EXPLANATORY MEMORANDUM – INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL 2020

INTRODUCTION

The *Industrial Relations Legislation Amendment Bill 2020* is the State Government's response to the recommendations made by:

a) the 2018 Ministerial Review of the State Industrial Relations System conducted by former acting President of the Western Australian Industrial Relations Commission (the Commission), Mark Ritter SC, and Stephen Price MLA; and

b) the 2019 Inquiry Into Wage Theft in Western Australia conducted by former Chief Commissioner of the Commission, Tony Beech.

The new laws, based principally on these recommendations, seek to protect vulnerable workers, tackle wage theft and ensure a level playing field for Western Australian employers.

Ministerial Review of the State Industrial Relations System

The Ministerial Review made a suite of recommendations. The Bill implements the following recommendations:

a) remove exclusions from the definition of employee;

b) introduce a stop workplace bullying jurisdiction for the Commission;

c) introduce an equal remuneration jurisdiction for the Commission;

d) vary the scope of private sector awards to ensure that all State private sector employees are covered by an award, other than those not traditionally award-covered;

e) modernise the *Long Service Leave Act 1958* and introduce penalties for non-compliance;

f) increase penalties for breaches of employment laws, strengthen industrial inspector powers and enhance rights of authorised representatives;

g) allow the Industrial Magistrates Court to treat illegal contracts of employment as valid (such as those involving visa holders working in contravention of visa conditions);

h) address the lack of certainty as to which industrial relations jurisdiction applies to WA local government; and

i) increase the compulsory retirement age of commissioners from 65 to 70 years.

Inquiry into Wage Theft in Western Australia

The Inquiry into Wage Theft in Western Australia made a number of recommendations relating to legislative reform. The Bill implements the following recommendations:

a) a prohibition on:

   (i) employers unreasonably requiring employees to spend, or 'pay back' to the employer, their wages (colloquially known as 'cash backs');

   (ii) employers discriminating against employees because of their right to inquire or complain about their employment conditions;

   (iii) employment being advertised at less than the applicable minimum wage for the position;

   (iv) sham contracting arrangements;

b) a successful claimant be able to recover legal costs in the case of systematic and deliberate underpayments; and

c) broader powers for industrial inspectors, including the power to post a notice at a workplace outlining employment rights and obligations.

ABBREVIATIONS

The following abbreviations have been used throughout the Explanatory Memorandum.

Abbreviation	**Meaning**
AIRC	Australian Industrial Relations Commission
Bill	*Industrial Relations Legislation Amendment Bill 2020*
Commencement day	The day on which the Act comes into operation
Commission	Western Australian Industrial Relations Commission
CICS	Commission in Court Session
Construction Industry Portable Paid LSL Act	*Construction Industry Portable Paid Long Service Leave Act 1985 (WA)*
Disability Services Act	*Disability Services Act 1986* (Cth)
FW (Transitional) Act	*Fair Work (Transitional Provisions and Consequential Amendments Act 2009* (Cth)
Federal WHS Act	*Work Health and Safety Act 2011* (Cth)

Abbreviation	Meaning
Foreign States Immunities Act	*Foreign States Immunities Act 1985* (Cth)
Full Bench	Full Bench of the Western Australian Industrial Relations Commission
FW Act	*Fair Work Act 2009* (Cth)
FWC	Fair Work Commission
FW (Registered Organisations) Act	*Fair Work (Registered Organisations) Act 2009* (Cth)
FW Regulations	*Fair Work Regulations 2009* (Cth)
Health Services Act	*Health Services Act 2011* (WA)
Industrial Appeal Court	Western Australian Industrial Appeal Court
IMC	Industrial magistrate's court
Inquiry into Wage Theft	2019 Inquiry into Wage Theft in Western Australia
IR Act	*Industrial Relations Act 1979* (WA)
Interpretation Act	*Interpretation Act 1985* (WA)
LSL Act	*Long Service Leave Act 1958* (WA)
MCE Act	*Minimum Conditions of Employment Act 1993* (WA)
MCE Regulations	*Minimum Conditions of Employment Regulations 1993* (WA)
Ministerial Review	2018 Ministerial Review of the State Industrial Relations System
National Trust of Australia (W.A.) Act	*National Trust of Australia (W.A.) Act 1964* (WA)
Police Act	*Police Act 1892 (WA)*
PSM Act	*Public Sector Management Act 1994* (WA)
PSM (Breaches of Public Sector Standards) Regulations	*Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* (WA)
Sentencing Act	*Sentencing Act 1995* (WA)
Social Security Act	*Social Security Act 1991* (Cth)
VET Act	*Vocational Education and Training Act 1996* (WA)
WA OSH Act	*Occupational Safety and Health Act 1984* (WA)

OVERVIEW OF KEY REFORMS

Employee coverage

1. The Bill amends the definition of 'employee' in the IR Act and the MCE Act to remove the following existing exclusions:

    a) from the IR Act definition – persons engaged in domestic service in a private home;

    b) from the MCE Act definition:

        (i) persons remunerated wholly by commission, percentage reward or piece rates;

        (ii) persons with a disability in supported employment;

        (iii) persons appointed under the *National Trust of Australia (W.A.) Act* to carry out the duties of wardens; and

        (iv) volunteers.

2. These exclusions have been identified by the Commonwealth Government as a barrier to Australia ratifying the International Labour Organization *Protocol of 2014 to the Forced Labour Convention, 1930*. The Protocol aims to support the global fight against forced labour, people trafficking and modern slavery. The amendments will ensure that no category of employee is denied employment protections and therefore ensure that Western Australian laws are compliant with the Protocol.

Private sector award scope

3. Some private sector awards are expressed to apply to an industry as determined by the industry carried on by named employer respondents listed in the award. This is the industry of the named employers at the time an award was made.[1] There are a number of issues, which result from such award scope clauses.

    a) As an award ages and employers named in an award cease to exist, it becomes difficult to establish the exact nature of the industry carried on by the named employers at the time the award was made and consequently, difficult to establish the scope of an award.

    b) Some awards do not identify the industry carried on by a named employer and instead include only a name – for example – 'Brown and Co'. This makes determining the nature of the industry carried on by the employer, and therefore the scope of the award difficult, if not impossible, particularly if awards were made many years ago.

[1] See, for example, *Freshwest Corporation Pty Ltd v TWU* (IAC) (1991) 71 WAIG 1746, which is authority for award respondency being determined by the industries carried on by named employer respondents at the time of the making of the award and when additional named respondents are added to the award.

c) Awards made in past decades have not kept pace with new industries and so named respondent lists that have not been updated limit the scope of the award. For example – the award applying to retail employees does not include a named employer operating a mobile phone business and so retail employees working in a mobile phone store are excluded from award coverage.

d) Similarly, gaps in coverage occur where an employee performing a particular type of work in one industry is covered by an award but an employee performing the same type of work in another industry is not covered. For example, a clerical employee working in a chiropractor's clinic is currently covered by an award whilst a clerical employee performing the same duties in a physiotherapy clinic is not covered.

4. To address these deficiencies, the Bill amends the IR Act to prescribe how the scope of an award is to be expressed when the Commission is varying its scope. This alternative expression of scope will ensure that awards relating to a particular industry or occupation are truly 'common rule'. That is, the award will apply to all employers and employees operating in a specified industry or employees employed in a specified kind of work.[2] The amendments will also ensure that no new private sector award can be made which determines its scope by the industry carried on by named employer respondents. This approach to private sector award scope is consistent with s 143 of the FW Act and how coverage of national modern awards is expressed.

5. To facilitate variations to private sector award scope clauses, the amendments provide the Commission with a new power to vary scope of its own motion. This is in addition to its existing powers under s 40 to vary an award's scope on application or make a General Order under s 50.

6. The provisions relating to private sector award scope clauses and variations of the Commission's own motion will not apply to public sector awards or enterprise awards.

<u>Employment records and pay slips</u>

7. Division 2F of the IR Act sets out requirements regarding the keeping of, and access to, employment records. The Bill amends Division 2F to introduce:

a) additional employment record keeping requirements;

b) a requirement for employers to issue pay slips containing prescribed information;

[2] It is noted that this type of private sector scope clause does currently exist. For example, the *Transport Workers (Passenger Vehicles) Award* applies to all bus drivers (including service, tour, charter and school bus drivers) employed in the classifications in the award. This is an example of an award applying to all employees employed in a particular kind or work or occupation. The *Photographic Industry Award* applies to all workers employed in the photographic industry. This is an example of an award applying to all employers and their employees operating in a specified industry.

c) a prohibition on an employer making an employment record or giving a pay slip that an employer knows is false or misleading.

8. Employment records and pay slips are an important means by which an employer can ensure an employee is paid their lawful entitlements and an employee knows for what they have been paid.

9. The employment record requirements in Division 2F will replace those in s 44 and s 45 of the MCE Act, which will be deleted by clause 103 of the Bill. It is intended that all Western Australian employers in the State industrial relations system be covered by the same employment record and pay slip obligations, regardless of whether they are bound by an award, industrial agreement, order of the Commission or the MCE Act. Furthermore, a number of the new requirements reflect those contained in the FW Act and the FW Regulations, in order to create consistent obligations between State and national system employers.

Stop bullying provisions

10. The Bill inserts stop bullying provisions in new Division 3AA. As recommended by the Ministerial Review, these are based on those contained in Part 6-4B of the FW Act in order to provide Western Australian workers who fall within the State industrial relations system with similar rights as Western Australian workers who fall within the national industrial relations system. They are also based on provisions in the federal WHS Act, as the FW Act stop bullying provisions draw upon the meaning of a number of terms from the federal WHS Act.

11. The stop bullying provisions will provide workers who are bullied at work with an individual right of access to the Commission and will provide the Commission with the jurisdiction and powers to deal with, and make orders in relation to, the worker's bullying allegations directly and promptly. The objective is to provide a mechanism that will help prevent actual harm to a person's health and safety due to workplace bullying.

12. These provisions are intended to complement obligations in the WA OSH Act placed on an employer and a person who has control of a workplace to, so far as is practicable, provide and maintain a working environment in which the employees and persons who are not employees are not exposed to hazards. The term 'hazard' means anything that may result in injury to, or harm to the health, of the person.

13. These provisions are also intended to complement the rights and remedies an employee, person or worker has under the WA OSH Act. There is nothing in the stop bullying provisions that will prevent a worker from also making a complaint to WorkSafe regarding a workplace hazard relating to the same alleged bullying behaviour. Similarly, it is intended that the Commission be able to deal with a bullying application notwithstanding that the worker has made a complaint to WorkSafe. This recognises the complementary nature of the provisions and the

intention that one set of provisions does not replace another set of provisions, notwithstanding that an issue concerns the same allegations of bullying.

Equal remuneration

14. The Bill inserts equal remuneration provisions in new Division 3B of the IR Act. These will:

    a) provide the Commission with the jurisdiction to make an equal remuneration order on application to ensure an employee receives equal remuneration; and

    b) require the Commission to issue an equal remuneration principle as part of the statement of principles in each annual State Wage order.[3]

Industrial organisations

15. Currently under the IR Act, the Registrar of the Commission may issue a certificate under s 71(5) to a State organisation (a union) which declares that the provisions of the IR Act relating to elections for office within a State organisation do not apply to the State organisation. This certificate is issued where the federal counterpart of the State union (registered under the FW (Registered Organisations) Act) has a WA branch and the prescribed requirements regarding rules of membership and offices are met. Although it is common for federally registered organisations of employees to have State branches, there has been some movement away from this form of structure.

16. The Bill amends the industrial organisation provisions in the IR Act to allow the Registrar of the Commission to issue a certificate under existing s 71(5) to a State organisation for which there is no WA branch registered under the FW (Registered Organisations) Act.

17. The amendments include provisions regarding the deeming of a federally registered organisation by the CICS to be a State organisation's counterpart federal body, and the conditions that must be satisfied in order for this to occur and before a s 71 certificate can be issued.

Employers declared not to be national system employers

18. Section 14(2) of the FW Act sets out a process for enabling certain employers, including a local government, to be declared not to be a national system employer. As identified by the Ministerial Review, 'there is grave doubt about whether local governments in Western Australia will be held to be trading corporations…the preponderance of judicial determinations on the issue suggest

[3] In the 2019 State Wage order, the Commission included, as part of its statement of principles, a principle for equal remuneration for men and women for work of equal or comparable value. Applications may currently be made under this principle to vary an award to implement equal remuneration for work of equal or comparable value.

they are not. However, unless and until there is a decision of the High Court on the issue there will be legal uncertainty'.[4]

19. The Bill inserts new Part IIAA into the IR Act to enable certain employers to be declared not to be a national system employer, as provided by s 14(2) of the FW Act. It is intended that every Western Australian local government will be declared not to be a national system employer. Part IIAA sets out transitional arrangements to move declared employers and employees from the national industrial relations system to the State system. The transitional arrangements will recognise existing federal employment arrangements for a specified period, to give declared employers sufficient time to comply with the IR Act and other State industrial laws. The arrangements will also preserve employees' continuity of employment and entitlements accrued in the national industrial relations system.

Penalties, enforcement tools and powers of inspectors

20. As recommended by both the Ministerial Review and the Inquiry into Wage Theft, the Bill amends the IR Act to significantly enhance compliance and enforcement mechanisms. The current penalty levels and enforcement tools under the IR Act have not been changed in 18 years and are significantly inferior to those under the FW Act.

21. The Bill amends Part III of the IR Act to increase the maximum pecuniary penalty amounts under s 83 (for a contravention of an entitlement provision) and s 83E (for a contravention of a civil penalty provision). The amended penalty amounts are broadly consistent with those under the FW Act for comparable contraventions.

22. A person who commits a 'serious contravention' will be liable to a maximum penalty that is 10 times higher than the normal penalty amount. A serious contravention is one that is committed knowingly and forms part of a systematic pattern of conduct.

23. A person who is 'involved in' a contravention committed by another person may be held liable under s 83 or s 83E. Among other things, a person held accessorily liable under s 83 may be ordered to rectify any underpayments, as well as pay a pecuniary penalty.

24. The Bill inserts new Divisions 3 to 5 in Part III of the IR Act to provide industrial inspectors with a range of enforcement tools. As an alternative to taking enforcement proceedings in the IMC, inspectors will be able to:

    a) issue a civil infringement notice for a contravention relating to employment records;

    b) accept an enforceable undertaking in relation to a contravention of an entitlement provision or a civil penalty provision; and

[4] Ministerial Review, [1215].

c) issue a compliance notice for a contravention of an entitlement provision.

25. The Bill also amends s 98 of the IR Act to enhance the powers of industrial inspectors in the performance of their statutory functions. The Inquiry into Wage Theft found 'the role of State Industrial Inspectors and Fair Work Inspectors to be the single most important factor in the effective regulatory response to wage theft'.[5]

Protection of employee rights

26. The Bill inserts new Part VIB in the IR Act to provide additional protections to employees, as recommended by the Inquiry into Wage Theft. The protections are based on general protections in Part 3-1 of the FW Act and are civil penalty provisions for the purposes of s 83E of the IR Act.

27. An employer will be prohibited from taking 'damaging action' against an employee because the employee is able to make an employment-related inquiry or complaint. 'Damaging action' includes dismissing an employee or altering an employee's position to their disadvantage.

28. An employer will also be prohibited from engaging in sham contracting arrangements, such as dismissing an employee in order to engage them under a contract for services.

29. An employer who takes damaging action against an employee or who engages in sham contracting may be subject to a pecuniary penalty under s 83E. The IMC may also make an order to provide redress to the affected employee (e.g. an order for reinstatement if the employee was dismissed from employment).

30. Finally, a person will be prohibited from advertising employment at a rate of pay that is less than the minimum wage applicable to the position under the MCE Act or an industrial instrument.

LSL Act

31. The Bill amends the LSL Act to:

a) clarify the absences that do not break an employee's continuous employment, and the absences that do and do not count towards the length of an employee's continuous employment. This includes specific provisions relating to casual and seasonal employees, and apprentices;[6]

b) clarify existing provisions relating to the cashing out of long service leave;

[5] Inquiry into Wage Theft, p.14.

[6] The term 'apprentice' is defined in the VET Act to mean the person named in a training contract as the person who will be trained under the contract whether the person is termed an apprentice, trainee, cadet, intern or some other term.

c) replace existing transmission of business provisions with transfer of business provisions, based on the FW Act transfer of business provisions;

d) provide for increased flexibilities regarding the taking of long service leave;

e) enable a long service leave entitlement to be enforced under s 83 of the IR Act and so ensure that contraventions attract a penalty consistent with the treatment of contraventions of other minimum employment entitlements; and

f) repeal spent provisions.

MCE Act

32. The Bill amends the MCE Act to:

a) remove all exclusions to the definition of employee;

b) enable a minimum condition to be directly enforced;

c) include provisions relating to minimum wages for specified employees with a disability;

d) include provisions relating to unreasonable requirements for a person to spend or pay an amount of money to an employer or a party related to the employer;

e) repeal the record keeping requirements.

33. The Bill also amends s 7 and s 50A of the IR Act to include provisions relevant to new Division 2 – Employees with disabilities in the MCE Act.

CLAUSES OF THE BILL

The Bill comprises of four parts:

a) Part 1 – Preliminary;

b) Part 2 – *Industrial Relations Act 1979* amended;

c) Part 3 – *Long Service Leave Act 1958* amended; and

d) Part 4 – *Minimum Conditions of Employment Act 1993* amended.

PART 1 – PRELIMINARY

Clause 1 – Short title

34. Clause 1 provides that, once enacted, the short title of the legislation will be the *Industrial Relations Legislation Amendment Act 2020*.

Clause 2 – Commencement

35. Clause 2 provides that this Act comes into operation as follows —

    a) Part 1 — on the day on which the Act receives the Royal Assent;

    b) the rest of the Act — on a day fixed by proclamation and different days may be fixed for different provisions.

PART 2 – *INDUSTRIAL RELATIONS ACT 1979* AMENDED

Clause 3 – Act amended

36. Clause 3 provides that this Part amends the IR Act.

Clause 4 – Section 6 amended

37. Clause 4 deletes the reference to 'remuneration for men and women for work of equal value' in existing s 6. This is a consequential amendment arising from the inclusion of a definition of 'equal remuneration' in s 7(1).

Clause 5 – Section 7 amended

38. Clause 5 makes a number of amendments to s 7(1).

39. Clause 5(1) deletes a number of existing definitions. Some of these are replaced with new definitions as set out in clause 5(2).

40. Clause 5(2) inserts the following definitions into s 7(1). The key definitions are explained below.

    <u>Award, enterprise award, private sector award and public sector award</u>

41. The following definitions have been inserted as a consequence of the introduction of new provisions pertaining to private sector awards in s 37B, s 37C and s 37D:

    a) 'award' means an award made by the Commission under the IR Act; and, for the purposes of s 37C(1), an award made under a law of the Commonwealth, another State or a Territory extending to and binding employees;

b) ‘enterprise award’ means an award that extends to and binds a single employer who is not a body or entity referred to in the definition of public sector award;

c) ‘private sector award’ means an award other than a public sector award or an enterprise award;

d) ‘public sector award’ means an award that only extends to and binds:

(i) a public sector body defined in s 3(1) of the PSM Act;

(ii) an entity specified in Schedule 1, column 2 of the PSM Act.

42. Section 3(1) of the PSM Act defines a ‘public sector body’ as an agency, ministerial office or non-SES organisation. These terms are defined in s 3(1) of the PSM Act as follows:

a) ‘agency’ means a department or a SES organisation;

b) ‘department’ means a department established under s 35 of the PSM Act;

c) ‘SES organisation’ means an entity which consists of:

(i) a body, whether corporate or unincorporate, or the holder of an office, post or position, being a body, or office, post or position established or continued for a public purpose under a written law, and specified in Schedule 2, column 2; and

(ii) persons employed by or for the purposes of that body or holder under that written law or another written law;

d) ‘ministerial office’ means one or more ministerial officers appointed to assist a particular political office holder. ‘Ministerial officer’ means a person appointed under s 68 of the PSM Act as a ministerial officer;

e) ‘non-SES organisation’ means an entity which consists of:

(i) a body, whether corporate or unincorporate, or the holder of an office, post or position, being a body, or office, post or position that is established or continued for a public purpose under a written law; and

(ii) persons employed by or for the purposes of that body or holder under that written law or another written law,

and which neither is nor includes a SES organisation or an entity specified in column 2 of Schedule 1.

Employee

43. The definition of employee has been amended to modernise its meaning and to ensure that no category of employee is excluded from the IR Act.

44. The reference in existing s 7(1) to any person employed as a canvasser whose services are remunerated wholly by commission or percentage reward has been deleted.

45. A canvasser was originally a person wholly and solely employed in the writing of industrial insurance.[7] Prior to the inclusion of this provision in the *Industrial Arbitration Act 1925*, it had been held that such persons were not workers but agents working on commission and over whom the insurance companies exercised no control as to the manner or the time of doing the work. However, the High Court in *Federal Commissioner of Taxation v Barrett* [8] held in 1973 that because a person is paid by commission does not exclude them from being an employee. As it is settled law that a person paid wholly by commission or percentage reward is an employee, this reference is no longer required in the definition of employee. This is consistent with the definition of employee in the LSL Act, as amended by clause 73 of the Bill.

46. As a consequence of this amendment, the existing defined term 'canvasser' has also been deleted from s 7(1).

47. The reference in existing s 7(1) to any person who is the lessee of any tools or other implements of production or any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if they are in all other respects an employee has been deleted.

48. In accordance with the decisions in *Stevens v Brodribb Sawmilling Company Pty Ltd*[9] and *Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Readymix Group (WA),*[10] at law, a person is no longer barred from being considered an employee because they own their own vehicle or tools. This provision is therefore redundant. This amendment is consistent with the definition of employee in the LSL Act, as amended by clause 73 of the Bill.

49. The reference to any person engaged in domestic service in a private home has been removed and therefore no category of employee will be excluded from the coverage of the IR Act or, by extension, the MCE Act.[11] This exclusion has been removed as it is a barrier to the Commonwealth Government ratifying the ILO *Protocol of 2014 to the Forced Labour Convention, 1930* (WA is the only non-compliant jurisdiction). It is also an anachronism and is inconsistent with the

[7] See definition of 'worker' in s 4 of the *Industrial Arbitration Act 1925*.
[8] (1973) 129 CLR 395.
[9] (1986) 160 CLR 16.
[10] 61 WAIG 1705.
[11] The definition of 'employee in the MCE Act means a person who is an employee within the meaning of the IR Act.

LSL Act, which has never, and does not currently, exclude employees engaged in domestic service in a private home.

50. It is noted that whether a particular person who performs a 'domestic service' in a private home – for example, cleaning – is an employee or an independent contractor will depend upon the nature of the person's engagement. This amendment does not change a particular person's engagement from one of a contract for service (that is, as a contractor) to a contract of service (that is, as an employee). This question can only be determined on the facts of a particular case.

Employer

51. The definition of employer has been amended to remove the reference to 'firms, companies, corporations, and the Crown and any Minister of the Crown'.

52. In accordance with s 5 of the *Interpretation Act*, the term 'person' means a public body, company, or association or body of persons, corporate or unincorporate. The definition of 'public authority' in s 7(1) currently includes any Minister of the Crown and is amended by clause 5(4) of the Bill to include 'the Crown'. It is therefore unnecessary to retain the reference to firms, companies, corporations, the Crown and any Minister of the Crown in the definition of employer.

53. The amended definition of employer as 'a person or public authority employing 1 or more employees', in effect, reflects the existing definition of employer.

54. The definition of employer has also been amended to include a foreign state or consulate employing one or more employees. This is intended to remove the gap that exists in the regulation of persons who are employed in WA by a foreign state or consulate. Such entities are not 'persons, firms, companies or corporations' and therefore fall outside the existing definition of employer.

55. Section 12 of the *Foreign States Immunities Act* provides immunity to a foreign state as an employer in specified circumstances; the definition of employer is subject to those provisions.

56. These amendments to the definition of employer are consistent with the definition of employer in the LSL Act, as amended by clause 73 of the Bill.

Entitlement provision

57. 'Entitlement provision' means:

    a) a provision of any of the following:

        (i) an award. This is defined in s 7(1);

        (ii) an industrial agreement. This is defined in s 7(1);

(iii) an employer-employee agreement. This is defined in s 7(1);

(iv) an order made by the Commission other than an order made under s 23A, s 32(8), s 44(6) or s 66;

or

b) a provision of Part III of the LSL Act; or

c) a minimum condition of employment as that term is defined in s 3(1) of the MCE Act.

Equal remuneration and equal remuneration order

58. 'Equal remuneration' means equal remuneration for men and women for work of equal or comparable value.

59. 'Equal remuneration order' is defined to have the meaning given in s 51O(2).

Federal organisation

60. 'Federal organisation' means an organisation of employees registered under the FW (Registered Organisations) Act.

Industrial instrument

61. 'Industrial instrument' means:

a) an award. This is defined in s 7(1); or

b) an order of the Commission under the IR Act; or

c) an industrial agreement. This is defined in s 7(1);

d) for the purposes of s 49D or in relation to a supported wage industrial instrument provision (SWIIP) – an employer-employee agreement. Both terms are defined in s 7(1).

Record-related civil penalty provision

62. 'Record-related civil penalty provision' means the following:

a) section 49D(1), (6) or (8) of the IR Act;

b) section 49DA(1) or (3) of the IR Act;

c) section 49E(1) of the IR Act;

d) section 102(1)(a) of the IR Act;

e) section 7I(2), s 26(1) or (2), or s 26A(1) of the LSL Act.

Serious contravention

63. ‘Serious contravention’ has the meaning given in new s 83EA(2).

Supported wage industrial instrument provision (SWIIP) and Supported Wage System (SWS)

64. ‘Supported wage industrial instrument provision or SWIIP’ is defined to mean a provision of an industrial instrument that:

a) applies to an employee with a disability;

b) provides a means (a wage assessment tool) for the assessment of whether, and the extent to which, the employee’s productive capacity is reduced because of the disability; and

c) provides that the employer may pay a wage rate that:

(i) relates to employee’s productive capacity as assessed using the wage assessment tool; and

(ii) may be less than the applicable minimum wage in the industrial instrument.

65. ‘Supported Wage System or SWS’ is defined to mean the scheme established by the Commonwealth Government to enable the assessment of whether, and the extent to which, a person’s productive capacity is reduced because of a disability.

66. The words ‘employee with a disability’ in paragraph (a) of the definition of SWIIP are intended to take their usual and ordinary meaning. The definition of SWIIP is intended to include any wage assessment tool that is provided for in an industrial instrument, not only the SWS. The SWS may, however, be a SWIIP.

67. These definitions replace the existing definitions in s 97U and the references in s 97UF(3) and s 97YA.

68. Clause 5(3) amends the definition of ‘industry’ to read ‘the performance of the functions of any public authority’. The words ‘exercise’ and ‘powers, and duties’ have been deleted as the definition of ‘function’ in the *Interpretation Act* includes powers, duties, and responsibilities.

69. Clause 5(4) amends the definition of ‘public authority’ to include ‘the Crown’. This is a consequential amendment arising from the amendment to the definition of employer.

70. Clause 5(5) inserts new s 7(2) and (2A). These subsections ensure that a matter relating or pertaining to the bullying of a worker is an industrial matter which may then be referred to the Commission under s 29(1)(a) or new s 29(1)(e). The term 'worker' has the meaning given in s 51BH. The term 'bullying' is behaviour to which s 51BI(1) applies.

71. Clause 5(6) deletes s 7(5) as this provision is no longer required, consequential to the deletion of existing Division 3B of Part II – Collective agreements and good faith bargaining.

72. Clause 5(7) replaces s 29(1)(b)(ii) with s 29(1)(d) in existing s 7(7). This is a consequential amendment arising from the inclusion of new s 29(1)(b) relating to an application for an equal remuneration order.

Clause 6 – Section 10 amended

73. Clause 6 amends existing s 10 to increase the compulsory retirement age of commissioners from 65 years to 70 years. This was a recommendation of the Ministerial Review and is consistent with the retirement age of other office holders in Western Australia who hold tenure, such as judges and magistrates.

Clause 7 – Section 16 amended

74. Clause 7 amends existing s 16, principally to clarify the administrative responsibilities of the Chief Commissioner as the titular head of the Commission. The Commission is a high profile public body and it is appropriate that the Chief Commissioner's key administrative responsibilities are clearly expressed.

75. Clause 7(2) deletes existing s 16(1aa) and replaces it with new s 16(1AA). Like s 16(1aa), s 16(1AA) provides that the Chief Commissioner is responsible for matters of an administrative nature relating to the Commission and commissioners. However, s 16(1AA) specifically identifies some of these responsibilities, without intending to be exhaustive. For example:

    a) in accordance with s 16(1AA)(a), the Chief Commissioner could give directions to commissioners to ensure that the Commission's practices and procedures are followed in a consistent, efficient and timely manner; and

    b) in accordance with s 16(1AA)(d), the Chief Commissioner could manage the leave arrangements of commissioners to ensure the business and operational needs of the Commission are met.

76. Clause 7(3) deletes s 16(2D) and (2E), as these subsections are obsolete.

77. Clause 7(4) inserts new s 16(4), to provide that the Chief Commissioner may do all things necessary or convenient to be done in the performance of their functions. This provision makes it clear that the Chief Commissioner has the necessary powers to effectively discharge their functions under the IR Act.

Clause 8 – Section 23 amended

78. Clause 8 amends existing s 23(3)(c), which prevents the Commission from making an award or order empowering a representative of an organisation (e.g. a union) from entering an employer's premises principally used for habitation by the employer and their household, or a private home. Section 23(3)(c) has been amended to make it subject to new s 49K(3), which enables the Commission to make an order granting entry to an employer's premises principally used for habitation in exceptional circumstances.

Clause 9 – Section 23A amended

79. Clause 9 amends existing s 23A(2) to require the Commission, when determining an unfair dismissal claim, to have regard to whether the employee was employed in a private home to provide services directly to the employer or a member of the employer's family or household. As a result of the amendment to the definition of 'employee' in s 7(1), all employees who perform work in a private home are now taken to be an employee for the purposes of the IR Act.

