From: Stuart Maxwell <smaxwell@cfmeu.org>
Sent: Wednesday, April 10, 2024 4:38 PM
To: Chambers - Asbury VP <Chambers.Asbury.VP@fwc.gov.au>
Subject: AM2024/6 - Variation of Modern Awards to Include Delegates' Rights Term

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Dear Associate,

Please find attached electronic copies of the documents that I will be referring to during the CFMEU C&G submission tomorrow morning.

Regards.

CFMEU
Construction & General Division
National Office

Stuart Maxwell
FED Senior Industrial Officer

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I acknowledge the traditional Aboriginal owners of country throughout Australia and pay my respect to them, their culture and their Elders past, present and future.

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C135 - Workers' Representatives Convention, 1971 (No. 135)

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Preamble

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Fifty-sixth Session on 2 June 1971, and

Noting the terms of the Right to Organise and Collective Bargaining Convention, 1949, which provides for protection of workers against acts of anti-union discrimination in respect of their employment, and

Considering that it is desirable to supplement these terms with respect to workers' representatives, and

Having decided upon the adoption of certain proposals with regard to protection and facilities afforded to workers' representatives in the undertaking, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention,

adopts this twenty-third day of June of the year one thousand nine hundred and seventy-one the following Convention, which may be cited as the Workers' Representatives Convention, 1971:

Article 1

Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.

Article 2

1. 1. Such facilities in the undertaking shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently.
2. 2. In this connection account shall be taken of the characteristics of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned.
3. 3. The granting of such facilities shall not impair the efficient operation of the undertaking concerned.

Article 3

For the purpose of this Convention the term ***workers' representatives*** means persons who are recognised as such under national law or practice, whether they are--

- (a) trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; or
- (b) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.

Article 4

National laws or regulations, collective agreements, arbitration awards or court decisions may determine the type or types of workers' representatives which shall be entitled to the protection and facilities provided for in this Convention.

Article 5

Where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures shall be taken, wherever necessary, to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives and to encourage co-operation on all relevant matters between the elected representatives and the trade unions concerned and their representatives.

Article 6

Effect may be given to this Convention through national laws or regulations or collective agreements, or in any other manner consistent with national practice.

Article 7

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 8

1. 1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. 2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. 3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 9

1. 1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. 2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 10

1. 1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
2. 2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 11

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 12

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 13

1. 1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:
    - (a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 9 above, if and when the new revising Convention shall have come into force;
    - (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.
2. 2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 14

The English and French versions of the text of this Convention are equally authoritative.

See related

Key Information

Convention concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking (Entry into force: 30 Jun 1973)

Adoption: Geneva, 56th ILC session (23 Jun 1971)
Status: Up-to-date instrument (Technical Convention).
Convention currently open for denunciation: 30 Jun 2023 - 30 Jun 2024

See also

Ratifications by country
Submissions to competent authorities by country

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[2011] FWA 4322
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FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Nenad Grubisic
v
Chubb Security Services Limited
(U2011/5257)

DEPUTY PRESIDENT HAMILTON MELBOURNE, 21 JULY 2011

Dismissal of union delegate - valid reason - dismissal not unfair

[1] On 18 February 2011 Mr.Nenad Grubisic filed an application under s.394 of the *Fair Work Act* 2009 ('the Act') against Chubb Security Services Limited for an unfair dismissal remedy for his dismissal on 7 February 2011. This was a summary dismissal.

The matter was conciliated and no settlement was reached. The matter was set down for arbitration before me, and pursuant to s.399 the matter was heard by hearing given the decision of the parties to cross examine witnesses. Written submissions and witness statements were filed:

Nenad Grubisic

Goce Avromoski

Clyde Hugh Bainbridge-Robb

Adam Joseph Scott Dalrymple

Emmanuel Spiteri

David Dalziell

Brian David Wright

[2] I have had regard to all the submissions and evidence.

Valid Reason - Section 387(a)

[3] The term 'valid reason' was considered by Northrop J in *Selvachandran v. Petron Plastics Pty Ltd* 1 , in relation to s.170DE of the *Industrial Relations Act* 1988. He said:

> "Section 170DE(1) refers to a `valid reason, or valid reasons', but the Act does not give a meaning to those phrases or the adjective `valid'. A reference to dictionaries shows that the word `valid' has a number of different meanings depending on the context in which it is used. In the Shorter Oxford Dictionary, the relevant meaning given is" `2. Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value.' In the Macquarie Dictionary the relevant meaning is `sound, just or well founded; a valid reason.'
>
> In its context in s 170DE(1), the adjective `valid' should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a

> valid reason for the purposes of s170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must `be applied in a practical, commonsense way to ensure that' the employer and employee are each treated fairly, see what was said by Wilcox CJ in Gibson v Bosmac Pty Ltd (1995) 60 IR 1, when considering the construction and application of a s170DC."

[4] This decision continues to be of relevance and continues to be applied.

First Incident of 23 August 2010

[5] Mr.Wright gave evidence that Mr.Grubisic attended work on 23 August 2010. Mr.Wright said that he saw Mr.Grubisic arguing with Mr.Montalto in relation to going to work. He said that he questioned Mr.Grubisic on being late for work and not starting work, which was delaying the truck. Mr.Wright spoke to Mr.Grubisic about his appearance. He said that his appearance was 'scruffy ... not up to standard in that he was unshaven and his uniform was untidy with the buttons open. Mr.Grubisic was loud and did not want to listen to anything I said. He said 'what are you going to do about it, sack me'. When instructed to leave the office and go to his truck to commence work Mr.Grubisic 'continued to speak in a disrespectful manner and was argumentative. I told Mr.Grubisic to either start work or hand his gun in and go home. Mr.Grubisic again responded with 'are you going to sack me?'. He then left despatch making a disparaging remark to me, saying 'you're nothing but a bloody wuss.' He went out to the yard and got in the passenger seat of the coin truck where the other two crew were waiting.' At 9.05 am the truck still had not left, and Mr.Wright asked why, and Mr.Montalto made a gesture towards Mr.Grubisic. Mr.Grubisic was on the mobile phone 2.

[6] Mr.Grubisic gave evidence that Mr.Wright said to him on 23 August 2010 3:

> 'put your gun in and go home or get out in the truck'. Wright was very agitated. He was waving his arms around like a windmill. I said to Wright that I was in uniform and here to work. He said 'no you don't, you just want to root the company'. I found Wright's behaviour very unreasonable and improper in the circumstances. I spoke to David Parish for approximately half an hour on this ...'

[7] Both Mr.Wright and Mr.Grubisic were cross examined 4. Mr.Wright denied the windmill allegations and denied making the statements attributed to him5. I found Mr.Wright to be a witness of credibility and I prefer his evidence to that given by Mr.Grubisic where it is inconsistent. I find that Mr.Grubisic said the words that Mr.Wright claimed that he said, and was not dressed for work. In my view Mr.Grubisic showed disrespect and defiance of the authority of the employer6, was late for work, delayed the truck and the commencement of the work of the truck and its team, and was not properly dressed for work. Viewed in context these are valid reasons for termination of employment. Such conduct is not appropriate even if it is the first day back at work after an industrial dispute, and notwithstanding the various issues between Mr.Grubisic and the employer.

Second Incident of 23 August 2010

[8] A Mr.Len Sumpter prepared an audit record 7 which purported to record the events that occurred when the Chubb Security truck containing Mr.Grubisic and other members of the team arrived at the Commonwealth Bank of Australia at Smith Street Collingwood. Mr.Grubisic is recorded as being the escort. It records the escort as not having his gun hand free. An email from Mr.Sumpter to Chubb dated 23 August 2010 states that Mr.Grubisic was 'talking on the phone and loading the trolley with one hand (no gun hand free).' This refers to the coin trolley which was then pushed into the bank, emptied, and then taken out again8. A second email from Mr.Sumpter to Chubb9 records a conversation between Mr.Grubisic and Mr.Sumpter as follows:

> 'He [Mr.Grubisic] stated to me that he was on the phone talking union business; I said to him that he was still on the phone while loading the trolley (no gun hand free) and while he entered the CBA branch.

His answer to me was he could not terminate the call, as he was talking to the union.'

[9] This tribunal is not bound by the rules of evidence, although those rules are given due weight in decisions. In any event, such documents would appear to fall within the scope of matters that may be admitted pursuant to s.69 of the *Evidence Act* 1995 (Cth.) as evidence of facts: *ASIC v Macdonald (No. 3)* [2008] NSWSC 1099 at 39 and 41, and *Blomfield v Nationwide News Pty Ltd (No. 2)* [2009] NSWSC 978.

[10] Such evidence should be treated with due weight, but in the circumstances of this case I accept that these exhibits contain relevant and useful evidence of the facts recorded in those documents which I am prepared to give weight to. The evidence given by Mr.Grubisic on this issue was not satisfactory. Mr.Grubisic prepared two witness statements but did not deal with this issue in either. I was then informed at the start of proceedings that it was contended that Mr.Grubisic used a mobile phone for no more than 30 seconds while on the street 10. Mr.Grubisic gave oral evidence to that effect, and also appeared to concede that he was talking on the phone for some time before alighting from the truck11.

[11] However, Mr.Bainbridge-Robb gave evidence 12 that Mr.Grubisic met with him on 24 January 2011 and put a different explanation. There was no mention of talking for a limited period of no more than 30 seconds while alighted from the truck and on the pavement. Rather he records Mr.Grubisic responding as follows:

'Mr.Grubisic claimed that there was no issue with his being on the phone and that it was common practice. I disputed this and again stated that this conduct was unacceptable.'

[12] I did not find Mr.Grubisic's evidence on most issues to be credible where that evidence might not assist him. I do not accept Mr.Grubisic's evidence that he was only on the phone for 30 seconds while standing on the pavement outside the truck.

[13] The Chubb Cash in Transit Armoured Vehicle Operators (AVO) Handbook 13 provides:

'Personal mobile phones are not to be used whilst you are actively performing cash in transit transactions.'

[14] Mr.Grubisic was aware of the handbook and its contents 14 and as a union delegate who repeatedly raised and extensively debated issues of policy with the employer he was well informed about Chubb policies and practices. Mr.Grubisic denied that this handbook was raised and discussed by Mr.Wright on 12 April 2010 at a toolbox meeting15. However, I prefer the evidence of Mr.Bainbridge-Robb, who gave evidence that Chubb policies regarding the use of company mobile phones were well known to guards including Mr.Grubisic, and that it was discussed as an agenda item at a toolbox meeting that he conducted at Kensington depot on 12 April 2010, which he said was attended by Mr.Grubisic16.

[15] I do not accept the evidence given by Mr.Avromoski that talking on the mobile phone is common practice amongst Chubb employees, except to the extent that a phone may need to be used on some occasions in order to obtain codes to access automatic tellers 17. I also note that Mr.Avromoski accepted that using a mobile phone during a cash delivery was dangerous and increased risks:

'You would accept, wouldn't you, that if you were on the phone whilst in the middle of a cash transit job that you are at a significantly increased risk of a hold-up?---Yes.'

[16] I also note that Mr.Dalrymple gave evidence that a mobile phone is not to be used during a cash transaction 18. He also would not make or prolong a call during a transaction19. I accept the evidence of Mr.Wright that for example crews were instructed not to answer the phone if they were completing a transaction, and employees were not reprimanded for not answering the phone during a transaction, contrary to the evidence given by Mr.Avramoski20. I accept the evidence of Mr.Wright in his comments to similar effect in relation to Mr.Dalrymple's evidence21. Overall I prefer the evidence of Mr.Wright and Mr.Bainbridge-Robb where it is inconsistent with the evidence given by Mr.Grubisic, Mr.Avramoski, or Mr.Dalrymple.

[17] Even if Mr.Grubisic was not on the phone with the union but with Comcare 22, that was still not a call from Chubb which conceivably must be answered given its source. It is a call made or answered during a period of some danger and risk for Chubb and its employees, namely delivery of cash by hand to a bank. Such phone calls are in breach of reasonable and lawful employer directions.

[18] I find that Mr.Grubisic was talking on the mobile phone while outside the truck during a cash delivery to the Commonwealth Bank in Smith Street Collingwood on 23 August 2010 and that this was in breach of reasonable and lawful company policy and directions contained in the Chubb Cash in Transit Armoured Vehicle Operators Handbook: see *R v Darling Island Stevedoring and Lighterage Co. Limited; Ex parte Halliday & Sullivan* 23 per Dixon J, and *Woolworths Ltd v. Brown*24. I do not accept that this was for a period as brief as 30 seconds. It was for a longer period, and most likely a substantially longer period.

[19] This is an important issue because the result was that Mr.Grubisic did not have his gun hand free. Instead he had one hand on a cash trolley and in the other hand held a mobile phone. The security cash transit business by its very nature is a dangerous business, involving the guarding of cash against robbery and violence. That is why guards carry guns, why security trucks are armoured, why a number of operators operate the vans, why there is an organised allocation of work between the guards involving guarding and transport and keeping watch, and so on. These are obvious features of the business. Mr.Grubisic as escort needed to have his gun hand free. Even if he was not the escort he should not have been distracted and had his hands and attention occupied with a mobile phone. Any employee who conducts himself in that way disregards safety and the purpose of the Chubb security business. I find that this constitutes a valid reason for termination of employment, and one which is serious in its nature. It is not a technical or minor act of misconduct.

[20] I note that the applicant asked that I draw a *Jones v. Dunkel* 25 regarding the alleged failure of Chubb to call a number of witnesses. I accept the submission of Chubb that the absence of these witnesses was explained26.

The Context of These Valid Reasons for Termination

[21] Mr.Bainbridge-Robb gave evidence that he had regard for earlier written warnings as part of the background. He said that:

> 'they showed an escalating pattern of behaviour. Mr.Grubisic's behaviour had reached the point of displaying flagrant disregard for company policies, basic safety procedures, and the authority and directions of management. His behaviour was detrimental to the business and to the safety of his fellow employees.' 27

[22] It is not in dispute that Mr.Grubisic was warned on 21 June 2010 28 for breaching an instruction to attend on 11 June 2010 the Kensington Branch of Chubb for the purpose of determining his medical ability to wear protective body armour (PBA). The issue of wearing PBA had been the subject of an ongoing industrial disagreement involving a number of tribunal matters and discussions between Mr.Grubisic and Chubb, and many other discussions elsewhere.

[23] Mr.Grubisic was also warned on 21 July 2010 29 for failing to attend on 10 July 2010 for a complete measuring and fitting of PBA.

[24] He was given a third and final warning on 18 October 2010 30 for failing to attend work on 23 July 2010, after a memorandum was issued to all Kensington employees that no leave or RDOs would be approved for that day because of the operational requirements of the business.

[25] In relation to the first warning, on 27 May 2010 Mr. Grubisic issued a Provisional Improvement Notice (PIN) under the Occupational Health and Safety Act which related to the alleged failure of Chubb to consult with their employees regarding the implementation of PBA. Nothing in that PIN appears to in any way prevent the carrying out of the Chubb direction that Mr.Grubisic attend to have a medical examination regarding his ability to wear PBA. Comcare found that there was no breach of health and safety legislation 31.

[26] In relation to the second warning, the PIN had been lifted by the time of the second warning 32. On 25 June 2010 Comcare cancelled the PIN issued by Mr.Grubisic after investigating the issues raised in it and finding that it had no basis, because Chubb had as a matter of fact taken reasonably practicable steps to consult with its employees in relation to the introduction of PBA at the Chubb Kensington depot33.

[27] Mr.Grubisic explained his refusals as follows 34.:

> 'Why did you refuse to be measured?---First of all, I had no knowledge that I was going to be measured that day. Secondly, I was in the middle of lunch break - approached by an employee who I didn't even know if he was qualified to measured up PBA. Also, as I said, my understanding was that, prior to being measured up for the PBA, you were required to be medically - undertake a medical examination to deem that you were medically fit, to then proceed with the next stage of implementation of PBA.
>
> Did you ultimately get measured for the body armour?---Yes, I did, yes, I did, but the next time I was - - -
>
> Can you recall the date?---The next time I was directed to be measured up for personal body armour was at the end of my shift on 22 September. Again I was given no notification of - - -
>
> Stop, thank you. On 22 September had you had the medical?---No, I had not.
>
> Did you ask about the medical?---I did explain that I hadn't undertaken a medical yet, that I haven't been rebooked to do the medical, but it didn't have any impact
>
> Was it ever rebooked?---No, I was never rescheduled to undertake a medical examination.'

[28] Firstly, I accept the evidence of Mr.Bainbridge-Robb that it is not the policy of Chubb to require a medical examination before a fitting of PBA 35.

[29] Secondly, Mr.Wright gave evidence that Mr.Grubisic simply refused to attend to be fitted, evidence which I accept 36:

> 'Do you recall having a conversation with Mr Avramoski and Mr Grubisic on the afternoon of 23 June at the end of the 48-hour period?---I do.
>
> Do you remember what the subject of that conversation was?---I believe the subject matter of the conversation was attending a member in relation to PBA and responding to the warning letter at which I had had not response.
>
> Do you recall what you asked of them?---I asked them simply to respond to the request for the direction at the bottom of the letter which was 48 hours response of, "Are you going to attend are you not?"
>
> Do you recall what the response from Mr Grubisic and Mr Avramoski was? -The response was no, they weren't going to attend, or they would not attend.'

[30] In my view no convincing reason has been advanced for Mr.Grubisic's failure to attend the medical examination or fitting. Both the first and second written warnings appear to be justified.

[31] The third warning raised the issue of interpretation of a clause of the agreement relating to the taking of RDOs. In my view Mr.Grubisic was again deliberately defiant in his conduct. The company had made clear its view that no RDOs should be taken, yet Mr.Grubisic chose to defy that expressed wish. It is consistent with a defiant pattern of conduct, and a consistent refusal to accept employer requests, directions and requirements.

[32] This defiant pattern of conduct is relevant to an evaluation of the seriousness of the valid reasons for termination of employment which I have found to exist.

Trade Union Membership and Activities

[33] Mr.Grubisic contended that he was 'targeted by management because of his role as a union workplace delegate and OHS representative who persisted in representing AVOs with respect to safety concerns about the implementation of the PBA, and the 2 man crew and guard sites issues.' 37 In my view on the material before me this submission is without foundation. Mr.Grubisic was an employee and as such was required to conduct himself in accordance with the reasonable and lawful directions and policies of his employer. He failed to do so. I have summarised the instances of those failures. None of that evidence or other evidence before me discloses the targeting of Mr.Grubisic for his union activities. If it did I would have reached a different conclusion to the one I have reached in this decision.

Notified of that reason - Section 387(b)

[34] Mr.Grubisic was notified of a number of allegations by letter on 18 October 2010 38, including lateness on 23 August, delaying the truck leaving the depot on that day, and talking on the mobile phone at Smith Street Collingwood.

An opportunity to respond - Section 387(c)

[35] Mr.Grubisic was given an opportunity to respond in that letter. He was requested to respond by 20 October. However, Mr.Grubisic was unfit for work until 17 January 2011. He was given further time to respond, this time by 19 January 2011. He sent an email dated 18 January, time was again extended until 24 January. Chubb received a letter of response from Mr.Grubisic's solicitors dated 21 January 2011. Chubb met with Mr.Grubisic on 24 January 2011. Mr.Grubisic responded to allegations at that meeting. A further meeting was held on 7 February with Mr.Grubisic and Mr.Bainbridge-Robb 39.

Unreasonable refusal to allow her to have a support person - Section 387(d)

[36] Mr.Grubisic had a support person present at the various meetings.

Unsatisfactory performance - Section 387(e)

[37] Termination was on the grounds of misconduct, not unsatisfactory performance.

Size of business - Section 387(f)

[38] The business is of a size that should mean that it follows appropriate procedures

Other matters

[39] I have taken all submissions and material put into account.

Conclusion

[40] The termination of Mr.Grubisic's employment was not harsh, unjust or unreasonable. He was afforded a fair go all round. An order dismissing the application is published with my decision, in PR512341.

DEPUTY PRESIDENT

Appearances:

Ms K Cochrane of Counsel for the applicant

Mr M Follett of Counsel for the respondent

Hearing details:

2011

Melbourne

8 June

9 June

Final written submissions:

2011

16 June

20 June

1 (1995) 62 IR 371 at 373

2 Exhibit C7, witness statement of Brian Wright, paragraphs 36-44.

3 Exhibit G1, witness statement of Grubisic, paragraph 35

4 PN832-837

5 Exhibit C7, paragraph 61

6 Pepper v. Webb [1969] I WLR 514

7 Exhibit C10

8 Exhibit C9

9 Exhibit C4

10 PN34-42

11 PN856

12 Exhibit C2, paragraph 22(b)

13 Exhibit C1, paragraph 7.12

14 Mr.Grubisic evidence PN550-554

15 PN610

16 Exhibit C7, paragraphs 48

17 PN1059-1064

18 PN1263

19 PN1292-1293

20 Exhibit C7, paragraph 62

21 Exhibit C7, paragraph 63

22 PN789-799

23 (1938) 60 CLR 601 at 621

24 (2005) 145 IR 285 at 293-297

25 (1959) 101 CLR 298

26 Submissions of the Respondent in Reply, paragraph 8

27 Exhibit C2, paragraph 35

28 Exhibit C2, CBR4

29 Exhibit C2, CBR5

30 Exhibit C2, CBR3

31 Exhibit C2, paragraph 46

32 PN355

33 Exhibit C3

34 PN356-361

35 PN1649

36 PN1824-1827

37 Applicant's Closing Submission, 16 June 2011, p.3

38 Exhibit C2, CBR6

39 Exhibit C2, paragraphs 49-55; Exhibit C2, paragraphs 8-41

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2022-2023

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

FAIR WORK LEGISLATION AMENDMENT (CLOSING LOOPHOLES) BILL 2023

REVISED EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations, the Hon Tony Burke MP)

THIS EXPLANATORY MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED

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FAIR WORK LEGISLATION AMENDMENT (CLOSING LOOPHOLES) BILL 2023

OUTLINE

The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Bill) would amend the *Fair Work Act 2009* (FW Act) and related legislation to improve the workplace relations framework by:

- Improving job security by replacing the existing definition of 'casual employee' with a fair and objective definition and by introducing a new employee choice pathway for eligible employees to change to permanent employment if they wish to do so.
- Addressing anomalous consequences of the small business redundancy exemption in insolvency contexts by providing an exception to its operation when a larger business downsizes to become a smaller business employer due to insolvency.
- Making targeted amendments to the bargaining framework by:
    - Enabling multiple franchisees to access the single-enterprise stream;
    - Allowing supported bargaining and single interest employer agreements to be replaced by single-enterprise agreements at any time if certain conditions are met;
    - Authorising the Fair Work Commission (FWC) to make and vary enterprise agreement model terms for flexibility, consultation and dispute resolution in place of the existing provisions according to which these terms are made by regulation;
- Ensuring that terms included in an intractable bargaining determination made by the FWC, if not previously agreed by the bargaining representatives, must be not less favourable to employees or employee organisations than corresponding terms in existing enterprise agreements.
- Protecting bargained wages in enterprise agreements from being undercut by the use of labour hire workers who are paid less than those minimum rates.
- Supporting workplace delegates by providing a framework for delegates' rights and including protections for workplace delegates when seeking to exercise those rights.
- Establishing a new protected attribute in the FW Act to improve workplace protections against discrimination for employees who have been, or continue to be, subjected to family and domestic violence.
- Changing the defence to misrepresenting employment as an independent contractor arrangement, known as 'sham contracting', from a test of 'recklessness' to one of 'reasonableness'.

- Enabling a registered organisation to obtain an exemption certificate from the FWC to waive the 24 hours' notice requirement for entry if they reasonably suspect a member of their organisation has been or is being underpaid.
- Empowering the FWC to take action in relation to the future issue of such exemption certificates if those rights are misused (for example, by imposing conditions, or banning their issue for a specified period).
- Addressing concerns that a bargaining representative's non-compliance with a FWC order to attend a FW Act section 448A conference could render subsequent industrial action unprotected – for both those represented by the non-complying bargaining representative, and for others participating in the action.
- Increasing maximum penalties for underpayments by amending the civil penalties and serious civil contravention frameworks, and adjusting the threshold for what will constitute a serious contravention.
- Clarifying that Fair Work Ombudsman (FWO) compliance notices can require an employer to calculate the amount of an underpayment that is owed to an employee, and that a court can order the recipient of the notice to comply with its terms.
- Repealing amendments made by the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020*, relating to the withdrawal of parts of amalgamated organisations (de-merger).
- Introducing a new criminal offence for wage theft, which applies to intentional conduct.
- Inserting into the FW Act an interpretive principle for determining the ordinary meanings of 'employee' and 'employer' for the purposes of the FW Act. This would enhance fairness by requiring consideration of the real substance, practical reality and true nature of the relationship by reference to the totality of the relationship between the parties.
- Allowing the FWC to set fair minimum standards for 'employee-like' workers, including in the gig economy.
- Allowing the FWC to set fair minimum standards to ensure the Road Transport Industry is safe, sustainable and viable.
- Allowing the FWC to deal with disputes about unfair terms in services contracts to which an independent contractor is a party.
- Repealing a sunsetted clause regarding applications to vary modern awards if already being dealt with in a four yearly review.
- Extending the functions of the Asbestos Safety and Eradication Agency to address silica related diseases.
- Introducing a presumption according to which first responders covered by the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) who sustain post-traumatic stress disorder (PTSD) will not have to prove their employment

significantly contributed to their PTSD for the purpose of their workers' compensation claim.

- Introducing a new offence of industrial manslaughter in the *Work Health and Safety Act 2011* (WHS Act), reflecting recommendations 23b of the *Review of the Model Work Health and Safety Laws – Final Report* (Boland Review) and 13 of the *They Never Came Home Report* (Senate Inquiry), and significantly increasing the penalties for the existing Category 1 offence.
- Providing for a Family and Injured Workers Advisory Committee in the WHS Act.
- Aligning the WHS Act offence framework with recent changes to the Model WHS Law by indexing the penalties for existing offences to the Consumer Price Index.
- Ensuring provisions dealing with the appointment of the Board of Directors of the Coal Mining Industry (Long Service Leave Funding) Corporation reflect the withdrawal of the Mining and Energy Division from the Construction, Forestry, Maritime, Mining and Energy Union, which will occur on 1 December 2023.

FINANCIAL IMPACT STATEMENT

The measures in the Bill have a financial impact of $18.9 million over four years to 2026–27. The Government has committed $104.7 million over four years to 2026–27, to support implementation of measures in the Bill. Revenues of $85.8 million over four years to 2026-27 are expected to be returned through measures in the Bill, including penalties.

REGULATION IMPACT STATEMENT

The impact analyses for the following amendments were attached to the explanatory memorandum to the Bill on introduction in the House of Representatives and are available in full online:[1]

- Standing up for casual workers;
- Closing the labour hire loophole;
- Minimum standards and increased access to dispute resolution for independent contractors.

[1]<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr7072_ems_01d7cd27-1ed6-45d7-a976-800c6da47c6a%22>

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

1. The Fair Work Legislation Amendment (Closing Loopholes) Bill (Bill) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

2. The Bill would amend the *Fair Work Act 2009* (FW Act) and related legislation to close loopholes to protect Australian workers and strengthen the work health and safety (WHS) framework.

Casual employment

3. Part 1 of Schedule 1 to the Bill would amend existing section 15A of the FW Act to implement an objective definition of 'casual employee' to determine when an employee can be classified as a casual employee.

4. The new definition would be characterised by the absence of a firm advance commitment to continuing and indefinite work, to be assessed against various factors that indicate the real substance, practical reality and true nature of the employment relationship. Assessment of the true nature of the employment relationship reflects the common law approach to defining casual employment before the High Court of Australia's decision in *WorkPac Pty Ltd v Rossato* [2021] HCA 23 (*Rossato*).

5. The factors would include whether there is a mutual understanding or expectation between the employer and employee, whether the employee can elect to accept or reject work, the future availability of continuing work, whether there are other employees performing the same work who are part-time or full-time employees, or whether there is a regular pattern of work.

6. The Bill would also amend the National Employment Standards (NES) at Part 2-2 of the FW Act to provide casual employees with two pathways to change their employment status – by exercising a choice via a new notification procedure, or through the existing casual conversion procedure. The amendments would also establish a robust new framework for dealing with disputes about employment status.

7. The Bill would respond to findings of the Review of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (Statutory Review) by:

   - strengthening the existing dispute resolution framework in the FW Act, including by allowing the Fair Work Commission (FWC) to determine, by mandatory arbitration, whether an employer had reasonable grounds to refuse to make an offer or decline a request for casual conversion;

- introducing new civil remedy provisions prohibiting employers from making misrepresentations to engage an employee as a casual employee and dismissing an employee to re-engage them as a casual employee in certain circumstances; and
- requiring employers to provide the Casual Employment Information Statement to casual employees at the start of their employment and at 12 months.

8. Casual employment forms a significant proportion of the Australian labour market, and suits the needs of many employees and employers.

9. Nonetheless, there are identified issues with casual employment. The Senate Committee on Job Security Report noted that the common characteristics of casual employment support a proposition that casual workers are less secure[2] and although casual employees are generally entitled to receive a loading to compensate for a lack of paid leave entitlements, casual employees generally earn less on average than permanent employees, both in terms of weekly and hourly earnings.[3]

10. The amendments made by this Part of the Bill would provide casual workers with a greater ability to make a choice about their employment status, by providing a pathway to move to permanent employment if they wish. Under the amendments, an employee would have the opportunity to move from casual employment where they are in fact working like a permanent employee. The choice to change status would rest with the employee; no employee would be forced to change employment status. Rather, the amendments would strengthen the pathway to permanent work for employees who choose it.

Small business redundancy exemption

11. Part 2 of Schedule 1 would address the anomalous consequences of the small business redundancy exemption in insolvency contexts by providing an exception to its operation when a larger business downsizes to become a smaller business employer due to insolvency.

Enabling multiple franchisees to access the single-enterprise stream

12. Part 3 of Schedule 1 would allow multiple franchisees of the same franchisor or related bodies corporate of the same franchisor or any combination to make a single-enterprise agreement, while retaining the ability to make a multiple-enterprise agreement.

Transitioning from multi-enterprise agreements

13. Part 4 of Schedule 1 would introduce provisions facilitating the transition from a single interest employer agreement or supported bargaining agreement to a single-enterprise agreement.

14. Part 4 would provide that where a single-enterprise agreement is made and an existing single interest employer agreement or supported bargaining agreement (whether or not nominally expired) applies to at least one of the employees covered by the single-

[2] Senate Committee on Job Security Report, page 79, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024780/toc_pdf/Thejobinsecurityreport.pdf;fileType=application%2Fpdf.
[3] ABS, Characteristics of Employment, August 2022.

enterprise agreement, the better off overall test (BOOT) would be modified. Any employee to whom a single interest employer agreement or supported bargaining agreement applies must be better off under the single-enterprise agreement than the supported bargaining agreement or single interest employer agreement (as the case may be) that applies at test time.

Model terms

15. Part 5 of Schedule 1 would change the process for determining the model flexibility, consultation and dispute resolution terms for enterprise agreements and the model term for settling disputes arising under a copied State instrument. Currently, these model terms are prescribed in the *Fair Work Regulations 2009* (FW Regulations). The proposed amendments would replace the existing requirements with requirements that the FWC, as Australia's expert and independent workplace relations tribunal, determine the model terms.

Intractable bargaining workplace determinations

16. Part 5A of Schedule 1 would provide that where an existing enterprise agreement applies to employees who will be covered by the intractable bargaining workplace determination, the FWC must not include in the determination a term dealing with a matter still at issue which is less favourable to the employee, and any employee organisation that was a bargaining representative, than the corresponding term in the existing enterprise agreement.

17. Part 5A would expand the definition of agreed terms for intractable bargaining workplace determinations to ensure that a determination must also include terms that are agreed between the bargaining representatives at the time the application for an intractable bargaining declaration is lodged, as well as terms that are agreed at the time a declaration is issued and at the end of any post-declaration negotiating period (if one is ordered).

Closing the labour hire loophole

18. Part 6 of Schedule 1 would insert new Part 2-7A into the FW Act, which would allow employees and organisations entitled to represent their industrial interests to apply to the FWC for a regulated labour hire arrangement order. The FWC would not be required to make the order if satisfied that it was not fair and reasonable, having regard to submissions from affected businesses and employees.

19. If the FWC made such an order, labour hire providers would generally be required to pay their employees no less than what they would be entitled to be paid under the host business' enterprise agreement (or other covered employment instrument) if the employee were directly employed by the host. Host businesses would also be required to provide certain information to labour hire providers on request to assist them in meeting their payment obligations.

20. Certain exemptions would be built into the framework, including where a labour hire employee is engaged for a short-term period or where a training arrangement applies to

the employee. The provisions also will not apply where the host is a small business employer as defined in the FW Act.

21. The provisions would be supported by an anti-avoidance framework to prevent businesses from adopting certain practices with the intention of avoiding obligations under new Part 2-7A.

22. The FWC would be able to resolve disputes about the operation of Part 2-7A, including by mandatory arbitration, and may determine an alternative protected rate of pay for a labour hire employee where it would be unreasonable for an employer to pay the employee the protected rate under Part 2-7A.

Workplace delegates' rights

23. Part 7 of Schedule 1 would insert statutory workplace rights for workplace delegates to support their role in representing workers and a general protection for workplace delegates to facilitate the exercise of these rights. It would also provide for modern awards and enterprise agreements to detail the specific requirements for various industries, occupations and workplaces.

Strengthening protections against discrimination

24. Part 8 of Schedule 1 would amend the FW Act to protect employees who have been, or continue to be, subjected to family and domestic violence (FDV) from discrimination within the workplace by making it a protected attribute in the FW Act. The amendments would prohibit a national system employer from taking adverse action against an employee or prospective employee on that basis. The amendments would also prohibit employers who are not covered by Part 3-1 of the FW Act from terminating an employee's employment on the basis of subjection to FDV.

25. Further, the amendments would prohibit modern awards and enterprise agreements from including terms that discriminate against employees because of, or for reasons including, their subjection to FDV. The amendments would also require the FWC, when performing functions or exercising its powers under the FW Act in relation to a matter, to take into account the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of subjection to FDV.

Sham arrangements

26. Part 9 of Schedule 1 would change the defence to misrepresenting employment as an independent contracting arrangement, known as 'sham contracting', in subsection 357(2) of the FW Act from a test of 'recklessness' to one of 'reasonableness'. The new test would provide that an employer would not contravene the prohibition on sham contracting in subsection 357(1) of the FW Act if the employer reasonably believed that the contract was a contract for services. The burden of proof would rest with the party who made the representation, consistently with the existing defence.

Exemption certificates for suspected underpayment

27. Part 10 of Schedule 1 would enable an organisation to obtain an exemption certificate from the FWC to waive the minimum 24 hours' notice requirement for entry if they

reasonably suspect a member of their organisation has been or is being underpaid. It would also protect permit holders who are exercising rights in accordance with Part 3-4 from improper conduct by others and empower the FWC to impose conditions on a permit, as an alternative to revoking or suspending an entry permit in the circumstances set out in section 510 of the FW Act.

Penalties for civil remedy provisions

28. Part 11 of Schedule 1 would increase the maximum civil pecuniary penalties that apply to contraventions (including serious contraventions) of wage exploitation-related provisions by five times (and 10 times for non-compliance with a compliance notice). It would also enable the maximum penalty for a contravention to be determined by reference to three times the value of the underpayment (if able to be determined) in certain circumstances. It would also amend the scheme for 'serious contraventions' in section 557A so that it applies to knowing and reckless contraventions of the relevant provisions, rather than to knowing and systematic contraventions.

Compliance notice measures

29. Part 12 of Schedule 1 would clarify that a compliance notice issued to a person may require the person to calculate and pay the amount of any underpayment; and a relevant court may make an order requiring compliance with a notice (other than an infringement notice) issued by a Fair Work Inspector or the FWO.

Withdrawal from amalgamations

30. Part 13 of Schedule 1 would repeal amendments made by the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020*, relating to the withdrawal of parts of amalgamated organisations (de-merger).

Wage theft

31. Part 14 of Schedule 1 would introduce a new criminal offence for wage theft (including 'related offence provisions' that deal with ancillary liability), which applies to intentional conduct. It would provide for 'safe harbour' by way of compliance with a voluntary small business wage compliance code or a cooperation agreement if the relevant requirements are met. It would also require the FWO to publish a compliance and enforcement policy, including guidelines relating to the circumstances in which the FWO will or will not accept or consider undertakings.

32. It would enable the Commonwealth Crown (but not other Australian Governments) to be liable to be prosecuted for the new criminal offence for wage theft or a 'related offence provision'. It would also clarify that the Crown in each of its capacities (that is, all Australian Governments) and to the extent the Commonwealth's legislative power permits, is liable to be the subject of proceedings for a contravention of a civil remedy provision (this reflects the status quo.) It would also include provisions of a machinery nature setting out how liability may attach in these circumstances.

Definition of employment

33. Part 15 of Schedule 1 would insert a new section 15AA into Part 1-2 of the FW Act. New section 15AA would require that the ordinary meanings of 'employee' and

'employer' be determined by reference to the real substance, practical reality and true nature of the relationship between the parties. This would require the totality of the relationship between the parties, including not only the terms of the contract governing the relationship but also the manner of performance of the contract, to be considered in characterising a relationship as one of employment or one of principal and contractor.

34. The amendments respond to the High Court's decisions in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (*Jamsek*). These decisions require that where the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the characterisation of that relationship proceeds by reference to the rights and obligations of the parties under the contract. Except in limited circumstances, a wide-ranging review of the parties' subsequent conduct is inappropriate. Prior to *Personnel Contracting* and *Jamsek*, it was broadly believed that the correct approach was to apply the 'multi-factorial' test.

35. The intention of the amendments is to facilitate a return to the 'multi-factorial' test previously applied by courts and tribunals in characterising a relationship as one of employment or of principal and contractor.

Provisions relating to regulated workers

36. Part 16 of Schedule 1 would implement amendments to the FW Act and associated legislation to ensure that certain independent contractors are entitled to greater workplace protections than they are currently. The majority of the amendments are targeted at independent contractors who are either:

- employee-like workers performing digital platform work; or
- engaged in the road transport industry.

37. The amendments would:

- provide a framework for the FWC to exercise functions and powers that relate to the road transport industry;
- insert a new jurisdiction enabling the FWC to set minimum standards orders and minimum standards guidelines in relation to employee-like workers performing digital platform work and regulated road transport industry contractors;
- enable digital labour platform operators and road transport businesses to make consent-based collective agreements with registered employee organisations;
- empower the FWC to deal with disputes over an employee-like worker's unfair deactivation from a digital labour platform, or the unfair termination of a road transport contractor's services contract by a road transport business;
- enable independent contractors earning below a specified contractor high income threshold to dispute unfair contract terms in the FWC;

- ensure the *Independent Contractors Act 2006* (IC Act) continues to apply in respect of independent contractors performing work that is remunerated at an amount that exceeds the new contractor high income threshold.

Mediation and conciliation conference orders

38. Part 14A of Schedule 1 would address concerns that a bargaining representative's non-compliance with a FWC order to attend a conference pursuant to section 448A of the FW Act could render subsequent employee claim action unprotected – for both those represented by the non-complying bargaining representative, and for others participating in the action.

Amendment of the *Asbestos Safety and Eradication Agency Act 2013*

39. Schedule 2 to the Bill would amend the *Asbestos Safety and Eradication Agency Act 2013* (ASEA Act) to broaden ASEA's functions which are currently confined to asbestos.

40. The increase in silicosis and other silica-related diseases is deeply concerning and has raised the need for urgent coordinated national action to reduce rates of silica-related diseases and to support affected workers and their families. This Bill would expand the functions of the well-respected Asbestos Safety and Eradication Agency (ASEA) to include coordinating action on silica safety and silica-related diseases. This would include developing, promoting and reporting on a Silica National Strategic Plan which will coordinate and track the progress of jurisdictions against nationally agreed targets. ASEA would be renamed the Asbestos and Silica Safety and Eradication Agency (Agency) to reflect these changes. The renamed Agency's functions will include responsibility for coordination, awareness raising, research, reporting and providing advice to the government on silica.

41. Establishing and appropriately resourcing the renamed Agency as a national coordination mechanism for action on silica-related diseases acts on the recommendations of the National Dust Disease Taskforce (NDDT). The NDDT was established in 2019, and in June 2021 submitted a final report to the then Minister for Health and Aged Care recommending a national approach to the prevention, early identification, control and management of silicosis and other occupational dust diseases in Australia. An All of Governments' response to the NDDT's Final Report was published in April 2022.

42. The Bill would expand the membership of the current Asbestos Safety and Eradication Council (ASEC) to include appropriate representation from employee and employer representatives and an expert in asbestos or silica-related matters. ASEC would be renamed the Asbestos and Silica Safety and Eradication Council (Council) to reflect these changes. Eligibility would also be broadened to allow for persons with lived experience to be appointed to the Council.

Amendment of the *Safety, Rehabilitation and Compensation Act 1988*

43. Schedule 3 to the Bill implements presumptive liability provisions for first responders covered by the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) who

suffer from PTSD. The proposed amendments are consistent with the recommendation of the Senate Education and Employment References Committee report, *The people behind 000: mental health of our first responders* and reflect epidemiologist Professor Tim Driscoll's advice in his December 2021 review of Safe Work Australia's Deemed Diseases List which recommended that PTSD be listed as a deemed disease for police officers, ambulance officers including paramedics, and firefighters.

44. Schedule 3 would amend the SRC Act to provide a rebuttable presumption that PTSD suffered by specified first responders was contributed to, to a significant degree, by employment. The presumption will apply to employees of the Australian Federal Police, firefighters, ambulance officers (including paramedics), emergency services communications operators and other persons engaged under the Australian Capital Territory's *Emergencies Act 2004*.

Amendment of the *Work Health and Safety Act 2011*

45. Schedule 4 to the Bill would strengthen the offences and penalties framework in the *Work Health and Safety Act 2011* (WHS Act). A new offence of industrial manslaughter would be introduced. This would align Commonwealth WHS laws with the model Act which was recently amended to provide for industrial manslaughter within the model framework. The model Act does not prescribe the exact provisions of the model offence to enable each jurisdiction to implement (or maintain) an offence tailored to the criminal law framework of the jurisdiction. However, the model Act provides for an industrial manslaughter offence via a jurisdictional note and accompanying model penalties for the offence. The offence in this Bill reflects recommendations 23b of the *Review of the Model Work Health and Safety Laws – Final Report* (Boland Review) and 13 of the *They Never Came Home Report* (Senate Inquiry).

46. The existing Category 1 offence and State and Territory general manslaughter offences may also apply when a worker or other person is killed at a workplace. A specific industrial manslaughter offence responds to community concern that the WHS framework requires stronger penalties for the most egregious breaches of WHS duties that result in workplace fatalities.

47. Schedule 4 would also:

- repeal and replace provisions dealing with criminal liability for bodies corporate, the Commonwealth, and public authorities. These amendments reflect recent changes to the model Act, with appropriate modifications and additional provisions where necessary;
- clarify that the Category 1 offence applies to officers of persons conducting a business or undertaking (PCBUs);
- significantly increase Category 1 penalties;
- increase all penalties in the WHS Act by 39.03 per cent (excluding Category 1 – see discussion below) and provide for future indexing (giving effect to recommendation 22 of the Boland Review); and

- provide for a Family and Injured Workers Advisory Committee.

Human rights implications

48. The definition of 'human rights' in the *Human Rights (Parliamentary Scrutiny) Act 2011* relates to the core seven United Nations human rights treaties. The Bill engages the following rights:

    - the right to the enjoyment of just and favourable conditions of work under Articles 6 and 7 of the *International Covenant on Economic Social and Cultural Rights* (ICESCR);

    - the right to social security, including social insurance under Article 9 of the ICESCR;

    - the right to protection and assistance for families under Article 10(2) of the ICESCR;

    - the right to the highest attainable standard of physical and mental health under Article 12 of the ICESCR;

    - the right to an effective remedy under Article 2(3) of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 2 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and right to a fair hearing under Article 14(1) of the ICCPR;

    - the right to presumption of innocence and other guarantees in relation to criminal charges under Article 14 and Article 15 of the ICCPR;

    - the right to privacy and reputation under Article 17 of the ICCPR;

    - the right to freedom of association, including the right to form and join trade unions under Article 22 of the ICCPR and Article 8 of the ICESCR;

    - the right to equality and non-discrimination under Article 2 of the ICCPR and Article 2 of the ICESCR and Article 26 of the ICCPR;

    - the right of women not to be discriminated against based on gender under Articles 2, 3 and 11 of the CEDAW and Article 26 of the ICCPR; and

    - the rights of parents and children in Articles 3 and 18 of the *Convention on the Rights of the Child* (CRC) and Article 5 of the CEDAW.

49. The content of the right to work, the right to just and favourable conditions of work and the right to freedom of association in the ICESCR and ICCPR can be informed by specific obligations in treaties of the International Labour Organisation (ILO), such as the *Right to Organise and Collective Bargaining Convention 1949* (No. 98) (ILO Convention 98), which protects the right of employees to collectively bargain for terms and conditions of employment, the *Freedom of Association and Protection of the Right to Organise Convention 1948* (No. 87), which provides employer and employee organisations with protection for their organisational autonomy, and the *Occupational Safety and Health Convention 1981* (No. 155), which requires the adoption of a

coherent national policy on occupational safety, occupational health and the working environment.

50. The content of the right to equality and non-discrimination in the ICESCR and ICCPR can be informed by specific obligations in the *Discrimination (Employment and Occupation) Convention 1958* (ILO Convention 111) and, when it comes into force for Australia, the *Violence and Harassment Convention 2019* (ILO Convention 190).

Rights to work and rights in work

51. Article 6 of the ICESCR requires the State Parties to the Covenant to recognise the right to work and to take appropriate steps to safeguard this right. The United Nations Committee on Economic, Social and Cultural Rights has stated that the right to work in Article 6(1) encompasses the need to provide the worker with just and favourable conditions of work.

52. The United Nations Committee on Economic Social and Cultural Rights in General Comment 18 has also stated that the right to work includes:

> *the right not to be deprived of work unfairly. This definition underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work, while emphasizing the importance of work for personal development as well as for social and economic inclusion.*

53. There can also be no discrimination in access to and maintenance of employment on the grounds enumerated in Article 2(2) of the ICESCR.

54. Article 7 of the ICESCR requires the State Parties to the Covenant to recognise the right of everyone to the enjoyment of just and favourable working conditions.

Casual employment

55. The amendments at Part 1 of Schedule 1 to the Bill would positively engage the right to the enjoyment of just and favourable working conditions by providing for a fair and objective definition of casual employee. The amended definition would require an objective assessment of the absence or presence of a firm advance commitment to continuing and indefinite work, having regard to the real substance, practical reality and true nature of the employment relationship. The amended definition would ensure employees are not able to be misclassified as casual, simply because of the label attached to their contract of employment, and ensure those employees receive the correct entitlements and working conditions, based on the true nature of their employment relationship.

56. This change to how casual employment is defined reflects the findings of the Statutory Review that consideration should be given to whether the definition should focus solely on the terms of the initial offer and acceptance, and ‘not on the basis of any subsequent conduct of either party’ as per existing subsection 15A(4) of the FW Act.

57. The amendments would also prohibit arrangements whereby employers dismiss a permanent employee in order to engage them as casual or make an intentional misrepresentation to engage an employee as a casual. This ensures similar protections are afforded in relation to casual employment as are provided in relation to independent contracting by the existing sham contracting provision in the FW Act, and gives effect to a finding of the Statutory Review.

58. These amendments would further promote rights in work by strengthening the dispute resolution framework, ensuring that employers and employees can resolve disputes that could not be resolved at the workplace level in a way that is accessible and informal.

59. The measures would also promote rights to work by making it fairer and easier for the FWC to deal with disputes about employee choice and casual conversion brought by employees. The current framework does not empower the FWC to deal with disputes by mandatory arbitration. Rather, parties must consent to the FWC arbitrating the matter, forcing employees to prosecute their claim in the Federal Circuit and Family Court if their employer does not consent to the arbitration. Under the new framework, employees will be able to access flexible and timely pathways to permanent employment, supporting employee choice about employment status, engaging Article 7 of the ICESCR.

60. The measures are aimed at achieving the legitimate objective for the purposes of international human rights law of promoting full, productive, and freely chosen employment (Article 1 of the ILO Convention 122).

Small business redundancy exemption

61. The amendments to the FW Act in Part 2 of Schedule 1 would promote the right to just and favourable conditions of work by addressing an anomaly which arises in the pre-existing small business redundancy exemption. This anomaly causes some employees to lose their legal entitlement to redundancy pay under the NES in the context of a business downsizing from a larger business to a smaller business due to insolvency.

62. The pre-existing small business redundancy exemption is a longstanding feature of the workplace relations framework under the FW Act. It encourages employment by small businesses by relieving them of NES redundancy pay obligations, which can be a significant contingent cost of employing staff. To qualify for the exemption, businesses must employ fewer than 15 staff.

63. An unintended anomaly arises in the operation of the small business redundancy exemption, in some insolvency contexts. When a larger employer incrementally downsizes due to insolvency, either in the period leading to liquidation or bankruptcy, or afterwards, they may fall below the 15-employee threshold and become a small business employer before the final few staff are made redundant. These final employees, who often stay on to assist in the orderly wind-up of the business, lose the entitlement they previously would have had to redundancy pay under the NES, accumulated over years of continuous service with their employer.

64. The amendments would provide an exception to the operation of the small business redundancy exemption in such downsizing contexts, thus preserving an employee's redundancy pay entitlement in a range of scenarios in which the employer may have become a small business employer due to insolvency. This ensures an employee's legal entitlement to redundancy pay is not taken away based on when they were made redundant.

Enabling multiple franchisees to access the single-enterprise stream

65. Part 3 of Schedule 1 engages the right to just and favourable conditions of work. It is intended that Part 3 would strengthen the ability of franchisees and their employees to bargain for just and favourable conditions of work by facilitating franchisees' access to the single-enterprise agreement stream, thereby allowing them access to the full range of bargaining streams under the FW Act. For example:

- Part 3 would enable franchisees to bargain as if they were a single enterprise, including conducting any ballot to approve an agreement as if they were a single enterprise.
- Employees of franchisees would be able to obtain a majority support determination where a majority of employees who would be covered by the proposed agreement wish to bargain, without needing to establish that each employer has at least 20 employees.

66. By making bargaining more accessible for franchisees and their employees, the employees of franchisees have a greater ability to influence their conditions of work and to achieve just and favourable conditions of work.

Transitioning from multi-enterprise agreements

67. Part 4 of Schedule 1 would support rights in work by allowing employers and their employees to make a single-enterprise agreement to replace a single interest employer agreement or supported bargaining agreement prior to its nominal expiry date. This would allow employers and their employees to come to an agreement on terms and conditions of employment that are suited to their specific circumstances.

68. Part 4 requires a replacement agreement to be compared with the existing agreement for the purposes of the BOOT. In doing so, it promotes the right to just and favourable conditions of work by preventing conditions in single-enterprise agreements that replace a multi-enterprise agreement regressing overall, even if they are still more beneficial than those in the underlying modern award.

69. Safeguards would be provided by the amendments to the BOOT and by requirements for the employer to receive the consent of employee organisations or to be permitted by a voting request order before taking a replacement single-enterprise agreement to vote. These safeguards would ensure that the amendments allowing for the transition from multi-enterprise agreements to single-enterprise agreements support the rights to just and favourable conditions of work.

Model terms

70. The amendments in Part 5 of Schedule 1 would be compatible with and promote the right to just and favourable working conditions of work and collective bargaining. The model terms act as a safety net ensuring that compliant terms dealing with consultation, flexibility and dispute resolution are included in all enterprise agreements, and a compliant term dealing with dispute settlement is included in copied State instruments. The model terms would not override terms agreed to between the parties to an agreement or instrument where the terms meet the requirements of the FW Act, minimising any concern that the model terms would limit the capacity of employees to determine just and favourable conditions.

71. The amendments empowering the FWC to determine the model terms for enterprise agreements and copied State instruments require the FWC to consider 'best practice' workplace relations and whether all persons and bodies have had a reasonable opportunity to be heard and make submissions before making the determinations. It is intended that this would ensure the ongoing relevancy of the model terms as well as facilitating greater public consultation in the determination of the model terms.

72. In mandating considerations of best practice workplace relations and public participation in the process of determining model terms, individuals are empowered to participate in the determination of up-to-date and relevant terms that may form part of the terms and conditions of their employment. In doing so, the amendments support the right to just and favourable conditions of work.

Intractable bargaining workplace determinations

73. Part 5A of Schedule 1 would support rights in work by ensuring that when the FWC makes an intractable bargaining workplace determination, the FWC cannot include terms dealing with matters still at issue which are less favourable to employees and employee organisations than terms dealing with the same matter in an existing enterprise agreement that applies to the employees. This would ensure that, unless otherwise agreed, terms for employees and employee organisations cannot go backwards under an intractable bargaining workplace determination.

74. Part 5A would support rights to work and rights in work by ensuring that an intractable bargaining workplace determination includes terms that are agreed between the bargaining representatives at the time the application for an intractable bargaining declaration is lodged, as well as terms that are agreed at the time a declaration is made and at the end of any post-declaration negotiating period (if one is ordered). This would ensure that rights in work that are agreed during bargaining are reflected in an intractable bargaining workplace determination.

Closing the labour hire loophole

75. Part 6 of Schedule 1 would positively engage the right to the enjoyment of just and favourable working conditions by protecting bargained rates in enterprise agreements, or other covered employment instruments (see item 72 of the Bill), from being undercut by the use of labour hire. While many employers negotiate enterprise agreements with

their employees that set minimum rates, the FW Act currently allows employers to engage workers through a labour hire company, who are often paid less than those agreed rates.

76. Several inquiries have shown that labour hire is used in a range of industries with the result of undercutting bargained rates. For example, a Senate inquiry into labour hire considered these labour hire issues in the mining, agriculture, and transport and distribution sectors. The Victorian Inquiry into the Labour Hire Industry also found that because host enterprise agreements do not generally apply to labour hire workers, this results in lower pay for some workers who work alongside directly engaged employees.

77. To close this loophole, the Bill would enable employees and organisations entitled to represent their industrial interests, as well as host businesses, to apply to the FWC for an order that would require labour hire employees to be paid no less than what they would receive if they were directly employed by the host business and paid in accordance with the host's enterprise agreement or other employment instrument. These provisions would therefore enable labour hire employees to be paid at least the same as their directly employed counterparts who are performing the same work and paid under the host's enterprise agreement. Labour hire workers who are paid higher rates than directly employed workers would not be affected.

78. Certain exceptions would be built into the framework, which are reasonable and proportionate. The framework would not apply to arrangements where the performance of work is for the provision of a service to the host business, rather than the supply of labour. A default three-month exemption period would apply to avoid impacting labour hire arrangements for surge work or where a short-term replacement is needed. The FWC would be able to hear from parties who wish to extend or shorten that exemption period, on a case-by-case basis.

79. Employees on training arrangements also would not be impacted by this measure to avoid impacting training arrangements regulated by State or Territory laws.

80. To minimise the impact on small businesses, the measure would not apply where a host business is a small business employer within the meaning of the FW Act.

81. Penalties would apply to an employer or regulated host who would enter into a scheme to prevent the making of an order and avoid the operation of a regulated labour hire arrangement order that has been made. This will ensure that employees who are covered by an order continue to enjoy just and favourable working conditions.

82. The Bill would also ensure that regulated employees are paid appropriately for any termination payments to which they are entitled.

Workplace delegates' rights

83. Part 7 of Schedule 1 would positively engage the right to the enjoyment of just and favourable working conditions by improving access to representation for workers, and the ability of workplace delegates to provide such representation. These provisions

engage and promote operative articles of the *Workers' Representative Convention, 1971* (No. 135) of the ILO (ILO Convention 135), which Australia has ratified.

84. Currently, the FW Act provides limited protection to workplace delegates of an employee organisation acting within the workplace. Divisions 3 and 4 of Part 3-1 of the FW Act prohibit adverse action against employees who are officers or members of industrial associations, and allows for freedom of association and involvement in lawful industrial activities. However, these protections do not provide workplace delegates with positive rights that protect and enable them to exercise their roles in the workplace. A key function of a workplace delegate is to be a point of contact for members within the workplace and to represent the concerns of workers to the employer or business. The Bill would positively engage the right to just and favourable conditions of work by ensuring that workplace delegates have substantive rights to represent the industrial interests and concerns of their and their fellow workers.

85. The Bill would further support this right by requiring that the details of various supporting rights for workplace delegates be included in modern awards and enterprise agreements, which would allow them to be tailored to particular industries and enterprises. The introduction of a new general protection to enforce these rights would also positively engage rights in work, including by implementing Article 1 of the ILO Convention 135.

86. Introducing rights for workplace delegates would also positively impact the right to just and favourable conditions of work for all workers in a workplace. By providing explicit rights for workplace delegates, other workers in the workplace are empowered to raise workplace concerns to the workplace delegate and therefore improve their ability to cooperatively resolve any disputes that may arise in the workplace. Workers can also more effectively engage in bargaining to negotiate fair wages and conditions.

Stronger protections against discrimination

87. Subjection to FDV can be a significant impediment and disruption to workforce participation and an employee's right to work. Current protections within the FW Act do not explicitly protect employees or prospective employees who are subjected to FDV against adverse action by their employer, such as being dismissed or refused employment. Part 8 of Schedule 1 would positively engage the right to work by clearly prohibiting employers from engaging in adverse action such as dismissing or refusing to employ a person because they are subjected to FDV. This Bill would also prohibit employers who are not covered by Part 3-1 of the FW Act from terminating an employee's position of employment on the grounds of their subjection to FDV.

88. FDV can also be a significant impediment and disruption to favourable work conditions. Under existing arrangements in the FW Act, an employee who is subjected to FDV is not necessarily protected from employer adverse action within the workplace unless it is connected to the exercise of the employee's workplace rights (that is, accessing paid FDV leave) or it can be argued to be protected by another attribute, such as sex. An employee's subjection to FDV therefore could be a source of discrimination

within the workplace, for example resulting in a reduction of work hours or a demotion. This Bill would promote the right to just and favourable conditions of work, and prevent discrimination in access to and maintenance of employment, by ensuring employees and prospective employees who have been, or continue to be, subjected to FDV are protected from adverse action.

89. Modern awards and enterprise agreements must not include terms that discriminate against employees on the basis of a range of protected attributes. By including this additional protected attribute, this Bill would ensure that employees who are subjected to FDV are also afforded equal, favourable conditions of work within the terms of modern awards and enterprise agreements. For example, if the FWC is considering whether to approve a new enterprise agreement, the amendments would require the FWC to be satisfied that the agreement does not include any terms that discriminate against employees on the basis of their subjection to FDV. The Bill would further promote the right to just and favourable conditions of work by requiring the FWC to take into account the need to prevent and eliminate discrimination on the basis of subjection to FDV when exercising its powers and performing its functions.

Sham arrangements

90. Sham contracting results in employees being wrongly classified as contractors, which may limit employees' access to employment protections and entitlements, including minimum or award wages and leave entitlements. Under the existing provision in the FW Act, employers are not liable for misrepresenting employment as independent contracting if they prove that, when the representation was made, they did not know, and were not reckless as to whether, the contract was a contract of employment rather than for services.

91. The amendments that would be made by the Bill to section 357 of the FW Act would promote the right to just and favourable conditions of work by ensuring a more objective test applies when determining whether an employer can make out the defence to sham contracting. This new test would require employers who have misrepresented employment as independent contractors to prove they reasonably believed that the employee was an independent contractor, not merely that they were not reckless as to the employee's correct status. This change will provide further incentives for employers to correctly classify workers from the outset, ensuring employees receive their proper entitlements.

Exemption certificates for suspected underpayment

92. Part 10 of Schedule 1 would positively engage the right to the enjoyment of just and favourable working conditions by improving access to representation for members, by enhancing entry rights and protections for entry permit holders exercising entry under Part 3-4 of the FW Act. Entry to investigate a suspected contravention of the FW Act, or a term of a fair work instrument, requires at least 24 hours' notice (section 487). While provision is made to waive the notice requirement, by application to the FWC for an exemption certificate (section 519), the bar for obtaining such exemption certificates

is high, so rarely used. That is, the FWC must reasonably believe that advance notice of the entry might result in the destruction, concealment or alteration of relevant evidence.

93. The Bill would expand the grounds for the issue of an exemption certificate under section 519, so the notice period may also be waived if the FWC is satisfied that the suspected contravention, or contraventions, involve the underpayment of wages, or other monetary entitlements, of a member of the organisation whose industrial interests the organisation is entitled to represent and who performs work on the premises. This measure would be subject to comprehensive safeguards against misuse of the entry powers.

94. Existing safeguards that will continue to apply, include:

- the obligation for the permit holder to give a copy of the exemption certificate to the occupier of the premises (or their apparent representative), any affected employer (or their apparent representative), before or as soon as practicable after entering the premises (section 487(4));
- the obligation to comply with reasonable work health and safety requirements (section 491);
- prohibitions on intentionally hindering and obstructing any other person when exercising rights of entry, or otherwise acting in an improper manner (section 500);
- restrictions on the unauthorised use or disclosure of information or documents (section 504); and
- existing dispute resolution mechanisms in the FW Act (sections 505 and 505A).

95. The proposed amendments would enhance access to the workplace for permit holders to effectively investigate suspected contraventions (involving underpayments) and exercise powers under Part 3-4 including interviewing relevant persons and inspecting relevant records and documents.

96. In addition, the measure will protect permit holders exercising rights under Part 3-4 against people acting in an improper manner towards them.

97. For these reasons, the measure positively engages the right to the enjoyment of just and favourable working conditions.

Penalties for civil remedy provisions and wage theft

98. The FW Act currently has a civil (not criminal) framework for the enforcement of workplace rights and entitlements under the Act. This means that underpaid workers may seek recovery of any underpayments, pecuniary penalties (except in small claims proceedings) and other civil remedies.

99. Despite recent Government action to address underpayments, non-compliance remains a persistent problem. Several inquiries, including the Migrant Workers' Taskforce and the Senate Inquiry into Unlawful Underpayment of Employees' Remuneration, have

recommended the introduction of a criminal offence for wage theft to further deter wage underpayments.

100. Part 14 of Schedule 1 proposes amendments to the FW Act to introduce a new criminal offence for wage theft (new section 327A), which would apply to intentional conduct. It would rely on Parts 2.4 and 2.5 of the Schedule 1 to the *Criminal Code Act 1995* (Criminal Code) to establish pathways for prosecuting ancillary and corporate criminal liability relating to the new offence. Provision would be made for the Commonwealth to be liable for an offence, and for the FWO to investigate suspected underpayment crimes (including of 'related offence provisions' as defined, which are provided for under the Criminal Code).

101. This measure aims to encourage compliance with the relevant workplace laws and further deter wrongdoing, particularly where the conduct is intentional.

102. Compliance outcomes would be further improved (as proposed by Part 11 of Schedule 1) by increasing civil pecuniary penalties for contraventions of civil remedy provisions involving worker exploitation. Details of the proposed civil pecuniary penalty increases are set out in more detail below.

103. The proposed new offence for wage theft (and related provisions), coupled with proposed increases to relevant civil pecuniary penalties, would promote the right to just and favourable conditions of work by improving compliance with the relevant workplace laws. Criminalising wage theft will further deter deliberate underpayments, and higher civil pecuniary penalties for contraventions involving worker exploitation would help promote a robust 'compliance culture' in relation to workplace laws across Australian businesses.

Definition of employment

104. Part 15 of Schedule 1 would positively engage the right to the enjoyment of just and favourable working conditions by ensuring that a fairer test applies when determining the ordinary meanings of 'employee' and 'employer' for the purposes of the FW Act.

105. The Bill would ensure the totality of the relationship, including the terms of the employment contract and the manner of performance of the contract, must be considered when characterising a relationship as one of employment or one subject to a contract for services. The provision is intended to address the existing common law test as set out in the High Court's decisions in *Personnel Contracting* and *Jamsek*, which provides that the question of whether an individual is an employee or independent contractor is to be determined with reference *only* to the terms of the written contract (if there is one), with limited exceptions.

106. Expanding the frame of reference for the categorisation of a work relationship would positively engage rights in work by enhancing fairness. Fairness will be enhanced by requiring that the question of a workers' status be determined by reference to all relevant aspects of the relationship. These amendments would ensure workers are

correctly categorised, even in the face of a carefully drafted contract which may not fully reflect how the contract is performed in practice.

107. The new interpretive principle is consistent with the approach set out in Article 9 of the ILO's *Employment Relationship Recommendation, 2006* (No. 198) (ILO Recommendation 198), which seeks to promote an objective of decent work and provides that:

> *For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.*

108. Whether a worker is categorised as an employee or as an independent contractor under a contract for services has significant implications for the rights and protections to which they are entitled. For the most part the FW Act confers rights and imposes obligations on, and in respect of the relationship between, an employer and an employee.

109. This Bill would result in some persons who are currently purportedly engaged as independent contractors becoming employees for the purposes of those parts of the FW Act where 'employee' and 'employer' are expressed to have their ordinary meaning. This would promote rights in work by extending to those workers who become employees by operation of the amendments a range of entitlements and protections only conferred on individuals who come within the meaning of 'employee' and work under arrangements reflective of a contract *of* service.

Provisions relating to regulated workers

110. Part 16 of Schedule 1 would promote the right to work and rights in work as it would provide the FWC the ability to make minimum standards for employee-like workers and regulated road transport contractors, collectively 'regulated workers'.

111. The right to just and favourable conditions of work, as set out in the ICESCR, is not limited to workers within an employment relationship. By extending certain minimum standards to regulated workers, these provisions of the Bill engage and promote Article 7 of the ICESCR.

112. **Part 3A-2 – MSOs and MSGs**: Under new Part 3A-2 the FWC would be empowered to make either binding (MSOs) or non-binding (MSGs) minimum standards for regulated workers, which could include (but not be limited to) payment terms, deductions, record-keeping in relation to matters covered by or required by the FW Act (or an order or instrument made under that Act), insurance, consultation, representation, delegates' rights and/or cost recovery.

113. Given regulated workers do not currently have a simple, fair and relevant safety net of minimum terms and conditions, this measure would clearly promote the rights of these workers to just and favourable conditions of work.

114. **New road transport objective and minimum standards objective**: Part 16 would introduce a minimum standards objective (new section 536JX) and a road transport objective (new section 40D) into the FW Act.

115. New section 536JX would promote the right to just and favourable conditions by requiring the FWC to take into account the need for an appropriate safety net of minimum standards for regulated workers when performing functions or exercising its powers under Part 3A-2 that, among other things:

- deals with minimum rates of pay:
- takes into account all necessary costs for regulated workers covered by an MSO or MSG;
- ensure that workers covered by an MSO or MSG receive pay comparable to the pay and conditions that employees performing comparable work would receive.

116. This would go towards ensuring fair wages and comparable remuneration for work of similar value.

117. When performing a function or power in relation to certain matters relating to the road transport industry, new section 40 would also require the FWC to also take into account the road transport objective, which would include the need for standards that ensure that the road transport industry is safe, sustainable and viable. Ensuring the road transport industry is safe, sustainable and viable would promote the right to work for people working in that industry, including by helping to ensure safe and healthy working conditions.

118. **Part 3A-4 – collective agreements for regulated workers**: Part 3A-4 would further promote the right to the enjoyment of just and favourable conditions of work by providing a simple, flexible and fair framework that enables consent-based collective agreement making between regulated businesses (that is, digital labour platform operators and road transport businesses) and registered employee organisations.

119. Collective agreements would be able to be made about the terms and conditions under which regulated workers perform work, and how agreements operate.

120. Expanding access to collective bargaining would promote the right to enjoyment of just and favourable conditions of work by enabling organisations representing workers to collectively secure safe, healthy and fair conditions.

121. Interaction rules would further promote a regulated workers' rights in work and ensure no regulated worker is worse off, by ensuring a term of a collective agreement would have no effect in relation to the extent that the term is detrimental to a worker in any respect, when compared to an applicable MSO or a State or Territory law that deals with the same matter.

122. **Part 3A-3–Unfair deactivation and unfair termination**: The right to work includes the right to not be deprived of work unfairly. Part 16 would insert new Part 3A-3. This would provide new protections for employee-like workers and road transport contractors against unfair deactivation and unfair termination respectively. Reactivation or reinstatement would be the primary remedy for unfair deactivation or termination respectively. These new protections would go towards ensuring these people are not deprived of work unfairly, thus promoting the right to work.

123. The Bill would enable digital labour platform operators to temporarily suspend or modify a person's access to a digital labour platform for no longer than 7 business days for specified reasons. In doing so, there are certain permissible circumstances where a person may be deprived of work for a limited period. However, it would not enable a person to be deprived of work unfairly.

124. The provisions would only allow a short temporary suspension or modification of a person's access to a digital labour platform where the digital platform operator believes on reasonable grounds:

- that it is necessary to protect the health and safety of users of the digital labour platform or a member of the community;
- the person may have committed fraud, misrepresented or falsified information;
- that the person has not complied with applicable licensing and accreditation requirements imposed by or under a law; or
- that the suspension or modification of access is necessary to enable the digital labour platform operator to conduct an investigation, or refer the matter to a law enforcement agency for the purposes of conducting an investigation.

125. In these circumstances, a short suspension would ensure that appropriate steps can be taken to consider, investigate and/or escalate these matters. The requirement that the FWC needs to be satisfied that the operator believed at least one of these circumstances exists would further ensure a person who uses a digital labour platform is not deprived of work unfairly.

126. These provisions would engage the right to the enjoyment of just and favourable working conditions by excluding some steps taken by digital labour platform operators when determining whether a person is an employee under the FW Act and providing that certain persons are not employees in certain circumstances. However, to the extent that this limits human rights for certain classes of workers, it is directed at achieving a legitimate objective and is necessary, reasonable and proportionate to achieving that objective.

127. The objective of these provisions is to provide certainty to digital labour platform operators about the status of their workers for the purpose of determining the workers' rights and entitlements. This would ensure that steps taken by a digital labour platform operator to comply with its obligations under the new unfair deactivation provisions in Part 3A-3, or the Digital Labour Platform Deactivation Code (being the Code made by

the Minister under section 536LJ) or an order made under, or for the purposes of, Chapter 3A, cannot be considered when determining whether the true nature and practical reality of the employment relationship is one of employment. This avoids a perverse outcome whereby acts of a digital labour platform to comply with the new employee-like provisions or orders made under them may otherwise have the effect of inadvertently creating an employment relationship.

128. The Bill would also ensure that a worker who has been found to be an 'employee-like worker' to whom a minimum standards order applies is not an employee in relation to particular digital platform work. This would provide certainty to digital labour platform operators that workers covered by these orders cannot later bring proceedings to recover unpaid employment entitlements.

Amendment of the *Asbestos Safety and Eradication Agency Act 2013*

129. The prevention of occupational diseases is a fundamental aspect of the right to just and favourable conditions of work. Its realisation requires the adoption of a national policy for the prevention of diseases, minimising hazards in the working environment and ensuring broad participation in its formulation, implementation and review, in particular of workers and employers and their representative organisations.

130. The policy should also promote the collection and dissemination of reliable and valid data on the fullest possible range of occupational diseases and include appropriate enforcement provisions and adequate penalties for violations.

131. Schedule 2 to the Bill would promote the right to safe and healthy working conditions by expanding the current remit of ASEA to include prevention of silica-related occupational diseases. The amendments would enhance the promotion of safe and healthy working conditions by setting out the priority matters for the Silica National Strategic Plan. These would include, eliminating or minimising exposure to respirable crystalline silica, raising silica safety awareness, and improving research and national data.

132. Workplace exposure to respirable crystalline silica is a serious issue threatening the lives of Australian workers. The increase in silicosis and other silica-related occupational diseases has raised the need for urgent national action and coordination. Silica reform is complex and sits across multiple portfolios and jurisdictions. ASEA's role as a coordinating agency reflects the jurisdictional nature of addressing asbestos, and now silica.

133. The Bill would expand the Agency's functions to include a focus on silica safety and coordination, awareness raising, reporting and providing advice to government on silica safety and silica-related diseases. Further, this Bill would promote and assist current efforts to manage silica risks in the workplace and eliminate silica-related diseases.

134. The Council's functions would also be broadened to reflect these changes. The addition of members with silica-related knowledge or experience, and its expanded silica-related

functions, would effectively contribute towards ensuring safe and healthy working conditions.

135. The Bill would promote the right to safe and healthy working conditions for those working with respirable crystalline silica as it would establish a cross-jurisdictional governance mechanism for national silica action, with aims to eliminate silica-related diseases by preventing exposure to respirable crystalline silica.

136. The Bill would also promote Article 7 through facilitating the new Agency's data collection, analysis and reporting functions to inform about the jurisdictional efforts to implement the national silica and asbestos strategic plans.

Amendment of the *Work Health and Safety Act 2011*

137. Rights to work and rights in work are engaged by Schedule 4 to the Bill as it strengthens the offences and penalties framework in the WHS Act, providing greater deterrence for poor safety management in workplaces. The United Nations Committee on Economic Social and Cultural Rights has stated that the right to work in Article 6(1) of the ICESCR includes the element that 'the right to work should be protected, by providing the worker with just and favourable conditions of work, in particular to safe working conditions…'. Article 7 of the ICESCR provides that everyone has the right to the 'enjoyment of just and favourable conditions of work, which ensure, in particular…[s]afe and healthy working conditions'. Similarly, the ILO recognises a safe and healthy working environment as a fundamental right at work, within the framework of the *Declaration on Fundamental Principles and Rights at Work 1998*, as amended in 2022.

138. The prevention of occupational accidents and diseases is a fundamental aspect of the right to just and favourable conditions of work. Its realisation requires the adoption of a national policy for the prevention of accidents and work-related injuries by minimising hazards in the working environment and ensuring broad participation in its formulation, implementation, and review, in particular by workers, employers, and their representative organisations.

139. This Bill promotes the right to safe and healthy working conditions by:

- strengthening the Commonwealth WHS offences regime by introducing a new industrial manslaughter offence to punish and deter the most egregious breaches of WHS duties;
- including provisions to allow for corporate and Commonwealth criminal liability through attribution of conduct engaged in on behalf of a body corporate or the Commonwealth by defined persons to these entities – that is, the conduct is taken to have been engaged in by the body corporate or the Commonwealth;
- increasing penalty amounts across the WHS Act by 39.03 per cent (excluding Category 1 – see discussion below), and inserting a mechanism to increase penalties annually in line with national CPI so penalties maintain their real value over time; and

- significantly increasing penalties for the Category 1 offence to reflect the seriousness of a breach of that provision.

140. Strengthening the Commonwealth WHS framework through these measures would promote the right to safe and healthy working conditions by deterring non-compliance with WHS laws and facilitating more effective prosecutions of bodies corporate and the Commonwealth.

141. The right to work includes the protection and promotion of the right to safe and healthy working conditions. Preventing serious work-related incidents resulting in death or serious injury or illness is fundamental to safeguarding that right.

142. The Bill would positively engage the right to work by protecting and promoting a safe and healthy workplace by creating the Family and Injured Workers Advisory Committee (Advisory Committee). The Advisory Committee will be primarily comprised of members with lived experiences of serious work-related incidents. The unique perspectives of lived experience members would inform the advice and recommendations the Advisory Committee gives to the Minister and Commonwealth regulators dealing with work health and safety (WHS) on policies, procedures and strategies concerning serious work-related incidents. This would contribute to more effective WHS policies and standards and promote the right to a safe and healthy workplace.

Right to protection and assistance for families

143. Article 9 of the ICESCR provides for the right of everyone to social security, including social insurance. Elaborating on Article 9, the Committee on Economic, Social and Cultural Rights provided in General Comment 19 that 'States parties should … ensure the protection of workers who are injured in the course of employment or other productive work'.[4] Workers' compensation is analogous to social insurance in that it provides payment of wages and medical costs to employees for injuries occurring as a result of their employment.

144. The right to protection and assistance to families in Article 10(2) of the ICESCR, recognises protection should be accorded to mothers during a reasonable period before and after childbirth.

Amendment of the *Safety, Rehabilitation and Compensation Act 1988*

145. The amendments to the SRC Act at Schedule 3 to the Bill are intended to improve the physical and mental health outcomes for first responders covered by the SRC Act by simplifying their access to workers' compensation if they are suffering from PTSD. Employment will be presumed to have significantly contributed to PTSD suffered by first responders for the purposes of workers' compensation.

146. If a person does not satisfy the requirements of subsection 7(11) of the SRC Act (for example, by not meeting the definition of 'first responder'), it remains open for the

[4] Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security (art. 9)*, U.N. Doc E/C.12/GC/19 (2008), [17].

employee to otherwise establish, on the balance of probabilities, that the disease was contributed to, to a significant degree, by the employee's employment.

Right to physical and mental health

147. Article 12 of the ICESCR requires that State Parties to the Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The UN Committee on Economic, Social and Cultural Rights has stated that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, extending to underlying determinants of health such as safe and healthy working conditions.

148. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:

…

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; …

Amendment of the *Asbestos Safety and Eradication Agency Act 2013*

149. Schedule 2 to the Bill would positively engage this right. Promoting 'industrial hygiene' involves taking steps to protect the work environment by reducing workers' exposure to substances that impact upon human health including where workplace exposure to respirable crystalline silica results in people developing serious health conditions. New Part 1A and Item 15 would provide the Agency with functions related to silica safety and coordination and monitoring of jurisdictional efforts to eliminate silica-related occupational diseases.

150. New section 5B and paragraphs 8(1)(b) and 8(1)(d) would confer on the Agency various functions in relation to the Silica National Strategic Plan. In new section 5B, the definition of the term 'Silica National Strategic Plan' specifically refers to supporting *workers* who are affected by silica-related diseases' and 'eliminating or minimising the exposure to respirable crystalline silica in *workplaces'.* These provisions would require the Agency to focus on addressing matters which would result in improving industrial hygiene in Australian workplaces.

151. Further, it is likely that conditions such as mesothelioma, asbestosis and silicosis are diseases for the purposes of Article 12(2)(c).

152. The Bill would promote the right to health by broadening the object of the ASEA Act to include elimination of silica-related diseases. One of the Agency's key objectives would be to lead coordinated and national action to eliminate asbestos and silica-related diseases by collaborating with States, Territories and local governments, and other relevant persons on the development of the Asbestos National Strategic Plan and Silica National Strategic Plan. The Agency would also be required to undertake various activities in relation to encouraging, coordinating and monitoring implementation of the

plans and collaborating with governments about asbestos and silica safety and related diseases.

153. New subsection 8(1) would provide that the Agency's functions would broadly include eliminating or minimising exposure to respirable crystalline silica, raising silica safety awareness, and improving research and national data. Therefore, the Bill would promote the right to health as the Agency's functions would be directed towards preventing and eliminating asbestos and silica-related diseases.

Amendment of the *Safety, Rehabilitation and Compensation Act 1988*

154. By simplifying the workers' compensation process for first responders suffering PTSD, the amendments to the SRC Act promote access to those first responders suffering PTSD to rehabilitation and compensation, embracing their right to the highest attainable standard of mental health.

Amendment of the *Work Health and Safety Act 2011*

155. The right to physical and mental health expressed in Article 12 of the ICESCR is engaged by this Bill as the United Nations Committee on Economic Social and Cultural Rights has stated that the right to health concerns safe and healthy working conditions. Guidance from the Attorney-General's Department clarifies that where Article 12(2)(b) mentions 'industrial hygiene' this 'refers to the minimisation, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment'.

156. This Bill promotes the right to physical and mental health by strengthening the offences and penalties framework which accompany a person's duty to minimise the causes of health hazards inherent in the working environment. The Bill achieves this by amending the WHS Act to better deter non-compliance with WHS duties.

157. Serious work-related incidents result in significant effects on the health and wellbeing of victims and their families. The Senate Inquiry report *They never came home – the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia* noted that the human impact of an industrial death is catastrophic and life-long. These impacts can be amplified while attempting to navigate formal processes such as investigations and prosecutions following a work-related death.

158. The Bill would positively engage the right to health by ensuring that the systems of support for workers and other persons (such as victim families) affected by a serious work-related incident are informed by lived experience perspectives.

159. The Advisory Committee will be primarily comprised of members with lived experiences of serious work-related incidents. The lived experiences of those members would inform advice and recommendations to the Minister and Commonwealth regulators dealing with WHS about the support necessary for people impacted by serious workplace incidents. Improving engagement with, and support for, workers and their families following a serious work-related incident would assist them to achieve the highest attainable standard of health possible and promote the right to physical and mental health.

Right to an effective remedy and right to a fair hearing

160. Article 2(3) of the ICCPR and Article 2 of the CEDAW provides the right to an effective remedy for persons who have suffered human rights violations by Australian authorities, as well as persons who have suffered discrimination perpetrated by Australian authorities. The United Nations Human Rights Committee has stated that the right to an effective remedy encompasses an obligation to bring to justice perpetrators of human rights abuses, including discrimination, and also to provide appropriate reparation to the persons who have suffered human rights abuses. Reparation can involve measures including compensation, restitution, rehabilitation, public apologies, guarantees of non-repetition and changes in relevant laws and practices.

161. Article 14(1) of the ICCPR provides that, in the determination of rights and obligations in a suit at law, all persons have a right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

Casual employment

162. Part 1 of Schedule 1 would positively engage the right to a fair remedy by implementing a new dispute resolution framework for the FWC to deal with disputes between employers and employees about employee choice and casual conversion.

163. Part 1 would require the parties to first attempt to resolve the dispute at a workplace level. If this is unsuccessful, the amendments would allow employees to make applications to the FWC to deal with disputes as it considers is appropriate, including by mediation, conciliation, making a recommendation or expressing an opinion, or mandatory arbitration.

164. The Bill would further promote the right to an effective remedy by enabling the FWC to make binding orders, having regard to what is fair and reasonable. Parties can also, on application, have the dispute heard in the small claims jurisdiction of the Federal Circuit and Family Court of Australia.

