takes protected industrial action and locks out its employees can, by submitting to an order under s 424 on an application brought by the Minister, or the employees' bargaining representative, or even the employer itself, obtain the result that not only is its protected industrial action terminated, but also the protected industrial action of the employees, because the employees industrial action loses its protected status. Once the employees have lost the protection for their industrial action, if the employees continue with the industrial action, the employees are liable to an order under s 418 stopping the unprotected industrial action from continuing.

As to the scope of the order, see also the decision of the Full Bench in *National Tertiary Education Industry Union v University of South Australia* [2010] FWAFB 1014.

In that matter, the appellant argued that an order should be restricted to the particular protected industrial action complained about. FWA rejected this narrow interpretation in favour of a more liberal approach. The Full Bench stated:

> [11] The suspension of protected industrial action is to be construed as a suspension of the protection or immunity which attaches to the industrial action under the Act provided it is authorised in a protected action ballot etc (see s 409). A reference in s 424 to the making of an order "suspending or terminating protected industrial action for a proposed enterprise agreement" would therefore seem to apply to protected industrial action which was authorised by the ballot, and not to the particular industrial action which is being taken as part of what might be a series of actions authorised by the ballot and which is having the requisite harmful effect.

More recently see the decision of Easton DP in *Svitzer Australia Pty Ltd v The Australian Maritime Officers' Union* [2022] FWC 493, and the cases regarding s 424 and s 426 referred to therein, where his Honour found likely damages of $100 million to be significant. The Deputy President made the order for the period of notified 48-hour stoppages of work only. Compare the decisions of Deputy President Cross in *State of NSW, NSW Trains and Sydney Trains v Australian Rail, Tram and Bus Industry Union and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2022] FWC 1724 and *The State of NSW, Sydney Trains and NSW Trains v Australian Rail, Tram and Bus Industry Union and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2022] FWC 1746 where his Honour refused to make orders in circumstances in which the respondent unions had withdrawn some notified bans and given undertakings to give five and seven days' notice of protected industrial action suspended by them during the course of the proceedings.

See also the decision of Hamberger SDP in *Sydney Trains v Minister for Industrial Relations* [2018] FWC 632. In that case, Hamberger SDP considered an application under s 424 in relation to protected industrial action notified by two unions. The Rail Tram and Bus Union had notified an unlimited number of overtime bans by train drivers on Sydney trains. In making the order, Hamberger SDP reasoned as follows:

> [43] While some of the evidence was inevitably somewhat speculative, much of it was quite specific. The evidence clearly established that the proposed 24-hour stoppage would almost certainly have meant no train services on Monday 29 January 2018. Moreover, the overtime ban would have greatly reduced the level of train services available from 25 January 2018, for an indefinite period.
>
> [44] The evidence also established that the 24-hour stoppage and the overtime bans – taken together – or indeed separately – threatened to endanger the welfare of a part of the population, including the large number of people in Sydney and surrounding areas who rely on the services provided by Sydney Trains and NSW Trains to get to work, attend school or

otherwise go about their business, as well as all those who would have suffered from the increased congestion on the roads that would have been an inevitable consequence of the industrial action.

[45] The evidence was also sufficient to establish that the industrial action would have threatened to cause significant damage to the economy of Sydney – the largest and most economically important city in Australia.

[46] This finding was supported by the NSW Treasury modelling that estimated that the cost to the NSW economy would have been in the order of $90 million. I note that this figure assumed no impact at all on the output of public sector workers, nor on the output of private sector workers who do not usually travel to work by train, even though many of them would have been affected by increased congestion on the roads. It also assumed that the output of the majority of private sector workers who do normally travel by train would have been unaffected. Moreover, the modelling only estimated the cost of the threatened overtime bans until 31 January 2018, even though they were of an indefinite nature. It is quite likely, in my opinion, that the cost to the economy, if the industrial action had gone ahead, would have been significantly more than $90 million modelled by Treasury. Such a loss of output would represent – in absolute terms – significant economic damage.

[47] In the light of these findings, I was required by s. 424 of the FW Act to make an order suspending or terminating the protected industrial action.

[FWA.424.140] Meaning of "welfare" and "endanger"

The terms "welfare" and "endanger" are not defined in the FW Act and are to be given their ordinary meaning: see *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* (2009) 187 IR 119, 3 August 2009, Kaufman SDP at [32].

[FWA.424.160] Meaning of "would threaten to endanger"

In *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* (2009) 187 IR 119; [2009] FWA 44 after referring to the decision of *F v National Crime Authority* (1998) 83 FCR 99; 100 A Crim R 348; 154 ALR 471 in relation to how the term "would threaten to endanger" should be interpreted, Kaufman SDP at [28] and [29], concluded that applications of this nature should be approached on the basis of probabilities rather than possibilities and that it must be satisfied that the protected action would threaten to endanger, not would endanger.

Similarly, see the decision of Bissett C in *G45 Custodial Services Pty Ltd v Health Services Unions of Australia (Vic No 2 Branch)* [2011] FWA 5902 (1 September 2011) at [17]: "That is, in determining if the protected action would threaten to endanger life etc it must be on the basis of probability of the action doing so, not the mere possibility".

More recently, see the decision of the FWC Full Bench in *Esso Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU); The Australian Workers' Union and Communications, Electrical, Electronic, Energy, Information, Postal. Plumbing and Allied Services Union of Australia* (2018) 281 IR 147; [2018] FWCFB 4120. That case was decided in the context of related litigation between the parties concerning the common requirements to take protected industrial action that was ultimately resolved in the High Court: see [FWA.413.60].

Prior to special leave being granted, the Unions served on Esso further notices of intention to take protected industrial action. In December 2016 prior to the decision of the High Court, Watson VP issued an order under s 424 terminating the notified protected industrial action. Following the decision of the High Court invalidating earlier protected industrial action on the basis that the common requirement in s 413(5) had not been met, Esso applied to the Commission under s 603 of the Act for an order revoking Watson VPs order of December 2016. This application was made on the basis that the power to make an order under s 424 is predicated on the existence of protected industrial action; given the High Court's decision, the notified action could not be protected.

The Unions and Victorian Minister for Industrial Relations opposed the revocation application having found that Watson VP proceeded on the basis, prior to the decision of the High Court, that the notified industrial action was protected. Whilst he was ultimately wrong in that conclusion following the decision of the High Court, the error was made within jurisdiction because he made the order in light of the decision of the Full Court of the Federal Court which held that the common requirements in s 413(5) had been met. On that basis, the Full Bench held that it could only revoke the order under s 603 on discretionary grounds and not on the ground that Watson VP had fallen into jurisdictional error. Ultimately the Full Bench exercised its discretion and revoked Watson VP's order:

> [74] We are mindful that our discretion must be exercised reasonably and in the context of the statute as a whole. An order under s 424 terminating protected industrial action may only be made if the Commission is satisfied the industrial action has or threatens to have the particularised effect on life, health, safety welfare or the economy. Section 266 imposes a regime for the resolution of the dispute that does not readily contemplate delay. The Commission is required to make a workplace determination as quickly as possible. But that said, we cannot countenance an outcome which has the result that a workplace determination should be made on the basis of an order which, though not affected by jurisdictional error, nonetheless terminated industrial action in the AWU Notified Action, which according to the decision in *Esso HCA* was plainly not protected industrial action at the time the Order was made. Whether or not a workplace determination, made consequent on the Order, is susceptible to subsequent challenge is in our view beside the point. We are in a position to determine whether the foundation upon which a workplace determination would be built should be removed. We consider that the discretionary matters which we discuss above, which point in favour of the exercise of our discretion, outweigh those going the other way. For these reasons we therefore propose to revoke the Order pursuant to s 603(1) of the Act.

Subsequently, in *Minister for Industrial Relations (Vic) v Esso Australia Pty Ltd* [2019] FCAFC 26, a Full Court of the Federal Court dismissed an application for judicial review of the decision of the Full Bench.

See also the decision of Harrison SDP in *Re Ausgrid* [2015] FWC 1600 in which the FWC suspended protected industrial action notified by two unions against Ausgrid and Endeavour Energy, but not taken at the time of the application for the s 424 order esp at [30] to [37].

[FWA.424.180] Effect of termination

The termination of protected industrial action under s 424 effectively removes any protection from immunity conferred by s 415: see *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* (2009) 187 IR 119, 3 August 2009, Kaufman SDP at [48].

[FWA.424.200] Exceptional circumstances?

It has been held that the power to suspend or terminate protected industrial action is only intended to be used in exceptional circumstances and where the action is causing significant harm: see *National Tertiary Education Industry Union v University of South Australia* (2010) 194 IR 30; [2010] FWAFB 1014, 14 April 2010, Boulton SDP; Ives DP, Gay C at [8].

See also the discussion of "exceptional circumstances" and "significant harm" in the decision of the Full Bench in *National Tertiary Education Industry Union v Monash University* [2013] FWCFB 5982 especially at [18]-[21]:

> [20] In *NTEU v University of South Australia* we do not consider that the Full Bench, by its use of the expressions "exceptional circumstances" and "significant harm" in the passages quoted in the Decision, was intending to establish criteria or tests in substitution for or in addition to those found in the language of s 424(1) itself. Rather the Full Bench used those expressions only to characterise the legislative intention that could be gleaned from the Explanatory Memorandum to the *Fair Work Bill 2008*. It is no doubt the case that the circumstances which would satisfy the criterion in s 424(1)(c) are likely to be exceptional in the sense of being atypical and out of the ordinary, and that a threatened endangerment to

life, personal safety, health or welfare under the subsection may well involve the affliction of significant harm. However, that does not mean that in determining any particular case, expressions of that nature not to be found in the actual language of the statute should be determinative of the outcome, and we do not understand the *NTEU v University of South Australia* to stand for any contrary proposition.

More recently, in *Commonwealth of Australia (represented by the Department of Immigration and Border Protection) v Community and Public Sector Union* [2016] FWC 2090, Wilson C made an interim order suspending industrial action by the union respondent in circumstances where the Commonwealth adduced evidence of the possibility of missed security or other alerts around a "date of concern" being heightened by participation in the protected industrial action concerned of members employed by the Department of Immigration and Border Protection at major airports across the nation.

See also the decision of Wilson C in *Commonwealth of Australia (represented by the Department of Immigration and Border Protection) v Community and Public Sector Union* [2016] FWC 2526 and subsequently, in *Commonwealth of Australia (represented by the Department of Immigration and Border Protection) v Community and Public Sector Union* [2016] FWC 7184 in which Wilson C issued a further interim order terminating industrial action and ultimately a final order again terminating industrial action for a term until the end of the calendar year. While the Community and Public Sector Union (CPSU) acknowledged the jurisdictional pre-requisites for the making of an order under s 424(1), it argued for an order terminating the protected industrial action whilst the Commonwealth sought an order suspending the protected industrial action for a short period in order that a further ballot of the Department's employees for its proposed enterprise agreement could be conducted.

In deciding to terminate the protected industrial action, Wilson C usefully observed:

[50] …

- Protected industrial action was terminated by Hamberger SDP in *Essential Energy v CEPU* after finding that planned stoppages and the absence of a skeleton staff to deal with emergencies within the NSW electricity distribution network and the components it operated of the NSW water and sewerage services would threaten to endanger the life, the personal safety, the health and the welfare of a part of the population of NSW. The decision took into account the Commission's precedents on the subject of termination, and found;

  "[37] These decisions indicate that the following factors are relevant:

  - the length of time negotiations had been going on;
  - the progress that had been made in negotiations;
  - whether there had been prior industrial action;
  - the views of the parties (especially where both parties agree on the appropriate course of action); and
  - the potential for further industrial action that would endanger the general welfare etc.

  [38] These are the factors upon which I have based my decision. Taken together, they support a decision to terminate, rather than suspend, the protected industrial action. I have also had regard to the management initiated ballot. Whether the decision is to suspend or terminate the industrial action, this would not prevent the ballot going ahead.

  [39] While both parties would, I am satisfied, prefer a negotiated outcome, it must also be recognised that negotiations have been going on for nearly a year, including a week of intensive conciliation by the Commission. Based on the evidence the parties are still far apart on some key issues – indeed Mr Humphreys expressed in his letter to Mr Butler on 10 May 2016 that the parties appeared to be moving further apart. There have already been several rounds of industrial action. There is no agreement between the parties on whether termination or suspension should be ordered. If

industrial action were only to be suspended on a temporary basis it is likely that there would be further industrial action once the suspension was lifted, that could once again threaten the welfare of the broader population." [*footnote omitted*]

[51] I concur with Hamberger SDP's analysis in *Essential Energy v CEPU* of the factors that require being taken into account in deciding whether it is appropriate to terminate protected industrial action, or to suspend it.

See [FWA266.80] regarding a subsequent post-industrial action workplace determination of the Fair Work Commission under s 266 of the FW Act.

[FWA.424.220] Making the order

The FWC can make the order on its own initiative or on application of a bargaining representative for the proposed agreement, the relevant Minister or by a person prescribed by the regulations: see s 424(2)(a)–(b)(iii).

Applications made to the FWC need to be determined, as far as practicable, within 5 days: see s 242(3). If a decision is not made within that time, the FWC are required to make an interim order suspending the protected industrial action: see s 424(4). The interim order continues in force until the application is determined: see s 424(5).

425 FWC must suspend protected industrial action—cooling off

(1) [When FWC must suspend protected industrial action]

The FWC must make an order suspending protected industrial action for a proposed enterprise agreement that is being engaged in if the FWC is satisfied that the suspension is appropriate taking into account the following matters:

(a) whether the suspension would be beneficial to the bargaining representatives for the agreement because it would assist in resolving the matters at issue;

(b) the duration of the protected industrial action;

(c) whether the suspension would be contrary to the public interest or inconsistent with the objects of this Act;

(d) any other matters that the FWC considers relevant.

[Subs (1) am Act 174 of 2012, s 3 and Sch 9 items 444 and 445, with effect from 1 Jan 2013]

(2) [Party must apply for order]

The FWC may make the order only on application by:

(a) a bargaining representative for the agreement; or

(b) a person prescribed by the regulations.

[Subs (2) am Act 174 of 2012, s 3 and Sch 9 item 446, with effect from 1 Jan 2013]

[S 425 am Act 174 of 2012, s 3 and Sch 9 item 443, with effect from 1 Jan 2013

Cross-reference: *Fair Work Commission Rules 2024*: r 9 and Sch 1 prescribe approved form F37 for an application for an order to suspend or terminate protected industrial action and r 21 and Sch 1 prescribe instructions as to service for s 425; and r 74 prescribes that an application under s 425 must be accompanied by a draft order in the terms sought by the applicant.]

SECTION 425 COMMENTARY

Overview ..... [FWA.425.20]
History ..... [FWA.425.40]
Definitions ..... [FWA.425.60]
Cooling off period cases ..... [FWA.425.80]

[FWA.425.20] Overview

This provision provides when the FWC must suspend protected industrial action.

[FWA.425.40] History

This section was inserted by the *Fair Work Act 2009* and commenced on 1 July 2009.

[FWA.425.60] Definitions

"Bargaining representative" is defined in s 176.

"Enterprise agreement" is defined in s 12.

"Protected industrial action" is defined in s 408.

[FWA.425.80] Cooling off period cases

Section 425 is a cooling off provision. The FWC is required to suspend protected industrial action for a proposed enterprise agreement in circumstances it considers it appropriate to do so: see s 425(1) and *Mammoet Australia Pty Ltd v Construction, Forestry, Mining and Energy Union* [2010] FWA 4389, 14 June 2010, McCarthy DP at [27] and as follows:

> [31] Mammoet argued that the absence of the ability to take industrial action would be beneficial as it would provide an environment free of industrial action and therefore have the effect of the bargaining representatives concentrating on their differences. The CFMEU on the other hand argued that it was the existence of the capacity to take industrial action and indeed the taking of it that had the effect of reducing the differences between the parties and making an agreement more likely.
>
> [32] The history of the matter and the approach taken by Mammoet to date would tend to support the view expressed by the CFMEU. It appears to me that at each step of the process of the CFMEU pursuing its rights Mammoet have endeavoured to prevent the obtaining of rights to take industrial action. Indeed the almost immediate reaction of Mammoet to the taking of employee claim action was to notify its own employer response action, thus immediately creating an expectation of two 28 days of industrial action rather than one.
>
> [33] Mammoet rather than withdrawing its own industrial action, seeks to rely on it as a means of preventing themselves or employees of taking protected industrial action. In my view the issuance of an order of the type sought given the opposition of Mammoet throughout to the obtaining of a right to take protected industrial action is likely to be less conducive to an agreement being reached rather than what Mammoet contends.
>
> [34] I therefore do not consider that a cooling off period would have a beneficial effect in resolving the matters at hand.

Woodside Burrup Pty Ltd subsequently applied for an order under s 426 suspending the protected industrial action on the ground of significant harm to a third party. McCarthy DP made an order under s 426 which was subsequently overturned on appeal in *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd* (2010) 198 IR 360; [2010] FWAFB 6021: see s 426.

In determining whether a suspension is appropriate the FWC must take account the following matters:

- whether the suspension will benefit the bargaining representatives by resolving the issues at hand: s 425(1)(a);
- the duration of the protected industrial action: s 425(1)(b);
- the public interest and objects of the Act: s 425(c); and
- other matters the the FWC considers relevant: s 425(d).

The scope of the provision does not extend to allow termination: see Explanatory Memorandum at [1723].

Significantly, the FWC cannot make the order on its own initiative. An application must be made by a bargaining representative for the agreement or a person prescribed by the regulations: see s 425(2)(a)–(b).

In *Tas Paper Pty Ltd v Australian Manufacturing Workers' Union* [2009] FWA 1872 (22 December 2009) Watson SDP concluded at [12] that s 425 is restricted in its operation to protected industrial action which is occurring and does not extend to threatened, impending or probable action.

See more recently, the decision of an application in *Re DP World (t/as DP World Brisbane Pty Ltd)* [2023] FWC 3314, holding:

> [51] DP World submit that suspension of the PIA would be beneficial because the PIA is distracting the parties from effectively negotiating a resolution of the issues between them. I am not satisfied that the PIA creates an inherent impediment to the parties meeting and bargaining. The CFMEU have committed to suspending notified PIA on each day negotiations are undertaken. If inclined to do so, DP World could commit to meeting with the CFMEU (who have indicated a willingness to do so) on the remaining consecutive days in the lead up to Christmas without PIA. This would spare DP World and its clients the adverse business consequences associated with the PIA in the lead up to Christmas.

See also the decisions of the Full Bench of the Fair Work Commission in *Maritime Union of Australia v Patrick Stevedores Holdings Pty Ltd* [2016] FWCFB 711 (initial decision) and *Maritime Union of Australia v Patrick Stevedores Holdings Pty Ltd* [2016] FWCFB 1083 (redetermination of original application). Employees of Patrick imposed an indefinite and continuing ban on overtime and shift extensions at its Port Botany operations commencing on 6 January 2016 and at Fremantle from 19 January 2016, and stoppages of work of varying durations at Brisbane, Port Botany, Melbourne and Fremantle on 18 and 19 January 2016. The union also gave notice that there would be additional stoppages of work at Brisbane and Melbourne on 25 January 2016 and at Port Botany on 26 and 27 January 2016. On 19 January 2016, Patrick applied for an order under s 425. On 22 January, Watson VP issued the order in relation to protected industrial action generally: see *Patrick Stevedores Holdings Pty Ltd v Maritime Union of Australia* [2016] FWC 464 (decision) and *Patrick Stevedores Holdings Pty Ltd v Maritime Union of Australia* [2016] FWC 510 (reasons).

On appeal, the union argued that the order was invalid because it did not specify the particular protected industrial action which was suspended. One of the jurisdictional prerequisites for the making of a suspension order under s 425(1) is that protected industrial action is "being engaged in", and only protected industrial action which is found to be "being engaged in" can be suspended by an order. For the Maritime Union of Australia (MUA), the evidence was that the only protected industrial action actually being engaged in at the time of the hearing and the decision were the bans on overtime and shift extensions at Port Botany and Fremantle, and if there was satisfaction that suspension was appropriate, the order that was made, should have been confined in its terms to suspension of those bans only. Because the order suspended protected industrial action generally, it went beyond the power conferred by s 425(1) (see *Maritime Union of Australia v Patrick Stevedores Holdings Pty Ltd* [2016] FWCFB 711 at [21] for appeal reasons for decision).

The Full Bench roundly rejected the union's argument:

> [26] We reject the MUA's submission that the Order was invalid because it did not identify the specific industrial action which was "being engaged in" and was thereby suspended by the Order. That submission was founded upon an interpretation of s 425(1) that we likewise reject, namely that the duty to make an order suspending protected industrial action where such a suspension is appropriate is confined to suspension of the particular protected industrial action which is identified as being engaged in at the time a decision is made under s 425(1).
>
> [27] While the MUA's interpretation of s 425(1) is one that may be available on the language of the provision, a range of contextual considerations strongly indicate that it does not accord with the meaning of the provision intended by the legislature. We consider that the correct interpretation of s 425(1) is that the purpose and effect of any order required to be made under the provision is to suspend the protection or immunity attaching to any industrial action authorised to be taken by a protected action ballot.

[28] The strongest indicator of this is s 413(7). Section 413(1) states that "*This section sets out the* **common requirements** *for industrial action to be protected industrial action for a proposed enterprise agreement". Section 413(7), which is therefore one of those requirements, relevantly provides:*

No suspension or termination order is in operation etc.

(7) None of the following must be in operation:

(a) an order under Division 6 of this Part suspending or terminating industrial action in relation to the agreement;

(b) …

(c) …

[29] An order made under s 425 is one made under Division 6 of "*this Part*" (Part 3-3). The effect of s 413(7) therefore is that once an order is made under s 425 and while it remains in effect, *any* industrial action would not be protected industrial action. The interpretation advanced by the MUA would set up an incongruity between the terms of the suspension order and the effect of s 413(7), in that the suspension order would be confined to the particular type of industrial action being engaged in at the time, but s 413(7) would in any event render any industrial action non-protected. An interpretation of s 425 by which a suspension order has the effect of suspending the protection attaching to any industrial action would, in contrast, be harmonious with s 413(7).

[30] The MUA's interpretation of s 425 would also not be consistent with its evident purpose to allow a "cooling off" period in the course of enterprise bargaining in order to advance the prospects of resolving the matters in issue. If a suspension order was confined in its effect to a particular type of protected industrial action taken at a particular time, that would imply that other types of protected industrial action could be taken during the cooling off period established by the order. That would appear likely to frustrate the objective of the provision, and it again raises the issue of inconsistency with s 413(7).

…

[37] We consider that, on the proper interpretation of s 425(1), once it is found that protected industrial action is being engaged in and a state of satisfaction is reached that suspension of protected industrial action is appropriate, the order that is required to be made is one which suspends, for the duration of the order, the protection attaching to *any* industrial action. There was no dispute that industrial action, at least in the form of the bans at Port Botany and Fremantle, was being engaged in at the time of the hearing before Vice President Watson and at the time the Decision and Order were issued. Subject to there being no error in the formation of the view that suspension was appropriate, we consider that the Order was one which conformed to the requirements of s 425(1).

However, the Full Bench found that Watson VP had erred in his determination of whether, in accordance with s 425(1)(a), the Commission was satisfied that the "suspension was appropriate" (at [37]) taking into account "whether the suspension would be beneficial to the bargaining representatives for the agreement because it would assist in resolving the matters at issue" (at [8]).

For Watson VP, critical to his satisfaction that the suspension order was appropriate was his conclusion that the "elevation of hostilities" between the parties had "precluded the processes of discussion and negotiation" (see Watson VP's reasons for his decision in *Patrick Stevedores Holdings Pty Ltd v Maritime Union of Australia* [2016] FWC 510 at [28]). The Full Bench held that Watson VP had mistaken the facts in this regard and "was plainly wrong" (in *Maritime Union of Australia v Patrick Stevedores Holdings Pty Ltd* [2016] FWCFB 711 at [40]; see also at [41] to [51]).

Having quashed the order of Watson VP, the Full Bench adjourned and reconvened ten days later to redetermine the original application under s 425 for itself (see *Maritime Union of Australia v Patrick Stevedores Holdings Pty Ltd* [2016] FWCFB 1083). At the time, no protected industrial action had been taken for almost one month and for the Full Bench, there

was therefore no basis for making an order:

> [3] An order under s 425 must be one directed at "… *suspending protected industrial action for a proposed enterprise agreement that is being engaged in*…". It is common ground between Patrick and the MUA that an order under the section may only be made if there is protected industrial action being engaged in.
>
> [4] Whatever view may reasonably be taken as to the temporal scope to be assigned to the expression "*being engaged in*", we do not consider that even on the most liberal interpretation it could apply to the current circumstances in which there has been no protected industrial action taken since 19 January 2016 and there is no evidence that protected industrial action is planned or impending. Patrick submitted that where there is a "campaign of industrial action" being undertaken during enterprise bargaining, it is open for the Commission to find that protected industrial action is being engaged in even if it is not happening at the precise time that the Commission makes its determination. It is not necessary for us to form a view about the merits of this submission because the evidence before us does not support the proposition that the MUA and its members are in fact currently undertaking a campaign of industrial action.

More recently, see the decision of Andersen DP to issue an order under s 425 in *ASC Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2017] FWC 5375, in which his Honour observed:

> [20] It does not automatically follow that because industrial action is "being engaged in" then orders under section 425 should be made. Making an order is a discretionary matter and should only be made having regard to each of the matters set out in subsections (1)(a) to (d). Indeed, considerable weight should be given to the statutory scheme which provides a basis for industrial action taken in pursuit of bargaining to be protected. Section 425 is a statutory check to what is otherwise a collective bargaining right under the statutory scheme, should that right be lawfully exercised. A suspension order should not be issued lightly and only decided upon where it is clearly appropriate to do so.
>
> [21] Having regard to the evidence before me, including the fact that fourteen stop-work meetings have been held in the past 36 hours, the agreement reached between the ASC and the bargaining representatives of the collective unions (including the CEPU) on 26 September, the history of negotiations between the collective unions and the ASC, the prior incidence of protected action and the advanced stage that the bargaining process has now reached I consider this a case in which it is appropriate to issue orders for a cooling off period under section 425.
>
> [22] I consider that a suspension of protected action would be of benefit to the bargaining representatives in that it would permit the remainder of the Access Period and the voting period on 19 and 20 October to be conducted in an environment largely free from industrial action. This was the general intention of the agreement reached between the parties on 26 September. I consider this would allow employees the opportunity to consider and vote on the proposed Agreement in a relatively stable environment not significantly disrupted by industrial action. To this extent, I consider that it would assist in resolving the matters in issue.

See also the decision of the Full Bench of the Commission in *Australian Manufacturing Workers' Union v Paper Australia Pty Ltd (t/as Australian Paper)* [2018] FWCFB 2011 and Colman DP in *Orora Packaging Australia Pty Ltd (t/as Orora Bag Solutions) v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union* [2020] FWC 49 at [26]–[41]. Most recently, see the decision of the Commission in *Virgin Australia Regional Airlines Pty Ltd T/A Virgin Australia Regional Airlines v The Australian Licenced Aircraft Engineers Association* [2023] FWC 1510.

426 FWC must suspend protected industrial action—significant harm to a third party

Suspension of protected industrial action

(1) The FWC must make an order suspending protected industrial action for a proposed enterprise agreement that is being engaged in if the requirements set out in this section are met.

[Subs (1) am Act 174 of 2012, s 3 and Sch 9 item 448, with effect from 1 Jan 2013]

Requirement—adverse effect on employers or employees

(2) The FWC must be satisfied that the protected industrial action is adversely affecting:

(a) the employer, or any of the employers, that will be covered by the agreement; or

(b) any of the employees who will be covered by the agreement.

[Subs (2) am Act 174 of 2012, s 3 and Sch 9 item 448, with effect from 1 Jan 2013]

Requirement—significant harm to a third party

(3) The FWC must be satisfied that the protected industrial action is threatening to cause significant harm to any person other than:

(a) a bargaining representative for the agreement; or

(b) an employee who will be covered by the agreement.

[Subs (3) am Act 174 of 2012, s 3 and Sch 9 item 448, with effect from 1 Jan 2013]

(4) [Matters FWC may take into account]

For the purposes of subsection (3), the FWC may take into account any matters it considers relevant including the extent to which the protected industrial action threatens to:

(a) damage the ongoing viability of an enterprise carried on by the person; or

(b) disrupt the supply of goods or services to an enterprise carried on by the person; or

(c) reduce the person's capacity to fulfil a contractual obligation; or

(d) cause other economic loss to the person.

[Subs (4) am Act 174 of 2012, s 3 and Sch 9 item 449, with effect from 1 Jan 2013]

Requirement—suspension is appropriate

(5) The FWC must be satisfied that the suspension is appropriate taking into account the following:

(a) whether the suspension would be contrary to the public interest or inconsistent with the objects of this Act;

(b) any other matters that the FWC considers relevant.

[Subs (5) am Act 174 of 2012, s 3 and Sch 9 items 450 and 451, with effect from 1 Jan 2013]

Order may only be made on application by certain persons

(6) The FWC may make the order only on application by:

(a) an organisation, person or body directly affected by the protected industrial action other than:

(i) a bargaining representative for the agreement; or

(ii) an employee who will be covered by the agreement; or

(b) the Minister; or

(ba) if the industrial action is being engaged in in a State that is a referring State as defined in section 30B or 30L—the Minister of the State who has responsibility for workplace relations matters in the State; or

(bb) if the industrial action is being engaged in in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory; or

(c) a person prescribed by the regulations.

[Subs (6) am Act 174 of 2012, s 3 and Sch 9 item 452, with effect from 1 Jan 2013; Act 124 of 2009, s 3 and Sch 3 item 6, with effect from 1 Jan 2010]

[S 426 am Act 174 of 2012, s 3 and Sch 9 item 447, with effect from 1 Jan 2013; Act 124 of 2009
Cross-reference: *Fair Work Commission Rules 2024*: r 9 and Sch 1 prescribe approved form F37 for an application for an order to suspend or terminate protected industrial action and r 21 and Sch 1 prescribe instructions as to service for s 426; and r 74 prescribes that an application under s 426 must be accompanied by a draft order in the terms sought by the applicant.]

SECTION 426 COMMENTARY

Overview ..... [FWA.426.20]
History ..... [FWA.426.40]
Definitions ..... [FWA.426.60]
Third parties ..... [FWA.426.80]
Meaning of significant harm ..... [FWA.426.100]

[FWA.426.20] Overview

This provision provides for the suspension of protected industrial action on the basis that it is causing significant harm to third parties.

[FWA.426.40] History

This section was inserted by the *Fair Work Act 2009* and commenced on 1 July 2009.

[FWA.426.60] Definitions

"Bargaining representative" is defined in s 176.

"Employee" is defined in s 13.

"Employer" is defined in s 14.

"Enterprise" is defined in s 12.

"Enterprise agreement" is defined in s 12.

"Organisation" is defined in s 12.

"Protected industrial action" is defined in s 408.

[FWA.426.80] Third parties

Section 426 is a mandatory provision that requires the FWC to suspend protected industrial action for a proposed enterprise agreement if it is satisfied that such action is:

- adversely affecting employers or employees that will be covered by the agreement: see s 426(2)(a)–(b); or
- threatening to cause significant harm to persons other than a bargaining representative for the agreement or an employee who will be covered by the agreement: see s 426(3)(a)–(b).

In addition to these requirements, the FWC needs to be satisfied the suspension is appropriate taking into consideration the public interest, the objects of the Act, and any other matter it thinks necessary.

[FWA.426.100] Meaning of significant harm

Section 426(4) sets out the factors the FWC can consider in determining whether protected industrial action is threatening to cause significant harm to a third party. Factors considered are:

- damage to the viability of the enterprise carried on by the third party: s 426(4)(a);
- disruption to the supply of goods or services to third party enterprise: s 426(4)(b);
- reduction in the third party's capacity to fulfil contractual obligations: s 426(4)(c); or
- economic loss to the third party: s 426(4)(d).

The construction of the expression "significant harm" was considered in *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd* (2010) 198 IR 360; [2010] FWAFB 6021, Lawler (VP), Ives (DP) and Roe C where the Full Bench relevantly stated (at [44]):

> … the expression "significant harm" in s 426(3) should be construed as having a meaning that refers to harm that has an importance or is of such consequence that it is harm above and beyond the sort of loss, inconvenience or delay that is commonly a consequence of industrial action. In this context, the word "significant" indicates harm that is exceptional in its character or magnitude when viewed against the sort of harm that might ordinarily be expected to flow from industrial action in a similar context. In this way, an order will only be available under s 426 in very rare cases, as contemplated by the Explanatory Memorandum.

In that case, alleged losses of about $3.5 million a day to Woodside as a consequence of protected industrial action by employees of a third party contractor, were found not to be "significant harm" to Woodside (as a third party) justifying an order suspended protected industrial action under s 426 (see at [57] to [70]): see also *Mammoet Australia Pty Ltd v Construction, Forestry, Mining and Energy Union* [2010] FWA 4389, 14 June 2010, at [27] per McCarthy DP, at s 425. More recently see the decisions of the Commission in *Shoalhaven Starches Pty Ltd T/A Manildra Group v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2024] FWC 1282 and *Linfox Australia Pty Ltd v Australian Federated Union of Locomotive Employees* [2019] FWC 3653.

The FWC can only make the order on application by an organisation, person or body directly affected by the protected industrial action, the relevant Minister or a person prescribed by statute: see s 426(6)(a)–(c). However, a bargaining representative for the agreement or an employee who will be covered by the agreement are expressly excluded: see s 426(6)(a)(i)–(ii).

427 FWC must specify the period of suspension

Application of this section

(1) This section applies if the FWC is required or permitted by this Division to make an order suspending protected industrial action.

[Subs (1) am Act 174 of 2012, s 3 and Sch 9 item 454, with effect from 1 Jan 2013]

Suspension period

(2) The FWC must specify, in the order, the period for which the protected industrial action is suspended.

[Subs (2) am Act 174 of 2012, s 3 and Sch 9 item 455, with effect from 1 Jan 2013]

Notice period

(3) The FWC may specify, in the order, a longer period of notice of up to 7 working days for the purposes of paragraph 430(2)(b) if the FWC is satisfied that there are exceptional circumstances justifying that longer period of notice.

[Subs (3) am Act 174 of 2012, s 3 and Sch 9 items 456 and 457, with effect from 1 Jan 2013]

[S 427 am Act 174 of 2012, s 3 and Sch 9 item 453, with effect from 1 Jan 2013]

SECTION 427 COMMENTARY

Overview ..... [FWA.427.20]
History ..... [FWA.427.40]
Definitions ..... [FWA.427.60]
Suspension period ..... [FWA.427.80]

[FWA.427.20] Overview

This section states that the FWC must specify the period of suspension.

[FWA.427.40] History

This section was inserted by the *Fair Work Act 2009* and commenced on 1 July 2009.

[FWA.427.60] Definitions

"Protected industrial action" is defined in s 408.

[FWA.427.80] Suspension period

When the FWC makes an order to suspend protected industrial action, the order must specify the period of suspension: see 427(1)–(2).

Ordinarily, pursuant to s 430(2)(b), the required notice period for protected industrial action is at least three working days after a suspension period. However, s 427(3) enables the FWC to specify a longer notice period of up to seven working days in exceptional circumstances.

428 Extension of a period of suspension

(1) [When FWC may extend the period of suspension]

The FWC may make an order extending the period of suspension specified in an order (the ***suspension order***) suspending protected industrial action for a proposed enterprise agreement if:

(a) the person who applied, or a person who could have applied, for the suspension order, applies for the extension; and

(b) the FWC has not previously made an order under this section in relation to the suspension order; and

(c) the FWC is satisfied that the extension is appropriate taking into account any matters the FWC considers relevant including the matters specified in the provision under which the suspension order was made.

[Subs (1) am Act 174 of 2012, s 3 and Sch 9 items 458 and 459, with effect from 1 Jan 2013]

(2) [Matters FWC must specify in the order]

If the FWC is permitted to make an order under this section:

(a) the FWC must specify, in the order, the period of extension; and

(b) the FWC may specify, in the order, a longer period of notice of up to 7 working days for the purposes of paragraph 430(2)(b) if the FWC is satisfied that there are exceptional circumstances justifying that longer period of notice.

