

Part 2-2—The National Employment Standards

Division 1—Introduction

59 Guide to this Part

This Part contains the National Employment Standards.

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

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

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

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

Divisions 2, 2A and 3 of Part 6-3 extend the operation of the parental leave, paid family and domestic violence leave and notice of termination provisions of the National Employment Standards to employees not otherwise covered by those provisions.

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60 Meanings of *employee* and *employer*

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

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

Division 2—The National Employment Standards

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

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

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

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

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Division 3—Maximum weekly hours

62 Maximum weekly hours

Maximum weekly hours of work

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

Employee may refuse to work unreasonable additional hours

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

Determining whether additional hours are reasonable

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

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

Authorised leave or absence treated as hours worked

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

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

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

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

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

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

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

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

Division 4—Requests for flexible working arrangements

65 Requests for flexible working arrangements

Employee may request change in working arrangements

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

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

- (1A) The following are the circumstances:
- (aa) the employee is pregnant;
 - (a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
 - (b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);
 - (c) the employee has a disability;
 - (d) the employee is 55 or older;
 - (e) the employee is experiencing family and domestic violence;
 - (f) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing family and domestic violence.
- (1B) To avoid doubt, and without limiting subsection (1), an employee who:
- (a) is a parent, or has responsibility for the care, of a child; and
 - (b) is returning to work after taking leave in relation to the birth or adoption of the child;

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may request to work part-time to assist the employee to care for the child.

- (2) The employee is not entitled to make the request unless:
- (a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or
 - (b) for a casual employee—the employee:
 - (i) is, immediately before making the request, a regular casual employee of the employer who has been employed on that basis for a sequence of periods of employment during a period of at least 12 months; and
 - (ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.
- (2A) For the purposes of applying paragraph (2)(a) in relation to an employee who has had their employment changed under Division 4A of Part 2-2, any period for which the employee was a regular casual employee of the employer is taken to be continuous service for the purposes of that paragraph.

Formal requirements

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

Agreeing to the request

65A Responding to requests for flexible working arrangements

Responding to the request

- (1) If, under subsection 65(1), an employee requests an employer for a change in working arrangements relating to circumstances that apply to the employee, the employer must give the employee a written response to the request within 21 days.

- (2) The response must:
- (a) state that the employer grants the request; or
 - (b) if, following discussion between the employer and the employee, the employer and the employee agree to a change to the employee's working arrangements that differs from that set out in the request—set out the agreed change; or
 - (c) subject to subsection (3)—state that the employer refuses the request and include the matters required by subsection (6).
- (3) The employer may refuse the request only if:
- (a) the employer has:
 - (i) discussed the request with the employee; and
 - (ii) genuinely tried to reach an agreement with the employee about making changes to the employee's working arrangements to accommodate the circumstances mentioned in subsection (1); and
 - (b) the employer and the employee have not reached such an agreement; and
 - (c) the employer has had regard to the consequences of the refusal for the employee; and
 - (d) the refusal is on reasonable business grounds.

Note: An employer's grounds for refusing a request may be taken to be reasonable business grounds, or not to be reasonable business grounds, in certain circumstances: see subsection 65C(5).

- (4) To avoid doubt, subparagraph (3)(a)(ii) does not require the employer to agree to a change to the employee's working arrangements if the employer would have reasonable business grounds for refusing a request for the change.

Reasonable business grounds for refusing requests

- (5) Without limiting what are reasonable business grounds for the purposes of paragraph (3)(d) and subsection (4), reasonable business grounds for refusing a request include the following:
- (a) that the new working arrangements requested would be too costly for the employer;

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- (b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested;
- (c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested;
- (d) that the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity;
- (e) that the new working arrangements requested would be likely to have a significant negative impact on customer service.

Note: The specific circumstances of the employer, including the nature and size of the enterprise carried on by the employer, are relevant to whether the employer has reasonable business grounds for refusing a request for the purposes of paragraph (3)(d) and subsection (4). For example, if the employer has only a small number of employees, there may be no capacity to change the working arrangements of other employees to accommodate the request (see paragraph (5)(b)).

Employer must explain grounds for refusal

- (6) If the employer refuses the request, the written response under subsection (1) must:
 - (a) include details of the reasons for the refusal; and
 - (b) without limiting paragraph (a) of this subsection:
 - (i) set out the employer's particular business grounds for refusing the request; and
 - (ii) explain how those grounds apply to the request; and
 - (c) either:
 - (i) set out the changes (other than the requested change) in the employee's working arrangements that would accommodate, to any extent, the circumstances mentioned in subsection (1) and that the employer would be willing to make; or
 - (ii) state that there are no such changes; and
 - (d) set out the effect of sections 65B and 65C.

Genuinely trying to reach an agreement

- (7) This section does not affect, and is not affected by, the meaning of the expression “genuinely trying to reach an agreement”, or any variant of the expression, as used elsewhere in this Act.

65B Disputes about the operation of this Division

Application of this section

- (1) This section applies to a dispute between an employer and an employee about the operation of this Division if:
- (a) the dispute relates to a request by the employee to the employer under subsection 65(1) for a change in working arrangements relating to circumstances that apply to the employee; and
 - (b) either:
 - (i) the employer has refused the request; or
 - (ii) 21 days have passed since the employee made the request, and the employer has not given the employee a written response to the request under section 65A.

Note 1: Modern awards and enterprise agreements must include a term that provides a procedure for settling disputes in relation to the National Employment Standards (see paragraph 146(b) and subsection 186(6)).

Note 2: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards. However, a term of a modern award or an enterprise agreement has no effect to the extent it contravenes section 55 (see section 56).

Resolving disputes

- (2) In the first instance, the parties to the dispute must attempt to resolve the dispute at the workplace level, by discussions between the parties.

FWC may deal with disputes

- (3) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the dispute to the FWC.

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- (4) If a dispute is referred under subsection (3):
- (a) the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances; and
 - (b) the FWC may deal with the dispute by arbitration in accordance with section 65C.

Note: For the purposes of paragraph (a), the FWC may deal with the dispute as it considers appropriate. The FWC commonly deals with disputes by conciliation. The FWC may also deal with the dispute by mediation, making a recommendation or expressing an opinion (see subsection 595(2)).

Representatives

- (5) The employer or employee may appoint a person or industrial association to provide the employer or employee (as the case may be) with support or representation for the purposes of:
- (a) resolving the dispute; or
 - (b) the FWC dealing with the dispute.

Note: A person may be represented by a lawyer or paid agent in a matter before the FWC only with the permission of the FWC (see section 596).

65C Arbitration

- (1) For the purposes of paragraph 65B(4)(b), the FWC may deal with the dispute by arbitration by making any of the following orders:
- (a) if the employer has not given the employee a written response to the request under section 65A—an order that the employer be taken to have refused the request;
 - (b) if the employer refused the request:
 - (i) an order that it would be appropriate for the grounds on which the employer refused the request to be taken to have been reasonable business grounds; or
 - (ii) an order that it would be appropriate for the grounds on which the employer refused the request to be taken not to have been reasonable business grounds;
 - (e) if the FWC is satisfied that the employer has not responded, or has not responded adequately, to the employee's request

under section 65A—an order that the employer take such further steps as the FWC considers appropriate, having regard to the matters in section 65A;

- (f) subject to subsection (3) of this section:
 - (i) an order that the employer grant the request; or
 - (ii) an order that the employer make specified changes (other than the requested changes) in the employee's working arrangements to accommodate, to any extent, the circumstances mentioned in paragraph 65B(1)(a).

Note: An order by the FWC under paragraph (e) could, for example, require the employer to give a response, or further response, to the employee's request, and could set out matters that must be included in the response or further response.

- (2) In making an order under subsection (1), the FWC must take into account fairness between the employer and the employee.
- (2A) The FWC must not make an order under paragraph (1)(e) or (f) that would be inconsistent with:
 - (a) a provision of this Act; or
 - (b) a term of a fair work instrument (other than an order made under that paragraph) that, immediately before the order is made, applies to the employer and employee.
- (3) The FWC may make an order under paragraph (1)(f) only if the FWC is satisfied that there is no reasonable prospect of the dispute being resolved without the making of such an order.
- (4) If the FWC makes an order under paragraph (1)(a), the employer is taken to have refused the request.
- (5) If the FWC makes an order under paragraph (1)(b), the grounds on which the employer refuses the request are taken:
 - (a) for an order made under subparagraph (1)(b)(i)—to be reasonable business grounds; or
 - (b) for an order made under subparagraph (1)(b)(ii)—not to be reasonable business grounds.

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Contravening an order under subsection (1)

- (6) A person must not contravene a term of an order made under subsection (1).

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

66 State and Territory laws that are not excluded

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

Division 4A—Casual employment

Subdivision A—Application of Division

66A Division applies to casual employees etc.

- (1) This Division applies in relation to an employee who is a casual employee.
- (2) A reference in this Division to full-time employment or part-time employment is taken not to include employment for a specified period of time, for a specified task or for the duration of a specified season.

66AAA Object of this Division

The object of this Division is to establish a framework for dealing with changes to casual employment status that:

- (a) is quick, flexible and informal; and
- (b) addresses the needs of employers and employees; and
- (c) provides for the resolution of disputes to support employee choice about employment status.

Subdivision B—Employee choice about casual employment

66AAB Employee notification

A casual employee may give an employer a written notification under this section if:

- (a) having regard to subsections 15A(1) to (4) and the employee's current employment relationship with the employer, the employee believes that the employee no longer meets the requirements of those subsections; and
- (b) the employee does not have a dispute with the employer relating to the operation of Division 4A of Part 2-2 being

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dealt with under section 66M (including by way of arbitration under section 66MA) or under section 739; and

- (c) if the employer:
 - (i) is a small business employer at the time the notification is given—the employee has been employed by the employer for a period of at least 12 months beginning the day the employment started; or
 - (ii) is not a small business employer at the time the notification is given—the employee has been employed by the employer for a period of at least 6 months beginning the day the employment started; and
- (d) in the period of 6 months before the day the notification is given, the employee has not:
 - (i) received a response from the employer under section 66AAC not accepting a previous notification made under this section; or
 - (v) had a dispute with the employer relating to the operation of Division 4A of Part 2-2 resolved under section 66M (including by way of arbitration under section 66MA) or under section 739.

Note: This section does not prevent an employee changing to full-time employment or part-time employment other than under this Division (see paragraphs 15A(5)(c) and (d)).

66AAC Employer response

Timing of response

- (1) An employer must give an employee a written response to a notification given under section 66AAB within 21 days after the notification is given to the employer.

Information that must be included in response

- (2) The response must be in writing and include the following:
 - (a) a statement that the employer:
 - (i) accepts the notification; or

- (ii) does not accept the notification on one or more grounds referred to in subsection (4); and
- (b) if the employer accepts the notification—the following information:
 - (i) whether the employee is changing to full-time employment or part-time employment;
 - (ii) the employee’s hours of work after the change takes effect;
 - (iii) the day the employee’s change to full-time employment or part-time employment takes effect;
- (c) if the employer does not accept the notification—reasons for the employer’s decision.

Consulting with employee

- (3) Before giving a response under subsection (1), the employer must consult with the employee about the notification and must, if the employer is accepting the notification, discuss the matters the employer intends to specify for the purposes of subparagraphs (2)(b)(i) to (iii).

Grounds for employer to not accept notification

- (4) For the purposes of subparagraph (2)(a)(ii), the employer may not accept the notification on any of the following grounds:
 - (a) having regard to subsections 15A(1) to (4) and the employee’s current employment relationship with the employer, the employee still meets the requirements of those subsections;
 - (b) there are fair and reasonable operational grounds for not accepting the notification;
 - (c) accepting the notification would result in the employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

Note 2: In relation to paragraph (4)(c), see (for example) the APS Employment Principle at paragraph 10A(1)(c) of the *Public Service*

Chapter 2 Terms and conditions of employment

Part 2-2 The National Employment Standards

Division 4A Casual employment

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Act 1999 (which deals with decisions based on merit) and any directions made under subsection 11A(2) of that Act in relation to that principle.

- (5) For the purposes of paragraph (4)(b), fair and reasonable operational grounds for not accepting the notification include the following:
- (a) substantial changes would be required to the way in which work in the employer's enterprise is organised;
 - (b) there would be significant impacts on the operation of the employer's enterprise;
 - (c) substantial changes to the employee's terms and conditions would be reasonably necessary to ensure the employer does not contravene a term of a fair work instrument that would apply to the employee as a full-time employee or part-time employee (as the case may be).

