EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 112

Issued by the authority of the Minister for Employment and Workplace Relations.

Fair Work Act 2009

Fair Work Regulations 2009

The *Fair Work Act 2009* (the Act) will replace the *Workplace Relations Act 1996* and will govern federal workplace relations.

The purpose of the *Fair Work Regulations 2009* is to deal with matters of detail within the framework established by the Act. The Regulations are divided into six Chapters.

Chapter 1 deals with preliminary matters, such as the name of the regulations, definitions and the commencement and application provisions.

Chapter 2 contains provisions related to terms and conditions of employment. The key provisions of this chapter:

- relate to the Fair Work Information Statement (Division 12 of Part 2-2);
- set out matters in relation to enterprise agreements, as well as provisions on the notice of representation rights and the flexibility and consultation model clauses for use in enterprise agreements (Part 2-4); and
- deal with deductions from wages, and the high income threshold (Part 2-9).

Chapter 3 specifies matters related to general protections (Part 3-1), provides detail in relation to unfair dismissal (Part 3-2) and sets out matters relating to industrial action (Part 3-3) and right of entry (Part 3-4). Chapter 3 also details arrangements in relation to employee records and pay slips (Part 3-6).

Chapter 4 deals with the civil remedies regime established by the Act, as well as provisions relating to the procedure for small claims and in relation to unclaimed money.

Chapter 5 relates to Fair Work Australia and the Office of the Fair Work Ombudsman.

Chapter 6 sets out a number of matters including a model term about dealing with disputes, the extension of National Employment Standards to non-national system employees, additional provisions relating to termination of employment, and provisions related to public sector employment.

The National Workplace Relations Consultative Council's (NWRCC) Committee on Industrial Legislation (COIL) was consulted on the regulations, as was the High Level Officials Group (HLOG).

The HLOG consists of officials from the Australian Government and each state and territory. It was established at the meeting of the Workplace Relations Ministers'

Council on 1 February 2008 to facilitate collaboration on the development of the national workplace relations system for the private sector.

A Regulation Impact Statement (RIS) was prepared for the *Fair Work Act 2009*, therefore a separate RIS has not been prepared for these regulations.

Details of the Regulations are in the Attachment.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commenced on 1 July 2009, except for Parts 2-2 and 6-3 which will commence on 1 January 2010.

FAIR WORK REGULATIONS 2009

Chapter 1 – Introduction

Part 1-1 – Introduction

Division 1 – Preliminary

Regulation 1.01 – Name of Regulations

1. This regulation sets out the name of the Regulations as the *Fair Work Regulations 2009*.

Regulation 1.02 – Commencement

2. This regulation provides that these Regulations commence on 1 July 2009, with the exception of Parts 2-2 and 6-3 which commence on 1 January 2010.

Part 1-2 – Definitions

Division 1 – Introduction

Regulation 1.03 – Definitions

3. This regulation defines terms used in these Regulations, these are:

- "Act". This refers to the *Fair Work Act 2009*.
- "quarter". This means a period of 3 months beginning on 1 January, 1 April, 1 June or 1 October in a year.

Division 2 – The Dictionary

Regulation 1.04 – Meaning of *designated outworker term*

4. Section 12 of the Act defines a designated outworker term as a term of a modern award, enterprise agreement, workplace determination or other instrument that deals with specified listed matters that relate to outworkers in the textile, clothing and footwear industry. A designated outworker term in a modern award may not be displaced by an enterprise agreement, ensuring that important industry specific award protection is not lost.

5. Paragraph (f) of the definition allows additional types of terms to be prescribed.

6. This regulation prescribes additional types of terms as designated outworker terms. These are:

- a term that deals with the filing of records about work to which outworker terms of a modern award apply;
- a term that deals with the provision of materials;
- a term that is incidental to another designated outworker term. An example of such a term would be a term dealing with the observance of the award.

Regulation 1.05 – Meaning of *eligible State or Territory court*

7. This regulation provides that the Industrial Court of New South Wales (the ICNSW) is an eligible State or Territory court for the purposes of the Act. This will enable the ICNSW to entertain applications for orders in relation to contraventions (or proposed contraventions) of civil remedy provisions.

Regulation 1.06 – Meaning of *prescribed State industrial authority*

8. This regulation provides that the Industrial Relations Commission of New South Wales, the Queensland Industrial Relations Commission, the Western Australian Industrial Relations Commission, the Industrial Relations Commission of South Australia and the Tasmanian Industrial Commission are prescribed State industrial authorities for the purposes of the Act. Section 631 of the Act provides for concurrent appointments to Fair Work Australia (FWA) and a prescribed State industrial authority.

Regulation 1.07 – Meaning of *serious misconduct*

9. Section 12 of the Act provides that the expression serious misconduct has the meaning prescribed by the Regulations. Regulation 1.07 provides that serious misconduct has its ordinary meaning. The regulation also identifies particular kinds of conduct that will amount to serious misconduct for the purposes of the Act. These include:

- wilful, or deliberate, behaviour that is inconsistent with the continuation of the contract of employment; and
- conduct that causes imminent and serious risk to health or safety or to business reputation, viability or profitability.

10. Such conduct may include theft, fraud, assault or intoxication (subject to the employee demonstrating that the conduct did not make employment during the period unreasonable).

11. The meaning of serious misconduct under regulation 1.07 is the same as the meaning it has under regulation 12.10, Part 12, Chapter 2 of the *Workplace Relations Regulations 2006*.

Regulation 1.08 – Meaning of *TCF award*

12. Section 12 of the Act defines a TCF award as an instrument prescribed by the Regulations for the purposes of that definition. This regulation prescribes the following instruments for the purposes of the definition of TCF award in section 12 of the Act:

- The Textile Industry Award 2000; and
- The Textile, Clothing, Footwear and Associated Industries Award 2010.

13. The Textile, Clothing, Footwear and Associated Industries Award 2010 is a modern award that will replace the Textile Industry Award 2000 when it commences on 1 January 2010.

Division 4 – Other definitions

Regulation 1.09 – Meaning of *base rate of pay* – pieceworkers (national system employee)

14. Section 16 of the Act defines the expression base rate of pay. Subsection 16(1) excludes incentive-based payments and bonuses, loadings, monetary allowances, overtime and penalty rates, and other separately identifiable amounts.

15. An employee's base rate of pay is important for the purpose of calculating many entitlements under the National Employment Standards (NES), which commences operation on 1 January 2010.

16. Subsection 16(2) makes specific provision for identifying the base rate of pay for NES purposes for employees who are pieceworkers (who are paid by reference to output or task, and who will not otherwise have a base rate of pay within the meaning of subsection 16(1)).

- Subsection 16(2) provides that an employee's base rate of pay for the purposes of the NES is the rate identified as such in the relevant modern award or enterprise agreement.
- The Regulations may prescribe, or provide for the determination of the base rate of pay for an award/agreement free employee.

17. Regulation 1.09 establishes a formula for calculating the hourly base rate of pay of an award/agreement free pieceworker for the purposes of the NES. The base rate of pay for such an employee is the average of the amount earned over a previous relevant period. This is calculated by dividing the amount the employee earned over the 'relevant period' by the number of hours worked during that period. The relevant period is either 12 months or, if the employee has been employed for a shorter period, that shorter period.

Regulation 1.10 – Meaning of *base rate of pay* – pieceworkers (enterprise agreement)

18. Section 206 of the Act ensures that an employee covered by an enterprise agreement cannot be paid less than the base rate of pay under an applicable modern award or, in the case of award/agreement free employees, the National Minimum Wage Order.

19. This regulation prescribes the base rate of pay for a pieceworker covered by a modern award. (The National Minimum Wage Order will set minimum rates of pay for award/agreement free employees.)

20. The base rate of pay for such an employee is the rate set out in the award for the calculation of the employee's NES entitlements.

21. Note: The provisions of the FW Act relating to modern awards, minimum wages and the NES commence on 1 January 2010.

Regulation 1.11 – Meaning of ordinary hours of work for award/agreement free employees

22. Many entitlements under the NES (which commences operation on 1 January 2010) are calculated by reference to an employee's ordinary hours of work; for example, annual leave and personal/carer's leave accrue according to an employee's ordinary hours of work.

23. Section 20 defines the expression ordinary hours of work for award/agreement free employees. (The Act does not define the concept of an employee's ordinary hours of work for those employees to whom a modern award or enterprise agreement applies as these will be provided for in the relevant instrument.)

24. The ordinary hours of work for an award/agreement free employee will generally be the hours agreed as such between the employee and his or her employer. However, where there is no such agreement the Act provides, as a default:

- 38 hours for a full-time employee; or
- the lesser of 38 hours and the employee's usual weekly hours of work for an employee who is not a full-time employee.

25. Where an employee who is not full time does not have usual hours, the Regulations may prescribe a method for determining usual hours. This regulation provides an averaging mechanism for determining the usual hours of such an employee, based on the number of hours worked by the employee in the last four completed weeks. If the employee has worked for the employer for less than 4 weeks, the average is calculated based on the number of hours worked during the completed weeks the employee has worked for the employer.

Regulation 1.12 – Meaning of *pieceworker*

26. This regulation prescribes a class of award/agreement free employees as pieceworkers. This is relevant to the operation of regulation 1.09 (which provides for

the calculation of the base rate of pay for such employees for the purposes of the NES).

27. The regulation prescribes award/agreement free employees who:

- are paid a rate set by reference to a quantifiable output or task; and
- are not paid by reference to time worked.

Part 1-3 – Application of the Act

Division 2 – Interaction with State and Territory laws

28. This Division sets out provisions about the interaction of the Act, and instruments made under the Act, with State and Territory laws.

Regulation 1.13 – State and Territory laws that are not excluded by section 26 of the Act – prescribed laws

29. Section 26 of the Act covers the field and excludes State or Territory industrial laws so far as they would otherwise apply in relation to national system employers and national system employees.

30. However, section 27 'saves' certain State and Territory laws that might otherwise be excluded, by making clear that they are not part of the field covered by section 26. Paragraph 27(1)(b) of the Act allows regulations to prescribe additional State and Territory laws that are saved.

Laws dealing with training arrangements

31. State and Territory laws dealing with training arrangements are saved under paragraphs 27(1)(c) and 27(2)(f) of the Act, but not to the extent that they deal with terms and conditions of employment that are provided for by the NES, or may be included in a modern award. Training arrangement is a defined term in section 12 of the Act.

32. This regulation clarifies that State or Territory laws are saved if they deal with:

- the suspension, cancellation or termination of a training contract (as distinct from a contract of employment) that is entered into as part of a training arrangement; or
- a probationary period under a training arrangement (but not a probationary period of employment).