[Subs (2) am Act 174 of 2012, s 3 and Sch 9 item 460, with effect from 1 Jan 2013]

[S 428 am Act 174 of 2012
Cross-reference: *Fair Work Commission Rules 2024*: r 9 and Sch 1 prescribe approved form F38 for an application for an order for an extension of a suspension of protected industrial action and r 21 and Sch 1 prescribe instructions as to service for s 428; and r 75 provides that a s 428 application must be accompanied by a copy of the order to suspend protected industrial action.]

SECTION 428 COMMENTARY

Overview ..... [FWA.428.20]
History ..... [FWA.428.40]
Definitions ..... [FWA.428.60]
Extending a suspension period ..... [FWA.428.80]

[FWA.428.20] Overview

This section outlines when the FWC can extend a period of suspension.

[FWA.428.40] History

This section was inserted by the *Fair Work Act 2009* and commenced on 1 July 2009.

[FWA.428.60] Definitions

"Enterprise agreement" is defined in s 12.

"Protected industrial action" is defined in s 408.

[FWA.428.80] Extending a suspension period

Section 428(1) provides the FWC with the discretion to extend the period of an order suspending protected industrial action if:

- the application is made by a person who applied or was eligible to apply for the original suspension: s 428(1)(a);
- the FWC has not previously ordered an extension: s 428(1)(b); and
- the FWC is satisfied the extension is appropriate after bearing in mind the factors specified in the provision under which the suspension order was made and other factors the FWC thinks relevant.

If the FWC decides to make an order to extend the suspension period, the order must specify the period of extension: see s 428(2)(a).

Notice

In exceptional circumstances, the FWC can extend the notice period for protected industrial action from three working days to up to seven: see s 428(2)(b).

429 Employee claim action without a further protected action ballot after a period of suspension etc

Application of this section

(1) This section applies in relation to employee claim action for a proposed enterprise agreement if:

(a) an order suspending the employee claim action has been made; and

(b) a protected action ballot authorised the employee claim action:
  (i) some or all of which had not been taken before the beginning of the period (the ***suspension period***) of suspension specified in the order; or
  (ii) which had not ended before the beginning of the suspension period; or
  (iii) beyond the suspension period; and

(c) the suspension period (including any extension under section 428) ends, or the order is revoked before the end of that period.

Further protected action ballot not required to engage in employee claim action

(2) A person may engage in the employee claim action without another protected action ballot.

(3) [Suspension period must be disregarded]
For the purposes of working out when the employee claim action may be engaged in, the suspension period (including any dates authorised by the protected action ballot as dates on which employee claim action is to be engaged in) must be disregarded.

(4) [Employee claim action must be same as protected action ballot]
Nothing in this section authorises employee claim action that is different in type or duration from the employee claim action that was authorised by the protected action ballot.

SECTION 429 COMMENTARY

Overview ..... [FWA.429.20]
History ..... [FWA.429.40]
Definition ..... [FWA.429.60]
Employee claim action after a suspension period ..... [FWA.429.80]

[FWA.429.20] Overview

This provision sets out when employee claim action can resume following a period of suspension.

[FWA.429.40] History

This section was inserted by the *Fair Work Act 2009* and commenced on 1 July 2009.

[FWA.429.60] Definition

"Employee claim action" is defined in s 409.

"Enterprise agreement" is defined in s 12.

"Protected action ballot" is defined in s 12.

[FWA.429.80] Employee claim action after a suspension period

An employee claim action that is authorised by a protected action ballot but then suspended by the FWC, may be able to resume at the end of the suspension period without another protected action ballot: see s 429(1)(a)–(b). To do so, the employee action claim must have been authorised by a protected action ballot and one of the following circumstances must apply:

- some or all of the employee claim action had not been taken before the suspension period commenced: s 429(1)(b)(i);
- the employee claim action had not ended before the suspension period commenced: s 429(1)(b)(i); or
- the employee claim action would have continued beyond the suspension period: s 429(1)(b)(i).

In determining when employee claim action may be engaged in, s 429(3) indicates that the suspension period must be disregarded.

Importantly, employee claim action of a different type or duration than that authorised by the protected action ballot is not authorised by this section: see s 429(4).

Also note s 409(6) in relation to the notice requirements.

430 Notice of employee claim action engaged in after a period of suspension etc

(1) [Bargaining representative must give written notice]

Before a person engages in employee claim action for a proposed enterprise agreement as permitted by subsection 429(2), a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

(2) [Minimum period of notice]

The period of notice must be at least:

(a) 3 working days; or

(b) if, under subsection 427(3) or paragraph 428(2)(b), the FWC specified, for the purposes of this paragraph, a longer period of notice in an order relating to the employee claim action—that period of notice.

[Subs (2) am Act 174 of 2012, s 3 and Sch 9 item 461, with effect from 1 Jan 2013]

(3) [Content of notice]

The notice must state the nature of the employee claim action and the day on which it will start.

[S 430 am Act 174 of 2012]

SECTION 430 COMMENTARY

Overview ..... [FWA.430.20]
History ..... [FWA.430.40]
Definitions ..... [FWA.430.60]
Notice of employee claim action following a period ofsuspension ..... [FWA.430.80]

[FWA.430.20] Overview

The section outlines the requirements for employee claim action to be engaged in following a period of suspension.

[FWA.430.40] History

This section was inserted by the *Fair Work Act 2009* and commenced on 1 July 2009.

[FWA.430.60] Definitions

"Bargaining representative" is defined in s 176.

"Employee claim action" is defined in s 409.

"Enterprise agreement" is defined in s 12.

[FWA.430.80] Notice of employee claim action following a period of suspension

Pursuant to section 430, employee claim action taken after a suspension period will only be protected if the bargaining representative or an employee who will be covered by the

agreement gives the affected employer at least three working days written notice: see ss 430(1) and (2)(a). Although, the period of notice may be varied by the FWC pursuant to s 427(3) or s 428(2)(b): see s 430(2)(b).

Furthermore, the notice must state the nature of the employee claim action and the day that it will start: see s 430(3).

Also note s 409(6) in relation to the notice requirements.

[The next text page is 3-27051]

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA ACT 2021

CHAPTER 1 – INTRODUCTION

PART 1 – INTRODUCTION

DIVISION 1 – PRELIMINARY

1 Short title
2 Commencement
3 Crown to be bound
4 External Territories

DIVISION 2 – OBJECTS OF THIS ACT

5 Objects of this Act

DIVISION 3 – SIMPLIFIED OUTLINE OF THIS ACT

6 Simplified outline of this Act

PART 2 – DEFINITIONS

7 Definitions

CHAPTER 2 – FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA

8 Federal Circuit and Family Court of Australia
9 Federal Circuit and Family Court of Australia (Division 1)
10 Federal Circuit and Family Court of Australia (Division 2)

CHAPTER 3 – FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 1)

PART 1 – CONSTITUTION

DIVISION 1 – CONSTITUTION

11 Appointment of Judges
12 Judges to be assigned to particular location
13 Authorised Judges may manage classes of proceedings
14 Style
15 Seniority
16 Oath or affirmation of allegiance and office
17 Constitution of a Full Court

DIVISION 2 – TERMS AND CONDITIONS OF JUDGES

18 Remuneration

19 Resignation from office
20 Removal from office

DIVISION 3 – JUDGES OF 2 OR MORE COURTS
21 Dual appointments
22 Judge also holding office of a prescribed court
23 Judge also holding office of a State Family Court

DIVISION 4 – ACTING CHIEF JUSTICE
24 Acting Chief Justice

PART 2 – JURISDICTION

DIVISION 1 – ORIGINAL JURISDICTION
25 Original jurisdiction

DIVISION 2 – APPELLATE JURISDICTION
26 Appeals
27 Family law regulations to be sole source of certain appellate jurisdiction
28 Leave to appeal needed for some family law or child support proceedings

DIVISION 3 – ASSOCIATED MATTERS
29 Jurisdiction in associated matters

DIVISION 4 – EXERCISE OF JURISDICTION

Subdivision A – Original jurisdiction
30 Exercise of original jurisdiction

Subdivision B – Appellate jurisdiction (other than relating to courts of summary jurisdiction)
31 Application
32 Exercise of appellate jurisdiction
33 Appeal may be determined without an oral hearing
34 Cases stated and questions reserved
35 Evidence on appeal
36 Form of judgment on appeal
37 Court divided in opinion
38 Stay of proceedings and suspension of orders
39 Appeals relating to court security orders
40 Exercise of certain appellate jurisdiction under family law regulations

Subdivision C – Appellate jurisdiction relating to courts of summary jurisdiction
41 Application
42 Exercise of appellate jurisdiction

Subdivision D – Miscellaneous
43 Determination of matter completely and finally

DIVISION 5 – CERTAIN POWERS RELATING TO MATTERS OF JURISDICTION
44 Making of orders and issuing writs
45 Contempt of court
46 Summary judgment

DIVISION 6 – ADMINISTRATION
47 Arrangement of business
48 Complaints

49 Protection for the Chief Justice and Deputy Chief Justice

PART 3 – CERTAIN PROCEEDINGS NOT TO BE INSTITUTED IN FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 1)

50 Prohibition on instituting first instance family law or child support proceedings

PART 4 – TRANSFER OF PROCEEDINGS

51 Discretionary transfer of proceedings from the Federal Circuit and Family Court of Australia (Division 2)
52 Discretionary transfer of proceedings to the Federal Circuit and Family Court of Australia (Division 2)
53 Rules of Court
54 Delegation

PART 5 – APPEALS

55 Appeals to the High Court

PART 6 – PRACTICE AND PROCEDURE

DIVISION 1 – GENERAL

56 Practice and procedure
57 Representation

DIVISION 2 – DOCUMENTS FILED IN THE FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 1)

58 Filing of documents in the Federal Circuit and Family Court of Australia (Division 1)
59 Seal of the Federal Circuit and Family Court of Australia (Division 1)
60 Federal Circuit and Family Court of Australia (Division 1) stamps
61 Writs etc.
62 Proceedings may be instituted by application
63 Limits on length of documents

DIVISION 3 – CONDUCT OF PROCEEDINGS

64 Place of sitting
65 Change of venue
66 Formal defects not to invalidate

DIVISION 4 – CASE MANAGEMENT

67 Overarching purpose of civil practice and procedure provisions
68 Parties to act consistently with the overarching purpose
68A Proceedings under the Family Law Act 1975
69 Power of the Federal Circuit and Family Court of Australia (Division 1) to give directions about practice and procedure in a civil proceeding
70 Chief Justice to achieve common approaches to case management with the Federal Circuit and Family Court of Australia (Division 2)

DIVISION 5 – EVIDENCE

71 Oaths and affirmations
72 Swearing of affidavits etc.
73 Orders and commissions for examination of witnesses

DIVISION 6 – JUDGMENTS
74 Reserved judgments etc.

DIVISION 7 – COMMON APPROACHES WITH THE FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)
75 Chief Justice to achieve common approaches with the Federal Circuit and Family Court of Australia (Division 2)

DIVISION 8 – RULES OF COURT
76 Rules of Court
77 Consultation

PART 7 – MANAGEMENT AND ADMINISTRATION

DIVISION 1 – MANAGEMENT RESPONSIBILITIES OF THE CHIEF JUSTICE
78 Management of administrative affairs of the Federal Circuit and Family Court of Australia (Division 1)
79 Arrangements with other courts
80 Arrangements with agencies or organisations
81 Arrangements for sharing courtrooms and other facilities
82 Advisory committees

DIVISION 2 – CHIEF EXECUTIVE OFFICER

Subdivision A – Functions and powers
83 Chief Executive Officer
84 Function of Chief Executive Officer
85 Powers of Chief Executive Officer

Subdivision B – Terms and conditions of appointment
86 Appointment
87 Term of appointment
88 Remuneration and allowances
89 Leave of absence
90 Outside employment
91 Disclosure of interests
92 Other terms and conditions
93 Resignation
94 Termination of appointment
95 Acting Chief Executive Officer

DIVISION 3 – REGISTRIES AND REGISTRARS
96 Registries
97 Senior Registrars and Registrars
98 Delegation
99 Independence of delegates
100 Review of power exercised by delegate
101 Protection for Registrars
102 Oath or affirmation of office

DIVISION 4 – OTHER OFFICERS AND STAFF
103 Officers of the Federal Circuit and Family Court of Australia (Division 1)
104 Marshal
105 Delegation by Registry Managers

DIVISION 5 – MISCELLANEOUS ADMINISTRATIVE MATTERS
106 Procedural information to be given to unrepresented parties
107 Annual report
108 Delegation of administrative powers of Chief Justice
109 Proceedings arising out of administration of the Federal Circuit and Family Court of Australia (Division 1)
110 Protection of persons involved in handling etc. complaints

CHAPTER 4 – FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

PART 1 – CONSTITUTION

DIVISION 1 – CONSTITUTION
111 Appointment of Judges
112 Assignment of Judges to Divisions
113 Authorised Judges may manage classes of proceedings
114 Style
115 Oath or affirmation of office

DIVISION 2 – TERMS AND CONDITIONS OF SERVING JUDGES
116 Remuneration
117 Leave
118 Outside work
119 Other terms and conditions
120 Resignation from office
121 Removal from office

DIVISION 3 – DISABILITY AND DEATH BENEFITS
122 Certification of retired disabled Judges
123 Pensions for retired disabled Judges
124 Superannuation for retired disabled Judges
125 Death benefits
126 Relationship definitions
127 Meaning of *eligible child*
128 Appropriation

DIVISION 4 – JUDGES OF 2 OR MORE COURTS
129 Dual appointments

DIVISION 5 – ACTING CHIEF JUDGE
130 Acting Chief Judge

PART 2 – JURISDICTION

DIVISION 1 – ORIGINAL JURISDICTION
131 Original jurisdiction—general
132 Original jurisdiction—family law or child support matters
133 Original jurisdiction—Commonwealth tenancy disputes

DIVISION 2 – ASSOCIATED MATTERS
134 Jurisdiction in associated matters

DIVISION 3 – EXERCISE OF JURISDICTION

135 General and Fair Work Divisions of the Federal Circuit and Family Court of Australia (Division 2)
136 Exercise of jurisdiction—open court or in Chambers
137 Exercise of jurisdiction
138 Decisions to be final
139 Determination of matter completely and finally

DIVISION 4 – CERTAIN POWERS RELATING TO MATTERS OF JURISDICTION

140 Making of orders and issue of writs
141 Declarations of right
142 Contempt of court
143 Summary judgment

DIVISION 5 – ADMINISTRATION

144 Arrangement of business
145 Complaints
146 Exercise of powers of General and Fair Work Divisions of the Federal Circuit and Family Court of Australia (Division 2)
147 Assignment of Judges to locations or registries
148 Protection for Chief Judge and Deputy Chief Judge

PART 3 – TRANSFER OF PROCEEDINGS

DIVISION 1 – TRANSFER OF PROCEEDINGS TO THE FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 1)

149 Discretionary transfer of proceedings
150 Transferred proceedings returned to the Federal Circuit and Family Court of Australia (Division 2)
151 Rules of Court
152 Delegation

DIVISION 2 – TRANSFER OF PROCEEDINGS TO THE FEDERAL COURT

153 Discretionary transfer of proceedings
154 Rules of Court

PART 4 – APPEALS

155 Appeals to the High Court may not be brought

PART 5 – DISPUTE RESOLUTION FOR PROCEEDINGS OTHER THAN PROCEEDINGS UNDER THE FAMILY LAW ACT 1975

DIVISION 1 – GENERAL

156 This Part does not apply to proceedings under the Family Law Act 1975
157 Federal Circuit and Family Court of Australia (Division 2) to consider whether to advise people to use dispute resolution processes
158 Federal Circuit and Family Court of Australia (Division 2) to advise people to use dispute resolution processes
159 Duty of legal practitioners to consider whether to advise people to use dispute resolution processes
160 Officers of the Federal Circuit and Family Court of Australia (Division 2) to advise people about dispute resolution processes

161 Conciliation
162 Referral of question of law—dispute resolution process (other than arbitration)
163 Rules of Court about dispute resolution processes
164 Regulations about dispute resolution processes
165 Rules of Court about costs of dispute resolution processes
166 Rules of Court about dispute resolution processes under the Family Law Act 1975
167 Consent orders

DIVISION 2 – PROCEEDINGS OTHER THAN FAMILY LAW OR CHILD SUPPORT PROCEEDINGS

168 Scope of Division
169 Mediation
170 Arbitration
171 Power of arbitrator to refer question of law to the Federal Circuit and Family Court of Australia (Division 2)
172 Review of arbitration award on a question of law etc.
173 Arbitration awards

PART 6 – PRACTICE AND PROCEDURE

DIVISION 1 – GENERAL

174 Practice and procedure
175 Representation
176 Interrogatories and discovery

DIVISION 2 – DOCUMENTS FILED IN THE FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

177 Filing of documents in the Federal Circuit and Family Court of Australia (Division 2)
178 Seal of the Federal Circuit and Family Court of Australia (Division 2)
179 Federal Circuit and Family Court of Australia (Division 2) stamps
180 Writs etc.
181 Proceedings may be instituted by application
182 Limits on length of documents

DIVISION 3 – CONDUCT OF PROCEEDINGS

183 Place of sitting
184 Change of venue
185 Determination of proceedings without a jury
186 Decisions without oral hearing
187 Limits on the length of oral argument
188 Written submissions
189 Formal defects not to invalidate

DIVISION 4 – CASE MANAGEMENT

190 Overarching purpose of civil practice and procedure provisions
191 Parties to act consistently with the overarching purpose
191A Proceedings under the Family Law Act 1975
192 Power of the Federal Circuit and Family Court of Australia (Division 2) to give directions about practice and procedure in a civil proceeding
193 Chief Judge to achieve common approaches to case management with the Federal Circuit and Family Court of Australia (Division 1)

DIVISION 5 – EVIDENCE

194 Oaths and affirmations
195 Swearing of affidavits etc.
196 Orders and commissions for examination of witnesses
197 Time limits on giving of testimony
198 Federal Circuit and Family Court of Australia (Division 2) may question witnesses
199 Evidence may be given orally or by affidavit
200 Offences by witness

DIVISION 6 – USE OF VIDEO LINKS OR AUDIO LINKS

201 Testimony by video link or audio link
202 Appearance of persons by video link or audio link
203 Making of submissions by video link or audio link
204 Conditions for use of video links and audio links
205 Putting documents to a person by video link or audio link
206 Administration of oaths and affirmations
207 Expenses
208 New Zealand proceedings

DIVISION 7 – ORDERS AND JUDGMENTS

209 Orders
210 Reserved judgments etc.
211 Interest up to judgment
212 Interest on judgment
213 Enforcement of judgment

DIVISION 8 – COSTS

214 Costs
215 Security for costs

DIVISION 9 – COMMON APPROACHES WITH THE FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 1)

216 Chief Judge to achieve common approaches with the Federal Circuit and Family Court of Australia (Division 1)

DIVISION 10 – RULES OF COURT

217 Rules of Court
218 Consultation
219 Documents
220 Service
221 Evidence
222 Orders and judgments
223 Costs
224 General
225 Incidental matters

PART 7 – SUPPRESSION AND NON-PUBLICATION ORDERS

DIVISION 1 – INTRODUCTION

226 Powers of Federal Circuit and Family Court of Australia (Division 2) not affected
227 Other laws not affected
228 This Part does not apply to proceedings under the Family Law Act 1975

DIVISION 2 – SUPPRESSION AND NON-PUBLICATION ORDERS

229 Safeguarding public interest in open justice
230 Power to make orders
231 Grounds for making an order
232 Procedure for making an order
233 Interim orders
234 Duration of orders
235 Exception for court officials
236 Contravention of order

PART 8 – VEXATIOUS PROCEEDINGS

DIVISION 1 – INTRODUCTION

237 Meaning of a person *acting in concert*
238 Powers of the Federal Circuit and Family Court of Australia (Division 2) not affected

DIVISION 2 – VEXATIOUS PROCEEDINGS ORDERS

239 Making vexatious proceedings orders
240 Notification of vexatious proceedings orders

DIVISION 3 – PARTICULAR CONSEQUENCES OF VEXATIOUS PROCEEDINGS ORDERS

241 Proceedings in contravention of vexatious proceedings order
242 Application for leave to institute proceedings
243 Dismissing application for leave
244 Granting application for leave

PART 9 – MANAGEMENT AND ADMINISTRATION

DIVISION 1 – MANAGEMENT RESPONSIBILITIES OF THE CHIEF JUDGE AND THE CHIEF EXECUTIVE OFFICER

245 Management of administrative affairs of the Federal Circuit and Family Court of Australia (Division 2)
246 Arrangements with other courts
247 Arrangements with agencies or organisations
248 Arrangements for sharing courtrooms and other facilities
249 Advisory committees

DIVISION 2 – CHIEF EXECUTIVE OFFICER

250 Function of Chief Executive Officer
251 Powers of Chief Executive Officer

DIVISION 3 – REGISTRIES AND REGISTRARS

252 Registries
253 Senior Registrars and Registrars
254 Delegation
255 Independence of delegates
256 Review of power exercised by delegate
257 Protection for Registrars
258 Oath or affirmation of office

DIVISION 4 – OTHER OFFICERS AND STAFF

Subdivision A – Officers and staff
259 Officers of the Federal Circuit and Family Court of Australia (Division 2)
260 Sheriff
261 Deputy Sheriffs
262 Marshal
263 Deputy Marshals
264 Family consultants
265 Staff of the Federal Circuit and Family Court of Australia (Division 2)
Subdivision B – Provisions relating to officers and staff
266 Arrangements relating to Commonwealth staff
267 Delegation by Registry Managers
268 Authorised persons to assist the Sheriff or Deputy Sheriffs
269 Authorised persons to assist the Marshal or Deputy Marshals
270 Actions by or against Sheriff or Marshal
271 Making arrests under this Chapter or warrants
272 Receivers
DIVISION 5 – MISCELLANEOUS ADMINISTRATIVE MATTERS
273 Procedural information to be given to unrepresented parties
274 Annual report
275 Delegation of the administrative powers of the Chief Judge
276 Proceedings arising out of administrative affairs of the Federal Circuit and Family Court of Australia (Division 2)
277 Protection of persons involved in handling etc. complaints
PART 10 – MISCELLANEOUS
277A Immunity for Judges of Federal Circuit and Family Court of Australia (Division 2)
CHAPTER 5 – MISCELLANEOUS
PART 1 – ADMINISTRATION OF FAMILY SERVICES
278 Chief Executive Officer has functions of family consultants
279 Chief Executive Officer may delegate powers and functions that relate to family consultants
280 Chief Executive Officer may give directions that relate to family services functions
281 Chief Executive Officer may authorise officers or staff members to act as family counsellor or family dispute resolution practitioner
PART 2 – MISCELLANEOUS
282 References in other laws to a Judge of the Federal Circuit and Family Court of Australia
283 References in other laws to a Registrar of the Federal Circuit and Family Court of Australia
284 Review of operation of this Act
285 Regulations

Editor's Note: Repealed provisions in this Act have not been reproduced

[The next text page is 156-35]

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Federal Circuit and Family Court of Australia Act 2021	**12 of 2021**	**1 Mar 2021**	**1 Sep 2021**

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021	13 of 2021	1 Mar 2021	Sch 1 item 239: 1 Sep 2021; Sch 4 items 11–14: 28 Sep 2022 (F2022N00206)
Courts and Tribunals Legislation Amendment (2021 Measures No 1) Act 2022	3 of 2022	17 Feb 2022	Sch 2 items 3 and 4: 18 Feb 2022
Statute Law Amendment (Prescribed Forms and Other Updates) Act 2023	74 of 2023	20 Sep 2023	Sch 4 items 46–49: 18 Oct 2023
Family Law Amendment Act 2023	87 of 2023	6 Nov 2023	Sch 2 item 37 and Schs 8 and 9: 7 Nov 2023; Sch 2 items 31–33 and 38, Sch 5 items 12 and 19–34 and Sch 6 item 10: 6 May 2024
Federal Courts Legislation Amendment (Judicial Immunity) Act 2023	102 of 2023	27 Nov 2023	Sch 1 item 2–4: 28 Nov 2023
Attorney-General's Portfolio Miscellaneous Measures Act 2024	41 of 2024	11 Jun 2024	Sch 4 items 11–13: 12 Jun 2024

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Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024	38 of 2024	31 May 2024	Sch 10 item 2: 14 Oct 2024
Australian Human Rights Commission Amendment (Costs Protection) Act 2024	89 of 2024	1 Oct 2024	Sch 1 items 4 and 5: 2 Oct 2024
Family Law Amendment Act 2024	118 of 2024	10 Dec 2024	Sch 4 items 12 and 13: 10 Jun 2025

[The next text page is 156-41]

Division 8 – Costs

214 Costs

(1) This section does not apply to:

(a) family law or child support proceedings; or

(b) proceedings in relation to a matter arising under:

(i) the *Fair Work Act 2009*; or

(ia) Division 2 of Part IIB of the *Australian Human Rights Commission Act 1986* (redress for unlawful discrimination); or

(ii) section 14, 15 or 16 of the *Public Interest Disclosure Act 2013*.

Note 1: Paragraph (a)—see section 114UB of the *Family Law Act 1975* in relation to family law or child support proceedings.

Note 1A: Subparagraph (b)(ia)—see section 46PSA of the *Australian Human Rights Commission Act 1986*.

Note 2: Subparagraph (b)(i)—see section 570 of the *Fair Work Act 2009* for proceedings in relation to matters arising under that Act.

Note 3: Subparagraph (b)(ii)—see section 18 of the *Public Interest Disclosure Act 2013* for proceedings in relation to matters arising under section 14, 15 or 16 of that Act.

[Subs (1) am Act 118 of 2024, s 3 and Sch 4 item 12, with effect from 10 June 2025; Act 89 of 2024, s 3 and Sch 1 items 4 and 5, with effect from 2 October 2024]

(2) The Federal Circuit and Family Court of Australia (Division 2) or a Judge has jurisdiction to award costs in all proceedings before the Court (including proceedings dismissed for want of jurisdiction) other than proceedings in respect of which any other Act provides that costs must not be awarded.

(3) Except as provided by the Rules of Court or any other Act, the award of costs is in the discretion of the Federal Circuit and Family Court of Australia (Division 2) or Judge.

Note: For further provision about the award of costs, see Division 4 of Part 6 and paragraphs 192(4)(d) and (e).

[S 214 am Act 118 of 2024; Act 89 of 2024]

215 Security for costs

(1) This section does not apply to family law or child support proceedings.

Note: See section 114UB of the *Family Law Act 1975* in relation to family law or child support proceedings.

[Subs (1) am Act 118 of 2024, s 3 and Sch 4 item 13, with effect from 10 June 2025]

(2) The Federal Circuit and Family Court of Australia (Division 2) or a Judge may order an applicant in a proceeding in the Court to give security for the payment of costs that may be awarded against the applicant.

(3) The security is to be of such amount, and given at such time and in such manner and form, as the Federal Circuit and Family Court of Australia (Division 2) or Judge directs.

(4) The Federal Circuit and Family Court of Australia (Division 2) or a Judge may:

(a) reduce or increase the amount of security ordered to be given; and

(b) vary the time at which, or manner or form in which, the security is to be given.

(5) If security, or further security, is not given in accordance with an order under this section, the Federal Circuit and Family Court of Australia (Division 2) or a Judge may order that the proceeding be:

(a) dismissed; or

(b) stayed until security or further security is given in accordance with the first-mentioned order.

(6) This section does not affect the operation of any provision made by or under any other Act or by the Rules of Court for or in relation to the giving of security.

[S 215 am Act 118 of 2024]

[The next text page is 156-2901]

278 Records to be kept and lodged by organisations
279 Directions by Industrial Registrar concerning maintenance of register of members
280 Organisations to notify particulars of loans, grants and donations
281 Waiver of requirement to keep records

DIVISION 8 – ACCOUNTS AND AUDIT

282 Regulations

DIVISION 9 – AMALGAMATION

283 Regulations

DIVISION 10 – VALIDATING PROVISIONS

284 Definitions
285 Validation of certain acts done in good faith
286 Validation of certain acts after 4 years
287 Order affecting application of section 285 or 286
288 Commission may make orders in relation to consequences of invalidity
289 Application for membership of organisation by person treated as having been a member
290 No challenge to dual membership with Federal organisation
290A Amalgamations

DIVISION 11 – POWERS RELATING TO CASES OF DYSFUNCTION, MISCONDUCT OR VACANCY IN OFFICES IN STATE ORGANISATIONS

290B Commission may order reconstitution of organisation or branch etc
290C Provision of assistance to administrator
290D Liability relating to administration
290E Power of Industrial Registrar to initiate elections
290F Application to organisations with federal links
290G Validation of elections

PART 5 – REGULATION OF INDUSTRIAL ORGANISATIONS (OTHER THAN STATE ORGANISATIONS)

291 Regulations applying Part 4
292 Documents to be lodged with Industrial Registrar
293 Cancellation of registration or other penalty for contravention of this Part

PART 6 – DEMARCATION ORDERS

294 Determination of demarcation questions concerning interests of industrial organisations of employees
295 Demarcation orders—coverage of industrial organisations of employees

PART 7 – ENTRY AND INSPECTION BY OFFICERS OF INDUSTRIAL ORGANISATIONS

296 Definitions
297 Right of entry for discussion with employees
298 Right of entry for investigating breaches
299 Provisions relating to authorities issued to officers
300 No entry to residential premises without permission
301 Offences
302 Powers of Commission

PART 8 – LEGALITY OF TRADE UNIONS

303 Meaning of *trade union*
304 Illegality on grounds of restraint of trade excluded
305 Certain agreements not affected

CHAPTER 6 – PUBLIC VEHICLES AND CARRIERS

PART 1 – APPLICATION AND DEFINITIONS

305A Objects of chapter
306 Contracts to which Chapter applies
307 Contract of bailment—meaning
308 Bailor—meaning
309 Contract of carriage—meaning
310 Principal contractor—meaning
310A Authorisations for purposes of Competition and Consumer Act 2010 of the Commonwealth
310B Extension of application of chapter to certain transport sector gig worker contracts
310C Meaning of *digital labour platform*

PART 2 – CONTRACT DETERMINATIONS

311 Applications to exercise functions
312 Jurisdiction of Commission with respect to contracts of bailment
313 Jurisdiction of Commission with respect to contracts of carriage
314 Jurisdiction with respect to reinstatement of contracts
315 Conference to precede contract determination
316 Making of contract determinations
317 Binding force of determination
318 Commencement of determination
319 Term of determination
320 Variation or rescission of determinations
321 Exemptions from determinations
321A Applications to make contract determinations—proposed Fair Work Commission minimum standards orders pending

PART 3 – CONTRACT AGREEMENTS

322 Agreements concerning contract conditions
322A Commission to assist bargaining
323 Contract agreement required to be approved
324 Application for approval of contract agreement
325 Approval of contract agreement by Commission
325A Special requirements relating to contract agreements to which groups of carriers are parties
326 Persons bound by contract agreement
327 Contract agreements prevail over contract determinations
328 Term of contract agreement
329 Variation of a contract agreement
330 Termination of contract agreement
331 Register and publication of contract agreements
331A Application of contract agreement to successor principal contractors

PART 4 – DISPUTE RESOLUTION

332 Compulsory conference with respect to disputes

PART 5 – ASSOCIATIONS OF EMPLOYING CONTRACTORS, DRIVERS AND CARRIERS

333 Associations of employing contractors
334 Cancellation of registration
335 Associations of contract drivers and contract carriers
336 Objections to registration of drivers' and carriers' associations
337 Grant or refusal of applications
338 Withdrawal or cancellation of registration
339 Demarcation questions relating to associations
340 Change of name or amalgamation of associations
341 Certificates of registration etc
342 Registers to be kept

PART 6 – APPLIED PROVISIONS

343 Application of certain provisions for the purposes of this Chapter
344 Interpretation of applied provisions

PART 7 – COMPENSATION FOR TERMINATION OF CERTAIN CONTRACTS OF CARRIAGE

345 Definitions
346 Claim for compensation
347 Contract of Carriage Tribunal
348 Compulsory conference with respect to claims
349 Arbitration of claim
350 Appeal from Tribunal to Full Bench of Commission
351 General procedure and powers of Tribunal
352 Voting by members of Tribunal
353 Costs
354 Representation of parties
355 Contracting out prohibited in certain circumstances

PART 8 – MISCELLANEOUS

355A Involvement in contravention treated in same way as actual contravention
355B Contract determinations and contract agreements must include provisions dealing with tolls and routes
355C Dispute resolution where proposed Fair Work Commission minimum standards orders pending

CHAPTER 6A – INDUSTRIAL PROCEEDINGS BEFORE SUPREME COURT [REPEALED]

355A Definitions [Repealed]
355B Jurisdiction of Supreme Court [Repealed]
355C Declaratory jurisdiction [Repealed]
355D Proceedings for contempt of Commission [Repealed]
355E Special provisions applicable to industrial proceedings [Repealed]

CHAPTER 7 – ENFORCEMENT

PART 1 – BREACH OF INDUSTRIAL INSTRUMENTS

356 Definition
357 Civil penalty for breach of industrial instruments
358 Related proceedings for recovery of remuneration and other money
359 Injunction to restrain further contraventions of industrial instruments
360 Advertisements that contravene industrial instruments
361 Exhibition of industrial instruments in workplace
362 Power to amend proceedings
363 Secretary or agent of union receiving money for contravention of, or under, industrial instrument

PART 2 – RECOVERY OF REMUNERATION AND OTHER AMOUNTS

364 Definitions
365 Order for recovery of remuneration and other amounts payable under industrial instrument
366 Order for recovery of over-award payments under contract of employment
367 Order for recovery of payments not fixed by industrial instruments
368 Order for recovery of unpaid superannuation
369 Application for order
370 Making of order
371 Conciliation to be attempted before order made
372 Order for interest
373 Order for costs
374 Power to amend application
375 Recovery of amounts ordered to be paid
376 Alternative proceedings for debt recovery in other courts
377 Age of claimant not a bar
378 Payment where employee represented by industrial organisation
379 Small claims procedure
380 Small claims during other Commission hearings

PART 3 – INDUSTRIAL MAGISTRATES

381 Appointment of Chief and other Industrial Magistrates
382 Jurisdiction of Chief and other Industrial Magistrates
383 Procedure
383A Recovery of amount ordered to be paid by Industrial Magistrate under other legislation

PART 4 – INSPECTORS AND THEIR POWERS

384 Appointment of inspectors
385 Inspectors' powers—employer breaches
385A Inspectors' powers—misconduct offences
385B Receipts for seized things
386 No entry to residential premises without permission or search warrant
387 Offences relating to obstruction etc of inspectors
388 Search warrant
389 Disclosure of information

PART 5 – EVIDENTIARY PROVISIONS

390 Evidence of an industrial instrument or order
391 Evidence of registration of industrial organisation
392 Evidence of rules of industrial organisation
393 Evidence of membership of, or office in, industrial organisation
394 List of officers to be evidence
395 Trade and other financial secrets tendered as evidence

PART 6 – CRIMINAL AND OTHER LEGAL PROCEEDINGS

396 Penalty notices
397 Nature of proceedings for offences
398 Time for instituting proceedings
399 Authority to prosecute
400 Offences by corporation
401 Proceedings by and against unincorporated associations
402 Recovery of penalty by appointment of receiver
403 Payment of penalties

CHAPTER 7A – APPEALS TO SUPREME COURT [REPEALED]

403A Appeals from decisions of Commission in Court Session [Repealed]
403B Appeals to Supreme Court by leave only [Repealed]
403C Time and procedure for making appeals [Repealed]
403D Stay of decision appealed against [Repealed]
403E Powers on appeal [Repealed]

CHAPTER 8 – MISCELLANEOUS

404 Act binds the Crown
405 Statutory provisions relating to public sector employees
406 Awards and other industrial instruments provide minimum entitlements
406A Costs agreements
407 Regulations
408 Repeal of Industrial Relations Act 1991 No 34 and regulations
409 Savings, transitional and other provisions
410 Amendment of other Acts [Repealed]
411 Review of Act
412 Special provision for COVID-19 pandemic
413 COVID-19 pandemic—deferral of elections

SCHEDULE 1 – PERSONS DEEMED TO BE EMPLOYEES
1 Persons to be treated as employees
2 Definitions
3 Substitution of employer

SCHEDULE 2 – PROVISIONS RELATING TO MEMBERS OF COMMISSION
1 Acting President
2 Acting Deputy Presidents and Acting Commissioners
3 Acting judicial members
4 Age of judicial members
5 Age of members (other than judicial members other than judicial members)
6 Oaths
7 Status, remuneration etc of judicial members
8 Protection and immunities of other members
9 Remuneration of other members
10 Vacancy in office of member