Closing the labour hire loophole

165. Part 6 of Schedule 1 would positively engage the right to a fair remedy by creating a new low-cost dispute resolution mechanism by allowing an affected party to apply to the FWC to resolve a dispute and by providing for parties to be represented by an organisation entitled to represent their industrial interests.

166. Consistently with other dispute resolution processes in the FW Act, the parties would be required to attempt to resolve the dispute at the workplace level before applying to the FWC. If these discussions did not resolve the dispute, the FWC would be required to first deal with the dispute other than by arbitration, such as by mediation or conciliation.

167. If mediation or conciliation were unsuccessful, and the parties agree to the FWC arbitrating the dispute, the FWC's order could apply to work performed before and after the order is made. If the parties do not consent to arbitration, the order could only apply prospectively in relation to work performed after the order is made. The FWC

would not be able to make the order unless satisfied it is fair and reasonable. This is consistent with the scope of the FWC's power as an administrative tribunal rather than a court.

Workplace delegates' rights

168. Part 7 of Schedule 1 would positively engage the right to a fair hearing by creating a right for workplace delegates to represent members who are in dispute with their employer or relevant regulated business. This would improve the ability for workers to access representation by their workplace delegates. The proposed rights to reasonable communication with members and reasonable access to the workplace would also support the efficacy with which workplace delegates can perform their roles. Although disciplinary or dispute processes in the workplace do not rise to the level of a hearing before a court or tribunal, the outcomes of these processes can have a substantial impact on the workers involved. Improving the ability for workers to seek assistance from a workplace delegate, and removing barriers to delegates providing such representation or assistance, would help to maintain the procedural fairness of these processes.

169. The Bill would also positively engage the right to an effective remedy by establishing a process for workplace delegates, in new sections 350A and 350B, to challenge behaviour that is inconsistent with the rights of delegates provided for by the new section 350C. Although the FW Act acknowledges their existence, there is currently limited legislative protection for workplace delegates. In some circumstances, workplace delegates might be able to avail themselves of the protections for participating in industrial activities (Division 4 of Part 3-1 of the FW Act), however there are currently no rights specific to workplace delegates. Establishing a purpose-built protection against unreasonably hindering or obstructing a workplace delegate would complement the existing protections and ensure that workplace delegates are able to enforce the proposed positive rights.

Provisions relating to regulated workers

170. Part 16 of Schedule 1 relating to standard setting for regulated workers would positively engage the right to an effective remedy by:

- requiring MSOs for regulated workers and collective agreements to include terms providing a procedure for settling disputes; and
- allow for regulations to be made to empower the FWC to conduct an internal merits review of a decision to make or vary an RTMSO.

171. Part 3A-3 establishes quick, flexible and informal procedures for the resolution of unfair deactivation and termination claims that address the needs of both the regulated businesses and regulated workers, thereby promoting the right to an effective remedy. The associated remedies under the new provisions would further enhance this right, by enabling the FWC to make a variety of orders, with reactivation/reinstatement being the primary remedy. The efficient and effective resolution of disputes, and therefore the promotion of the right to a fair hearing, would be assured by empowering the FWC to

determine whether it is appropriate to hold a conference or a hearing, taking into account the differences of the parties' circumstances and their wishes.

172. This measure would allow the FWC to make an order for costs against a party in a matter arising under new Part 3A-3 (unfair deactivation or unfair termination of regulated workers). While this could be construed as having the potential to limit a person's access to justice (if the risk of costs acts as a disincentive), this provision should not bar access to the FWC in relation to new Part 3A-3. Costs could only be awarded under the new provision if a party's unreasonable act or omission relating to the conduct or continuation of the matter caused the other party to incur costs. This is targeted towards litigants who pursue or defend unfair termination or unfair deactivation claims in an unreasonable manner. This would also disincentivise a party with 'deeper pockets' from acting unreasonably to increase the other party's own costs in an attempt to discourage parties from bringing proceedings against them or encourage a party to settle on unfavourable terms. In this respect the measure will enhance the right to a fair hearing.

173. **Part 3-5–Unfair contract terms**: A remedy under Part 3-5 would only be available to independent contractors who earn below a high income threshold. This measure is targeted at people with low bargaining power and lower pay for whom the costs of going to court could act as a disincentive or outright bar to seeking a remedy. For those applicants, the lower costs and increased accessibility of the FWC as compared to the federal courts would enhance their right to an effective remedy.

174. Independent contractors with incomes above the contractor high income threshold would continue be able to access the existing unfair contracts protections under the IC Act, ensuring that they would still have the right to an effective remedy.

175. This Part would prevent people from 'double dipping' by pursuing or obtaining multiple remedies in relation to the same services contract. However, to ensure that a person would still be able to obtain an effective remedy, they could still commence proceedings under Part 3-5 or another law so long as the applicant discontinued the other proceedings, or the proceedings failed for lack of jurisdiction.

176. Appropriate transitional and application provisions in Part 17 of Schedule 1 would further ensure that no litigants or potential litigants under the IC Act are disadvantaged, confused or suffer delays because of the commencement of the FWC's new jurisdiction. Proceedings currently before the courts and applications relating to contracts entered into prior to commencement would be able to be conclusively determined under the IC Act.

<u>Criminal process rights</u>

177. Articles 14 and 15 of the ICCPR protect criminal process rights:

- Article 14(1) provides that all persons shall be equal before the courts and tribunals, and that in the determination of any criminal charge against a person, that person is entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law;

- Article 14(2) provides that those charged with a criminal offence are presumed innocent until proven guilty according to the law;
- Article 14(3) sets out a range of guarantees that each person shall be entitled to in the determination of any criminal charge against them. This includes the right not to be compelled to testify against themselves or to confess guilt;
- Article 14(7) protects against the risk of double punishment; and
- Article 15(1) protects against criminal penalties applying retrospectively.

Casual employment

178. Part 1 of Schedule 1 in relation to casual employees do not directly engage rights in relation to criminal process, but these amendments do propose to enact several civil remedy provisions.

179. New civil remedy provisions would be included in relation to contravening an order of the FWC or engaging in sham casual arrangements. The maximum penalty for these contraventions would be 300 penalty units. Contravention of an FWC order will often result in underpayments due to misclassification. This penalty is consistent with other underpayment-related penalties, and for sham casual arrangements is consistent with increased penalties for sham arrangements in relation to independent contractors.

Closing the labour hire loophole

180. The amendments to close the labour hire loophole would not directly engage rights in relation to criminal process but they do provide for civil remedies. This includes penalties where a labour hire provider fails to pay an employee in accordance with Part 2-7A where a regulated labour hire arrangement order is in place, where a regulated host does not provide certain information to an employer on request, or where a party contravenes an order of the FWC.

181. The maximum penalty a court could order would be 600 penalty units for a serious contravention or otherwise 60 penalty units. This is consistent with the maximum penalty that currently applies under the FW Act in relation to similar conduct, for example, contravening an equal remuneration order. This penalty is proportionate to the seriousness of the contravention, noting that the measure is directed towards preventing the undercutting of bargained rates.

182. Appropriate safeguards are built into the new civil penalty provisions. For example, an employer who does not pay a regulated employee the protected rate of pay in accordance with Part 2-7A will not be liable to a civil penalty if they reasonably relied upon information provided by a regulated host and the information was incorrect.

183. The anti-avoidance provisions would apply retrospectively, with application from the date the Bill is introduced in the Parliament. This means penalties may apply in relation to conduct engaged in before the Bill commences. This is reasonable and proportionate to prevent businesses from taking steps to avoid obligations under new Part 2-7A

before the Bill commences. Parties will be on notice about their obligations as the legislation will be publicly available when it is introduced.

Workplace delegates' rights

184. Part 7 of Schedule 1 providing for specific workplace delegates' rights do not directly engage rights in relation to criminal processes, but they do provide for civil remedies. Specifically, the Bill would introduce a new protection against employers and regulated businesses unreasonably failing or refusing to deal with a workplace delegate, knowingly or recklessly making a false or misleading representations to a workplace delegate, or unreasonably hindering, obstructing or preventing the exercise of a workplace delegate's rights.

185. The protection would not apply when an employer or regulated business has acted reasonably. The onus would be on the employer or regulated business to prove their conduct was not unreasonable, as the employer or regulated business is best placed to provide evidence about the reasons and intent behind the actions they took (or did not take).

186. This protection would also not be engaged if the employer or regulated business is taking actions required under a Commonwealth or State or Territory law.

187. The maximum pecuniary penalty for contravening this new civil remedy provision would be 60 penalty units for an individual, or 300 penalty units for a body corporate. This is consistent with the maximum penalties which apply to contraventions of existing civil remedy provisions in Part 3-1 of the FW Act, including the protections against adverse action and coercion. The new civil penalty provisions will only apply to conduct which occurs after the date the respective Divisions commence. This positively engages the protection against retrospective application of penalties in relation to civil remedies.

188. In some circumstances, action by an employer which obstructs a workplace delegate might contravene both the proposed civil remedy provisions, and the existing civil penalty provision prohibiting adverse action taken because an employee has exercised, or proposes to exercise, a workplace right. This will not expose employers or regulated businesses to a risk of double punishment. Section 556 of the FW Act prevents a court from ordering that a person pay a pecuniary penalty if a pecuniary penalty has already been imposed under another provision of a law of the Commonwealth in relation to the same conduct.

189. Overall, this measure would have a neutral impact on criminal process rights.

Sham arrangements

190. The prohibition of certain sham contracting arrangements in subsection 357(1) of the FW Act does not directly engage rights in relation to criminal processes, but does provide for civil remedies.

191. The existing provision in section 357 of the FW Act places the onus on an employer to prove they have a defence to sham contracting. Whilst the new provision changes the nature of the defence to sham contracting, it does not change this burden of proof. The burden is on the employer because it is a defence and the burden of proving a defence usually rests with the party seeking to rely on it. Further, the employer is best placed to provide evidence about the belief they held when making the representation.

192. There is a legitimate objective to this evidential burden and it is confined within reasonable limits considering the question to be answered. The provision does not impose criminal penalties, for the reasons articulated at paragraph 177 below. However, to the extent that section 357 may limit criminal process rights those limitations are reasonable, necessary and proportionate

Penalties for civil remedy provisions

193. The Parliamentary Joint Committee on Human Rights (PJCHR) Practice Note 2 provides that civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the ICCPR, regardless of the distinction between criminal and civil penalties in domestic law. A penalty may be considered 'criminal' where it:

- is classified as criminal under Australian law;
- is intended to punish or deter, and applies to the public in general (rather than being restricted to people in a specific regulatory context); or
- includes imprisonment or a substantial pecuniary sanction.

194. When a provision imposes a civil penalty, an assessment is required as to whether it amounts to a criminal penalty for the purposes of ICCPR.

195. **New civil remedy provisions should not be considered criminal penalties**: The Bill includes several new civil penalty provisions. The penalty provisions of the FW Act are expressly classified as civil penalties (section 549). These provisions create pecuniary penalties in the form of a debt payable to the Commonwealth or other person. The civil penalty provisions do not impose criminal liability, and do not lead to the creation of a criminal record. There is no possibility of imprisonment for failing to pay a penalty (section 571).

196. The purpose of the civil penalty provisions is to encourage compliance with the FW Act, which supports the implementation of Australia's obligations under international law. The penalties would generally apply to defined classes of employers and not the public in general. While the FWO has enforcement powers, proceedings may also be brought by an affected employee or union. In addition, the civil remedy provisions would apply in the regulatory environment for industrial relations, rather than to the public at large. These factors all suggest that the civil penalties imposed by the FW Act are civil rather than criminal in nature.

197. The severity of the relevant civil penalties should be considered low. They are pecuniary penalties (rather than a more severe punishment like imprisonment) and there

is no sanction of imprisonment for non-payment of penalties. The penalties are generally at or below the level usually considered to be severe enough to be classified as criminal (that is, below 60 penalty units for individuals).

198. As the proposed new civil penalties would reasonably be characterised as not being criminal in nature, the specific criminal process guarantees in Articles 14 and 15 of the ICCPR would not apply. In any event, however, new civil penalties, and the civil penalty regime in the FW Act more broadly, comply with the requirements of Articles 14 and 15 in that they would not apply retrospectively (Article 15(1)), the presumption of innocence applies (Article 14(2)), and there is no risk of double punishment as there are no comparable criminal penalties (Article 14(7)).

199. On this basis, the proposed new penalties should not be considered criminal for the purposes of human rights law.

Wage theft

200. The Bill proposes amendments to introduce a new criminal offence for wage theft (new section 327A), which would apply to intentional conduct. It would rely on Parts 2.4 and 2.5 of the Criminal Code to establish pathways for prosecuting ancillary and corporate criminal liability relating to the new offence. Provision would be made for the Commonwealth to be liable for an offence, and for the FWO to investigate suspected underpayment crimes (including of 'related offence provisions' as defined, which are provided for under the Criminal Code).

201. Criminalising wage theft engages criminal process rights. The proposed offence provision, if enacted, would sit within the broader Commonwealth criminal framework, including the Crimes Act and Criminal Code, which guarantees criminal process rights as provided for in Articles 14 and 15. Further comments relating to Article 14(3) are made below.

202. In addition to these rights:

- the FW Act provides for an appeals process from decisions of eligible State or Territory courts (section 565);
- the FW Act protects against criminal/civil double jeopardy (section 552), and would protect an accused while criminal proceedings are on foot, by staying any related civil proceedings against the person (where a pecuniary penalty order is sought) (section 553); and
- proposed transitional arrangements for the proposed new offence for wage theft (new section 327A) would make clear that the new offence provision applies prospectively, that is to conduct that occurs after commencement.

203. **Absolute liability elements:** The Bill limits the presumption of innocence by imposing absolute liability for certain offence elements. The application of absolute liability limits the presumption of innocence to the extent that it allows for the imposition of criminal liability without requiring the prosecution to prove fault in the defendant.

204. According to the Guide to Framing Commonwealth Offences, absolute liability may be acceptable where an element is essentially a precondition of an offence and the state of mind of the defendant is not relevant. For the new offence for wage theft (new section 327A), absolute liability would attach to two preconditions for the offence, that is:

    - the employer is required to pay an amount (a required amount) to, on behalf of, or for the benefit of, an employee under (new paragraph 327A(1)(a)):
        - the FW Act; or
        - a fair work instrument; or
        - a transitional instrument (as continued in existence by Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*); and
    - the required amount is not (new subparagraph 327A(1)(b)) an amount covered by subsection (2).

205. It is also appropriate to apply absolute liability to paragraph 327A(1)(b), because this is a jurisdictional element. New paragraph 327A(1)(b) does not relate to the substance of the offence, but marks a boundary between matters that are within scope for the offence and those that are not. The Commonwealth Guide to Framing Offences explains that applying absolute liability to a particular physical element of an offence may be justified where the element is jurisdictional, rather than one going to the essence of the offence.

206. Further, the absolute liability measures are proportionate in that they only apply to elements of the offence and not to the offence as a whole. In this respect, the prosecution will still be required to prove, beyond a reasonable doubt, all other elements of the offence including fault elements.

207. The substance of the offence is in new paragraphs 327A(1)(c) and (d), for which the fault element would be intention (paragraph 327A(3)(b)):

    - For new paragraph 327A(1)(c), the prosecution would have to prove beyond a reasonable doubt that the defendant intentionally engaged in the relevant conduct.
    - For new paragraph 327A(1)(d), the prosecution would have to prove beyond a reasonable doubt that the defendant intended that their conduct would result in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment. For there to be an offence, the person must mean to bring about the result (that is, a failure to pay the required amount), or be aware that result will occur in the ordinary course of events (refer to s 5.2 of the Criminal Code).

208. These fault elements ensure that only serious conduct involving underpayments is caught by the offence provision, which justifies the corresponding sanctions.

209. For these reasons, it is appropriate to attach absolute liability to the preconditions to the offence in new paragraphs 327A(1)(a) and (b).

210. **Abrogating the privilege against self-incrimination:** The Bill would expand the circumstances in which Fair Work Inspectors may exercise their existing powers, as they would be able to investigate suspected wage theft under the proposed new offence provision and 'related offence provisions'. A number of minor or technical amendments (explained elsewhere) are proposed to ensure that outcome.

211. Sections 713 and 713A abrogate the privilege against self-incrimination in the specified circumstances. With some exceptions, subsection 713(2) and section 713A of the FW Act generally provide that if an individual produces a document or record in compliance with specified provisions, that record or document, and any evidence obtained as a direct or indirect consequence of inspecting that document or record, is not admissible in evidence in criminal proceedings. The immunity is different in the case of an individual who gives information, or produces a record or document, or answers a question, under a FWO notice (see subsection 713(3)).

212. Items 228 to 230 of the Bill would provide that the immunities conferred by subsections 713(2) and (3) and section 713A do not apply to two classes of documents. The first is an employee record that is required to be made and kept under section 535 of the FW Act. The second is a copy of a pay slip that has been created in relation to an employee (see section 536 of the FW Act).

213. As a result of the amendments, these employee records and copies of pay slips may be used in evidence.

214. To the extent that these amendments limit the rights under Article 14 of the ICCPR, those limitations are reasonable, necessary and proportionate.

215. Sections 535 and 536 of the FW Act require employers to keep the employee records and issue pay slips to employees. If an employer is lawfully required to produce and keep (or issue) these documents and records, then it is not reasonable for their use in evidence to be prevented.

216. Records required to be kept and pay slips required to be issued under sections 535 and 536 of the FW Act are often central to establishing that an underpayment has occurred in civil proceedings. The immunities conferred by subsections 713(2) and (3) and section 713A would significantly impair Fair Work Inspectors' ability to effectively investigate the new wage theft criminal offence.

217. Further, the records and documents must only be produced in limited circumstances: the documents may only be produced and inspected/copied while a Fair Work Inspector is on the premises or following the provision of a notice.

218. To the extent these amendments limit the rights under Articles 14 and 15 of the ICCPR, they are appropriate as they seek to achieve the legitimate objective of protecting employee entitlements, recovering underpayments and prosecuting criminal non-compliance. The commencement and application provision, and the operation of

existing sections 552 and 553 of the FW Act, operate to reduce any conflict with the relevant Articles 14(3)(g) and 15(1).

Amendment of the *Work Health and Safety Act 2011*

219. Measures in Schedule 4 of the Bill engage and limit criminal process rights.

220. **Part 1 of Schedule 4**: There will be no limitation period for bringing proceedings for an industrial manslaughter offence (Item 7). New subsection 30A(5) states that for the purposes of alternative verdicts, the general limitation period of 2 years which otherwise applies to Category 1 and 2 offences (with some exceptions – see existing section 232) is displaced (Item 1).

221. The absence of limitation periods for industrial manslaughter and alternative verdicts could limit a defendant's right to a fair trial. This is particularly relevant to the right in Article 14(3)(c) of the ICCPR that everyone is entitled to be tried without undue delay and the principle of 'equality of arms' in Article 14(1), which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings. Where no limitation period applies it could be difficult for an officer to defend themselves years after the fact. People with relevant knowledge may have moved on and evidence may be difficult to access.

222. Any limitation on the right to a fair trial arising from not applying limitation periods to the industrial manslaughter offence and alternative verdicts is justifiable because it would be necessary to pursue a legitimate objective and is reasonable, necessary and proportionate.

- A limitation period would be inappropriate for an offence as serious as industrial manslaughter. The absence of a limitation period is consistent with other manslaughter offences.
- Disapplying limitation periods in relation to alternative verdicts seeks to ensure the accused does not escape punishment on technical grounds. This would mean that if the prosecution commenced industrial manslaughter proceedings outside the limitation period that applied to, for example, a Category 2 offence (2 years after the offence first comes to the notice of the regulator or 1 year after a coronial finding – see section 232 of the WHS Act), it would not impact the ability of a court to find the accused guilty of a Category 2 offence in the alternative.

223. **Reasonable excuse**: The Category 1 offence is drafted to align with the model Act and therefore includes a 'reasonable excuse' defence in paragraph 31(1)(b). The reasonable excuse defence imposes the evidential burden on the defence to establish that a reasonable excuse justifying their conduct existed.

224. The reasonable excuse defence contained in section 31 of the WHS Act enlivens the presumption of innocence in Article 14(2) of the ICCPR. As explained above, a reverse onus provision will not necessarily violate the presumption of innocence provided the law is not unreasonable in the circumstances and maintains the rights of the accused.

Such a provision may be justified if the nature of the offence makes it very difficult for the prosecution to prove each element, or if it is clearly more practical for the accused to prove a fact than for the prosecution to disprove it. To the extent section 31 limits the presumption of innocence, that limitation is justified on the basis that it is more practical for the accused to bear the evidential burden in relation to whether a reasonable excuse for their conduct existed.

225. **Legal burden for defence like provisions in new sections 244B, 244C, 245B and 245C**: New subsection 244B(2) would create defences that provide paragraphs 244B(1)(b) and (c) do not apply if the body corporate proves it took reasonable precautions to prevent the conduct, authorisation, or permission of the conduct. New subsection 244B(2) requires the defendant to discharge the legal burden in relation to that matter, that is, they must positively prove that such reasonable precautions were taken. Section 13.5 of the Criminal Code provides that a legal burden imposed on the defendant must be discharged on the balance of probabilities. This reversal of the burden of proof is necessary because the steps taken to prevent WHS breaches are peculiarly within the knowledge of the defendant. Also, the inside access to specialised information and corporate knowledge available to the body corporate as to the actual steps taken, and the context for those choices, would mean that it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

226. Additionally, the conduct proscribed by WHS offences poses a grave danger to public health or safety. Conduct constituting a WHS breach often poses a such danger.

227. New sections 244C, 245B and 245C are substantially the same as new section 244B and the explanation above applies.

228. **Strict liability**: The Parliamentary Joint Committee on Human Rights has noted the imposition of strict or absolute liability will not violate Article 14(2) where it pursues a legitimate aim and is reasonable and proportionate to that aim.

229. The Bill would introduce an industrial manslaughter offence which would include strict liability elements. Importantly, the offence also requires the prosecution to prove either negligence or recklessness and that the conduct was intentional. Strict liability only applies to certain elements.

230. Most offences in the WHS Act include strict liability elements or are strict liability. Strict liability as a feature of WHS Act offences was carefully considered when the WHS Act was first introduced. The presumption of innocence can be seen to be impinged by removing the requirement for the prosecution to prove fault in relation to one or more physical elements of an offence. However, WHS strict liability offences arise in a regulatory context where, for reasons such as public safety, and the public interest in ensuring that regulatory schemes are observed, the sanction of criminal penalties is justified.

231. WHS offences also arise in a context where a defendant can reasonably be expected, because of their professional involvement, to know the requirements of the law, and the

mental, or fault, element can justifiably be excluded. The rationale is that people who owe WHS duties such as employers, persons in control of aspects of work, and designers and manufacturers of work structures and products, as opposed to members of the general public, can be expected to be aware of their duties and obligations to workers and the wider public. The industrial manslaughter offence would apply to PCBUs, and 'officers' (the most senior persons in an organisation).

232. The legitimate aim of strict liability for WHS offences, to ensure defendants operating in the WHS regulatory context are held accountable for breaches of their positive duties to ensure a safe and healthy workplace, is proportionate to any limitation it places on the presumption of innocence.

Right to privacy and reputation

233. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home and correspondence. This includes respect for informational privacy, including in respect of storing, using, and sharing private information and the right to control the dissemination of personal and private information. Privacy guarantees a right to secrecy from the publication of personal information. It also prohibits unlawful attacks on a person's reputation.

Exemption certificates for suspected underpayment

234. The FW Act establishes a right of entry scheme for entry permit holders, including entry to investigate suspected contraventions (section 481) which is subject to (among other things) at least 24 hours' notice. Provision is made to waive the 24 hour-notice period by applying to the FWC for an exemption certificate, with a view to preventing the possibility of destruction, concealment or alternation of relevant documents and records (section 519).

235. It is proposed that the grounds for the issue of an exemption certificate should be expanded, so the notice period may also be waived if the FWC is satisfied that the suspected contravention, or contraventions, involve the underpayment of wages, or other monetary entitlements, of a member of the organisation whose industrial interests the organisation is entitled to represent and who performs work on the premises. This measure would be subject to comprehensive safeguards against misuse of the entry powers.

236. There may be concerns that this measure may engage the right to privacy. However, there is no proposal in this measure to change either the grounds for entry, or to modify the existing limits and protections for entry scheme under Part 3-4. This means that the existing framework will continue to:

- limit the exercise of the relevant entry rights to workplaces and working hours only (subsections 481(1), 490(1));
- limit access to member records as set out in section 482, subject to the existing application process in section 483AA;

- prohibit entry permit holders from intentionally hindering and obstructing any other person when exercising rights of entry, or otherwise acting in an improper manner (section 500);
- restrict the unauthorised use or disclosure of information or documents (section 504); and
- prohibit an entry permit holder from entering any part of premises that is used mainly for residential purposes (section 493).

237. For these reasons, the proposed measure does not engage the right to privacy.

Provisions related to regulated workers

238. Section 712AA would be consequentially amended by Part 16 of Schedule 1 to provide that the FWO may apply to a nominated AAT presidential member for an FWO notice in relation to the underpayment of monetary entitlements under an MSO, the unfair deactivation of an employee-like worker or unfair termination of a regulated road transport contractor.

239. A FWO notice may require a person to give information, produce documents or attend before the FWO and answer questions relevant to an investigation. The person who is been given a FWO notice must comply with the notice, and if they do not, they could be subject to a civil penalty.

240. By extending the circumstances under which a person can be required by a FWO notice to produce documents, give information or attend an examination to answer questions, this provision would limit the right to privacy.

241. The objective of this measure is to ensure that the FWO would be able to secure positive investigation outcomes in relation to underpayment of monetary entitlements under an MSO or the unfair deactivation of an employee-like worker or unfair termination of a regulated road transport contractor.

242. The limitation on privacy would be necessary, reasonable and proportionate. The ability to use these powers would be particularly important where there are no relevant documents that appear to be available and subsequently the investigation into these matters has stalled. These powers would also be important to enable the FWO to establish whether a contravention of an MSO would constitute a serious contravention by determining whether the conduct was deliberate.

243. These powers are currently available for investigations into matters such as the underpayment of wages or other monetary entitlements of employees, and the unfair dismissal of employees. The FWO should have the same powers in investigations into similar matters involving regulated workers, otherwise this would perpetuate the disadvantage already faced by these workers.

244. Extending the FWO notice regime to breaches of MSOs and collective agreements would ensure the FWO's coercive powers would continue to only be used for the

intended purpose of facilitating investigations into the exploitation of vulnerable workers, specifically in relation to underpayments and entitlements.

245. Additionally, the FWO notice regime has adequate safeguards, including:

- The requirement that the FWO believes on reasonable grounds that a person has informational documents relevant to an investigation and is capable of giving evidence and sets this out in an affidavit.
- The requirement that an AAT member can only issue the FWO notice if satisfied that there are reasonable grounds to believe the person has information or documents or is capable of giving evidence relevant to the investigation and that of obtaining information, documents or evidence have been attempted and have been unsuccessful or are not appropriate.
- Protection from liability relating to FWO notices.
- The requirement that the FWO notify the Commonwealth Ombudsman of the issue of a FWO notice and provide a report about the examination.

Amendment of the *Asbestos Safety and Eradication Agency Act 2013*

246. New section 14A inserted by Schedule 2 would provide for the Chief Executive Officer of the Agency to request information from a person in certain circumstances and an express permission for a person to provide the requested information.

247. New subsections 14A(5)–(6) would provide an express permission that a person can rely on to provide the requested information, if they consider the disclosure to the new Agency is appropriate. This express permission would not compel a person to provide information when requested. New subsection 14A(6) would provide that a person may disclose information to the Agency in response to a request despite anything in a law of the Commonwealth (other than the ASEA Act) or a law of a State or Territory. This means that a non-disclosure provision in other legislation that would otherwise prevent information being disclosed to the new Agency, does not prevent its disclosure.

248. This amendment engages the right to privacy because information that may be disclosed could include personal information and non-disclosure provisions that otherwise apply may be overridden.

249. To the extent that the right to privacy is limited by the amendment it is considered that limitation is necessary to achieve a legitimate objective. The purpose of the amendment is to ensure that information necessary to support the Agency's research, data and reporting functions can be collected. Silica issues are complex and require coordination and information sharing across portfolios as well as jurisdictions. This amendment is intended to facilitate information sharing between government agencies and bodies. New section 14A is framed broadly to provide flexibility for the future. For example, ASEA has a very cooperative approach and in the future the Agency may form partnerships with non-Governmental organisations and request information from such bodies as well.

250. Tracking progress against the national strategic plans and developing evidence-based research relies on input from a range of sources including all State and Territory governments. This amendment would ensure that persons with relevant information are able to provide that information to the Agency.

251. The amendment is reasonable and proportionate, as information must be necessary for the performance of the Agency's research, data and reporting functions. This would involve for example, data on number of diagnosed cases of silicosis or other silica-related diseases in each State and Territory. It would not include for example, a person's medical record as that would not be necessary for the performance of the Agency's functions. Failing to fulfil a request would not be an offence and broad discretion will be retained by the person holding information. There could be a range of legitimate reasons why a request may not be fulfilled, including if, for example, providing the information requested would cause unnecessary duplication of work and create an administrative burden on the person.

252. The Agency would be subject to a range of obligations to ensure that the information it obtains is handled appropriately:

- Personal information collected by the Agency is subject to the requirements of the *Privacy Act 1988* which governs its collection, use, disclosure, storage and disposal.
- As Australian Public Service (APS) employees, the Agency's employees would be bound by the APS Code of Conduct, including regulation 2.1 (duty not to disclose information) which applies to information obtained by the Agency related to the performance of its statutory functions. A breach of the Code of Conduct by an APS employee may lead to the imposition of sanctions up to and including termination of employment.
- The Criminal Code includes offences relating to the unauthorised disclosure of information by current (and former) Commonwealth officers, including APS employees, punishable by terms of imprisonment (of between two and seven years depending on the circumstances of the offence).

Right to freedom of association

253. Article 22 of the ICCPR protects the right to freedom of association, including the right to form and join trade unions. Article 8(1)(c) and (d) of the ICESCR also support the right to freedom of association by providing that States Parties undertake to ensure the right to form and join trade unions and the right to strike, including picketing activities. There are also specific obligations relating to freedom of association in the ILO's *Freedom of Association and Protection of the Right to Organise Convention 1948* (No. 87) and *Right to Organise and Collective Bargaining Convention 1949* (No. 98).

Workplace delegates' rights

254. Workplace delegates have various roles and responsibilities necessary for the ongoing support and functioning of registered employee organisations. They can serve as the first point of contact for members of an employee organisation within the workplace,

including when a worker is considering joining an employee organisation, and represent worker concerns in the workplace.

255. There is currently limited legislative protection or specific rights for workplace delegates performing these roles within a workplace. Delegates may have to use annual leave or take unpaid time off work to undertake training necessary to their roles in the registered organisation. Employers may also seek to prevent delegates from communicating with members or eligible members while at the employer's premises. Consequently, in some circumstances it may be difficult for delegates to provide effective support and representation to members and eligible members in the workplace. Imposing such restrictions on workplace delegates can have an impact on how effectively they can perform their roles, and consequently take lawful industrial activity and protected industrial action.

256. Part 7 of Schedule 1 would require that modern awards and all new enterprise agreements contain a term that deals with workplace delegates' rights. These terms must include a right to represent members within their workplace and various supporting rights, including rights to reasonable access to paid time off for training, and reasonable access to the workplace and workplace facilities for advancing their members' industrial interests. The Bill would support these new protections for workplace delegates by introducing a specific protection against an employer unreasonably failing or refusing to deal with the workplace delegate, making a false or misleading representation to the workplace delegate, or unreasonably hindering or obstructing the exercise of a workplace delegate's rights.

257. These amendments would positively engage the right to freedom of association, particularly Article 8(c) of the ICESCR which guarantees the right of trade unions to function freely, subject to no limitations other than those prescribed by law. These amendments would ensure that workplace delegates are afforded these basic primary rights within the workplace to carry out their delegate duties.

Exemption certificates for suspected underpayment

258. These amendments would positively engage the right to freedom of association, particularly Article 8(1)(c) of the ICESCR which guarantees the right of trade unions to function freely, subject to no limitations other than those prescribed by law. Of particular relevance is guidance provided by the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Conference which acknowledges 'the right of trade union officers to have access to places of work' pursuant to Article 3 of ILO Convention 87 (*Freedom of Association and Collective Bargaining*, 81st session, Report III, Part 4B at [128]).

259. Part 3-4 of the FW Act provides a framework for right of entry for officials of organisations and employers the FWC to deal with the misuse of rights and disputes.

260. These amendments would waive the minimum 24-hour notice period required for entry to investigate a suspected contravention of the FW Act, or a term of a fair work instrument, in specified circumstances, namely, that the permit holder's organisation

has been issued with an exemption certificate on the ground of a suspected underpayment. This would enhance access to the workplace for officials of registered organisations (who are permit holders) to effectively investigate suspected contraventions and exercise powers under Part 3-4 including interviewing relevant persons and inspecting relevant records and documents.

261. In addition, the measure will protect permit holders exercising rights under Part 3-4 against people acting in an improper manner towards them.

262. The measure positively engages the right to freedom of association by enhancing the ability of permit holders to investigate suspected wage underpayments.

Withdrawal from amalgamations

263. This measure engages the right to freedom of association and the right to take part in public affairs and elections, by proposing to:

- repeal provisions of the RO Act that enable applications for a de-merger ballot to the FWC (to initiate a de-merger process) to be made more than five years after the relevant amalgamation (RO Act, section 94A); and
- repeal paragraph (c) of the definition of 'separately identifiable constituent part' to restore certainty about the part(s) of an organisation that may be subject to a de-merger ballot (RO Act, section 93(1)).

264. This measure would restore the provisions as they were before amendments made by the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Bill 2020* (2020 amendments). The measure would strengthen the principle of freedom of association by removing the instability and uncertainty that has been brought about by the 2020 amendments.

265. The measure would restore the old arrangements for de-amalgamations, which provide a reasonable opportunity for members of a constituent part of an amalgamated organisation with a connection to a previously de-registered organisation to de-merge within a period of two to five years after the relevant amalgamation occurred. The measure would also not preclude members from forming, joining or seeking the registration of trade unions and employer organisations subject to the requirements of the RO Act and the rules of those organisations.

Provisions relating to regulated workers

266. The new collective agreement framework in Part 16 of Schedule 1 would provide for the making of collective agreements between regulated businesses and organisations that are entitled to represent the industrial interests of regulated workers. Further, organisations that represent the industrial interests of a person who is party to a services contract would be able to apply to the FWC for a remedy under the new unfair contract terms provisions. These amendments would positively engage the right to freedom of association by enhancing the ability of trade unions to advocate for their members and enhancing their role.

267. Item 268 would insert new subsection 350(2A), which would provide that a regulated business must not induce a regulated contractor to take, or propose to take, membership action. While existing subsection 350(2) would apply to most regulated businesses and regulated workers, it would not necessarily apply to those digital labour platforms that do not directly enter into a contract for services with an independent contractor. As such, new subsection (2A) would ensure these digital labour platform operators, and their workers are also covered. Under existing subsection 350(3), a person takes membership action if they become, do not become, remain or cease to be, an officer or member of an industrial association. By extending this protection to more people, the Bill would promote the right to freedom of association.

Mediation and conciliation conference orders

268. On 6 June 2023, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (SJBP Act) made a number of changes to the process for applying for a protected action ballot (PAB) order. Relevantly, the SJBP Act inserted section 448A into the FW Act, which provides that if the FWC has made a PAB order in relation to a proposed enterprise agreement, the FWC must make an order directing the bargaining representatives for the agreement to attend a conciliation conference during the PAB period. These amendments were intended to de-escalate disputes by providing an opportunity for parties to further negotiate and potentially resolve, or at least reduce, matters in dispute.

269. In *CEPU v Nilsen (NSW) Pty Ltd* [2023] FWCFB 134, a Full Bench of the FWC considered the new provisions and noted (at [69]) that non-compliance with an order to attend a conciliation conference by one or more employee bargaining representatives could render subsequent employee claim action unprotected – for both those represented by the non-complying bargaining representative and for others participating in the action.

270. The Bill would enhance the right to freedom of association by removing this barrier that might prevent employees from engaging in employee claim action in circumstances where their bargaining representative has complied with an order to attend a conciliation conference. The amendments would only require the employee bargaining representative (or representatives) who applied for the PAB order to attend the conciliation conference in order for the subsequent employee claim action to be protected. If any other bargaining representative failed to attend the conference, this would not render subsequent employee claim action unprotected.

271. The Bill also positively engages the right to freedom of association by clarifying the circumstances in which an employer can engage in employer response action. The amendments would clarify that the employer organising or engaging in employer response action in response to employee claim action authorised by a PAB, or their bargaining representative, must attend the conciliation conference in order for the employer response action to be protected.

Right to collective bargaining

272. ILO Convention 98 protects the right of workers to collectively bargain for terms and conditions of employment. It requires States Parties (among other things) to take measures appropriate to national conditions to encourage and promote machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Enabling multiple franchisees to access the single-enterprise stream

273. Part 3 of Schedule 1 would enhance the ability of employees of franchisees to collectively bargain for terms and conditions of employment by allowing them to access the single-enterprise stream. This would provide employees of franchisees with more options when bargaining, and would allow employees of franchisees to access a more straightforward bargaining stream.

274. Franchisees are able to access the existing single interest employer stream, in Division 10 of Part 2-4 (Enterprise agreements) of the FW Act, where the application for a single interest employer authorisation is made by the employers that would be covered, or by a bargaining representative for an employee who would be covered where other criteria are satisfied including that each employer employs at least 20 people. Employees of franchisees that employ fewer than 20 people may therefore be unable to access this stream without the consent of the employers concerned.

275. Allowing franchisees to access the single-enterprise agreement stream will remove this barrier, allowing employees of franchisees to seek a majority support determination regardless of the number of employees of each franchisee. The Bill would therefore promote the right to collective bargaining by providing an additional means of reaching agreement on the terms and conditions of employment which may be more accessible for employees of franchisees where the employer does not consent to multi-enterprise bargaining and each individual employer employs fewer than 20 people.

276. The single-enterprise agreement stream may also be the preferable bargaining stream for franchisees as a separate vote at each franchise would not be required. This is intended to make bargaining for such an agreement more attractive to franchisees and increase the willingness of franchisees to bargain with their employees.

277. By making bargaining more accessible and more attractive to franchisees, the Bill is intended to increase bargaining between franchisees and their employees. In this way, the Bill would support the right to collective bargaining.

Transitioning from multi-enterprise agreements

278. Part 4 of Schedule 1 supports the right to collective bargaining as it expands the circumstances in which an enterprise agreement can be bargained for and made. The amendments in Part 4 would allow a single-enterprise agreement to be made with employees to whom a single interest employer agreement or supported bargaining agreement that has not nominally expired applies.

279. At present, an employer specified in a supported bargaining authorisation is prohibited from bargaining for a single-enterprise agreement with employees covered by a supported bargaining authorisation unless all of its employees are covered by a supported bargaining agreement. Part 4 would allow bargaining for a replacement single-enterprise agreement to occur where not all of the employees specified in the authorisation are covered by a supported bargaining agreement. This would support the right to collective bargaining.

Provisions relating to regulated workers

280. New Part 3A-4 inserted by Part 16 of Schedule 1 would allow the FWC to register consent collective agreements between a digital labour platform operator and an organisation entitled to represent employee-like workers, or a road transport business and an organisation entitled to represent regulated road transport contractors. In doing so, it would promote the right to collectively bargain consistently with the objectives and provisions of ILO Convention 98.

281. Collective agreements would be about the terms and conditions under which regulated contractors perform work. The collective agreement making process would be simple and flexible and ensure that barriers to making and implementing agreements are as low as possible. Parties would be free to negotiate the terms of a collective agreement without interference. This would act as an incentive to make a collective agreement.

282. Further, section 536JT would authorise certain conduct for the purposes of subsection 51(1) of the *Competition and Consumer Act 2010* (CCA) and Competition Code. This would include making a collective agreement and anything done by a person or entity in preparation for, or incidental to, making, or applying for registration of, a collective agreement. This authorisation would enable the relevant parties to make and comply with collective agreements without breaching the CCA and Competition Code. By limiting appropriately these competition related restrictions on the ability to make collective agreements, this measure would further promote the right to collectively bargain.

Right to equality and non-discrimination

283. Both the ICCPR (Article 2(1)) and the ICESCR (Article 2(2)) require States Parties to the covenants to guarantee that the rights set out in these covenants are exercised without discrimination of any kind, including on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 of the ICCPR further provides that States Parties must ensure that all persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law.

Stronger protections against discrimination

284. Adding 'subjection to FDV' as a protected attribute in the FW Act would promote the rights to equality and non-discrimination by protecting vulnerable employees from discrimination within Australia's workplaces. Terms within modern awards and enterprise agreements that discriminate against an employee because they have been, or

continue to be, subjected to FDV would be prohibited by these amendments. The amendments would also protect employees and prospective employees from adverse action, such as being dismissed or refused employment, on account of the employee's or prospective employee's subjection to FDV. The amendments would further promote anti-discrimination protections and equality by requiring the FWC to consider the need to prevent discrimination against employees subjected to FDV whilst performing its functions. The amendment would also complement protections against discrimination for victim-survivors of FDV which exist in some States and Territories.

Right of women not to be discriminated against based on gender

285. The CEDAW provides that in relation to discrimination against women, State Parties must:

- ensure the effective protection of women against acts of discrimination (Article 2(c));
- ensure the full development and advancement of women (Article 3); and
- take all appropriate measures to eliminate discrimination against women in the field of employment to ensure the same rights between men and women (Article 11). This includes the right to equal remuneration, equal treatment in respect of work of equal value, and equality of treatment in the evaluation of the quality of work (Article 11(1)(d)).

286. Article 26 of the ICCPR requires State laws to guarantee equal and effective protection against discrimination on a number of grounds, including sex.

Casual employment

287. The Workplace Gender Equality Agency has noted that women are overrepresented in casual employment.[5] Furthermore, ABS data shows that not only are women more likely than men to be casual (53.2 per cent of casual employees are women),[6] they are more likely than men to be long term casuals. Of the 752,200 casual employees employed for more than two years, 55.7 per cent were women.[7]

288. This may add to the gender pay gap, noting casual employees are, on average, paid less than permanent employees, and exacerbates job insecurity for women workers. Casual employee average weekly earnings (in main job) were $845.60, whereas permanent employee average weekly earnings were $1,691.10, a difference of $845.50.[8]

289. The amendments that would be made by Part 1 of Schedule 1 would positively engage the right of women not to be discriminated against based on gender by providing an easier pathway to permanent employment for those who choose it.

[5] Workplace Gender Equality Agency, Australia's Gender Equality Scorecard: Key results from the Workplace Gender Equality Agency's Employer Census 2021-22, https://www.wgea.gov.au/sites/default/files/documents/WGEA-Gender-Equality-Scorecard-2022.pdf.
[6] ABS, Labour Force Survey Detailed, May 2023.
[7] ABS, Characteristics of Employment, August 2022, unpublished TableBuilder.
[8] ABS, Characteristics of Employment, August 2022, unpublished TableBuilder.

Stronger protections against discrimination

290. While FDV can affect anyone, it is recognised as a form of gendered violence that disproportionately affects women. Discrimination on the basis of subjection to FDV is therefore more likely to affect employees and prospective employees who are women. The amendments in Part 8 of Schedule 1, by protecting against such discrimination, would positively engage the rights of women not to be discriminated against based on gender in the context of employment.

Rights of parents and children

291. Article 3(1) of the CRC provides that the best interests of the child must be a primary consideration in all actions undertaken by legislative bodies.

292. Article 18(1) of the CRC goes on to state that parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of their children. Similarly, Article 5(b) of the CEDAW provides parties shall take measures to promote the recognition of the common responsibility of men and women in the upbringing and development of their children.

Casual employment

293. The amendments that would be made by Part 1 of Schedule 1 would positively engage the right to protection and assistance for families by providing a pathway to permanent employment for casual employees in caring roles. Employees who are classified as casual on engagement but whose working arrangements thereafter are not reflective of true casual employment could more easily opt to change their status to permanent under the proposed amendments. This would provide an opportunity for these employees to access paid leave and other entitlements in relation to care and family responsibilities, including paid carer's leave, which is not available to casual workers.

Conclusion

The Bill is compatible with human rights because it promotes human rights, including civil, political, social, economic and labour rights. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Minister for Employment and Workplace Relations, the Hon Tony Burke MP

NOTES ON CLAUSES

In these notes on clause, the following abbreviations are used:

Abbreviation	Definition
2019 ASEA Review	*Review of the Asbestos Safety and Eradication Agency's Role and Functions – Final Report*
2020 RO Amdt Act	*Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020*
Advisory Committee	Family and Injured Workers Advisory Committee
AEC	Australian Electoral Commission
AFP	Australian Federal Police
Agency	Asbestos and Silica Safety and Eradication Agency
AI Act	*Acts Interpretation Act 1901*
AMSA	Australian Maritime Safety Authority
ASEA	Asbestos Safety and Eradication Agency
ASEA Act	*Asbestos Safety and Eradication Agency Act 2013*
ASSEA Act	*Asbestos and Silica Safety and Eradication Agency Act 2013* This refers to the ASEA Act as it would be amended by the Bill
Bankruptcy Act	*Bankruptcy Act 1966*
Bill	Fair Work Legislation Amendment (Closing Loopholes) Bill 2023
Boland Review	*Review of the Model Work Health and Safety Laws – Final Report*
BOOT	Better off overall test
CDPP	Commonwealth Director of Public Prosecutions
CEO	Chief Executive Officer of the Asbestos Safety and Eradication Agency

Abbreviation	Definition
CFMMEU	Construction, Forestry, Maritime, Mining and Energy Union
Coal LSL Administration Act	*Coal Mining Industry (Long Service Leave) Administration Act 1992*
Coal LSL Corporation	Coal Mining Industry (Long Service Leave Funding) Corporation
Corporations Act	*Corporations Act 2001*
Council	Asbestos and Silica Safety and Eradication Council
CPI	Consumer Price Index (national)
Crimes Act	*Crimes Act 1914*
Criminal Code	Schedule 1 to the *Criminal Code Act 1995*
Department	Department of Employment and Workplace Relations
ELGs	Employee-like Worker Guidelines
ELMSO	Employee-like minimum standards order
Fair Work Inspector	A person appointed as a Fair Work Inspector under section 700 or the FWO in their capacity as such
FDV	Family and domestic violence
Federal Court	Federal Court of Australia
Federal Court of Australia Act	*Federal Court of Australia Act 1976*
FEG Act	*Fair Entitlements Guarantee Act 2012*
FW Act	*Fair Work Act 2009*
FW Regulations	*Fair Work Regulations 2009*
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
Guide	*Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*
IC Act	*Independent Contractors Act 2006*

Abbreviation	Definition
ICCPR	International Convention on Civil and Political Rights
IFA	Individual Flexibility Arrangement
ILO	International Labour Organisation
ILO Convention 111	*Discrimination (Employment and Occupation) Convention 1958* (No. 111)
ILO Convention 190	*Violence and Harassment Convention 2019* (No. 190)
Legislation Act	*Legislation Act 2003*
Migrant Workers' Taskforce	The taskforce established in 2016 to identify proposals for improvements in law, law enforcement and investigation, and other practical measures to more quickly identify and rectify any cases of migrant worker exploitation, and chaired by Professor Allan Fels AO and Dr David Cousins AM
Minister	Minister for Employment and Workplace Relations
M&E Division	Mining and Energy Division
MEU	Mining and Energy Union
Model Act	*Model Work Health and Safety Act*
MSGs	Minimum Standards Guidelines
MSO	Minimum Standards Order
National Principles	*National Principles to support families following an industrial death*
NDDT	National Dust Diseases Taskforce
NES	National Employment Standards
NOPSEMA	National Offshore Petroleum Safety and Environmental Management Authority
NORDR	National Occupational Respiratory Disease Registry
NPEVWC	National Plan to End Violence against Women and Children 2022–2032

Abbreviation	Definition
NWRCC	The council by the name of the National Workplace Relations Consultative Council, established under section 4 of the National Workplace Relations Consultative Council Act 2002
OHS(MI) Act	*Occupational Health and Safety (Maritime Industry) Act 1993*
PAB	Protected action ballot
PCBU	Person conducting a business or undertaking
President	President of the Fair Work Commission
RO Act	*Fair Work (Registered Organisations) Act 2009*
RTAG	Road Transport Advisory Group
RTGs	Road Transport Guidelines
RTMSO	Road Transport Minimum Standards Order
Senate Inquiry	*They never came home – the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*
SJBP Act	*Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*
SRC Act	*Safety, Rehabilitation and Compensation Act 1988*
SWA	Safe Work Australia
UCT	Unfair contract term
WHS	Work Health and Safety
WHS Act	*Work Health and Safety Act 2011*
WHS Regulations	*Work Health and Safety Regulations 2011*

Clause 1: Short title

294. This is a formal provision specifying the short title of the Act.

Clause 2: Commencement

295. The table in this clause sets out when the provisions of the Bill commence.

Clause 3: Schedules

296. This clause gives effect to the provisions in the Schedules to the Bill.

Clause 4: Review of operation of amendments

297. This clause would require the Minister to cause a review to be conducted of all amendments made by the Bill. Including a statutory review provision in this Act is consistent with the approach to reviews in recent workplace relations legislation. It will provide for a review to be conducted following the commencement of all provisions in this Bill, allowing for a consideration of their impact and whether further legislative amendments may be necessary to improve their operation.

298. Subclause 4(2) sets out the matters that must be considered when conducting the review, as part of a non-exhaustive list.

299. Subclause 4(3) would require the statutory review to start no later than two years after Royal Assent.

300. Subclauses 4(4)–(5) would require a written report of the review to be provided to the Minister within six months of the commencement of the review, and set out the tabling requirements for the report.

SCHEDULE 1—MAIN AMENDMENTS

Part 1—Casual employment

Amendments to the *Fair Work Act 2009*

301. Part 1 would repeal the definition of casual employee at existing section 15A in Division 3 of Part 1-2, and introduce a new fair and objective definition which would draw on core elements of the meaning of casual employment as it was understood before the decision of the High Court of Australia in *WorkPac Pty Ltd v Rossato* [2021] HCA 23 (*Rossato*). The amendments would provide clear points in time at which the definition is to be applied, to provide certainty as to status. Together with amendments to enhance employee choice, the new definition would expand access to permanent employment for those employees who seek it.

302. Part 1 would also provide an enhanced pathway for casual employees to move to full-time or part-time employment if they wish to do so. The new framework would provide clear processes for employee driven choice about employment status which would supplement existing provisions enabling conversion in specified circumstances and the contractual ability of employees and employers to change employment status by consent. This would be underpinned by the new fair and objective test for when an employee can be classified as a casual employee of an employer, an effective dispute resolution process and strong protections against conduct designed to avoid or undermine the new framework. The new framework would retain the existing statutory offset rule in section 545A.

303. Part 1 would also amend existing Division 4A of Part 2-2 by introducing a new notification process underpinned by employee choice. This new process would enable an employee to notify their employer if they believe they are no longer, at that point in time, a casual employee within the meaning of the new definition of casual employee. This process would provide a new legislative pathway to full-time or part-time employment driven by employee choice in addition the existing casual conversion pathway.

304. Part 1 would also strengthen dispute resolution for employers and employees who have a dispute about the operation of amended Division 4A of Part 2-2, including by allowing the FWC to deal with disputes by arbitration and make any orders it considers fair and reasonable.

305. Part 1 would also include new civil remedy provisions in Division 6 of Part 3-1, the general protections provisions, to protect against conduct designed to result in the misclassification of casual employees.

Item 1: Section 15A

Section 15A Meaning of casual employee

306. This item would repeal the definition of casual employee at existing section 15A in Division 3 of Part 1-2 and substitute a new definition of casual employee. A casual employee within the meaning of new subsections 15A(1)–(2) would remain a casual employee until the occurrence of an event specified in new subsection 15A(5).

307. The new meaning of casual employee would:

- provide a fair and objective test to determine when a person can be classified as a casual employee;
- provide certainty about when a casual employee would change or convert their employment status from casual to full-time or part-time employment; and
- ensure that backpay liabilities could not arise because of a change in an employee's status during their employment.

308. Taken together with the new pathways for employees to seek to have their status under the definition recognised, this definition would provide greater access to permanent employment opportunities for those employees who seek it.

309. The new meaning of casual employee would underpin the new employee choice pathway (new Subdivision B—Employee choice about casual employment in Division 4A of Part 2-2), which would allow a casual employee who believes they are no longer a casual employee to notify their employer, at that point in time, and effect a change in their employment status with their employer to full-time or part-time employment (subject to the grounds for not accepting an employee notification at new subsection 66AAC(4)).

310. **General rule:** New subsection 15A(1) would introduce a general rule that defines an employee as a 'casual employee' of an employer if both of the following conditions are satisfied:

- the employment relationship is characterised by an absence of a firm advancement commitment to continuing and indefinite work (new paragraph 15A(1)(a)); and
- the employee would be entitled to a casual loading, or a specific rate of pay for casual employees under the terms of a fair work instrument if the employee were a casual employee, or the employee is entitled to such a loading or rate of pay under the contract of employment (new paragraph 15A(1)(b)).

311. The 'absence of a firm advance commitment to continuing and indefinite work' would be the central element of the new meaning of casual employee, and the key feature distinguishing casual employment from full-time or part-time employment. There is no requirement for the 'continuing and indefinite work' to be according to an agreed pattern of work, unlike the existing definition or the position at common law before *Rossato*. The intention is to expand access to secure work for an employee engaged in a manner substantially consistent with full-time or part-time employment, and reflective of the patterns of work of these employees.

312. The new meaning of casual employee would draw on core elements of the meaning of casual employment, as it was understood prior to the decision of the High Court in *Rossato*, including considerations to inform the objective assessment of whether there is an absence of a firm advance commitment to continuing and indefinite work. These considerations would capture all aspects of the employment relationship and require an objective assessment of the totality of the employment relationship.

313. **Indicia that apply for the purposes of the general rule**: New subsection 15A(2) would set out a number of considerations which would need to be assessed when considering whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work (new paragraph 15A(1)(a)).

314. Firstly, the relationship would be required to be assessed based on the real substance, practical reality and true nature of the employment relationship, as was the approach in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 at [180] (new paragraph 15A(2)(a)).

315. This would require an objective assessment of the totality of the relationship, and not just the terms of the contract of employment, in assessing whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work.

316. Secondly, a firm advance commitment may be in the form of a mutually agreed term in a contract of employment, or a mutual understanding or expectation between an employer and employee (new paragraph 15A(2)(b)). A firm advance commitment may be discerned from a mutual understanding or expectation between an employer and employee irrespective of the terms of the contract of employment. The mutual understanding or expectation does not need to amount to a contract or a variation of the contract of employment. A mutual understanding or expectation could be inferred from how the employment contract is performed, or the conduct of the employer and employee after entering into the employment contract (see new paragraph 15A(3)(a)).

317. The intention of this provision is to ensure that the assessment would be genuinely objective and not limited by the subjective views of the parties. Contrary to the result in *Rossato*, a firm advance commitment would not be required to be an 'enforceable commitment'. A firm advance commitment could be identified, for instance, on the basis of ongoing work performed on a regular, systematic, stable or predictable basis performed over a sufficient length of time.

318. Finally, in assessing the employment relationship (on the basis of new paragraphs 15A(2)(a)–(b)), regard would be required to the following potential indicators that the employment relationship is not casual:

- whether there is an inability of the employer to elect to offer work and/or an inability of the employee to elect to accept or reject work and whether this inability occurs in practice (new subparagraph 15A(2)(c)(i));
- whether it is reasonably likely that continuing work of the kind performed by the employee, in the employer's enterprise, will be available in the future, having regard to the nature of the employer's enterprise (new subparagraph 15A(2)(c)(ii));
- whether there are full-time or part-time employees in the employer's enterprise performing the same kind of work usually performed by the employee (new subparagraph 15A(2)(iii)) – this comparison may demonstrate that the work usually performed by the employee in the employer's enterprise is or is not able to be performed on a full-time or part-time basis; and

- whether there is a regular pattern of work for the employee (new subparagraph 15A(2)(c)(iv)) – this regular pattern of work may include some fluctuations or variations over time, including for reasonable absences such as for illness, injury or recreation, and does not need to be absolutely uniform (see new paragraph 15A(3)(c)). A regular pattern of work may be (but is not necessarily) indicative of a firm advance commitment to continuing and indefinite work. This reflects the former position under the general law, according to which it was the informality, uncertainty and irregularity of an engagement that gave it the characteristic of being casual: *Reed v Blue Line Cruises Ltd* (1996) 73 IR 420.

319. The considerations in new paragraph 15A(2)(c) would not be exhaustive, but each of the considerations listed would need to be taken into account when assessing whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work. Not all considerations need to be satisfied to establish the employment relationship is characterised by a firm advance commitment to continuing work (see new paragraph 15A(3)(b)).

320. A legislative note to new subsection 15A(2) would clarify that a regular pattern of work does not of itself indicate a firm advance commitment to continuing and indefinite work. That is, an employee who has a regular pattern of work may still be a casual employee if there is no firm advance commitment to continuing and indefinite work.

321. New paragraph 15A(3)(b) would clarify that no single consideration in new paragraph 15A(2)(c) is determinative of a firm advance commitment to continuing and indefinite work and not all the considerations listed in new paragraph 15A(2)(c) need to be satisfied to establish a firm advance commitment.

322. Together, these two items support the emphasis of the new objective definition in section 15A being on the totality of the employment relationship. A regular pattern of work neither automatically means the employee is casual, nor does it mean the employee is *not* casual. The assessment should consider the real substance, practical reality and true nature of the employment relationship, not a single factor in isolation.

Illustrative examples

Example 1: University student

Quyen is a university student who obtains a casual bar attendant position at her local hotel. Quyen chooses to accept casual employment as she prefers the flexibility to accommodate university commitments and the 25 per cent casual loading.

Upon commencement, Quyen and her employer have a discussion. Quyen advises her employer that she is available to work on Friday and Saturday nights only. Quyen advises that she is unavailable to work at any other time, due to study commitments. In response, the employer offers Quyen casual shifts each Friday and Saturday night, with Quyen able to reject any shifts if unavailable. This suits the employer's operational requirements and fits in with Quyen's advised availability. The employer explains to Quyen that there is no firm

advance commitment to continuing and indefinite work in the business, which is reflected in a written employment contract. Quyen accepts the contract and commences work.

Irrespective of the offer of regular shifts to accommodate Quyen's university schedule, the employer has made no firm advance commitment to Quyen to continuing and indefinite work upon commencement; which means Quyen is correctly classified as a casual within the meaning of section 15A.

After 6 months working with the local hotel, Quyen considers her circumstances and is happy to continue working as a casual employee each Friday and Saturday night when available, and decides not to give her employer written notice seeking to change from casual to part-time employment.

Example 2: Mature age pensioner

Barry has retired from full time work and is on the part pension. Barry is offered casual employment at Parliament House on the basis that his employer expects to be able to offer him shifts on sitting days. The Parliamentary calendar is provided to Barry upon commencement in November for the next year, although it is subject to change.

Barry receives no guaranteed hours from the employer, nor a firm advance commitment that he will be offered casual shifts on every sitting day. This flexibility works well for Barry, as it provides him with the autonomy to accept or reject work so as not to impact on his pension. Barry is a casual employee upon commencement within the meaning of section 15A.

Example 3: Firm advance commitment

Alex accepts a casual position as a security guard at a shopping centre. The contract of employment Alex receives contains terms to the effect that they will be required to work rostered shifts each Thursday late night and at least one weekend day each week, and will be paid a 25 per cent loading.

The contract communicates the firm advance commitment to continuing and indefinite work that Alex's employer makes to them. Due to the stated requirement for Alex to work those rostered shifts on Thursday evenings and over the weekend (as opposed to stating an expectation for their availability to work at peak trading times), it does not appear that Alex has the ability to elect to accept or reject work. The contract of employment does not include a term that provides the contract will terminate at the end of an identifiable period, or a term that limits the above requirement to work each Thursday night and one weekend day, to a specified season or period.

These considerations indicate Alex's employment should be characterised as permanent part-time and not casual within the meaning of section 15A.

If Alex questions their classification and they are found to have been misclassified as casual, amounts payable to Alex for relevant entitlements as a permanent employee can be reduced by an amount equal to the casual loading paid to them already. If Alex was mistakenly

misclassified and the employer reasonably believed Alex would be correctly classified as a casual, no penalty would apply for misrepresentation.

323. **Exceptions to general rule:** From 6 December 2023, the FW Act will include specific provisions limiting the use of fixed term contracts. These limitations do not apply to casual employees. To ensure that casual employment is not used to undermine the limits on fixed term contracts, new subsection 15A(4) would provide that, generally, a casual employee cannot be engaged on a fixed term contract – that is, a contract which includes a term providing the contract will terminate at the end of identifiable period, whether or not the contract also includes a term that provides for circumstances in which the contract may be terminated earlier than the end of identifiable period (new paragraph 15A(4)(a)).

324. However, the limitation on casual employees being engaged on fixed term contracts will not apply if the identifiable period is identified by reference to a specified season, or the completion of the shift of work to which the contract of employment relates (new paragraph 15A(4)(b)). As a consequence, a casual employee would be able to be engaged for the duration of a season, such as a fruit picking season, or as a labourer on a shift by shift basis.

325. The term 'season' is not defined in the Bill and would take its ordinary meaning. This means 'season' would include, for example, a generally recognised season of the year (Spring, Summer, Autumn, Winter), a particular period marked by festivity (such as Christmas, Easter, and Ramadan), or a period generally described with reference to seasonality (such as a fruit picking season, football season, or ski season). It would not refer to simply any defined period of time.

326. Consistent with this, a note to subsection 15A(4) would clarify that a 'specified season' does not include a university semester or a school term.

327. **Employees engaged as casual employees remain so until the occurrence of a specified event:** New subsection 15A(5) would specify an exhaustive list of events which would result in casual employee changing status to full-time or part-time employment if specified events were to occur.

328. The effect of this new subsection is to provide certainty that a person who commences employment as a casual employee within the meaning of new subsections 15A(1)–(4) will remain a casual employee of the employer until:

- the employment status of the employee is changed or converted to full-time or part-time employment under new Division 4A of Part 2-2, including by the employee choice pathway in new Subdivision B, or the existing casual conversion pathway in new Subdivision C (new paragraph 15A(5)(a)); or
- the FWC makes an order under new section 66MA, or under existing section 739 in Division 2 of Part 6, changing or converting the employment status of the employee (new paragraph 15A(5)(b)); or

- the employment status of the employee is changed or converted to full-time or part-time employment under the terms of a fair work instrument that applies to the employee (new paragraph 15A(5)(c)); or
- the employer makes an alternative offer of employment to the employee and the employee commences work for the employer on a basis other than as a casual employee (new paragraph 15A(5)(d)).

329. New subsection 15A(5) would provide certainty about when the employment status of a casual employee would change or convert to full-time or part-time employment and about entitlements payable to casual employees. If an employee was correctly classified as a casual employee on engagement within the meaning of new subsections 15A(1)–(4), they would remain a casual employee until such time that an event specified in new subsection 15A(5) occurred.

330. However, as under the existing definition of casual employee, if an employer misclassifies an employee as a casual employee at commencement of the employment relationship, the employee would never have been a casual employee and may make a claim to be paid an amount for one or more relevant entitlements with respect to the period they were misclassified. A court making orders in such circumstances would be required under existing section 545A to reduce any amount payable to the employee for relevant entitlements (but not below nil) by an amount equal to the casual loading amount received by the employee.

Item 2: Paragraph 61(2)(ba)

331. Existing subsection 61(2) in Division 2 of Part 2-2 lists the minimum standards that comprise the NES.

332. This item would repeal the reference to 'offers and requests for casual conversion (Division 4A);' at existing paragraph 61(2)(ba) and substitute with a reference to 'casual employment (Division 4A);' as a consequence of the amendment made by item 4.

Item 3: Subsection 65(2A)

333. Existing subsection 65(2) sets out categories of employees entitled to request flexible working arrangements. Existing paragraph 65(2)(a) provides that an employee who is not a casual employee may only request flexible working arrangements after having completed at least 12 months of continuous service. Existing subsection 65(2A) enables an employee who converts to full-time or part-time employment under existing casual conversion provisions to count the time they were a regular casual employee as continuous service for the purposes of establishing eligibility to request flexible working arrangements.

334. Item 3 would omit reference to 'converted under Division 4A of Part 2-2' in existing subsection 65(2A) and substitute 'changed or converted under Division 4A of Part 2-2', to reflect the new pathway to full-time and part-time employment provided under new Subdivision B in Division 4A of Part 2-2 ('employee choice').

335. The amendment would clarify that a period of employment as a regular casual employee would count as continuous service for the purposes of applying existing paragraph 65(2)(a) in circumstances where:

- an employee changes to full-time or part-time employment under new Subdivision B in Division 4A of Part 2-2 ('employee choice'); or
- an employee converts to full-time or part-time employment under existing Division 4A of Part 2-2 ('casual conversion') which would become new Subdivision C in Division 4A of Part 2-2.

Item 4: Division 4A of Part 2-2 (heading)

Division 4A – Casual employment

336. This item would repeal the heading 'Division 4A—Offers and requests for casual conversion' at existing Division 4A of Part 2–2 and substitute with 'Division 4A—Casual employment', to reflect the inclusion of employee choice provisions in Division 4A, as well as the existing casual conversion provisions.

337. The casual employment framework in new Division 4A of Part 2-2 would have four subdivisions:

- Subdivision A, setting out the general application rule and object for Division 4A;
- Subdivision B ('employee choice'), setting out a process for an employee (if they choose) to notify their employer in writing that they believe they no longer meet the requirements in subsections 15A(1)–(4), and a procedure for the employer to respond;
- Subdivision C ('casual conversion'), setting out a process for casual conversion, including a requirement for an employer to offer eligible casual employees conversion to full-time or part-time employment within 21 days after the end of the 12 month period from the employee's commencement of employment unless they have reasonable grounds not to offer; and
- Subdivision D, dealing with other provisions relevant to employee choice and casual conversion, including its effect and dispute resolution options.

338. The new casual employment framework in Division 4A of Part 2-2 would form part of the NES. The established interaction rules at existing section 55 in Division 3 of Part 2-1 would apply. These include that a modern award or enterprise must not exclude any provision of the NES.

339. Nothing would prevent an employer and employee from agreeing to a change of employment status outside the employee choice and casual conversion pathways in Division 4A of Part 2-2. If they do so, this change of status would be recognised under new paragraph 15A(5)(d).

Item 5: After section 66A

Section 66AAA Object of this Division

340. This Item would insert a new section 66AAA, to introduce an object into Division 4A of Part 2-2.

341. New section 66AAA would set out the intent to establish a new framework for changes to, or conversion of, casual employment status that:

- is quick, flexible, and informal;
- addresses the needs of employers and employees; and
- provides dispute resolution supporting casual employees' choice about employment status.

342. Existing paragraph 578(a) requires the FWC to take the objects of the FW Act, or any part of the FW Act, into account when performing its functions or exercising powers in relation to disputes about employee choice or casual conversion. Consequently, the FWC would need to take the object in new section 66AAA into account in performing its functions under new Division 4A.

Item 6: After Subdivision A of Division 4A of Part 2-2

Subdivision B – Employee choice about casual employment

343. Item 6 would insert new 'Subdivision B — Employee choice about casual employment' in Division 4A of Part 2-2 ('employee choice'), providing a new legislative pathway to full-time or part-time employment for casual employees who no longer believe they are a casual employee within the meaning of new subsection 15A(1).

344. An eligible casual employee would be able to initiate a change to full-time or part-time employment under these provisions if the employee:

- believes they are no longer a casual employee at the point in time when they make the notification to their employer; and
- wants to change their employment status to full-time or part-time employment.

There would be no requirement for an employee to issue a notification if they do not want to change their employment status from casual to full-time or part-time employment. Employees would have complete choice about whether or not to do so. These amendments would have no effect on any casual employee, or their entitlement to a casual loading, unless the employee wishes to avail themselves of the opportunity to change status.

Section 66AAB Employee notification

345. New section 66AAB would provide rules for employees who wish to notify a change of status to their employer. An employee would need to:

- believe that their status no longer meets the definition of casual employment;
- meet minimum employment periods; and

- not be currently engaged in a dispute under new section 66M, or had certain notification or dispute resolution events occur within the preceding six months.

346. **Belief in change of status:** To be eligible to make a notification, an employee would have to believe that they are no longer, at that point in time, a casual employee, having regard to the meaning of casual employee at new subsections 15A(1)–(4).

347. **No notifications while dispute being dealt with:** A casual employee would not be eligible to issue a notification under new section 66AAB to change their employment status if a dispute between the employer and employee was already being dealt with under new section 66M, including by arbitration under new section 66MA, or under existing section 739 in Division 2 of Part 6-2 (new paragraph 66AAB(b)).

348. **Minimum employment period:** To be eligible to issue a notification under new section 66AAB, a casual employee would have to have been employed for a period, beginning on the day employment started, of at least:

- 12 months, in the case of a small business employee (new subparagraph 66AAB(c)(i)); or
- six months, for all other employees (new subparagraph 66AAB(c)(ii)).

349. **Frequency of notifications:** A casual employee would not be eligible to issue a notification to their employer if any of the events set out in the list at new paragraph 66AAB(d) had taken place in the six month period before the date the notification were to be given. If a casual employee has:

- received a response from their employer under new section 66AAC not accepting a previous employee notification made under new section 66AAB;
- received a notice from their employer under existing subsection 66C(3) not making an offer of casual conversion under existing section 66B;
- declined an offer for casual conversion under existing section 66D made by their employer under existing section 66B; or
- resolved a dispute about the operation of new Division 4A of Part 2-2, including about employee choice or casual conversion, with their employer under new section 66M, including by arbitration under new section 66MA, or under existing section 739 in Division 2 of Part 6-2 they would be required to wait a period of six months from the event before issuing a notification to their employer under new section 66AAB. If more than one event has occurred, the six month period would be counted from the last of the events.

350. This feature of the framework would protect employers against repeated attempts by a casual employee to change or convert their employment status within a six month period. Where a casual employee has had the opportunity to change or convert their employment status to full-time or part-time employment, they will not be entitled to issue a notification under new section 66AAB within a period of at least six months.

351. Restricting access to the employee choice pathway to employees with at least six months of service for casual employees of non-small business employers, and 12 months for small business employers, would provide employers and employees with sufficient time to establish and assess the real substance, practical reality and true nature of the employment relationship. The longer period provided for small business is appropriate given the significance of change of employment status for such businesses, is intended to allow small business employers additional time to understand their rights and obligations under new Division 4A of Part 2-2, and is consistent with the current eligibility timeframes under the existing casual conversion framework.

352. The employee choice pathway would sit alongside the existing casual conversion pathway, as amended by this Bill. A casual employee would not be able to access both pathways simultaneously, or within a six month period of an event under one pathway occurring (subject to the ability to change pathways once a dispute is before the FWC under new subsection 66M(7)).

Section 66AAC Employer response

353. New section 66AAC provides rules for how an employer must respond to an employee notification under new section 66AAB.

354. **Timing of notification:** An employer would be required to respond in writing to a notification from an employee under new section 66AAB within 21 days after the notification is given to them (new subsection 66AAC(1)).

355. **Information that must be included in the response:** A response would be required to state whether the employee does or does not agree with the employee notification, and different information depending on whether the employer does, or does not, accept the notification (new subsection 66AAC(2)).

356. If the employer accepts the notification, they must state:

- that they accept the notification;
- whether the employee is changing to full-time or part-time employment;
- the employee's hours of work after the change takes effect; and
- the day that the change will take effect.

357. If the employer does not accept the notification, they must state:

- that they do not accept the notification on one or more of the grounds set out in new subsection 66AAC(4);
- detailed reasons for their decision; and
- information about the employee's ability to attempt to resolve the dispute under new section 66M, and, if the dispute is not resolved, the ability of the FWC to make an order under new subsection 66MA(1).

358. **Consulting with employees:** If accepting the notification, the employer would be required to first consult with the employee on the changes to the employee's

employment, including whether the change is to full-time or part-time employment, what the employee's hours of work will be and the day the change will take effect (new subsection 66AAC(3)).

359. In general, the day the status change would take effect must be the first day of the employee's first full pay period starting after the day the response is given by the employer, unless otherwise agreed (new subsection 66AAD(2)). The written response issued by the employer, after consulting with the employee, must include this information (new subparagraph 66AAC(2)(b)(iii)).

360. If not accepting the notification, the employer would be required to first consult with the employee about their decision.

Illustrative example

Mackenzie, the new owner of a beachside café, buys an upmarket espresso machine and wants to hire a barista to operate the machine. This will enable her to focus on establishing the new business.

Mackenzie engages Gus in November, on a casual basis, paying him a 25 per cent loading and rostering him to work on an 'as needed' basis. He is a student and has nominated his availability to be Wednesday to Sunday between 7.30am–3.30pm.

She is not able to indicate how long she may be able to provide him with employment at the outset, but hopes that if the new coffee machine proves successful she may be able to provide more regular employment.

On engagement: Gus is correctly classified as a casual employee. There is no firm advance commitment to continuing and indefinite work, and he is paid a casual loading under the applicable fair work instrument.

Two years later: The business is thriving and Gus now works regularly at the café, Wednesday to Sunday 7.30am–12pm, with extra hours as required to meet customer demand during the summer period. Gus is absent for some single days due to illness.

Gus decides that a move to ongoing employment would be beneficial and decides to issue a notification to Mackenzie under the 'employee choice' provisions of the FW Act.

He considers that his working arrangements are, in effect, those of an ongoing employee, although there are no other employees with which to compare. Both Mackenzie and Gus expect that these arrangements will continue into the future.

Mackenzie agrees to Gus' notification and, after discussing the notification, they agree that he will commence as a permanent part-time employee two weeks later.

361. **Grounds for not accepting a notification:** new subsection 66AAC(4) would set out an exhaustive list of grounds upon which an employer would be able to refuse an employee notification under new section 66AAB. An employer would be able to refuse an employee notification on any of the following grounds:

- the employer believes the employee is still correctly classified as a casual employee, having regard to new subsections 15A(1)–(4) (new paragraph 66AAC(4)(a));
- it would be impractical for the employer to accept the notification because, in order to avoid contravening the term of a fair work instrument that would apply to the employee as a full-time or part-time employee, it would be reasonably necessary to make substantial changes to the terms and conditions of the employee's employment which would significantly affect the way the employee would need to work (new paragraph 66AAC(4)(b));
- a change of employment status to full-time or part-time employment would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory if the employer were to accept the notification (new paragraph 66AAC(4)(c)).

362. A change of status may be impractical for the purposes of new paragraph 66AAC(4)(b), for example, where the relevant fair work instrument would require minimum hours of engagement for part-time employment that are more than the employee is usually rostered to work as a casual employee of the employer. However, nothing would prevent the employer and employee from coming to an alternative arrangement during consultation with one another before the employer issues a written response under new section 66AAC.

363. A ground for refusal to comply with public sector recruitment or selection processes in new paragraph 66AAC(4)(c) would allow the uninterrupted operation of Commonwealth, State and Territory laws governing public service recruitment. In these sectors, decisions relating to engagement and promotion into permanent roles are required to be based on merit, which is a long-standing and fundamental principle of public sector employment in Australia. At the Commonwealth level, the *Public Service Act 1999* provides for an Australian Public Service that is career-based and which makes decisions relating to engagement and promotion that are based on merit. In order to be engaged as an ongoing Australian Public Service employee, a person must have been found suitable through a merit-based selection process. A process that enables an employee to become ongoing without a merit-based selection process for the same or a similar role within the preceding 18 months, would be inconsistent with the recruitment processes required under the *Public Service Act 1999.*

Section 66AAD Effect of employer acceptance of employee notification

364. New subsection 66AAD(1) would provide that an employee is taken to be a full-time or part-time employee, beginning on the day specified in the employer response accepting the employee's notification.

365. New subsection 66AAD(2) would provide that the day specified must be the first day of the employee's first full pay period that starts after the day of the employer's response, unless another day is agreed.

Item 7: Subdivision B of Division 4A of Part 2-2 (heading)

Item 9: Subsection 66C(3) (note)

Item 10: Subdivision C of Division 4A of Part 2-2 (heading)

Subdivision C - Offers for casual conversion

366. These items would make consequential amendments to reflect the insertion of new 'Subdivision B — Employee choice about casual employment' in Division 4A of Part 2-2 before existing 'Subdivision B—Employer offers for casual conversion' which would become 'Subdivision C—Offers for casual conversion':

- Item 7 would repeal the heading 'Subdivision B—Employer offers for casual conversion' at existing Division 4A of Part 2–2 and substitute with 'Subdivision C—Offers for casual conversion';
- Item 9 would repeal the note at existing subsection 66C(3) in existing 'Subdivision B—Employer offers for casual conversion'; and
- Item 10 would repeal the heading 'Subdivision C—Residual right to request casual conversion' This item is consequential to item 11.

Item 11: Sections 66F to 66J

367. This item would repeal existing sections 66F to 66J, which deal with an employee's residual right to request casual conversion.

368. This item would remove the existing pathway for eligible casual employees to request casual conversion.

369. Employees would be able to access the employee choice pathway to notify their employer if they no longer believe they are a casual employee where they have been employed with their employer for six months, or 12 months for employees of a small business.

370. This would not impact on the existing requirement to offer conversion to eligible employees. Where an employee has been employed with their employer for 12 months, the employer (except small businesses) will still need to undertake an assessment under the existing casual conversion framework and, if the employee has worked a regular pattern of work during at least the last six months of that period, offer conversion or provide reasons for not doing so.

371. Small business employers are not required to make an offer of casual conversion under the existing framework. Casual employees employed by a small business will be able to access the employee choice pathway at 12 months of employment with their employer.

372. This means that medium and large employers would retain the obligation to offer eligible employees conversion and employees would have one pathway to initiate a status change, the new employee choice pathway. Employees would have access to the new employee choice pathway and would only be eligible to issue a notification to their employer every six months in accordance with new paragraph 66AAB(d).

Item 12: Section 66K

373. This item would insert a reference to new subparagraph 66AAC(2)(b)(iii) into the existing avoidance of doubt provision in section 66K, which deals with the effect of conversion of employment to full-time or part-time employment, as a consequence of the insertion of the new employee choice provisions in Subdivision B by item 6.

374. The existing provision makes clear that a change from casual to non-casual employment under existing paragraph 66E(1)(c) would be a change for the purpose of:

- the FW Act and any other law of the Commonwealth;
- a law of a State or Territory;
- any fair work instrument that applies to the employee; and
- the employment contract.

375. This item would add a change of employment status to full-time of part-time employment under the employee choice pathway, on and after the day specified in the employers response (new subparagraph 66AAC(2)(b)(iii)), to the existing avoidance of doubt provision in section 66K, to ensure clarity regarding the effect of a change of employment status under the employee choice pathway.

Item 13: Subsection 66L(1)

376. This item would repeal existing subsection 66L(1) (not including the note) and substitute new subparagraph 66L(1), which would prohibit an employer from changing the usual pattern of work, reducing of varying the hours of work, or terminating the employment of a casual employee as a means of avoiding their rights and obligations under new Division 4A of Part 2-2.

377. This amendment would expand the effect of existing subsection 66L(1) to expressly prohibit changing the pattern of work of a casual employee to avoid any right or obligation under Division 4A of Part 2-2.

378. This amendment is necessary to reflect the meaning of casual employee in new section 15A, in particular the requirement to have regard to whether there is a regular pattern of work for the employee when assessing whether there is an absence of a firm advance commitment to continuing and indefinite work (new subparagraph 15A(2)(c)(iv)). The existence of a regular pattern of work is an important indicator of the presence of a firm advance commitment, although it would not be solely determinative of an employee's status.

Item 14: Subsection 66L(2)

379. This item would repeal existing subsection 66L(2) and substitute new subparagraph 66L(2), which would make it clear that nothing in Division 4A of Part 2-2 would:

- require an employee to change or convert to full-time or part-time employment;

- permit an employer to require an employee to change or convert to full-time or part-time employment; or
- require an employer to increase the working hours of a casual employee if they have made a notification to change to full-time or part-time employment.

Item 15: Section 66M

380. This item would repeal existing section 66M and substitute a new section 66M to provide procedures the employer and employee must follow to resolve any disputes about the operation of new Division 4A of Part 2-2. This would include a procedure for referring disputes to the FWC if the employer and employee have been unable to resolve the dispute at the workplace level.

381. **Disputes covered:** This item would apply to a dispute between an employer and employee about the operation of new Division 4A of Part 2-2, including disputes about employee choice under new Subdivision B (new subsection 66M(1)) and disputes about casual conversion under new Subdivision C (new subsection 66M(3)). Unlike existing section 66M, which only applies where a process is not otherwise provided by a fair work instrument, contract of employment or other written agreement, this new process would apply generally. However, if the dispute is about employee choice under new Subdivision B, the FWC would not be able to deal with the dispute if it were satisfied a change to the status of the employee would result in the employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or State or a Territory (new subsection 66M(2)).

382. **Resolving disputes:** New subsection 66M(4) would require an employer and employee to first attempt to resolve a dispute at the workplace level, by discussion between the parties. The reflects the benefit of resolving disputes as close to the workplace as possible.

383. Exactly how disputes are handled in the workplace is not specified, and may be adapted by particular employers to suit their workplace structures and policies. This could include discussion between the affected employee and their immediate supervisor or more senior levels of management if appropriate.

384. The notes at new subsection 66M(4) would refer the reader to modern awards and enterprise agreements, which must contain dispute settlement terms capable of dealing with any dispute under the NES, which would include new Division 4A of Part 2-2. These terms may supplement or be incidental or ancillary to the procedures in new sections 66M and 66MA.