Laws about making disclosures and complaints

33. This regulation preserves the operation of State and Territory laws that provide protection for employees who disclose information or make complaints under

State or Territory laws dealing with whistleblowers, environmental protection, health services, transport safety or operations or the supply of essential services.

34. Examples of laws saved under this regulation include:

- subparagraph 73(2)(f)(i) of the Queensland *Industrial Relations Act 1996*, which provides relief against termination of employment as a result of making a public interest disclosure under the Queensland *Whistleblowers Protection Act 1994*;

- subparagraph 73(2)(f)(iii) of the Queensland *Industrial Relations Act 1996*, which provides relief against termination of employment as a result of making a complaint under the Queensland *Health Quality and Complaints Commission Act 2006*;

- paragraph 210(i) of the New South Wales *Industrial Relations Act 1996*, which provides protection against victimisation for employees who inform of an alleged breach of the New South Wales *Protection of the Environment Operations Act 1987*;

- paragraphs 210(ia) and (ib) of the New South Wales *Industrial Relations Act 1996*, which provide protection against victimisation for employees who inform or give evidence in relation to notifiable occurrences as defined in the New South Wales *Rail Safety Act 2008*, or report about matters of safety or reliability of railway, bus or ferry operations to the Ministry of Transport; and

- paragraph 210(k) of the New South Wales *Industrial Relations Act 1996*, which provides protection against victimisation for employees who assist the New South Wales Independent Pricing and Regulatory Tribunal in the exercise of functions under the New South Wales *Electricity Supply Act 1995*.

35. State and Territory laws that provide protection in relation to disclosures or complaints under occupational health and safety laws are saved under other provisions of the Act, which save laws that deal with rights or remedies incidental to laws dealing with a non excluded matter (see paragraphs 27(1)(c), 27(2)(c) and subparagraph 27(1)(d)(iii) of the Act).

Regulation 1.14 – Act excludes prescribed State and Territory laws

36. Subsection 28(1) of the Act authorises the Regulations to exclude the application of additional State or Territory laws in relation to national system employers and national system employees, even if these laws would be otherwise 'saved' because of section 27 of the Act.

Child labour laws

37. State and Territory laws dealing with child labour are saved under paragraphs 27(1)(c) and 27(2)(e) of the Act. This regulation provides that State or Territory laws about child labour are excluded to the extent that they deal with terms and conditions of employment that are provided for by the NES, or that may be included in a modern award or in an enterprise agreement under section 55 of the Act.

38. However, the regulation also makes clear that State or Territory laws that deal with times during which and periods for which children may be employed (such as maximum periods of employment, prohibitions on working after a certain time, and minimum rest periods) are not excluded.

Laws dealing with training arrangements

39. Section 26 of the Act excludes the operation of a State or Territory industrial law, which is defined to include both:

- a *general State industrial law* (that is, one of the named State industrial relations Acts set out in subsection 26(3)); and
- a State or Territory law that *applies to employment generally* and has a purpose of regulating workplace relations or other matters.

40. Section 27 of the Act saves a State or Territory industrial law otherwise excluded by section 26 that deals with training arrangements, but not to the extent that it deals with terms and conditions of employment provided for by the NES or that may be included in a modern award (see paragraphs 27(1)(c) and 27(2)(f) of the Act).

41. This regulation excludes a State or Territory law (whether or not it applies to employment generally) that deals with training arrangements, to the extent that the law deals with terms and conditions of employment provided for by the NES, or that may be included in a modern award, or that may be included in an enterprise agreement under section 55 of the Act.

Contracts Review Act 1980

42. This regulation also clarifies that the *Contracts Review Act 1980* of New South Wales is not saved in its operation in relation to national system employers and national system employees, to the extent that it relates to contracts of employment. The *Contracts Review Act 1980* deals with the review of contracts that a court finds to be ‘unjust’, which is defined to include ‘unconscionable, harsh or oppressive’. This is consistent with the exclusion of State or Territory laws dealing with unfair contracts (see paragraph 26(2)(e) of the Act).

Regulation 1.15 – Interaction of modern awards and enterprise agreements with State and Territory laws

43. Under subsection 29(1) of the Act modern awards and enterprise agreements generally prevail over State or Territory laws to the extent of any inconsistency, but under subsection 29(2) modern awards and enterprise agreements are subject to any of

the State or Territory laws that are saved by section 27 (including any State or Territory laws prescribed by the Regulations as laws to which section 26 does not apply). Subsection 29(3) of the Act permits the Regulations to prescribe State and Territory laws to which modern awards and enterprise agreements are not subject.

44. This regulation provides that modern awards and enterprise agreements are not subject to State or Territory laws that are excluded under regulation 1.14 (see discussion above). This ensures that rules about the interaction of Act instruments with State or Territory laws are consistent with the general rules about interaction between the Act and State or Territory laws. These Regulations provide that modern awards and enterprise agreements are not subject to State or Territory laws dealing with:

- child labour to the extent that they deal with terms and conditions of employment that are provided for in the NES, or may be included in a modern award or in an enterprise agreement under section 55 of the Act (other than laws dealing with the times during which and periods for which children may be employed);

- training arrangements to the extent that they deal with terms and conditions of employment that are provided in the NES, or may be included in a modern award or in an enterprise agreement under section 55 of the Act; and

- the *Contracts Review Act 1980* of New South Wales to the extent that it relates to contracts of employment.

Division 4 – Miscellaneous

Regulation 1.16 – Interaction between fair work instruments and public sector employment laws

45. This regulation prescribes certain public sector laws of the Northern Territory and the Australian Capital Territory for the purposes of section 40 of the Act.

46. Section 40 of the Act provides that public sector employment laws (which include Territory laws, and instruments made under those laws, dealing with public sector employment) prevail over fair work instruments unless regulations prescribe to the contrary. The effect of the regulation is to give priority to Commonwealth industrial instruments over Territory public sector laws, as was the case under the *Workplace Relations Act 1996*.

Chapter 2 – Terms and conditions of employment

Part 2-2 – The National Employment Standards

Division 12 – Fair Work Information Statements

Regulation 2.01 – Fair Work Ombudsman to prepare and publish Fair Work Information Statement – content

47. Section 124 requires the Fair Work Ombudsman to prepare a Fair Work Information Statement. Subsection 124(2) specifies matters that must be addressed in the Statement. Regulations may prescribe additional matters (subsection 124(4)).

48. This regulation prescribes as an additional matter to be included in the Statement an explanation of the effects of transfer of business on a transferring employee's entitlements.

49. This regulation comes into operation on the day the NES commences (this is the effect of regulation 1.02).

Regulation 2.02 – Fair Work Ombudsman to prepare and publish Fair Work Information Statement – manner of giving Statement to employees

50. Section 125 requires an employer to give an employee the Fair Work Information Statement before, or as soon as practicable after, they commence employment.

51. Subsection 124(4) provides that regulations may prescribe matters relating to the manner in which employers may give the Statement to employees.

52. This regulation sets out a range of ways in which the Statement may be provided – both electronically and in hard copy. The list is non-exhaustive and does not preclude the Statement being provided in other ways.

53. This regulation comes into operation on the day the NES commences (this is the effect of regulation 1.02).

Division 13 – Miscellaneous

Regulation 2.03 – What can be agreed to etc. in relation to award/agreement free employees

54. Paragraph 129(a) of the Act enables regulations to be made to permit employers and award/agreement free employees to agree on matters that would or might otherwise be contrary to Part 2-2.

55. Regulation 2.03 will enable employers and award/agreement free employees to agree to the provision of extra annual leave or personal/carer's leave in exchange for foregoing an equivalent amount of pay. This would allow, for example,

arrangements under which an employer and award/agreement free employee agree on the employee taking 8 weeks leave (rather than 4 weeks) on half pay.

56. This regulation comes into operation on the day the NES commences (this is the effect of regulation 1.02).

Part 2-4 – Enterprise agreements

Division 3 – Bargaining and representation during bargaining

Regulation 2.04 – Notice of employee representational rights – how notice is given

57. Section 173 of the Act requires an employer to take reasonable steps to give each employee who will be covered by a proposed enterprise agreement a notice of their right to be represented in collective bargaining for that agreement by a bargaining representative.

58. Regulation 2.04 prescribes how the employer may give the notice to the employee. Subregulation 2.04(8) makes clear that the methods of giving notice prescribed in this regulation are not exhaustive. In some circumstances, "reasonable steps" may necessitate the giving of a notice using more than one method for the respective employees.

Regulation 2.05 – Notice of employee representational rights – prescribed form

59. Section 174 of the Act sets out the content that is required to be included in the notice of employee representational rights and that the Regulations may prescribe the form of this notice.

60. When it comes into force, item 2 of Schedule 13 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* will have the effect that if an employee is currently covered by an individual agreement-based transitional instrument (for example, Australian workplace agreement, individual transitional employment agreement or preserved individual State agreement), the notice must also specify that the employee may only appoint a bargaining representative if the nominal expiry date of their existing agreement has passed or they have entered into a conditional termination of the agreement.

61. Regulation 2.05 provides that the notice is required to be in the form prescribed in Schedule 2.1. This prescribed notice covers both the requirements specified above and includes, amongst other things, an explanation to the employees who will be covered by the enterprise agreement of their right to appoint a bargaining representative and describes the circumstances when an employee organisation will be taken to be an employee's bargaining representative.

Regulation 2.06 – Appointment of bargaining representatives – independence

62. Subsection 178(3) of the Act states that the Regulations may prescribe matters relating to the qualifications or appointment of bargaining representatives. This

regulation prescribes that a bargaining representative of an employee must be free from control by, or improper influence from the employee's employer or another bargaining representative. This regulation would not, for example, prevent an employer from allowing an employee time off to enable the employee to represent his or her colleagues.

Division 4 – Approval of enterprise agreements

Regulation 2.07 – FWA may approve an enterprise agreement with undertakings – requirements for signing undertaking

Regulation 2.10 – FWA may approve variation of enterprise agreement with undertaking – requirements for signing undertaking for variation

63. Section 190 of the Act permits Fair Work Australia (FWA) to approve an enterprise agreement with undertakings provided by the employer. Section 212 of the Act permits FWA to approve variations of enterprise agreements with undertakings. Subsections 190(5) and 212(4) require undertakings to meet any requirement relating to the signing of undertakings that are prescribed by the Regulations.

64. Regulations 2.07 and 2.10 respectively provide that a written undertaking relating to an enterprise agreement or a variation to an enterprise agreement must be signed by each employer covered by the agreement who gave the undertaking.

65. This would, for example, allow FWA to establish which employers have made the undertaking in cases where the agreement covers two or more employers.

Regulation 2.08 – Model flexibility term for enterprise agreement

66. Regulation 2.08 provides that the model flexibility term for enterprise agreements is set out in Schedule 2.2 to the Regulations.