80. For example, if the employee was employed as a carer by a person with a disability in the person's home, it is intended that the Commission have regard to the nature of the employment relationship when determining the unfair dismissal claim. Unlike most other employers, the person with a disability is not carrying on a business. Additional considerations would arise if this employee also shared living arrangements with their employer. Ultimately, the Commission would determine the unfair dismissal claim on the facts taking into account a range of considerations, one of which must be that the employee was employed by the person to perform work in a private home.

Clause 10 – Section 26 amended

81. Clause 10 amends the definition of 'public sector decision' in s 26(2B) to provide in paragraph (c) that it does not include an equal remuneration order. This means that, when the Commission is making an equal remuneration order that applies in the public sector, it is not required to take into consideration the matters set out in s 26(2A).

Clause 11 – Section 29 amended

82. Clause 11(1) amends s 29(1)(b) to set out that, in the case of an equal remuneration order, an industrial matter may be referred to the Commission by an application made by any of the following:

    a) an employee to be covered by the order;

    b) an organisation in which employees to be covered by the order are eligible to be enrolled as members;

    c) an organisation in which employers of employees to be covered by the order are eligible to be enrolled as members;

d) UnionsWA;

e) the Chamber of Commerce and Industry WA;

f) the Minister; and

g) the Commissioner for Equal Opportunity.

83. This is, however, subject to the limitation set out in s 51Q(2), which prevents an application being made for an equal remuneration order if there are proceedings for an alternative remedy that have not been withdrawn or determined. An alternative remedy is a right to a remedy under the IR Act or another enactment to secure equal remuneration.

84. In accordance with s 10(c) of the *Interpretation Act*, the reference to 'an employee' in s 29(1)(b) encompasses both a single employee and a group of employees. A group of employees to be covered by an order may therefore make an application to the Commission.

85. Clause 11(1) also inserts new paragraph (e) in existing s 29(1). New s 29(1)(e) provides that an industrial matter mentioned in s 7(2A) – being a matter relating or pertaining to the bullying of a worker – may be referred to the Commission by the individual worker as defined in s 51BH.

86. Under existing s 29(1)(a)(ii), an industrial matter may be referred to the Commission by an organisation in which persons to whom the industrial matter relates are eligible to be enrolled as members (e.g. a union) or an association that represents such an organisation. As s 7(2A) provides that a matter relating or pertaining to the bullying of a worker is an industrial matter, a union in which the worker is eligible to be enrolled as a member may make a stop bullying application in relation to that worker.

87. Clause 11(2) amends existing s 29(2) and (3) to replace the references to subsection (1)(b)(i) with references to subsection (1)(c). This is a consequential amendment arising from new s 29(1)(b) and renumbered s 29(1)(c).

Clause 12 – Section 31 amended

88. Clause 12 amends s 31(1)(c)(ii) to replace the reference to subsection (1)(b)(i) with a reference to subsection (1)(c) or (d). This is a consequential amendment arising from new s 29(1)(b).

Clause 13 – Section 37 amended

89. Clause 13 amends s 37, which applies to all awards (private sector, public sector and enterprise awards), to:

a) delete existing s 37(1); and

b) insert new s 37(1) and (2).

90. As provided for in s 37(1), it will remain the case that an award has effect according to its terms.

91. Except as provided for in the terms of an award, an award operates throughout the State other than in areas to which s 3(1) applies. Section 37(2) enables an award to limit which parts of the State the award operates in, as provided for in existing s 37(1).

92. It is noted that, in accordance with the transitional provision in s 117,[12] until the scope of a private sector award that existed prior to commencement day is varied under s 37D, s 40(2A) or s 50(5), the provisions of existing s 37(1) which set out to whom an award extends continue in operation in relation to that private sector award.

93. For public sector and enterprise awards, existing s 37(1) and (1)(a) have been replaced by new s 37(1) and s 37A, and existing s 37(1)(b) has been replaced by new s 37(2). Existing s 37(1) ceases to apply to public sector and enterprise awards on and from commencement day.

Clause 14 – Sections 37A to 37D inserted

94. Clause 14 inserts new s 37A, s 37B, s 37C and s 37D.

Section 37A – Public sector awards and enterprise awards

95. Section 37A substantively replicates existing s 37(1)(a) with the drafting language modernised. This section provides that, except as provided for in the award, a public sector or enterprise award extends to and binds:

a) employees in a calling specified in the award in the industry or industries to which the award applies; and

b) employers employing those employees.

Section 37B – Private sector awards: general

96. Section 37B establishes new provisions regulating the scope of private sector awards. In accordance with the transitional provision in s 117(3),[13] s 37B does not apply to a private sector award that was in force immediately before commencement day until that award is varied under s 37D, s 40(2A) or s 50(5).

97. Section 37B does, however, apply to private sector awards that are made on and from commencement day. Consequently, when the Commission is making a private sector award it will be required to express the scope of the award to extend to and bind employers and employees of specified classes.

[12] Inserted by clause 63 of the Bill.

[13] Ibid.

98. Section 37B(1) provides that, except as provided for in its terms, a private sector award extends to and binds:

    a) employers:

        (i) of a class or classes specified in the award; or

        (ii) specified by name in the award;[14] and

    b) employees who are:

        (i) employees of employers referred to in s 37B(1)(a); and

        (ii) of a class or classes specified in the award.

99. It is intended that employers and employees must be specified by class when an award is made. Section 37B(2) provides that, for the purposes of s 37B(1)(a)(i) and (b)(ii), a class may be described by reference to a particular industry or part of an industry, or a particular kind of work. This will enable the scope of a private sector award to be expressed to, for example, extend to and bind employees (and their employers):

    a) employed in a specific industry e.g. the fruit growing and fruit packing industry;

    b) employed in particular types of businesses e.g. private child care facilities;

    c) performing particular types of work e.g. clerical work;

    d) employed in both a specific industry and occupation e.g. construction workers performing work in the building construction industry.

100. Section 37B(2) does not, however, limit the way in which a class may be described. It also does not require that specified classes for employers or employees **must** be described by reference to a particular industry or particular kind of work. For example, an award may be expressed to extend to and bind an employer in the hospitality industry and employees of that employer employed within the classifications in the award. In this example, the employees are not specified by a particular kind of work.

101. Not all awards specify employers by name and the Commission will not be required to specify employers by name when making a new award. There is, however, scope for the Commission to specify an employer by name in an award if an employer seeks this or the Commission considers there is utility in doing so.

[14] This section should be read in conjunction with s 37D(3), s 40(2A) and s 50(5) which each specify that a variation to the scope of a private sector award must specify that it extends to and binds employers of a class or classes specified in the award, whether or not the employers are also specified by name.

102. Section 37B(3)(a) provides that a private sector award may be made or varied to prevent any overlap with another award. For example, the scope of a private sector award applying to the cleaning industry may be expressed to prevent an overlap in coverage with a public sector cleaners' award.

103. Section 37B(3)(b) provides that a private sector award may be made or varied to extend to and bind a labour hire agency and any employees of a labour hire agency conducting business in an industry to which the award relates and in relation to employees to whom a classification in the award applies.

104. 'Labour hire agency' is defined in s 7(1) to mean a person or entity that conducts a business of the kind commonly known as a labour hire agency. For a labour hire agency, 'conducting business' will therefore include the supply of labour to clients operating in an industry to which an award relates.

> **Example**
>
> A labour hire agency – Perth Warehouse Labour – supplies warehouse workers to a client – Italian Imports WA – operating in the storage services and wholesale industry.
>
> Although the warehouse workers are employees of Perth Warehouse Labour, award coverage of Perth Warehouse Labour and its employees may be determined by the scope of the industry – the storage services and wholesale industry – in which the Italian Imports WA operates and the Perth Warehouse Labour employees perform work.
>
> The application of an award to the labour hire agency in this circumstance must be in relation to labour hire workers that would be covered by classifications in that award.

105. The scope of a number of State awards currently operate in effect to extend to employees of labour hire businesses performing work for clients operating in particular industries. For example, the *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977*, and the *Restaurant, Tearoom and Catering Workers' Award*. Section 37B(3)(b) reflects this and enables both labour hire employees and those employees employed directly by the client to be covered by the same award and entitled to the same minimum conditions.

<u>Section 37C – Private sector awards: limitations on making and varying</u>

106. Section 37C places limitations on the Commission when it is making or varying the scope of a private sector award.

107. In accordance with the transitional provision in s 117(3), s 37C does not apply to a private sector award that was in force immediately before commencement day until the scope of that award is varied under s 37D, s 40(2A) or s 50(5). However, when the Commission varies the scope of a private sector award, it is obliged to do so in accordance with the limitations in s 37C. To do otherwise would result in a scope clause that falls foul of the limitations that will apply once the scope clause has been varied. The intention is therefore that the Commission must

comply with the limitations in s 37C when it is in the process of varying the scope of a private sector award under s 37D, s 40(2A) or s 50(5).

108. Section 37C applies to a private sector award made on and from commencement day.

109. Section 37C(1) provides that the Commission must not make or vary a private sector award which extends to and binds a class of employees who:

    a) because of the nature and seniority of their role, have not had awards (be these awards made under laws of the State, the Commonwealth, another State or a Territory) extend to and bind them; or

    b) perform work that is not of a similar nature to work that has been traditionally regulated by such awards.

110. For example, in some (but not all) industries, managerial employees have traditionally not been covered by awards. This provision reflects the same requirement that applies to national modern awards.[15] Whether the limitation should apply in a particular circumstance will depend on the nature of the award/s and the work carried out by the employees.

111. The amended definition of 'award' in s 7(1) applies to s 37C(1).

112. Section 37C(2) provides that the scope of a private sector award must not be fixed by reference to an industry or part of an industry carried on by an employer if the Commission makes or varies the private sector award to extend to and bind an employer specified by name in the award. This is to ensure that a private sector award can no longer have a scope clause that is limited by the industry of a named employer. (This limitation will only apply to new awards, and to existing State private sector awards when their scope clauses are varied after commencement day.)

113. Section 37C(3) provides that a private sector award must not be made or varied to extend to and bind an employee and employer if a public sector award or enterprise award extends to and binds the employee and employer.

114. This provision ensures that a private sector award – for example, an award covering gardeners – cannot be extended to public sector employers if there is a public sector award covering gardeners that extends to and binds the public sector employer and employee. It does not, however, prevent a private sector award from also applying to a public sector employee and their employer if there is no public sector award that extends to and binds the employer and employee.

115. It is noted that a public sector award is one that **only** extends to and binds a public sector body or entity. An award that extends to both private sector and public sector employers and employees is therefore not a public sector award.

[15] Section 143(7) of the FW Act.

Section 37D – Private sector awards: variations of the Commission's own motion

116. Section 37D(1) provides the Commission with a new power to vary the scope of a private sector award of its own motion. This power is, however, limited by s 37D(2)(a) which prevents the Commission from varying the scope of a private sector award via a General Order under s 50(2), unless an application seeking the variation of the scope of a private sector award or awards has been made by UnionsWA, the Chamber of Commerce and Industry WA, the Australian Mines and Metals Association or the Minister (for Industrial Relations).

117. The Commission is also prevented under s 37D(2)(b) from varying the scope of private sector awards as part of a State Wage order issued under s 50A.

118. When the Commission varies the scope of a private sector award under s 37D(1), the variation must specify that the scope of the private sector award extends to and binds:

    a) employers of a class or classes specified in the award, whether or not the employers are also specified by name in the award; and

    b) employees who are:

        (i) employees of employers referred to in s 37D(3)(a); and

        (ii) of a class specified in the award.

119. It is intended that employers and employees must be specified by class when the private sector award scope clause is varied. Section 37D(4) provides that, for the purposes of s 37D(3)(a) and (b)(ii), a class may be described by reference to a particular industry or part of an industry, or a particular kind of work.

120. Section 37D(4) does not, however, limit the way in which a class may be described. It also does not require that specified classes for employers or employees **must** be described by reference to a particular industry or particular kind of work. For example, an award may be expressed to extend to and bind an employer in the hospitality industry and employees of that employer employed within the classifications in the award. In this example, the employees are not specified by a particular kind of work.

121. The Commission is not required to also specify employers by name when varying the scope of a private sector award. There is, however, scope for the Commission to do so if an employer seeks this or the Commission considers there is utility in doing so.

122. Section 37D(5) prevents the Commission from varying the scope of a private sector award such that it stops the award from extending to and binding particular employers or employees, unless the Commission is satisfied that another appropriate award will extend to and bind them. This is to ensure that a previously award covered employee and employer do not become excluded from award

coverage but allows the Commission the flexibility to vary the coverage of another award to bind those employers and employees.

123. Section 37D(6) provides that, where the Commission varies the scope of a private sector award under s 37D, it must comply with the provisions set out in s 29A(1a) to (2b), with necessary modifications. These existing provisions require:

    a) the publishing of a proposed variation to the scope of an award in the required manner; and

    b) the service of the proposed variation on UnionsWA, the Chamber of Commerce and Industry WA, the Australian Mines and Metals Association and the Minister for Industrial Relations, and such organisations, associations and employers as the Commission may determine. In the case of employers, this will be such employers as constitute, in the opinion of the Commission, a sufficient number of employers who are reasonably representative of the employers who would be bound by the varied award.

124. The limitations in s 37C will apply when the Commission is varying the scope of an award under s 37D.

Clause 15 – Section 38 amended

125. Clause 15 amends existing s 38 to provide that, where an employer who is added as a named party to a public sector award or an enterprise award is engaged in an industry to which the award did not previously apply, the variation to the scope of the award is expressly limited to that industry for the purposes of s 37A. With respect to public sector and enterprise awards, this reflects existing s 38(3).

Clause 16 – Section 40 amended

126. Clause 16(1) amends existing s 40(1) to ensure that, when the Commission is varying the scope of a private sector award, it must do so in accordance with the provisions in s 37C and s 37D(5). As the provisions in s 37C and s 37D(5) only apply to private sector awards, these requirements cannot apply to the Commission when it is varying a public sector award or enterprise award under s 40.

127. Varying any award (private, public or enterprise) on application under s 40 must currently satisfy the requirements set out in s 29A. This includes variations to award scope.

128. Clause 16(2) inserts new s 40(2A) to provide that a variation to the scope of a private sector award must specify that it extends to and binds:

    a) employers of a class or classes specified in the award, whether or not the employers are also specified by name in the award; and

b) employees:

(i) of employers referred to in s 40(2A)(a); and

(ii) of a class specified in the award.

129. It is intended that employers and employees must be specified by class when the private sector award scope clause is varied.

130. The Commission is not required to also specify employers by name when varying the scope of a private sector award under s 40(2A). There is, however, scope for the Commission to do so if an employer seeks this or the Commission considers there is utility in doing so.

131. Clause 16(2) inserts new s 40(2B) to provide that, for the purposes of s 40(2A)(a) and (b)(ii), a class may be described by reference to a particular industry or part of an industry, or a particular kind of work.

132. Section 40(2B) does not, however, limit the way in which a class may be described. It also does not require that specified classes for employers or employees **must** be described by reference to a particular industry or particular kind of work. For example, an award may be expressed to extend to and bind an employer in the hospitality industry and employees of that employer employed within the classifications in the award. In this example, the employees are not specified by a particular kind of work.

Clause 17 – Part II Division 2F heading amended

133. Clause 17 amends the heading of Part II Division 2F to read 'Keeping of and access to employment records and pay slips'.

Clause 18 – Section 49D amended

134. The employment record related requirements in s 49D and s 49E will replace those in existing s 44 and 45 of the MCE Act.[16] It is intended that the same employment record and pay slip obligations cover all Western Australian employers in the State industrial relations system, regardless of whether they are bound by an award, industrial agreement, order of the Commission or the MCE Act. Furthermore, a number of the new requirements reflect those contained in s 535 of the FW Act and Division 3 Subdivision 1 of the FW Regulations, in order to create consistent obligations between State and national system employers.

135. Clause 18(1) replaces existing s 49D(1) and provides that employment records relating to an employee must be kept in accordance with this section. The use of the term 'employment record' requires consequential amendment to existing s 49D(3) and s 49E(2).

[16] Which will be deleted by clause 103 of the Bill.

136. Clause 18(2) amends existing s 49D(2) to include the following additional employment records required to be kept by an employer:

a) the employer's name and Australian Business Number (if any);

b) the gross and net amounts paid to the employee under an industrial instrument or the MCE Act, and any amount withheld as tax. An industrial instrument is defined in amended s 7(1) to mean an award, order of the Commission under the IR Act, an industrial agreement or an employer-employee agreement. This replaces the definition of industrial instrument in existing s 49D(4);

c) any incentive based payment, bonus, loading, penalty rates or other monetary allowance or separately identifiable entitlement;

d) any agreement under s 8(1) of the MCE Act – being an agreement to cash out accrued annual leave – including details of the benefit for, and the amount of, annual leave that was foregone (i.e. cashed out) and when the benefit was paid (i.e. when the payment for the cashed out leave was paid);

e) any information not otherwise covered by this subsection that is necessary to show that the remuneration and the benefits received by the employee comply with an industrial instrument or other entitlement provision. 'Entitlement provision' is defined in amended s 7(1) to include a provision of Part III of the LSL Act and a minimum condition of employment as defined in s 3(1) of the MCE Act;

f) the following matters relating to superannuation –

   (i) the amount of the superannuation contributions made;

   (ii) the period over which the superannuation contributions were made;

   (iii) the date on which the superannuation contributions were made;

   (iv) the name of any fund to which superannuation contributions were made;

   (v) how the employer worked out the amount of superannuation owed;

   (vi) any election made by the employee as to the fund to which the contributions are to be made and the date the election was made; and

g) termination-related matters, including:

   (i) whether the employee's employment was terminated by consent, notice, summarily (i.e. without notice) or in some other specified manner; and

   (ii) the name of the person who terminated the employee's employment.

137. Clause 18(3) amends existing s 49D(3)(b) to additionally require the retention of each entry relating to annual leave during the employee's period of employment and for not less than seven years after the employment terminates. This requirement to keep annual leave records for up to seven years after termination is necessary as an employee is entitled to be paid for untaken accrued annual leave on termination and an employee may seek to enforce this entitlement after their employment ends. In this respect, it is the same as long service leave.

138. Clause 18(4) amends existing s 49D(4) to provide that an employer who enters into an agreement under s 8(1) of the MCE Act must ensure that a copy of the signed, written agreement is kept as an employment record. This record ensures that an employer can demonstrate that the employee has agreed to cash out an amount of accrued annual leave and the employee has been paid for that leave.

139. Clause 18(4) also inserts new s 49D(5), s 49D(6), s 49D(7), s 49D(8) and s 49D(9).

140. Section 49D(5) provides that, if the Supported Wage System (SWS) or a supported wage industrial instrument provision (SWIIP)[17] applies to an employee with a disability, an employer must ensure that the following are kept as employment records in relation to the employee:

    a) any agreement entered into under the SWS or SWIIP by the employer and employee;

    b) any other document required to be kept by the SWS or SWIIP relating to the determination of a wage for the employee.

141. The retention of an agreement and other documents required to be kept under the SWS or a SWIIP ensures transparency regarding the determination of a minimum wage for specified employees with a disability.

142. Section 49D(6) provides that the employer must, as soon as practicable, lodge with the Registrar a copy of an agreement entered into under the SWS that is required to be kept under s 49D(5)(a). This reflects the requirement in the SWS for a wage assessment agreement to be lodged with the FWC (for national system employees) or the 'industrial registrar' of the Commission.[18]

143. Section 49D(7) provides that, if an employer makes a payment to an employee in cash, the employer must provide a record of the payment to the employee and ensure that a copy of the record of payment is kept as an employment record. It is common for employers to pay employees either wholly or partly in cash. This requirement is intended to ensure that a record of a cash payment is provided to the employee and kept as an employment record so the employer can demonstrate they have complied with their employment obligations.

[17] Supported Wage System' or 'SWS', and 'supported wage industrial instrument provision' or 'SWIIP' are defined in s 7(1) as amended by clause 5 of the Bill.
[18] Disability Services Australia, *Supported Wage System in Open Employment Handbook*, 1 July 2018, 29.

144. Section 49D(8) provides that an employer must not make or keep an employment record for the purposes of s 49D that they know, or could be reasonably expected to know, is false or misleading. New s 49D(9) provides, however, that s 49D(8) does not apply if the record is not false or misleading in a material particular. This reflects similar provisions in s 535(4) and (5) of the FW Act.

Clause 19 – Section 49DA inserted

145. Clause 19 inserts new s 49DA – Employer obligations in relation to pay slips.

146. Section 49DA(1) requires an employer to give a pay slip (in hard copy or electronic form) to each employee within one working day of paying an amount to an employee in relation to the performance of work.

147. The employer may determine whether to give a hard copy or electronic form of the pay slip. It is not intended that the requirement to give a pay slip within one working day mean that the employee must physically receive it within one working day. For example, an employer may post a pay slip to an employee within one working day of paying the employee. This requirement will be satisfied notwithstanding the mailed pay slip may not reach the employee until a later date.

148. Section 49DA(2) provides that the pay slip must include the following information:

a) the employer's name and Australian Business Number (if any);

b) the employee's name;

c) the period to which the pay slip relates;

d) the date on which the payment referred to in the pay slip was made;

e) the gross and net amounts of the payment, and any amount withheld as tax;

f) any incentive based payment, or payment of a bonus, loading, penalty rates or another monetary allowance or separately identifiable entitlement;

g) if an amount is deducted from the gross amount of the payment –

(i) the name of the person in relation to whom or which the deduction was made; and

(ii) if the deduction was paid into a fund or account, the name, or the name and number, of the fund or account;

(iii) the purpose of the deduction;

h) if the employee is paid at an hourly rate of pay –

(i) the rate of pay for the employee's ordinary hours; and

(ii) the number of hours worked during the period to which the pay slip relates; and

(iii) the amount of the payment made at that rate;

i) if the employee is paid a weekly or an annual rate of pay, the rate as at the latest date to which the payment relates;

j) if the employer is required to make superannuation contributions for the benefit of the employee –

(i) the amount of each contribution that the employer made during the period to which the pay slip relates and the name, or the name and number, of any fund to which the contribution was made; or

(ii) the amounts of the contributions that the employer is liable to make in relation to the period to which the pay slip relates, and the name, or the name and number, of any fund to which the contributions will be made.

149. These pay slip requirements reflect those in regulation 3.46 of the FW Regulations.

150. New s 49DA(3) provides than an employer must not give a pay slip for the purposes of s 49DA that is false or misleading. New s 49DA(4) provides, however, that s 49DA(3) does not apply if the employer gives the pay slip without knowing, or being reasonably expected to know, that it is false or misleading, or the pay slip is not false or misleading in a material particular. This reflects similar provisions in s 536(3) and (4) of the FW Act.

Clause 20 – Section 49E amended

151. Clause 20 makes a consequential amendment to s 49E arising from the use of the term 'employment record' in s 49D(1).

Clause 21 – Section 49F amended

152. Clause 21 amends existing s 49F to provide that a contravention of s 49D(1), (6) or (8), or s 49DA(1) or (3), in addition to s 49E(1), is not an offence but those subsections are civil penalty provisions for the purposes of s 83E of the IR Act.

Clause 22 – Section 49I amended

153. Clause 22(1) amends existing s 49I(1) to enable an authorised representative to investigate a suspected breach of the Construction Industry Portable Paid LSL Act. This was a recommendation of the Ministerial Review and is consistent with the existing right for an authorised representative to investigate a suspected breach of the LSL Act.

154. Clause 22(2) amends existing s 49I(2)(c) to expressly provide that, when investigating a suspected breach, an authorised representative may use electronic means to record work, material, machinery or appliances. This was a recommendation of the Ministerial Review and recognises that electronic recordings may be an accurate and efficient way of investigating a suspected breach and preserving evidence, as opposed to relying solely on the visual observations of an authorised representative.

155. Existing s 49I(2)(b) allows an authorised representative to make copies of entries in employment records or other documents related to the suspected breach. The provision is broadly expressed and does not preclude copies being taken by electronic means, such as photographing or recording with a mobile phone. The amendment to s 49I(2)(c) is consistent with s 49I(2)(b).

156. Any recording made pursuant to s 49I(2)(c) must be for the purpose of investigating the suspected breach in question, and the subject matter of the recording must furthermore be relevant to the suspected breach. The recording will not be authorised by the provision if there is insufficient relevancy.

157. An authorised representative who chooses to electronically record for the purposes of investigating a suspected breach will still need to be compliant with the *Surveillance Devices Act 1998*. This means, among other things, that intentionally recording a private conversation or activity within the meaning of that Act will generally be unlawful. It is also an offence to knowingly publish or communicate a private conversation or activity, subject to certain exceptions (e.g. publication or communication may be permissible in the course of legal proceedings).

158. While authorised representatives have statutory rights under the right of entry provisions, they also have concomitant responsibilities, including an obligation not to act in an improper manner. An authorised representative who acts in an improper manner may have a penalty imposed in the form of having their authority revoked or suspended under s 49J of the IR Act. Acting improperly could include, for example, using an electronic recording taken under s 49I(2)(c) for a purpose unrelated to investigating or rectifying the suspected breach.

Clause 23 – Section 49K replaced

159. Clause 23 replaces existing s 49K, which currently prevents an authorised representative from entering any part of an employer's premises principally used for habitation by the employer and their household.

160. Similar to existing s 49K, new s 49K(1) prevents an authorised representative from entering any part of premises principally used for habitation by an employer or a member of the employer's household (referred to as 'habitation premises'). However, s 49K(1) is subject to s 49K(3).

161. Section 49K(2) enables an authorised representative to apply to the Commission for an order permitting entry to habitation premises under s 49I(1). Section 49K(3) provides that the Commission may only make the order if it is satisfied that exceptional circumstances exist warranting the making of the order. It is intended that the Commission have broad discretion to decide whether exceptional circumstances exist. To be exceptional a circumstance need not be unique, or unprecedented or very rare; but it cannot be one that is regularly, or routinely or normally encountered.[19]

162. New s 49K provides a balance between privacy considerations and the need to ensure appropriate protections for employees, including those who work in their employer's home.

Clause 24 – Section 50 amended

163. Clause 24 amends existing s 50 to insert new s 50(5) and (6). Section 50(5) provides that a General Order that varies the scope of a private sector award must specify that it extends to and binds:

    a) employers of a class or classes specified in the award, whether or not the employers are also specified by name in the award; and

    b) employees:

        (i) of employers referred to in s 50(5)(a); and

        (ii) of a class specified in the award.

164. It is intended that employers and employees must be specified by class when a private sector award scope clause is varied via a General Order.

165. The Commission is not required to also specify employers by name when varying the scope of a private sector award via a General Order made under s 50. There is, however, scope for the Commission to do so if an applicant seeks this or the Commission considers there is utility in doing so.

166. Section 50(6) provides that, for the purposes of s 50(5)(a) and (b)(ii), a class may be described by reference to a particular industry or part of an industry, or a particular kind of work.

[19] *R v Kelly (Edward)* [2000] 1 QB 198 at 208.

167. Section 50(6) does not, however, limit the way in which a class may be described. It also does not require that specified classes for employers or employees **must** be described by reference to a particular industry or particular kind of work. For example, an award may be expressed to extend to and bind an employer in the hospitality industry and employees of that employer employed within the classifications in the award. In this example, the employees are not specified by a particular kind of work.

168. The limitations in s 37C will apply when the Commission is varying the scope of a private sector award via a General Order.

Clause 25 – Section 50A amended

169. Clause 25 amends s 50A to provide for the setting by the Commission of the minimum amount payable for employees with a disability assessed under, and paid in accordance with, the SWS.

170. Clause 25(1) inserts new s 50A(1AA) and provides that the term 'instrument-governed employee with a disability' means an employee:

    a) whose contract of employment is governed by an industrial instrument that includes a SWIIP (supported wage industrial instrument provision); and

    b) whose productive capacity has been assessed under the SWS as being reduced because of a disability; and

    c) who is not employed by a supported employment service as defined in s 7 of the *Disability Services Act*. 'Supported employment service' is defined in that Act as services to support the paid employment of persons with disabilities, being persons:

        (i) for whom competitive employment at or above the relevant award wage is unlikely; and

        (ii) who, because of their disabilities, need substantial ongoing support to obtain or retain paid employment; and

    d) who is being a paid a weekly rate of pay determined by the SWS under the SWIIP.

171. Clause 25(2) inserts new s 50A(1)(a)(iii), which provides that the Commission is required to set, as part of the State Wage order, the minimum amount payable under s 17(2) of the MCE Act. The minimum amount payable under new s 17(2) of the MCE Act[20] only applies to employees with a disability who have been, or are being assessed, under the SWS.

[20] Inserted by clause 99 of the Bill.

172. Clause 25(3) inserts new s 50A(1A), which provides that the amount set by the Commission under s 50A(1)(a)(iii) must be the same as that set by the FWC in the national minimum wage order made under s 285(2)(c) of the FW Act for an eligible employee whose productive capacity is assessed as reduced under the SWS because of a disability.

173. This is intended to be a reference to special national minimum wage 2 and Schedule A in the national minimum wage order. Special national minimum wage 2 applies to an award/agreement free employee with a disability:

    a) who is unable to perform the range of duties to the competence level required of an employee within the class of work for which the employee is engaged because of the effects of a disability on their productive capacity; and

    b) who meets the impairment criteria for receipt of the disability support pension.

174. Schedule A of the national minimum wage order sets out the SWS methodology for determining a minimum wage for an employee with a disability and sets the minimum amount payable to an employee to whom special national minimum wage 2 applies. The FWC sets the minimum amount payable as part of each Annual Wage Review and adjusts this amount from time to time.

175. The Commission must adopt the same minimum amount payable as that set by the FWC in Schedule A of the national minimum wage order in each Annual Wage Review.

176. Section s 50A(1B) provides that, for the purposes of s 50A(1)(b) – the requirement of the Commission to adjust the rates of wages paid under awards – the Commission must, in relation to an instrument-governed employee with a disability:

    a) order that the minimum amount payable is to be the same as the previous State Wage order; or

    b) order that the minimum amount payable is to be the same as that set by the FWC in the national minimum wage order made under s 285(2)(c) of the FW Act for an eligible employee whose productive capacity is assessed under the SWS as reduced because of a disability.

177. Section 50A(1B) only applies to awards and only those that incorporate the SWS. The definition of ‘instrument-governed employee with a disability’ in s 50(1AA), however, excludes employees who are employed by a supported employment service as defined in s 7 of the *Disability Services Act*.