385. **FWC dispute resolution:** new subsection 66M(5) would allow the employer or employee to refer the dispute to the FWC if discussions at the workplace level do not resolve the dispute.

386. The FWC would be required to first deal a dispute with it by means other than arbitration in the first instance, unless there were exceptional circumstances (new subsection 66M(6)). The note to new subsection 66M(6) refers the reader to the

existing powers of the FWC to deal with disputes by mediation, conciliation, making a recommendation or expressing an opinion (see existing section 595 in Division 3 of Part 5-1).

387. If the dispute cannot be resolved by other means, the FWC would be able to deal with the dispute by arbitration in accordance with new section 66MA.

388. **Changing streams:** New subsections 66M(7)–(9) would provide the FWC with the ability to deal with a dispute about the operation of 'Subdivision B—Employee choice about casual employment' as though it were a dispute about the operation of new 'Subdivision C—Offers for casual conversion', and vice versa, if it considered it appropriate to do so and the employee agreed.

389. This feature of the dispute resolution framework is designed to provide the FWC with a broad range of options for dealing with disputes arising under the operation of new Division 4A of Part 2-2. It is also intended to give effect to the object in new section 66AAA, to ensure dispute resolution is flexible and supports employee choice about employment status.

390. New subsection 66M(7) would set out the circumstances in which the FWC could deal with a dispute referred about employee choice as though it were a dispute about casual conversion. If the FWC considered it appropriate to do so and the employee agreed, the FWC would be able to treat a dispute referred under employee choice as though it were referred under casual conversion so long as the employee agrees to the dispute being dealt with in such a manner, and the FWC considers it appropriate to do so.

391. New subsection 66M(8) would set out the circumstances in which the FWC could deal with a dispute referred about casual conversion as though it were a dispute about employee choice. If the FWC considered it appropriate to do so and the employee agreed, the FWC would be able to treat a dispute referred under casual conversion as though it were referred under employee choice so long as the timing requirements set out in new subparagraphs 66AAB(c)–(d) would not have otherwise prevented the employee from giving the employer a notification under new section 66AAB. The FWC would also not be able to deal with a dispute about casual conversion as though it were a dispute about employee choice if it were satisfied a change to the status of the employee would result in employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or State or a Territory (new subsection 66M(2)).

392. If the FWC considered it appropriate to change streams under new subsections 66M(7)–(9) and the employee agreed, for the purposes of dealing with the dispute in the alternative stream, the FWC would be able to:

- deem any actions required by the employer and employee under the alternative stream, which would have been required in order for the FWC to deal with the dispute, to be taken to have occurred (new paragraph 66M(9)(a));
- invite submissions from the employer and employee, when treating a dispute about casual conversion as though it were a dispute about employee choice, about whether

any grounds from new subsection 66AAC(4) exist which would have caused the employer to be unable to accept an employee notification under new section 66AAB (new paragraph 66M(9)(b)); or

- invite submissions from the employer and employee, when treating a dispute about employee choice as though it were a dispute about casual conversion, about whether there any reasonable grounds referred to in paragraph 66C(1)(a) exist (new paragraph 66M(9)(b)).

393. These processes are intended to reduce the burden on the FWC, applicants and respondents, by providing flexibility to the FWC to deal with matters before it in the most expedient fashion.

394. **Representatives**: New subsection 66M(10) would allow the employer or employee to appoint a representative for the purpose of resolving the dispute or having the dispute dealt with by the FWC. The representative could be a person, or an employer or employee organisation entitled to represent the industrial interests of the employer or employee. The note at new subsection 66M(10) refers the reader to the provisions at existing section 596, which allow a person to be represented in a matter before the FWC by a lawyer or paid agent with the permission of the FWC.

395. **Procedural rules**: new subsection 66M(11) provides that, in relation to a dispute referred to the FWC under new subsection 66M(5), procedural rules may provide for:

- the joinder as a party to the dispute of any other employee that has a dispute with the same employer under new section 66M, or any employee organisation entitled to represent the industrial interests of such an employee; and

- for processes to support the operation of changing streams under new subsections 66M(7)-(9).

396. Nothing in new subsection 66M(11) would limit the operation of the procedural rules at existing section 609.

397. The content of these rules would be informed by the objects at new section 66AAA, particularly the importance of quick, flexible and informal arrangements that support the needs of both employers and employees.

398. The FWC would be able to deal with a dispute referred to it under either the employee choice or casual conversion pathway by arbitration in accordance with new section 66MA. The FWC would only deal with a dispute by arbitration after other means of dispute resolution had been attempted, such as mediation or conciliation, or in the first instance if there were exceptional circumstances (new subsection 66M(6)).

399. **Orders the FWC may make**: New subsection 66MA(1) would set out a number of orders the FWC may consider it appropriate to make if dealing with a dispute by arbitration, including:

- for a dispute about employee choice, that the employee be treated as a full-time or part-time employee from the date of the first full pay period that starts after the day

the order is made (or a later date if the FWC considers it appropriate), or that the employee continue to be treated as a casual employee (new subsection 66M(4));

- for a dispute about casual conversion, that the employer make the employee an offer of casual conversion under existing section 66B (new subsection 66MA(7)).

400. The orders set out in new subsection 66MA(1) are not exhaustive and the FWC is not limited to making only the orders listed in subsections 66MA(4) and (7). In general, the FWC would be able to make any order it considers appropriate. However, it would not be able to make any order unless it considers that making the order would be fair and reasonable (new subsection 66MA(2)).

401. The note at new subsection 66MA(2) refers the reader to existing paragraph 578(a), which requires the FWC to take into account the objects of the FW Act, or any part of the FW Act, when performing its functions or exercising its powers. The objects of Division 4A of Part 2-2 (new section 66MA), in addition to the objects of the FW Act at existing section 3 in Division 1 of Part 1-1, would therefore need to be considered by the FWC when making an order under new subsection 66MA(1).

402. Under new subsection 66MA(3), the FWC would not be able to make an order if the order would be inconsistent with a provision of the FW Act or a term of a fair work instrument that applies to the employer and employee at the time immediately before the order were to be made (new subsection 66MA(3)). This is intended to ensure that an order does not have the effect of amending terms and conditions designed to protect full-time or part-time employees, but which may not apply to casual employees because of the differences between full-time and part-time employment and casual employment. It would not prevent an order that is inconsistent with a previous order made under new subsection 66MA(1), where this was considered appropriate by the FWC. This clarification is necessary because 'fair work instrument' is defined by section 12 to include orders of the FWC.

403. In deciding whether to make an order about employee choice under new subsection 66MA(1), including an order referred to new subsection 66MA(4), and what the terms of such an order would be, the FWC would be required to:

- consider whether a substantial change would be reasonably necessary to the employee's terms and conditions to ensure the employer does not contravene the term of a fair work instrument that would apply to the employee as a full-time or part-time employee (new paragraph 66MA(5)(a));

- disregard any conduct of the employer and employee that took place after the employee gave the employer the notification under new section 66AAB (new paragraph 66MA(5)(b)).

404. **Contravening an order:** New subsection 66MA(8) would provide that a person must not contravene an order made under new subsection 66MA(1). A contravention of an order made under new subsection 66MA(1) would be subject to a potential civil penalty.

Item 16: Subsection 67(1A)

405. This item would omit 'converted under Division 4A of Part 2-2' in existing subsection 67(1A) in Division 5 of Part 2-2 and substitute 'changed or converted under Division 4A of Part 2-2'.

406. Existing section 67 sets out categories of employees who are entitled to access parental leave and related entitlements under existing Division 5 of Part 2-2. Existing subsection 67(1) provides that an employee who is not a casual employee may access leave entitlements (other than unpaid pre-adoption leave or unpaid safe job leave) after having completed at least 12 months of continuous service. Existing subsection 67(1A) enables an employee who converts to full-time or part-time employment under existing Division 4A of Part 2-2 to count the time they were a regular casual employee as continuous service for the purposes of establishing entitlement to parental leave and relation entitlements.

407. This item would clarify that a period of employment as a regular casual employee would count as continuous service for the purposes of applying existing subsection 67(1A) in circumstances where:

- an employee changes to full-time or part-time employment under the employee choice provisions; or
- an employee converts to full-time or part-time employment under the existing casual conversion provisions.

408. The item is a consequential amendment to reflect the new pathway to full-time and part-time employment provided by the employee choice provisions.

Item 17: Subsection 125A(2)

409. This item would omit 'and offers and requests for casual conversion' from existing subsection 125A(2) and substitute 'and how this can be changed or converted'.

410. Existing section 125A requires the FWO to prepare a Casual Employment Information Statement for publishing in the Gazette. Existing subsection 125A(2) sets out what information must be included in the Casual Employment Information Statement, including information about casual conversion under existing provisions.

411. This item would amend existing subsection 125A(2) to clarify that the Casual Employment Information Statement must include information about how an employee's casual status may change under both the employee choice and the casual conversion provisions.

Item 18: After paragraph 125A(2)(a)

412. This item would insert new subparagraphs 125A(2)(aa) and (ab) after existing paragraph 125A(2)(a).

413. Existing subsection 125A(2) provides that the Casual Employment Information Statement prepared by the FWO must include information about the meaning of casual employee under existing section 15A and information relating to casual conversion. The Casual Employment Information Statement would continue to include this

information and would be updated to reflect the new meaning of casual employee and other changes made by this Bill to Division 4A of Part 2-2, such as the new employee choice pathway, the role of the FWC in dealing with disputes and the availability of arbitration.

414. This item would require the Casual Employment Information Statement to include the following information relating to the new employee choice provisions:

- the ability for casual employees who have completed six months of employment, or 12 months in the case of casual employees of small business employers, to issue a notification to their employer under new section 66AAB if they no longer, at that point in time, believe they are a casual employee within the meaning of new subsections 15A(1)–(4) (new subparagraph 125A(2)(aa));
- the grounds upon which an employer may not accept an employee choice notification made under new section 66AAB (new subparagraph 125A(2)(ab)).

415. While the Casual Employment Information Statement must include this information, it could also include additional information about casual employment. For example, the Statement could include information about casual employees being entitled to a casual loading (or a specific rate of pay for casual employees under the terms of a fair work instrument) under new paragraph 15A(1)(b). This loading amount is paid to casual employees having regard to the nature of their employment and the fact that casual employees do not receive a range of entitlements provided to full-time and part-time employees, such as annual leave. The Statement could also explain that employees would no longer be entitled to a casual loading if they were to change or convert to full-time or part-time employment.

Item 18A: Paragraphs 125A(2)(d) and (da)

416. This item would repeal existing paragraphs 125A(2)(d) and (da) relating to information about the residual right to request casual conversion in the Casual Employment Information Statement.

Item 19: Subsection 125B(1)

417. This item would repeal existing subsection 125B(1) and substitute new subsection 125B(1).

418. Existing subsection 125B sets out when an employer must give each casual employee the Casual Employment Information Statement during the course of their employment. Existing subsection 125B(1) requires this to occur before, or as soon as practicable after, the casual employee commences employment with the employer.

419. This item would amend existing subsection 125B(1) by including an additional requirement for an employer to give each casual employee the Casual Employment Information Statement as soon as practicable after 12 months of employment (new paragraph 125B(1)(b)).

420. This will ensure casual employees receive information about the ability to change or convert to full-time or part-time employment at a point in time when all casual

employees will have access to the employee choice pathway, including employees of small business employers, and when some employers will be required to offer casual conversion under that pathway.

Item 20: Before section 357

Subdivision A – Independent contracting

421. Division 6 of Part 3-1 of the FW Act relates to general protections against sham arrangements. It currently only addresses independent contracting arrangements. This item would insert protections relating to casual employment arrangements. This will provide protections for employees who are engaged as casual employees under a sham arrangement.

Item 21: At the end of Division 6 of Part 3-1

Subdivision B – Casual employment

422. This item would insert a new Subdivision B—Casual employment in Division 6 of Part 3-1 of the FW Act, dealing with employers:

- dismissing an employee to engage them as casual employee (new section 359B); and
- making a misrepresentation to a current or former employee to engage them as casual employee (new section 359C).

423. These provisions complement the new definition and employee choice pathway by establishing an anti-avoidance framework in relation to casual employment.

Section 359B Dismissing to engage as casual employee

424. New section 359B would prohibit an employer from dismissing an employee to reengage them as casual employee to perform the same, or substantially the same, work. It is modelled on the protection in existing section 358 against dismissing an employee to engage them as an independent contractor. This new section would be a civil remedy provision under Part 4-1 of the FW Act.

425. As new section 359B would turn on the reasons for the actions of the employer, it would be subject to the effect of existing section 360 in Division 7 of Part 3-1 which provides that a person takes action for a particular reason if the reasons for the action include that reason.

Section 359C Misrepresentation to engage as casual employee

426. New section 359C would prohibit an employer from knowingly making a false statement to a current or former employee with the intention of persuading or influencing that employee to become a casual employee to perform the same, or substantially the same, work for the employer. This new section would be a civil remedy provision under Part 4-1 of the FW Act.

427. As new section 359C would turn on the reasons for the actions of the employer, it would be subject to the effect of existing sections 360 and 361 in Division 7 of Part 3-1 which provide that a person takes action for a particular reason if the reasons for the

action include that reason, and place the burden of proving the reason for an action on the employer, respectively.

Item 22: Subsection 539(2) (after table item 5AA)

428. This item would add new item 5AAA, regarding contraventions of new Division 4A of Part 2-2, to the table of civil remedy provisions set out at existing subsection 539(2). Contraventions of new subsection 66MA(8) (a person must not contravene an order of the FWC about casual employment) would be included in the new table item as a civil remedy provision.

429. The new table item would provide that a person affected by the contravention, an employee organisation or an inspector can bring an action for an alleged contravention of the provisions in a federal court or eligible State or Territory Court. The maximum civil penalty for a contravention would be 300 penalty units.

Item 23: Subsection 539(2) (before table item 12)

430. This item would add a new table item 11B, regarding contraventions of the new sham casual arrangement prohibitions in new sections 359B and 359C, to the table of civil remedy provisions set out at existing subsection 539(2).

431. The new table item would provide that a person affected by the contravention, an employee organisation or an inspector can bring an action for an alleged contravention of the provisions in a federal court or eligible State or Territory Court. The maximum civil penalty for a contravention would be 300 penalty units.

Item 23A: At the end of subparagraph 548(1B)(a)(ii)

Item 23B: Subparagraphs 548(1B)(a)(iii) and (iv)

Item 23C: Subsection 548(1B) (note)

432. These items would make a technical amendment to subparagraph 548(1B)(a)(ii) and repeal subparagraphs 548(1B)(a)(iii) and (iv), consequential to the repeal of the residual right to request casual conversion.

433. It would also repeal the note at subsection 548(1B) and substitute a new note that notifies the reader that a court may make orders under Division 2 in relation to small claims proceedings requiring an employer to make an offer of conversion because the employee meets eligibility requirements, and that it is not open to an employer to rely on reasonable business grounds to not make an offer of casual conversion.

Item 24: After subsection 548(1B)

434. This item would amend existing section 548 to expand the small claims jurisdiction to include disputes about whether a person was a casual employee of their employer within the meaning of new subsections 15A(1)–(4) at commencement of their employment with that employer (new subsection 548(1C)).

435. This item would allow employees to choose the small claims procedure to apply to proceedings if the employee has applied for an order (other than a pecuniary penalty order) under Division 2 from a magistrates court or the Federal Circuit and Family Court of Australia (Division 2) in connection with a dispute about whether the

employee was a casual employee of their employer within the meaning of new subsections 15A(1)–(4) at commencement of their employment with that employer.

436. The note to new subsection 548(1C) sets out an example of the kind of order a court may make under Division 2 in relation to small claims proceedings under new subsection 548(1C), being a declaration as to whether the employee was a casual, parttime or full-time employee at the commencement of the employment.

437. If an employee is found to have been misclassified as a casual employee by a court, existing section 545A will allow any resulting backpay to be offset against any casual loadings paid to the employee.

Item 25: After paragraph 675(2)(ab)

438. This item would amend existing section 675 by inserting new paragraph 675(2)(ac).

439. The effect of this would be to provide that a person does not commit an offence if the FWC has made an order under new subsection 66MA(1), and the person contravenes the order. However, contravention of an order would be prohibited by new subsection 66MA(8), and would give rise to a civil remedy.

Part 2—Small business redundancy exemption

Amendments to the *Fair Work Act 2009*

440. Part 2 would amend section 121 of the FW Act to address an anomaly arising under paragraph 121(1)(b), commonly referred to as the 'small business redundancy exemption'. It only applies to employees of employers that are bankrupt or in liquidation due to insolvency. It does not affect ongoing, solvent businesses.

441. Part 2 covers the situation when a larger employer incrementally downsizes due to insolvency, either in the period leading up to liquidation or bankruptcy, or afterwards, and the number of employees falls below the 15 employee threshold for the small business definition, causing some employees to lose their previous entitlement to redundancy pay under section 119 of the NES. This may occur, for example, where an insolvency practitioner makes most of the employees of a company redundant upon their appointment, but retains the bookkeeping and payroll staff – fewer than 15 employees in total – to assist with the orderly wind up of the business. At present, the majority of employees would receive their redundancy entitlements. However, the employees kept on to finalise the winding up would not because the employer would then come within the small business redundancy exemption.

442. The amendment would provide an exception to the operation of the small business redundancy exemption in such downsizing contexts. It is intended to address inequitable outcomes for employees, including those who remain employed to assist with the orderly wind-down of an insolvent business, and support the more efficient conduct of external administrator, controller and bankruptcy trustee appointments.

Item 26: Section 12 (definition of *appointment*)

443. This item would repeal the existing definition of 'appointment' and replace it with a definition of 'appointment' that includes the 'appointment of an insolvency practitioner', to give meaning to the term in new paragraph 121(4)(d). The newly inserted text is consistent with the definition of 'appointment' in section 5 of the FEG Act.

Item 27: Section 12

444. This item would insert the following new definitions:

- '*Bankruptcy Act 1966*';
- 'Bankruptcy trustee' (as defined in the Bankruptcy Act);
- '*Corporations Act 2001*';
- 'Insolvency practitioner' (as defined in the FEG Act);
- 'Liquidator' (as defined in the Corporations Act); and
- 'Members' voluntary winding up'.

445. The new definitions would inform the interpretation of new subsections 121(4)–(7), where those terms are used.

Item 28: At the end of section 121

446. This item would insert new subsections (4), (5), (6) and (7) into section 121, to provide an exception to the operation of the small business redundancy exemption in current paragraph 121(1)(b), where an employer downsizes from a larger business to a small business employer due to insolvency.

447. New paragraphs (4)(a)–(d) would ensure the current exemption to the obligation to pay redundancy at paragraph 121(1)(b) does not apply in the circumstances where the employer is bankrupt or in liquidation (other than a members' voluntary winding up) and has only become a small business employer due to employee terminations.

448. New subparagraphs (4)(d)(i)–(iii) would provide a six month 'look back' period to apply to determine the application of the exception, from six months before the bankruptcy or liquidation, or the appointment of the insolvency practitioner, or, if the appointment of the insolvency practitioner was immediately preceded by the appointment of other insolvency practitioners, from the earliest appointment date.

449. New subparagraph (4)(d)(iv) would apply where the terminations that caused the employer to become a small business employer were due to the insolvency of the employer. It would apply, for example, in the following circumstance: a receiver and manager is appointed to an employer because the employer is in default due to insolvency. During the appointment, the employer terminates the employment of one or more employees with the result that the employer becomes a small business employer. The receivership concludes and the employer enters liquidation six months and one day after the conclusion of the receivership. New subparagraphs (4)(d)(i)–(iii) do not apply to the employer because of the length of time between the conclusion of the receivership and the liquidation. However, new subparagraph (4)(d)(iv) applies because the terminations that caused the employer to become a small business employer were due to insolvency.

450. New subsection (5) would provide the new definition of members' voluntary winding up to clarify the use of that term in new subsection (4). A members' voluntary winding up under section 495 of the Corporations Act is a process for winding up solvent companies and requires a declaration of solvency by members. Liquidations due to a members' voluntary winding up are excluded from new paragraph (4)(b) so that it only applies to insolvent liquidations.

451. New subsection (6) clarifies the operation of new subsection (4) in circumstances where an employer enters liquidation due to a members' voluntary winding up but subsequently turns out to be insolvent. If and when the employer enters liquidation (other than a members' voluntary winding up), following the process set out in section 496 of the Corporations Act, the new subsection (4) would apply to the employer, and for the purposes of new subsections (4)–(6), the original appointment date of the members' voluntary winding up is treated as the date the company went into liquidation.

452. New subsection (7) would clarify when a partnership is bankrupt or liquidation for the purposes of new paragraph (4)(b).

Part 3—Enabling multiple franchisees to access the single enterprise stream

Amendments to the *Fair Work Act 2009*

453. Part 3 would allow multiple franchisees to access the single-enterprise agreement stream, without removing the ability to bargain for a multi-enterprise agreement if this is the preferred option of the parties.

Item 29: Subsection 172(3)

454. Existing section 172(2) of the FW Act limits bargaining for a single-enterprise agreement to a single employer or to 'related employers' as defined in existing subsection 172(5A). Franchisees do not come within the existing definition of 'related employers' and accordingly may be prevented from making a single-enterprise agreement.

455. Existing section 172(3) limits bargaining for a multi-enterprise agreement to a situation where there are two or more employers who are not all related employers.

456. This item would enable bargaining for a multi-enterprise agreement where two or more employers are all related employers as set out in new subsection 172(3A). Item 30 would insert new subsection 172(3A). This would ensure that employers that carry on similar business activities under the same franchise, and that are franchisees of the same franchisor, or related bodies corporate of the same franchisor, continue to be able to make a multi-enterprise agreement, despite meeting the definition of 'related employers' in new paragraph 172(5A)(c) (refer item 31).

457. The new provisions would maintain the ability of employers who are otherwise not all related employers to make a multi-enterprise agreement. If, for example, a group of employers includes franchisees of a common franchisor, as well as other employers that are not franchisees of that franchisor, these employers would not all be related employers, and could make a multi-enterprise agreement.

Item 30: After subsection 172(3)

458. This item would insert subsection 172(3A). Subsection 172(3A) operates with item 29 and item 31 to ensure that a class of related employers can bargain for a multi-enterprise agreement. This class is specified through item 30 and is all related employers under new paragraph 172(5A)(c). Item 31 would insert new paragraph 172(5A)(c).

459. In conjunction with item 29, item 30 would make clear that all related employers as defined in new paragraph 172(5A)(c) retain the ability to make a multi-enterprise agreement. Two or more employers that are all related employers as defined in existing paragraphs 172(5A)(a)–(b) (that is, related employers that are not franchisees or related bodies corporate of the same franchisor) would continue to be excluded from multi-enterprise bargaining.

Item 31: At the end of subsection 172(5A)

460. This item would expand the definition of 'related employers' in existing subsection 172(5A) to include employers that carry on similar business activities under the same franchise as franchisees of the same franchisor, or related bodies corporate of

the same franchisor, or any combination of the two. This definition is modelled on the definition used in existing subsection 249(2).

461. New paragraph 172(5A)(c) would allow franchisees to bargain together as related employers for a single-enterprise agreement under subsection 172(2) without needing to demonstrate that they are engaged in a common enterprise. This would allow franchisees of the same franchisor to bargain for and make a single-enterprise agreement as a single enterprise, including access to all available mechanisms relating to single-enterprise bargaining under the FW Act. A single-enterprise agreement is made where a majority of employees who vote approve the agreement (subsection 182(1)). Approval by a majority of employees of each employer would not be required. Finally, bargaining representatives for a single-enterprise agreement are able to obtain a majority support determination where a majority of employees who would be covered by the agreement wish to bargain.

Part 4—Transitioning from multi-enterprise agreements

Amendments to the *Fair Work Act 2009*

462. Part 4 would amend the FW Act to allow a single-enterprise agreement to replace a single interest employer agreement or supported bargaining agreement (as the case may be) that has not passed its nominal expiry date.

Item 32: Section 12 (definition of *voting request order*)

463. This item is a consequential amendment which expands the definition of voting request order to include an order as described in new subsection 240A(4), introduced by item 57.

Item 33: Paragraph 58(2)(c)

464. This item is a consequential amendment which would provide that the general rule in existing subsections 58(1) and (2) applies where existing subsection 58(3) and new subsections 58(4) and (5) (refer item 34) do not apply.

Item 34: At the end of section 58

465. Existing section 58 provides that only one enterprise agreement can apply to an employee at a time and sets out the rules for determining when an enterprise agreement applies to an employee. Subsection 58(2) provides that, generally, where an enterprise agreement applies to an employee, and another enterprise agreement comes into operation that would also apply to that employee, the later enterprise agreement will not apply until the earlier agreement reaches its nominal expiry date. Existing subsection 52(2) makes clear that a reference to an enterprise agreement applying to an employee is a reference to the agreement applying to that employee in relation to particular employment.

466. A special rule in existing subsection 58(3) provides that if a single-enterprise agreement applies to an employee, and a supported bargaining agreement comes into operation that covers the employee in relation to the same employment, the supported bargaining agreement will apply immediately, and the single-enterprise agreement can never apply again.

467. This item would add two new special rules into existing section 58. The interaction rules, respectively in new subsections 58(4) and 58(5), would provide that if a single interest employer agreement or a supported bargaining agreement (each of which is an old agreement) applies to an employee in relation to particular employment, and a single-enterprise agreement later comes into operation that covers that employment, the single-enterprise agreement will apply to that employee in relation to that employment, and the old agreement can never apply again.

Item 35: At the end of paragraph 173(2)(d)

468. This item would correct a typographical error in existing subsection 173(2).

Item 36: Section 180A (at the end of the heading)

469. This item would amend the heading of existing section 180A to specify that the section applies to proposed enterprise agreements that are multi-enterprise agreements. This item would assist in distinguishing between section 180A, and new section 180B (refer

item 37) which deals with the agreement of bargaining representatives in relation to certain proposed single-enterprise agreements.

Item 37: After section 180A

470. This item would insert a new section 180B into the FW Act. New section 180B is modelled on existing section 180A. Existing section 180A prevents an employer asking their employees to vote to approve a proposed multi-enterprise agreement unless they have received the written agreement of employee organisations that would be covered by the agreement, or are permitted to do so by a voting request order in relation to the agreement.

471. New section 180B would only apply to a proposed single-enterprise agreement (new agreement) where a single interest employer agreement or supported bargaining agreement that is within its nominal term (each of which is an old agreement) applies to at least one of the employees covered by the proposed agreement.

472. Where an old agreement applies to at least one of the employees who is covered by the new agreement, new section 180B would require an employer to have received the written agreement of all employee organisations to which the old agreement applies before asking employees to vote to approve the new agreement. If written agreement is not provided, the employer may apply for a voting request order under new subsection 240A(4), introduced by item 57.

Item 38: Subsection 188(2A)

Item 39: Subsection 188(2A)

Item 40: Paragraph 188(5)(ab)

473. These items are technical amendments which would deal with the insertion of new section 180B.

Item 41: After paragraph 191A(3)(b)

474. This item would add new paragraph 191A(3)(ba). Currently, when considering whether to approve an enterprise agreement with amendments, the FWC is required by existing subsection 191A(3) to seek the views of the employer or employers covered by the agreement, the award covered employees for the agreement and a bargaining representative for the agreement.

475. This item would insert a requirement that if the enterprise agreement is a single-enterprise agreement that covers a group of employees that includes at least one employee to whom a single interest employer agreement or supported bargaining agreement applies, the FWC must also seek the views of the employee or employees to whom the single interest employer agreement or supported agreement applies.

Item 42: Subsection 193(1)

476. This item would repeal and substitute subsection 193(1) with new subsections 193(1) and 193(1A). Existing subsection 193(1) states that an agreement passes the BOOT where each award covered employee and each reasonably foreseeable employee for the agreement would be better off under the agreement than the relevant modern award.

This current test for award covered employees would be retained at new paragraph 193(1)(a).

477. New paragraph 193(1)(b) would modify the operation of the BOOT in the circumstance where an application has been made for approval of a single-enterprise agreement (new agreement) which covers at least one employee to whom a single interest employer agreement or supported bargaining agreement (each of which is an old agreement) applies.

478. New paragraph 193(1)(b) would require the new agreement to be assessed against the old agreement rather than relevant modern award, for each employee to whom the old agreement applies. The new agreement would pass the BOOT in relation to these employees where the employees are better off under the new agreement than the old agreement. This would ensure that employees would be better off under the subsequent single-enterprise agreement than the old agreement.

479. In this circumstance the BOOT analysis for award covered employees would not be changed. The new agreement would pass the BOOT in relation to award covered employees where those employees are better off under the new agreement than the relevant award.

480. New subsection 193(1A) makes clear that where an employee is both award covered and an old agreement applies to them, the BOOT analysis for that employee is to be undertaken in relation to the old agreement only.

481. Employees who are award covered, and those to whom an old agreement applies, must all be better off overall under the new agreement for it to pass the BOOT.

482. The legislative notes included under existing subsection 193(1) are retained under new subsection 193(1). Legislative note 1 points the reader to the definition of reasonably foreseeable employee in existing subsection 193(5). Legislative note 2 highlights the rules for applying the BOOT in existing section 193A, drawing particular attention to the requirement that the FWC only have regard to reasonably foreseeable patterns or kinds of work in existing subsection 193A(6).

Item 43: After subsection 193(2)

483. This item would insert new subsection 193(2A). Existing subsection 193(2) requires the FWC to disregard an individual flexibility arrangement (IFA) that has been agreed between an employee and employer under a modern award when assessing whether an employee is better off overall under a proposed agreement than the relevant modern award.

484. If the FWC is assessing whether a single-enterprise agreement passes the BOOT, and a supported bargaining agreement or single interest employer agreement applies to at least one of the employees that the single-enterprise agreement covers, new subsection 193(2A) would require the FWC to disregard an IFA made under the supported bargaining agreement or single interest employer agreement.

Item 44: Paragraphs 193A(2)(a) and (b)

485. This item would amend existing paragraphs 193A(2)(a) and (b). New paragraph 193(1)(b) (refer item 42) would provide that where a single-enterprise agreement (new agreement) is made with employees, and a single interest employer agreement or supported bargaining agreement (each of which is an old agreement) applies to at least one of those employees, the employees to whom the old agreement applies must be better off under the new agreement than the old agreement for the new agreement to pass the BOOT.

486. Existing paragraphs 193A(2)(a) and (b) make clear that, when assessing whether an agreement passes the BOOT, the FWC must have regard to the terms and conditions of the agreement that would be more beneficial, and those that would be less beneficial, relative to the relevant modern award terms.

487. This item would amend paragraphs 193A(2)(a) and (b) to require the FWC to have regard to the terms and conditions of an agreement that would be more beneficial to an employee, and those that would be less beneficial to an employee, than those under the modern award, supported bargaining agreement or single interest employer agreement, whichever is relevant to the employee.

Item 45: Paragraph 193A(3)(b)

488. This item would repeal and substitute paragraph 193A(3)(b). Existing paragraph 193A(3)(b) requires the FWC to consider the views expressed by award covered employees for an agreement when determining whether the agreement passes the BOOT. This requirement would be retained in new subparagraph 193A(3)(b)(i).

489. New subparagraph 193A(3)(b)(ii) would require the FWC to also consider the opinion of any employee to whom a supported bargaining agreement or single interest employer agreement applies as to whether a proposed single-enterprise agreement that covers them passes the BOOT.

Item 46: At the end of subsection 193A(4)

490. This item would add new paragraph 193A(4)(c). Existing subsection 193A(4) requires the FWC to give primary consideration to a view shared by all of those listed in paragraphs 193A(4)(a)–(b) as to whether a proposed agreement (other than a greenfields agreement (refer existing subsection 193A(5)) passes the BOOT. Existing paragraphs 193A(4)(a)–(b) list bargaining representatives for employers and bargaining representatives for award covered employees (that are employee organisations).

491. New paragraph 193A(4)(c) would add a reference to bargaining representatives for employees to whom a supported bargaining agreement or single interest employer agreement applies, where the proposed agreement is a single-enterprise agreement that covers at least one employee to whom a supported bargaining agreement or single interest employer agreement applies.

492. Where a proposed agreement is a single-enterprise agreement that covers one of more employees to whom a supported bargaining agreement or single interest employer agreement applies, the FWC would be required to give primary consideration to a

common view as to whether the agreement passes the BOOT that is expressed by bargaining representatives for employers, bargaining representatives (that are employee organisations) for award covered employees, and bargaining representatives (that are employee organisations) for employees to whom a single interest employer agreement or supported bargaining agreement applies.

Item 47: Paragraph 193A(6A)(b)

493. This item would repeal and substitute paragraph 193A(6A)(b). Existing section 193A provides guidance as to how the FWC is to apply the BOOT. Existing subsection 193A(6) limits the patterns or kinds of work that the FWC may have regard to when applying the BOOT to those that are reasonably foreseeable. Employers cannot be required to provide undertakings in relation to hypothetical kinds of work that are not reasonably foreseeable.

494. Existing section 193A(6A) provides that the FWC must determine whether a particular pattern or kind of work is reasonably foreseeable if a view is expressed by a relevant employer, award covered employee, or bargaining representative.

495. New subparagraph 193A(6A)(b)(ii) would include an additional requirement that the FWC must also determine the matter, in the circumstance that the agreement is a single-enterprise agreement which covers employees to whom a single interest employer agreement or supported bargaining agreement applies, if those employees express a view as to whether a particular pattern or kind of work is reasonably foreseeable.

Item 48: Subsection 193A(7)

496. Existing subsection 193A(7) allows the FWC to assume that if an employee belongs to a class of employees that would be better off under the agreement than the modern award, the employee would also be better off under the agreement, in the absence of evidence to the contrary.

497. This item would amend existing subsection 193A(7) to allow the FWC to assume that an employee would be better off under a proposed single-enterprise agreement than under an existing single interest employer agreement or supported bargaining agreement that applies to them, in the absence of evidence to the contrary, where that employee is a member of a group of employees that would be better off under the single-enterprise agreement than the relevant single interest employer agreement or supported bargaining agreement.

Item 49: After paragraph 211(4A)(ac)

498. This item would insert new paragraph 211(4A)(ad). Existing section 211 sets out when the FWC must approve a variation of an enterprise agreement. Existing subsection 211(4A) provides that the FWC must give consideration to any views relating to whether the agreement (as proposed to be varied) passes the BOOT that have been expressed by the relevant employer or employers, employees, and any employee organisations covered by the agreement.

499. New paragraph 211(4A)(ad) would provide that new paragraph 193A(4)(c) (refer item 46) would not apply when the FWC is considering whether an agreement as proposed to be varied passes the BOOT.

500. Existing subsection 193A(4) requires the FWC to give primary consideration to the common views of those listed in paragraphs 193A(4)(a)–(b). New paragraph 193A(4)(c) lists employee organisations that are bargaining representatives for any employee to whom a single interest employer agreement or supported bargaining agreement applies, where a single-enterprise agreement has been made that covers at least one such employee.

501. In the context of an application to vary an enterprise agreement, the circumstances described in new paragraph 193A(4)(c) are not relevant as the previous agreement would no longer apply to the employees. Existing paragraph 211(4A)(ac) relevantly provides for the consideration of the views of bargaining representatives that are covered by the agreement that is proposed to be varied.

Item 50: Paragraph 227A(2)(a)

502. This item would amend existing paragraph 227A(2)(a). Existing subsection 227A(2) provides the circumstances that must be satisfied before an application can be made to the FWC for a reconsideration as to whether an enterprise agreement passes the BOOT.

503. The condition in existing paragraph 227A(2)(a) is that the FWC must have had regard to patterns or kinds of work engaged in or to be engaged in by award covered employees for the agreement prior to approving it.

504. This item would amend existing paragraph 227A(2)(a) to include the FWC having had regard to patterns or kinds of work engaged in, or to be engaged in, by any employee or employees to whom a single interest employer agreement or supported bargaining agreement applies prior to approving a single-enterprise agreement that covers that employee or those employees.

Item 51: Paragraph 227A(2)(b)

Item 52: At the end of section 227A

505. These items would amend paragraph 227A(2)(b) and insert new subsection 227A(5). Existing paragraph 227A(2)(b) provides the second condition that must be satisfied before an application can be made to the FWC for reconsideration of whether an agreement passes the BOOT.

506. Existing paragraph 227A(2)(b) refers to employees covered by existing subsection 227A(4) performing or engaging in patterns or kinds of work that the FWC did not consider when it undertook the BOOT. Existing subsection 227A(4) covers an employee if the employee would be an award covered employee as defined in existing subsection 193(4) if the test time were the time the application for reconsideration was made.

507. These items provide that the condition in paragraph 227A(2)(b) can also be satisfied where the relevant employee is covered by new subsection 227A(5).

508. New subsection 227A(5) would cover employees who, at the time the application for reconsideration is made, are employees to whom a single-enterprise agreement applies, and to whom a single interest employer agreement or supported bargaining agreement applied at the time the FWC undertook the BOOT assessment of the single-enterprise agreement.

Item 53: After paragraph 227B(2)(a)

509. This item would amend section 227B to insert new paragraph 227B(2)(aa). Existing section 227B varies the effect of existing sections 193 and 193A for the purposes of reconsidering whether an agreement passes the BOOT.

510. This item would provide that, when reconsidering whether a single-enterprise agreement which applies to employees to whom a single interest employer agreement or supported bargaining agreement applied immediately before the single-enterprise agreement came into operation, employees that are covered by new subsection 227A(5) (refer item 52) are taken to have a single interest employer agreement or supported bargaining agreement apply to them. Employees covered by new subsection 227A(5) are employees to whom a supported bargaining agreement or single interest employer agreement applied before the FWC approved the single-enterprise agreement.

511. This item is necessary as, at the time of reconsideration, the single interest employer agreement or supported bargaining agreement would no longer apply, as the single-enterprise agreement would apply.

Item 54: After paragraph 227B(2)(f)

512. This item would amend section 227B to insert new paragraph 227B(2)(fa). Existing section 227B varies the effect of existing sections 193 and 193A for the purposes of reconsidering whether an agreement passes the BOOT. Existing subsection 193A(4) requires the FWC to give primary consideration to the common views of those listed in paragraphs 193A(4)(a)–(b). New paragraph 193A(4)(c) (refer item 46) would list employee organisations that are bargaining representatives for any employee to whom a single interest employer agreement or supported bargaining agreement applies, where a single-enterprise agreement has been made that covers at least one such employee.

513. New paragraph 227B(2)(fa) would provide that when reconsidering whether an agreement passes the BOOT, the FWC would not need to consider the views shared by persons including bargaining representatives for any employee to whom a single interest employer agreement or supported bargaining agreement applies, where a single-enterprise agreement has been made that covers at least one such employee. In the context of an application to reconsider the BOOT, the single interest employer agreement or supported bargaining agreement would no longer apply. Existing paragraph 227B(2)(f) relevantly provides for the consideration of the common views of the employer(s) and employee organisations that are covered by the agreement.

Item 55: After subsection 236(1A)

Item 56: After subsection 238(1)

514. These items would insert new subsections 236(1B) and 238(2), which would prevent applications for majority support determinations and scope orders being made in relation to a proposed single-enterprise agreement which covers (among other employees) at least one employee to whom a single interest employer agreement or supported bargaining agreement that has not nominally expired, applies. Parties would have access to bargaining dispute applications under existing section 240. Preventing access to majority support determinations and scope orders would have the effect that bargaining representatives could not compel bargaining for a single-enterprise agreement where there is a supported bargaining agreement or single interest employer agreement within its nominal term and in operation.

Item 57: At the end of section 240A

515. This item would insert new subsection 240A(4). Existing section 240A allows a bargaining representative for a multi-enterprise agreement to apply to the FWC for a voting request order permitting the employer to ask their employees to vote to approve the agreement (refer existing section 180A).

516. New subsection 240A(4) would allow an application to be made for a voting request order in relation to a proposed single-enterprise agreement where a supported bargaining agreement or single interest employer agreement (each of which is an old agreement), which has not passed its nominal expiry date, applies to one or more of the employees who would be covered by the proposed agreement.

517. The requirements in new subsection 240A(4) are modelled on those in existing subsection 240A(1). After the notification time for a proposed agreement, a bargaining representative for the agreement could apply for a voting request order where the bargaining representatives for the agreement have been asked to provide the employer with their written agreement to the employer putting the agreement to vote, and one or more bargaining representatives have failed to do so.

518. This item would provide a means for an employer to take the new agreement to vote where the failure of a bargaining representative to provide written agreement is unreasonable in the circumstances, and making the request for employees to vote on the agreement would not be inconsistent with the employer's good faith bargaining obligations (refer sections 240B and 228).

Item 58: Section 240B

519. This item is a consequential amendment that would give effect to new subsection 240A(4).

Item 59: Section 245

520. This item is a technical amendment to allow for new subsection 245(2) (refer item 60).

Item 60: At the end of section 245

521. This item would insert new subsection 245(2). Existing section 245 provides that the FWC is taken to have varied a supported bargaining authorisation (authorisation) to

remove an employer's name only when they, and all of their employees that are listed on the authorisation, are covered by an enterprise agreement or workplace determination. There is no means for an employee to be removed from an authorisation.

522. Existing subsection 172(7) provides that an employer covered by an authorisation cannot bargain for or make an enterprise agreement other than a supported bargaining agreement with employees specified on an authorisation.

523. New subsection 245(2) would provide that the FWC is taken to have varied an authorisation to remove an employee when they are covered by an enterprise agreement or workplace determination that has come into operation. New subsection 245(2) would allow an employer to make a single-enterprise agreement with a group of employees with whom the employer has previously made a supported bargaining agreement, where some of its employees that are specified on the authorisation are not covered by an agreement or workplace determination.

Part 5—Model terms

Amendments to the *Fair Work Act 2009*

524. Part 5 would require the FWC to determine model flexibility, consultation and dispute resolution terms for enterprise agreements, and the model dispute settlement term for copied State instruments. As Australia's independent workplace relations tribunal, with responsibility for setting and reviewing the equivalent clauses in the award safety net, it is appropriate that the FWC perform this function. The Bill prescribes the matters the FWC must take into account when determining each model term.

525. Part 5 would commence by Proclamation or the day after a 12-month period commencing on the day the Bill receives Royal Assent. A maximum period of 12 months would allow sufficient time to constitute a Full Bench (or Full Benches) to determine the model terms, hear and consider submissions made in relation to the model terms as would be required by Part 5, and make the determinations. It is intended that the FWC would undertake detailed consultation, including with (but not limited to) national peak councils, during this period.

526. The FWC would have the power to vary its determinations. Responsibility for maintaining the currency of the model terms will be vested in the FWC and the ability to vary the terms in line with developments in workplace relations will ensure their ongoing relevancy.

Item 61: Subsection 202(5)

527. Existing subsection 202(1) requires that enterprise agreements contain a flexibility term. The flexibility term enables an employer and employee to agree to vary the effect of an enterprise agreement to meet the genuine needs of the employer and employee.

528. This item would repeal and substitute a new subsection 202(5) as well as insert new subsections 202(6) and (7).

529. In doing so, the existing requirement that the FW Regulations prescribe the model flexibility term for enterprise agreements would be replaced with a requirement that the FWC determine the model flexibility term.

530. New subsection 202(6) would set out what is required of the FWC when determining the model flexibility term.

531. The model term determined by the FWC would be required to be consistent with the existing requirements of a flexibility term set out in subsection 202(1).

532. Paragraph 202(6)(b) would provide a list of matters that the FWC must take into consideration in determining the model term, in addition to any other matters the FWC considers relevant.

533. The FWC would be required to consider whether the model term generally accords with comparable terms in modern awards. New subparagraph 202(6)(b)(i) would require consideration of common features of flexibility terms in modern awards, rather than a detailed examination of all flexibility terms found in awards, or the selection of a single

flexibility term to be used as a comparator. This would promote consistency across enterprise agreements and modern awards.

534. New subparagraph 202(6)(b)(ii) would require the FWC to take into account what it considers is 'best practice' workplace relations. This would allow the FWC to exercise its expert judgement, supplemented by submissions, to determine a model term that reflects the current best approach.

535. New subparagraph 202(6)(b)(iii) would require the FWC to consider whether all persons and bodies have been provided with a reasonable opportunity to make submissions on the determination of the model term. This would ensure that there is meaningful public consultation prior to determining the model term.

536. New subparagraph 202(6)(b)(iv) would require the FWC to take into account the object of the FW Act, and the objects of Part 2-4 (see section 171).

537. Legislative note 1 draws attention to the requirement that a Full Bench is required to make the model flexibility term. This requirement would be inserted into the FW Act by item 63.

538. Legislative note 2 points to subsection 33(3) of the AI Act for variations of a determination. This subsection provides that, in summary, where an Act provides a power to make an instrument of legislative character, that power includes the power to vary such an instrument. This would allow the FWC to update the model term from time to time in line with developments in workplace relations practices.

539. New subsection 202(7) would provide that the model term is a legislative instrument that could not be disallowed by Parliament. As Australia's workplace relations tribunal, the FWC has expert and technical knowledge of contemporary workplace relations and operates independently of political processes. The determination would be required to be made following consideration of submissions by the public, thereby mandating public participation in the process. The model term would play a limited role in creating rights or obligations in circumstances where an enterprise agreement does not contain a compliant flexibility term.

540. Ensuring the model term is not disallowable would also avoid the risk of the model term being disallowed after an enterprise agreement has proceeded to a vote by employees on the basis that the model term determined by the FWC would be included. Were this to occur, questions as to genuine agreement may arise on the basis that an important term of the agreement would not be included. This situation may also cause commercial uncertainty and frustrate bargaining processes.

Item 62: Subsection 205(3)

541. Existing subsection 205(1) requires enterprise agreements to include a consultation term which requires an employer to consult with employees about major workplace change or a change in rosters or ordinary hours of work. The term must also allow for employees to be represented for the purposes of that consultation.

542. This item would repeal and substitute a new subsection 205(3) as well as insert new subsections 205(4), (5) and (6).

543. In doing so, the existing requirement that the FW Regulations prescribe the model consultation term for enterprise agreements would be replaced with a requirement that the FWC determine the model consultation term.

544. New subsection 205(4) would set out what is required of the FWC when determining the model consultation term.

545. New paragraph 205(4)(a) would require the model term to satisfy the requirements of existing subsections 205(1) and (1A), which set the minimum requirements of a consultation term included in an enterprise agreement.

546. New paragraph 205(4)(b) would provide a list of matters that the FWC must take into consideration in determining the model term, in addition to any other matters the FWC considers relevant.

547. The FWC would be required to consider whether the model term generally accords with comparable terms in modern awards. New subparagraph 205(4)(b)(i) would require consideration of common features of consultation terms in modern awards, rather than a detailed examination of all consultation terms found in awards, or the selection of a single consultation term to be used as a comparator. This would promote consistency across enterprise agreements and modern awards.

548. New subparagraph 205(4)(b)(ii) would require the FWC to take into account what it considers is 'best practice' workplace relations. This would allow the FWC to exercise its expert judgement, supplemented by submissions, to determine a model term that represents the current best approach.

549. New subparagraph 205(4)(b)(iii) would require the FWC to consider whether all persons and bodies have been provided with a reasonable opportunity to make submissions on the determination of the model term. This would ensure that there is appropriate public consultation prior to determining the model term.

550. New subparagraph 205(4)(b)(iv) would require the FWC to assess whether the model term would be an objectionable emergency management term according to existing paragraphs 195A(1)(a)–(d). It is not relevant to the FWC's assessment of whether the model term would be an objectionable emergency management term that the term would not be an objectionable emergency management term because of the operation of existing subsection 195A(2).

551. New subparagraph 205(4)(b)(v) would require the FWC to take into account the object of the FW Act and the objects of Part 2-4 of the FW Act (see section 171).

552. Legislative note 1 draws attention to the requirement that a Full Bench is required to make the model consultation term. This requirement would be inserted into the FW Act by item 63.

553. Legislative note 2 points to subsection 33(3) of the AI Act for variations of a determination. This subsection provides that, in summary, where an Act provides a power to make an instrument of legislative character, that power includes the power to vary such an instrument. This would allow the FWC to update the model term from time to time in line with developments in workplace relations practices.

554. New subsection 205(5) would ensure that when determining the model consultation term, the FWC is not limited to addressing the content of existing subsections 205(1) and 205(1A). Rather, existing subsections 205(1) and (1A) set the core requirements that must be satisfied by a consultation term, including the model consultation term.

555. New subsection 205(6) would provide that the model term is a legislative instrument that cannot be disallowed by Parliament. As Australia's industrial relations tribunal, the FWC has expert and technical knowledge of contemporary workplace relations and operates independently of political processes. The determination would be required to be made following consideration of submissions by the public, thereby mandating public participation in the process. The model term would play a limited role in creating rights or obligations in circumstances where an enterprise agreement does not contain a compliant consultation term.

556. Ensuring the model term is not disallowable would also avoid the risk of the model term being disallowed after an enterprise agreement has proceeded to a vote by employees on the basis that the model term determined by the FWC would be included in it. Were this to occur, questions as to genuine agreement may arise on the basis that an important term of the agreement would not be included. This situation may also cause commercial uncertainty and frustrate bargaining processes.

Item 63: After subsection 616(4)

557. Section 616 sets out the FWC's functions that must be performed by a Full Bench of the FWC. This item would insert new subsection 616(4A) to require that any determination of a model term under new subsections 202(5), 205(3), 737(1) or 768BK(1A) be made by a Full Bench. This would ensure consistency with the manner in which modern awards are created.

Item 64: Section 737

558. This item would repeal and substitute a new section 737.

559. The existing requirement that the FW Regulations prescribe the model dispute resolution term for enterprise agreements in section 737 would be replaced with a requirement in new subsection 737(1) that the FWC determine the model term.

560. New subsection 737(2) sets out what is required of the FWC when determining the model term.

561. New paragraph 737(2)(a) would require the model term determined by the FWC to satisfy the requirements of existing subsection 186(6). This subsection requires an enterprise agreement to include a term setting out the process for settling disputes arising under the agreement or the National Employment Standards (NES). The term must also permit the representation of employees throughout that process.

562. New paragraph 737(2)(b) would provide a list of matters that the FWC must take into account in determining the model term, in addition to any other matters the FWC considers relevant.

563. New paragraph 737(2)(b) would provide a list of matters that the FWC must take into account in determining the model term, in addition to any other matters the FWC considers relevant.

564. The FWC would be required to consider whether the model term generally accords with comparable terms in modern awards. New subparagraph 737(2)(b)(i) would require consideration of common features of dispute resolution terms in modern awards, rather than a detailed examination of all dispute resolution terms found in awards, or the selection of a single dispute resolution term to be used as a comparator. This would promote consistency across enterprise agreements and modern awards.

565. New subparagraph 737(2)(b)(ii) would require the FWC to take into account what it considers is 'best practice' workplace relations. This would allow the FWC to exercise its expert judgement, supplemented by submissions, to determine a model term that represents the current best approach.

566. New subparagraph 737(2)(b)(iii) would require the FWC to consider whether all persons and bodies have been provided with a reasonable opportunity to make submissions on the determination of the model term. This would ensure that there is appropriate public consultation prior to determining the model term.

567. New subparagraph 737(2)(b)(iv) would require the FWC to take into account the operation of existing subsections 739(3)–(6) and 740(3)–(4). These subsections limit the powers of the FWC, or the person empowered to arbitrate a dispute under the dispute resolution term, to dealing with the dispute only in the manner permitted by the dispute resolution term, and prohibit a decision being made by the FWC or the person that is inconsistent with the FW Act or a fair work instrument that applies to the parties.

568. New subparagraph 737(2)(b)(v) would require the FWC to take into account the object of the FW Act.

569. Legislative note 1 draws attention to the requirement that a Full Bench is required to make the model dispute resolution term. This requirement would be inserted into the FW Act by item 63.

570. Legislative note 2 points to subsection 33(3) of the AI Act for variations of a determination. This subsection provides that, in summary, where an Act provides a power to make an instrument of legislative character, that power includes the power to vary such an instrument. This would allow the FWC to update the model term from time to time in line with developments in workplace relations practices.

571. New subsection 737(3) would provide that the model term would be a legislative instrument that could not be disallowed by Parliament. As Australia's independent workplace relations tribunal, the FWC has expert and technical knowledge of contemporary workplace relations and operates independently of political processes.

The determination would be required to be made following consideration of submissions by the public, thereby mandating public participation in the process. The model term would play a limited role in determining rights and obligations, as it will only apply where it is agreed to by the parties, or where the FWC accepts an undertaking from the employer that the model term will apply under existing paragraph 190(1)(b).

Item 65: Section 768BK (after the heading)

Item 66: Subsection 768BK(1)

Item 67: After subsection 768BK(1)

572. Part 6-3A of the FW Act provides for the transfer of State public sector employees to the national system. This might take place when, for example, a State enterprise is sold to a national system employer. Part 6-3A was modelled on Part 2-8 of the FW Act, which provides for transfers of employees between national system employers.

573. When the employees transfer from State public sector employment to national system employment, a copied State instrument governs the terms and conditions under which the employees are employed. The instrument is the same as the State award or agreement which applied to the employees immediately before moving into the national system.

574. Existing section 768BK provides that if the copied State instrument does not provide a procedure for settling disputes about matters arising under the instrument, then the model term prescribed by the FW Regulations applies.

575. Item 65 would insert a new subheading into existing section 768BK as a guide for the reader consequential to item 67 inserting new subsection 768BK(1A) in the FW Act.

576. Items 66 and 67 would amend existing subsection 768BK(1) to provide that a copied State instrument for a transferring employee that does not include a dispute settlement procedure term will be taken to include the model term determined by the FWC pursuant to new subsection 768BK(1A).

Item 68: Subsection 768BK(2)

Item 69: Subsection 768BK(2)

577. As copied State instruments can either be based on a State award or an agreement made under State law, existing subsection 768BK(2) clarifies that the model term prescribed for either class of instrument can be the same or different.

578. Items 68 and 69 do not change the substance of existing subsection 768BK(2). The items would amend subsection 768BK(2) to reflect the amendments made by items 66 and 67.

Item 70: At the end of section 768BK

579. This item would insert a new subsection 768BK(3) into the FW Act. The new subsection would set out the matters the FWC must take into account when determining the model dispute settlement term.

580. New paragraph 768BK(3)(a) would require the FWC to consider whether the model term generally accords with comparable terms in modern awards. The new paragraph would require consideration of common features of dispute settlement terms in modern awards, rather than a detailed examination of all dispute settlement terms found in awards, or the selection of a single dispute settlement term to be used as a comparator.

581. New paragraph 768BK(3)(b) would require the FWC to take into account what it considers is 'best practice' workplace relations. This would allow the FWC to exercise its expert judgement, supplemented by submissions, to determine a model term that represents the current best approach.

582. New paragraph 768BK(3)(c) would require the FWC to consider whether all persons and bodies have been provided with a reasonable opportunity to make submissions on the determination of the model term. This would ensure that there is appropriate public consultation prior to determining the model term, and in applying the other factors set out in new subsection 768BK(3).

583. New paragraph 768BK(3)(d) would require the FWC to consider whether the model term is consistent with the operation of existing subsections 739(3)–(6) and 740(3)–(4). These subsections limit the powers of the FWC, or the person empowered to arbitrate a dispute under the dispute settlement term, to dealing with the dispute only in the manner permitted by the dispute settlement term, and prohibit a decision being made by the FWC or the person that is inconsistent with the FW Act or a fair work instrument that applies to the parties.

584. New paragraph 768BK(3)(e) would require the FWC to take into account the object of the FW Act.

585. Legislative note 1 draws attention to the requirement that a Full Bench is required to make the model dispute settlement term. This requirement would be inserted into the FW Act by item 63.

586. Legislative note 2 points to subsection 33(3) of the AI Act for variations of a determination. This subsection provides that, in summary, where an Act provides a power to make an instrument of legislative character, that power includes the power to vary such an instrument. This would allow the FWC to update the model term from time to time in line with developments in workplace relations practices.

587. New subsection 768BK(4) would provide that the model term would be a legislative instrument that could not be disallowed by Parliament. As Australia's industrial relations tribunal, the FWC has expert and technical knowledge of contemporary workplace relations and operates independently of political processes. The determination would be required to be made following consideration of submissions by the public, thereby mandating public participation in the process. The model term would play a limited role in creating rights or obligations in circumstances where a copied State instrument does not contain a dispute settlement term.

Part 5A—Intractable bargaining workplace determinations

Amendments to the *Fair Work Act 2009*

588. Part 5A would ensure that terms that are agreed at the time an application for an intractable bargaining declaration is lodged, the time the intractable bargaining declaration is made and at the end of any post-declaration negotiating period (if there is one) must be included in an intractable bargaining workplace determination.

589. Part 5A would provide that the FWC cannot include in an intractable bargaining workplace determination a term dealing with a matter still at issue which is less favourable to employees, or employee organisations to be covered by the determination, than a term dealing with the same matter in an enterprise agreement that applies to an employee or employee organisation immediately before the determination is made.

Item 70A: At the end of subsection 270(3)

590. This item would introduce a legislative note at the end of existing subsection 270(3), to signpost that terms in an intractable bargaining workplace determination which deal with matters still at issue must comply with new section 270A (refer item 70B).

Item 70B: After section 270

591. This item would insert new section 270A into the FW Act.

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.

Item 70C: Subsection 274(3)

598. This item would repeal existing subsection 274(3) and substitute it with a new subsection 274(3) that defines an 'agreed term' for an intractable bargaining workplace determination.

599. New subsection 274(3) would define agreed terms to be any terms that the bargaining representatives for the proposed enterprise agreement had agreed should be included in the enterprise agreement at any of three points in time:

- when the application for an intractable bargaining declaration is lodged,
- when the intractable bargaining declaration is made, and
- at the end of any post-declaration negotiating period, if there is one.

600. The provision is intended to operate cumulatively. Additional terms may become 'agreed terms' at each step. Once a term is an agreed term according to any of paragraphs 273(3)(a)–(c), it remains an agreed term and cannot later become a term dealing with a matter still at issue or be left out of the determination. It is intended that this would narrow the matters still at issue at each stage.

601. Subsection 274(3) would ensure that bargaining representatives cannot retract their agreement to proposed terms once an intractable bargaining declaration application is made. If a bargaining representative sought to retract their agreement to a term at an earlier stage or resisted agreeing to a term in an attempt to have the matter determined by the FWC, the good faith bargaining requirements in existing section 228 may be relevant. In determining which terms to include in a workplace determination, the Full

Bench (under existing section 275 of the FW Act) must take into account factors including whether the conduct of bargaining representatives was reasonable and the extent to which bargaining representatives have complied with good faith bargaining.

Part 6—Closing the labour hire loophole

Amendments to the *Fair Work Act 2009*

602. Part 6 would insert new Part 2-7A into the FW Act. New Part 2-7A would relate to various labour hire arrangements and provide for orders to be made regulating these arrangements.

603. When an employer supplies one or more employees to perform work for a host business, employees and unions would be able to apply to the FWC for a regulated labour hire arrangement order. The FWC would be prohibited from making an order unless it is satisfied that the performance of the work for the host is not or will not be for the provision of a service, rather than the supply of labour. The FWC would also be prohibited from making an order if satisfied that it was not fair and reasonable in all the circumstances to do so, having regard to submissions from affected businesses and employees. In determining whether making an order would not be fair and reasonable, the FWC would be required to consider a range of factors including existing pay arrangements, whether the performance of the work is for the provision of services rather than the supply of labour, and the history of industrial arrangements applying to the host and the employer.

604. If the FWC made the order, employers that supply labour to a host and are covered by the order would generally be required to ensure that employees working as part of the arrangement are paid no less than the rate at which they would be paid under the host employer's enterprise agreement if they were directly employed (the protected rate of pay). In this way, the orders would protect bargained rates in enterprise agreements that host businesses have negotiated with their employees from being undercut by the use of labour hire.

605. Once an order is made, host employers would be required to provide certain information to employers supplying employees under the arrangement on request to assist them in meeting their payment obligations.

606. Certain exemptions would be built into the framework, including where an employee supplied under the arrangement is engaged for a short-term period or where a training arrangement applies to the employee. The provisions also would not apply where the host business is a small business employer as defined in the FW Act.

607. The provisions would be supported by an anti-avoidance framework to prevent businesses from adopting certain practices with the intention of avoiding obligations under new Part 2-7A.

608. The FWC would be able to resolve disputes about the operation of Part 2-7A, including by mandatory arbitration. It would be able to determine an alternative protected rate of pay for an employee supplied to work for a host employer where it would be unreasonable for the employee's employer to pay the employee the protected rate of

pay under Part 2-7A and there is an alternate employment instrument that applies to the host employer or a related body corporate of the host employer.

Item 71: After paragraph 5(8)(a)

609. Section 5 sets out the content of Chapter 2 of the FW Act (Terms and conditions of employment). This item would make a consequential amendment to include new Part 2-7A (inserted by item 73) in the list of other terms and conditions for national system employees.

Item 72: Section 12

610. Section 12 of the FW Act contains the Dictionary. This item would insert several new definitions in section 12 for terms relied on in new Part 2-7A (inserted by item 73). Those terms are:

- alternative protected rate of pay order, defined by reference to new subsection 306M(2);
- arbitrated protected rate of pay order, defined by reference to new subsection 306Q(1);
- covered employment instrument;
- host employment instrument, defined by reference to new subsection 306E(6);
- protected rate of pay, defined by reference to new section 306F;
- recurring extended exemption period, defined by reference to new subsection 306K(2);
- regulated employee, defined by reference to new subsection 306E(5);
- regulated host, defined by reference to new section 306C; and
- regulated labour hire arrangement order, defined by reference to new subsection 306E(1).

611. A reference to a covered employment instrument would include an enterprise agreement, a workplace determination (as defined in section 12 of the FW Act), and a determination under section 24 of the *Public Service Act 1999* that applies to a class of APS employees in an Agency (within the meaning of that Act).

612. It would also include an instrument made under any other law of the Commonwealth or a State or a Territory that provides for the terms and conditions of employment for a class of national system employees of the Commonwealth or a State or Territory, or of an authority of the Commonwealth or of a State or Territory. This would include instruments determining the terms and conditions of employment of relevant employees made under Acts such as the *Australian Federal Police Act 1979* or the *Parliamentary Service Act 1999.*

613. This definition would ensure that the regulatory framework in new Part 2-7A would apply in relation to workplaces covered by determinations or instruments other than an

enterprise agreement, but which serve an equivalent purpose. The Part would apply in relation to any determination or equivalent instrument that covers a class of employees, including as amended after the provision would commence. Regulations may be made to ensure that new Part 2-7A can apply to any other instrument relating to the employment of a class of national system employees that is made under a Commonwealth, State or Territory law that is not already covered by the wording of this provision.

Item 72A: At the end of section 201

614. New subsection 201(5) would address circumstances where the FWC approves a new enterprise agreement, where that enterprise agreement would become the host employment instrument named in an existing regulated labour hire arrangement order by operation of new section 306EB. This would require that when approving a new enterprise agreement in these circumstances, the FWC must note in its decision to approve the enterprise agreement that it will be the host employment instrument, for that order.

615. This provision would be relevant where an enterprise agreement that applies to a regulated host is specified as the host employment instrument in a regulated labour hire arrangement order, and the new enterprise agreement being approved by the FWC would replace that enterprise agreement.

616. This provision would operate in conjunction with new subsection 306EC(3), which would require the FWC to give written notice to employers covered by a regulated labour hire arrangement order of the approval of the host's new enterprise agreement, where the new enterprise agreement would become the host employment instrument for the purposes of that order. The FWC would also be required to notify relevant employers of the effect of the approval of the new enterprise agreement in relation to the regulated labour hire arrangement order.

Item 73: After Part 2-7

617. This item would insert new Part 2-7A, relating to regulated labour hire arrangement orders, into the FW Act, after existing Part 2-7.

618. The Guide to Part 2-7A provides that Division 2 deals with certain payments relating to termination of employment and the continued application of regulated labour hire arrangement orders in particular circumstances, in addition to alternative protected rate of pay orders.

Division 1—Introduction

619. Division 1 would set out the introductory matters for Part 2-7A.

Section 306A Guide to this Part

620. New section 306A would set out the guide to Part 2-7A. This Part would regulate certain labour hire arrangements with the intention of ensuring that employees working for a host business as part of a labour hire arrangement are paid for the work they perform in line with the terms of the host business' covered employment instrument.

The guide would provide that the new Part relates to regulated labour hire arrangement orders. This includes the making of such orders by the FWC and the obligations of employers and regulated hosts covered by such orders. The Part deals with the making of alternative protected rate of pay orders by the FWC, disputes arising under the Part, and prohibiting avoidance behaviour.

Section 306B Meanings of employee and employer

621. New section 306B would provide that, for the purposes of Part 2-7A, employee means a national system employee and employer means a national system employer. These terms are defined in sections 13 and 14 of the FW Act respectively.

Section 306C Meaning of regulated host

622. New section 306C would provide the definition of 'regulated host' and lists the bodies and persons that would be defined as a 'regulated host'. The list would reflect the entities covered by the definition of national system employer set out at section 14 of the FW Act, as extended by sections 30D and 30N in States that have referred power over workplace relations to the Commonwealth. The provision would rely on the same constitutional powers that underpin the definition of national system employer, with some alteration given host businesses are not the employers of regulated employees. The Part would regulate the conduct of those persons and bodies in relation to their role in hosting a person who is not their employee.

Section 306D References to kinds of work and work performed for a person etc.

623. New subsection 306D(1) would provide that, for the purposes of Part 2-7A, a reference to work of a kind includes a reference to work that is substantially of that kind. This would clarify that the provisions of this Part are not intended to be read narrowly or limited to a specific kind of work. Labour hire arrangements can be complex and involve multiple parties and agreements.

624. New subsection 306D(2) would provide that for the purposes of Part 2-7A, a reference to work performed for a person includes a reference to work performed wholly or principally for that person, for an enterprise carried on by the person, and for a joint venture or common enterprise engaged in by the person and one or more other persons. This would not expand the scope of the provisions in Part 2-7A but rather clarify the intention of new section 306D that new Part 2-7A is intended to take into account the various circumstances in which labour hire arrangements may be used, including where labour hire employees are provided to work for the benefit of a joint venture or common enterprise between a number of parties. In those circumstances, the regulated host may be determined to be one of the parties to the joint venture or common enterprise.

625. For the purposes of this Part, the terms 'joint venture' and 'common enterprise' are intended to be read broadly and would include arrangements where there is a contractual agreement between parties to participate in a common project, and where the parties act together to incorporate a company for the purposes of a joint project.

626. To further clarify this point, new subsection 306D(3) would provide that when determining whether work is performed for a person by an employee of an employer it does not matter whether there is or will be any agreement between the person and the employer relating to the performance of the work. That is, for the purposes of determining which party should be named the 'regulated host' for the purposes of an order made under the new Part, it is not a requirement that there be a direct agreement (or any agreement) between the party receiving the benefit of the work, and the employer employing workers to perform the work.

Division 2—Regulated labour hire arrangement orders

627. Division 2 would set out:

- when the FWC may make a regulated labour hire arrangement order (Subdivision A, new section 306E);
- the obligations of employers and regulated hosts when there is a regulated labour hire arrangement order in effect (Subdivision B, new sections 306F–306H);
- the details of short-term arrangements (Subdivision C, new sections 306J–306L); and
- the details of alternative protected rate of pay orders (Subdivision D, new sections 306M–306N).

Subdivision A—Making regulated labour hire arrangement orders

Section 306E FWC may make a regulated labour hire arrangement order

628. New section 306E would provide for the circumstances in which the FWC may make a regulated labour hire arrangement order. The effect of the order would be to apply the obligations in Part 2-7A to a labour hire arrangement. If no order is made, hosts and employers would have no obligations under Part 2-7A, other than those imposed by the anti-avoidance provisions in Division 4.

629. **Regulated labour hire arrangement order:** New subsection 306E(1) would provide that the FWC must make such an order if satisfied of certain matters.

630. New paragraph 306E(1)(a) would ensure that an application may be made where an employee is supplied, either directly or indirectly, to perform work for the regulated host, irrespective of the contractual or other arrangements between the employer and the regulated host or other associated entities of the regulated host.

631. As an example, this provision would provide that the FWC may make an order where it is satisfied that the employer would supply labour to a regulated host who is party to a joint venture, whether or not the agreement for the supply of labour is made with the regulated host or another party to the joint venture.

632. New paragraph 306E(1)(b) would provide that in order to be able to make an order, the FWC must be satisfied that a covered employment instrument that applies to the regulated host would apply to the employees being supplied, or to be supplied, if the

host were to employ the employees to perform work of the kind being, or to be, performed.

633. New paragraph 306E(1)(c) would provide that the FWC cannot make such an order where the regulated host is a small business employer. This would reduce the administrative burden on small businesses. It would also allow for labour hire workers employed by small businesses to be covered by a regulated labour hire arrangement order where they are working for a regulated host who is not a small business. Small business employer is defined in section 23 of the FW Act.

634. New subsection 306E(1A) would provide that despite subsection 306E(1), the FWC must not make a regulated labour hire arrangement order 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. In order to determine whether an arrangement is for the provision of a service rather than the supply of labour, the FWC would be required to have regard to the matters listed in new subsection 306E(7A). These matters are whether and to what extent:

- the employer is involved in matters relating to the performance of the work (paragraph 306E(7A)(a));
- the employer or a person acting on their behalf directs, supervises or controls the employees when they perform work for the host (paragraph 306E(7A)(b));
- the employees use or will use systems, plant or structures of the employer to perform the work (paragraph 306E(7A)(c));
- the employer or another person is or will be subject to industry or professional standards or responsibilities in relation to the employees (paragraph 306E(7A)(d)); and
- the work is of a specialist or expert nature (paragraph 306E(7A)(e)).

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.

639. New subsection 306E(2) would provide that despite subsection (1), the FWC must not make the order if it is satisfied that it is not fair and reasonable to do so in the circumstances, having regard to considerations arising under subsection (8). As part of an order under this provision, the FWC may consider and jointly make other orders pursuant to applications made under Part 2-7A relating to the regulated labour hire arrangement. For example, if a party considered that an alternative protected rate of pay should apply in relation to an employee, if the FWC were to make a regulated labour hire arrangement order, the FWC could deal with that question by making an order under new section 306M at the same time as it considered whether to make the regulated labour hire arrangement order (see new paragraph 306M(1)(c)).

640. Subsection 306E(3) would provide that the supply of employees to the regulated host can be the result of one or more agreements, and that those agreements can be between parties that are not the regulated host or the employer. This would recognise that regulated labour hire arrangement orders can cover complex arrangements with multiple participating parties and agreements. Labour hire employees can be supplied directly from the employer to the regulated host or indirectly through multiple agreements and entities. Where the result of those agreements is that an employer provides employees to perform labour for the regulated host, the arrangement would satisfy the criterion in new paragraph 306E(1)(a).

641. New paragraph 306E(3)(c) would provide that a regulated labour hire arrangement order can apply even where the regulated host and employer are related bodies corporate. This would capture circumstances where a company is established to employ employees and provide them to a related body corporate host business under a labour hire arrangement where there is a covered employment instrument applying to the regulated host. A note to the provision would clarify that where related bodies corporate with different branding do not provide labour to one another, the FWC would not make a regulated labour hire arrangement order. This is because the obligations imposed as a result of a regulated labour hire arrangement order only apply where one employer provides labour to another.

642. New subsection 306E(4) would clarify that the basis on which particular employees are engaged as part of a labour hire arrangement is not relevant to the consideration under new paragraph 306E(1)(b). This would address, for example, circumstances where employees are or would be employed as casual employees and the covered employment instrument that applies to the regulated host does not provide for casual employment. Where that instrument applies to work of the kind to be undertaken by the employees as part of the labour hire arrangement, the requirements of new paragraph 306E(1)(b) would be satisfied.

643. **Regulated employee and host employment instrument definition:** New subsection 306E(5) would define the term 'regulated employee' as an employee supplied, or who will be supplied, to perform work for a regulated host.

644. New subsection 306E(6) would define the term 'host employment instrument' as the covered employment instrument relevant to a regulated labour hire arrangement order, referred to in paragraph 306E(1)(b).

645. **Who may apply for an order:** New subsection 306E(7) would list the parties who can apply to the FWC for a regulated labour hire arrangement order.

646. **Matters to be considered if submissions are made:** New subsection 306E(8) would set out matters that the FWC may consider when deciding whether it is not fair and reasonable in all the circumstances to make a regulated labour hire arrangement order for the purposes of new subsection 306E(2). The FWC is only required to consider matters listed in new subsection (8) where the parties have made submissions on these matters (new subsection 306E(2)).

647. New paragraph 306E(8)(a) would provide that the FWC may consider the pay arrangements that apply to employees of the regulated host (or its related bodies corporate). The FWC may consider whether the host employment instrument applies only to a particular class of employees, and whether there would be employees of that class performing work as part of the regulated labour hire arrangement. It may consider whether the host has ever actually engaged employees under its employment instrument to perform work of the same classification as would be performed under the labour hire arrangement. This may assist the FWC in determining the relevant rate of pay that would apply to the regulated employees, were an order made. The FWC may also consider the relevant rate of pay that would apply under a regulated labour hire arrangement order in determining if it is fair and reasonable to all parties to make the order.

648. New paragraph 306E(8)(c) would provide that the FWC may consider the history of industrial arrangements applying to the regulated host and the employer. This would include considering previous regulated labour hire arrangement orders and bargaining related to any covered employment instrument applying to each party. It may also include how workers have been previously engaged by a regulated host to perform certain work.

649. New paragraph 306E(8)(d) would provide that the FWC may also consider any corporate relationship between the regulated host and the employer, including whether they are related bodies corporate, engaged in a joint venture or a common enterprise.

650. New paragraph 306E(8)(da) would provide that the FWC may consider the nature of the named host's interest in the joint venture or common enterprise. For example, where the host's interest in the joint venture or common enterprise is minor, or the host does not otherwise supply labour for the joint venture, these are intended to weigh against the FWC considering it would be fair and reasonable to make an order treating the named entity as the regulated host. However, where the named host is a meaningful

participant in the joint venture,[9] and/or supplies labour of the same kind as would be covered by the order to the joint venture, this would weigh in favour of the FWC finding that it is fair and reasonable to make an order that names the named party as the regulated host.

651. New subparagraph 306E(8)(da)(ii) would also require the FWC to consider the pay arrangements that apply to parties in the joint venture or common enterprise. The FWC may consider whether parties to the joint venture have employment instruments that apply to a particular class of employees, and whether there would be employees of that class performing work as part of the joint venture or common enterprise. Where labour provided as part of the labour hire arrangement is of a similar type to the work performed by those employees or where it would otherwise be covered by the employment instrument of a party to the joint venture, this may weigh in favour of that party being named the regulated host on the face of an order.

652. The effect of these provisions would be to permit the FWC to clarify which party should be named as the regulated host on the face of an order, where employees perform work for a joint venture or common enterprise and multiple parties to that joint venture or common enterprise benefit from the work. The FWC must consider fairness and reasonableness in coming to any decision. Where appropriate, this would permit employees providing work to a joint enterprise to be paid at the same rate as other employees working for that enterprise, where those employees are undertaking work that is similar or the same.

653. New paragraph 306E(8)(e) would provide that the FWC may consider the terms and nature of the labour hire arrangement, including how long it will operate for, the location of the work being performed, the industry the work is performed in and how many employees are engaged to perform work for the regulated host as part of the arrangement.

654. Finally, new paragraph 306E(8)(f) would provide that the FWC would also be able to have regard to any other matter it considers relevant.

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

[9] For example, has a significant share compared to other joint venturers, but not where a minority party is not simply providing a financial contribution in return for a share of the joint venture's output (for example, a share of the output in proportion to the share of the joint venture by way of an off-take arrangement).

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.

Section 306EA Regulated labour hire arrangement order may cover additional arrangements

659. Subsection 306EA(1) would allow the FWC, of its own motion or upon a further application, to join another employer or employers (the additional employers) to an application for a regulated labour hire arrangement order. Before joining additional employers to an application, the FWC must be satisfied that the additional employers also, or will also, provide employees, and that the employees of the additional employers carry out, or will carry out, the same or similar work to the employees of the employer already named in the application for the regulated host.

660. New subsection 306EA(2) would provide that in addition to the FWC being able to make a determination under this section on its own motion, an application could be made by any of the following parties:

- the original applicant for the regulated labour hire arrangement order;
- any other party who could have made an application for the regulated labour hire arrangement order. For example, this would include the host, an employee of either the employer supplying labour or of the host receiving the labour, or an employee organisation entitled to represent such an employee; and
- any potential additional employer that could be joined to the application, any employee of that employer, or an employee organisation entitled to represent any employees of that employer.

661. If the FWC exercises its power to join additional employers to the application, and before making a regulated labour hire arrangement order, new subsection 306EA(3) would require the FWC to seek the views of the additional employers, the employees of the additional employers, and any employee organisation entitled to represent the industrial interests of the additional employers' employees.

662. Subsection 306EA(4) would provide that, if the FWC decides to make an order under the original application, then, unless either of subsections 306EA(5) or (6) apply, the FWC may also decide to include any or all of the additional employers, and any or all of their employees, as named parties within that order.

663. New subsection 306EA(5) would provide that the FWC must not include the additional employers or additional employees as parties named in the order, to whom the order applies, unless it is satisfied that:

- the additional employers provide or will provide the additional employees to the regulated host, and the additional employees carry out or will carry out the same or similar kind of work as the employees already named in the application;
- the host's employment instrument would be the covered employment instrument in respect of the additional employees; and
- the work being carried out by the additional employees would not be for the provision of a service, rather than the supply of labour, taking into account the matters at subsection 306E(7A) in relation to the additional employer and additional regulated employees.

664. The FWC also must not make the order in respect of the additional employers and additional regulated employees if satisfied that it is not fair and reasonable to do so, taking into account the submissions of the additional employers and additional regulated employees, and the factors in subsection 306E(8).

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

665. New section 306EB would cover 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 amendments would provide that 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.

Section 306EC Notification requirements in relation to new covered employment instrument

666. New subsections 306EC(1) and 306EC(2) would require the regulated host to provide written notice to the employer or employers covered by the order that the new employment instrument has been approved (whether by its employees or otherwise) and inform the employer or employers of the effect of the new instrument. This provision is a civil remedy provision.

667. New subsection 306EC(3) would further provide that, where the FWC approves an enterprise agreement that will replace a covered employment instrument listed in a regulated labour hire arrangement order, the FWC must inform the employers covered by the order that the enterprise agreement has been approved, and the effect of approval of the enterprise agreement in relation to the order. Subsection 306EC(3) would operate in conjunction with the proposed amendment to insert a new subsection 201(5) of the FW Act, which would require the FWC to specify in its approval decision that the regulated labour hire arrangement order would apply in relation to the newly approved enterprise agreement.

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

668. New subsection 306ED(1) would apply where there is a regulated labour hire arrangement order either in force or made but not yet in force between a regulated host

and one or more employers, and the host enters into an arrangement with one or more other employers not already covered by the order to supply employees to perform work of the kind being provided by the employer already covered by the order. This may occur in the ordinary course of business, for example, where the regulated host puts the supply of labour services out to tender.

669. In these circumstances, new subsection 306ED(2) would require the host to apply to the FWC for an order to vary the regulated labour hire arrangement order to cover the new employers, as soon as practicable after they become aware that a new employer is to supply regulated employees in the manner described in subsection 306ED(1). This provision would be a civil remedy provision.

670. New subsection 306ED(3) would provide that a regulated host is not permitted to discontinue an application brought under subsection 306ED(2) under section 588 (which relates to discontinuing applications) unless the host will no longer be engaging a new employer to provide employees to perform work of the kind covered by the regulated labour hire arrangement order.

671. New subsection 306ED(4) would require the host to notify the new employer engaged to provide labour to the regulated host in writing that the host has made the variation application, and that the regulated labour hire arrangement order would apply to the new employer and their employees on an interim basis until the FWC makes a decision on the variation application. The host would be required to so notify the new employer as soon as possible after the variation application is made. This provision would be a civil remedy provision.

672. New subsection 306ED(5) would provide 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.

673. New subsection 306ED(6) would provide 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.

674. New subsection 306ED(7) would provide 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.

675. New subsection 306ED(8) would provide 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).

676. New subsection 306ED(9) would provide 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.

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

678. New subsection 306ED(11) would provide 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.

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

679. New subsection 306EE(1) would provide that the provision applies where a host is covered by a regulated labour hire arrangement order, and a tender process is conducted by or on behalf of a host, or in respect of a joint venture or common enterprise to which the host is a party. The tender process must be in respect of work that is the subject of an order, where successful tenderers to that process would become covered by that order by operation of new section 306ED.

680. New subsection 306EE(2) would provide that the host conducting the tender process must advise all of the tenderers for the supply of labour, from the start of the tender process, that the regulated labour hire arrangement order may apply to the successful tenderer, and that they could be required to pay the protected rate of pay to their employees. This provision would be a civil remedy provision. In relation to this requirement, new subsection 306F(3A) described below would provide that an employer would not be subject to a civil penalty if they pay regulated employees less than the protected rate of pay, where the host was required to notify them as a tenderer under subsections 306EE(2) or (3), but failed to do so.

681. New subsection 306EE(3) would provide that the host must, as soon as practicable after the end of the tender process, advise the successful tenderer or tenderers in writing that:

- the host is required to make an application pursuant to subsection 306ED(2);
- the effect of subsection 306ED(11) in relation to the application; and
- that if the FWC decides to vary the regulated labour hire arrangement order under section 306ED to cover those employers, and the order is in force or would come into force, the employers would be required to pay their employees who perform work for the regulated host in accordance with Part 2-7A at the protected rate of pay.

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

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

682. **Application of section:** Section 306F would apply where there is a regulated labour hire arrangement order in force.