67. Section 202 of the Act requires an enterprise agreement to contain a flexibility term which enables an employee and his or her employer to agree to an arrangement (an individual flexibility arrangement or IFA) varying the effect of the agreement in relation to the employee and employer in order to meet the genuine needs of the employee and employer.

68. The flexibility term must meet the requirements set out in section 203 of the Act. These include requirements relating to: content; genuine agreement; the requirement than an employee that enters into an IFA would be better off overall under it in comparison to the enterprise agreement; approval requirements; and termination of IFAs.

69. Where an enterprise agreement does not contain a flexibility term that complies with the requirements under section 203, the model flexibility term that is prescribed in Schedule 2.2 to the Regulations is taken to be a term of the agreement (see subsection 202(4) of the Act). If FWA approves an enterprise agreement and the model flexibility term is taken to be a term of the agreement, it must note in its decision to approve the agreement that the model flexibility term is included in the agreement (subsection 201(1) of the Act).

Regulation 2.09 – Model consultation term for enterprise agreement

70. Regulation 2.09 provides that the model consultation term for enterprise agreements is set out in Schedule 2.3 to the Regulations.

71. Subsection 205(1) of the Act requires all enterprise agreements to include a term which requires the employer to which the agreement applies to consult the employees to whom the agreement applies about major workplace changes that are likely to have a significant effect on those employees. The term must also allow for the representation of those employees during such consultation.

72. Where an enterprise agreement does not include such a consultation term, the model consultation term in Schedule 2.3 is taken to be a term of the agreement (see subsection 205(2) of the Act). If the model consultation term is taken to be a term of the agreement, FWA must note in its decision to approve the agreement that the agreement contains the model term (subsection 201(1) of the Act).

Division 8 – FWA's general role in facilitating bargaining

Regulation 2.11 – What a bargaining order must specify – bargaining order for reinstatement of employee

73. FWA has power to make orders (bargaining orders) to ensure compliance with the good faith bargaining requirements set out in subsection 228(1) of the Act. Paragraph 228(1)(e) of the Act sets out the requirement to 'refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining'.

74. The kinds of bargaining orders that FWA may make are described in section 231 of the Act. The orders that FWA may make include an order for the reinstatement of an employee whose employment has been terminated if the termination constitutes, or relates to, a failure by a bargaining representative to meet the good faith bargaining requirement in paragraph 228(1)(e).

75. Subsection 231(3) states that the Regulations may provide for FWA to take action and make orders in connection with, and to deal with matters relating to, a bargaining order for the reinstatement of an employee.

76. Subregulation 2.11(2) provides that FWA may make the following orders in relation to a bargaining order for reinstatement of an employee:

- an order to reappoint the employee to the position in which he or she was employed immediately before the termination of his or her employment;
- an order to appoint the employee to another position for which the terms and conditions of employment are no less favourable than those under which the employee was employed immediately before his or her termination;
- an order which FWA thinks appropriate to maintain the continuity of the employee's employment; and

- an order that the employer pay the employee an amount for the remuneration lost or likely to have been lost, because of the termination.

Part 2-9 – Other terms and conditions of employment

Division 2 – Payment of Wages

Regulation 2.12 – Certain terms have no effect – reasonable deductions

77. Section 323 of the Act provides that wages must be paid in full, other than as permitted by section 324 (which provides circumstances in which an employer may deduct an amount from an amount payable to an employee).

78. Among other circumstances, section 324 allows a deduction to be made if:

- it is principally for the employee's benefit, and is in writing; or
- it is authorised in accordance with an enterprise agreement; or
- the deduction is authorised by or under a modern award.

79. Subsection 326(1) provides that a term of a modern award, enterprise agreement or contract of employment that permits a deduction from wages, or requires a payment to be made by an employee to the employer or another person, is of no effect in certain circumstances. One of the factors that is relevant in the assessment of whether a provision that requires or permits deduction is ineffective is whether the deduction is unreasonable in the circumstances.

80. Subsection 326 (2) allows regulations to be made prescribing circumstances in which such a deduction or payment is or is not reasonable.

81. This regulation prescribes a number of circumstances in which a deduction permitted by a term of a modern award, enterprise agreement or contract of employment is reasonable. These are:

- deductions made for goods or services provided in the ordinary course of an employer's business, provided that the goods or services are provided to the employee on terms not less beneficial than are available to members of the general public
    - examples of such deductions are deductions of health insurance fees by an employer that is a health fund, and deductions for loan repayments by an employer who is a financial institution;
- a deduction for the purpose of recovering costs directly incurred by an employer as a result of the voluntary private use of the employer's property by an employee

- examples of such costs include: the cost of items purchased on a corporate credit card for personal use by an employee and the cost of personal calls on a company mobile phone.

82. The fact that regulations have been made prescribing certain terms of a modern award, enterprise agreement or contract of employment as being reasonable does not, of course, mean that other types of terms may not also be reasonable in the circumstances.

Division 3 – Guarantee of annual earning

Regulation 2.13 – High income threshold

83. Section 333 provides that the high income threshold is the amount prescribed by, or worked out in the manner prescribed by, the Regulations. This regulation provides for the calculation of the high income threshold on an annual basis.

84. The relevance of the high income threshold is that:

- from 1 July 2009, it determines whether certain employees are protected from unfair dismissal – see paragraph 382(b)(iii) of the Act;

- from 1 January 2010, a modern award does not apply to an employee with a guarantee of annual earnings above the high income threshold (section 47 and Division 3 of Part 2-9 of the Act).

85. Subregulation (2) provides for the calculation of the amount that applies from 1 July 2009. The amount is $100,000 indexed from 27 August 2007 (when the policy was announced). Indexation is based on average weekly ordinary time earnings, seasonally adjusted for full-time adult employees. The figure that results from the indexation process is rounded to the nearest $100.

86. The figure that will apply from 1 July 2009, as a result of applying this formula, is $108,300. This figure will apply until 30 June 2010.

87. A new figure is calculated for each year starting on 1 July. The Regulations ensure that the high income threshold cannot decrease as a result of this indexation process.

Chapter 3 – Rights and responsibilities of employee, employers organisations etc

Part 3-1 – General protections

Division 5 – Other protections

Regulation 3.01 – Temporary absence – illness or injury

88. Regulation 3.01 prescribes the kinds of illness or injury for the purposes of the protection against dismissal in section 352 of the Act. The effect of regulation 3.01 and section 352 is that an employer must not terminate an employee's employment for the reason that, or for reasons including that, the employee is temporarily absent from work because of illness or injury of a kind prescribed by regulation 3.01.

89. An illness or injury is of a prescribed kind if:

- a medical certificate or statutory declaration is provided by the employee within 24 hours after the commencement of the absence (or within such longer period as is reasonable in the circumstances); or
- the employee complies with the terms of a workplace instrument which requires the employee to notify the employer of the absence and to substantiate the reasons for absence; or
- the employee complies with the evidentiary requirements in paragraph 107(3)(a) for taking personal/carer's leave for a personal illness or injury.

90. An illness or injury is not of a prescribed kind if the employee is not on paid personal/carer's leave (however described) for their illness or injury and either:

- the absence extends for more than 3 months; or
- the total absences within a 12 month period (based on a single or separate illnesses or injuries) extend for more than 3 months; and

the employee is not on paid personal/carer's leave (however described) for their illness or injury for the duration of the absence.

91. Subregulation 3.01(6) specifically provides that a period of paid personal/carer's leave (however described) does not include a period of absence on paid workers' compensation. This provision has been included to clarify that the protection is not intended to apply to employees on workers' compensation. Specific protections in State and Territory workers compensation legislation that prohibit a person being dismissed because they are on workers compensation (including any incidental remedies) are preserved by section 27 the Act. The reference to "personal/carer's leave" is to reflect the language in the NES, and is intended to encompass leave of this kind that is described differently – for example, "sick leave".

Division 8 – Compliance

Subdivision A – Contraventions involving dismissal

Regulation 3.02 – Application fees

92. Regulation 3.02 prescribes the application fees that must accompany an application to FWA to deal with a dispute involving dismissal under section 365 of the Act. Subregulation 3.02(2) provides that the fee is $59.50 for applications made in the financial year commencing 1 July 2009. The method for indexing the fee annually is set out in subregulations 3.02(3) – (6).

93. Subregulation 3.02(7) provides that if FWA is satisfied that the person making an application will suffer serious hardship if the person is required to pay the fee, no fee is payable for making the application.

94. Subregulation 3.02(8) sets out the circumstances in which the application fee will be refunded. The fee must be refunded where the application is subsequently discontinued (see section 588 of the Act) and at that time either:

- the application has not yet been listed for conference; or
- if the application has been listed for conference on a specified date or dates – the discontinuance occurs at least 2 days before that date or the earlier of those dates.

Subdivision B – Other contraventions

Regulation 3.03 – Application fees

95. Regulation 3.03 prescribes the application fee that must accompany an application to FWA to deal with a dispute not involving dismissal under section 372 of the Act. Subregulation 3.03(2) provides that the fee is $59.50 for applications made in the financial year commencing 1 July 2009. The method for indexing the fee annually is set out in subregulations 3.03(3) – (6).

96. Regulation 3.03(7) provides that if FWA is satisfied that the person making an application will suffer serious hardship if the person is required to pay the fee, no fee is payable for making the application.

97. Subregulation 3.03(8) sets out the circumstances in which the application fee will be refunded. The fee must be refunded where the application is subsequently discontinued (see section 588 of the Act) and at that time either:

- the application has not yet been listed for conference; or
- if the application has been listed for conference on a specified date or dates – the discontinuance occurs at least 2 days before that date or the earlier of those dates.

Subdivision C – Conference costs

Regulation 3.04 – Schedule of costs

98. Regulation 3.04 provides that for section 376 of the Act, the schedule of costs set out in Schedule 3.1 is prescribed.

99. This regulation relates to costs orders against lawyers and paid agents in relation to General Protections disputes.

100. This regulation is made pursuant to section 610 of the Act.

Part 3-2 – Unfair Dismissal

Division 2 – Protection from unfair dismissal

Regulation 3.05 – When a person is protected from unfair dismissal – high income threshold

101. Regulation 3.05 prescribes matters relevant to determining whether a person's remuneration is less than the high income threshold for access to the unfair dismissal protections for the purposes of section 382(b)(iii) of the Act. Specifically, the regulation provides for the inclusion of piece rates and benefits other than the payment of money in the amount that is relevant for the high income threshold.

102. Subregulations 3.05(3), 3.05(4) and 3.05(5) apply if part or all of a person's income is paid as a piece rate. Piece rates are those that are set by reference to a quantifiable output or task and not paid as a rate set by reference to a period of time worked and encompasses, for example, payments in the form of commission (subregulation 3.05(2)).