10A Former members may complete unfinished matters
11 Seniority of members
12 Leave for members
13 Superannuation and leave—preservation of rights

SCHEDULE 3 – PROVISIONS RELATING TO MEMBERS AND PROCEDURE OF INDUSTRIAL COMMITTEES
1 Definitions
2 Allowances for nominee members
3 Deputy nominee members
4 Vacation of office by nominee members
5 Oaths
6 Notices of appointment or termination
7 Continuation of hearing
8 Procedure and powers of Committees
9 Meetings of Committees

SCHEDULE 4 – SAVINGS, TRANSITIONAL AND OTHER PROVISIONS

PART 1 – PRELIMINARY

1 Definitions
2 Regulations

PART 2 – PROVISIONS RELATING TO CHAPTER 2 (EMPLOYMENT)

DIVISION 1 – AWARDS
3 Existing awards
4 Existing exemptions
5 Pending applications

DIVISION 2 – FORMER ENTERPRISE AND INDUSTRIAL AGREEMENTS
6 Continuation in force of existing enterprise agreements
7 Continuation in force of existing former industrial agreements
8 Variation of existing agreements
9 Termination of existing agreements
10 Effect of existing agreement
11 Persons bound by existing agreement

DIVISION 3 – PARENTAL LEAVE
12 Things done under previous parental leave provisions
13 Pregnancy/birth/adoption before commencement of this Act
13A Parental leave for casual employees—Industrial Relations Amendment Act 2000 and Industrial Relations Amendment (Casual Employees Parental Leave) Act 2001
13B Adoption leave—Industrial Relations Amendment (Adoption Leave) Act 2003

DIVISION 4 – OTHER EMPLOYMENT PROVISIONS
14 Transitional provision consequent on prohibition on cashing-in of accumulated sick leave in 1993
15 Basic wage
16 Saving for existing part-time work agreements
17 Saving for pending application for unfair dismissals
17A Federal award employees
17B Industrial agents

18 Saving for pending application for reinstatement of dismissed injured employee
19 Protection of accrued entitlements on transfer of business
19A Transitional provision consequent on changes to unfair contracts jurisdiction
19B Transitional provision relating to unfair contracts arising from 2005 amending Act
20 Saving of existing permits for under-award pay for impaired workers

PART 3 – PROVISIONS RELATING TO CHAPTER 3 (INDUSTRIAL DISPUTES)

21 Pending industrial disputes

PART 4 – PROVISIONS RELATING TO CHAPTER 4 (THE INDUSTRIAL RELATIONS COMMISSION)

21A Representation of parties
22 Abolition of 1991 Act Commission and appointment of members to new Commission
23 Abolition of Industrial Court and appointment of Judges as judicial members of new Commission
24 Provisions relating to Judges of former Industrial Court taken to be judicial members
25 Provisions relating to Presidential members of former 1991 Act Commission (other than Judges) taken to be appointed as Presidential members of new Commission
26 Provisions relating to Conciliation Commissioners taken to be appointed as Commissioners of new Commission
27 Conciliation and other Committees
28 Industrial Registrar, Deputy Industrial Registrar, inspectors and other staff
29 Issue of replacement commission
30 Transitional arrangements pending making of rules of Commission
31 Pending proceedings under 1991 Act
31A Costs agreements
31B Finality of decisions
31C Transitional arrangements relating to Industrial Gazette

PART 5 – PROVISIONS RELATING TO CHAPTER 5 (INDUSTRIAL ORGANISATIONS)

32 Union officials' rights of entry—saving of existing authorities

PART 6 – PROVISIONS RELATING TO CHAPTER 6 (PUBLIC VEHICLES AND CARRIERS)

33 Contract determinations
34 Continuation in force of existing contract agreements
35 Previous extension of Chapter 6 from motor lorries to motor vehicles
36 Extension of Chapter 6 from motor vehicles to bicycles
37 Continuation of registration of existing associations
38 Transitional—provisions relating to termination of head contracts of carriage

PART 7 – PROVISIONS RELATING TO CHAPTER 7 (ENFORCEMENT)

39 Chief and other Industrial Magistrates

PART 8 – MISCELLANEOUS PROVISIONS

40 Construction of superseded references
41 Orders
42 Expiration of current period
43 General saving
44 Validation of exercise of jurisdiction by Industrial Magistrates

PART 8A – PROVISIONS CONSEQUENT ON ENACTMENT OF INDUSTRIAL RELATIONS AMENDMENT ACT 2006

44A Definitions
44B Application of section 146A
44C Certain agreed awards to have effect as enterprise agreements
44D Applications to Commission concerning effect of clause 44C

PART 9 – PROVISIONS CONSEQUENT ON ENACTMENT OF OTHER ACTS

45 Provision consequent on enactment of Coal Mine Health and Safety Act 2002
46 Provision consequent on enactment of Industrial Relations Amendment (Public Vehicles and Carriers) Act 2003
47 Provisions consequent on enactment of Courts Legislation Amendment Act 2003
48 Provisions consequent on enactment of Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008

PART 10 – PROVISIONS CONSEQUENT ON APPOINTMENT OF APEC PUBLIC HOLIDAY

49 Definition
50 APEC public holiday

PART 11 – PROVISIONS CONSEQUENT ON REPEAL OF SHOPS AND INDUSTRIES ACT 1962

51 Day baking

PART 12 – PROVISIONS CONSEQUENT ON REPEAL OF GOVERNMENT AND RELATED EMPLOYEES APPEAL TRIBUNAL ACT 1980

52 Definitions
53 Promotion and disciplinary appeals made before repeal of GREAT Act

PART 13 – PROVISIONS CONSEQUENT ON ENACTMENT OF INDUSTRIAL RELATIONS AMENDMENT (NON-OPERATIVE AWARDS) ACT 2010

54 Non-operative awards

PART 14 – PROVISIONS CONSEQUENT ON ENACTMENT OF INDUSTRIAL RELATIONS AMENDMENT (NON-OPERATIVE AWARDS) ACT 2011

55 Certain awards taken to have been rescinded

PART 15 – PROVISIONS CONSEQUENT ON ENACTMENT OF INDUSTRIAL RELATIONS AMENDMENT (INDUSTRIAL ORGANISATIONS) ACT 2012

56 Definition
57 Application of amendments

PART 16 – PROVISIONS CONSEQUENT ON ENACTMENT OF INDUSTRIAL RELATIONS AMENDMENT (INDUSTRIAL COURT) ACT 2013

58 Application of amendments to pending proceedings

PART 17 – PROVISIONS RELATING TO INDUSTRIAL RELATIONS (PUBLIC SECTOR CONDITIONS OF EMPLOYMENT) REGULATION 2014

59 Re-making of regulation

PART 18 – PROVISIONS RELATING TO INDUSTRIAL RELATIONS AMENDMENT (INDUSTRIAL COURT) ACT 2016

DIVISION 1 – INTERPRETATION

60 Definitions

DIVISION 2 – INDUSTRIAL COURT

61 Abolition of Industrial Court
62 Judicial member to become Judge of Supreme Court on abolition day

DIVISION 3 – RECONSTITUTION OF COMMISSION

63 Renaming and abolition of certain offices
64 Relationship of Division with Interpretation Act 1987

DIVISION 4 – PROCEEDINGS INVOLVING INDUSTRIAL COURT

Subdivision 1 – Interpretation

65 Interpretation

Subdivision 2 – Determination of pending proceedings

66 Pending proceedings before Industrial Court
67 Pending proceedings before Supreme Court concerning Industrial Court

Subdivision 3 – Exercise of certain unexercised rights

68 Certain unexercised rights to apply or appeal to Industrial Court may be exercised in successor body
69 Certain unexercised rights to appeal against decisions of Industrial Court may continue to be exercised

DIVISION 5 – MISCELLANEOUS

70 Construction of superseded references
71 Functions of judicial members conferred or imposed in their personal capacities
72 Arbitrators under Health Services Act 1997

PART 19 – PROVISIONS RELATING TO INDUSTRIAL RELATIONS AMENDMENT ACT 2023

DIVISION 1 – INTERPRETATION

73 Definitions

DIVISION 2 – RECONSTITUTION OF COMMISSION

74 Renaming of office
75 Relationship of division with Interpretation Act 1987

DIVISION 3 – PENDING PROCEEDINGS

76 Interpretation
77 Pending proceedings before courts
78 Construction of superseded references

PART 20 – PROVISIONS RELATING TO INDUSTRIAL RELATIONS AMENDMENT ACT 2025

79 Definitions
80 Appeals from Local Court

SCHEDULE 5 – REGISTRATION OF SIMILAR ORGANISATIONS

SCHEDULE 6 – ADMINISTRATOR FOR CFMEU, C & G DIVISION

1 Definitions
1A Meaning of *removed person*
2 Administration of CFMEU, C & G Division
3 Minister must appoint administrator of CFMEU, C & G Division
4 When administration order takes effect
5 Functions of administrator
6 Variation or revocation of administration orders
7 Expenses of administrator
7A Complaints procedure
8 Section 290B does not apply to administrator exercising functions under schedule
9 Provision of assistance to administrator
10 Application of liability provisions
10A Restriction on persons removed from office being officers or employees
10B Certificate to hold office
11 Anti-avoidance provision
12 Interaction with rules
13 Actions under scheme
14 Contravention of clauses 9 and 11
15 Alteration of rules under administration scheme
16 Proceedings for contravention of civil penalty provision
16A Reporting by administrator
17 Regulation-making power
18 Repeal of certain provisions

DICTIONARY

Editor's Note: Repealed provisions in this Act have not been reproduced

[The next text page is 311-51]

Principal legislation	Number	Date of gazettal/ assent/ registration	Date of commence-ment
Industrial Relations Act 1996	**17 of 1996**	**13 Jun 1996**	**S 322(3): 2 Sep 1996, s 2 and Gov Gaz 99, 30 Aug 1996, p 4983; s 322(3): 14 Feb 1997, s 2 and Gov Gaz 18, 14 Feb 1997, p 545; Sch 5.4 was not commenced and was repealed by the *Statute Law (Miscellaneous Provisions) Act (No 2) 1996* No 121**

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/ assent/ registration	Date of commence-ment
Industrial Relations Amendment (Administrator) Act 2024	56 of 2024	20 Aug 2024	Sch 1: 26 Aug 2024 (Proc 430 of 2024, 26 Aug 2024)
Police Amendment (Police Officer Support Scheme) Act 2024	60 of 2024	27 Sep 2024	Sch 3.1: 27 Sep 2024

Principal legislation	Number	Date of gazettal/ assent/ registration	Date of commence-ment
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Amending legislation	Number	Date of gazettal/ assent/ registration	Date of commence-ment
Industrial Relations Amendment (Administrator) Regulation 2024	431 of 2024		Sch 1: 26 Aug 2024
Statute Law (Miscellaneous Provisions) Act (No 2) 2024	82 of 2024	21 Nov 2024	Sch 2.8: 21 Nov 2024

Principal legislation	Number	Date of gazettal/ assent/ registration	Date of commence-ment
Industrial Relations Act 1996	**17 of 1996**	**13 Jun 1996**	**S 322(3): 2 Sep 1996, s 2 and Gov Gaz 99, 30 Aug 1996, p 4983; s 322(3): 14 Feb 1997, s 2 and Gov Gaz 18, 14 Feb 1997, p 545; Sch 5.4 was not commenced and was repealed by the *Statute Law (Miscellaneous Provisions) Act (No 2) 1996* No 121**

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/ assent/ registration	Date of commence-ment
Industrial Relations Amendment Act 2025	8 of 2025	2 Mar 2025	Sch 1.5[1]: 2 Mar 2025; Sch 1.5[2]–[5]: 1 May 2025 (Proc 182 of 2025, 24 Apr 2025)

Principal legislation	Number	Date of gazettal/ assent/ registration	Date of commence-ment
Industrial Relations Act 1996	**17 of 1996**	**13 Jun 1996**	**S 322(3): 2 Sep 1996, s 2 and Gov Gaz 99, 30 Aug 1996, p 4983; s 322(3): 14 Feb 1997, s 2 and Gov Gaz 18, 14 Feb 1997, p 545; Sch 5.4 was not commenced and was repealed by the *Statute Law (Miscellaneous Provisions) Act (No 2) 1996* No 121**

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/ assent/ registration	Date of commence-ment
Industrial Relations Amendment (Transport Sector Gig Workers and Others) Act 2025	20 of 2025	9 Apr 2025	Sch 1[1], [9]–[20] and [22]: 9 Apr 2025

[The next text page is 311-121]

(d) to the Attorney General is taken to include a reference to the Minister, and
(e) to the Director of Public Prosecutions is taken to include a reference to the prosecutor in the proceedings before the Commission in Court Session, and
(f) to the registrar is taken to be a reference to the Industrial Registrar.

(4) Subsection (2) does not apply to a provision of the *Criminal Appeal Act 1912* relating to costs.

[S 196 reinsrt Act 41 of 2023, Sch 1.2[54], with effect from 1 Jul 2024; rep Act 85 of 2013, Sch 1[22], with effect from 20 Dec 2013]

197 Appeals from Local Court

(1) An appeal lies to the Commission in Court Session against:
(a) any order made under this Act by the Local Court for the payment of money or the dismissal by the Local Court of an application for such an order (including a dismissal on the ground that it does not have jurisdiction to deal with the application), or
(b) any conviction or penalty imposed by the Local Court for an offence against this Act or the regulations, or
(c) a civil penalty imposed under this Act by the Local Court for a contravention of an industrial instrument or the dismissal by the Local Court of proceedings for such a civil penalty, or
(d) a civil penalty imposed under Division 7 of Part 13 of the *Work Health and Safety Act 2011* by the Local Court for a contravention of a WHS civil penalty provision or the dismissal by the Local Court of proceedings for such a civil penalty.

[Subs (1) am Act 8 of 2025, Sch 1.5[2], with effect from 1 May 2025; Act 41 of 2023, Sch 1.2[55], with effect from 1 Jul 2024; Act 48 of 2016, Sch 1[63], with effect from 8 Dec 2016; Act 85 of 2013, Sch 1[23], with effect from 20 Dec 2013; Act 67 of 2011, Sch 4.14[3], with effect from 1 Jan 2012; Act 94 of 2007, s 4 and Sch 2, with effect from 6 Jul 2009; Act 67 of 2000, s 3 and Sch 1[25] and [26], with effect from 9 Oct 2000]

(2) The following apply, subject to the regulations under this Act, to an appeal referred to in subsection (1)—
(a) the provisions of the *Crimes (Appeal and Review) Act 2001*, Parts 3 and 6 that relate to the following—
(i) an appeal from the Local Court to the District Court,
(ii) a decision of the District Court on the appeal,
(iii) the carrying out or enforcement of the decision,
(b) the provisions of the *Crimes (Appeal and Review) Act 2001* as applied by the *Local Court Act 2007*, section 70.

[Subs (2) subst Act 8 of 2025, Sch 1.5[3], with effect from 1 May 2025; am Act 15 of 2015, Sch 2.25[1], with effect from 8 Jul 2015; Act 94 of 2007, s 4 and Sch 2, with effect from 6 Jul 2009; Act 94 of 2007, s 3 and Sch 1.51[1], with effect from 6 Jul 2009; subst Act 121 of 2001, s 4 and Sch 2.126[2], with effect from 7 Jul 2003; Act 137 of 1998, s 4 and Sch 2.11, with effect from 1 Mar 1999]

(3) [Repealed]

[Subs (3) rep Act 137 of 1998, s 4 and Sch 2.11, with effect from 1 Mar 1999]

(4) The Commission in Court Session may refer a matter the subject of an appeal back to the Local Court with such directions or recommendations as it considers appropriate.

[Subs (4) am Act 8 of 2025, Sch 1.5[4], with effect from 1 May 2025; Act 41 of 2023, Sch 1.2[56], with effect from 1 Jul 2024; Act 48 of 2016, Sch 1[63], with effect from 8 Dec 2016; Act 85 of 2013, Sch 1[24], with effect from 20 Dec 2013]

(5) Section 179—

(a) applies to a decision or purported decision of the Local Court in proceedings to which this section applies in the same way as it applies to a decision or purported decision of the Commission, and

(b) without limiting that section, applies to a decision or purported decision of the Commission in relation to proceedings to which this section applies.

[Subs (5) subst Act 41 of 2023, Sch 1.2[57], with effect from 1 Jul 2024; Act 48 of 2016, Sch 1[64], with effect from 8 Dec 2016; am Act 94 of 2007, s 4 and Sch 2, with effect from 6 Jul 2009]

Note: The provisions of this section are extended to similar proceedings under other industrial relations legislation eg section 14 of the *Annual Holidays Act 1944*; section 14 of the *Long Service Leave Act 1955*.

[S 197 am Act 8 of 2025; Act 41 of 2023; Act 48 of 2016; Act 15 of 2015; Act 85 of 2013; Act 67 of 2011; Act 94 of 2007; Act 121 of 2001; Act 67 of 2000; Act 137 of 1998]

197B Appeals on questions of law in relation to public sector promotional and disciplinary matters

(1) A party to proceedings under Part 7 of Chapter 2 may, subject to this Part, appeal to the Full Bench of the Commission in Court Session against any decision of the Commission in the proceedings on a question of law.

[Subs (1) am Act 41 of 2023, Sch 1.2[58], with effect from 1 Jul 2024; Act 48 of 2016, Sch 1[65], with effect from 8 Dec 2016; Act 85 of 2013, Sch 1[25], with effect from 20 Dec 2013]

(2) On an appeal under this section, the Full Bench of the Commission in Court Session may—

(a) remit the matter to the Commission for determination in accordance with the decision of the Full Bench, or

(b) make another order in relation to the appeal as seems fit.

[Subs (2) subst Act 41 of 2023, Sch 1.2[59], with effect from 1 Jul 2024; am Act 48 of 2016, Sch 1[65], with effect from 8 Dec 2016; Act 85 of 2013, Sch 1[25] and [26], with effect from 20 Dec 2013]

[S 197B am Act 41 of 2023; Act 48 of 2016; Act 85 of 2013; insrt Act 54 of 2010, Sch 1[9], with effect from 1 Jul 2010]

[The next text page is 311-1951]

CHAPTER 6 – PUBLIC VEHICLES AND CARRIERS

PART 1 – APPLICATION AND DEFINITIONS

305A Objects of chapter

The objects of this chapter are as follows—

(a) to promote fair and efficient arrangements for contracts of carriage and contracts of bailment,

(b) to promote fair and efficient arrangements in contractual chains affecting contracts of carriage and contracts of bailment.

[S 305A insrt Act 20 of 2025, Sch 1[1], with effect from 9 Apr 2025]

306 Contracts to which Chapter applies

The contracts to which this Chapter applies are contracts of bailment and contracts of carriage.

307 Contract of bailment—meaning

(1) For the purposes of this Chapter, a ***contract of bailment*** is a contract under which:

(a) a public vehicle that is a taxi is bailed to a person to enable the person to ply for hire, or

(b) a public vehicle that is a hire vehicle is bailed to a person to transport passengers.

[Subs (1) am Act 34 of 2016, Sch 7.2[1] and [2], with effect from 1 Nov 2017; Act 63 of 2003, s 3 and Sch 1[1] and [2], with effect from 6 Nov 2003]

(2) [Repealed]

[Subs (2) rep Act 34 of 2016, Sch 7.2[3], with effect from 1 Nov 2017; am Act 63 of 2003, s 3 and Sch 1[3], with effect from 6 Nov 2003]

[S 307 am Act 34 of 2016; Act 63 of 2003]

308 Bailor—meaning

For the purposes of this Chapter, a ***bailor*** is the bailor under a contract of bailment to which this Chapter applies.

309 Contract of carriage—meaning

(1) For the purposes of this Chapter, a ***contract of carriage*** is a contract (whether written or oral or partly written and partly oral) for the transportation of goods by means of a motor vehicle or bicycle in the course of a business of transporting goods of that kind by motor vehicle or bicycle, but only:

(a) where the carrier is not a partnership or body corporate—if no person except the carrier is, except in the prescribed circumstances, employed (whether pursuant to a contract of employment or not and whether by the carrier or not) in driving or riding on that or any other motor vehicle or bicycle in the course of that business, or

(b) where the carrier is a partnership—if no person other than a partner is, except in the prescribed circumstances, employed (whether pursuant to a contract of employment or not and whether by the partnership or not) in driving or riding on that or any other motor vehicle or bicycle in the course of that business, or

(c) where the carrier is a body corporate—if no person is, except in the prescribed circumstances, employed (whether pursuant to a contract of employment or not and whether by the body corporate or not) in driving or riding on that or any other motor vehicle or bicycle in the course of that business unless the person is:

(i) a director of the body corporate or a member of the family of a director of the body corporate, or

(ii) a person who, together with the members of his or her family, has a controlling interest in the body corporate, or

(iii) a member of the family of a person who, together with the members of his or her family, has a controlling interest in the body corporate.

(2) For the purposes of subsection (1), a reference to a carrier includes a carrier carrying on business under a franchise or other arrangement.

(3) A contract of carriage includes any contract that the Commission declares, after inquiry, to be such a contract. The Commission may make such a declaration if, in its opinion:

(a) the contract was entered into for the purpose of defeating, evading or avoiding the provisions of this Act relating to contracts of carriage, and

(b) but for being entered into for that purpose, the contract would have been a contract of carriage.

(4) A contract of carriage does not include a contract:

(a) that is, if the carrier is a common carrier, made in the ordinary course of the business of the carrier as a common carrier, or

(b) that is made in the ordinary course of business for the carriage of packaged goods for different principal contractors by the use of the same motor vehicle or bicycle, or

(c) for the carriage of mail by or on behalf of Australia Post, or

(d) for the carriage of bread, milk or cream for sale or delivery for sale, or

(e) for the carriage of goods that are to be sold pursuant to orders solicited during the carriage of the goods, or

(f) for the carriage of livestock, or

(g) if the principal contractor is a primary producer or a member of the family of a primary producer and the contract is for the transportation of primary produce (other than timber), or

(h) for the transportation of primary produce (other than timber) from or to land used for primary production, or

(i) for the delivery of meals by couriers to homes or other premises for consumption.

310 Principal contractor—meaning

(1) For the purposes of this Chapter, a ***principal contractor*** is, subject to this section, the person for whom the carrier under a contract of carriage agrees to transport goods to which the contract relates.

(2) If:

(a) a contract of carriage is made by the acceptance by an agent of the carrier of an offer to enter into the contract not directed specifically to that carrier, and

(b) the agent accepted the offer in the course of a business of acting as agent for the receipt and acceptance, on behalf of 2 or more prospective carriers, of offers to enter into contracts of carriage, and

(c) the agent has a discretion in the selection of the prospective carrier on whose behalf an offer received in the course of that business will be accepted by the agent, the agent is, for the purposes of this Chapter, to be regarded as the principal contractor under the contract to the exclusion of the offerer.

(3) For the purposes of section 309(4)(a) and (b), the carrier under a contract of carriage made as referred to in subsection (2) is to be regarded as having held himself or herself out as ready to transport the goods to which the contract relates for the person required by subsection (2) to be regarded as the principal contractor and not to have held himself or herself out as ready to transport the goods for the offerer so referred to.

310A Authorisations for purposes of Competition and Consumer Act 2010 of the Commonwealth

(1) The following things are specifically authorised by this Act for the purposes of section 51 of the *Competition and Consumer Act 2010* of the Commonwealth and the *Competition Code of New South Wales*:

(a) anything done by the Commission in exercising its functions under this Chapter,

(b) anything done by a person in order to comply with a contract determination of the Commission under this Chapter,

(c) the entering into of an agreement approved by the Commission under this Chapter,

(d) the doing of anything preparatory or incidental to the entering into of any such agreement,

(e) anything done under any such agreement,

(f) anything done by the Contracts of Carriage Tribunal in exercising its functions under this Chapter.

[Subs (1) am Act 68 of 2018, Sch 2.16, with effect from 8 Jan 2019]

(2) Things authorised to be done by subsection (1) are authorised only to the extent (if any) that they would otherwise contravene Part IV of the *Competition and Consumer Act 2010* of the Commonwealth or the *Competition Code of New South Wales*.

[Subs (2) am Act 68 of 2018, Sch 2.16, with effect from 8 Jan 2019]

(3) This section extends to any contract determination made or agreement entered into before the commencement of this section.

(4) [Repealed]

[Subs (4) rep Act 63 of 2003, s 3 and Sch 1[4], with effect from 6 Nov 2003]

[S 310A am Act 68 of 2018; Act 63 of 2003; insrt Act 113 of 2001, s 3 and Sch 1, with effect from 14 Dec 2001]

[The next text page is 311-3201]

PART 2 – CONTRACT DETERMINATIONS

311 Applications to exercise functions

(1) An application for the exercise of a function of the Commission under this Part may be made by:

(a) a bailor under a contract of bailment, if the average number of different bailees with whom the bailor entered into contracts of bailment on each working day during the period of one month that last preceded the making of the application was not less than 10, or

(b) a principal contractor under a contract of carriage, if the average number of different carriers with whom the principal contractor entered into contracts of carriage on each working day during the period of one month that last preceded the making of the application was not less than 10, or

(c) an association of employing contractors, or any other association, which represents bailors or principal contractors who are, or some of whom are, parties to contracts of the class concerned, or

(d) an association of contract drivers or an association of contract carriers that represents bailees or carriers who are, or some of whom are, parties to contracts of the class concerned.

(2) An application must be in such form, and contain such particulars, as are required by the rules of the Commission.

312 Jurisdiction of Commission with respect to contracts of bailment

(1) The Commission may inquire into any matter arising under contracts of bailment and may make a contract determination with respect to any of the following matters under those contracts:

(a) the remuneration of bailees under those contracts (including by way of a minimum rate of commission expressed as a percentage of the chargeable fares earned),

(b) the amounts (if any) to be paid by the bailor to the bailee as attendance money when the bailee is required to attend at a place where the public vehicle concerned is to be bailed to the bailee but no such bailment takes place and for special duties such as preparing and driving a public vehicle to a registering or licensing authority for inspection,

(c) annual or other holidays, sick leave and long service leave for the bailee or payments to the bailee instead of any such leave,

(d) the minimum number of hours per day, per week or for any longer period during which the bailor is to bail the vehicle, if drivable, to the bailee,

(e) if satisfied that it is imperative to do so in the interest of bailors, bailees and the public—the maximum number of hours per day, per week or for any longer period that a bailee may drive a public vehicle,

(f) other conditions.

(2) Subsection (1)(a) does not authorise the Commission to fix penalty rates of commission in relation to excess hours of work or work on specified days but, in fixing a rate of commission under subsection (1)(a), the Commission may take into account all the circumstances in which a public vehicle is driven for reward.

(3) The Commission may, after inquiry, make a contract determination with respect to the records to be kept by bailors in respect of contracts of bailment. Any such determination is subject to any regulations with respect to the matter.

313 Jurisdiction of Commission with respect to contracts of carriage

(1) The Commission may inquire into any matter arising under contracts of carriage and may make a contract determination with respect to remuneration of the carrier, and any condition, under such a contract.

(2) The Commission must, when making a contract determination under this section, consider including provisions relating to the following—

(a) rates of remuneration, including—

(i) payment of allowances instead of annual or other holidays, sick leave or long service leave, and

(ii) payment methods and periods, cost recovery, ensuring a fair return on financial risk and capital investment and the value of entitlements that would otherwise apply to employees,

(b) record keeping,

(c) training and skill development, including relevant industry accreditation,

(d) adequate consultation and dispute resolution,

(e) ensuring access to proper representation by an association of contract carriers, including workplace rights inductions and workplace delegate leave,

(f) the attraction and retention of contract carriers.

[Subs (2) subst Act 20 of 2025, Sch 1[9], with effect from 9 Apr 2025]

(3) The Commission constituted by a Presidential Member may, in relation to contracts of carriage, inquire into any matter in a contractual chain and make a contract determination in relation to remuneration and other conditions in the contractual chain.

[Subs (3) subst Act 20 of 2025, Sch 1[9], with effect from 9 Apr 2025]

(4) The Commission must not exercise a function under subsection (3) if, in the Commission's opinion, the exercise would interfere with the reasonable commercial arrangements of the parties to a contract or arrangement in a contractual chain.

Note: Section 317(3) provides that the Commission may, in a contract determination or by a subsequent order, provide that the contract determination is binding on the successors of a principal contractor.

[Subs (4) insrt Act 20 of 2025, Sch 1[9], with effect from 9 Apr 2025]

[S 313 am Act 20 of 2025]

314 Jurisdiction with respect to reinstatement of contracts

(1) The Commission may, after inquiry, make a contract determination with respect to the reinstatement of a contract of bailment or contract of carriage that has terminated.

(2) Reinstatement of a contract includes re-engagement under a similar contract.

(2A) To avoid doubt, the Commission may make a contract determination with respect to the reinstatement of a contract of bailment or contract of carriage that has been terminated, including the reinstatement of the following—

(a) a part of a contract of carriage or contract of bailment, including a contract where the carrier uses multiple vehicles,

(b) a contract which has been declared to be a contract of carriage by the Commission under section 309(3A).

[Subs (2A) insrt Act 20 of 2025, Sch 1[10], with effect from 9 Apr 2025]

(2B) This section does not apply to the following—

(a) a person who was protected from unfair deactivation, within the meaning of the *Fair Work Act 2009* of the Commonwealth, section 536LD, at the time the contract of bailment or contract of carriage was terminated (a ***protected person***),

(b) a person who would be a protected person, except that the person has been performing the work referred to in the *Fair Work Act 2009* of the Commonwealth, section 536LD(c) on a regular basis, within the meaning of the *Fair Work (Digital Labour Platform Deactivation Code) Instrument 2024*, section 18, for a period of less than 6 months.

[Subs (2B) insrt Act 20 of 2025, Sch 1[10], with effect from 9 Apr 2025]

(3) A contract determination under this section may be made on such terms and conditions as the Commission thinks fit, including provision for any period after the termination of the contract to be treated as a period of engagement under relevant contracts.

(4) If the Commission considers that it would be impracticable to make a determination for reinstatement, the Commission may order the bailor to pay to the driver, or the principal contractor to pay to the carrier, an amount of compensation not exceeding the amount of remuneration of the driver or carrier under relevant contracts during the period of 6 months immediately before the termination of the contract.

(5) When assessing any compensation payable, the Commission is to take into account whether the driver or carrier made a reasonable attempt to find alternative engagements and the remuneration received in alternative engagements, or that would have been payable if the driver or carrier had succeeded in obtaining alternative engagements.

(6) A contract determination under this section takes effect when it is made, and is not required to have a specified term or to be published on the NSW industrial relations website.

[Subs (6) am Act 97 of 2006, s 3 and Sch 1[2], with effect from 1 Dec 2006]

[S 314 am Act 20 of 2025; Act 97 of 2006]

315 Conference to precede contract determination

(1) When application is made to the Commission to exercise its jurisdiction under this Part, the Commission must, before it considers the application, summon to attend and confer with the Commission the applicant and such other persons served with the application as the Commission may direct.

(2) At the conference, the Commission is to:

(a) ascertain which of the matters with which the application is concerned are in dispute and which are not, and

(b) ascertain whether there are any special circumstances or problems existing with respect to contracts of the class with which the application is concerned, and

(c) take all reasonable steps to effect an amicable settlement of any matters in dispute.

(3) After conferring on an application, the Commission may:

(a) dismiss the application, or

(b) proceed to hear the application or specify a time and place at which it will be heard, or

(c) adjourn the application for such period or periods as it thinks fit.

(4) Before hearing an application, the Commission may require service of the application on such persons as it may direct.

316 Making of contract determinations

(1) After hearing an application for it to exercise its jurisdiction under this Part, the Commission may:

(a) dismiss the application, or

(b) make a contract determination with respect to the application.

(2) When the Commission makes a contract determination:

(a) it may defer the operation of the determination wholly or in part for such period or periods as it thinks fit, and

(b) it must specify the class or classes of contracts in respect of which the determination is to operate (including classes defined by reference to a named bailor or principal contractor).

317 Binding force of determination

(1) Subject to such exemptions and conditions as the Commission may direct, a contract determination is binding on all bailors and bailees or all principal contractors and carriers who are parties to contracts of the class to which the determination relates as the Commission may direct.

(2) A contract determination that is binding on a carrier which is a corporation is, except to the extent that the determination otherwise provides, also binding on:

(a) any director of the corporation, or any member of the family of any such director, who personally does work under a contract to which the determination relates and to which the corporation is a party, and

(b) any holder of shares in the corporation who personally does work under any such contract if that holder, together with the members of his or her family, has a controlling interest in the corporation, and

(c) any member of the family of the holder of shares in the corporation who personally does work under any such contract if that holder, together with the members of his or her family, has a controlling interest in the corporation.

(3) Without limiting subsection (1), the Commission may, in a contract determination or by a subsequent order, provide that the contract determination is binding on the successors of a principal contractor.

[Subs (3) insrt Act 20 of 2025, Sch 1[11], with effect from 9 Apr 2025]

(4) Subject to the exemptions and conditions that the Commission directs, a contract determination is binding on all parties in the contractual chain to which the determination relates.

[Subs (4) insrt Act 20 of 2025, Sch 1[11], with effect from 9 Apr 2025]

[S 317 am Act 20 of 2025]

318 Commencement of determination

(1) A contract determination comes into force on the date specified by the Commission.

(2) However, legal proceedings relating to the enforcement of the determination cannot be commenced until the expiration of 7 days after the day on which it is published on the NSW industrial relations website.

[Subs (2) am Act 97 of 2006, s 3 and Sch 1[2], with effect from 1 Dec 2006]

(3) A contract determination may be expressed to apply retrospectively, but not earlier than the date on which:

(a) application for the determination was lodged with the Industrial Registrar or the Commission initiated proceedings for the determination, or

(b) the Commission initiated proceedings for the determination, or

(c) the dispute giving rise to the determination was notified to the Commission,

as the case requires.

Note: Section 190 enables the Full Bench or a Presidential Member, on such terms as it thinks fit, to stay the operation of the whole or any part of a contract determination for the purposes of appeal pending determination of the appeal or further order of the Commission.

[S 318 am Act 41 of 2023, Sch 1.2[72], with effect from 1 Jul 2024; Act 48 of 2016, Sch 1[76], with effect from 8 Dec 2016; Act 97 of 2006]

319 Term of determination

(1) A contract determination applies for the period specified in it as its nominal term and, after that period, until rescinded by the Commission. However, the Commission may specify that the determination ceases to apply at the end of its nominal term.

(2) The nominal term of a determination must not be more than 3 years.

320 Variation or rescission of determinations

The Commission may vary or rescind a contract determination and, when it rescinds a determination, it may replace that determination with a new determination.

321 Exemptions from determinations

(1) The Commission may, on application, grant an exemption from the whole or any part of a contract determination if satisfied it is not contrary to the public interest.

(2) An exemption may be granted for a period not exceeding 3 years at any one time.

(3) The Commission may, on application or on its own initiative, review any exemption, and may confirm, vary or revoke the exemption.

321A Applications to make contract determinations—proposed Fair Work Commission minimum standards orders pending

(1) This section applies if—

(a) an application has been made to the Commission under this part (a ***Part 2 application***) in relation to a carrier or group of carriers, and

(b) an application has been made, but has not been determined, for an employee-like worker minimum standards order under the *Fair Work Act 2009* of the Commonwealth, section 536JZ (an ***employee-like MSO application***) that has a reasonable likelihood of applying to the same carrier or group of carriers.

(2) Despite this part, the Commission, when dealing with the Part 2 application, must—

(a) have regard to the employee-like MSO application, and

(b) without limiting the Commission's other functions, do one of the following unless the Commission is satisfied it would be unreasonable in the circumstances—

(i) dismiss the application,

(ii) adjourn the application for the period the Commission considers reasonable.

[S 321A insrt Act 20 of 2025, Sch 1[12], with effect from 9 Apr 2025]

[The next text page is 311-3251]

PART 3 – CONTRACT AGREEMENTS

322 Agreements concerning contract conditions

(1) An association of contract drivers may enter into an agreement with a bailor of a public vehicle, or with an association of employing contractors representing bailors of public vehicles, with respect to the conditions of contracts of bailment made with that bailor or with bailors represented by the association.

(2) An association of contract carriers may enter into an agreement with a principal contractor, or with an association of employing contractors, with respect to the conditions of contracts of a specified class made with carriers by that principal contractor or with principal contractors represented by the association.