683. **Employer must not pay less than the protected rate of pay:** Subsection 306F(2) would require an employer covered by a regulated labour hire arrangement order to pay regulated employees no less than the protected rate of pay in connection with the work performed under the arrangement. This is a civil remedy provision.

684. 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.

685. That is, if the full rate of pay that would have been payable to the regulated employee if they were directly employed by a host for a particular period is $1,000, the only obligation of the employer is to pay that employee at least $1,000.

686. The obligation to pay the protected rate of pay extends to periods of leave a regulated employee takes during a placement with a regulated host covered by a regulated labour hire arrangement order.

687. **Exception:** New subsection 306F(3) would set out an exception to the obligation to pay no less than the protected rate of pay at subsection 306F(2). The subsection would provide for circumstances where the protected rate of pay is not paid because the employer reasonably relies on information provided by the regulated host as to how the protected rate of pay should be correctly calculated and the information provided by the regulated host is incorrect. In this circumstance, the employer would not be exposed to a civil penalty for failing to comply with new subsection 306F(2). This would protect employers from a penalty that could arise from circumstances that are outside of their control. Given the serious consequences for employees should this situation arise, employers should take careful steps to ensure that the protected rate of pay is properly

calculated and that the regulated host has provided them with any necessary information to allow correct calculation of the protected rate of pay.

688. New subsection 306F(3A) would provide that an employer would not contravene the requirement to pay the protected rate of pay in subsection 306F(2) if they are required to pay the protected rate of pay on an interim basis because a variation application has been made but they have not been notified by the regulated host of the variation application or because the host did not comply with their obligations under new subsections 306EE(2) and (3). The intention of this provision is to prevent employers being exposed to a civil penalty where they were not notified of their obligations to pay the protected rate of pay to employees.

689. **Meaning of protected rate of pay:** New subsection 306F(4) would define 'protected rate of pay' as 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. This provision would adopt the definition of 'full rate of pay' in existing section 18. The protected rate of pay would accordingly include loadings (including annual leave loading), allowances, overtime or penalty rates, incentive-based payments or bonuses and any other separately identifiable amounts.

690. New subsection 306F(5) would clarify how the protected rate of pay should be calculated for casual employees where the host employment instrument either does not provide for casual employment, or does not provide for casual employees to undertake work of the relevant kind the casual employee is engaged to perform. The provision would provide that the protected rate of pay for casual employees in this circumstance is the full rate of pay that would be payable if the employee were engaged other than as a casual employee under the host employment instrument, and the base rate of pay were increased by an additional 25 per cent. This increase to the base rate of pay is intended to reflect the casual loading rates. This provision would ensure that casual employees are not prevented from receiving the protected rate of pay for their work for a regulated labour host, including where casual employment is not specifically provided for in the host employment instrument.

691. New subsection 306F(6) would address circumstances where the employer mentioned in subsection 306F(1) is only a national system employer because of section 30D or 30N (which extend the meaning of national system employer in relation to state referrals of power). The new subsection would provide that, despite subsections (4) and (5), the protected rate of pay for regulated employees in this circumstance would not include any amount that relates to an excluded subject matter within the meaning of subsection 30A(1) or 30K(1). Amounts relating to excluded subject matters for the purposes of this subsection may include long service leave, leave for victims of crime and jury or emergency service leave.

692. New subsections 306F(7) and (8) would set out how the protected rate of pay would be calculated for employees who are pieceworkers for the purposes of existing paragraphs 16(2)(b) and 18(2)(b) respectively.

693. New subsection 306F(9) would provide that the protected rate of pay for the purposes of new subsection 306F(5) would not include paid leave entitlements that would apply if the employee were engaged other than as a casual, unless the employee were otherwise entitled to them. This subsection would clarify the operation of new subsection 306F(5). This means, for example, that a casual would not be entitled to paid annual leave because of any provision in Part 2-7A, but nothing in the Part would prevent a casual employee being entitled to paid family and domestic violence leave as this paid leave entitlement is extended to casual employees.

694. **Requirement to pay no less than protected rate of pay applies despite other fair work instruments etc.:** New subsection 306F(10) would provide that new subsection 306F(2) would apply irrespective of any provision of any fair work instrument or covered employment instrument (other than an instrument made by the FWC under the Part, including under section 306N or section 306Q) that applies to the regulated employee or the regulated employee's contract of employment, that would provide for a rate of pay for the work that is less than the protected rate of pay. The intention of this provision is to ensure that regulated employees are remunerated at the higher of any applicable rate of pay under a fair work instrument or relevant covered employment instrument. Where the protected rate of pay is less than the amount of total remuneration an employee receives, paying the employee as normal would comply with both the obligation to pay at least the protected rate of pay, and the remuneration obligations under the relevant industrial instrument.

Section 306G Exceptions from requirement to pay protected rate of pay

695. New section 306G would provide for circumstances where there is no requirement to pay the protected rate of pay, despite a regulated labour hire arrangement order being in force.

696. **Training arrangements:** New subsection 306G(1) would provide that there is no requirement to pay the protected rate of pay where a training arrangement applies in respect of a regulated employee. This provision is intended to apply to all workers employed on an apprentice or trainee contract. This would reduce barriers to employers providing training pathways to meet future skills demands. Training arrangement is defined in the Dictionary at section 12.

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.

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

699. **Application of this section:** New section 306H would set out obligations of regulated hosts covered by a regulated labour hire arrangement order.

700. **Ability to request information regarding protected rate of pay:** New subsection 306H(2) would provide that where a regulated labour hire arrangement order is in force and an employer does not have all the information required to work out the protected rate of pay for work performed by a regulated employee for a regulated host, the employer may request that the regulated host provide it with the information. The subsection would allow employers to identify specific information which, if provided, would allow them to accurately determine the protected rate of pay and request that the regulated host or proposed regulated host provide it. It would also allow employers to request that regulated hosts provide information such as policies relating to how rates of pay are calculated or how a host employment instrument applies.

701. New subsection 306H(3) would provide that, if an employer makes a request for the purposes of subsection 306H(2), the regulated host must comply with the request as soon as reasonably practicable after it is made, and within a period that allows the employer to comply with its obligations to pay the protected rate of pay to its employees in a timely manner. This subsection would be a civil remedy provision.

702. This information could include documents, policies, emails or records in any form detailing how a regulated host applies the terms of the host employment instrument to certain classes of employee (whether in practice, or in theory if the regulated host has not previously engaged employees under a certain classification). It may include a copy of the host employment instrument that covers the class of work or class of employees

covered by a regulated labour hire arrangement order. It may include information about how a regulated host calculates, or would calculate, certain entitlements under the relevant host employment instrument or how it determines or would determine an employee's classification and rate of pay for certain work based on their previous level of experience. The obligation to respond to an employer's request could also extend to the creation of documents that detail how the protected rate of pay should be calculated, if no documents to this effect were available, or if the relevant documents were considered to be commercially sensitive.

703. **Manner of complying with request:** New subsection 306H(4) would provide that a regulated host could comply with a request under new subsection 306H(2) by different methods.

- Regulated hosts could provide an employer with the relevant information that would allow the employer to undertake their own calculations to determine the protected rate of pay for the work.
- Alternatively, a regulated host may choose to undertake its own calculations as to the correct protected rate of pay for each regulated employee for each pay period, and to provide that information to the employer before the end of each pay period. Regulated hosts might choose to undertake their own calculations, for example, where information about how the protected rate of pay is calculated under their policies is commercially sensitive, or where they are concerned that the correct protected rate of pay will not otherwise be accurately calculated.

Subdivision C—Short-term arrangements

Section 306J Determination altering exemption period for short-term arrangements

704. Subdivision C would address short-term arrangements, including circumstances where the FWC may make orders altering the exemption period of a short-term arrangement.

705. New section 306J would provide that the FWC can alter the duration of the three month short-term exemption period provided for in new subsection 306G(2). On application, the FWC could make a determination under this section if 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.

706. The FWC could determine under this section that there was no exempt period for the purpose of new section 306G, or that the exempt period provided for in that section is extended or reduced to a period determined by the FWC. During the exempt period, there would be no requirement for the employer to pay regulated employees the protected rate of pay.

707. Parties would be able to apply for a determination that the short-term exemption period is extended or reduced, or that there is no exemption period, to reflect the specific circumstances of a surge demand period experienced by a regulated host. Employers or organisations entitled to represent their industrial interests may seek a determination under this provision due to an extended surge in demand during which it is necessary to

engage many additional workers. Employees or organisations entitled to represent their industrial interests may seek a determination that a specified surge period should be shortened or that there is no surge period at all.

Section 306K Determination of recurring extended exemption period

708. New section 306K would provide that the FWC could determine that there is a recurring period that would be exempt from the requirement to pay the protected rate of pay for the purposes of subparagraph 306G(2)(b)(iii). An application for a determination 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.

709. The FWC could determine under this section that the exempt period for the purpose of subsection 306G(4) is to recur at specified intervals, for an exempt period of more than three months, starting on a specified day in specified consecutive years. An example of this would be for surges in staffing requirements occurring around the Christmas period or snow season, that occur every year for a period of more than three months. For employees who commence during the recurring extended exempt period, there would be no requirement for the employer to pay regulated employees the protected rate of pay for the remaining period of the extended exemption, or three months, whichever is longer (see new subparagraph 306G(2)(b)(iii)). The determination could be made in relation to specified kinds of work in relation to which the labour hire arrangement order relates or would relate.

710. For harvest periods or surge periods with changeable dates, employers could apply for the recurring surge period to start at the earliest possible date for that predicted surge period. Regulated hosts would not be required to commence engaging labour hire on the start date of a recurring surge exemption period and could engage employees under the exemption at any time during the period. A regulated host could seek a longer recurring exemption period to buffer any uncertainty around the dates of a seasonal surge period if necessary.

Section 306L Making and effect of determinations under this Subdivision

711. New section 306L would set out matters relating to determinations made under Subdivision C.

712. **Who may apply for determination:** New subsection 306L(1) would specify which parties can apply for a determination under the subdivision.

713. New paragraph 306L(1) would make clear that a regulated host, an employer or employee covered by the regulated labour hire arrangement order, or any organisation entitled to represent their industrial interests, may make an application to the FWC for a determination to vary the exemption period for a short term arrangement.

714. **Time for making determination:** New subsection 306L(2) would require the FWC to make a determination under the subdivision as quickly as possible after an application

is made. This is intended to minimise the period of uncertainty as to what the exemption period will be once an application has been made.

715. **Requirements for making determination:** New subsection 306L(3) would require the FWC to seek submissions from any other party that could have applied for a determination under the Subdivision. This would ensure all relevant parties are given an opportunity to make submissions relating to any application for a change to the short-term exemption period. However, there is no requirement that those parties express any views, provided that they have been provided with a reasonable opportunity to do so.

716. New subsection 306L(4) would require that the FWC only make a determination extending, reducing, or removing the exemption period, or providing for a recurring period, if it is satisfied that there are exceptional circumstances to justify the determination. In determining whether there are exceptional circumstances, the FWC would be required to have regard to the purpose of the proposed exemption period, including whether the application requests that the period be specified to satisfy the need for short term or surge workforce demands. The FWC would also be required to have regard to several other factors set out in the subsection, including submissions from the relevant parties and organisations entitled to represent their industrial interests (if any), the circumstances of the relevant parties, the industry in which the work is performed, and any other matters it considers relevant. If an application has been made for a longer or recurring exemption period, a greater justification will be required the longer the period or the greater the number of recurring surge periods sought in the application.

717. **When determination comes into force:** New subsection 306L(5) would specify when a determination under this subdivision comes into force.

Subdivision D—Alternative protected rate of pay orders

Section 306M Making an alternative protected rate of pay order

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.

724. **Who may apply:** The FWC could make an alternative protected rate of pay order on application by the employee, the employer, the regulated host or an organisation entitled to represent the industrial interests of one of those parties (new subsection 306M(4)).

725. **Time for making:** The FWC would be required to make a determination as quickly as possible after the application for an alternative protected rate of pay order is made. If it makes an alternative protected rate of pay order, the order would be required to specify how the alternative protected rate of pay is to be calculated, and that the employer must pay the alternative protected rate of pay as specified in connection with the work performed under the associated regulated labour hire arrangement order.

726. **Criteria for making etc.:** New subsection 306M(6) would provide that the FWC must not make the order unless it is satisfied that requiring an employer to pay the regulated employee at the protected rate of pay arising under the host employment instrument

would be unreasonable (for example, because the rates would be insufficient or excessive). The FWC must also be satisfied that there is a covered employment instrument of the kind referred to in new subsection 306M(3) that could be the subject of an alternative rate of pay order.

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.

729. The FWC must also consider the views of any of the parties listed in subsection (7), the protected rate of pay that would be payable to the regulated employee if an order were made, and any other considerations it thinks is relevant in deciding whether to make the order.

730. **Exception for short-term arrangements:** New subsection 306M(9) would provide that when making an alternative protected rate of pay order, the FWC must ensure that any exception set out in new section 306G (short-term arrangements) that would apply to the calculation of the protected rate of pay also applies in relation to the alternative protected rate of pay order.

Section 306N Effect of alternative protected rate of pay order

731. New section 306N would provide when an alternative protected rate of pay order comes into effect, and when the alternative protected rate of pay would be applied.

732. **When alternative protected rate of pay order comes into force:** New subsection 306N(1) would specify when an alternative protected rate of pay order would come into force.

733. **Effect of alternative protected rate of pay order:** New subsection 306N(2) would provide 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. 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 hire arrangement order that is already in force, when an alternative protected rate of pay order is made that decreases the protected rate of pay.

734. The alternative protected rate of pay order would have effect despite the requirement in new section 306F and any other provision of a fair work instrument, covered employment instrument or employment contract that provides for a lower rate of pay than that specified in the alternative protected rate of pay order.

735. **Person must not contravene an alternative protected rate of pay order:** New subsection 306N(3) would provide that a person must not contravene a term of an alternative protected rate of pay order. This provision would be a civil remedy provision.

Subdivision E – Termination payments

Section 306NA Determining amounts of payments relating to termination of employment

736. New subsection 306NA(1) would provide that the section applies if an employee's employment is or is to be terminated, and the employee is or has been covered by a regulated labour hire arrangement order. This amendment would specify appropriate rates of pay for termination entitlements for employees who are or have been covered by such an order.

737. New subsection 306NA(2) would specify how amounts of payments relating to the termination of an employee's employment are to be determined. The new provision would provide that where an employer is required to make payments in relation to the termination of an employee's employment, the rate of that payment will be the rate of pay the employee is ordinarily entitled to, unless the employee is covered by new subsection 306NA(3). In that case, the applicable rate of pay will be the rate of pay under the operation of new Part 2-7A.

738. New subsection 306NA(3) would set out circumstances in which an employee's termination of employment payments must be calculated in accordance with the operation of the new Part. These circumstances include where:

- immediately before the termination of the employee's employment occurs or is to occur, the employee's work is or will be covered by a regulated labour hire arrangement order;
- the employee would be performing work in respect of that order for a host at the time of the termination of their employment, (including during a period of authorised leave or absence); and

- 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.

739. The intention of this provision is to simplify the calculation of amounts payable on termination of employment for employers. Where an employee has only performed work for one regulated host during their employment, termination payments will be calculated with reference to the protected rate of pay if that rate is higher than what they would otherwise be paid. Where an employee has performed work for more than one regulated host, termination payments will be calculated with reference to the terms of the employer's enterprise agreement or other applicable employment instrument. The exception to this is payment in lieu of notice of termination of employment. Such payments in lieu of notice will be payable at the protected rate of pay, where that rate is higher than what the employee would otherwise be paid in lieu of notice, and where 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. In practice, this means payment in lieu of notice will be payable at no less than the protected rate of pay where termination occurs during an employee's placement with a host covered by a regulated labour hire arrangement order, even if they have worked for other regulated hosts previously.

740. New subsection 306NA(4) would provide that if the performance of the work for the host relates to a joint venture or common enterprise engaged in by the host and one or more other persons, for the purposes of paragraph 306NA(3)(d), parties are to disregard any work that is taken to be performed for those other persons because of the operation of paragraph 306D(2)(c). Paragraph 306D(2)(c) provides that a reference in this Part to work performed for a person includes a reference to work performed wholly or principally for the benefit of a joint venture or common enterprise engaged in by the person and one or more other persons.

741. New subsection 306NA(4) would ensure that, where an employee has worked for a joint venture or common enterprise, each of the other parties to the joint venture or common enterprise are disregarded when considering whether an employee has worked for one or more parties. This would mean that, if an employee has only worked for the joint venture under their agreement with their employer, the employee is taken to have only worked for one regulated host under that joint venture. The employee will not be taken to have worked for more than one regulated host, irrespective of whether their work has also been for the benefit of the other joint venturers.

742. New subsection 306NA(5) would provide for excluded subject matters in respect of this provision. It would provide that where the employer is a referring state, and therefore is only a national system employer by operation of section 30D or 30N of the FW Act, section 306NA would not apply. Any termination payments would be paid in accordance with the relevant arrangements of the employer.

743. New subsection 306NA(6) would provide that the section would apply despite the terms of any fair work instrument, covered employment instrument, or employment contract that applies to the employee.

Division 3—Dealing with disputes

744. Division 3 would set out the dispute resolution framework for Part 2-7A.

Section 306P Disputes about the operation of this Part

745. **When this division applies to a dispute:** New section 306P would provide a mechanism for the resolution of disputes arising under the Part. This dispute resolution mechanism would apply if there was a dispute about the operation of Part 2-7A and a regulated labour hire arrangement order is in force or will come into force. A dispute may arise, for example, about what the protected rate of pay is for a regulated employee. The dispute could also be concerned with whether the protected rate of pay has been or is being paid by the employer.

746. **Parties must attempt to resolve dispute at a workplace level:** The section would require parties to attempt to resolve the dispute at a workplace level before applying to the FWC.

747. **How the FWC deals with dispute:** If workplace level discussions do not resolve the dispute, a party to the dispute would be able to make an application to the FWC to resolve the dispute. The FWC would be required to first deal with the dispute by means other than arbitration unless were exceptional circumstances.

748. **Representatives:** An employer, employee or regulated host would be able to appoint an organisation or other person to support or represent them for the purposes of resolving the dispute at the workplace level or through the FWC.

749. **Joinder of other employees to disputes:** The FWC procedural rules could also provide for the joinder of employees as parties to the dispute who have a dispute about the operation of Part 2-7A with the same regulated host or employer.

Section 306Q Dealing with disputes by arbitration

750. New subsection 306Q(1) would provide that the FWC can arbitrate a dispute under this Part, including by making an arbitrated protected rate of pay order.

751. An arbitrated protected rate of pay order made under this section would be required to specify how the protected rate of pay in respect of a regulated employee should be worked out where an order is or will be in force. This may include a breakdown of how provisions of a host employment instrument are to be applied. It may include specifying how a regulated employee or class of regulated employees are to be classified under a host employment instrument.

752. The order must also specify that the protected rate of pay for a regulated employee is to be calculated and paid as provided by the order.

753. New subsection 306Q(2) would address circumstances where the employer is only a national system employer because of section 30D or 30N (which extend the meaning of national system employer in relation to state referrals of power). The new subsection would provide that the rate of pay specified under an arbitrated protected rate of pay order made for the purposes of this new subsection must not include any amount that relates to an excluded subject matter within the meaning of subsection 30A(1) or 30K(1). Amounts relating to excluded subject matters for the purposes of this subsection may include long service leave, leave for victims of crime and jury or emergency service leave.

754. New subsection 306Q(3) would provide that the FWC could not make an arbitrated protected rate of pay order unless satisfied that it would be fair and reasonable to do so.

755. New subsection 306Q(4) would provide that where the parties agree to the FWC arbitrating the dispute, the protected rate of pay order could apply in relation to work performed on or after the regulated labour hire arrangement order is made. This may mean that an employer is liable to pay backpay to the regulated employee if the employer has been paying the employee less than the rate set out in the arbitrated protected rate of pay order.

756. New subsection 306Q(5) would provide that if the parties did not agree to the FWC arbitrating the dispute, the arbitrated protected rate of pay order could only apply in relation to work performed on or after the day the order is made, or on or after the day a regulated labour hire arrangement order comes into force (whichever is later). An employer will not be required to provide back pay in respect of work performed under a regulated labour hire arrangement that has been undertaken prior to an arbitrated protected rate of pay order being made in this circumstance.

757. **Effect of arbitrated protected rate of pay order:** New subsection 306Q(6) would provide that an arbitrated protected rate of pay order would have effect despite the requirements in new section 306F and any relevant fair work instrument, covered employment instrument or employment contract that provides for a lower rate of pay in relation to so much of the work as is performed during the period in which the order applies. The intention of this provision is to clarify that the effect of an arbitrated protected rate of pay order is to establish a single authority for how the protected rate of pay should be calculated in respect of a relevant regulated employee, during the period in which it is in force.

758. New subsection 306Q(7) would provide that a person must not contravene a term of an arbitrated protected rate of pay order. This provision would be a civil remedy provision.

759. New subsection 306Q(8) would provide that, when making an arbitrated protected rate of pay order, the FWC must ensure that any exception set out in section 306G (short-term arrangements) that would apply to the calculation of the protected rate of pay also applies in relation to the arbitrated protected rate of pay order.

Section 306R Application fees

760. New section 306R is modelled on section 367 of the FW Act and other similar provisions that provide for application fees.

761. New subsection 306R(1) would require an application made under new subsection 306P(4) to be accompanied by the fee prescribed in the FW Regulations (if any). New paragraphs 306R(2)(a)–(c) would provide that the FW Regulations may prescribe the application fee, the method for indexing the fee and the circumstances in which all or part of the fee may be waived or refunded.

762. As a result of section 15A of the AI Act, as in force on 25 June 2009 (see section 40A of the FW Act), this regulation-making power cannot be read as authorising the imposition of a tax.

Division 4—Anti-avoidance

763. Division 4 would set out the anti-avoidance framework for Part 2-7A.

Section 306S Preventing making of regulated labour hire arrangement orders

764. New section 306S is intended to be a broad anti-avoidance provision aimed at preventing behaviours intended to avoid the operation of Part 2-7A.

765. New subsection 306S(1) would provide that an employer or a regulated host contravenes the section if they enter into a scheme, or carry out or begin to carry out a scheme, either alone or with another person or persons, where the sole or dominant purpose is to prevent the FWC from making a regulated labour hire arrangement order, and the FWC is prevented from making the order.

766. A contravention of this provision would attract a civil penalty.

767. 'Scheme' would be defined broadly in new subsection 306S(2).

768. Adopting certain corporate structures with the purpose of preventing the FWC from being able to make a regulated labour hire order is an example of a scheme that may contravene this provision.

Section 306SA Avoidance of application of regulated labour hire arrangement orders

769. New section 306SA is a broad anti-avoidance provision aimed at preventing behaviours intended to avoid the operation of Part 2-7A. It would supplement the effect of new section 306S.

770. New subsection 306SA(1) would provide that an employer or a regulated host contravenes the section if they enter into a scheme, or carry out or begin to carry out a scheme, either alone or with another person or persons, where the sole or dominant purpose is to avoid the application of a regulated labour hire arrangement order that has been made, whether or not the order is yet in force. The provision would apply where as a result of the scheme a person avoids the application of such an order. A contravention of this provision would attract a civil penalty.

771. ‘Scheme’ would be defined broadly in new subsection 306SA(2).

772. Adopting certain corporate structures with the sole or dominant purpose of avoiding the application of an existing regulated labour hire arrangement order (for instance, a structure that would limit the number of employees to whom the order would apply) is an example of a scheme that may contravene this provision.

Section 306T Short-term arrangements —engaging other employees

773. This provision is intended to prevent an employer from engaging successive employees for less than three months (or another period determined by the FWC) in order to enliven the short-term arrangement exemption and avoid paying employees in accordance with Part 2-7A.

774. An employer would contravene this provision if they were covered by a regulated labour hire arrangement order and:

- the employer is not required to pay a regulated employee at a rate determined in accordance with Part 2-7A (the protected rate of pay, arbitrated rate of pay or alternative rate of pay) because the employee was engaged for less than three months (or a different period determined by the FWC altering the short-term exemption period); and
- the employer engages another person to perform the same, or substantially the same, work as the first employee; and
- it could reasonably be concluded that the purpose, or one of the purposes, of engaging the other person was to avoid paying a regulated employee in accordance with Part 2-7A.

775. A contravention of this provision would attract a civil penalty.

Section 306U Short-term arrangements — entering into other labour hire agreements

776. This provision is intended to prevent a regulated host from entering into successive short-term labour hire agreements to avoid paying employees in accordance with Part 2-7A. As each such agreement would be for a period of three months or less, the short-term arrangement exemption would be enlivened which would mean employers would not be obliged to pay regulated employees the protected rate of pay under this Part.

777. A regulated host would contravene this provision if they were covered by a regulated labour hire arrangement order and:

- the employer is not required to pay a regulated employee at a rate determined in accordance with Part 2-7A (the protected rate of pay, arbitrated rate of pay or alternative rate of pay) because the agreement would engage employees for less than three months (or a different period determined by the FWC altering the short-term exemption period); and

- the regulated host enters into an agreement that has the result that another person is to perform the same, or substantially the same, work as that performed by the regulated employee for the regulated host; and
- it could reasonably be concluded that the purpose, or one of the purposes, of engaging the other person was to avoid the employer paying a regulated employee in accordance with Part 2-7A.

778. A contravention of this provision would attract a civil penalty.

Section 306V Engaging independent contractors

779. This provision is intended to prevent an employer from dismissing labour hire employees and engaging other workers as independent contractors to perform the same work to avoid the operation of Part 2-7A.

780. Dismissing an employee and re-engaging the same employee as an independent contractor to perform the same work is already prohibited under section 358 of the FW Act.

781. An employer covered by a regulated labour hire arrangement order would contravene new section 306V if the employer:

- dismisses a regulated employee covered by the order who was performing work for a regulated host; and
- engages another person as an independent contractor to perform the same work or work of that kind for the regulated host; and
- as a result, the employer is not required to pay a person a rate determined under or in accordance with Part 2-7A (for example, because the obligations do not extend to labour hire employees who are independent contractors); and
- it could reasonably be concluded that the purpose, or one of the purposes, of engaging the independent contractor was to avoid paying a regulated employee in accordance with Part 2-7A.

782. A contravention of this provision would attract a civil penalty.

Division 5—Other matters

Section 306W Guidelines

783. New section 306W would require the FWC to make written guidelines in relation to the operation of Part 2-7A to assist with education and compliance, so that readers can more easily understand the new Part.

784. New subsection 306W(2) would assist readers by clarifying that the guidelines would not be a legislative instrument within the meaning of subsection 8(1) of the Legislation Act. This is not an express exemption from the Legislation Act, but rather clarifies the status of the guidelines.

785. New subsection 306W(3) would require the FWC to ensure the guidelines are in force by 1 November 2024, when the provisions take effect, and at all times after that day.

Item 74: Subsection 539(2) (after table item 9)

786. This item would add a new table item, 9A, regarding contraventions of new Part 2-7A, to the table of civil remedy provisions set out at subsection 539(2) of the FW Act. Contraventions of news subsections 306EC(1), 306ED(2), 306ED(4), 306EE(2), 306EE(3), 306F(2), 306H(3), 306N(3), 306Q(7), 306S(1), 306SA(1), and sections 306T, 306U and 306V would be included in the new table item as civil remedy provisions.

787. The new table item would provide that an employee, an employee organisation or an inspector could bring an action for an alleged contravention of the provisions in a federal court or eligible State or Territory Court. The maximum civil penalty for a contravention would be 60 penalty units, or 600 penalty units for serious contraventions.

Item 75: After paragraph 557(2)(f)

788. Section 557 of the FW Act sets out when two or more contraventions of a civil remedy provision are taken to constitute a single contravention where certain conditions are met. Generally, those conditions are that the contraventions were committed by the same person and arose out of a course of conduct by that person.

789. This item would insert new paragraphs into subsection 557(2), including new sections 306F(2) (protected rate of pay payable to employees covered by a regulated labour hire arrangement order), 306H(3) (obligations of regulated hosts covered by regulated labour hire arrangement orders), 306N (contravention of alternative protected rate of pay orders) and 306Q(7) (contravention of arbitrated protected rate of pay orders) in the list of civil remedy provisions that are taken to constitute a single contravention.

Item 76: After paragraph 576(1)(f)

790. Section 576 of the FW Act sets out the functions that are conferred on the FWC by the FW Act. This item would make a consequential amendment that would insert regulated labour hire arrangement orders (Part 2-7A) into the existing list of functions.

Part 7—Workplace delegates' rights

Amendments to the *Fair Work Act 2009*

791. Part 7 would introduce new workplace rights and protections for workplace delegates, who are employees or workers, appointed or elected under the rules of their employee organisation, to represent members in a particular enterprise. These new rights and protections would support their role in representing employees and regulated workers in workplaces. It would provide for modern awards and future enterprise agreements to provide more detailed rights for specific industries, occupations and workplaces. It would also provide a new general protection for workplace delegates to facilitate the exercise of these rights.

Division 1—Amendments commencing the day after Royal Assent

792. Division 1 of Part 7 contains amendments to the FW Act that would commence the day after Royal Assent. These amendments would:

- insert definitions of 'delegates' rights term' and 'workplace delegate' into the Dictionary;
- from 1 July 2024, require all modern awards, new enterprise agreements and new workplace determinations to include a delegates' rights term (see item 308, clauses 103, 104, 105 and 106);
- insert a new general protection in Division 4 of Part 3-1 of the FW Act specific to workplace delegates; and
- give workplace delegates rights in relation to representing the industrial interests of members, and other persons eligible to be a member, of the relevant employee organisation, including in a dispute with their employer.

Item 77: Section 12

793. Section 12 of the FW Act contains the Dictionary. This item would insert a new definition of 'delegates' rights term' as a term in a fair work instrument that provides for the exercise of the rights of workplace delegates.

794. The note to the definition of 'delegates' rights term' would alert readers to:

- new section 350C, which sets out the rights of workplace delegates, and
- that the delegates' rights term must provide for at least the exercise of these rights (in accordance with new section 205A and new subsection 273(7) inserted by items 81 and 82).

795. This item would also insert a new definition of 'workplace delegate' into the Dictionary by reference to new subsection 350C(1), which would be inserted by item 84.

Item 78: At the end of Subdivision C of Division 3 of Part 2-3

796. Subdivision C of Division 3 of Part 2-3 of the FW Act sets out the terms that must be included in modern awards. This item would insert a new section 149E, which would require modern awards to include a delegates' rights term.

797. When the FWC varies a modern award, it would be required to include a new delegates' rights term or to vary an existing delegates' rights term in a modern award, and it must be satisfied that making the variation would be necessary to achieve the modern awards objective in section 134 of the FW Act. This obligation (to be satisfied it is necessary to achieve the modern awards objective in section 134 of the FW Act) also applies to the FWC making a new modern award.

Item 79: Section 169 (paragraph about Division 5)

798. Section 169 is the Guide to Part 2-4 of the FW Act, which deals with enterprise bargaining. This item is a consequential amendment that would signpost that Division 5 of Part 2-4, which deals with mandatory terms of enterprise agreements, would include a requirement for terms about workplace delegates' rights. This reflects the inclusion of this requirement in new section 205A, which would be inserted by item 81.

Item 80: After subsection 201(1)

799. This item would insert a new subsection 201(1A) to support the operation of the new subsection 205A(2) (as set out in item 81).

800. Existing section 201 of the FW Act sets out certain matters that the FWC must note in its decision to approve an enterprise agreement. This item would add to these matters a requirement for the FWC to make a note in its approval decision if the delegates' rights term contained in a modern award is taken to be term of an enterprise agreement.

801. The FWC's enterprise agreement approval decisions are publicly available, and this item would provide greater clarity to employees and employers regarding their rights and obligations.

Item 81: At the end of Division 5 of Part 2-4

802. Division 5 of Part 2-4 of the FW Act sets the terms that must be included in an enterprise agreement. This item would insert a new section 205A.

803. New subsection 205A(1) would provide that an enterprise agreement must include a delegates' rights term. This requirement would only apply to enterprise agreements put to a vote by the employer on or after 1 July 2024 (as set out in Part 18 item 105).

804. New subsection 205A(2) would provide that a delegates' rights term in an enterprise agreement must be at least as favourable as the delegates' rights term of modern award (or awards) that cover the workplace delegates. This would involve comparing the delegates' rights term of the enterprise agreement against the term in the relevant modern award(s).

805. If during the approval process, the FWC considers an enterprise agreement that would otherwise be approved has a less favourable delegates' rights term than that included in the modern award(s) that cover the workplace delegates, this item would provide that the enterprise agreement term has no effect and that the delegates' rights term of the modern award that covers the workplace delegates would instead be taken as a term of the agreement. If there are multiple modern awards that cover the workplace delegates, the FWC would be required to determine the most favourable delegates' rights term included in those modern awards. New subsection 201(1A) (inserted by item 80) would

then require the FWC to note that this modern award term is taken to be a term of the enterprise agreement in its decision to approve the enterprise agreement.

806. New subsection 205A(3) would confirm that, where a delegates' rights term in a modern award is taken to be a term of the enterprise agreement, the term does not change if the modern award changes. This means that the delegates' rights term contained in the relevant modern award at the time that the enterprise agreement is approved continues to be the term that applies to the parties to the enterprise agreement. This is intended to provide certainty as to the rights and obligations of parties to the enterprise agreement.

Item 82: At the end of section 273

807. Existing section 273 of the FW Act sets out the mandatory terms that must be included in a workplace determination. Workplace determinations set the terms and conditions of employment in certain circumstances where bargaining for a proposed enterprise agreement has not resolved all of the matters at issue at the end of a negotiating period.

808. New subsections 273(6) and (7) would provide that the FWC must include a delegates' rights term for workplace delegates to whom the workplace determination applies in workplace determinations, and require that such a term cannot be less favourable than a delegates' rights term in any modern award that covers the workplace delegate.

Item 83: Section 334 (paragraph about Division 4)

809. Existing section 334 provides a Guide to Part 3-1 of the FW Act, which provides for the general protections. This item would amend section 334 to signpost that provisions concerning the exercise of workplace delegates' rights are also contained in Division 4 of that Part.

Item 84: At the end of Division 4 of Part 3-1

810. This item would insert new sections 350A and 350C into Division 4 of Part 3-1, to provide protections for workplace delegates, and to set out their rights, respectively.

New section 350A – Protection for workplace delegates

811. Division 3 of Part 3-1 provides protections against adverse action for employees who become officers or members of industrial associations as a result of their membership. Division 4 of Part 3-1 includes protections for freedom of association and involvement in lawful industrial activities. New section 350A would complement these existing protections by providing specific protections for workplace delegates.

812. New subsection 350A(1) would prohibit an employer from:

- unreasonably failing or refusing to deal with a workplace delegate;
- knowingly or recklessly making a false or misleading representation to a workplace delegate; or
- unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate.

813. This new general protection would be subject to certain limitations.

814. Under new paragraphs 350A(1)(a) and (c), a delegate would only be protected from an employer unreasonably failing or refusing to deal with a workplace delegate, or unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate. As a result, employers would still be able to undertake reasonable management action, carried out in a lawful way.

815. New subsection 350A(3) provides that the burden for establishing that the conduct of an employer is not unreasonable is on the employer. Accordingly, if a workplace delegate establishes that an employer failed or refused to deal with them, or hindered, obstructed or prevented the exercise of their rights, the burden would shift to employers to demonstrate the reasonableness of their acts or omissions. The burden would be placed on the employer because the employer is best placed to provide evidence about the reasons and intent behind the actions they took (or omitted to take).

816. New subsection 350A(2) makes it clear that the protections in new subsection 350A(1) are only enlivened when an employer is dealing with a workplace delegate acting in that capacity.

817. Finally, new subsection 350A(4) would provide that the protections would not apply in respect of any conduct required by or under a law of the Commonwealth or a State or Territory. This would include action taken, for example, under relevant work health and safety legislation, to ensure the health and safety of workers while at work.

New section 350C – Workplace delegates and their rights

818. **Definition of 'workplace delegate':** New subsection 350C(1) would define the term 'workplace delegate'.

819. Section 12 of the FW Act provides that the term 'officers of industrial associations' can include 'delegates', but does not specify who would be a workplace delegate.

820. This new definition is intended to be sufficiently broad to capture workplace delegates across a range of employee organisations, regardless of the language used to describe the role in each organisation's rules. The definition of 'workplace delegate' would recognise the role of workplace delegates in representing the interests of all workers, not just employees, who work at the relevant enterprise and who are eligible to be a member of the relevant employee organisation. The definition would not include employees of the employee organisations in workplaces generally, as a person can only be a workplace delegate in respect of the enterprise or part of an enterprise where they work, either as an employee or as a regulated worker (see new section 15G).

821. 'Employee organisation' is defined in section 12 of the FW Act as an organisation of employees that is registered under the RO Act. Almost all large trade unions are registered as employee organisations under the RO Act. Limiting the definition of workplace delegate to representatives of such organisations enables the new provisions to rely on the existing regulatory framework established around registered organisations, and is consistent with the approach taken in the FW Act regarding the application of the right of entry provisions in Part 3-4.

822. **Workplace delegates' rights:** New subsections 350C(2) and (3) would provide rights for workplace delegates.

823. There is currently limited legislative protection for workplace delegates performing their roles within a workplace. The FW Act does not contain any positive rights specific to workplace delegates.

824. New subsection 350C(2) would provide a key right for workplace delegates to represent the industrial interests of members, and other persons eligible to be a member, of the relevant employee organisation, including in a dispute with their employer. If reasonable opportunities to undertake representation are provided, but not taken up, there will be no breach of the right.

825. The proposed note to subsection 350C(2) clarifies that new subsection 350C(2) would not require a worker to accept representation from a workplace delegate or create any obligation on a worker. It would not infringe on a workers' right to choose their own representative in a dispute with their employer or relevant regulated business (if they choose to be represented) and does not affect the relationship between workplace delegates and their members. Rather, new subsection 350C(2) would create an enforceable right between a workplace delegate and their employer or relevant regulated business.

826. New subsection 350C(3) would facilitate the exercise of the representational rights in new subsection 350C(2) by providing that workplace delegates are entitled to:

- reasonable communication with members, and any other persons eligible to be members, in relation to their industrial interests;
- reasonable access to the workplace and workplace facilities where the enterprise is being carried on; and
- reasonable access to paid time, during normal working hours, for the purposes of related training.

827. These rights are specified at the level of principle, with the expectation that for most employees, modern awards and enterprise agreements would provide greater detail for particular industries, occupations, or enterprises. In relation to communication and access, in many cases this may require nothing more than the general access to communications or premises that an employee would normally have by virtue of working for an enterprise.

828. All of the rights in new subsection 350C(3) are subject to a requirement of reasonableness, that is, an employer would only be required to provide facilities to the extent that this would be reasonable. To recognise the diversity of Australian workplaces and their available facilities and resources, new subsection 350C(5) would provide that in determining what is reasonable for the purposes of new subsection 350C(3), regard must be had to the size and nature of the relevant enterprise, the resources of the employer at the enterprise and the facilities available at the relevant enterprise.

829. Further, an exemption for small business employers would be provided by new subparagraph 350C(3)(b)(ii). Small business employers would be exempt from the obligation to provide workplace delegates paid time for the purpose of undertaking training for their role as a workplace delegate due to the amendments. This exemption would alleviate the cost burden of the amendments on small businesses. Small businesses could still elect to provide workplace delegates with paid time for training, or may otherwise have obligations to do so, for example under an enterprise agreement. For the purposes of this provision, small business has the meaning given by existing section 23 of the FW Act.

830. Subsection 350C(4) would provide that where an employer complies with a delegates' rights term in a fair work instrument, the employer is taken to have complied with the rights as set out in subsection 350C(3). This would ensure that, where a fair work instrument provides more detailed information about the rights of workplace delegates, employers can rely on that term as a complete statement of their obligations under new subsection 350C(3).

Item 85: Subsection 539(2) (table item 11, column 1)

831. This item would add a contravention of subsection 350A(1) to the table of civil remedy provisions set out at existing subsection 539(2) of the FW Act.

832. The new table item would provide that a person affected by the contravention, an industrial association or a FWO inspector can bring an action for an alleged contravention of new subsection 350A(1) in a federal court.

833. The maximum penalty for a contravention would be 60 penalty units, which is consistent with the penalty for other breaches of the general protections.

Division 2—Amendments commencing 1 July 2024

834. Division 2 of Part 7 contains amendments to the FW Act that commence on 1 July 2024, to align with the commencement of new Chapter 3A inserted by Part 16 of Schedule 1 (Provisions relating to regulated workers). This Division would expand the provisions provided for in Division 1 of Part 7 to include regulated workers (see new section 15G) and regulated businesses (see new section 15F).

835. Under new section 15G a person would be taken to be a regulated worker if they are:

- an 'employee-like worker' (see new section 15P), being an independent contractor performing digital platform work (see new section 15N) under a services contract (see new section15H) with one or more 'employee-like' characteristics (see new paragraph 15P(1)(e)); or
- a 'regulated road transport contractor' (see new section 15Q) performing work in the road transport industry (see new section 15S) under a services contract (see new section 15H).

Item 86: Section 12

836. Section 12 of the FW Act contains the Dictionary. This item would insert a new definition of 'associated regulated business' by reference to new subsection 350B(5) which would be inserted by item 87.

Item 87: After section 350A

837. This item would insert a new section 350B to provide protections to regulated workers who are workplace delegates, on the same basis as the protections provided to workplace delegates who are employees by new section 350A (inserted by item 84).

Protections for delegates who are regulated workers

838. As for workplace delegates who are employees, new subsection 350B(1) would prohibit an associated regulated business from:

- unreasonably failing or refusing to deal with a workplace delegate;
- knowingly or recklessly making a false or misleading representation to a workplace delegate; or
- unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate.

839. As for the protection for workplace delegates who are employees, the protection for workplace delegates who are regulated workers would be subject to certain limitations.

840. Under new paragraphs 350B(1)(a) and (c), a delegate would only be protected from an associated regulated business *unreasonably* failing or refusing to deal with a workplace delegate, or *unreasonably* hindering, obstructing or preventing the exercise of the rights of a workplace delegate. As a result, associated regulated businesses would still be able to undertake reasonable management action, carried out in a lawful way.

841. New subsection 350B(3) provides that the burden for establishing that the conduct of an associated regulated business is not unreasonable is on the business. Accordingly, if a workplace delegate establishes that a business failed or refused to deal with them, or hindered, obstructed or prevented the exercise of their rights, the burden would shift to the business to demonstrate the reasonableness of their acts or omissions. The burden would be placed on the business because it is best placed to provide evidence about the reasons and intent behind the actions it took (or omitted to take).

842. New subsection 350B(2) makes it clear that the protections in new subsection 350B(1) are only enlivened when an associated regulated business is dealing with a workplace delegate acting in that capacity.

843. Finally, new subsection 350B(4) would provide that the protections would not apply in respect of any conduct required by or under a law of the Commonwealth or a State or Territory. This would include action taken, for example, under relevant work health and safety legislation, to ensure the health and safety of workers while at work.

Meaning of associated regulated business

844. New subsection 350B(5) would set out the meaning of 'associated regulated business'. A business would be an associated regulated business for a regulated worker who is a workplace delegate if it either directly engaged the delegate under a contract for services, or if it arranged or facilitated the delegates entry into a services contract.

Item 88: Subsection 350C(1)

845. This item would amend the definition of workplace delegate provided in new subsection 350C(1) (inserted by item 84), to provide that a workplace delegate is a person appointed or elected to represent the industrial interests of either or both employees and regulated workers. This reflects the extension of protections to regulated workers by the amendments in Division 2.

Item 89: Subsection 350C(2)

846. This item would amend new subsection 350C(2) to expand the right for workplace delegates to represent other workers in a dispute to include disputes with regulated businesses.

Item 90: Subparagraphs 350C(3)(b)(i) and (ii)

847. This item would replace subparagraphs 350C(3)(b)(i) and (ii) (inserted by item 84), to grant regulated workers who are workplace delegates the ability to access workplace facilities for the purpose of representing the industrial interests of all workers who are eligible to be a member of the relevant employee organisation.

848. The extent to which regulated workers can access facilities is assessed against a test of reasonableness and in consideration of the factors in new subsection 350C(5). For example, some regulated businesses (for example, a digital labour platform or a road transport business) may not have physical workplaces or facilities in the same way as an employer does where employees perform work on-site. In determining whether a regulated business provided a workplace delegate reasonable access to the workplace and facilities, regard would have to be given to the factors at new subsection 350C(5), which could include consideration of the actual facilities available at the regulated business and whether providing access to such facilities is possible.

849. The amendments made by this item would not require regulated businesses to provide paid time to regulated worker delegates for the purposes of training in relation to their role as a workplace delegate. This recognises that regulated workers often perform 'task' based commitments within clearly defined parameters, such as making a delivery, compared to many traditional employee relationships with routine 'shifts', time-based work or regular and systematic working hours.

Item 91: Subsection 350C(4)

850. This item would replace new subsection 350C(4) to ensure that, in addition to employers, regulated businesses are taken to have complied with the workplace delegates' rights provided for in new subsection 350C(3) of the FW Act if they have complied with the delegates' rights term in the relevant fair work instrument. While the inclusion of such a term would not be mandatory, for a regulated business, the relevant

category of fair work instrument would be a minimum standards order (MSO) (see new section 15E) or collective agreement (see new section 15B)

Item 92: Paragraphs 350C(5)(a), (b) and (c)

851. This item would replace new paragraphs 350C(5)(a), (b) and (c), to ensure that the factors provided for in new subsection 350C(5), which must be considered when assessing the reasonableness of workplace delegates' entitlements in subsection 350C(3), appropriately extend to regulated businesses.

Item 93: Subsection 539(2) (table item 11, column 1)

852. This item would add a contravention of subsection 350B(1) to the table of civil remedy provisions set out at existing subsection 539(2) of the FW Act.

853. The new table item would provide that a person affected by the contravention, an industrial association or a FWO inspector can bring an action for an alleged contravention of new subsection 350B(1) in a federal court.

854. The maximum penalty for a contravention would be 60 penalty units, which is consistent with the penalty for other breaches of the general protections.

Part 8—Strengthening protections against discrimination

Amendments to the *Fair Work Act 2009*

855. Subjection to FDV is not currently a protected attribute in the FW Act or other Commonwealth anti-discrimination laws but is protected by some State and Territory anti-discrimination laws. The amendments in Part 8 would include a new protection for employees and prospective employees by recognising subjection to FDV as a protected attribute within the FW Act's anti-discrimination provisions.

856. The FW Act was recently amended by the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* to introduce 10 days of paid FDV leave in a 12-month period for full-time, part-time and casual employees. These amendments would complement this leave entitlement as both amendments seek to give effect to Australia's obligations under *Violence and Harassment Convention 2019* (ILO Convention 190) and work to progress the same overall policy intention of strengthening workplace protections for employees subjected to FDV.

Item 94: Subsection 153(1)

Item 95: Subsection 195(1)

Item 96: Subsection 351(1)

Item 97: Section 578

Item 98: Paragraph 772(1)(f)

857. The FW Act contains a range of protections against discriminatory conduct:

- Subsections 153(1) and 195(1) of the FW Act deal with discriminatory terms in modern awards and enterprise agreements, respectively.
- Subsection 351(1) of the FW Act prohibits an employer from taking discriminatory adverse action against a person who is a current or prospective national system employee because of the person's protected attribute.
- Paragraph 578(c) requires the FWC, when performing its functions or exercising powers, to take into account the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination.
- Paragraph 772(1)(f) prohibits an employer from terminating an employee's employment because of the person's protected attribute.

858. These items would add 'subjection to family and domestic violence' to the existing list of protected attributes at each of these provisions.

859. This protection against subjection to family and domestic violence would be consistent with the approach of State and Territory anti-discrimination laws which include family and domestic violence as a protected attribute.[10] This protection would also ensure the

[10] *Discrimination Act 1991* (ACT) s 7(1)(x); *Industrial Relations Act 2016* (QLD) s 296; *Anti-Discrimination Act 1992* (NT) s 19(1)(jb); *Equal Opportunity (Domestic Abuse) Amendment Act 2023* (SA). See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA) (Project 111 Final Report)*, May 2022, pp. 12, 121-4.

anti-discrimination provisions in the FW Act would not apply to persons who are perpetrators of (or have perpetrated) family and domestic violence and who are not subject to (or have not been subjected to) family and domestic violence.

860. Under existing subsection 342(3) of the FW Act, action taken that is authorised by or under a law of the Commonwealth or a law of a State or Territory prescribed by the regulations, such as an action taken to mitigate a work health safety risk, does not constitute adverse action for the purposes of subsection 351(1).

Item 99: Before section 789HA

Item 100: Section 789HA (heading)

Item 101: Section 789HA

861. These items are consequential amendments to Part 6-4E of the FW Act to accommodate the insertion of a new Division 2.

Item 102: At the end of Part 6-4E

862. This item would insert a new Division 2 in existing Part 6-4E dealing with the constitutional basis for the amendments and the extension of the anti-discrimination rules. This would ensure that the amendments to add subjection to FDV as a protected attribute under the FW Act would have constitutional support to apply to national system employers and employees by virtue of the external affairs power under paragraph 51(xxix) of the Constitution.

863. This would ensure that the amendments to add subjection to FDV as a protected attribute in the FW Act have constitutional support to apply in relation to employees and employers that are national system employees and employers by virtue of the States' referrals of industrial relations power (State referral employees and employers).

864. New section 789HC would set out the Conventions relied upon for the external affairs power under paragraph 51(xxix) of the Constitution.

865. Existing sections 153, 195 and 351 of the FW Act are intended to operate with the same coverage in relation to subjection to FDV as they currently do in relation to the existing protected attributes. The extension of these amendments by new section 789HD to State referral employers and employees, and in the case of section 351 to action taken in a referring State, would rely on the external affairs power as enlivened by the Conventions listed in new section 789HC.

866. The amendments to paragraph 578(c) made by item 97 would be supported by the incidental aspects of the relevant powers relied on to support sections 153, 195 and 351, and so is not covered by this item.

867. The amendments in Part 8 give effect to Australia's obligations under ILO Convention 111 and the ILO Convention 190.

868. Article 2 of ILO Convention 111 requires Members to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of

employment and occupation, with a view to eliminating any discrimination in employment.

869. Article 3(b) of ILO Convention 111 requires Members to, by methods appropriate to national conditions and practice, enact such legislation 'as may be calculated to secure the acceptance and observance of the policy.'

870. The National Plan to End Violence against Women and Children 2022–2032 (NPEVWC), is a national policy encouraging workplaces to integrate intervention initiatives to reduce, prevent and respond appropriately to sexual harassment and violence. The NPEVWC aims to promote recovery for victim-survivors, including 'rebuilding of a victim-survivor's life, their ability to return to the workplace and community, as well as obtaining financial independence and economic security'.[11] The term 'victim-survivor' is used in the NPEVWC as a gender-neutral term to describe all people, including men, experiencing family, domestic and sexual violence.[12] The NPEVWC also aims to challenge sensationalised or stereotyped views, as well as views informed by other types of discrimination, that contribute to a culture that condones gender-based violence and enables victim-blaming.[13] The NPEVWC notes '[e]ffective processes and policies can also enable employees experiencing gender-based violence to seek support and receive assistance from their employers'.[14] The amendments in Part 8 would support these aims by preventing discrimination against employees and prospective employees subjected to FDV and, in the case of items 96 and 97, allowing a victim-survivor to seek civil remedy when they believe their employer or prospective employer has contravened the relevant general protections prohibitions.

871. The Australian Government ratified ILO Convention 190 on 9 June 2023. When ILO Convention 190 comes into force for Australia on 9 June 2024, amendments in Part 8 would engage Australia's commitments under this Convention to ensure non-discrimination in employment and occupation, and to mitigate the effects of domestic violence in the world of work.

872. Article 6 of ILO Convention 190 requires Members to adopt laws, regulations and policies ensuring the right to equality and non-discrimination in employment and occupation, including for women workers, as well as for workers and other people belonging to vulnerable groups disproportionately affected by violence and harassment in the world of work. The amendments in Part 8 ensure the right to equality and non-discrimination for employees experiencing FDV by establishing a new protected attribute within the FW Act for employees who have been, or continue to be, subjected to family and domestic violence.

873. Article 10(f) of ILO Convention 190 requires Members to take appropriate measures to recognise the effects of domestic violence and, so far as reasonably practicable,

[11] Commonwealth of Australia (2022) *National Plan to End Violence Against Women and Children 2022-2032*, 86.
[12] Ibid 33.
[13] Ibid 105.
[14] Ibid 57.

mitigate its impact in the world of work. The amendments in Part 8 recognise the effects of domestic violence and mitigate its impact in the world of work by preventing discrimination against employees subjected to family and domestic violence and improving those employees' options for recourse when such discrimination does occur in the workplace.

Part 9—Sham arrangements

Amendments to the *Fair Work Act 2009*

874. The amendments in Part 9 would change the defence to misrepresenting employment as an independent contracting arrangement (known as 'sham contracting'), in subsection 357(2) of the Act from a test of 'recklessness' to one of reasonable belief. The amendments in this schedule would also provide a non-exhaustive list of factors a court must consider when assessing reasonableness under the new defence. The new test will only apply in relation to representations made on or after the commencement of Part 9 of Schedule 1 to this Bill.

Item 103: Subsection 357(2)

875. Subsection 357(1) currently prohibits an employer from misrepresenting an employment contract as an independent contracting arrangement. This is often referred to as sham contracting. Subsection 357(2) currently provides a defence to sham contracting if the employer proves that, when the representation was made, the employer did not know, and was not reckless as to whether, the contract was a contract of employment rather than a contract for services.

876. This item would repeal existing subsection 357(2) and replace it with new subsections 357(2) and 357(3). New subsection 357(2) would provide a defence to sham contracting in subsection 357(1) if the employer reasonably believed that the contract was a contract for services. The burden of proof would rest with the party who made the representation, consistently with the existing defence.

877. This would implement recommendations made by several independent reviews, including the Post Implementation Review of the Act, the Productivity Commission's Report on the Workplace Relations Framework and the Black Economy Taskforce Final Report. The reviews found that the current defence in subsection 357(2) is not effective at deterring sham contracting, as it is too easy for an employer to establish that they did not know the true nature of the engagement and did not act recklessly when making the misrepresentation. The reviews recommended the defence be replaced with a more objective test. The new defence under subsection 357(2) would enable a court to assess an employer's behaviour according to what the employer reasonably believed, rather than assessing an employer's behaviour only with regards to their subjective reasons for acting.

878. The new subsection 357(3) would provide guidance to a court in determining whether an employer's belief was reasonable. Subparagraph 357(3)(a) would provide that the size and nature of the employer's enterprise must be considered when determining if an employer's belief was reasonable. This consideration would only be a relevant consideration of reasonable belief for the purposes of sham contracting and would not apply to uses of that phrase elsewhere in the FW Act.

879. New subparagraph 357(3)(b) would give a court discretion to consider any other relevant factors relevant to determining if an employer's belief was reasonable. Depending on the particular circumstances, other relevant factors might include:

- the employer's skills and experience;
- the industry in which the employer operates;
- how long the employer has been operating;
- the presence or absence of dedicated human resource management specialists or expertise in the employer's enterprise; and
- whether the employer sought legal or other professional advice about the proper classification of the individual, including any advice from an industrial association, and, if so, acted in accordance with that advice.

880. Subsection 357(3) would provide guidance to employers as to the evidence they may seek to rely upon in establishing the new defence to sham contracting and reinforce the expectation that employers should take appropriate steps, commensurate with their experience and the nature of their enterprise, to understand how they are engaging an individual before entering into a contract.

881. If an employer is found to have engaged in sham contracting but successfully makes out the defence, the employer would not be liable to a civil penalty for a contravention of subsection 357(1). However, they may still be liable for other civil contraventions in relation to the misclassification. For example, if an employer has not paid correct entitlements to an employee as a result of a misclassification of an employee as an independent contractor, the employer may be liable to a civil penalty and/or to backpay the unpaid entitlements.

Part 10—Exemption certificates for suspected underpayment

Amendments to the *Fair Work Act 2009*

882. This Part would amend Part 3-4 (Right of Entry) of the FW Act to:

- enable an organisation to obtain an exemption certificate from the FWC to waive the minimum 24 hours' notice requirement for entry if they reasonably suspect a member of their organisation has been or is being underpaid;
- empower the FWC to take action in relation to the future issue of such exemption certificates if those rights are misused (for example, by imposing conditions, or banning their issue for a specified period);
- protect permit holders who are exercising rights in accordance with Part 3-4 from improper conduct by others; and
- empower the FWC to impose conditions on a permit, as an alternative to revoking or suspending an entry permit in the circumstances set out in section 510 of the FW Act.

Item 104: Subsection 481(1) (note 4)

Item 105: Subsection 483A(1) (note 3)

Item 106: Section 484 (note 2)

Item 107: Subsection 492(3) (note 2)

Item 108: Section 500 (note 3)

Item 109: Section 502 (at the end of the heading)

Item 110: At the end of subsection 502(1)

Item 111: Subsection 502(2)

Item 112: Subsection 502(3)

883. These items would amend the existing prohibition on hindering or obstructing a permit holder exercising their rights in accordance with Part 3-4 of the FW Act, so that it also prohibits improper conduct, and make the necessary consequential amendments.

884. Items 104 to 108 are consequential, and would update the notes under the specified subsections to reflect the proposed change.

885. Item 109 is consequential upon the substantive change, and would amend the specified heading so it reflects the proposed change.

886. Item 110 would amend subsection 502(1) to provide (in addition to the existing prohibitions) that a person must not act in an improper manner towards a permit holder who is exercising their rights in accordance with Part 3-4 of the FW Act. This extension is intended to cover a wider range of conduct than intentionally hindering or obstructing and may include, depending on the circumstances, swearing, making offensive, racist, sexist or homophobic comments or acting in a physically aggressive or intimidatory manner towards a permit holder.

887. The proposed amendment would bring the prohibition in section 502 in line with the similar prohibition in section 500, which prohibits permit holders from hindering or obstructing etc. others while exercising their rights in accordance with Part 3-4.

888. Subsection 502(1) is a civil remedy provision under Part 4-1 (Civil Remedies).

889. Items 111 and 112 are consequential, and would amend the specified subsections to reflect the changes made to the substantive provision by Item 110.

Item 113: After paragraph 508(2)(d)

Item 114: After paragraph 508(2)(e)

890. Subsection 508(1) of the FW Act empowers the FWC to restrict the rights that are exercisable under Part 3-4 by an organisation, or officials of an organisation, if satisfied that they have misused those rights. Subsection 508(2) sets out examples of the kind of action the FWC may take.

891. These items would insert two new items into the list to make clear that the FWC may take action by:

- requiring, for a specified period, that some or all of the exemption certificates that might be issued in relation to the organisation on the ground mentioned in subparagraph 519(1)(b)(ii) to be issued subject to specified conditions; and
- banning, for a specified period, the issue of exemption certificates on the ground mentioned in subparagraph 519(1)(b)(ii) in relation to an organisation, either generally or to specified permit holders.

892. The reference to subparagraph 519(1)(b)(ii) denotes the new ground on which the FWC may issue an exemption certificate (see item 122).

893. These items would provide the FWC with additional powers to support its protective role with respect to rights exercised under Part 3-4.

894. If the FWC required exemption certificates to be issued subject to specified conditions, such conditions could be recorded on the exemption certificate(s) when issued by the FWC.

Item 115: Subdivision D of Division 5 of Part 3-4 (heading)

Item 116: Section 510 (heading)

Item 117: Subsection 510(1) (heading)

Item 118: Subsection 510(1)

Item 119: Subsection 510(5) (at the end of the heading)

Item 120: Subsection 510(5)

Item 121: Paragraph 510(6)(a)

895. Subsection 510(1) provides that the FWC must revoke or suspend each entry permit held by a permit holder if it is satisfied that any of the events listed in paragraphs 510(1)(a) to (f) has happened since the first of those permits was issued.

896. These items would empower the FWC to impose conditions on a permit, as an alternative to revoking or suspending an entry permit in the circumstances set out in section 510 of the FW Act, and make the necessary consequential amendments.

897. Items 115 to 117 are consequential upon the substantive changes, and would amend the specified headings to reflect the proposed changes.

898. Item 118 would empower the FWC to impose conditions on an entry permit as an alternative to suspending or revoking the entry permit when required to take action under subsection 510(1). This would provide the FWC with an additional mechanism in taking action under subsection 510(1), to ensure that the proposed sanction is appropriate.

899. The FWC must record on an entry permit any conditions that have been imposed on its use (FW Act, subsection 515(3)). The FWC may specify the duration of a condition, if appropriate.

900. Items 119 to 121 are consequential upon the substantive change made by item 118, and would ensure that the change is reflected throughout section 510 as appropriate.

Item 122: Paragraph 519(1)(b)

Item 123: After paragraph 519(2)(d)

901. Subsection 519(1) of the FW Act provides that the FWC must issue an exemption certificate to an organisation for an entry under section 481 (which deals with entry to investigate suspected contraventions) if the organisation has applied for the certificate (paragraph 519(1)(a)) and the FWC reasonably believes that the advance notice of the entry given by an entry notice might result in the destruction, concealment or alteration of relevant evidence (paragraph 519(1)(b)).

902. In effect, an exemption certificate waives the minimum 24 hours' notice requirement that would otherwise apply to entry under section 481. A permit holder exercising entry without notice (pursuant to a certificate) must instead provide a copy of the exemption certificate to the occupier of the premises and any affected employer either before or as soon as practicable after entering the premises (section 487).

903. Item 122 would supplement the exemption scheme in section 519 by empowering the FWC to issue an exemption certificate on a new ground, that is, if it is satisfied that the suspected contravention, or contraventions, involve the underpayment of wages, or other monetary entitlements, of a member of the organisation whose industrial interests the organisation is entitled to represent and who performs work on the relevant premises.

904. This amendment would enhance the ability of permit holders and organisations to effectively investigate suspected contraventions of the Act or a fair work instrument (for example, a modern award or enterprise agreement) involving underpayment of wages, or other monetary entitlements, of a member.

905. It is anticipated that applications under section 519 (including applications brought under the new ground) would generally be dealt with on an *ex parte* basis, because its purpose is to enable entry to premises without notice, in the specified circumstances.

906. There is no change to existing protections, including:

- limiting the exercise of the relevant entry rights to workplaces and working hours only (subsections 481(1), 490(1));
- limiting access to member records as set out in section 482, subject to the existing exemption scheme in section 483AA;
- prohibiting entry permit holders from intentionally hindering and obstructing any other person when exercising rights of entry, or otherwise acting in an improper manner (section 500);
- restricting the unauthorised use or disclosure of information or documents (section 504); and
- prohibiting an entry permit holder from entering any part of premises that is used mainly for residential purposes (section 493).

907. Item 123 would add a new requirement to the content requirements for exemption certificates listed in subsection 519(2). That is, a new requirement that an exemption certificate issued on the new ground set out in new subparagraph 519(1)(b)(ii) must also specify the names of any permit holders who may enter under the exemption certificate.

Part 11—Penalties for civil remedy provisions

Amendments to the *Fair Work Act 2009*

908. Part 11 would amend the FW Act to reduce underpayments and the exploitation of workers in Australia by providing further deterrence against non-compliance with tougher penalties.

909. The measures in this Part implement recommendation 5 of the Migrant Workers' Taskforce to increase the general level of penalties for contraventions of wage exploitation-related provisions in the FW Act so that they are more in line with those applicable in other business and consumer laws.

910. The amendments made by this Part would:

- increase civil pecuniary penalties that apply to contraventions (including serious contraventions) of wage exploitation-related provisions by five times;
- increase the civil pecuniary penalty for failure to comply with a compliance notice by 10 times so that it is consistent with other penalties;
- enable the maximum penalty for a contravention to be determined by reference to three times the value of the underpayment (if relevant) in certain circumstances;
- amend the scheme for 'serious contraventions' in section 557A so that it applies to knowing and reckless contraventions of the relevant provisions, so the scheme applies to mid-tier contraventions and operates more harmoniously with the proposed underpayments offence.

Division 1—Penalties

Item 124: Subsection 539(2) (cell at table item 1, column 4)

Item 125: Subsection 539(2) (cell at table item 2, column 4)

Item 126: Subsection 539(2) (cell at table item 3, column 4)

Item 127: Subsection 539(2) (cell at table item 4, column 4)

Item 128: Subsection 539(2) (cell at table item 5, column 4)

Item 129: Subsection 539(2) (cell at table item 7, column 4)

Item 130: Subsection 539(2) (cell at table item 8, column 4)

Item 131: Subsection 539(2) (cell at table item 9, column 4)

Item 132: Subsection 539(2) (cell at table item 10, column 4)

Item 133: Subsection 539(2) (cell at table item 10A, column 4)

Item 138: Subsection 539(2) (cell at table item 29, column 4)

911. These items would increase the maximum civil pecuniary penalties for the specified civil remedy provisions to 3,000 penalty units for a 'serious contravention' (as provided for in section 557A of the FW Act) and otherwise 300 penalty units. This represents a five-fold increase. The maximum civil pecuniary penalties would be five times higher

for a body corporate. The amount of a Commonwealth penalty unit is $313 at the time of publishing.

912. In summary, the proposed civil pecuniary penalty increases for ordinary and 'serious contraventions' would affect:

Bill item	Item in subs 539(2) table	Provision, general description
124	1	44—Contravening National Employment Standards
125, 126	2, 3	45—Contravening a modern award
127, 128	4, 5	50—Contravening an enterprise agreement
129	7	280—Contravening a workplace determination
130	8	293—Contravening a national minimum wage order
131	9	305—Contravening an equal remuneration order
132, 133	10, 10A	323(1), (3)—Method and frequency of payment 325(1), (1A)—Unreasonable requirements to spend or pay amount 328(1), (2), (3)—Employer obligations in relation to guarantee of annual earnings
138	29	535(1), (2), (4)—Employer obligations in relation to employee records 536(1), (2), (3)—Employer obligations in relation to pay slips

Item 134: Subsection 539(2) (table item 11, column 1)

Item 135: Subsection 539(2) (table item 11, column 1)

Item 136: Subsection 539(2) (table item 11, column 1)

Item 137: Subsection 539(2) (after table item 11)

Item 139: Subsection 539(2) (table item 29AA, column 4)

Item 140: Subsection 539(2) (table item 29A, column 4)

Item 141: Subsection 539(2) (table item 32, column 4)

Item 142: Subsection 539(2) (table item 33, column 4)

Item 143: Subsection 539(2) (table item 33A, column 4)

Item 144: Subsection 539(2) (table item 34, column 4)

913. These items would increase the ordinary civil pecuniary penalties for the specified civil remedy provisions to 300 penalty units for an individual, and five times higher for a body corporate. This represents a five-fold increase, and a ten-fold increase to the maximum civil pecuniary penalty for a failure to comply with a compliance notice (table item 33 in subsection 539(2)).

914. Items 134 to 137 would involve a rearrangement of table item 11 in subsection 539(2), so that the penalty increase is limited to contraventions of subsection 357(1) and sections 358 and 359 of the FW Act.

915. In summary, the proposed civil pecuniary penalty increases for ordinary contraventions would affect:

Bill item	Item in subs 539(2) table	Provision, general description
137	11A	357(1)—Misrepresenting employment as independent contracting arrangement 358—Dismissing to engage as independent contractor 359—Misrepresentation to engage as independent contractor
139	29AA	536AA(1), (2)—Employer obligations in relation to advertising rates of pay
140	29A	558B(1), (2)—Responsibility of responsible franchisor entities and holding companies for certain contraventions
141	32	712(3)—Power to require persons to produce records etc
142	33	716(5)—Compliance notices
143	33A	718A(1)—False or misleading information or documents
144	34	745(1)—Contravening the extended parental leave provisions 760—Contravening the extended notice of termination provisions

Item 145: Paragraph 557A(1)(a)

Item 146: Paragraph 557A(1)(b)

Item 147: Subsection 557A(1) (example)

Item 148: Subsections 557A(2) to (5)

916. These items would amend the scheme for 'serious contraventions' in section 557A so that the scheme applies to mid/upper-tier contraventions and operates harmoniously with the proposed underpayments offence. The latter would be reserved for the most serious instances of intentional underpayments.

917. Items 145 and 146 would amend the concept of a 'serious contravention' so that a contravention of a civil remedy provision by a person is a serious contravention if the person knowingly contravened the provision or was reckless as to whether the contravention would occur.

918. This adds an alternative 'recklessness' element to the provision, and omits the requirement in existing paragraph 557A(1)(b) that 'the person's conduct constituting the contravention was part of a systematic pattern of conduct relating to one or more other persons'.

919. Item 147 would update the example under subsection 557A(1) to reflect the changes.

920. Item 148 would omit provisions that deal with the test for systematic patterns of conduct, and insert a definition of 'reckless' for purposes of the provision as amended. The definition is specific to the provision, and adopts a 'subjective belief' test, commensurate to the test that is typically used in the criminal law. The higher evidentiary bar posed by using the 'subjective belief' test for recklessness reflects the seriousness of these kinds of contraventions, which attract relatively high civil pecuniary penalties under the FW Act. The insertion of this provision is not intended to affect the operation of how 'recklessness' fault elements operate elsewhere in the FW Act, as the term is intended to take its meaning from the individual purpose and context of each provision.

Division 2—Contingent amendments

Item 149: Subsection 539(2) (cell at table item 34AAA, column 4)

921. The SJBP Act will insert a new item (item 34AAA) into the table under subsection 539(2) of the FW Act. This will specify section 757BA (which deals with employer obligations in relation to pay slips relating to paid leave to which the person is entitled because of section 757B) as a civil remedy provision. The maximum civil penalty for a contravention will attract a penalty for a 'serious contravention' of 600 penalty units for an individual, or otherwise 60 penalty units for an individual. The penalty is five times higher for bodies corporate.

922. This item is contingent on the commencement of the relevant sections, and would increase the penalties five-fold to 3,000 penalty units for a 'serious contravention' (as provided for in section 557A of the FW Act) and otherwise 300 penalty units.

Division 3—Underpayments

Item 150: Section 12

Item 151: Subsection 539(2) (after note 3)

Item 152: Subsection 546(2)

Item 153: After subsection 546(2)

923. These items would enable an 'amount of the underpayment' penalty to apply as the maximum civil penalty for contravention of a civil remedy provision, if certain prerequisites are met.

924. Item 150 would insert a definition of the phrase 'associated with an underpayment amount' into the definitions (section 12 of the FW Act).

925. Item 151 would insert a note under subsection 539(2) to alert readers to provisions that deal with civil penalties for bodies corporate, and contraventions associated with underpayment amounts.

926. Item 152 is consequential upon the insertion of new subsection 546(2A), by accommodating the new subsection.

927. Item 153 would insert new subsection 546(2A), which provides for application of the new 'amount of the underpayment' penalty for contravention of a civil remedy provision, providing that:

- the contravention is 'associated with an underpayment amount' (paragraph 546(2A)(a)); and
- the application specifies that the applicant wants the maximum penalty to be calculated based on a multiple of the underpayment amount (paragraph 546(2A)(b)); and
- the person is not taken to have contravened the civil remedy provision under section 550 (person involved in a contravention) (paragraph 546(2A)(c)).

928. New paragraph 546(2A)(b) is intended to afford respondents an extra degree of protection; by putting them on notice, as early as possible in the proceeding, about the kind of civil pecuniary penalties that are being sought (and could be imposed) against them and the evidence required for the court to determine the amount of the underpayment. It is intended to operate in a similar manner to existing subsection 557A(6), which applies where higher pecuniary penalties are being sought for an alleged 'serious contravention'. While it would be possible for an applicant to seek to amend their originating application before a court to seek an 'amount of the underpayment' penalty at a later stage, it is expected that the relevant court would consider justice between the parties and the timing of the application to amend as important factors in exercising their discretion whether to allow the application.

929. New paragraph 546(2A)(c) makes it clear that an 'amount of the underpayment' penalty would not be available in relation to an accessory (see section 550 of the FW Act). The rationale for an 'amount of the underpayment' penalty is that the maximum penalty that may be imposed on a wrong doer should reflect a multiple (that is, three times) of the amount of their wrongful profit, in this context, the amount of the underpayment. Such a penalty is intended to more adequately penalise and deter wrongdoing in circumstances where the amount of the underpayment exceeds the maximum civil pecuniary penalty specified in subsection 539(2). In an underpayments case, the beneficiary of the wrongful conduct (that is, underpayments) would be the underpaying employer, not an accessory, so it is inappropriate to levy an 'amount of the underpayment' penalty against multiple parties, and against individuals who are not the beneficiary of the underpayment—that is, against an accessory or accessories, as well as the employer.

930. New paragraphs 546(2A)(d) and (e) would provide that the maximum pecuniary penalty is the higher of: the ordinary penalty for the contravention as set out in the relevant column in the table in existing subsection 539(2) (or five times that amount for bodies corporate) or three times the 'underpayment amount'. This provision establishes the maximum pecuniary penalty for a contravention of a civil remedy provision, and the courts would be responsible for imposing an appropriate civil pecuniary penalty on the contravener(s), using their sentencing discretion.

Item 154: After section 546

931. This item would insert new section 546A into the FW Act, to provide for when a contravention of a civil remedy provision is taken to be 'associated with an underpayment amount' for the purposes of determining whether an 'amount of the underpayment' penalty may apply.

932. New section 546A would enable an 'amount of the underpayment' penalty to be available if there is a failure to pay the required amount under the FW Act or a specified instrument (as set out in the provision), and the failure is related to the contravention. This means that such a penalty may apply to contraventions that directly or indirectly result in underpayments. For example, failure to pay minimum rates under an applicable modern award is an example of a contravention that directly results in an underpayment. A sham contracting misrepresentation, or a failure to keep employee records, are examples of contraventions that may indirectly result in an underpayment. The effect of new section 546A is that an 'amount of the underpayment' penalty may be available in either of these circumstances.

933. New subsection 546A(2) would define the term 'underpayment amount', consistently with the approach taken for the proposed wage theft measure.

934. Existing section 557 may apply if 2 or more contraventions of a civil remedy provision specified in subsection 557(2) are committed by the same person, and the contraventions arouse out of a course of conduct by the person. If multiple contraventions are 'grouped' by this rule, then the corresponding 'underpayment amount' for each relevant contravention would also likewise be aggregated for purposes of the new provisions.

Part 12—Compliance notice measures

Amendments to the *Fair Work Act 2009*

935. This Part would amend the FW Act to clarify that:

- a compliance notice issued to a person may require the person to calculate and pay the amount of any underpayment; and
- a relevant court may make an order requiring compliance with a notice (other than an infringement notice) issued by a Fair Work Inspector or the FWO.

Item 155: At the end of subsection 545(2)

936. Subsection 545(1) of the FW Act affords a broad discretion to a relevant court to grant an 'appropriate' remedy which meets the circumstances of the contravention of a civil remedy provision under the FW Act. Without limiting subsection (1), subsection 545(2) provides that a relevant court can make orders of the specified kind.

937. This item would amend the provision to add a new example to the list in subsection 545(2): an order requiring a person to comply, either wholly or partly, with a notice (other than an infringement notice) given to the person by a Fair Work Inspector or the FWO. This reference to a notice includes:

- a notice to produce issued by a Fair Work Inspector (see the FW Act, section 712);
- a compliance notice issued by a Fair Work Inspector (see the FW Act, section 716); and
- a FWO notice given to a person by the FWO (or their delegate) (see the FW Act, section 712AD).

Item 156: At the end of paragraph 716(2)(a)

938. Subsection 716(2) of the FW Act provides that a Fair Work Inspector may give a person a notice (compliance notice) requiring the person to take the action specified in the notice to remedy the direct effects of the contravention identified in subsection 716(1). That subsection applies only if an inspector reasonably believes that a person has contravened one or more of the provisions or terms referred to in subsection 716(1) of the FW Act.

939. This item would amend existing subsection 716(2) to clarify that the specified action may include requiring the recipient to calculate and pay the amount of any underpayment.

940. This amendment supports the view of the Migrant Workers' Taskforce that there should be no 'unnecessary legislative or administrative barriers' to the effective use of compliance notices.

Part 13—Withdrawal from amalgamations

Amendments to the *Fair Work (Registered Organisations) Act 2009*

941. This Part would amend the RO Act to repeal amendments made by the 2020 RO Amdt Act, relating to the withdrawal of parts of amalgamated organisations (de-merger).

942. Amendments proposed to be made by this Part would:

- repeal provisions of the RO Act that enable the FWC to accept applications for a de-merger ballot to be made more than five years after the relevant amalgamation has occurred, to restore stability and certainty for amalgamated organisations;
- repeal paragraph (c) of the definition of 'separately identifiable constituent part' in subsection 93(1) of the RO Act, to restore certainty about the part(s) of an organisation that may be subject to a de-merger ballot and de-merger from an amalgamated organisation;
- reverse a number of minor or technical amendments to the de-merger provisions including provisions about:
    - the conduct of ballots;
    - the proposed name of the relevant organisations and the proposed rules, or alterations of rules, of the relevant organisations and when they take effect at the conclusion of a de-merger process;
    - the FWC's power to accept undertakings to avoid demarcation disputes; and
    - membership of the newly registered organisation.

Item 157: Paragraph 92(a)

Item 158: Paragraph 92(b)

943. These items update the objects of the relevant Part to reflect the proposed changes made by this Bill.

Item 159: Section 92A

944. Section 92A of the RO Act requires there to be a statutory review of the amendments made by the 2020 RO Amdt Act by the specified time. The relevant review report is published on the website of the Department.

945. This item would repeal the section, as it has been complied with and is now redundant.

Item 160: Subsection 93(1) (definition of *amalgamated organisation*)

Item 161: Subsection 93(1) (definition of *amalgamated organisation*)

Item 162: Subsection 93(1) (paragraph (b) of the definition of *constituent member*)

Item 163: Subsection 93(1) (subparagraph (b)(i) of the definition of *constituent part*)

Item 165: Subsection 93(1) (definition of *predecessor law*)

Item 166: Subsection 93(1) (paragraph (a) of the definition of *separately identifiable constituent part*)

Item 170: Subsection 93(2)

Item 171: Subsection 93(3)

Item 172: Subsection 93(4)

Item 174: Paragraph 94(1)(a)

946. The 2020 RO Amdt Act amended the RO Act to empower the FWC to accept applications for de-merger ballots more than five years after the relevant amalgamation occurred: section 94A of the RO Act. As part of this function, the FWC may consider organisations that existed, or amalgamations that occurred under older, 'predecessor laws' (as defined). It is proposed that the FWC's ability to accept applications outside the standard five year limitation period be removed.

947. These items would remove the definition of, and references to, the term 'predecessor law' throughout the relevant Part, as they will no longer be required if the other repeals proposed by this Bill are made.

Item 164: Subsection 93(1) (definition of *designated official*)

Item 179: Subsection 102(1) (heading)

Item 180: Subsections 102(1A), (1B) and (1C)

Item 185: Subsection 102(3)

Item 187: Section 103 (heading)

Item 188: Subsection 103(1) (heading)

Item 189: Subsections 103(1A), (1B) and (1C)

Item 190: Subsection 103(2) (heading)

Item 191: Subsection 103(2)

Item 192: Subsection 103(5) (heading)

Item 193: Subsection 103(7) (heading)

Item 194: Subsection 103(7)

Item 195: Subsection 104(1)

Item 196: Subsection 104(1A)

Item 197: Subsection 106(1)

Item 198: Paragraph 106(1)(c)

Item 199: Subsections 106(2) and (3)

Item 200: Section 107 (heading)

Item 201: Subsection 107(1)

Item 202: Subsection 107(2)

Item 203: Subsection 107(4)

948. The 2020 RO Amdt Act amended the RO Act to enable a 'designated official' to conduct de-merger ballots and related functions if allowed by the FWC.

949. These items would remove capacity for de-merger ballots to be conducted by a 'designated official', and make the necessary consequential amendments. This would reinstate the arrangements for conducting de-merger ballots as they were before the 2020 amendments (that is, de-merger ballots would be conducted exclusively by the AEC).

Item 167: Subsection 93(1) (paragraph (b) of the definition of *separately identifiable constituent part*)

Item 168: Subsection 93(1) (paragraph (c) of the definition of *separately identifiable constituent part*)

950. The 2020 RO Amdt Act amended the RO Act to expand the kinds of 'constituent parts' that are eligible to de-merge from an amalgamated organisation (that is, by adding paragraph (c) to the definition of 'separately identifiable constituent part' in subsection 93(1)). In a departure from previous policy, this extension did not require there to be a clear connection between the 'constituent part' seeking to de-merge and a previous organisation de-registered with respect to the formation of the amalgamated organisation.

951. These items would repeal paragraph (c) of the definition of a 'separately identifiable constituent part' in subsection 93(1) of the RO Act and make a consequential amendment. This would reinstate the rules regarding which parts of an amalgamated organisation are capable of de-merging to as they were before the 2020 amendments were made, and remove the uncertainty about the scope and operation of the current provisions.

Item 169: Subsection 93(1) (definition of *workplace or safety law*)

Item 175: Sections 94A and 95A

Item 177: Paragraph 100(1)(ba)

Item 183: Paragraphs 102(2)(aa) and (ca)

Item 207: Sections 110A and 110B

952. The 2020 RO Amdt Act amended the RO Act to:

- empower the FWC to accept applications for de-merger ballots made more than five years after the relevant amalgamation has occurred (section 94A of the RO Act);
- require specified information be given to the FWC about proposed names and rules (or amendments to existing names and rules, as the case may be) for the affected organisations (section 95A of the RO Act);
- specify when the rules of a newly registered organisation and any alterations to the rules of an amalgamated organisation take effect (section 110A of the RO Act); and

- make the necessary consequential amendments.

953. These items would repeal these provisions, and restore the relevant provisions to how they were before the 2020 amendments.