103. Subregulation 3.05(3) provides that if the person was continuously employed by the employer and not on leave without full pay at any time during the previous 12 months immediately before the dismissal, the prescribed amount is the total amount of piece rates paid or payable to the person in this 12 month period. Subregulations 3.05(4) and (5) provide methods of calculation for persons who were on leave without pay at any time during the previous 12 months or have less than 12 months service with their employer.

104. Certain benefits other than the payment of money are also relevant for the purposes of the high income threshold. Subregulation 3.05(6) provides that benefits that have been agreed upon by the employer and employee and have an attributable but not agreed value are to be included at FWA's discretion for the purposes of calculating the high income threshold, subject to certain conditions being satisfied.

Division 4 – Remedies for unfair dismissal

Regulation 3.06 – Remedy – compensation (amount taken to have been received by the employee)

105. Subsection 392(5) of the Act provides that there is a cap on the compensation FWA can order to be paid to a person. Subsection 392(6) of the Act sets out how that compensation cap is to be calculated by providing in paragraph 392(6)(b) that if the employee was on leave without pay or without full pay for the relevant period, then their remuneration for the purpose of the compensation cap calculation will be determined in accordance with the Regulations. Regulation 3.06 prescribes that for these purposes, an employee is taken to have received the remuneration that the employee would ordinarily have received during the period of leave if the employee had not been on leave without pay or without full pay.

Division 5 – Procedural matters

Regulation 3.07 – Application fees

106. Regulation 3.07 prescribes the application fees for unfair dismissal applications made under section 394 of the Act. Subregulation 3.07(2) provides that the fee is $59.50 for applications made in the financial year starting on 1 July 2009 and the method for indexing the fee annually is set out in subregulations 3.07(3) – (6).

107. Subregulation 3.07(7) provides that if FWA is satisfied that the person making an application will suffer serious hardship if the person is required to pay the fee, no fee is payable for making the application.

108. Subregulation 3.07(8) sets out the circumstances in which the application fee can be refunded. The fee must be refunded where the application is subsequently discontinued (see section 588 of the Act) and FWA is satisfied that FWA did not deal with the application in a substantial way before the application was discontinued.

Regulation 3.08 – Schedule of costs

109. Regulation 3.08 provides that for subsection 403(1) of the Act, the schedule of costs set out in Schedule 3.1 is prescribed.

110. This regulation relates to costs orders against lawyers and paid agents in relation to unfair dismissal matters.

111. This regulation is made pursuant to subsection 403(1) of the Act.

Part 3-3 – Industrial Action

Division 2 – Protected industrial action

Regulation 3.09 – Purposes prescribed for continuity of employment when employer response action occurs

112. Section 416A provides that employer response action does not affect the continuity of the employees' employment for the purposes prescribed in the Regulations. Regulation 3.09 prescribes the purposes as being: superannuation, any entitlements under the National Employment Standards and remuneration and promotion, as affected by seniority.

Division 6 – Suspension or termination of protected industrial action by FWA

Regulation 3.10 – Persons prescribed for order to suspend or terminate protected industrial action

113. Subsections 423(7) and 424(2) and paragraph 426(c) of the Act provide that the Regulations may prescribe persons who have standing to apply to FWA for an order suspending or terminating protected industrial action for a proposed enterprise agreement.

114. Regulation 3.10 prescribes a Minister of a referring State or of a Territory if the industrial action is being engaged in, threatened, impending or probable in the respective State or Territory.

115. Subregulation 3.10(2) refers the reader to the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* for the meaning of 'referring State'.

Division 8 – Protected action ballots

Regulation 3.11 – FWA may decide on ballot agent other than the Australian Electoral Commission – requirements for protected action ballot agent

116. Section 444 of the Act provides that FWA may decide that a person other than the Australian Electoral Commission is to be the protected action ballot agent for a ballot but only if FWA is satisfied: the person is specified in the application; the person is a fit and proper person to conduct the ballot; and any other requirements prescribed by the Regulations are met.

117. Regulation 3.11 further prescribes that the person must be capable of:

- ensuring the secrecy and security of votes cast in the ballot;
- ensuring that the ballot will be fair and democratic; and
- conducting the ballot expeditiously.

118. Subregulation 3.11(5) requires the person to have agreed to be a protected action ballot agent.

119. Subregulation 3.11(6) provides that the person must be bound to comply with the *Privacy Act 1988* in respect to the handling of information relating to the protected action ballot. This provision ensures that if the person is not currently bound to comply with the *Privacy Act 1988*, for example, the person falls outside the definition of 'organisation', then the person is not permitted to be a protected action ballot agent unless the person elects to be prescribed as an 'organisation' for the purposes of the *Privacy Act 1988*.

120. If the person to be the protected action ballot agent is an industrial association or a body corporate, then each individual who will carry out the functions for the association or body corporate must also be a fit and proper person to conduct the ballot and satisfy the requirements prescribed in Subregulations 3.11(2) to (6).

Regulation 3.12 – Requirements for independent advisor

121. Subsection 444(3) provides that FWA may decide on an independent advisor for a protected action ballot subject to certain requirements being met. This includes that FWA must be satisfied the person also meets any other requirements prescribed by the Regulations.

122. Regulation 3.12 further requires that FWA must be satisfied the person:

- is capable of giving the protected action ballot agent both advice and recommendations that are directed towards ensuring that the ballot will be fair and democratic; and
- has agreed to be an independent advisor.

Regulation 3.13 – Notice of protected action ballot order – notifying employees

123. Regulation 3.13 sets out the procedures to be followed for notifying employees in relation to the conduct of a protected action ballot.

124. Subregulation 3.13(2) requires the protected action ballot agent to take all reasonable steps to notify each employee who is eligible to be included on the roll of voters that FWA has made the order, as soon as practicable after the order is made.

125. Subregulations 3.13(3) and (4) provide that the notice to the employees must include the following information:

- any matter specified by FWA in the ballot order;
- the voting method(s) to be used and the location (if any) at which the ballot will be conducted;
- the date(s) or period during which the ballot will be conducted;

- contact details for the protected action ballot agent and independent advisor (if any);

- a statement that the employee may contact the protected action ballot agent to find out whether the employee is on the roll of voters;

- a statement that the employee may ask the protected action ballot agent to add or remove the employee's name from the roll of voters; and

- a statement that the employee may raise any concerns or complaints about the conduct of the ballot (including any alleged irregularity) with the protected action ballot agent, FWA (if the protected action ballot agent is not the Australian Electoral Commission) or the independent advisor (if any).

126. The note below Subregulation 3.13(4) refers the reader to section 453 which sets out the circumstances in which an employee is eligible to be included on the roll of voters.

127. Subregulation 3.13(5) prescribes how the protected action ballot agent may give the notice to an employee. Subregulation 3.13(6) makes clear that the methods of giving notice prescribed in Subregulation 3.13(5) are not exhaustive. In some circumstances, fulfilling the obligation to provide notice may necessitate the giving of a notice using more than one method for the respective employees.

128. Subregulations 3.13(7) and (8) provide that an employer must also allow the protected action ballot agent access to the workplace for the purpose of notifying employees of the information about the ballot and for the purpose of preparing for, or conducting the ballot. Subject to parliamentary and other processes, the intention is that these two Subregulations will become civil remedy provisions.

Regulation 3.14 – Protected action ballot to be conducted by Australian Electoral Commission or other specified ballot agent – directions about ballot paper

129. Subsection 449(2) of the Act requires the protected ballot agent to conduct the protected action ballot in accordance with any procedures prescribed by the Regulations. Paragraph 469(b) of the Act states that the Regulations may provide for the procedures to be followed in relation to the conduct of a protected action ballot.

130. Regulation 3.14 states that the protected action ballot agent may provide employees with directions and notes to ensure that their votes comply with the Act and these Regulations and give other directions to assist in ensuring that irregularities do not occur in the conduct of the ballot.

Regulation 3.15 – Compilation of roll of voters

131. Regulation 3.15 provides that if an applicant for a protected action ballot order or an employer of the employees to be balloted is directed to provide information to assist in the compilation of the roll of voters, the applicant or employer must include

with the information a written declaration that they reasonably believe the information is complete, up-to-date and accurate.

Regulation 3.16 – Protected action ballot papers – form

132. Section 455 of the Act provides that the ballot paper for a protected action ballot must, if a form is prescribed by the Regulations – be in that form.

133. Regulation 3.16 prescribes the form of the ballot paper to be as set out in Form 1 of Schedule 3.2. This prescribed form: includes information about the ballot, requires a description of the proposed industrial action, provides directions to voters about how to record their vote, and requires voters to be informed of the names of the applicants for the protected action ballot order and the protected action ballot agent.

Regulation 3.17 – Report about conduct of protected action ballot – independent advisor

134. Section 458 of the Act requires an independent advisor to prepare a report about the conduct of a protected action ballot in certain circumstances. Subsection 458(4) states that the report must be prepared in accordance with the Regulations.

135. Subregulation 3.17(2) provides that for the purpose of preparing the report, the independent advisor may:

- be present at the conduct of any part of a protected action ballot (including the scrutiny of the roll of voters);
- request information held by the protected action ballot agent for the ballot;
- make a recommendation to the ballot agent for the purpose of ensuring the conduct of the ballot will be fair and democratic; and
- set out in his or her report a description of any such recommendation and whether the protected action ballot agent complied with the recommendation.

Subdivision G – Miscellaneous

Regulation 3.18 – Conduct of protected action ballot – ballot papers

136. This regulation sets out procedures to be followed in relation to the conduct of a protected action ballot.

137. Subregulation 3.18(2) provides that the protected action ballot agent must issue to each employee who is to be balloted a ballot paper that bear the agent's initials or a facsimile of the agent's initials.

138. If the ballot is to be conducted by postal voting, Subregulations 3.18(3) and (4) set how the ballot papers are to be distributed and the material that must accompany the ballot paper. These Regulations prescribe a form of declaration voting.

139. Subregulations 3.18(5) to (7) provide for the issuing of replacement ballot papers for postal voting in circumstances where an employee did not receive the ballot paper or related documents, or where an employee's ballot paper has been lost, spoilt, or destroyed.

140. If an employee is to be balloted other than by postal voting, Subregulation 3.18(8) provides for the issuing of a replacement ballot paper if the ballot agent is satisfied before depositing the ballot paper in the ballot box, that the employee accidentally spoilt the paper. The protected ballot agent must also mark "spoilt" on the ballot paper, initial the marking and keep the ballot paper.

Regulation 3.19 – Conduct of protected action ballot – scrutiny of ballot

141. This regulation provides for how the protected action ballot agent must conduct the scrutiny of a protected action ballot and determine its results.