178. The reasons for the exclusion of supported employment services employees are as follows:

    a) The productive capacity of an employee with a disability currently employed under the national *Supported Employment Services Award 2010* (a modern award) may be assessed under one of a number of wage assessment tools in the award, including the SWS.

    b) The minimum amount payable per week under the SWS, which is provided for in the national minimum wage order and is also incorporated into other modern awards, does not apply to the SWS in the *Supported Employment Services Award 2010*. At present, employees under the *Supported Employment Services Award 2010* are instead entitled to no less than 12.5% of the relevant minimum wage in the award.

    c) Work is underway before the FWC to replace the wage assessment tools in the national *Supported Employment Services Award 2010* with a modified form of the SWS.[21] It is possible that the minimum 12.5% wage entitlement in the SWS in this award will be replaced.

    d) Excluding supported employment services employees assessed under the SWS in a State award from the minimum amount payable per week is consistent with the national *Supported Employment Services Award 2010*.

179. As the FWC does not always increase the minimum amount payable under special national minimum wage 2 in the Annual Wage Review, s 50A(1B)(a) enables the Commission to keep the amount as the same as the amount set in the previous State Wage order (which will reflect the previous minimum amount payable set by the FWC). This will maintain consistency with the national minimum wage order amount.

180. Section 50A(1B)(b) reflects s 50A(1A) and ensures that the Commission must set the minimum amount payable as the same amount as that set by the FWC in the national minimum wage order each year. This is a reference to the minimum amount payable in special national minimum wage 2 and Schedule A in the national minimum wage order.

Clause 26 – Section 50B amended

181. Clause 26 corrects a cross referencing error in existing s 50B(1).

Clause 27 – Part II Division 3AA inserted

182. Clause 27 inserts new Part II Division 3AA – Workers bullied at work, comprising new s 51BF to s 51BN.

[21] [2019] FWCFB 8179 (3 December 2019).

Section 51BF – Terms used

183. Section 51BF defines the following terms for the purposes of Division 3AA:

a) ‘bullied at work’ has the meaning given in s 51BI;

b) ‘person’ conducting a business or undertaking includes a public authority conducting the business or undertaking. It is noted that ‘public authority’ is defined in existing s 7(1). The term ‘person’ is also defined in s 5 of the *Interpretation Act* to include a public body;

c) ‘stop bullying application’ has the meaning given in s 51BJ(1);

d) ‘volunteer’ means a person who is acting in a voluntary basis (irrespective of whether the person receives out of pocket expenses). This reflects the definition of volunteer in the federal WHS Act;

e) ‘WA Police’ means the Police Force of Western Australia provided for by the *Police Act*;

f) ‘worker’ has the meaning given in s 51BH.

Section 51BG – Person conducting a business or undertaking

184. Section 51BG sets out the meaning of the term ‘person conducting a business or undertaking’ for the purposes of Division 3AA and s 51BH. The meaning of this term is based upon the definition of person conducting a business or undertaking in s 5 of the federal WHS Act, with some modification. The definition of person conducting a business or undertaking from the federal WHS Act is used in the FW Act to define which businesses and undertakings are covered by the federal stop bullying provisions.

185. Section 51BG(1)(a) provides that a reference in s 51BH to a person conducting a business or undertaking includes a reference to a person conducting the business or undertaking:

a) whether alone or with others; and

b) whether or not for profit or gain.

186. The term ‘person’ is defined in the *Interpretation Act* to include a public body, company, or association or body of persons, corporate or unincorporate. ‘Person’ also has its ordinary meaning of a human being. Section 51BG(1)(a) is therefore a reference to the legal entity running a business or undertaking and includes sole traders, partnerships, public authorities (as defined in s 7(1)) operating in the WA public sector, public bodies, unincorporated associations, and incorporated associations which are not national system employers.

187. The terms ‘business’ and ‘undertaking’ are not defined. These terms derive from the federal WHS Act. It is noted that, according to SafeWork Australia:

    a) businesses are usually enterprises operated with the aim of making a profit, and ‘have a degree of organisation, system and continuity’;

    b) undertakings usually have ‘elements of organisation, systems and possibly continuity, but are usually not profit-making or commercial in nature’.[22]

188. It is not relevant whether a person is carrying on a business or undertaking for profit or gain.

189. Section 51BG(1)(b) provides that a reference in s 51BH to a person conducting a business or undertaking includes a reference to a partnership or an unincorporated association conducting the business or undertaking. It is noted that the reference to an unincorporated association does not exclude an incorporated association. In accordance with the definition of ‘person’ in s 5 of the *Interpretation Act*, a person conducting a business or undertaking will include incorporated associations and bodies of persons.[23]

190. As provided by s 51BG(1)(c), where the business or undertaking is being carried out by a partnership (other than an incorporated partnership), each partner is considered to be a person conducting a business or undertaking.

191. Section 51BG(2)(a) provides that a reference to a person conducting a business or undertaking does not include a reference to an individual engaged solely as a worker in the business or undertaking. In other words, an individual who is only a worker in a business is not to be considered a person conducting that business or undertaking. However, if (for example) the person is both a partner and a worker in the business, they would be considered to be a person conducting a business or undertaking.

192. It is noted that a person who is solely engaged as an officer in a business or undertaking – such as a public service officer in the WA public service, an officer of a registered organisation or an officer of an incorporated association – may also be considered a worker in that business or undertaking. Section 51BG(2)(a) will therefore apply to such persons if they are engaged solely as workers in a business or undertaking.

193. Section 51BG(2)(b) provides that a reference to a person conducting a business or undertaking does not, in the case of a business or undertaking conducted by a local government or regional local government, include a reference to a member of the council of that local or regional local government. The intention is that an individual councillor is not considered a person conducting a business or undertaking. An individual councillor can, however, be an individual referred to in s 51BI(1) – that is, one who repeatedly behaves unreasonably towards a worker.

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[22] *Interpretive Guidelines to model WHS Act – The meaning of ‘person conducting a business or undertaking’* p.1.

[23] However, the FW Act stop bullying provisions will cover workers of an incorporated association that is a constitutionally covered business, as that term is defined in s 789FD(3) of the FW Act.

194. Section 51BG(2)(c) provides that a reference to a person conducting a business or undertaking does not include a volunteer association. The term volunteer association, however, has a specific meaning; in accordance with s 51BG(3) it means a group of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly with other volunteers, employs any person to carry out work for the volunteer association. This exclusion therefore does not apply where the volunteer association employs a person to carry out work for the association. Hiring a contractor is not considered 'employing' a person, provided the true nature of the engagement is a contract for service, rather than a contract of service (employment).

> **Example**
>
> Hazelmere Cricket Club is a community sporting group and a volunteer association. It employs Laura to work in a kiosk during club cricket matches. Hazelmere Cricket Club is therefore 'a person conducting a business or undertaking'.

195. The term 'community purposes' is intended to cover the following:

    a) philanthropic or benevolent purposes, including the promotion of art, culture, science, religion, education, medicine or charity; and

    b) sporting or recreational purposes, including the benefiting of sporting or recreational clubs or associations.

Section 51BH – Worker

196. The stop bullying provisions extend to workers, which is a wider term than 'employee'. This term has been adopted as it recognises the changing nature of working relationships and to ensure stop bullying protections are extended to all types of workers. The definition of worker is based on the definition of worker in s 7 of the federal WHS Act. This is the definition used for the meaning of worker in the FW Act stop bullying provisions.

197. Section 51BH(1) provides that a person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as any of the following:

    a) an employee. This term is defined in s 7(1);

    b) a contractor or subcontractor;

    c) an employee of a contractor or subcontractor;

    d) an employee of a labour hire agency who has been assigned to work in the person's business or undertaking. 'Labour hire agency' is defined in s 7(1);

    e) an outworker;

f) an apprentice or trainee;[24]

g) a student gaining work experience;

h) a volunteer;

i) a person of a prescribed class.

198. The examples provided in s 51BH are illustrative only and are not intended to be exhaustive. This means that there will be other kinds of workers (and by extension, other kinds of work) covered that are not specifically listed in s 51BH e.g. students on practical placement as part of a course of education or vocational training.

199. The mere fact that a person performs work does not alone make them a worker for the purposes of Division 3AA; the person must also perform work for a person conducting a business or undertaking.[25]

200. Section 51BH(2) provides that a police officer is a worker of WA Police and at work throughout the time when the officer is on duty or lawfully performing the functions of a police officer but not otherwise. For example, a police officer who is called on to perform their duties while rostered 'off-duty' is considered to be on active duty while lawfully performing those functions. A police officer would not be considered to be a worker during a period they are not on active duty. This provision relates only to Division 3AA.

201. Section 51BH(3) provides that a person conducting a business or undertaking is also a worker if the person is an individual who carries out work in that business or undertaking. In other words, a self-employed person may be simultaneously both a person conducting a business or undertaking and a worker for the purposes of Division 3AA.[26] It is not intended that, where a business is conducted by a partnership, both partners must also be workers in the business in order for s 51BG(3) to apply to one partner who is carrying out work.

<u>Section 51BI – Worker bullied at work</u>

202. Section 51BI(1) provides that a worker is bullied at work if:

a) while the worker is at work, an individual or group of individuals repeatedly behaves unreasonably towards:

(i) the worker; or

(ii) a group of workers of which the worker is a member;

[24] The term 'apprentice' is defined in the VET Act to mean the person named in a training contract as the person who will be trained under the contract whether the person is termed an apprentice, trainee, cadet, intern or some other term.

[25] In *Balthazaar v Department of Human Services* (Commonwealth) [2014] FWC 2076 the FWC held that whilst the applicant carried out work, he did not carry out work for the Department of Human Services.

[26] See, for example, *Re Manderson* [2015] FWC 8231 where the FWC determined that a worker who was an employee in his own business was 'at work' whilst performing work in his own business.

and

b) that behaviour creates a risk to the safety and health of the worker.

203. As the term 'worker' means a person who carries out work in any capacity for a person conducting a business or undertaking, the reference in s 51BI(1) to 'while the worker is at work' is intended to mean while the worker is at work carrying out work in any capacity for a person conducting a business or undertaking. This includes carrying out work at a place other than the employer's premises, as may be the case for employees of a subcontractor or a labour hire agency, both of whom fall within the definition of 'worker'.

204. It is also intended that the term 'at work' is not limited to the worker actively performing work – for example, a worker may be considered to be at work whilst on a lunch break.[27]

205. The use of the term 'individual' and 'group of individuals' is broad and intended to capture a wider range of persons than co-workers or an employer. For example, s 51BI(1) will capture clients or customers of the business or undertaking in which the worker works. It can therefore include an individual who is a national system employer or employee.

Example

Carlos is employed by ABC Security as a security guard. A sole trader, Brian Noonan, owns and operates ABC Security. ABC Security is contracted to provide security at a sports stadium.

The sports stadium is managed by Sports Events Australia Pty Ltd and is a national system employer.

Carlos performs his duties at the sports stadium. Whilst he is at work, Carlos alleges that the operations manager employed by Sports Events Australia Pty Ltd is harassing him and making racist slurs.

Carlos is 'bullied at work' as:

- he is a worker i.e. an employee of a contractor;
- he is at work i.e. carrying out work for a person – Brian Noonan – conducting a business or undertaking; and
- an individual – the Sports Events Australia Pty Ltd operations manager – repeatedly behaves unreasonably towards him and this behaviour creates a risk to his health and safety.

It is not relevant to the question of whether Carlos is bullied at work that the operations manager is a national system employee.

[27] In *Bowker and Others v DP World Melbourne Limited T/A DP World and Others* [2014] FWCFB 9227 at [49] to [51], the Full Bench of the FWC held that the concept of being 'at work' encompasses both the performance of work (at any time or location) and when the worker is engaged in some other activity which is authorised or permitted by their employer such as being on a meal break or accessing social media while performing work.

206. It is not a requirement that the individuals engaging in the unreasonable behaviour be themselves 'at work'.[28]

207. In order for the behaviour of an individual or group of individuals to be captured by s 51BI(1), they must repeatedly behave unreasonably and this behaviour must create a risk to the health and safety of the worker who is being bullied.

208. There is not a specific number of incidents required for the behaviour to constitute repeated unreasonable behaviour, provided that there is more than one occurrence. There is also not a requirement that the same specific behaviour has to be repeated. This means that the repeated unreasonable behaviour may involve a range of behaviours over time.[29]

209. Examples of repeated unreasonable behaviour constituting bullying at work include intimidation; coercion; threats; humiliation; malicious pranks; physical, verbal and emotional abuse; harassment; isolation; ostracism; rumour mongering; and discrimination.[30]

210. Actual harm to a worker's health and safety is not necessary; there must, however, be a demonstrated risk to the health and safety of the worker and this risk must be real, not simply conceptual.[31]

211. Section 51BI(2) provides that s 51BI(1) does not apply to reasonable management action that is carried out in a reasonable manner. This is intended to ensure that employers, managers and supervisors can manage the performance of workers, take remedial or disciplinary action if required, and direct workers in the carrying out of their duties. The management action must, however, be both reasonable and carried out in a reasonable manner. Furthermore, to be captured by s 51BI(1), the management action must be repeated behaviour that creates a risk to the health and safety of the worker.

<u>Section 51BJ – Stop bullying application</u>

212. Section 51BJ(1) provides that a worker who reasonably believes[32] that the worker has been bullied at work may make an application (a stop bullying application) to the Commission for a stop bullying order. This application must be accompanied by any fee prescribed by the regulations. A worker may be represented in proceedings under Division 3AA by an organisation as agent, as per s 31(1) of the IR Act.

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[28] Ibid [31].

[29] As held by the FWC in *Re MS SB* [2014] FWC 2104 at [41].

[30] In *Amie Mac v Bank of Queensland Limited and Others* [2015] FWC 774 at [99], the FWC set out these and other examples of what might be expected to be found in a course of repeated unreasonable behaviour constituting bullying at work.

[31] In *Re G.C* [2014] FWC 6988 at [50], the FWC held that a risk to health and safety means the possibility of danger to health and safety and it is not confined to actual danger to health and safety; the ordinary meaning of risk is exposure to the chance of injury or loss; and the risk must also be real and not simply conceptual.

[32] See *Amie Mac v Bank of Queensland Limited and Others* [2015] FWC 774 at [79] for a discussion of the meaning of 'reasonably believes' and the FWC's finding at [96] that the applicant's belief was reasonable 'in the sense that it has something tangible to support it and is not entirely irrational, absurd or ridiculous'.

Section 51BK – Dealing with a stop bullying application

213. Section 51BK(1) provides that the Commission must start to deal with a stop bullying application within 14 days after the application is made. The Commission may deal with the application via conciliation or arbitration under s 32 of the IR Act or take action in accordance with s 27 of the IR Act. The Commission may also dismiss an application under its general power to dismiss a matter in s 27(1) of the IR Act.

214. In accordance with s 51BK(2), s 44 of the IR Act does not apply to a stop bullying application. This means that where a stop bullying application has been made under s 51BJ(1), an organisation cannot make an application to the Commission under s 44(7) in relation to the subject matter of that application, or otherwise seek to have the application in effect dealt with under s 44. A stop bullying application must be dealt with under Division 3AA. If a stop bullying application has not been made, however, then there is nothing to prevent an organisation from applying for a compulsory conference under s 44 in relation to an industrial matter involving the alleged bullying of an employee or a group of employees.

215. Under s 48A(1), the Commission must not make an award or order, or register an industrial agreement unless it includes provisions to be followed in connection with questions, disputes or difficulties. Section 48A(1a) requires these procedures to provide for the persons involved in the dispute to confer among themselves and make reasonable attempts to resolve the dispute before taking the matters to the Commission. Section 48A(2) provides that the Commission may order persons involved in the dispute before the Commission to comply with the dispute settling procedures.

216. Section 51BK(3) provides that s 48A(2) or any other enactment does not limit the power of the Commission to deal with a stop bullying application under Division 3AA. It is intended that:

    a) the Commission be able to deal with a stop bullying application irrespective of whether a person has first complied with a dispute settlement procedure in an award, order or industrial agreement; and

    b) that the Commission cannot, under s 48A(2), order the parties to the bullying matter to comply with dispute settlement procedures before it will deal with the stop bullying application.

217. In the same way that s 48A cannot limit the power of the Commission under Division 3AA, a dispute settlement procedure in an award, order or industrial agreement cannot then limit the power of the Commission to deal with a stop bullying application under Division 3AA.

218. The power of the Commission to deal with a stop bullying application is also not limited by another provision of the IR Act or another enactment providing for the resolution of grievances or disputes by workers. For example, a worker may have made a racial harassment complaint to the Equal Opportunity Commissioner relating to alleged bullying behaviour of another person. The Commission is not

prevented from exercising its stop bullying jurisdiction in relation to the same alleged behaviour.

219. Other examples intended to be captured by s 51BK(3) include where a matter has been referred to, and/or is being considered or heard by:

    a) WorkSafe in relation to a complaint made under the WA OSH Act;

    b) the Public Service Appeal Board (PSAB) under s 80I of the IR Act;

    c) the Commission or the PSAB under Part 5 of the PSM Act or Part 11 of the *Health Services Act*;

    d) the Commission under Part X of the *Prisons Act 1981*; Part 3 Division 3 of the *Young Offenders Act 1994*; or Part IIB of the *Police Act*; and

    e) the Public Sector Commission in relation to a breach of public sector standards under regulation 6 of the PSM (Breaches of Public Sector Standards) Regulations.

220. The purpose of s 51BK(3) is to ensure that bullying matters are dealt with expeditiously and harm to a worker's health and safety is minimised. It should be noted, however, that new s 51BM(2) places obligations on the Commission which are relevant in this context.

    <u>Section 51BL – Power to dismiss stop bullying applications involving covert operations</u>

221. Section 51BL(2) provides that the Commission may dismiss a stop bullying application if the Commission considers that the application might involve matters that relate to the exercise of a power of a police officer in circumstances where:

    a) a covert operation is undertaken by WA Police for the purpose of obtaining information about criminal activity; and

    b) unless the exercise of the power is secret or confidential, it would be likely that:

        (i) the effectiveness of the exercise of the power is reduced; or

        (ii) a person is exposed to the danger of physical harm arising from the actions of another person.

222. This is consistent with s 789FE(2)(c) the FW Act where the FWC may dismiss a stop bullying application if it considers that the application may involve an existing or future covert operation of the Australian Federal Police.

Section 51BM – Commission may make stop bullying orders

223. Section 51BM(1) provides that the Commission may make any order it considers appropriate to prevent a worker being bullied at work by an individual or group, other than an order requiring payment of a pecuniary amount by way of compensation to a worker.

224. The Commission may make an order if:

a) the worker has made a stop bullying application; and

b) the Commission is satisfied that:

(i) the worker has been bullied at work by an individual or group of individuals; and

(ii) there is a risk that the worker will continue to be bullied at work by the individual or group of individuals.

225. A pecuniary order is only one that requires payment of compensation to the worker. An order requiring an employer to continue to pay a worker their normal wages for work performed in a continuing employment relationship would not be considered an order requiring payment of a pecuniary amount by way of compensation to the worker and so would not be excluded by s 51BM(1).[33]

226. With the exception of orders for compensation, the Commission has wide discretion to make orders directed at preventing a worker being bullied at work in the future by the person or persons who are the subject of a stop bullying application. It may, therefore, make an order that applies to a person other than the individual or group who has engaged in the bullying. For example, to prevent a worker being bullied by a co-worker, the Commission could order the workers' employer to provide workplace bullying training to its employees.

227. The Commission may also make orders to apply to co-workers, clients, visitors to the workplace, and the applicant worker themselves. Examples of orders the Commission may make include an order requiring:

a) the individual or group of individuals to stop specified behaviour;

b) an individual to not make contact with another person, to not attend certain premises or to refrain from making offensive statements to others;

c) regular monitoring of behaviours by an employer;

d) an individual's compliance with an employer's workplace bullying policy;

e) an employer to provide workplace bullying information and anti-bullying training to managers and workers;

[33] See, for example, *South Eastern Sydney Local Health District v Kusum Lal* [2019] FBFWC 1475 at [27].

f) an employer to develop a workplace bullying policy;

g) an employer to place the applicant worker or the individual found to have engaged in bullying conduct in an alternative position;

h) an applicant worker to comply with reasonable directions of their employer.

228. For the Commission to be empowered to make a stop bullying order, both requirements in s 51BM(1)(b) must be satisfied – the worker has been bullied at work by an individual or group of individuals, and there is a risk that the worker will continue to be bullied at work by the individual or group of individuals. The use of the definite article 'the' in s 51BM(1)(b)(ii) means that the worker must be at risk of being bullied by **the same** individual or group who the Commission has found to have engaged in bullying pursuant to s 51BM(1)(b)(i).[34]

229. Where an employee's employment has terminated after making a stop bullying application but before the Commission deals with the matter, the Commission will be unable to make a stop bullying order if there is no demonstrated risk of continued bullying of the person at work. An employee in this situation may choose to pursue a remedy under the IR Act – for example, for unfair dismissal under s 29(1)(c).

230. Section 51BM(2) provides that, in considering the terms of an order, the Commission must take into account:

a) if the Commission is aware of any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body – those outcomes;

b) if the Commission is aware of any procedure available to a worker to resolve grievances or disputes, that procedure. This would include dispute resolution procedures in an award, industrial agreement, order or employer-employee agreement;

c) if the Commission is aware of any final or interim outcomes arising out of any procedure available to a worker to resolve grievances or disputes – those outcomes; and

d) any matters that the Commission considers relevant.

231. Section 51BM(2) is relevant in the context of s 51BK(3), which ensures that the Commission's power to deal with a stop bullying application is not limited by the availability of other procedures for the resolution of disputes. Section 51BM(2) ensures that the Commission takes into account both the procedures available, and the outcomes of any investigations or procedures, where the Commission is aware of them.

[34] See, for example, consideration of the similar provision in s 789FF(1)(b) in the FW Act by the Full Bench of the FWC in *Alemtsehay Mekuria v MECCA Brands Pty Ltd t/a Mecca Cosmetica; Debra Kelso; Christine Mantacas; Grace Chiruvu* [2019] FWCFB 2771 at [29].

232. Section 51BM(2)(c) enables the Commission to take into account any other matters it considers relevant – for example, steps an employer has taken to reduce risks associated with bullying in their workplace; whether the individual involved in the bullying behaviour is no longer in the workplace; or whether the bullying occurred in a particular context that no longer applies.

233. It is noted that s 49 applies enabling an appeal from any decision of the Commission to the Full Bench.

Section 51BN – Contravening stop bullying order

234. A person to whom a stop bullying order applies must not contravene a term of the order. A contravention is not an offence but is a civil penalty provision for the purposes of s 83E of the IR Act.

235. It is noted that, under s 83E(2), the IMC may instead of, or in addition to, making an order imposing a penalty, make an order against the person for the purpose of preventing any further contravention.

Clause 28 – Part II Division 3B replaced

236. Clause 28 deletes existing Part II, Division 3B – Collective agreements and good faith bargaining. This Division relates to collective agreements under the federal *Workplace Relations Act 1996* and is redundant.

237. Clause 28 inserts new Part II Division 3B – Equal remuneration comprising new s 51O to s 51R.

Section 51O – Equal remuneration orders

238. Section 51O(1) defines 'statement of principles' for the purposes of s 51O to mean the statement of principles referred to in s 50A(1)(d)(ii).[35] The current equal remuneration principle in the statement of principles,[36] which only applies to awards and orders, sets out how the Commission is to assess the value of work, and how equal remuneration is to be achieved.

239. Section 51O(2) provides that the Commission must make an equal remuneration order to ensure that an employee receives equal remuneration if it is satisfied that the employee does not receive that remuneration. The Commission has no discretion regarding the making of an order if it is satisfied that the employee to be covered by the order does not receive equal remuneration for men and women for work of equal or comparable value.

240. The Commission can only make an order on application under s 29(1)(b). It does not have the power to make an equal remuneration order of its own motion.

[35] Inserted by clause 25(2) of the Bill.
[36] Principle 8 in the State Wage order 2019 statement of principles.

241. Whilst the Commission must make an equal remuneration order if it is satisfied that the employee does not receive equal remuneration, it cannot make an order if it is not satisfied that the employee does not receive equal remuneration.

242. Section 51O(3) provides that the equal remuneration order may relate to any matter that the Commission considers appropriate, including (but not limited to) orders:

    a) reclassifying work;

    b) establishing new career paths;

    c) implementing changes to incremental pay scales;

    d) providing for an increase in remuneration rates, including:

        (i) minimum rates of pay in awards, industrial agreements and enterprise orders; and

        (ii) new allowances;

    e) reassessing definitions and descriptions of work to properly reflect the value of the work.

243. These measures are consistent with the measures in the equal remuneration principle in the 2019 State Wage order statement of principles.

244. Section 51O(4) provides that the Commission must apply the statement of principles, with any necessary modifications, in:

    a) determining whether an employee receives equal remuneration; and

    b) deciding the terms of an equal remuneration order.

245. As the statement of principles only applies to awards and orders, s 51O(4) ensures that the same provisions are applied when the Commission is dealing with an equal remuneration application under the IR Act, with any necessary modifications to apply the principles to industrial instruments other than an award or order.

246. Section 51O(5) provides that, for the purposes of s 51O(3), Division 3B prevails over the statement of principles to the extent of any inconsistency. This provision has been included as the statement of principles excludes the application of the principles to enterprise orders. As provided for in s 51O(2), the Commission may make any order that it considers appropriate including (at paragraph (d)(i)) increasing the minimum rates in enterprise orders. Section 51O(4) ensures that, whilst the principles must be applied when the Commission is determining the content of an equal remuneration order, the Commission is not prevented by the principles from making an order that increases remuneration rates in an enterprise order.

247. Section 51O(6) provides that an equal remuneration order may introduce equal remuneration measures immediately, or progressively – in stages specified in the order. This is consistent with the equal remuneration principle in the 2019 State Wage order statement of principles.

Section 51P – Employer not to reduce remuneration

248. Section 51P provides that an employer must not reduce an employee's remuneration because an equal remuneration order, or an application for the order, has been made in relation to the employee. This includes where a union has made an application for an equal remuneration order to cover employees who are eligible to be members.

249. If an employer does reduce an employee's remuneration, this purported reduction will be of no effect.

Section 51Q – Alternative remedies

250. Section 51Q(1) provides that, except as provided for in s 51Q(3), Division 3B does not limit the right a person might otherwise have to a remedy to secure equal remuneration (termed an 'alternative remedy') under another provision of the IR Act or another enactment.

251. The use of the term 'person' in s 51Q(1) is intended to include an employee, an employer and an organisation (union or employer association). It is noted that the term 'person' is defined in s 5 of the *Interpretation Act* to include an association or body of persons, be it corporate or unincorporate.

252. Section 51Q(2) provides that a person who has applied for an alternative remedy in relation to an employee cannot apply for an equal remuneration order in relation to the employee unless the proceedings for the alternative remedy have been withdrawn or determined.

253. Once an application for an alternative remedy has been determined (i.e. the application succeeded, failed or failed for want of jurisdiction) or has been withdrawn, the person may make an application for an equal remuneration order.

254. For example, an organisation may have made an application under s 40 to vary an award to implement equal remuneration in relation to employees covered by the award. Until those proceedings have been determined or withdrawn, the organisation cannot apply for an equal remuneration order in relation to those same employees.

255. It is noted that, if an application for an alternative remedy to secure equal remuneration was successful and a person still subsequently applies for an equal remuneration order, the Commission is only required to make an equal remuneration order if it is satisfied that the employee does not receive equal remuneration. If the Commission determines that the employee receives

equal remuneration, which may be because of the outcomes from the alternative remedy, the Commission cannot make an equal remuneration order.

256. Whilst the term 'person' in s 51Q(2) includes an employee or an organisation, this section does not apply to an employer for, although an employer would be considered a person, they are not a person who may make an application for an equal remuneration order under s 29(1)(b).

257. Section 51Q(3) provides that a person who has applied for an equal remuneration order in relation to an employee cannot commence proceedings for an alternative remedy unless the application for the equal remuneration order has been withdrawn or determined.

258. The term 'person' in s 51Q(3) does not include an employer for, although an employer would be considered a person, they are not a person who can make an application for an equal remuneration order under s 29(1)(b). Therefore, an employer is not subject to the limitation in s 51Q(3).

259. Once a person's application for an equal remuneration order has been determined (i.e. the application succeeded, failed or failed for want of jurisdiction) or has been withdrawn, the person may make an application for an alternative remedy.

260. Section 51Q(4) provides that s 51Q(3) does not prevent an organisation from commencing proceedings that relate in part or as a whole to the securing of equal remuneration for the employee and that comprise any of the following:

    a) an application to vary an award under s 40;

    b) an application for the registration of an industrial agreement under s 41;

    c) an initiation of bargaining under s 42(1);

    d) an application under s 42G for an order regarding provisions of an industrial agreement;

    e) an application under s 42I for an enterprise order.

261. Section 51Q(4) is intended to ensure that specified proceedings that relate to securing equal remuneration for an employee can be commenced despite the fact that an organisation has applied for an equal remuneration order in relation to that employee.

262. Section 51Q(4) does not include an employer as the limitation in s 51Q(3) does not apply to an employer. There is therefore no limitation on an employer commencing any proceedings to secure equal remuneration for its employees. For example, an organisation may have applied for an equal remuneration order for particular employees; the employer of those employees is not prevented from initiating bargaining under s 42 to, in part, secure equal remuneration for those employees.

Section 51R – Remuneration-related action

263. Section 51R provides that the Commission must not take 'remuneration-related action' that:

a) prohibits or restricts the making of an application for an equal remuneration order; or

b) is inconsistent with, or prohibits or restricts the application of an equal remuneration order.

264. A 'remuneration-related action' means:

a) the registration of an industrial agreement under s 41; or

b) the making of an award under this Act; or

c) the making of an order under this Act.

265. The reference to 'an order under this Act' in s 51R(1)(c) includes the making of an order under s 40, s 40B, s 42G, and 42I, the making of a General Order under s 50 and s 50A, and the making of any other order that may be made by the Commission.

Example

The Commission makes an equal remuneration order that increases the rates of pay in an award that applies to childcare workers to ensure that employees covered by the award receive equal remuneration.