Item 173: Subsection 94(1)

Item 176: Subsection 100(1)

Item 181: Subsection 102(2) (heading)

Item 182: Subsection 102(2)

Item 184: Subsection 102(3)

Item 186: Subsection 102(4)

954. The 2020 RO Amdt Act amended provisions of the RO Act relating to the conduct of de-merger ballots, to provide that such ballots could be conducted otherwise than by post (for example, by attendance ballots).

955. These items would restore the provisions relating to the conduct of de-merger ballots to how they were before the 2020 amendments, and make necessary consequential amendments. This would align the provisions with those for similar kinds of ballots conducted under the RO Act, including the default for ballots to approve proposed amalgamations (RO Act, section 65).

Item 178: Subsection 100(4)

Item 183: Paragraphs 102(2)(aa) and (ca)

Item 207: Sections 110A and 110B

956. The 2020 RO Amdt Act amended the RO Act so that, in ordering that a ballot be held, the FWC may accept certain undertakings to avoid demarcation disputes that might otherwise from an overlap between the eligibility rules proposed for the affected organisations (RO Act, subsection 100(4)).

957. These items would repeal this power (RO Act, subsection 100(4)) (item 178), provision for when and how such undertakings take effect (RO Act, section 110B) (item 207) and other minor consequential amendments. This would restore the provisions to how they were before the 2020 amendments.

Item 204: Paragraph 109(2)(a)

Item 205: Paragraph 109(2)(b)

Item 206: Paragraph 109(2)(ba)

958. The 2020 RO Amdt Act made minor amendments to section 109 of the RO Act, which empowers the Federal Court to make certain orders giving effect to ballots, including orders relating to assets and liabilities. In general, these amendments reflected the fact that a broader range of ‘constituent parts’ could potentially de-merge from an amalgamated organisation.

959. These items would reverse the 2020 amendments, which will no longer be necessary or relevant if the other repeals proposed by this Bill are made.

Item 208: Section 111 (heading)

Item 209: Paragraph 111(3)(b)

Item 210: Subsection 111(4)

960. The 2020 RO Amdt Act amended the provisions for membership of an organisation following de-merger of a 'separately identifiable constituent part', so that any members of such a part would become a member of the newly registered organisation by default (RO Act, subsections 111(3) and (4)).

961. These items would restore the relevant provisions to how they were prior to the 2020 amendments. In particular, by restoring a process for members of the amalgamated organisation to choose to remain a member of the amalgamated organisation or become a member of the newly registered organisation.

Item 211: Subsection 123(2)

962. The 2020 RO Amdt Act amended the provisions for individuals holding office after de-merger under section 123 of the RO Act, so that the rules of a newly registered organisation must not permit a person to hold office after the day that would have been the person's last day of term in the constituent office if the de-merger had not occurred.

963. This item would reinstate the provisions that applied before the 2020 amendments, so that the rules of the newly registered organisation must not permit a person to hold office after the later of:

- the day that would have been the person's last day of term in the constituent office if the withdrawal had not occurred; or
- the first anniversary of the date of the withdrawal.

Item 212: Application of amendments

964. This item provides for the application of the proposed amendments, as follows:

- if the relevant section 94 application does not or did not rely on section 94A or paragraph (c) of the definition of 'separately identifiable part' – the process may proceed under the old rules (that is, the provisions that applied under the RO Act as if the amendments made by this Part had not been made); and
- if the relevant section 94 application for a proposed de-merger relies or relied on one or both of those provisions – the process may only continue (again, under the old rules) if the ballot in relation to the proposed de-merger was finalised before 1 July 2023 (that is, the ballot was prepared, dated and signed (under subsection 106(1) of the RO Act)).

Part 14—Wage theft

Amendments to the *Fair Work Act 2009*

965. Part 14 would amend the FW Act to:

- introduce a new criminal offence for wage theft, which applies to intentional conduct;
- apply Part 2.5 of the Criminal Code to establish corporate criminal liability in relation to the new criminal offence for wage theft;
- enable the responsible Minister to declare, by legislative instrument, a voluntary small business wage compliance code (the voluntary code). Compliance with the voluntary code is intended to provide assurance to small business employers that they will not be referred for criminal prosecution for wage theft under the FW Act;
- introduce cooperation agreements with 'safe harbour' effect, in relation to self-reporting of conduct to the FWO which may amount to the commission of a wage theft offence under the FW Act;
- confer a new function on the FWO requiring the FWO to publish a compliance and enforcement policy, including guidelines relating to the circumstances in which the FWO will or will not accept or consider undertakings, or enter or consider entering into cooperation agreements;
- require the FWO consult with the NWRCC about the guidelines, before publishing its compliance and enforcement policy;
- make minor amendments to the functions and powers of FWO and Fair Work Inspectors, to ensure that all relevant existing compliance and related powers may be exercised for determining whether an offence has been committed;
- clearly empower the FWO and Fair Work Inspectors to exercise their compliance and related powers to investigate suspected ancillary and similar offences ('related offence provisions'), for which provision is made under the Criminal Code or Crimes Act;
- provide that immunities (that apply if an individual's privilege against self-incrimination is abrogated) do not apply in relation to employee records required to be kept under the FW Act, or records of pay slips;
- provide that only the CDPP and AFP may commence a prosecution of the new criminal offence for wage theft, within 6 years of the offence occurring;
- enable the Commonwealth Crown (but not other Australian Governments) to be liable to be prosecuted for the new criminal offence for wage theft or a 'related offence provision';
- clarify that the Crown in each of its capacities (that is, all Australian Governments) and to the extent the Commonwealth's legislative power permits, is liable to be the subject of proceedings for a contravention of a civil remedy provision (which maintains the status quo for these provisions); and

- establish new attribution rules enabling civil liability to be established under the FW Act against all Australian Governments (to the extent the Commonwealth's legislative power permits) and criminal liability to be established against the Commonwealth.

Item 213: Section 12

966. This item would insert 11 new definitions into the Dictionary of the FW Act, section 12. These new definitions are explained in the context of the proposed substantive provisions in which they appear (below).

Item 214: At the end of subsection 37(2)

Item 215: At the end of section 37

967. These items would amend the Crown liability provisions in section 37 of the FW Act, to lift the 'Crown shield' in that section, to enable the Commonwealth to be prosecuted for the new criminal offence for wage theft or a 'related offence provision'.

968. Item 214 would enable an exception to be created to the general rule in subsection 37(2), that the FW Act does not make the Crown liable to be prosecuted for an offence.

969. Item 215 would insert new subsections 37(3) and (4).

970. New subsection 37(3) provides that the Crown in right of the Commonwealth (Commonwealth) is liable to be prosecuted for the new criminal offence for wage theft or a 'related offence provision' that relates to such an offence. The Crown in right of the States and Territories will not be liable for prosecution for the new offence.

971. New subsection 37(4) clarifies that the Crown, in each of its capacities and to the extent the Commonwealth's legislative power permits, is liable to be subject of proceedings for a contravention of a civil remedy provision. The reference to the Crown in each of its capacities refers to all Australian Governments. Notably, the scope of liability is intended to apply only to the extent of the Commonwealth's legislative power, including the States' referral of powers in relation to the FW Act.

972. This provision makes clear that civil proceedings may be brought against an Australian Government under the FW Act (subject to the relevant limitations described above), and civil remedies including civil pecuniary penalties may be imposed in such civil proceedings. This reflects the status quo.

Item 216: Section 321 (after the paragraph relating to Division 2)

973. This item would update the Guide to the relevant Part, to reflect the introduction of the new criminal offence for wage theft.

Item 217: Before section 323

Item 218: Subsection 324(1) (note 1)

Item 219: Section 327 (heading)

Item 220: At the end of Division 2 of Part 2-9

974. These items would insert 2 new subdivisions into Division 2 of Part 2-9 (Items 217 and 220) and make a consequential amendment to a note and section heading to reflect this change (Items 218 and 219).

975. Item 220 would insert the new criminal offence for wage theft into the FW Act (new section 327A), make provision for the voluntary code (new section 327B) and provide for the commencement of proceedings for offences against the new offence for wage theft and related offence provisions (new section 327C).

Subdivision B – Offence for failing to pay certain amounts as required

Section 327A Offence – failing to pay certain amounts as required

976. New section 327A provides that an employer commits an offence if:

- the employer is required to pay an amount (a required amount) to, on behalf of, or for the benefit of, an employee under the FW Act or a specified instrument; and
- the required amount is not an amount covered by subsection (2); and
- the employer engages in conduct; and
- the conduct results in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment.

977. New section 327A requires consideration of whether an amount is one that an employee is 'required' to pay 'to, on behalf of, or for the benefit of, an employee'. If an employer pays what the FW Act requires (section 323, read subject to the deductions clause in section 324), they will not contravene new subsection 327A(1). For example, if a modern award specifies a weekly base rate of $1,000 for a full-time employee, and the employer has been properly authorised by the employee to deduct $100 per week for parking fees (or salary sacrifice, etc.) then the 'required amount' would be $900.

978. New paragraph 327A(1)(b) provides that an amount covered by subsection (2) is not covered by the offence provision. The states' referral of powers to the Commonwealth that is relied on for the FW Act relevantly excludes:

- superannuation;
- long service leave;
- paid leave that the employee was entitled to take by reason of being a victim of crime; and
- paid leave that the employee was entitled to take because the employee attended for service on a jury, or for emergency services duties.

979. The new offence provision for wage theft does not apply to any underpayments in this respect, if the parties are only national system employees and national system

employers due to the States' referral of powers to the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution.

980. Generally, with the exception of employees who are entitled to long service leave under Division 9 of Part 2-2 (the NES), State or Territory long service leave laws are specifically permitted to provide entitlements to national system employees (paragraph 27(2)(g)).

981. For new paragraph 327A(1)(c), the prosecution will have to prove beyond reasonable doubt that the defendant intentionally engaged in the relevant conduct. A failure to make a payment, for example, due to a banking error would not be caught by the provision.

982. For clarity, the term 'engage in conduct' will be defined in section 12 to mean: do an act or omit to perform an act. The term 'engages in conduct' allows the prosecution to allege a course of conduct in charging an offence rather than being required to identify a particular act as constituting the offending conduct.

983. For new paragraph 327A(1)(d), the prosecution will have to prove beyond reasonable doubt that the defendant intended that their conduct would result in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment.

984. For there to be an offence, the person must mean to bring about the result (that is, a failure to pay the required amount), or be aware that result will occur in the ordinary course of events (refer to section 5.2 of the Criminal Code).

985. This makes clear that underpayments that are accidental, inadvertent or based on a genuine mistake are not caught by the provision. For example, if an employer genuinely misclassifies an employee and pays them an hourly rate of $25 per hour instead of $30 per hour (for the correct classification), the resulting failure to pay the required amount ($30 per hour) was not intentional and would not be caught by the provision.

986. If, however, an employer paid an employee $10 per hour, knowing it was below the minimum wage, the resulting failure to pay the required amount (whatever it may be) would be intentional, and caught by the provision. Exact knowledge of the required amount (to a dollars and cents value) would not be required to establish the offence.

987. New subsection 327A(1) is followed by two legislative notes. Note 1 refers readers to the penalty, in subsection (5), and note 2 makes clear that a single payment to, on behalf of, or for the benefit of, an employee in relation to a particular period may comprise more than one required amount.

988. New subsection 327A(2) would list the relevant amounts for purposes of new paragraph 327A(1)(b). It would disapply the wage theft provision in relation to the specified entitlements for 'referral' employees and employers, that is, those employees and employers who are covered by the FW Act only by virtue of the States' referral of powers to the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution.

989. New subsection 327A(3) specifies the fault elements for the new criminal offence for wage theft:

- absolute liability applies to paragraphs (1)(a) and (b); and
- the fault element for paragraphs (1)(c) and (d) is intention.

990. The two legislative notes under the subsection alert the reader to the sections of the Criminal Code that are relevant to the interpretation of the subsection.

991. Section 6.2 of the Criminal Code provides that the prosecution is not required to prove any fault element in relation to any offence or physical element of an offence which is expressly provided to be of absolute liability. Where absolute liability applies to an element of an offence or the complete offence, the defence of mistake of fact under section 9.2 of the Criminal Code is not available to the defendant. Absolute liability is appropriate in situations where it is not sensible to place on the prosecution the onus of demonstrating a fault element and where the mistake of fact defence should not be available to a defendant.

992. Absolute liability applies to the physical elements in proposed paragraphs (1)(a) and (b) because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, and accordingly the offence would become almost unenforceable if the prosecution were obliged to demonstrate fault. Further, the person's degree of culpability under this offence is not materially affected by absence of the subject fault. (The fault element for paragraphs (1)(c) and (d) is intention, which requires the prosecution to prove that the required conduct was intention, and that there was a resulting intention to fail to pay the required amount, or underpay.) The defence of mistake of fact should not be available to the defendant for paragraphs (1)(a) and (1)(b) and accordingly absolute liability, and not strict liability, is the appropriate application.

993. New subsection 327A(4) deals with the situation where things have been given or provided (that is 'payment in kind'), or amounts required to be spent or paid, in contravention of Division 2 of Part 2-9 of the FW Act. For example, an employee may have been required to pay an amount of their wages back to their employer (or a person nominated by their employer) as 'cashback'. The new subsection would apply the rules in section 327 of the FW Act, so that:

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

994. Any unlawful off-set or requirement to spend would be treated as an underpayment for purposes of the new offence for wage theft.

995. New subsection 327A(5) sets out the maximum penalty for an offence against the new offence provision for wage theft, which may include a term of imprisonment of up to 10 years, in addition to a fine of up to the specified amount, set out in the provision. The Guide to Framing Commonwealth Offences was applied in determining to criminalise the requisite conduct, and set the maximum penalty for an offence. In setting the maximum term of imprisonment for an offence, regard was had to offences of a similar nature, particularly offences of theft and fraud under the general law (for example, the offence of general dishonesty in section 135.1 of the Criminal Code, among others).

996. New subsection 327A(5) enables the sentencing court to impose a fine based on the underpayment amount.

997. New subsection 327A(6) provides that the maximum fine for an offence against the new offence provision for wage theft is:

- if the court can determine the underpayment amount for the offence—the greater of 3 times the underpayment amount and whichever of the following applies:
    - for an individual – 5,000 penalty units;
    - for a body corporate – 25,000 penalty units; or
- otherwise, the following amount:
    - for an individual – 5,000 penalty units;
    - for a body corporate – 25,000 penalty units.

998. The value of a Commonwealth penalty unit is $313 at the time of publishing.

999. New subsection 327A(7) defines the 'underpayment amount' for the purposes of the section. It covers both a failure to underpay the required amount in full, or a failure to pay at all.

1000. New subsections 327A(8)–(10) establish a 'course of conduct' sentencing rule for the new offence for wage theft, which is based on a similar rule that applies in the context of sentencing for civil contraventions (FW Act, section 557).

1001. New subsection 327A(8) provides that if a person is found guilty of committing two or more offences (the aggregated offences) and the aggregated offences arose out of a course of conduct by the person, then the person is taken for sentencing purposes to have been found guilty of a single offence.

1002. The intention is that a 'course of conduct' may occur in relation to groups of employees who have been underpaid in the same manner over time, not just in relation to a single employee.

1003. New subsections 327A(9) and (10) clarify the effect of the 'course of conduct' sentencing rule on calculating penalties based on the underpayment amount. If multiple offences are grouped and penalised as a single offence under the sentencing rule, then

the corresponding underpayments are also aggregated (that is, added up together) for purposes of applying these penalties.

Section 327B The Voluntary Smal Business Wage Compliance Code

1004. New subsection 327B(1) enables the Minister to declare by legislative instrument a 'voluntary small business wage compliance code' (voluntary code). Compliance with the voluntary code is intended to provide assurance to small business employers (as defined by the voluntary code) that they will not be referred for criminal prosecution in relation to a failure to pay an amount to, on behalf of, or for the benefit of, an employee. Item 213 relevantly amends the Dictionary in section 12 of the FW Act to insert a signpost referring readers to the definition of 'voluntary small business wage compliance code' in new subsection 327B(1).

1005. It is intended that the FWO will develop the voluntary code through a tripartite process involving both employee and employer organisations. The voluntary code would be declared by the Minister before the commencement of the offence contained in new subsection 327A(1).

1006. If a small business employer has underpaid an employee and wishes to seek assurance from the FWO under these provisions, the small business employer will need to satisfy the FWO that it has complied with the voluntary code in relation to that underpayment. For example, this could include evidence that the small business employer has rectified any systemic issue that contributed to underpaying affected employees, and that required payments have been made to those employees. If the FWO is satisfied that a small business employer has complied with the voluntary code, the FWO must not refer any conduct that resulted in the failure to pay to the CDPP or the AFP for action in relation to a possible offence against new subsection 327A(1). The FWO must also not enter into a cooperation agreement with the employer that covers any conduct that resulted in the 'failure to pay' (new subsection 327B(2)).

1007. The FWO must give a small business employer written notice of its decision as to whether the employer has complied (or not) with the voluntary code (new subsection 327B(3)).

1008. Compliance or otherwise with the voluntary code does not affect the power of an inspector to institute or continue civil proceedings, or give a compliance notice (section 716 of the FW Act) in relation to the conduct, or the power of the FWO to accept an enforceable undertaking in relation to the conduct (section 715 of the FW Act), or any other power or function of the FWO or a Fair Work Inspector that is not mentioned in new paragraphs 327(2)(a) or 327(2)(b) (new subsection 327B(4)).

Section 327C Commencing proceedings for certain offences against this Act

1009. New subsection 327C(1) would limit the function of commencing proceedings for an offence against the new offence for wage theft or a 'related offence provision' to the CDPP or the Australian Federal Police. This has the effect of providing a contrary intention for purposes of the Crimes Act, section 13 (which provides for the institution of proceedings in respect of offences).

1010. New subsection 327C(2) would impose a limitation period of 6 years for bringing a proceeding, after the commission of the offence. This means that any alleged offending that occurred outside the limitation period (even if it could be said to form part of the same course of conduct) would not be covered by the new wage theft offence.

Item 221: Paragraph 682(1)(c)

Item 222: Paragraph 682(1)(c)

1011. The functions of the FWO include monitoring compliance with the FW Act, and inquiring into, and investigating any act or practice that may be contrary to the Act (paragraphs 682(1)(b) and (c)). These functions already cover investigating offences against the FW Act. Amendments are proposed to ensure the FWO has the new function of investigating offences against 'related offence provisions' (in the Crimes Act and Criminal Code), that deal with ancillary and similar liability, insofar as they relate to offences against the FW Act.

1012. Item 213 would insert a definition of 'contravene' into the Act's definitions section (section 12), to make clear that general references to contravening the Act (or a similar phrase) may cover the contravention of a civil remedy provision, a provision of the FW Act that creates an offence and a 'related offence provision' (that is, unless the context of the term clearly dictates otherwise). This is consistent with the well-understood interpretation of the term, so is a clarifying amendment only.

1013. Item 221 would amend paragraph 682(1)(c) to replace the word 'act' with 'any conduct', to make clear that the FWO's functions include monitoring and investigating etc. omissions under the FW Act, as well as acts.

1014. Item 222 would amend the FWO's investigations function in paragraph 682(1)(c) to additionally cover conduct that maybe contrary to a 'related offence provision'. The term 'related offence provision' is proposed to be defined in FW Act's dictionary in section 12 to mean:

- section 6 of the Crimes Act; or
- a provision of Part 2.4 of the Criminal Code;

to the extent that the offence created by the provision relates to an offence against this Act other than an offence mentioned in the dot points above.

1015. Similar amendments are proposed in relation to the compliance powers Fair Work Inspectors (as necessary), to ensure that these powers also extend to investigating alleged offences against 'related offence provisions' insofar as they relate to offences against the FW Act. These are described in more detail below.

Item 223: After paragraph 682(1)(d)

Item 224: At the end of section 682

1016. Subsection 682(1) of the FW Act sets out the functions of the FWO.

1017. This item would add to this list the function of publishing a compliance and enforcement policy, including guidelines relating to the circumstances in which the

FWO will, or will not: accept or consider accepting undertakings under section 715; or enter or consider entering into cooperation agreements under section 717B.

1018. The addition of this function would formalise a long-standing practice of the FWO, in publishing this material. The provision does not specify how the material must be published.

1019. Item 224 would require the FWO to consult with the NWRCC about the guidelines, before publishing its policy. No details are prescribed about how this consultation should occur, but it is expected that it would be carried out reasonably, commensurate to the nature of any proposed changes to the guidelines. This would not prevent the FWO from consulting more widely on other aspects of its policies as appropriate.

Item 225: Paragraph 706(1)(a)

Item 226: Subsection 711(1)

Item 227: Paragraph 712AA(1)(a)

1020. Sections 706, 711 and 712AA deal with the scope of the compliance powers of Fair Work Inspectors, their power to ask for a person's name and address, and the FWO's powers in relation to FWO notices.

1021. These items would amend the specified provisions to ensure that the relevant powers are exercisable in relation to a suspected offence against the Act, including a 'related offence provision' as proposed to be defined in section 12.

Item 228: At the end of section 713

Item 229: Section 713A

Item 230: At the end of section 713A

1022. Sections 713 and 713A of the FW Act abrogate the common law privilege against self-incrimination in the specified circumstances. This loss is offset, by conferring use and derivative use immunities on the affected individuals. That is, by providing that documents produced and any information or thing obtained as a direct or indirect consequence will not be admissible as evidence against the individual in the specified proceedings (subject to the specified exceptions).

1023. These items would create an exception to the immunities conferred by these sections, in relation to:

- an employee record in relation to an employee that is made under section 535; or
- a copy of a pay slip created in relation to an employee. Pay slips are required to be issued to employees under section 536.

1024. The rationale is that employee records that are required to be kept under the FW Act, section 535, or copies of payslips that are required to be issued under the FW Act, section 536, should be able to be tendered as evidence before a court, including criminal proceedings. In other words, the regulator should not be prevented from tendering evidence of employee records or pay slips against an individual, just because they were produced by notice or other coercive process. Further, as the regulator will be

undertaking criminal investigations, and these records will be central to being able to prove the offence, providing immunity would mean the regulator is unable to properly discharge their function in respect of criminal underpayments.

Item 231: After Subdivision DD of Division 3 of Part 5-2

1025. This item inserts new subdivision DE of Division 3 of Part 5-2, which establishes a framework for the making of cooperation agreements between the FWO and a person that has self-reported to the FWO the possible commission of an offence, or at least the physical elements of an offence, against new subsection 327A(1) or a related offence provision (to the extent that the offence created by the provision relates to an offence against subsection 327A(1)) (new subsection 717B(1)). Item 213 amends the Dictionary in section 12 of the FW Act to relevantly insert a signpost referring readers to the definition of 'cooperation agreement' in new subsection 717B(1).

1026. The cooperation agreements framework is intended to provide a person with the opportunity to access 'safe harbour' from potential criminal prosecution if they have engaged in conduct that amounts to the possible commission of the new wage theft offence or related offence and self-reported their conduct to the FWO. If, after having regard to a range of matters provided in new subsection 717B(2), the FWO decides to enter into a cooperation agreement with the person, the FWO must not refer conduct engaged in by the person that is covered by the agreement to the CDPP or the AFP for possible criminal prosecution while the agreement is in force. The matters that the FWO must have regard to in new subsection 717B(2) include whether in the FWO's view, the person has made a voluntary, frank and complete disclosure of the conduct (to the extent of the person's knowledge at the time of the disclosure), and the nature and level of detail of the disclosure (paragraph 717B(2)(a)), and the person's history of compliance with the FW Act (paragraph 717B(2)(f)), which is intended to be construed broadly and could include, for example, whether there has been past compliance with enforcement tools such as compliance notices.

1027. While a cooperation agreement is in force, it does not prevent an inspector instituting or continuing civil proceedings in relation to the conduct, or conduct engaged in by any other person from being referred to the CDPP or the AFP for action in relation to a possible offence (new subsection 717A(2)).

1028. The regulations may prescribe matters in relation to the content of cooperation agreements (new subsection 717B(3)).

1029. New section 717C provides that a cooperation agreement is in force from the time it is entered into or any later time specified in the agreement until it expires (if an expiry date is specified in the agreement), is terminated (new section 717D), or is withdrawn (new section 717E).

1030. The FWO may terminate a cooperation agreement with a person, by written notice at any time, if it is satisfied that the person has contravened a term of the agreement, or provided false or misleading information or documents, or on any other ground prescribed by the regulations (new subsection 717D(1)). As an alternative to

terminating a cooperation agreement on the grounds in new subsection 717D(1), the FWO may apply to the Federal Court, the Federal Circuit and Family Court of Australia (Division 2) or an eligible State or Territory Court for an order under new subsection 717D(3).

1031. The parties to a cooperation agreement may withdraw from, or vary, the agreement by consent (new sections 717E, 717F).

1032. New section 717G is intended to clarify how the cooperation agreements framework interacts with other powers in the FW Act. In particular, a cooperation agreement does not affect the power of an inspector to give a compliance notice (section 716 of the FW Act) in relation to the conduct, or the power of the FWO to accept an enforceable undertaking in relation to the conduct (section 715 of the FW Act), or any other power or function of the FWO or an inspector that is not mentioned in new subsection 717A(1). An enforceable undertaking or a compliance notice has no effect to the extent of inconsistency with a cooperation agreement (new subsection 717G(2)).

Item 232: Subsections 793(1) and (2)

Item 233: After subsection 793(3)

Item 234: At the end of subsection 793(4)

1033. Section 793 of the FW Act attributes to the corporation the conduct and (if relevant) state of mind of the individuals referred to in the section. It deals with both civil and criminal liability. Section 793 does not exhaustively prescribe the legal means by which the state of mind held by, or the conduct engaged in by, a body corporate may be ascertained. Its purpose is to provide for an expanded range of persons whose conduct and state of mind might be ascribed to a body corporate than that which exists at common law, while at the same time preserving the common law doctrines.

1034. Subsection 793(4) provides that Part 2.5 of Chapter 2 of the Criminal Code does not apply to an offence against the FW Act.

1035. These items would reverse the position in relation to the new offence for wage theft and related offence provisions (to the extent they relate to such an offence), by disapplying the statutory attribution rules in subsections 793(1) and (2), so applying Part 2.5 of Chapter 2 of the Criminal Code. This means that the attribution rules for criminal responsibility in Part 2.5 of Chapter 2 of the Criminal Code would apply in those circumstances (but not for other offences against the FW Act).

Item 235: After section 794

1036. Subsection 37(1) provides that the FW Act binds the Crown in all its capacities (that is, all the Australian Governments), to the extent the states' referral of powers (if any) permit. However, the provision that attributes the conduct (and states of mind) of individuals to apply to bodies corporate (section 793), so that liability may be established, does not apply to bodies politic (that is, the Australian Governments).

1037. Item 235 would address this gap by inserting:

- new section 794A into the FW Act to provide for the liability of Australian Governments under civil remedy provisions;
- new section 794B to provide for the liability of the Commonwealth for certain offences (that is, to the extent that the 'Crown shield' against prosecution for offences has been lifted);
- new section 794C to identify responsible agencies for Australian Governments; and
- new section 794D to provide for the liability of the Commonwealth to pay civil and criminal penalties.

Section 794A Liability of Australian governments under civil remedy provisions

1038. New subsection 794A(1) would limit the scope of the new attribution provision for the purposes of applying a civil remedy provision, or any other provision of the FW Act, insofar as it relates to a civil remedy provision, in relation to an Australian Government.

1039. The practical operation of this provision will be limited to the extent the Commonwealth's legislative power permits, including the scope of the states' referral of powers.

1040. New subsection 794A(2) would define an 'Australian Government' for purposes of the section to include the Commonwealth, a State, the Australian Capital Territory and the Northern Territory.

1041. New subsections 794A(3) and (4) would make provision for the conduct and state of mind the individuals referred to in the section to be attributed to an Australian Government. These provisions are based on the equivalent provisions that apply in relation to bodies corporate, in section 793 of the FW Act.

1042. New subsection 794A(5) would clarify that if an Australian Government contravenes a civil remedy provision, the pecuniary penalty that it may be ordered to pay is that applicable to a body corporate. This reflects the status quo, so would be an amendment of a clarifying nature only.

1043. New subsection 794A(6) would enable regulations to be made to prescribe modifications in the way the section applies in relation to Australian Governments. The Government has developed the new regulatory framework for the liability of Australian Governments under civil remedy provisions, but it is a new and as yet untested framework. A degree of complexity is involved, as the provisions need to be able to (potentially) apply to all Australian Governments (noting practical operation of the provisions would currently be limited because of the limited scope of the states' referrals in relation to their public services). There remains the possibility that the operation of the section in practice may produce unintended or unforeseen results. Including this regulation-making power is critical to ensuring timely and targeted adjustments can be implemented if required.

1044. New subsection 794A(7) would define the term 'employee' to have its ordinary meaning in the section.

Section 794B Liability of the Commonwealth for certain offences

1045. New subsection 794B(1) would apply Part 2.5 of the Criminal Code in relation to the Commonwealth, for the purposes of an offence against new subsection 327A(1) (offence for failing to pay amounts as required) or a related offence provision, to the specified extent, in the same way as Part 2.5 applies in relation to bodies corporate. This aligns with the attribution rules that are proposed for corporate criminal responsibility (that is, Part 2.5 of the Criminal Code).

1046. New subsection 794B(1) would apply Part 2.5 of the Criminal Code:

- without the provisions that are not relevant (that is, as if section 12.4 and 12.5 of the Criminal Code were omitted); and
- with the modifications set out in the table below subsection (2) (subject to any further modification prescribed by the regulations);
- such other modifications as are necessary, given the different regulatory context for liability of the Commonwealth (subject to any further modification prescribed by the regulations); and
- any modifications prescribed by the regulations.

1047. The modifications set out in the table translate certain terms and concepts that apply in the corporate context (that is, 'a body corporate's board of directors', 'a high managerial agent of a body corporate' and 'the corporate culture of a body corporate') and substitute references that work in the government context.

1048. In the context of government, the equivalent of:

- a body corporate's board of directors—is taken to be the governing body of the agency of the Commonwealth (the 'relevant agency') whose officer, employee or agent engaged in conduct constituting a physical element of the offence;
- a high managerial agency of a body corporate— is taken to be a person who is an officer, employee or agent of the Commonwealth with duties of such responsibility that the person's conduct may fairly be assumed to represent the policy of the relevant agency;
- the corporate culture of a body corporate—is taken to be one or more attitudes, policies, rules, courses of conduct or practices existing within the relevant agency or a part of the relevant agency.

1049. New subparagraph 794B(2)(b)(iii) would enable regulations to be made to prescribe modifications to the way in which Part 2.5 applies to establish Commonwealth liability (including modifications to those made by the table following the subsection (2)).

1050. The Government has developed a new regulatory framework for the criminal liability of the Commonwealth, leveraging from a similar exercise in relation to the WHS Act. It

is a new and as yet untested framework. A degree of complexity is involved, as the provisions need to be able to (potentially) apply to a broad range of Commonwealth entities. There remains the possibility that the operation of the section in practice may produce unintended or unforeseen results. Including this regulation-making power is critical to ensuring timely and targeted adjustments can be implemented if required.

1051. New subsection 794B(3) provides that the penalty to be imposed on the Commonwealth, if found guilty of a relevant offence, is the penalty applicable to a body corporate.

1052. New subsection 794B(4) would define the term 'employee' to have its ordinary meaning.

1053. New subsection 794B(5) would define the term 'governing body' of the Commonwealth for the purposes of the section.

Section 794C Responsible agencies for Australian governments

1054. New section 794C would specify how proceedings may be brought against an Australian Government (civil proceedings only), or the Commonwealth (that is, civil proceedings, or criminal proceedings brought against the Commonwealth in the permitted circumstances). That is, by identifying a 'responsible agency'.

1055. New subsection 794C(1) would provide that, if relevant proceedings are brought, the 'responsible agency' as defined in new subsection (4) in relation to the contravention or the commission of the offence may be specified in any document initiating, or relating to, the proceedings.

1056. New subsection 794C(2) specifies the nature of the responsible agency's entitlement to act in the proceedings, and confers the procedural rights and obligations of the relevant Government on the responsible agency.

1057. New subsection 794C(3) would empower, with the court's leave, a specified person to change the responsible agency during the proceedings. This flexibility is necessary to deal with changes like machinery of government changes.

1058. New subsection 794C(4) would define what a 'responsible agency' is in relation to a contravention of a civil remedy provision by an Australian Government, or the commission of an offence by the Commonwealth. The starting point is identifying the agency where the relevant conduct occurred; then, if it has ceased to exist, any successor of that agency; then (if none), the agency of the Australian Government or Commonwealth (as the case requires) that the court declares to be the responsible agency.

1059. New subsection 794C(5) would enable regulations to be made to modify how the section applies in relation to an Australian government (in relation to a contravention of a civil remedy provision), and the Commonwealth (in relation to the commission of an offence).

1060. The Government has developed a new regulatory framework for the liability of Australian Governments, including how relevant proceedings may be brought against them under the FW Act. It is a new and as yet untested framework. A degree of complexity is involved, as the provisions need to be able to (potentially) apply to a broad range of entities of the Australian Governments. There remains the possibility that the operation of the section in practice may produce unintended or unforeseen results. Including this regulation-making power is critical to ensuring timely and targeted adjustments can be implemented if required.

Section 794D Liability of the Commonwealth to pay civil and criminal penalties

1061. While the Commonwealth is not liable to pay a pecuniary penalty to itself, the intention is that the Commonwealth should be notionally liable to pay such a penalty, whether under:

- a court's pecuniary penalty order (whether imposed in civil or criminal proceedings under the FW Act); or
- infringement notice issued under the FW Act.

1062. New section 794D would provide a process for making the notional payment, including provision for an appropriation for the purpose (new subsection 794D(4)).

Amendments to the *Federal Court of Australia Act 1976*

Item 236: After paragraph 23AB(4)(a)

1063. Section 562 of the FW Act confers jurisdiction on the Federal Court in relation to any matter (whether civil or criminal) arising under the FW Act.

1064. Division 1A of Part III of the Federal Court of Australia Act sets out procedures to be followed during criminal proceedings in the Federal Court relating to certain indictable offences. This Division does not confer jurisdiction on the Court in relation to indictable offences. Other provisions (like section 562 of the FW Act) need to have done this.

1065. Subsection 23AB(4) of the Federal Court of Australia Act lists the offences to which the Division applies.

1066. This item would amend paragraph 23AB(4)(a) to add a new item, being an indictable offence against the FW Act, so that the procedures in the Division apply in relation to those proceedings.

Part 14A— Amendments relating to mediation and conciliation conference orders made under section 448A of the Fair Work Act 2009

Amendments to the *Fair Work Act 2009*

1067. New Part 14A would address the circumstances in which employee claim action and employer response action are available following a conference ordered by the FWC under section 448A of the FW Act.

1068. Amendments made by the SJBP Act provided that where the FWC has made a PAB order in relation to a proposed enterprise agreement, the FWC is required under section 448A to make an order directing all bargaining representatives for the proposed agreement to attend a conference for the purposes of mediation or conciliation. The conference must occur on or before the day on which voting in the PAB closes. The amendments were intended to provide an opportunity for bargaining parties to further negotiate and potentially reach agreement, or at least confine disputed issues, before industrial action is taken.

1069. A Full Bench of the FWC considered the new provisions in *CEPU v Nilsen (NSW) Pty Ltd* [2023] FWCFB 134 (*Nilsen*). The Full Bench noted (at [68]–[69]) that employee claim action will only be protected under the amendments if each bargaining representative of an employee who will be covered by the agreement has attended the conciliation conference. This means that non-compliance with an order to attend a section 448A conference by one or more employee bargaining representatives, for example, one who may not have been the applicant for the PAB order, could render subsequent employee claim action unprotected – for both those represented by the non-complying bargaining representative and for others participating in the action.

1070. New Part 14A would address the issue identified in *Nilsen* by clarifying the class of employee bargaining representatives captured by the requirement to attend a conciliation conference in order for subsequent employee claim action engaged in by employees to be protected. It would also clarify the circumstances in which an employer can engage in employer response action.

Item 236A: Subsection 409(6A)

1071. This item would repeal and substitute subsection 409(6A), which sets out one of the requirements that must be satisfied for employee claim action to be protected. The effect of amended subsection 409(6A) is that the bargaining representative who applied for a PAB order must have attended the conciliation conference under section 448A that related to the PAB order for the subsequent employee claim action to be protected. Where 2 or more bargaining representatives jointly apply for the PAB order, each of those bargaining representatives must have attended the conciliation conference.

Item 236B: Subsection 411(3)

1072. This item would amend subsection 411(3) to clarify that the employer organising or engaging in employer response action in response to action that is authorised by a PAB, and any bargaining representative of the employer, must have attended a conciliation

conference under section 448A that related to the PAB order for the subsequent employer response action to be protected.

Part 15—Definition of employment

Amendments to the *Fair Work Act 2009*

1073. For the most part the FW Act confers rights and imposes obligations on, and in respect of the relationship between, an 'employer' and an 'employee'. The terms 'employer' and 'employee' are defined to have their ordinary meanings, that is, the meanings ascribed at common law.

1074. Part 15 of Schedule 1 would insert a new section 15AA into Part 1-2 of the FW Act. New section 15AA would require that the ordinary meanings of 'employee' and 'employer' be determined by reference to the real substance, practical reality and true nature of the relationship between the parties. This would require the totality of the relationship between the parties, including not only the terms of the contract governing the relationship but also the manner of performance of the contract, to be considered in characterising a relationship as one of employment or one of principal and contractor.

1075. In requiring an inquiry that extends beyond the contractual rights and obligations of the parties, the amendments would overcome the contract-centric approach established by the High Court's decisions in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (*Jamsek*). In these decisions, a majority of the High Court held that where a comprehensive written contract exists, the question of whether an individual is an employee of a person is to be determined solely with reference to the rights and obligations found in the terms of that contract. In such circumstances, the High Court held, it is not necessary or appropriate to engage in a wide-ranging review of the parties' conduct in performing their obligations under that contract. There are limited exceptions where one can look beyond the terms of the contract, such as where a contract is a sham, or has been varied or rendered unenforceable, or subject to an estoppel.

1076. The intention of this Part is to require a 'multi-factorial' assessment, as was previously commonly understood to be the correct approach in characterising a relationship as one of employment, or of principal and contractor, for the purposes of the FW Act. There is no exhaustive list of factors that will be relevant to a 'multi-factorial' assessment, ensuring a flexible approach that will enable the ordinary meanings of 'employee' and 'employer' to continue to adapt to changing social conditions, market structures and work arrangements.

Item 237: After section 15

1077. This item would insert new section 15AA into Division 3 of Part 1-2 of the FW Act to provide a principle of interpretation for determining the ordinary meanings of 'employee' and 'employer' for the purposes of the FW Act.

Section 15AA Determining the ordinary meanings of employee and employer

1078. Subsection 15AA(1) would require that the ordinary meanings of 'employee' and 'employer' be determined by ascertaining the real substance, practical reality and true nature of the relationship between the parties. This phrase indicates that, while the

terms of the contract between the parties will be a relevant factor, they are not determinative in circumstances where they do not reflect the real nature of the working relationship.

1079. The new interpretive principle aligns with Article 9 of ILO Recommendation 198, which states that, with respect to the employment relationship, 'the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.' By ensuring that the true nature of the relationship is determinative, the new provision will ensure that disguised employments, which seek to evade or attenuate the legal obligations of an employment relationship, are legally ineffective.

1080. Subsection 15AA(1) would make it clear that this new approach applies for the purposes of the FW Act. New section 15AA would not change the meaning of 'employee' or 'employer' at common law. New section 15AA would not change the meaning of these terms in the context of any other Commonwealth legislative scheme.

1081. Subsection 15AA(2) would identify matters that must be considered in ascertaining the real substance, practical reality and true nature of the relationship between parties.

1082. Paragraph 15AA(2)(a) would first require consideration of the totality of the relationship between the parties. This phrase, drawn from His Honour Justice Mason's judgment in *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1 (*Brodribb*) and echoed by the majority in *Hollis v Vabu* [2001] HCA 44 (*Hollis*), is intended to indicate that in characterising the relationship, all relevant incidents of the relationship must be considered and no one incident will necessarily be determinative.

1083. Paragraph 15AA(2)(b) would provide that in considering the totality of the relationship between the individual and the person, regard must be had not only to the terms of the contract governing the relationship, but also to other factors including, but not limited to, the manner in which the contract is performed. This would make it clear that analysis of the totality of the relationship is not restricted to a consideration of the rights and duties established under the parties' contract. It must include, among other things, how the contract is performed in practice.

1084. The intention is to ensure that the way in which a contract is performed in practice can be considered in characterising the relationship irrespective of whether the performance of the contract has resulted in a contractual variation. This is intended to directly counteract the principle established in *Personnel Contracting* and *Jamsek* that where a comprehensive written contract exists, evidence of post-contractual conduct of the parties is not relevant in establishing the existence of an employment relationship or otherwise (except in limited circumstances, including where the contract has been varied by post-contractual conduct).

1085. The intention is that subsection 15AA(2) would facilitate the use of a multi-factorial approach when characterising a relationship, even in the face of a comprehensive written contract.

1086. Under the multi-factorial approach, guidance for the outcome is provided by various factors or indicia. A considerable number of case authorities, including *Brodribb* and *Hollis*, identify factors relevant in the characterisation of a relationship as one of employment or one of contractor and principal. In *Brodribb*, Mason J noted a prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. Other relevant matters were said to include, among other things:

- the mode of remuneration;
- the provision and maintenance of equipment;
- the obligation to work;
- the hours of work and provision for holidays;
- the deduction of income tax;
- the delegation of work by the putative employee.

1087. Wilson and Dawson JJ determined that factors suggesting a contract of service (an employment relationship) include:

- the right to have a particular person do the work;
- the right to suspend or dismiss the person engaged;
- the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like.

1088. Indicia which indicate a contract for services (a relationship of principal and contractor) were said to include:

- work involving a profession, trade or distinct calling on the part of the person engaged;
- the provision by the putative employee of their own place of work or their own equipment;
- the creation by the putative employee of goodwill or saleable assets in the course of their work;
- the payment by the putative employee from their remuneration of business expenses of any significant proportion;
- the payment to the putative employee of remuneration without deduction for income tax.

1089. Wilson and Dawson JJ also noted that the actual terms and terminology of the contract will always be of considerable importance.

1090. Other indicia have arisen over time in the authorities. Courts have often observed that there is no exhaustive list of relevant factors and that they will vary from case to case. So too will the weight to be afforded to particular indicia. This is partly because the test has evolved to adapt to changing social conditions and new work arrangements, and indeed will continue to do so.

1091. A legislative note following subsection 15AA(2) would alert the reader to the decisions of the High Court in *Personnel Contracting* and *Jamsek* and clarify that the amendments are a direct response to those decisions.

1092. In most work relationships, the question of an individual's employment status is uncontroversial. Where this is the case, the amendments are intended to have little or no impact. Where the question of an individual's work status does arise, the amendments would ensure that a fairer test applies to characterising the relationship.

Illustrative example

Wei is a cleaner and works via a cleaning agency to clean commercial offices in Melbourne's Central Business District. She works five nights per week and is told which offices to clean among the agency's list of clients. Wei signed a services agreement with the cleaning agency, which describes her as an independent contractor and specifies a rate of $90 per office, which can take anywhere from three to six hours in the evening. The services agreement also specifies that she is responsible for travel to and from worksites, and able to delegate work to others as required.

The new interpretive principle to determine the meaning of 'employee' and 'employer' under the FW Act applies when determining whether Wei is an employee of the cleaning agency. The interpretive principle allows an assessment of the arrangement by way of reference to the real substance, practical reality and true nature of the relationship between Wei and the agency, and beyond the terms of the services agreement to which Wei has agreed. For example, a court or a tribunal would take into account a range of factors relating to the totality of the relationship, such as Wei being told where and when she has to work, that she has little control over how she performs the work, the expectation that Wei would dress in attire branded with the logo of the cleaning agency and that her work is judged against the agency's performance standards. It would be relevant that she is able to delegate that work.

1093. New section 15AA would not apply to certain provisions of the FW Act.

- New paragraph 15AA(3)(a) would provide that subsections 15AA(1) and (2) do not apply to Divisions 2A and 2B of Part 1-3 of the FW Act. As a result, subsections 15AA(1) and (2) would not apply to employers and employees who are national system employers and employees because of the extended meaning given by sections 30C, 30D, 30M and 30N. The common law test for employment as provided for in *Personnel Contracting* and *Jamsek* would continue to apply to

employees and employers that are national system employees and employers by virtue of the States' referrals of industrial relations power.

- New paragraph 15AA(3)(b) would provide that subsections 15AA(1) and (2) would not apply to Part 3-1 of the FW Act to the extent that Part 3-1 applies only by operation of sections 30G or 30R of the FW Act. Part 3-1 of the FW Act sets out a range of workplace protections. Section 30G and 30R extend the application of Part 3-1 to action in a referring State.

1094. The approach required by the decisions in *Personnel Contracting* and *Jamsek* would also continue to apply to employees and employers under other workplace laws, to the extent that those laws adopt the ordinary meaning of employee and employer.

Part 16—Provisions relating to regulated workers

1095. This Part would implement amendments to the Fair Work Act and associated legislation to ensure that certain independent contractors are entitled to greater workplace protections than they are currently. The majority of the amendments are targeted at independent contractors who are either:

- employee-like workers performing digital platform work; or
- engaged in the road transport industry.

1096. The amendments would:

- provide a framework for the FWC to exercise functions and powers that relate to the road transport industry;
- insert a new jurisdiction enabling the FWC to set minimum standards orders and minimum standards guidelines in relation to employee-like workers performing digital platform work and regulated road transport industry contractors;
- enable digital labour platform operators and road transport businesses to make consent-based collective agreements with registered employee organisations;
- empower the FWC to deal with disputes over an employee-like worker's unfair deactivation from a digital labour platform, or the unfair termination of a road transport contractor's services contract by a road transport business; and
- enable independent contractors earning below a specified high-income threshold to dispute unfair contract terms in the FWC.

Division 1—Overarching road transport matters

Amendments to the *Fair Work Act 2009*

Item 238: After section 40B

1097. This item would insert new Part 1-4—Road transport industry objective and advisory group into the FW Act.

1098. Part 1-4 would provide a framework for the FWC's exercise of functions and powers in relation to the road transport industry, including:

- employers and employees; and
- regulated road transport contractors and road transport businesses, primarily under new Chapter 3A.

Part 1-4—Road transport industry objective and advisory group

Division 1—Guide to this Part

40C Guide to this Part

1099. This section would outline the Guide to this Part. In particular, the Guide would explain that Part 1-4 provides:

- that the Expert Panel for the road transport industry must have regard to the road transport objective when performing functions and exercising powers under this Act;
- that the Expert Panel's functions and powers extend to employees, employers, regulated road transport contractors and road transport businesses;
- for the establishment and membership of the RTAG, its advisory functions in relation to road transport minimum standards, and matters relating to prioritisation of the FWC's work in the road transport industry;
- for regulations in relation to the road industry contractual chain.

Division 2—Road transport industry objective

40D The road transport objective

1100. This section would set out the road transport objective. In performing a function or exercising power under the FW Act, the Expert Panel for the road transport industry would be required to consider the need for an appropriate safety net of minimum standards for regulated road transport workers and employees in the road transport industry, having regard to:
    - the need for standards that ensure the road transport industry is safe, sustainable and viable;
    - the need to avoid unreasonable adverse impacts on the following:
        - sustainable competition among road transport industry participants;
        - road transport industry business viability, innovation and productivity;
        - administrative and compliance costs for road transport industry participants.

1101. A note to this section would clarify that the matters that must be dealt with by the Expert Panel are matters relating to the making of, varying or revoking modern awards and road transport minimum standards orders relating to the road transport industry (with a cross reference to subsection 617(10B)). It would also confirm that the President has discretion to direct an Expert Panel for the road transport industry to deal with a matter (with a cross reference to subsection 617(10D)).

1102. For matters relating to employees, it is intended that the road transport objective would be a consideration the Expert Panel must take into account in addition to any other objectives or guidance provided under the FW Act, such as the modern awards objective set out in section 134 in relation to making or varying a modern award.

Division 3—Road Transport Advisory Group

1103. This division would provide for the establishment and functions of the RTAG and its subcommittees. The RTAG is a special advisory body appointed by the Minister specifically to support the FWC in carrying out its functions relating to the road

transport industry, including in relation to employees and regulated road transport contractors.

40E Establishment of Road Transport Advisory Group

1104. This section would provide for the establishment of the RTAG.

1105. Subsection (2) would outline that the function of the RTAG is to advise the FWC in relation to matters about the road transport industry, including but not limited to:

- the making and varying of modern awards relating to the road transport industry;
- the making and varying of RTMSOs and RTGs;
- the prioritisation by the FWC of matters relating to the road transport industry; and
- such other matters as are prescribed by the regulations.

1106. Subsection (3) would require that the RTAG, before advising the FWC in relation to a matter, must consult any relevant subcommittee established under 40G.

1107. Subsection (4) would require the President to consult, and have regard to the views of, the RTAG in deciding the priorities for the work of the FWC regarding matters affecting the road transport industry.

1108. Note that new subsection 536KA would require the FWC to not make a RTMSO unless it has consulted with the RTAG.

40F Membership of the Road Transport Advisory Group

1109. Subsection (1) would provide that the RTAG consists of members the Minister appoints.

1110. Subsection (2) would state the Minister must ensure members of the RTAG are members of and/or nominated by an organisation entitled to represent the industrial interests of one or more regulated road transport contractors; or an organisation that is entitled to represent the industrial interests of one or more road transport businesses.

1111. Subsection (3) would explain that a member of RTAG would hold office for the period specified in the instrument of appointment, which would be a maximum of three years. A note to this section would clarify a member of RTAG is eligible for reappointment, cross referencing subsection 33(4A) of the AI Act.

1112. Subsection (4) would allow the Minister to revoke a person's appointment to the RTAG.

1113. Subsection (5) would state the President of the FWC could give directions to the RTAG as to how it is to carry out its functions.

1114. Subsection (6) would allow the President to appoint a member of the Expert Panel for the road transport industry to chair the RTAG.

1115. It is not intended that members of the RTAG would be entitled to any remuneration or allowances for their participation.

40G Road Transport Advisory Group subcommittees

1116. This section would allow the RTAG to establish subcommittees to advise it in relation to matters relevant to performance of its functions.

1117. The subcommittee may include persons who are not members of RTAG, but a subcommittee must be chaired by a member. Subcommittee membership may be drawn from the broad range of organisations and interests in the road transport industry, under the leadership of RTAG members.

1118. It is not intended that members of the RTAG's subcommittees would be entitled to any remuneration or allowances for their participation.

Division 4—Regulations relating to the road transport industry contractual chain

1119. This division would provide a power for regulations to be made about the road transport industry contractual chain and contractual chain participants.

1120. This division would allow regulations to be made to empower the FWC to make orders in relation to road transport contractual chains and participants within those chains. This reflects the nature of the road transport industry that may see a range of parties throughout a contractual chain (otherwise known as a supply chain) that affect the working conditions of road transport workers and operating conditions of road transport and ancillary businesses. It would give the Government flexibility to extend the operation of the new road transport jurisdiction in Chapter 3A to contractual chains, should it become apparent this is necessary to ensure the successful operation of the new framework.

40H Meaning of road transport industry contractual chain participant

1121. This section would provide that a road transport industry contractual chain participant is a person connected with the road transport industry who is:

- a national system employer (as defined in section 14);
- a national system employee (as defined in section 14);
- a constitutional corporation (as defined in section 12);
- a regulated road transport contractor (see new section 15Q);
- a road transport business (see new section 15R); or
- a person who satisfies the requirements prescribed by the regulations.

1122. The intent is to ensure that all relevant persons in the road transport industry contractual chain are able to be brought within scope, should this be required for the purposes described below.

40J Regulations about the road transport industry contractual chain

1123. This section would enable regulations to be made for and in relation to matters relating to the road transport industry contractual chain or road transport contractual chain participants. For example, the regulations may:

- empower the FWC to make road transport industry contractual chain orders, that confer rights and impose obligations on road transport industry contractual chain participants;
- specify the matters that a road transport industry contractual chain order must, may or must not deal with;
- empower the FWC to vary, suspend or revoke road transport industry contractual chain orders;
- empower the FWC to deal with disputes between road transport industry contractual chain participants covered by road transport industry contractual chain orders;
- provide for and in relation to the interaction between road transport industry contractual chain orders, fair work instruments and other instruments under this Act or the regulations;
- provide for and in relation to the interaction between the regulations or road transport industry contractual chain orders and a law of the Commonwealth, a State or a Territory or an instrument made under such a law;
- provide for civil penalties for contraventions of the regulations, which must not exceed 60 penalty units for an individual and 600 penalty units for a body corporate; and
- empower the FWO to enforce road transport industry contractual chain orders.

1124. The maximum penalties for these regulations would ensure broadly consistent treatment with breaches of other civil remedy provisions in the Fair Work Act. Ensuring penalties have an appropriate deterrent effect would be consistent with achieving the objective of ensuring a safe and viable road transport industry

1125. This section would provide that before making regulations under this section, the Minister must be satisfied that the regulations are for the purposes of promoting the following:

- equitable workplace relations outcomes;
- a safe, sustainable and viable road transport industry;
- sustainable competition among road transport industry participants; and
- fairness between road transport industry contractual chain participants.

Division 2—Expert Panel for the road transport industry

Amendments to the *Fair Work Act 2009*

1126. This division would make amendments to the FW Act to establish and provide the functions of a new Expert Panel for the road transport industry. The Expert Panel would be responsible for performing functions and exercising powers relating to the road transport industry, including in relation to modern awards and RTMSOs, having regard

to the road transport objective. The Expert Panel could also be directed to deal with other matters that the President considers may relate to the road transport industry.

1127. This would ensure the FWC has the expertise it needs to better assess minimum standards and conditions for both employees and contractors working in the road transport industry. The expertise required for the new Expert Panels would be provided by either part-time Expert Panel members or appropriately qualified FWC members.

Item 239: At the end of subsection 157(1) (after note 3)

1128. Section 157 of the FW Act provides that the FWC may make, vary or revoke a modern award if the FWC is satisfied that it is necessary to achieve the modern awards objective.

1129. This item would insert a note at the end of subsection 157(1) (after note 3) of the FW Act clarifying if the FWC is making, varying or revoking a modern award the President considers might relate to the road transport industry (cross-referencing section 40D), it must have regard to the road transport objective.

1130. This would make the reader aware that both the modern awards objective and road transport objective would need to be applied when the FWC is making, varying or revoking such an award.

Item 240: After subsection 582(4)

1131. This item would amend section 582 of the FW Act to insert new subsections (4A), (4B) and (4C). Existing section 582 relates to directions by the President.

1132. New subsection (4A) would provide that if the President gives a direction that two or more matters be dealt with jointly, then the direction must require the matters to be dealt with by the Expert Panel where at least one of the matters:

- must be dealt with by an Expert Panel constituted to deal with a matter that relates to the road transport industry (as required by new subsection 617(10B)); or
- is a matter the President considers might relate to the road transport industry and has directed be dealt with by an Expert Panel constituted for that purpose (in accordance with new subsection 617(10D)).

1133. This means that where at least one of the matters to be dealt with jointly fall into one of those categories then the matters will travel together and be dealt with by an Expert Panel. The note to this subsection would cross-reference subsection 620(1E) regarding the constitution of an Expert Panel for these purposes.

1134. Subsection (4B) would provide that the above provisions do not limit the power of the President to direct that other matters be dealt jointly by an Expert Panel.

1135. Section (4C) would provide that the President may give a direction that a FWC member deal with a matter that the President considers might relate to the road transport industry, if the FWC member has knowledge of, or experience in, the road transport industry, whether or not the President considers that the matter might relate to another industry or sector. For example, the President would be able to direct a suitably

qualified FWC member to deal with a dispute relating to a road transport collective agreement.

Item 241: After subsection 617(10A)

1136. This item would insert new subsections after subsection 617(10A) of the FW Act.

1137. Subsection (10B) would provide that the following must be made by an Expert Panel for the road transport industry:

- a modern award that the President considers might relate to the road transport industry;
- a determination varying or revoking a modern award that the President considers might relate to the road transport industry;
- a RTMSO or a determination varying or revoking a RTMSO;
- RTG or a determination varying or revoking RTG;
- such other instruments as prescribed.

1138. Note 1 to this subsection would cross-reference subsection 620(1E) for further information about the constitution of the Expert Panel for the road transport industry.

1139. Note 2 to this subsection would inform the reader that the road transport objective would be relevant to functions of the Expert Panel for the road transport industry as would be provided in new section 40D.

1140. Subsection (10C) would provide that for the purposes of new subsection (10B), if the President considers that a determination or a modern award or other prescribed instrument might relate to the road transport industry it does not matter if the President considers that the determination or modern award might relate to another industry or sector.

1141. Section 10D would provide that the President with power to direct that the following matters be dealt with by an Expert Panel constituted for the purpose, regardless of whether the President considers that the matter might also relate to another industry or sector:

- the making, varying or revoking of an ELMSO or ELG to the Expert Panel if the President considers it might relate to the road transport industry; and
- any other prescribed instrument or matter that the President considers might relate to the road transport industry.

1142. The note to this subsection would cross-reference to subsection 620(1E) regarding constitution of an Expert Panel.

Item 242: At the end of subsection 617AA(4)

1143. This item would insert new paragraphs (e) and (f) in existing subsection 617AA(4).

1144. Existing section 617AA applies where a Full Bench and Expert Panel consist of the same FWC members. It provides, for the avoidance of doubt, that the functions and

powers of those FWC members as a Full Bench are not limited by the purposes for which an Expert Panel consisting of those same members was constituted. Likewise, the functions and powers of the Expert Panel are not limited by the functions and powers of the Full Bench.

1145. Subsection 617AA(4) clarifies that a reference to a full bench or an Expert Panel performing a functions or exercising a power would include reference to the listed functions or powers.

1146. The following would be added would to the listed functions or powers to make clear section 617AA would apply to them:

- performing a function or exercising a power under Chapter 3A;
- dealing with a matter that the President considers might relate to the road transport industry.

Item 243: Subsection 617A(1)

1147. This item would amend existing section 617A(1) to insert reference to new subsection 620(1E).

1148. Existing Subsection 617A allows the President to give a direction under section 582 requiring that a matter that is relevant to a function of an Expert Panel for pay equity, an Expert Panel for the Care and Community Sector or an Expert Panel for pay equity in the Care and Community Sector be investigated, and that a report about the matter be prepared.

1149. This amendment would similarly allow the President to also give a direction requiring that a matter relevant to a function of the Expert Panel for the road transport industry be investigated and that report about the matter be prepared.

Item 244: Subsection 617A(1) (note)

1150. After 'remuneration' in subsection 617A(1)(note), this item would insert the words 'the road transport industry'. This is a consequential change to reflect the amendment made by the above item.

Item 245: After subsection 620(1D)

1151. This item would insert new subsection 620(1E) which would provide for constitution of an Expert Panel for the road transport industry.

1152. Subsection (1E) would provide that an Expert Panel constituted under this subsection for a purpose referred to in subsection 617(10B) or (10D) must include (except as provided by section 622):

- the President, a Vice President or Deputy President appointed by the President to be Chair of the Panel; and
- at least one Expert Panel member or other FWC Member who has knowledge of, or experience in, the road transport industry; and

- subject to existing subsection 620(2A) (which would require the President to ensure an Expert Panel for the road transport industry consists of a majority of FWC members who have knowledge of, or experience in, the road transport industry), such number (if any) of other FWC Members as the President considers appropriate.

Item 246: Subsection 620(2A)

Item 247: Subsection 620(2A)

1153. These items would add references to new subsection (1E) and paragraph (1E)(b) in existing subsection 620(2A).

1154. These amendments would require the President to ensure an Expert Panel for the road transport industry consists of a majority of FWC members who have knowledge of, or experience in, the road transport industry.

Division 3—Minimum standards for regulated workers

Amendments to the *Fair Work Act 2009*

Item 248: After section 15A

1155. This item would insert new Division 3A into Part 1-2 (Definitions).

Division 3A—Definitions relating to regulated workers

Subdivision A—General

*15B Meaning of **collective agreement***

1156. This section would insert a new meaning of 'collective agreement' into the FW Act, being:

- an employee-like worker collective agreement;
- a road transport collective agreement.

*15C Meaning of **contractor high income threshold***

1157. This section would insert a new definition of 'contractor high income threshold' into the FW Act. This amount would be prescribed by regulations. A regulation will have no effect if it reduces the amount of the contractor high income threshold.

1158. This regulation making power is similar to section 333 of the FW Act, which provides for a high income threshold for employees. This would allow for indexation of the contractor high income threshold.

1159. The contractor high income threshold would be relevant in the following circumstances:

- New paragraph 536LT(5)(b) – the amount of compensation for an unfair termination that can be ordered by the FWC to a person would not be able to exceed the lesser of half the amount of the contractor high income threshold immediately before termination. This amount is the total amount of remuneration received by the person or to which the person was entitled (whichever is higher) for any period

during which the person performed work under the services contract during the 26 weeks immediately before the termination.

- New subsection 536LU(2) – this would prevent a person from making an application for an unfair deactivation or unfair termination remedy unless, the sum of the contractor's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the contractor high income threshold.
- New section 536ND – this would prevent a person from making an application for an unfair contract remedy in relation to a services contract unless, the sum of the contractor's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the contractor high income threshold within the meaning of the FW Act.
- New subsection 12(2A) of the IC Act, as amended by item 306 of this Part 16 – this would provide an application must not be made in relation to a services contract unless, the sum of the contractor's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is more than the contractor high income threshold within the meaning of the FW Act.

*15D Meaning of **minimum standards guidelines***

1160. This section would insert a new definition of 'minimum standards guidelines' into the FW Act, being:

- employee-like worker guidelines (ELG);
- road transport guidelines (RTG).

*15E Meaning of **minimum standards order***

1161. This section would insert a new definition of 'minimum standards order' (MSO) into the FW Act, being:

- an employee-like worker minimum standards order (ELMSO);
- a road transport minimum standards order (RTMSO).

*15F Meaning of **regulated business***

1162. This section would insert a new definition of 'regulated business' into the FW Act, being:

- a digital labour platform operator; or
- a road transport business.

*15G Meaning of **regulated worker***

1163. This section would insert a new definition of 'regulated worker' into the FW Act, being:

- an employee-like worker; or
- a regulated road transport contractor.

*15H Meaning of **services contract***

1164. This section would insert a new definition of 'services contract' into the FW Act.

General meaning

1165. Subsection (1) would provide that services contract is defined to mean a contract for services that:

- relates to the performance of work under the contract by an individual; and
- has the requisite constitutional connection.

1166. A note in subsection (1) would provide that conditions or collateral arrangements that relates to a services contract would be taken to be part of that services contract: subsection (4).

The requisite constitutional connection

1167. Subsection (2) would provide the circumstances in which a services contract would have the requisite constitutional connection for the purposes of subsection (1). The requisite constitutional connection identifies the constitutional bases for new Chapter 3A. This includes the corporations power (paragraph 51(xx) of the Constitution), the Commonwealth's power to regulate entities of the Commonwealth and Commonwealth authorities, the Territories power and the trade and commerce power.

1168. A contract for services would have the requisite constitutional connection if:

- at least one party to the contract is:
    - a constitutional corporation; or
    - the Commonwealth or a Commonwealth authority; or
    - a body corporate incorporated in a Territory in Australia;
- or any of the following applies:
    - the work concerned is wholly or principally to be performed in a Territory in Australia; or
    - the contract was entered into in a Territory in Australia; or
    - at least one party to the contract is a natural person who is resident in, or a body corporate that has its principal place of business in, a Territory in Australia; or
    - the work concerned is done in the course of constitutional trade or commerce.

1169. A note to subsection (2) would explain that Australia includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, including a cross-reference to the definition of Australia in section 12.

1170. A services contract under Part 3A-2 (minimum standards for regulated workers), Part 3 (unfair deactivation and unfair termination) and Part 4 (collective agreement) to the extent it relates to digital platform work, would also have the requisite constitutional connection if the contract was arranged or facilitated through or by means of a digital labour platform, where the operator of the digital labour platform is either:

- a constitutional corporation; or
- the Commonwealth or a Commonwealth authority; or
- a body corporate incorporated in a Territory in Australia; or
- a natural person who is resident in, or a body corporate that has its principal place of business in, a Territory in Australia.

1171. A note to (3) would mirror the note in (2) regarding the coverage of Australia.

1172. The intent of this definition is to clearly capture operators of 'horizontal' or 'marketplace' digital labour platforms which may intermediate a services contract made between a worker and an individual but is not itself a party to it. There are examples of such digital labour platforms in the care sector.

Conditions and collateral arrangements

1173. Subsection (4) would provide that a condition or a collateral arrangement that relates to a services contract is to be included as part of the services contract if, were the condition or collateral arrangement itself a contract for services, would have the requisite constitutional connection. For example, this would mean that a side agreement that refers to the operation of the services contract could be treated itself as part of the services contract. This ensures that technical distinctions do not need to be drawn between the services contract and other agreements between the parties that are likely to impact on the operation of the services contract. A similar provision exists in subsection 5(4) of the IC Act and existed in the former paragraph 832(1)(b) of the *Workplace Relations Act 1996* in relation to the former Commonwealth unfair contracts jurisdiction.

15J Prospective regulated workers

1174. This section would make clear that a reference to a regulated worker in relation to a services contract also refers to a person who may later become a regulated worker for a services contract.

15K Effect of Chapter in determining whether a person is an employee or employer

1175. This section would provide that the effect of an MSO, MSG or a collective agreement applying to or covering an individual or a person is to be disregarded for the purposes of ascertaining the real substance, practical reality and true nature of the relationship between an individual and a person.

1176. This provision would aim to ensure that anything done to comply with an MSO, MSG or collective agreement would not, in and of itself, have the effect of altering a worker's

status. For example, an assessment of the practical reality of the relationship would occur before considering how external factors such as an MSO or MSG are factored in.

1177. Item 237 in Part 15 would insert new section 15AA into Division 3 of Part 1-2 of the FW Act which would provide a principle of interpretation that applies for the purposes of determining the ordinary meaning of 'employee' and 'employer' for the purposes of the FW Act.

15KA Specific provision about the effect of certain provisions relating to digital platform work in determining whether a person is an employee or an employer

1. New section 15KA would be inserted at the end of new Subdivision A of new Division 3A. Subsection (1) would provide that, for the purposes of ascertaining the real substance, practical reality and true nature of the relationship between an individual and a person, any steps taken by a digital labour platform operator to comply with its obligations under any of the following in relation to the individual are to be disregarded:

    - Part 3A-3 (Unfair deactivation or unfair termination);
    - the Digital Labour Platform Deactivation Code (being the code made by the Minister under section 536LJ); or
    - an order made under, or for the purposes of, Chapter 3A.

2. Subsection (2) would provide that an employee-like worker to whom an ELMSO applies in relation to particular digital platform work is not an employee in relation to that work.

3. This section would provide certainty to digital labour platform operators about the status of their workers for the purpose of determining the workers' rights and entitlements. The would ensure that steps taken by a digital labour platform operator to comply with its obligations cannot be considered when determining whether the true nature and practical reality of the employment relationship is one of employment. This avoids a perverse outcome whereby acts of a digital labour platform operator to comply with the new employee-like provisions or orders made under them may otherwise have the effect of inadvertently creating an employment relationship.

1178. The section would also provide certainty to digital labour platform operators that workers covered by MSOs cannot later bring proceedings to recover unpaid employment entitlements.

Subdivision B—Digital platform work

*15L Meaning of **digital labour platform***

1179. Subsection (1) would insert a new definition of 'digital labour platform' into the FW Act. It would mean an online enabled application, website or system operated to arrange, allocate or facilitate the provision of labour services, where:

    - the operator of the application, website or system:

- engages independent contractors directly or indirectly through or by means of the application, website or system; or
- acts as an intermediary for or on behalf of more than one distinct but interdependent sets of users who interact with the independent contractors or the operator via the application, website or system; and

- the operator of the application, website or system processes aggregated payments referable to the work performed by the independent contractors.

1180. Subsections (2) and (3) would insert regulation-making powers, enabling an online enabled application, website or system to be prescribed as a digital labour platform, or to be excluded as not a being digital labour platform.

1181. Subsection (4) would specify that an application, website or system may be specified by name or by inclusion in a specified class or specified classes or in respect of all forms of digital platform work, or in respect of specified forms of digital platform work.

1182. The definition of digital labour platform is intended to be deliberately broad to ensure that it can capture new market structures and forms of work as they emerge. It is not intended to capture online classifieds where there is not a payment processed, or digital platforms that facilitate the sale of goods.

*15M Meaning of **digital labour platform operator***

1183. This section would insert a new definition of 'digital labour platform operator' into the FW Act. It would mean the operator of a digital labour platform that enters into or facilitates a services contract where work is performed by employee-like workers.

*15N Meaning of **digital platform work***

1184. Subsection (1) would insert a new definition of 'digital platform work' into the FW Act. It would mean either work:

- performed by an independent contractor where the work is performed under a services contract through or by means of a digital labour platform, or the services contract under which the work is performed was arranged or facilitated through or by means of a digital labour platform and payment is made for that work; or
- work prescribed by the regulations.

1185. Subsection (2) would enable regulations to also be made to prescribe when work is not 'digital platform work'.

1186. Subsection (3) would provide that for the purposes of paragraph (1)(b) and subsection (2), digital platform work may include work specified by name or by inclusion in a specified class or classes.

*15P Meaning of **employee-like worker***

1187. This section would insert a new definition of 'employee-like worker' into the FW Act.

1188. A person will be an employee-like worker if they are any of the following:

- an individual who is a party to a services contract in their capacity as an individual (other than as a principal), and performs work under the contract;
- if a body corporate is a party to a services contract (other than as a principal) – an individual who is a director of the body corporate, or a member of the family of a director of a body corporate, and performs work under the contract;
- if a trustee of a trust is a party to a services contract in their capacity as a trustee (other than as a principal) – an individual who is a trustee of the same trust and performs work under the contract, whether or not the individual is a party to the contract; or
- if a partner in a partnership is a party to a services contract in their capacity as a partner (other than as a principal) – an individual who is a partner in the same partnership and performs work under the contract, whether or not the individual is a party to the contract.

1189. The effect of this subsection to capture individuals performing work under a services contract regardless of the type of entity they have adopted.

1190. Additionally, the person must:

- perform all, or a significant majority, of the work to be performed under the services contract;
- the work that the person performs under the services contract is digital platform work;
- the person does not perform any work under the services contract as an employee; and
- satisfy one or more of the following characteristics:
    - the person has low bargaining power in negotiations in relation to the services contract under which the work is performed;
    - the person receives remuneration at or below the rate of an employee performing comparable work;
    - the person has a low degree of authority over the performance of the work; or
    - the person has such other characteristics as are prescribed by the regulations.

1191. The regulations made may specify that a person must have all or only one or some of the characteristics prescribed.

1192. The intended effect of these provisions is not to capture persons that have a high degree of bargaining power, are comparatively well paid and have a significant degree of authority over their work, regardless of whether they perform work on a digital platform. It is intended, for example, that skilled tradespeople would not be captured even if they work on a digital platform.

1193. For the purposes of determining whether a person satisfies the above characteristics, the effect of an MSO, MSG or a collective agreement applying to, or covering, the individual is to be disregarded.

Illustrative example: Care sector digital labour platform

Jim works as an independent contractor providing services on a gig platform in the care sector called GigCare. GigCare operates as an online-enabled marketplace, where contractors pay a fee to operate on the platform and must agree to terms of service that place obligations on how they use the platform and interact with clients found on the platform. GigCare's platform provides a platform for communications between the parties and processes payments from clients to Jim.

GigCare's platform is a digital labour platform because it acts as an intermediary between Jim (and other contractors) and clients, and it processes payments. If a union representing Jim and similar contractors applies to the FWC for a minimum standards order in relation to work that he and those similar contractors performs through the GigCare platform, the FWC will also need to consider whether those similar contractors are employee-like workers, including because they have low bargaining power, comparatively low pay or a low degree of authority over their work.

1194. A reference to an independent contractor includes a reference to an employee-like worker.

Subdivision C—Road Transport Industry

*15Q Meaning of **regulated road transport contractor***

1195. Subsection (1) would insert a new definition of 'regulated road transport contractor' into the FW Act.

1196. A person will be a regulated road transport contractor if they are any of the following:

- an individual who is a party to a services contract in their capacity as an individual (other than as a principal), and performs work under the contract;
- if a body corporate is a party to a services contract (other than as a principal) – an individual who is a director of the body corporate, or a member of the family of a director of a body corporate, and performs work under the contract;
- if a trustee of a trust is a party to a services contract in their capacity as a trustee (other than as a principal) – an individual who is a trustee of the same trust and performs work under the contract, whether or not the individual is a party to the contract; or
- if a partner in a partnership is a party to a services contract in their capacity as a partner (other than as a principal) – an individual who is a partner in the same partnership and performs work under the contract, whether or not the individual is a party to the contract.

1197. The effect of this subsection to capture individuals performing work under a services contract regardless of the type of entity they have adopted.

1198. Additionally:

- the person must perform all, or a significant majority, of the work to be performed under the services contract (the definition of services contract would be inserted at section 15H);
- the person must not perform any work under the services contract as an employee;
- the work performed under the services contract must be work in the road transport industry (the definition of road transport industry would be inserted at section 15S); and
- the person must not be an employee-like worker who performs work in the road transport industry under the services contract (the definition of employee-like worker would be inserted at section 15P).

1199. Subsection (2) would provide that in this Part, a reference to an independent contractor includes a reference to an individual who is a regulated road transport contractor.

*15R Meaning of **road transport business***

1200. This section would insert a new definition of 'road transport business' into the FW Act.

1201. Subsection (1) would provide a person is a road transport business if they:

- receive services under a services contract, where the services contract provides for the performance of work in the road transport industry; or
- are a constitutional corporation, or is included in a class of constitutional corporations, prescribed by the regulations.

1202. Subsection (2) would specify that a business or undertaking may be specified by name or by inclusion in a specified class or classes.

*15S Meaning of **road transport industry***

1203. This section would insert a new definition of 'road transport industry' into the FW Act.

1204. Subsection (1) would provide that 'road transport industry' includes all of the following:

- the road transport and distribution industry within the meaning of the Road Transport and Distribution Award 2020 as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and
- the long distance operations in the private road transport industry within the meaning of the Road Transport (Long Distance Operations) Award 2020 as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and

- the waste management industry within the meaning of the Waste Management Award 2020 as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and
- the cash in transit industry within the meaning of the Transport (Cash in Transit) Award 2020 as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and
- the passenger vehicle transportation industry within the meaning of clause 4.2 of the Passenger Vehicle Transportation Award 2020, not including paragraph 4.2(c)), as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and
- any other industry (however described) prescribed by the regulations for the purposes of this paragraph.

1205. Subsection (2) would specify that the regulations can prescribe an industry as a road transport industry by applying, adopting or incorporating any matter contained in a modern award as in force or existing from time to time.

Item 249: After section 536H

1206. This item would insert new Chapter 3A into the FW Act.

- Part 3A-1 would contain core provisions, dealing with the coverage and operation of the provisions of this Chapter;
- Part 3A-2 would provide the framework for setting minimum standards for employee-like workers performing digital platform work, and for road transport contractors;
- Part 3A-3 would be about unfair deactivation from digital labour platforms of employee-like workers and unfair termination of the services contracts of regulated road transport contractors;
- Part 3A-4 would provide the framework for collective-agreement making between regulated businesses (that is, digital labour platform operators and road transport businesses) and registered employee organisations;
- Part 3A-5 would be about unfair contract terms of services contracts, providing a framework for dealing with unfair contract terms.

Part 3A-1—Core provisions for this Chapter

1207. Part 3A-1 would be about the coverage and operations of the provisions in new Chapter 3A. It would set out when MSOs, MSGs and collective agreements cover regulated workers and regulated businesses. It would also specify the rules relating to the interaction of the provisions in new Chapter 3A with State and Territory laws.

Division 1—Introduction

536J Guide to this Part

1208. New section 536J would provide a Guide to Part 3A-1.

536JA Meaning of employee and employer

1209. This section would provide that in Part 3A-1 the terms 'employee' and 'employer' have their ordinary meanings.

Division 2—Provisions relating to coverage and operation of minimum standards orders, minimum standards guidelines and collective agreements

Subdivision A—Coverage and operation of minimum standards orders and guidelines

536JB Contravening a minimum standards order

1210. Section 536JB would provide that a person must not contravene a term of an MSO.

1211. A note would explain this section would be a civil remedy provision under Part 4-1 of the FW Act. As such, civil remedies may be sought in relation to a contravention.

1212. Another note would provide that a person would not contravene a term of an MSO unless the MSO applies to the person (with a cross-reference to subsection 536JC(1)).

536JC The significance of a minimum standards order applying to a person

1213. New section 536JC would provide that an MSO would not impose obligations on a person, and a person would not contravene an MSO unless the MSO specifically applies to that person (see new section 536JD).

1214. This section would also provide that an MSO does not give a person an entitlement unless the MSO specifically applies to that person (see new section 536JD).

*536JD When a minimum standards order **applies** to a person*

1215. Section 536JD would provide when an MSO applies to a person.

1216. **When a minimum standards order applies to a regulated worker:** Subsection (1) would provide that an MSO 'applies' to a regulated worker if:

- the MSO is in operation and covers the regulated worker (see section 536JE); and
- no other provision of the FW Act provides, or has the effect, that the MSO does not apply to the regulated worker.

1217. **When an ELMSO applies to a digital labour platform operator:** Subsection (2) would provide that an ELMSO 'applies' to a digital labour platform operator if:

- the ELMSO covers the digital labour platform operator (see new section 536JE);
- the ELMSO covers employee-like workers;
- the digital labour platform operator:
    - directly or indirectly engages employee-like workers under services contracts covered by the ELMSO, and those employee-like workers perform work through or by means of the digital labour platform it operates; or
    - arranges or facilitates services contracts through or by means of the digital labour platform it operates, under which employee-like workers who are covered by the MSO perform work;

- the MSO is in operation; and
- no other provision of the FW Act provides, or has the effect, that the ELMSO does not apply to the digital labour platform operator.

1218. **When a RTMSO applies to a road transport business:** Subsection (3) would provide that a RTMSO applies to a road transport business if:

- the RTMSO covers the road transport business (see new section 536JE); and
- the RTMSO covers regulated road transport contractors (see new section 536JE); and
- the road transport business receives the services of a regulated road transport contractor covered by the RTMSO under a services contract;
- the RTMSO is in operation (see new section 536JF); and
- no other provision of the FW Act provides, or has the effect, that the RTMSO does not apply to the road transport business.

1219. **MSO applies in relation to services contracts:** Subsection (5) would provide that a reference in the FW Act to an MSO applying to a regulated worker is a reference to the order applying to the regulated worker in relation to a services contract. In other words, MSOs would only apply in relation to services contracts (see new section 15H).

*536JE When a minimum standards order **covers** a regulated worker or a regulated business*

1220. Section 536JE would provide when an MSO 'covers' a regulated worker or a regulated business, being when the order is expressed to cover the regulated worker or regulated business.

1221. **Effect of other provisions of this Act, FWC orders or court orders on coverage:** Subsection (2) would provide that an MSO also covers a regulated worker or regulated business if any of the following provides for or has that effect:

- a provision of the FW Act;
- an FWC order made under a provision of the FW Act;
- an order of a court.

1222. Subsection (3) would provide that, despite subsections (1) and (2), an MSO does not cover a regulated worker or regulated business if any of the following provides, or has the effect, that the MSO would not cover the regulated worker or regulated business:

- a provision of the FW Act;
- an FWC order made under a provision of the FW Act;
- an order of a court.

1223. **MSOs that have ceased to operate:** Subsection (4) would provide that an MSO that has ceased to operate does not cover a regulated worker or regulated business (see new section 536JF).

536JF When a minimum standards order is in operation

1224. Section 536JF would provide when an MSO is in operation.

1225. **When an MSO comes into operation:** Subsections (1) and (2) would provide that an MSO comes into operation on the day specified in the order, which must not be earlier than the day on which the MSO is made.

1226. Subsection (2A) would provide that the FWC must be satisfied that the specified day on which an ELMSO would come into operation would enable the FWC to undertake a reasonable period of consultation after the relevant notice of intent for the order was published, having regard to the unique nature of digital platform work.

1227. Subsection (3) would provide that the specified day on which an RTMSO would come into operation must not be earlier than 24 months after the relevant notice of intent for the order is published (refer to new section 536KB). This is to ensure that a notice of intent and draft RTMSO would need to be in place for 24 months before an RTMSO can come into effect.

1228. Where the FWC make significant changes to a draft RTMSO, it would be required to publish a notice of intent in relation to the revised draft RTMSO and publish the revised draft; and undertake a period of consultation on the revised draft RTMSO lasting at least 12 months (see new subsection 536KE(2)).

1229. **When a determination revoking an MSO comes into operation:** Subsection (4) would provide that a determination varying or revoking an MSO would operate on the day specified in that determination.

1230. Subsection (5) would provide that a determination varying or revoking an MSO must not be earlier than the day on which the determination is made. The subsection provides very limited exceptions in which a determination can come into operation before that day:

- when a determination is made under subsection 536KQ(3), which would enable the FWC to make a determination varying an MSO to remove an ambiguity or uncertainty or to correct an error; and
- where the FWC is satisfied that there are exceptional circumstances.

1231. This is similar to existing subsection 165(2) of the FW Act, which provides for a determination that varies a modern award, other than in relation to modern award wages, to have retrospective effect in limited circumstances.

1232. Enabling retrospectivity in limited circumstances would help to ensure that MSOs are working as intended in the event of errors, ambiguity or exceptional circumstances. New section 536JU would ensure that any person who contravenes a term of an MSO due to a variation with retrospective effect is not liable to pay a pecuniary penalty in respect of past conduct.

1233. **MSOs operate until revoked:** Subsection (6) would provide that an MSO continues to operate until it is revoked.