(3) A group of carriers may enter into an agreement with a principal contractor, or with an association of employing contractors, with respect to the conditions of contracts of a specified class made with those carriers by that principal contractor or with principal contractors represented by that association. Those carriers are taken to be one of the parties to the agreement for the purposes of this Part.

(4) An agreement under this section is required to be in writing and signed by or on behalf of the parties to it.

(4A) An agreement under this section must identify the parties to the agreement and describe the class of contracts to which it relates. In particular, an agreement under subsection (3) must identify each member of the group of carriers that enters into the agreement.

[Subs (4A) insrt Act 109 of 1996, s 3 and Sch 1[1], with effect from 13 Dec 1996]

(5) An agreement under this section is called a contract agreement.

[S 322 am Act 109 of 1996]

322A Commission to assist bargaining

(1) The Commission must assist in bargaining in good faith for agreements between an association of contract carriers and a principal contractor or association of employing contractors.

(2) For that purpose, the Commission may convene a compulsory conference and require the attendance of any person whose presence the Commission considers would help in the bargaining.

(3) A compulsory conference must be presided over by a member of the Commission.

(4) The Commission may confer with any person on any matter that may affect the bargaining, without requiring the person to attend a compulsory conference.

(5) If unresolved, the Commission must first attempt to resolve the bargaining by conciliation.

(6) The Commission, when attempting the conciliation, must do everything that seems to be proper to assist the parties to make an agreement.

(7) During conciliation proceedings, the Commission may make a recommendation or give a direction to the parties.

(8) Failure to comply with a recommendation or direction may not be penalised but may be taken into account by the Commission in exercising the Commission's functions under this Act.

(9) The action that may be taken by the Commission to assist the parties includes making arrangements or giving directions for the convening and conduct of conferences of the parties or their representatives, whether or not compulsory conferences and whether or not presided over by a member of the Commission.

(10) The Commission, when dealing with parties negotiating an agreement, must consider whether the parties have bargained in good faith and, in particular, whether the parties have—

(a) attended meetings they have agreed to attend, and
(b) complied with agreed or reasonable negotiating procedures, and
(c) disclosed relevant information for the purposes of negotiation, other than confidential or commercially sensitive information.

(11) The Commission may make recommendations or give directions to the parties to bargain in good faith.

[S 322A insrt Act 20 of 2025, Sch 1[13], with effect from 9 Apr 2025]

323 Contract agreement required to be approved

(1) A contract agreement does not have effect unless it is approved by the Commission under this Part.

(2) This section extends to a contract agreement that varies an earlier agreement.

324 Application for approval of contract agreement

(1) Application for approval of a contract agreement may be made by lodging the agreement with the Industrial Registrar in accordance with this Part and the rules of the Commission.

(2) At proceedings of the Commission relating to any such application for approval, the following may appear or be represented:

(a) any party to the agreement,
(b) any association registered under this Chapter if its members or persons eligible to become members are affected by the agreement (but only with leave of the Commission),
(c) a State peak council (but only with leave of the Commission),
(d) the President of the Anti-Discrimination Board (but only with leave of the Commission).

325 Approval of contract agreement by Commission

(1) The Commission is to approve each contract agreement lodged for approval, but only if the Commission is satisfied that:

(a) the agreement complies with all relevant statutory requirements (including the requirements of this Part and of the *Anti-Discrimination Act 1977*), and
(b) the agreement does not, on balance, provide a net detriment to the drivers or carriers who are to be covered by the agreement when compared with the aggregate package of conditions of engagement under relevant contract determinations that would otherwise apply to the drivers or carriers, and

(c) the parties understand the effect of the agreement, and

(d) the parties did not enter the agreement under duress.

(2) This subsection applies to a contract agreement that applies to contracts of carriage entered into by some but not all of the carriers engaged by the principal contractor or contractors bound by the agreement, unless those carriers comprise a distinct geographical, operational or organisational unit. The Commission is not to approve such a contract agreement if it is satisfied that:

(a) the contract agreement fails to cover other carriers engaged by the principal contractor or contractors who would reasonably be expected to be covered, given the nature of the work performed under the contracts to which the agreement applies and the organisational and operational relationships between the carriers bound by the agreement and those other carriers, and

(b) it is unfair not to cover the carriers excluded from the contract agreement.

[Subs (2) insrt Act 109 of 1996, s 3 and Sch 1[2], with effect from 13 Dec 1996]

(3) The Commission is to follow the principles for approval set under section 33 (Principles for approval of enterprise agreements), with any necessary modifications, when deciding whether to approve a contract agreement, unless satisfied that any departure from those principles would not prejudice the interests of any of the parties to the agreement.

[Subs (3) insrt Act 109 of 1996, s 3 and Sch 1[2], with effect from 13 Dec 1996]

[S 325 am Act 109 of 1996]

325A Special requirements relating to contract agreements to which groups of carriers are parties

(1) A contract agreement to which a group of carriers is a party is not to be approved unless the requirements of this section have been complied with.

(2) Before or at the time the principal contractor, or association of principal contractors, first undertakes formal negotiations with a group of carriers for the purposes of a contract agreement, the principal contractor or association is to advise the Industrial Registrar in writing of the following:

(a) that a contract agreement is proposed or under negotiation,

(b) the contract determinations or contract agreements that then apply to the carriers.

(3) The Industrial Registrar is to advise such persons or bodies as are prescribed by the regulations of the proposed contract agreement.

(4) The contract agreement must be approved in a secret ballot by not less than 65% of the carriers who enter into the agreement.

(5) The Industrial Registrar must, after the contract agreement is lodged for approval, prepare a report for the Commission comparing the conditions of engagement under the agreement and the conditions of engagement that would otherwise apply to the carriers under relevant contract determinations.

(6) Section 37 applies to secret ballots under this Part in the same way as it applies to secret ballots under Part 2 of Chapter 2. Section 344 extends to that application of section 37.

[S 325A insrt Act 109 of 1996, s 3 and Sch 1[3], with effect from 13 Dec 1996]

326 Persons bound by contract agreement

(1) A contract agreement is binding on:

(a) the parties to the agreement, and

(b) in the case of a party that is an association of employing contractors—all members of the association or a specified member or class of members, as provided by the agreement, and

(c) in the case of a party that is an association of contract drivers or contract carriers—all bailees or carriers who are members of the association, or who are eligible to be members of the association and who enter into contracts of the class to which the contract agreement relates.

(2) A contract agreement that, by the operation of this Part, is binding on a corporation as a member of an association of contract carriers is, except to the extent that the agreement otherwise provides, also binding on:

(a) any director of the corporation, or any member of the family of any such director, who personally does work under a contract to which the agreement relates and to which the corporation is a party, and

(b) any holder of shares in the corporation who personally does work under any such contract if that holder, together with the members of his or her family, has a controlling interest in the corporation, and

(c) any member of the family of the holder of shares in the corporation who personally does work under any such contract if that holder, together with the members of his or her family, has a controlling interest in the corporation.

327 Contract agreements prevail over contract determinations

The provisions of a contract agreement prevail over the provisions of any contract determination of the Commission that deal with the same matters in so far as the provisions of the determination apply to a person bound by the agreement.

328 Term of contract agreement

(1) A contract agreement applies for the period specified in it as its nominal term and, after that period, until terminated in accordance with this Part.

(2) The nominal term of a contract agreement must not be less than 12 months nor more than 3 years.

(3) However, a contract agreement made for a project may have a specified nominal term not exceeding the expected duration of the project.

(4) A contract agreement varying an earlier agreement applies for the residue of the term of the agreement it varies.

329 Variation of a contract agreement

(1) A contract agreement may be varied at any time by a further contract agreement made and approved in accordance with this Part.

(2) It does not matter that the parties to the further agreement are not the same as the parties to the earlier agreement.

330 Termination of contract agreement

(1) A contract agreement can be terminated only in accordance with this section.

(2) A contract agreement can be terminated at any time with the approval of all the parties to it, whether during or after its nominal term.

(3) After the end of the nominal term of a contract agreement, a party to the contract agreement may apply to the Commission under Part 2 for a contract determination to replace the contract agreement.

[Subs (3) subst Act 20 of 2025, Sch 1[14], with effect from 9 Apr 2025]

(3A) A contract determination must not be made unless the Commission considers it appropriate having regard to the following—

(a) the conduct of the parties in negotiations for a new contract agreement, if any,

(b) whether the replacement of the contract agreement with a contract determination would adversely impact a party's bargaining position,

(c) whether the replacement of the contract agreement with a contract determination would adversely impact the bailees or carriers who were parties to the contract agreement,

(d) the state of the bailor's or principal contractor's business, including the impact the continued operation of the contract agreement would have on the bailor's or principal contractor's business,

(e) other matters the Commission considers relevant.

[Subs (3A) subst Act 20 of 2025, Sch 1[14], with effect from 9 Apr 2025; insrt Act 109 of 1996, s 3 and Sch 1[4], with effect from 13 Dec 1996]

(3B) If a contract determination is made following an application under subsection (3), the Commission must terminate the contract agreement with effect from the commencement of the operation of the contract determination.

[Subs (3B) insrt Act 20 of 2025, Sch 1[14], with effect from 9 Apr 2025]

(3C) Subsection (3B) has effect despite subsection (4).

[Subs (3C) insrt Act 20 of 2025, Sch 1[14], with effect from 9 Apr 2025]

(3D) In the case of a contract agreement to which a group of carriers is a party, the contract agreement can be terminated by the carriers, but only if the proposed termination is approved in a secret ballot by not less than 65% of the carriers covered by the agreement at the time the ballot is conducted.

[Subs (3D) insrt Act 20 of 2025, Sch 1[14], with effect from 9 Apr 2025]

(4) Termination of the contract agreement is not effective until the Industrial Registrar has been given written notice of the approval to terminate or of service of the notice of intention to terminate.

[S 330 am Act 20 of 2025; Act 109 of 1996]

331 Register and publication of contract agreements

(1) The Industrial Registrar is to keep a register of all contract agreements that have been approved by the Commission, approvals or notices to terminate contract agreements and such other particulars as the Industrial Registrar considers appropriate.

(2) The Industrial Registrar is to publish the following details on the NSW industrial relations website of each contract agreement as soon as practicable after the agreement is approved:

(a) the identity of the parties to the agreement and the description of the drivers or carriers for whom it is made,

(b) the commencement and the nominal term of the agreement,

(c) a statement of whether the agreement is a new agreement or the variation of an earlier agreement.

[Subs (2) am Act 97 of 2006, s 3 and Sch 1[2], with effect from 1 Dec 2006]

(3) The register of contract agreements is to be open for public inspection during ordinary office hours.

(4) A person may make copies of any document kept in the register of contract agreements on payment of such fee, if any, as is prescribed by the regulations.

[S 331 am Act 97 of 2006]

331A Application of contract agreement to successor principal contractors

(1) This section applies if—

(a) a contract agreement that applies to a principal contractor is approved by the Commission, and

(b) at a later time, a new principal contractor becomes the successor, whether or not immediate, of the whole or part of the business of the principal contractor.

(2) From the later time—

(a) to the extent the contract agreement applies to the whole or part of the business, the contract agreement—

(i) applies to the new principal contractor, and

(ii) does not apply to the previous principal contractor, and

(b) a reference in this chapter to the principal contractor, to the extent the context relates to the whole or part of the business—

(i) is a reference to the new principal contractor, and

(ii) is not a reference to the previous principal contractor.

(3) The Commission may make an order to give effect to the operation of this section, including by varying the contract agreement.

[S 331A insrt Act 20 of 2025, Sch 1[15], with effect from 9 Apr 2025]

[The next text page is 311-3301]

PART 4 – DISPUTE RESOLUTION

332 Compulsory conference with respect to disputes

(1) If subsection (2) or (3) applies or the Commission has reasonable cause to believe that it applies, the Commission may summon a person to a compulsory conference:

(a) to confer, or

(b) to give evidence, or

(c) to produce documents or exhibits,

in an endeavour to bring the interested parties to a settlement which will determine the matter in relation to which the subsection applies.

(1A) For the compulsory conference, the Commission may require the attendance of any person whose presence the Commission considers would help in the settlement of the industrial dispute, including a person involved in the contractual chain that relates to the dispute.

[Subs (1A) insrt Act 20 of 2025, Sch 1[16], with effect from 9 Apr 2025]

(1B) A compulsory conference must be presided over by a member of the Commission.

[Subs (1B) insrt Act 20 of 2025, Sch 1[16], with effect from 9 Apr 2025]

(1C) The Commission must first attempt to settle the industrial dispute by conciliation.

[Subs (1C) insrt Act 20 of 2025, Sch 1[16], with effect from 9 Apr 2025]

(1D) During conciliation proceedings, the Commission may—

(a) make a recommendation or give a direction to the parties to the dispute, and

(b) make a recommendation to a person referred to in subsection (1A).

[Subs (1D) insrt Act 20 of 2025, Sch 1[16], with effect from 9 Apr 2025]

(1E) Failure to comply with a recommendation may be taken into account by the Commission in exercising the Commission's functions under this Act, including in relation to a decision to vary or rescind a contract determination.

[Subs (1E) insrt Act 20 of 2025, Sch 1[16], with effect from 9 Apr 2025]

(2) This subsection applies if an association registered under this chapter or a bailor or a principal contractor becomes aware of an industrial dispute that relates to a contract of bailment or a contract of carriage, including a contract of bailment or a contract of carriage that has been terminated.

[Subs (2) subst Act 20 of 2025, Sch 1[17], with effect from 9 Apr 2025]

(3) This subsection applies if an industrial dispute arising from the reorganisation of the business of a principal contractor affects, or is likely to affect, the number of carriers used by the principal contractor or their remuneration.

(4) At a compulsory conference, the Commission is to investigate the merits of the matter concerned, irrespective of whether or not industrial action is taking place.

(5) If the Commission considers that all reasonable steps have been taken to resolve the industrial dispute by conciliation, the Commission may do one or both of the following—

(a) make a contract determination expressed to be an interim determination made under this subsection,

(b) make another order or exercise another function the Commission considers appropriate to resolve the dispute.

[Subs (5) subst Act 20 of 2025, Sch 1[18], with effect from 9 Apr 2025]

(6) An interim determination made under subsection (5)(a)—

(a) may be expressed in the terms the Commission considers appropriate, including terms to restore or maintain the conditions existing between the parties immediately before the occurrence of the events giving rise to the industrial dispute, and

(b) remains in force for the period specified by the Commission in the interim determination.

[Subs (6) subst Act 20 of 2025, Sch 1[18], with effect from 9 Apr 2025]

(7) An interim determination or an order the Commission makes under subsection (5)(b) may apply to one or more parties to the industrial dispute, including a person involved in the contractual chain that relates to the dispute.

[Subs (7) insrt Act 20 of 2025, Sch 1[18], with effect from 9 Apr 2025]

(8) The Commission must not exercise a function under subsection (5) if, in the Commission's opinion, the exercise would interfere with the reasonable commercial arrangements of the parties to a contract or arrangement in a contractual chain.

[Subs (8) insrt Act 20 of 2025, Sch 1[18], with effect from 9 Apr 2025]

[S 332 am Act 20 of 2025]

[The next text page is 311-3321]

(2) An order of the Tribunal for the payment of costs may only be made with the approval of the Presidential Member.

[Subs (2) am Act 41 of 2023, Sch 1.2[83], with effect from 1 Jul 2024; Act 48 of 2016, Sch 1[85], with effect from 8 Dec 2016]

[S 353 am Act 41 of 2023; Act 48 of 2016]

354 Representation of parties

(1) A party to proceedings before the Tribunal may appear personally or be represented by an Australian legal practitioner or by an agent who is not an Australian legal practitioner, by an employee or officer of an association of employing contractors, or by an employee or officer of an association of contract carriers.

[Subs (1) am Act 120 of 2006, s 3 and Sch 3.13[1], with effect from 4 Dec 2006]

(2) However, a party is not entitled to be represented in conciliation proceedings by a person who is an Australian legal practitioner without the leave of the Tribunal.

(3) The leave of the Tribunal is not required if the Australian legal practitioner represents a member of an association of employing contractors or an association of contract carriers and is an officer or employee of such an association.

[Subs (3) am Act 120 of 2006, s 3 and Sch 3.13[3], with effect from 4 Dec 2006]

(4) The Tribunal may allow any party appearing before it the services of an interpreter.

[S 354 am Act 120 of 2006]

355 Contracting out prohibited in certain circumstances

(1) The provisions of this Part have effect despite any stipulation to the contrary.

(2) No contract or agreement made or entered into before or after the commencement of this Part operates to annul, vary or exclude any of the provisions of this Part.

[The next text page is 311-3357]

PART 7 – MISCELLANEOUS

355A Involvement in contravention treated in same way as actual contravention

(1) A person who is involved in a contravention of a provision of this chapter, other than an offence provision, is taken to have contravened that provision.

(2) A person is involved in a contravention of a 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.

[S 355A insrt Act 20 of 2025, Sch 1[19], with effect from 9 Apr 2025]

355B Contract determinations and contract agreements must include provisions dealing with tolls and routes

A contract determination or contract agreement for contracts of carriage must include the following—

(a) a provision specifying how tolls incurred in the course of work performed under a contract of carriage to which the contract determination or contract agreement applies are to be reimbursed,

(b) a provision setting out a carrier's obligations under the contract determination or contract agreement regarding routes that must be taken to effect a delivery, being obligations that are reasonable in the circumstances.

[S 355B insrt Act 20 of 2025, Sch 1[19], with effect from 9 Apr 2025]

355C Dispute resolution where proposed Fair Work Commission minimum standards orders pending

The Commission must not deal with an industrial dispute under Part 4 that relates to a carrier or group of carriers if an application has been made, but has not been determined, for an employee-like worker minimum standards order under the *Fair Work Act 2009* of the Commonwealth, section 536JZ that has a reasonable likelihood of applying to the same carrier or group of carriers.

[S 355C insrt Act 20 of 2025, Sch 1[19], with effect from 9 Apr 2025]

[The next text page is 311-3361]

Schedule 1 – Persons deemed to be employees

(Section 5(3))

1 Persons to be treated as employees

The following persons are taken to be employees:

(a) [Repealed]

(b) **Cleaners**

Any person (other than the owner or occupier of the premises or a bona fide cleaning contractor employing labour for the purpose) who performs any work of cleaning premises or a part of premises for which work, if performed by an employee, a price or rate is for the time being fixed by an industrial instrument. (In such a case, the owner or, where there is an occupier other than the owner, the occupier of the premises is taken to be the employer.)

(c) **Carpenters, joiners or bricklayers**

Any person (other than the owner or, where the owner is not occupying the building or premises, the occupier of any building or premises or a bona fide contractor employing labour for that purpose) who performs carpentry or joinery or bricklaying work upon any building or premises the erection, construction, repair, alteration or maintenance of which is being carried out under a contract between the owner or occupier and a contractor. (In such a case, the last-mentioned contractor is taken to be the employer. This provision does not apply to work of repair, alteration or addition to existing premises used as residences.)

(d) **Painters**

Any person (other than the owner or, where the owner is not the occupier, the occupier of any building or premises or a bona fide contractor employing labour for that purpose who has entered into a contract with such owner or occupier or with a bona fide contractor who has contracted to erect, renovate, repair or maintain such building or premises) who performs the work of house or general painting. (In such a case, the owner or occupier is taken to be the employer. This provision does not apply to work of repair, alteration or addition to existing premises used as residences.)

(e) [Repealed]

(f) **Outworkers in clothing trades**

Any person (not being the occupier of a factory) who performs outside a factory any work in the clothing trades or the manufacture of clothing products, whether directly or indirectly, for the occupier of a factory or a trader who sells clothing by wholesale or retail. (In such a case, the occupier or trader is taken to be the employer.)

(g) **Timber cutter and supplier**

Any person (in this paragraph referred to as ***the contractor***) who, in response to an advertisement or other notification placed by a person (in this paragraph referred to as ***the principal***) requiring the delivery or supply of timber to the principal or as directed by the principal, notifies the principal in writing that the contractor will deliver or supply the whole or part of the timber and who engages in the work of cutting, delivering and supplying timber to the principal or at the principal's direction until the principal by written notice withdraws the offer to accept timber so delivered or supplied. (In such a case, the principal is taken to be the employer.)

(h) **Plumber, drainer or plasterer**

Any person (other than the owner or, where the owner is not occupying the building or premises, the occupier of any building or premises or a bona fide contractor employing labour for that purpose) who performs the work of plumbing, draining, plastering, fibrous plaster fixing or fixing of gypsum plaster board on any building or premises the erection, construction, repair, alteration or maintenance of which is being carried out under a contract between the owner or occupier and a contractor. (In such a case, the last-mentioned contractor is taken to be the employer. This provision does not apply to work of repair, alteration or maintenance of existing premises used as residences.)

(i) **Blinds fitter**

Any person (not being a bona fide contractor employing labour for that purpose) who, as a trade or occupation, performs the work of fitting blinds in or on a building (including the work of taking measurements for blinds, or of assembling or selling blinds, in connection with their fitting) if the blinds or component parts have been supplied to the person by the manufacturer or a distributor of the blinds or components under an agreement for their supply for the purpose of being fitted by the person in the course of his or her trade or occupation. (In such a case, the manufacturer or distributor is taken to be the employer.)

(j) **Council swimming centre manager or supervisor**

Any person (other than an excluded person) who performs the work of managing or supervising swimming activities at a swimming centre under the care and control of a local council pursuant to a contract with the local council. (In such a case, the local council is taken to be the employer).

(k) **Ready-mixed concrete driver**

Any person who owns or hires a vehicle and drives the vehicle when it is being used for the carriage of ready-mixed concrete (or of materials to be made into ready-mixed concrete on the vehicle) if the concrete or materials have been supplied to the person for their delivery by a manufacturer who carries on the business of manufacturing, supplying or distributing ready-mixed concrete. (In such a case, the manufacturer is taken to be the employer.)

(l) **Transport for NSW lorry driver**

Any person (other than an excluded person) who owns a motor lorry and drives the motor lorry when it is being used for road work under a contract between the person and Transport for NSW (or between them and others). (In such a case, Transport for NSW is taken to be the employer.)

(m) **Others prescribed by regulations**

Any person of a class prescribed by the regulations (whether or not of the same kind as the other classes of persons referred to in this clause). Any such regulation must specify the person who, for the purposes of this Act, is taken to be the employer of any person of a class so prescribed.

[Cl 1 am Act 20 of 2025, Sch 1[20], with effect from 9 Apr 2025; Act 30 of 2020, Sch 4.31, with effect from 22 Jan 2021; Act 41 of 2011, Sch 5.12[3] and [4], with effect from 1 Nov 2011; Act 128 of 2001, s 20 and Sch 2[6], with effect from 1 Feb 2002; Act 74 of 2000, s 3 and Sch 1[1], with effect from 20 Nov 2000]

2 Definitions

(1) For the purposes of:

(a) clause 1(f): ***factory*** has the same meaning as "Factory" had in the *Factories, Shops and Industries Act 1962* immediately before that definition was repealed by Schedule 2.4[2] to the *Occupational Health and Safety Act 2000*, but does not include an office, building or place (whether or not required to be registered as a

factory under that Act) in which mechanical power of less than 0.75 kilowatt is used, and ***occupier*** has the same meaning as "Occupier" had in the *Factories, Shops and Industries Act 1962* immediately before that definition was amended by Schedule 2.4[3] to the *Occupational Health and Safety Act 2000*,

(b) clause 1(g):

(i) the notice of intention by the contractor to deliver or supply timber must be in the prescribed form and must indicate the nature of the work to be undertaken and the locality where and time within which the work is to be carried out,

(ii) the notice may be given personally or by letter posted to the principal at his or her place of business or usual address,

(iii) ***timber*** includes sleepers, piles, poles, girders, logs and pit timber, and ***cutting*** includes felling, sawing, obtaining, preparing and doing any related work in connection with timber.

(1A) For the purposes of clause 1(j):

(a) ***excluded person*** means:

(i) a bona fide contractor employing labour for the purpose of performing the work referred to in clause 1(j), or

(ii) a person who performs that work as a partner in a bona fide partnership (whether or not employing labour for the purpose), or

(iii) an employee of any such contractor or partnership.

(b) ***contract*** includes any lease, licence or arrangement.

(c) ***swimming centre*** means any public facility used predominantly for the purpose of swimming.

(d) a swimming centre does not cease to be under the care and control of a local council or councils because it is managed on behalf of the council or councils by a committee appointed by the council or councils under the *Local Government Act 1993*.

(2) For the purposes of clause 1(l):

(a) ***contract*** includes any agreement or arrangement,

(b) ***motor lorry*** means any motor vehicle (whether or not in combination with any trailer) that is constructed principally for the conveyance of goods or merchandise or for the conveyance of any kind of materials used in any trade, business or industry, or for use in any work whatsoever other than the conveyance of persons, but does not include a motor cycle or a tractor,

(c) ***road work*** means the carriage of goods or materials for use in (or for the purpose of) the construction or maintenance of roads by or on behalf of Transport for NSW,

(d) ***excluded person*** means:

(i) a person who employs another to drive or assist in driving a motor lorry when it is being used for road work (except where the person employs another during his or her absence on holidays or long service leave or due to sickness, accident or other reasonable cause),

(ii) a person (whether or not a common carrier) who is engaged in the business of transporting for the public generally freight in containers,

(e) a person ***owns*** a motor lorry if:

(i) the person alone (or with others) owns the motor lorry, or

(ii) a proprietary company owns the motor lorry and the person is a director of the company or owns not less than 20 per cent of the issued shares of the company, or

(iii) the person has the use of the motor lorry under a contract,

(f) a person ***employs*** another if that other person is employed:

(i) by the person alone (or with others), or

(ii) by a proprietary company and the first-mentioned person is a director of the company or owns not less than 20 per cent of the issued shares of the company,

(g) a person who has a beneficial interest in a motor lorry or shares is taken to be the owner of the motor lorry or shares,

(h) ownership or employment by any one or more members of a partnership is taken to be ownership or employment by all members of the partnership,

(i) a contract made with any one or more members of a partnership is taken to have been made with all the members of the partnership.

[Cl 2 am Act 30 of 2020, Sch 4.31[2], with effect from 22 Jan 2021; Act 41 of 2011, Sch 5.12[4], with effect from 1 Nov 2011; Act 128 of 2001, s 20 and Sch 2[7] and [8], with effect from 1 Feb 2002; Act 74 of 2000, s 3 and Sch 1[1], with effect from 20 Nov 2000; Act 19 of 1999, s 4 and Sch 2.16[1], with effect from 1 Dec 1999]

3 Substitution of employer

(1) In any proceedings for a breach of this Act or of an industrial instrument or for the recovery of money under this Act brought against any person taken because of this Schedule to be an employer, it is a defence if the person required to be taken to be an employer joins as a party to the proceedings some other person whom he or she alleges to be the employer and proves that, apart from the operation of this Schedule, that other person was at the relevant time the employer.

(2) The other person is to have the right to appear and defend the allegation made by the person taken to be an employer and, if the other person is held to be the employer, the same orders may be made against the other person and the other person is to be in the same position as if the proceedings had been originally instituted against the other person at the time they were instituted against the person required to be taken to be the employer.

[Sch 1 am Act 20 of 2025; Act 30 of 2020; Act 41 of 2011; Act 128 of 2001; Act 74 of 2000; Act 19 of 1999]

[The next text page is 311-3621]

Schedule 2 – Provisions relating to members of Commission

(Section 150)

1 Acting President

(1) The Vice-President is the Acting President during the absence from duty of the President.

(2) If the President and the Vice-President are or are to be both absent from duty, the Minister may appoint a Deputy President to be Acting President during the absence.

(3) An Acting President has the functions of the President and anything done by an Acting President in the exercise of those functions has effect as if it had been done by the President.

(4) In this clause, ***absence from duty*** includes a vacancy in the relevant office.

[Cl 1 subst Act 41 of 2023, Sch 1.2[97], with effect from 1 Jul 2024; Act 48 of 2016, Sch 1[97], with effect from 8 Dec 2016]

2 Acting Deputy Presidents and Acting Commissioners

(1) The Governor may, by commission under the public seal of the State, appoint as an Acting Deputy President or Acting Commissioner a person qualified for appointment if satisfied the additional member is necessary to enable the Commission to exercise its functions effectively during the period of the appointment.

(2) The person's appointment is for the period, not exceeding 12 months, specified in the person's commission.

(3) An Acting Deputy President or Acting Commissioner has the functions of, and is taken to be, a Deputy President or Commissioner, as the case requires, subject to the conditions or limitations specified in the person's commission.

(4) The person appointed may, despite the expiration of the period of the person's appointment, complete or otherwise continue to deal with any matters relating to proceedings that have been heard, or partly heard, by the person before the expiration of the period.

[Cl 2 subst Act 41 of 2023, Sch 1.2[97], with effect from 1 Jul 2024; Act 48 of 2016, Sch 1[98], with effect from 8 Dec 2016; am Act 49 of 1998, s 3 and Sch 13[1], with effect from 8 Aug 1998]

3 Acting judicial members

(1) The Governor may, by commission under the public seal of the State, appoint as an acting member of the Commission in Court Session (an ***acting judicial member***) a person qualified for appointment as a judicial member, including an acting member of the Commission who is qualified.

(2) A person who was formerly a judicial member or a Judge of another court may be appointed as an acting judicial member, and also appointed as an Acting Deputy President or Acting Commissioner under clause 2, even though the person has reached 75 years of age, or will have reached that age before the appointment expires.

(3) However, the person must not be appointed for any period that extends beyond the date the person reaches 78 years of age.

(4) The person's appointment as an acting judicial member is for the period, not exceeding 5 years, specified in the person's commission.

(5) Subject to any conditions or limitations specified in the person's commission, an acting judicial member—

(a) has the functions of a judicial member, and

(b) is taken to be a judicial member.

(6) The conditions specified in the commission may exclude the whole or a part of the period of appointment as an acting judicial member from being regarded as a period of prior judicial service as referred to in the *Judges' Pensions Act 1953*, section 8(2).

(7) The person appointed may, despite the expiration of the period of the person's appointment, complete or otherwise continue to deal with any matters relating to proceedings that have been heard, or partly heard, by the person before the expiration of the period.

[Cl 3 reinsrt Act 41 of 2023, Sch 1.2[97], with effect from 1 Jul 2024; rep Act 48 of 2016, Sch 1[99], with effect from 8 Dec 2016; am Act 2 of 2015, Sch 3.5, with effect from 15 May 2015; Act 49 of 1998, s 3 and Sch 13[2], with effect from 8 Aug 1998]

4 Age of judicial members

A person who has reached 75 years of age is not eligible to be appointed as a judicial member.

[Cl 4 reinsrt Act 41 of 2023, Sch 1.2[97], with effect from 1 Jul 2024; rep Act 48 of 2016, Sch 1[99], with effect from 8 Dec 2016]

5 Age of members (other than judicial members other than judicial members)

(1) A person of or above the age of 65 years is not eligible to be appointed as a member of the Commission, unless the person is or is to be appointed as a judicial member.

(2) However, a person who is or was a member of the Commission may be appointed as such a member after the person reaches the age of 65 years.

(3) Any appointment under subclause (2):

(a) may not be made in respect of a person so as to extend beyond the date on which the person reaches the age of 72 years, and

(b) may be made before the person reaches the age of 65 years (in which case the appointment has effect on and from the date the person reaches that age), and

(c) is to be made for a term not exceeding 3 years at any one time.

[Cl 5 am Act 41 of 2023, Sch 1.2[98] and [99], with effect from 1 Jul 2024; Act 48 of 2016, Sch 1[100], with effect from 8 Dec 2016]

6 Oaths

The regulations may make provision for the oaths to be taken by members of the Commission, including judicial members.

[Cl 6 am Act 41 of 2023, Sch 1.2[100], with effect from 1 Jul 2024; Act 48 of 2016, Sch 1[101], with effect from 8 Dec 2016]

7 Status, remuneration etc of judicial members

(1) Each judicial member has the same rank, title, status and precedence, and, subject to subclause (3), the same remuneration and other rights, as a Judge of the Supreme Court, other than the Chief Justice or the President or a Judge of the Court of Appeal.

(2) In particular, a judicial member is entitled to be called a Judge and to use the title of "Justice".

(3) The remuneration of a judicial member who is the President, Vice-President or a Deputy President of the Commission must be determined under the *Statutory and Other Offices Remuneration Act 1975*.

[Cl 7 reinsrt Act 41 of 2023, Sch 1.2[101], with effect from 1 Jul 2024; rep Act 48 of 2016, Sch 1[99], with effect from 8 Dec 2016]

8 Protection and immunities of other members

A member of the Commission who is not a judicial member has the same protection and immunities as a judicial member.

[Cl 8 subst Act 41 of 2023, Sch 1.2[102], with effect from 1 Jul 2024; Act 48 of 2016, Sch 1[102], with effect from 8 Dec 2016]

9 Remuneration of other members

(1) A member of the Commission, other than a member who is also a judicial member, is entitled to be paid:

(a) remuneration in accordance with the *Statutory and Other Offices Remuneration Act 1975*, and

(b) such travelling and subsistence allowances as the Minister may from time to time determine in respect of the member.

(2) A member of the Commission who is also a judicial member is only entitled to be paid remuneration as a judicial member.

[Cl 9 am Act 41 of 2023, Sch 1.2[103]–[105], with effect from 1 Jul 2024; Act 48 of 2016, Sch 1[103] and [104], with effect from 8 Dec 2016]

10 Vacancy in office of member

(1) The office of a member of the Commission, including a judicial member, becomes vacant if the member is removed or retired from office in accordance with the applicable provisions of the *Constitution Act 1902*, Part 9 and the *Judicial Officers Act 1986*, Parts 7 and 8.

(2) A member of the Commission who is not a judicial member may be removed from office only in accordance with the provisions of the *Constitution Act 1902*, Part 9 relating to the removal from office of judicial members.

(3) A member of the Commission who is also a judicial member ceases to hold both offices if removed or retired from either office.

(4) The office of a member also becomes vacant if the member–

(a) dies, or

(b) is appointed for a limited period and the period expires without the member being re-appointed.

[Cl 10 subst Act 41 of 2023, Sch 1.2[106], with effect from 1 Jul 2024; am Act 48 of 2016, Sch 1[105], with effect from 8 Dec 2016; Act 67 of 2000, s 3 and Sch 1[32], with effect from 9 Oct 2000]

10A Former members may complete unfinished matters

(1) This clause applies to a member of the Commission (a ***former member***) who ceases to hold office as a member because:

(a) the term of appointment for the member has expired without the member being re-appointed, or

(b) the member has resigned or retired from office.

(2) A former member may, despite ceasing to hold office as a member, complete or otherwise continue to deal with any matters relating to proceedings that have been heard, or partly heard, by the former member before that cessation.

(3) While a former member completes or otherwise continues under subclause (2) to deal with any matters relating to proceedings that have been heard or partly heard by the member before ceasing to hold office, the former member has all the entitlements and functions of a member of the same kind as he or she was and, for the purpose of those proceedings, is taken to continue to be such a member.

(3A) To avoid doubt, a former member who held office as the President cannot exercise the functions of the President and is not taken to be the President.

(4) This clause does not apply in relation to an acting judicial member who ceases to hold office.

Note: See clause 3(7) in relation to former acting judicial members.

[Cl 10A am Act 41 of 2023, Sch 1.2[107], with effect from 1 Jul 2024; Act 48 of 2016, Sch 1[109] and [110], with effect from 8 Dec 2016]

11 Seniority of members

(1) The members of the Commission have seniority according to the following order of precedence—

(a) the President,

(b) the Vice-President,

(c) Deputy Presidents according to the days on which their commissions took effect or, if the commissions of 2 or more Deputy Presidents took effect on the same day, according to the precedence assigned to the Deputy Presidents by their commissions,

(d) Commissioners according to the days on which their commissions took effect or, if the commissions of 2 or more Commissioners took effect on the same day, according to the precedence assigned to the Commissioners by their commissions.

(2) If a member is re-appointed under this Act, the member's seniority is to be determined as if there had been no break in the member's service.

[Cl 11 am Act 41 of 2023, Sch 1.2[108], with effect from 1 Jul 2024; Act 48 of 2016, Sch 1[111], with effect from 8 Dec 2016]

12 Leave for members

(1) The entitlement of a member of the Commission to annual and other leave is to be as stated in the instrument of appointment as a member.