142. Subregulation 3.19(3) sets out the process for admitting valid ballot papers and rejecting informal ballot papers, counting and recording the formal votes, and counting the informal ballot papers.

143. Subregulations 3.19(4) and (5) describe when a vote is informal. Subregulations 3.19(6) and (7) prescribe the responsibilities of the protected action ballot agent when a scrutineer either objects to a ballot paper being admitted or informs the ballot agent that in the scrutineer's opinion an error has been made in the conduct of the scrutiny.

144. Subregulation 3.19(8) provides that in order to preserve the secrecy of a postal vote, the protected action ballot agent must ensure that the independent advisor or a scrutineer does not have access to any evidence that may allow the ballot paper to be identified as having been completed by a particular employee.

145. A person who is not entitled to be present or remain present at a scrutiny and who disrupts the scrutiny of a ballot may be directed to leave by the protected action ballot agent. Subregulation 3.18(10) specifies that a person must comply with such a direction. Subject to parliamentary and other processes, the intention is that this Subregulation will become a civil remedy provision.

Regulation 3.20 – Conduct of protected action ballot – scrutineers

146. Regulation 3.20 provides the matters relating to the qualifications, appointment, powers and duties of scrutineers for a protected action ballot. The regulation provides that both the employer and the applicant for a protected action ballot may appoint one or more scrutineers to carry out the functions listed in Subregulations 3.20(6) and (8).

147. However, the total numbers of scrutineers must not exceed the total number of people who are performing functions and duties as, or on behalf of, the protected action ballot agent.

Division 9 – Payments relating to periods of industrial action

Regulation 3.21 – Payments relating to partial work bans – working out proportion of reduction of employee's payments

148. Section 471 of the Act enables an employer to give an employee, who engages in protected action which is a partial work ban, a written notice stating that, because of the ban, the employee's payments will be reduced by a proportion specified in the notice.

149. Subsection 471(3) of the Act provides that the Regulations may prescribe how the proportion of the reduction of the employee's payments is to be worked out.

150. Regulation 3.21 sets out three steps required to be carried out by an employer in calculating the proportion of the employee's payments for an employee or class of employees as follows:

- identify the work that an employee or a class of employees is failing or refusing to perform, or is proposing to fail or refuse to perform;
- estimate the usual time that the employee or the class of employees would spend performing the work during a day; and
- then work out the time estimated (above) as a percentage of an employee's usual hours of work for a day. It is intended that this would allow for averaging; for example, if the banned duties were performed every second day and constituted 10 per cent of the duties of that day, a reasonable average deduction on a day would be 5 per cent.

151. The solution is the proportion by which the employee's payment will be reduced for a day.

Regulation 3.22 – Payments relating to partial work bans – form of partial work ban notice

152. Under paragraph 471(1)(c) of the Act, an employer may give an employee who engages in protected action which is a partial work ban a written notice stating that, because of the ban, the employee's payments will be reduced by a proportion specified in the notice.

153. Alternatively, an employer may refuse to accept partial performance of work and instead refuse to make any payment to the employee, by giving the employee a notice of the employer's refusal and non-payment in relation to the industrial action period. This notice is given under paragraph 471(4)(c) of the Act.

154. Regulation 3.22 provides that a notice given under either paragraph 471(1)(c) or paragraph 471(4)(c) must be in a legible form and in English.

Regulation 3.23 – Payments relating to partial work bans – content of partial work ban notice

155. Subsection 471(6) of the Act provides that the Regulations may prescribe the content required for the partial work ban notices given under either paragraphs 471(1)(c) or 471 (4)(c).

156. Regulation 3.23 requires the notice to:

- specify the day on which the notice is issued;
- specify the industrial action engaged in, or proposed to be engaged in, that constitutes the partial work ban;
- state that the notice will take effect from the later of either the start of the first day of the partial work ban, or the start of the first day after the day on which the notice is given to the employee, if the employee performs work on that day; and
- state that the notice will cease to have effect at the end of the day on which the partial work ban ceases.

157. Subregulation 3.23(2) outlines additional matters that must be specified in a partial work ban notice if the notice provides that the employee's payments will be reduced by a proportion specified in the notice.

158. If the partial work ban notice specifies that the employee is not entitled to any payments at all, the notice must also state that the employee will not be entitled to any payment for a day on which the employee engages in the partial work ban.

Regulation 3.24 – Manner of giving notice about partial work ban

159. Subsection 471(7) of the Act provides that an employer is taken to have given a partial work ban notice to the employee if the employer has taken all reasonable steps to ensure that the employee, and the employee's bargaining representative (if any) receives the notice and the employer has complied with any requirements relating to the giving of the notice prescribed by the Regulations.

160. Regulation 3.24 prescribes how the employer may give the notice to the employee. The methods prescribed in this regulation only allow for giving the notice directly to an employee and not, for example, displaying a notice in a conspicuous place. In some circumstances, "reasonable steps" may necessitate the giving of a notice using more than one method for the respective employees.

161. Where an employer gives a partial work ban notice to an employee by posting it to that employee's postal address, receipt of the letter will be deemed to be the time at which the letter would be delivered in the ordinary course of post (section 29 of the *Acts Interpretation Act 1901*).

Part 3-4 – Right of Entry

Division 3 – State or Territory OHS rights

Regulation 3.25 – Meaning of State or Territory OHS law

162. Division 3 of Part 3-4 of the Act imposes certain additional obligations on a union official seeking to exercise a right of entry under a State or Territory OHS law. State or Territory OHS law is defined in subsection 494(3) of the Act as a law of a State or Territory prescribed in the Regulations. This regulation prescribes the relevant State and Territory laws for the purposes of the definition.

Division 6 – Entry permits, entry notices and certificates

Regulation 3.26 – Form of entry permit

Regulation 3.27 – Form of entry notice

Regulation 3.28 – Form of exemption certificate

Regulation 3.29 – Form of affected member certificate

163. Paragraph 521(a) of the Act allows regulations to be made for the form of entry permits, entry notices, exemption certificates and affected member certificates. These regulations refer readers to the form of these documents which are set out in Schedule 3.3 to these Regulations.

Part 3-6 – Other rights and responsibilities

Division 2 – Notification and consultation relating to certain dismissals

Subdivision A – Requirement to notify Centrelink

Regulation 3.30 – Employer to notify Centrelink of certain proposed dismissals – form of notice

164. Regulation 3.30 prescribes that, for subsection 530(2) of the Act, the prescribed body is Centrelink and the prescribed form is Form 1 of these Regulations (contained in Schedule 3.4 to the Regulations).

165. The effect of regulation 3.30 and section 530 is that an employer that decides to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons, must as soon as practicable after so deciding and before terminating an employee's employment provide to Centrelink a notice in the form of Form 1, setting out the matters in subsection 530(2).

Division 3 – Employer obligations in relation to employee records and pay slips

166. This Division deals with employer obligations to make and keep employee records and to issue pay slips.

167. Section 535 of the Act sets out obligations for employers to make and keep employee records.

- Subsection 535(1) provides that employers must make and keep employee records of the kind prescribed by the Regulations.

- Subsection 535(2) provides that the records must be in the form, if any, prescribed by the Regulations and must include any information prescribed by the Regulations.

- Subsection 535(3) allows regulations to provide for the inspection of these records.

- Section 536 of the Act sets out employers' obligations in relation to pay slips.

- Subsection 536(1) provides that an employer must give a pay slip to each employee within one working day of paying the employee for the performance of work.

- Subsection 536(2) provides that the pay slip must be in a form prescribed by the Regulations and include any information prescribed by the Regulations.

168. Subsections 535(1) and (2) and section 536 of the Act are civil remedy provisions, making it unnecessary for each regulation made under those provisions to be separately identified in the Regulations as civil remedy provisions. The penalty for contravention of these provisions is set out in the Act (see section 539).

169. Regulations regarding employee inspection of records (made under subsection 535(3) of the Act), use of records, accuracy of records and record keeping in a transfer of business (made under section 796 of the Act) will each be prescribed as separate civil remedy provisions.

Subdivision 1 – Employee records

170. This subdivision prescribes the kinds of records that employers must make and keep in relation to each employee.

171. For example, an employer must make and keep a record in respect of each employee about:

- basic employment details such as the name of the employer and the employee and the nature of their employment (e.g. part-time, full-time, permanent, temporary or casual);

- pay;

- overtime hours;
- averaging arrangements;
- leave entitlements;
- superannuation contributions; and
- termination of employment (where applicable).

172. Records must be properly maintained. For example, regulation 3.31 prescribes form requirements to make sure that records are legible and readily accessible to an inspector. Regulation 3.44 contains requirements to ensure that records are accurate at all times.

173. These records are each required to be kept for a period of seven years.

174. There are obligations on 'old employers' and 'new employers' in transfer of business situations, and also provisions to allow employees to inspect and copy records relating to them.

175. The requirements reflect the requirements under the *Workplace Relations Regulations 2006*, with necessary modifications to reflect the new fair work framework.

- For example, employers will be required to keep a record of any individual flexibility arrangements and undertakings given by employers in relation to a guarantee of annual earnings. Employers will also be required to keep records of terminations or revocations of such instruments.

Regulation 3.31 – Records – administration

176. This regulation sets out the form requirements for employee records. Employers are required to ensure that each employee record is legible, in English and in a form that is readily accessible to an inspector.

Regulation 3.32 – Records – general matters

177. Regulation 3.32 sets out general matters that employers are to record in relation to each employee such as their name, whether they are a full-time or part-time employee and the date on which their employment commenced. From 1 January 2010, employers will also be required to record their ABN (if any).

Regulation 3.33 – Records – Pay

178. Regulation 3.33 sets out the records that employers are required to keep regarding payments made to their employees.

179. Employers are required to keep a record of the rate of remuneration, the gross and net amounts paid to each employee as well as any deductions.

180. Subregulation 3.33(2) requires an employer to keep a record of the hours worked by casual or irregular part-time employees. This obligation applies to employees who are paid by reference to by reference to a period of time worked.

181. If an employee is entitled to be paid an incentive based payment or bonus, a loading, a penalty rate or another monetary allowance or separately identifiable entitlement, Subregulation 3.33(3) requires their employer to record details of these payments.

Regulation 3.34 – Records - overtime

182. Regulation 3.34 sets out the records that employers must keep about overtime hours. Employers must record the number of overtime hours actually worked by each employee on each day (e.g. two hours on a particular day) or alternatively, the employer must record the time that the employee started and stopped working overtime hours (e.g. start 6pm, finish 8pm on a particular day).

Regulation 3.35 – Records – averaging of hours

183. Regulation 3.35 requires employers to keep a copy of any agreement that they make with an employee to average the employee's hours of work.

184. Agreements to average hours may be made under the National Employment Standards in the Act or section 226 of the *Workplace Relations Act 1996* (the WR Act).