1234. Subsection (6A) would provide that the 'the relevant notice of intent' for an ELMSO (referred to subsection 2A) is the notice of intent published under new subsection 536KAA(1) at the same time as the draft of the ELMSO is published.

1235. Subsection (7) would provide that the 'relevant notice of intent' for an RTMSO is the notice of intent published under subsection 536KB(1) at the same time as the draft of the RTMSO is made.

*536JG When minimum standards guidelines **cover** a regulated worker or regulated business*

1236. Subsection (1) would provide that an MSG 'covers' a regulated worker or a regulated business if the MSG is expressed to cover them.

1237. **Effect of other provisions of this Act, FWC orders or court orders on coverage:** Subsection (2) would provide that an MSG would cover a regulated worker or regulated business if any of the following provides or has the effect that an MSG would cover them:

- a provision of the FW Act;
- an FWC order made under a provision of the FW Act;
- an order of the court.

1238. Subsection (3) would provide that despite subsections (1) and (2), an MSG would not cover a regulated worker or regulated business if any of the following provides or has the effect that an MSG would not cover them:

- a provision of the FW Act;
- an FWC order made under a provision of the FW Act;
- an order of the court.

1239. **MSGs that have ceased to operate:** Subsection (4) would provide that an MSG that has ceased to operate does not cover a regulated worker or regulated business.

536JH When minimum standards guidelines are in operation

1240. This section would provide when an MSG is in operation.

1241. **When MSGs come into operation:** Subsections (1) and (2) would provide that an MSG would come into operation on the day specified in the MSG, which must not be earlier than the day on which the MSG is made.

1242. **When a determination varying or revoking MSGs comes into operation:** Subsections (3) and (4) would provide that a determination revoking an MSG would operate on the day specified in that determination; which must not be earlier than the day on which the determination is made.

1243. **MSGs operate until revoked:** Subsection (5) would provide that an MSG would continue to operate until it is revoked.

Subdivision B—Coverage and operation of collective agreements

536JJ Contravening a collective agreement

1244. Section 536JJ would provide that a person must not contravene a term of a collective agreement.

1245. A note would explain this section would be a civil remedy provision under Part 4-1 of the FW Act. As such, civil remedies may be sought in relation to a contravention.

1246. Another note would explain that a person does not contravene a term of a collective agreement unless it applies to them and refer the reader to new section 536JK.

536JK The significance of a collective agreement applying to a person

1247. Subsection (1) would provide that a collective agreement would not impose obligations on a person, nor would a person contravene a term of a collective agreement, unless the agreement applies to the person (see new section 536JL).

1248. Subsection (2) would provide that a collective agreement would not give a person an entitlement unless it applies to them (see new section 536JL).

*536JL When a collective agreement **applies** to a person*

1249. **When a collective agreement applies to a regulated worker:** Subsection (1) would provide that a collective agreement 'applies' to a regulated worker where:

- it covers the regulated worker (see new section 536JM);
- is in operation (see new section 536JN); and
- no other provision of the FW Act has the effect that the collective agreement does not apply to the regulated worker.

1250. **When a collective agreement applies to a regulated business:** Subsection (2) would provide that a collective agreement 'applies' to a regulated business if:

- the collective agreement covers the regulated business (see new section 536JM);
- the collective agreement covers regulated workers (see new section 536JN);
- if the regulated business is a digital labour platform operator:
    - it directly or indirectly engages, under services contracts, employee-like workers covered by the collective agreement who perform work through or by means of a digital labour platform it operates; or
    - it arranges or facilitates services contracts through or by means of the digital labour platform it operates, under which employee-like workers covered by the collective agreement perform work;
- if the regulated business is a road transport business – the road transport business receives services of the regulated road transport contractors under a services contract; and
- no other provision of the FW Act provides, or has the effect, that the collective agreement does not apply to the regulated business.

1251. **Collective agreement applies in relation to services contracts:** Subsection (3) would provide that a reference in the FW Act to a collective agreement applying to a regulated worker is a reference to the collective agreement applying to the regulated worker in relation to a services contract. In other words, collective agreements would only apply in relation to services contracts (section 15H).

*536JM When a collective agreement **covers** a regulated worker, a regulated business or an organisation*

1252. Section 536JM would provide when a collective agreement 'covers' a regulated worker, a regulated business or an organisation.

1253. Subsection (1) would provide that a regulated worker, regulated business or an organisation would be covered by a collective agreement if the agreement is expressed to cover them.

1254. **Effect of other provisions of this Act, FWC orders or court orders on coverage:** Subsection (2) would provide that a collective agreement would also cover a regulated worker, regulated business or organisation if a provision of the FW Act, a FWC order made under the FW Act or court order has the effect that they would be covered.

1255. Subsection (3) would provide that, despite subsections (1) and (2), a collective agreement would not cover the regulated worker, the regulated business or the organisation if a provision of the FW Act, a FWC order made under the FW Act or court order has the effect that they would not be covered.

1256. **Collective agreements that have ceased to operate:** Subsection (4) would provide that a collective agreement would not cover a regulated worker, business or an organisation where it has ceased to operate.

536JN When a collective agreement is in operation

1257. Section 536JN would provide when a collective agreement is in operation.

1258. **When a collective agreement comes into operation:** Subsection (1) would provide that a collective agreement would come into operation on either the day it is registered, or on a later date if one is specified in the collective agreement.

1259. **When a collective agreement is terminated:** Subsection (2) would provide that a collective agreement would be terminated either at the end of the period of operation specified in the collective agreement (see paragraph 536MS(3)(a)), or on an earlier date if one is specified in a termination notice for the collective agreement (see new subsection 536MW(1)).

1260. **Collective agreements operate until terminated:** Subsection (3) would provide that a collective agreement would continue in operation until it is terminated.

1261. **Interaction with MSOs, etc.:** Subsection (4) would provide that a term of a collective agreement has no effect to the extent that it is detrimental to the regulated worker in any respect, when compared to an MSO or State or Territory law that applies to the regulated worker in relation to that matter (see further the requirements set out in new

section 536MR). This would enable collective agreements to supplement an MSO or State or Territory law, but not override them.

Division 3—Exclusion of certain States and Territory laws

536JP Exclusion of certain State and Territory laws

1262. This section would exclude the operation of certain State and Territory laws that cover similar kinds of matters that Chapter 3A would cover. This broadly replicates sections 7 and 10 of the IC Act but relates to regulated workers and regulated businesses instead of parties to a services contract.

1263. The reason for broadly replicating parts of the IC Act in a new division (rather than amending Part 1-3 of the FW Act) is to ensure the same kinds of laws covered by the IC Act exclusion would be excluded in relation to parties covered by Chapter 3A, and therefore support consistency across the statute book.

1264. The intention is to ensure that no new State or Territory schemes would operate concurrently with the Commonwealth scheme without the power for the Commonwealth to prevent (or allow) this. This seeks to ensure the full effectiveness of the scheme.

1265. Subsection (1) would provide that the rights, entitlements, obligations and liabilities of a regulated worker or a regulated business are not affected by a law of a State or Territory to the extent that the law would otherwise do one or more of the following:

- take, deem or treat a regulated business or regulated worker to be an employee or an employer for the purposes of a law relating to one or more workplace relations matters (defined in new section 536JQ);
- confer or impose rights, entitlements, obligations or liabilities on regulated business or regulated worker in relation to matters that, in an employment relationship, would be workplace relations matters (defined in new section 536JQ);
- expressly provide for a court, commission or tribunal to do any of the following in relation to a services contract on an unfairness ground (defined in new section 536JR):
    - make an order or determination setting aside, voiding or making all or part of the services contract unenforceable;
    - make an order or determination amending or varying all or part of the services contract.

1266. Notes to subsection (1) would refer the reader to the fact that the meanings of ‘workplace relations matter’ and ‘unfairness ground’ are set out in sections 536JQ and 536JR respectively.

1267. Subsection (2) would provide for the exclusion of additional State and Territory laws by regulation. Specifically, it would specify that rights, entitlements, obligations and liabilities of a regulated business or a regulated worker are not affected by a State or Territory law that is specified in regulations made for the purposes of this subsection.

This would allow the Commonwealth to provide that particular laws (or parts of those laws) are excluded from operation even where other parts of Division 3 expressly preserve their operation, as made clear by subsection 536JP(4).

1268. Subsection (3) would provide certain exceptions to the rule in subsection (1). A State or Territory law is not excluded in relation to:

- the extent that it deals with outworkers;
- Chapter 6 of the *Industrial Relations Act 1996* (NSW) and related provisions; and
- the *Owner Drivers and Forestry Contractors Act 2005* (Vic).

1269. Paragraph (3)(c) would also enable the regulations to specify a law of a State or Territory (or part of those laws) that would be exempt from the exclusion in subsection 536JP(1), and as such, would continue to have effect. It is expected (but subject to a future decision of government) that initially the same laws that are presently exempted by the *Independent Contractors Regulation 2016* would also be exempted by regulations made under this subsection.

*536JQ What are **workplace relations matters***

1270. Section 536JQ would provide a definition of 'workplace relations matters'. This definition would be critical for the operation of the exclusion of State and Territory laws in new subsection 536JP(1) and is also relevant to the new framework for orders in relation to unfair contract terms of services contracts (Div 3 of Part 3A-5). It would provide a list of what matters would be included and excluded as a workplace relations matter, and broadly replicates section 8 of the IC Act.

1271. New paragraph (1)(i) would allow the regulations to specify further matters that would be 'workplace relations matters'.

1272. New paragraph (2)(m) would allow the regulations to specify further matters that would not be 'workplace relations matters'.

*536JR What is an **unfairness ground***

1273. Section 536JR would provide a definition of 'unfairness ground'. It would list of what matters would be an unfairness ground, and broadly replicates section 9 of the IC Act. This definition would be critical for the operation of the exclusion of State and Territory laws in paragraph 536JP(1)(c).

536JS Interaction of minimum standards orders with State and Territory laws

1274. Subsection (1) would provide that an MSO would prevail over a State or Territory law to the extent of any inconsistency.

1275. This is intended to address the interaction between MSOs and State and Territory laws that are not excluded from operating by subsection 536JP(1), as these laws would otherwise have concurrent operation.

1276. Such a law (or regulations, rules or other instruments (however described) made under that law) would not operate, in relation to the parties covered by the MSO, to the extent

that it prescribes rights and obligations that are inconsistent with the rights and obligations set out in the MSO.

1277. Subsection (2) would provide that, despite subsection 536JS(1), an MSO is subject to:

- any State or Territory laws prescribed by the regulations;
- any State or Territory law that provides for rights or remedies by reference to a State or Territory law prescribed by the regulations for the purposes of paragraph (2)(a); and
- regulations, rules or other instruments (however described) made pursuant to or for the purposes of these laws.

1278. An MSO could not diminish, but could supplement, rights and obligations under these laws.

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

1279. This section would authorise certain conduct for the purposes of subsection 51(1) of the *Competition and Consumer Act 2010* (CCA) and the Competition Code that is operative in each state and territory within the meaning of section 150A of the CCA.

1280. Subsection 51(1) of the CCA provides that an Act can specify, and specifically authorise, conduct that would otherwise contravene Part IV of the CCA. Such conduct must be disregarded in deciding whether a person has contravened Part IV, which relates to restrictive trade practices and prohibits certain conduct.

1281. Under subsections (1), (2) and (3), the following conduct would be specified in and specifically authorised for the purposes of subsection 51(1) of the CCA and Competition Code:

- anything done in accordance with an MSO, MSG or a collective agreement by a person or entity covered by the order or agreement;
- making a collective agreement by a person or entity;
- anything done by a person or entity in preparation for, or incidental to, making, or applying for registration of, a collective agreement. This includes conduct involved in amending or terminating a collective agreement.

1282. The intention of authorising this conduct would be to enable people or entities to make and comply with collective agreements and comply with MSOs or guidelines in accordance with Chapter 3A without breaching the CCA or Competition Code.

1283. However, subsection 536JT(4) would provide that conduct referred to in subsections (1), (2) and (3) would not be specified in or specifically authorised where the conduct is:

- making a contract or arrangement, or arriving at an understanding, that contravenes or would contravene paragraphs 45AD(3)(a) or 45AD(3)(b) of the CCA or the Competition Code; or

- boycott conduct within the meaning of subsection 87AA(2) of the CCA or the Competition Code.

1284. This conduct is not authorised because it is not considered necessary to do so to give effect to the arrangements in Chapter 3A and, in relation to boycott conduct, could be inconsistent with the consent-based nature of the collective agreement provisions.

1285. Collective agreement would take the meaning set out in new section 15B, that is, an employee-like worker collective agreement or a road transport collective agreement.

Division 4—Other general matters

536JU Special rules relating to retrospective variations of minimum standards orders

1286. Subsection (1) would provide that this section applies if a determination is made that varies an MSO with retrospective effect. A note would refer the reader to subsection 536JF(5), which sets out when a determination may commence retrospectively.

1287. **No creation of liability to pay pecuniary penalty for past conduct:** Subsection (2) would provide that a court must not order a person to pay a pecuniary penalty under Division 2 of Part 4-1 in relation to conduct that contravenes a term of the order if:

- the person engaged in conduct before the determination was made; and
- but for the retrospective effect of the determination, the conduct would not have contravened a term of the minimum standards order.

1288. A note to this subsection would clarify that subsection (2) does not affect the powers of a court to make other kinds of orders under Division 2 of Part 4-1.

Part 3A-2—Minimum standards for regulated workers

1289. This Part would insert a new and novel framework which empowers the FWC to set minimum standards for certain classes of independent contractors.

1290. Part 3A-2 would deal with two specific classes of independent contractors eligible for minimum standards. While the rationale for minimum standards for employee-like workers performing digital platform work and road transport contractors may differ, the way in which the FWC should approach setting standards for individuals performing work under services contracts is essentially the same. For this reason, Part 3A-2 would establish a single framework for standard-setting, with some important departures for RTMSOs in respect of the process of consultation and prohibited content, owing to the specific characteristics of the industry.

Division 1—Introduction

536JV Guide to this Part

1291. This section would provide a Guide to Part 3A-2, which sets out the minimum standards objective and empowers the FWC to make MSOs and MSGs for regulated workers.

536JW Meaning of employee and employer

1292. This section would provide that in Part 3A-2 the terms 'employee' and 'employer' have their ordinary meanings.

Division 2—The minimum standards objective

536JX The minimum standards objective

1293. This section would set out the minimum standards objective and provide for when the minimum standards objective applies.

1294. The minimum standards objective would require the FWC to take into account the need for an appropriate safety net of minimum standards for regulated workers, having regard for the need for standards:

- to be clear, simple, fair and relevant;
- to recognise the skills and experiences of regulated workers and the value of the work they perform, as well as their views and preferences about their working arrangements;
- that do not change the form of engagement of regulated workers from independent contractor to employee;
- that do not preference a particular business model or working arrangement;
- to be tailored to the relevant industry, occupation, sector, business model, the type of work, working arrangements, and regulated worker preferences
- that reflect the differences in the form of engagement of regulated workers as independent contractors to the form of engagement of employees;
- that have regard to the ability of regulated workers to perform work under a services contract for multiple businesses, and the fact that the work may be performed simultaneously;
- that deal with minimum rates of pay that:
    - take into account costs necessarily incurred by regulated workers directly arising from the performance of a services contract; and
    - take into account safety net minimum standards that apply to employees performing comparable work.
    - do not change the form or engagement of regulated workers;
- to avoid unreasonable adverse impacts upon:
    - industry participants, including on sustainable competition and administrative and compliance costs;
    - business costs, regulatory burden, sustainability, innovation, productivity or viability;
    - the national economy;

- persons or bodies that use or rely on the work performed by regulated workers, or the services received under services contracts for the performance of that work; and

- to consider other orders or instruments (including but not limited to MSOs and MSGs) made under new Chapter 3A and to avoid unnecessary overlap of such orders or instruments.

1295. It is intended subsection 536JX(b) would require the FWC to consider the type of costs that would be incurred by a regulated worker in the course of performing work under a services contract and not costs that regulated workers would ordinarily incur regardless of the work performed under a services contract, such as fixed costs for vehicles that also are for personal use. The FWC would also be required to take into account comparable safety net minimum standards that apply to employees performing similar work, rather than terms and conditions above these that reflect 'industry rates'.

1296. The minimum standards objective would apply to the performance and exercise of the FWC's functions and powers under Part 3A-2.

1297. When performing a function or power in relation to the road transport industry under Part 3A-2, new section 40D would also require the FWC to take into account the road transport objective.

Division 3—Minimum standards orders

Subdivision A—General matters

536JY Minimum standards orders

1298. This section would allow the FWC, on its own initiative or on an application, to make an MSO setting standards for employee-like workers or regulated road transport contractors.

1299. An MSO for employee-like workers would be an 'employee-like minimum standards order' (ELMSO).

1300. An MSO for regulated road transport contractors would be a 'road transport minimum standards order' (RTMSO).

1301. A note would refer the reader to the fact that an RTMSO can only be made by the Expert Panel for the road transport industry (cross-referencing new subsection 617(10B)).

536JZ Applications for minimum standards orders

1302. This section would set out the process for how an application for an MSO can be made to the FWC.

1303. Subsection (1) would provide that any of the following may apply to the FWC for the making of an MSO:

- an organisation entitled to represent the industrial interests of one or more regulated workers that would be covered by the MSO;

- an organisation entitled to represent the industrial interests of one or more regulated businesses that would be covered by the MSO;
- a regulated business that would be covered by the MSO;
- the Minister.

1304. 'Organisation' is defined in section 12 of the FW Act as an organisation registered under the RO Act. As such, only registered organisations would be able to make an application. This is consistent with applications for the making or variation of modern awards.

1305. A note would explain that an Expert Panel for the road transport industry can hear more than one application under the FW Act together (cross-referencing subsection 582(4)). An Expert Panel would be able to hear an application for an RTMSO together with another application that relates to the road transport industry.

1306. **Matters to be specified in an application:** Subsections (2) and (3) would create a requirement that an application under subsection (1) must:

- specify whether an ELMSO or a RTMSO is being applied for; and
- specify the class of regulated worker to be covered by the MSO.

1307. Subsection (4) would provide that this class could be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work.

1308. These application requirements would be in addition to any application requirements specified in the procedural rules (see section 609 of the FW Act).

Subdivision B—Matters relating to employee-like worker minimum standards orders

536K Particular matters FWC must take into account in making a decision on an employee-like worker minimum standards order

1309. This section would set out the initial matter the FWC must consider before making or varying an ELMSO under new section 536KG.

1310. Subsection (1) would provide this section applies if an application is made for an ELMSO or for a variation of an ELMSO under subsection 536JZ(1), or if the FWC is considering making or varying an employee-like worker MSO under new section 536KP.

1311. Subsection (2) would require the FWC be satisfied that, overall, the class of people to be covered by the MSO are employee-like workers. If the FWC is not satisfied, subsection (3) would require it to decide to refuse to consider the application or not make the order.

1312. The FWC would be required to generally consider the class of people, rather than enquiring into the individual circumstances of all of the persons that fall within the class.

1313. It is intended that this would act as a "gateway" so that whether workers within a class detailed in the application meet the criteria set out in paragraph 15P(1)(d) is a preliminary consideration for the FWC before it considers the application further. This reflects the scope of the jurisdiction that is limited to employee-like workers rather than independent contractors more generally.

1314. Subsection (4) would provide additional matters the FWC must take into account before making or varying an ELMSO.

1315. Under the new subsection, the FWC could not make or vary an ELMSO unless there has been genuine engagement with the parties that the ELMSO covers or would cover, and the consultation process set out in new Subdivision BA has been followed.

1316. When making or varying ELMSOs the FWC would also be required to have regard to choice and flexibility in working arrangements. The requirement to have regard to choice and flexibility in working arrangements would further ensure that the FWC has regard to the unique nature of digital platform work, without compromising on minimum safeguards to be afforded to employee-like workers to whom an ELMSO would apply. That is, the ability of an employee-like worker, as a type of independent contractor, to have choice and flexibility regarding matters such as when and how they perform digital platform work, the time of day they choose to work, the duration of such work, and how many times a day they choose to work. This would complement the requirements that the FWC not include any term in an MSO that changes the form of the engagement (paragraph 536KM(1)(d)) and that it sets standards having regard to the need for standards to reflect the differences in the form of engagement of regulated workers as independent contractors.

Subdivision BA—Consultation process for employee-like worker minimum standards orders

536KAA FWC to prepare and publish a draft of an employee-like worker minimum standards order

1317. Subsection (1) would provide that before the FWC makes an ELMSO, it must publish a notice stating that it proposes to make an ELMSO, and must publish a draft of the proposed ELMSO. Subsection (2) would require the FWC to publish the notice of intent and the draft ELMSO on the FWC website and by any other means the FWC considers appropriate.

1318. This requirement is limited to the making of ELMSOs and would ensure that before a ELMSO is made, the FWC has adequately consulted affected parties on the implications of the rights and obligations put forward in a draft ELMSO.

1319. This would also assist the FWC in its decision-making in accordance with the minimum standards objective (section 536JX) and the additional matters listed in amended section 536K.

536KAB Affected entities to have a reasonable opportunity to make submissions on a draft employee-like worker minimum standards order

1320. Subsection (1) would require the FWC to ensure affected entities have a reasonable opportunity to make written submissions to it in relation to a draft ELMSO published under new paragraph 536KAA(1)(b), having regard to the unique nature of digital platform work.

1321. Subsections (2) and (4) would require the FWC to publish submissions received on its website and by any other means it considers appropriate.

1322. Subsection (3) would provide the FWC does not have to publish information in submissions that is confidential or commercially sensitive. Instead, the FWC may publish a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive). If the FWC considers it not practicable to prepare such a summary, the FWC may publish a statement that confidential or commercially sensitive information in the submission has not been published.

1323. Subsection (5) would provide that a reference in the FW Act to a submission under this section includes a reference to a summary or statement referred to in paragraph (3)(b).

1324. Subsection (6) would provide that an affected entity for the purposes of subsection (1) is a person or body likely to be affected by the making of an ELMSO based on the draft. An affected person or body would include an employee-like worker who would be covered by the ELMSO, a digital labour platform operator that would be covered by the ELMSO, and registered organisations entitled to represent them.

1325. Subsection (6) would also provide an affected entity for the purposes of subsection (1) is a person or body prescribed by the regulations, or a person or body belonging to a class prescribed by the regulations.

1326. It is intended this section would require the FWC to give people an opportunity to be involved in the process, noting it is required under existing section 577 to perform its functions in a manner that is open and transparent. This would ensure that there is meaningful public consultation prior to the making of ELMSOs.

536KAC Hearings in relation to draft order

1327. This section would provide that the FWC may hold a hearing in relation to a draft ELMSO if it chooses.

536KAD Finalising draft order

1328. This section would provide that the FWC may make any changes it thinks appropriate to a draft ELMSO. If the changes are significant, the FWC must do the following:

- decide not to make the ELMSO based on the draft;

- publish a subsequent notice of intent (as per new subsection 536KAA(1)) in relation to the revised ELMSO and publish the revised draft; and
- follow the same process set out in section 536KAB – with the FWC to ensure a further reasonable period of consultation having regard to the unique nature of digital platform work.

1329. This provision would require the FWC to afford affected persons another meaningful opportunity (in addition to the initial consultation that would be required under new section 536KAB) to consider the revised draft order and how it may affect them, and ensure the FWC takes these contemporary views on a draft ELMSO as it is meant to be taken into account in the making of a final order, if any.

536KAE Decision not to make order based on the draft

1330. This section would provide that the FWC can decide that no ELMSO is to be made based on the draft. If it does, it must publish a notice of this decision on its website and any other means it considers appropriate. In this way, there is no compulsion or requirement for the FWC to make an ELMSO at the completion of the mandatory consultation process.

Subdivision C—Matters relating to road transport minimum standards orders

536KA Particular matters FWC must take into account in making a decision on a road transport minimum standards order

1331. This section would set out the particular matters the FWC must take into account before making a decision to make or vary a RTMSO.

1332. Subsection (1) would provide that this section applies where an application is made for a RTMSO under subsection 536JZ(1), variation of a RTMSO under section 536KP or the FWC is considering making or varying a RTMSO on its own initiative.

1333. Subsection (2) would require the FWC to not make an RTMSO unless:

- there has been genuine engagement with the parties to be covered;
- the RTAG has been consulted; and
- the consultation process set out in Subdivision D has been followed;

1334. The FWC must also have regard to the commercial realities of the road transport industry; and must be satisfied that making the RTMSO will not unduly affect the viability and competitiveness of owner drivers or similar persons.

Subdivision D—Consultation process for road transport minimum standards orders

536KB FWC to prepare and publish a draft of a road transport minimum standards order

1335. Subsection (1) would provide that before the FWC makes a RTMSO, it must publish a notice stating that it proposes to make it and publish a draft of the proposed RTMSO. Subsection (2) would require the notice of intent and draft RTMSO be published on the FWC website and by any other means the FWC considers appropriate.

1336. This requirement is limited to the making of RTMSOs and would ensure that before a RTMSO is made, the FWC has adequately consulted affected parties on the implications of the rights and obligations put forward in a draft RTMSO. This would also assist the FWC in its decision-making in accordance with the minimum standards objective (see new section 536JX), road transport objective (see new section 40D) and additional matters listed in new section 536KA.

536KC Affected persons and bodies to have a reasonable opportunity to make and comment on a draft road transport minimum standards order

1337. Subsection (1) would provide that, during the period of consultation, the FWC must ensure affected persons have a reasonable opportunity to make written submissions to it in relation to a draft RTMSO published under new section 536KB.

1338. Subsections (2) and (4) would require the FWC to publish submissions received on its website and by any other means it considers appropriate.

1339. Subsection (3) would provide the FWC does not have to publish information in submissions that is confidential or commercially sensitive. Instead, the FWC may publish a summary of the information which contains sufficient detail to allow a reasonable understanding of the information without disclosing anything that is confidential or commercially sensitive. If the FWC considers it not practicable to prepare such a summary, the FWC may publish a statement that confidential or commercially sensitive information in the submission has not been published. As for submissions, subsection (4) would require the FWC to publish this material on its website and by any other means it considers appropriate. Subsection (5) would provide that a reference in the FW Act to a submission under this section includes a reference to a summary or statement.

1340. Subsection (6) would provide that an affected person for the purposes of subsection (1) is a person likely to be affected by the making of an RTMSO based on the draft RTMSO. An affected person would include, but not be limited to, a regulated road transport contractor that would be covered by the RTMSO, a road transport business that would be covered by the RTMSO, or an organisation entitled to represent the industrial interests of such a regulated road transport contractor or road transport business. It is intended this section would require the FWC to give people an opportunity to be involved in the process, noting it is required under existing section 577 to perform its functions in a manner that is open and transparent. This subsection would not prevent any other interested person or association (including peak councils) from making submissions during this process.

536KD Hearings in relation to draft order

1341. This provision would provide that the FWC may hold a hearing in relation to a draft road transport MSO if it chooses.

536KE Finalising draft order

1342. This section would provide that the FWC may make any changes it thinks appropriate to a draft RTMSO. If the changes are significant, the FWC must do the following:

- decide not to make the RTMSO based on the draft;
- publish a subsequent notice of intent (as per new section 536KB) in relation to the revised RTMSO and republish the revised draft;
- follow the same process set out in section 536KC – with the period of consultation to be no shorter than 12 months starting from when the subsequent notice of intent and revised draft are published.

1343. This provision would require the FWC to afford affected persons another meaningful opportunity (in addition to the initial consultation that would be required under section 536KC) to consider the revised draft order and how it may affect them, and ensure the FWC takes these contemporary views on a draft RTMSO as it is meant to be made into account in the making of a final order, if any.

536KF Decision not to make order based on the draft

1344. This provision would provide that the FWC can decide that no RTMSO is to be made based on the draft. If it does, it must publish a notice of this decision on its website and any other means it considers appropriate. In this way, there is nothing compelling the FWC to make a RTMSO at the completion of the mandatory consultation process.

Subdivision E—Decisions on minimum standards orders

536KG Decisions on applications for minimum standards orders

1345. Subsection (1) would list the types of decisions the FWC could make about an application for an MSO. The FWC may decide to:

- refuse to consider the application
- make an MSO;
- not make an MSO; or
- if it considers it appropriate to do so, instead make an MSG under section 536KR.

1346. Without limiting the FWC's power to refuse an application, subsection (2) would provide that the FWC would be empowered (but would not be required) to refuse to consider an application if it would not be consistent with a direction of the President under new section 582(4D). New section 582(4D) would be inserted by item 279, and would require the President to give a direction as to how the FWC would prioritise its work under Part 3A-2.

536KH Terms that must be included in an employee-like worker minimum standards order

1347. **Terms relating to coverage:** Subsection (1) would provide that an ELMSO must have terms that set out their coverage which set out:

- the digital platform work covered by the ELMSO;
- the digital labour platform operator or operators covered by the ELMSO; and
- the employee-like workers covered by the ELMSO.

1348. Subsection (2) would provide that an ELMSO must be expressed to cover one or more specified digital labour platform operators, and specified employee-like workers with the requisite link to a digital platform operator. These being employee-like workers who:

- are engaged through or by means of a digital labour platform operated by a digital labour platform operator covered by the ELMSO; or
- perform work under a contract arranged or facilitated through or by means of a digital labour platform operated by digital labour platform operator covered by the ELMSO.

1349. Subsection (3) would provide that an ELMSO must specify which digital labour platform operator or operators is/are primarily responsible for providing the entitlements of employee-like workers.

1350. Subsection (4) would provide that a digital labour platform operator may be specified by name or by inclusion in a specified class/classes. Employee-like workers must be specified by inclusion in a specified class/classes. Subsection (5) would provide that the class may be described by reference to a particular industry or sector or part thereof, or by reference to particular kinds of work.

536KJ Terms that must be included in a road transport minimum standards order

1351. **Terms relating to coverage:** Subsection (1) would provide that RTMSOs must have terms that set out their coverage. An RTMSO must include terms which set out:

- the work in the road transport industry covered by the RTMSO;
- the regulated road transport contractors covered by the RTMSO; and
- the road transport businesses covered by the RTMSO.

1352. Subsection (2) would provide that an RTMSO must be expressed to covered specified road transport businesses and specified regulated road transport contractors.

1353. Subsection (3) would provide that a road transport business may be specified by name or by inclusion in a specified class or classes. Regulated road transport contractors must be specified by inclusion in a specified class or classes. Subsection (4) would provide that the class may be described by reference to a particular industry or sector or part thereof, or by reference to particular kinds of work.

536KK Terms about setting disputes must be included in a minimum standards order

1354. This section would provide that an MSO must include a term setting out a procedure for settling disputes about any matter arising under the order.

1355. Item 302 of Part 16 would make corresponding consequential amendments to section 738 of the FW Act. Section 738 provides that Division 2 of Part 6-2 of the FW Act (which relates to dealing with disputes) applies where certain instruments include terms for dealing with disputes. This would have the effect that Division 2 of Part 6-2 would apply if an MSO includes a term that provides a procedure for the FWC to deal with a dispute.

536KL Terms that may be included in a minimum standards order

1356. This section would provide a non-exhaustive list of matters that may be included in an MSO, which would be:

- payment terms;
- deductions;
- record-keeping in relation to matters covered by or required by the FW Act (or an order or instrument made under that Act) that concern regulated workers or regulated businesses;
- insurance;
- consultation;
- representation;
- delegates' rights; and
- cost recovery

1357. Other matters not listed above would be able to be included in an MSO, provided they are not terms that must not be in an MSO (refer to new section 536KM and 536KN). This may include terms which require human review of automated decisions made by the digital labour platform.

536KM Terms that must not be included in a minimum standards order

1358. Subsection (1) would set out matters which MSOs cannot include terms about. These would be:

- overtime rates;
- rostering arrangements;
- matters primarily of a commercial nature that do not affect the terms and conditions of engagement of regulated workers covered by the MSO;
- terms that would change the form of the engagement or the status of regulated workers covered by the MSO. For example, an MSO could not include a term that deems a regulated worker to be an employee. An MSO could also not include terms that are so incompatible with the nature of independent contracting that to comply with them, would cause the regulated worker to be treated as if they were an employee;
- a matter relating to work health and safety that is otherwise comprehensively dealt with by a law of the Commonwealth, a State or a Territory; and
- a matter prescribed by the regulations, or belonging to a class of matter prescribed by the regulations.

1359. Subsection (3) would provide that for the purposes of paragraph (1)(e), the regulations would be able to

- specify that a particular matter is, or is not, dealt with comprehensively by another law; and
- prescribe one or more laws to which paragraph (1)(e) does not apply.

536KMA Further terms that must not be included in an employee-like worker minimum standards order

1360. New section 536KMA would, in addition to the matters set out in section 536KM, provide further terms that must not be included in an ELMSO.

1361. Subsection (1) would provide that an ELMSO must not include terms about the following matters:

- penalty rates for work performed at particular times or on particular days (including but not limited to loadings and shift allowances);
- payment for time prior to the acceptance of an engagement on a digital labour platform or time in between the completion of an engagement and the commencement of the next engagement on a digital labour platform; and
- minimum periods of engagement or a minimum payment referrable to a period of minimum engagement.

1362. Subsection (2) would allow the FWC to include a term about a matter mentioned in subsection (1) only if it is satisfied that the inclusion of the term is appropriate for the type of work performed by the employee-like workers and the digital labour platform operators covered by the ELMSO.

536KN Further terms that must not be included in a road transport minimum standards order

1363. This section would set out additional matters which RTMSOs cannot include terms about. These would be:

- matters relating to road transport that is otherwise comprehensively dealt with by the Heavy Vehicle National Law (as set out in the schedule to the *Heavy Vehicle National Law Act 2012* (Qld)) or another law of the Commonwealth, a State or a Territory;
- matters prescribed by the regulations.

1364. Subsection (2) would provide that for the purposes of paragraph (1)(b), the regulations would be able to:

- specify that a particular matter is, or is not, dealt with comprehensively by the Heavy Vehicle National Law or another law; and
- prescribe one or more laws to which subparagraph (1)(a)(ii) does not apply.

536KP Application to vary or revoke minimum standards orders

1365. This section would set out that the following may apply to the FWC for variation or revocation of an MSO:

- an organisation that is entitled to represent the industrial interests of one or more regulated workers that is or would be covered by the MSO;
- an organisation that is entitled to represent the industrial interests of one or more regulated businesses that is or would be covered by the MSO;
- a regulated business that is or would to be covered by the MSO; and
- the Minister.

1366. 'Organisation' is defined in section 12 of the FW Act as an organisation registered under the RO Act. As such, only registered organisations would be able to make an application. This is consistent with applications for the making or variation of modern awards.

536KQ FWC may vary or revoke minimum standards orders if consistent with the minimum standards objective

1367. Subsection (1) would allow the FWC to make a determination to vary or revoke an MSO if the FWC is satisfied that doing so would be consistent with the minimum standards objective (see new section 536JX). A note would indicate that for RTMSOs, the FWC would also need to take into account the road transport objective (see new section 40D).

1368. Subsection (2) would provide that in making a determination to vary an MSO, the FWC would not need to give effect to all elements of the variation sought an application under new section 536KP. For example, an application may seek for an MSO to be varied in such a way that would cover people who would not meet the definition of 'regulated worker', but also seek that additional terms are included in the MSO. The FWC could refuse to extend the coverage but make a determination to vary the MSO to include the additional terms if it considers this would be consistent with the minimum standards objective.

1369. Subsection (2) is intended to complement (and apply in addition to) section 599 of the FW Act, which provides that the FWC is not required to make a decision in relation to an application in the terms applied for.

1370. Subsection (3) would provide that the FWC can make a determination varying an MSO to remove an ambiguity or uncertainty or to correct an error.

1371. Subsection (4) would provide that the FWC can make a determination to vary or revoke an MSO on its own initiative or on application by a party under new section 536KP.

Division 4—Minimum standards guidelines

536KR Minimum standards guidelines

1372. Subsection (1) would allow the FWC to make MSGs for regulated workers performing work under a services contract (refer to new sections 15G and 15H). MSGs would set non-binding minimum standards.

1373. Subsections (2) and (3) would provide that MSGs for employee-like workers would be called ‘employee-like worker guidelines’ (ELGs) and MSGs for regulated road transport contractors would be called ‘road transport guidelines’ (RTGs), respectively.

1374. Subsection (4) would provide the FWC may make MSGs on its own initiative or on application by a relevant party under new section 536KS.

536KS Applications for minimum standards guidelines

1375. Subsection (1) would provide that the following may apply to the FWC for the making of MSGs:

- an organisation that is entitled to represent the industrial interests of one or more regulated workers to be covered by the MSGs;
- an organisation that is entitled to represent the industrial interests of one or more regulated businesses to be covered by the MSGs;
- a regulated business to be covered by the MSGs; and
- the Minister.

1376. ‘Organisation’ is defined in section 12 of the FW Act as an organisation registered under the RO Act. As such, only registered organisations would be able to make an application. This is consistent with applications for the making or variation of modern awards.

1377. **Matters to be specified in an application:** Subsection (2) would require that an application for MSGs must specify the class of regulated workers to be covered by the MSGs.

1378. Subsection (3) would provide that for the purposes of subsection (2) (but without limiting the way in which the class can be described), the class may be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work. This would mirror the equivalent MSO provisions (refer to section 536JZ).

1379. These application requirements would be in addition to any application requirements specified in the procedural rules (see section 609 of the FW Act)

536KT Initial matter to be considered for employee-like worker minimum standards guidelines

1380. Subsection (1) would provide that the FWC must consider a certain initial matter before making or varying an ELG on its own initiative or on application. This mirrors the provision under section 536K for ELMSOs.

1381. The FWC must be satisfied under new subsection (2) that, on the whole, the class of people to be covered by the ELGs are employee-like workers. It is intended that the FWC would be required to consider the class of people in general, rather than enquiring into the individual circumstances of all the persons that fall within the class.

1382. If it is not satisfied, subsection (3) would require the FWC to refuse to consider the application (if an application was made) or not make or vary the ELGs (if the FWC was considering making or varying the ELGs on its own initiative). It is intended that this would act as a "gateway" so that whether workers within a class detailed in the application meet the criteria set out in paragraph 15P(1)(e) is a preliminary consideration for the FWC before it considers the matter further.

536KU Decision on applications for minimum standards guidelines

1383. Subsection (1) would set out the decisions the FWC can make if an application for MSGs is made to it under subsection 536KS(1). The FWC may decide to:

- refuse to consider the application;
- make the MSGs; or
- not make the MSGs.

1384. Without limiting the FWC's power to refuse an application, subsection (2) would provide that the FWC would be empowered (but would not be required) to refuse to consider an application if it would not be consistent with a direction of the President regarding prioritisation under new section 582(4D). New section 582(4D) would be inserted by item 279, and would require the President to give a direction as to how the FWC would prioritise its work under Part 3A-2.

536KV Minimum standards guidelines not to be made if a minimum standards order is in operation

1385. This section would provide that where an MSO is in operation, the FWC must not make MSGs that cover the same regulated workers and the same regulated businesses in relation to the same matters as the MSO. This is because the intention is that, since MSOs are binding, they would override MSGs.

536KW Terms that must be included in minimum standards guidelines

1386. This section would provide that:

- RTGs must include terms about the same matters RTMSOs must include terms on (see section 536KJ); and
- ELGs must include terms about the same matters that ELMSOs must include terms on (see section 536KH).

536KX Terms that may be included in minimum standards guidelines

1387. This section would provide that MSGs may include terms about any of the same matters as permitted to be included in MSOs (as would be set out in new sections 536KJ and 536KL).

536KY Terms that must not be included in minimum standards guidelines

1388. This section would provide that:

- RTGs must not include terms about any matters not permitted to be included in RTMSOs (see sections 536KM and 536KN); and

- ELGs must not include terms about any matters not permitted to be included in ELMSOs (see section 536KM and 536KMA).

536KZ FWC may vary or revoke minimum standards guidelines if consistent with the minimum standards objective and the road transport objective

1389. Subsection (1) would provide that the FWC may make a determination to vary or revoke MSGs if it is satisfied that doing so would be consistent with the minimum standards objective and, if applicable, the road transport objective. New section 40D would set out when the road transport objective would be applicable.

1390. Subsection (2) would provide that in making a determination to vary MSGs, the FWC would not need to give effect to all elements of the variation sought an application under new section 536L. For example, an application could seek for MSGs to be varied in such a way that they would cover people who would not meet the definition of 'regulated worker', but also seek that additional terms are included in the MSGs. The FWC could refuse to extend the coverage but make a determination to vary the MSGs to include the additional terms if it considers this would be consistent with the minimum standards objective.

1391. Subsection (2) is intended to complement (and apply in addition to) section 599 of the FW Act, which provides that the FWC is not required to make a decision in relation to an application in the terms apply for.

1392. Subsection (3) would allow the FWC to make a determination varying the minimum standards guidelines to remove an ambiguity or uncertainty or correct an error.

1393. Subsection (4) would provide that the FWC could vary or revoke MSGs on its own initiative or on application under section 536L.

1394. Subsection (5) would require that where the FWC makes an MSO that covers the same regulated workers and the same regulated businesses in relation to the same matters as MSGs, the MSGs must be revoked from the day which the MSO comes into operation. This would prevent both being in force at the same time, which could create confusion. The intention is for MSOs to effectively replace relevant MSGs.

1395. Subsection (6) would require that where the FWC makes an MSO that covers the some or all of the same regulated workers and the same regulated businesses in relation to some or all of the same matters as are in MSGs, the FWC must vary the MSGs so that it does not cover the same regulated workers, regulated businesses or matters. The intention of this subsection is to address situations where the contents and coverage of MSGs and an MSO are not identical but have some overlap. The FWC would essentially be required to vary the MSGs to remove this overlap.

536L Applications to vary or revoke minimum standards guidelines

1396. This section would set out that the following may apply to the FWC for variation or revocation of MSGs:

- an organisation that is entitled to represent the industrial interests of one or more regulated workers that is or would be covered by the MSGs;

- an organisation that is entitled to represent the industrial interests of one or more regulated businesses that is or would be covered by the MSGs;
- a regulated business that is or would to be covered by the MSGs; and
- the Minister.

1397. 'Organisation' is defined in section 12 of the FW Act as an organisation registered under the RO Act. As such, only registered organisations would be able to make an application. This is broadly consistent with applications for the making or variation of modern awards.

Division 5—Merits review of minimum standards orders

536LA Regulations may be made for internal merits review of road transport minimum standards orders

1398. The purpose of this section would be to provide for a mechanism, subject to regulations being made, to allow for the internal review of a FWC decision to make or vary an RTMSO in certain circumstances. This would reflect the fact that RTMSOs when made by the FWC are binding on the parties, and can only be varied or revoked by application consistent with the requirements of Part 3A-2. The alternative would be to apply to a court for injunctive relief, which would be unnecessarily confrontational and potentially longer and more expensive.

1399. Taking a future-focused approach, there may be circumstances where a particular party considers that the FWC has erred in its decision-making and, subject to the parameters set by regulation, apply for a reconsideration, confirmation, revocation, variation or set aside/substitution of a decision before it comes into, or soon after comes into, force.

1400. As this is a novel jurisdiction and there is no precedent for internal review for the decisions of an Expert Panel or Full Bench under the FW Act, it is to be determined whether internal review is necessary, and if so, what shape it should take. Enabling regulations to provide for this would mean that any internal review mechanism, if established, would be fit for purpose and responsive to emerging issues.

1401. Subsection (1) would provide that the regulations may empower the FWC to review the decision to make or vary an RTMSO.

1402. Subsection (2) would provide that without limiting subsection (1), the regulations could empower the FWC to: reconsider, confirm, revoke or vary the decision; or set the decision aside and substitute a new decision.

1403. Subsection (3) would provide that without limiting subsection (1), the regulations could provide that a reconsideration, confirmation, revocation or variation of a decision or setting aside of a decision and substitution of a new decision may have the effect that:

- the RTMSO is suspended from operating for a definite or indefinite period;
- the RTMSO is revoked;
- that the day the RTMSO commences is varied;

- that the operation of one or more of the terms of the RTMSO is suspended for a definite or indefinite period.

1404. Subsection (4) would provide that without limiting subsection (1), the regulations could provide for the following in respect of a decision to make or vary and RTMSO:

- the circumstances in which an application for review of the decision can be made;
- the people who may apply for review of the decision;
- timeframes for applications and decisions on applications for review the decision;
- the enforcement of decisions made on review;
- the circumstances in which the decision mentioned in subsection (2) may have an effect set out in subsection (3);
- matters consequential on decision made on review; and
- how the FWC is constituted for the review – for example, the regulations could provide that the internal review must be performed by an Expert Panel that includes different members to those who made the original decision to ensure an independent review process.

1405. The regulations would provide for internal review only (rather than external review) to promote consistency with the role and structure of the FWC and because of the unique expertise that the FWC would have compared to another review body.

*Part 3A-**3**—**Unfair deactivation or unfair termination of regulated workers***

1406. Part 3A-3 would be about:

- unfair deactivation from digital labour platforms of employee-like workers; and
- unfair termination of the services contracts of regulated road transport contractors.

1407. This Part would set out:

- when a person is protected from unfair deactivation or unfair termination;
- when a person is taken to have been deactivated or terminated, and the factors the FWC must consider in deciding whether a deactivation or termination is harsh;
- the remedies the FWC may grant for unfair deactivation or unfair termination; and
- the procedural matters of an unfair deactivation or unfair termination application.

Division 1—Introduction

536LB Guide to this Part

1408. New section 536LB would provide a guide to Part 3A-3.

536LC Object of this Part

1409. Subsection (1) would set out the objects of Part 3A-3. The principal aim of this framework would be to create new protections for employee-like workers and road

transport contractors against unfair deactivation and unfair termination respectively, while balancing the needs of the regulated businesses and regulated workers.

1410. The object of Part 3A-3 would also be to establish quick, flexible and informal procedures for the resolution of unfair deactivation and termination claims that address the needs of both the regulated businesses and regulated workers. In addition to the rules set out in Part 3A-3, the rules of natural justice would apply. Paragraph (1)(c) would highlight that reactivation or reinstatement would be the primary remedy for unfair deactivation or termination respectively.

1411. Subsection (2) would provide that the procedures and remedies referred to in subsection (1), and the manner of deciding on and working out such remedies, are intended to ensure that a 'fair go all round' is provided to both regulated businesses and regulated workers. A note would refer to the fact that the expression 'fair go all round' was used by Sheldon J in *re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95. This is the same test used in relation to Part 3A-5 (Unfair contract terms of services contracts).

Division 2—Protection from unfair deactivation or unfair termination

536LD When a person is protected from unfair deactivation

1412. Section 536LD would outline when a person is protected from unfair deactivation. This expression is subsequently used in section 536LP as a condition that is necessary before the FWC may order a remedy for unfair deactivation, and section 538LW, as a matter which the FWC must consider before considering the merits of an application for a remedy for unfair deactivation.

1413. A person would be 'protected from unfair deactivation' at a time if:

- the person is an employee-like worker (see section 15P);
- the person:
    - performs work through or by the means of a digital labour platform operator (see section 15M); or
    - perform work under a services contract arranged or facilitated by a digital labour platform (see sections 15H and 15L) operated by a digital labour platform operator; and
- the person had been performing digital platform work through or by means of that digital labour platform (see sections 15N and 15L), or under a contract, or a series of contracts, arranged or facilitated through or by means of the digital labour platform, on a regular basis for a period of at least six months.

1414. Definitions of 'services contract', 'employee-like worker', 'digital labour platform', 'digital labour platform operator' and 'digital platform work' would be set out in new Division 3A of Part 1-2.

536LE When a person is protected from unfair termination

1415. Section 536LE would outline when a person is protected from unfair termination. This expression is subsequently used in section 536LR as a condition that is necessary before the FWC may order a new contract or compensation as a remedy for unfair termination, and section 536LW as a matter which the FWC must consider before considering the merits of an application for a remedy for unfair termination.

1416. A person would be 'protected from unfair termination' at a time if:

- the person is a regulated road transport contractor (see section 15Q);
- a road transport business receives services under a services contract under which the person performs work in the road transport industry (see sections 15H, 15R and 15S); and
- the person has been performing work in the road transport industry under a services contract for a road transport business for at least 12 months.

1417. Definitions of 'services contract' 'regulated road transport contractor', 'road transport business' and 'road transport industry' would be set out new Division 3A of Part 1-2.

Division 3—What is an unfair deactivation or unfair termination

Subdivision A—What is an unfair deactivation

536LF What is an unfair deactivation?

1418. New section 536LF would set out when a person has been unfairly deactivated, being when the FWC is satisfied that:

- the person has been deactivated from a digital labour platform (see section 536LG);
- the deactivation was unfair (see section 536LH); and
- the deactivation was not consistent with the Digital Labour Platform Deactivation Code (being the code made by the Minister under section 536LJ).

*536LG Meaning of **deactivated***

1419. Section 536LG would set out the circumstances in which a person is taken to be 'deactivated' from a digital labour platform. A person would be deactivated if:

- the person performed digital platform work through or by means of the digital labour platform (see sections 15L and 15N);
- the digital labour platform operator (see section 15M) modifies, suspends, or terminates the person's access to the digital labour platform; and
- the person is no longer able to perform work under an existing or prospective services contract (see section 15H), or their ability to do so is significantly altered that in effect the person is no longer able to perform such work.

536LH Criteria for considering whether a deactivation was unfair etc.

1420. Subsection (1) would be central to the unfair deactivation provisions as it sets out the factors the FWC must take into account when considering whether a person's deactivation was unfair, including:

- whether there was a valid reason for deactivation related to the person's capacity or conduct;
- whether any relevant processes specified in the Digital Labour Platform Deactivation Code were followed (being the code made by the Minister under section 536LJ); and
- any other matters the FWC considers relevant.

1421. Subsection (2) would provide that deactivation that occurs because of serious misconduct of the person who was deactivated is not unfair. 'Serious misconduct' is already defined in section 12 of the FW Act and has the meaning prescribed by the regulations. Examples of serious misconduct would include, but not be limited to:

- criminal conduct, including theft, fraud, assault, sexual harassment; and
- causing serious and imminent risk to the health and safety of another person, or to the reputation or profits of the digital labour platform.

1422. Subsection (3) would provide that, despite subsection 536LH(1) and any other provision of Part 3A-3, a deactivation is not unfair if:

- the deactivation is constituted by the modification or suspension of the person's access to the digital labour platform for a period of not more than 7 business days; and
- the FWC is satisfied that the digital labour platform operator concerned believes on reasonable grounds that one or more of the matters in subsection (4) is applicable.

1423. Subsection (4) would provide that those matters include that:

- the deactivation of the person is necessary to protect the health and safety of a user of the digital labour platform or member of the community;
- the person has engaged in fraudulent or dishonest conduct;
- the person has not complied with applicable licencing and accreditation requirements imposed by or under law of the Commonwealth, a State or a Territory, whether the requirements relate to the licensing or accreditation of:
    - the person; or
    - the digital labour platform operator, and the person's conduct causes, or may cause, the digital labour platform operator to breach the requirements;
- the deactivation is necessary to enable the digital labour platform operator to conduct an investigation into a matter referred to in paragraphs (a), (b) or (c) or refer the matter to a law enforcement agency.

536LJ Minister to make a Digital Labour Platform Deactivation Code

1424. Subsection (1) would require the Minister to, by legislative instrument, make a Digital Labour Platform Deactivation Code.

1425. Without limiting the matters covered by the Digital Labour Platform Deactivation Code, subsection (2) would require the code to deal with at least the following:

- the circumstances in which work is performed on a regular basis;
- matters that constitute or may constitute a valid reason for deactivation;
- rights of response to deactivations;
- the internal processes of digital labour platform operators in relation to deactivation;
- communication between the employee-like worker and the digital labour platform operator in relation to deactivation;
- the accessibility in practice of the internal processes of digital labour platform operators in relation to deactivation; and
- the treatment of data relating to the work performed by employee-like workers.

1426. Subsection (3) would provide that a person's deactivation is 'consistent with the Digital Labour Platform Deactivation Code' if the actions of the digital labour platform operator at the time of deactivation were consistent with the code in relation to the deactivation.

Subdivision B—What is an unfair termination

536LK What is an unfair termination

1427. New section 536LK would set out when a person has been unfairly terminated, being when the FWC is satisfied that:

- the person was performing work in the road transport industry (see section 15S);
- the person was terminated (see section 536LL);
- the termination was unfair (see section 536LM); and
- the termination was not consistent with the Road Transport Industry Termination Code (being the code made by the Minister under section 536LN).

*536LL Meaning of **terminated***

1428. New section 536LL would set out the circumstances in which a person is taken to be terminated, being if:

- the person performed work as a regulated road transport contractor under a services contract (see sections 15Q and 15H);
- the road transport business received services under the services contract (see section 15R); and

- the services contract was terminated by, or as a result of, conduct, the road transport business.

1429. A person would not be terminated if the services contract entered into with a road transport business contains a term which specifies the duration of a contract, and the duration of the contract has expired and is not renewed by the road transport business.

536LM Criteria for considering whether a termination was unfair etc.

1430. Subsection (1) would be central to the unfair termination provisions as it sets out the factors the FWC must take into account when considering whether a termination was unfair, including:

- whether there was a valid reason for the termination related to the person's capacity or conduct;
- whether any relevant processes specified in the Road Transport Industry Termination Code were followed (being the code made by the Minister under section 536LN); and
- any other matters the FWC considers relevant.

1431. Subsection (2) would provide that termination that occurs because of serious misconduct of the person who was terminated is not unfair. 'Serious misconduct' is already defined in section 12 of the FW Act and has the meaning prescribed by the regulations. Examples of serious misconduct would include, but not be limited to:

- criminal conduct, including theft, fraud, assault, sexual harassment, and
- causing serious and imminent risk to the health and safety of another person, or to the reputation or profits of the road transport business.

536LN Minister to make a Road Transport Industry Termination Code

1432. Subsection (1) would require the Minister to, by legislative instrument, make a Road Transport Industry Termination Code.

1433. Without limiting the matters covered by the Road Transport Industry Termination Code, subsection (2) would require the code to deal with at least the following:

- matters that constitute or may constitute a valid reason for termination;
- rights of response to terminations;
- the internal processes of road transport businesses in relation to the termination; and
- communication between the regulated road transport contractor and the road transport business in relation to the termination.

1434. Subsection (3) would provide that a person's termination is 'consistent with the Road Transport Industry Termination Code' if the actions of the road transport business that terminated the services contract, or as a result of whose conduct the services contract was terminated, complied with the Road Transport Industry Termination Code.

Division 4—Remedies

Subdivision A—Remedies for unfair deactivation

536LP When the FWC may order remedy for unfair deactivation

1435. New subsection (1) would provide the FWC may order a person's reactivation if:

- the FWC is satisfied that the person was protected from unfair deactivation (see section 536LD) at the time of being deactivation; and
- the person has been unfairly deactivated (see Division 2).

1436. Subsection (2) would provide the FWC can only make the order if the person has applied under new section 536LU.

1437. However, the FWC would not be confined to ordering the remedy the applicant has specifically applied for. Section 599 of the FW Act provides that the FWC does not have to make an order in the terms applied for.

1438. Consistently with reactivation being the primary remedy, subsection (3) would prevent the FWC from ordering the payment of compensation to the person.

1439. A note would refer the reader to Division 5 of this Part, which deals with procedural matters such as applications for remedies for unfair deactivation.

536LQ Remedy – reactivation etc.

1440. **Reactivation:** Subsection (1) would provide that an order for reactivation must be that the digital labour platform operator who operated the digital labour platform at the time of the deactivation take measures to restore the person to the position they would have been in but for the deactivation, including to, as relevant:

- remove the suspension of the person's access to the digital labour platform;
- reinstate the person's access to the digital labour platform;
- modify the person's access to the digital labour platform to way it was before deactivation took place.

1441. If the digital labour platform from which the person was deactivated no longer exists (the 'original digital labour platform') and a similar digital labour platform is operated by an associated entity of the operator of the original digital labour platform (the 'second digital labour platform'), the FWC may make an order that the associated entity provide access to the second digital labour platform on terms and conditions no less favourable than those immediately before the person's access to the original digital labour platform was terminated or suspended. 'Associated entity' is defined in section 12 of the FW Act.

1442. **Order to restore lost pay:** In addition to making an order under subsection (1), should the FWC consider it appropriate to do so, subsection (3) would permit it to also make an order for the digital labour platform to pay the person an amount for remuneration lost, or likely to have been lost, because of the deactivation.

1443. In making such an order, subsection (4) would require the FWC to take into account any remuneration the person has earned, or is likely to earn, from any other work between the time of deactivation and the actual reactivation.

1444. As these orders would only be intended to compensate for lost remuneration, they cannot extend to include any component by way of compensation for shock, distress or humiliation caused by the manner of the person's deactivation.

Subdivision B—Remedies for unfair termination

536LR When the FWC may order remedy for unfair termination

1445. New subsection (1) would provide the FWC may order a remedy for unfair termination if:

- the FWC is satisfied that the person was protected from unfair termination (see section 536LE) at the time of being terminated; and
- the person has been unfairly terminated (see Division 3 of this Part).

1446. Subsection (2) would provide the FWC can only make the order if the person has applied under new section 536LU.

1447. However, the FWC would not be confined to ordering the remedy the applicant has specifically applied for. Section 599 of the FW Act provides that the FWC does not have to make an order in the terms applied for.

1448. Consistent with ordering the parties enter into a new services contract being the primary remedy, subsection (3) would provide the FWC must not order compensation unless it is satisfied that entering into a new services contract would be inappropriate, and it considers compensation is appropriate in all circumstances if the case.

1449. A note would refer the reader to Division 5 of this Part, which deals with procedural matters such as applications for remedies for unfair termination.

536LS Remedy – new contract, etc.

1450. **Reinstatement:** Subsection (1) would provide that an order for a new contract must be an order that the road transport business enter into a new contract in the same terms as the services contract at the time of the termination, with such variations as the FWC considers appropriate.

1451. Subsection (2) would further provide that if the original road transport business the person used to work for no longer exists, the FWC may order that an associated entity of the former that is a road transport business, enter into a new contract with the person on terms and conditions no less favourable than those immediately before the termination, with such variations as the FWC considers appropriate. 'Associated entity' is defined in section 12 of the FW Act.

1452. **Order to restore lost pay:** In addition to making orders under subsection (1), should the FWC consider it appropriate to do so, subsection (3) would permit it to also make an order for the road transport business to pay the person an amount for remuneration lost, or likely to have been lost, as a result of the termination.

1453. In making such an order, subsection (4) would require the FWC to take into account any remuneration the person has earned, or is likely to earn, from any other work between the time of the termination and the new services contract being entered into.

1454. As these orders would only be intended to compensate for lost remuneration, they cannot extend to include any component by way of compensation for shock, distress or humiliation caused by the manner of the person's termination.

536LT Remedy – compensation

1455. **Compensation:** Subsection (1) would provide that an order for the payment of compensation must be in lieu of entering into a new services contract.

1456. **Criteria for deciding amounts:** New subsection (2) would require the FWC to take into account all of the circumstances of the case in determining the amount of compensation, including:

- the effect of the order on the viability of the road transport business;
- the remuneration that the person would have received, or would have been likely to receive, if the person had not been terminated;
- the efforts of the person (if any) to mitigate the loss suffered by the person because of the termination;
- the amount of any remuneration earned by the person from other work during the period between the termination and the making of the order for compensation;
- the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- any other matter that the FWC considers relevant.

Illustrative example: Circumstances the FWC must consider in determining the amount of compensation

The FWC is deciding the amount of compensation to order for a tipper truck driver, Ewin. In addition to the matters listed in section 536LT, the FWC can consider Ewin's conduct following the termination of his contract, such as his social media posts about the incident. It can also consider costs that Ewin has not had to bear during this time – which are likely to be primarily variable rather than fixed costs. An example of a variable cost borne by Ewin is the cost of diesel to operate the tipper truck.

1457. **Misconduct reduces amount**: Subsection (3) would provide that the FWC must reduce the amount of compensation it would otherwise order if it is satisfied that the person's misconduct contributed to the road transport business's decision to dismiss the person.

1458. **Shock, distress etc. disregarded:** Under subsection (4), any compensation ordered by the FWC must not include a component by way of compensation for shock, distress of humiliation, or other analogous hurt resulting from the termination.

1459. **Compensation cap:** New subsection (5) would provide that there is a cap on the compensation the FWC can order to a person. The compensation cap is the lesser of the amount worked out in subsection (6) or half the amount of the 'contractor high income threshold' immediately before the termination. The 'contractor high income threshold' is defined at section 15C, and will be prescribed by, or worked out in a manner prescribed by, regulations.

1460. Subsection (6) would outline the amount is the total remuneration received by the person or to which the person was entitled to (whichever is higher) for any period the person performed work under the services contract during the 26 weeks immediately before the termination.

Division 5—Procedural matters

536LU Application for unfair deactivation or unfair termination remedy

1461. Subsection (1) would set out when a person who has been deactivated or terminated may apply to the FWC under Division 4 of Part 3A-3 for a remedy.

1462. Note 1 to this section would refer the reader to Division 4, which sets out when the FWC may order a remedy for unfair deactivation or unfair termination.

1463. Note 2 to this section would provide that application fees are set out in section 536LV.

1464. Note 3 to this section would alert the reader that Part 6-1 (Multiple actions) may prevent an application being made under this Part if another application or complaint has been made in relation to the deactivation or termination.

1465. Subsection (2) would apply the contractor high income threshold; providing that an application for an unfair deactivation or unfair termination remedy must not be made unless in the year the application was made, the sum of the person's annual rate of earnings, and any other relevant amounts worked out in accordance with the regulations, is less than the contractor high income threshold. The 'contractor high income threshold' is defined at section 15C.

1466. Subsection (3) would provide that an application must be made within 21 days of a deactivation or termination taking effect. However, subsection (4) would give the FWC discretion to extend the timeframe for making an unfair deactivation or unfair termination application if it is satisfied that there are exceptional circumstances, taking into account:

- the reason for the delay; and
- whether the person first became aware of the deactivation or termination after it had taken effect; and
- any action taken by the person to dispute the deactivation or termination; and
- prejudice to the regulated business (including prejudice caused by the delay); and
- the merits of the application; and

- fairness as between the person and other regulated workers in a similar position; and
- any processes specified in the Digital Labour Platform Deactivation Code or the Road Transport Industry Termination Code.

536LV Application fees

1467. Subsection (1) would require applicants to pay any prescribed fee at the time of making their application.

1468. Paragraphs (2)(a), (b) and (c) would provide that the application fee, a method for indexing the fee, and the circumstances in which all or part of the fee may be waived or refunded, may be prescribed by regulation.

1469. The intent is that the FWC would be a low-cost jurisdiction for unfair deactivation and unfair termination applications.

536LW Initial matters to be considered before merits

1470. New section 536LW would require the FWC to decide certain matters before it considers the merits of a deactivation or unfair termination application. These matters are whether:

- the application was made within 21 days as specified in subsection 536LU(3);
- the person was protected from unfair deactivation (section 536LD) or unfair termination (section 536LE); and
- the deactivation or termination was consistent with the Digital Labour Platform Deactivation Code (section 536LJ) or the Road Transport Industry Termination Code (section 536LN).

536LX Matters involving contested facts

1471. New section 536LX would provide that, where an unfair deactivation or unfair termination matter involves contested facts, the FWC must conduct a conference or hold a hearing in relation to the matter. However, the FWC's ability to conduct a hearing would be limited by section 536LZ.

536LY Conferences

1472. Subsection (1) would set out that this provision only applies where the FWC holds a conference in relation to the unfair deactivation or unfair termination matter.

1473. Subsection (2) would provide that where a conference is held it must be undertaken in private. This section would act as an unfair deactivation and unfair termination specific limitation on the FWC's discretion in subsection 592(3), which would otherwise enable the person conducting the conference to direct it be held in public. This subsection is analogous with subsection 398(2), which applies in relation to unfair dismissal proceedings.

1474. Subsection (3) would require the FWC to take into account any difference in the circumstances of the parties when considering the application and informing itself in relation to the application.

1475. Subsection (4) would require the FWC to take into account the wishes of the parties when considering and informing itself in relation to an application in a conference situation.

1476. Subsections (3) and (4) relate to how the FWC considers a matter in a procedural sense in the context of a conference, for instance, where it holds the conference or the method of conducting it. It does not mean that FWC should take into account the circumstances and wishes of the parties when making a substantive decision in relation to the matter, for example, when deciding whether the deactivation or termination was unfair or when making a resulting order.

1477. Sections that are relevant to the holding of unfair deactivation and unfair termination conferences are also located in Part 5-1 (Fair Work Commission). Subsection 592(1) has the effect of empowering the FWC to direct people to attend an unfair deactivation or termination conference at a time and place specified by the FWC.

1478. Subsection 592(2) has the effect that responsibility for conducting unfair deactivation or termination conferences rests with an FWC Member, or a delegate of the FWC.

1479. Section 609 also enables the President of the FWC to make procedural rules in relation to the manner in which conferences are to be conducted.

536LZ Hearings

1480. This section would limit the FWC's discretion under paragraph 590(2)(i) to inform itself by holding a hearing under section 593.

1481. Subsection (1) would provide that the FWC must not hold a hearing in relation to a matter arising under Part 3A-3 unless it considers it is appropriate to do so, taking into account the views of the parties and whether a hearing would be the most effective and efficient way to resolve the matter.

1482. Subsection (2) would provide the FWC with flexibility to hold a hearing in relation to all, or only part of, a matter arising under this Part. For instance, the FWC may decide that one element of an unfair deactivation or unfair termination claim is best dealt with in a formal hearing because it involves a complex legal issue but that the remaining elements would be better dealt with in a more informal conference.

1483. Subsection (3) would provide the FWC with flexibility to decide whether to hold a hearing in relation to a matter arising under this Part at any time, including before, during or after a conference.

536M Dismissing applications

1484. Subsection (1) would enable the FWC to dismiss an unfair deactivation or unfair termination application if it is satisfied the application has acted unreasonably:

- failed to attend a conference or hearing held by the FWC in relation to the application; or
- failed to comply with a direction or order of the FWC relating to the application; or

- failed to discontinue the application after a settlement agreement has been concluded.

1485. The power to dismiss an unfair deactivation or unfair termination application in these circumstances is not intended to prevent an applicant from robustly pursuing a legitimate claim. Rather, it is intended to address circumstances in which applicants seek to pursue claims in an improper or unreasonable manner.

1486. Note 2 to subsection (1) would draw the reader's attention to the FWC's capacity to make an order for costs under new section 536MB if satisfied that the applicant's failure caused the other party to the matter to incur costs.

1487. Subsection (2) would provide that the power to dismiss applications is only exercisable on application by a regulated business.

1488. Subsection (3) and Note 1 to subsection (1) would make clear new subsection (2) is not intended to limit the FWC's general power to dismiss applications on grounds such as where the application is frivolous or vexatious or has no reasonable prospects of success under section 587.

536MA Appeal rights

1489. The primary provisions dealing with appeals of decisions are contained in Division 3 of Part 5-1 of the FW Act (Fair Work Commission). The appeal rights for unfair dismissal provisions are contained in section 400 of the FW Act. These provisions broadly replicate those provisions.

1490. The effect of this section would be to make the process for permitting appeals for unfair deactivation and unfair termination decisions different from the general grounds in section 604 in two respects.

1491. First, subsection (1) would prevent the FWC from granting permission to appeal a decision under Part 3A-3 (in relation to unfair deactivation and unfair termination) unless satisfied that it is in the public interest to do so. This replicates the appeal rights in subsection 400(1).

1492. Secondly, subsection (2) would limit appeals based on a question of fact to only be made where the decision involved a significant error of fact. This is intended to limit the FWC's discretion to permit an appeal under subsection 604(1). This mirrors subsection 400(2).

536MB Costs orders against parties

1493. New subsection (1) would allow the FWC to make costs orders against a party to a matter arising under Part 3A-3 where the FWC is satisfied costs were incurred because of an unreasonable act or omission of a party in connection with conduct or continuation of the matter.

1494. Subsection (2) would provide that, in order for the FWC to make a costs order against a party, an application by the person seeking the costs order needs to have been made under new section 536MD.

1495. This section is designed to deter parties from bringing speculative unfair deactivation or unfair termination claims, particularly claims they know have no reasonable prospects of success, or to unreasonably defend a claim or make a jurisdictional argument where there is no prospect of the argument succeeding.

1496. Subsection (3) would make clear that it does not limit the FWC's power to order costs under current section 611 in the circumstances where:

- a person made an application, or responded to an application, vexatiously or without reasonable cause; or
- a person made an application, or responded to an application, and it should have been reasonably apparent to the person that their application, or response to an application, had no reasonable prospects of success.

1497. Not complying with a costs order would expose a person to a civil penalty, by virtue of section 536MG which provides that a person must not contravene a term of an order made Part 3A-3.

536MC Costs orders against lawyers and paid agents

1498. Subsection (2) would allow the FWC to make costs orders against a lawyer or paid agent where the representative caused those costs to be incurred because:

- the representative encouraged the person to start, continue or respond to the matter even though it had no reasonable prospect of success; or
- of an unreasonable act or omission by the representative in connection with the ongoing matter.

1499. This section is designed to deter lawyers and paid agents from encouraging others to bring speculative unfair deactivation or unfair termination claims, particularly claims they know have no reasonable prospects of success, or to unreasonably encourage a party to defend a claim or make a jurisdictional argument where there is no prospect of the argument succeeding.

1500. Subsection (3) would clarify the power in this section would operate in addition to and does not limit section 611. Section 611 provides the FWC with a general power to make costs orders against a person in the following circumstances:

- where a person made an application, or responded to an application, vexatiously or without reasonable cause; or
- where a person made an application, or responded to an application, and it should have been reasonably apparent to the person that their application, or response to an application, had no reasonable prospects of success.

1501. Not complying with a costs order would expose a person to a civil penalty, by virtue of section 536MG, which would provide that a person must not contravene a term of an order made under the Part.

536MD Application for costs orders

1502. Section 536MD would provide that an application for costs, either under general costs provisions in section 611 in relation to this Part, or under new sections 536MB or 536MC, must be made within 14 days after the FWC determines the matter or it is discontinued.

1503. Sections relevant to the discontinuation of matters are contained in Part 5-1 (Fair Work Commission). Section 588 allows a person who has applied to the FWC to discontinue the application in accordance with the procedural rules, whether or not the matter has been settled.

536ME Schedule of costs

1504. New subsection (1) would allow for the prescription of a schedule of costs to items of expenditure likely to be incurred in relation to matters covered by an order under

- section 611 in relation to a matter arising under Part 3A-3; or
- under new sections 536MB or 536MC.

1505. The term costs is intended to have its ordinary meaning, namely legal and professional costs, disbursements and expenses of witnesses (see *Cachia v Hanes* (1994) 179 CLR 403; *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184). The purpose of this section would be to expand the FWC's capacity to award legal and professional costs and disbursements to include expenses arising from the representation of a party by a person or organisation other than on a legal professional basis.

1506. Subsection (2) would provide that if a schedule of costs is prescribed, the FWC is not restricted in its award of costs to the items of expenditure listed in the schedule. However, if an item of expenditure appears in the schedule, the FWC cannot make an award of costs above the rate or amount specified.

536MF Security for costs

1507. Section 536MF would allow the FWC to make procedural rules for the furnishing of security of costs in respect of matters arising under Part 3A-3.

536MG Contravening orders under this Part

1508. Section 536MG would provide that where an order made by the FWC under Part 3A3 applies to a person, that person must not contravene the order.

1. This section would be a civil remedy provision under Part 4-1 of the FW Act. As such, civil remedies may be sought in relation to contravention.

<u>Part 3A-4—Collective agreements for regulated workers</u>

1509. Part 3A-4 would provide for a new consent-based collective agreement making framework covering regulated workers and regulated businesses (that is, digital labour platform operators and road transport businesses). Key elements of the agreement-making framework would include that:

- agreement-making is achieved by consent of both parties to the agreement;

- collective agreements are about the terms and conditions under which regulated workers perform work, and how agreements operate, and have no effect to the extent that they are about other matters;
- collective agreements are intended to operate in addition to (but not override) any mandatory terms under a law of the Commonwealth, a State or Territory or orders made by the FWC or a tribunal of a State or Territory;
- the framework reflects the status of regulated workers as independent contractors and the arrangements whereby a regulated business agrees to terms and conditions of engagement through the services contracts they make with regulated workers from time to time; and
- the FWC must register new collective agreements, vary eligible collective agreements and register notices of termination.

Division 1—Introduction

536MH Guide to this Part

1510. New section 536MH would provide a Guide to Part 3A-4.

536MJ Object of this Part

1511. This section would set out the object of Part 3A-4. The object of this Part would be to provide a simple, flexible and fair framework that enables collective agreements to be made by consent for employee-like workers and regulated road transport contractors.

Division 2—Regulated workers and regulated businesses may make collective agreements

536MK Making a collective agreement

1512. New subsection (1) would provide that this section enables the making of an agreement (a collective agreement) between a regulated business and an organisation that is entitled to represent the industrial interests of one or more regulated workers. Only one regulated business will be able to make a collective agreement with one relevant organisation who will act on behalf of a particular class of regulated workers proposed to be covered by the agreement. This Part would not permit collective agreements to be made between multiple regulated businesses and an organisation.

1513. New subsection (2) would describe the entities that can make a collective agreement for employee-like workers and the content the agreement may contain. A collective agreement may be made between a digital labour platform operator and an organisation that is entitled to represent the industrial interests of one or more employee-like workers about the following matters:

- the terms and conditions on which employee-like workers covered by the collective agreement perform digital platform work:
    - under a services contract to which the digital labour platform operator is a party; or

    - under a services contract arranged or facilitated through or by means of the digital labour platform operated by the digital labour platform operator; and

- how the collective agreement will operate.

1514. A note to subsection (2) would cross-reference new section 536JM which describes when a collective agreement covers a digital labour platform operator, an employee-like worker or an organisation.

1515. New subsection (3) would similarly describe the entities that may make a collective agreement for regulated road transport contractors and the content the agreement may contain. A collective agreement may be made between a road transport business and an organisation entitled to represent the industrial interests of one or more regulated road transport contractors about:

- the terms and conditions on which regulated road transport contractors covered by the collective agreement perform work under services contracts to which the road transport business is a party, and

- how the collective agreement will operate.

1516. A note to new subsection (3) would again cross-reference new section 536JM which would describe when a collective agreement covers a road transport business, a regulated road transport contractor or an organisation.

1517. A term of a collective agreement will have no effect to the extent that it is about a matter not mentioned in subsection (2) or (3) (see section 536MX below).

1518. New subsections (4)-(5) would provide that a collective agreement referred to in subsection (2) is an 'employee-like worker collective agreement', and a collective agreement referred to in subsection (3) is a 'road transport collective agreement'.

536ML Notice of consultation period for a proposed collective agreement

1519. This section would set out the entities that may initiate a consultation period for a proposed collective agreement by giving a consultation notice, and what the consultation notice must specify.

1520. New subsection (1) would provide that either a regulated business that will be covered by the proposed collective agreement, or an organisation that is entitled to represent the industrial interests of one or more regulated workers who will be covered by the proposed collective agreement, may initiate a consultation period by giving a notice under this section (a 'consultation notice').

1521. New subsection (2) would list the matters required to be specified in a consultation notice. These are:

- that the entity giving the notice (the 'notifying entity') proposes to try to make a collective agreement under this Part;

- the name of the organisation to which the consultation notice is given (if the notifying entity is a regulated business), or that is giving the consultation notice;
- the matters that are to be dealt with by the proposed collective agreement;
- the regulated business that will be covered by the proposed collective agreement; and
- the class of regulated workers who will be covered by the proposed collective agreement.

536MM Consultation notice to be given to FWC, etc.

1522. This section would outline when a notifying entity must give a consultation notice to the other entity proposed to be covered by the collective agreement and to the FWC. Giving a consultation notice would formally indicate to the regulated business or organisation that the notifying entity wishes to commence negotiations for a collective agreement that will cover it, the entity receiving the notice and a specified class of regulated workers. The requirement to also provide the consultation notice to the FWC alerts the FWC to the fact that negotiations for a proposed collective agreement will occur, enabling the FWC to maintain broad oversight of the process if required.

1523. New subsection (1) would provide that a consultation notice for a proposed collective agreement must be given on the same day to the FWC, and depending on the notifying entity, either the regulated business or organisation entitled to represent the industrial interests of the regulated workers who will be covered by the proposed collective agreement.

1524. New subsection (2) would provide the notifying entity, and the entity to which the consultation notice is given, are the 'negotiating entities' for the proposed collective agreement.

1525. New subsection (3) would require the FWC publish a copy of the consultation notice on its website.

536MN Notice to be given to regulated workers

1526. New subsection (1) sets out a process for the notification of regulated workers. It would provide that, after a consultation notice has been given for a proposed collective agreement, either negotiating entity must, with the other negotiating entity's consent, make reasonable efforts to give a notice to either:

- each eligible employee-like worker for a proposed employee-like worker collective agreement; or
- each eligible regulated road transport contractor for a proposed road transport collective agreement.

1527. New subsection (2) would outline the matters that must be specified in a notice. These are:

- the regulated business that will be covered by the proposed collective agreement;

- the class of regulated workers that will be covered by the proposed collective agreement, and that the regulated worker to whom the notice is given is included in that class;
- the organisation that will sign the proposed collective agreement on behalf of the regulated workers; and
- the matters proposed to be dealt with in the proposed collective agreement.

1528. New subsection (3) would define an 'eligible employee-like worker' for a proposed employee-like collective agreement. This refers to an employee-like worker who, at any time in the 28 days prior to the giving of a consultation notice by the notifying entity under new subsection 536ML(1)), was performing work under a services contract:

- through or by means of a digital platform operated by a digital platform operator that will be covered by the proposed collective agreement, or
- arranged or facilitated through by means of a digital platform operated by a digital platform operator that will be covered by the proposed collective agreement.

1529. New subsection (4) would similarly define an 'eligible regulated road transport contractor' for a proposed road transport collective agreement. This refers to a regulated road transport contractor who, at any time in the 28 days prior to the giving of a consultation notice under new subsection 536ML(1), was performing work under a services contract to which a road transport business covered that will be covered by the proposed collective agreement is a party.

1530. The 28 day period prior to the giving of a consultation notice for eligibility will focus efforts to notify on regulated workers with a current or recent connection to the regulated business and ensure the obligation on notifying entities is manageable.

536MP Application for the FWC to deal with a dispute

1531. New subsection (1) would provide that if the negotiating entities for a proposed collective agreement are unable to resolve a dispute about the making of the agreement, either negotiating entity may, with the consent of the other entity, apply to the FWC for the FWC to deal with the dispute. The FWC must then deal with the dispute (other than by arbitration).

1532. This recognises that while a collective agreement is to be made by consent of both negotiating entities, disagreements during the negotiation process may arise requiring resolution by the FWC as an independent third party. It is intended this dispute resolution mechanism would only be relied on by the parties during negotiations for the proposed collective agreement, prior to the agreement being made.

536MQ Negotiating entity may request that other negotiating entity sign a proposed collective agreement

1533. New subsection (1) would provide that a negotiating entity may request the other negotiating entity for a proposed agreement to sign the agreement.

1534. New subsection (2) would introduce a time limit for when such a request to sign a proposed agreement may take place, that being no earlier than 30 days after the last day on which a notice was given to the employee-like worker or regulated road transport contractor under subsection 536MN(1) in relation to the proposed agreement. The minimum 30-day timeframe commencing on the day after the last notice was given to a relevant regulated worker about the proposed agreement is intended to provide the relevant regulated workers sufficient opportunity to consult with the organisation and the business on the proposed terms and conditions of the agreement that will cover them, prior to it being signed.

1535. Subsection (3) would provide that the collective agreement is made when both negotiating parties sign the agreement. At this point, the collective agreement would commence to cover the relevant regulated business, regulated workers and organisation.

Division 3—Registration of collective agreements by the FWC

536MR Application to the FWC to register a collective agreement

1536. New subsection (1) would permit a negotiating entity who has signed the agreement, with consent of the other negotiating entity, to apply to the FWC register the agreement. If the other negotiating entity does not consent to the first negotiating entity applying to the FWC to register the agreement, the agreement cannot commence operation. New subsection 536JN(1) would provide that a collective agreement comes into operation on the day that it is registered under subsection 536MS(1), or on a later day specified in the agreement.

1537. New subsections (2)–(3) would describe the material that must accompany the application. The application must be accompanied by a signed copy of the collective agreement which must identify the regulated business, the organisation and the class of regulated workers covered by the collective agreement.

1538. The application must also be accompanied by a declaration signed by the regulated business and the organisation covered by the collective agreement which must:

- state that the regulated business and the organisation explained the terms of the agreement and their effect to the regulated workers covered by the agreement, and a description of the explanation;
- state the regulated business or the organisation, as required, made reasonable efforts to give a notice under paragraph 536MN(1)(a) or (b) to the regulated workers referred to in whichever of those paragraphs is applicable. Paragraph 536MN(1)(a) and (b) require either negotiating entity to the proposed collective agreement, with the other's consent, to make reasonable efforts to notify the relevant regulated workers that a collective agreement that will over them is proposed to be made;
- state that neither the regulated business, organisation or a relevant regulated worker who was notified of the collective agreement, were subject to any form of duress in relation to the making the collective agreement; and

- if an MSO currently is in operation that covers the same class of regulated workers as the collective agreement covers, specify:
    - the MSO; and
    - in relation to each matter dealt with by both the collective agreement and the MSO – how the term of the collective agreement is more beneficial to the regulated workers than the term of the order in relation to that matter. Relevantly, new subsection 536JN(4) would in effect provide that a term of a collective agreement may only supplement a term of an MSO that deals with the same matter. The term of a collective agreement will have no effect in relation to a regulated worker in respect of a matter to the extent that the term is detrimental to the worker in any respect, when compared to an applicable MSO or a State or Territory law that deals with that matter.