(2) A member of the Commission may be granted leave:

(a) in the case of the President—by the Minister, and

(b) in any other case—by the President.

(3) This clause is subject to clause 7.

[Cl 12 am Act 41 of 2023, Sch 1.2[109] and [110], with effect from 1 Jul 2024; Act 48 of 2016, Sch 1[112] and [113], with effect from 8 Dec 2016]

13 Superannuation and leave—preservation of rights

(1) In this clause:

eligible member means a member of the Commission who, immediately before becoming such a member, was a Public Service employee or an officer or employee of a public authority declared by an Act or proclamation to be an authority to which this clause applies.

[Def am Act 58 of 2015, Sch 3.48[9], with effect from 15 Jan 2016]

superannuation scheme means a scheme, fund or arrangement under which any superannuation or retirement benefits are provided and which is established by or under an Act.

(2) An eligible member:

(a) may continue to contribute to any superannuation scheme to which he or she was a contributor immediately before becoming an eligible member, and

(b) is entitled to receive any payment, pension or gratuity accrued or accruing under the scheme,

as if he or she had continued to be such a contributor during service as a member of the Commission.

(3) Service by the eligible member as a member of the Commission is taken to be service as an officer in his or her previous employment for the purposes of any law under which the member continues to contribute to the scheme or by which an entitlement under the scheme is conferred.

(4) The eligible member is to be regarded as an officer or employee, and the State is to be regarded as the employer, for the purposes of the scheme.

(5) This clause ceases to apply to the eligible member if he or she becomes a contributor to another superannuation scheme, but the eligible member is not prevented from receiving a resignation benefit from the first superannuation scheme.

(6) An eligible member retains any rights to annual leave, extended or long service leave and sick leave accrued or accruing in his or her previous employment.

(7) An eligible member is not entitled to claim, under both this Act and any other Act, dual benefits of the same kind for the same period of service.

[Cl 13 am Act 15 of 2015, Sch 2.25[3], with effect from 8 Jul 2015]

[Sch 2 am Act 41 of 2023; Act 48 of 2016; Act 58 of 2015; Act 15 of 2015; Act 2 of 2015; Act 67 of 2000; Act 49 of 1998]

[The next text page is 311-3631]

Schedule 3 – Provisions relating to members and procedure of Industrial Committees

(Section 201)

1 Definitions

In this Schedule:

Committee means an Industrial Committee (including an Industrial Committee established for the purposes of Chapter 6).

nominee member of a Committee means a member of the Committee other than the Chairperson.

2 Allowances for nominee members

A nominee member of a Committee is not entitled to remuneration as such a member but is entitled to be paid such travelling and subsistence allowances as the Minister may from time to time determine in respect of the member.

3 Deputy nominee members

(1) Such number of deputies as the Industrial Registrar determines are to be appointed for each nominee member of a Committee in the same way as the member.

(2) A deputy, while representing a member in the absence of the member, is to be taken to be the member.

(3) This Act applies to a deputy representing a member of a Committee in the same way as it applies to the member.

4 Vacation of office by nominee members

(1) The office of a nominee member of a Committee becomes vacant if:

(a) the member dies, or

(b) the member resigns the office by instrument in writing addressed to the Industrial Registrar, or

(c) the nominator of the member withdraws the nomination by giving notice to that effect to the Industrial Registrar, or

(d) the Committee is dissolved or expires.

(2) If a nominee member of a Committee ceases to hold the office, the Industrial Registrar may appoint an appropriately qualified person to the vacant office. The regulations may make provision for or with respect to the nomination of any such person for appointment to the vacant office.

5 Oaths

The regulations may make provision for the oaths to be taken by members of a Committee.

6 Notices of appointment or termination

The Industrial Registrar is to cause a notice of the appointment of a member to a Committee or the termination of any such appointment to be published on the NSW industrial relations website.

7 Continuation of hearing

A Committee to which an appointment is made to fill a vacancy in its membership may, as constituted with the new member, continue to hear, and may determine, any matter under consideration by it at the time the vacancy occurred.

8 Procedure and powers of Committees

(1) Part 5 of Chapter 4 applies to proceedings before a Committee in the same way as it applies to proceedings before the Commission, other than in Court Session, subject to such exceptions and modifications as are prescribed by the regulations.

(2) A Committee is not to award costs under the provisions as so applied unless the decision is supported by its Chairperson.

[Cl 8 am Act 41 of 2023, Sch 1.2[111], with effect from 1 Jul 2024; Act 48 of 2016, Sch 1[114], with effect from 8 Dec 2016]

9 Meetings of Committees

(1) Meetings of a Committee are, subject to the rules of the Commission, to be convened by the Industrial Registrar.

(2) The conduct of business at a meeting of a Committee is, subject to the rules of the Commission, to be determined by the Committee.

(3) The Chairperson of a Committee is to preside at a meeting of the Committee.

(4) Each member of a Committee present at a meeting, except the Chairperson, has one vote and:

(a) if the votes for and against a motion are unequal, the decision according to the majority of the votes is the decision of the Committee, or

(b) if the votes for and against a motion are equal, the Chairperson is to decide the question and the decision of the Chairperson is the decision of the Committee.

(5) Any question before a Committee as to the admissibility of evidence is to be decided by the Chairperson of the Committee, and the decision of the Chairperson is final.

(6) The Chairperson may refer to the Commission for determination or directions any question or matter arising at a meeting of the Committee.

[Sch 3 am Act 41 of 2023; Act 48 of 2016]

[The next text page is 311-3651]

Schedule 4 – Savings, transitional and other provisions

(Section 409)

Part 1 – Preliminary

1 Definitions

In this Schedule:

1940 Act means the *Industrial Arbitration Act 1940*.

1991 Act means the *Industrial Relations Act 1991*.

former 1940 Act Commission means the Industrial Commission of New South Wales established under the 1940 Act.

former 1991 Act Commission means the Industrial Relations Commission of New South Wales established under the 1991 Act.

former Industrial Court means the Industrial Court of New South Wales established under the 1991 Act.

new Commission means the Industrial Relations Commission established under this Act.

2 Regulations

(1) The regulations may contain provisions of a savings or transitional nature consequent on the commencement of—

(a) a provision of this Act, or

(b) a provision amending this Act.

(2) A savings or transitional provision consequent on the commencement of a provision must not be made more than 2 years after the commencement.

(3) A savings or transitional provision made consequent on the commencement of a provision is repealed 2 years after the commencement.

(4) A savings or transitional provision made consequent on the commencement of a provision may take effect before the commencement but not before—

(a) for a provision of this Act—the date of assent to this Act, or

(b) for a provision amending this Act—the date of assent to the amending Act.

(5) A savings or transitional provision taking effect before its publication on the NSW legislation website does not—

(a) affect the rights of a person existing before the publication in a way prejudicial to the person, or

(b) impose liabilities on a person for anything done or omitted to be done before the publication.

(6) In this clause—

person does not include the State or an authority of the State.

[Cl 2 subst Act 41 of 2023, Sch 1.2[112], with effect from 1 Jul 2024; am Act 48 of 2016, Sch 1[115] and [116], with effect from 18 Oct 2016; Act 85 of 2013, Sch 1[31], with effect from 20 Dec 2013; Act 68 of 2012, Sch 1[8], with effect from 24 Sep 2012; Act 27 of 2012, Sch 1[9], with effect from 11 May 2012; Act 68 of 2011, Sch 1[10], with effect from 28 Nov 2011; Act 13 of 2011, Sch 1[3], with effect from 17 Jun 2011; Act 109 of 2010, Sch 1[11], with effect from 29 Nov 2010; Act 54 of 2010, Sch 1[12], with effect from 1 Jul 2010; Act 115 of 2009, Sch 2[8], with effect from 1 Jan 2010; Act 49 of 2008, Sch 3.2[2], with effect from 1 Jul 2008; Act 23 of 2008, s 5 and Sch 3.27[9], with effect from 22 Sep 2008; Act 97 of 2006, s 3 and Sch 1[13], with effect from 1 Dec 2006; Act 1 of 2006, s 3 and Sch 1[6], with effect from 13 Mar 2006; Act 104 of 2005, s 3 and Sch 1[6], with effect from 12 Sep 2005; Act 71 of 2003, s 3 and Sch 4[5], with effect from 1 Jan 2004; Act 63 of 2003, s 3 and Sch 1[3], with effect from 11 Jun 2003; Act 48 of 2003, s 3 and Sch 1[2], with effect from 23 Oct 2003; Act 120 of 2002, s 3 and Sch 1[6], with effect from 1 Feb 2003; Act 86 of 2002, s 4 and Sch 2.2, with effect from 17 Feb 2003; Act 32 of 2002, s 3 and Sch 1[3], with effect from 24 Jun 2002; Act 94 of 2001, s 3 and Sch 7[3], with effect from 21 Dec 2001; Act 47 of 2001, s 3 and Sch 1[2], with effect from 17 Jul 2001; Act 21 of 2001, s 3 and Sch 1[2], with effect from 19 Jun 2001; Act 67 of 2000, s 3 and Sch 1[33], with effect from 9 Oct 2000; Act 69 of 1999, s 4 and Sch 2.3[2], with effect from 17 Dec 1999; Act 164 of 1998, s 3 and Sch 1[4], with effect from 12 Feb 1999; Act 106 of 1998, s 3 and Sch 1[2], with effect from 1 Dec 1998; Act 109 of 1996, s 3 and Sch 1[3], with effect from 13 Dec 1996]

Part 2 – Provisions relating to Chapter 2 (Employment)

Division 1 – Awards

3 Existing awards

An award made under the 1991 Act by the former 1991 Act Commission or the former Industrial Court (or made under the 1940 Act and taken by the 1991 Act to be an award under the 1991 Act), being an award in force immediately before the repeal of the 1991 Act, is taken to be an award made under the corresponding provision of this Act by the new Commission.

4 Existing exemptions

An exemption from an award granted under the 1991 Act (being an exemption in force immediately before the repeal of that Act) is taken to have been granted under this Act.

5 Pending applications

Any application for an award or exemption made under the 1991 Act and not determined immediately before the repeal of that Act is to continue to be dealt with as if made under this Act.

Division 2 – Former enterprise and industrial agreements

6 Continuation in force of existing enterprise agreements

(1) Any enterprise agreement registered (or taken to be registered) under the 1991 Act and in force immediately before the repeal of that Act (a ***former enterprise agreement***) is taken to be an enterprise agreement approved under this Act.

(2) Any enterprise agreement lodged for registration under the 1991 Act and not registered immediately before the repeal of the 1991 Act is to continue to be dealt with under the relevant provisions of the 1991 Act despite its repeal. If it is registered, subclause (1) applies to the agreement.

(3) The Commission must, on the application of an industrial organisation of which employers or employees who are parties to the agreement are (or are eligible to be) members, by order terminate an agreement to which subclause (1) applies if the Commission is satisfied that the agreement:

(a) is not consistent with the principles prescribed by section 33, or

(b) does not comply with the conditions of approval prescribed by section 35. The agreement may also be terminated in accordance with section 44.

[Cl 6 am Act 67 of 2000, s 3 and Sch 1[34], with effect from 9 Oct 2000]

7 Continuation in force of existing former industrial agreements

An industrial agreement filed under section 11 of the 1940 Act (including a variation of such an agreement) that was continued in force by the 1991 Act and was in force immediately before the repeal of the 1991 Act (a ***former industrial agreement***) continues in force under this Act and (except as otherwise provided by this Act) is taken to be an enterprise agreement approved under this Act.

8 Variation of existing agreements

A former enterprise or industrial agreement may be varied at any time by an enterprise agreement made and approved in accordance with this Act, but not otherwise.

9 Termination of existing agreements

(1) Unless each of the parties agrees to terminate the agreement during its term or after its term has expired, a former enterprise or industrial agreement can be terminated only at or after the expiration of its term by one of the parties giving to the other party or all other parties at least 3 months' written notice of intention to terminate. The notice may be served before the end of its term.

(2) Termination of the agreement is not effective unless the Industrial Registrar has been given written notice of an agreement to terminate or of service of the notice of intention to terminate.

10 Effect of existing agreement

The provisions of a former enterprise or industrial agreement prevail over the provisions of any award or order of the Commission that deal with the same matters in so far as they apply to a person bound by the agreement (but the provisions of a former industrial agreement do not prevail over a former or any other enterprise agreement).

11 Persons bound by existing agreement

(1) A former enterprise agreement is binding on:

(a) the parties to the agreement, and

(b) each person from time to time employed in the enterprise for which the agreement was made who, whether or not a member of an industrial organisation or a works committee that is a party to the agreement or otherwise a named party to the agreement, is employed in a trade or occupation to which the agreement relates, and

(c) each successor to an employer who was a party to the agreement.

(2) A former industrial agreement is binding on:

(a) the parties to the agreement, and

(b) every member for the time being of an industrial organisation of employees that is a party to the agreement, being a member to whom the agreement applies, and

(c) every member for the time being of an industrial organisation of employers that is a party to the agreement, and

(d) each person from time to time employed by the employer or each employer for whom the agreement was made who, although not a member of an industrial organisation of employees, is employed in a trade or occupation to which the agreement relates, and

(e) each successor to any such employer.

Division 3 – Parental leave

12 Things done under previous parental leave provisions

(1) For the purposes of this clause, the ***previous parental leave provisions*** are the provisions of Part 14A of the 1940 Act and the provisions of Division 3 of Part 2 of Chapter 2 of the 1991 Act.

(2) Anything done by an employee or employer for the purposes of the previous parental leave provisions is taken to have been done for the purposes of the corresponding provisions of this Act.

(3) Any entitlement (to leave or otherwise) in accordance with the previous parental leave provisions subsisting immediately before the repeal of the 1991 Act becomes an entitlement in accordance with the corresponding provisions of this Act.

(4) Leave taken under the previous parental leave provisions is taken to have been taken under the corresponding provisions of this Act.

13 Pregnancy/birth/adoption before commencement of this Act

(1) Part 4 of Chapter 2 (Parental leave) applies to and in respect of a pregnancy that began before, and a birth or adoption that occurred before, the commencement of that Part.

(2) The employer may waive the application of any notice requirements under that Part, or reduce the period of notice required, in the case of such a pregnancy, birth or adoption.

13A Parental leave for casual employees—Industrial Relations Amendment Act 2000 and Industrial Relations Amendment (Casual Employees Parental Leave) Act 2001

(1) The amendments to Part 4 of Chapter 2 made by the *Industrial Relations Amendment Act 2000* or the *Industrial Relations Amendment (Casual Employees Parental Leave) Act 2001* extend to persons employed as casual employees on the commencement of those amendments.

(2) The employment of those persons before the commencement of those amendments may be taken into account for the purposes of the 24-month qualifying period of service referred to in section 57(3) (as in force before the commencement of the *Industrial Relations Amendment (Casual Employees Parental Leave) Act 2001*) or for the purposes of the 12-month qualifying period of service referred to in section 57(3) (as in force after the commencement of that Act).

[Cl 13A am Act 47 of 2001, s 3 and Sch 1[3] and [4], with effect from 17 Jul 2001; insrt Act 67 of 2000, s 3 and Sch 1[35], with effect from 9 Oct 2000]

13B Adoption leave—Industrial Relations Amendment (Adoption Leave) Act 2003

The amendment made to section 55(4) by the *Industrial Relations Amendment (Adoption Leave) Act 2003* does not apply to or in respect of an adoption of a child if placement of the child occurred before the commencement of that Act.

[Cl 13B insrt Act 48 of 2003, s 3 and Sch 1[3], with effect from 23 Oct 2003]

Division 4 – Other employment provisions

14 Transitional provision consequent on prohibition on cashing-in of accumulated sick leave in 1993

(1) Section 27 does not affect the cashing-in of accumulated sick leave under an existing provision on termination of employment (whether by resignation, retirement, death or otherwise), but the maximum number of days (or other periods) of that leave that may be cashed-in is to be calculated as follows:

Step 1

Calculate the number of days (or other periods) of accumulated sick leave, as at the date of termination of employment, that the employee could cash-in in accordance with the existing provision as in force on that date.

Step 2

Calculate the number of days (or other periods) of accumulated sick leave, as at 15 February 1993, that the employee could have cashed-in if his or her employment had been terminated immediately before that date and all conditions in the existing provision that had to be satisfied before accumulated sick leave could be paid to the employee (for example, attaining a specified age or completing a specified period of employment) were satisfied.

The maximum number of days (or other periods) of accumulated leave that may be cashed-in is the lesser of the numbers calculated under step 1 and step 2.

(2) An existing provision may be duly repealed or varied, but not so as to increase the number of days (or other periods) of accumulated sick leave that may be cashed-in.

(3) Section 27 does not affect any payment made or due to an employee before 15 February 1993.

(4) In this clause:

award means an award within the meaning of section 27.

existing provision means a provision of an award that allows or requires an employee to cash-in the employee's accumulated sick leave on termination of employment (whether by resignation, retirement, death or otherwise), being a provision that commenced before 15 February 1993.

Note: 15 February 1993 is the date of commencement of section 99A of the 1991 Act—the predecessor of the above clause.

15 Basic wage

(1) The adult basic wage on the repeal of the 1991 Act is $121.40 per week.

(2) The adult basic wage may be varied by the Commission. Notice of any such variation is to be published in the Industrial Gazette by the Industrial Registrar.

(3) A reference in another Act, in an industrial instrument, in an instrument made under an Act or in any document to the adult basic wage is to be read as a reference to the adult basic wage in force under this clause.

16 Saving for existing part-time work agreements

A part-time work agreement made under Division 4 of Part 2 of Chapter 2 of the 1991 Act and in force immediately before the repeal of that Act is taken to be a part-time agreement under Part 5 of Chapter 2 of this Act.

17 Saving for pending application for unfair dismissals

An application made but not determined under Part 8 of Chapter 3 of the 1991 Act immediately before the repeal of that Act is to continue to be dealt with as if made under Part 6 of Chapter 2 of this Act.

17A Federal award employees

(1) Section 90A (which was inserted by the *Industrial Relations Amendment (Federal Award Employees) Act 1998*) does not apply to a termination of employment that occurred before the commencement of that section.

(2) Section 83(1A) (as replaced by the *Industrial Relations Amendment Act 2000*) does not apply to a termination of employment that occurred before the commencement of that replacement subsection.

[Cl 17A am Act 67 of 2000, s 3 and Sch 1[36], with effect from 9 Oct 2000; insrt Act 164 of 1998, s 3 and Sch 1[5], with effect from 12 Feb 1999]

17B Industrial agents

Section 90A (as inserted by the *Industrial Relations Amendment (Industrial Agents) Act 2002*) does not apply to or in respect of proceedings that were commenced before the commencement of that section.

[Cl 17B insrt Act 120 of 2002, s 3 and Sch 1[7], with effect from 1 Feb 2003]

18 Saving for pending application for reinstatement of dismissed injured employee

An application made but not determined under Part 7 of Chapter 3 of the 1991 Act immediately before the repeal of that Act is to continue to be dealt with as if made under Part 7 of Chapter 2 of this Act.

19 Protection of accrued entitlements on transfer of business

Part 8 of Chapter 2 (Protection of entitlements on transfer of business) applies to a transferred employee only if the transfer of business occurs or occurred on or after 1 April 1987.

19A Transitional provision consequent on changes to unfair contracts jurisdiction

Section 109A (which was inserted by the *Industrial Relations Amendment (Unfair Contracts) Act 1998*) does not affect the jurisdiction of the Commission under Part 9 of Chapter 2 in connection with the dismissal of an employee before the commencement of that section.

[Cl 19A insrt Act 106 of 1998, s 3 and Sch 1[3], with effect from 1 Dec 1998]

19B Transitional provision relating to unfair contracts arising from 2005 amending Act

Section 106(2A), as inserted by the *Industrial Relations Amendment Act 2005* applies to a contract made before the commencement of that provision and to proceedings pending in the Commission at that commencement that have not been finally determined by the Commission. However, section 106(2A) does not apply to any proceedings pending in any other court or tribunal on that commencement.

[Cl 19B insrt Act 104 of 2005, s 3 and Sch 1[7], with effect from 12 Sep 2005]

20 Saving of existing permits for under-award pay for impaired workers

A permit issued, or taken to be issued, under section 21 of the 1991 Act and in force immediately before the repeal of that section is taken to have been granted under section 125 of this Act.

Part 3 – Provisions relating to Chapter 3 (Industrial disputes)

21 Pending industrial disputes

(1) An industrial dispute being dealt with by the former 1991 Act Commission immediately before the repeal of the 1991 Act is to continue to be dealt with by the new Commission according to the procedures for conciliation and arbitration of the 1991 Act despite its repeal. Any dispute order made in the proceedings is taken to be a dispute order made under this Act (whether or not such an order could be made under this Act).

(2) Any proceedings for a breach of a dispute order, or for an injunction in connection with industrial action, pending before the former Industrial Court immediately before the repeal of the 1991 Act is to continue to be dealt with by the new Commission in Court Session according to the relevant provisions of the 1991 Act despite its repeal. Any order made in the proceedings is taken to be an order made under this Act (whether or not such an order could be made under this Act).

(3) Despite subclause (1), if immediately before the repeal of the 1991 Act, the industrial dispute was being dealt with by conciliation and a certificate of attempted conciliation had not been issued, the dispute is taken to be an industrial dispute notified to the new Commission under Chapter 3 and is to continue to be dealt with according to the procedures for conciliation and arbitration of that Chapter.

Part 4 – Provisions relating to Chapter 4 (The Industrial Relations Commission)

21A Representation of parties

Section 166(2) (as amended by the *Industrial Relations Amendment (Industrial Agents) Act 2002*) does not apply to or in respect of conciliation proceedings that were commenced before the commencement of the amendment.

[Cl 21A insrt Act 120 of 2002, s 3 and Sch 1[8], with effect from 1 Feb 2003]

22 Abolition of 1991 Act Commission and appointment of members to new Commission

(1) The Industrial Relations Commission of New South Wales established under the 1991 Act is abolished on the repeal of the 1991 Act.

(2) On the repeal of the 1991 Act:

(a) the person holding office as President of the former 1991 Act Commission immediately before that repeal is by this Act appointed as President of the new Commission, and

(b) the person holding office as Vice-President of the former 1991 Act Commission immediately before that repeal is by this Act appointed as Vice-President of the new Commission, and

(c) a person holding office as a Deputy President of the former 1991 Act Commission immediately before that repeal is by this Act appointed as a Deputy President of the new Commission, and

(d) a person holding office as a Conciliation Commissioner of the former 1991 Act Commission immediately before that repeal is by this Act appointed as a Commissioner of the new Commission, and

(e) a person holding office as an Acting Deputy President of the former 1991 Act Commission immediately before that repeal is by this Act appointed as an Acting Deputy President of the new Commission, and

(f) a person holding office as an Acting Conciliation Commissioner of the former 1991 Act Commission immediately before that repeal is by this Act appointed as an Acting Commissioner of the new Commission.

(3) Any such person who was holding office as a regional member for a specified region under the 1991 Act is by this Act appointed as a regional member for that region under this Act.

(4) Any such person who was holding office for a specified term is taken to have been appointed to the new office for the balance of that term of office.

23 Abolition of Industrial Court and appointment of Judges as judicial members of new Commission

(1) The Industrial Court of New South Wales established under the 1991 Act is abolished on the repeal of the 1991 Act.

(2) On the repeal of the 1991 Act:

(a) a person holding office as a Judge of the former Industrial Court (including the Chief Judge and the Deputy Chief Judge) immediately before that repeal is by this Act appointed as a member of the new Commission in Court Session (a ***judicial member*** of the new Commission), and

(b) if any such person does not also hold office as a member of the former 1991 Act Commission, the person is by this Act appointed as a Deputy President of the new Commission, and

(c) a person holding office as an Acting Judge of the former Industrial Court immediately before that repeal is by this Act appointed as an acting member of the new Commission in Court Session (an ***acting judicial member*** of the new Commission), and

(d) if any such person does not also hold office as a member or acting member of the former 1991 Act Commission, the person is by this Act appointed as an acting member of the new Commission.

(3) Any such person who was holding office for a specified term is taken to have been appointed to the new office for the balance of that term of office.

24 Provisions relating to Judges of former Industrial Court taken to be judicial members

(1) This clause applies to a person who was a Judge of the former Industrial Court (including the Chief Judge and Deputy Chief Judge) and who is appointed as a judicial member of the new Commission under this Part.

(2) In the case of a person who is by this Act appointed as a judicial member and also as President or Vice-President of the new Commission, the remuneration that the person is entitled to be paid is to be not less than the remuneration from time to time determined on the basis of the same comparison with a Judge of the Supreme Court as that on which the remuneration of the person had been determined immediately before the repeal of the 1991 Act. This subclause has effect despite the provisions of the *Statutory and Other Offices Remuneration Act 1975* relating to the President and Vice-President.

(3) In the case of a person who is by this Act appointed as another judicial member, Schedule 2 to this Act provides that the remuneration payable is to be the same as that payable to a Judge of the Supreme Court (other than the Chief Justice and the President or a Judge of the Court of Appeal).

(4) Service as a judicial member of the former 1940 Act Commission or as a Judge of the former Industrial Court of a person to whom this clause applies is to be reckoned for all purposes as service as a judicial member of the new Commission.

25 Provisions relating to Presidential members of former 1991 Act Commission (other than Judges) taken to be appointed as Presidential members of new Commission

(1) This clause applies to a person who was a Presidential member of the former 1991 Act Commission (and was not also a Judge of the former Industrial Court) and who is appointed as a Presidential member of the new Commission under this Part.

(2) Any such person has, while holding the office to which the person is by this Act appointed, the same rank, status, precedence and other rights as the person had under the 1991 Act immediately before the repeal of that Act.

(3) The remuneration that a person to whom this clause applies is entitled to be paid is to be not less than the remuneration from time to time determined on the basis of the same comparison with a Judge of the Supreme Court as that on which the remuneration of the person had been determined immediately before the repeal of the 1991 Act. This subclause has effect despite the provisions of the *Statutory and Other Offices Remuneration Act 1975* relating to Presidential members of the new Commission.

(4) The *Judges' Pensions Act 1953* does not apply to a person to whom this clause applies.

(5) Service as a non-judicial member of the former 1940 Act Commission or as Presidential member of the former 1991 Act Commission of a person to whom this clause applies is to be reckoned for all purposes as service as a Presidential member of the new Commission.

26 Provisions relating to Conciliation Commissioners taken to be appointed as Commissioners of new Commission

(1) This clause applies to a person who was a Conciliation Commissioner under the 1991 Act and who is appointed as a Commissioner of the new Commission under this Part.

(2) The remuneration that a person to whom this clause applies is entitled to be paid is to be not less than the remuneration that was payable to the person as a Conciliation Commissioner immediately before the repeal of the 1991 Act. This subclause has effect despite the provisions of the *Statutory and Other Offices Remuneration Act 1975* relating to Commissioners of the new Commission.

(3) Despite their repeal, the provisions of section 15(1A)(a), (7), (8), (8A) and (8B) of the 1940 Act continue to apply to a person to whom this clause applies if those provisions applied to the person immediately before the repeal of the 1991 Act because of clause 7 of Schedule 2 to the 1991 Act, and so apply in the same way as they applied to the person when the person was a Conciliation Commissioner under the 1940 Act.

(4) Despite their repeal, the provisions of section 327 of the 1991 Act continue to apply to a person to whom this clause applies, and so apply in the same way as they applied to the person when the person was a Conciliation Commissioner under the 1991 Act.

(5) Service as a Conciliation Commissioner under the 1940 Act and the 1991 Act of a person to whom this clause applies is to be reckoned for all purposes as service as a Commissioner of the new Commission.

27 Conciliation and other Committees

(1) A Conciliation Committee or Contract Regulation Committee established under the 1991 Act and in existence immediately before the repeal of that Act is taken to have been established under this Act as an Industrial Committee.

(2) For the purposes of calculating the duration of any such Committee, the Committee is taken to have been established on the repeal of that Act.

(3) Proceedings pending before the Committee on the repeal of that Act are to be continued as if they were pending under this Act.

28 Industrial Registrar, Deputy Industrial Registrar, inspectors and other staff

(1) Any person appointed under Part 2 of the *Public Sector Management Act 1988* to the office of Industrial Registrar, Deputy Industrial Registrar or inspector for the purposes of the 1991 Act and holding that office immediately before the repeal of the 1991 Act is by this Act so appointed to the corresponding office for the purposes of this Act.

(2) Any other persons employed under Part 2 of the *Public Sector Management Act 1988* for the purposes of the 1991 Act or to enable the former Industrial Court to exercise its functions are by this Act so employed for the purposes of this Act.

29 Issue of replacement commission

The Governor may issue an appropriate commission under the public seal of the State to a person who is appointed to a new office under this Part. The appointment is effective whether or not such a commission is issued.

30 Transitional arrangements pending making of rules of Commission

(1) Until rules of the Commission are in force with respect to any matter for which rules may be made, the regulations may make provision with respect to that matter.

(2) Until rules or regulations are made, the following regulations under the 1991 Act (as in force immediately before the repeal of that Act) apply to the matter with such modifications as may be necessary:

(a) in the case of proceedings before the Commission in Court Session—*Industrial Court Rules (Transitional) Regulation 1992*,

(b) except in the case of proceedings before the Commission in Court Session—*Industrial Relations Commission Rules (Transitional) Regulation 1992*.

31 Pending proceedings under 1991 Act

(1) If, before the repeal of the 1991 Act, proceedings in relation to a matter were instituted (or taken to be instituted) in the former 1991 Act Commission or the former Industrial Court, but the hearing of the matter had not been commenced before that repeal, the proceedings are taken to be proceedings instituted in the new Commission.

(2) If, before the repeal of the 1991 Act, the former 1991 Act Commission or the former Industrial Court, had commenced the hearing of, but had not determined, a matter, the

person or persons constituting the Commission hearing the matter are to continue the hearing, and are to determine the matter, sitting as the new Commission.

(3) If proceedings referred to in subclause (2) are proceedings before the former Industrial Court, the new Commission sitting to determine the matter is to be the Commission in Court Session (whether or not the matter is one within the jurisdiction of the new Commission in Court Session under this Act).

(4) The repeal of the 1991 Act does not affect any proceedings pending before a Local Court under that Act, whether or not constituted by an Industrial Magistrate.

(5) Section 191 (Nature of appeal) applies to appeals made under the 1991 Act, but not determined before the repeal of that Act.

31A Costs agreements

Sections 181A and 406A (as inserted by the *Industrial Relations Amendment (Industrial Agents) Act 2002*) do not apply to or in respect of proceedings that were commenced before the commencement of those sections.

[Cl 31A insrt Act 120 of 2002, s 3 and Sch 1[9], with effect from 1 Feb 2003]

31B Finality of decisions

The amendments made to section 179 by the *Industrial Relations Amendment Act 2005* apply to decisions and proceedings of the Commission made or instituted before the commencement of the amendments, and to proceedings pending in any State court or tribunal (other than the Commission) on that commencement. However, those amendments do not affect any order or decision made by any such court or tribunal before that commencement.

[Cl 31B insrt Act 104 of 2005, s 3 and Sch 1[8], with effect from 12 Sep 2005]

31C Transitional arrangements relating to Industrial Gazette

(1) This clause applies to any provision of an Act or statutory rule that is amended by the *Industrial Relations Further Amendment Act 2006* to replace a reference to the Industrial Gazette with a reference to the NSW industrial relations website.

(2) Any matter that was duly published in the Industrial Gazette as required or permitted by a provision to which this clause applies continues to have been duly published for the purposes of that provision on and after the relevant commencement day despite the amendment of the provision by the *Industrial Relations Further Amendment Act 2006*.

(3) In this clause:

relevant commencement day means the day on which Schedule 1[10] to the *Industrial Relations Further Amendment Act 2006* commences.

[Cl 31C insrt Act 97 of 2006, s 3 and Sch 1[14], with effect from 2 Feb 2007]

Part 5 – Provisions relating to Chapter 5 (Industrial organisations)

Note: Section 223 provides that all industrial organisations registered or recognised under the *Industrial Relations Act 1991* immediately before the repeal of that Act by this Act are taken to be registered under Chapter 5 of this Act as State organisations or separate organisations, as the case requires.

32 Union officials' rights of entry—saving of existing authorities

Any authority issued under section 733 of the 1991 Act to an officer of an industrial organisation of employees (within the meaning of that section) and in force immediately before the repeal of that section by this Act is taken to be an authority issued under Part 7 of Chapter 5 of this Act.

Part 6 – Provisions relating to Chapter 6 (Public vehicles and carriers)

33 Contract determinations

(1) A contract determination made under Chapter 6 of the 1991 Act (or made under Part 8A of the 1940 Act and taken by the 1991 Act to have been made under the 1991 Act), being a contract determination in force immediately before the repeal of the 1991 Act, is taken to have been made by the new Commission under Chapter 6 of this Act.

(2) Any application for a contract determination made under Chapter 6 of the 1991 Act and not determined immediately before the repeal of that Act is to continue to be dealt with as if made under Chapter 6 of this Act.

34 Continuation in force of existing contract agreements

Any agreement registered (or taken to be registered) under Chapter 6 of the 1991 Act and in force immediately before the repeal of that Act is taken to be a contract agreement approved under Chapter 6 of this Act.

35 Previous extension of Chapter 6 from motor lorries to motor vehicles

Contract agreements and contract determinations made before the commencement of the *Industrial Relations (Public Vehicles and Carriers) Amendment Act 1993* apply, until such time as they are varied, only to motor lorries.

36 Extension of Chapter 6 from motor vehicles to bicycles

Contract agreements and contract determinations made before the commencement of this Act apply, until such time as they are varied, only to motor vehicles.

37 Continuation of registration of existing associations

Any association registered (or taken to be registered) under Chapter 6 of the 1991 Act immediately before the repeal of that Act is taken to be an association registered under Chapter 6 of this Act.

38 Transitional—provisions relating to termination of head contracts of carriage

Part 7 of Chapter 6 applies to the termination of a head contract of carriage that occurs on or after 1 August 1994 (being the commencement of the predecessor of that Part enacted by the *Industrial Relations (Contracts of Carriage) Amendment Act 1994*), and so applies whether the head contract of carriage was entered into before or after that date.

Part 7 – Provisions relating to Chapter 7 (Enforcement)

39 Chief and other Industrial Magistrates

(1) On the repeal of the 1991 Act, a person holding office as Chief Industrial Magistrate or Industrial Magistrate under the 1991 Act immediately before that repeal is by this Act appointed as Chief Industrial Magistrate or Industrial Magistrate under this Act.

(2) Until a relevant determination is made and takes effect under the *Statutory and Other Offices Remuneration Act 1975*, an Industrial Magistrate holding office on a part-time basis is entitled to be paid in accordance with the determination in force for the time being for Industrial Magistrates, but on a pro rata basis (according to time spent in service), as calculated by the Attorney General.

[Cl 39 am Act 69 of 1999, s 4 and Sch 2.3[3], with effect from 17 Dec 1999]

Part 8 – Miscellaneous provisions

40 Construction of superseded references

A reference in another Act, in an instrument made under an Act or in any document:

(a) to the 1940 Act or the 1991 Act—is to be read as a reference to this Act, or

(b) to the *Trade Union Act 1881* or the *Truck Act 1900*—is to be read as a reference to the corresponding provisions of this Act, or

(c) to the former 1940 Act Commission or the former 1991 Act Commission—is to be read as a reference to the new Commission, or

(d) to the former Industrial Court—is to be read as a reference to the new Commission in Court Session, or

(e) to a Conciliation Committee established under the 1940 Act or under the 1991 Act—is to be read as a reference to an Industrial Committee established under this Act, or

(f) to a Contract Regulation Tribunal established under the 1940 Act or a Contract Regulation Committee established under the 1991 Act—is to be read as a reference to an Industrial Committee established under this Act, or

(g) to an award under the 1940 Act or the 1991 Act—is to be read as a reference to an award under this Act, or

(h) to an industrial agreement or enterprise agreement under the 1940 Act or the 1991 Act—is to be read as a reference to an enterprise agreement under this Act (unless otherwise provided), or

(i) to a contract determination under the 1940 Act or the 1991 Act—is to be read as a reference to a contract determination under this Act, or

(j) to a registered agreement under section 91H of the 1940 Act or under Chapter 6 of the 1991 Act—is to be read as a reference to a contract agreement under this Act, or

(k) to an industrial union of employees or employers is to be read as a reference to an industrial organisation of employees or employers registered under Chapter 5, or

(l) to the holder of an authority issued under section 733 of the 1991 Act is to be read as a reference to the holder of an authority issued under Part 7 of Chapter 5 of this Act.