Note: For the purposes of paragraphs (5)(a) and (c), substantial changes include changes that significantly affect the way an employee would need to work.

66AAD Effect of employer acceptance of employee notification

- (1) If an employer responds under section 66AAC that the employer accepts an employee's notification given under section 66AAB, the employee is taken to be a full-time employee or part-time employee (as the case may be) beginning on the day specified in the response.
- (2) The day specified in the response for the purposes of subsection (1) must be the first day of the employee's first full pay period that starts after the day the employer response is given, unless the employer and employee agree to another day.

Subdivision D—Other provisions

66K Effect of change

To avoid doubt, an employee is taken, on and after the day specified in a notice for the purposes of

subparagraph 66AAC(2)(b)(iii), to be a full-time employee or part-time employee of the employer for the purposes of the following:

- (a) this Act and any other law of the Commonwealth;
- (b) a law of a State or Territory;
- (c) any fair work instrument that applies to the employee;
- (d) the employee's contract of employment.

66L Other rights and obligations

(1) An employer must not do any of the following in order to avoid any right or obligation under this Division:

- (a) reduce or vary an employee's hours of work;
- (b) change the employee's pattern of work;
- (c) terminate an employee's employment.

Note: The general protections provisions in Part 3-1 also prohibit the taking of adverse action by an employer against an employee (which includes a casual employee) because of a workplace right of the employee under this Division.

(2) Nothing in this Division:

- (a) requires an employee to change to full-time employment or part-time employment under this Division; or
- (b) permits an employer to require an employee to change to full-time employment or part-time employment under this Division; or
- (c) requires an employer to increase the hours of work of an employee who gives a notification to change to full-time employment or part-time employment under this Division.

(3) To avoid doubt, each of the following is a workplace right within the meaning of Part 3-1:

- (a) giving an employer a notification under section 66AAB;
- (b) receiving a response from an employer in accordance with section 66AAC;
- (c) being taken to be a full-time employee or part-time employee under section 66AAD;

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- (d) receiving an offer or notice in accordance with sections 66B and 66C;
- (e) accepting an offer and receiving a notice under section 66E;
- (f) participating in a dispute about the operation of this Division in accordance with sections 66M and 66MA.

Note: The general protections provisions in Part 3-1 prohibit adverse action, coercion, undue influence or pressure, and misrepresentations because of a workplace right of an employee.

66M Disputes about the operation of this Division

Application of this section to disputes about employee choice

- (1) This section applies to a dispute between an employer and an employee about the operation of Subdivision B of this Division.

Resolving disputes

- (4) In the first instance, the parties to the dispute must attempt to resolve the dispute at the workplace level, by discussions between the parties.

Note 1: Modern awards and enterprise agreements must include a term that provides a procedure for settling disputes in relation to the National Employment Standards (see paragraph 146(b) and subsection 186(6)).

Note 2: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards. However, a term of a modern award or an enterprise agreement has no effect to the extent it contravenes section 55 (see section 56).

FWC may deal with disputes

- (5) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the dispute to the FWC.
- (6) If a dispute is referred under subsection (5):
 - (a) the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances; and
 - (b) the FWC may deal with the dispute by arbitration in accordance with section 66MA.

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Note: For the purposes of paragraph (a), the FWC may deal with the dispute as it considers appropriate, including by mediation, conciliation, making a recommendation or expressing an opinion (see subsection 595(2)).

Representatives

- (10) The employer or employee may appoint a person, or an employer organisation or employee organisation, that is entitled to represent the industrial interests of the employer or employee to provide the employer or employee (as the case may be) with support or representation for the purposes of:
- (a) resolving the dispute; or
 - (b) the FWC dealing with the dispute.

Note: A person may be represented by a lawyer or paid agent in a matter before the FWC only with the permission of the FWC (see section 596).

Procedural rules

- (11) Without limiting section 609, the procedural rules may provide, in relation to a dispute between an employer and employee that has been referred to the FWC under subsection (5) of this section, for the joinder of the following as parties to the dispute:
- (a) any other employee that has a dispute to which this section applies with the same employer;
 - (b) any employee organisation that is entitled to represent the industrial interests of such an employee.

66MA Arbitration

FWC may make any orders it considers appropriate

- (1) For the purposes of paragraph 66M(6)(b), the FWC may deal with the dispute by arbitration, including by making any orders it considers appropriate, including (but not limited to) any order referred to in subsection (4) of this section.

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- (2) However, the FWC must not make an order under this section unless the FWC considers that it would be fair and reasonable to make the order.

Note: The FWC must also take into account the object of this Act and the object of this Division (see paragraph 578(a)).

- (3) The FWC must not make an order under subsection (1) that would be inconsistent with:
- (a) a provision of this Act; or
 - (b) a term of a fair work instrument (other than an order made under that subsection) that, immediately before the order is made, applies to the employer and employee.

Orders relating to employee choice

- (4) For the purposes of paragraph (1)(a), the orders are the following:
- (a) that the employee continue to be treated as a casual employee;
 - (b) that the employee be treated as a full-time employee or part-time employee (as the case may be) from the first day of the employee's first full pay period that starts after the day the order is made, or such later day that the FWC considers appropriate.
- (5) In considering whether to make, and the terms of, an order under subsection (1) (including an order referred to in subsection (4)) in relation to a dispute about the operation of Subdivision B of this Division (which deals with employee choice about casual employment), the FWC must:
- (a) have regard to whether substantial changes to the employee's terms and conditions would be reasonably necessary to ensure the employer does not contravene a term of a fair work instrument that would apply to the employee as a full-time employee or part-time employee; and
 - (b) disregard conduct of the employer and employee that occurred after the employee gave the notification under section 66AAB (which deals with employee choice notifications) to the employer.

Contravening an order under subsection (1)

- (8) A person must not contravene a term of an order made under subsection (1).

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

Division 5—Parental leave and related entitlements

Subdivision A—General

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

Employees other than casual employees

- (1) An employee, other than a casual employee, is not entitled to leave under this Division (other than unpaid pre-adoption leave or unpaid no safe job leave) unless the employee has, or will have, completed at least 12 months of continuous service with the employer immediately before the date that applies under subsection (3).
- (1A) For the purposes of applying subsection (1) in relation to an employee who has had their employment changed under Division 4A of Part 2-2, any period for which the employee was a regular casual employee of the employer is taken to be continuous service for the purposes of that subsection.

Casual employees

- (2) A casual employee, is not entitled to leave (other than unpaid pre-adoption leave or unpaid no safe job leave) under this Division unless:
 - (a) the employee is, or will be, immediately before the date that applies under subsection (3), a regular casual employee of the employer who has been employed on that basis for a sequence of periods of employment during a period of at least 12 months; and
 - (b) but for:
 - (i) the birth or expected birth of the child; or
 - (ii) the placement or the expected placement of the child; the employee would have a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Date at which employee must have completed 12 months of service

- (3) For the purposes of subsections (1) and (2), the date that applies is:
- (a) if the leave is:
 - (i) birth-related leave starting before the birth of the child;
or
 - (ii) unpaid special parental leave;
the expected date of birth of the child; or
 - (b) in any other case—the date on which the employee’s period of leave is to start.

Meaning of birth-related leave

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

Meaning of adoption-related leave

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

Meaning of day of placement

- (6) The **day of placement**, in relation to the adoption of a child by an employee, means the earlier of the following days:
- (a) the day on which the employee first takes custody of the child for the adoption;
 - (b) the day on which the employee starts any travel that is reasonably necessary to take custody of the child for the adoption.

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

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

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

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

(1) If:

- (a) there is a transfer of employment in relation to an employee; and
- (b) the employee has already started a period of leave under this Division when the employee's employment with the first employer ends;

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

(2) If:

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

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

Note: Steps covered by this subsection include (for example) complying with a notice or evidence requirement of section 74 in relation to the first employer.

Subdivision B—Parental leave

70 Entitlement to unpaid parental leave

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

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

Note: The employee's entitlement under this section may be affected by other provisions of this Division.

71 The period of leave

Application of this section

- (1) This section applies to an employee who intends to take unpaid parental leave.

Leave must be taken in single continuous period

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

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

Note 2: For provisions affecting the rule in this subsection, see:

- (a) subsection 72A(11) (flexible unpaid parental leave); and
- (b) subsection 73(4) (pregnant employee may be required to take unpaid parental leave within 6 weeks before the birth); and
- (c) paragraph 78A(2)(b) (permitted work periods while child is hospitalised); and
- (d) subsection 79A(1) (keeping in touch days).

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When birth-related leave must start and end

- (3) If the leave is birth-related leave for an employee who is pregnant with, or gives birth to, the child, the period of leave may start:
- (a) up to 6 weeks before the expected date of birth of the child;
or
 - (b) earlier, if the employer and employee so agree; or
 - (c) during the 24-month period starting on the date of birth of the child;

but must end during the 24-month period starting on the date of birth of the child.

Note 1: If the employee is not fit for work, the employee may be entitled to:

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

Note 2: If it is inadvisable for the employee to continue in the employee's present position, the employee may be entitled:

- (a) to be transferred to an appropriate safe job under section 81; or
- (b) to paid no safe job leave under section 81A; or
- (c) to unpaid no safe job leave under section 82A.

Note 3: Section 344 prohibits the exertion of undue influence or undue pressure on the employee in relation to a decision by the employee whether to agree as mentioned in paragraph (3)(b) of this section.

- (4) If the leave is birth-related leave but subsection (3) does not apply, the period of leave must start and end during the 24-month period starting on the date of birth of the child.

When adoption-related leave must start and end

- (5) If the leave is adoption-related leave, the period of leave must start and end during the 24-month period starting on the day of placement of the child.

Limit on amount of leave

- (6) The employee may take unpaid parental leave under this section only if the period of leave is no longer than 12 months, less the employee's notional flexible period.

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

72A Flexible unpaid parental leave

Taking leave during 24 months starting on date of birth or day of placement

- (1) An employee may take up to 100 days (or, if a higher number of days is prescribed by the regulations, that higher number of days) of unpaid parental leave (***flexible unpaid parental leave***) during the 24-month period starting on the date of birth or day of placement of the child if the requirements of this section are satisfied in relation to the leave.

Note 1: The flexible unpaid parental leave is unpaid parental leave and so comes out of the employee's entitlement to 12 months of unpaid parental leave under section 70.

Note 2: The number of days of flexible unpaid parental leave that the employee takes must not be more than the number of flexible days notified to the employer under subsection 74(3C) (subject to any agreement under subsection 74(3D)).

- (2) Flexible unpaid parental leave under subsection (1) is available in full to part-time and casual employees.

Taking leave that starts up to 6 weeks before the expected date of birth of the child

- (2A) A pregnant employee may take unpaid parental leave (***flexible unpaid parental leave***) during the period that starts 6 weeks before the expected date of birth of the child if the requirements of this section are satisfied in relation to the leave.

Note 1: The flexible unpaid parental leave is unpaid parental leave and so comes out of the employee's entitlement to 12 months of unpaid parental leave under section 70.

Note 2: The number of days of flexible unpaid parental leave that the employee takes must not be more than the number of flexible days

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notified to the employer under subsection 74(3C) (subject to any agreement under subsection 74(3D)).

- (2B) Flexible unpaid parental leave under subsection (2A) is available in full to pregnant part-time employees and pregnant casual employees.
- (2C) The amount of flexible unpaid parental leave to which an employee is entitled under subsection (1) in relation to the child is reduced by the number of days of flexible unpaid parental leave taken by the employee under subsection (2A) in relation to the child.

How flexible unpaid parental leave may be taken

- (3) The employee must take the flexible unpaid parental leave as:
- (a) a single continuous period of one or more days; or
 - (b) separate periods of one or more days each.

Effect of taking unpaid parental leave under other provisions

- (4) The employee may take the flexible unpaid parental leave whether or not the employee has taken unpaid parental leave under another provision of this Division in relation to the child.
- (5) However, the employee may take flexible unpaid parental leave after taking one or more periods of unpaid parental leave under another provision of this Division only if the total of those periods (disregarding any extension under section 76A) is no longer than 12 months, less the employee's notional flexible period.

Meaning of notional flexible period

- (6) An employee's **notional flexible period** is the period during which the employee would be on flexible unpaid parental leave if the employee took leave for all the employee's flexible days in a single continuous period. For this purpose, the employee's flexible days are the flexible days notified to the employer under subsection 74(3C) (subject to any agreement under subsection 74(3D)).