An application is later made to vary this award under s 40. The Commission must not vary the rates of pay in the award (i.e. take 'remuneration-related action'), if the variation is inconsistent with, or restricts the application of, the equal remuneration order that increased the award's rates of pay.

Similarly, the Commission cannot make a State Wage General Order under s 50A that varies the rates of pay in the award, if the variation is inconsistent with, or restricts the application of, the equal remuneration order that increased the award's rates of pay.

Clause 29 – Section 52 amended

266. Clause 29 amends existing s 52 to include the following defined terms:

    a) 'counterpart federal body' is defined to have the meaning in new s 52A.[37] This replaces the definition of counterpart federal body in existing s 71(1); and

    b) 'State organisation' means an organisation that is registered under Part II Division 4. This replaces the definition of State organisation in existing s 71(1).

Clause 30 – Section 52A inserted

267. Clause 30 inserts new s 52A, which establishes two types of counterpart federal bodies.

268. Section 52A(1) provides that, in this section, 'rules' of a branch of a federal organisation means:

    a) rules relating to the qualification of persons for membership; and

    b) rules prescribing the offices that exist within the branch.

269. Section 52A(2) provides that a Western Australian branch of a federal organisation is a 'counterpart federal body' in relation to a State organisation if the rules of the branch are, or in accordance with amended s 71(2) or (4),[38] are taken to be, the same as the rules of the State organisation relating to the corresponding subject matter.

270. Amended s 71(2) provides that the rules, as defined in s 52A(1), of a State organisation and a counterpart federal body described in s 52A(2) are taken to be the same if the rules of the organisation and body relate to the qualifications of persons for membership and are, in the opinion of the CICS, substantially the same.

271. Amended s 71(4) provides that the rules, as defined in s 52A(1), of the State organisation and a counterpart federal body described in s 52A(2) are taken to be the same if the rules prescribe the offices existing in the body and, for every office in the organisation, there is a corresponding office in the body.

272. Section 52A(2), in effect, replicates the existing s 71(1) definition of 'counterpart federal body'.

273. Section 52A(3) provides that a federal organisation is a 'counterpart federal body' of a State organisation even though the body does not have or comprise a Western Australian branch of the federal organisation, if the CICS is of the

[37] As inserted by clause 30 of the Bill.
[38] As amended by clause 32 of the Bill.

opinion that the federal organisation is a counterpart federal body in relation to a State organisation.

274. Section 52A(4) provides that the CICS may form the opinion referred to in s 52A(3) only if:

a) a substantial number of members of the State organisation are:

(i) members, or eligible to be members, of the federal organisation; or

(ii) engaged in the same work, or in aspects of the same work or in similar work as members of the federal organisation; or

(iii) employed in the same or similar work by employers engaged in the same industry as members of the federal organisation; or

(iv) engaged in work or in industries for which there is a community of interest between the federal organisation and the State organisation;

or

b) there is an agreement in force under s 151 of the FW (Registered Organisations) Act between the federal organisation and the State organisation.

275. An agreement in force under s 151 of the FW (Registered Organisations) Act is one made under the rules of a federal organisation which authorises it to enter into an agreement with a State union to the effect that members of the State union who are ineligible State members are eligible to become members of the federal organisation under the agreement. The agreement must also be registered with the FWC.

276. It is intended that s 52A(4) enable the CICS to determine that a federal organisation which does not have a Western Australian branch is a State organisation's counterpart federal body if one of the requirements specified in s 52A(4) is met.

277. Section 52A(5) provides that the CICS may form the opinion referred to in s 52A(3) despite the fact that a person who is eligible to be a member of the State organisation is, by reason of being a member of a particular class of persons, ineligible to be a member of that State organisation's counterpart federal body.

278. Section 52A(6) provides that the CICS may form the opinion referred to in s 52A(3) despite the fact that a person who is eligible to be a member of the counterpart federal body is, by reason of being a member of a particular class of persons, ineligible to be a member of the State organisation.

279. Sections 52A(5) and (6), in effect, reflect the provisions in existing s 71(3), which apply to a counterpart federal body referred to in new s 52A(2).

280. Section 52A(7) provides that a State organisation may apply to the CICS for a declaration that, for the purposes of s 52A(2) or (3), a Western Australian branch of a federal organisation or a federal organisation is a counterpart federal body in relation to the State organisation.

281. It is intended that the CICS may only declare that a Western Australian branch of a federal organisation or a federal organisation (as the case may be) is a counterpart federal body in relation to the State organisation that made the application. It is not intended that the CICS be able to make such a declaration in relation to a State organisation that has not made an application.

Clause 31 – Section 59 amended

282. Clause 31 amends existing s 59(3) to remove the reference to 'under that section'.

Clause 32 – Section 71 amended

283. Clause 32(1) deletes existing s 71(1) and amends existing s 71(2) to provide that the rules of the State organisation and a counterpart federal body described in s 52A(2) are taken to be the same if the rules of the organisation and body relate to the qualifications of persons for membership and are, in the opinion of the CICS, substantially the same.

284. This replicates the effect of existing s 71(2).

285. Clause 32(2) amends existing s 71(4) to provide that the rules of the State organisation and a counterpart federal body are taken to be the same if the rules prescribe the offices existing in the counterpart federal body and, for every office in the organisation, there is a corresponding office in the counterpart federal body.

286. This replicates the effect of existing s 71(4).

287. Clause 32(3) amends s 71(5)(a) to delete the reference to holding a 'corresponding office' in a State organisation's counterpart federal body and replace it with a reference to holding an 'office described in s 71(5A)'.

288. Clause 32(4) inserts new s 71(5A), which provides that the 'office' referred to in s 71(5)(a) is:

a) in the case of a counterpart federal body referred to in s 52A(2) – the corresponding office in the body;

b) in the case of a counterpart federal body referred to in s 52A(3) – an office that is specified in the rules of the State organisation for the purposes of this subsection and, in relation to which, members of the State organisation are, under the rules of the counterpart federal body, entitled to:

(i) nominate a person to be the office holder; and

(ii) vote for a person to be the office holder.

289. Section 71(5A)(a) reflects the effect of existing s 71(5)(a).

290. It is intended that, under s 71(5A)(b), the rules of the State organisation must specify which offices in the State organisation may be held by a person who holds a specified office in the counterpart federal body.

291. Clause 32(5) amends s 71(6) to include a reference to a counterpart federal body referred to in s 52A(2) and (3), and the making of an agreement with the branch or organisation that is the State organisation's counterpart federal body. In effect, this reflects existing s 71(6) with respect to a counterpart federal body referred to in s 52A(2).

292. As a consequence of the amendment to s 71(6), existing s 71(7) and (8) will apply to counterpart federal bodies referred to in both s 52A(2) and s 52A(3).

Clause 33 – Section 71A amended

293. Clause 33 amends existing s 71A to include, at paragraph (ba), a rule described in s 71(5)(a) relating to an office described in s 71(5A)(b), and at paragraph (bb), a rule described in s 71(5A)(b). This is intended to ensure that such rules are retained if, in accordance with s 71A, a State organisation alters its rules to state that all of the rules of the counterpart federal body are adopted as rules of the State organisation.

Clause 34 – Part IIAA inserted

294. Clause 34 inserts new Part IIAA to enable certain employers to be declared not to be national system employers for the purposes of the FW Act. This was a recommendation of the Ministerial Review, specifically to address the ongoing uncertainty surrounding the industrial coverage of local government employers in Western Australia.

295. The Ministerial Review comprehensively reviewed the status and nature of local governments, noting there was significant uncertainty as to whether they could be characterised as 'trading or financial corporations' within the meaning of s 51(xx) of the Commonwealth *Constitution*. Relevantly, recommendation 81 of the Review noted that:

a) the preponderance of judicial and industrial commission authority favours local governments in Western Australia not being characterised as trading corporations; and

b) the most legally certain process to move local governments to the State industrial relations system is to use the process outlined in s 14(2) of the FW Act.

296. New Part IIAA provides the legislative framework for giving effect to this recommendation. Division 1 provides the mechanism for declaring an employer not to be a national system employer. Division 2 prescribes the transitional arrangements to facilitate the move of employers and employees from the national industrial relations system to the State system.

Division 1 – Declarations

297. Section 80A provides the mechanism for declaring an employer not to be a national system employer. Section 14(2) of the FW Act enables certain employers, including a local government, to be declared not to be a national system employer by or under a law of the State. Any such declaration must be endorsed by the Federal Minister for Industrial Relations (Federal Minister) in writing to take effect under the FW Act.

298. Section 80A(2) provides that the regulations may:

a) declare an employer not to be a national system employer for the purposes of the FW Act; and

b) fix a day (the 'relevant day') for the purposes of the declaration. The relevant day is, in effect, the commencement day of the declaration. As the Federal Minister's endorsement is required before a declaration takes effect under the FW Act, the ability to fix the relevant day enables the timing of any such endorsement to be taken into account.

299. Any declaration made under regulation can be amended or repealed by regulation, as per s 43(4) of the *Interpretation Act*. For example, if the name of a particular local government changed, the regulations could be amended by regulation to reflect the name change.

Division 2 – Change from federal to State system

300. Section 80B defines relevant terms for the purposes of Division 2.

Defined term	Meaning	References to the term
Declared employee	A person employed by a declared employer	Throughout Division 2
Declared employer	An employer declared not to be a national system employer under s 80A(2)(a)	Throughout Division 2

Defined term	Meaning	References to the term
Federal award	• A modern award under the FW Act; or • An award under the repealed Workplace Act continued in existence under the FW (Transitional) Act	Section 80BB(3)(b)(i)
Federal industrial authority	• Australian Industrial Relations Commission (AIRC) under the repealed Workplace Act; or • FWC	• Section 80BB(3)(b)(ii) • Section 80BE(2)
Federal industrial instrument	A fair work instrument under the FW Act which means: • a modern award; • an enterprise agreement; • a workplace determination; or • an order of the FWC	Section 80BB(1)(b)
National fair work legislation	• FW Act;[39] or • FW (Transitional) Act	Section 80BD
New State instrument	Meaning given in s 80BB(2) – being an industrial agreement	Throughout Division 2
Old federal instrument	Meaning given in s 80BB(1)(b) – being a federal industrial instrument that applied	• Section 80BB(3)(b)(i) • Section 80BB(3)(c)(ii)

[39] A reference to the FW Act includes the FW Regulations. Section 46(2) of the *Interpretation Act* provides that a reference to a Commonwealth Act shall be construed so as to include a reference to any subsidiary legislation made under that Act.

Defined term	Meaning	References to the term
	immediately before the relevant day	• Section 80BI • Section 80BJ • Section 80BK
Relevant day	Meaning given in s 80A(2)(b) – being the day fixed by the regulations for the purposes of a declaration that an employer is not a national system employer	Throughout Division 2
Repealed Workplace Act	*Workplace Relations Act 1996* (Cth)	Referred to in the definitions of 'federal award' and 'federal industrial authority'
Terms	Includes conditions, restrictions and other provisions	Section 80BB(3)(b)

Section 80BA – Operation of awards, industrial agreements or orders

301. Section 80BA enables an award, industrial agreement or order of the Commission (an existing State instrument) to be specified in the regulations as applying to the employees of a particular declared employer on and from the relevant day. If an existing State instrument is specified, it applies to the declared employer, declared employees of the employer and an organisation that is party to or bound by the instrument.

302. The purpose of s 80BA is to provide flexibility should a declared employer and declared employees prefer to be covered by an existing State instrument on and from the relevant day, rather than a 'new State instrument' as per s 80BB. Before any regulations are made under s 80BA, the Minister for Industrial Relations (who has responsibility for administration of the IR Act) and the Governor (who has the power to make the regulations) would need to be satisfied that there has been genuine consultation and the relevant declared employer and declared employees wish to have the existing State instrument apply to them. For example, on and from the relevant day the parties may wish to be covered by the *Municipal Employees (Western Australia) Interim Award 2011* or the *Local Government Officers' (Western Australia) Interim Award 2011*.

Section 80BB – New State instruments

303. Section 80BB is a key operative provision in Division 2 which provides for the transfer and continuation of instruments made under the FW Act in the State industrial relations system for a period of time. The purpose of s 80BB is to provide declared employers and declared employees with continuity in their employment arrangements for an appropriate transitional period, to enable them to comply with the IR Act and other applicable State industrial laws.

304. Section 80BB(1) provides that s 80BB applies:

a) to the extent that s 80BA does not provide for a declared employee of a declared employer (i.e. the regulations have not provided for an existing State instrument to apply to the declared employee); and

b) if, immediately before the relevant day, a federal industrial instrument applies to the declared employee (i.e. a fair work instrument as defined in s 12 of the FW Act meaning a modern award, an enterprise agreement, a workplace determination or an order of the FWC). Such an instrument is referred to in Division 2 as the 'old federal instrument'.

305. Section 80BB(2) provides that, on the relevant day, an industrial agreement applies to the declared employer and declared employees. Such an instrument is referred to in Division 2 as the 'new State instrument'. The new State instrument is, in effect, the old federal instrument continued in force under the IR Act.

306. Section 80BB(3) provides that the new State instrument is taken:

a) to have been registered under the IR Act on the relevant day (i.e. registered as an industrial agreement under s 41); and

b) except as provided in s 80BB or s 80BC, to have the same terms as the old federal instrument, including any terms added to or modified by:

(i) the terms of a federal award (meaning a modern award or an award continued in existence under the FW (Transitional) Act) incorporated by the old federal instrument;

(ii) orders of a federal industrial authority (meaning the FWC[40] or the AIRC); or

(iii) another instrument under the national fair work legislation (meaning the FW Act or the FW (Transitional) Act) or the repealed Workplace Act; and

[40] The reference to the FWC also encapsulates any orders of Fair Work Australia. Section 575(1) of the FW Act provides that the body previously known as Fair Work Australia is continued in existence as the FWC.

c) to have a nominal expiry date that is the earlier of the following:

(i) a day that is two years after the relevant day;

(ii) the day that, immediately before the relevant day, was the nominal expiry day of the old federal instrument.

307. The effect of s 80BB(3)(c) is that the maximum nominal expiry date for a new State instrument is two years after the relevant day. If the new State instrument has a nominal expiry date that is earlier than two years, however, then that date will apply.

> **Example**
>
> The City of ABC has an enterprise agreement with a nominal expiry date of 30 June 2021.
>
> The City is declared by the regulations not to be a national system employer for the purposes of the FW Act from 1 February 2021 (this day being the relevant day).
>
> On 1 February 2021, the City's enterprise agreement is taken to be a new State instrument under the IR Act.
>
> The nominal expiry date of the City's new State instrument is 30 June 2021, in accordance with its terms.

308. As the new State instrument is taken to be an industrial agreement registered under the IR Act, relevant provisions of the IR Act that apply to an industrial agreement will apply to the new State instrument including:

a) section 41(6) – notwithstanding the expiry of the term of an industrial agreement, it continues in force in respect of the parties until a new agreement or an award is made in substitution for it. A party can, however, retire from the agreement under s 41(7);

b) section 41(7) – 30 days before the expiry of an industrial agreement, or any time after the expiry, a party to the agreement may file a notice with the Registrar to retire from the agreement. At the end of 30 days after filing the notice, the party ceases to be a party to the agreement. Where there are only two parties to an agreement, the effect of one party retiring is to terminate the agreement;[41]

c) section 42(5) – bargaining for a new industrial agreement must not be initiated under s 42(1) earlier than 90 days before the nominal expiry date of the existing agreement;

[41] *The Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch v Western Australian Government Railways Commission* (2000) 80 WAIG 1740.

d) section 83 – a provision of an industrial agreement, being an 'entitlement provision' as defined in amended s 7(1), may be enforced by the IMC under s 83.

309. A new State instrument that is taken under s 80BB(3)(c)(i) to have a nominal expiry date that is two years after the relevant day will, in accordance with s 41(6), continue in force until:

a) a new agreement or an award is made in substitution for it; or

b) a party retires from it, which will have the concomitant effect of bringing the instrument to an end.

The instrument will not therefore automatically terminate at the end of two years.

310. Section 80BB(4) provides that the IR Act applies to the new State instrument subject to any modifications or exclusions prescribed by regulations. The purpose of s 80BB(4) is to provide flexibility, if necessary, to deal with any unforeseen or unintended consequences arising from the IR Act applying to the new State instrument.

311. Section 80BB(5) provides that the new State instrument applies, except as provided in the MCE Act. That is, the new State instrument is subject to the MCE Act like any other industrial agreement. This means, inter alia, that the minimum conditions of employment under the MCE Act are taken to be implied in the new State instrument, and any provision of the new State instrument that is less favourable to an employee than a minimum condition of employment has no effect.[42]

Section 80BC – Amendment of new State instruments

312. Section 80BC enables a declared employer, a declared employee or an organisation to apply to the Commission to amend a new State instrument. The Commission may make the amendment if satisfied it is fair and reasonable to do so in the circumstances. The amendment may take effect immediately or progressively in stages.

313. Section 80BC provides the Commission with broad discretion to amend a new State instrument, subject to it being fair and reasonable to do so in the circumstances, and subject to the general requirements governing the exercise of the Commission's jurisdiction in s 26(1).

[42] Section 5(1) and (2) of the MCE Act.

Section 80BD – Ability to carry over matters

314. Section 80BD provides that the Commission may, in connection with the operation of new Part IIAA:

a) accept, recognise, adopt or rely on any step taken under, or for, the national fair work legislation;

b) accept or rely on any matter or thing that has been presented, filed or provided under, or for, the national fair work legislation; and

c) give effect in any other way to any other thing done under, or for, the national fair work legislation.

315. The intent of s 80BD is to provide the Commission with the ability to carry over matters being dealt with under the national fair work legislation prior to the relevant day, in order to provide for continuity of those matters to the extent possible under the IR Act on and from the relevant day. This is intended to minimise disruption, inconvenience and duplication for the parties involved.

316. For example, if the FWC was dealing with a bargaining dispute under s 240 of the FW Act in relation to a proposed enterprise agreement immediately before the relevant day, the Commission could rely on any evidence presented to the FWC and any finding of the FWC in relation to that dispute.

Section 80BE – References in new State instruments to federal industrial authority and General Manager

317. Section 80BE provides that, on and from the relevant day, a term of a new State instrument expressed to confer a power or function on:

a) a federal industrial authority (meaning the FWC or the AIRC) has effect as if it conferred the power or function on the Commission;

b) the General Manager (meaning the General Manager of the FWC under the FW Act) has effect as if it conferred the power or function on the Registrar.

Section 80BF – References in new State instruments to provisions of Commonwealth laws

318. Section 80BF provides that, on and from the relevant day, a term of a new State instrument that refers to a provision of the FW Act is taken to refer to the corresponding provision of the IR Act. A 'corresponding provision' is defined to mean a provision of the IR Act that is of similar effect to the FW Act provision or a provision of the IR Act declared by regulations to be a corresponding provision.

Section 80BG – References in new State instruments to federal organisations

319. Section 80BG(2) provides that, on and from the relevant day, a reference to a federal organisation in a new State instrument is taken to refer to an organisation under the IR Act of which the federal organisation is a federal counterpart.

320. Part 3 of Schedule 1A to the *Fair Work (Registered Organisations) Regulations* prescribes federal counterparts for organisations registered under the IR Act. For example, the Australian Municipal, Administrative, Clerical and Services Union (ASU) is the federal counterpart for the Western Australian Municipal, Administrative, Clerical and Services Union of Employees (ASU WA). If a new State instrument makes reference to the ASU, the reference would be taken to mean the ASU WA.

321. In the event a federal organisation referred to in a new State instrument is not a federal counterpart, s 80BG(3) provides that the federal organisation is taken to be an organisation under the IR Act for the purposes of representing declared employees in proceedings or other matters arising under the IR Act. This recognition of the federal organisation under the IR Act will cease to apply when the new State instrument ceases to apply, in accordance with s 80BG(4).

Section 80BH – Named parties to new State instruments

322. Section 80BH(1) enables an organisation of employees, or an industrial association of employees registered under s 67, to apply to the Commission for an order to be named as a party to a new State instrument. Section 80BH(2) provides that the Commission must grant the order if, in the Commission's opinion, the instrument applies to an employee who is eligible to be a member of the organisation or industrial association.

323. An organisation or association may seek to be named as a party to a new State instrument in order to have certain rights under the IR Act. As the instrument is taken to be an industrial agreement, being named as a party would enable an organisation or association to:

    a) apply to the IMC to enforce the instrument under s 83;

    b) retire from the instrument on or any time after the nominal expiry of the instrument under s 41(7);

    c) apply to the Commission under s 40A for the incorporation of some or all of the provisions of the instrument into an award by consent;

    d) apply to the Commission for an interpretation of the instrument under s 46.[43]

[43] The definition of 'award' in s 46(5) includes an industrial agreement.

Section 80BI – Employment under old federal instrument

324. The purpose of s 80BI is to:

    a) recognise the employment of a declared employee under an old federal instrument (i.e. to ensure there is continuity of employment between the old federal instrument and the new State instrument); and

    b) determine the entitlements of a declared employee under a new State instrument.

325. Section 80BI(2) provides that employment of a declared employee with a declared employer before the relevant day that counted under the old federal instrument also counts as employment under the new State instrument. For example, if the employee had five years' continuous employment under the old federal instrument, they will be taken to have five years' continuous employment under the new State instrument.

326. Section 80BI(3) provides that if, before the relevant day, the declared employee already had the benefit of an entitlement determined by reference to a period of service, that period of service cannot be counted again for calculating the employee's entitlements of that type under the new State instrument. For example, if the employee had taken annual leave before the relevant day that related to a year of service, that year of service will not count again when calculating the employee's entitlement to annual leave under the new State instrument. Section 80BI(3) is intended to prevent 'double dipping' where the employee has already had the benefit of an entitlement.

Section 80BJ – Leave accrued immediately before relevant day

327. The purpose of s 80BJ is to recognise any paid or unpaid leave accrued before the relevant day under an old federal instrument, the national fair work legislation or a law of Western Australia.

328. Any leave accrued immediately before the relevant day by a declared employee is taken to have accrued under the new State instrument. Among other things, this ensures that the leave can be enforced as a term of the instrument.

Section 80BK – Leave taken under old federal instrument

329. The purpose of s 80BK is to recognise a declared employee's leave arrangements under a new State instrument, where those arrangements were made before the relevant day under the old federal instrument or the FW Act.

330. Section 80BK(1) and (2) provide that a declared employee:

    a) who was, immediately before the relevant day, taking a period of leave under the old federal instrument or the FW Act, is entitled to continue on that leave under the new State instrument or a law of Western Australia for the remainder of the period; and

b) who has, before the relevant day, taken a step under the old federal instrument or the FW Act to take a period of leave on and from the relevant day, is taken to have taken the step under the new State instrument or a law of Western Australia.

331. Section 80BK(3) provides that the regulations may deal with other matters relating to how a new State instrument applies to leave that is being taken, or is to be taken, under the old federal instrument or the FW Act immediately before the relevant day.

Clause 35 – Section 80E amended

332. Clause 35 amends existing s 80E to exclude equal remuneration and stop bullying applications relating to government officers from the exclusive jurisdiction of the Public Service Arbitrator. It is intended that an equal remuneration application relating to a government officer, a group of government officers or government officers generally, and a stop bullying application relating to a government officer, be heard by the Commission, and not by the Public Service Arbitrator.

Clause 36 – Section 80I amended

333. Clause 36 amends existing s 80I to replace an incorrect cross reference to s 172(1)(b) of the *Health Services Act* with a reference to s 172(1).

Clause 37 – Part III Division 1 heading inserted

334. Clause 37 inserts a new Division heading in Part III of the IR Act titled 'Division 1 – Industrial magistrate's court'.

Clause 38 – Section 81G inserted

335. Clause 38 inserts new s 81G to enable an industrial inspector to assist the IMC in certain proceedings, with the leave of the IMC.

336. Section 81G(2) provides that the IMC may grant leave to an industrial inspector if the proceedings:

a) have significant implications for the administration of the IR Act, the LSL Act or the MCE Act; or

b) involve special circumstances so that it would be in the public interest for the inspector to assist.

337. Industrial inspectors have compliance and enforcement functions under the IR Act, the LSL Act and the MCE Act. It may be, for example, that an unrepresented employee takes enforcement proceedings in the IMC against an unrepresented employer and the proceedings involve a complex question of law.

338. As an illustration, the question might relate to the construction of overtime provisions under a particular private sector award. The determination of this question may have broader implications for other employers and employees covered by the award, and even for other awards with similarly worded overtime provisions. In this instance, it may be appropriate for an industrial inspector to seek leave to assist the IMC, as the question of law may not be fully ventilated by the parties and they may be unaware of the broader implications. Industrial inspectors are, as a matter of course, represented by a legal practitioner in IMC proceedings.

Clause 39 – Part III Division 2 heading inserted

339. Clause 39 inserts a new Division heading in Part III titled 'Division 2 – Enforcement generally'.

Clause 40 – Section 83 amended

340. Clause 40 amends existing s 83, which deals with the enforcement of 'industrial instruments', as defined in s 7(1),[44] and certain orders of the Commission by the IMC.

341. Clause 40(1) inserts new s 83(1A) to define 'contravene' to include where a person fails to comply with an entitlement provision. This has been done to simplify drafting in s 83, rather than to refer to "a contravention or failure to comply" throughout the section.

342. Clause 40(2) amends s 83(1) to enable prescribed persons to apply to the IMC for the enforcement of an entitlement provision. The term 'entitlement provision' is defined in s 7(1)[45] of the IR Act to mean:

    a) a provision of an award, industrial agreement, employer-employee agreement and certain orders of the Commission;

    b) a provision of Part III of the LSL Act, which prescribes entitlements to long service leave;[46] and

    c) a minimum condition of employment as defined in s 3(1) of the MCE Act.[47]

343. Section 83(1)(e) has been amended to also enable a person to whom an entitlement provision under the LSL Act or MCE Act applies to seek enforcement of the provision.

[44] As amended by clause 5(2) of the Bill.
[45] Ibid.
[46] See also s 11 of the LSL Act.
[47] See also s 7 of the MCE Act.

344. The LSL Act may apply to national system employees and employers within the meaning of the FW Act, by virtue of long service leave being a 'non-excluded matter' under s 27(2)(g) of the FW Act. The IR Act may therefore apply to national system employees and employers so far as it deals with rights or remedies incidental to long service leave[48] – s 83 of the IR Act provides rights and remedies incidental to long service leave.

345. Clause 40(3) deletes existing s 83(2), which defines 'instrument to which this section applies'. This term has been replaced in s 83 with the term 'entitlement provision'.

346. Clause 40(3) inserts new s 83(2) and (2A). Section 83(2) extends liability under s 83 to persons who are involved in a contravention of an entitlement provision, commonly referred to as 'accessorial liability'. New s 83(2A) defines what is meant by being 'involved in' a contravention. A person will only be involved if they intentionally participated in the contravention. Intentional participation requires actual, not constructive, knowledge of the essential matters that make up the contravention. Where there is a combination of suspicious circumstances and a failure to make inquiry, it may be possible to infer actual knowledge (i.e. wilful blindness).[49]

347. Sections 83(2) and (2A) reflect s 550 of the FW Act, which has been the subject of substantial judicial consideration. On the facts of a particular case, accessorial liability could extend to a range of persons including the office holders of a company, managers, HR consultants, external accountants and labour hire providers.

348. As under s 83(2) a person who is involved in a contravention is taken to have contravened the relevant entitlement provision, they may be ordered by the IMC to pay a pecuniary penalty pursuant to s 83(4) and further ordered to rectify any underpayment pursuant to s 83A(1). A person who is involved in a contravention may be jointly and severally liable, along with the employer, to rectify any underpayment to the employee.[50]

349. Clause 40(5) amends existing s 83(4)(a)(ii), which currently prescribes the pecuniary penalties that the IMC can order for a contravention. Pecuniary penalties will now be prescribed by new s 83(4A).

350. Clause 40(6) inserts new s 83(4A), which prescribes the pecuniary penalties that may be ordered by the IMC for a contravention of an entitlement provision. The maximum penalty amounts have been increased to reflect corresponding civil remedy penalty amounts under the FW Act. There are higher penalty amounts for a serious contravention, as defined in new s 83EA(2).[51]

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[48] Section 27(1)(d)(iii) of the FW Act.
[49] *Fair Work Ombudsman v Priority Matters Pty Ltd & Anor (No 4)* [2019] FCCA 56 at [30].
[50] *Fair Work Ombudsman v Mhoney Pty Ltd & Anor* [2017] FCCA 811 at [85].
[51] Inserted by clause 45 of the Bill.

Current maximum penalties under section 83	New maximum penalties under section 83
• $2,000 in the case of an employer, organisation or association • $500 in any other case	**Normal contravention** • $60,000 in the case of a body corporate • $12,000 in the case of an individual **Serious contravention as per section 83EA** • $600,000 in the case of a body corporate • $120,000 in the case of an individual

351. Consistent with the FW Act, bodies corporate are liable for higher penalty amounts under s 83(4A). For example, incorporated national system employers covered by the LSL Act are subject to the higher penalty amounts for a contravention of Part III of the LSL Act. Significantly, bodies corporate that are held to be accessorily liable under s 83(2) are also subject to the higher penalty amounts. Penalties ordered under s 83(4A) may be made payable to a range of persons as per existing s 83F(2), including to the applicant and to a person directly affected by the contravening conduct.

352. Clause 40(8) amends existing s 83(8) to increase the penalty amounts for non-compliance with an order of the IMC under existing s 83(5). If a contravention of an entitlement provision is proved against a person, the IMC may make an order under s 83(5) to prevent further contravention of the provision by the person. As s 83(8) is an offence provision, the penalty amounts are expressed as fines. A person will now be subject to a fine of $12,000, as well as a daily fine of $1,000 for each day or part day during which the offence continues. The penalty amounts are maximum amounts that may be ordered, as per s 9(2) of the *Sentencing Act*.

353. Clause 40(9) inserts new s 83(9) to expressly provide that the standard of proof observed in civil proceedings applies when determining whether there has been a contravention of an entitlement provision (i.e. on the balance of probabilities).

Clause 41 – Section 83A amended

354. Clause 41 amends existing s 83A, consequential to amendments made to s 83.

355. The references to ‘employer’ in s 83A have been replaced with ‘person’, to reflect that a person who is not the employer may be held accessorily liable under s 83(2) and may be jointly and severally liable for any underpayment. For example, if a director of a company is held accessorily liable for a contravention of the LSL Act by the company, they may be ordered to rectify any underpayment of long service leave.