41 Orders

(1) An order made under the 1991 Act by the former 1991 Act Commission or the former Industrial Court (or made under the 1940 Act and taken by the 1991 Act to be an order under the 1991 Act), being an order having effect immediately before the repeal of the 1991 Act, is taken to be an order made under the corresponding provision of this Act by the new Commission.

(2) Any application for an order made under the 1991 Act and not determined immediately before the repeal of that Act is to continue to be dealt with as if made under this Act (but only if there is a corresponding provision of this Act under which the order could be made).

(3) This clause is subject to the other provisions of this Schedule.

42 Expiration of current period

If, for any purpose, time had commenced to run under a provision of the 1991 Act before, but had not expired before, the repeal of the provision, it expires for the corresponding purpose under this Act at the time at which it would have expired if the provision had not been repealed.

43 General saving

(1) If anything done or commenced under the 1991 Act before the repeal of that Act and still having effect or not completed immediately before that repeal could have been done or commenced under this Act if this Act had been in force when the thing was done or commenced:

(a) the thing done continues to have effect, or

(b) the thing commenced may be completed,

as if it had been done or commenced under this Act.

(2) A reference in this clause to anything done or commenced under the 1991 Act includes a reference to anything done or commenced under the 1940 Act and continuing to have effect under the 1991 Act.

(3) This clause is subject to any express provision of this Act on the matter.

[Cl 43 am Act 54 of 1998, s 3 and Sch 2.20[3], with effect from 30 Jun 1998]

44 Validation of exercise of jurisdiction by Industrial Magistrates

(1) For the avoidance of doubt, any exercise or purported exercise of jurisdiction by the Chief Industrial Magistrate or other Industrial Magistrate under any of the following Acts (or regulations under those Acts) before the commencement of this clause is as valid as it would have been had the amendments made by Schedule 7 to the *Workers Compensation Legislation Further Amendment Act 2001* been in force at the time of the exercise or purported exercise of the jurisdiction:

Building and Construction Industry Long Service Payments Act 1986
Essential Services Act 1988
Occupational Health and Safety Act 2000
Shops and Industries Act 1962
Workers Compensation Act 1987
Workplace Injury Management and Workers Compensation Act 1998

(2) For the avoidance of doubt, any exercise or purported exercise of jurisdiction by the Chief Industrial Magistrate or other Industrial Magistrate under any of the following Acts (or regulations under those Acts) before the repeal of the Act concerned is as valid as it would have been had that Act been specified in section 382(1) at the time of the exercise or purported exercise of the jurisdiction:

Construction Safety Act 1912
Occupational Health and Safety Act 1983

[Cl 44 insrt Act 94 of 2001, s 3 and Sch 7[4], with effect from 21 Dec 2001]

Part 8A – Provisions consequent on enactment of Industrial Relations Amendment Act 2006

44A Definitions

In this Part:

amending Act means the *Industrial Relations Amendment Act 2006*.

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

relevant time means the beginning of the day that occurs immediately before the day on which Part 2 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005* of the Commonwealth commences.

[Cl 44A insrt Act 1 of 2006, s 3 and Sch 1[7], with effect from 13 Mar 2006]

44B Application of section 146A

Section 146A, as inserted by Schedule 1[3] to the amending Act, extends to agreements of the kind referred to in section 146A(1) entered into before the commencement of that section.

[Cl 44B insrt Act 1 of 2006, s 3 and Sch 1[7], with effect from 13 Mar 2006]

44C Certain agreed awards to have effect as enterprise agreements

(1) This clause applies to an award that was in force immediately before the relevant time:

(a) that applies to a group of employees that is constituted wholly or partly by employees of any constitutional corporation and in respect of which an enterprise agreement could have been made (as referred to in section 30), and

(b) the parties to which are limited to the kinds of persons or bodies that could have been parties to an enterprise agreement (as referred to in section 31) in respect of those employees, and

(c) that binds only the parties to the award and the employees for whom the award was made, and

(d) that was made by the Commission so as to give effect to an agreement of the parties to the award.

(2) Without limiting subclause (1)(d), an award was made so as to give effect to an agreement of the parties if:

(a) the award was made with the consent of the parties, or

(b) the award substantially gives effect to conditions of employment agreed to, or jointly proposed to the Commission, by the parties.

(3) On and from the relevant time:

(a) an award to which this clause applies ceases to have effect as an award, but only to the extent to which it applies to employees of a constitutional corporation (the ***relevant award***), and

(b) an enterprise agreement (with the features referred to in subclause (4)(a) – (d)) has effect instead of the relevant award in respect of those employees even though the formalities under Part 2 of Chapter 2 for the making of an enterprise agreement may not have been complied with.

(4) Part 2 of Chapter 2 applies to any enterprise agreement given effect to by subclause (3)(b) in the same way as that Part applies to any other enterprise agreement, subject to the following:

(a) the agreement is taken to have been duly made and to have been duly approved by the Commission at the relevant time,

(b) the agreement binds the same employees of a constitutional corporation and parties as the relevant award,

(c) the conditions of employment for which the agreement provides are taken to be the same conditions of employment for which the relevant award provided,

(d) the agreement has a nominal term commencing at the relevant time and ending at the same time as the nominal term of the relevant award,

(e) the provisions of section 45 (Register and publication of enterprise agreements) apply to the agreement as if the agreement were approved at the relevant time,

(f) such modifications of that Part as may be prescribed by the regulations.

(5) Nothing in this clause affects the continued operation of any award to the extent to which the award applies to employees that are employed by the Government in the service of the Crown.

(6) In this clause:

modification includes addition, exception, omission or substitution.

[Cl 44C insrt Act 1 of 2006, s 3 and Sch 1[7], with effect from 13 Mar 2006]

44D Applications to Commission concerning effect of clause 44C

Subject to any rules of the Commission, any party to an award may apply to the Commission (whether before or after the relevant time) for an order determining any of the following issues:

(a) whether or not the award is an award to which clause 44C applies,

(b) the extent to which an enterprise agreement has effect instead of an award to which clause 44C applies.

[Cl 44D insrt Act 1 of 2006, s 3 and Sch 1[7], with effect from 13 Mar 2006]

[Pt 8A insrt Act 1 of 2006, s 3 and Sch 1[7], with effect from 13 Mar 2006]

Part 9 – Provisions consequent on enactment of other Acts

45 Provision consequent on enactment of Coal Mine Health and Safety Act 2002

In relation to a decision in proceedings for an offence under the *Occupational Health and Safety Act 1983* or the regulations under that Act:

(a) section 197A of this Act does not apply to a decision made before the commencement of Schedule 2.9 to the *Coal Mine Health and Safety Act 2002* (which substituted section 197A(10)), and

(b) section 197A extends to proceedings commenced before the commencement of Schedule 2.9 to the *Coal Mine Health and Safety Act 2002*.

[Cl 45 insrt Act 129 of 2002, s 224 and Sch 2.9[2], with effect from 13 Jun 2003]

46 Provision consequent on enactment of Industrial Relations Amendment (Public Vehicles and Carriers) Act 2003

If the *Industrial Relations Amendment (Public Vehicles and Carriers) Act 2003* commences after the day that is 2 years after the date of commencement of section 310A:

(a) the authorisation conferred by section 310A is taken not to have ceased to have effect despite section 310A(4), and

(b) anything done before the commencement of that Act that would (but for section 310A(4)) have been specifically authorised by this Act for the purposes of section 51 of the *Trade Practices Act 1974* of the Commonwealth and the *Competition Code of New South Wales* is specifically authorised.

[Cl 46 insrt Act 63 of 2003, s 3 and Sch 1[6], with effect from 6 Nov 2003]

47 Provisions consequent on enactment of Courts Legislation Amendment Act 2003

(1) Sections 153 and 164, as amended by Schedule 4 to the *Courts Legislation Amendment Act 2003*:

(a) extend to any contempt committed before the commencement of Schedule 4[2] to that Act, and

(b) do not extend to proceedings for any such contempt that are pending in the Commission immediately before that commencement.

(2) Section 164A, as inserted by Schedule 4[4] to the *Courts Legislation Amendment Act 2003*, extends to proceedings before the Commission that were commenced, but not finally determined, before the commencement of that section.

[Cl 47 insrt Act 71 of 2003, s 3 and Sch 4[6], with effect from 1 Jan 2004]

48 Provisions consequent on enactment of Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008

(1) The amendments made to Part 4 of Chapter 2 of this Act by the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* extend to the taking of extended paternity or partner leave by a female employee where the birth of a child of the employee or of the employee's female de facto partner has taken place before the commencement of the amendments.

(2) The following provisions apply in place of section 58(2) in relation to that extended paternity or partner leave:

(a) the employee must, at least 4 weeks before proceeding on leave, give written notice of the dates on which she proposes to start and end the period of leave,

(b) the employee must, before the start of leave, provide a certificate from a medical practitioner stating that the child was born and the date of birth,

(c) the employee must, before the start of leave, provide a statutory declaration by the employee stating:

(i) if applicable, the period of any maternity leave sought or taken by her de facto partner, and

(ii) that the employee is seeking the period of leave to become the primary care-giver of the child.

(3) Any entitlement of a female employee to take paternity or partner leave under this clause ceases on the expiration of 1 year following the birth of the child concerned.

(4) In this clause:

(a) a reference to a child of a female employee is a reference to a child of whom the employee is presumed to be a parent because of the application of section 14(1A)(a) of the *Status of Children Act 1996*, and

(b) a reference to a child of the employee's de facto partner is a reference to a child who is born following the pregnancy of the employee's de facto partner.

[Cl 48 insrt Act 23 of 2008, s 5 and Sch 3.27[10], with effect from 22 Sep 2008]

[Pt 9 insrt Act 129 of 2002, s 224 and Sch 2.9[2], with effect from 13 Jun 2003]

Part 10 – Provisions consequent on appointment of APEC public holiday

49 Definition

In this Part, ***the APEC public holiday*** means 7 September 2007, being the day appointed by the notice published under section 19(3) of the *Banks and Bank Holidays Act 1912* in

Gazette No 36 of 2 March 2007 as a day to be observed as a public holiday in the local government areas specified in the Schedule to the notice.

[Cl 49 insrt Act 15 of 2007, s 3 and Sch 1, with effect from 4 Jul 2007]

50 APEC public holiday

A reference in any industrial instrument to a public holiday (whether described as a "holiday", "public holiday", "proclaimed", "gazetted", "for the State", "for a special purpose" or otherwise) is taken to include a reference to the APEC public holiday, but only in respect of employment in the local government areas in which that holiday is to be observed.

[Cl 50 insrt Act 15 of 2007, s 3 and Sch 1, with effect from 4 Jul 2007]

[Pt 10 insrt Act 15 of 2007, s 3 and Sch 1, with effect from 4 Jul 2007]

Part 11 – Provisions consequent on repeal of Shops and Industries Act 1962

51 Day baking

(1) Any person exercising the trade or calling of a pastrycook, whether an employer of labour or not, or any person employed in such a trade or calling, who in any area makes or bakes for trade or sale any pastry before the time that may be fixed by a State award for the time being in force in the area for the commencement of ordinary hours of work by employees engaged in the making or baking of pastry, or after the time that may be so fixed for the cessation of the ordinary hours of work by employees so engaged, is guilty of an offence.

Maximum penalty: 25 penalty units.

(2) The Minister may, in the case of any emergency or unforeseen circumstances, or in order to meet the exigencies of the trade carried on in a particular bakehouse, exempt any person exercising or employed in the trade or calling of a pastrycook from the operation of all or any of the provisions of this clause for such periods and subject to such conditions as the Minister determines.

(3) A person who contravenes a condition of an exemption under this clause is guilty of an offence.

Maximum penalty: 25 penalty units.

(4) In this clause:

pastry includes cakes, biscuits, muffins and crumpets and any goods usually made by pastrycooks.

(5) This clause (with minor modifications) re-enacts Division 5 of Part 4 of the *Shops and Industries Act 1962*. This clause is a transferred provision to which section 30A of the *Interpretation Act 1987* applies.

[Cl 51 insrt Act 49 of 2008, s 25 and Sch 3.2[3], with effect from 1 Jul 2008]

[Pt 11 insrt Act 49 of 2008, s 25 and Sch 3.2[3], with effect from 1 Jul 2008]

Part 12 – Provisions consequent on repeal of Government and Related Employees Appeal Tribunal Act 1980

52 Definitions

In this Part:

former appellate body means the Government and Related Employees Appeal Tribunal.

GREAT Act means the *Government and Related Employees Appeal Tribunal Act 1980*.

2010 Act means the *Industrial Relations Amendment (Public Sector Appeals) Act 2010*.

[Cl 52 insrt Act 54 of 2010, Sch 1[13], with effect from 1 Jul 2010]

53 Promotion and disciplinary appeals made before repeal of GREAT Act

(1) An appeal against a decision of an employer that was lodged in accordance with the GREAT Act before its repeal is taken to have been made to the Commission under Part 7 of Chapter 2 of this Act (as inserted by the 2010 Act).

(2) If the hearing of an appeal referred to in subclause (1) had commenced before the repeal of the GREAT Act, the President of the Commission may give such directions regarding the continuance of the hearing (including directions for the replacement of a member of the former appellate body with a member of the Commission and the exercise of any functions by the Industrial Registrar in relation to the hearing) that the President considers appropriate.

(3) A member of the Commission who replaces a member of the former appellate body is to have regard to the evidence and decisions made in relation to the appeal before the replacement.

(4) A member of the former appellate body is not entitled to any remuneration or compensation because of the loss of office as a consequence of the enactment of the 2010 Act.

[Cl 53 insrt Act 54 of 2010, Sch 1[13], with effect from 1 Jul 2010]

[Pt 12 insrt Act 54 of 2010, Sch 1[13], with effect from 1 Jul 2010]

Part 13 – Provisions consequent on enactment of Industrial Relations Amendment (Non-operative Awards) Act 2010

54 Non-operative awards

(1) This clause applies to an award that:

(a) was in force on the date of introduction, and

(b) was varied or rescinded during the period commencing on the date of introduction and ending immediately before the commencement of the 2010 amending Act.

(2) On or after the commencement of the 2010 amending Act before the commencement of the *Industrial Relations Amendment (Non-operative Awards) Act 2011*, the Commission may make a declaration under section 20A in relation to an award to which this clause applies as if the award had not been rescinded or varied.

(3) If the Commission makes a declaration under section 20A(1)(a) in relation to such an award, the award continues in force as if the variation or rescission referred to in subclause (1)(b) had not occurred.

(4) In this clause:

date of introduction means the date on which the Bill for the 2010 amending Act was introduced into the Legislative Assembly.

the 2010 amending Act means the *Industrial Relations Amendment (Non-operative Awards) Act 2010*.

[Cl 54 am Act 68 of 2011, Sch 1[11], with effect from 28 Nov 2011; insrt Act 109 of 2010, Sch 1[12], with effect from 29 Nov 2010]

[Pt 13 insrt Act 109 of 2010, Sch 1[12], with effect from 29 Nov 2010]

Part 14 – Provisions consequent on enactment of Industrial Relations Amendment (Non-operative Awards) Act 2011

55 Certain awards taken to have been rescinded

(1) All awards that were declared to be non-operative awards under this Act before the commencement of the *Industrial Relations Amendment (Non-operative Awards) Act 2011* are taken to have been rescinded on the commencement of this clause by the Commission in accordance with section 20(2).

(2) Subclause (1) extends to awards referred to in clause 54(3).

[Cl 55 insrt Act 68 of 2011, Sch 1[12], with effect from 28 Nov 2011]

[Pt 14 insrt Act 68 of 2011, Sch 1[12], with effect from 28 Nov 2011]

Part 15 – Provisions consequent on enactment of Industrial Relations Amendment (Industrial Organisations) Act 2012

56 Definition

In this Part:

the amending Act means the *Industrial Relations Amendment (Industrial Organisations) Act 2012*.

[Cl 56 insrt Act 27 of 2012, Sch 1[10], with effect from 11 May 2012]

57 Application of amendments

(1) Action may be taken under Division 11 of Part 4 of Chapter 5, as inserted by the amending Act, in relation to an act or omission that:

(a) occurred before the commencement of that Division, or

(b) was the subject of an application or declaration of a kind referred to in section 290F that was made before the commencement of that Division.

(2) Sections 385, 388 and 398, as amended by the amending Act, and sections 385A and 385B, as inserted by the amending Act, apply to offences committed before the commencement of the amending Act.

[Cl 57 insrt Act 27 of 2012, Sch 1[10], with effect from 11 May 2012]

[Pt 15 insrt Act 27 of 2012, Sch 1[10], with effect from 11 May 2012]

Part 16 – Provisions consequent on enactment of Industrial Relations Amendment (Industrial Court) Act 2013

58 Application of amendments to pending proceedings

(1) Meaning of *pending proceedings*

This clause applies in relation to proceedings before a Full Bench of the Commission in Court Session (***pending proceedings***) that were commenced (but not completed) by the Full Bench before the abolition day.

(2) Heard or partly heard proceedings

Pending proceedings that were heard, or partly heard, by a Full Bench of the Commission in Court Session before the abolition day may continue to be dealt with and determined by a Full Bench of the Commission in Court Session.

(3) The provisions of this Act and any other legislation or law that would have applied to or in respect of proceedings referred to in subclause (2) had the amending Act not been enacted continue to apply to those proceedings.

(4) Unheard proceedings

The following provisions apply in respect of pending proceedings that had not commenced to be heard before the abolition day:

(a) if the function of determining proceedings of the kind concerned becomes the function of the Supreme Court or the Court of Criminal Appeal on that day because of amendments made by the amending Act—the proceedings are taken, on and from that day, to have been commenced in the Supreme Court or the Court of Criminal Appeal (as the case requires) and may be heard and determined accordingly,

(b) if the function of determining proceedings of the kind concerned becomes the function of the Commission other than in Court Session on that day because of amendments made by the amending Act—the proceedings are taken, on and from that day, to have been commenced in the Commission and may be heard and determined accordingly,

(c) if the function of determining proceedings of the kind concerned becomes the function of the Commission in Court Session (constituted by a single judicial member) on that day because of amendments made by the amending Act—the proceedings are taken, on and from that day, to have been commenced in the Commission in Court Session and may be heard and determined by a single judicial member accordingly.

(5) The provisions of this Act and any other legislation (as amended by the amending Act) apply to and in respect of proceedings referred to in subclause (4).

(6) Definitions

In this clause:

abolition day means the day on which Schedule 1[6] to the amending Act commences.

amending Act means the *Industrial Relations Amendment (Industrial Court) Act 2013*.

[Cl 58 insrt Act 85 of 2013, Sch 1[32], with effect from 20 Dec 2013]

[Pt 16 insrt Act 85 of 2013, Sch 1[32], with effect from 20 Dec 2013]

Part 17 – Provisions relating to Industrial Relations (Public Sector Conditions of Employment) Regulation 2014

59 Re-making of regulation

(1) Subschedule 5.2 to the *State Revenue and Other Legislation Amendment (Budget Measures) Act 2014* sets out the terms of the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2014*.

(2) On and from the commencement of Subschedule 5.2 to that Act:

(a) the regulation set out in the subschedule is taken to be and has effect as a regulation validly made under section 146C of the *Industrial Relations Act 1996*,

(b) Part 2 of the *Subordinate Legislation Act 1989* does not apply to the regulation set out in the subschedule (but applies to any amendment or repeal of the regulation),

(c) the regulation set out in the subschedule is taken, for the purposes of section 10 of the *Subordinate Legislation Act 1989*, to have been published on the commencement of the subschedule,

(d) sections 39, 40 and 41 of the *Interpretation Act 1987* do not apply to the regulation set out in the subschedule (but apply to any amendment or repeal of the regulation),

(e) section 146C(6) of the *Industrial Relations Act 1996* applies to the regulation set out in the subschedule, and accordingly the regulation applies to proceedings that are pending in the Commission on the commencement of the subschedule (except as otherwise provided in the regulation).

[Cl 59 insrt Act 37 of 2014, Sch 5.1, with effect from 24 Jun 2014]

[Pt 17 insrt Act 37 of 2014, Sch 5.1, with effect from 24 Jun 2014]

Part 18 – Provisions relating to Industrial Relations Amendment (Industrial Court) Act 2016

Division 1 – Interpretation

60 Definitions

In this Part:

abolition day means the day on which Part 3 of Chapter 4 is repealed by the amending Act.

amending Act means the *Industrial Relations Amendment (Industrial Court) Act 2016*.

Deputy President of the Commission has the same meaning as it had immediately before the abolition day.

Industrial Court means the Industrial Court of New South Wales as referred to in section 151A immediately before the abolition day (also referred to in this Act as the Commission in Court Session).

judicial member has the same meaning as it had immediately before the abolition day.

President of the Commission has the same meaning as it had immediately before the abolition day.

Vice-President of the Commission has the same meaning as it had immediately before the abolition day.

[Cl 60 insrt Act 48 of 2016, Sch 1[117], with effect from 18 Oct 2016]

Division 2 – Industrial Court

61 Abolition of Industrial Court

(1) The Industrial Court is abolished on the abolition day.

(2) The abolition of the Industrial Court does not affect the continuation in existence of the Commission (except when constituted as the Industrial Court).

[Cl 61 insrt Act 48 of 2016, Sch 1[117], with effect from 18 Oct 2016]

62 Judicial member to become Judge of Supreme Court on abolition day

(1) On the abolition day, a person holding office as a judicial member immediately before that day ceases to hold that office and is, by this clause, appointed as a Judge of the Supreme Court (without the need for a commission to be issued).

(2) Subclause (1) does not extend to a Judge of the Supreme Court who is acting as a judicial member under section 151B (Supreme Court Judges may act as judicial members of the Commission in Court Session) immediately before the abolition day.

(3) A judicial member appointed by this clause as a Judge of the Supreme Court:

(a) is to have seniority, rank and precedence as a Judge of the Supreme Court as if the date of the person's commission as a Judge of the Supreme Court were the date of the person's commission as a judicial member of the Commission, and

(b) if the judicial member was also the President of the Commission—is to continue to be entitled to the same remuneration as the person received as President immediately before the abolition day until such time as the remuneration of a puisne Judge of the Supreme Court exceeds that remuneration.

(4) Service as a judicial member by a person appointed by this clause as a Judge of the Supreme Court is to be taken for all purposes (including for the purposes of the *Supreme Court Act 1970* and the *Judges' Pensions Act 1953*) to be service as a Judge of the Supreme Court.

(5) The Governor may, on the recommendation of the Attorney General, issue an appropriate commission under the public seal of the State to a person who is to be (or has been) appointed by this clause as a Judge of the Supreme Court.

(6) The Attorney General is to make a recommendation under subclause (5) as soon as practicable after the publication of a proclamation under the amending Act that specifies the commencement date for the repeal of Part 3 of Chapter 4 of this Act.

(7) A commission may be issued under this clause before the abolition day, but must state that the person's appointment takes effect on the day that is the abolition day.

(8) This clause does not limit the application of section 8 of the *Oaths Act 1900* to a person appointed by this clause as a Judge of the Supreme Court.

Note: Section 8 of the *Oaths Act 1900* requires a Judge of the Supreme Court to take the oath of allegiance and the judicial oath.

(9) Nothing in this clause prevents a person being appointed as a judicial officer of a different court or to a different office in the Supreme Court.

[Cl 62 insrt Act 48 of 2016, Sch 1[117], with effect from 18 Oct 2016]

Division 3 – Reconstitution of Commission

63 Renaming and abolition of certain offices

(1) On the abolition day:

(a) the office of President of the Commission is abolished and replaced with the office of Chief Commissioner, and

(b) the office of Vice-President of the Commission is abolished, and

(c) the office of Deputy President of the Commission is abolished, and

(d) the office of judicial member is abolished.

(2) A person who, immediately before the abolition day, held office as an Acting Deputy President of the Commission is taken to have been appointed as an Acting Commissioner for the remainder of the person's term of appointment.

(3) Anything done by the President of the Commission that, immediately before the abolition day, had effect under this Act continues to have effect as if it had been done by the Chief Commissioner.

(4) A person who ceases to hold an office by operation of this clause is not entitled to any remuneration or compensation because of the loss of that office.

(5) This clause does not limit the application of clause 62 to a person who is also a judicial member.

[Cl 63 insrt Act 48 of 2016, Sch 1[117], with effect from 18 Oct 2016]

64 Relationship of Division with Interpretation Act 1987

This Division does not limit section 53 of the *Interpretation Act 1987* in its application to alterations made to legislation by the amending Act.

[Cl 64 insrt Act 48 of 2016, Sch 1[117], with effect from 18 Oct 2016]

Division 4 – Proceedings involving Industrial Court

Subdivision 1 – Interpretation

65 Interpretation

(1) In this Division:

part heard proceedings means pending proceedings where the court in which the proceedings were commenced had begun to hear (but had not determined) the proceedings before the abolition day.

pending proceedings are proceedings (including appeals) that:

(a) were commenced before the abolition day, and

(b) have not been finally determined before that day by the court in which the proceedings were commenced.

Note: See subclause (2) as to the meaning of finally determined proceedings.

successor court, in relation to a former function of the Industrial Court, means:

(a) if an amendment made by the amending Act has resulted in the function being conferred or imposed on the Supreme Court—the Supreme Court, or

(b) if an amendment made by the amending Act has resulted in the function being conferred or imposed on the District Court—the District Court.

Supreme Court includes, where appropriate, the Court of Criminal Appeal.

unexercised right means a right (including a right exercisable only with leave) that:

(a) was available to be exercised immediately before the abolition day, and

(b) had not yet been exercised before that day.

unheard proceedings means pending proceedings that had not been heard before the abolition day by the court in which the proceedings were commenced.

(2) For the purposes of this Division, proceedings are not finally determined if:

(a) any period for bringing an appeal as of right in respect of the proceedings has not expired (ignoring any period that may be available by way of extension of time to appeal), or

(b) any appeal in respect of the proceedings is pending (whether or not it is an appeal brought as of right).

(3) To avoid doubt, this Division extends to proceedings before the President or a judicial member in exercise of any functions conferred or imposed on them by the *Criminal Procedure Act 1986* in the same way as it applies to proceedings before the Industrial Court.

[Cl 65 insrt Act 48 of 2016, Sch 1[117], with effect from 18 Oct 2016]

Subdivision 2 – Determination of pending proceedings

66 Pending proceedings before Industrial Court

(1) Unheard proceedings in the Industrial Court are taken, on and from the abolition day, to have been duly commenced in the successor court for the function concerned and may be heard and determined instead by that court.

(2) In relation to part heard proceedings in the Industrial Court, the judicial member (or person acting as a judicial member) constituting the Industrial Court for those proceedings:

(a) is to continue, on and from the abolition day, to hear the matter, and to determine the matter, sitting as the Supreme Court, and

(b) may have regard to any record of the proceedings before the Industrial Court, including a record of any evidence taken in the proceedings before the Industrial Court.

(3) For the purposes of subclauses (1) and (2):

(a) the court determining the proceedings has and may exercise all the functions that the Industrial Court had immediately before its abolition, and

(b) the provisions of any Act, statutory rule or other law that would have applied to or in respect of the proceedings had the amending Act not been enacted continue to apply.

[Cl 66 insrt Act 48 of 2016, Sch 1[117], with effect from 18 Oct 2016]

67 Pending proceedings before Supreme Court concerning Industrial Court

(1) This clause applies to pending proceedings before the Supreme Court on an appeal against, or for the judicial review of, a decision of the Industrial Court.

(2) The Supreme Court may, on and from the abolition day, continue to deal with the proceedings until they are concluded.

(3) For this purpose:

(a) the Supreme Court continues to have and may exercise all the functions that the Court had in relation to the proceedings immediately before the abolition day, and

(b) the provisions of any Act, statutory rule or other law that would have applied to or in respect of the proceedings had the amending Act not been enacted continue to apply.

(4) Without limiting subclause (3), if the original powers of the Supreme Court included the power to remit the proceedings to be heard and decided again by the Industrial Court, the Supreme Court may determine the proceedings instead of remitting them.

[Cl 67 insrt Act 48 of 2016, Sch 1[117], with effect from 18 Oct 2016]

Subdivision 3 – Exercise of certain unexercised rights

68 Certain unexercised rights to apply or appeal to Industrial Court may be exercised in successor body

(1) This clause applies to each of the following unexercised rights (an ***existing unexercised application or appeal right***):

(a) an unexercised right to apply to the Industrial Court for it to exercise a function,

(b) an unexercised right to appeal to the Industrial Court against a decision of another person or body.

(2) A person who has an existing unexercised application or appeal right may apply or appeal to the successor body for the exercise of the same functions that could have been exercised by the Industrial Court to which the right relates had it not been abolished.

Note: An application or appeal under this clause that would have required leave before the abolition day will still require such leave. Also, any time limits under existing law for making the application or appeal will continue to apply to applications or appeals under this clause. See subclause (3).

(3) For the purposes of subclause (2):

(a) the successor body has and may exercise all the functions that the Industrial Court would have had in relation to the application or appeal if it had been made before the abolition day (including any functions relating to the granting of leave to apply or appeal), and

(b) the provisions of any Act, statutory rule or other law (including provisions concerning the time within which to apply or appeal) that would have applied to or in respect of the application or appeal had the amending Act not been enacted continue to apply.

(4) In this clause:

cancellation function means the cancellation of the registration of an association of employing contractors under section 334.

successor body means:

(a) in relation to the exercise of a cancellation function—a Full Bench of the Commission, or

(b) in relation to the exercise of any other function—the successor court for the function.

[Cl 68 insrt Act 48 of 2016, Sch 1[117], with effect from 18 Oct 2016]

69 Certain unexercised rights to appeal against decisions of Industrial Court may continue to be exercised

(1) This clause applies to an unexercised right to appeal against a decision of the Industrial Court to the Supreme Court (an ***existing unexercised appeal right***).

(2) A person who has an existing unexercised appeal right may appeal against the decision of the Industrial Court to the Supreme Court.

Note: An appeal under this clause that would have required leave before the abolition day will still require such leave. Also, any time limits under existing law for appealing will continue to apply to appeals under this clause. See subclause (3).

(3) For the purposes of an appeal made to the Supreme Court under this clause:

(a) the Supreme Court continues to have and may exercise all the functions that the Court would have had if the appeal had been made to it before the abolition day (including any functions relating to the granting of leave to appeal), and

(b) the provisions of any Act, statutory rule or other law (including provisions concerning the time within which to appeal) that would have applied to or in respect of such an appeal had the amending Act not been enacted continue to apply.

(4) Without limiting subclause (3), if the original powers of the Supreme Court included the power to remit the proceedings to be heard and decided again by the Industrial Court, the Supreme Court may determine the proceedings instead of remitting them.

[Cl 69 insrt Act 48 of 2016, Sch 1[117], with effect from 18 Oct 2016]

Division 5 – Miscellaneous

70 Construction of superseded references

(1) Subject to the regulations, a reference in any other Act, in an instrument made under any other Act or in any other document:

(a) to the Industrial Court or the Industrial Relations Commission in Court Session—is to be read as a reference to the successor court for the function concerned, and

(b) to the President, the Vice-President or a Deputy President of the Commission—is to be read as a reference to the Chief Commissioner, and

(c) to a judicial member—is to be read as a reference to a Judge of the successor court for the function concerned.

(2) Subclause (1) extends to a reference in a provision of the former *Industrial Relations Act 1991* (or the regulations under that Act) that continues to apply to a matter because of a provision of this Act or the regulations under this Act and, for that purpose, the successor court is taken to be the Supreme Court.

(3) Subclauses (1) and (2) do not apply to the following references in the following provisions:

(a) a provision of the amending Act,

(b) a provision of the *Constitution Act 1902* or the *Judges' Pensions Act 1953*,

(c) a provision of any other Act or instrument made under another Act that contains a reference inserted or substituted by, or retained despite, an amendment made to the provision by the amending Act,

(d) a spent savings or transitional provision of any other Act or an instrument made under any other Act,

(e) a provision of an Act, instrument made under an Act or any other document (or a provision belonging to a class of provisions) prescribed by the regulations.

[Cl 70 insrt Act 48 of 2016, Sch 1[117], with effect from 18 Oct 2016]

71 Functions of judicial members conferred or imposed in their personal capacities

(1) This clause applies in relation to the exercise of functions that, immediately before the abolition day, were conferred or imposed on judicial members in a personal capacity rather than as members of the Commission (that is, as persona designata).

(2) A judicial member (or acting judicial member) who was exercising a function to which this clause applies may complete the exercise of the function as if the amending Act had not been enacted.

(3) An application for the exercise of a function to which this clause applies that has not yet been dealt with may be exercised by a person to whom the function has been transferred by the amending Act as if it had been made under the relevant amended legislative provision.

[Cl 71 insrt Act 48 of 2016, Sch 1[117], with effect from 18 Oct 2016]

72 Arbitrators under Health Services Act 1997

(1) A person appointed as an arbitrator for a determination under section 90 of the *Health Services Act 1997* before the abolition day ceases to hold that office on that day.

(2) Accordingly, any arbitration that is uncompleted by the person immediately before the abolition day cannot be completed by the person.

(3) Nothing in this clause prevents another person from being appointed as an arbitrator for the determination under section 90 of the *Health Services Act 1997* (as substituted by the amending Act).

(4) No compensation is payable to any person (including a person who ceases to hold office as an arbitrator) for any loss resulting from the operation of this clause.

[Cl 72 insrt Act 48 of 2016, Sch 1[117], with effect from 18 Oct 2016]

[Pt 18 insrt Act 48 of 2016, Sch 1[117], with effect from 18 Oct 2016]

Part 19 – Provisions relating to Industrial Relations Amendment Act 2023

Division 1 – Interpretation

73 Definitions

In this part—

amending Act means the *Industrial Relations Amendment Act 2023*.

Chief Commissioner has the same meaning as it had immediately before the commencement day.

commencement day means the day on which Chapter 4, Part 3 is inserted into this Act by the amending Act.

[Cl 73 insrt Act 41 of 2023, Sch 1.2[113], with effect from 1 Jul 2024]

Division 2 – Reconstitution of Commission

74 Renaming of office

(1) On the commencement day, the office of Chief Commissioner is abolished and replaced with the office of President of the Commission.

(2) A person who, immediately before the commencement day, held office as Chief Commissioner is taken to have been appointed as a Commissioner for the remainder of the person's term of appointment and is to be known as the Senior Commissioner.

(3) The person appointed under subclause (2) continues to be entitled to the same remuneration as the person received as Chief Commissioner immediately before the commencement day until the time the remuneration of a Commissioner exceeds that remuneration.

(4) Anything done by the Chief Commissioner that, immediately before the commencement day, had effect under this Act continues to have effect as if it had been done by the President of the Commission.

(5) To avoid doubt, this clause has effect despite the following—

(a) this Act, Schedule 2, clause 10,

(b) the *Judicial Officers Act 1986*, Parts 7 and 8.

[Cl 74 insrt Act 41 of 2023, Sch 1.2[113], with effect from 1 Jul 2024]

75 Relationship of division with Interpretation Act 1987

This division does not limit the *Interpretation Act 1987*, section 53 in its application to alterations made to legislation by the amending Act.

[Cl 75 insrt Act 41 of 2023, Sch 1.2[113], with effect from 1 Jul 2024]

Division 3 – Pending proceedings

76 Interpretation

(1) In this division—

pending proceedings means proceedings, including appeals, that—

(a) were commenced before the commencement day, and

(b) have not before the commencement day been finally determined by the court in which the proceedings were commenced, and

(c) would, after the commencement day, be required to be commenced in the Industrial Court.

Note: See subclause (2) as to the meaning of finally determined proceedings.

(2) For this division, proceedings are not finally determined if—

(a) a period for bringing an appeal as of right in relation to the proceedings has not expired, ignoring any period that may be available by way of extension of time to appeal, or

(b) an appeal in relation to the proceedings is pending, whether or not it is an appeal brought as of right.

[Cl 76 insrt Act 41 of 2023, Sch 1.2[113], with effect from 1 Jul 2024]

77 Pending proceedings before courts

(1) A court may, on and from the commencement day, continue to deal with pending proceedings until they are concluded.

(2) For this purpose—

(a) the court continues to have and may exercise all the functions the court had in relation to the proceedings immediately before the commencement day, and

(b) the provisions of an Act, statutory rule or other law that would have applied to or in relation to the proceedings had the amending Act not been enacted continue to apply.