- The National Employment Standards will not commence until 1 January 2010. Until that time (during the bridging period) the averaging of hours provision in section 226 of the WR Act will continue to apply (see Part 2 of Schedule 2 of the Fair Work (Transitional Provisions and Consequential Amendments) Bill).

Regulation 3.36 – Records – leave

185. Regulation 3.36 sets out the record keeping obligations for employers in relation to employee leave.

186. Subregulation (1) prescribes a record that sets out:

- any leave that an employee takes; and
- the balance (if any) of the employee's entitlement to that leave from time to time

as a kind of record that an employer must make and keep.

187. If an employer and employee agree to cash out an accrued amount of leave, Subregulation 3.36(2) ensures that an employer must keep a copy of the agreement, and must record the rate of payment for the cashed out leave, and when the payment was made.

188. Specific provision is made for cashing out of annual leave and personal/carer's leave by the Act and the preserved provisions of the WR Act (during the bridging period). The same record keeping requirements apply in either case.

Regulation 3.37 – Records – superannuation contributions

189. Regulation 3.37 sets out the records that employers must make and keep in relation to the superannuation contributions that they make.

190. These include: the amount of the contributions made, the period over which they were made, the date on which each contribution was made, the name of the fund and the basis on which the employer became liable to make the contribution.

191. Subregulation (2) defines contribution, as excluding contributions to defined benefit interests (within the meaning of the *Superannuation Industry (Supervision) Regulations 1994*). This is because different record keeping obligations already apply in relation to these contributions under other legislation.

Regulation 3.38 – Records – individual flexibility arrangement

192. Where an employer and an employee enter into an individual flexibility arrangement (an IFA), regulation 3.38 introduces a new requirement for employers to keep a copy of the IFA.

193. IFAs may be entered into between an employer and an employee under the Act. IFAs are required to be made in writing.

- Section 144 requires a modern award to include a term that allows an employee and their employer to enter into an arrangement to vary the effect of the award in relation to the employee and the employer. These types of IFAs can only be made after 1 January 2010 because modern awards will not commence operation until that time.

- Section 202 requires enterprise agreements to include a term that enables an employer and employee to agree to an IFA to vary the effect of the agreement in relation to the employee and the employer.

194. An employer is also required to keep a record of any written notice terminating an IFA.

- IFAs can be terminated unilaterally by either party giving written notice of not more than 28 days, or by written agreement between the parties.

195. This record keeping requirement is intended to ensure that it is possible to ascertain the source of employee entitlements at a particular point in time – as the way in which a modern award or enterprise agreement applies to an employee will be affected by whether there is an IFA in operation.

Regulation 3.39 – Records – guarantee of annual earnings

196. This regulation requires an employer to keep a copy of any guarantee of annual earnings given to an employee under section 330 of the Act.

197. Where a guarantee of annual earnings is revoked, the employer is to keep a record of the date of revocation.

- A guarantee can be revoked by the employer only with the agreement of the employee (see subsections 329(3) and 331(b)(iii) of the Act).

198. These requirements will apply from 1 January 2010, after the commencement of modern awards. This is because guarantees of annual earnings can only be given to employees to whom a modern award would otherwise apply.

199. This record keeping requirement is designed to ensure that it is possible to ascertain the source of employee entitlements at a particular point in time, as a modern award does not apply to an employee who has a guarantee of annual earnings.

Regulation 3.40 – Records – termination of employment

200. Regulation 3.40 ensures that employers are required to make and keep records about the circumstances of the termination of employment of an employee.

201. This record must set out whether the employment was terminated by consent, by notice, summarily or in some other specified manner (e.g. redundancy, retirement, abandonment of employment). The record must also include the name of the person who acted to terminate the employee's employment.

Regulation 3.41 – Records – transfer of business

202. This regulation sets out how employee records must be dealt with when a transfer of a business occurs (see section 311 of the Act).

203. Subregulation 3.41(2) requires the old employer to transfer to the new employee each employee record relating to a transferring employee that the old employer was required to keep.

204. Subregulation 3.41(3) allows a Commonwealth authority to provide copies of the records (rather than originals).

205. Subregulations 3.41(4) and (5) ensure that were an employee of the old employer later transfers, the new employer is able to request their employment records.

206. Subregulation 3.41(6) ensures that where an employee of the old employer transfers to the new employer, the new employer must keep the records relating to the transferred employee as if they had been made by the new employer at the time at which they are made by the old employer. The employer is not required to make new records in relation to the period of employment with the old employer (subregulation (7)).

Regulation 3.42 – Records – inspection and copying of a record

207. Regulation 3.42 prescribes the requirements for employers to make employee records available to employees and former employees upon request.

208. Subregulation (1) requires employers to make employee records available to the individual to whom the record relates, for inspection or copying.

209. An employee or former employee could appoint an agent to copy and inspect documents on their behalf. For example, an agent could include a parent or guardian (in the case of a young employee), a departmental employee dealing with claims under the GEERS scheme or a professional adviser such as a lawyer or accountant.

210. Subregulations (2), (3) and (4) set out how, and in what form records must be made available.

211. The requirement that employers make employee records available for inspection and copying by inspectors is not dealt with in the Regulations because Fair Work Inspectors have comprehensive powers to inspect and copy employee records under the Act (see section 709 of the Act). FW Inspectors also have power to compel the production of documents by notice to produce. Failure to comply with a notice to produce is a civil remedy provision (see section 712 of the Act).

Regulation 3.43 – Records – information concerning a record

212. Regulation 3.43 requires employers to tell an employee where records relating to the employee (or former employee) are kept when an employee makes a request to inspect an employee record.

213. An employee (or former employee) may interview the employer, or a representative of the employer, at any time during ordinary working hours, about an employee record (subregulation 3.43(2)).

214. Participation in an interview is voluntary.

215. An equivalent ability for FW Inspectors to interview employers is provided in section 709 of the Act.

216. Regulations 3.43 and 3.44 ensure that employees and/or their agents are able to gain access to their own records and/or information about those records in a timely and efficient manner.

Regulation 3.44 – Record – accuracy

217. Regulation 3.44 provides that, to the extent of an employer's knowledge, an employer must ensure that records are not false or misleading.

218. In order to ensure that records are accurate at all times, employers are not permitted to alter records except to correct errors that come to their attention. Employers are also required to ensure, to the extent possible, that other persons (such as managers or other employees) do not alter records except to correct errors.

Corrections must be made immediately upon discovery of error, and the record must note that a correction has been made (as well as what the correction is).

219. Regulation 3.44 also prohibits a person (including managers, other employees and bodies corporate) from using information in an employee record where the person knows that information is false or misleading.

Subdivision 2 – Pay slips

220. This subdivision sets out the information that must be included on pay slips, and the form that pay slips must take for the purposes of section 536(2) of the Act. Subsection 536(1) sets out the requirement that an employer must give each employee a pay slip containing such information within one working day of paying an amount to the employee in relation to the performance of work.

Regulation 3.45 – Pay slips – form

221. Regulation 3.45 clarifies that a pay slip can be provided either in electronic form or a hard copy. Employers are not required to issue pay slips in both formats to employees.

Regulation 3.46 – Pay slips – content

222. Regulation 3.44 prescribes the content that employers are required to include in a pay slip. The main content requirements are set out in paragraphs (1)(a) – (g) and include the employer's name, the employee's name, the period to which the pay slip relates and the gross amount of payment. From 1 January 2010, a pay slip will also be required to include the employer's ABN (if any).

223. Subregulation 3.44(2) provides that the pay slip must record details of any amounts deducted from the gross amount of payment.

224. Subregulations 3.45(3) and 3.45(4) provide additional requirements for information to be recorded on pay slips if an employee is paid at an hourly rate of pay or an annual rate of pay.

225. Subregulation 3.44(5) provides that pay slips must also record the details of any superannuation contributions that were made or required to be made for the benefit of the employee during the period to which the pay slip relates. Subregulation 3.44(6) provides that an employer does not have to record contributions in respect of a defined benefit superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993*.

Chapter 4 – Compliance and enforcement

Part 4-1 – Civil remedies

Division 3 – Small claims procedure

Regulation 4.01 – Plaintiffs may choose small claims procedure

226. Subsection 548 of the Act provides that the small claims procedure will apply to actions for recovery of money in a magistrates court or the Federal Magistrates Court if the applicant indicates in a manner prescribed by the Regulations that he or she wants the small claims procedure to apply.

227. Subregulation 4.01(1) sets out the ways that an applicant can indicate that he or she wants the small claims procedure to apply to the matter. The applicant can either endorse the initiating papers with a statement that he or she wants the small claims procedure to apply or lodge a separate paper with the court to that effect. The applicant must also serve a copy of the initiating papers, together with any separate paper mentioned in subparagraph (a)(ii) on every other party to the proceedings.

228. Subregulation 4.01(2) provides that the above process is only relevant where the rules of the court in which the action is commenced do not prescribe the manner in which a person indicates that he or she wants to have his or her matter dealt with under the small claims procedure in that court.

Division 4 – General provisions relating to civil remedies and infringement notices

Regulation 4.02 – General

229. Subregulation 4.02(1) explains that this subdivision provides for a person who is alleged to have contravened certain civil remedy provisions to pay a penalty to the Commonwealth as an alternative to civil proceedings. This means that infringement notices can only be issued in relation to alleged contraventions of employers' obligations about employee records and pay slips.

230. Where an alleged contravention of such a provision has occurred, subregulation 4.02(2) provides that this Division does not:

- require an infringement notice to be issued to a person for an alleged contravention of a civil remedy provision;
- affect the liability of a person to proceedings for contravention of an a civil remedy provision if an infringement notice is not issued to the person for the alleged contravention;

- affect the liability of a person to proceedings for contravention of a civil remedy provision if the person does not comply with an infringement notice for the alleged contravention; or

- limit or otherwise affect the penalty that may be imposed by a court on a person for contravention other than the contravention of the civil remedy provision for which the infringement notice was issued.

Regulation 4.03 – Definitions for Division 4

231. Regulation 4.03 sets out the definitions for Division 4. It provides that for the purposes of the Division:

- *civil remedy provision* means a civil remedy provision in item 27 of the table in subsection 539(2) of the Act (relating to record keeping and payslips);

- *contravention* means a contravention of a civil remedy provision;

- *infringement notice* means an infringement notice under regulation 4.04;

- *recipient* means a person to whom an infringement notice is given (e.g. an employer); and

- *nominated person* means the person to whom a recipient can apply to have an infringement notice withdrawn or to be allowed more time to pay a penalty.