- (7) For the purposes of subsection (6), assume that:
- (a) the employee ordinarily works each day that is not a Saturday or a Sunday; and
 - (b) there are no public holidays during the period.

Multiple births

- (10) An employee is not entitled to take flexible unpaid parental leave in relation to a child if:
- (a) the child and another child:
 - (i) are born during the same multiple birth; or
 - (ii) are both placed with the employee for adoption and have the same day of placement; and
 - (b) the employee takes flexible unpaid parental leave in relation to the other child.

Interaction with section 71

- (11) Flexible unpaid parental leave taken by an employee is an exception to the rules in section 71 about:
- (a) taking the employee's unpaid parental leave in a single continuous period; and
 - (b) when the employee's period of unpaid parental leave must start.
- (12) Despite anything in subsection (11), flexible unpaid parental leave cannot be used to break up a period of unpaid parental leave taken under section 71.

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

Employer may ask employee to provide a medical certificate

- (1) If a pregnant employee who is entitled to unpaid parental leave (whether or not the employee has complied with section 74) continues to work during the 6 week period before the expected date of birth of the child, the employer may ask the employee to

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give the employer a medical certificate containing the following statements (as applicable):

- (a) a statement of whether the employee is fit for work;
- (b) if the employee is fit for work—a statement of whether it is inadvisable for the employee to continue in the employee’s present position during a stated period because of:
 - (i) illness, or risks, arising out of the employee’s pregnancy; or
 - (ii) hazards connected with the position.

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

Employer may require employee to take unpaid parental leave

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

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

When the period of leave must end

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

Special rules about the period of leave

- (4) The period of leave is an exception to the rules in section 71 about:
- (a) taking the employee's unpaid parental leave in a single continuous period; and
 - (b) when the employee's period of unpaid parental leave must start.

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

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

74 Notice and evidence requirements

General requirement to give notice of taking leave

- (1) An employee must give the employee's employer written notice of the taking of unpaid parental leave under section 71, or flexible unpaid parental leave, or both, by the employee.

Notice requirements

- (2) The employee must give the notice to the employer:
- (a) at least 10 weeks before starting any of the leave covered by the notice; or
 - (b) if that is not practicable, and:

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- (i) the first or only period of leave covered by the notice is leave to be taken under section 71; or
 - (ii) any of the leave covered by the notice starts before the child's date of birth or expected date of birth; as soon as practicable (which may be a time after any of the leave covered by the notice has started).
- (2A) However, if the first or only period of leave covered by the notice is leave to be taken under section 72A, the notice may be given at any later time if the employer agrees.
- (3) If any of the leave covered by the notice is to be taken under section 71, the notice must specify the intended start and end dates of the leave to be taken under section 71.
- (3C) If any of the leave covered by the notice is to be taken under section 72A, the notice must specify the total number of days (***flexible days***) of flexible unpaid parental leave that the employee intends to take in relation to the child.
- (3D) If the employer agrees, the employee may:
 - (a) reduce the number of flexible days, including by reducing the number of flexible days to zero; or
 - (b) increase the number of flexible days, but not so as to increase the number of flexible days above 100 (or, if a higher number of days is prescribed by regulations made for the purposes of subsection 72A(1), that higher number).

Taking leave under section 71—confirming or changing intended start and end dates

- (4) If any of the leave covered by the notice is to be taken under section 71, then at least 4 weeks before the intended start date specified in the notice given under subsection (1), the employee must:
 - (a) confirm the intended start and end dates of the leave to be taken under section 71; or
 - (b) advise the employer of any changes to the intended start and end dates of the leave to be taken under section 71;

unless it is not practicable to do so.

Taking flexible unpaid parental leave—notifying days on which employee will take leave

- (4B) The employee must give the employer written notice of a flexible day on which the employee will take flexible unpaid parental leave:
- (a) at least 4 weeks before that day; or
 - (b) if that is not practicable—as soon as practicable (which may be a time after the leave has started).

Note: Whether or not it is practicable for the employee to give notice at least 4 weeks before that day will depend on the employee's personal and family circumstances. For example, it may not be practicable for the employee to give notice at least 4 weeks before that day where the employee experiences a health issue, a pregnancy complication or an unexpected change in the employee's child care arrangements.

- (4C) If the employer agrees, the employee may change a day on which the employee takes flexible unpaid parental leave from a day specified in a notice under subsection (4B).

Evidence requirements

- (5) An employee who has given the employee's employer notice of the taking of unpaid parental leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person:
- (a) if the leave is birth-related leave:
 - (i) of the date of birth, or the expected date of birth, of the child; and
 - (ii) that paragraph 77A(1)(a) (which deals with the stillbirth of a child) applies in relation to the employee, if relevant; or
 - (b) if the leave is adoption-related leave:
 - (i) of the day of placement, or the expected day of placement, of the child; and

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- (ii) that the child is, or will be, under 16 as at the day of placement, or the expected day of placement, of the child.
- (6) Without limiting subsection (5), an employer may require the evidence referred to in paragraph (5)(a) to be a medical certificate.
- Example: If the application of paragraph 77A(1)(a) (which deals with the stillbirth of a child) is relevant—certification by a medical practitioner of the child as having been delivered.

Compliance

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

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

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

Application of this section

- (1) This section applies if:
- (a) an employee has, in accordance with section 74, given notice of the taking of a period of unpaid parental leave (the ***original leave period***) under section 71; and
 - (b) the original leave period is less than the employee's available parental leave period; and
 - (c) the original leave period has started.
- (2) The employee's ***available parental leave period*** is 12 months, less any periods of the following kinds:
- (b) a period of unpaid parental leave that the employee has been required to take under subsection 73(2) or 82(2);
 - (d) if the employee has given notice in accordance with subsection 74(2) or (2A) of the taking of flexible unpaid

parental leave—a period equal to the employee’s notional flexible period.

First extension by giving notice to employer

- (3) The employee may extend the period of unpaid parental leave taken under section 71 by giving the employee’s employer written notice of the extension at least 4 weeks before the end date of the original leave period. The notice must specify the new end date for the leave.
- (4) Only one extension is permitted under subsection (3).

Further extensions by agreement with employer

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

No entitlement to extension beyond available parental leave period

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

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

Employee may request further period of leave

- (1) An employee who takes unpaid parental leave under section 71 for the employee’s available parental leave period may request the employee’s employer to agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months immediately following the end of the available parental leave period.

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

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Making the request

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

Note: The request must be made when the employee is taking unpaid parental leave under section 71.

No extension beyond 24 months after birth or placement

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

76A Responding to requests for extension of unpaid parental leave

Responding to the request

- (1) If, under subsection 76(1), an employee requests an employer to agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months immediately following the end of the available parental leave period, the employer must give the employee a written response to the request within 21 days.
- (2) The response must:
- (a) state that the employer grants the request; or
 - (b) if, following discussion between the employer and the employee, the employer and the employee agree to an extension of unpaid parental leave for the employee for a period that differs from the period requested—set out the agreed extended period; or
 - (c) subject to subsection (3)—state that the employer refuses the request and include the matters required by subsection (6).
- (3) The employer may refuse the request only if:
- (a) the employer has:
 - (i) discussed the request with the employee; and

- (ii) genuinely tried to reach an agreement with the employee about an extension of the period of unpaid parental leave for the employee; and
- (b) the employer and the employee have not reached such an agreement; and
- (c) the employer has had regard to the consequences of the refusal for the employee; and
- (d) the refusal is on reasonable business grounds.

Note: An employer's grounds for refusing a request may be taken to be reasonable business grounds, or not to be reasonable business grounds, in certain circumstances (see subsection 76C(6)).

- (4) To avoid doubt, subparagraph (3)(a)(ii) does not require the employer to agree to an extension of the period of unpaid parental leave for the employee if the employer would have reasonable business grounds for refusing a request for the extension.

Reasonable business grounds for refusing requests

- (5) Without limiting what are reasonable business grounds for the purposes of paragraph (3)(d) and subsection (4), reasonable business grounds for refusing a request include the following:
 - (a) that the extension of the period of unpaid parental leave requested by the employee would be too costly for the employer;
 - (b) that there is no capacity to change the working arrangements of other employees to accommodate the extension of the period of unpaid parental leave requested by the employee;
 - (c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the extension of the period of unpaid parental leave requested by the employee;
 - (d) that the extension of the period of unpaid parental leave requested by the employee would be likely to result in a significant loss in efficiency or productivity;

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- (e) that the extension of the period of unpaid parental leave requested by the employee would be likely to have a significant negative impact on customer service.

Note: The specific circumstances of the employer, including the nature and size of the enterprise carried on by the employer, are relevant to whether the employer has reasonable business grounds for refusing a request for the purposes of paragraph (3)(d) and subsection (4). For example, if the employer has only a small number of employees, there may be no capacity to change the working arrangements of other employees to accommodate the request (see paragraph (5)(b)).

Employer must explain grounds for refusal

- (6) If the employer refuses the request, the written response under subsection (1) must:
- (a) include details of the reasons for the refusal; and
 - (b) without limiting paragraph (a) of this subsection:
 - (i) set out the employer's particular business grounds for refusing the request; and
 - (ii) explain how those grounds apply to the request; and
 - (c) either:
 - (i) set out the extension of the period of unpaid parental leave for the employee (other than the period requested by the employee) that the employer would be willing to agree to; or
 - (ii) state that there is no extension of the period that the employer would be willing to agree to; and
 - (d) set out the effect of sections 76B and 76C.

Genuinely trying to reach an agreement

- (7) This section does not affect, and is not affected by, the meaning of the expression "genuinely trying to reach an agreement", or any variant of the expression, as used elsewhere in this Act.

76B Disputes about extension of period of unpaid parental leave

Application of this section

- (1) This section applies to a dispute between an employer and an employee that relates to a request by the employee to the employer under subsection 76(1) to agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months immediately following the end of the available parental leave period if:
 - (a) the employer has refused the request; or
 - (b) 21 days have passed since the employee made the request, and the employer has not given the employee a written response to the request under section 76A.

Note 1: Modern awards and enterprise agreements must include a term that provides a procedure for settling disputes in relation to the National Employment Standards (see paragraph 146(b) and subsection 186(6)).

Note 2: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards. However, a term of a modern award or an enterprise agreement has no effect to the extent it contravenes section 55 (see section 56).

Resolving disputes

- (2) In the first instance, the parties to the dispute must attempt to resolve the dispute at the workplace level, by discussions between the parties.

FWC may deal with disputes

- (3) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the dispute to the FWC.
- (4) If a dispute is referred under subsection (3):
 - (a) the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances; and
 - (b) the FWC may deal with the dispute by arbitration in accordance with section 76C.

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Note: For the purposes of paragraph (a), the FWC may deal with the dispute as it considers appropriate. The FWC commonly deals with disputes by conciliation. The FWC may also deal with the dispute by mediation, making a recommendation or expressing an opinion (see subsection 595(2)).

Representatives

- (5) The employer or employee may appoint a person or industrial association to provide the employer or employee (as the case may be) with support or representation for the purposes of:
- (a) resolving the dispute; or
 - (b) the FWC dealing with the dispute.

Note: A person may be represented by a lawyer or paid agent in a matter before the FWC only with the permission of the FWC (see section 596).

76C Arbitration

- (1) For the purposes of paragraph 76B(4)(b), the FWC may deal with the dispute by arbitration by making any of the following orders:
- (a) if the employer has not given the employee a written response to the request under section 76A—an order that the employer be taken to have refused the request;
 - (b) if the employer refused the request:
 - (i) an order that it would be appropriate for the grounds on which the employer refused the request to be taken to have been reasonable business grounds; or
 - (ii) an order that it would be appropriate for the grounds on which the employer refused the request to be taken not to have been reasonable business grounds;
 - (c) if the FWC is satisfied that the employer has not responded, or has not responded adequately, to the employee's request under section 76A—an order that the employer take such further steps as the FWC considers appropriate, having regard to the matters in section 76A;
 - (d) subject to subsection (4) of this section:
 - (i) an order that the employer grant the request; or

- (ii) an order that the employer agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months (other than the period requested by the employee) immediately following the end of the available parental leave period.

Note: An order by the FWC under paragraph (c) could, for example, require the employer to give a response, or further response, to the employee's request, and could set out matters that must be included in the response or further response.