[Cl 77 insrt Act 41 of 2023, Sch 1.2[113], with effect from 1 Jul 2024]

78 Construction of superseded references

(1) Subject to the regulations, a reference in another Act, an instrument made under another Act or another document to the Chief Commissioner must be read as a reference to the President.

(2) Subclause (1) does not apply to the following provisions—

(a) a provision of the amending Act,

(b) a provision of the *Constitution Act 1902* or the *Judges' Pensions Act 1953*,

(c) a provision of another Act or an instrument made under another Act that contains a reference inserted or substituted by, or retained despite, an amendment made to the provision by the amending Act,

(d) a spent savings or transitional provision of another Act or an instrument made under another Act,

(e) a provision of an Act, an instrument made under an Act or another document, or a provision belonging to a class of provisions, prescribed by the regulations.

[Cl 78 insrt Act 41 of 2023, Sch 1.2[113], with effect from 1 Jul 2024]

[Pt 19 insrt Act 41 of 2023, Sch 1.2[113], with effect from 1 Jul 2024]

PART 20 – PROVISIONS RELATING TO INDUSTRIAL RELATIONS AMENDMENT ACT 2025

79 Definitions

In this part—

amending Act means the *Industrial Relations Amendment Act 2025*.

commencement date means the day on which the amending Act, Schedule 1.5[3] commences.

[Cl 79 insrt Act 8 of 2025, Sch 1.5[5], with effect from 1 May 2025]

80 Appeals from Local Court

(1) This clause applies to the following matters—

(a) proceedings on appeal from the Local Court that have commenced but not been determined before the commencement date,

(b) a matter for which an application to commence proceedings on appeal from the Local Court has been filed but not determined before the commencement date.

(2) The amending Act, Schedule 1.5[3] is taken not to have commenced in relation to the matters to which this clause applies.

[Cl 80 insrt Act 8 of 2025, Sch 1.5[5], with effect from 1 May 2025]

[Pt 20 insrt Act 8 of 2025, Sch 1.5[5], with effect from 1 May 2025]

[Sch 4 am Act 8 of 2025; Act 41 of 2023; Act 48 of 2016; Act 37 of 2014; Act 85 of 2013; Act 27 of 2012; Act 68 of 2011; Act 109 of 2010; Act 54 of 2010; Act 49 of 2008; Act 23 of 2008; Act 15 of 2007; Act 1 of 2006; Act 104 of 2005; Act 71 of 2003; Act 63 of 2003; Act 129 of 2002; Act 120 of 2002; Act 54 of 1998]

[The next text page is 311-3701]

Dictionary

(Section 4)

award means an award made, or taken to be made, by the Commission under this Act, and includes any order of the Commission under this Act that sets conditions of employment.

bailor —see section 308.

bicycle includes the following—

(a) a scooter,

(b) a powered or unpowered bicycle.

[Def insrt Act 20 of 2025, Sch 1[22], with effect from 9 Apr 2025]

Chief Commissioner [Repealed]

[Def rep Act 41 of 2023, Sch 1.2[114], with effect from 1 Jul 2024; insrt Act 48 of 2016, Sch 1[118], with effect from 8 Dec 2016]

Commission means the Industrial Relations Commission of New South Wales established by this Act.

Commissioner means a Commissioner of the Commission.

[Def insrt Act 48 of 2016, Sch 1[118], with effect from 8 Dec 2016]

Commission in Court Session means the Commission as constituted under section 151.

[Def reinsrt Act 41 of 2023, Sch 1.2[114], with effect from 1 Jul 2024; rep Act 48 of 2016, Sch 1[118], with effect from 8 Dec 2016]

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

conditions of employment includes any provisions about an industrial matter.

contract agreement means an agreement approved, or taken to be approved, by the Commission under Part 3 of Chapter 6.

contract determination means a contract determination made, or taken to be made, by the Commission under Part 2 of Chapter 6.

contract of bailment —see section 307.

contract of carriage —see section 309.

contractual chain means a chain or series of contracts or arrangements under which work is performed for a party to a contract or arrangement in the chain or series by a bailor or carrier under a contract to which Chapter 6 applies.

[Def insrt Act 20 of 2025, Sch 1[22], with effect from 9 Apr 2025]

dispute order —see Part 2 of Chapter 3.

employee —see section 5.

employer means a person who employs an employee within the meaning of this Act:

(a) whether the person is an individual, a corporation, an unincorporated body or the State, and

(b) whether the person does so on the person's own behalf or on behalf of some other person.

enterprise agreement means an enterprise agreement approved, or taken to be approved, by the Commission under this Act.

exercise a function includes perform a duty.

facilitator, for mutual gains bargaining, has the same meaning as in section 129O.

[Def insrt Act 41 of 2023, Sch 1.1[3], with effect from 15 Dec 2023]

Fair Work Australia means Fair Work Australia established under the *Fair Work Act 2009* of the Commonwealth, and includes any successor to that body.

[Def insrt Act 35 of 2010, Sch 1[15], with effect from 1 Jul 2010]

former industrial agreement —see clause 6 of Schedule 4.

function includes a power, authority or duty.

good faith, in relation to mutual gains bargaining—see section 129M.

[Def insrt Act 41 of 2023, Sch 1.1[3], with effect from 15 Dec 2023]

goods includes the following—

(a) goods carried in the course of work performed by a contract carrier who, if the contract carrier were an employee, would be covered by one of the following instruments or an instrument that replaces it—
  (i) the *Road Transport and Distribution Award 2020*,
  (ii) the *Transport (Cash in Transit) Award 2020*,
  (iii) the *Waste Management Award 2020*,

(b) groceries,

(c) food, whether—
  (i) cooked or uncooked, or
  (ii) for immediate consumption or otherwise,

(d) another thing prescribed by the regulations.

[Def insrt Act 20 of 2025, Sch 1[22], with effect from 9 Apr 2025]

industrial action means a strike by employees or a lock-out by an employer, and includes:

(a) a practice relating to the performance of work, adopted in connection with an industrial dispute, that restricts, limits or delays the performance of work, or

(b) a ban, limitation or restriction affecting the performance of work, or the offering or acceptance of work, that is adopted in connection with an industrial dispute, or

(c) any failure or refusal in connection with an industrial dispute to attend for work or to perform work,

but does not include any action taken by employees with the agreement of their employer or any action taken by employers with the agreement of their employees.

industrial agent means a person (other than an Australian legal practitioner or an employee or officer of an industrial organisation) who represents a party in proceedings before the Commission for fee or other reward.

[Def insrt Act 120 of 2002, s 3 and Sch 1[10], with effect from 1 Feb 2003]

industrial agent service means any service performed by a person in the person's capacity as an industrial agent.

[Def insrt Act 120 of 2002, s 3 and Sch 1[10], with effect from 1 Feb 2003]

Industrial Committee means an Industrial Committee of the Commission established, or taken to be established, under this Act.

industrial dispute means a dispute (including a question or difficulty) about an industrial matter, and includes the following:

(a) a demarcation dispute,
(b) a threatened or likely industrial dispute,
(c) a situation that is likely to give rise to an industrial dispute if preventative action is not taken.

Industrial Gazette means the publication of that name published under the authority of the Industrial Registrar.

industrial instrument —see section 8.

industrial matters —see section 6.

industrial organisation means an industrial organisation of employees or an industrial organisation of employers.

industrial organisation of employees means an industrial organisation of employees registered, or taken to be registered, under Chapter 5.

industrial organisation of employers means an industrial organisation of employers registered, or taken to be registered, under Chapter 5.

Industrial Registrar means the Industrial Registrar referred to in section 207.

industrial relations legislation means any of the following Acts and the regulations made under any such Act:

This Act
Annual Holidays Act 1944
Employment Protection Act 1982
Long Service Leave Act 1955
Long Service Leave (Metalliferous Mining Industry) Act 1963.

industry —see section 7.

inspector means an inspector appointed for the purposes of this Act.

judicial member, of the Commission—see section 149(4).

[Def reinsrt Act 41 of 2023, Sch 1.2[114], with effect from 1 Jul 2024; rep Act 48 of 2016, Sch 1[118], with effect from 8 Dec 2016]

member of the family of a person, means (in section 265 and Chapter 6) the person's spouse (including a person with whom the person has a de facto relationship), parent, grandparent, child or sibling, any such relative by marriage or de facto relationship and any step-parent or step-child (with ***de facto relationship*** having the same meaning in this definition as in the *Property (Relationships) Act 1984*).

[Def subst Act 73 of 2002, s 3 and Sch 1.12, with effect from 1 Nov 2002]

Minimum Wage Panel means the Minimum Wage Panel constituted under the *Fair Work Act 2009* of the Commonwealth, and includes any successor to that panel.

[Def insrt Act 35 of 2010, Sch 1[15], with effect from 1 Jul 2010]

motor vehicle means a motor vehicle or trailer within the meaning of the *Road Transport Act 2013*.

[Def am Act 19 of 2013, Sch 3, with effect from 1 Jul 2013; Act 11 of 2005, s 247 and Sch 3.17, with effect from 30 Sep 2005; subst Act 19 of 1999, s 4 and Sch 2.16[2], with effect from 1 Dec 1999; Act 115 of 1997, s 4 and Sch 4.7, with effect from 1 Jul 1999]

NSW industrial relations website —see section 208A.

[Def insrt Act 97 of 2006, s 3 and Sch 1[15], with effect from 2 Feb 2007]

office in an organisation, means:

(a) an office of president, vice-president, secretary or assistant secretary of the organisation, or

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

(i) the management of the financial or other affairs of the organisation,

(ii) the determination of policy for the organisation,

(iii) the making, alteration or rescission of rules of the organisation,

(iv) the enforcement of rules of the organisation, or the performance of functions in relation to the enforcement of such rules, or

(c) an office the holder of which is, under the rules of the organisation, entitled to participate directly in any of the functions referred to in paragraph (b)(i) or (iv), other than an office the holder of which participates only in accordance with directions given by a collective body or another person for the purpose of implementing existing policy of the organisation or decisions concerning the organisation, or

(d) an office the holder of which is, under the rules of the organisation, entitled to participate directly in any of the functions referred to in paragraph (b)(ii) or (iii), or

(e) the office of a person holding (whether as trustee or otherwise) property of the organisation or property in which the organisation has a beneficial interest.

officer of an organisation means a person who holds an office in the organisation.

outworker in the clothing trades means a person described in clause 1(f) of Schedule 1 as an employee.

Note: A person described in clause 1(f) of Schedule 1 as an employee is taken to be an employee for the purposes of this Act by section 5(3).

[Def insrt Act 97 of 2006, s 3 and Sch 1[15], with effect from 1 Dec 2006]

party to an industrial instrument includes the successor of a party to the instrument.

pay equity means equal remuneration for men and women doing work of equal or comparable value.

penalty unit see section 17 of the *Crimes (Sentencing Procedure) Act 1999*.

Note: Penalties for offences are expressed in penalty units. At the time of this update the penalty unit was $110.

[Def subst Act 56 of 2001, s 3 and Sch 2.24, with effect from 17 Jul 2001]

premises includes any mine, structure, building, aircraft, vehicle, vessel and place (whether built on or not), and any part of it.

Presidential Member, of the Commission—see section 147(2).

[Def reinsrt Act 41 of 2023, Sch 1.2[114], with effect from 1 Jul 2024; rep Act 48 of 2016, Sch 1[118], with effect from 8 Dec 2016]

principal contractor —see section 310.

public sector employee includes an employee of a public authority and a member of the Public Service, the NSW Police Force, the NSW Health Service or the Teaching Service.

[Def am Act 40 of 2013, Sch 6.4[16], with effect from 24 Feb 2014; Act 94 of 2006, s 4 and Sch 3.17, with effect from 1 Feb 2007; insrt Act 2 of 2006, s 7 and Sch 5.6, with effect from 17 Mar 2006; Act 114 of 2004, s 4 and Sch 2.10[1], with effect from 17 Jan 2005]

public sector industrial agreement means an agreement under section 51 of the *Government Sector Employment Act 2013*, section 87 of the *Police Act 1990*, section 14 of the *Teaching Service Act 1980* or section 26(4) of the *Area Health Services Act 1986* or any similar kind of agreement relating to public sector employees.

[Def am Act 63 of 2017, Sch 1.11[2], with effect from 7 Dec 2017; Act 40 of 2013, Sch 6.4[17], with effect from 24 Feb 2014; Act 114 of 2004, s 4 and Sch 2.10[2], with effect from 17 Jan 2005]

public vehicle means a taxi or hire vehicle within the meaning of the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016*.

[Def subst Act 34 of 2016, Sch 7.2[4], with effect from 1 Nov 2017]

resolution of an industrial dispute includes the avoidance or settlement of the dispute.

rules of an organisation includes, in the case of an organisation that is a company, the memorandum or articles of association of the organisation.

State peak council means:

(a) Unions NSW (being the State peak council for employees), or

(b) an organisation approved for the time being by the Commission under section 216 as a State peak council for employers.

[Def am Act 64 of 2005, s 3 and Sch 2.26, with effect from 1 Jul 2005]

successor includes transferee, assignee, devisee or other successor at law.

[Dic am Act 20 of 2025; Act 41 of 2023; Act 63 of 2017; Act 48 of 2016; Act 34 of 2016; Act 40 of 2013; Act 19 of 2013; Act 68 of 2011; Act 109 of 2010; Act 35 of 2010; Act 19 of 2010; Act 23 of 2008; Act 120 of 2006; Act 97 of 2006; Act 94 of 2006; Act 2 of 2006; Act 64 of 2005; Act 11 of 2005; Act 114 of 2004; Act 120 of 2002; Act 73 of 2002; Act 56 of 2001; Act 19 of 1999; Act 115 of 1997]

[The next text page is 312-1]

WORKPLACE GENDER EQUALITY ACT 2012

PART I – PRELIMINARY

1 Short title
2 Commencement
2A Objects of Act
2B Simplified outline
3 Interpretation
4 Meaning of *relevant employer*
4A Meaning of *designated relevant employer*
5 Application of Act
5A Application of *Criminal Code*
5B Binding the Crown

PART II – EQUAL OPPORTUNITY FOR WOMEN IN THE WORKPLACE PROGRAMS [REPEALED]

6 Employers required to develop equal opportunity for women in the workplace programs [Repealed]
7 Timing for development etc of affirmative action program [Repealed]
8 Equal opportunity for women in the workplace program [Repealed]

PART III – WORKPLACE GENDER EQUALITY AGENCY

8A Workplace Gender Equality Agency
9 Director [Repealed]
10 Functions and powers of Agency
11 Directions by Minister
12 Agency to submit reports to Minister

PART IV – REPORTS BY RELEVANT EMPLOYERS

DIVISION 1 – REPORTING REQUIREMENTS

13 Relevant employers to prepare reports relating to gender equality indicators
13A Reporting periods for reports
13B When public reports are due
13C Personal information
14 Information relating to remuneration
14A Information of a kind specified by the Minister
15 Agency's use of public report
15A Agency must publish information for relevant employers—achieving gender equality in relation to remuneration
16 Relevant employer to make public reports accessible to employees and shareholders etc
16A Relevant employer to inform employee organisations of lodgement of public report

16B Relevant employer to inform employees and employee organisations of the opportunity to comment
16C Certain reports to be given to relevant employer's governing body
17 Agency may grant extensions

DIVISION 2 – GENDER EQUALITY TARGETS

17A Target cycles
17B Minister to set gender equality targets and selection rules
17C Failure to comply with gender equality targets

PART IVA – REVIEWING COMPLIANCE WITH THIS ACT AND CONSEQUENCES OF NON-COMPLIANCE

18 Simplified outline
19 Minister to set gender equality standards in relation to gender equality indicators
19A Agency may review compliance with Act
19B Relevant employer fails to comply with Act if employer gives false or misleading information
19C Relevant employer fails to comply with Act if employer fails to improve against gender equality standard
19CA Relevant employer fails to comply with Act if certain reports are not given to governing body
19D Consequences of non-compliance with Act
19E Agency to offer relevant employers advice and assistance if employers fail to meet gender equality standards

PART V – CEO

20AA CEO
20 Appointment of CEO
21 Tenure of CEO
22 Remuneration and allowances
23 Leave of absence
24 Outside employment
25 Resignation
26 Termination of appointment
27 Disclosure of interest
28 Acting appointment

PART VI – MISCELLANEOUS

29 Staff
30 Consultants
31 Advisory committees
32 Non-disclosure of confidential information
33 Delegation
33A Minister to consult before making legislative instruments
34 Regulations

Editor's Note: Repealed provisions in this Act have not been reproduced.

[The next text page is 805-161]

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Workplace Gender Equality Act 2012	**91 of 1986**	**3 Sep 1986**	**1 Oct 1986 (Gaz S491, 1986)**

This legislation (formely titled *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* and *Equal Opportunity for Women in the Workplace Act 1999*) has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Employment, Education and Training Act 1988	80 of 1988	24 Jun 1988	1 Jul 1988 (Gaz S190, 1988)
Industrial Relations (Consequential Provisions) Act 1988	87 of 1988	8 Nov 1988	S 1 and 2: 8 Nov 1988 and remainder: 1 Mar 1989 (Gaz S53, 1989)
Affirmative Action (Equal Employment Opportunity for Women) Amendment Act 1989	30 of 1989	24 May 1989	24 May 1989
Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992	105 of 1992	9 Jul 1992	5 Oct 1992
Affirmative Action (Equal Employment Opportunity for Women) Amendment Act 1992	181 of 1992	16 Dec 1992	16 Dec 1992
Statute Law Revision Act 1996	43 of 1996	25 Oct 1996	Sch 4 items 6, 7: 25 Oct 1996
Workplace Relations and Other Legislation Amendment Act 1996	60 of 1996	25 Nov 1996	Sch 19 item 4: 25 Nov 1996

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Workplace Gender Equality Act 2012	**91 of 1986**	**3 Sep 1986**	**1 Oct 1986 (Gaz S491, 1986)**

This legislation (formely titled *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* and *Equal Opportunity for Women in the Workplace Act 1999*) has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Public Employment (Consequential and Transitional) Amendment Act 1999	146 of 1999	11 Nov 1999	Sch 1 items 54, 55: 5 Dec 1999 (Gaz S584, 1999)
Equal Opportunity for Women in the Workplace Amendment Act 1999	183 of 1999	22 Dec 1999	Sch 1: 1 Jan 2000 and remainder: 22 Dec 1999
Corporations (Repeals, Consequentials and Transitionals) Act 2001	55 of 2001	28 Jun 2001	Sch 3 item 173: 15 Jul 2001 (Gaz S285, 2001)
Employment, Workplace Relations and Small Business Legislation Amendment (Application of Criminal Code) Act 2001	142 of 2001	1 Oct 2001	Sch 1 items 10–14: 2 Oct 2001
Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2001	144 of 2001	1 Oct 2001	Sch 3 item 1: 1 Oct 2001; Sch 3 item 2: 29 Oct 2001
Abolition of Compulsory Age Retirement (Statutory Officeholders) Act 2001	159 of 2001	1 Oct 2001	29 Oct 2001

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Workplace Gender Equality Act 2012	**91 of 1986**	**3 Sep 1986**	**1 Oct 1986 (Gaz S491, 1986)**

This legislation (formely titled *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* and *Equal Opportunity for Women in the Workplace Act 1999*) has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Workplace Relations Legislation Amendment (Registration and Accountability of Organisations) (Consequential Provisions) Act 2002	105 of 2002	14 Nov 2002	Sch 3 item 47: 12 May 2003 (Gaz GN49, 2002)
Workplace Relations Legislation Amendment Act 2002	127 of 2002	11 Dec 2002	Sch 3 item 19: 11 Dec 2002
Higher Education Support (Transitional Provisions and Consequential Amendments) Act 2003	150 of 2003	19 Dec 2003	Sch 2 item 102: 1 Jan 2004
Fair Work (State Referral and Consequential and Other Amendments) Act 2009	54 of 2009	25 Jun 2009	Sch 9 item 1: 1 Jul 2009
Sex and Age Discrimination Legislation Amendment Act 2011	40 of 2011	20 Jun 2011	Sch 1 item 70: 21 Jun 2011
Equal Opportunity for Women in the Workplace Amendment Act 2012	179 of 2012	6 Dec 2012	Sch 1 items 1–71, 75–79: 6 Dec 2012
Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014	62 of 2014	30 Jun 2014	Sch 6 item 77 and Sch 12 items 290–299: 1 July 2014

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Workplace Gender Equality Act 2012	**91 of 1986**	**3 Sep 1986**	**1 Oct 1986 (Gaz S491, 1986)**

This legislation (formely titled *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* and *Equal Opportunity for Women in the Workplace Act 1999*) has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Statute Law Revision Act (No 1) 2015	5 of 2015	25 Feb 2015	Sch 1 items 43, 44: 25 Mar 2015
Acts and Instruments (Framework Reform) (Consequential Provisions) Act 2015	126 of 2015	10 Sep 2015	Sch 1 items 670 and 671: 5 Mar 2016
Territories Legislation Amendment Act 2016	33 of 2016	23 Mar 2016	Sch 5 items 102 and 103: 1 Jul 2016
Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022	85 of 2022	12 Dec 2022	Sch 6: 13 Dec 2022
Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Act 2023	18 of 2023	11 Apr 2023	Sch 1: 12 Apr 2023
Workplace Gender Equality Amendment (Setting Gender Equality Targets) Act 2025	25 of 2025	27 Mar 2025	Sch 1: 4 Apr 2025 (F2025N00284)

[The next text page is 805-181]

PART I – PRELIMINARY

1 Short title

This Act may be cited as the *Workplace Gender Equality Act 2012*.

[S 1 am Act 179 of 2012, s 3 and Sch 1 item 2; Act 183 of 1999, s 3 and Sch 2 item 1]

2 Commencement

This Act shall come into operation on a day to be fixed by Proclamation.

2A Objects of Act

The principal objects of this Act are:

(a) to promote and improve gender equality (including equal remuneration between women and men) in employment and in the workplace; and

(b) to support employers to remove barriers to the full and equal participation of women in the workforce, in recognition of the disadvantaged position of women in relation to employment matters; and

(c) to promote, amongst employers, the elimination of discrimination on the basis of gender in relation to employment matters (including in relation to family and caring responsibilities); and

(d) to foster workplace consultation between employers and employees on issues concerning gender equality in employment and in the workplace; and

(e) to improve the productivity and competitiveness of Australian business through the advancement of gender equality in employment and in the workplace.

[S 2A subst Act 179 of 2012, s 3 and Sch 1 item 3; insrt Act 183 of 1999, s 3 and Sch 1 item 2]

2B Simplified outline

The following is a simplified outline of this Act:

- This Act requires various employers (***relevant employers***) to lodge reports each year containing information relating to various gender equality indicators (for example, equal remuneration between women and men).
- Some larger employers (designated relevant employers) will also, every 3 years, need to select and include in their report targets (gender equality targets) against various gender equality indicators. Such employers are required to meet, or improve against, those targets over the following 3 year period (a target cycle).
- Those reports are available to the public, subject to some exceptions for information that is personal information, information relating to remuneration and information of a kind specified by the Minister. Information contained in those reports may also be used in publishing information for the purposes of showing a relevant employer's performance and progress in achieving gender equality in relation to remuneration for the employer's workforce.
- There is a Workplace Gender Equality Agency. Its functions include advising and assisting employers in promoting and improving gender equality in the workplace and undertaking research and programs for the purpose of promoting and improving gender equality in the workplace.
- The CEO has the management of the Agency.
- The Agency may review a relevant employer's compliance with this Act by seeking further information from the employer.
- If a relevant employer fails to comply with this Act, the Agency may name the employer in a report given to the Minister or by electronic or other means (for example, on the Agency's website or in a newspaper).

[S 2B am Act 25 of 2025, s 3 and Sch 1 item 1, with effect from 4 Apr 2025; Act 18 of 2023, s 3 and Sch 1 items 1 and 24, with effect from 12 Apr 2023; insrt Act 179 of 2012, s 3 and Sch 1 item 3]

3 Interpretation

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

accountable authority has the same meaning as in the *Public Governance, Performance and Accountability Act 2013*.

[Def insrt Act 25 of 2025, s 3 and Sch 1 item 2, with effect from 4 Apr 2025]

Agency means the Workplace Gender Equality Agency.

[Def am Act 179 of 2012, s 3 and Sch 1 item 4; Act 183 of 1999, s 3 and Sch 1 item 4; insrt Act 181 of 1992, s 4(a)]

appoint includes re-appoint.

authority [Repealed]

[Def rep Act 85 of 2022, s 3 and Sch 6 item 1, with effect from 13 Dec 2022; reloc Act 5 of 2015, s 3 and Sch 1 item 43; am Act 179 of 2012, s 3 and Sch 1 item 75]

baseline report, in relation to a target cycle; see subsection 13(3AB).

[Def insrt Act 25 of 2025, s 3 and Sch 1 item 2, with effect from 4 Apr 2025]

CEO, when used in relation to a relevant employer, means the Chief Executive Officer (however described) of the relevant employer.

[Def insrt Act 18 of 2023, s 3 and Sch 1 item 16, with effect from 12 Apr 2023]

CEO, except when used in relation to a relevant employer, means the Chief Executive Officer of the Workplace Gender Equality Agency.

[Def insrt Act 18 of 2023, s 3 and Sch 1 item 25, with effect from 12 Apr 2023]

Commonwealth company has the same meaning as in the *Public Governance, Performance and Accountability Act 2013*.

[Def insrt Act 85 of 2022, s 3 and Sch 6 item 2, with effect from 13 Dec 2022]

Commonwealth entity has the same meaning as in the *Public Governance, Performance and Accountability Act 2013*.

[Def insrt Act 85 of 2022, s 3 and Sch 6 item 2, with effect from 13 Dec 2022]

designated relevant employer means an employer that has become a designated relevant employer under subsection 4A(1) and has not ceased to be a designated relevant employer under subsection 4A(2).

[Def insrt Act 25 of 2025, s 3 and Sch 1 item 2, with effect from 4 Apr 2025]

Director [Repealed]

[Def rep Act 18 of 2023, s 3 and Sch 1 item 26, with effect from 12 Apr 2023; am Act 179 of 2012, s 3 and Sch 1 item 7; Act 183 of 1999, s 3 and Sch 1 item 6]

discrimination means discrimination as defined in section 5, 6, 7, 7AA or 7A of the *Sex Discrimination Act 1984*.

[Def reloc Act 5 of 2015, s 3 and Sch 1 item 44; am Act 40 of 2011, s 3 and Sch 1 item 70]

employee organisation has the same meaning as in the *Fair Work Act 2009*.

[Def insrt Act 179 of 2012, s 3 and Sch 1 item 9]

employer means an individual, or a body or association (whether incorporated or not), that employs an individual:

(a) under a contract of service, whether on a full-time, part-time, casual or temporary basis; or

(b) under a contract for services; or

(c) as described in subsection (5) or (6).

[Def subst Act 181 of 1992, s 4(b)]

employment matters includes the following:

(a) the recruitment procedure, and selection criteria, for appointment or engagement of persons as employees;

(b) the promotion, transfer and termination of employment of employees;

(c) training and development for employees;

(d) work organisation, including flexible working arrangements;

(e) conditions of service of employees, including equal remuneration between women and men;

(f) arrangements for dealing with sexual harassment, or harassment on the ground of sex, of employees in the workplace, or discrimination against employees in the workplace;

(g) arrangements for dealing with pregnant, or potentially pregnant employees and employees who are breastfeeding their children;

(h) arrangements relating to employees with family or caring responsibilities.

[Def am Act 18 of 2023, s 3 and Sch 1 item 20, with effect from 12 Apr 2023; Act 179 of 2012, s 3 and Sch 1 items 10–12; insrt Act 183 of 1999, s 3 and Sch 1 item 7]

executive summary report, for a relevant employer for a reporting period, means a report that:

(a) is given by the Agency to the relevant employer; and

(b) contains a summary of the information contained in a public report prepared by the relevant employer in respect of the reporting period.

[Def insrt Act 18 of 2023, s 3 and Sch 1 item 16, with effect from 12 Apr 2023]

gender equality indicators means the following:

(a) gender composition of the workforce;

(b) gender composition of governing bodies of relevant employers;

(c) equal remuneration between women and men;

(d) availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities;

(e) consultation with employees on issues concerning gender equality in the workplace;

(ea) sexual harassment, harassment on the ground of sex or discrimination;

(f) any other matters specified in an instrument under subsection (1A).

[Def am Act 18 of 2023, s 3 and Sch 1 item 21, with effect from 12 Apr 2023; insrt Act 179 of 2012, s 3 and Sch 1 item 14]

gender equality standard: see subsection 19(1A).

[Def insrt Act 18 of 2023, s 3 and Sch 1 item 6, with effect from 12 Apr 2023]

gender equality target: see subsection 17B(2).

[Def insrt Act 25 of 2025, s 3 and Sch 1 item 2, with effect from 4 Apr 2025]

governing body of a relevant employer means the body, or group of members of the employer, with primary responsibility for the governance of the employer.

[Def subst Act 85 of 2022, s 3 and Sch 6 item 3, with effect from 13 Dec 2022; insrt Act 179 of 2012, s 3 and Sch 1 item 15]

harass on the ground of sex has the same meaning as in the *Sex Discrimination Act 1984*.

Note: Other parts of speech and grammatical forms of "harass on the ground of sex" (for example, "harassment on the ground of sex") have a corresponding meaning (see section 18A of the *Acts Interpretation Act 1901*).

[Def insrt Act 18 of 2023, s 3 and Sch 1 item 22, with effect from 12 Apr 2023]

industry benchmark report, for a relevant employer for a reporting period, means a report that:

(a) is given by the Agency to the relevant employer; and

(b) compares the information contained in a public report prepared by the relevant employer in respect of the reporting period with the information contained in public reports prepared by similar relevant employers in respect of the reporting period.

[Def insrt Act 18 of 2023, s 3 and Sch 1 item 16, with effect from 12 Apr 2023]

man means a member of the male sex irrespective of age.

[Def insrt Act 179 of 2012, s 3 and Sch 1 item 16]

minimum standard [Repealed]

[Def rep Act 18 of 2023, s 3 and Sch 1 item 7, with effect from 12 Apr 2023; insrt Act 179 of 2012, s 3 and Sch 1 item 17]

personal information has the same meaning as in the *Privacy Act 1988*.

[Def insrt Act 179 of 2012, s 3 and Sch 1 item 18]

potentially pregnant has the meaning given by section 4B of the *Sex Discrimination Act 1984*.

[Def insrt Act 183 of 1999, s 3 and Sch 1 item 10]

public report means a public report referred to in section 13.

registered higher education provider means a person or body that is a registered higher education provider for the purposes of the *Tertiary Education Quality and Standards Agency Act 2011*.

Note: This definition includes bodies taken to be registered higher education providers for the purposes of that Act by Schedule 3 to the *Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Act 2011*.

[Def insrt Act 179 of 2012, s 3 and Sch 1 item 77]

relevant employer: see section 4.

[Def subst Act 85 of 2022, s 3 and Sch 6 item 4, with effect from 13 Dec 2022; am Act 179 of 2012, s 3 and Sch 1 items 19 and 78; Act 181 of 1992, s 4(c)]

reporting period means:

(a) for a relevant employer that is not a Commonwealth company or a Commonwealth entity—a period referred to in subsection 13A(2); or

(b) for a relevant employer that is a Commonwealth company or Commonwealth entity—a period referred to in subsection 13A(2A).

[Def subst Act 18 of 2023, s 3 and Sch 1 item 33, with effect from 12 Apr 2023; insrt Act 179 of 2012, s 3 and Sch 1 item 20]

sexually harass has the same meaning as in the *Sex Discrimination Act 1984*.

Note: Other parts of speech and grammatical forms of "sexually harass" (for example, "sexual harassment") have a corresponding meaning (see section 18A of the *Acts Interpretation Act 1901*).

[Def insrt Act 18 of 2023, s 3 and Sch 1 item 22, with effect from 12 Apr 2023]

target cycle: see section 17A.

[Def insrt Act 25 of 2025, s 3 and Sch 1 item 2, with effect from 4 Apr 2025]

woman means a member of the female sex irrespective of age.

(1A) The Minister may, by legislative instrument, specify matters for the purposes of paragraph (f) of the definition of ***gender equality indicators*** in subsection (1).

Note: See also section 33A.

[Subs (1A) insrt Act 179 of 2012, s 3 and Sch 1 item 24]

(1B) The matters specified in an instrument under subsection (1A) may relate to employment matters.

[Subs (1B) insrt Act 179 of 2012, s 3 and Sch 1 item 24]

(1C) Subsection (1B) does not limit subsection (1A).

[Subs (1C) insrt Act 179 of 2012, s 3 and Sch 1 item 24]

(1D) An instrument under subsection (1A) has no effect in relation to a reporting period unless it is made before the first day of that period.

[Subs (1D) insrt Act 179 of 2012, s 3 and Sch 1 item 24]

(2) [Repealed]

[Subs (2) rep Act 85 of 2022, s 3 and Sch 6 item 5, with effect from 13 Dec 2022; am Act 55 of 2001, s 3 and Sch 3 item 173]

(2A) [Repealed]

[Subs (2A) rep Act 85 of 2022, s 3 and Sch 6 item 5, with effect from 13 Dec 2022; insrt Act 179 of 2012, s 3 and Sch 1 item 25]

(3) [Repealed]

[Subs (3) rep Act 33 of 2016, s 3 and Sch 5 item 102]

(4) Nothing in this Act shall be taken to require a relevant employer to take any action incompatible with the principle that employment matters should be dealt with on the basis of merit.

(5) For the purposes of this Act, an elected employee organisation official is taken to be employed by the employee organisation, and not by any other employer, and this subsection has effect even if the rules of the employee organisation have an effect contrary to this subsection, or do not deal with the question at all.

[Subs (5) am Act 179 of 2012, s 3 and Sch 1 item 26; insrt Act 181 of 1992, s 4(e)]

(6) For the purposes of this Act, during any time when a Group Training Scheme:

(a) is receiving funding support from the Commonwealth Government; and

(b) has placed a trainee in employment with a host employer; and

(c) pays the trainee, and receives payments from the host employer, for the services rendered by the trainee to the host employer;

the trainee is taken to be employed by the Scheme and not by the host employer.

[Subs (6) insrt Act 181 of 1992, s 4(e)]

[S 3 am Act 25 of 2025; Act 18 of 2023; Act 85 of 2022; Act 33 of 2016; Act 5 of 2015; Act 179 of 2012; Act 40 of 2011; Act 54 of 2009; Act 150 of 2003; Act 127 of 2002; Act 105 of 2002; Act 55 of 2001; Act 183 of 1999; Act 60 of 1996; Act 181 of 1992; Act 105 of 1992; Act 30 of 1989; Act 87 of 1988; Act 80 of 1988]

4 Meaning of *relevant employer*

(1) A ***relevant employer*** means:

(a) a registered higher education provider that is an employer; or

(b) a natural person, or a body or association (whether incorporated or not), that is an employer of 100 or more employees in Australia; or

(c) a Commonwealth company that is an employer of 100 or more employees in Australia; or

(d) a Commonwealth entity that is an employer of 100 or more employees in Australia.

(2) However, a ***relevant employer*** does not include:

(a) a State; or

(b) a Territory; or

(c) a body (whether incorporated or not) established for a public purpose by or under a law of a State or Territory, other than a registered higher education provider; or

(d) the holder of an office established for a public purpose by or under a law of a State or Territory; or

(e) an incorporated company over which a State, a Territory or a body referred to in paragraph (c) is in a position to exercise control.

(3) For the purpose of the definition of ***relevant employer*** in subsection (1):

(a) if an employer is a body corporate that is a subsidiary (within the meaning of the *Corporations Act 2001*) of one or more other bodies corporate, and the subsidiary employs a person, the subsidiary and each of the other bodies corporate are taken to employ the person; and

(b) if the relevant employer is a Commonwealth company—a Commonwealth company employs a person if the person is employed by another Commonwealth company which is a subsidiary (within the meaning of the *Public Governance, Performance and Accountability Act 2013*) of the first-mentioned Commonwealth company; and

(c) if the relevant employer is a Commonwealth entity that is a corporate Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013*)—the corporate Commonwealth entity employs a person if the person is employed by another corporate Commonwealth entity which is a subsidiary (within the meaning of that Act) of the first-mentioned corporate Commonwealth entity.

Example 1: For paragraph (a), a subsidiary employs 150 people. The subsidiary and each of its holding companies (within the meaning of those terms in the *Corporations Act 2001*) is a relevant employer, regardless of how many people each of the holding companies directly employs.