Clause 42 – Section 83B amended

356. Clause 42 amends existing s 83B to make minor drafting changes and to increase the penalty amounts under that section. Section 83B relates to the enforcement of unfair dismissal orders of the Commission by the IMC.

357. Section 83B(5)(a) has been amended to increase the maximum penalty amount from $5,000 to $12,000, consistent with the new penalty amount for individuals under s 83(4A)(b)(ii) and s 83E(1)(b)(ii).

358. Section 83B(10) has been amended to increase the penalty amounts for non-compliance with an order of the IMC under s 83B(3)(a) or (4)(a) (i.e. an order requiring a person to do any specified thing, or cease any specified activity). As s 83B(10) is an offence provision, the penalty amounts are expressed as fines. A person will now be subject to a fine of $12,000, as well as a daily fine of $1,000 for each day or part day during which the offence continues. The penalty amounts are maximum amounts that may be ordered, as per s 9(2) of the *Sentencing Act.*

Clause 43 – Section 83C amended

359. Clause 43 amends existing s 83C(2), which deals with the IMC's ability to order costs for the services of a legal practitioner or agent in proceedings under s 83 or s 83B ('representation costs').

360. Section 83C(2) has been amended to enable representation costs to be given to a party in proceedings under s 83 if the IMC finds that the other party committed a serious contravention of an entitlement provision. This was a recommendation of the Inquiry into Wage Theft and recognises that:

    a) vulnerable employees are more likely to require representation to bring enforcement proceedings in the IMC under s 83; and

    b) a person who commits a serious contravention has increased culpability and should therefore be liable for representation costs incurred as a result of their serious contravention.

361. The ability to order representation costs in this circumstance is consistent with amended s 83E(12) and s 84(5),[52] and new s 91A(2).[53]

Clause 44 – Section 83E amended

362. Clause 44 amends existing s 83E, which deals with the enforcement of civil penalty provisions by the IMC. There are a range of civil penalty provisions in the IR Act, the MCE Act, the LSL Act and the Construction Industry Portable Paid LSL Act.

[52] As amended by clause 46 of the Bill.

[53] As inserted by clause 51 of the Bill.

363. Clause 44(1) replaces s 83E(1) to increase the pecuniary penalties that may be ordered by the IMC for a contravention of a civil penalty provision. The maximum penalty amounts have been increased to be broadly consistent with the corresponding civil remedy penalty amounts under the FW Act. There are higher penalty amounts for a serious contravention, as defined in new s 83EA.

Current maximum penalties under section 83E	New maximum penalties under section 83E
• $5,000 in the case of an employer, organisation or association • $1,000 in any other case	**Normal contravention** • $60,000 in the case of a body corporate • $12,000 in the case of an individual **Serious contravention as per section 83EA** • $600,000 in the case of a body corporate • $120,000 in the case of an individual

364. New s 83E(1A) and (1B) extend liability under s 83E to persons who are involved in a contravention of a civil penalty provision. The provisions are consistent with those in new s 83(2) and (2A).

365. Clause 44(2) amends existing s 83E(3) to prevent the IMC from making an order under s 83E(2) instead of ordering a pecuniary penalty under s 83E(1) for record related contraventions. Section 83E(3) is amended to make reference to the new record related provisions of the IR Act, as well as relevant provisions of the LSL Act.

366. Clause 44(3) amends s 83E(6a) to delete references to s 44(3) and 45(1) of the MCE Act, as these provisions have been repealed by clause 103 of the Bill, and to include a reference to s 26(1) of the LSL Act.

367. Clause 44(4) amends s 83E(9) to increase the penalty amounts for non-compliance with an order of the IMC under s 83E(2). As s 83E(9) is an offence provision, the penalty amounts are expressed as fines. A person will now be subject to a fine of $12,000, as well as a daily fine of $1,000 for each day or part day during which the offence continues. The penalty amounts are maximum amounts that may be ordered, as per s 9(2) of the *Sentencing Act*.

368. Clause 44(5) replaces existing s 83E(12) to enable representation costs to be given to a party in proceedings under s 83E, if the IMC finds that the other party committed a serious contravention of a civil penalty provision. The ability to order costs in this circumstance is consistent with amended s 83C(2) and s 84(5), and new s 91A(2).

Clause 45 – Sections 83EA and 83EB inserted

369. Clause 45 inserts new s 83EA and s 83EB.

Section 83EA – Serious contravention of entitlement provision or civil penalty provision

370. Section 83EA provides for serious contraventions of civil penalty provisions and entitlement provisions and reflects s 557A of the FW Act.

371. The Inquiry into Wage Theft found that deliberate and systematic underpayments are occurring in Western Australia. The Inquiry noted that such underpayments have the deleterious effect of making it 'harder for workers to meet day-to-day living expenses, and can affect the individual's health, and have consequences for the worker's family. The unfair cost advantage achieved by underpaying businesses can undermine those businesses which are compliant, and this has consequences for the viability of the compliant business, its employees, and in a wider sense for the economy. As a community, we are the poorer because of businesses which systematically and deliberately underpay their employees'.[54]

372. With this mischief in mind, s 83EA is intended to address knowing and systematic contraventions of civil penalty provisions and entitlement provisions. The maximum penalties for serious contraventions under s 83(4A) and s 83E(1) are 10 times higher than for other contraventions, reflecting the seriousness of the conduct and the need for specific and general deterrence. There is also the capacity for representation costs to be ordered against a person who has committed a serious contravention.

373. Section 83EA(1) defines 'contravention' for the purposes of s 83EA as a contravention of a civil penalty provision (enforced under s 83E) or of an entitlement provision (enforced under s 83). Among other things, this means s 83EA applies to contraventions of record-related civil penalty provisions as defined in s 7(1) of the IR Act.[55]

374. Section 83EA(2) provides that a contravention is a 'serious contravention' if the contravening conduct was knowingly committed and part of a systematic pattern of conduct relating to one or more other persons. The term 'knowingly commits' in s 83EA(2)(a) is intended to refer to a conscious and deliberate choice. The term 'systematic pattern of conduct' in s 83EA(2)(b) is intended to refer to a recurring pattern of methodical conduct or a series of coordinated acts over time – it is not intended to encompass ad hoc or inadvertent conduct.

[54] Inquiry Report, p.7.
[55] Inserted by clause 5(2) of the Bill.

375. Section 83EA(3) prescribes how a body corporate may be liable for a serious contravention. A contravention by a body corporate is knowingly committed if it expressly, tacitly or impliedly authorised the contravention. The authorisation may be given by an individual within the organisation, such as an office holder. Alternatively, the authorisation may be given via a policy, rule or practice that exists within the organisation.

376. Section 83EA(4) lists the factors that the IMC may consider in determining whether there has been a systematic pattern of conduct, including the number of contraventions committed and whether there were also concurrent record keeping contraventions. Section 83EA(5) makes it clear that these factors are not exhaustive, and are not intended to limit the circumstances in which a serious contravention may occur. For example, while s 83EA(4)(c) identifies as a factor the number of persons affected by the contraventions, a serious contravention may only relate to one employee.

377. Section 83EA(6) clarifies the operation of s 83(2) and s 83E(1A), which provide for accessorial liability, in the context of a serious contravention. A person 'involved in' a contravention committed by another person ('the principal') only commits a serious contravention if:

    a) the principal's contravention is a serious contravention; and

    b) the person knew that the principal's contravention was a serious contravention.

378. Where an order is sought in proceedings under s 83 or s 83E in relation to a serious contravention, the IMC may not be satisfied that a **serious** contravention has occurred but may nonetheless be satisfied that a contravention has been committed. In this circumstance, s 83EA(7) and (8) provide the IMC with the ability to impose a pecuniary penalty for the contravention (i.e. a penalty applicable to a contravention that is not a serious contravention).

    <u>Section 83EB – Employer to have burden of disproving certain allegations by applicant under s 83</u>

379. Section 83EB provides that an employer has the burden of disproving certain allegations by an applicant in proceedings under s 83. Section 83EB reflects s 557C of the FW Act.

380. An employer will have the burden of disproving an allegation in relation to a matter under s 83 if the employer was required to:

    a) make or keep a record under the IR Act or LSL Act in relation to the matter;

    b) give a pay slip in relation to the matter; or

c) make available for inspection a record in relation to the matter (e.g. pursuant to s 49E, s 49I or s 98 of the IR Act or s 26A of the LSL Act);

and failed to comply with the requirement.

> **Example**
>
> Tammy brings proceedings under s 83 for multiple contraventions of the overtime clause of an award. Tammy alleges that she started work at 5am each day and that she should have been paid overtime between 5am and 6am under the award.
>
> Tammy's employer, Peter Charming, denies that Tammy started work at 5am each day. However, Peter failed to keep employment records in accordance with s 49D(2)(d)(i) of the IR Act showing what time Tammy started work each day.
>
> As Peter failed to keep the relevant records, he is required under s 83EB to disprove that Tammy started at 5am each day.

381. 'Disproving' an allegation requires the employer to do more than merely cast doubt on the credibility of the applicant's evidence. If the evidence adduced by the employer does not rise to the level necessary, on the balance of probabilities, to affirmatively prove that the employee did not work the hours claimed, then the effect of s 83EB(1) will be to uphold the employee's claim.[56]

382. Section 83EB(2) provides that s 83EB(1) does not apply if the employer provides a reasonable excuse for failing to comply with the requirement in question. The employer has the onus of raising and proving the existence of a reasonable excuse in any given case.

383. Section 83EB addresses the inherent evidential difficulties of bringing an underpayment claim if an employer has failed to comply with their record related obligations under the IR Act or the LSL Act. An employer should not be advantaged in proceedings under s 83 as a result of such a failure. This is a perverse outcome that incentivises, rather than deters, non-compliance with record related obligations.

Clause 46 – Section 84 amended

384. Clause 46 amends existing s 84(5), which deals with the Full Bench of the Commission's ability to order representation costs in an appeal from a decision of the IMC. Section 84(5) has been amended to enable representation costs to be ordered against a party found to have committed a serious contravention. The ability to order costs in this circumstance is consistent with amended s 83C(2) and s 83E(12), and new s 91A(2).

[56] *Ghimire v Karriview Management Pty Ltd (No 2)* [2019] FCA 1627 at [16].

Clause 47 – Section 84AA inserted

385. Clause 47 inserts new s 84AA to address illegal contracts of employment. This was a recommendation of the Ministerial Review and the Inquiry into Wage Theft.

386. It is unclear whether purported contracts of employment involving illegality are valid or capable of being enforced. For example, contracts involving migrant workers who are not authorised to work in Australia or who are working contrary to the terms of their visa. These categories of workers are often vulnerable to exploitation by virtue of the fact that their status, or work, is not recognised at law. Furthermore, employers should not gain an unfair competitive advantage over compliant businesses by engaging illegal workers on the premise that such workers are exempt from minimum wages and other employment conditions, and that the employer is immune from enforcement mechanisms under the relevant legislation.

387. Section 84AA expressly provides the IMC with the ability, in proceedings under s 83 or 83E, to treat an illegal contract as valid. This is similar to the discretion provided to an arbitrator under s 192 of the *Workers' Compensation and Injury Management Act 1981* (WA).

Clause 48 – Section 84A amended

388. Clause 48 amends s 84A(5)(a)(ii) to increase the maximum pecuniary penalty that the Full Bench may order in enforcement proceedings under s 84A, dealing with the enforcement of certain sections of the IR Act and certain directions, orders and declarations of the Commission. The maximum penalties have been increased from $2,000 (in the case of an employer, organisation or association) and $500 (in any other case) to $10,000. This was a recommendation of the Ministerial Review which noted, inter alia, that the previous maximum penalty had not been amended since 1984 and was low in an absolute and comparative sense.

Clause 49 – Part III Divisions 3 to 5 inserted

389. Clause 49 inserts new Divisions 3 to 5 of Part III dealing with civil infringement notices, enforceable undertakings and compliance notices.

Division 3 – Civil infringement notices

390. Division 3 comprises new sections 84B to 84J. This Division enables an industrial inspector to give a person a civil infringement notice for a record related contravention. Division 3 reflects s 558 of the FW Act and regulations 4.02 to 4.10 of the FW Regulations.

391. The IR Act and the LSL Act require prescribed employment records to be made and kept, and to be produced for inspection by a relevant person on request. A failure to comply with one of these requirements can usually be readily ascertained on the facts of the case. In such circumstances, it may be appropriate for an inspector to issue a civil infringement notice as an alternative

to taking enforcement proceedings in the IMC. It will not be appropriate for a notice to be given in every circumstance. For example, it would not be appropriate if the contravention appeared to be deliberate and systematic, or if the employer had a history of non-compliance with employment obligations (including record keeping obligations).

392. It is intended that the Private Sector Labour Relations Division of the Department of Mines, Industry Regulation and Safety (DMIRS) will develop policies and procedures to ensure that civil infringement notices are given in a consistent, appropriate and transparent manner. DMIRS is the department principally assisting the Minister for Industrial Relations in the administration of the IR Act.

393. Section 84B defines relevant terms for the purposes of Division 3. With respect to the term "nominated person", this will be a senior officer in the Private Sector Labour Relations Division of DMIRS who has supervisory responsibility for industrial inspectors.

Section 84C – Terms used

394. Section 84C sets out when an industrial inspector may give a civil infringement notice. A notice may be given if an inspector reasonably believes that a person has committed one or more contraventions of a record-related civil penalty provision (other than a contravention of s 49D(8) or s 49DA(3), as it would not be appropriate for a notice to be given in relation to a false or misleading record). The term 'record-related civil penalty provision' is defined in s 7(1) of the IR Act to relevantly mean a provision that requires:

a) a record to be made or kept under the IR Act or LSL Act – s 49D(1) and (6) of the IR Act, and s 7I(2) and s 26(1) and (2) of the LSL Act;

b) a pay slip to be given to an employee – s 49DA(1) of the IR Act;

c) a person to produce a record for inspection – s 49E(1) and s 102(1)(a) of the IR Act, and s 26A(1) of the LSL Act.

395. Section 84C(3) provides that a civil infringement notice must be given within 12 months after the day the alleged contravention occurred.

396. Section 84C(4), in effect, provides that only one civil infringement notice can be given to a person in relation to multiple contraventions of a record-related civil penalty provision that took place on the same day, and that relate to the same action or conduct by the person. This is to prevent the person from being penalised multiple times for essentially the same conduct over a short period of time.

397. For example, if an employer had 10 employees and failed to give them pay slips as required by s 49DA(1) on a particular day, only one civil infringement notice could be issued to the employer (rather than 10). However, s 84C(4) only applies to multiple contraventions of the same record-related civil penalty provision. An employer could, for example, be issued with multiple civil infringement notices if

the employer contravened different record-related civil penalty provisions on the same day (e.g. failed to give pay slips and failed to keep a record of cash payments under new s 49D(7)).

Section 84D – Content of civil infringement notice

398. Section 84D prescribes the content requirements for a civil infringement notice. Among other things, the notice must set out details of the alleged contravention and the statutory provision to which it relates.

Section 84E – Amount of civil infringement notice penalty

399. Section 84E provides that a civil infringement notice penalty must not exceed one-tenth of the statutory penalty that the IMC could order under s 83E(1), namely $6,000 for a body corporate and $1,200 for an individual (i.e. one-tenth of the statutory penalty that applies to contraventions that are not serious contraventions).

Section 84F – Time for payment of civil infringement notice penalty

400. Section 84F requires a civil infringement notice penalty to be paid within 28 days after the day the notice is served on the recipient, except as prescribed by that section.

Section 84G – Extension of time to pay civil infringement notice penalty

401. Under s 84G, the recipient may apply to the nominated person for more time to pay the penalty, or to withdraw the notice under s 84H, in which case different timeframes will apply.

Section 84H – Withdrawal of civil infringement notice

402. Section 84H(4) enables an industrial inspector who issued a civil infringement notice to withdraw the notice by serving a notice of withdrawal on the recipient (this would include another industrial inspector acting in the inspector's office, or performing the functions of the office).[57] Withdrawal of a notice might be appropriate, for example, if further evidence comes to the inspector's attention suggesting that the recipient's contravening is more widespread or serious than originally suspected. In this instance, the inspector may decide to withdraw the notice and instead take enforcement proceedings under s 83E of the IR Act.

Section 84I – Effect of payment of civil infringement notice

403. Section 84I explains the effect of paying a civil infringement notice penalty. Among other things, any liability for the alleged contravention is discharged, and payment is not an admission of having committed the contravention.

[57] Section 49 of the *Interpretation Act*.

Section 84J – Refund of civil infringement notice penalty

404. Section 84J provides for the refund of monies where a civil infringement notice is withdrawn after the penalty has been paid.

Division 4 – Enforceable undertakings

405. Division 4 comprises new sections 84K to 84N and enables an industrial inspector to accept a written enforceable undertaking from a person in relation to a contravention of an entitlement provision or a civil penalty provision. Division 4 reflects s 715 of the FW Act.

406. In some circumstances, it may be appropriate for an industrial inspector to accept an enforceable undertaking from a person as an alternative to taking enforcement proceedings. Whether or not it is appropriate for an inspector to accept an undertaking will depend on the circumstances of the case, as well as broader public interest considerations, including:

a) the seriousness of the conduct involved (e.g. it would not be appropriate to accept an undertaking if the inspector reasonably believed the conduct was deliberate and systematic);

b) whether the person has a history of complaints and/or non-compliance with employment obligations;

c) the person's attitude towards compliance (e.g. demonstrated by cooperation or admissions made);

d) the prospects of a timely and efficient resolution that will fully address the effects of the contravention;

e) the prospects of the person being sufficiently deterred from future contravening.

407. It is intended that the Private Sector Labour Relations Division of DMIRS will develop policies and procedures to ensure that enforceable undertakings are administered in a consistent, appropriate and transparent manner. Any undertakings accepted will be published on the DMIRS website.

Section 84K – Terms used

408. Section 84K defines relevant terms for the purposes of Division 4.

Section 84L – Application of Division

409. Section 84L provides that Division 4 applies if an industrial inspector reasonably believes that a person has committed a contravention. 'Contravention' is defined in s 84K to mean a contravention of a civil penalty provision or an entitlement provision.

Section 84M – Enforceable undertaking

410. Section 84M provides that:

a) an industrial inspector may accept an enforceable undertaking given by a person in relation to a contravention;

b) the person can withdraw or vary the undertaking with the inspector's consent (this would include another industrial inspector acting in the inspector's office, or performing the functions of the office);[58]

c) an inspector cannot apply for an order under s 83 or s 83E in relation to the contravention unless the undertaking has been withdrawn under s 84M(2) or cancelled by the IMC under new s 84N(2)(c). While an inspector is prevented from applying for an order, another person with standing under s 83 or s 83E could still make an application in relation to the contravention, such as an employee or an organisation;

d) an inspector cannot accept an undertaking in relation to a contravention that is the subject of a compliance notice under new s 84Q. If an undertaking is given in this circumstance, it will be of no effect.

Section 84N – Enforcement of enforceable undertakings

411. Section 84N(1) enables an industrial inspector to apply to the IMC to enforce the terms of an enforceable undertaking. Section 84N(2) sets out the orders that the IMC may make if satisfied that a term of the undertaking has been contravened. The IMC may order one or more of the following:

a) that a person comply with the term of the undertaking;

b) compensation for loss suffered because of the contravention;

c) variation or cancellation of the undertaking (cancellation would enable the inspector to take enforcement proceedings under s 83 or s 83E in relation to the original contravention of the entitlement provision or civil penalty provision);

d) any other order that the IMC considers appropriate.

Division 5 – Compliance notices

412. Division 5 comprises new sections 84O to 84V and enables an industrial inspector to give a person a compliance notice in relation to a contravention of an entitlement provision. Division 5 reflects s 716 of the FW Act.

[58] Section 49 of the *Interpretation Act*.

413. Compliance notices provide industrial inspectors with another mechanism for achieving compliance as an alternative to taking enforcement proceedings. As with enforceable undertakings, whether or not it is appropriate for an inspector to give a compliance notice will depend on the circumstances of the case, as well as broader public interest considerations.

Section 84O – Terms used

414. Section 84O defines relevant terms for the purposes of Division 5.

Section 84P – Application of Division

415. Section 84P provides that Division 5 applies if an industrial inspector reasonably believes that a person has contravened an entitlement provision.

Section 84Q – Giving compliance notice

416. Section 84Q sets out the requirements for the giving of a compliance notice.

417. A compliance notice:

a) may require a person to take certain action to remedy the direct effects of the contravention and to produce reasonable evidence of compliance with the notice, within a reasonable time; and

b) must set out the information prescribed in s 84Q(2), including details of the alleged contravention.

Example

An inspector reasonably believes that John Cash trading as Johnny's Cafe has underpaid all of his casual employees by $1 per hour.

In this instance, the inspector could give John a compliance notice requiring him to remedy the underpayments to his casual employees by a specified date. The notice could require John to produce evidence of the rectification, such as bank statements showing EFT transfers.

The notice could also require John to produce written confirmation from employees that they have received back payment, along with their contact details should the inspector wish to contact them independently.

Section 84R – Relationship with enforceable undertakings

418. Section 84R explains the interaction between a compliance notice and an enforceable undertaking. A compliance notice must not be given in relation to a contravention that is the subject of a current enforceable undertaking (i.e. that has not been withdrawn or cancelled).

Section 84S – Relationship with proceedings under s 83

419. Section 84S explains the interaction between a compliance notice and enforcement proceedings under s 83. The general rule is that an industrial inspector must not apply for an order under s 83 in relation to a contravention that is the subject of a compliance notice that has not been withdrawn. This is to ensure that an inspector cannot pursue multiple enforcement avenues in relation to the same contravention. If the inspector withdraws the notice under s 84V, then enforcement proceedings may be taken under s 83 unless:

    a) the compliance notice has been complied with. In this circumstance, the inspector will not be able to take enforcement proceedings under s 83 in relation to the contravention. Section 84S(2) provides that compliance with the notice is not an admission or finding of the contravention having been committed; or

    b) the person to whom the notice has been given has applied for a review of the notice by the IMC, and that application has not been completely dealt with. Once the application has been dealt with, and assuming the IMC confirms the notice, then the inspector could withdraw the notice and take enforcement proceedings under s 83 in relation to the contravention.

Section 84T – Person must comply with compliance notice

420. Section 84T provides that a person must comply with a compliance notice, unless they have a reasonable excuse. A contravention of s 84T(1) is a civil penalty provision for the purposes of s 83E of the IR Act. However, s 84T(2) modifies the maximum pecuniary penalty amounts in s 83E(1) that would otherwise apply to a contravention of a civil penalty provision. In the case of a contravention of s 84T(1), the maximum penalty is $30,000 for a body corporate and $6,000 for an individual.

Section 84U – Review of compliance notices

421. Section 84U enables a person who has been given a compliance notice to apply to the IMC for a review of the notice on the following grounds:

    a) the person did not commit a contravention set out in the notice; and/or

    b) the notice does not comply with s 84Q (which sets out the requirements for the giving of a compliance notice).

422. Section 83U(3) provides that a person who applies for a review on the ground that they did not commit a contravention set out in the notice bears the burden of proving this in the review proceedings.[59]

423. Section 84U(4) provides that the IMC may confirm, cancel or vary the notice after reviewing it.

[59] *Hindu Society of Victoria (Australia) Inc. v Fair Work Ombudsman* [2016] FCCA 221 at [33] – [35].

Section 84V – Withdrawal of compliance notice

424. Section 84V enables a compliance notice to be withdrawn by an industrial inspector by serving a notice of withdrawal. If a notice has not been complied with, the inspector could choose to withdraw it and take enforcement proceedings under s 83 for contravention of the entitlement provision. Alternatively, the inspector could seek to take proceedings under s 83E for non-compliance with the notice. While proving non-compliance with a notice may be relatively straightforward under s 83E, there may be other considerations justifying enforcement proceedings under s 83. For example, in proceedings under s 83 the IMC could order the employer to rectify any underpayment to employees pursuant to s 83A(1). The IMC could also order higher penalties under s 83(4A) than s 84T(2).

Clause 50 – Section 86 amended

425. Clause 50 deletes existing s 86(2), dealing with the ability of the Industrial Appeal Court to order costs and expenses. These matters are now dealt with in new s 91A.

Clause 51 – Section 91A inserted

426. Clause 51 inserts new s 91A to replace existing s 86(2). Section 91A reflects s 86(2), with the addition that the Industrial Appeal Court may order representation costs against a party found to have committed a serious contravention. The ability to order costs in this circumstance is consistent with amended s 83C(2), s 83E(12) and s 84(5).

Clause 52 – Section 93 amended

427. Clause 52 deletes existing s 93(6a) which is obsolete, and makes a consequential amendment to existing s 93(6).

Clause 53 – Section 96 amended

428. Clause 53 amends existing s 96(2)(a) consequential to amendments made to s 29(1) of the IR Act.

Clause 54 – Part VIB inserted

429. Clause 54 inserts new Part VIB to provide for certain employment protections as recommended by the Inquiry into Wage Theft. Part VIB is based on aspects of Part 3-1 – General Protections of the FW Act.

430. Part VIB comprises new sections 97 to 97H.

Section 97 – Terms used

431. Section 97 defines terms for the purposes of Part VIB. The term 'damaging action' includes:

a) dismissing an employee, altering an employee's position to their disadvantage, refusing to promote or transfer an employee, or injuring an employee in their employment (or threatening to do any of these things);

b) refusing to employ a prospective employee or discriminating against a prospective employee in their proposed terms and conditions of employment (or threatening to do either of these things).

432. Section 97 defines 'employee' to include a prospective employee (note too paragraph (b) of the definition of 'employee' in existing s 7(1) of the IR Act, to include a person whose usual status is that of an employee) and the term 'employer' to include a former employer or prospective employer.

Division 2 – Damaging action

Section 97A – Damaging action because of inquiry or complaint

433. Section 97A(1) provides that an employer must not take damaging action against an employee for the reason, or for reasons that include, that the employee is able to make an employment-related inquiry or complaint to their employer or another person. Section 97A(1) is based on s 340(1) and s 341(1)(c) of the FW Act.

434. The employment-related inquiry or complaint must be one that the employee 'is able to make'. The ability to make a complaint does not arise simply because the complainant is an employee of the employer. The inquiry or complaint must be underpinned by an entitlement or right. The source of such entitlement includes a contract of employment, award or legislation.[60]

435. An employee is 'able to complain' to their employer concerning the employer's alleged breach of the contract of employment. Further, an employee is 'able to complain' to the employer or to a relevant authority of their employer's alleged contravention of a statutory provision or industrial instrument relating to the employment. The instrument need not expressly or directly confer a right to bring proceedings or to complain to an authority. The complaint must be made genuinely, in good faith and for a proper purpose.[61] If a grievance or accusation is communicated in order to achieve some extraneous purpose unrelated to its notification, investigation or redress, it is not a complaint made in good faith and for a proper purpose.[62]

[60] *Shea v TRUenergy Services Pty Ltd (No 6)* [2014] FCA 271 at [65].
[61] *PIA Mortgage Services Pty Ltd v King* [2020] FCAFC 15 at [26].
[62] *Shea v TRUenergy Services Pty Ltd* at [29].

436. Section 97A(2) provides for a reverse onus of proof in damaging action proceedings. If it is proved that an employer took damaging action, it is for the employer to prove that they did not take the action because the employee made (or proposed to make) an inquiry or complaint. The purpose of the reverse onus is to cast upon the employer the onus of proving that which lies peculiarly within their own knowledge.[63] The reverse onus does not relieve an employee from proving, on the balance of probabilities, each ingredient of the alleged contravention.[64] It simply enables the employee's allegation to stand as sufficient proof of the fact unless the employer proves otherwise.

437. Section 97A(3) provides that a contravention of s 97A(1) is a civil penalty provision for the purposes of s 83E of the IR Act.

Section 97B – Court orders to employers

438. If the IMC determines that an employer engaged in damaging action against an employee, it may make one or more of the following orders under s 97B(2), in addition to imposing a penalty under s 83E(1):

a) to reinstate the employee if they were dismissed from employment;

b) to employ a prospective employee who was refused employment;

c) to pay the employee compensation for loss or injury suffered as a result of the contravention.

439. However, s 97B(5) prevents the IMC from making an order under s 97B(2) if the employee has applied for relief in relation to the same damaging action (e.g. the same dismissal, or the same refusal to promote or transfer the employee etc.) under another provision of the IR Act or any other written law. The only exception is if the alternative proceedings have been withdrawn or failed for want of jurisdiction, in which case the employee would not have obtained relief or had their application dealt with on the merits. The intent is to prevent an employee from obtaining redress under s 97B(2) if they have already sought relief via another legislative avenue, to avoid 'double dipping' or 'forum shopping'.

440. For example, an employee could not obtain an order under s 97B(2) if:

a) the damaging action was dismissal, and the employee had referred an unfair dismissal claim to the Commission under s 29(1)(c) of the IR Act; or

b) the damaging action was a refusal to appoint the employee to a position, and the employee had lodged a breach of Standard claim with the Public Sector Commission pursuant to the PSM (Breaches of Public Sector Standards) Regulations.

[63] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 at [50] and [105] – [106].
[64] *Short v Ambulance Victoria* [2015] FCAFC 55 at [56].

441. If the IMC makes an order under s 97B(2), the employer is required to comply with it. Failure to comply constitutes an offence under s 97B(3), the penalty for which is a maximum fine of $12,000 and a daily fine of $1,000 for each day or part day during which the offence continues.

Section 97C – Court orders to third parties

442. Section 97C provides that the IMC may make an order against a third party in proceedings under s 83E for a contravention of s 97A(1), if the IMC has determined that the employer contravened s 97A(1). A copy of the application under s 83E must be served on the third party.

443. The IMC may order a third party to refrain from taking any damaging action against the employee and to take any action necessary to give effect to an order under s 97B(2). This is similar to the power of the Commission under existing s 23B(2) of the IR Act. The intent is to ensure that a relevant third party with sufficient connection to the employment relationship does not in effect prevent an employer from complying with an order made under s 97B(2).