- (2) In making an order under subsection (1), the FWC must take into account fairness between the employer and the employee.
- (3) The FWC must not make an order under paragraph (1)(c) or (d) that would be inconsistent with:
 - (a) a provision of this Act; or
 - (b) a term of a fair work instrument (other than an order made under that paragraph) that, immediately before the order is made, applies to the employer and employee.
- (4) The FWC may make an order under paragraph (1)(d) only if the FWC is satisfied that there is no reasonable prospect of the dispute being resolved without the making of such an order.
- (5) If the FWC makes an order under paragraph (1)(a), the employer is taken to have refused the request.
- (6) If the FWC makes an order under paragraph (1)(b), the grounds on which the employer refuses the request are taken:
 - (a) for an order made under subparagraph (1)(b)(i)—to be reasonable business grounds; or
 - (b) for an order made under subparagraph (1)(b)(ii)—not to be reasonable business grounds.

Contravening an order under subsection (1)

- (7) A person must not contravene a term of an order made under subsection (1).

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

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77 Reducing period of unpaid parental leave

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

77A Effect of stillbirth or death of child on unpaid parental leave

Stillbirth—preserving entitlement to birth-related leave

- (1) If:
- (a) a child is stillborn; and
 - (b) an employee would have been entitled to unpaid parental leave that is birth-related leave, if the child had been born alive;
- then the employee is taken to be entitled to the unpaid parental leave, despite the stillbirth of the child.
- (2) A **stillborn** child is a child:
- (a) who weighs at least 400 grams at delivery or whose period of gestation was at least 20 weeks; and
 - (b) who has not breathed since delivery; and
 - (c) whose heart has not beaten since delivery.
- (3) The provisions of this Division have effect in relation to the employee as if the birth of a child included the stillbirth of a child.

Note: One effect of this subsection is that if the employee has not given notice in accordance with section 74 before the stillbirth of the child, the employee can do so as soon as practicable (which may be a time after the leave has started).

Stillbirth or death of child—cancelling leave or returning to work

- (4) If a child is stillborn, or dies during the 24-month period starting on the child's date of birth, then an employee who is entitled to a period of unpaid parental leave in relation to the child may:
- (a) before the period of leave starts, give the employee's employer written notice cancelling the leave; or

- (b) if the period of leave has started, give the employee's employer written notice that the employee wishes to return to work on a specified day.
- (5) For the purposes of paragraph (4)(b), the specified day must be at least 4 weeks after the employer receives the notice.
- (6) If the employee takes action under subsection (4), the employee's entitlement to unpaid parental leave in relation to the child ends:
 - (a) if the action is taken under paragraph (4)(a)—immediately after the cancellation of the leave; or
 - (b) if the action is taken under paragraph (4)(b)—immediately before the specified day.

Interaction with section 77

- (7) Subsections (4) to (6) do not limit section 77 (which deals with the employee reducing the period of unpaid parental leave with the agreement of the employer).

78 Employee who ceases to have responsibility for care of child

- (1) This section applies to an employee who has taken unpaid parental leave in relation to a child if the employee ceases to have any responsibility for the care of the child for a reason other than because the child:
 - (a) is stillborn; or
 - (b) dies during the 24-month period starting on the child's date of birth.
- (2) The employer may give the employee written notice requiring the employee to return to work on a specified day.
- (3) The specified day:
 - (a) must be at least 4 weeks after the notice is given to the employee; and
 - (b) if the leave is birth-related leave taken by an employee who has given birth—must not be earlier than 6 weeks after the date of birth of the child.

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- (4) The employee's entitlement to unpaid parental leave in relation to the child ends immediately before the specified day.

78A Hospitalised children

Agreeing to not take unpaid parental leave for a period while child remains in hospital

- (1) If:
- (a) a child is required to remain in hospital after the child's birth, or is hospitalised immediately after the child's birth, including because:
 - (i) the child was born prematurely; or
 - (ii) the child developed a complication or contracted an illness during the child's period of gestation or at birth; or
 - (iii) the child developed a complication or contracted an illness following the child's birth; and
 - (b) an employee, whether before or after the birth of the child, gives notice in accordance with section 74 of the taking of a period of unpaid parental leave (the **original leave period**) in relation to the child;

then the employee may agree with the employee's employer that the employee will not take unpaid parental leave for a period (the **permitted work period**) while the child remains in hospital.

Note: Section 344 prohibits the exertion of undue influence or undue pressure on the employee in relation to a decision by the employee whether to agree.

- (2) If the employee and employer so agree, then the following rules have effect:
- (a) the employee is taken to not be taking unpaid parental leave during the permitted work period;
 - (b) the permitted work period does not break the continuity of the original leave period;
 - (c) the employee is taken to have advised the employer, for the purposes of subsection 74(4), of an end date for the original

leave period that is the date on which that period would end if it were extended by a period equal to the permitted work period.

Note: One effect of paragraph (b) is that, if the employee takes periods of unpaid parental leave either side of the permitted work period, the periods are still treated as a single continuous period for the purposes of section 71.

When permitted work period must start

- (3) The permitted work period must start after the birth of the child.

When permitted work period ends

- (4) The permitted work period ends at the earliest of the following:
- (a) the time agreed by the employee and employer;
 - (b) the end of the day of the child's first discharge from hospital after birth;
 - (c) if the child dies before being discharged—the end of the day the child dies.

Only one permitted work period allowed

- (5) Only one period may be agreed to under subsection (1) for which the employee will not take unpaid parental leave in relation to the child.

Evidence

- (6) The employee must, if required by the employer, give the employer evidence that would satisfy a reasonable person of either or both of the following:
- (a) that paragraph (1)(a) applies in relation to the child;
 - (b) that the employee is fit for work.
- (7) Without limiting subsection (6), an employer may require the evidence referred to in that subsection to be a medical certificate.

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

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79 Interaction with paid leave

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

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

- (2) While an employee is taking unpaid parental leave, the employee is not entitled to take:
- (a) paid personal/carer's leave; or
 - (b) compassionate leave, unless the permissible occasion is the stillbirth or death of the child in relation to whom the employee is taking unpaid parental leave.
- (3) An employee is not entitled to any payment under Division 8 (which deals with community service leave) in relation to activities the employee engages in while taking unpaid parental leave.

79A Keeping in touch days

- (1) This Subdivision does not prevent an employee from performing work for the employee's employer on a keeping in touch day while the employee is taking unpaid parental leave. If the employee does so, the performance of that work does not break the continuity of the period of unpaid parental leave.
- (2) A day on which the employee performs work for the employer during the period of leave is a **keeping in touch day** if:
- (a) the purpose of performing the work is to enable the employee to keep in touch with the employee's employment in order to facilitate a return to that employment after the end of the period of leave; and
 - (b) both the employee and the employer consent to the employee performing work for the employer on that day; and

- (c) the day is not within:
 - (i) if the employee suggested or requested that the employee perform work for the employer on that day—14 days after the date of birth, or day of placement, of the child to which the period of leave relates; or
 - (ii) otherwise—42 days after the date of birth, or day of placement, of the child; and
- (d) the employee has not already performed work for the employer or another entity on 10 days during the period of leave that were keeping in touch days.

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

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

- (3) The employee's decision whether to give the consent mentioned in paragraph (2)(b) is taken, for the purposes of section 344 (which deals with undue influence or pressure), to be a decision to make, or not make, an arrangement under the National Employment Standards.
- (4) For the purposes of paragraph (2)(d), treat as 2 separate periods of unpaid parental leave:
 - (a) a period of unpaid parental leave taken during the employee's available parental leave period; and
 - (b) a period of unpaid parental leave taken as an extension of the leave referred to in paragraph (a) for a further period immediately following the end of the available parental leave period.
- (5) Subsection (1) does not apply in relation to flexible unpaid parental leave.

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79B Unpaid parental leave not extended by paid leave or keeping in touch days

If, during a period of unpaid parental leave, an employee:

- (a) takes paid leave; or
- (b) performs work for the employee's employer on a keeping in touch day;

taking that leave or performing that work does not have the effect of extending the period of unpaid parental leave.

Subdivision C—Other entitlements

80 Unpaid special parental leave

Entitlement to unpaid special parental leave

- (1) An employee is entitled to a period of unpaid special parental leave if the employee is not fit for work during that period because:
 - (a) the employee is pregnant and has a pregnancy-related illness; or
 - (b) all of the following apply:
 - (i) the employee has been pregnant;
 - (ii) the pregnancy ends after a period of gestation of at least 12 weeks otherwise than by the birth of a living child;
 - (iii) the child is not stillborn.

Note 1: Entitlement is also affected by section 67 (which deals with the length of the employee's service).

Note 1A: If the child is stillborn, the employee may be entitled to unpaid parental leave (see section 77A).

Note 2: If an employee has an entitlement to paid personal/carer's leave (see section 96), the employee may take that leave instead of taking unpaid special parental leave under this section.

Notice and evidence

- (2) An employee must give the employee's employer notice of the taking of unpaid special parental leave by the employee.

- (3) The notice:
 - (a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
 - (b) must advise the employer of the period, or expected period, of the leave.
- (4) An employee who has given the employee's employer notice of the taking of unpaid special parental leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason specified in subsection (1).
- (5) Without limiting subsection (4), an employer may require the evidence referred to in that subsection to be a medical certificate.
- (6) An employee is not entitled to take unpaid special parental leave unless the employee complies with subsections (2) to (4).
- (7) Subdivision B does not apply to unpaid special parental leave.

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

81 Transfer to a safe job

- (1) This section applies to a pregnant employee if the employee gives the employee's employer evidence that would satisfy a reasonable person that the employee is fit for work, but that it is inadvisable for the employee to continue in the employee's present position during a stated period (the *risk period*) because of:
 - (a) illness, or risks, arising out of the employee's pregnancy; or
 - (b) hazards connected with that position.

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

- (2) If there is an appropriate safe job available, then the employer must transfer the employee to that job for the risk period, with no other change to the employee's terms and conditions of employment.

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Note: If there is no appropriate safe job available, then the employee may be entitled to paid no safe job leave under section 81A or unpaid no safe job leave under 82A.

- (3) An **appropriate safe job** is a safe job that has:
 - (a) the same ordinary hours of work as the employee's present position; or
 - (b) a different number of ordinary hours agreed to by the employee.
- (4) If the employee is transferred to an appropriate safe job for the risk period, the employer must pay the employee for the safe job at the employee's full rate of pay (for the position the employee was in before the transfer) for the hours that the employee works in the risk period.
- (5) If the employee's pregnancy ends before the end of the risk period, the **risk period** ends when the pregnancy ends.
- (6) Without limiting subsection (1), an employer may require the evidence to be a medical certificate.

81A Paid no safe job leave

- (1) If:
 - (a) section 81 applies to a pregnant employee but there is no appropriate safe job available; and
 - (b) the employee is entitled to unpaid parental leave; and
 - (c) the employee has complied with the notice and evidence requirements of section 74 for taking unpaid parental leave;then the employee is entitled to paid no safe job leave for the risk period.
- (2) If the employee takes paid no safe job leave for the risk period, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the risk period.

82 Employee on paid no safe job leave may be asked to provide a further medical certificate

Employer may ask employee to provide a medical certificate

- (1) If an employee is on paid no safe job leave during the 6 week period before the expected date of birth of the child, the employer may ask the employee to give the employer a medical certificate stating whether the employee is fit for work.

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

Employer may require employee to take unpaid parental leave

- (2) The employer may require the employee to take a period of unpaid parental leave (the ***period of leave***) as soon as practicable if:
 - (a) the employee does not give the employer the requested certificate within 7 days after the request; or
 - (b) within 7 days after the request, the employee gives the employer a certificate stating that the employee is not fit for work.

Entitlement to paid no safe job leave ends

- (3) When the period of leave starts, the employee's entitlement to paid no safe job leave ends.

When the period of leave must end etc.

- (4) Subsections 73(3), (4) and (5) apply to the period of leave.

82A Unpaid no safe job leave

- (1) If:
 - (a) section 81 applies to a pregnant employee but there is no appropriate safe job available; and
 - (b) the employee is not entitled to unpaid parental leave; and

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- (c) if required by the employer—the employee has given the employer evidence that would satisfy a reasonable person of the pregnancy;
then the employee is entitled to unpaid no safe job leave for the risk period.
- (2) Without limiting subsection (1), an employer may require the evidence referred to in paragraph (1)(c) to be a medical certificate.