Regulation 4.04 – When an infringement notice can be given

232. Subregulation 4.04(1) sets out the circumstances in which a Fair Work Inspector can issue an infringement notice. It is intended to allow a Fair Work Inspector to issue an infringement notice if he or she reasonably believes that a person has contravened one or more of the record-keeping and pay slip requirements in Division 3 of Part 3-6 of the Act.

233. Subregulation 4.04(2) provides that a FW Inspector can only issue an infringement notice within 12 months of the time that the alleged contravention took place.

234. Subregulation 4.04(3) provides that two or more infringement notices cannot be issued to a person for contraventions of a particular civil remedy provision that allegedly took place on the same day and allegedly relate to the same action or conduct by the person. This reflects the course of conduct rule in section 557 of the Act.

235. Subregulation 4.04(4) provides that an inspector cannot issue an infringement notice in relation to a contravention if the Fair Work Ombudsman has accepted an enforceable undertaking from the person under section 715 of the Act in relation to the relevant alleged contravention. It is not necessary for the Regulations to provide for the interaction between infringement notices and compliance notices issued under

section 716 of the Act because compliance notices cannot be issued to an employer in relation to alleged record-keeping contraventions.

Regulation 4.05 – Content of infringement notice

236. Subregulation 4.05(1) sets out the content requirements of an infringement notice, including:

- the full name and address of the recipient (e.g. the employer);
- the name and signature of the FW inspector who issued it;
- the date that it is issued;
- brief details of the alleged contravention that would enable the person receiving the notice to understand why the Fair Work Inspector has issued it, including the civil remedy provision that is allegedly contravened;
- the penalty for the alleged contravention payable under the notice;
- where and how the penalty can be paid;
- the maximum penalty that a court could impose on the recipient for the alleged contravention;
- the identity (e.g. name and position) of the nominated person to whom the employer can apply and an explanation about how the recipient can apply to the nominated person to have the infringement notice withdrawn or to be allowed more time to pay the penalty; and
- the effect of the person complying with the infringement notice.

237. Subregulation 4.05(2) provides that an infringement notice can contain any other information that the inspector who issues it thinks necessary.

Regulation 4.06 – Time for payment of penalty

238. Subregulation 4.06(1) provides that the penalty stated in an infringement notice must generally be paid within 28 days after the day on which the notice is served on the recipient.

239. However, subregulation 4.06(2) provides that if the recipient applies for an extension of time to pay the penalty (see regulation 4.07), and the extension if granted, the extended time frame applies.

240. Subregulation 4.06(3) provides that if the application for an extension of time is refused, the penalty must be paid within seven days after the notice of the refusal is served on the recipient.

241. Subregulation 4.06(4) provides that if the recipient applies to have the infringement notice withdrawn (see regulation 4.08), and the application is refused,

the penalty must be paid within 28 days after the notice of the refusal is served on the recipient.

Regulation 4.07 – Extension of time to pay penalty

242. Subregulation 4.07(1) sets out the procedure for the recipient to apply (in writing) for an extension of time to pay the specified penalty. Subregulation 4.07(2) requires the nominated person to deal with such an application within 14 days.

Regulation 4.08 – Withdrawal of infringement notice

243. Regulation 4.08 sets out the procedure under which an infringement notice can be withdrawn after it has been issued.

244. Subregulations 4.08(1) and 4.08(2) provide that a recipient may apply to have the notice withdrawn. The nominated person is required to deal with the application within 14 days.

245. Subregulation 4.08(3) makes it clear that if the nominated person has not approved, or has refused to approve the withdrawal of the notice in accordance with Subregulation 4.08(2), the application for withdrawal is taken to have been refused.

246. Subregulation 4.08(4) provides that a Fair Work Inspector can withdraw an infringement notice without an application having been made by serving a notice of withdrawal on the recipient.

247. Subregulation 4.08(5) sets out the details that a notice of withdrawal of an infringement notice must contain.

Regulation 4.09 – Effect of payment of penalty

248. Regulation 4.09 deals with the effect of the recipient having paid the penalty stated in the notice, where the infringement notice has not been withdrawn.

249. Paragraph 4.09(a) provides that any liability of the recipient for the alleged contravention is discharged

250. Paragraph 4.09(b) provides that proceedings cannot be brought against the recipient in relation to the alleged contravention, by any person. This does not preclude a person (e.g. an affected employee) from bringing proceedings in relation to other matters, including the matter for which the employee records were sought (e.g. alleged underpayment of wages).

251. Paragraph 4.09(c) provides that the recipient is not taken to have admitted guilt in respect of the alleged contravention; and

252. Paragraph 4.09(d) provides that the recipient is not taken to have been convicted of a contravention.

Regulation 4.10 – Refund of penalty

253. Regulation 4.10 provides for the refund of an infringement notice penalty by the Commonwealth if the penalty was paid and the infringement notice is subsequently withdrawn.

Division 5 – Unclaimed money

Regulation 4.11 – Unclaimed money

254. Subsection 559(1) of the Act provides that where an employer is required to pay certain amounts to an employee, but cannot locate the employee, the employer may pay the amounts to the Commonwealth instead of the employee. Subsection 559(3) allows a person who was a former employee to later recover such amounts from the Commonwealth by lodging a claim with the Fair Work Ombudsman. Such a claim must be in accordance with the form prescribed by the Regulations.

Chapter 5 – Administration

Part 5-1 – Fair Work Australia

Division 5 – FWA Members

Regulation 5.01 – Delegation by the President of functions and powers of FWA

255. This regulation provides that the requirement to give a copy of a protected action ballot order under section 445 of the Act is a function that may be delegated by the President to the General Manger or to specified staff of FWA.

Regulation 5.02 – Dual federal and Territory appointments of Deputy Presidents or Commissioners

256. This regulation provides that a Deputy President or Commissioner of FWA may hold a concurrent appointment to the Defence Force Remuneration Tribunal, the Pharmaceutical Benefits Remuneration Tribunal, the Prison Officers Arbitral Tribunal of the Northern Territory, or the Police Officers Arbitral Tribunal of the Northern Territory.

Regulation 5.03 – Oath and affirmation of office

257. This regulation provides that the oath or affirmation of office of the President of FWA may be taken before the Governor-General, a Justice of the High Court, a Judge of the Federal Court, or a Judge of the Supreme Court of a State or Territory. It further provides that the oath or affirmation to be taken by a FWA Member other than the President may be taken before one of those people, or before the President of FWA.

258. The regulation also directs the reader to schedule 5.1 for the form of the oath or affirmation to be taken.

Division 7 – Seals and additional powers of the President and the General Manager

Regulation 5.04 – President must provide certain information etc. to the Minister and Fair Work Ombudsman

259. This regulation, together with Schedule 5.2, sets out the information and copies of documents that the President is required to provide to the Minister and the Fair Work Ombudsman under subsection 654(1) of the Act. The regulation also specifies the form in which the information and copies are to be provided. The purpose of this information is to assist with policy evaluation of the new system, and the compliance and education activities of the Fair Work Ombudsman.

Part 5-2 – Office of the Fair Work Ombudsman

Division 5 – Office of the Fair Work Ombudsman

Regulation 5.05 – Powers and functions of inspectors – notification of failure to observe requirements

260. Regulation 5.05 provides that if a Fair Work Inspector (FW Inspector) is satisfied that a person has failed to observe a requirement imposed by the Act, a fair work instrument or the Regulations, the FW Inspector may issue a written notice:

- advising the person of that failure;
- requiring the person to take action to rectify the failure;
- requiring the person to advise the FW Inspector of action taken; and
- advising the person what actions the FW Inspector may take if the person fails to comply (e.g. issue an infringement or compliance notice in relation to an alleged contravention).

Regulation 5.06 – Powers of inspectors while on premises – taking samples of goods and substances

261. Paragraph 709(f) of the Act provides that a FW Inspector may take samples of any goods or substances in accordance with any prescribed procedures. Regulation 5.06 provides that a FW Inspector must not take such a sample until he or she has informed the listed persons of his or her intention to do so.

Chapter 6 – Miscellaneous

Part 6-2 – Dealing with disputes

Division 2 – Dealing with disputes

Subdivision A – Model term about dealing with disputes

Regulation 6.01 – Model term about dealing with disputes

262. Section 737 of the Act requires the Regulations to prescribe a model term for dealing with disputes for enterprise agreements.

263. Regulation 6.01 provides that the model dispute resolution term for enterprise agreements is set out in Schedule 6.1.

Part 6-3 – Extension of National Employment Standards entitlements

Division 2 – Extension of entitlement to unpaid parental leave and related entitlements

Regulation 6.02 – Modification of meaning of *base rate of pay* for pieceworkers (non-national system employees)

264. Part 6-3 of the Act extends the operation of certain NES entitlements (parental leave and related entitlements; notice of termination of employment). The extended entitlements apply to non-national system employees, with necessary modifications.

265. This regulation ensures that provision is made to ensure that non-national system pieceworkers have a base rate of pay for the purposes of the extended parental leave provisions of the NES.

266. A base rate of pay is relevant where a pregnant employee who meets the prerequisites to transfer to a safe job takes leave because there is no appropriate safe job for them to be transferred to ('no safe job leave').

267. A regulation is necessary because pieceworkers are paid by reference to output or task, and would not otherwise have a base rate of pay for the purpose of this entitlement (the term base rate of pay is defined in section 16(1) as excluding incentive based payments and bonuses).

268. The base rate of pay for a non-national system pieceworker is either:

- the rate provided in, or calculated in accordance with, a State industrial instrument that applies to the employee; or

- an average rate - calculated by dividing the amount the employee earned over the 'relevant period' by the number of hours worked during that period. The relevant period is either 12 months or, if the employee has been employed for a shorter period, that shorter period.

269. This regulation comes into operation on the day the NES commences (this is the effect of regulation 1.02).

Regulation 6.03 – Meaning of *pieceworker*

270. This regulation prescribes a class of non-national system employees as pieceworkers. This is relevant to the operation of regulation 6.02 (which provides for the calculation of the base rate of pay for such employees for the purposes of the extended parental leave provisions of the NES).

271. The regulation prescribes non-national system employees who:

- are paid a rate set by reference to a quantifiable output or task; and

- are not paid by reference to time worked.

272. This regulation comes into operation on the day the NES commences (this is the effect of regulation 1.02).

Part 6-4 – Additional provisions relating to termination of employment

Division 2 – Termination of employment

Regulation 6.04 – Temporary absence – illness or injury

273. Regulation 6.04 prescribes the kinds of illness or injury for the purposes of the protection in paragraph 772(1)(a) of the Act. The effect of regulation 6.04 and paragraph 772(1)(a) is that an employer must not terminate an employee's employment for the reason that, or for reasons including that, an employee is temporarily absent from work because of illness or injury of a kind prescribed by regulation 6.04.