Example

The IMC finds that Deanne Panetta trading as Market Labour Supply has contravened s 97A(1) by dismissing Louise, a fruit and vegetable packer, for making an employment-related inquiry. Deanne exclusively supplies labour to Garden of Eden Pty Ltd, a wholesaler of fruit and vegetables at the markets.

The IMC orders Deanne to reinstate Louise under s 97B(2)(a). The IMC also makes an order against Garden of Eden Pty Ltd as a third party, to ensure that it does not hinder the reinstatement of Louise at the markets. As the company is Deanne's only client, it has the ability to facilitate or hinder Louise's reinstatement.

444. If the IMC makes an order under s 97C(3), the third party is required to comply with it. Failure to comply constitutes an offence under s 97C(4).

Division 3 – Sham contracts for services

Section 97D – Misrepresenting contract of employment as contract for services

445. Section 97D(1) provides that an employer must not represent to an employee that a contract of employment is a contract for services. As per the definition of 'employee' in s 97, the term includes a prospective employee. Section 97D(1) is based on s 357 of the FW Act.

446. Section 97D(3) provides that a contravention of s 97D(1) is a civil penalty provision for the purposes of s 83E of the IR Act. It is a defence for the employer to prove that, when the representation was made, they did not know (and could not reasonably be expected to have known) that the contract was a contract of employment rather than a contract for services. The onus will be on the employer to prove this.

Section 97E – Dismissing to engage under contract for services

447. Section 97E(1) provides that an employer must not dismiss (or threaten to dismiss) an employee performing particular work for the employer in order to engage them to perform the same (or substantially the same) work under a contract for services. Section 97E(1) is based on s 358 of the FW Act.

448. Section 97E(3) provides that a contravention of s 97E(1) is a civil penalty provision for the purposes of s 83E of the IR Act. The employer bears the onus of proving that they did not dismiss (or threaten to dismiss) the employee for the proscribed reason.

Section 97F – False statement to engage under contract for services

449. Section 97F(1) provides that an employer must not make a statement that the employer knows (or could reasonably be expected to know) is false in order to persuade an employee to enter into a contract for services to perform the same (or substantially the same) work. Section 97F(1) is based on s 359 of the FW Act.

450. Section 97F(3) provides that a contravention of s 97F(1) is a civil penalty provision for the purposes of s 83E of the IR Act. The employer bears the onus of proving that they did not make the statement for the proscribed reason.

Section 97G – Court orders to employers

451. If the IMC determines that an employer has contravened s 97D(1), s 97E(1) or s 97F(1), it may make one or more of the following orders under s 97G(2), in addition to imposing a penalty under s 83E(1):

a) to reinstate the employee if they were dismissed from employment;

b) to employ a prospective employee who was refused employment;

c) to pay the employee compensation for loss or injury suffered as a result of the contravention.

452. However, s 97G(5) prevents the IMC from making an order under s 97G(2) if the employee has applied for relief in relation to the same act or omission under another provision of the IR Act or any other written law. The only exception is if the alternative proceedings have been withdrawn or failed for want of jurisdiction, in which case the employee would not have obtained relief or had their application dealt with on the merits. As with s 97B(5), the intent of s 97G(5) is to prevent an employee from obtaining redress under s 97G(2) if they have already sought relief via another legislative avenue, to avoid ‘double dipping’ or ‘forum shopping’.

Section 97H – Certain advertising prohibited

453. Section 97H(1) provides that a person must not advertise employment at a rate of pay that is less than the minimum wage for the position. This was a recommendation of the Inquiry into Wage Theft and is designed to deter unlawful arrangements from being entered into.

454. Section 97H(2) provides that a contravention of s 97H(1) is a civil penalty provision for the purposes of s 83E of the IR Act. Industrial inspectors and others with an enforcement responsibility (e.g. unions) could take action under existing s 83E to seek the imposition of a penalty against a person who has contravened s 97H(1), as well as an order under s 83E(2) to prevent the person from unlawfully advertising in the future.

Clause 55 – Section 97U amended

455. Clause 55 amends existing s 97U(1) to delete the definitions for supported wage provisions and Supported Wage System as these terms will now be defined in s 7(1).

Clause 56 – Section 97UF amended

456. Clause 56 amends existing s 97UF to use the term 'SWIIP' in lieu of 'supported wage provisions'.

Clause 57 – Section 97YA amended

457. Clause 57 amends existing s 97YA to use the term 'SWIIP' in lieu of 'supported wage provisions'.

Clause 58 – Section 98 amended

458. Clause 58 amends existing s 98 dealing with the powers of industrial inspectors.

459. Existing s 98(3)(a), dealing with the power of industrial inspectors to enter an industrial location for the purposes of carrying out their functions, has been condensed and modernised. In addition, s 98(3)(a) has been amended to enable industrial inspectors to enter 'business premises' at which there are reasonable grounds to suspect that relevant records are kept or can be accessed (e.g. from a computer or mobile phone). The term 'record' is broadly defined in existing s 7(1) of the IR Act. The ability to enter business premises is consistent with the powers of Fair Work Inspectors under s 708(1) of the FW Act and recognises that employment records are often kept at premises other than the workplace (e.g. at the premises of an external consultant providing payroll, accountancy or HR services to the employer).

460. Existing s 98(3)(b) has been amended to include that inspectors may enter 'business premises'.

461. Existing s 98(3)(c) – (f) has been modernised and amended as appropriate to reflect that inspectors may enter 'business premises'.

462. New s 98(3)(fa) has been inserted to enable an inspector to post a notice at an industrial location where it may be viewed by employees (e.g. in a lunchroom or on a notice board), containing information on:

a) rights and obligations under any law relating to employment; and

b) a conviction of the employer under an employment law, or a finding that the employer has contravened an entitlement provision or civil penalty provision under the IR Act, or a civil remedy provision under the FW Act.

463. Section 98(3)(fa) was a recommendation of the Inquiry into Wage Theft and is designed to help empower employees at the workplace by the provision of information. A person who interferes with a notice is taken under new s 102(2A) to have obstructed the inspector who posted it and may be subject to a civil penalty under s 83E of the IR Act.

464. Clause 58(2) inserts new s 98(3A) to qualify the entry powers of industrial inspectors where the industrial location or business premises in question are also principally used for habitation. In this circumstance, an inspector must give the owner or occupier of the premises 24 hours' written notice of the proposed entry unless:

a) the owner or occupier is carrying on an industry (as currently defined in s 7(1) of the IR Act) at the location or premises. For example, an inspector would not be required to give notice if the premises were being used by home-based outworkers in the clothing trades; or

b) the Commission has made an order waiving the requirement to give notice.

465. The Commission may make an order on the application of an inspector if satisfied that giving notice would defeat the purpose for which the power of entry is intended to be exercised. For example, there may be grounds to reasonably suspect that records kept at the premises would be removed or destroyed if prior notice of the entry was given.

466. Clause 58(3) deletes existing s 98(5), as the unauthorised disclosure of information by an interpreter assisting an industrial inspector will now be dealt with by new s 98A.

467. New s 98(5) clarifies that the power of an industrial inspector to require the production of records under existing s 98(3)(e) may be exercised:

a) whether or not the inspector has entered, or proposes to enter, an industrial location or business premises; and

b) where the inspector has entered an industrial location or business premises, in relation to any record whether or not it is kept at the location or premises.

468. New s 98(5A) provides that regulations may be made prescribing the form and manner in which records may be produced for inspection under existing s 98(3)(e). For example, the regulations could require an employer to generate a copy of information that has been recorded but is not readily accessible (such as a consolidated list of all current employees and their contact details, or details of any labour hire agency being used by the employer).

Clause 59 – Section 98A inserted

469. Clause 59 inserts new s 98A to regulate the use of information obtained under s 98. Such information can only be used by an industrial inspector or a person assisting an inspector as set out in s 98A(2), including:

    a) in the course of performing their statutory functions;

    b) for the purpose of court proceedings;

    c) to assist in the administration or enforcement of another law. For example, an inspector may disclose information to another law enforcement agency such as the Australian Taxation Office, the Australian Border Force or the Fair Work Ombudsman if it would assist in the enforcement of obligations under those agencies' respective laws.

470. It is intended that the Private Sector Labour Relations Division of DMIRS will develop policies and procedures to ensure that information is disclosed appropriately and in compliance with s 98A.

471. A person who uses information other than in accordance with s 98A(2) commits an offence and is liable to a fine of $5,000.

Clause 60 – Section 102 amended

472. Clause 60(1) inserts new s 102(2A) to provide that a person who interferes with a notice posted by an industrial inspector at an industrial location under new s 98(3)(fa) is taken to have obstructed the inspector.

473. Clause 60(2) inserts new s 102(4) and (5).

474. New s 102(4) provides the IMC with flexibility in civil penalty proceedings for a contravention of s 102(1)(a). As an alternative to finding a contravention of s 102(1)(a), the IMC may determine that a contravention of a record-related civil penalty provision has occurred. An employer could establish in proceedings that they failed to comply with a lawful requirement to produce an employment record because they did not make the record in the first place. In this case, the IMC could determine that the employer contravened the relevant record-related civil penalty provision instead of s 102(1)(a).

475. New s 102(5) similarly provides the IMC with flexibility in civil penalty proceedings for a contravention of a record-related civil penalty provision. An employer could establish in proceedings that they did in fact make and keep the relevant record, but they failed to produce it in compliance with a lawful requirement. In this case, the IMC could determine that the employer contravened s 102(1)(a), instead of the relevant record-related civil penalty provision.

Clause 61 – Section 103

476. Clause 61 makes a minor drafting amendment to s 103(3).

Clause 62 – Section 112A amended

477. Clause 62 inserts new s 112A(3A) and (3B).

478. Section 112A of the IR Act provides, inter alia, for a system of registration of industrial agents. Industrial agents are authorised to provide industrial relations advice and representation to parties under the IR Act.

479. Significantly, s 112A(3) authorises industrial agents and their employees, as well as employees/officers of registered organisations, to effectively engage in 'legal practice' under the *Legal Profession Act 2008* (WA). Generally, only a person who is an Australian legal practitioner is authorised to engage in legal practice.

480. New s 112A(3A) will provide that s 112A(3) does not apply to a 'disqualified person' as defined in s 112A(3B). This means that a disqualified person will not be authorised to engage in legal practice by providing advice and representation to parties under the IR Act.

481. The term 'disqualified person' in s 112A(3B) takes its meaning from s 3 of the *Legal Profession Act*, with some modification, and relevantly includes:

    a) a person whose name has been removed from an Australian roll of lawyers or a foreign roll (but does not include a person whose name has been removed for reasons other than or in connection with disciplinary action);

    b) a person who has been refused the grant or renewal of a local practising certificate;

    c) a person whose Australian practising certificate has been suspended or cancelled (but does not include a person whose local practising certificate has been suspended or cancelled for reasons other than or in connection with disciplinary action).

482. The intent of the amendments is to ensure that a legal practitioner who has been disqualified from practising in the public interest is not then able to engage in 'legal practice' under s 112A of the IR Act. This is not to punish the individual, but rather, to protect the public and to maintain proper standards in the legal profession.

483. A ‘disqualified person’ who engages in legal practice under the IR Act will commit an offence under s 12(2) of the *Legal Profession Act* and may be penalised under that Act. The penalty is a fine of up to $20,000.

Clause 63 – Section 117 inserted

484. Clause 63 inserts new s 117, which is a transitional provision.

485. Section 117(2) provides that, on and from commencement day, former s 37(1) continues in operation in relation to a private sector award that was in force immediately before commencement day (a ‘transitioned private sector award’) until the award is:

a) cancelled; or

b) varied under s 37D, s 40(2A) or s 50(5).

486. Section 117(3) provides that s 37B and s 37C do not apply to a transitioned private sector award until it is varied under s 37D, s 40(2A) or s 50(5). As s 37D, s 40(2A) and s 50(5) only relate to award scope variations, the words ‘until it is varied’ mean until the award’s scope is varied.

Clause 64 – Schedule 4 amended

487. Clause 64 amends existing Schedule 4 clause 1(2)(a) to refer to a ‘SWIIP’.

Clause 65 – Various penalties amended

488. Clause 65 amends various sections of the IR Act that prescribe fines for offences. The sections are amended in line with modern drafting protocols. There is no change to the penalty amounts prescribed in those sections.

Clause 66 – Various references to ‘Federal’ amended

489. Clause 66 replaces all references to ‘Federal’ in the IR Act with ‘federal’.

Clause 67 – Various references to titles amended

490. Clause 67 amends the titles of various statutes referred to in the IR Act with abbreviated forms, as defined in s 7(1).[65]

Clause 68 – Various references to ‘shall’ replaced

491. Clause 68 modernises the drafting of the IR Act, including by replacing:

a) the word ‘shall’ with ‘must’, ‘can’ or ‘is’ or by deleting the reference entirely;

b) the term ‘shall be’ with ‘is’ or ‘are’;

[65] Amended in accordance with clause 5(2) of the Bill.

c) the term ‘shall not’ with ‘cannot’.

Clause 69 – Various references to gender removed

492. Clause 69 modernises the IR Act by removing gender specific references.

Clause 70 – Various other modernisations

493. Clause 70 adopts various other modernisations to the IR Act’s drafting replacing words such as ‘deemed, ‘therein, and ‘thereto’.

PART 3 – *LONG SERVICE LEAVE ACT 1958* AMENDED

Clause 71 – Act amended

494. Clause 71 provides that Part 3 amends the LSL Act.

Clause 72 – Part II Division 1 heading inserted

495. Clause 72 inserts a new heading in Part II titled ‘Division 1 – General’.

Clause 73 – Section 4 amended

496. Clauses 73(1) and (2) amend existing s 4 of the LSL Act to vary a number of existing definitions and include new definitions. The key definitions are as follows.

Continuous employment

497. ‘Continuous employment’ is defined to have the meaning given in s 6.[66]

Employee

498. ‘Employee’ is redefined to:

a) refer to casual and seasonal employees. The LSL Act currently extends to casual and seasonal employees (being any person employed by an employer to do work for hire or reward)[67] but the term ‘employee’ has been redefined to clearly reflect this and avoid uncertainty;

b) remove the reference to any person employed as a canvasser.

Prior to the inclusion of ‘canvasser’ in the LSL Act definition (and the IR Act definition of employee), the courts had held that such persons were not workers but agents working on commission over whom the

[66] As inserted by clause 74 of the Bill.

[67] *Janine Callan, Department of Mines, Industry Regulation & Safety v Ubiquitous Holdings Pty Ltd* [2020] WAIRC 00250 at [55]. Existing s 4(2)(c) provides the means for determining a casual employee’s normal weekly hours where the employee’s hours have varied over their period of employment.

companies exercised no control. However, in 1973, the High Court in *Federal Commissioner of Taxation v Barrett*[68] held that because a person is paid by commission it does not exclude them from being an employee.

The LSL Act currently extends to employees who are remunerated wholly or partly by commission or percentage reward[69] and, in light of the above decision, this provision is redundant. The removal of canvassers is also consistent with the amendment to the definition of 'employee' in s 7(1) of the IR Act made by clause 5 of the Bill;

c) delete the reference to a person who is a lessee of tools or of any vehicle.

Since the decisions in *Stevens v Brodribb Sawmilling Company Pty Ltd*,[70] and *Transport Workers Union of Australia*, *Industrial Union of Workers, Western Australian Branch v Readymix Group* (WA),[71] at law, a person is no longer barred from being considered an employee because they own their own tools or vehicle. This provision is therefore redundant. The removal of lessees of tools or a vehicle is consistent with the amendment to the definition of 'employee' in s 7(1) of the IR Act made by clause 5 of the Bill.

Employer

499. 'Employer' is redefined to:

a) change the reference to 'persons, firms, companies and corporations' to 'a person or public authority as defined in the IR Act employing 1 or more employees'.

The term 'person' is defined in s 5 of the *Interpretation Act* to include a public body, company, or association or body of persons, corporate or unincorporate. It is therefore unnecessary to retain the reference to firms, companies and corporations in the definition of employer. This change is consistent with the amended definition of employer in s 7(1) of the IR Act.

As s 7(1) of the IR Act defines 'public authority'[72] to include the Crown and any Minister of the Crown in right of the State, it is unnecessary to retain the reference to the Crown or any Minister of the Crown in the definition of employer in the LSL Act;

b) include a foreign state or consulate, except where s 12 of the *Foreign States Immunities Act* confers immunity. This is intended to remove the gap that exists in the regulation of employment of persons who are employed in WA by a foreign state or consulate. Such entities are not

[68] (1973) 129 CLR 395.
[69] Existing s 4(2)(b) interprets the meaning of 'ordinary pay' for employees employed on a system of payment by results such as commission.
[70] (1986) 160 CLR 16.
[71] 61 WAIG 1705.
[72] As amended by clause 5(2) of the Bill.

'persons, firms, companies or corporations' and therefore fall outside the existing definition of employer.

It is noted that s 12 of the *Foreign States Immunities Act* provides immunity to a foreign state as an employer in specified circumstances; the definition of employer in the LSL Act is subject to those provisions.

This change is consistent with the amended definition of employer in s 7(1) of the IR Act.

c) include a related body corporate of the employer if the employer is itself a body corporate. As the LSL Act applies to incorporated employers,[73] this amendment ensures an employee's continuous employment with a related body corporate (as that term is defined) is captured.[74]

Ordinary pay

500. The current definition of ordinary pay has been replaced by the meaning given in Division 2.[75] Existing s 4(2) has therefore been deleted.

Related body corporate

501. 'Related body corporate' of an employer that is a body corporate is defined to have the meaning given in s 9 of the *Corporations Act 2001* (Cth). Section 9 defines a related body corporate to mean a body corporate that is related to the first-mentioned body by virtue of s 50. Section 50, in turn, provides that, where a body corporate is:

a) a holding company of another body corporate; or

b) a subsidiary of another body corporate; or

c) a subsidiary of a holding company of another body corporate,

the first-mentioned body and the other body are related to each other.

502. Clause 73(4) deletes s 4(2) and (3). The Bill inserts replacements provisions for:

a) section 4(2) in new s 7, s 7A, s 7B, s 7C; and

b) section 4(3) in new s 4A.

[73] Subject to s 27(2)(g) of the FW Act.

[74] It was determined by the Full Bench of the Commission in *Baker Hughes Australia Pty Ltd v Martin Venier* [2016] WAIRC 00843 at [104] to [107] that the term 'one and the same employer' in s 8(1) of the LSL Act does not include related bodies corporate.

[75] As inserted by clause 76 of the Bill.

Clause 74 – Sections 5 and 6 replaced

503. Clause 74 deletes existing s 5 and s 6 and inserts new s 4A, s 5, s 6 and s 6A.

Section 4A – Employees with equivalent separate LSL entitlements

504. Section 4A, in effect, replaces existing s 4(3) which provides that, where a person is, by virtue of an award, industrial agreement, employer-employee agreement, other agreement between the person and their employer or an enactment of the State, the Commonwealth or of another State or Territory entitled to, or eligible to become entitled to, long service leave at least equivalent to the entitlement to long service leave under the LSL Act, that person is not within the definition of employee in s 4(1).

505. An employee's entitlement to long service leave under the LSL Act comprises an entitlement to take leave (in accordance with existing s 8(1) and s 8(2)(a) and (b)), and a conditional right to payment in lieu of long service leave on termination (in accordance with existing s 8(2)(c) and s 8(3)).[76] Both entitlements are paid on an employee's ordinary pay.

506. Section 4A(1) defines three terms:

a) 'award, agreement or enactment' is defined to mean:

(i) an award or industrial agreement. These terms are defined in s 4(1)[77] to mean (respectively) an award or an industrial agreement in force under the IR Act.

This does not include a federal modern award,[78] or a federal enterprise agreement;

(ii) an agreement between an employer and employee, including an employer-employee agreement. As inserted into s 4(1) by clause 73(2), an employer-employee agreement is defined to have the meaning given in s 7(1) of the IR Act.

An agreement between an employer and employer can include a federal enterprise agreement. However, it is noted that under s 29(2) of the FW Act, an enterprise agreement applies subject to any law of a State or Territory so far as it deals with a non-excluded matter in s 27(2). Long service leave is a non-excluded matter. The effect of this is that an enterprise agreement must provide a long service leave entitlement that is at least the same as the LSL Act; or

[76] *Public Transport Authority of Western Australia v Yoon* [2017] WASCA 25 at [40].
[77] In accordance with clause 73(2) of the Bill.
[78] It is noted that s 155 of the FW Act provides that a modern award must not include terms dealing with long service leave.

(iii) an enactment of the State, the Commonwealth, another State or a Territory. An enactment is defined in s 5 of the *Interpretation Act* as any written law or any portion of a written law.

This definition replicates existing s 4(3)(a), (b) and (c);

b) 'entitlement', in relation to long service leave or payment on termination instead of long service leave, includes an eligibility to become entitled to long service leave or payment on termination instead of long service leave.

This replicates the effect of existing s 4(3); and

c) 'WA LSL' is defined to mean long service leave, or payment on termination instead of long service leave under Part III. Part III of the LSL Act includes an entitlement to long service leave on ordinary pay under existing s 8(2)(a) and (b), an entitlement to long service leave on termination under existing s 8(2)(c) and s 8(3), and an entitlement to be paid for leave on ordinary pay on termination under existing s 9(2).

507. Section 4A(2) provides for a new term – 'separate LSL entitlement'. This is defined to mean an entitlement to long service leave, or a payment on termination instead of long service leave, under an award, agreement or enactment.

508. Section 4A(3) provides that, for the purposes of s 4A, a payment (whether in the form of a loading, other additional incremental payment or otherwise) instead of an entitlement under s 4A(2) is not a separate LSL entitlement.

509. This includes, for example:

a) a casual loading;

b) an additional commission payment;

that is paid to an employee in lieu of an entitlement to receive long service leave and/or payment of long service leave on termination.

510. This reflects and clarifies the current operation of the LSL Act with respect to 'at least equivalent' entitlements. For example, if the payment of a casual loading in an award or an additional commission payment in a contract of employment is in lieu of a person's entitlement to take long service leave on ordinary pay and payment of long service on termination, the award or agreement does not provide an 'at least equivalent' entitlement as required by existing s 4(3). Such a person then falls within the definition of employee and therefore coverage by the LSL Act.

511. Furthermore, if an additional commission payment does not provide a person with the ability to take leave and to be paid ordinary pay during this period of leave, it is not an 'at least equivalent' entitlement.[79] Again, the person would fall within the definition of employee and coverage by the LSL Act.

512. Section 4A(2) and (3) are intended to ensure that such payments are not considered a separate LSL entitlement.

513. Section 4A(4) provides that the LSL Act does not apply to an employee who has a separate LSL entitlement to take leave and to be paid on termination instead of long service leave that is at least equivalent to the entitlement to WA LSL to take leave and to be paid on termination instead of long service leave.

514. The comparison under s 4A(4) to be undertaken is whether an employee's entitlement to take long service leave and to be paid for long service leave on termination under the separate LSL entitlement is at least equivalent to the entitlement to take paid long service leave on ordinary pay and be paid on termination instead of long service leave on ordinary pay under Part III of the LSL Act. If this comparison demonstrates that the employee's separate LSL entitlement is at least equivalent to Part III of the LSL Act, the LSL Act will not apply to that employee.

> **Example**
>
> Isla is employed under an industrial agreement that provides her with 13 weeks of long service leave after 10 years of continuous employment, a further five weeks of leave for every five years of continuous employment thereafter, and pro rata long service leave after seven years of continuous employment.
>
> As this entitlement is better than the entitlement under the LSL Act to $8^{2/3}$ weeks of leave after 10 years of continuous employment and a further $4^{1/3}$ weeks for every five years of continuous employment thereafter, the LSL Act does not apply to Isla.

515. This provision replicates the effect of existing s 4(3).

516. Section 4A(5) and (6) regulate the circumstances in which an employee becomes entitled to WA LSL in relation to their employment with an employer and, immediately before this, they had a separate LSL entitlement in relation to their employment with that employer. Section 4A(6) provides that any leave taken or payment on termination instead of long service leave made to an employee under the separate LSL entitlement must be taken into account in the calculation of the employee's entitlement to WA LSL as if it were taken or paid on termination as WA LSL.

[79] It was held by the Full Bench of the Commission in *Nekros Pty Ltd v Rosanne Baker* [2006] WAIRC 05764 at [34] and [35] that the entitlement to long service leave under the LSL Act is not only an entitlement to leave, but also leave on ordinary pay. 'Ordinary pay' and its method of calculation is currently defined in existing s 4(2).

Example

Warren employs Sonya and they had a written contract of employment that provided Sonya with an entitlement to 13 weeks' long service leave after 10 years' continuous employment and to payment of long service leave on termination after 7 years of continuous employment. This was therefore a separate LSL entitlement.

As it was 'at least equivalent' to the WA LSL entitlement, the LSL Act did not apply to Sonya in accordance with s 4A(4). Warren and Sonya have now signed a new written contract of employment that does not provide for long service leave. Sonya therefore no longer has a separate LSL entitlement and is instead entitled to WA LSL.

Under s 8(1), Sonya is entitled to long service leave in respect of continuous employment. As Sonya has remained employed with Warren, the period of her employment that was covered by the separate LSL entitlement will be counted as continuous employment under the WA LSL entitlement.

Sonya has now worked for Warren for 16 years. Under s 8(2), an employee's entitlement to long service leave after 15 years of continuous employment is 13 weeks.

If Sonya took four weeks of long service leave under her separate LSL entitlement, this period of leave must be taken into account when determining her entitlement to long service leave under the LSL Act.

Section 4A(6) operates to treat the four weeks Sonya took under the separate LSL entitlement as though it was four weeks' leave taken under the LSL Act. Sonya's leave entitlement under the LSL Act after 15 years is then nine weeks.

517. Section 4A(6) similarly applies where an employee has been paid long service leave on termination under a separate LSL entitlement.

Example

Miho has employed Craig for 8 years. He is entitled to long service leave under a separate LSL entitlement that is at least equivalent to the WA LSL entitlement.

Miho's business suffered a downturn due to summer bushfires. She therefore terminated Craig's employment and paid out his accrued long service leave. Five months later, business picked up enabling Miho to re-employ Craig.

Under new s 6(4)(b), Craig's employment is continuous despite his termination because he was terminated by Miho on the ground of slackness of trade and he was re-employed by Miho within six months of being terminated.

A year later Miho sells her business to Valerie and Valerie employs Craig. Under new s 7H, Craig's periods of employment with both Miho and Valerie are taken to be a single period of continuous employment.

Section 4A(6) operates to ensure that the leave that was previously paid out by Miho to Craig on termination under the separate LSL entitlement is taken into account when determining Craig's entitlement with Valerie to long service leave or to payment of long service leave on termination under the LSL Act.

Section 5 – Cashing out of accrued long service leave

518. Section 5(1) provides that an employer and employee may agree that the employee may forgo the employee's entitlement, or part of the employee's entitlement, to long service leave under s 8(2)(a) or (b) if the employee is given an adequate benefit instead of the entitlement and the agreement is both in writing and signed by the employer and employee.

519. Section 5(2) provides that a benefit is not adequate unless the employee is paid at least the amount of ordinary pay the employee would have received had the employee taken the long service leave or part of the leave. The intent is that an employee who cashes out accrued long service leave should not be financially worse off by cashing out their leave compared with taking the leave.

520. Section 5(3) provides that nothing in s 5 enables the employer and employee to reach an agreement to cash out long service leave before the employee's entitlement to long service leave has accrued. That is, an employer and employee may only agree to cash out the employee's long service leave once an employee has completed the requisite continuous employment and accrued an entitlement in accordance with s 8(2)(a) and/or (b).

Section 6 – Continuous employment

521. Section 6(1) and (2) of the the LSL Act currently provides for an employee's employment to be continuous, notwithstanding certain absences from employment. An employee's continuity of employment is not broken by these absences. New s 6 replaces existing s 6(1) and (2).

522. Section 6(1) provides that an employee's continuous employment with an employer includes the following paid and unpaid absences, irrespective of duration:

a) annual leave. This replicates existing s 6(1)(a)(i);

b) leave for illness or injury, or carer's leave. This replicates existing s 6(1)(b) with two exceptions – the 15 working day cap in any year has been deleted and carer's leave has been included;

c) long service leave. This replicates existing s 6(1)(a)(ii);

d) parental leave. This includes the entitlement to parental leave under the FW Act, the MCE Act, and other parental leave entitlements contained in State and federal awards, agreements and written contracts of employment. Parental leave is captured by existing s 6(2)(c) if it is an absence authorised by an employer;

e) compassionate leave. This includes, for example, the entitlement for national system employees to compassionate leave under the FW Act. Compassionate leave is captured by existing s 6(2)(c) if it is an absence authorised by an employer;

f) bereavement leave. This includes, for example, the entitlement to bereavement leave in the MCE Act and in State award and industrial agreements. Bereavement leave is captured by existing s 6(2)(c) if it is an absence authorised by an employer;

g) public holidays. This replicates existing s 6(1)(a)(iii); and

h) any other form of leave provided as part of the employee's employment. This is captured by existing s 6(2)(c) if it is an absence authorised by an employer. This provision is intended to be broad and able to capture:

   (i) other statutory leave entitlements – for example, community service leave under the FW Act;

   (ii) other leave entitlements in a State or federal award, agreement or order – for example, family and domestic violence leave;

   (iii) other leave entitlements in a written contract of employment – for example, study leave.

523. Section 6(2) provides that an employee's continuous employment with an employer also includes the following absences, whether paid or unpaid and irrespective of duration:

a) a period following the termination of the employee's employment by the employer if the termination has been made with the intention of avoiding obligations under the LSL Act or annual leave obligations under a State or federal enactment, award or agreement. This reflects existing s 6(1)(c) with amendment to refer to both State and federal enactments, awards and agreements; and

b) a period during which an employee's employment is interrupted by service as a member of the Naval, Military or Air Forces of the Commonwealth, other than as a member of the Permanent Forces of the Commonwealth of Australia, and provided the employee resumes employment with the employer as soon as practicable after the absence. This replicates existing s 6(1)(d)(i) with amendments to remove obsolete references to the

British Commonwealth Occupation Forces in Japan,[80] circumstances referred to in s 31(2) of the *Defence Act 1903*,[81] and Korea or Malaya after 26 June 1950.[82]

524. Existing s 6(1)(d)(ii) – which refers to service as a member of the Civil Construction Corps established under the *National Security Act 1939-1946*;[83] and existing s 6(1)(d)(iii) – which refers to service in the Armed Forces under the *National Service Act 1951* or any Act passed in substitution for, or amendment of, that Act[84] have not been replicated in s 6(2) as these provisions are obsolete.