83 Consultation with employee on unpaid parental leave

If:

- (a) an employee is taking a period of unpaid parental leave, other than flexible unpaid parental leave; and
- (b) the employee's employer makes a decision that will have a significant effect on the status, pay or location of the employee's pre-parental leave position;

the employer must take all reasonable steps to give the employee information about, and an opportunity to discuss, the effect of the decision on that position.

84 Return to work guarantee

On ending a period of unpaid parental leave, an employee is entitled to return to:

- (a) the employee's pre-parental leave position; or
- (b) if that position no longer exists—an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.

84A Replacement employees

- (1) Before an employer engages an employee to perform the work of another employee who is going to take, or is taking, unpaid parental leave, the employer must notify the replacement employee:
 - (a) that the engagement to perform that work is temporary; and

- (b) of the rights the employee taking unpaid parental leave has under:
 - (i) subsections 77A(4) and (5) (which provide a right to cancel the leave or end the leave early if the child is stillborn or dies within 24 months); and
 - (ii) section 84 (which deals with the return to work guarantee); and
 - (d) of the effect of section 78 (which provides the employer with a right to require the employee taking unpaid parental leave to return to work if the employee ceases to have any responsibility for the care of the child).
- (2) Subsection (1) does not apply in relation to the taking of flexible unpaid parental leave.

85 Unpaid pre-adoption leave

Entitlement to unpaid pre-adoption leave

- (1) An employee is entitled to up to 2 days of unpaid pre-adoption leave to attend any interviews or examinations required in order to obtain approval for the employee's adoption of a child.
- Note: Entitlement is also affected by section 68 (which deals with the age etc. of the adopted child).
- (2) However, an employee is not entitled to take a period of unpaid pre-adoption leave if:
- (a) the employee could instead take some other form of leave; and
 - (b) the employer directs the employee to take that other form of leave.
- (3) An employee who is entitled to a period of unpaid pre-adoption leave is entitled to take the leave as:
- (a) a single continuous period of up to 2 days; or
 - (b) any separate periods to which the employee and the employer agree.

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Notice and evidence

- (4) An employee must give the employee's employer notice of the taking of unpaid pre-adoption leave by the employee.
- (5) The notice:
 - (a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
 - (b) must advise the employer of the period, or expected period, of the leave.
- (6) An employee who has given the employee's employer notice of the taking of unpaid pre-adoption leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken to attend an interview or examination as referred to in subsection (1).
- (7) An employee is not entitled to take unpaid pre-adoption leave unless the employee complies with subsections (4) to (6).

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

Division 6—Annual leave

86 Division applies to employees other than casual employees

This Division applies to employees, other than casual employees.

87 Entitlement to annual leave

Amount of leave

- (1) For each year of service with an employer (other than periods of employment as a casual employee of the employer), an employee is entitled to:
 - (a) 4 weeks of paid annual leave; or
 - (b) 5 weeks of paid annual leave, if:
 - (i) a modern award applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or
 - (ii) an enterprise agreement applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or
 - (iii) the employee qualifies for the shiftworker annual leave entitlement under subsection (3) (this relates to award/agreement free employees).

Note: Section 196 affects whether the FWC may approve an enterprise agreement covering an employee, if the employee is covered by a modern award that is in operation and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards.

Accrual of leave

- (2) An employee's entitlement to paid annual leave accrues progressively during a year of service (other than periods of employment as a casual employee of the employer) according to the employee's ordinary hours of work, and accumulates from year to year.

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Note: If an employee's employment ends during what would otherwise have been a year of service, the employee accrues paid annual leave up to when the employment ends.

Award/agreement free employees who qualify for the shiftworker entitlement

- (3) An award/agreement free employee qualifies for the shiftworker annual leave entitlement if:
 - (a) the employee:
 - (i) is employed in an enterprise in which shifts are continuously rostered 24 hours a day for 7 days a week; and
 - (ii) is regularly rostered to work those shifts; and
 - (iii) regularly works on Sundays and public holidays; or
 - (b) the employee is in a class of employees prescribed by the regulations as shiftworkers for the purposes of the National Employment Standards.
- (4) However, an employee referred to in subsection (3) does not qualify for the shiftworker annual leave entitlement if the employee is in a class of employees prescribed by the regulations as not being qualified for that entitlement.
- (5) Without limiting the way in which a class may be described for the purposes of paragraph (3)(b) or subsection (4), the class may be described by reference to one or more of the following:
 - (a) a particular industry or part of an industry;
 - (b) a particular kind of work;
 - (c) a particular type of employment.

88 Taking paid annual leave

- (1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.
- (2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

89 Employee not taken to be on paid annual leave at certain times

Public holidays

- (1) If the period during which an employee takes paid annual leave includes a day or part-day that is a public holiday in the place where the employee is based for work purposes, the employee is taken not to be on paid annual leave on that public holiday.

Other periods of leave

- (2) If the period during which an employee takes paid annual leave includes a period of any other leave (other than unpaid parental leave) under this Part, or a period of absence from employment under Division 8 (which deals with community service leave), the employee is taken not to be on paid annual leave for the period of that other leave or absence.

90 Payment for annual leave

- (1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.
- (2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

91 Transfer of employment situations that affect entitlement to payment for period of untaken paid annual leave

Transfer of employment situation in which employer may decide not to recognise employee's service with first employer

- (1) Subsection 22(5) does not apply (for the purpose of this Division) to a transfer of employment between non-associated entities in relation to an employee, if the second employer decides not to

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recognise the employee's service with the first employer (for the purpose of this Division).

Employee is not entitled to payment for untaken annual leave if service with first employer counts as service with second employer

- (2) If subsection 22(5) applies (for the purpose of this Division) to a transfer of employment in relation to an employee, the employee is not entitled to be paid an amount under subsection 90(2) for a period of untaken paid annual leave.

Note: Subsection 22(5) provides that, generally, if there is a transfer of employment, service with the first employer counts as service with the second employer.

92 Paid annual leave must not be cashed out except in accordance with permitted cashing out terms

Paid annual leave must not be cashed out, except in accordance with:

- (a) cashing out terms included in a modern award or enterprise agreement under section 93, or
- (b) an agreement between an employer and an award/agreement free employee under subsection 94(1).

93 Modern awards and enterprise agreements may include terms relating to cashing out and taking paid annual leave

Terms about cashing out paid annual leave

- (1) A modern award or enterprise agreement may include terms providing for the cashing out of paid annual leave by an employee.
- (2) The terms must require that:
 - (a) paid annual leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks; and

- (b) each cashing out of a particular amount of paid annual leave must be by a separate agreement in writing between the employer and the employee; and
- (c) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

Terms about requirements to take paid annual leave

- (3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

Terms about taking paid annual leave

- (4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave.

94 Cashing out and taking paid annual leave for award/agreement free employees

Agreements to cash out paid annual leave

- (1) An employer and an award/agreement free employee may agree to the employee cashing out a particular amount of the employee's accrued paid annual leave.
- (2) The employer and the employee must not agree to the employee cashing out an amount of paid annual leave if the agreement would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.
- (3) Each agreement to cash out a particular amount of paid annual leave must be a separate agreement in writing.
- (4) The employer must pay the employee at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

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Requirements to take paid annual leave

- (5) An employer may require an award/agreement free employee to take a period of paid annual leave, but only if the requirement is reasonable.

Note: A requirement to take paid annual leave may be reasonable if, for example:

- (a) the employee has accrued an excessive amount of paid annual leave; or
- (b) the employer's enterprise is being shut down for a period (for example, between Christmas and New Year).

Agreements about taking paid annual leave

- (6) An employer and an award/agreement free employee may agree on when and how paid annual leave may be taken by the employee.

Note: Matters that could be agreed include, for example, the following:

- (a) that paid annual leave may be taken in advance of accrual;
- (b) that paid annual leave must be taken within a fixed period of time after it is accrued;
- (c) the form of application for paid annual leave;
- (d) that a specified period of notice must be given before taking paid annual leave.

Division 7—Personal/carer's leave, compassionate leave and paid family and domestic violence leave

Subdivision A—Paid personal/carer's leave

95 Subdivision applies to employees other than casual employees

This Subdivision applies to employees, other than casual employees.

96 Entitlement to paid personal/carer's leave

Amount of leave

- (1) For each year of service with an employer (other than periods of employment as a casual employee of the employer), an employee is entitled to 10 days of paid personal/carer's leave.

Accrual of leave

- (2) An employee's entitlement to paid personal/carer's leave accrues progressively during a year of service (other than periods of employment as a casual employee of the employer) according to the employee's ordinary hours of work, and accumulates from year to year.

97 Taking paid personal/carer's leave

An employee may take paid personal/carer's leave if the leave is taken:

- (a) because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee;
or
- (b) to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:

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- (i) a personal illness, or personal injury, affecting the member; or
- (ii) an unexpected emergency affecting the member.

Note 1: The notice and evidence requirements of section 107 must be complied with.

Note 2: If an employee has an entitlement to paid personal/carer's leave, the employee may take that leave instead of taking unpaid special parental leave under section 80.

98 Employee taken not to be on paid personal/carer's leave at certain times

Public holidays

- (1) If the period during which an employee takes paid personal/carer's leave includes a day or part-day that is a public holiday in the place where the employee is based for work purposes, the employee is taken not to be on paid personal/carer's leave on that public holiday.

Period of paid family and domestic violence leave

- (2) If the period during which an employee takes paid personal/carer's leave includes a period of paid family and domestic violence leave, the employee is taken not to be on paid personal/carer's leave for the period of that paid family and domestic violence leave.

99 Payment for paid personal/carer's leave

If, in accordance with this Subdivision, an employee takes a period of paid personal/carer's leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

100 Paid personal/carer's leave must not be cashed out except in accordance with permitted cashing out terms

Paid personal/carer's leave must not be cashed out, except in accordance with cashing out terms included in a modern award or enterprise agreement under section 101.

101 Modern awards and enterprise agreements may include terms relating to cashing out paid personal/carer's leave

- (1) A modern award or enterprise agreement may include terms providing for the cashing out of paid personal/carer's leave by an employee.
- (2) The terms must require that:
 - (a) paid personal/carer's leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid personal/carer's leave being less than 15 days; and
 - (b) each cashing out of a particular amount of paid personal/carer's leave must be by a separate agreement in writing between the employer and the employee; and
 - (c) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

Subdivision B—Unpaid carer's leave

102 Entitlement to unpaid carer's leave

An employee is entitled to 2 days of unpaid carer's leave for each occasion (a *permissible occasion*) when a member of the employee's immediate family, or a member of the employee's household, requires care or support because of:

- (a) a personal illness, or personal injury, affecting the member;
or
- (b) an unexpected emergency affecting the member.

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103 Taking unpaid carer's leave

- (1) An employee may take unpaid carer's leave for a particular permissible occasion if the leave is taken to provide care or support as referred to in section 102.
- (2) An employee may take unpaid carer's leave for a particular permissible occasion as:
 - (a) a single continuous period of up to 2 days; or
 - (b) any separate periods to which the employee and his or her employer agree.
- (3) An employee cannot take unpaid carer's leave during a particular period if the employee could instead take paid personal/carer's leave.

Note: The notice and evidence requirements of section 107 must be complied with.

Subdivision C—Compassionate leave

104 Entitlement to compassionate leave

- (1) An employee is entitled to 2 days of compassionate leave for each occasion (a *permissible occasion*) when:
 - (a) a member of the employee's immediate family or a member of the employee's household:
 - (i) contracts or develops a personal illness that poses a serious threat to his or her life; or
 - (ii) sustains a personal injury that poses a serious threat to his or her life; or
 - (iii) dies; or
 - (b) a child is stillborn, where the child would have been a member of the employee's immediate family, or a member of the employee's household, if the child had been born alive; or
 - (c) the employee, or the employee's spouse or de facto partner, has a miscarriage.

- (2) Paragraph (1)(c) does not apply:
- (a) if the miscarriage results in a stillborn child; or
 - (b) to a former spouse, or former de facto partner, of the employee.

Note: For the definition of a *stillborn* child, see subsection 77A(2).