1539. The regulated business and the organisation must ensure that the content of the declaration is true and correct. If the information in the declaration is false or misleading, that may amount to a contravention of the Criminal Code.

1540. New subsection (4) would provide that the application must be accompanied by any other declaration required by the procedural rules.

536MS FWC must register collective agreement

1541. New subsection (1) would provide that if an application is made under subsection 536MR(1), the FWC must register the collective agreement if all the requirements under section 536MR and subsection (2) are met in relation to the agreement.

1542. New subsection (2) would provide that the FWC must be satisfied that the collective agreement includes a dispute settlement term that requires or allows the FWC, or another person independent of the persons covered by the agreement, to settle disputes about any matters arising under the collective agreement. The term must also allow for regulated workers covered by the agreement to be represented for the purposes of that dispute resolution procedure.

1543. New subsection (3) would provide that the FWC must be satisfied that the collective agreement includes:

- a term that provides for its period of operation; and
- a term that provides for requirements in relation to terminating the collective agreement before the end of that period.

1544. In effect, the collective agreement would automatically terminate and no longer operate once the period of operation has concluded. However, persons covered by the agreement would be able terminate the collective agreement at an earlier time by following the agreed termination procedure required to be in the agreement under paragraph (3)(b).

1545. New subsection (4) would require the FWC to publish a copy of the collective agreement and declaration referred in new subsection 536MR(3) on the FWC's website.

Division 4—Variation of collective agreements

536MT Application for variation of a collective agreement

1546. New subsection (1) would provide that either a regulated business or organisation covered by the collective agreement may apply for a variation of a collective agreement that is in operation. New section 536MT merely stipulates the administrative steps that must occur for a variation agreed to by both the regulated business and organisation to be registered. Negotiations for any variation and the timing of these negotiations will otherwise be left to the discretion of the regulated business, the organisation and the regulated workers.

1547. New subsections (2)–(3) would set out the material that must accompany the application for variation. The application must be accompanied by a signed copy of the collective agreement as proposed to be varied which must identify the regulated business and organisation covered by the agreement, and the class of regulated workers covered by the collective agreement as proposed to be varied.

1548. New subsection (3) would provide that the application must be accompanied by a declaration signed by the regulated business and organisation covered by the agreement which must:

- state that the regulated business and the organisation explained the terms of the agreement and their effect to the regulated workers covered by the agreement as proposed to be varied. The declaration must also provide a description of the explanation;
- if an MSO currently is in operation that covers the same class of regulated workers covered by the collective agreement as proposed to be varied, specify:
    - the MSO; and
    - in relation to each matter dealt with by a term of the collective agreement as proposed to be varied that is also dealt with by a term of the MSO—how the term of the collective agreement as proposed to be varied is more beneficial to the regulated workers covered by the collective agreement as proposed to be varied, in relation to that matter, than the term of the order in relation to that matter. Relevantly, new subsection 536JN(4) would in effect provide that a term of a collective agreement may only supplement a term of an MSO that deals with the same matter. The term of a collective agreement will have no effect in relation to a regulated worker in respect of a matter to the extent that the term is detrimental to the worker in any respect, when compared to an applicable MSO or a State or Territory law that deals with that matter.

- that no regulated worker, regulated business or organisation covered by the collective agreement as proposed to be varied was subject to any form of duress in relation to the proposed variation.

1549. The regulated business and the organisation must ensure that the content of the declaration is true and correct. If the information in the declaration is false or misleading, that may amount to a contravention of the Criminal Code.

1550. New subsection (4) would provide that the application must be accompanied by any other declaration required by the procedural rules.

536MU FWC must vary collective agreement

1551. New subsection (1) would provide that if an application for a variation of a collective agreement is made under subsection 536MT(1), the FWC must register the agreement as varied if the requirements of section 536MT (which set out the requirements for making an application for a variation) are met in relation to the variation.

1552. New subsection (2) would require the FWC to publish a copy of the collective agreement as varied and the declaration referred to in subsection 536MT(3) on the FWC's website.

1553. New subsection (3) would provide that the variation comes into operation when the agreement as varied is registered by the FWC.

Division 5—Termination of collective agreements

536MV FWC must be notified of termination

1554. New section (1) would apply if a collective agreement has been terminated in accordance with the termination process specified in the agreement before the end of its period of operation. New paragraph 536MS(3)(b) would require the FWC to be satisfied that the collective agreement includes a procedure enabling the organisation and regulated business covered by the agreement to terminate the agreement prior to the end of its period of operation.

1555. New subsection (2) would require the regulated business or organisation covered by the collective agreement to, with the consent of the other, notify the FWC of the termination on the date the agreement is terminated.

1556. New subsection (3) would provide that the notification to the FWC under subsection (2) must be accompanied by a declaration signed by the regulated business and the organisation covered by the collective agreement. The declaration must state that the collective agreement has been terminated in accordance with the process stipulated in the agreement; and specify the date of effect of the termination. The regulated business and the organisation must ensure that the content of the declaration is true and correct. If the information in the declaration is false or misleading, the entities may contravene the Criminal Code.

1557. New subsection (4) would provide that the notice must be accompanied by any other declaration required by the procedural rules. Procedural rules are made by the President under section 609.

536MW FWC must register termination notice

1558. New subsection (1) would provide that if a notice is given to the FWC under subsection 536MV(2) in relation to the collective agreement (that is, a notification that a collective agreement has been terminated in accordance with the agreed termination procedure specified in the agreement), the FWC must publish a notice on the FWC's website:

- stating that the collective agreement has been terminated; and
- specifying the date of effect of the termination specified in the declaration under paragraph 536MV(3)(b).

1559. New subsection (2) would provide that the collective agreement ceases to operate on the date of effect of the termination specified in the declaration under paragraph 536MV(3)(b).

Division 6—Other matters

536MX—Terms of a collective agreement that are of no effect

1560. New subsection (1) would provide that a term of a collective agreement has no effect to the extent that it is a term about a matter other than a matter mentioned in subsection 536MK(2) or (3). These subsections would stipulate that a collective agreement may be made in respect of the terms and conditions on which regulated workers covered by the collective agreement perform work; and how the agreement will operate.

1561. New subsection (2) would provide that a term of a collective agreement has no effect to the extent that it deals with matters that are primarily of a commercial nature that do not affect the terms and conditions of engagement of regulated workers covered by the agreement. The intention is that a collective agreement would only include terms and conditions relating to the engagement of the relevant class of regulated workers and the operation of the agreement.

1562. New subsection (3) would provide that if a collective agreement includes a term that has no effect because of subsections (1) and (2), the inclusion of the term does not prevent the agreement from being a collective agreement. This would allow a collective agreement to include other matters by consent, but they are not enforceable under the FW Act.

Illustrative example: Agreement-making framework

Platform A is a digital labour platform operator that engages delivery partners under services contracts to perform parcel delivery services via its digital labour platform. The Delivery Network is an organisation entitled to represent the industrial interests of one or more of the delivery partners engaged via the Platform A digital labour platform. The delivery partners are employee-like workers.

The Delivery Network gives a consultation notice to Platform A in accordance with section 536ML to negotiate an employee-like worker collective agreement. Platform A agrees to negotiate a collective agreement covering its delivery partners, and The Delivery Network

provides the consultation notice to the FWC, which in turn publishes the notice on its website (section 536MM).

With the agreement of The Delivery Network, Platform A provides a notice under section 536MN about the proposed collective agreement to its delivery partners that have performed work in the last 28 days. Platform A is best placed to give the notice via its digital labour platform in the most efficient and accurate manner. Delivery partners engage with Platform A and The Delivery Network over the proposed terms and implications of the collective agreement.

After three months of negotiation, The Delivery Network requests Platform A sign the collective agreement. Once both parties have signed the agreement, it is made.

The Delivery Network, with the consent of Platform A, applies to the FWC to register the agreement. The application is accompanied by a signed copy of the collective agreement and a signed declaration of both parties covered by the agreement declaring that the delivery partners have had the terms of the agreement explained to them, that the parties made reasonable efforts to give a notice to eligible delivery partners, and that no party was subject to any form of duress in relation to the making of the agreement.

The declaration also specifies the relevant minimum standards order in operation. The declaration details in relation to each matter dealt with by a term of the collective agreement that is also dealt with by the minimum standards order, how the term of the collective agreement is more beneficial to the delivery partners covered by the agreement than the terms of the minimum standards order.

Upon receiving the application and declaration, the FWC registers the agreement and publishes it on its website. The collective agreement comes into operation.

The collective agreement would continue to operate for as long as parties agreed it to operate, unless the agreement is varied (and registered by the FWC) or is terminated in accordance with the provisions providing for its termination, and the termination is registered by the FWC.

If a delivery partner or The Delivery Network commences action under the FW Act to enforce a term of the collective agreement, it can only do so in relation to terms that relate to the terms and conditions of engagement of the delivery partners, or how the agreement is to operate. Any other term of the agreement, including any that deal with matters that are primarily of a commercial nature cannot be enforced under the civil penalty framework of the FW Act.

Part 3A-5—Unfair contract terms of services contracts

1563. Part 3A-5 would empower the FWC to deal with disputes about UCTs in services contracts.

Division 1—Introduction

536MY Guide to this Part

1564. New section 536MY would provide a guide to Part 3A-5.

*536MZ Meaning of **employee and employer***

1565. This section would provide that in Part 3A-5 the terms 'employee' and 'employer' have their ordinary meanings.

Division 2—Object of Part

536N Object of Part

1566. New subsection (1) would set out the object of Part 3A-5, which would be to:

- establish a framework for dealing with UCTs of services contracts that:
- balances the needs of principals and independent contractors;
    - addresses the need for a level playing field between independent contractors and principals by creating disincentives to include UCTs in services contracts;
    - recognises and protects the freedom of independent contractors to enter into services contracts;
- establish procedures for dealing with UCTs that are quick, flexible and informal and that address the needs of principals and independent contractors;
- provide appropriate remedies if a term of a services contract is found to be unfair.

1567. Subsection (2) would provide that the procedures and remedies referred to in subsection (1), and the manner of deciding on and working out such remedies, are intended to ensure that a 'fair go all round' is provided to both independent contractors and principals. A note would refer to the fact that the expression 'fair go all round' was used by Sheldon J in *re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.

Division 3—Orders in relation to unfair contract terms of services contracts

536NA When the FWC may make an order in relation to an unfair contract term of a services contract

1568. Subsections (1) and (2) would set out when the FWC may make an order in relation to an UCT of a services contract, being if:

- the FWC is satisfied that a services contract includes one or more UCTs which, in an employment relationship, would relate to workplace relations matters (see section 536JQ); and
- an application has been made under section 536ND (by a person who is a party to the services contract or an organisation that represents their industrial interests).

1569. Subsection (3) would require the FWC to take into account fairness between parties concerned in deciding whether to make an order, and what kind of order to make.

536NB Matters to be considered in deciding whether a term of a services contract is an unfair contract term

1570. Subsection (1) would list certain matters the FWC may consider when determining whether a term of a services contract is an UCT. These include:

- the relative bargaining power of the parties;
- whether the services contract displays a significant imbalance between the rights and obligations of the parties;
- whether the contract term is reasonably necessary to protect the legitimate interests of a party to the contract;
- whether the contract term imposes a harsh, unjust or unreasonable requirement on a party to the contract;
- whether the services contract as a whole provides total remuneration for performing work less than regulated workers performing the same or similar work would receive under an MSO or MSG, or less than employees performing the same or similar work would receive; and
- any other matter the FWC considers relevant.

1571. The concepts of 'harsh', 'unjust' and 'unreasonable' would take their common law meanings.

1572. It is intended that total remuneration would include all payments and income paid to an independent contractor. New subsection (2) would require that the matters described above, except for the relative bargaining power of the parties, are to be assessed at the time the FWC considers the application.

Illustrative example: FWC assessment at time it considers application

Thanh works as an independent contractor providing graphic design services to businesses. One of his clients, PriceCo, is a large retail business with stores across Australia. At the time Thanh first entered into the services contract with PriceCo, it was a small business with only one store. The contract sets out Thanh's terms and conditions of engagement, including PriceCo's ability to unilaterally vary certain terms.

One day PriceCo informs Thanh that it will vary a term in his contract. Thanh applies to the FWC for an UCT remedy on the basis that the contract term allowing PriceCo to unilaterally vary the contract is unfair.

In determining whether the contract term is unfair, the FWC may take into account matters such as whether the contract term is reasonably necessary to protect PriceCo's legitimate interests and whether the contract term would impose a harsh, unjust or unreasonable requirement on Thanh. As the FWC is required to consider the contract at the time of the application rather than at its commencement when determining whether the term is unfair, PriceCo's *current* business size and circumstances will be relevant to the FWC's consideration.

536NC Remedy – order to set aside etc. contract

1573. Section 536NC would empower the FWC to make the following orders:

- setting aside all or part of a services contract which, in an employment relationship, would relate to a workplace relations matter (the term workplace relation matter is defined in section 536JQ); or
- amending or varying all part of a services contract which, in an employment relationship, would relate to a workplace relations matter.

Division 4—Procedural matters

536ND Application for unfair term remedy

1574. Subsection (1) would outline the parties that can apply to the FWC for a remedy on the basis that the services contract contains a term that is unfair (these are a person party to the contract or an organisation that represents their industrial interests).

1575. Subsection (2) would introduce the contractor high income threshold; providing that an application for an UCT remedy must not be made unless in the year the application was made, the sum of the person's annual rate of earnings, and any other relevant amounts worked out in accordance with the regulations, is less than the contractor high income threshold. The 'contractor high income threshold' is defined at section 15C.

1576. A note refers the reader to Division 3, which would set out when the FWC may order a remedy for an UCT.

Illustrative example: Contractor high income threshold

Teresa is a construction worker who provides her services as an independent contractor. Teresa makes an application to the FWC to dispute a contract term. However, the FWC finds that her rate of earnings in the year of her application was more than the contractor high income threshold, making her ineligible to access the FW Act UCT protections. Teresa decides to apply to a Court for a review of her contract under the IC Act instead.

536NE Application fees

1577. Subsection (1) would require applicants to pay any prescribed fee at the time of making their application.

1578. Paragraphs (2)(a), (b) and (c) would provide that the application fee, a method for indexing the fee, and the circumstances in which all or part of the fee may be waived or refunded, may be prescribed by regulation.

1579. The intent is that the FWC would be a low-cost jurisdiction for parties dealing with UCTs.

536NF Conferences

1580. Subsection (1) would set out that this provision only applies where the FWC holds a conference.

1581. Subsection (2) would provide that where a conference is held it must be undertaken in private. This subsection would act as an UCT specific limitation on the FWC's

discretion in subsection 592(3), which would otherwise enable the member conducting the conference to direct it to be held in public. This subsection is consistent with the unfair dismissal provision in subsection 398(2).

1582. Subsection (3) would require the FWC to take into account any differences in the circumstances of the parties when considering and informing itself in relation to an application for unfair contract terms remedy.

1583. Subsection (4) would similarly require the FWC to take into account the wishes of the parties when considering and informing itself in relation to an application.

1584. Subsections (3) and (4) relate to how the FWC considers a matter in a procedural sense in the context of a conference, for instance where it holds the conference or the method of conducting it. It does not mean that FWC should take into account the circumstances and wishes of the parties when making a substantive decision in relation to the matter, for example when deciding whether a term of the contract is an UCT or when making a resulting order.

536NG Hearings

1585. This section would limit the FWC's discretion under paragraph 590(2)(i) to inform itself by holding a hearing under section 593.

1586. Subsection (1) would provide that the FWC must not hold a hearing in relation to a matter arising under this Part 3A-5 unless it considers it is appropriate to do so, taking into account the views of the parties and whether a hearing would be the most effective and efficient way to resolve the matter.

1587. Subsection (2) would provide the FWC with flexibility to hold a hearing in relation to all, or only part of, a matter arising under this Part. For instance, the FWC may decide that one element of an UCT claim is best dealt with in a formal hearing because it involves a complex legal issue but that the remaining elements would be better dealt with in a more informal conference.

1588. Subsection (3) would provide the FWC with flexibility to decide whether to hold a hearing in relation to a matter arising under this Part at any time, including before, during or after a conference.

536NH Dismissing applications

1589. Subsection (1) would enable the FWC to dismiss an UCT application where the FWC is satisfied the applicant has unreasonably:

- failed to attend a conference or hearing conducted by the FWC in relation to the application;
- failed to comply with a direction or order of the FWC relating to the application; or
- failed to discontinue the application after a settlement was reached between the parties.

1590. The power to dismiss an UCT application in these circumstances is not intended to prevent an applicant from robustly pursuing a legitimate claim. Rather, it is intended to

address any circumstances in which applicants seek to pursue claims in an improper or unreasonable manner.

1591. Subsection (2) would provide that the power to dismiss applications is exercisable on application by a party to the matter or an organisation entitled to represent the industrial interests of a party (the same entities that may apply for an UCT remedy).

1592. Subsection (3) and a note to subsection (1) would make clear new subsection (2) is not intended to limit the FWC's general power to dismiss applications on grounds such as where the application is frivolous or vexatious or has no reasonable prospects of success under section 587.

536NJ Appeal rights

1593. The primary provisions dealing with appeals of FWC decisions are contained in Division 3 of Part 5-1 of the FW Act. The appeal rights for unfair dismissal provisions are contained in section 400 of the FW Act. These provisions broadly replicate those provisions.

1594. First, subsection (1) would prevent the FWC from granting permission to appeal a decision under Part 3A-5 (in relation to UCT) unless satisfied that it is in the public interest to do so. This replicates the appeal rights in subsection 400(1).

1595. Secondly, subsection (2) would limit appeals based on a question of fact to only be made where the decision involved a significant error of fact. This is intended to limit the FWC's discretion to permit an appeal under subsection 604(1). This mirrors subsection 400(2).

1596. The intent of these provisions to improve the opportunity for applicants to appeal an unfair contracts matter due to the lower cost and accessibility of applying to the FWC compared to the Federal Court of Australia.

536NK Contravening orders under this Part

1597. Section 536NK would provide that where an order made by the FWC under Part 3A-5 applies to a person, that person must not contravene the order.

1598. This section would be a civil remedy provision under Part 4-1 of the FW Act. As such, civil remedies may be sought in relation to contravention.

Division 4—Consequential amendments

Amendments to the *Fair Work Act 2009*

1599. This division would make consequential amendments to the Fair Work Act that are required a result of the changes that would be made by Part 16.

Item 250: After paragraph 3(c)

1600. This item would amend section 3, which provides the object of the FW Act, to insert new paragraphs (3)(ca) and (cb). This would have the effect that the object of the FW Act would include providing a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion of all Australians by:

- ensuring safety net of fair, relevant and enforceable minimum terms and conditions regulated workers through MSOs and related measures; and
- providing appropriate remedies in relation to unfair terms of services contracts.

1601. These new additions would broadly reflect the purpose of the new provisions of the FW Act that would be inserted by Part 16.

Item 251: After paragraph 4(1)(b)

1602. This item would amend the Guide to the Act to insert new paragraphs 4(1)(ba) and (bb), to state the FW Act also:

- provides for minimum terms and conditions for regulated workers; and
- sets out measures to deal with unfair terms of services contracts.

Item 252: At the end of subsection 4(2)

1603. This item would amend subsection 4(2) to insert new paragraph 2(c). This would alert the reader to the fact that Chapter 1 also includes new Part 1-4—Road transport industry objective and advisory group into the FW Act.

Item 253: After section 6

2. This item would insert a new section 6A to set out the key elements of Chapter 3A.

Item 254: Section 12 (after paragraph (b) of the definition of *applies*)

1604. This item would insert the following paragraphs into the definition of 'applies' in the Dictionary in section 12:

- in relation to a minimum standards order – see section 536JD; and
- in relation to a collective agreement – see section 536JL.

Item 255: Section 12

1605. This item would insert the following signpost definitions into the Dictionary at section 12 of the FW Act:

- 'collective agreement' would be defined in section 15B;
- 'consistent with the Digital Labour Platform Deactivation Code' would be defined in subsection 536LJ(3);
- 'consistent with the Road Transport Industry Termination Code' would be defined in subsection 536LN(3);
- 'consultation notice' for a collective agreement would be defined in subsection 536ML(1);
- 'contractor high income threshold' would be defined in section 15C.

Item 256: Section 12 (after paragraph (c) of the definition of *covers*)

1606. This item would insert the following paragraphs into the definition of 'covers' in the Dictionary in section 12

- in relation to a minimum standards order – see section 536JE; and

- in relation to minimum standards guidelines – see section 536JG; and
- in relation to a collective agreement – see section 536JM.

Item 256A: Section 12

1607. This item would insert the following signpost definitions into the Dictionary at section 12 of the FW Act:

- 'deactivated' would be defined in section 536LG;
- 'digital labour platform' would be defined in section 15L;
- 'Digital Labour Platform Deactivation Code' would mean the code made under subsection 536LJ(1);
- 'digital labour platform operator' would be defined in section 15M;
- 'digital platform work' would be defined in section 15N;
- 'employee-like worker' would be defined in section 15P;
- 'employee-like worker collective agreement' would be defined in subsection 536MK(4);
- 'employee-like worker guidelines' would be defined in subsection 536KR(2);
- 'employee-like worker minimum standards order' would be defined in subsection 536JY(2).

Item 257: Section 12 (paragraph (d) of the definition of *fair work instrument)*

1608. This item would amend paragraph (d) of the definition of 'fair work instrument' in the Dictionary in section 12 to provide that the reference to an FWC order in that paragraph:

- would include an MSO – this is included for the avoidance of doubt;
- would not include an MSG – this would ensure that even where guidelines are made by order in accordance with subsection 598(4) of the FW Act, the guidelines would not be a fair work instrument.

Item 258: Section 12

1609. This item would insert the following signpost definitions into the Dictionary at section 12 of the FW Act:

- 'minimum standards guidelines' would be defined in section 15D;
- 'minimum standards objective' would be defined in section 536JX;
- 'minimum standards order' would be defined in section 15E;
- 'protected from unfair deactivation' would be defined in section 536LD;
- 'protected from unfair termination' would be defined in section 536LE;
- 'regulated business' would be defined in section 15F;

- ‘regulated road transport contractor’ would be defined in section 15Q;
- ‘regulated worker’ would be defined in section 15G;
- ‘Road Transport Advisory Group’ would be defined in section 40E;
- ‘road transport business’ would be defined in section 15R;
- ‘road transport industry’ would be defined in section 15S;
- ‘road transport collective agreement’ would be defined in subsection 536MK(5);
- ‘road transport guidelines’ would be defined in subsection 536KR(3);
- ‘road transport minimum standards order’ would be defined in subsection 536JY(3);
- ‘services contract’ would be defined in section 15H;
- ‘Road Transport Industry Termination Code’ would mean the code made under subsection 536LN(1);
- ‘terminated’ would be defined in section 536LL;
- ‘unfairly deactivated’ would be defined in section 536LF;
- ‘unfairly terminated’ would be defined in section 536LK;
- ‘unfairness ground’ would be defined in section 536JR.

Item 259: Section 12 (paragraph (b) of the definition of *workplace instrument*)

1610. This item would amend the definition of ‘workplace instrument’ in the Dictionary in section 12 to provide that ‘workplace instrument’ would also mean an instrument that concerns the relationship between:
    - digital labour platform operators and employee-like workers; and
    - road transport businesses and regulated road transport contractors.
1611. Instruments that concern these relationships would include MSOs, MSGs and collective agreements.
1612. ‘Workplace instrument’ is relevant to the general protections provided in Part 3-1 of the FW Act. Expanding this definition would mean that certain general protections relating to workplace instruments in Part 3-1 are expanded to cover those that would be covered by new Chapter 3A.

Item 260: After section 19

1613. This item would insert new section 19A, which would provide the meaning of industrial action in relation to regulated workers and regulated businesses.
1614. This definition would have consequences for the application of existing and proposed new provisions of the FW Act, including the definition of ‘engages in industrial activity’ in existing subsection 347(f).

1615. Subsection (1) would provide that new section 19A would apply to a regulated worker and regulated business if:

- the regulated worker is covered by an MSO, or is mentioned in the application for an MSO as a regulated worker that would be covered by the MSO if it is made; and
- the regulated business is covered by is covered by the same MSO, or is mentioned in application for the same MSO as a regulated business that would be covered by the MSO if it is made; and
- if the regulated business is a digital labour platform operator:
    - the regulated worker is an employee-like worker from whom the digital labour platform operator receive services under a services contract; or
    - the regulated worker is an employee-like worker who perform services under a services contract arranged or facilitated through or by means of the digital labour platform operator's digital labour platform; and
- if the regulated business is a road transport business, the regulated road transport contractor performs work under the services contract for the regulated business.

1616. Subsection (2) would provide that industrial action, in relation to a regulated worker and regulated business, includes action of any of the following kinds:

- the performance of work by a regulated worker in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by a regulated worker, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
- a ban, limitation or restriction on the performance of work by a regulated worker or on the acceptance of or offering for work by a regulated worker;
- a failure or refusal by regulated worker to attend for work or a failure or refusal to perform any work at all by regulated contractors who attend for work;
- the lockout of regulated worker by the regulated business (see subsection (4)).

1617. Subsection (3) would provide that the action referred to in subsection (2) must be directed against the regulated business, whether or not regulated business is a party to the services contract.

1618. Subsection (4) would provide that industrial action does not include the following:

- action by regulated workers that is authorised or agreed to by a regulated business covered by the same MSO as the regulated workers;
- lockout of the regulated workers by the regulated business if it is authorised or agreed to by, or on behalf of, regulated workers who are covered by the same MSO as the regulated business;

- action by regulated worker if:
    - the action was based on a reasonable concern of the regulated worker about an imminent risk to their health or safety; and
    - the regulated worker did not unreasonably fail to comply with a direction of the regulated business that engaged the regulated worker to perform other available work, whether at the same or another workplace, that was safe and appropriate for the regulated worker to perform.

1619. Subsection (5) would provide that the regulated business 'locks out' a regulated worker if:

- the regulated business prevents the regulated worker from performing work under a services contracts without terminating that services contract; or
- if the regulated business is a digital labour platform operator and it modifies, limits or suspends the employee-like workers' access to the digital labour platform it operates.

Item 261: Subsection 134(2) (note)

1620. Consequential to the amendment proposed by item 262 below, this item would omit the word 'Note' and substitute 'Note 1'.

Item 262: At the end of subsection 134(2)

3. Subsection 134(2) provides that the modern awards objective applies to the performance or exercise of the FWC's modern award powers. This item would insert a second note under subsection (2) to make clear that the FWC must take into account the road transport objective when performing certain functions (see new section 40D and subsection 617(10B)).

Item 263: After section 338

1621. This item would insert new section 338A, which would provide that a reference in Part 3-1 to an independent contractor includes a reference to a regulated worker. This is to ensure, for the avoidance of doubt, that relevant provisions in Part 3-1 would apply to regulated workers (which are a subset of independent contractors).

1622. The note would explain that a regulated worker must be an individual and refers the reader to section 15G and related definitions. This is because 'regulated worker' would be defined to mean a person who is an 'employee-like worker' or 'regulated road transport contractor'. Both these terms would require a person to be an individual (see sections 15G and 15Q).

Item 264: Subsection 342(1) (after table item 3)

Item 265: Subsection 342(1) (after table item 4)

Item 266: Subsection 342(1) (after table item 6)

Item 267: Subsection 342(1) (at the end of the table)

1623. These items would insert new table items 3A, 4A, 6A and 8 in the table in subsection 342(1). The table in subsection 342(1) sets out circumstances in which a person takes adverse action against another person for the purposes of certain protections in Part 3-1. The new table items would set out additional circumstances where conduct would constitute adverse action.

1624. Existing table items 3, 4, 6 and 7 of the table would already capture action taken by or against many regulated businesses and regulated workers. However, they may not capture all digital labour platform operators because certain digital labour platforms operate to facilitate services contracts between an employee-like worker and an individual rather than directly entering into a contract for services with an employee-like worker. As such, these items are intended to mirror the concepts in existing table items 3, 4, 6 and 7 but in relation to 'horizontal' arrangements between digital labour platform operators and the employee-like workers that use the digital labour platform they operate to perform work as appropriate.

Item 268: After subsection 350(2)

1625. This item would insert new subsection (2A) in existing section 350.

1626. Section 350 currently prohibits an employer from inducing an employee to take, or propose to take, membership action. It similarly prevents a person who has entered into a contract for services from inducing the independent contractor to take, or propose to take, membership action (subsection 350(2)).

1627. While subsection (2) would apply to most regulated businesses and regulated workers, it would not necessarily apply to those digital labour platforms that do not directly enter into a contract for services with an independent contractor. As such, new subsection (2A) would ensure these digital labour platform operators are covered. A note would explain that the new subsection 350(2A) is a civil remedy provision and refer the reader to Part 4-1.

Item 269: At the end of section 354

1628. This item will insert new subsection (3), which would provide that a person must not discriminate against a regulated business because:

- regulated workers in relation to the regulated business are covered, or not covered, by a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or
- it is proposed regulated workers in relation to the regulated business are covered, or not covered, by a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument).

1629. A note would explain that new subsection (3) would be a civil remedy provision and refer the reader to Part 4-1.

Item 270: Subsection 539(2) (table item 11, column 1)

Item 271: Subsection 539(2) (table item 11, column 1)

1630. These items would amend table item 11, column 1 in the table in subsection 539(2) to include reference to:

- new subsection 350(2A) (see item 268);
- new subsection 354(3) (see item 269).

1631. Table item 11 relates to certain general protections provisions that are civil remedy provisions. The above-mentioned subsections would be new general protections provisions.

Item 272: Subsection 539(2) (after table item 29AA)

1632. This item would insert new table item 29AB into the table in existing subsection 539(2), which would relate to section 536JB. Section 536JB would provide that a person must not contravene a term of an MSO.

1633. The following would have standing to apply for an order in relation to a contravention of section 536JB:

- a regulated worker covered by the MSO;
- a regulated business covered by the MSO;
- an organisation;
- an inspector.

1634. An application for an order in relation to a contravention of section 536JB could be made to the following courts:

- the Federal Court;
- the Federal Circuit and Family Court of Australia (Division 2);
- an eligible State or Territory Court.

1635. The maximum penalty that a court could impose for a contravention of section 536JB would be 600 penalty units for a serious contravention, or otherwise 60 penalty units.

1636. This item would insert new table item 29AC into the table in existing subsection 539(2), which would relate to section 536MG. Section 536MG would provide that a person must not contravene an order under new Part 3A-3 (Unfair deactivation or unfair termination of regulated workers) if it applies to them.

1637. The following would have standing to apply for an order in relation to a contravention of section 536MG:

- a party to the relevant services contract;
- an organisation;
- an inspector.

1638. An application for an order in relation to a contravention of section 536MG could be made to the following courts:

- the Federal Court;
- the Federal Circuit and Family Court of Australia (Division 2);
- an eligible State or Territory Court.

1639. The maximum penalty that a court could impose for a contravention of section 536MG would be 60 penalty units.

1640. This item would insert new table item 29AD into the table in existing subsection 539(2), which would relate to section 536JJ. Section 536JJ would provide that a person must not contravene a term of a collective agreement.

1641. The following would have standing to apply for an order in relation to a contravention of section 536JJ:

- a regulated worker covered by the collective agreement;
- a regulated business covered by the collective agreement;
- an organisation.

1642. An application for an order in relation to a contravention of section 536JJ could be made to the following courts:

- the Federal Court;
- the Federal Circuit and Family Court of Australia (Division 2);
- an eligible State or Territory Court.

1643. The maximum penalty that a court could impose for a contravention of section 536JJ would be 600 penalty units for a serious contravention, or otherwise 60 penalty units.

1644. This item would insert new table item 29AE into the table in existing subsection 539(2), which would relate to section 536NK. Section 536NK would provide that a person must not contravene an order under new Part 3A-5 (relating to unfair contract terms of service contracts).

1645. The following would have standing to apply for an order in relation to a contravention of section 536NK:

- a party to the relevant services contract;
- an organisation;
- an inspector.

1646. An application for an order in relation to a contravention of section 536NK could be made to the following courts:

- the Federal Court;

- the Federal Circuit and Family Court of Australia (Division 2);
- an eligible State or Territory Court.

1647. The maximum penalty that a court could impose for a contravention of section 536NK would be 60 penalty units.

Item 273: After subsection 540(7)

1648. This item would insert new subsection (7A), which would provide that regulated workers and regulated businesses may only apply for an order under Division 2 of Part 4-1 of the FW Act in relation to a contravention or proposed contravention of a civil remedy provision if they are affected by the contravention, or will be affected by the proposed contravention.

1649. This item would also insert new subsection (7B), which would provide that a person who is a party to a services contract to which an order under Division 4 of Part 3A-5 relates may only apply for an order under Division 2 of Part 4-1 of the FW Act in relation to a contravention or proposed contravention of a civil remedy provision if they are affected by the contravention, or will be affected by the proposed contravention.

Item 274: After paragraph 557(2)(oa)

1650. Subsection (1) provides that where the same person commits two or more contraventions of a civil remedy provision referred to in subsection 557(2), arising out of a course of conduct by that person, the contraventions are to be taken to constitute a single contravention for the purposes of Part 4-1.

1651. This item would insert a new paragraphs into subsection (2) so that subsection (1) applies to section 536JB (which would deal with contraventions of MSOs), section 536JJ (which would deal with contraventions of collective agreements) and section 536NK (which would deal with contraventions of orders regarding unfair contract terms of services contracts).

Item 275: After paragraph 576(1)(m)

1652. This item would insert additional paragraphs in existing subsection (1) to provide that the FWC also has functions conferred by the FW Act in relation to minimum standards for regulated workers, unfair deactivation or unfair termination, collective agreements for regulated workers and unfair contract terms of services contracts.

Item 276: After paragraph 581(b)

1653. This item would insert new subsection (c) to provide that the President is also responsible for ensuring that the FWC performs its functions and exercises powers in a manner that adequately serves the needs of persons that would be covered by new Chapter 3A.

Item 277: After paragraph 582(4)(ab)

1654. Existing subsection (4) lists some of the kinds of directions that the President can give under existing subsection 582(2).

1655. This item would insert new paragraph (4)(ac), which would provide that, without limiting the President's power to give directions, a direction under subsection (2) may

be a direction about the exercise of powers under new Part 3A-2, which would relate to minimum standards for regulated workers.

Item 278: Paragraph 582(4)(c)

1656. Existing subsection (4) lists some of the kinds of directions that the President can give under existing subsection (2).

1657. This item would amend paragraph (4)(c) to add 'one or more Expert Panels'. This would emphasise that, without limiting the President's power to give directions, a direction under subsection (2) may be a direction that two or more matters be dealt with jointly by one or more single FWC Members, one or more Full Benches or one or more Expert Panels.

Item 279: Before subsection 582(5)

1658. This item would insert new subsections (4D) and (4E).

1659. New subsection (4D) would require the President to give a direction as to how the FWC would be required to prioritise its work under new Part 3A-2. This could include prioritising specified cohorts of workers.

1660. New subsection (4E) would require the FWC to publish the direction relating to prioritisation as soon as reasonably practical after the President gives the direction.

Item 280: Subsection 587(2)

1661. Subsection (1) allows the FWC to dismiss an application if it:

- is not made in accordance with the requirements of the FW Act;
- is frivolous or vexatious; or
- has no reasonable prospects of success.

1662. This item would amend subsection (2) to insert a reference to new section 536LU. New section 536LU would enable a person who has been deactivated or terminated to make an application to the FWC. The amendment would provide about the FWC must not dismiss an application under new section 536LU on the grounds of the application is frivolous or vexatious or has no reasonable prospects of success. This is consistent with the treatment of applications to relating to dismissal disputes for employees.

Item 281: Subsection 602(1)

Item 282: At the end of subsection 602(1)

1663. These items would amend subsection (1) to provide that the FWC's power under section 602 to correct any obvious error, defect or irregularity does not apply to MSOs or MSGs. This is because, as would be made clear by new note 3, the FWC would correct MSOs and MSGs under new subsections 536KQ(3) and 536KZ(3) respectively.

Item 283: After paragraph 603(3)(g)

1664. This item would insert new paragraphs under subsection (3) to provide that the FWC must not use its power to vary or revoke a decision under section 603 to:

- vary or revoke a decision under new Part 3A-2;

- vary or revoke a collective agreement under new Part 3A-4.

1665. This is because varying or revoking decisions under new Part 3A-2 and varying or revoking a collective agreement under Part 3A-4 would be covered by other provisions (see sections 536KQ, 536KZ and 536MU).

Item 284: Subsection 604(2) (note)

1666. This item would amend the note to make it clear that subsection (2) does not apply in relation to an application for unfair deactivation or an unfair termination (see section 536MA).

Item 285: Subsection 616(1)

Item 286: Subsection 616(3B)

Item 287: Subsections 616(3C) and (3D)

1667. These items would amend subsections (1), (3B), (3C) and (3D) and the note after subsection (3B) to provide that the requirements in these subsections for certain functions to be performed by a Full Bench would be subject to new subsection 617(10B). These subsections relate to the making or varying of modern awards. New subsection 617(10B) would require the Expert Panel for the road transport industry to make, vary or revoke modern awards that the President considers may relate to the road transport industry. This would mean that the requirement for the Expert Panel to perform this function to exercise these powers would supplement the existing requirements that a Full Bench must perform the relevant functions or exercise the relevant powers in relation to modern awards.

Item 288: After subsection 616(4)

1668. This item would insert new subsection (4A), which would provide that the following decisions must be made by a Full Bench (subject to new subsections 582(4A) and 617(10D)):

- an ELMSO;
- a determination varying or revoking an ELMSO under subsection 536KQ(1);
- ELGs;
- a determination varying or revoking ELGs under subsection 536KZ(1).

1669. Note 1 would explain that a determination under subsections 536KQ(3) or 536KZ(3) (which would deal with minor technical variations) would not need to be made by a Full Bench.

1670. Note 2 would explain that new subsection 617(10D) would enable the President to direct that certain matters that relate to the road transport industry be dealt with by the Expert Panel for the road transport industry. In this case, an Expert Panel for the road transport industry would make these decisions instead of a Full Bench.

Item 289: Paragraph 622(2)(aa)

Item 290: Subparagraph 622(2)(aa)(ii)

Item 291: Subsection 622(4)

Item 292: Subsection 622(4)

1671. These items would amend paragraph (2)(aa), subparagraph 622(2)(a)(ii) and subsection 622(4) to insert references to new subsection 620(1E) (which would provide for the constitution of an Expert Panel for the road transport industry) and new paragraph 620(1E)(b) (which would require an Expert Panel for the road transport industry to have a least one Expert Panel member or other FWC Member who has knowledge of, or experience in, the road transport industry).

1672. These amendments would ensure that where an FWC Member is part of an Expert Panel for the road transport industry and the FWC Member becomes unavailable to continue dealing with the matter, the Expert Panel could continue to deal with the matter if the Expert Panel consists of at least three FWC Members, of whom:

- at least one FWC Member is the President, Vice President or Deputy President; and
- a majority of the FWC Members have knowledge of, or experience in, the road transport industry.

1673. Such a reconstitution may result in a minority of members of the Expert Panel having the requisite knowledge or experience. This would not affect the capacity of an Expert Panel constituted under new proposed subsection 620(1E) to make any of the orders, determinations or instruments listed in new subsection 617(10A).

Item 293: At the end of subsection 627(4)

1674. This item would insert new paragraph (4)(k) so that road transport would be included as one of the fields the Minister must be satisfied that a person has knowledge of, or experience in, before the Governor-General appoints the person as an Expert Panel member.

Item 294: After paragraph 675(2)(k)

1675. This item would insert new paragraph (2)(l), which would provide that it would not be an offence for a person to engage in conduct that would contravene an MSO.

1676. This item would also insert new paragraph (2)(m), which would provide that it would not be an offence for a person to engage in conduct that would contravene an order made under regulation under new section 40J (which would deal with the road transport industry contractual chain).

Item 295: Paragraph 682(1)(a)

1677. This item would amend paragraph (1)(a) to include reference to regulated workers and regulated businesses. This would mean that the FWO's functions would be expanded to include providing education, assistance and advice to regulated workers and regulated businesses.

Item 296: Paragraph 682(1)(f)

1678. This item would amend paragraph (1)(f) to include reference to regulated workers. This would mean that the FWO's functions would be expanded to include representing regulated workers who are, or may become, a party to proceedings in a court, or a party

to a matter before the FWC, under the FW Act or a fair work instrument (which would include an MSO – see item 257).

Item 297: At the end of section 682

1679. This item would insert new subsection (3). This would provide that the FWO's functions include providing education, assistance and advice, and producing best practice guides, in relation to MSGs.

Item 298: After subparagraph 712AA(1)(a)(vii)

1680. This item would insert new subparagraphs under paragraph 712AA(1)(a).

1681. Section 712AA provides that the FWO may apply to a nominated AAT presidential member for the issue of an FWO notice if the FWO believes on reasonable grounds that a person has information or documents relevant to an investigation by an inspector into a suspected contravention that relates, directly or indirectly, to the matters listed in paragraph 712AA(1)(a).

1682. The new subparagraphs would provide that the FWO may apply for an FWO notice in relation to the underpayment of monetary entitlements under an MSO, the unfair deactivation of an employee-like worker or unfair termination of a regulated road transport contractor.

1683. This is consistent with the treatment of underpayments for employees and unfair dismissals of employees, and would ensure the FWO's coercive powers continue to only be used for the intended purpose of facilitating investigations into the exploitation of vulnerable workers, specifically in relation to underpayments and entitlements.

Item 299: After paragraph 716(1)(fa)

1684. This item would insert a new paragraph in subsection (1) which would have the effect that an inspector could give a person a compliance notice if the inspector reasonably believes the person has contravened a term of an MSO. As outlined in the explanatory memorandum to the Fair Work Bill 2008, the ability to issue a compliance notice is restricted to what would be considered an 'entitlement provision'. A term of an MSO would fall into this category. This is also consistent with the treatment of modern awards.

Item 299A: At the end of Part 6-1

1685. This item would add new Subdivision E into existing Part 6-1 (Multiple actions).

1686. Within new Subdivision E, new subsection 734C(1) would provide that an application to review a services contract under Division 4 of new Part 3A-5 (unfair contract terms) must not be made if other review proceedings have commenced in relation to the services contract. The exceptions to this would be where the other review proceedings have been discontinued by the person who commenced them or failed for want of jurisdiction.

1687. New subsection 734C(1) would provide that a person must not commence other review proceedings in relation to a service contract if an application to review the contract has been made under Division 4 of new Part 3A-5 (unfair contract terms). The exceptions

to this would be where the application has been discontinued by the person who commenced them or proceedings in relation to the application failed for want of jurisdiction.

1688. New subsection 734C(1) would define 'other review proceedings' as:

- proceedings under a provision of a law of a State or Territory that makes provision as mentioned in new paragraph 536JP(1)(c) (that is, it provides for a court, commission or tribunal to do certain things in relation to services contracts on an unfairness ground) and is not affected by the exclusion provisions; or
- proceedings in relation to services contract under provision of another law that is specified in the regulations.

1689. The intention is that new section 734C would prevent 'double dipping' by pursuing multiple remedies under different laws in relation to the same services contract.

1690. It is not intended that 'other review proceedings' would include proceedings that may be available at common law or equity in relation to a 'services contract' under a State or Territory law that makes provision as mentioned in new paragraph 536JP(1)(c).

Item 300: Section 735

Item 301: Section 735

1691. These items would amend the Guide to Part 6-2. This would outline that this Part also deals with disputes between regulated workers and regulated businesses. It would also outline that the FWC has the power to deal with disputes about instruments made under new Chapter 3A.

Item 302: After paragraph 738(b)

1692. This item would insert new subsections under section 738. Section 738 provides that Division 2 of Part 6-2 of the FW Act (which relates to dealing with disputes) applies where certain instruments include terms for dealing with disputes.

1693. The new subsections would have the effect that Division 2 of Part 6-2 would apply if an MSO or collective agreement includes a term that provides a procedure for dealing with disputes.

Item 303: At the end of subsection 738

1694. This item would insert a new subsection under section 738. Section 738 provides that Division 2 of Part 6-2 of the FW Act (which relates to dealing with disputes) applies where certain instruments include terms for dealing with disputes.

1695. The new subsection would have the effect that Division 2 of Part 6-2 would apply if an order made under regulations under new section 40J (which would deal with the road transport industry contractual chain) includes a term that provides a procedure for dealing with disputes.

Item 304: Section 796A

1696. This item would amend section 796A to provide that the regulations may confer powers, in addition to functions, on the FWC and general manager. This would ensure

that the regulations made under section 40J (which would deal with the road transport industry contractual chain) could give the FWC and general manager additional powers, which may be required to give effect to dealing with the road transport industry contractual chain.

Item 305: At the end of section 798

1697. Existing section 798 enables the regulations to provide for civil penalties for contravention of the regulations. Subsection (2) limits the maximum penalty for contraventions to 20 penalty units for an individual and 100 penalty units for a body corporate.

1698. This item would add new subsection (3) which would provide that subsection 798(2) would not apply to civil penalties for contravention of regulations under new section 40J (which would deal with the road transport industry contractual chain), or an order made under regulations under new section 40J. This would enable the regulations to prescribe a higher civil penalty amount for contravention, as would be provided for in new paragraph 40J(2)(f), for example, to provide for penalties for contraventions of road transport contractual chain orders to match penalties for MSOs (60 penalty units and 600 penalty units for serious contraventions).

1699. As outlined in the explanatory memorandum to the Fair Work Bill 2008, the limit set in subsection (2) was set based on 'the nature of the regulations that could be made'. Because the regulations under new section 40J have a different nature to the regulations that could be made under the original Fair Work Bill 2008, this limit is not appropriate in this instance.

Division 5—Amendments of the Independent Contractors Act 2006

Amendments to the *Independent Contractors Act 2006*

Item 306: After subsection 12(2)

1700. This item would insert new subsection (2A) into the IC Act. This would provide an application must not be made in relation to a services contract unless, the sum of the independent contractor's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is more than the contractor high income threshold within the meaning of the FW Act.

1701. This would give effect to the intention that high income earners would be covered by the IC Act's unfair contract regime, and that people who are not high income earners would be covered by the FW Act's unfair contract regime.

1702. New section 15C of the FW Act would define the contractor high income threshold. Under new subsection 536ND(2) of the FW Act, a person could not make an application for an unfair contract term remedy unless the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with regulations made under new subsection 536ND(2), is less than the contractor high income threshold within the meaning of the FW Act.

1703. A new note would indicate that new Division 3 of Part 3A-5 of the FW Act would set out when the FWC may order a remedy for unfair contract term.

Part 17—Technical amendment

Amendments to the *Fair Work Act 2009*

1704. This Part would make a technical amendment to repeal a sunsetted clause.

Item 307: Clause 27 of Schedule 1

1705. This item is a technical amendment which would repeal clause 27 of Schedule 1 to the FW Act. Schedule 1 to the FW Act contains application, saving and transitional provisions relating to amendments to the FW Act. Subclause 27(3) of Schedule 1 provides that the clause ceased to have effect on 1 January 2020. The item would therefore remove from the FW Act a clause that no longer has any effect.

Part 18—Application and transitional provisions

Amendments to the *Fair Work Act 2009*

1706. Part 18 would amend the FW Act to provide consequential application and transitional clauses arising from the amendments made by the Bill.

Item 308: At the end of Schedule 1

1707. Item 308 would insert new Part 15 at the end of Schedule 1 (Application, saving and transitional provisions relating to amendments to this Act) of the FW Act.

Part 15—Main amendments made by the Fair Work Legislation Amendment (Closing Loopholes) Act 2023

Division 1—Definitions

Clause 91: Definitions

1708. New clause 91 would insert two new definitions that apply to new Part 15:

- 'amended Act' would mean the FW Act as amended by the Fair Work Legislation Amendment (Closing Loopholes) Act 2023; and
- 'amending Act' would mean the Fair Work Legislation Amendment (Closing Loopholes) Act 2023.

Division 2—Amendments made by Part 1 of Schedule 1 to the amending Act

Clause 92: Resolving uncertainties and difficulties about interaction between fair work instruments and the definition of casual employee and employee choice

1709. Clause 92 would empower the FWC to make a determination varying a fair work instrument that was made before the commencement of clause 92 on application, or on its own initiative if the fair work instrument is a modern award.

1710. An employer, employee or employee organisation covered by an enterprise agreement or workplace determination has standing to make an application for a variation to resolve an interaction issue (paragraph 92(1)(a)).

1711. An employer or employee organisation entitled to represent the industrial interests of an employee or employer covered by a modern award has standing to make an application to vary that modern award (paragraph 92(1)(b)).

1712. An order could be made to resolve an uncertainty or difficulty arising from the interaction between certain fair work instruments that were on foot prior to commencement of this clause and the definition of 'casual employee' as amended by this Bill, or to make the instrument operate effectively with the amended provisions (subclause 92(2)).

1713. A variation of this kind would operate from the day specified in the determination – including where the date specified is a day before the determination is made (subclause 92(3)).

1714. If a determination relates to a modern award, the FWC would be required to publish the varied award as soon as practicable on its website, or by other means it considers appropriate (subclause 92(4)).

Clause 93: Application of amendments

1715. This clause would provide for the application of amendments in Part 1 of Schedule 1 – Casual employment.

1716. For employment relationships entered into before, on or after 1 July 2024, the amended definition of 'casual employee' in new section 15A would apply on and after that date (subclause 93(1)).

1717. For the purposes of employment relationships entered into prior to 1 July 2024, conduct by the employer that occurred before that date is not relevant to either:

- the application of the considerations at new subsection 15A(2); or
- the application of the avoidance of doubt provisions at new subsection 15A(3)

in relation to the employee (paragraph 93(2)(a)).

1718. Similarly, any period of employment as a casual employee that occurred before that date is not counted for the purposes of calculating the periods relevant to the giving of an employee notification under new paragraphs 66AAB(c) and (d) (subclause 93(6)).

1719. An employee engaged as a casual employee prior to 1 July 2024 would be taken to be casual within the meaning of new section 15A after that date and employers of those employees would be required to provide the Casual Employment Information Statement to those employees within 3 months of commencement of these provisions (subclauses 93(3) and (4)).

1720. For an employee engaged as a casual employee on a fixed term contract on or before commencement, they can remain employed on that basis, despite new subsection 15A(4) for the remainder of the term of that contract (paragraph 93(2)(b)). The effect of this is that fixed term contracts on foot will not be disrupted by the commencement of these amendments.

1721. Subclause 93(6) provides that for employment relationships that are entered into prior to the commencement of Division 4A of Part 2-2, any period of employment that occurred before commencement will not count for the purposes of determining whether an employee has met the eligibility requirements at paragraphs 66AAB(c) and (d) concerning service accrued with a small business employer.

1722. Subclause 93(6A) would provide that section 66F, the provision for requesting casual conversion, will continue to apply to employment relationships entered into prior to the commencement of Division 4A of Part 2-2 as amended by the Bill, for a period of 12 months from commencement for small business employers or 6 months from commencement for all other employers.

1723. Subclause 93(6B) would provide that sections 66G to 66J, which set out the requirements for responding to a request for casual conversion under section 66F, will

continue to apply after commencement in relation to requests made before commencement of Division 4A of Part 2-2 as amended by the Bill, and to requests made after commencement by an employee under section 66F as that section continues to apply because of subclause 93(6A).

1724. Subclause 93(7) would provide that sections 66M and 739, which set out dispute resolution processes, will continue to apply after commencement in relation to disputes relating to Division 4A of Part 2-2 that arose before commencement of Division 4A of Part 2-2 as amended by the Bill, and to disputes that arise after commencement relating to the operation of sections 66F to 66J as those sections continue to apply because of subclauses 93(6A) and 93(6B).

1725. The provisions would preserve the right to request casual conversion for employees who are engaged as casual employees at commencement. The intention is to ensure that existing casual employees retain a mechanism in the FW Act to request conversion to full-time or part-time employment, until such time as they are able to access the new employee choice pathway. The employee choice pathway will become available 6 months after commencement of the Bill, or 12 months for casual employees employed by a small business.

Clause 94: Transitional provision

1726. This item would insert clause 94 to provide that for the purposes of the anti-avoidance provisions that would be inserted by Items 13 and 14 of Part 1 of Schedule 1, references to 'this Division' in those provisions are to be taken to include a reference to Division 4A Part 2–2 as amended by Part 1 of Schedule 1.

1727. This is intended to ensure that an employer could not engage in conduct including reducing or varying an employee's hours of work, changing an employee's pattern of work or terminating an employee's employment in order to avoid any right or obligation that would arise under Division 4A Part 2-2 between the introduction of the Bill and the commencement of Part 1 of Schedule 1 to the Bill, in order to defeat the intended effect of the Bill.

Division 3—Amendments made by Part 2 of Schedule 1 to the amending Act

Clause 95: Application—section 121

1728. This clause would ensure that despite the operation of new paragraph 121(4)(d), the amendments to section 121 will only apply to employees whose employment has been terminated post-commencement and where the insolvent employer downsizing to become a small business employer occurred post-commencement.

Division 4—Amendments made by Part 4 of Schedule 1 to the amending Act

Clause 96: Replacement agreements

1729. New subclause 96(1) would make clear that new subsections 58(4) and (5) apply in relation to single-enterprise agreements made after commencement, whether the relevant single interest employer agreement or supported bargaining agreement was made before or after commencement.

1730. New subclause 96(2) would make clear that new section 180B and new subsection 240A(4) apply to proposed single-enterprise agreements from commencement, whether or not the related single interest employer agreement or supported bargaining agreement was made before or after commencement.

1731. New subclause 96(3) would make clear that new subsections 236(1B) and 238(2) apply from commencement to prohibit majority support determination applications and scope order applications being made in relation to a proposed single-enterprise agreement that would replace a single interest employer agreement or a supported bargaining agreement, whether the single interest employer agreement or supported bargaining agreement was made before or after commencement.

Clause 97: Variation of supported bargaining authorisations

1732. This clause would provide that new subsection 245(2) applies, after commencement, in relation to enterprise agreements and workplace determinations that come into operation before or after commencement. This would provide consistency in the operation of the legislation, to ensure employees to whom a single interest employer agreement or supported bargaining agreement applies are not prevented from making a single-enterprise agreement whether or not all employees specified on the supported bargaining authorisation are covered by an agreement or workplace determination.

Clause 98: Application of better off overall test to replacement agreements

1733. This clause is a transitional provision which would provide that sections 193 and 193A as amended by Part 4 would apply to a single-enterprise agreement made after commencement which, if it were to come into operation, would replace a single interest employer agreement or supported bargaining agreement made before or after commencement. This would allow the amended BOOT to apply to all new agreements made on and after commencement.

Division 5—Amendments made by Part 5 of Schedule 1 to the amending Act

Clause 99: Model terms and enterprise agreements

1734. New subclause 99(1) would provide that the amendments made by Part 5 of Schedule 1 to the amending Act do not apply to an enterprise agreement where, prior to the commencement of Part 5, an employer that will be covered by the proposed agreement asks its relevant employees to vote on the agreement, the employees by that vote (which may be before or after commencement) approve the agreement and the agreement is made, and the agreement is later approved by the FWC.

1735. New subclause 99(2) would provide that, after the commencement of Part 5 of that Schedule, the FWC is not to consider the amendments made by Part 5, including the model terms determined by the FWC, when deciding whether to approve an enterprise agreement covered by subclause 99(1).

Clause 100: Model terms and copied State instruments

1736. This clause would provide that where a model term has been taken to be a term of a copied State instrument prior to commencement of Part 5 of that Schedule, existing

section 768BK continues to apply in relation to that model term as if the amendments made to that section by Part 5 had not been made.

Clause 101: Disallowance—model terms made before commencement

1737. This clause would provide that a determination made by the FWC before the commencement of Part 5 under new subsections 202(5), 205(3), 737(1) or 768BK(1A) is a legislative instrument to which section 42 of the Legislation Act (disallowance) does not apply.

1738. The effect is that a model term determined by the FWC between the passage and commencement of Part 5 in reliance on subsection 4(1) of the AI Act (as in force on 25 June 2009) would not be disallowable, consistently with the approach to terms made after commencement as described above.

1739. This exemption from disallowance is appropriate to avoid the commercial uncertainty, and potential impact on bargaining and enterprise agreement approval processes, that would arise if FWC model terms were disallowed in circumstances where no such terms were prescribed by the FW Regulations.

1740. The model terms may only be determined by the FWC after taking into account 'best practice' workplace relations and following public consultation, ensuring widespread opportunity for input into and comment on the making of the terms, and as such do not require Parliamentary scrutiny. It is appropriate that the FWC determine the model terms, as Australia's expert and independent industrial relations tribunal, and given the limited capacity of the model terms to create or vary rights and obligations.

1741. Relying on subsection 4(1) of the AI Act as in force on 25 June 2009, this clause would make clear that a model term determined by the FWC between Royal Assent and the commencement of Part 5 would not be disallowable.

1742. The FWC has been provided 12 months to make the model terms to accommodate the public consultation required, however it is possible that the FWC will conclude the determination of the model terms prior to commencement. It is in the public interest that terms made prior to commencement be treated consistently and that the FWC not be required to delay making model terms in order to avoid potential disallowance.

Division 5A—Amendments made by Part 5A of Schedule 1 to the amending Act

Clause 101A: Application of amendments—intractable bargaining workplace determinations

1743. New clause 101A would provide that new section 270A and subsection 274(3) as amended apply in relation to intractable bargaining workplace determinations made on or after commencement. However, new subclause 101A(3) would provide that those provisions also apply to intractable bargaining workplace determinations made before commencement in the circumstances specified in clause 101B, which provide for the FWC to vary an existing determination in certain circumstances.

Clause 101B: Application of amendments to intractable bargaining workplace determinations made before commencement

1744. New clause 101B applies in relation to an intractable bargaining workplace determination that is made before the commencement of Part 5A of Schedule 1 (the original determination). It requires the FWC to vary the original determination, where required, to give effect to new section 270A and subsection 274(3) as amended, where an application is made by an employee, employee organisation or employer covered by the determination. Existing paragraph 603(3)(c) does not apply to a variation of this kind. An application would need to be made within 12 months of commencement. A variation would be required to be made by a Full Bench of the FWC. A variation would be required to specify a date from which the variation operates, which could be the date the variation is made or a later date.

Division 6—Amendments made by Part 6 of Schedule 1 to the amending Act

Clause 102: Application of amendments—regulated labour hire arrangement orders

1745. This clause would provide transitional arrangements for new Part 2-7A, which relates to regulated labour hire arrangement orders. It would provide that any obligations on an employer to pay a regulated employee at the protected rate of pay would apply on and after 1 November 2024 in relation to labour hire arrangements entered into at any time before, on or after that day.

1746. The anti-avoidance provisions in Division 4 of Part 2-7A would apply in relation to conduct on or after the day the Bill is introduced to Parliament. This will minimise the risk of businesses seeking to change their arrangements between introduction and Royal Assent to avoid being caught by the measure.

Division 7—Amendments made by Part 7 of Schedule 1 to the amending Act

Clause 103: Application of section 149E of amended Act

1747. This clause provides that new section 149E would apply in relation to a modern award that is in operation on or after 1 July 2024. This would capture all modern awards that are presently in operation, and not revoked before 1 July 2024, and all new modern awards that might come into operation after that day.

1748. This clause also provides that the failure of a modern award to comply with new section 149E would not affect the validity of that modern award.

Clause 104: FWC to vary certain modern awards

1749. This clause would require the FWC to vary all modern awards that are be in effect on 1 July 2024 to include terms that deal with delegates' rights (as required by new section 149E) by 30 June 2024. This clause provides that determinations made as part of this process will only come into effect from 1 July 2024.

1750. This clause would also require the FWC to publish the varied award as soon as practicable, consistent with the general publication requirements on the FWC contained in existing section 168 of the FW Act.

Clause 105: Application of section 205A of amended Act

1751. This clause provides transitional arrangements for enterprise agreement compliance with new section 205A. Under subitem (1), new section 205A would not apply to an enterprise agreement if, before 1 July 2024, the employer concerned requests the relevant employees to approve the agreement by voting for it, those employees vote to approve the agreement and the agreement is approved by the FWC. Only the first step in this process (that is, the employer must have requested the relevant employees vote to approve the agreement) would need to have occurred prior to 1 July 2024.

1752. This would avoid the amendments applying to an enterprise agreement that had been substantially progressed prior to the requirement to comply with new section 205A coming into effect. Enterprise agreements which did not require a delegates' rights term to be included at the time the employer asked the employees to vote can still be approved by the FWC, provided that it has been voted on and approved by the employees of the workplace and the agreement would not otherwise be refused by the FWC.

1753. However, if an enterprise agreement was voted upon but rejected by employees, or not approved by the FWC due to another condition not being met, any future agreement that is subject to further workplace bargaining would be required to contain a delegates' rights term in compliance with new section 205A.

1754. Under subclause (2), the FWC must disregard the new section 205A in deciding after 1 July 2024 whether to approve an enterprise agreement mentioned in subitem (1).

1755. This item also means that new section 205A would not apply in relation to enterprise agreements approved by the FWC before 1 July 2024.

Clause 106: Application of subsections 273(6) and (7) of amended Act

1756. This clause provides that workplace determinations made on or after 1 July 2024 must include a delegates' rights term for the workplace delegates to whom the determination applies.

1757. A delegates' rights term in a workplace determination made on or after 1 July 2024 must not be less favourable than the delegates' rights term in any modern award that covers a workplace delegate to whom the determination applies.

1758. However, a workplace determination will not be invalid on or after 1 July 2024 only because it does not include a delegates' rights term. This ensures that the amendments do not affect the validity of workplace determinations made before 1 July 2024.

Division 8—Amendments made by Part 9 of Schedule 1 to the amending Act

Clause 107: Application of amendments

1759. This clause would provide that section 357, as amended by Part 9 of Schedule 1 of this Act, would apply only in relation to representations made on or after the commencement of Part 9 of Schedule 1 to this Act.

Division 9—Amendments made by Part 10 of Schedule 1 to the amending Act

Clause 108: Application of amendments—right of entry

1760. This clause would provide that the amendment to subsection 510(1) of the FW Act empowering the FWC to impose conditions on an entry permit as an alternative to suspending or revoking the entry permit when required to take action under that subsection (see item 118) would apply to entry permits held by a permit holder whether issued before, on or after the commencement of Part 10 of Schedule 1.

Division 10—Amendments made by Part 11 of Schedule 1 to the amending Act

Clause 109: Penalties for contravention of civil remedy provisions

1761. This clause sets out application provisions for the proposed civil pecuniary penalty increases, proposed changes to the 'serious contraventions' regime, and the introduction of 'amount of the underpayment' civil penalties under this Part. The provisions apply where there is a single course of (contravening) conduct, with some of the conduct occurring before, and some after, commencement.

1762. The overarching principle is that the changes apply prospectively; that is, in relation to conduct that occurs after commencement of the relevant provisions. For the relevant provisions (as described in subclauses 109(1) and (3)), conduct engaged in before the relevant commencement cannot constitute the same course of conduct as conduct engaged in after that commencement. This approach ensures that the proposed higher penalties, new kinds of penalties, or new rules for establishing 'serious contraventions' cannot apply retrospectively to any relevant conduct that occurred before commencement of the relevant new provisions.

1763. While the proposed application provisions would have the effect of dividing any 'single course of conduct' into 2, so that 2 rather than one penalty applies. However, the courts will apply the 'totality' principle in sentencing. The 'totality' principle, requires the courts to look at the entirety of the contraventions and determine the most appropriate sentence for all the contraventions taken together. In effect, it is an important safeguard against 'double punishment'.

Division 11—Amendments made by Part 14 of Schedule 1 to the amending Act

Clause 110: Offence relating to failure to pay certain amounts as required

1764. This clause would make clear that the new offence for wage theft (in new section 327A) would apply prospectively, that is, in relation to conduct that occurs after commencement. If part of a single course of conduct occurs before, and some after, commencement, only conduct that occurs afterwards may be subject to prosecution.

Division 12—Amendments made by Part 14A of Schedule 1 to the amending Act

Clause 111: Application of amendments

1765. Subclause 111(1) would apply the amendment of subsection 409(6A) to employee claim action to the extent that the action occurs, or is to occur, on or after the commencement of Part 14A.

1766. Subclause 111(2) would provide that the amendment does not apply in relation to certain conduct undertaken before commencement in relation to employee claim action, even if the action occurs, or was to occur, on or after that commencement.

1767. Subclause 111(3) would provide that for the purposes of subsection 409(6A), as amended by Part 14A, it does not matter whether a contravention of an order made under section 448A of the FW Act occurred before, on or after the commencement of that Part.

1768. The intention is to ensure the amendment of subsection 409(6A) applies prospectively in relation to conduct engaged in on or after commencement and does not affect the legal status of past conduct.

Part 16—Amendments made by Part 15 of Schedule 1 to the Fair Work Legislation Amendment (Closing Loopholes) Act 2023

Division 1—Definitions

Clause 112: Definitions

1769. This clause would insert four new definitions that apply to new Part 16:

- 'amended Act' would mean the FW Act as amended by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*;
- 'amending Act' would mean the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*;
- 'commencement' would mean the commencement of item 237 of Part 15 of Schedule 1 to the amending Act;
- 'old Act' would mean the FW Act as in force immediately before commencement.

Division 2—Transitional provisions

Clause 113: Relationships in existence as at commencement or entered into on or after commencement

1770. This clause contains an application provision for new section 15AA.

1771. Subclause 113(1) would provide that section 15AA of the amended Act applies on or after commencement to a relationship between an individual and a person entered into:

- before commencement that is in existence as at commencement;
- on or after commencement.

1772. New subclause 113(2) would provide that despite section 40A of the FW Act, section 7 of the AI Act, as in force from time to time, applies in relation to the amendment made by item 237 of Part 15 of Schedule 1 to the amending Act. Section 40A of the FW Act provides that the AI Act as in force on 25 June 2009 applies to the FW Act, and that amendments of the AI Act made after that day do not apply to the FW Act. Existing section 7 of the AI Act, which is concerned with the effect of repeal or amendment of an Act, was inserted into the AI Act by amendments made after 25 June 2009. Existing

subsection 7(2) of the AI Act preserves the previous operation of the affected Act or part of the Act, as well as accrued rights, privileges, obligations, or liabilities beyond the repealing of the Act, or the part of the Act, under which they arose.

1773. New subclause 113(2) would therefore mean that any rights, privileges, obligations, or liabilities accrued by an individual before commencement of new section 15AA would continue in effect after commencement.

1774. A legislative note under new subclause 113(2) would clarify the scope of section 7 of the AI Act.

Clause 114: References to employees etc. in fair work instruments made before commencement

1775. This clause would ensure that a reference in a fair work instrument made before commencement and in operation on or after commencement to an employee or an employer is taken, on and after commencement, to include a reference to an employee or an employer within the meaning of new section 15AA.

1776. This provision would clarify that individuals and persons who become employees or employers by operation of new section 15AA are covered by a modern award, enterprise agreement, workplace determination or FWC order made before commencement and in operation on or after commencement that is otherwise expressed to cover them. The intention is to avoid a situation where a fair work instrument continues to cover individuals who are employees within the common law meaning of that term, but does not also cover individuals who are employees by operation of new section 15AA.

Illustrative example: A new employee being covered by an enterprise agreement

Hamish is a security guard who has worked with the same security firm, Protect Pty Ltd (Protect), for the past four years. Hamish is engaged as an independent contractor, and the agreement between the two parties describes him as such.

Protect also employs 55 security guards who are covered by the Protect and United Workers' Union Enterprise Agreement 2022 (Protect EA). The Protect EA was approved on 1 December 2022 and is expressed to cover all employees of Protect who are employed as security guards. The nominal expiry date for the Protect EA is 1 December 2025.

On commencement of new section 15AA, Hamish becomes an employee of Protect. Despite the relationship being described as one of principal and contractor in the written agreement governing the relations between Hamish and Protect, various factors suggest that the relationship is one of employment. Among other things, Hamish is required to wear Protect branded attire, Protect tell him when and where he is required to work and Hamish has no capacity to delegate the services that he performs for Protect.

If Hamish becomes an employee of Protect because of the operation of new section 15AA, he will be covered by the Protect EA.

Clause 115: Entitlements determined by reference to length of a period of employment etc.

1777. This clause would provide that for the purposes of determining whether an individual who becomes an employee because of the operation of new section 15AA has a right or entitlement under the amended Act or under a fair work instrument calculated by reference to the individual's length of service or a minimum period of employment, the nature of the relationship in respect of a period or periods before commencement is to be ascertained in accordance with the FW Act as in force immediately before commencement.

1778. This clause would ensure that new section 15AA operates prospectively and any rights or entitlements accrued by an individual before commencement of new section 15AA would continue in effect after commencement.

Illustrative example: Recognising length of service

Sharon is a personal trainer and engaged as an independent contractor at a large gym franchise. She was engaged as an independent contractor on 1 April 2023.

Following commencement of new section 15AA, Sharon talks to the gym that engages her and they both agree she is better characterised as an employee under the new provisions.

Sharon has an eight year old daughter and wishes to enter into a flexible work arrangement so she can take her daughter to school three days a week. Under the FW Act, permanent employees who have worked for the same employer for at least 12 months can formally request flexible working arrangements in specified circumstances – including where they are a parent, or have the responsibility for the care, of a child who is school-aged or younger. The employer must follow certain procedures, and the employee has the right to dispute resolution if the employers does not agree.

Sharon makes the request on 1 August 2024. Although Sharon has worked at the gym since 1 April 2023, a period of 16 months, she only became an employee on 1 July 2024. Therefore, Sharon will need to wait until 1 July 2025 before she is eligible to request a flexible working arrangement under the formal processes in the FW Act. This does not prevent Sharon and her employer from negotiating a flexible working arrangement earlier.

Clause 116: Old Act applies to proceedings on foot as at commencement

1779. Despite the amendments made by item 237 of Part 15 of Schedule 1, this clause would provide that the old Act continues to apply, on and after commencement, in relation to:

- an application made, or proceedings on foot, as at commencement (other than an application or proceeding prescribed by the regulations);
- an application for review of, or an appeal relating to, an application made or proceedings on foot at commencement (whether the application for review was made, or the appeal proceedings were brought, before, on or after commencement).

1780. Subclause 116(2) would make it clear that an application or proceedings will be considered on foot until all rights of review and appeal in relation to the application or proceedings have expired or have been exhausted.

Illustrative example: Unfair dismissal proceedings on foot

Henry was a cook engaged as an independent contractor to provide services to an off-site catering business. Henry began work in February 2022 and on 15 May 2024 had his services contract terminated.

On 1 June 2024, Henry applied to the Fair Work Commission (FWC) for an unfair dismissal remedy alleging that he was an employee of the catering business, not an independent contractor, and therefore protected from unfair dismissal. The respondent business objected to the FWC dealing with the application, contending that Henry was not a person protected from unfair dismissal on the basis that he was not an employee.

The FWC begins to deal with the application in June 2024, but the matter is still on foot on 1 July 2024 when the amendments commence.

As Henry lodged his application before the commencement of the amendments to the FW Act, the FWC must determine whether Henry was an employee within the meaning of that term according to the FW Act as in force immediately before commencement of the amendments until the matter is determined to finality. This is also the case if either party decides to appeal the single member decision to a Full Bench of the FWC.

Clause 117: FWC power to deal with uncertainties or difficulties arising from the operation of section 15AA of the amended Act

1781. This clause would empower the FWC to vary a fair work instrument to resolve uncertainty or difficulty arising as a result of, or in connection with, the amendment made by item 237 or Part 15 of Schedule 1 to the amending Act.

1782. By new subclause 117(2), the FWC would be able to make a determination varying a modern award on its own initiative, or on application by a specified party. It is intended that the standing requirements under new subclause 117(2) are consistent with those in existing section 160 of the FW Act.

1783. By new subclause 117(3), the FWC would be able to make a determination varying an enterprise agreement or a workplace determination on its own initiative, or on application by a specified party. It is intended that the standing requirements under new subclause 117(3) are consistent with those in existing section 218A of the FW Act.

1784. By new subclause 117(4), the FWC would be able to make a determination varying a FWC order on its own initiative, or on application by a specified party.

1785. New subclause 117(5) would specify that a variation under this clause operates from the day specified in the determination, which may be a day before the determination was made.

1786. It is intended that this process may be utilised where a fair work instrument is attempting to define 'employee', 'employer' or 'employment' in a way that may not align with the principle of interpretation in new section 15AA. New clause 117 would complement the FWC's existing powers to vary fair work instruments.

1787. New subclause 117(6) would provide a regulation making power which would enable regulations prescribing that clause 117 applies, or does not apply, to a specified:

- fair work instrument;
- class of fair work instrument;
- uncertainty or difficulty;
- class of uncertainty or difficulty.

1788. This regulation making power is necessary to deal with any unforeseen issues that may arise as a result of the amendments to the Fair Work framework. Any regulations would be subject to scrutiny by both Houses of Parliament and subject to disallowance.

Division 3—Regulations about transitional matters

Clause 118: General power for regulations to deal with transitional etc. matters

1789. This clause would include a regulation-making power which would enable regulations of a transitional, application or saving nature in relation to a person becoming an employer or an individual becoming an employee because of the amendments made by item 237 of Part 15 of Schedule 1. Any regulations would be subject to scrutiny by both Houses of Parliament and subject to disallowance.

Clause 119: Other general provisions about regulations

1790. This item would provide that subsection 12(2) of the Legislation Act does not apply to regulations made for the purposes of Part 16. Subsection 12(2) of the Legislation Act ensures against legislative instruments retrospectively adversely affecting rights.

1791. The ability to make regulations with retrospective application is necessary to provide the Minister with the discretion and flexibility to deal with any unforeseen developments that could require immediate or prompt changes. This is particularly important to ensure a smooth transition between the old Act and the operation of provisions under the amended Act. Any regulations would be subject to disallowance under the Legislation Act and therefore subject to Parliamentary scrutiny.

1792. While regulations under Part 16 could be made with retrospective application, subclause 119(3) would make it clear that a person could not be convicted of an offence or ordered to pay a pecuniary penalty for contravening a provision of the FW Act in relation to conduct before the registration date. As such, the rules would not be able to detrimentally affect any persons due to their retrospective application.

1793. Pursuant to table item 27(e) in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (Exemption Regulations), any regulations made pursuant to this clause will not be subject to ordinary sunsetting processes. The *Legislation (Exemptions and Other Matters) Amendment (2019 Measures No. 1) Regulations 2019*

(Fair Work Exemption Amendment) amended the Exemption Regulations to include as exempt from sunsetting, among other things, a regulation made under the FW Act. The Explanatory Statement to the Fair Work Exemption Amendment contains the justification as to why regulations made under the FW Act should be exempt from sunsetting. In short, regulations and other like instruments made under the FW Act are exempt from sunsetting because they form part of an intergovernmental scheme.

Part 17—Amendments made by Part 16 of Schedule 1 to the Fair Work Legislation Amendment (Closing Loopholes) Act 2023

Division 1—Definitions

Clause 120: Definitions

1794. New clause 120 would insert four new definitions that apply to this Part:

- 'amended Act' would mean the FW Act as amended by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*;
- 'amending Act' would mean the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*;
- 'commencement' would mean the commencement of item 238 of Part 16 of Schedule 1 to the amending Act;
- 'old Act' would mean the FW Act as in force immediately before commencement.

Division 2—Transitional provisions

Clause 121: Unfair deactivation and unfair termination

1795. Subclause (1) is a transitional provision that would provide that Part 3A-3 (Unfair deactivation or unfair termination of regulated workers) applies to a deactivation or termination that occurs after commencement.

1796. New subclause (2) would provide that for the purposes of determining under paragraph 536LD(c) whether an employee-like worker has been performing work for a period of at least six months, a period or periods before commencement are not to be counted. Meeting that six month threshold is a requirement for a person to be protected from unfair deactivation under paragraph 536LD(c).

1797. New subclause (3) would provide that for the purposes of determining under paragraph 536LE(c) whether a regulated road transport contractor has been performing work for a period of at least 12 months, a period or periods before commencement are not to be counted. Meeting that 12 month threshold is a requirement for a person to be protected from unfair termination under section 536LE.

Clause 122: New applications relating to unfair contracts

1798. Clause 122 would provide that an application to the FWC for an unfair contract terms remedy in relation to a services contract may be made under section 536ND only if the contract was entered into on or after the commencement of item 122.

Clause 123: Services contracts entered into before commencement

1799. Subclause (1) would confirm that this section applies to a services contract entered into before commencement.

1800. Subclause (2) would provide for the continued application of the IC Act in relation to services contracts entered into prior to commencement, despite the amendments of the IC Act made by the Amending Act.

SCHEDULE 2—AMENDMENT OF THE ASBESTOS SAFETY AND ERADICATION AGENCY ACT 2013

Part 1—Main amendments

Amendments to the *Asbestos Safety and Eradication Agency 2013*

1801. The increase in silicosis and other silica-related diseases is deeply concerning and has raised the need for urgent coordinated national action to reduce rates of silica-related diseases and to support affected workers and their families. The amendments in Schedule 2 would expand the functions of the well-respected ASEA to include coordinating action on silica safety and silica-related diseases. This includes developing, promoting and reporting on a Silica National Strategic Plan which will coordinate and track the progress of jurisdictions against nationally agreed targets. ASEA would be renamed the Agency to reflect these changes.

1802. Establishing and appropriately resourcing the renamed Agency as a national coordination mechanism for action on silica-related diseases acts on the recommendations of the NDDT. The NDDT was established in 2019, and in June 2021 submitted a final report to the then Minister for Health and Aged Care recommending a national approach to the prevention, early identification, control and management of silicosis and other occupational dust diseases in Australia. An All of Governments response to the NDDT's Final Report was published in April 2022.

1803. This Bill would amend the ASEA Act to broaden ASEA's functions which are currently confined to asbestos. The renamed Agency's functions would include responsibility for silica coordination, awareness raising, research, reporting and providing advice to the government on silica.

1804. The Bill would also expand the membership of the current ASEC to include appropriate representation from employee and employer representatives and an expert in asbestos or silica-related matters. Eligibility would be broadened to allow for persons with lived experience to be appointed to the Council. ASEC would be renamed the Asbestos and Silica Safety and Eradication Council to reflect these changes.

1805. The amendments would complement the establishment of the NORDR, which will require reporting of silicosis and is aimed at improving national data. There are links between the NORDR Bill and this Bill, but they are distinct as NORDR will remain the responsibility of the Department of Health and Aged Care. The amendments would move responsibility for the Silica National Strategic Plan from the Department of Health and Aged Care to the Agency.

1806. The amendments would not duplicate or undermine the role of other agencies, such as Safe Work Australia, the national work health and safety policy body that is currently undertaking a range of work related to respirable crystalline silica and silica-related diseases. Safe Work Australia is responsible for national work health and safety policy and the model work health and safety laws.

1807. It is intended that the Agency would work in lock step with other government departments and agencies. The Government believes there is value in identifying a

national coordination body, and for this body to focus on preventing silica-related diseases as a priority. The Agency is unique because it would report to both health ministers and work health and safety ministers in relation to silica and asbestos.

1808. The Statement of Compatibility with Human Rights outlines how these amendments would implement the NDDT's recommendations to promote safe and healthy working conditions for Australian workers.

Item 1: Title

1809. Item 1 would remove the word 'Asbestos' and substitute the words 'Asbestos and Silica' to amend the name of the ASEA Act to 'Asbestos and Silica Safety and Eradication Agency Act 2013'.

1810. This amendment would reflect the expansion of functions related to silica. The addition of functions related to the prevention of silica-related diseases is not intended to divert attention or resources away from ASEA's important work on eradicating asbestos from the built environment.

Item 2: Section 1

1811. Item 2 would amend the short title of the ASEA Act to reflect the new name.

Item 3: Section 2A

1812. Item 3 would repeal and replace the 'Objects' provision in the ASEA Act.

1813. New section 2A would add references to silica safety and silica-related diseases to reflect the broader remit. It would also implement Recommendation 3 of the 2019 ASEA Review, which identified inconsistencies in how ASEA's role is described. This amendment would clarify and strengthen the Agency's purpose and provide guidance on how it is to perform its existing asbestos-related functions alongside the new silica-related functions.

Item 4: Section 3 (definition of *Agency*)

Item 5: Section 3

1814. Section 3 of the ASEA Act contains definitions. Items 4 and 5 would amend section 3 to include three new terms which streamline existing provisions and reflect the amendments which would be made in this Schedule.

1815. Item 4 would repeal and replace the existing definition of 'Agency' to reflect the new name.

1816. Item 5 would add new definitions for:

- 'Asbestos and Silica Safety and Eradication Agency' with a cross reference to new section 6 to reflect the new name.
- 'Asbestos and Silica Safety and Eradication Council' with a cross reference to new section 28 to reflect the new name of the Council. A new definition is included because the existing ASEA Act is inconsistent in the way it refers to the ASEC where some provisions only use the term 'Council' and not its full name.
- 'Asbestos National Strategic Plan' with a cross reference to new section 5A.

Item 6: Section 3 (definition of *Asbestos Safety and Eradication Council*)

Item 8: Section 3

1817. Item 6 would repeal the existing definition of ASEC.

1818. Item 8 would update the way this body is referred to in the ASSEA Act. Rather than spelling out the name in full, it would be referred to as the 'Council' which is defined to mean the 'Asbestos and Silica Safety and Eradication Council'. The ASEC would be renamed to reflect the expanded remit of the Agency.

Item 7: Section 3 (definition of *Chair*)

Item 9: Section 3 (definition of *Council member*)

1819. Items 7 and 9 would update definitions of 'Chair' and 'Council member'. The new definition of Council means that the name does not need to be spelt out in full.

Item 10: Section 3 (definition of *National Strategic Plan*)

1820. Item 10 would repeal the existing definition of 'National Strategic Plan' which refers to the current asbestos plan (new section 5A). This Bill would provide for a new 'Silica National Strategic Plan' and the asbestos plan name needs to be updated to clearly distinguish the two.