274. This protection is for non-national system employees, where a remedy is not available under Part 3-1 (General protections), to which regulation 3.01 relates. With the exception of this difference, regulation 6.04 replicates the content of regulation 3.01.

Regulation 6.05 – Application fees

275. Regulation 6.05 prescribes the application fees for disputes alleging a contravention of section 772 of the Act. Subregulation 6.05(2) provides that the fee is $59.50 for applications made in the financial year starting on 1 July 2009 and the method for indexing the fee annually is set out in subregulations 6.05(3) – (6).

276. Subregulation 6.05(7) provides that if FWA is satisfied that the person making an application will suffer serious hardship if the person is required to pay the fee, no fee is payable for making the application.

277. Subregulation 6.05(8) sets out the circumstances in which the application will be refunded. The fee must be refunded where the application is subsequently discontinued (see section 588 of the Act) and at that time either:

- the application has not yet been listed for conference; or
- if the application has been listed for conference on a specified date or dates – the discontinuance occurs at least 2 days before that date or the earlier of those dates.

Regulation 6.06 – Schedule of costs

278. Regulation 6.06 provides that for section 780 of the Act, the schedule of costs set out in Schedule 3.1 is prescribed.

279. This regulation relates to costs orders against lawyers and paid agents in relation to disputes alleging a contravention of section 772.

280. This regulation is made under section 610 of the Act.

Division 3 – Notification and consultation requirements relating to certain terminations of employment

Subdivision B – Requirement to notify Centrelink

Regulation 6.07 – Employer to notify Centrelink of certain proposed terminations – form of notice

281. Regulation 6.07 prescribes that, for subsection 785(2) of the Act, the prescribed body is Centrelink and the prescribed form is Form 1 of the Regulations (contained in Schedule 6.2 to the Regulations).

282. The effect of regulation 6.07 and section 785 is that an employer that decides to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons, must as soon as practicable after so deciding and before terminating an employee's employment provide to Centrelink a notice in the form of Form 1, setting out the matters in subsection 785(2).

Part 6-5 – Miscellaneous

Division 2 – Miscellaneous

Subdivision 1 – Employment matters

Regulation 6.08 – Public sector employer to act through employing authority – meaning of *public sector employment*

283. This regulation sets out various inclusions and exclusions for the purposes of the definition of 'public sector employment' in subsection 795(4) of the Act.

Regulation 6.09 – Public sector employer to act through employing authority – meaning of *employing authority*

284. This regulation, together with Schedule 6.3, specifies the employing authority for various categories of public sector employees for the purposes of subsection 795(6) of the Act. Subsection 795(1) provides that the employer of public sector employee must act only through the employee's employing authority acting on behalf of the employer.

Regulation 6.10 – No action for defamation in certain cases

285. Regulation 6.10 provides that no civil or criminal action for defamation can be taken against the Commonwealth or an electoral official conducting a protected action ballot on behalf of the Australian Electoral Commission in relation to the printing or issuing of a document by the electoral official or a third party who has printed the material.

Schedule 2.1 – Notice of employee representational rights

286. This is the notice of employee representational rights as prescribed by regulation 2.05.

Schedule 2.2 – Model flexibility term

287. Section 202 of the Act requires an enterprise agreement to include a flexibility term which would enable an employee and his or her employer to vary the effect of an agreement in relation to the employee and employer.

288. Schedule 2.2 prescribes the model flexibility term for enterprise agreements. The term is based on flexibility terms developed by the AIRC for inclusion in modern awards.

289. The model term provides that an individual flexibility arrangement (IFA) can vary the application of the terms of an enterprise agreement concerning:

- arrangements about when work is performed;
- overtime rates;
- penalty rates;
- allowances; and
- leave loading.

290. The model term clarifies that the parties must genuinely agree to the terms of the IFA and that the IFA must meet the genuine needs of the employee and employer.

291. In accordance with section 203 of the Act, the model term requires the employer to ensure the terms of the IFA:

- are about permitted matters under section 172 of the Act;
- are not unlawful terms under section 194 of the Act; and
- result in the employee being better off overall than the employee would be if no arrangement were made.

292. Under the model term the employer is required to ensure that each IFA is in writing and includes details of;

- the commencement date of the IFA;
- the names and signatures of the employer and employee;
- the terms to be varied by the arrangement; and
- how the IFA will make the employee better off overall.

293. If the employee is under 18, the model term requires the employer to ensure the IFA is also signed by the employee's parent or guardian.

294. The model term also requires the employer to give the employee a copy of the IFA within 14 days of it being agreed to.

295. The model term enables an employer or employee to terminate an IFA by written agreement at any time. It also enables either party to terminate the IFA unilaterally by giving the other party no more than 28 days written notice of their intention to terminate the arrangement.

Schedule 2.3 – Model consultation term

296. Section 205 of the Act requires an enterprise agreement to contain a consultation term requiring an employer to consult employees about major workplace changes that

are likely to have a significant effect on the employees. The term must also provide for the representation of the employees for the purposes of that consultation.

297. Schedule 2.3 prescribes the model consultation term for enterprise agreements. The model term is based on consultation terms developed by the AIRC for inclusion in modern awards.

298. The model consultation term requires an employer to notify relevant employees of a decision to introduce a major change to production, program, organisation, structure, or technology in relation to an enterprise if it is likely to have a significant effect on employees by resulting in:

- the termination of the employment of employees;
- major change to the composition, operation or size of the employer's workforce or to the skills required of employers;
- the elimination or diminution of job opportunities (including opportunities for promotion or tenure);
- the alteration of hours of work;
- the need to retrain employees;
- the need to relocate employees to another workplace; or
- the restructuring of jobs.

299. The model term requires the employer, as soon as is practicable after making a decision to introduce a major change:

- discuss the introduction of the change with relevant employees, as well as the likely effect of the change on them and the measures the employer is taking to avert or mitigate the adverse effect of the change on the employees;
- for the purposes of the discussion, provide the relevant employees with relevant information in writing, including information about the nature of the proposed change and its expected effects on those employees, and any other matters likely to affect the employees. However, the employer is not required to disclose confidential or commercially sensitive information to the employees.

300. The employer is then required to give prompt and genuine consideration to matters raised about the major change by the relevant employees.

301. The model term allows an employee or group of employees to be represented in the consultation process. It provides that employers must consult with a representative

of the employees if an employee advises the employer that a person has been appointed to represent them.

Schedule 3.1 – Schedule of costs

302. This Schedule sets out a scale of costs in accordance with regulations 3.04, 3.08 and 6.06.

Schedule 3.2 – Ballot papers

303. This is the form of the ballot paper for a protected action ballot as prescribed by regulation 3.16.

Schedule 3.3 – Forms relating to entry to premises

304. This Schedule prescribes certain forms for the purposes of the right of entry provisions in Part 3-4 of the Act.

Schedule 3.4 – Forms for certain dismissals

305. This Schedule prescribes the form of a notice to Centrelink as specified in regulation 3.30.

Schedule 4.1 – Form of claim for unclaimed money

306. Schedule 4.1 prescribes the form referred to in regulation 4.11. This is the form that a person must use when making a claim to the Fair Work Ombudsman to recover unclaimed money that was paid to the Commonwealth under subsection 559(1) of the Act.

Schedule 5.1 – Oath and affirmation of office

307. This schedule, together with regulation 5.03, sets out the form of the oath or affirmation to be taken by FWA Members before taking office.

Schedule 5.2 – Information and copies of documents to be provided to the Minister and the Fair Work Ombudsman

308. This schedule, together with regulation 5.04, sets out the particular information and documents that must be provided by the President to the Minister and to the FWO.

Schedule 6.1 – Model term for dealing with disputes for enterprise agreements

309. Subsection 186(6) of the Act requires FWA to be satisfied that an enterprise agreement includes a dispute resolution term that provides a procedure for settling disputes about any matters arising under the agreement or in relation to the National Employment Standards.

310. Schedule 6.1 prescribes the model dispute resolution term for enterprise agreements. The model term for dealing with disputes for enterprise agreements was developed with reference to the dispute resolution terms made by the AIRC for inclusion in modern awards but has been adapted for inclusion in enterprise agreements.

311. Unlike the model flexibility and consultation terms, the dispute resolution term will not be taken to be a term of the enterprise agreement if the parties fail to include such a term in their agreement. Instead, FWA must refuse to approve an agreement which does not include a term about dealing with disputes.

312. The model term makes provision for an employee who is a party to the dispute to be represented at any stage in the dispute resolution process.

313. The model term provides for a number of stages in the dispute resolution process. Parties should initially attempt to resolve the dispute at the workplace level, via discussion between employees and relevant supervisors and/or management. If discussions at the workplace level are unsuccessful, either party may ask FWA to resolve the dispute.

314. Once the parties have referred the matter to FWA the model term prescribes a two stage process. In the first instance FWA may use all of its powers under section 595(2) to resolve the dispute. The note to subregulation (5) clarifies that FWA can use any dispute resolution technique it thinks fit, including:

- engaging in conciliation or mediation;
- ordering compulsory conferences; and
- requiring a party to provide information to FWA or another party.

315. If conciliation or mediation cannot resolve the dispute the model term empowers FWA to arbitrate the dispute and make a determination that is binding on the parties. FWA is empowered to use any power available to it under the Act for the purpose of resolving disputes in accordance with the model term.

316. Subregulation (7) makes explicit that the parties agree to be bound by an arbitrated outcome of FWA. This means that a failure to comply with a decision of FWA is a breach of the agreement and can be enforced in the Courts.

317. A decision that FWA makes when exercising its power to arbitrate under the model term for dealing with disputes for enterprise agreements is a decision for the purpose of subsection 598(1) of the Act. A decision by FWA may therefore be appealed by one of the parties under subdivision E of Division 3 of Part 5.1.

318. While the parties are trying to resolve the dispute using the procedures in this term, the model term provides that work must continue normally unless an employee has a reasonable concern about an imminent risk to his or her health or safety.

319. An employee must comply with the employer's direction to perform other available work either at the same or another workplace, unless:

- the work is unsafe;
- the work would not be permitted under applicable occupational health and safety legislation;
- it would be inappropriate for the employee to perform the work; or
- there are other reasonable grounds for the employee to refuse to comply with the direction.

320. This means that while a dispute resolution process is occurring an employee may a refuse a direction to work if the employee has reasonable health or safety concerns about performing the work. A reasonable ground for refusing to comply with a direction to work would include an imminent risk to health or safety of an employee caused by bullying or harassment from the employer.

Schedule 6.2 – Forms for certain terminations

321. This Schedule prescribes the form of a notice to Centrelink as specified in regulation 6.07.

Schedule 6.3 – Public sector employment – employing authorities

322. This Schedule, together with regulation 6.09, specifies the employing authority for various categories of public sector employees for the purposes of subsection 795(6) of the Act.