105 Taking compassionate leave

- (1) An employee may take compassionate leave for a particular permissible occasion if the leave is taken:
- (a) to spend time with the member of the employee's immediate family or household who has contracted or developed the personal illness, or sustained the personal injury, referred to in section 104; or
 - (b) after the death of the member of the employee's immediate family or household, or the stillbirth of the child, referred to in section 104; or
 - (c) after the employee, or the employee's spouse or de facto partner, has the miscarriage referred to in section 104.
- (2) An employee may take compassionate leave for a particular permissible occasion as:
- (a) a single continuous 2 day period; or
 - (b) 2 separate periods of 1 day each; or
 - (c) any separate periods to which the employee and his or her employer agree.
- (3) If the permissible occasion is the contraction or development of a personal illness, or the sustaining of a personal injury, the employee may take the compassionate leave for that occasion at any time while the illness or injury persists.

Note: The notice and evidence requirements of section 107 must be complied with.

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106 Payment for compassionate leave (other than for casual employees)

If, in accordance with this Subdivision, an employee, other than a casual employee, takes a period of compassionate leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

Note: For casual employees, compassionate leave is unpaid leave.

Subdivision CA—Paid family and domestic violence leave

106A Entitlement to paid family and domestic violence leave

- (1) An employee is entitled to 10 days of paid family and domestic violence leave in a 12 month period.
- (2) Paid family and domestic violence leave:
 - (a) is available in full at the start of each 12 month period of the employee's employment; and
 - (b) does not accumulate from year to year; and
 - (c) is available in full to part-time and casual employees.
- (3) For the purposes of subsection (2), if an employee is employed by a particular employer:
 - (a) as a casual employee; or
 - (b) for a specified period of time, for a specified task or for the duration of a specified season;the start of the employee's employment is taken to be the start of the employee's first employment with that employer.
- (4) The employee may take paid family and domestic violence leave as:
 - (a) a single continuous 10 day period; or
 - (b) separate periods of one or more days each; or
 - (c) any separate periods to which the employee and the employer agree, including periods of less than one day.

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- (5) To avoid doubt, this section does not prevent the employee and the employer agreeing that the employee may take paid or unpaid leave in addition to the entitlement in subsection (1) to deal with the impact of family and domestic violence.

106B Taking paid family and domestic violence leave

- (1) The employee may take paid family and domestic violence leave if:
- (a) the employee is experiencing family and domestic violence; and
 - (b) the employee needs to do something to deal with the impact of the family and domestic violence; and
 - (c) it is impractical for the employee to do that thing outside the employee's work hours.

Note 1: Examples of actions, by an employee who is experiencing family and domestic violence, that could be covered by paragraph (b) include arranging for the safety of the employee or a close relative (including relocation), attending court hearings, accessing police services, attending counselling and attending appointments with medical, financial or legal professionals.

Note 2: The notice and evidence requirements of section 107 must be complied with.

- (2) **Family and domestic violence** is violent, threatening or other abusive behaviour by a close relative of a person, a member of a person's household, or a current or former intimate partner of a person, that:
- (a) seeks to coerce or control the person; and
 - (b) causes the person harm or to be fearful.
- (3) A **close relative** of a person is another person who:
- (a) is a member of the first person's immediate family; or
 - (b) is related to the first person according to Aboriginal or Torres Strait Islander kinship rules.

Note: **Immediate family** is defined in section 12.

Section 106BA

106BA Payment for paid family and domestic violence leave

- (1) If, in accordance with this Subdivision, an employee takes a period of paid family and domestic violence leave, the employer must pay the employee, in relation to the period:
 - (a) for an employee other than a casual employee—at the employee's full rate of pay, worked out as if the employee had not taken the period of leave; or
 - (b) for a casual employee—at the employee's full rate of pay, worked out as if the employee had worked the hours in the period for which the employee was rostered.
- (2) Without limiting paragraph (1)(b), an employee is taken to have been rostered to work hours in a period if the employee has accepted an offer by the employer of work for those hours.
- (3) Paragraph (1)(b) does not prevent a casual employee from taking a period of paid family and domestic violence leave that does not include hours for which the employee is rostered to work. However, the employer is not required to pay the employee in relation to such a period.

106C Confidentiality

- (1) Employers must take steps to ensure information concerning any notice or evidence an employee has given under section 107 of the employee taking leave under this Subdivision is treated confidentially, as far as it is reasonably practicable to do so.
- (2) An employer must not, other than with the consent of the employee, use such information for a purpose other than satisfying itself in relation to the employee's entitlement to leave under this Subdivision. In particular, an employer must not use such information to take adverse action against an employee.
- (3) Subsection (2) has effect subject to subsection (4).
- (4) Nothing in this Subdivision prevents an employer from dealing with information provided by an employee if doing so is required

by an Australian law or is necessary to protect the life, health or safety of the employee or another person.

Note: Information covered by this section that is personal information may also be regulated under the *Privacy Act 1988*.

106D Operation of paid family and domestic violence leave and leave for victims of crime

- (1) This Subdivision does not exclude or limit the operation of a law of a State or Territory to the extent that it provides for leave for victims of crime.

Note: Leave for victims of crime is a non-excluded matter under paragraph 27(2)(h).

- (2) If an employee who is entitled, under a law of a State or Territory, to leave for victims of crime is also entitled to leave under this Subdivision, that law applies in addition to this Subdivision.

- (3) A person who is a national system employee only because of section 30C or 30M is entitled to leave under this Subdivision only to the extent that the leave would not constitute leave for victims of crime.

Note: To the extent that leave would constitute leave for victims of crime, the entitlement to paid family and domestic violence leave is extended to the persons mentioned in subsection (3) by Division 2A of Part 6-3 (see subsection 757B(2)).

106E Entitlement to days of leave

What constitutes a day of leave for the purposes of this Subdivision is taken to be the same as what constitutes a day of leave for the purposes of sections 72A and 85 and Subdivisions B and C.

Section 107

Subdivision D—Notice and evidence requirements

107 Notice and evidence requirements

Notice

- (1) An employee must give his or her employer notice of the taking of leave under this Division by the employee.
- (2) The notice:
 - (a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
 - (b) must advise the employer of the period, or expected period, of the leave.

Evidence

- (3) An employee who has given his or her employer notice of the taking of leave under this Division must, if required by the employer, give the employer evidence that would satisfy a reasonable person that:
 - (a) if it is paid personal/carer's leave—the leave is taken for a reason specified in section 97; or
 - (b) if it is unpaid carer's leave—the leave is taken for a permissible occasion in circumstances specified in subsection 103(1); or
 - (c) if it is compassionate leave—the leave is taken for a permissible occasion in circumstances specified in subsection 105(1); or
 - (d) if it is paid family and domestic violence leave, and the employee has met the requirement specified in paragraph 106B(1)(a)—the leave is taken for the purpose specified in paragraph 106B(1)(b), and the requirement specified in paragraph 106B(1)(c) is met.

Compliance

- (4) An employee is not entitled to take leave under this Division unless the employee complies with this section.

Modern awards and enterprise agreements may include evidence requirements

- (5) A modern award or enterprise agreement may include terms relating to the kind of evidence that an employee must provide in order to be entitled to paid personal/carer's leave, unpaid carer's leave or compassionate leave.

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

Division 8—Community service leave

108 Entitlement to be absent from employment for engaging in eligible community service activity

An employee who engages in an eligible community service activity is entitled to be absent from his or her employment for a period if:

- (a) the period consists of one or more of the following:
 - (i) time when the employee engages in the activity;
 - (ii) reasonable travelling time associated with the activity;
 - (iii) reasonable rest time immediately following the activity; and
- (b) unless the activity is jury service—the employee’s absence is reasonable in all the circumstances.

109 Meaning of *eligible community service activity*

General

- (1) Each of the following is an ***eligible community service activity***:
 - (a) jury service (including attendance for jury selection) that is required by or under a law of the Commonwealth, a State or a Territory; or
 - (b) a voluntary emergency management activity (see subsection (2)); or
 - (c) an activity prescribed in regulations made for the purpose of subsection (4).

Voluntary emergency management activities

- (2) An employee engages in a ***voluntary emergency management activity*** if, and only if:
 - (a) the employee engages in an activity that involves dealing with an emergency or natural disaster; and

- (b) the employee engages in the activity on a voluntary basis (whether or not the employee directly or indirectly takes or agrees to take an honorarium, gratuity or similar payment wholly or partly for engaging in the activity); and
 - (c) the employee is a member of, or has a member-like association with, a recognised emergency management body; and
 - (d) either:
 - (i) the employee was requested by or on behalf of the body to engage in the activity; or
 - (ii) no such request was made, but it would be reasonable to expect that, if the circumstances had permitted the making of such a request, it is likely that such a request would have been made.
- (3) A **recognised emergency management body** is:
- (a) a body, or part of a body, that has a role or function under a plan that:
 - (i) is for coping with emergencies and/or disasters; and
 - (ii) is prepared by the Commonwealth, a State or a Territory; or
 - (b) a fire-fighting, civil defence or rescue body, or part of such a body; or
 - (c) any other body, or part of a body, a substantial purpose of which involves:
 - (i) securing the safety of persons or animals in an emergency or natural disaster; or
 - (ii) protecting property in an emergency or natural disaster; or
 - (iii) otherwise responding to an emergency or natural disaster; or
 - (d) a body, or part of a body, prescribed by the regulations; but does not include a body that was established, or is continued in existence, for the purpose, or for purposes that include the purpose, of entitling one or more employees to be absent from their employment under this Division.

Section 110

Regulations may prescribe other activities

- (4) The regulations may prescribe an activity that is of a community service nature as an eligible community service activity.

110 Notice and evidence requirements

Notice

- (1) An employee who wants an absence from his or her employment to be covered by this Division must give his or her employer notice of the absence.
- (2) The notice:
- (a) must be given to the employer as soon as practicable (which may be a time after the absence has started); and
 - (b) must advise the employer of the period, or expected period, of the absence.

Evidence

- (3) An employee who has given his or her employer notice of an absence under subsection (1) must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the absence is because the employee has been or will be engaging in an eligible community service activity.

Compliance

- (4) An employee's absence from his or her employment is not covered by this Division unless the employee complies with this section.

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

111 Payment to employees (other than casuals) on jury service

Application of this section

- (1) This section applies if:
-

- (a) in accordance with this Division, an employee is absent from his or her employment for a period because of jury service; and
- (b) the employee is not a casual employee.

Employee to be paid base rate of pay

- (2) Subject to subsections (3), (4) and (5), the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

Evidence

- (3) The employer may require the employee to give the employer evidence that would satisfy a reasonable person:
 - (a) that the employee has taken all necessary steps to obtain any amount of jury service pay to which the employee is entitled; and
 - (b) of the total amount (even if it is a nil amount) of jury service pay that has been paid, or is payable, to the employee for the period.

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

- (4) If, in accordance with subsection (3), the employer requires the employee to give the employer the evidence referred to in that subsection:
 - (a) the employee is not entitled to payment under subsection (2) unless the employee provides the evidence; and
 - (b) if the employee provides the evidence—the amount payable to the employee under subsection (2) is reduced by the total amount of jury service pay that has been paid, or is payable, to the employee, as disclosed in the evidence.

Section 112

Payment only required for first 10 days of absence

- (5) If an employee is absent because of jury service in relation to a particular jury service summons for a period, or a number of periods, of more than 10 days in total:
- (a) the employer is only required to pay the employee for the first 10 days of absence; and
 - (b) the evidence provided in response to a requirement under subsection (3) need only relate to the first 10 days of absence; and
 - (c) the reference in subsection (4) to the total amount of jury service pay as disclosed in evidence is a reference to the total amount so disclosed for the first 10 days of absence.

Meaning of jury service pay

- (6) **Jury service pay** means an amount paid in relation to jury service under a law of the Commonwealth, a State or a Territory, other than an amount that is, or that is in the nature of, an expense-related allowance.

Meaning of jury service summons

- (7) **Jury service summons** means a summons or other instruction (however described) that requires a person to attend for, or perform, jury service.

112 State and Territory laws that are not excluded

- (1) This Act is not intended to apply to the exclusion of laws of a State or Territory that provide employee entitlements in relation to engaging in eligible community service activities, to the extent that those entitlements are more beneficial to employees than the entitlements under this Division.

Note: For example, this Act would not apply to the exclusion of a State or Territory law providing for a casual employee to be paid jury service pay.

- (2) If the community service activity is an activity prescribed in regulations made for the purpose of subsection 109(4), subsection (1) of this section has effect subject to any provision to the contrary in the regulations.

Division 9—Long service leave

113 Entitlement to long service leave

Entitlement in accordance with applicable award-derived long service leave terms

- (1) If there are applicable award-derived long service leave terms (see subsection (3)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.