Item 11: Section 3

1821. Item 11 would insert a new definition of 'National Strategic Plans' to provide for two separate national strategic plans for asbestos and silica. Throughout the ASSEA Act, where both plans are referred to, they would be referred to as the 'National Strategic Plans'.

1822. Item 11 would also insert a new definition 'Silica National Strategic Plan' which would be defined in new section 5B.

1823. Item 11 would also insert a new, non-exhaustive definition of 'silica safety' which is similar to the existing definition of 'asbestos safety'. Silica safety would include a broad range of matters including matters relating to awareness, education and information sharing in relation to respirable crystalline silica. This is intended to cover the full life cycle of silica products, including the manufacture, supply, use and disposal where appropriate. Not all forms of silica or silica products are hazardous. Although the definition of 'silica safety' is broad, it is not intended that the Agency would have a role in relation to silica which does not pose a risk to human health.

Item 12: Part 1A

1824. Item 12 would repeal and replace existing Part 1A of the ASEA Act, which would be renamed 'National Strategic Plans'. The Bill provides for two similar but distinct plans- the Asbestos National Strategic Plan which already exists in the 'National Strategic Plan' and a new plan for silica-related diseases.

Asbestos National Strategic Plan

1825. Item 12 would insert a new definition of 'Asbestos National Strategic Plan' which is less prescriptive than the existing section 5A to provide flexibility in the future, where

priorities and actions can be changed as needed without being restricted by the ASSEA Act. This amendment would implement recommendation 2 of the 2019 ASEA Review, which identified that while some prescription is useful to guide the development of a National Strategic Plan, the legislation needs to provide sufficient flexibility to address emerging issues and new priorities.

1826. The new definition would reflect and expand the existing Asbestos National Strategic Plan which would be renamed shortly after commencement of this Bill. The aim of the Asbestos National Strategic Plan would be to eliminate asbestos-related diseases in Australia by preventing exposure to asbestos fibres and to support workers and others who are affected by asbestos-related diseases.

1827. New paragraph 5A(1)(b) would set out the matters which must be addressed in the plan to ensure there is a nationally consistent and coordinated approach to improving asbestos removal, national data and awareness about asbestos safety and asbestos-related diseases and facilitating international collaboration.

1828. New subsection 5A(2) would require a two-thirds majority of jurisdictions to agree to the Asbestos National Strategic Plan for it to be a valid plan. The current plan has been agreed to by all governments and this provision is included for clarity. It would provide a clear threshold for when a plan has sufficient support to be valid.

1829. On commencement the existing Asbestos National Strategic Plan would meet the requirements of new section 5A because it has been agreed to by governments and addresses the matters set out in new subparagraph 5A(1)(b).

Silica National Strategic Plan

1830. New section 5B 'Silica National Strategic Plan' would be similar to the definition of the Asbestos National Strategic Plan in new section 5A. The plan would aim to eliminate silica-related diseases by preventing exposure to respirable crystalline silica and supporting workers and others who are affected by silica-related diseases. New paragraph 5B(1)(b) would set out the matters which must be addressed in the plan, including eliminating or minimising exposure to respirable crystalline silica in workplaces, and improving research and national data.

1831. New subsection 5B(2) would require a two-thirds majority of jurisdictions to agree to the to the Silica National Strategic Plan for it to be a valid plan. This would recognise that the successful implementation of the plan requires commitment by the majority of governments.

1832. The Lung Foundation Australia is currently developing a Silica National Strategic Plan pursuant to Recommendation 3(a) of the 2021 NDDT's Final Report to the Minister for Health and Aged Care. This work would provide an important foundation upon which the first Silica National Strategic Plan would be built.

1833. Responsibility for implementing the NDDT's recommendations in relation to the development of a National Silicosis Prevention Strategy and associated National Action Plan, and a national coordination mechanism for action on silica-related diseases.

Item 13: Part 2 (heading)

1834. Item 13 would repeal the existing heading for this part and substitute a new heading 'Asbestos and Silica Safety and Eradication Agency' to reflect the new name.

Item 14: Section 6

1835. Item 14 would repeal section 6 of the ASEA Act, which establishes ASEA. The new section 6 would provide for the continuation of the body under a new name: the Asbestos and Silica Safety and Eradication Agency.

Item 15: Subsection 8(1)

1836. Section 8 of the ASEA Act sets out the functions of the Agency.

1837. Item 15 would repeal existing subsection 8(1) and substitute a new provision, which would build on and clarify the existing functions of ASEA. This reflects the proposed expanded remit of the Agency and would implement relevant recommendations of the 2019 ASEA Review. In particular:

- New paragraph 8(1)(c) would allow the Agency to provide advice to the Minister at any time and not only when requested.
- New paragraph 8(1)(d) would refer to the Agency's function to collaborate, rather than merely liaise with, other governments, agencies, and bodies and expressly refers to international governments. This would better reflect ASEA's current collaborative approach. For example, the Agency would be able to collaborate with Safe Work Australia about the development and implementation of the Silica National Strategic Plan.
- New paragraph 8(1)(e) would provide for the Agency to conduct, as well as commission, research about asbestos safety, asbestos-related diseases, silica safety and silica-related diseases.
- New paragraphs (8)1(f) to (h) would incorporate section 5 of the *Asbestos Safety and Eradication Agency Rule 2022* with modifications to include silica safety and silica-related diseases. These functions would relate to awareness raising and promoting consistent messages around asbestos safety, asbestos-related diseases, silica safety and silica-related diseases.

Item 16: Subsection 8(3)

1838. Item 16 would omit the words 'performing it' and substitute 'performing its' to correct a grammatical error in the existing provision.

Item 17: Subsection 8(3)

Item 30: Paragraphs 29(1)(c) and (d)

Item 52: Subsection 42(3)

1839. These items would make technical amendments to remove the words 'National Strategic Plan' and substitute 'National Strategic Plans' to reflect the change in the number of plans as there will be a separate National Strategic Plan for asbestos and silica.

Item 17A: At the end of section 8

1840. Item 17A would clarify the relationship between the new functions which will be conferred on ASEA and the Commonwealth's powers under the *Financial Framework (Supplementary Powers) Act 1997*. It is a technical amendment.

Item 18: After section 8

1841. Item 18 would insert new section 8A and require the Agency to report on both asbestos and silica national strategic plans. This would be a key part of the Agency's coordination function providing a national snapshot on progress to the relevant Commonwealth and State and Territory ministers.

1842. The content of the reports would be flexible but is intended to cover progress in implementing the national strategic plans and achieving national targets, as well as any relevant activities that a jurisdiction is undertaking.

1843. The asbestos report would be provided to ministers with interest in work health and safety, health and environmental protection. For silica, the report would be provided to ministers with interest in work health and safety and health.

1844. New subsections 8A(3) and (5) would provide that reports must be prepared before 31 December in each financial year and must be made publicly available.

Item 19: Section 12 (heading)

Item 20: Subsections 12(1), (1A) and (2)

Item 23: Paragraph 24(1)(b)

Item 25: Division 1 of Part 5 (heading)

Item 27: Section 29 (heading)

Item 28: Paragraph 29(1)

Item 31: Subsections 29(2), (2A) and (3)

Item 32: Section 30 (heading)

Item 33: Subsections 30(1) and (2)

Item 34: Subsections 30A(1), (2) and (3)

Item 35: Division 2 of Part 5 (heading)

Item 36: Section 31

Item 41: Paragraph 40(d)

Item 42: Division 4 of Part 5 (heading)

Item 43: Section 41 (heading)

Item 44: Subsection 41(1)

Item 45: Subsection 41A(1)

Item 47: Paragraph 41A(2)(a)

Item 48: Sections 41B, 41C, 41D and 41E

Item 49: Subparagraph 41F(a)(ii)

Item 51: Subparagraph 41F(e)(iii)

1845. These items would be consequential amendments to Item 8.

1846. Since all references to the full name of ASEC would need to be amended to reflect the new functions related to silica, these amendments would remove the words 'Asbestos Safety and Eradication' and streamline the legislation by using the term Council instead of spelling out its full name.

Item 21: At the end of Division 1 of Part 3

1847. Item 21 would insert a new section 14A to allow the CEO to request information from a person in certain circumstances and an express permission for a person to provide the requested information. Information that may be disclosed could include personal information.

1848. It is appropriate provide for the collection of personal information for the following reasons:

- New paragraph 14A(1)(b) would provide that the CEO may request information where the information is necessary to perform certain functions and is not otherwise available. For example, the CEO could not request information which is publicly available.

- New subsections 14A(5) and (6) would provide an express permission that a person can rely on to provide the requested information, if they consider the disclosure to the Agency is appropriate. This express permission would not compel a person to provide information upon request.

- New subsection 14A(6) would provide that a person may disclose information to the Agency in response to a request despite anything in a law of the Commonwealth (other than the proposed ASSEA Act) or a law of a State or Territory. This means a non-disclosure provision in other legislation that would otherwise prevent information being disclosed to the Agency, does not prevent its disclosure. The purpose of the amendment is to ensure information necessary to support the Agency's research, data and reporting functions can be collected. Silica issues are complex and require coordination and information sharing across portfolios as well as jurisdictions. This amendment is intended to facilitate information sharing between government agencies and bodies. New section 14A is framed broadly to provide flexibility for the future. For example, ASEA is very cooperative and in the future the Agency may form partnerships with non-Governmental organisations and request information from such bodies as well.

- Tracking progress against the national strategic plans and developing evidence-based research relies on input from a range of sources including all State and Territory governments. The amendments will ensure that persons with relevant information are able to provide that information to the Agency.

- The Agency's coordination, advice and reporting roles would rely on input from a range of sources including all State and Territory governments. The amendments would ensure persons with relevant information are able to provide that information to the Agency. This would involve for example, data on number of diagnosed cases of silicosis or other silica-related diseases in each State and Territory. It would not include for example, a person's medical record as that would not be necessary for the performance of the Agency's functions. Failing to fulfil a request would not be an offence and broad discretion will be retained by the person holding information. There could be a range of legitimate reasons why a request may not be fulfilled, including if, for example, providing the information requested would cause unnecessary duplication of work and create an administrative burden on the person.

1849. The new Agency would be subject to a range of obligations to ensure that the information it obtains is handled appropriately:

1850. Personal information collected by the Agency is subject to the requirements of the *Privacy Act 1988* which governs its collection, use, disclosure, storage and disposal.

1851. As Australian Public Service (APS) employees, the Agency's employees would be bound by the APS Code of Conduct, including regulation 2.1 (duty not to disclose information) which applies to information obtained by the Agency related to the performance of its statutory functions. A breach of the Code of Conduct by an APS employee may lead to the imposition of sanctions up to and including termination of employment.

1852. The Criminal Code contains offences relating to the unauthorised disclosure of information by current (and former) Commonwealth officers, including APS employees, punishable by terms of imprisonment (of between two and seven years depending on the circumstances of the offence).

Item 22: Subsection 23A(1)

1853. Item 22 would provide that the CEO cannot delegate the new function under new section 14A to obtain information. Section 23A of the ASEA Act currently allows the CEO's functions or powers to be delegated to any ASEA staff member. Due to the small size of ASEA there are no senior executives who could be delegated to and allowing for delegation beyond senior executives would be inappropriate for this function.

Item 26: Section 28

1854. Existing section 28 of the ASEA Act establishes ASEC.

1855. Item 26 would provide that ASEC would continue to exist as the Asbestos and Silica Safety and Eradication Council. This will ensure continuity for the Council in its work relating to asbestos.

Item 29: Paragraph 29(1)(b)

1856. Item 29 would insert the words 'asbestos-related diseases, silica safety and silica-related diseases' after the word 'safety' to reflect the remit of the Agency.

Item 37: Paragraph 31(d)

1857. Item 37 would remove the words ‘1 member’ and substitute ‘2 members’ to increase the membership of the Council and provide for an additional member representing the interests of workers. Silica-related diseases are occupational in nature and greater representation from those representing workers is required.

Item 38: Paragraph 31(e)

1858. Item 38 would remove the words ‘1 member’ and substitute ‘2 members’ to increase the membership of the Council and provide for an additional member representing the interests of employers. Silica-related diseases are occupational in nature and greater representation from those representing employers is required.

Item 39: After paragraph 31(e)

1859. Item 39 would insert a new paragraph 31(ea) to provide that the Council must include a member with expertise relevant to asbestos safety, asbestos-related diseases, silica safety or silica-related diseases. This amendment would ensure the work of the Council is informed by a person who is an expert in relevant areas, for example an epidemiologist, occupational physician, respiratory physician, or occupational hygienist.

Item 40: Subsection 32(3)

1860. Item 40 would repeal the existing subsection 32(3) of the ASEA Act and substitute a new provision. This new provision would replicate some of the eligibility criteria in the existing subsection and add additional criteria.

1861. New paragraph 32(3)(a) would expand the eligibility for appointment as a Council member to include knowledge or experience in silica safety, silica-related diseases or representation of, or providing support to persons with silica-related diseases and their families.

1862. New paragraph 32(3)(b) would expand the eligibility for appointment to the Council as a non-government representative to include a person who has or has had asbestos or silica-related diseases or has lived experience as a family member of a person who is or has been affected by asbestos or silica-related diseases.

1863. There is some overlap between the new subparagraphs 32(3)(a)(iv) and (vii) and 32(3)(b)(ii) and (iv). New subparagraphs 32(3)(a)(iv) and (vii) would not require lived experience. A person with professional experience in victim advocacy or undertaking support groups for affected workers or their families would also be eligible. The new subparagraphs 32(3)(b)(ii) and (iv) in contrast require lived experience supporting an affected family member or as a carer or advocate. Persons with lived experience have a unique perspective and the amendments would make it clear that they are eligible to be appointed and contribute to the work of the Council as a member.

Item 46: Paragraph 41A(1)(b)

1864. Item 46 would remove the number ‘4’ and substitute ‘6’ to increase the number of other Council members that would be required to constitute a quorum of the Council. This would reflect the increase to Council numbers.

Item 50: Paragraph 41F(b)

1865. Item 50 would remove the word ‘Asbestos’ and substitute ‘Asbestos and Silica’ to reflect the new name of the Council.

Item 52: Subsection 42(3)

1866. Item 52 would remove the words ‘the National Strategic Plan’ and substitute ‘either of the National Strategic Plans’ to reflect the change in the number of plans as there would be a separate National Strategic Plan for asbestos and silica.

Item 53: At the end of section 42

1867. Section 5A of the ASEA Act currently provides that the Asbestos National Strategic Plan is taken to be a corporate plan for the purposes of the *Public Governance, Performance and Accountability Act 2013.* This section would be repealed and replaced by the Bill and Item 53 would add a new subsection 42(4) to the ASSEA Act to provide that the annual operational plan is taken to be a corporate plan for the purposes of the *Public Governance, Performance and Accountability Act 2013.*

1868. The National Strategic Plans set out what actions all governments will take and are not appropriate as a corporate plan. In contrast, the annual operational plan would set out the activities to be undertaken by the Agency and is a more appropriate plan to specify.

Item 54: Section 47

1869. Item 54 would repeal section 47 of the ASEA Act and substitute a new provision.

1870. This amendment would provide for a review of the Agency’s role and functions to be conducted five years after commencement of the amendment and completed within six months. The new provision would have the same terms as the previous review requirement. A review of the ASEA’s role and functions was previously completed in 2019.

Part 2—Application, saving and transitional provisions

Item 55: Definitions

1871. Item 55 sets out three definitions used in Part 2:

- 'amended Act' means the *Asbestos Safety and Eradication Agency Act 2013*, as in force after the commencement day;
- 'Commencement day' means the day this Part commences (day after Royal Assent);
- 'Silica Plan agreement day' means the day after the day the Silica National Strategic Plan has been agreed to by at least 6 of the governments of the Commonwealth and each State or Territory.

Item 56: Functions of the Agency – Silica National Strategic Plan

Item 60: Functions of the CEO of the Agency – annual operational plan

Item 61: Functions of the Council – Silica National Strategic Plan

1872. These items would provide that plan related functions of the new Agency, the CEO and the Council do not have effect until the Silica National Strategic Plan has been agreed upon by a two-thirds majority of jurisdictions.

1873. These transitional provisions do not have a sunsetting date because it is expected that a Silica National Strategic Plan would be finalised and agreed to within one to two years at most. There is strong and unified commitment by governments to address this issue. In the unlikely event that a plan was not agreed to in a timely manner, the review of the Agency's functions required in item 54 would provide an opportunity to review the insertion of silica-related functions. Such a review would need to consider whether it is appropriate to remove the additional functions and reconsider the purpose of the Agency.

Item 57: Functions of the Agency –annual report relating to implementation of Asbestos National Strategic Plan

1874. Item 57 would prescribe the timing for the first annual report relating to the Asbestos National Strategic Plan after commencement. This report would be due before the report relating to the National Silica Strategic Plan because there is already a well-established asbestos plan in existence. The current asbestos plan has been agreed to by all governments.

Item 58: Functions of the Agency – annual report relating to implementation of Silica National Strategic Plan

1875. Item 58 would prescribe the timing for the first annual report relating to the Silica National Strategic Plan after commencement. Annual reports are tied to financial years and there are two different dates contemplated to ensure that the content of the first report is provided as soon as practicable but is also sensible given plans will be in their very early stages.

1876. If the Silica National Strategic Plan is agreed to by the requisite number of Australian governments (the Silica Plan agreement day, see item 55) on a day in the first half of a

financial year, the first report would be due before the end of 31 December in the following year. The report would have to include information relating to matters covered by the Silica National Strategic Plan, for example, preventing exposure to respirable crystalline silica in the workplace and activities undertaken by governments in the period between the plan start date and the end of the first financial year (that is, 30 June the following year). This report would be a snapshot of activities already underway in jurisdictions and a benchmark which could be used to inform future reports. Because the plan would be in its very early days at this time there may be limited progress to report on and separate arrangements for the first report are necessary.

1877. If the Silica National Strategic Plan is agreed to by the requisite number of Australian governments (the Silica Plan agreement day, see item 55) on a day in the second half of a financial year, the first report would also be due before the end of 31 December in the following year. The content of the report would be different though and would be required to relate to progress made by governments in implementing the Silica National Strategic Plan. This could cover, for example, how governments have begun to set up monitoring and have begun implementing measures to meet targets.

Item 59: CEO of the Agency

Item 62: Members of the Council

1878. These items would preserve the appointments of the CEO and members of the Council.

SCHEDULE 3—AMENDMENT OF THE SAFETY, REHABILITATION AND COMPENSATION ACT 1988

Amendments to the *Safety, Rehabilitation and Compensation Act 1988*

1879. Schedule 3 would amend the SRC Act to introduce a rebuttable presumption that post--traumatic stress disorder suffered by specified first responders was contributed to, to a significant degree, by their employment.

Item 1: Before subsection 7(8)

1880. This item would introduce a heading before subsection 7(8) indicating that subsections 7(8)–(10) relate to 'diseases suffered by firefighters'.

1881. This heading is to provide for consistency in section 7 and is not intended to alter the operation of subsections 7(8)–(10).

Item 2: At the end of section 7

1882. Subsection 7(11) would provide that unless the decision-maker is satisfied to the contrary, post-traumatic stress disorder suffered by specified first responders is to be taken to have been contributed to, to a significant degree, by their employment.

1883. Paragraph 7(11)(a) would specify that for the presumption to apply, the decision-maker must be satisfied that the employee's post-traumatic stress disorder was suffered in accordance with a legislative instrument determined in accordance with new subsection 7(12).

1884. Subsection 7(12) would enable the Minister to make a legislative instrument specifying the circumstances in which an employee is taken to have suffered, or be suffering from, post-traumatic stress disorder. As paragraph 7(11)(a) requires that the post-traumatic stress disorder must have been suffered in accordance with such an instrument, an instrument would be required in order for the presumption to operate.

1885. Subsection 7(13) would provide an exhaustive list of 'first responders' to whom the presumption in subsection 7(11) would apply. Under new subsection 7(11), a person must have been employed as a first responder prior to the symptoms of post-traumatic stress disorder first becoming apparent. Subsection 7(13) would specify that a person, being an 'employee' within the meaning provided by existing section 5, was a first responder if they were:

- the Commissioner of the Australian Federal Police, a Deputy Commissioner of the Australian Federal Police, or an AFP employee (all within the meaning of the *Australian Federal Police Act 1979*);
- employed as a firefighter;
- employed as an ambulance officer or paramedic;
- employed as an emergency services communications operator; or
- a member of an emergency service within the meaning of the *Emergencies Act 2004* (ACT).

1886. New paragraph 7(14) would confirm that the presumption in new paragraph 7(11) does not limit, and is not limited by, the pre-existing presumptions in subsections 7(1) and (2).

Item 3: Application of amendments

1887. Item 3 specifies that the amendments to the SRC Act would apply to post-traumatic stress disorder sustained after the commencement of the amendments. The date on which diseases are taken to have been sustained is determined in accordance with existing subsection 7(4).

SCHEDULE 4—AMENDMENT OF THE WORK HEALTH AND SAFETY ACT 2011

Overview

1888. Schedule 4 would strengthen the offences and penalties framework in the WHS Act. A new offence of industrial manslaughter would be introduced. This would align Commonwealth WHS laws with the model Act which was recently amended to provide for industrial manslaughter within the model framework. The model Act does not prescribe the exact provisions of the model offence to enable each jurisdiction to implement (or maintain) an offence tailored to the criminal law framework of the jurisdiction. However, the model Act provides for an industrial manslaughter offence via a jurisdictional note and accompanying model penalties for the offence. The offence in this Bill reflects recommendations 23b of the Boland Review and 13 of the Senate Inquiry.

1889. The existing Category 1 offence and State and Territory general manslaughter offences may also apply when a worker or other person is killed at a workplace. A specific industrial manslaughter offence responds to genuine community concern that the WHS framework requires stronger penalties for the most egregious breaches of WHS duties that result in workplace fatalities.

1890. Schedule 4 would also:

- repeal and replace provisions dealing with criminal liability for bodies corporate, the Commonwealth, and public authorities. These amendments reflect recent changes to the model Act, with appropriate modifications and additional provisions where necessary;
- clarify that the Category 1 offence applies to officers of PCBUs;
- significantly increase Category 1 penalties;
- increase all penalties in the WHS Act by 39.03 per cent and provide for future indexing (giving effect to recommendation 22 of the Boland Review).
- provide for a Family and Injured Workers Advisory Committee in the WHS Act.

Part 1—Industrial manslaughter

Amendments to the *Work Health and Safety Act 2011*

Item 1: After section 30

1891. The Bill would insert new section 30A into the WHS Act providing for an industrial manslaughter offence. The new offence would apply to 'officers' and PCBUs whose negligent conduct or recklessness causes the death of an individual.

Core elements of new offence

1892. New subsection 30A(1) would provide for when a person commits an offence of industrial manslaughter, with each paragraph outlining one element of the offence.

1893. New paragraph 30A(1)(a) would require that a person either be a PCBU (as defined in section 5 of the WHS Act) or an officer of a PCBU (officer is defined in section 4 of the WHS Act). The new offence would apply to PCBUs and officers because of their elevated responsibilities within the workplace.

1894. Due to the operation of subsection 12F(2) of the WHS Act, strict liability applies to this element. Strict liability is appropriate for this element as the element is analogous to a jurisdictional element – that is, the element does not go to the substance of the offence. New paragraph 30A(1)(a) would ensure the offence only captures those within the Commonwealth's WHS jurisdiction.

1895. The application of strict liability to a particular element means that the prosecution is not required to prove fault in relation to that matter. However, as per paragraph 6.1(2)(b) of the Criminal Code, the defence of mistake of fact under section 9.2 of the Criminal Code would be available in relation to these elements. This means where the accused produced evidence of an honest and reasonable, but mistaken, belief in the existence of certain facts which, if true, the conduct would not have constituted the offence, it will be incumbent on the prosecution to establish that there was not an honest and reasonable mistake of fact.

1896. New paragraph 30A(1)(b) would require that the person has a health and safety duty. Due to the operation of subsection 12F(2) of the WHS Act, strict liability applies to this element. As with paragraph 30A(1)(a), this element is analogous to a jurisdictional element as it does not go to the substance of the offence, but ensures the offence only captures those subject to the Commonwealth's WHS jurisdiction.

1897. New paragraph 30A(1)(c) would require that the person intentionally engages in conduct. This would require that the person intentionally engaged in the conduct that constitutes the offence. As per the wording of the paragraph, intention (as defined in the Criminal Code) is the applicable fault element. Due to the operation of subsection 12F(2) of the WHS Act it is necessary to explicitly include 'intentionally', otherwise strict liability would apply to the paragraph. The new criminal responsibility provisions contained in Parts 3, 4 and 5 of Schedule 4 to the Bill deal with how intention can be proven in relation to bodies corporate, the Commonwealth, and public authorities (respectively).

1898. New paragraph 30A(1)(d) would require the conduct to have breached the health and safety duty. Due to the operation of subsection 12F(2) of the WHS Act, strict liability applies to this element. While breach of duty is central to the offence, it would not be appropriate to apply a fault element to this element. Most offences in the WHS Act, including the Category 2 and Category 3 offences are strict liability.

1899. Including strict liability as a feature of offences was carefully considered when the WHS Act was first introduced as the presumption of innocence can be seen to be impinged by removing the requirement for the prosecution to prove fault in relation to one or more physical elements of an offence. WHS offences arise in a regulatory context where, for reasons such as public safety, and the public interest in ensuring that regulatory schemes are observed, the sanction of criminal penalties is justified. The offences also arise in a context where a defendant can reasonably be expected, because of their professional involvement, to know what the requirements of the law are, and the mental, or fault, element can be justifiably excluded. The rationale is that people who owe WHS duties such as employers, persons in control of aspects of work, and designers and manufacturers of work structures and products, as opposed to members of the general public, can be expected to be aware of their duties and obligations to workers and the wider public. The industrial manslaughter offence would apply to PCBUs, and 'officers' (the most senior persons in an organisation).

1900. Other elements which interact closely with this element (specifically the requirement to *intentionally* engage in the conduct (paragraph 30A(1)(c)) and the requirement that the person was *reckless or negligent* as to whether the conduct would cause the death (paragraph 30A(1)(f)), provide sufficient application of fault to the offence.

1901. New paragraph 30A(1)(e) would require that the conduct caused the death of an individual. 'Causes' is defined in new subsection 30A(2) (see below). Causing the death of a person is central to this offence and the reason for the high penalties (see below).

1902. New paragraph 30A(1)(f) would provide that the relevant fault elements for paragraph 30A(1)(e) are that the person was reckless or negligent as to whether their conduct would cause the death of an individual. Recklessness and negligence are defined in the Criminal Code. Parts 3, 4 and 5 of Schedule 4 to the Bill deal with how negligence and recklessness can be proven in relation to bodies corporate, the Commonwealth, and public authorities (respectively).

1903. The Criminal Code definition of negligence reflects what is commonly referred to as 'gross negligence'. A person would be negligent in respect to causing a death if their conduct involves such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk that the conduct warrants criminal punishment.

Negligence as a fault element

1904. The application of negligence as a fault element to industrial manslaughter has been carefully considered. Negligence was recently inserted into section 31 of the WHS Act.

This change lowered the threshold for prosecution and gave effect to recommendation 23b of the Boland Review. Recommendation 23b arose because it was considered that the threshold to prove the fault element of recklessness was too high and difficult to establish in a WHS context, meaning the offence was failing to meet its objective of ensuring compliance through deterrence.

1905. Including negligence as a fault element is consistent with the Guide, which notes the use of negligence is supported where the context of negligence is a well-established indication of liability. The Guide expressly references WHS laws as an example because WHS duties require the proactive identification and management of risks. WHS breaches can result in substantial harm to workers including serious injury, illness or death.

Penalties

1906. New subsection 30A(1) would prescribe the penalties for an industrial manslaughter offence. The new penalties are a maximum of 25 years imprisonment for individuals and a fine of $18 million for bodies corporate or the Commonwealth. The maximum penalty for individuals found guilty of industrial manslaughter (25 years' imprisonment) reflects manslaughter penalties in the Criminal Code. This is consistent with the Guide which states that where an offence is comparable to an offence in the Criminal Code, the penalty under the Criminal Code should be adopted.

1907. The maximum monetary penalty of $18 million reflects the seriousness of the offence and is consistent with the penalty for industrial manslaughter in the model Act. This penalty provides a clear and effective punishment that acts as a deterrent against breaching WHS duties.

Causation

1908. New subsection 30A(2) would define 'causes' for the purpose of subsection 30A(1). Under this definition a person's conduct is taken to have caused a death if the conduct substantially contributes to the death. This ensures for example, that where a worker is seriously injured at a workplace and later dies in hospital, the death can be prosecuted as industrial manslaughter if other elements are made out. Where conduct is found to have substantially contributed to a workplace death, that is sufficient to satisfy paragraph 30A(1)(e) – the conduct need not be the sole cause of death. Egregious WHS failings are often a consequence of various elements, such as a failure of workplace management to provide and maintain effective WHS supervision and protections and the direct conduct of individuals.

1909. New subsection 30A(3) would disapply subsection 4B(2) of the Crimes Act which would otherwise allow a court to substitute a pecuniary penalty for a term of imprisonment. The intention of this subsection is to ensure that the deterrent effect of a maximum penalty of 25 years' imprisonment for individuals cannot be diluted.

Alternative verdicts

1910. New subsection 30A(4) would allow a court to find the defendant guilty of either a Category 1 or Category 2 offence should they be unsatisfied that the defendant is guilty of industrial manslaughter. This would be caveated by the requirement that the court

may only find the person guilty of the alternative offence if they have been accorded procedural fairness.

1911. New subsection 30A(5) would provide that any limitation period which would have applied to the alternative offence of which the accused is found guilty would not apply. This would mean that if the prosecution commenced industrial manslaughter proceedings outside the limitation period that applied to, for example, a Category 2 offence (two years after the offence first comes to the notice of the regulator or one year after a coronial finding – see section 232 of the WHS Act), it would not impact the ability of a court to find the accused guilty of a Category 2 offence in the alternative.

Item 2: Subsection 216(2)

Item 3: At the end of subsection 216(2)

1912. Item 2 would amend subsection 216(2) to align the language used in the rest of the section for clarity .

1913. Item 3 would amend subsection 216(2) to ensure that a WHS undertaking cannot be accepted in relation to an industrial manslaughter offence. Industrial manslaughter would be the most serious WHS offence and it would be inappropriate to allow enforceable undertakings in these circumstances. Existing section 216 provides that WHS undertakings are not available for an alleged contravention which is a Category 1 offence.

Item 4: Subparagraphs 231(1)(a)(i) and (ii)

Item 5: Subsection 231(3)

1914. Section 231 of the WHS Act would be amended to allow a person who reasonably believes an industrial manslaughter (or Category 1 or Category 2) offence has been committed but no prosecution has been brought to ask the regulator, in writing, to bring a prosecution. The existing procedure would not change.

Item 6: Before subsection 232(2)

Item 7: After subsection 232(2)

Item 8: Before subsection 232(3)

1915. Items 6 to 8 would amend section 232 of the WHS Act to ensure that no limitation period would apply to an industrial manslaughter prosecution and would also provide a clear categorisation of the definitions in this section. Because of the seriousness of the industrial manslaughter offence a limitation period is considered inappropriate.

Item 9: Application provision

1916. Item 9 would provide that the new offence in section 30A applies to conduct engaged in on or after the commencement of the Part.

Part 2—Category 1 offence

Amendments to the *Work Health and Safety Act 2011*

1917. Part 2 would make a technical change to paragraph 31(1)(b) of the WHS Act to clarify that an officer may commit a Category 1 offence. Officers are senior persons in an organisation who make decisions that affect the whole or a substantial part of the business or undertaking – for example, a CEO (see section 4 of the WHS Act). It has always been understood that these persons, like any duty holder, are liable for a Category 1 offence. The amendment would make this clear.

1918. New paragraph 31(1)(b) raises two scrutiny issues which have previously been explained in explanatory materials but are set out again here for clarity .

Negligence as a fault element

1919. A recent change to the Category 1 offence added negligence as a fault element in section 31 of the WHS Act (*Work Health and Safety Amendment Act 2023*). This change lowered the threshold for prosecution and gave effect to recommendation 23b of the Boland Review. This recommendation arose because it was considered that the threshold to prove the fault element of recklessness was to too high and difficult to establish, meaning the offence was failing to meet its objective of ensuring compliance through deterrence.

1920. Including negligence is consistent with considerations outlined in the Guide, which notes the use of negligence is supported where the context of negligence is a well-established indication of liability. The Guide expressly references WHS laws as an example because WHS duties require the proactive identification and management of risks. The Category 1 offence has significant penalties (which would be increased by Part 6 of this Schedule). A Category 1 breach can result in substantial harm to workers including serious injury, illness or death.

Reasonable excuse

1921. The Category 1 offence is drafted to align with the model Act which includes a ‘reasonable excuse’ defence in paragraph 31(1)(b). The Guide cautions against the use of ‘reasonable excuse’ defences in Commonwealth laws and prefers to rely on the Criminal Code or specific defences. In this case, alignment with the model laws which furthers the harmonisation of WHS laws in Australia is preferred. For completeness, in these circumstances it is considered appropriate to impose the evidential burden associated with the ‘reasonable excuse’ defence on the defendant because the existence of an excuse would be peculiarly within the knowledge of the defendant.

Item 10: Paragraph 31(1)(b)

1922. An officer’s duty in section 27 of the WHS Act is expressed as being owed to a PCBU (to ensure the PCBU’s compliance with its WHS duties), rather than to an individual (as required by existing section 31). However, the penalties for a breach of section 31 include a penalty for a breach of the duty by an officer of a PCBU.

1923. This amendment would clarify that an officer may commit a Category 1 offence under section 31 of the WHS Act by specifying that the offence is committed if the officer of

a PCBU exposes an individual (to whom the PCBU owes a health and safety duty) to a risk of death or serious illness or injury.

Part 3—Corporate criminal liability

Amendments to the *Work Health and Safety Act 2011*

1924. A body corporate is an artificial entity that can only act and make decisions through individuals. Corporate criminal responsibility for WHS offences is currently dealt with in Part 2.5 of the Criminal Code, as noted in existing section 244 of the WHS Act.

1925. Part 3 of this Schedule would adopt recent amendments to the model Act, with minor modifications to ensure the provisions work alongside the Criminal Code which provides relevant definitions and a broader criminal law framework. This approach would depart from existing section 244 which allows the existing corporate criminal responsibility provisions in the Criminal Code to apply, rather than adopt the model provisions for bodies corporate.

1926. The model amendments are based on Part 2.5 of the Criminal Code, with modifications to adopt relevant recommendations of the Australian Law Reform Commission Report 136 (Corporate Criminal Responsibility). In particular, Part 3 of this Schedule includes a definition of 'authorised person' which allows for the conduct of officers, employees and agents acting within their actual or apparent authority to be attributed to a body corporate. This is broader than the approach in the Criminal Code which provides for attribution of the actions of 'high managerial agents' to a body corporate. A high managerial agent is a senior person within an organisation whose conduct could be fairly assumed to represent the body corporate's policy (section 12.4 Criminal Code).

1927. Part 3 of this Schedule also includes a provision based on section 12.4 of the Criminal Code to ensure that the WHS Act deals with how negligence can be proven in relation to a body corporate. Negligence is not dealt with in the model provisions but has been included to maintain parity with the Criminal Code which would otherwise apply to a body corporate.

1928. Part 3 would repeal section 244 of the WHS Act and insert new sections 244A–244D. Sections 244A and 244B would set out the circumstances in which the physical and fault elements of an offence are attributed to a body corporate.

1929. New sections 244A and 244B would also allow for aggregation of conduct. This enables the conduct of authorised persons within a body corporate to be considered as a whole in determining whether the body corporate has committed an offence with the relevant state of mind for that offence. This means the same individual would not need to have engaged in the relevant conduct and also hold the relevant state of mind (fault element) in order to prove an offence against a body corporate.

Item 11: Section 4

1930. Item 11 would insert four new definitions into existing section 4. These defined terms are used in provisions inserted by Part 3. The definitions of 'fault element' and 'physical element' are used in provisions inserted by Part 4 as well:

- 'authorised person' – would be given the meaning in new section 244;

- ‘board of directors’ – would be given the meaning in new section 244;
- ‘fault element’, in relation to an offence, would be defined to have the same meaning as in the Criminal Code;
- ‘physical element’, in relation to an offence, would be defined to have the same meaning as in the Criminal Code.

Item 12: Before subsection 12F(1)

Item 13: Before subsection 12F(2)

1931. Items 12 and 13 would insert subheadings into existing section 12F.

Item 14: At the end of section 12F

1932. Item 14 would insert new subsection 12F(4). Subsection 12F(4) would provide that Part 2.5 of the Criminal Code, which currently applies to offences committed by a body corporate against the WHS Act, does not apply to an offence against the WHS Act. The Criminal Code needs to be disapplied because it applies by default to Commonwealth offences due to section 2.2 of the Criminal Code. As set out above, the provisions in this Bill would insert a ‘modified’ Criminal Code approach to establishing fault for bodies corporate. The rationale for applying WHS specific provisions instead of Part 2.5 is alignment with the model work health and safety laws.

Item 15: Section 244

1933. Item 15 would insert new sections 244–244E. These provisions are based on the model Act amendments, with some modifications where noted.

1934. New section 244 would define two terms used throughout the new sections:

- ‘authorised person’ for a body corporate would be defined to mean an officer, employee or agent of the body corporate acting within the officer’s, employee’s or agent’s actual or apparent authority. The definition of ‘authorised person’ incorporates the common law doctrine of actual and apparent authority. A person’s actual or apparent authority may extend beyond the actual or apparent scope of his or her employment. Actual authority derives from the relationship between the principal and the agent (*Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 [502]). Apparent authority is created by the relationship between the principal and the third party: An ‘apparent’ or ‘ostensible’ authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the ‘apparent’ authority, so as to render the principal liable to perform any obligations imposed upon him by such contract (*Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 [502]);
- ‘board of directors’ would be defined to mean the body, whatever it is called, exercising the executive authority of the body corporate.

1935. New section 244A would provide the situations in which the conduct of an offence would be attributed to a body corporate. Section 244A would provide that the conduct constituting the physical elements of an offence would be taken to have been committed by a body corporate if the conduct is committed by:

- the body corporate's board of directors; or
- one or more authorised persons for the body corporate; or
- one or more persons acting at the direction of or with the express or implied agreement or consent of:
    - an authorised person for the body corporate; or
    - the body corporate's board of directors.

1936. New section 244B would provide how the fault elements of an offence are attributed to a body corporate for fault elements other than negligence.

1937. Where it is necessary to establish a state of mind (fault element) of a body corporate in relation to the commission of the physical element of an offence, new subsection 244B(1) would provide that it is sufficient to show that:

- the body corporate's board of directors:
    - engaged in the conduct constituting the offence and had that state of mind in relation to that physical element; or
    - expressly, tacitly or impliedly authorised or permitted the conduct constituting the offence; or
- an authorised person for the body corporate:
    - engaged in the conduct constituting the offence and had that state of mind in relation to that physical element of the offence; or
    - expressly, tacitly or impliedly authorised or permitted the conduct constituting the offence; or
- a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to the conduct constituting the offence.

1938. New subsection 244B(3) would set out factors that are relevant to determining whether a corporate culture existed for the purposes of paragraph 244B(1)(c). These factors are not meant to be exhaustive.

1939. New subsection 244B(2) would create specific defences that provide paragraphs 244B(1)(b) and (c) do not apply if the body corporate proves it took reasonable precautions to prevent the conduct, authorisation or permission of the conduct. Subsection 244B(2) requires the defendant to discharge the legal burden in relation to that matter, that is, they must positively prove that such reasonable precautions were taken. Section 13.5 of the Criminal Code provides that a legal burden imposed on the defendant must be discharged on the balance of probabilities. This

reversal of the burden of proof is justifiable because the of steps taken to prevent WHS breaches are peculiarly within the knowledge of the defendant. Also, the inside access to specialised information and corporate knowledge available to the body corporate as to the actual steps taken, and the context for those choices, would mean that it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

1940. Additionally, the Guide provides that casting a matter as a defence is more readily justified if the conduct proscribed by the offence poses a grave danger to public health or safety. Conduct constituting a WHS breach often poses a such danger.

1941. Subsection 244B(4) would define 'corporate culture' and 'corporate officer' for the purpose of section 244B. Corporate culture is defined similarly to subsection 12.3(6) of the Criminal Code to mean one or more attitudes, policies, rules, courses of conduct or practices existing within the body corporate generally or in the part of the body corporate in which the relevant activity takes place. Corporate officer is defined by reference to section 9 of the Corporations Act.

1942. New section 244BA would provide that the test of negligence for a body corporate is that set out in section 5.5 of the Criminal Code. It would also replicate section 12.4 of the Criminal Code to explain how negligence is attributed to a body corporate. In a body corporate negligence often occurs across multiple layers of the organisation and in the actions of multiple persons. New section 244BA would provide that fault may exist where no individual employee, agent or officer of the body corporate has that state of mind but the body corporate's conduct is negligent when viewed as a whole. This allows the conduct of multiple individuals to be aggregated and attributed to the body corporate.

1943. New subsection 244BA(2) would provide that negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

- inadequate management, control or supervision of the conduct of one or more of the body corporate's employees, agents or officers; or
- failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

1944. New section 244C would provide a mechanism by which a body corporate can rely on the defence of mistake of fact, if mistake of fact is relevant to determining liability for an offence. A body corporate may rely on mistake of fact only if:

- the employee, agent or officer of the body corporate who engaged in the conduct constituting the offence was under a mistaken but reasonable belief about facts that, had they existed, would have meant the conduct would not have constituted the offence; and
- the body corporate proves it took reasonable precautions to prevent the conduct. The rationale for a reverse onus is explained in relation to new section 244B which is similar.

1945. New section 244D would set out factors that may be used to establish that a body corporate failed to take reasonable precautions, in relation to subsection 244B(2) and section 244C. A failure to take reasonable precautions may be evidenced by the fact that the conduct constituting the offence was substantially attributable to:

- inadequate management, control or supervision of the conduct of one or more of the body corporate's employees, agents or officers; or
- failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

1946. New section 244E is not a model Act provision. The section would provide that if a body corporate is a public authority, the Division applies in relation to the body corporate in accordance with new section 251.

Part 4—Commonwealth criminal liability

Amendments to the *Work Health and Safety Act 2011*

1947. Part 4 of the Schedule is mirrored on new Part 3, with necessary modifications to reflect the nature of the Commonwealth. This approach would allow criminal liability to be attributed to the Commonwealth in a similar way to a body corporate. The Commonwealth as a PCBU undertakes its work and activities though agencies. Without these provisions, the prosecution of the Commonwealth as a large, dispersed entity would be very difficult.

1948. Currently, criminal liability for the Commonwealth is set out in section 245 of the WHS Act and reflects the model Act provisions which apply to the Crown. Part 4 would repeal and replace those provisions, to align with the approach to corporate criminal liability in the model Act. As explained above, this approach is based on Part 2.5 of the Criminal Code, with modifications.

No Crown immunity from criminal prosecution

1949. The Crown cannot be held criminally responsible unless legislation provides to the contrary. The Guide provides that for the Crown to be bound by the provisions of a statute, there must be clear words or a necessary implication that the Crown is so bound. Section 10 of the WHS Act explicitly binds the Commonwealth.

1950. Commonwealth WHS duties are enforced by criminal offences because they can result in significant physical or psychological harm to persons and impact the community more generally. Other WHS jurisdictions, both domestic and international, do not include Crown immunity in their laws. The *National Review into Model Occupational Health and Safety Laws – First Report* which informed development of the model Act, noted this had not caused any difficulty. It is intended the Commonwealth would remain subject to the WHS Act in its entirety and that no Crown immunity exception would exist.

Item 16: Section 4

1951. Item 16 would insert two new definitions:

- ‘authorised person’ – see new section 245 below.
- ‘executive’ of an agency of the Commonwealth – see new section 245 below.

Item 17: Section 4 (definition of *officer*)

1952. Item 17 would repeal and replace the existing definition of ‘officer’. Minor changes would be made to the definition which do not affect the meaning of the existing term.

Item 18: Section 245

1953. Item 18 would repeal existing section 245 which sets out criminal liability and replace it with new sections 245–245E.

1954. New section 245 would insert three definitions which are used in the new Part:

- ‘authorised person’, for the Commonwealth would be defined to mean an officer, employee or agent of the Commonwealth acting within their actual or apparent authority;
- ‘executive’ of an agency of the Commonwealth, would be defined to mean the person or body, whatever the person or body is called, exercising the executive authority of the agency. This is intended to operate similarly to the definition of ‘board of directors’ in relation to a body corporate. It would cover for example, the executive board of an agency;
- ‘officer’ of an agency of the Commonwealth would be defined to mean a person who makes, or participates in making, decisions that affect the whole or a substantial part of the business or undertaking of the agency. A definition is required for this Part because of the way the corporate criminal liability provisions have been used as a base for provisions.

1955. New sections 245A–D are modelled on new sections 244A–D. Detailed explanations on those sections are set out above. The sections have been adapted to refer to the Commonwealth instead of a corporation and to the definition of executive rather than board of directors. Other minor modifications are made, for example the definition of ‘corporate culture’ refers to the culture within an agency of the Commonwealth.

1956. New section 245E would replicate existing subsection 245(1) which provides that the applicable penalty to the Commonwealth is the penalty applicable to a body corporate.

Part 5—Criminal liability of public authorities

Amendments to the *Work Health and Safety Act 2011*

Item 19: Section 251

1958. Part 5 deals with criminal responsibility for public authorities. Item 19 would repeal existing section 251 of the WHS Act and provide that Division 4 of Part 13 of the WHS Act (corporate criminal responsibility) applies to a public authority. The amendments to Division 4 are set out above.

1959. The existing definition of 'public authority' in section 4 of the WHS Act covers different bodies corporate, for example a body corporate established under a Commonwealth law.

Part 6—Penalties

Amendments to the *Work Health and Safety Act 2011*

1960. This Part would increase penalties for all Commonwealth WHS offences. It consists of three measures: a general increase to all penalties that would give effect to Recommendation 22 of the Boland Review to update the penalty levels in the model Act, a significant increase to the penalty for the Category 1 offence to reflect the seriousness of the offence, and a mechanism for future indexing of penalties to ensure penalties remain effective and appropriate.

1961. The general 39.03 per cent increase in monetary penalties represents the average increase in penalty units for non-WHS offences across all jurisdictions since 2011 (when the model Act was introduced).

1962. The significant increase to penalties for the Category 1 offence in this Part exceeds the similar increase in the recent amendments to the model Act. The decision to depart from the model Act was made to ensure the coherence of the Commonwealth WHS offence penalty scheme. Workplace fatalities could be prosecuted as either an industrial manslaughter offence or a Category 1 offence. Adopting the model penalty for Category 1 would conflict with the principle set out in the Guide which holds that a penalty should be consistent with penalties of a similar kind or of a similar seriousness.

1963. The significant increase to penalties for the Category 1 offence in this Part exceeds the similar increase in the recent amendments to the model Act. The decision to depart from the model Act was made to ensure the coherence of the Commonwealth WHS offence penalty scheme. Workplace fatalities could be prosecuted as either an industrial manslaughter offence or a Category 1 offence. Adopting the model penalty for Category 1 would conflict with the principle set out in the Guide which holds that a penalty should be consistent with penalties of a similar kind or of a similar seriousness.

1964. Given the number of individual penalty provisions and the introduction of annual indexation to adjust penalty amounts for changes in the national CPI, it was considered impractical to modify each penalty provision annually. Each offence penalty is currently expressed in a dollar figure which would require that after each annual indexation occurred hundreds of amendments would be required to update those figures in each provision. This would be unduly burdensome. To account for this, the following items would replace each individual penalty amount with a reference to the relevant penalty tier set out in new Schedule 4. Indexation will be applied to the penalty tier amounts set out in new Schedule 4 and as a result apply automatically to each provision that specifies that penalty tier as the maximum penalty amount for that offence or civil penalty provision.

1965. There would be three kinds of penalty tiers:

- Category penalties would be the penalties set for the three category offences in Part 2 of the WHS Act (sections 31–33).

- There would be nine different monetary penalty tiers used for the general offences in the WHS Act and Regulations reflecting the nine different penalty levels used in the WHS Act and Regulations.
- There would be four WHS civil penalty provision tiers for the four different civil penalty amounts used in Part 7 of the WHS Act.

1966. Penalties in this Bill and in the WHS Act are not expressed in penalty units which conflicts with the general principle set out in the Guide. However, the Guide also provides that in limited circumstances (including in the case of a national uniform scheme like the WHS scheme), penalties should be expressed in dollars rather than penalty units. This is supported by the *Protocol on Drafting National Uniform Legislation* which recommends that offences in such laws should also express penalties in dollars rather than penalty units to ensure uniformity.

1967. The method of indexation is also different to that provided by subsection 4AA(3) of the Crimes Act. To promote harmonisation of WHS laws and penalties across jurisdictions, a deliberate choice has been made to align with model penalty increases rather than Commonwealth penalty increases.

Division 1—Definitions

Item 20: Section 4

1968. This item would amend section 4 of the WHS Act to create new definitions for each of the penalty provision tiers. The new definitions take their meaning from the relevant clause of new Schedule 4, which is also where the monetary value of those penalties would be set out.

Division 2—Categorised monetary penalties for offences

Item 21: Subsection 31(1) (penalty)

1969. This item would amend subsection 31(1) to repeal the current penalty. It would set the new penalty for a Category 1 offence to the Category 1 monetary penalty (defined in new Schedule 4, see Item 72) or 15 years imprisonment or both for individuals, and the Category 1 monetary penalty (defined in new Schedule 4, see Item 72) for body corporates and the Commonwealth.

1970. This penalty is significant as the Guide specifies that offences should have penalties that are adequate to deter and punish a worst-case offence. Higher maximum penalties are justified where there are strong incentives to commit the offence, or where its consequences are particularly dangerous or damaging. The Category 1 offence and corresponding penalty are intended to capture some of the most egregious WHS breaches the consequences of which can be catastrophic – for example, where a person's reckless conduct causes death.

1971. Following the decision of WHS Ministers to significantly increase the Category 1 penalty, the Commonwealth elected to further raise the penalty from that agreed by SWA members on the basis that to do so would provide a more coherent Commonwealth WHS penalty scheme (discussed above).

Item 22: Section 32 (penalty)

1972. This item would amend section 32 to remove the current Category 2 penalty and set the new penalty as the Category 2 monetary penalty defined in new Schedule 4.

Item 23: Section 33 (penalty)

1973. This item would amend section 33 to remove the current Category 3 penalty and set the new penalty as the Category 3 monetary penalty defined in new Schedule 4.

Division 3—Tier A monetary penalties for offences

Item 24: Subsections 104(1), 107(1), 108(1) and 109(1) (penalty)

Item 25: Section 197 (penalty)

1974. These items would amend subsections 104(1), 107(1), 108(1), 109(1) and section 197 to remove the current penalty and set the new penalty as the tier A monetary penalty defined in new Schedule 4.

Division 4—Tier B monetary penalties for offences

Item 26: Section 41 (penalty)

Item 27: Subsection 99(2) (penalty)

Item 28: Section 190 (penalty)

Item 29: Section 193 (penalty)

Item 30: Subsection 200(1) (penalty)

Item 31: Section 219 (penalty)

Item 32: Subsection 242(1) (penalty)

1975. These items would amend section 41, subsection 99(2), sections 190 and 193, subsection 200(1), section 219 and subsection 242(1) to remove the current penalty and set the new penalty as the tier B monetary penalty defined in new Schedule 4.

Division 5—Tier C monetary penalties for offences

Item 33: Subsections 42(1) and (2), 43(1) and (2) and 44(1) and (2) (penalty)

Item 34: Section 45 (penalty)

Item 35: Section 46 (penalty)

Item 36: Subsection 47(1) (penalty)

1976. These items would amend subsections 42(1) and (2), 43(1) and (2), and 44(1) and (2), sections 45 and 46, and subsection 47(1) to remove the current penalty and set the new penalty as the tier C monetary penalty defined in new Schedule 4.

Division 6—Tier D monetary penalties for offences

Item 37: Subsections 38(1) and 39(1) (penalty)

Item 38: Subsection 52(5) (penalty)

Item 39: Subsection 56(2) (penalty)

Item 40: Subsection 61(4) (penalty)

Item 41: Subsections 70(1) and (2), 71(2) and 72(7) (penalty)

Item 42: Subsections 79(1), (3) and (4) (penalty)

Item 43: Subsection 155(5) (penalty)

Item 44: Subsection 165(2) (penalty)

Item 45: Subsections 171(6) and 177(2) and (6) (penalty)

Item 46: Subsection 185(4) (penalty)

Item 47: Sections 188 and 189 (penalty)

Item 48: Subsections 271(2) and (4) (penalty)

1977. These items would amend subsections 38(1), 39(1), 52(5), 56(2) 61(4), 70(1) and (2), 71(2), 72(7), 79(1) and (3) and (4), 155(5), 165(2), 171(6), 177(2) and (6), 185(4) and sections 188 and 189, and subsections 271(2) and (4) to remove the current penalty and set the new penalty as the tier D monetary penalty defined in new Schedule 4.

Division 7—Tier F monetary penalties for offences

Item 49: Subsection 38(7) (penalty)

Item 50: Subsection 75(1) (penalty)

Item 51: Subsections 97(1) and (2) (penalty)

Item 52: Subsections 210(1) and (2) (penalty)

Item 53: Section 273 (penalty)

1978. These items would amend subsections 38(7), 75(1), 97(1) and (2), 210(1) and (2) and section 273 to remove the current penalty and substitute the tier F monetary penalty defined in new Schedule 4.

Division 8—Tier H monetary penalties for offences

Item 54: Subsections 53(1) and (2) (penalty)

Item 55: Subsections 57(1) and (2) (penalty)

Item 56: Subsection 74(1) (penalty)

1979. These items would amend subsections 53(1) and (2), 57(1) and (2) and 74(1) to remove the current penalty and set the new penalty as the tier H monetary penalty defined in new Schedule 4.

Division 9—Penalties for WHS civil penalty provisions

Item 57: Subsection 118(3) (penalty)

Item 58: Section 123 (penalty)

Item 59: Sections 124 to 126, 128 and 129 (penalty

Item 60: Section 143 (penalty)

Item 61: Subsection 144(1) (penalty)

Item 62: Sections 145 and 146 (penalty)

Item 63: Subsection 147(1) (penalty)

Item 64: Section 148 (penalty)

Item 65: Subsection 149(1) (penalty)

Item 66: Section 150 (penalty)

1980. These items would amend provisions to remove the current penalty and set the new penalty as either a tier 1, 2, 3 or 4 WHS civil penalty provision penalty as defined in new Schedule 4.

1981. Section 123 would be amended to include a tier 1 WHS civil penalty provision penalty.

1982. Subsection 118(3), sections 124, 125, 126, 128, 129, 143, subsection 144(1), sections 145 and 146, subsection 147(1) and section 128 would be amended to include a tier 2 WHS civil penalty provision penalty.

1983. Section 150 would be amended to include a tier 3 WHS civil penalty provision penalty.

1984. Subsection 149(1) would be amended to include a tier 4 WHS civil penalty provision penalty.

Item 67: Paragraphs 254(1)(a) and (2)(a)

Item 68: Subsection 259(2)

1985. These items would amend paragraphs 254(1)(a) and (2)(a) and subsection 259(2) to make minor technical amendments consequential to other Division 9 amendments.

Item 69: Application provision

1986. This item would provide that Division 9 would only apply in relation to contraventions of WHS civil penalty provisions that occur on or after the commencement of the Division.

Division 10—Penalties prescribed by the regulations

Item 70: Paragraph 276(3)(h)

1987. This item would make a minor technical amendment to the Governor General's regulation-making powers provisions to account for the changes to penalty indexing. The regulations currently allow the Governor-General to make regulations which prescribe a penalty for any contravention not exceeding $30,000. This item would replace the monetary figure of $30,000 with the following penalty tiers which may be prescribed as the penalty for an offence under regulations:

- a tier E monetary penalty;
- a tier F monetary penalty;
- a tier G monetary penalty;
- a tier H monetary penalty;
- a tier I monetary penalty.

Item 71: Transitional provision—existing penalty provisions

1988. This item is a transitional provision which would apply to provisions in the WHS Regulations which prescribe a monetary penalty for an offence. It would allow monetary penalty provisions to remain in force after the commencement of Division 10 despite the changes which would be made to regulation making powers by item 70.

1989. Subitem 71(3) would allow an existing penalty provision to be repealed or amended by regulations made under section 276 of the WHS Act.

Division 11—Penalty amounts

Item 72: At the end of the Act

1990. This item would introduce a new Schedule 4 to the WHS Act setting out monetary penalties for Categories 1 to 3, tiers A to I and the WHS civil penalty provisions tiers 1 to 4. The penalty amounts would be subject to indexation which is set out in clause 4 of the Schedule.

1991. Clause 1 would establish the maximum monetary penalties for offences under the WHS Act where a Category 1, 2 or 3 monetary penalty is specified. The maximum monetary penalty is set out in the table to clause 1 as indexed under clause 4 and rounded under clause 5.

1992. For categories 1 to 3 there are different maximum monetary penalties for an individual (as a PCBU or as an officer of a PCBU), an individual (otherwise) and a body corporate or the Commonwealth. The penalty amounts in the table to clause 1 include the 39.03 per cent increase to monetary penalties for Category 2 and 3 offences (which represents the average increase in penalty units for non-WHS offences across all jurisdictions since the introduction of the model Act in 2011), and the significant increase for Category 1 offences.

1993. Clause 2 would establish the maximum penalty for offences under the WHS Act and Regulations where a tier A, B, C, D, E, F, G, H or I monetary penalty is specified. The maximum penalty is set out in the table to clause 2 as indexed under clause 4 and rounded under clause 5.

1994. Clause 3 would establish the maximum penalty for WHS civil penalty provisions under Part 7 of the WHS Act where a tier 1, 2, 3, or 4 monetary penalty is specified. The maximum penalty is set out in the table to this subclause as indexed under clause 4 and rounded under clause 5.

1995. Clause 4 would provide for the indexation of penalty amounts in the WHS Act to reflect increases in CPI (discussed above). This is achieved by introducing an indexation formula to be applied annually to all monetary penalties in the WHS Act and Regulations.

1996. Subclause 4(1) would establish that each monetary penalty set out in clauses 1–3 must be indexed for the year commencing on 1 July 2024 and each subsequent year in accordance with clause 4.

1997. Subclause 4(2) would contain the formula for calculating the maximum amount of each monetary penalty that will apply in each year. This formula is adapted from the indexation formula used in subsection 242B(1) of the *Work Health and Safety Act 2011* (NSW).

1998. The denominator year of 2022 would apply because the calculation of the one-off increase (of 39.03 per cent) was for the period from the commencement of the model WHS law in 2011 until 2021.

1999. Subclause 4(3) would provide that if the maximum amount of a monetary penalty calculated for a year is less than the amount that applied in the previous year, then the amount for the previous year continues to apply. This ensures that penalty levels do not decrease.

2000. Clause 5 would specify that for penalties under $10,000 and which are not a multiple of $100, the maximum monetary penalty would be rounded down to the nearest $100. Where the amount is a multiple of $50 it is to be rounded down. For penalties more than $10,000 and not a multiple of $1000, the maximum amount of the penalty would be rounded to the nearest $1000 and a multiple of $500 would be rounded down.

2001. Clause 6 would provide that as soon as practicable after publication by the Australian Statistician of the CPI number for the March quarter each year, the regulator must give notice of the maximum amount of each monetary penalty calculated under Schedule 4 by notifiable instrument.

2002. Clause 7 defines ‘CPI number’ and ‘year’ for the purpose of Schedule 4.

Part 7—Tied amendments

Amendments to the *Work Health and Safety Act 2011*

2003. This item would amend the WHS Act and replace the referenced penalty provision to align it with the newly introduced tiered monetary penalty system.

Item 73: Subsections 272A(1) and 272B(1) (penalty)

2004. This item would amend the reference of maximum penalties available for these two offences to be a tier B monetary penalty.

2005. The offences in subsections 272A(1) and 272B(1) will be inserted by the *Work Health and Safety Amendment Act 2023* when it commences (which will occur no later than 21 September 2023). Item 73, which would commence after the commencement of that Act, would amend subsections 272A(1) and 272B(1) to ensure the new method of categorisation and indexation of penalties also applies to them.

Part 8—Family and Injured Workers Advisory Committee

2006. This Part would amend the WHS Act to provide for a Family and Injured Workers Advisory Committee (the Advisory Committee). The Advisory Committee would provide a representative forum for people with lived experience of serious workplace incidents to share their perspectives, give advice and make recommendations to the Minister about the needs of persons affected by serious work-related incidents. The Advisory Committee would also give advice to Commonwealth WHS regulators (Comcare, AMSA and NOPSEMA). Advice to regulators would be about their engagement with persons affected by serious work related incidents, and the development of relevant policies and strategies.

2007. This Part would complement other measures in Schedule 4 to the Bill by ensuring the voices of those with relevant lived experience inform the policies and supports for those who are affected by serious work-related incidents.

2008. The establishment of the Committee aligns with the *National Principles to support families following an industrial death* developed by SWA, which include the principle that 'bereaved families and seriously injured workers and their families should have the opportunity to give feedback to government, and advocate for change or reform to meet the needs of those significantly impacted by industrial death or serious injury'.

2009. This Part also responds to the 2018 Senate Education and Employment References Committee Report Senate Inquiry which identified critical issues in the prevention, investigation and prosecution of workplace deaths, and made recommendations, including improving support for families affected by a workplace fatality. In particular, recommendation 27 of the Senate Inquiry that each jurisdiction 'establish advisory committees designed to give advice and make recommendations to the relevant minister about the information and support needs of persons who have been affected directly or indirectly by a workplace incident that involves a death, serious injury or serious illness'.

Item 74: After Part 3 of Schedule 2

2010. This item would insert a new Part 3A to Schedule 2 to the WHS Act providing the legislative framework to establish the Advisory Committee. The Advisory Committee would be primarily comprised of members with lived experiences of serious work-related incidents. The unique perspectives of lived experience members would inform the advice and recommendations the Advisory Committee gives to the Minister and Commonwealth WHS regulators (Comcare, NOPSEMA, AMSA) on policies, procedures and strategies concerning serious work-related incidents.

Clause 3A: Definitions for this part

2011. This clause would insert 6 new definitions for the purposes of new Part 3A.

2012. The definition of 'serious work-related incident' would mean the death of a person, or a serious injury or illness of a person, arising out of the conduct of a business or undertaking. Whether the death, illness or injury meets this definition would be a

question of fact and in this context 'serious injury or illness' has its ordinary meaning. This is unlike Part 3 of the WHS Act which defines 'serious injury or illness' in section 36 for the purposes of incident notification.

2013. A death, serious injury or illness would need to have a sufficient connection to the conduct of an undertaking (or multiple undertakings) but would not need to be a specific 'incident' such as an accident. This would ensure that having a long latency disease such as silicosis or mental illness, which can develop over time, would make a person eligible to be a member of the Advisory Committee.

Clause 3B: Establishment of the Family and Injured Workers Advisory Committee

2014. This clause would establish an advisory committee titled the Family and Injured Workers Advisory Committee, which would need to be established within 12 months of Part 3A commencing.

2015. Deferring establishment of the Advisory Committee would provide the opportunity for appointments to be made, stakeholder consultation and drafting necessary legislative instruments to support the Advisory Committee's functions.

Clause 3C: Functions of the Advisory Committee

2016. This clause would set out the functions of the Advisory Committee, which would be to give advice to government and relevant regulators. The Advisory Committee would:

- give advice and make recommendations to the Minister who administers the WHS Act about the needs of persons affected by serious work-related incidents;
- give advice to Comcare, and contribute to the development and review of, Comcare's policies, practices and strategies for liaising with, and providing information to persons affected by serious work-related incidents;
- give advice to AMSA, and contribute to the development and review of, AMSA's policies, practices and strategies for liaising with, and providing information to persons affected by serious work-related incidents that arise on a prescribed ship (within the meaning of the OHS(MI) Act or a prescribed unit (within the meaning of that Act) that is engaged in trade or commerce of the kind referred to in subsection 6(1) of that Act; and
- give advice to NOPSEMA, and contribute to the development and review of, their policies, practices and strategies for liaising with, and providing information to persons affected by serious work-related incidents on a facility in the Commonwealth offshore area, or out of the conduct of a business or undertaking in the Commonwealth offshore area.

2017. Comcare, AMSA and NOPSEMA are the main Commonwealth WHS regulators.

- Comcare's jurisdiction under the WHS Act extends to the Commonwealth, public authorities, and non-Commonwealth licensees, which are a small number of large companies.

- AMSA is the relevant inspectorate under the OHS(MI) Act and is responsible for, among other things, ensuring obligations under the OHS(MI) Act are complied with (section 82 of the OHS(MI) Act).
- NOPSEMA is the regulator of occupational health and safety for persons engaged in offshore petroleum operations or offshore greenhouse gas storage operations under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*. It also performs the function of the Offshore Infrastructure Regulator under the *Offshore Energy Infrastructure Act 2021* with WHS inspectorate functions in relation to offshore infrastructure activities as defined.

Clause 3D: Membership of the Advisory Committee members

2018. This clause would provide that the Advisory Committee consists of 2 Co-Chairs and at least 3 other members. The number of Committee members could exceed the 5 prescribed under this clause subject to the discretion of the Minister and needs of the Committee.

2019. The roles of the Co-Chairs would not be provided for in the WHS Act to provide flexibility and to ensure that the Advisory Committee can grow and adapt over time. It is envisaged that the first Co-Chair would represent the lived experience members of the Committee. The second Co-Chair would have skills and experience in facilitating meetings and could take on administrative tasks within the Committee. The roles would complement each other.

Clause 3E: Appointment of Advisory Committee Members

2020. Subclauses 3E(1) and 3E(2) would provide that Advisory Committee members are appointed by the Minister by written instrument, on a part time basis. The instrument appointing a member to the Advisory Committee is required to specify whether the member is appointed as the first Co-Chair or second Co-Chair.

2021. Subclauses 3E(3) and 3E(4) deal with the period of appointment for members. Subclause 3E(3) would specify that a member's initial appointment term must not exceed 3 years. Subclause 3E(4) would provide that members are eligible for reappointment but must not hold office for a total of more than 9 years.

2022. Subclause 3E(5) would prescribe eligibility criteria for the appointment of the first CoChair and other lived experience members. To be eligible for appointment under subclause 3E(5) the Minister must be satisfied that:

- the person has, or has had, a serious injury or illness that arose out of the conduct of a business or undertaking; or
- the person has lived experience as a family member or carer of another person who:
    - has died, if the person's death arose out of the conduct of a business or undertaking; or

- has, or has had, a serious injury or illness that arose out of the conduct of a business or undertaking; or

- the person has been affected, directly or indirectly, by a serious work-related incident suffered by another person.

2023. The note to paragraph 3E(5)(c) specifies that examples of persons who might qualify for membership under that paragraph are friends and co-workers. It is not intended to include persons with a professional connection to a serious work-related incident such as an inspector, lawyer, or union representative.

2024. To be eligible for appointment as first Co-Chair a person would have to meet the criteria for appointment under subclause 3E(5).

2025. Subclause 3E(6) would set out the criteria for appointment as the second Co-Chair. A person may be appointed as the second Co-Chair if the Minister is satisfied they have relevant skills and experience in trauma and group facilitation. This person could also qualify under the criteria in subclause 3E(5), but does not need to for appointment under subclause 3E(6).

2026. The second Co-Chair's skill and experience in relation to managing trauma and group facilitation would be necessary to ensure the effectiveness and functionality of the Advisory Committee and to help manage the risk of re-traumatisation and vicarious trauma for the Advisory Committee members and others who engage with the Advisory Committee.

2027. Subclause 3E(7) would provide a discretionary power for the Minister to appoint an additional Advisory Committee member with relevant skills and experience in relation to trauma and grief. This person would not need to meet the eligibility criteria under subclause 3E(5) and could be appointed only once the Advisory Committee already has at least 5 members (including both the first and second Co-Chairs). The additional member would not be intended to provide counselling or personal support to members. Their role would be to provide another perspective to the Committee's advocacy and work.

Clause 3F: Invited participants

2028. Subclause 3F(1) would permit either Co-Chair, having consulted the other members of the Advisory Committee, to invite a person, body or organisation to participate in a committee meeting. The purpose of this would be to encourage committee members to engage with external stakeholders with expertise in the matters discussed by the Advisory Committee to assist in executing its functions. Subclause 3F(6) would provide that the WHS Regulations may provide for or in relation to persons invited to participate in a meeting.

2029. Subclause 3F(2) would allow either Co-Chair to terminate the invitation of an invited participant at any time, including during a meeting.

2030. Subclause 3F(3) would clarify that the participation of an invited participant does not make them a member of the Advisory Committee.

2031. Subclause 3F(4) would provide that an invited participant is entitled to be paid a travel allowance as prescribed by the WHS Regulations and that they must comply with any requirements imposed by the WHS Regulations in relation to that entitlement. For example, it is envisaged that an invited participant would be bound by any confidentiality requirements applying to members under the WHS Regulations. Subclause 3F(5) would clarify that regulations made in relation to the travel allowance referred to in subclause 3F(4) may identify an applicable rate of allowance payable to a class of office holders under a Remuneration Tribunal determination. The note to subclause 3F(5) would clarify that the rate of travel allowance could also be determined in other ways.

Clause 3G: Acting appointments

2032. Subclause 3G(1) would allow the Minister to appoint an Advisory Committee member (other than the second Co-Chair) to act as the first Co-Chair during a vacancy in their office or when the first Co-Chair is absent from duty, overseas or unable to perform the duties of the office.

2033. Subclause 3G(2) would allow the Minister to appoint an Advisory Committee member (other than the first Co-Chair) or any other person to act as the second Co-Chair during a vacancy in their office or when the second Co-Chair is absent from duty, overseas or unable to perform the duties of the office. Subclause 3G(3) would provide that a person is only eligible for an acting appointment as the second Co-Chair if they meet the eligibility criteria for that position set out by subclause 3E(6).

2034. Subclause 3G(4) would allow the Minister to appoint a person to act as an Advisory Committee member (other than a Co-Chair) during a vacancy in a committee member's office or when the member is absent from duty, overseas or unable to perform the duties of the office. Subclause 3G(5) would clarify that a person is only eligible for appointment as an acting Advisory Committee member if they meet the eligibility criteria for that position set out by subclause 3E(5).

2035. Notes in subclauses 3G(1), (3) and (5) draw attention to sections 33AB and 33A of the *Acts Interpretation Act 1901*. Section 33AB has the effect that anything done by or in relation to a person purporting to act under an appointment (including an acting appointment) is not invalid just because the appointment was not valid. Section 33A sets out the general rules that apply where a provision of an Act confers on a person or body, power to act in a particular office.

Clause 3H: Remuneration and allowances

2036. Subclause 3H(1) would provide that the remuneration and allowances to be paid to Advisory Committee members is to be determined by the Remuneration Tribunal. Subclause 3H(2) would provide that if no Remuneration Tribunal determination is in effect, the WHS Regulations would prescribe the amount to be paid.

Clause 3J: Leave of absence

2037. Subclause 3J(1) would provide for the Minister to grant a leave of absence to a Co-Chair of the Advisory Committee on the terms and conditions the Minister determines.

2038. Subclause 3J(2) would provide that a Co-Chair of the Advisory Committee may grant a leave of absence to Advisory Committee members on the terms and conditions that a CoChair determines.

Clause 3K: Disclosure of interests to the Minister

2039. This clause would require any Advisory Committee member to give written notice to the Minister of all interests, pecuniary or otherwise, that the Advisory Committee member has or acquires and that conflict, or could conflict, with the proper performance of the Advisory Committee's functions. This would promote the integrity of the Advisory Committee and ensure its advice is as independent, impartial, and free from conflict as possible.

2040. The interest disclosed could be either pecuniary or otherwise in nature – for example, a member of the Advisory Committee may be involved in, or a member of, another support group that the Advisory Committee promotes.

Clause 3L: Disclosure of interests to the Advisory Committee

2041. This clause would require committee members to disclose any interest (pecuniary or otherwise) in a matter that being considered or will be considered, by the Advisory Committee as soon as possible at an Advisory Committee meeting, and record in the meeting minutes. The WHS Regulations or the Advisory Committee itself may provide additional requirements in relation to how interests will be managed.

Clause 3M: Resignation

2042. This clause would provide that an Advisory Committee member may resign their appointment by providing the Minister a written notice of resignation. This resignation will take effect on the day it is received by the Minister, or at a later date specified in the written notice.

Clause 3N: Termination of appointment

2043. This clause would provide for circumstances in which the Minister has discretion to terminate the appointment of an Advisory Committee member. Grounds for termination would include misbehaviour, bankruptcy, unauthorised extended leave, or the member's inability to perform the duties of their office. An Advisory Committee member's appointment may also be terminated should they fail (without reasonable excuse) to disclose a relevant interest to the Minister or Advisory Committee under clause 3K or 3L.

2044. Subclause 3N(3) requires the Minister to terminate a member's appointment if they are absent, except on leave of absence, from 3 consecutive Advisory Committee meetings.

Clause 3P: Other terms and conditions

2045. This clause would provide that, in relation to matters not covered by this Bill, Advisory Committee members hold office on the terms and conditions that are to be determined by the Minister.

Clause 3Q: Meetings and procedures

2046. Subclause 3Q(1) would provide a non-exhaustive list of matters which regulations may be made in relation to. This includes:

- convening meetings;
- quorums;
- selecting an Advisory Committee member to act as a Co-Chair at a meeting in a Co-Chair's absence;
- resolving questions;
- inviting experts to attend meetings; and
- minute keeping.

2047. Subclause 3Q(2) would specify that a resolution is taken to have been passed at a meeting if a majority of Advisory Committee members indicate agreement using an agreed method and all Advisory Committee members were informed of the proposed resolution (or reasonable efforts had been made to ensure that occurred).
Subclause 3Q(3) clarifies that this method for determining a resolution would only apply if the Advisory Committee determines that it does and determines the method of indicating agreement with regard to a matter.

Clause 3R: Administrative support

2048. The Secretary of the Department which administers the WHS Act would be required to ensure that the Advisory Committee has the necessary administrative and other support to enable the committee to perform its functions efficiently and effectively.

SCHEDULE 5—AMENDMENT OF THE COAL MINING INDUSTRY (LONG SERVICE LEAVE) ADMINISTRATION ACT 1992

Amendments to the *Coal Mining Industry (Long Service Leave) Administration Act 1992*

2049. Schedule 5 would amend the legislation establishing the Coal LSL Corporation, which administers the portable long service leave scheme for the black coal mining industry.

2050. As a result of an order made by the Federal Court on 20 November 2023 in proceeding number NSD 1120/2023, the M&E Division will withdraw from the CFMMEU and become a new registered organisation registered under the RO Act from 1 December 2023 called the MEU.

Item 1: Subsection 13(4)

2051. Item 1 would amend subsection 13(4) to allow the Minister to appoint 2 Directors to represent the new MEU. This would transfer existing Board positions from the former M&E Division to the new MEU.

Item 2: Subsection 13(7)

2052. Item 2 would repeal subsection 13(7), which currently preserves the operation of the provisions establishing the Board of Directors if the M&E Division changes its name or merges with another Division of the CFMMEU. Subsection 13(7) is no longer necessary given existing subsection 13(8) preserves the operation of the provisions dealing with the Board of Directors if a registered organisation represented on the Board changes its name, mergers with another organisation or is succeeded by another organisation. As the MEU will be a registered organisation following the demerger, existing subsection 13(8) will apply to it in relation to any future changes.

Item 3: Savings provision—appointments of directors

2053. Item 3 is a savings provision. It would preserve the appointments of existing Directors representing the M&E Division until the expiry of their term.

R143 - Workers' Representatives Recommendation, 1971 (No. 143)

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Preamble

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Fifty-sixth Session on 2 June 1971, and,

Having adopted the Workers' Representatives Convention, 1971, and

Having decided upon the adoption of certain proposals with regard to protection and facilities afforded to workers' representatives in the undertaking, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation,

adopts this twenty-third day of June of the year one thousand nine hundred and seventy-one, the following Recommendation, which may be cited as the Workers' Representatives Recommendation, 1971:

I. Methods of Implementation

1. 1. Effect may be given to this Recommendation through national laws or regulations or collective agreements, or in any other manner consistent with national practice.

II. General Provisions

1. 2. For the purpose of this Recommendation the term ***workers' representatives*** means persons who are recognised as such under national law or practice, whether they are--
    - (a) trade union representatives, namely representatives designated or elected by trade unions or by the members of such unions; or
    - (b) elected representatives, namely representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.
2. 3. National laws or regulations, collective agreements, arbitration awards or court decisions may determine the type or types of workers' representatives which should be entitled to the protection and facilities provided for in this Recommendation.
3. 4. Where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures should be taken, wherever necessary, to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives and to encourage co-operation on all relevant matters between the elected representatives and the trade unions concerned and their representatives.

III. Protection of Workers' Representatives

1. 5. Workers' representatives in the undertaking should enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.
2. 6.
    - (1) Where there are not sufficient relevant protective measures applicable to workers in general, specific measures should be taken to ensure effective protection of workers' representatives.
    - (2) These might include such measures as the following:
        - (a) detailed and precise definition of the reasons justifying termination of employment of workers' representatives:
        - (b) a requirement of consultation with, an advisory opinion from, or agreement of an independent body, public or private, or a joint body, before the dismissal of a workers'

representative becomes final;
- (c) a special recourse procedure open to workers' representatives who consider that their employment has been unjustifiably terminated, or that they have been subjected to an unfavourable change in their conditions of employment or to unfair treatment;
- (d) in respect of the unjustified termination of employment of workers' representatives, provision for an effective remedy which, unless this is contrary to basic principles of the law of the country concerned, should include the reinstatement of such representatives in their job, with payment of unpaid wages and with maintenance of their acquired rights;
- (e) provision for laying upon the employer, in the case of any alleged discriminatory dismissal or unfavourable change in the conditions of employment of a workers' representative, the burden of proving that such action was justified;
- (f) recognition of a priority to be given to workers' representatives with regard to their retention in employment in case of reduction of the workforce.

3. 7.
   - (1) Protection afforded under Paragraph 5 of this Recommendation should also apply to workers who are candidates, or have been nominated as candidates through such appropriate procedures as may exist, for election or appointment as workers' representatives.
   - (2) The same protection might also be afforded to workers who have ceased to be workers' representatives.
   - (3) The period during which such protection is enjoyed by the persons referred to in this Paragraph may be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation.
4. 8.
   - (1) Persons who, upon termination of their mandate as workers' representatives in the undertaking in which they have been employed, resume work in that undertaking should retain, or have restored, all their rights, including those related to the nature of their job, to wages and to seniority. (2) The questions whether, and to what extent, the provisions of subparagraph (1) of this Paragraph should apply to workers' representatives who have exercised their functions mainly outside the undertaking concerned should be left to national laws or regulations, collective agreements, arbitration awards or court decisions.

IV. Facilities to be Afforded to Workers' Representatives

1. 9.
   - (1) Such facilities in the undertaking should be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently.
   - (2) In this connection account should be taken of the characteristics of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned.
   - (3) The granting of such facilities should not impair the efficient operation of the undertaking concerned.
2. 10.
   - (1) Workers' representatives in the undertaking should be afforded the necessary time off from work, without loss of pay or social and fringe benefits, for carrying out their representation functions in the undertaking.
   - (2) In the absence of appropriate provisions, a workers' representative may be required to obtain permission from his immediate supervisor or another appropriate representative of management designated for this purpose before he takes time off from work, such permission not to be unreasonably withheld.
   - (3) Reasonable limits may be set on the amount of time off which is granted to workers' representatives under subparagraph (1) of this Paragraph.
3. 11.
   - (1) In order to enable them to carry out their functions effectively, workers' representatives should be afforded the necessary time off for attending trade union meetings, training courses, seminars, congresses and conferences.
   - (2) Time off afforded under subparagraph (1) of this Paragraph should be afforded without loss of pay or social and fringe benefits, it being understood that the question of who should bear the

resulting costs may be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation.

4. 12. Workers' representatives in the undertaking should be granted access to all workplaces in the undertaking, where such access is necessary to enable them to carry out their representation functions.
5. 13. Workers' representatives should be granted without undue delay access to the management of the undertaking and to management representatives empowered to take decisions, as may be necessary for the proper exercise of their functions.
6. 14. In the absence of other arrangements for the collection of trade union dues, workers' representatives authorised to do so by the trade union should be permitted to collect such dues regularly on the premises of the undertaking.
7. 15.
    - (1) Workers' representatives acting on behalf of a trade union should be authorised to post trade union notices on the premises of the undertaking in a place or places agreed on with the management and to which the workers have easy access.
    - (2) The management should permit workers' representatives acting on behalf of a trade union to distribute news sheets, pamphlets, publications and other documents of the union among the workers of the undertaking.
    - (3) The union notices and documents referred to in this Paragraph should relate to normal trade union activities and their posting and distribution should not prejudice the orderly operation and tidiness of the undertaking.
    - (4) Workers' representatives who are elected representatives in the meaning of clause (b) of Paragraph 2 of this Recommendation should be given similar facilities consistent with their functions.
8. 16. The management should make available to workers' representatives, under the conditions and to the extent which may be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation, such material facilities and information as may be necessary for the exercise of their functions.
9. 17.
    - (1) Trade union representatives who are not employed in the undertaking but whose trade union has members employed therein should be granted access to the undertaking.
    - (2) The determination of the conditions for such access should be left to the methods of implementation referred to in Paragraphs 1 and 3 of this Recommendation.

See related

Key Information

Recommendation concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking

Adoption: Geneva, 56th ILC session (23 Jun 1971)
Status: Up-to-date instrument.

See also

Submissions to competent authorities by country

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