Example 2: For paragraph (a), a subsidiary employs 90 people. The subsidiary is not a relevant employer. A holding company of the subsidiary directly employs 10 people. The holding company, because it is taken to also employ the employees of the subsidiary (for the purposes of the definition of ***relevant employer***), is a relevant employer.

[Subs (3) am Act 25 of 2025, s 3 and Sch 1 items 3 and 4, with effect from 4 Apr 2025]

(4) If, at any time, an employer ceases to be a relevant employer because the number of employees of the employer falls below 100, this Act continues to apply to the employer as if the employer were a relevant employer unless and until the number of employees falls below 80.

[S 4 am Act 25 of 2025; reinsrt Act 85 of 2022, s 3 and Sch 6 item 6, with effect from 13 Dec 2022; rep Act 33 of 2016, s 3 and Sch 5 item 103]

4A Meaning of *designated relevant employer*

(1) A relevant employer becomes a ***designated relevant employer*** if:

(a) the relevant employer employs 500 or more employees at any time; and

(b) the relevant employer is not already a designated relevant employer at that time.

(2) An employer ceases to be a designated relevant employer if:

(a) the number of employees of the employer falls below 400 for a continuous period of 6 months; or

(b) the employer ceases to be a relevant employer.

Note: The number of employees for the purpose of this section does not include employees that the employer is taken under subsection 4(3) to employ for the purpose of the definition of ***relevant employer*** in subsection 4(1).

[S 4A insrt Act 25 of 2025, s 3 and Sch 1 item 5, with effect from 4 Apr 2025]

5 Application of Act

(1) Without prejudice to its effect apart from this section, this Act also has effect as provided by this section.

(2) By virtue of this subsection, this Act has the effect it would have if each reference in this Act to employment were, by express provision, confined to employment in connection with trade and commerce:

(a) between Australia and a place outside Australia;

(b) between the States; or

(c) within a Territory, between a State and a Territory, or between two Territories.

(3) By virtue of this subsection, this Act has the effect it would have if each reference in this Act to employment were, by express provision, confined to employment in connection with the provision of a broadcasting service specified in section 11 of the *Broadcasting Services Act 1992*.

[Subs (3) am Act 105 of 1992, s 30 and Sch 2]

(4) By virtue of this subsection, this Act has the effect it would have to the extent that this Act relates to the collection of statistics.

[Subs (4) subst Act 179 of 2012, s 3 and Sch 1 item 27; am Act 183 of 1999, s 3 and Sch 1 item 13]

(5) By virtue of this subsection, this Act has the effect it would have if each reference in this Act to employment were, by express provision, confined to employment in connection with the business of banking, other than State banking that does not extend beyond the limits of the State concerned.

(6) By virtue of this subsection, this Act has the effect it would have if each reference in this Act to employment were, by express provision, confined to employment in connection with the business of insurance, other than State insurance that does not extend beyond the limits of the State concerned.

(7) By virtue of this subsection, this Act has the effect it would have if each reference in this Act to a relevant employer were, by express provision, confined to a relevant employer that is a foreign corporation, or a trading or financial corporation formed within the limits of the Commonwealth.

(8) By virtue of this subsection, this Act has the effect it would have if each reference in this Act to employment by a relevant employer were, by express provision, confined to employment by a trading or financial corporation formed within the limits of the Commonwealth, being employment in connection with the trading or financial activities, as the case may be, of that corporation.

(9) By virtue of this subsection, this Act has the effect it would have to the extent that this Act is appropriate to give effect to, or carry out the purposes of:

(a) the Convention on the Elimination of all Forms of Discrimination Against Women, done at New York on 18 December 1979 ([1983] ATS 9); or

(b) the ILO Convention (No 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, done at Geneva on 29 June 1951 ([1975] ATS 45); or

(c) the ILO Convention (No 111) concerning Discrimination in respect of Employment and Occupation, done at Geneva on 25 June 1958 ([1974] ATS 12); or

(d) 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); or

(e) the International Covenant on Economic, Social and Cultural Rights, done at New York on 16 December 1966 ([1976] ATS 5); or

(f) the Convention on the Rights of the Child, done at New York on 20 November 1989 ([1991] ATS 4).

Note 1: In 2012, the text of an international agreement in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (http://www.austlii.edu.au).
Note 2: For paragraphs (b), (c) and (d): ILO refers to the International Labour Organization.

[Subs (9) subst Act 179 of 2012, s 3 and Sch 1 item 28]

(10) By virtue of this subsection, this Act has the effect it would have if each reference in this Act to employment were, by express provision, confined to employment in a Territory.

(11) By virtue of this subsection, this Act has the effect it would have if each reference in this Act to a relevant employer were, by express provision, confined to a relevant employer that is a corporation incorporated in a Territory.

(11A) By virtue of this subsection, this Act has the effect it would have if each reference in this Act to a relevant employer were, by express provision, confined to a relevant employer that is a Commonwealth company or a Commonwealth entity.

[Subs (11A) insrt Act 85 of 2022, s 3 and Sch 6 item 7, with effect from 13 Dec 2022]

(12) In this section, ***foreign corporation*** and ***trading or financial corporation*** have the same meanings as in paragraph 51(xx) of the Constitution.

[S 5 am Act 85 of 2022; Act 179 of 2012; Act 183 of 1999; Act 105 of 1992]

5A Application of *Criminal Code*

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

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

[Subs (5A) insrt Act 142 of 2001, s 3 and Sch 1 item 10]

5B Binding the Crown

This Act binds the Crown in right of the Commonwealth. However, it does not bind the Crown in right of a State, of the Australian Capital Territory or of the Northern Territory.

[S 5B insrt Act 85 of 2022, s 3 and Sch 6 item 8, with effect from 13 Dec 2022]

[The next text page is 805-301]

PART III – WORKPLACE GENDER EQUALITY AGENCY

[Pt III heading subst Act 179 of 2012, s 3 and Sch 1 item 30; Act 183 of 1999, s 3 and Sch 1 item 17; Act 181 of 1992, s 5]

8A Workplace Gender Equality Agency

(1) The Workplace Gender Equality Agency is established.

[Subs (1) am Act 179 of 2012, s 3 and Sch 1 item 32; Act 183 of 1999, s 3 and Sch 1 item 18]

(2) The Agency consists of the CEO and the staff referred to in section 29.

[Subs (2) am Act 18 of 2023, s 3 and Sch 1 item 27, with effect from 12 Apr 2023; Act 179 of 2012, s 3 and Sch 1 item 33; Act 183 of 1999, s 3 and Sch 1 item 18]

(3) For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):

(a) the Agency is a listed entity; and

(b) the CEO is the accountable authority of the Agency; and

(c) the persons referred to in subsection (2) are officials of the Agency; and

(d) the purposes of the Agency include the functions of the Agency referred to in section 10.

[Subs (3) am Act 18 of 2023, s 3 and Sch 1 item 28, with effect from 12 Apr 2023; insrt Act 62 of 2014, s 3 and Sch 6 item 77]

[S 8A am Act 18 of 2023; Act 62 of 2014; Act 179 of 2012, s 3 and Sch 1 item 31; Act 183 of 1999; insrt Act 181 of 1992, s 6]

10 Functions and powers of Agency

(1) The functions of the Agency are:

(a) to advise and assist employers in promoting and improving gender equality in the workplace; and

(aa) to develop, in consultation with relevant employers and employee organisations, benchmarks in relation to gender equality indicators; and

(b) to issue guidelines to assist relevant employers to achieve the purposes of this Act; and

(c) to review compliance with this Act by relevant employers, to review public reports lodged by relevant employers and to deal with those reports in accordance with this Act; and

(d) to collect and analyse information provided by relevant employers under this Act to assist the Agency to advise the Minister in relation to legislative instruments made under this Act; and

(e) to undertake research, educational programs and other programs for the purpose of promoting and improving gender equality in the workplace; and

(ea) to work with employers to maximise the effectiveness of the administration of this Act, including by minimising the regulatory burden on employers; and

(f) to promote and contribute to understanding and acceptance, and public discussion, of gender equality in the workplace; and

(g) to review the effectiveness of this Act in achieving its purposes; and

(h) to report to the Minister on such matters in relation to gender equality in the workplace as the Agency thinks fit (including a review under paragraph (g)).

Note: Paragraph (d): see also section 33A.

[Subs (1) am Act 179 of 2012, s 3 and Sch 1 items 35–41; Act 183 of 1999, s 3 and Sch 1 items 20 and 21]

(2) In addition to any other powers conferred on the Agency by this Act, the Agency has power to do all things necessary or convenient to be done for or in connection with the performance of the functions of the Agency.

[S 10 am Act 179 of 2012; Act 183 of 1999; Act 181 of 1992, s 8]

11 Directions by Minister

(1) The Agency is to exercise its powers and perform its functions in accordance with general instructions given by the Minister in writing.

[Subs (1) subst Act 181 of 1992, s 9]

(2) Where the Minister gives a direction under subsection (1), the Minister shall cause a copy of the direction to be laid before each House of the Parliament within 15 sitting days of that House after the direction is given.

[S 11 am Act 181 of 1992]

12 Agency to submit reports to Minister

(1) Despite section 46 of the *Public Governance, Performance and Accountability Act 2013*, the annual report prepared by the CEO for a period for the purposes of that section must be given to the Minister by the last day of the fifth month after the end of the period.

[Subs (1) am Act 18 of 2023, s 3 and Sch 1 item 32(a), with effect from 12 Apr 2023; subst Act 62 of 2014, s 3 and Sch 12 item 290; Act 181 of 1992, s 10(a)]

(2) The Agency may, from time to time, submit to the Minister:

(a) a report on the operations of the Agency during the period to which the report relates; or

(b) a report in respect of any matter relating to, or connected with, the exercise of the powers, or the performance of the functions, of the Agency under this Act.

[Subs (2) am Act 181 of 1992, s 10(b)]

(2A) The Agency must, as soon as practicable after the end of:

(a) the 2-year period ending on 31 May 2016; and

(b) each later 2-year period;

submit to the Minister a report on the progress achieved in relation to the gender equality indicators in that period.

[Subs (2A) insrt Act 179 of 2012, s 3 and Sch 1 item 42]

(3) Where a report has been submitted to the Minister under this section, the Minister shall cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the day on which the Minister receives the report.

[Subs (3) am Act 179 of 2012, s 3 and Sch 1 item 43]

[S 12 am Act 18 of 2023; Act 62 of 2014; Act 179 of 2012; Act 181 of 1992]

[The next text page is 805-401]

PART IV – REPORTS BY RELEVANT EMPLOYERS

Division 1 – Reporting requirements

Note

[Div 1 heading insrt Act 25 of 2025, s 3 and Sch 1 item 6, with effect from 4 Apr 2025]

13 Relevant employers to prepare reports relating to gender equality indicators

(1) In respect of each reporting period, a relevant employer must prepare a public report in writing containing information relating to the employer and to the gender equality indicators.

[Subs (1) subst Act 30 of 1989, s 5(a)]

Specified matters to be included in the report

(2) The public report in respect of a reporting period must contain details of the matters specified in an instrument under subsection (3).

[Subs (2) am Act 25 of 2025, s 3 and Sch 1 item 7, with effect from 4 Apr 2025; Act 181 of 1992, Sch; Act 30 of 1989, s 5(b)]

(3) For the purposes of subsection (2), the Minister must, by legislative instrument, specify matters in relation to each gender equality indicator.

Note: See also section 33A.

[Subs (3) am Act 30 of 1989, s 5(c)]

Gender equality targets to be selected in the report

(3AA) If:

(a) a designated relevant employer is required to prepare a public report for a reporting period (the ***relevant period***); and

(b) the employer made a public report for the reporting period that ended immediately before the start of the relevant period; and

(c) either:

(i) the relevant period ends at the same time as a target cycle for the employer; or

(ii) the employer did not have a target cycle in the relevant period and it is at least 12 months since the day the employer became (or became again) a designated relevant employer;

the employer must, in the public report for the relevant period, select gender equality targets that the employer commits to achieving in the target cycle that begins immediately after the end of the relevant period.

[Subs (3AA) insrt Act 25 of 2025, s 3 and Sch 1 item 8, with effect from 4 Apr 2025]

(3AB) The public report mentioned in (3AA)(b) is the ***baseline report*** for the target cycle that begins immediately after the end of the relevant period.

[Subs (3AB) insrt Act 25 of 2025, s 3 and Sch 1 item 8, with effect from 4 Apr 2025]

(3AC) A designated relevant employer's selection of targets under subsection (3AA) must be done in accordance with any rules made under paragraph 17B(1)(b).

[Subs (3AC) insrt Act 25 of 2025, s 3 and Sch 1 item 8, with effect from 4 Apr 2025]

Exclusion of operationally sensitive information etc.

(3A) Subsection (3B) applies to a relevant employer that is a law enforcement or security agency (within the meaning of the *Independent National Security Legislation Monitor Act 2010*).

[Subs (3A) insrt Act 85 of 2022, s 3 and Sch 6 item 9, with effect from 13 Dec 2022]

(3B) The relevant employer is not required to include in a public report any information:

(a) that is operationally sensitive information (within the meaning of the *Independent National Security Legislation Monitor Act 2010*); or

(b) the publication of which could prejudice the security, defence or international relations of Australia.

[Subs (3B) insrt Act 85 of 2022, s 3 and Sch 6 item 9, with effect from 13 Dec 2022]

Timing of instrument

(4) An instrument under subsection (3) has no effect in relation to a reporting period unless it is made before the first day of that period.

Reports to be signed

(5) The public report must be signed by:

(a) if the relevant employer is a Commonwealth entity—the accountable authority of the Commonwealth entity; and

(b) otherwise—the CEO of the relevant employer.

[Subs (5) am Act 25 of 2025, s 3 and Sch 1 item 9, with effect from 4 Apr 2025; Act 18 of 2023, s 3 and Sch 1 item 17, with effect from 12 Apr 2023; subst Act 85 of 2022, s 3 and Sch 6 item 10, with effect from 13 Dec 2022]

[S 13 am Act 25 of 2025; Act 18 of 2023; Act 85 of 2022; subst Act 179 of 2012, s 3 and Sch 1 item 44; Act 183 of 1999, s 3 and Sch 1 item 22; am Act 181 of 1992; Act 30 of 1989]

13A Reporting periods for reports

(1) A relevant employer must lodge with the Agency public reports in respect of each of the periods set out in this section unless subsection (3) applies to the employer in respect of a reporting period.

Note: Sections 137.1 and 137.2 of the Criminal Code create offences for providing false or misleading information or documents.

[Subs (1) am Act 179 of 2012, s 3 and Sch 1 item 45]

(2) A relevant employer, other than a Commonwealth company or Commonwealth entity, must prepare a public report in respect of the period of 12 months commencing on 1 April 2000 and after that, in respect of each consecutive period of 12 months.

[Subs (2) am Act 85 of 2022, s 3 and Sch 6 item 11, with effect from 13 Dec 2022]

(2A) A relevant employer that is a Commonwealth company or Commonwealth entity must prepare a public report in respect of the period of 12 months commencing on 1 January 2022 and after that, in respect of each consecutive period of 12 months.

[Subs (2A) insrt Act 85 of 2022, s 3 and Sch 6 item 12, with effect from 13 Dec 2022]

(3) If the relevant employer had the status of relevant employer for less than 6 months of a particular reporting period, the employer does not have to comply with an obligation under this section to report in respect of that particular period.

[S 13A am Act 85 of 2022; Act 179 of 2012; subst Act 183 of 1999, s 3 and Sch 1 item 22; insrt Act 181 of 1992, s 11]

13B When public reports are due

Unless a relevant employer has received an extension of time in which to lodge a report under section 17:

(a) if the relevant employer is a Commonwealth company or Commonwealth entity—the employer must lodge a public report under section 13A within 2 months after the day determined by the Agency for the purposes of this paragraph; and

(b) otherwise—the relevant employer must lodge a public report under section 13A within 2 months after the end of the period to which the report relates.

[S 13B subst Act 85 of 2022, s 3 and Sch 6 item 13, with effect from 13 Dec 2022; insrt Act 183 of 1999, s 3 and Sch 1 item 22]

13C Personal information

(1) At the time of lodging a public report under section 13A, a relevant employer must, in writing (either in the report or otherwise), inform the Agency of the information included in the report that is personal information.

(2) Subject to subsection (3), that personal information:

(a) must not be published under section 15; and

(b) must not be used in a report under:

(i) section 12; or

(ii) section 46 of the *Public Governance, Performance and Accountability Act 2013*.

Note: However, such information may be used for the purposes of publishing information under subsection 15A(1) (see subsection 15A(3)). The publishing of information under subsection 15A(1) is subject to certain protections (see subsection 15A(4)).

[Subs (2) am Act 18 of 2023, s 3 and Sch 1 item 2, with effect from 12 Apr 2023; Act 62 of 2014, s 3 and Sch 12 item 291]

(3) Particular personal information may be so published or used if the individual to whom the information relates consents in writing to the publication or use.

[S 13C am Act 18 of 2023; Act 62 of 2014; subst Act 179 of 2012, s 3 and Sch 1 item 46; insrt Act 183 of 1999, s 3 and Sch 1 item 22]

14 Information relating to remuneration

(1) Subject to this section, any information relating to remuneration that is included in a public report lodged by a relevant employer under section 13A:

(a) must not be published under section 15; and

(b) must not be used in a report under:

(i) section 12; or

(ii) section 46 of the *Public Governance, Performance and Accountability Act 2013*.

Note: However, such information may be used for the purposes of publishing information under subsection 15A(1) (see subsection 15A(3)). The publishing of information under subsection 15A(1) is subject to certain protections (see subsection 15A(4)).

[Subs (1) am Act 18 of 2023, s 3 and Sch 1 item 3, with effect from 12 Apr 2023; Act 62 of 2014, s 3 and Sch 12 item 292; Act 181 of 1992, Sch]

(2) Information referred to in subsection (1) (except personal information) may be so published or used if the relevant employer has, by written notice given to the Agency, agreed to that information being so published or used.

Note: Section 13C deals with personal information.

(3) Information referred to in subsection (1) may be so published or used if the information is in an aggregated form that does not disclose, either directly or indirectly, information about a specific relevant employer or another specific person.

[S 14 am Act 18 of 2023; Act 62 of 2014; subst Act 179 of 2012, s 3 and Sch 1 item 46; Act 183 of 1999, s 3 and Sch 1 item 22; am Act 181 of 1992]

14A Information of a kind specified by the Minister

(1) Subject to this section, information of a kind specified in an instrument under subsection (2):

(a) must not be published under section 15; and

(b) must not be used in a report under:

(i) section 12; or

(ii) section 46 of the *Public Governance, Performance and Accountability Act 2013*.

Note: However, such information may be used for the purposes of publishing information under subsection 15A(1) (see subsection 15A(3)). The publishing of information under subsection 15A(1) is subject to certain protections (see subsection 15A(4)).

[Subs (1) am Act 18 of 2023, s 3 and Sch 1 item 4, with effect from 12 Apr 2023; Act 62 of 2014, s 3 and Sch 12 item 293]

(2) The Minister may, by legislative instrument, specify kinds of information for the purposes of subsection (1).

Note: See also section 33A.

(3) Information referred to in subsection (1) may be so published or used if the information is in an aggregated form that does not disclose, either directly or indirectly, information about a specific relevant employer or another specific person.

[S 14A am Act 18 of 2023; Act 62 of 2014; insrt Act 179 of 2012, s 3 and Sch 1 item 46]

15 Agency's use of public report

(1) Subject to sections 13C, 14 and 14A, a public report, or a part of a public report (including a copy of the report or part of the report):

(a) may be published by the Agency by electronic or other means; and

(b) may be used, either in whole or in part, in a report under:

(i) section 12; or

(ii) section 46 of the *Public Governance, Performance and Accountability Act 2013*.

[Subs (1) am Act 62 of 2014, s 3 and Sch 12 item 294]

(2) If:

(a) a relevant employer lodges a public report under section 13A in respect of a reporting period; and

(b) the report is lodged within the time allowed by section 13B or 17;

then, during the period of 28 days beginning on the day the report is lodged, subsection (1) of this section does not apply in relation to the report.

[Subs (2) insrt Act 179 of 2012, s 3 and Sch 1 item 51]

[S 15 am Act 62 of 2014; Act 179 of 2012, s 3 and Sch 1 items 47–50; Act 181 of 1992, Sch]

15A Agency must publish information for relevant employers—achieving gender equality in relation to remuneration

(1) The Agency must publish aggregate information, for each relevant employer for each reporting period, for the purpose of showing the employer's performance and progress in achieving gender equality in relation to remuneration for the employer's workforce.

(2) The information may be published by electronic or other means.

(3) The Agency may use information in a public report for the purposes of subsection (1).

(4) However, the Agency must not publish information under subsection (1) that discloses, either directly or indirectly:

(a) personal information; or

(b) other information about the remuneration paid to a specific individual.

[S 15A insrt Act 18 of 2023, s 3 and Sch 1 item 5, with effect from 12 Apr 2023]

16 Relevant employer to make public reports accessible to employees and shareholders etc

(1) A relevant employer must, as soon as reasonably practicable after lodging a public report under section 13A, inform:

(a) the employees of the employer; and

(b) any shareholders or members of the employer;

that the employer has lodged the report and of the way in which the report may be accessed (whether electronic or otherwise).

(2) The relevant employer must, as soon as reasonably practicable after that lodgement, provide those employees and shareholders or members with access (whether electronic or otherwise) to the public report (excluding information to which subsection (3) applies).

(3) This subsection applies to the following information:

(a) personal information;

(b) information relating to remuneration that the relevant employer considers should not be subject to the requirement in subsection (2);

(c) information of a kind specified in an instrument under section 14A.

(4) Paragraph (3)(a) does not apply in relation to particular information if the individual to whom the information relates consents in writing to the information being subject to the requirement in subsection (2).

[S 16 subst Act 179 of 2012, s 3 and Sch 1 item 52; am Act 181 of 1992, Sch]

16A Relevant employer to inform employee organisations of lodgement of public report

A relevant employer must, within 7 days after lodging a public report under section 13A, take all reasonable steps to inform each employee organisation, that has members who are employees of the employer, that the employer has lodged the report.

[S 16A insrt Act 179 of 2012, s 3 and Sch 1 item 52]

16B Relevant employer to inform employees and employee organisations of the opportunity to comment

A relevant employer must, when informing employees under section 16 or an employee organisation under section 16A, advise the employees or employee organisation that comments on the report may be given to the employer or to the Agency.

[S 16B insrt Act 179 of 2012, s 3 and Sch 1 item 52]

16C Certain reports to be given to relevant employer's governing body

Executive summary reports

(1) The CEO of a relevant employer must, after receiving from the Agency an executive summary report for the employer for a reporting period, cause a copy of the report to be given to each member of the employer's governing body (if any).

Industry benchmark reports

(2) The CEO of a relevant employer must, as soon as reasonably practicable after receiving from the Agency an industry benchmark report for the employer for a reporting period, cause a copy of the report to be given to each member of the employer's governing body (if any).

Giving reports together

(3) If, as at the time a relevant employer receives an industry benchmark report for the employer for a reporting period from the Agency:

(a) the employer has received from the Agency an executive summary report for the employer for the period; but

(b) copies of the executive summary report have not been given to members of the employer's governing body as mentioned in subsection (1);

then the CEO of the employer must cause the copies of the executive summary report to be given to the members of the governing body together with the copies of the industry benchmark report.

Commonwealth entities

(4) If the relevant employer is a Commonwealth entity, a reference in this section to the CEO of the relevant employer is taken to be a reference to the accountable authority of the Commonwealth entity.

[Subs (4) insrt Act 25 of 2025, s 3 and Sch 1 item 10, with effect from 4 Apr 2025]

[S 16C am Act 25 of 2025; insrt Act 18 of 2023, s 3 and Sch 1 item 18, with effect from 12 Apr 2023]

17 Agency may grant extensions

(1) A relevant employer may, before the end of the relevant period within which the relevant employer is required to lodge with the Agency a public report under section 13B, apply to the Agency to extend the period for a further period to enable the employer to lodge the public report.

[Subs (1) am Act 85 of 2022, s 3 and Sch 6 item 14, with effect from 13 Dec 2022; Act 179 of 2012, s 3 and Sch 1 item 53; Act 144 of 2001, s 3 and Sch 3 item 1; Act 183 of 1999, s 3 and Sch 1 item 23]

(2) Where the Agency:

(a) has received a request under subsection (1) to extend a period in respect of a report; and

(b) considers that there are reasonable grounds for extending the period;

the Agency may grant an extension in respect of the report for such period, not exceeding 6 months, as the Agency thinks fit.

[S 17 am Act 85 of 2022; Act 179 of 2012; Act 144 of 2001; Act 183 of 1999; Act 181 of 1992, Sch]

[The next text page is 805-451]

Division 2 – Gender equality targets

Note

[Div 2 insrt Act 25 of 2025, s 3 and Sch 1 item 11, with effect from 4 Apr 2025]

17A Target cycles

(1) A ***target cycle*** for a designated relevant employer is a 3-year period that begins on the same day as the next reporting period following a reporting period for a public report in which the employer has selected gender equality targets in accordance with subsection 13(3AA).

(2) If an employer ceases, in accordance with subsection 4A(2), to be a designated relevant employer:

(a) the employer does not have a target cycle; and

(b) section 17C does not apply to the employer in relation to a target cycle that the employer had immediately before ceasing to be a designated relevant employer.

Note: If the employer later becomes a designated relevant employer again, the employer's new target cycle will be worked out in accordance with subsection (1) of this section.

[S 17A insrt Act 25 of 2025, s 3 and Sch 1 item 11, with effect from 4 Apr 2025]

17B Minister to set gender equality targets and selection rules

(1) The Minister must, by legislative instrument:

(a) set targets in relation to specified gender equality indicators and specified target cycles; and

(b) specify rules for the selection of targets by designated relevant employers in specified target cycles.

Note 1: The Minister must consult the Agency before making legislative instruments under this Act (see section 33A).

Note 2: For specification by class, see subsection 13(3) of the *Legislation Act 2003*.

(2) A target set by an instrument in force under subsection (1) is a ***gender equality target***.

(3) Rules specified in accordance with paragraph (1)(b) may (without limiting that paragraph) include rules that do any of the following:

(a) provide for classes of targets;

(b) require the selection of a specified number of targets;

(c) require the selection of a specified number of targets of a specified class;

(d) require a designated relevant employer to nominate the level of improvement against a specific target that is required for the employer to have met the target.

(4) An instrument under subsection (1) has no effect in relation to a target cycle unless it is made before the first day of that cycle.

[S 17B insrt Act 25 of 2025, s 3 and Sch 1 item 11, with effect from 4 Apr 2025]

17C Failure to comply with gender equality targets

For the purposes of section 19D, a designated relevant employer is taken to fail to comply with this Act if, at the end of a target cycle for the employer, the employer has not, without reasonable excuse, in respect of each gender equality target selected by the employer for the target cycle, either:

(a) met the target; or

(b) demonstrated improvement against the target in the public report for the final year of the target cycle, as compared to the baseline report for the target cycle.

Note: If the employer does not have a reasonable excuse for the failure, the Agency may name the employer in a report given to the Minister or by electronic or other means: see section 19D.

[S 17C insrt Act 25 of 2025, s 3 and Sch 1 item 11, with effect from 4 Apr 2025]

[The next text page is 805-501]

PART IVA – REVIEWING COMPLIANCE WITH THIS ACT AND CONSEQUENCES OF NON-COMPLIANCE

[Pt IVA insrt Act 179 of 2012, s 3 and Sch 1 item 55]

18 Simplified outline

The following is a simplified outline of this Part:

- The Minister must set gender equality standards in relation to gender equality indicators, relevant employers and reporting periods.
- The Agency may review a relevant employer's compliance with this Act by seeking further information from the employer. The Agency may do this on a random basis.
- If a relevant employer fails to comply with this Act, the Agency may name the employer in a report given to the Minister or by electronic or other means (for example, on the Agency's website or in a newspaper).
- Examples of a failure to comply with this Act are a failure by a relevant employer to lodge a public report on time or to give the Agency information under section 19A.
- If the Agency proposes to name a relevant employer, the Agency must give the employer notice in writing of the proposal and the reasons for the proposal.
- Relevant employers failing to comply with this Act may not be eligible to compete for contracts under the Commonwealth procurement framework and may not be eligible for Commonwealth grants or other financial assistance.

[S 18 am Act 18 of 2023, s 3 and Sch 1 item 8, with effect from 12 Apr 2023; subst Act 179 of 2012, s 3 and Sch 1 items 54 and 55; Act 183 of 1999, s 3 and Sch 1 item 24; am Act 181 of 1992, Sch]

19 Minister to set gender equality standards in relation to gender equality indicators

(1) The Minister must, by legislative instrument, set standards in relation to specified gender equality indicators, specified relevant employers and specified reporting periods.

Note 1: The Minister must consult the Agency before making legislative instruments under this Act (see section 33A).

Note 2: For specification by class, see subsection 13(3) of the *Legislation Act 2003*.

Note 3: An instrument under subsection (1) may make different provision with respect to different relevant employers and different reporting periods (see subsection 33(3A) of the *Acts Interpretation Act 1901*).

[Subs (1) subst Act 18 of 2023, s 3 and Sch 1 item 10, with effect from 12 Apr 2023; am Act 85 of 2022, s 3 and Sch 6 item 15, with effect from 13 Dec 2022; Act 126 of 2015, s 3 and Sch 1 item 670, with effect from 5 Mar 2016]

(1A) A standard set by an instrument in force under subsection (1) is to be known as a ***gender equality standard***.

[Subs (1A) insrt Act 18 of 2023, s 3 and Sch 1 item 10, with effect from 12 Apr 2023]

(2) An instrument under subsection (1) has no effect in relation to a reporting period unless it is made before the first day of that reporting period.

[S 19 am Act 18 of 2023, s 3 and Sch 1 item 9, with effect from 12 Apr 2023; Act 85 of 2022; Act 126 of 2015; subst Act 179 of 2012, s 3 and Sch 1 items 54 and 55; am Act 181 of 1992, Sch]

19A Agency may review compliance with Act

(1) The Agency may, by written notice, require a relevant employer to give the Agency information:

(a) that relates to the employer's compliance with this Act or to the employer's performance against the gender equality standards; and

(b) that is specified in the notice.

[Subs (1) am Act 18 of 2023, s 3 and Sch 1 item 11, with effect from 12 Apr 2023]

(2) The notice must specify the period within which, and the manner in which, the information must be given.

(3) A period specified in a notice under subsection (1) must be at least 14 days after the notice is given.

Note: Sections 137.1 and 137.2 of the Criminal Code create offences for providing false or misleading information or documents.

[S 19A am Act 18 of 2023; insrt Act 179 of 2012, s 3 and Sch 1 item 55]

19B Relevant employer fails to comply with Act if employer gives false or misleading information

For the purposes of section 19D, a relevant employer is taken to fail to comply with this Act if:

(a) the employer lodges a public report under section 13A and any information included in the report is false or misleading; or

(b) the employer gives the Agency information under section 19A and the information is false or misleading.

Note: If the employer does not have a reasonable excuse for the failure, the Agency may name the employer in a report given to the Minister or by electronic or other means: see section 19D.

[S 19B insrt Act 179 of 2012, s 3 and Sch 1 item 55]

19C Relevant employer fails to comply with Act if employer fails to improve against gender equality standard

If:

(a) a relevant employer lodges a public report under section 13A in respect of a reporting period (the ***base period***); and

(b) in a case where a gender equality standard (the ***base standard***) applies in relation to the employer and the base period—at the end of the base period, the employer fails to meet that standard; and

[Para (b) am Act 18 of 2023, s 3 and Sch 1 item 13, with effect from 12 Apr 2023]

(c) the employer lodges a public report under section 13A in respect of the second reporting period (the ***comparison period***) after the base period; and

(d) at the end of the comparison period, the employer's performance against the base standard has failed to improve from the employer's performance against that standard at the end of the base period;

then the failure referred to in paragraph (d) is taken, for the purposes of section 19D, to be a failure to comply with this Act.

Note: If the employer does not have a reasonable excuse for the failure referred to in paragraph (d) of this section, the Agency may name the employer in a report given to the Minister or by electronic or other means: see section 19D.

[S 19C am Act 18 of 2023, s 3 and Sch 1 item 12, with effect from 12 Apr 2023; insrt Act 179 of 2012, s 3 and Sch 1 item 55]

19CA Relevant employer fails to comply with Act if certain reports are not given to governing body

(1) For the purposes of section 19D, a relevant employer is taken to fail to comply with this Act without reasonable excuse if the CEO of the relevant employer fails, without reasonable excuse, to comply with subsection 16C(1), (2) or (3) (certain reports to be given to relevant employer's governing body).

Note: The Agency may name the employer in a report given to the Minister or by electronic or other means: see section 19D.

[Subs (1) am Act 25 of 2025, s 3 and Sch 1 item 12, with effect from 4 Apr 2025]

(2) If the relevant employer is a Commonwealth entity, a reference in this section to the CEO of the relevant employer is taken to be a reference to the accountable authority of the Commonwealth entity.

[Subs (2) insrt Act 25 of 2025, s 3 and Sch 1 item 13, with effect from 4 Apr 2025]

[S 19CA am Act 25 of 2025; insrt Act 18 of 2023, s 3 and Sch 1 item 19, with effect from 12 Apr 2023]

19D Consequences of non-compliance with Act

(1) This section applies if a relevant employer, without reasonable excuse, fails to comply with this Act.

Note: Examples of a failure to comply with this Act are:

(a) a relevant employer fails to lodge a public report on time (see sections 13A, 13B and 17); and

(b) a relevant employer fails to inform employees, shareholders or members of the employer that a public report has been lodged (see section 16); and

(c) a relevant employer fails to inform employees and relevant employee organisations as required by sections 16A and 16B; and

(d) a relevant employer fails to give the Agency information under section 19A; and

(e) a designated relevant employer fails to select gender equality targets for a target cycle (see subsection 13(3AA)).

[Subs (1) am Act 25 of 2025, s 3 and Sch 1 item 14, with effect from 4 Apr 2025]

Naming employer in Agency report

(2) The Agency may name the employer as having failed to comply with this Act, and set out details of the non-compliance, in a report under:

(a) subsection 12(2); or

(b) section 46 of the *Public Governance, Performance and Accountability Act 2013*.

[Subs (2) subst Act 62 of 2014, s 3 and Sch 12 item 295]

Naming employer in other ways

(3) The Agency may, by electronic or other means, name the employer as having failed to comply with this Act and set out details of the non-compliance.

Note: For example, the Agency may do this on the Agency's website or in a newspaper.

Prior notice to employer

(4) If the Agency proposes to:

(a) name an employer in a report under:

(i) subsection 12(2); or

(ii) section 46 of the *Public Governance, Performance and Accountability Act 2013*; or

(b) name an employer under subsection (3) of this section;

the Agency must:

(c) give the employer notice in writing of the proposal and the reasons for the proposal; and

(d) invite the employer to make written representations to the Agency about the proposal within the period of 28 days beginning on the day the notice is given; and

(e) have regard to any written representations made by the employer within that period.

[Subs (4) am Act 62 of 2014, s 3 and Sch 12 item 296]

(5) If:

(a) a relevant employer lodges a public report under section 13A in respect of a reporting period; and

(b) the report is lodged within the time allowed by section 13B or 17;

then, during the period of 28 days beginning on the day the report is lodged, the Agency must not give the employer a notice under subsection (4) of this section in relation to the lodgement of that report.

[S 19D am Act 25 of 2025; Act 62 of 2014; insrt Act 179 of 2012, s 3 and Sch 1 item 55]

19E Agency to offer relevant employers advice and assistance if employers fail to meet gender equality standards

If:

(a) a relevant employer lodges a public report under section 13A in respect of a reporting period; and

(b) in a case where a gender equality standard applies in relation to the employer and that reporting period—the Agency becomes aware that, at the end of that reporting period, the employer fails to meet that standard;

[Para (b) am Act 18 of 2023, s 3 and Sch 1 item 15, with effect from 12 Apr 2023]

the Agency must offer to provide the employer with advice and assistance in relation to improving the employer's performance against that standard.

[S 19E am Act 18 of 2023, s 3 and Sch 1 item 14, with effect from 12 Apr 2023; insrt Act 179 of 2012, s 3 and Sch 1 item 55]

[The next text page is 805-601]