Note: This Act does not exclude State and Territory laws that deal with long service leave, except in relation to employees who are entitled to long service leave under this Division (see paragraph 27(2)(g)), and except as provided in subsection 113A(3).

- (2) However, subsection (1) does not apply if:
- (a) a workplace agreement, or an AWA, that came into operation before the commencement of this Part applies to the employee; or
 - (b) one of the following kinds of instrument that came into operation before the commencement of this Part applies to the employee and expressly deals with long service leave:
 - (i) an enterprise agreement;
 - (ii) a preserved State agreement;
 - (iii) a workplace determination;
 - (iv) a pre-reform certified agreement;
 - (v) a pre-reform AWA;
 - (vi) a section 170MX award;
 - (vii) an old IR agreement.

Note: If there ceases to be any agreement or instrument of a kind referred to in paragraph (a) or (b) that applies to the employee, the employee will, at that time, become entitled under subsection (1) to long service leave in accordance with applicable award-derived long service leave terms.

- (3) ***Applicable award-derived long service leave terms***, in relation to an employee, are:

- (a) terms of an award, or a State reference transitional award, that (disregarding the effect of any instrument of a kind referred to in subsection (2)):
 - (i) would have applied to the employee at the test time (see subsection (3A)) if the employee had, at that time, been in his or her current circumstances of employment; and
 - (ii) would have entitled the employee to long service leave; and
 - (b) any terms of the award, or the State reference transitional award, that are ancillary or incidental to the terms referred to in paragraph (a).
- (3A) For the purpose of subparagraph (3)(a)(i), the test time is:
- (a) immediately before the commencement of this Part; or
 - (b) if the employee is a Division 2B State reference employee (as defined in Schedule 2 to the Transitional Act)—immediately before the Division 2B referral commencement (as defined in that Schedule).
- Entitlement in accordance with applicable agreement-derived long service leave terms*
- (4) If there are applicable agreement-derived long service leave terms (see subsection (5)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.
 - (5) There are ***applicable agreement-derived long service leave terms***, in relation to an employee if:
 - (a) an order under subsection (6) is in operation in relation to terms of an instrument; and
 - (b) those terms of the instrument would have applied to the employee immediately before the commencement of this Part if the employee had, at that time, been in his or her current circumstances of employment; and
 - (c) there are no applicable award-derived long service leave terms in relation to the employee.
 - (6) If the FWC is satisfied that:
-

Section 113A

- (a) any of the following instruments that was in operation immediately before the commencement of this Part contained terms entitling employees to long service leave:
 - (i) an enterprise agreement;
 - (ii) a collective agreement;
 - (iii) a pre-reform certified agreement;
 - (iv) an old IR agreement; and
- (b) those terms constituted a long service leave scheme that was applying in more than one State or Territory; and
- (c) the scheme, considered on an overall basis, is no less beneficial to the employees than the long service leave entitlements that would otherwise apply in relation to the employees under State and Territory laws;

the FWC may, on application by, or on behalf of, a person to whom the instrument applies, make an order that those terms of the instrument (and any terms that are ancillary or incidental to those terms) are applicable agreement-derived long service leave terms.

References to instruments

- (7) References in this section to a kind of instrument (other than an enterprise agreement) are references to a transitional instrument of that kind, as continued in existence by Schedule 3 to the Transitional Act.

113A Enterprise agreements may contain terms discounting service under prior agreements etc. in certain circumstances

- (1) This section applies if:
 - (a) an instrument (the *first instrument*) of one of the following kinds that came into operation before the commencement of this Part applies to an employee on or after the commencement of this Part:
 - (i) an enterprise agreement;
 - (ii) a workplace agreement;
 - (iii) a workplace determination;

- (iv) a preserved State agreement;
 - (v) an AWA;
 - (vi) a pre-reform certified agreement;
 - (vii) a pre-reform AWA;
 - (viii) an old IR agreement;
 - (ix) a section 170MX award; and
 - (b) the instrument states that the employee is not entitled to long service leave; and
 - (c) the instrument ceases, for whatever reason, to apply to the employee; and
 - (d) immediately after the first instrument ceases to apply, an enterprise agreement (the **replacement agreement**) starts to apply to the employee.
- (2) The replacement agreement may include terms to the effect that an employee's service with the employer during a specified period (the **excluded period**) (being some or all of the period when the first instrument applied to the employee) does not count as service for the purpose of determining whether the employee is qualified for long service leave, or the amount of long service leave to which the employee is entitled, under this Division or under a law of a State or Territory.
- (3) If the replacement agreement includes terms as permitted by subsection (2), the excluded period does not count, and never again counts, as service for the purpose of determining whether the employee is qualified for long service leave, or the amount of long service leave to which the employee is entitled, under this Division or under a law of a State or Territory, unless a later agreement provides otherwise. This subsection has effect despite sections 27 and 29.
- (4) References in this section to a kind of instrument (other than an enterprise agreement) are references to a transitional instrument of that kind, as continued in existence by Schedule 3 to the Transitional Act.

Division 10—Public holidays

114 Entitlement to be absent from employment on public holiday

Employee entitled to be absent on public holiday

- (1) An employee is entitled to be absent from his or her employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes.

Reasonable requests to work on public holidays

- (2) However, an employer may request an employee to work on a public holiday if the request is reasonable.
- (3) If an employer requests an employee to work on a public holiday, the employee may refuse the request if:
 - (a) the request is not reasonable; or
 - (b) the refusal is reasonable.
- (4) In determining whether a request, or a refusal of a request, to work on a public holiday is reasonable, the following must be taken into account:
 - (a) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;
 - (b) the employee's personal circumstances, including family responsibilities;
 - (c) whether the employee could reasonably expect that the employer might request work on the public holiday;
 - (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday;
 - (e) the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork);

- (f) the amount of notice in advance of the public holiday given by the employer when making the request;
- (g) in relation to the refusal of a request—the amount of notice in advance of the public holiday given by the employee when refusing the request;
- (h) any other relevant matter.

115 Meaning of *public holiday*

The public holidays

- (1) The following are **public holidays**:
 - (a) each of these days:
 - (i) 1 January (New Year's Day);
 - (ii) 26 January (Australia Day);
 - (iii) Good Friday;
 - (iv) Easter Monday;
 - (v) 25 April (Anzac Day);
 - (vi) the Queen's birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);
 - (vii) 25 December (Christmas Day);
 - (viii) 26 December (Boxing Day);
 - (b) any other day, or part-day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day or part-day, or a kind of day or part-day, that is excluded by the regulations from counting as a public holiday.

Substituted public holidays under State or Territory laws

- (2) If, under (or in accordance with a procedure under) a law of a State or Territory, a day or part-day is substituted for a day or part-day that would otherwise be a public holiday because of subsection (1), then the substituted day or part-day is the **public holiday**.

Section 116

Substituted public holidays under modern awards and enterprise agreements

- (3) A modern award or enterprise agreement may include terms providing for an employer and employee to agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

Substituted public holidays for award/agreement free employees

- (4) An employer and an award/agreement free employee may agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

Note: This Act does not exclude State and Territory laws that deal with the declaration, prescription or substitution of public holidays, but it does exclude State and Territory laws that relate to the rights and obligations of an employee or employer in relation to public holidays (see paragraph 27(2)(j)).

116 Payment for absence on public holiday

If, in accordance with this Division, an employee is absent from his or her employment on a day or part-day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day.

Note: If the employee does not have ordinary hours of work on the public holiday, the employee is not entitled to payment under this section. For example, the employee is not entitled to payment if the employee is a casual employee who is not rostered on for the public holiday, or is a part-time employee whose part-time hours do not include the day of the week on which the public holiday occurs.

Division 10A—Superannuation contributions

116A Division does not apply to certain employees or employers in referring States

This Division does not apply in relation to:

- (a) an employee who is a national system employee only because of section 30C or 30M (which extend the meaning of *national system employee*); or
- (b) an employer that is a national system employer only because of section 30D or 30N (which extend the meaning of *national system employer*).

116B Employer’s obligation to make superannuation contributions

An employer must make contributions to a superannuation fund for the benefit of an employee so as to avoid liability to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* in relation to the employee.

116C Reduction of employer’s liability to the extent of superannuation charge payments

The obligation to make contributions for an employee under section 116B does not apply to an employer to the extent that:

- (a) the employer has made a charge payment (within the meaning of section 63A of the *Superannuation Guarantee (Administration) Act 1992*) in respect of the employee under Part 8 of that Act; and
- (b) the employee is a benefiting employee (within the meaning of that Part); and
- (c) the Commissioner of Taxation is required to pay, or otherwise deal with, a shortfall component (within the meaning of that Part) for the benefit of the employee under that Part.

Section 116D

116D Preventing multiple actions

Scope

- (1) This section applies if:
- (a) an employer has contravened, or allegedly contravened, a civil remedy provision that relates to a contravention of this Division; and
 - (b) the contravention, or alleged contravention, relates wholly or partly to an employee; and
 - (c) the employee or another person referred to in an item in column 2 of the table in subsection 539(2) would be entitled to apply for an order under Division 2 of Part 4-1 in relation to the contravention, or alleged contravention.

No application for orders in certain circumstances

- (2) An application for such an order may not be made if:
- (a) the Commissioner of Taxation has commenced proceedings against the employer to recover an amount of superannuation guarantee charge; and
 - (b) either:
 - (i) the Commissioner has obtained an order for recovery of the charge; or
 - (ii) if the proceedings have not been finally disposed of— the Commissioner has not discontinued the proceedings; and
 - (c) the employer's superannuation guarantee shortfall in respect of which the charge is imposed includes an individual superannuation guarantee shortfall for the employee.
- (3) Terms (apart from employee and employer) used in this section that are defined in the *Superannuation Guarantee (Administration) Act 1992* have the same meaning in this section as they have in that Act.

116E Orders for compensation

- (1) This section applies if a court makes an order under section 545 awarding compensation to an employee for a contravention of a civil remedy provision that relates to a contravention of this Division.
- (2) The court must have regard to the principle that any component of the compensation payable on account of unpaid superannuation contributions should usually be paid to a superannuation fund for the benefit of the employee.

Section 117

Division 11—Notice of termination and redundancy pay

Subdivision A—Notice of termination or payment in lieu of notice

117 Requirement for notice of termination or payment in lieu

Notice specifying day of termination

- (1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).

Note 1: Section 123 describes situations in which this section does not apply.

Note 2: Sections 28A and 29 of the *Acts Interpretation Act 1901* provide how a notice may be given. In particular, the notice may be given to an employee by:

- (a) delivering it personally; or
- (b) leaving it at the employee's last known address; or
- (c) sending it by pre-paid post to the employee's last known address.

Amount of notice or payment in lieu of notice

- (2) The employer must not terminate the employee's employment unless:
- (a) the time between giving the notice and the day of the termination is at least the period (the **minimum period of notice**) worked out under subsection (3); or
 - (b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.
- (3) Work out the minimum period of notice as follows:

- (a) first, work out the period using the following table:

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	Period
1	Not more than 1 year	1 week
2	More than 1 year but not more than 3 years	2 weeks
3	More than 3 years but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

- (b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.
- (4) A reference in this section to continuous service with the employer does not include periods of employment as a casual employee of the employer.

118 Modern awards and enterprise agreements may provide for notice of termination by employees

A modern award or enterprise agreement may include terms specifying the period of notice an employee must give in order to terminate his or her employment.

Subdivision B—Redundancy pay

119 Redundancy pay

Entitlement to redundancy pay

- (1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:
- (a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone,

Section 120

except where this is due to the ordinary and customary turnover of labour; or

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

Note: Sections 121, 122 and 123 describe situations in which the employee does not have this entitlement.

Amount of redundancy pay

(2) The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee's base rate of pay for his or her ordinary hours of work:

Redundancy pay period	
Employee's period of continuous service with the employer on termination	Redundancy pay period
1 At least 1 year but less than 2 years	4 weeks
2 At least 2 years but less than 3 years	6 weeks
3 At least 3 years but less than 4 years	7 weeks
4 At least 4 years but less than 5 years	8 weeks
5 At least 5 years but less than 6 years	10 weeks
6 At least 6 years but less than 7 years	11 weeks
7 At least 7 years but less than 8 years	13 weeks
8 At least 8 years but less than 9 years	14 weeks
9 At least 9 years but less than 10 years	16 weeks
10 At least 10 years	12 weeks

(3) A reference in this section to continuous service with the employer does not include periods of employment as a casual employee of the employer.