525. Section 6(3) provides than an employee has continuous employment with an employer despite any of the following paid or unpaid absences, irrespective of duration:

a) an absence other than one referred to in s 6(1) or (2) that is authorised by the employer. For example, an employer may authorise an employee to take an extended period of unpaid leave. This replicates existing s 6(2)(c);

b) a standing down of an employee in accordance with the provisions of an award, agreement, order or determination in force under the IR Act, or under the FW Act or an enterprise agreement under that Act. For example, some State awards provide for a stand down of employees in specific circumstances and, under s 524 of the FW Act, an employer may stand down employees in certain circumstances. A federal enterprise agreement may also provide for a stand down of employees. This reflects existing s 6(2)(d);

c) an absence arising directly or indirectly from an industrial dispute if the employee returns directly to work in accordance with the terms of settlement of the dispute. This replicates existing s 6(2)(e);

d) a reasonable absence from work on legitimate union business in respect of which the employee has requested and been refused leave. This replicates existing s 6(2)(h);

e) an absence not specified in s 6(1), (2) or (3), unless the employer gives written notice to the employee during or within 14 days after the absence that their continuity of employment has been broken by the absence. This replicates existing s 6(2)(i).

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[80] The British Commonwealth Occupation Forces in Japan were disbanded in 1952. There will not be any employees who remain employed with the one employer and who performed service with the British Commonwealth Occupation Forces.

[81] Section 31(2) has been repealed.

[82] This is presumed to be a reference to service in the Korean War and the Malayan Emergency. The last Australian forces left Korea in 1957 and Malaya in 1963 and so there will not be any employees who remain employed with the one employer and who performed service in either the Korean War or the Malayan Emergency.

[83] The Civil Construction Corp was disbanded in 1945. There will not be any employees who remain employed with the one employer and who performed service with the Civil Construction Corp.

[84] The *National Service Act 1964* amended the *National Service Act 1951*. Conscription was abolished in 1972 and the Act was repealed in 1992. There will not be any employees who remain employed with the one employer and who performed national service prior to 1972.

526. Section 6(4) provides that an employee has continuous employment with an employer despite a termination of the employment by the employer:

a) on any ground other than slackness of trade if the employee is re-employed by the employer within a period not exceeding two months from the date of termination. This replicates existing s 6(2)(f);

b) on the ground of slackness of trade if the employee is re-employed by the employer within a period not exceeding six months from the date of termination. This replicates existing s 6(2)(g).

527. Section 6(5) provides that a casual or seasonal employee has continuous employment with an employer despite an absence from work comprising any of the following, irrespective of duration:

a) an absence under the terms of employment;

> **Example**
>
> Niall is a casual employee who is engaged by Danni to only work during school term time. As Danni does not require Niall to perform work during the term breaks, this 'absence' is one that arises under the terms of Niall's employment and Niall's employment is considered continuous.

b) an absence caused by seasonal factors;

> **Example**
>
> Freya employs Heide for six months of the year to perform harvest related work. As Heide's harvest related work for Freya always recommences at the start of each harvest season, Heide's employment is considered continuous because the six month 'absences' each year are caused by seasonal factors.

c) any other absence after which the employee has, due to the regular and systematic nature of the employment, a reasonable expectation of returning to work for the employer.

> **Example**
>
> Usman is regularly employed by Howard to work such shifts as determined by Howard. Usman asks Howard for two months off work to study for final exams and Howard agrees to this.
>
> As Usman is regularly and systematically employed by Howard and he has a reasonable expectation of returning to work for Howard after the two month absence, the two month absence will not break Usman's continuity of employment. This provision does not, however, require Usman to regularly and systematically work the same shifts or days each week.

528. Section 6(6) additionally provides that a casual or seasonal employee has continuous employment with an employer despite the fact that:

    a) the employee is employed by the employer under two or more contracts of employment; or

    b) the employee is employed by another person during the period of employment with the employer.

529. Section 6(6)(a) recognises the unique nature of casual employment, which is that a casual may be:

    a) engaged on a single subsisting contract of employment, which allows the employer to direct the employee to work as and when required; or

    b) they may be employed by the employer under two or more contracts of employment over a period of time.

    If a casual employee satisfies the continuous employment requirements and qualifies for a period of long service leave, the fact they were employed under two or more contracts does not affect their continuity.

530. It is noted that a casual or seasonal employee who has completed the requisite period of continuous employment will be entitled to leave on ordinary pay. Ordinary pay will be defined in new s 7(1)[85] to mean the employee's remuneration for the employee's normal weekly number of hours of work. New s 7(2) provides that the normal weekly number of hours of an employee whose hours have varied during a period of employment is the average weekly hours worked by the employee. Consequently, where a casual employee's hours vary from week to week, and where a seasonal employee only works for part of a year, their hours will be averaged over their period of employment, including these absences. The absences within the weeks or years where no hours were worked due to the terms of employee's casual employment or seasonal factors will therefore be taken into account when calculating the employee's ordinary pay for a period of leave.

531. Section 6(6)(b) recognises that casual and seasonal employees may have other employment. This fact does not affect their continuous employment with a particular employer.

532. Section 6(7) provides that, if an employee enters into a contract of employment with an employer within 52 weeks of completing their apprenticeship with the employer, the period of the apprenticeship is taken as part of the employee's continuous employment.

[85] As inserted by clause 76 of the Bill.

533. An apprentice is an employee as defined in existing s 4(1) and therefore service as an apprentice is part of their period of continuous employment.[86] However, an apprenticeship is a training contract and, once completed, the training contract ends. Section 6(7) ensures that if the employee is subsequently employed under an employment contract with the employer, the service under the apprenticeship contract is part of their continuous employment.

Section 6A – Calculating the length of continuous employment

534. Section 6(3) of the LSL Act currently regulates which absences are and are not counted as part of an employee's period of continuous employment. An amount of continuous employment calculated in accordance with new s 6A will determine when an employee qualifies for long service leave under s 8(1).[87]

535. Section 6A(1) provides that, when calculating the length of continuous employment for the purposes of the LSL Act, the following periods are counted:

a) leave referred to in s 6(1) provided that it is paid leave. For example, only paid parental leave is counted; unpaid parental leave is not counted (although, as per s 6(1)(d), unpaid parental leave will not break continuity of employment). To the extent that s 6(1) provides for annual leave, long service leave, sick leave and public holidays, s 6A(1) replicates the effect of existing s 6(3);

b) an absence referred to in s 6(2). This replicates the effect of existing s 6(3);

c) an absence referred to in s 6(5). Whilst these absences count as part of a casual or seasonal employee's continuous employment, weeks when no hours were worked due to these absences are taken into account when calculating the employee's ordinary pay for a period of leave.

536. Section 6A(2) provides that, when calculating the length of continuous employment for the purposes of the LSL Act, the following periods are not counted:

a) leave that is referred to in s 6(1) that is unpaid. This reflects the effect of existing s 6(3);[88]

b) an absence referred to in s 6(3). This replicates existing s 6(3);

c) a period between the employee's termination and their re-employment as referred to in s 6(4). This replicates existing s 6(3);

[86] The term 'apprentice' is defined in the VET Act to mean the person named in a training contract as the person who will be trained under the contract whether the person is termed an apprentice, trainee, cadet, intern or some other term.

[87] Section 8(1) is amended by clause 79(1) of the Bill.

[88] These absences are captured as continuous employment by existing s 6(2).

d) any period between the completion of the employee's apprenticeship and the employment of the employee under a contract of employment with the same employer in respect of an employee to whom s 6(7) applies;

e) a period during a transfer of business where the employment of an employee of the old employer has terminated and the employee has not yet been employed by the new employer (as those terms are defined in new s 7D).

Clause 75 – Part II Division 2 heading inserted

537. Clause 75 inserts a new heading in Part II titled 'Division 2 – Ordinary Pay'.

Clause 76 – Section 7 replaced

538. Clause 76 deletes existing s 7 and inserts new s 7 to s 7C.

Section 7 – Ordinary pay: general

539. Section 7 replaces but replicates a number of elements in the definition of ordinary pay in existing s 4(1) and (2).

540. Section 7(1) provides that, except as provided for in s 7(4), an employee's ordinary pay is the employee's remuneration for the employee's normal weekly number of hours worked, calculated on the ordinary time rate of pay applicable to the employee as at the time when any period of long service leave granted to the employee commences or is taken to commence. 'Taken to commence' is a reference to existing s 9(2) and the payment of long service leave on termination.

541. Section 7(1) replicates the definition of ordinary pay in existing s 4(1).

542. As provided for in new s 7A, an employee's ordinary pay does not include shift premiums, overtime, allowances or similar payments. An employee's normal weekly number of hours, however, may include normally working in excess of 38 hours per week. Whilst the employee's ordinary rate of pay will not include any overtime payments, their normal weekly number of hours can include overtime hours that they normally worked during that period.

543. Section 7(2) provides that for the purposes of determining ordinary pay in s 7(1), the normal weekly number of hours of work of any employee whose hours have varied during a period of employment is the average weekly number of hours worked by the employee during the period, calculated by reference to ascertainable hours worked by the employee during the period.

544. This section enables the averaging of hours in a range of circumstances where an employee's hours have varied over their period of employment, including where an employee:

a) changes employment status, such as from part time to full time or vice versa;

b) is a casual employee who has worked varying weekly hours;

c) is a seasonal employee who has not worked for their employer for parts of years.

545. This replicates existing s 4(2)(c) with the removal of the reference to full time, part time or casual employees. As the definition of employee in s 4(1) captures all three employee types, there is not a requirement to include a reference to employee types in s 7(2). The removal of this reference, however, does not alter the effect of this provision.

546. It is noted that the absences referred to in s 6A(2) are not counted in the length of an employee's continuous employment. These absences are therefore also not counted when averaging an employee's hours, as they do not form part of the employee's period of employment.

> **Example**
>
> Ezra took 12 months of unpaid parental leave during a period of continuous employment. This 12 month period does not count towards the length of Ezra's continuous employment.
>
> If Ezra's hours require averaging over his period of employment, the averaging will not include this 12 month period during which Ezra was on unpaid leave and worked no hours.

547. Section 7(3) provides that, for the purposes of determining ordinary pay in s 7(1), the rate of pay of an employee whose leave has been postponed to meet the convenience of the employee by agreement between the employer and employee is the rate of pay applicable:

a) on the day the leave accrues. For example, the rate of pay that applied to the employee when they completed 10 years' continuous employment and so had accrued a leave entitlement; or

b) if the employer and employee agree, on the day the employee commences the leave. This may be the same rate of pay that applied to the employee when they accrued the leave or it may be a higher rate of pay if, for example, the employee has received a pay rise since accruing their entitlement.

548. It is not the intent that s 7(3) apply when an employee's leave is postponed at the request or direction of the employer.

549. Section 7(3) reflects existing s 4(2)(e).

550. Section 7(4) provides that the ordinary pay of an employee employed on piece work, commission, bonus work, percentage reward or any other system of payment by results is the average weekly rate of pay earned by the employee while in employment during the period of 12 months:

a) ending on the day immediately before the day on which the employee commences long service leave or would, but for payment of long service leave under s 5 (i.e. for leave that has been cashed out), have commenced long service leave if the employee is still in employment; or

b) ending on the day immediately before the day on which the employee was last in employment, if the employee is no longer employed; or

c) ending on the day immediately before the day on which the employee died if the employee is dead.

551. This reflects existing s 4(2)(b).

Section 7A – Ordinary pay: shift premiums, overtime or penalty rates

552. Section 7A provides that, except as provided by s 7B, an employee's ordinary pay does not include shift premiums, overtime, penalty rates, allowances or any similar payments. This replicates existing s 4(1).

Section 7B – Ordinary pay: casual employees' loading

553. Section 7B provides that a casual employee's ordinary pay includes any casual loading payable under:

a) an award, industrial agreement, employer-employee agreement or order of the Commission; or

b) a modern award, enterprise agreement or national minimum wage order made by the FW Commission under the FW Act. It is intended that the meaning of these terms be as defined in the FW Act;

c) a contract of employment;

d) an enactment. This will include, for example, casual loading under s 11 of the MCE Act.

Section 7C – Ordinary pay: board and lodging

554. Section 7C(1) provides that an employee's ordinary pay includes the cash value of board and lodging during a period of long service leave if the board and lodging is provided to the employee by their employer but it is not provided to, and taken by, the employee during the period of long service leave.

Example

Lei provides her chef Harvey with board and lodging in her hotel but, when Harvey takes long service leave, he holidays overseas.

In this circumstance, the board and lodging is not provided to and taken by Harvey and so Lei must include the cash value of the board and lodging in Harvey's ordinary pay for his period of leave.

555. Section s 7C(2) provides, that for the purposes of s 7C(1), the cash value of the board and lodging is:

a) if the value is fixed by or under the conditions of the employee's employment, that value; or

b) if the value is not fixed by or under the conditions of the employee's employment, a value calculated by reference to a rate prescribed in the regulations.

556. Section 7C reflects existing s 4(1) and s 4(2)(d).

Clause 77 – Part II Division 3 inserted

557. Clause 77 inserts a new Division in Part II titled 'Division 3 – Transfer of Business'. This comprises new s 7D to s 7I. Sections 7D to 7H replace existing s 6(4) and (5). These provisions are based on the transfer of business provisions in s 311 of the FW Act.

Section 7D – Terms used

558. Section 7D defines the following terms used in Division 3:

a) 'connection between the old employer and the new employer' has the meaning given in s 7G(1) to (4);

b) 'new employer'; 'old employer'; 'transfer of business'; and 'transferring work' have the meanings given in s 7E;

c) 'transferring employee' has the meaning given in s 7F.

Section 7E – Transfer of business, old employer, new employer, transferring work

559. Section 7E provides that there is a transfer of business from an old employer to a new employer if the following requirements are satisfied:

a) the employment of an employee of the old employer has terminated;

b) within three months after the termination, the employee becomes employed by the new employer;

c) the work (the ‘transferring work’) the employee performs is the same or substantially the same as the work the employee performed for the old employer; and

d) there is a connection between the old employer and the new employer.

560. The reference in s 7E(a) to an employee's employment ‘terminating’ includes any circumstances in which an employee’s employment with an employer ends, including by the employee’s resignation.

561. Under s 7E(b), there can be a period of up to three months between an employee’s periods of employment with the old employer and the new employer. This reflects that in some transactions – for example, where the old employer has become insolvent and a liquidator is trying to sell the business – there may be a period of time where a transferring employee is not employed by either the old or the new employer. The three month period is also intended to ensure that the operation of Division 3 cannot be avoided by the new employer delaying the employment of an employee. The three month period also provides certainty as to when a transfer of business must occur for the purposes of the LSL Act.

562. Section 7E(c) requires the transferring employee to perform the same, or substantially the same, work for the new employer as they performed for the old employer. This provision does not exclude minor differences between the work performed for the old and new employers. However, the requirement is satisfied where, overall, the work is the same or substantially the same, even if the precise duties of the employee, or the manner in which they are performed, have changed.

563. Although s 7E(c) refers to the work performed by an individual employee, in some instances a group of employees may be employed by the new employer. In this circumstance, it may be possible to categorise the work more generally. For example, if the old employer runs a supermarket and sells the supermarket to the new employer, the work might be characterised generally as retail work in a supermarket. The fact that an employee may have stacked shelves for the old employer but now works on the checkout for the new employer would not stop the employee from being a transferring employee.

Section 7F – Transferring employee

564. Section 7F provides that an employee in relation to whom the requirements in s 7E(a), (b) and (c) are satisfied is a ‘transferring employee’.

Section 7G – Connection between old employer and new employer

565. Section 7G sets out the circumstances in which there is a connection between an old employer and a new employer.

566. Section 7G(1) provides that there is a connection between the old employer and the new employer if, in accordance with an arrangement between them, the new employer owns or has the beneficial use of some or all of the assets (whether tangible or intangible) that the old employer owned or had the beneficial use of, and that relate to, or are used in connection with, the transferring work.

> **Example**
>
> Cleaver Designs Pty Ltd sells its manufacturing business to Parish Engineering Pty Ltd. Included in the sale were manufacturing plant and equipment, forklifts, trucks and stock that were used by Cleaver Designs to conduct its business. These are tangible assets. Also included in the sale was an amount for intellectual property in the form of industrial designs unique to the business. This is an intangible asset.
>
> Parish Engineering now owns the tangible and intangible assets that were owned by Cleaver Designs. If these are used in connection with the transferring work, there is a connection between the old employer (Cleaver Designs) and the new employer (Parish Engineering). There would therefore be a transfer of business.

567. Section 7G(2) provides that there is a connection between the old employer and the new employer if, because the old employer has outsourced the transferring work to the new employer, the transferring work is performed by one or more transferring employees as employees of the new employer.

568. Section 7G(2) applies where an old employer decides that it no longer wishes to perform work of a particular type, or no longer wishes to perform as much work of a particular type, and so contracts out the work to a third party to perform that work instead. In this situation, the third party employs an employee or employees of the old employer to continue performing that work. This provision applies irrespective of whether there is a transfer of assets between the old employer and the new employer.

> **Example**
>
> A supermarket business – Fresh Food West Perth – decides it no longer wishes to directly employ cleaners to clean its stores. It decides instead to contract out the cleaning work to a cleaning business – A/One Cleaning Pty Ltd – and so terminates the employment of its cleaners. A/One Cleaning then employs those cleaners.
>
> As the work performed by the transferring employees for A/One Cleaning (the new employer) is the same as the work performed for Fresh Food West Perth (the old employer), there is a connection between the old and new employers and so there is a transfer of business.

569. Section 7G(3) provides that there is a connection between the old employer and the new employer if:

a) because the new employer had outsourced the transferring work to the old employer, the transferring work had been performed by one or more transferring employees, as employees of the old employer; and

b) because the new employer has ceased to outsource the work to the old employer, the transferring work is performed by those transferring employees, as employees of the new employer.

570. Section 7G(3) applies where a new employer decides to in-source the work previously done by the transferring employee of the old employer. This provision applies irrespective of whether there is a transfer of assets between the new employer and the old employer.

Example continued

After one year, Fresh Food West Perth decides that it no longer wants to outsource the cleaning work at its stores and instead wants to directly employ cleaners to undertake this work. The supermarket ends its contract with A/One Cleaning and offers employment to the cleaners employed by A/One Cleaning.

The cleaners end their employment with A/One Cleaning and commence employment with Fresh Food West Perth, performing the same work as the work they had performed for A/One Cleaning.

There is therefore a connection between the old and new employers and so there is a transfer of business.

571. Section 7G(4) provides that there is a connection between the old employer and the new employer if the new employer is a related body corporate of the old employer when the transferring employee becomes employed by the new employer. This provision applies irrespective of whether there is a transfer of assets between the related bodies corporate.

572. This type of connection is intended to cover some corporate restructures. It also ensures that employers cannot intentionally avoid obligations under instruments by 'transferring' employees between related bodies corporate (although any attempt to change an employee's employer without the employee's consent may be ineffective).[89]

[89] *McCluskey v Karagiozis* [2002] FCA 1137; 120 IR 147.

Section 7H – Status of transferring employees on transfer of business

573. Section 7H provides that, for the purposes of the LSL Act, on a transfer of business:

a) a transferring employee's employment before and after the transfer is taken to be a single period of continuous employment; and

b) the new employer is taken to have been the transferring employee's sole employer for the entire period.

574. The intention is that a transfer of business does not disadvantage an employee with respect to their long service leave. The effect of s 7H is therefore that, when a business is transferred:

a) an employee's service (their period of continuous employment) with the old employer 'transfers' to the new employer;

b) an employee's accrued leave (if any) is also 'transferred'.

Example

Dharani has employed Arteman for 10 years. She sells her business to Emma and Emma employs Arteman to perform the same work for her in the business. There is a connection between the old employer (Dharani) and the new employer (Emma) in accordance with new s 7G.

Arteman had accrued $8^{2/3}$ weeks of long service leave at the time Dharani sells her business.

New s 7H operates to ensure that Arteman's accrued long service leave entitlement is transferred to his employment with Emma.

The price Emma pays for the business reflects the fact that she has acquired Arteman's leave entitlements and period of continuous employment.

575. Section 7H reflects the effect of existing s 6(4). It will also apply where more than one transfer of business occurs during an employee's period of employment. In accordance with new s 6A(2)(e), any period between a transferring employee's employment with the old employer being terminated and the employee being employed by the new employer is not counted as part of the length of their continuous employment.

Section 7I – Transfer of employment records

576. Section 26(1) of the LSL Act, as amended by clause 82(1) of the Bill, sets out the employment records an employer must keep. Section 7I provides that, on the transfer of a business, the old employer must transfer copies of all transferring employees' employment records required to be kept under s 26(1) to the new employer. This will enable the new employer to determine the length of an employee's period of continuous employment with the old employer or employers

and the normal weekly number of hours worked by the employee over their entire period of employment. This will then allow the new employer to accurately determine an employee's long service leave entitlement.

577. This is a civil penalty provision under s 83E of the IR Act as it reflects the seriousness of the need for an old employer to provide records to the new employer.

578. Section 7I(4) provides that, in proceedings under s 83E of the IR Act for a contravention of s 7I(2), the IMC may, as an alternative, determine that a contravention of s 26(1) or (2) has occurred. This reflects new s 102 of the IR Act.[90]

Clause 78 – Part III heading amended

579. Clause 78 amends the heading to Part III to read 'Part IIII – Entitlements to long service leave or to payment on termination instead'.

Clause 79 – Section 8 amended

580. Clause 79 amends existing s 8 to specify that continuous employment refers to the length of continuous employment calculated under s 6A. The reference to employment with a transmittee under existing s 6(4) has been removed as new s 7H provides for the new employer to be taken as the transferring employee's sole employer for the entire period of an employee's employment.

581. Existing s 8(3)(b) has been redrafted to be consistent with the language of existing s 8(2)(c)(ii). The amendment does not change the substantive provision as only an employer can terminate an employee's employment for serious misconduct.

Clause 80 – Section 9 amended

582. Existing s 9(1) provides that an employer and employee may agree for the employee to take leave in separate periods. Clause 80(1) amends s 9 to remove the requirement that this be for periods of not less than one week. The parties may therefore agree, for example, to the employee taking leave in single day absences.

583. Clause 80(2) amends existing s 9(1AA); this reflects existing s 9(1)(a).

584. Clause 80(3) inserts new s 9(1C) to provide that an employee may request the employer to grant the employee a period of long service leave that is twice as long as the period to which the employee would otherwise be entitled and at half the employee's ordinary rate of pay. For example, an employee who is entitled to four weeks' long service leave may request that they be granted eight weeks of leave at half pay.

[90] Inserted by clause 60(2) of the Bill.

585. Clause 80(3) also inserts new s 9(1D) to provide that an employee may request the employer to grant the employee a period of long service leave that is half as long as the period to which the employee would otherwise be entitled and at twice the employee's ordinary rate of pay. For example, an employee who is entitled to 10 weeks' long service leave may request that they be granted five weeks of leave at double pay.

586. An employer is not required to agree to a request under s 9(1C) or 9(1D).

587. Clause 80(4) inserts the word 'accrued' in existing s 9(3) as this subsection provides for payment of leave where the employee is taking a period of accrued leave.

Clause 81 – Section 11 amended

588. Clause 81(1) amends existing s 11(1) to modernise the drafting language and reflect other amendments to the LSL Act.

589. Clause 81(2) inserts s 11(3) to provide that the jurisdiction granted to the IMC in s 11(1) is in addition to the jurisdiction the IMC has:

    a) under s 83(1)(e) of the IR Act to enforce an entitlement in Part III of the LSL Act as an 'entitlement provision' as defined in amended s 7(1) of the IR Act;[91] and

    b) under s 83E of the IR Act to enforce a civil penalty provision of the LSL Act.

590. Section 11(3) ensures that the IMC is able to impose a penalty on an employer for a contravention of a long service leave entitlement provision or a civil penalty provision.

591. It is noted that new s 83EB of the IR Act[92] will apply to employers covered by the LSL Act. This section provides that, in proceedings under s 83, an employer has the burden of disproving an allegation by an applicant in relation to a matter if the employer was required under the LSL Act to keep an employment record under s 26(1) or (2) of the LSL Act and failed to comply with the requirement.

Clause 82 – Section 26 amended

592. Clause 82(1) amends existing s 26(1) to require an employer to keep the following additional employment records:

    a) the employer's name and Australian Business Number (if any);

    b) the date of any transfer of business as defined in new s 7D during the employment of the employee;

    c) the weekly hours worked by the employee;

[91] In accordance with clause 5(2) of the Bill.
[92] Inserted by clause 45 of the Bill.

d) the details of the benefit for, and the amount of, long service leave that was foregone under an agreement to cash out long service leave and when the benefit was paid.

593. Clause 82(3) amends existing s 26(3) to ensure that a failure to keep the employment records specified in s 26(1) is a civil penalty provision enforceable under s 83E of the IR Act.

Clause 83 – Section 26A amended

594. Clause 83 amends existing s 26A to use the term 'employment' records.

Clause 84 – Section 39 amended

595. Clause 84 amends existing s 39 to use the acronym 'IR Act'.

Clause 85 – Part VIII inserted

596. Clause 85 inserts new Part VIII titled 'Part VIII – Savings provisions for *Industrial Relations Legislation Amendment Act 2020*' comprising new s 40 and s 41.

597. Section 41 applies in relation to a transmission, as defined in existing s 6(5), of a business that occurred before commencement day.

598. Section 41(2) provides that, for the purposes of determining whether an employee in the business has had continuous employment with an employer, on and after commencement day, former s 6 and s 8 continue in operation and Part II Division 3 does not apply.

Clause 86 – Various references to 'shall' replaced

599. Clause 86 modernises the drafting of the LSL Act by replacing various references to 'shall'.

Clause 87 – Various references to gender removed

600. Clause 87 modernises the drafting of the LSL Act by replacing various gender specific references.

Clause 88 – Various other modernisations

601. Clause 88 adopts various other modernisations to the drafting of the LSL Act by replacing words such as 'thereof', 'hereunder', and 'thereto'.

PART 4 – *MINIMUM CONDITIONS OF EMPLOYMENT ACT 1993* AMENDED

Clause 89 – Act amended

602. Clause 89 provides that Part 4 amends the MCE Act.

Clause 90 – Section 3 amended

603. Clause 90 amends existing s 3(1) to include the term 'industrial instrument'. This is defined to mean an award or employer-employee agreement. Section 3(1) defines 'award' to mean an award made under the IR Act and any industrial agreement or order of the Commission under the IR Act. An employer-employee agreement is defined as an employer-employee agreement under Part VID of the IR Act.

604. Clause 90 also amends the definition of 'employee' in existing s 3(1) to mean 'a person who is employed by an employer to do work for hire or reward, including as an apprentice; or a person whose usual status is that of an employee'. The words 'a person who belongs to a class of persons prescribed by the regulations not be treated as an employee for the purposes of the Act' in the existing definition have been deleted.

605. Regulation 3 and Schedule 1 of the MCE Regulations currently provide that the following persons are not employees for the purposes of the MCE Act – persons:

    a) whose services are remunerated wholly by commission or percentage reward;

    b) whose services are remunerated wholly at piece rates;

    c) who:

        (i) receive a disability support pension under the *Social Security Act*; and

        (ii) whose employment is supported by 'supported employment services' within the meaning of the *Disability Services Act*;

    d) who are not entitled to be paid for work done by them but who receive some benefit or entitlement in relation to work;

    e) who are appointed under s 22(1) of the *National Trust of Australia (W.A.) Act* to carry out duties of wardens in relation to property that is managed, maintained, preserved or protected, whether solely or jointly, by the National Trust of Australia (WA).

606. The removal of the reference to persons prescribed by the regulations will mean employees who fall within the categories of persons currently excluded under the MCE Regulations will now be considered employees under the MCE Act.

607. An employee whose services are remunerated **partially** by commission, percentage reward, or piece rates is currently an employee for the purposes of the MCE Act. Consequently, such an employee is entitled to the minimum rate of pay in s 10 and to leave paid in accordance with s 18. The amendment to the definition of employee will ensure equitable treatment for employees whose services are remunerated **wholly** by commission, percentage reward, or piece rates.

608. It is also noted that employees whose services are remunerated wholly by commission, percentage reward, or piece rates are not currently excluded from the definition of employee in the IR Act and so may be employed under an award or agreement. Nothing in the MCE Act currently prevents the making of an award or industrial agreement that provides a minimum rate of pay for employees paid wholly by commission or piece rates, provided an employee is paid no less that the minimum rate of pay in s 10 for each hour worked in a week. The amendment to the definition of employee will then ensure equitable treatment with those employees who are entitled to piece rates (or some other form of minimum wage) and other conditions of employment in an award.

609. It is noted that clause 104 of the Bill inserts s 49. This is a transitional provision which applies to employees who, prior to commencement day, were remunerated wholly by commission, percentage reward or piece rates and who do not have a minimum rate of pay for paid leave in an industrial instrument or contract of employment. As these employees will now be entitled to paid leave under s 18, s 49 ensures that they have a minimum rate of pay for a period of leave – being the applicable minimum weekly rate under s 12, s 13 or s 14.

610. Employees who:

    a) receive a disability support pension under the *Social Security Act*; and

    b) whose employment is supported by 'supported employment services' within the meaning of the *Disability Services Act*

    will be entitled to the minimum wage in s 10, except where s 16(1) of the MCE Act applies. Section 16(1) of the MCE Act allows for the payment of a rate of pay, which may be less than the rate in s 10, to specified employees with a disability. All the other minimum conditions in the MCE Act apply to an employee with a disability.

611. Employees with a disability whose employment is **not** supported by a supported employment service are currently entitled to the minimum wage and other minimum conditions in the MCE Act. The amendment to the definition of employee will ensure equitable treatment of all employees with a disability. The amendments to s 10 and s 16 also apply to any employee with a disability who meets the definition in s 15.