120 Variation of redundancy pay for other employment or incapacity to pay

(1) This section applies if:

- (a) an employee is entitled to be paid an amount of redundancy pay by the employer because of section 119; and
- (b) the employer:
 - (i) obtains other acceptable employment for the employee; or
 - (ii) cannot pay the amount.
- (2) On application by the employer, the FWC may determine that the amount of redundancy pay is reduced to a specified amount (which may be nil) that the FWC considers appropriate.
- (3) The amount of redundancy pay to which the employee is entitled under section 119 is the reduced amount specified in the determination.

121 Exclusions from obligation to pay redundancy pay

- (1) Section 119 does not apply to the termination of an employee's employment if, immediately before the time of the termination, or at the time when the person was given notice of the termination as described in subsection 117(1) (whichever happened first):
 - (a) the employee's period of continuous service with the employer (other than periods of employment as a casual employee of the employer) is less than 12 months; or
 - (b) the employer is a small business employer.
- (2) A modern award may include a term specifying other situations in which section 119 does not apply to the termination of an employee's employment.
- (3) If a modern award that is in operation includes such a term (the **award term**), an enterprise agreement may:
 - (a) incorporate the award term by reference (and as in force from time to time) into the enterprise agreement; and
 - (b) provide that the incorporated term covers some or all of the employees who are also covered by the award term.

Section 121

Certain small businesses to pay redundancy pay

- (4) Despite subsection (1), an employee whose employment is terminated is entitled to be paid redundancy pay in accordance with this Division if:
- (a) at the time of the termination, section 119 did not apply to the termination because the employer was a small business employer; and
 - (b) the employer is bankrupt or in liquidation (other than only because of a members' voluntary winding up); and
 - (c) the employer is a small business employer because the employment of one or more employees was terminated; and
 - (d) those terminations occurred:
 - (i) on or after the day that is 6 months before the employer became bankrupt or went into liquidation; or
 - (ii) if there was an insolvency practitioner (the ***last insolvency practitioner***) for the employer on the business day before the employer became bankrupt or went into liquidation—on or after the day that is 6 months before the insolvency practitioner was appointed; or
 - (iii) if, before the last insolvency practitioner was appointed, other insolvency practitioners for the employer were appointed without any intervening business days between any of those appointments—on or after the day that is 6 months before the first of those insolvency practitioners was appointed; or
 - (iv) due to the insolvency of the employer.
- (5) A ***members' voluntary winding up*** is a winding up under section 495 of the *Corporations Act 2001*.

Time of liquidation—members' voluntary winding up where company turns out to be insolvent

- (6) If a liquidator takes action under section 496 of the *Corporations Act 2001* (company turns out to be insolvent) in relation to a small business employer whose liquidation began as a members'
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voluntary winding up, then, for the purposes of subparagraph (4)(d)(i), the time the employer goes into liquidation is the time the employer goes into liquidation because of the members' voluntary winding up.

Application to partnerships

- (7) For the purposes of subsection (4), a small business employer that is a partnership is not bankrupt or in liquidation unless each partner of the partnership is bankrupt or in liquidation, as the case requires.

122 Transfer of employment situations that affect the obligation to pay redundancy pay

Transfer of employment situation in which employer may decide not to recognise employee's service with first employer

- (1) Subsection 22(5) does not apply (for the purpose of this Subdivision) to a transfer of employment between non-associated entities in relation to an employee if the second employer decides not to recognise the employee's service with the first employer (for the purpose of this Subdivision).

Employee is not entitled to redundancy pay if service with first employer counts as service with second employer

- (2) If subsection 22(5) applies (for the purpose of this Subdivision) to a transfer of employment in relation to an employee, the employee is not entitled to redundancy pay under section 119 in relation to the termination of his or her employment with the first employer.

Note: Subsection 22(5) provides that, generally, if there is a transfer of employment, service with the first employer counts as service with the second employer.

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Employee not entitled to redundancy pay if refuses employment in certain circumstances

- (3) An employee is not entitled to redundancy pay under section 119 in relation to the termination of his or her employment with an employer (the **first employer**) if:
 - (a) the employee rejects an offer of employment made by another employer (the **second employer**) that:
 - (i) is on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than, the employee's terms and conditions of employment with the first employer immediately before the termination; and
 - (ii) recognises the employee's service with the first employer, for the purpose of this Subdivision; and
 - (b) had the employee accepted the offer, there would have been a transfer of employment in relation to the employee.
- (4) If the FWC is satisfied that subsection (3) operates unfairly to the employee, the FWC may order the first employer to pay the employee a specified amount of redundancy pay (not exceeding the amount that would be payable but for subsection (3)) that the FWC considers appropriate. The first employer must pay the employee that amount of redundancy pay.

Subdivision C—Limits on scope of this Division

123 Limits on scope of this Division

Employees not covered by this Division

- (1) This Division does not apply to any of the following employees:
 - (a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;
 - (b) an employee whose employment is terminated because of serious misconduct;
 - (c) a casual employee;

- (d) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement;
 - (e) an employee prescribed by the regulations as an employee to whom this Division does not apply.
- (2) Paragraph (1)(a) does not prevent this Division from applying to an employee if a substantial reason for employing the employee as described in that paragraph was to avoid the application of this Division.

Other employees not covered by notice of termination provisions

- (3) Subdivision A does not apply to:
- (b) a daily hire employee working in the building and construction industry (including working in connection with the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures); or
 - (c) a daily hire employee working in the meat industry in connection with the slaughter of livestock; or
 - (d) a weekly hire employee working in connection with the meat industry and whose termination of employment is determined solely by seasonal factors; or
 - (e) an employee prescribed by the regulations as an employee to whom that Subdivision does not apply.

Other employees not covered by redundancy pay provisions

- (4) Subdivision B does not apply to:
- (a) an employee who is an apprentice; or
 - (b) an employee to whom an industry-specific redundancy scheme in a modern award applies; or
 - (c) an employee to whom a redundancy scheme in an enterprise agreement applies if:
 - (i) the scheme is an industry-specific redundancy scheme that is incorporated by reference (and as in force from

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- time to time) into the enterprise agreement from a modern award that is in operation; and
- (ii) the employee is covered by the industry-specific redundancy scheme in the modern award; or
- (d) an employee prescribed by the regulations as an employee to whom that Subdivision does not apply.

Division 12—Fair Work Ombudsman to prepare and publish statements

124 Fair Work Ombudsman to prepare and publish Fair Work Information Statement

- (1) The Fair Work Ombudsman must prepare a *Fair Work Information Statement*. The Fair Work Ombudsman must publish the Statement in the *Gazette*.

Note: If the Fair Work Ombudsman changes the Statement, the Fair Work Ombudsman must publish the new version of the Statement in the *Gazette*.

- (2) The Statement must contain information about the following:
- (a) the National Employment Standards;
 - (b) modern awards;
 - (c) agreement-making under this Act;
 - (d) the right to freedom of association;
 - (e) the role of the FWC and the Fair Work Ombudsman;
 - (f) termination of employment;
 - (g) individual flexibility arrangements;
 - (h) right of entry (including the protection of personal information by privacy laws).
- (3) The Fair Work Information Statement is not a legislative instrument.
- (4) The regulations may prescribe other matters relating to the content or form of the Statement, or the manner in which employers may give the Statement to employees.

125 Giving new employees the Fair Work Information Statement

- (1) An employer must give each employee the Fair Work Information Statement before, or as soon as practicable after, the employee starts employment.

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- (2) Subsection (1) does not require the employer to give the employee the Statement more than once in any 12 months.

Note: This is relevant if the employer employs the employee more than once in the 12 months.

125A Fair Work Ombudsman to prepare and publish Casual Employment Information Statement

- (1) The Fair Work Ombudsman must prepare a Casual Employment Information Statement. The Fair Work Ombudsman must publish the Statement in the Gazette.

Note: If the Fair Work Ombudsman changes the Statement, the Fair Work Ombudsman must publish the new version of the Statement in the Gazette.

- (2) The Statement must contain information about casual employment and how this can be changed under Division 4A of Part 2-2, including the following:
- (a) the meaning of casual employee under section 15A;
 - (aa) an employee who has completed 6 months of employment (12 months if a small business employer) can notify the employer if, having regard to the employee's current employment relationship with the employer, the employee believes that the employee no longer meets the requirements of subsections 15A(1) to (4);
 - (ab) the grounds upon which an employer may not accept a notification given by an employee;
 - (e) the FWC may deal with disputes about the operation of that Division.
- (3) The Casual Employment Information Statement is not a legislative instrument.
- (4) The regulations may prescribe other matters relating to the content or form of the Statement, or the manner in which employers may give the Statement to employees.

125B Giving employees the Casual Employment Information Statement

- (1) An employer must give a casual employee the Casual Employment Information Statement:
 - (a) before, or as soon as practicable after, the employee starts employment as a casual employee with the employer; and
 - (b) as soon as practicable after the employee has been employed by the employer for a period of 6 months beginning the day the employment started; and
 - (c) as soon as practicable after the following:
 - (i) the employee has been employed by the employer for a period of 12 months beginning the day the employment started;
 - (ii) the end of any subsequent period of 12 months for which the employee is employed by the employer.
- (2) However, paragraph (1)(b) and subparagraph (1)(c)(ii) do not apply if at the time the employer has employed the employee for the period referred to in that paragraph or subparagraph, the employer is a small business employer.
- (3) This section does not, apart from the operation of paragraph (1)(b), require the employer to give the employee the Statement more than once in any 12 months.

Note: This is relevant if the employer employs the employee more than once in the 12 months.

Division 13—Miscellaneous

126 Modern awards and enterprise agreements may provide for school-based apprentices and trainees to be paid loadings in lieu

A modern award or enterprise agreement may provide for school-based apprentices or school-based trainees to be paid loadings in lieu of any of the following:

- (a) paid annual leave;
- (b) paid personal/carer's leave;
- (c) paid absence under Division 10 (which deals with public holidays).

Note: Section 199 affects whether the FWC may approve an enterprise agreement covering an employee who is a school-based apprentice or school-based trainee, if the employee is covered by a modern award that is in operation and provides for the employee to be paid loadings in lieu of paid annual leave, paid personal/carer's leave or paid absence under Division 10.

127 Regulations about what modern awards and enterprise agreements can do

The regulations may:

- (a) permit modern awards or enterprise agreements or both to include terms that would or might otherwise be contrary to this Part or section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement); or
- (b) prohibit modern awards or enterprise agreements or both from including terms that would or might otherwise be permitted by a provision of this Part or section 55.

128 Relationship between National Employment Standards and agreements etc. permitted by this Part for award/agreement free employees

The National Employment Standards have effect subject to:

- (a) an agreement between an employer and an award/agreement free employee or a requirement made by an employer of an award/agreement free employee, that is expressly permitted by a provision of this Part; or
- (b) an agreement between an employer and an award/agreement free employee that is expressly permitted by regulations made for the purpose of section 129.

Note 1: In determining what matters are permitted to be agreed or required under paragraph (a), any regulations made for the purpose of section 129 that expressly prohibit certain agreements or requirements must be taken into account.

Note 2: See also the note to section 64 (which deals with the effect of averaging arrangements).

129 Regulations about what can be agreed to etc. in relation to award/agreement free employees

The regulations may:

- (a) permit employers, and award/agreement free employees, to agree on matters that would or might otherwise be contrary to this Part; or
- (b) prohibit employers and award/agreement free employees from agreeing on matters, or prohibit employers from making requirements of such employees, that would or might otherwise be permitted by a provision of this Part.

130 Restriction on taking or accruing leave or absence while receiving workers' compensation

- (1) An employee is not entitled to take or accrue any leave or absence (whether paid or unpaid) under this Part during a period (a *compensation period*) when the employee is absent from work because of a personal illness, or a personal injury, for which the

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employee is receiving compensation payable under a law (a *compensation law*) of the Commonwealth, a State or a Territory that is about workers' compensation.

- (2) Subsection (1) does not prevent an employee from taking or accruing leave during a compensation period if the taking or accruing of the leave is permitted by a compensation law.
- (3) Subsection (1) does not prevent an employee from taking unpaid parental leave during a compensation period.

131 Relationship with other Commonwealth laws

This Part establishes minimum standards and so is intended to supplement, and not to override, entitlements under other laws of the Commonwealth.