612. Persons who are not entitled to be paid for work done by them but who receive some benefit or entitlement in relation to work includes volunteers. This amendment does not mean that the MCE Act extends minimum employment entitlements to volunteers. As to whether a particular person is an employee or a volunteer always depends upon whether the elements of a contract of employment are established, including a mutual intention to create a legally binding employment relationship; it is therefore considered unnecessary to define 'employee' to exclude a volunteer.

613. Under s 22(1) of the *National Trust of Australia (W.A.) Act,* the National Trust may:

    a) appoint such employees as may be necessary for the efficient carrying out of the functions of The Trust; and

    b) engage and remunerate for their services such professional persons or agents as The Trust considers may be necessary for carrying out the objects of The Trust.

614. The current exclusion in the MCE Regulations is limited to wardens appointed under s 22(1). The MCE Act will now cover wardens who are employed by the National Trust of WA. The amendment to the definition of employee will ensure equitable treatment with other employees employed in the WA public sector. It is also noted that National Trust wardens are not currently excluded from the definition of employee in the IR Act and so may be covered by an award or industrial agreement.

615. A warden who is not at law an employee and who is instead a volunteer or an agent will not be affected by this amendment.

616. The term 'employer' in the MCE Act is defined to have the same meaning as 'employer' in the IR Act. The definition of 'employer' in the IR Act will be amended by clause 5(2) of the Bill to include a foreign state or consulate employing one or more employees, except as provided in s 12 of the *Foreign States Immunities Act*, which confers immunity in some circumstances. This expanded definition will therefore apply in the MCE Act.

Clause 91 – Section 5 amended

617. Clause 91 amends existing s 5(1) to provide that the minimum conditions of employment extend to and bind all employees and employers and are taken to be implied in an industrial instrument or, if a contract of employment is not governed by an industrial instrument, in that contract. 'Industrial instrument' will be defined in s 3(1).

618. Amended s 5(1) reflects the effect of existing s 5(1).

Clause 92 – Section 7 replaced

619. Clause 92 amends existing s 7 to provide that a minimum condition of employment may be enforced under s 83 of the IR Act as an entitlement provision (as that term will be defined in s 7(1) of the IR Act), or as a provision of an industrial instrument if the condition is implied in the instrument.

620. Amended s 7 reflects the effect of existing s 7, with the additional ability for a minimum condition to be enforced directly as an entitlement provision; that is, without the need to first imply the minimum condition into an industrial instrument.

Clause 93 – Section 8 amended

621. Clause 93 amends the heading of existing s 8 to refer to the 'cashing out of accrued' annual leave. This does not change the substantive provision but aligns with the renaming of s 5 in the LSL Act,[93] which provides for the cashing out of accrued long service leave.

622. Clause 93 also amends existing s 8(1)(c) to require a written agreement to cash out an employee's annual leave to be signed by both the employer and employee. This amendment is consistent with the amended cashing out of long service leave provision in the LSL Act and ensures that both parties are able to demonstrate agreement to the cashing out of the employee's accrued annual leave.

Clause 94 – Section 9 deleted

623. Clause 94 deletes existing s 9.

624. Section 9 currently enables an employer and employee to agree that the employee is entitled to be paid a weekly rate of pay other than the weekly rate of pay applicable under s 12, s 13 or s 14, if the employee is either permanently or temporarily mentally or physically disabled. This section currently applies to employees with a disability but not those in supported employment services as they are currently excluded from the MCE Act by the MCE Regulations.

625. Section 9 is, to some extent, replaced by new s 16,[94] which will enable the payment of a rate of pay that may be less than the rate in s 10 for **specified** employees with a disability. Section 15 defines which employees with a disability are not entitled to the minimum rate of pay in s 10 – the employee must be an employee who has been assessed under the Supported Wage System (SWS) or a supported wage industrial instrument provision and they must be paid a rate of pay determined in accordance with that assessment.

626. If an employer and employee have, prior to commencement day, made an agreement under s 9 for the employee to be paid a weekly rate of pay that is less than the MCE Act minimum rate, the new transitional provisions in s 50[95] will apply. These enable the employer to continue to lawfully pay the agreed weekly wage whilst the employee is assessed under the SWS, provided this wage is not less than the minimum amount payable per week referred in new s 17(2). The transitional period is a maximum of six months. If an employee is not assessed or the assessment is not completed within this period, the employee must be paid in accordance with s 10.

[93] By clause 74 of the Bill.
[94] Inserted by clause 99 of the Bill.
[95] Inserted by clause 104 of the Bill.

627. It is noted that an employee with a disability is currently an employee for the purposes of the IR Act and so may be entitled to a minimum rate of pay contained in an award or industrial agreement. Furthermore, some awards and agreements include the SWS, which enables the payment of a rate of pay determined according to the assessed productive capacity of an employee with a disability. Similarly, an industrial instrument may contain a different wage assessment tool. An agreement made under existing s 9 does not allow an employer to lawfully pay a rate of pay that is less than an award or agreement rate of pay. The repeal of s 9 will not, therefore, have implications for such award or agreement covered employees.

Clause 95– Section 9A amended

628. Clause 95 amends s 9A to delete the definition of industrial instrument. This will instead be a defined term in s 3(1).

Clause 96 – Section 9B amended

629. Clause 96 replaces the words ‘health and safety’ with ‘safety and health’ in existing s 9B(2)(a).

Clause 97 – Part 3 Division 1 heading inserted

630. Clause 97 inserts a new Division heading in Part 3 titled ‘Division 1 – General’.

Clause 98 – Section 10 amended

631. Section 10 currently provides for the minimum rate of pay for an employee for each hour worked in a week. This is calculated by reference to the minimum weekly rate set out in s 12, s 13 and s 14, divided by 38. It is noted that s 12, s 13 and s 14 do not themselves require the payment of those rates to an employee; rather these sections provide the minimum weekly rate of pay on which an employee’s minimum rate of pay for each hour worked is determined for the purposes of s 10.

632. Clause 98(1) amends s 10 to provide that, except as provided in s 16, an employee is entitled to be paid, for each hour worked in a week, the minimum weekly rate applicable to the employee in s 12, s 13 or s 14, divided by 38. New s 16(1) will enable the payment of a rate of pay, which may be less than the rate in s 10, for specified employees with a disability. New s 15 defines which employees with a disability are not entitled to the minimum rate of pay in s 10. (It should be noted, however, that such employees are entitled to all other minimum conditions of employment.)

633. Clause 98(2) inserts new s 10(2) to provide that nothing in this section prevents an industrial instrument from providing for minimum rates of pay for an employee with a disability. It is noted that the term ‘employee with a disability’ is intended to mean any employee with a disability, not only an employee with a disability as defined in s 15. The word ‘disability’ therefore takes its ordinary and natural meaning. However, in accordance with s 5(2), a provision in an industrial

instrument that is less favourable to an employee than a minimum condition of employment has no effect. Therefore, an industrial instrument that provides for minimum rates of pay for an employee with a disability must still comply with the provisions of the MCE Act, including in relation to employees with a disability covered by s 16(1) and as defined in s 15.

634. The reference to 'providing for minimum rates of pay' in s 10(2) is intended to include provisions in an industrial instrument enabling the use of a specified wage assessment tool to determine an employee's minimum rate of pay.

Clause 99 – Part 3 Division 2 inserted

635. Clause 99 inserts a new Division in Part 3 titled 'Division 2 – Employees with disabilities' comprising new s 15, s 16 and s 17.

Section 15 – Terms used

636. Section 15 defines the following terms for the purposes of Division 2 – Employees with disabilities.

637. 'Employee with a disability' means an employee whose productive capacity:

a) has been assessed under:

(i) the Supported Wage System (SWS); or

(ii) a supported wage industrial instrument provision;

and

b) is assessed as being reduced because of a disability.

638. 'Instrument-free employee with a disability' means an employee:

a) whose contract of employment is not governed by an industrial instrument; and

b) whose productive capacity has been assessed under the SWS as being reduced because of a disability.

639. 'Instrument-governed employee with a disability' means an employee:

a) whose contract of employment is governed by an industrial instrument that includes a supported wage industrial instrument provision (SWIIP) that incorporates the SWS; and

b) whose productive capacity has been assessed under the SWS as being reduced because of a disability; and

c) who is not employed by a supported employment service as defined in s 7 of the *Disability Services Act*. 'Supported employment service' is defined in that Act as services to support the paid employment of persons with disabilities, being persons:

(i) for whom competitive employment at or above the relevant award wage is unlikely; and

(ii) who, because of their disabilities, need substantial ongoing support to obtain or retain paid employment; and

d) who is being a paid a weekly rate of pay determined by the SWS under the SWIIP.

640. 'Supported wage industrial instrument provision or SWIIP' means a provision of an industrial instrument that:

a) applies to an employee with a disability;

b) provides a means (a wage assessment tool) for the assessment of whether, and the extent to which, the employee's productive capacity is reduced because of the disability; and

c) provides that the employer may pay a wage rate that:

(i) relates to the employee's productive capacity as assessed using the wage assessment tool; and

(ii) may be less than the applicable minimum wage in the industrial instrument.

641. The words 'employee with a disability' in paragraph (a) of the definition of SWIIP are intended to take their usual and ordinary meaning. The definition of SWIIP is intended to include any wage assessment tool that is included in an industrial instrument, not only the SWS. The SWS may, however, be a SWIIP.

642. 'Supported Wage System or SWS' means the scheme established by the Commonwealth Government to enable the assessment of whether, and the extent to which, a person's productive capacity is reduced because of a disability.

<u>Section 16 – Application of Act to employee with disability</u>

643. Section 16(1) provides that s 10 does not apply to an employee with a disability who has been assessed under the SWS or a SWIIP and is being paid a rate of pay in accordance with that assessment.

644. In s 16(1), a SWIIP is not limited to the SWS and so this subsection is not limited to employees with a disability who have been assessed under the SWS.

Example

Theo is an employee with a disability. His disability has an effect on his capacity to undertake his tasks and duties.

Theo and his employer Sofie are covered by an award that contains a supported wage provision that permits the use of a wage assessment tool to assess the productive capacity of an employee with a disability and to pay a wage that relates to the employee's assessed productive capacity.

Theo's productive capacity has been assessed under this wage assessment tool as reduced and an associated rate of pay has been determined for him.

Although this wage is less than the applicable minimum wage in the award, Sofie may lawfully pay this rate to Theo because it has been determined in accordance with the supported wage industrial instrument provisions of the award.

Section 16(1) of the MCE Act provides that the minimum rate of pay in s 10 will not apply to Theo. This, in turn, means that s 5(2), which provides that a provision in an industrial instrument that is less favourable to an employee than a minimum condition of employment (in this case, the minimum wage in s 10), has no effect.

645. An employee who has been assessed under the SWS or a SWIIP but who is not being paid a rate of pay in accordance with that assessment is entitled to the minimum rate of pay in s 10. This is intended to ensure that an employee with a disability is not left without a minimum rate of pay.

646. Section 16(2) provides that a person eligible to be employed under the SWS may be employed under its provisions for the purposes of this Act. In accordance with the Commonwealth Government's *Supported Wage System in Open Employment Handbook 2018*, for the SWS to apply to a person, the job under consideration must be covered by an industrial instrument or legislative provision that permits employment under SWS provisions.[96] This is the purpose of s 16(2).

647. Furthermore, the SWS only applies to eligible persons as set out in the SWS. According to the *Supported Wage System in Open Employment Handbook 2018*, the conditions for eligibility which must be met are:

    a) the person is an Australian citizen or a person resident in Australia whose continued presence is not subject to a time limit imposed by Australian law (e.g. a temporary visa);

    b) the person is at least 15 years of age;

    c) the person has no outstanding workers' compensation claim against the current employer;

[96] Disability Employment Services, 1 July 2018, 6.

d) the person meets the impairment criteria for the disability support pension as determined by Centrelink;

e) the job being offered is for a minimum of eight hours per week.[97]

648. Only those employees who are unable to perform the range of duties to the competence level required because of the effects of a disability on their productive capacity can be paid a supported wage under the SWS. That is, the mere fact an employee has a disability does not mean they can be assessed under the SWS and paid a rate less than the applicable minimum.

649. It is intended that any SWS eligibility requirements, conditions or restrictions set by the Commonwealth Government apply to s 16(2). It is not intended that the SWS provisions in the MCE Act be used to determine a rate of pay for employees who are not eligible for the SWS according the Commonwealth Government's SWS requirements.

650. Section 16(2) operates in conjunction with new s 17. Section 17 applies only to employees with a disability who have been or are being assessed under the SWS, other than those who are employed by a supported employment service.

Section 17 – Minimum pay for employee with disability

651. The purpose of s 17 is two-fold – to:

a) provide for the determination of a minimum wage to be paid to an instrument-free employee with a disability who has been assessed under the SWS – s 17(3); and

b) ensure that an employee with a disability who has been or is being assessed under the SWS, with the exception of an instrument-governed employee employed by a supported employment service, is to be paid no less than the minimum amount payable set by the Commission under s 50A of the IR Act – s 17(2).

652. In other words (and in contrast to s 16(1)), s 17 only applies to an employee who has been or is being assessed under the SWS. Section 17 does not apply to an employee with a disability who has been or is being assessed under a different wage assessment tool.

653. Section 17(1) provides that this section applies to the following employees:

a) an instrument-free employee with a disability;

b) an instrument-governed employee with a disability;

[97] Ibid.

c) an employee who is employed for a trial period for the purpose of an assessment under the SWS as to whether the employee will become an employee referred to in paragraph (a) or (b).

654. An instrument-free employee with a disability and an instrument-governed employee with a disability are defined in s 15 to mean an employee whose productive capacity has been assessed under the SWS as being reduced because of a disability.

655. The definition of instrument-governed employee with a disability does not, however, include an employee who is employed by a supported employment service as defined in s 7 of the *Disability Services Act*. The term 'instrument-governed employee with a disability' is for the purposes of the minimum amount payable in s 17(2). The reasons for the exclusion of supported employment services employees are as follows:

a) The productive capacity of an employee with a disability currently employed under the national *Supported Employment Services Award 2010* (a modern award) may be assessed under one of a number of wage assessment tools in the award, including the SWS.

b) The minimum amount payable per week under the SWS that is provided for in the national minimum wage order and is also incorporated into other modern awards does not apply to the SWS in the *Supported Employment Services Award 2010*. At present, employees assessed under the SWS in the national *Supported Employment Services Award 2010* are instead entitled to no less than 12.5% of the relevant minimum wage in the award.

c) Work is underway before the FWC to replace the wage assessment tools in the *Supported Employment Services Award 2010* with a modified form of the SWS.[98] It is possible that the minimum 12.5% wage entitlement in the SWS in this award will be replaced.

d) Excluding supported employment service employees assessed under the SWS in a State award or industrial agreement from the minimum amount payable per week is consistent with the SWS in the national *Supported Employment Services Award 2010*.

e) The WA Supported Employees Industry Award does not contain wage rates. If it were to include wages and the SWS in the future, s 17 will not prevent the inclusion of a minimum amount to be paid to employees covered by the award. This may or may not reflect a minimum amount payable under the SWS in the national *Supported Employment Services Award 2010*. Similarly, an industrial agreement containing the SWS could be registered for employees employed by a supported employment services and s 17 will not prevent the inclusion of a minimum amount payable.

[98] [2019] FWCFB 8179 (3 December 2019).

f) The exclusion only applies to a supported employment services employee whose contract of employment is governed by an industrial instrument that includes the SWS. It does not apply to instrument free employees. This reflects the national system where eligible award/agreement free employees assessed under the provisions of the SWS in the national minimum wage order are entitled to the minimum amount payable per week.

656. Section 17(1)(a) and (b) employees are those who have already been assessed under the SWS. The SWS, however, enables the employment of an employee on a trial period once a SWS application has been approved, during which time, the employee's productive capacity is assessed by an approved SWS assessor. Section 17(1)(c) employees are those who are still being assessed under the SWS, either as enabled under s 16(2) or under a SWIIP that incorporates the SWS.

657. Section 17(2) provides that, except as provided for in s 17(3), the minimum amount payable for each week worked by an employee is an amount not less than the amount in effect under new s 50A(1)(a)(iii) of the IR Act, regardless of the number of hours worked by the employee during the relevant week.

658. Under s 50A(1)(a)(iii) of the IR Act, the Commission will be required to set the minimum amount payable. New s 50A(1A) and s 50A(1B)(b) require that the amount set by the Commission must be the same as that set by the FWC in the national minimum wage order for an eligible employee whose productive capacity is assessed as reduced under the SWS because of a disability.

659. Special national minimum wage 2 and Schedule A of the national minimum wage order set out the SWS methodology for determining a minimum wage for an employee with a disability. Schedule A also includes a minimum amount payable per week that must be paid to an employee with a disability assessed under the SWS per week. This must be paid regardless of the number of hours worked in a week and/or the level of the employee's assessed productive capacity. This amount is set by the FWC each year in its Annual Wage Review.

660. The minimum amount payable does not apply to an instrument-governed employee with a disability who has been assessed under the SWS and who is employed by a supported employment service. An instrument-free employee with a disability who is employed by a supported employment service will, however, be entitled to the minimum amount payable, including if they are being assessed under the SWS and will become an employee referred to in s 17(1)(a).

661. Section 17(3) provides that an instrument-free employee with a disability is entitled to be paid the higher of the following amounts:

a) for each hour worked by the employee in a week, an amount calculated by:

(i) determining the weekly rate of pay applicable to the employee by reference to the percentage of the rate referred to in s 12 that

corresponds to the employee's assessed productive capacity under the SWS, rounded up to the nearest 10 cents; and

(ii) dividing that weekly rate by 38;

b) the amount referred to in s 17(2).

662. Under the SWS, the productivity of an employee with a disability is assessed against performance standards of other employees with or without disability undertaking the same tasks or duties in the workplace. This assessment yields a percentage figure, which is then applied to the applicable minimum wage to determine a pro-rata wage for the employee.

663. The relevant minimum wage may be the rate in a modern award that incorporates the SWS or the rate in the national minimum wage order. The FWC sets weekly wages rounded to the nearest 10 cents.

664. The purpose of s 17(3)(a)(i) is to replicate this process and apply the percentage of an instrument-free employee's assessed productive capacity to the minimum weekly rate of pay in s 12.

665. Section 10 of the MCE Act provides that an employee is entitled to be paid, for each hour worked by an employee in a week, the minimum rate of pay applicable in s 12, s 13 or s 14, divided by 38. This, in effect, provides employees with an entitlement to a minimum hourly rate of pay.

666. Section 17(3)(a) replicates s 10 insofar as it provides for the weekly rate determined in s 17(3)(a)(i) to be divided by 38 and so provide for a rate of pay to be paid for each hour worked.

667. Section 17(3)(b) ensures that an instrument-free employee can be paid no less than the amount referred to in s 17(2) for each week worked by the employee. An employee cannot be paid less than this amount, regardless of the level of the employee's assessed productivity or the number of hours worked in a week.

Example

Aicha works for Martin. She has a disability and is eligible to be assessed under the SWS. An approved SWS assessor has assessed her productive capacity at 50%.

Aicha is therefore entitled to 50% of the applicable minimum wage. As she is an instrument-free employee, her minimum weekly wage will be 50% of the rate in s 12 of the MCE Act.

If the minimum weekly wage in s 12 is $750, Aicha's minimum weekly rate will be $375. She is then entitled to $9.87 per hour ($375 divided by 38) for each hour worked.

Aicha must, however, be paid no less that the minimum amount payable per week. For example, she must not be paid less than $87 per week (which is the minimum amount payable set by the FWC in the 2019 national minimum wage order).

Aicha is entitled to all other minimum conditions such as annual leave in the MCE Act.

Clause 100 – Section 17B amended

668. Clause 100 amends existing s 17B to delete s 17B(2) and s 17B(3)(b) and insert new s 17B(2). This is a consequential amendment resulting from the introduction of new s 17BA.

Clause 101 – Section 17BA inserted

669. Clause 101 inserts new s 17BA. Section 17BA prohibits unreasonable requirements by an employer or prospective employer to compel an employee or prospective employee to spend or pay an amount of money. This section is based on s 325 of the FW Act.

670. Section 17BA(1) defines the following terms for the purpose of s 17BA:

a) 'party related' in relation to an employer or prospective employer means a relative of the employer or prospective employer;

b) 'relative' of an employer means:

(i) each of the following people, whether the relationship is established by, or traced through, consanguinity, marriage, a de facto relationship, a written law or natural relationship:

- a parent, grandparent or other ancestor;
- a step-parent;
- a sibling;
- an uncle or aunt;
- a cousin;
- a spouse or de facto partner;

or

(ii) in the case of an employer who is an Aboriginal person or Torres Strait Islander – a person regarded under the customary law or tradition of the employer's community as the equivalent of a person mentioned above.

671. Section 17BA(2) provides that an employer must not directly or indirectly require an employee to spend, or pay to the employer or another person, an amount of the employee's money or the whole or any part of an amount payable to the employee in relation to the performance of work if:

    a) the requirement is unreasonable in the circumstances; and

    b) in the case of a payment – the payment is directly or indirectly for the benefit of the employer or a party related to the employer.

672. Section 17BA(2) replaces existing s 17B(2) but expands the provision to prevent an employer from requiring an employee to spend any part of their money (whether earned by the performance of work for the employer or not) where this in unreasonable in the circumstances. For example, asking an employee for 'cash back' so the person can keep their job, or with the sole purpose of undercutting their minimum entitlements under the MCE Act, an award or an employer-employee agreement, will always be unreasonable and prohibited under s 17BA(2).[99]

673. Similarly, asking an employee for any amount to be spent, or money to be paid, out of the employee's pocket in a way which involves undue influence, duress or coercion, will always be unreasonable and prohibited under s 17BA(2).

674. Section 17BA(2) applies even if the employee refuses or fails to make the payment that was required of them.

675. It is not intended that this provision prevent legitimate, mutual negotiations for overpayments to be paid back by an employee to their employer in lieu of legal proceedings being taken against the employee.

676. Section 17BA(3) provides that a prospective employer must not directly or indirectly require another person (the prospective employee) to spend, or pay to the prospective employer or any other person, an amount of the prospective employee's money if:

    a) the requirement is in connection with employment or potential employment of the prospective employee by the prospective employer; and

    b) the requirement is unreasonable in the circumstances; and

    c) in the case of a payment, the payment is directly or indirectly for the benefit of the prospective employer or a party related to the prospective employer.

677. For example, a requirement for a person to pay a prospective employer an amount of money in order to secure employment would be captured by s 17BA(3).

[99] See, for example, *Fair Work Ombudsman v Xia Jung Qi Pty Ltd & Anor* [2019] FCCA 83; and *Fair Work Ombudsman v Abella Travel Pty Ltd & Anor* [2019] FCCA 3262. These decisions relate to contraventions of s 325 of the FW Act on which s 17BA is based.

678. Section 17BA(5) provides that a contravention of s 17BA(2) or (3) is a civil penalty provision for the purposes of s 83E of the IR Act.

679. Section 17BA(6) provides that, in proceedings under s 83E of the IR Act for a contravention of s 17BA(2), the IMC may, as an alternative, determine that a contravention of an entitlement provision has occurred for the purposes of s 83 of the IR Act. For example, an employer's requirement for an employee to pay the employer an amount that is payable to the employee for work performed may result in the underpayment of the employee's minimum wage. In proceedings under s 83E for a contravention of s 17BA(2), the IMC may instead determine that there has been a contravention of an entitlement provision for the purposes of s 83. The IMC may then, under s 83A, also order that the employer pay the employee the amount that has been underpaid.

680. Section 17BA(7) provides that, if the IMC determines that an employer has contravened s 17BA(2) or (3), the court may order the employer to pay to the employee or prospective employee compensation for any loss or injury suffered as a result of the contravention. The loss of a part of the employee's money due to an employer's 'cash back' requirement may then attract an order for compensation.

681. Section 17BA(8) provides that the IMC may make an order under s 17BA(7) in addition to imposing a penalty under s 83E of the IR Act.

Clause 102 – Section 18 amended

682. Clause 102 amends existing s 18 to specify that, when an employee's hours have varied over their period of employment, for the purposes of payment for a period of leave, the employee's hours are averaged over the shorter of the 52 weeks immediately before the leave is taken, or the employee's period of employment. This amendment accommodates employees who have yet to complete 52 weeks of employment. In practical terms, this will not affect an employee's entitlement as their hours currently need to be averaged and would logically need to be averaged over the employee's period of employment if their period of employment was less than 52 weeks.

Clause 103 – Part 6 deleted

683. Clause 103 deletes Part 6 of the MCE Act – Keeping of records. Employment record keeping requirements for all employers will be provided for in amended Part II Division 2F of the IR Act.

Clause 104 – Part 8 inserted

684. Clause 104 inserts 'Part 8 – Transitional Provisions for *Industrial Relations Legislation Amendment Act 2020'* comprising new s 48, s 49, s 50 and s 51.

Section 48 – Terms used: commencement day

685. Section 48 provides that commencement day means the day on which s 90 of the *Industrial Relations Legislation Amendment Act 2020* comes into operation.

Section 49 – Employees remunerated wholly by percentage reward or at piece rates

686. Section 49 applies to an employee:

a) whose services were, immediately before commencement day, remunerated wholly:

(i) by commission or percentage reward; or

(ii) at piece rates;

and

b) in relation to whom an industrial instrument or contract of employment did not specify the rate of pay the employee was entitled to when on a period of leave.

687. Existing s 18(1) of the MCE Act provides that, where leave is paid leave, payment is to be made at the rate the employee would have received as their payment at the time the leave is taken under the employer-employee agreement, award or contract of employment.

688. Section 49(2) provides that, for the purpose of s 18 of the MCE Act, the employee's contract of employment is, on and after commencement day, taken to specify the employee's weekly rate of pay as the minimum weekly rate of pay applicable under s 12, s 13 or s 14.

689. This transitional provision is necessary as currently employees who are remunerated wholly by commission, percentage reward or piece rates are not employees for the purposes of the MCE Act. With the amendment to the definition of employee in s 3(1), these employees will be covered by the MCE Act and therefore entitled to its leave entitlements. Section 18 will therefore apply. Section 49(2) is intended to ensure that these employees have a minimum rate of pay for paid leave, in the absence of an entitlement in an industrial instrument or contract of employment.

Section 50 – Employees with disabilities

690. Section 50 applies to a person who, immediately before commencement day, was an employee with a disability whose contract of employment was (and is) not governed by an industrial instrument. The term 'employee with a disability' has its usual and ordinary meaning.

691. This is a transitional provision that applies to an employee with a disability who is being paid a rate of pay that is less than the minimum wage, agreed to with their employer in accordance with existing s 9. The transitional provision enables the employer to continue to lawfully pay the agreed weekly wage whilst the employee is assessed under the SWS, provided this wage is not less than the minimum amount payable per week referred in s 17(2). The transitional period is a maximum of six months. If an employee is not assessed, or the assessment is not completed within this period, the employee must be paid in accordance with s 10.

692. Section 50(3) provides that, during the assessment period, the employee is entitled to be paid, for each week worked by the employee, the higher of the following:

    a) the employee's weekly wage immediately before commencement day;

    b) the amount referred to in s 17(2).

693. 'Assessment period' means a period starting on commencement day and ending on the earlier of the following:

    a) the day on which an assessment of the employee's productive capacity is completed for the purposes of determining the employee's minimum rate of pay under s 17(3)(a);

    b) the day that is 6 months after commencement day.

694. 'Assessment' means an assessment of an employee's productive capacity under the SWS as defined in s 15 of the MCE Act.

695. Section 50(4) provides that, if the employee's assessment is completed, and the employee's wage is determined within the assessment period, s 50(3) ceases to apply to the employee on the day of completion. The intention is that the employee must not only have been assessed, but they must also have had their wage determined.

696. Section 50(5) provides that, if the employee is not assessed, or the employee's assessment is not completed, within the assessment period, then on and after the expiry of the assessment period the employee is entitled to be paid in accordance with s 10(1) until such time as the employee's productive capacity is determined, on an assessment, to be reduced by a disability.

Section 51 – 'Under rate employee' provisions in awards

697. Section 51 applies to an employee who was, immediately before commencement day, entitled to be paid under an 'under rate employee provision' by reason of infirmity or old age. An 'under rate employee provision' means a provision in an award to the effect that an employee who by reason of old age or infirmity is unable to earn the minimum wage may be paid a lesser wage as is agreed in writing between a union and the employer.

698. Section 51(2) provides that, on and from commencement day, each under rate employee provision is of no effect to the extent to which it applies to an employee who by reason of infirmity or old age is unable to earn the minimum wage.

699. Section 51(3) provides that, during the assessment period, an under rate employee is entitled to be paid, for each week worked by the employee, the higher of the following amounts:

    a) the employee's pre-commencement day wage;

    b) the amount referred to in s 17(2) of the MCE Act.

700. 'Assessment' means an assessment of the employee's productive capacity under the SWS or a SWIIP, as those terms are defined in s 15. 'Assessment period' means the period ending six months after the commencement day. 'Pre-commencement day wage' means the weekly wage that an under rate employee was entitled to be paid immediately before commencement day.

701. Section 51(4) provides that, if an employee's assessment is completed, and the employee's wage is determined within the assessment period, s 51(3) ceases to apply to the employee on the day of completion.

702. Section 51(5) provides that, if the employee is not assessed, or the employee's assessment is not completed, within the assessment period, then on and after the expiry of the assessment period, the employee is entitled to be paid in accordance with the rate of pay applicable under the award until such time as the employee's productive capacity is determined, on an assessment, to be reduced by a disability.

703. This transitional provision enables an employer to continue to lawfully pay an under rate employee rate of pay to an employee who is being paid the lesser rate **due to infirmity**, whilst the employee is assessed under the SWS or a SWIIP, provided this rate is not less than the minimum amount payable per week referred in s 17(2). The transitional period is a maximum of six months. If an employee is not assessed or the assessment is not completed within this period, the employee must be paid in accordance with the applicable rate of pay in the award.

704. The capacity to pay an employee a reduced wage **due to old age** is discriminatory. The transitional provisions do not apply to these employees and so an employer will be unable to continue to lawfully pay them a lesser wage on and from commencement day. Instead, an employer will be required to pay the employee in accordance with the applicable minimum rate of pay in the award. However, if such employee has a disability, the employee may be assessed under the SWS or a SWIIP.

Clause 105 – Various references to gender removed

705. Clause 105 modernises the MCE Act by removing gender specific references.