

## **Part 2-2—The National Employment Standards**

### **Division 1—Introduction**

#### **59 Guide to this Part**

This Part contains the National Employment Standards.

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

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

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

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

Divisions 2 and 3 of Part 6-3 extend the operation of the parental leave and notice of termination provisions of the National Employment Standards to employees who are not national system employees.

#### **60 Meanings of *employee* and *employer***

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

## **Division 2—The National Employment Standards**

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

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

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

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

## **Division 3—Maximum weekly hours**

### **62 Maximum weekly hours**

#### *Maximum weekly hours of work*

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

#### *Employee may refuse to work unreasonable additional hours*

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

#### *Determining whether additional hours are reasonable*

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

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

*Authorised leave or absence treated as hours worked*

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

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

- (1) A modern award or enterprise agreement may include terms providing for the averaging of hours of work over a specified period. The average weekly hours over the period must not exceed:
  - (a) for a full-time employee—38 hours; or
  - (b) for an employee who is not a full-time employee—the lesser of:
    - (i) 38 hours; and
    - (ii) the employee's ordinary hours of work in a week.
- (2) The terms of a modern award or enterprise agreement may provide for average weekly hours that exceed the hours referred to in paragraph (1)(a) or (b) if the excess hours are reasonable for the purposes of subsection 62(1).

Note: Hours in excess of the hours referred to in paragraph (1)(a) or (b) that are worked in a week in accordance with averaging terms in a modern

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award or enterprise agreement (whether the terms comply with subsection (1) or (2)) will be treated as additional hours for the purposes of section 62. The averaging terms will be relevant in determining whether the additional hours are reasonable (see paragraph 62(3)(i)).

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

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

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

## **Division 4—Requests for flexible working arrangements**

### **65 Requests for flexible working arrangements**

#### *Employee may request change in working arrangements*

- (1) An employee who is a parent, or has responsibility for the care, of a child may request the employer for a change in working arrangements to assist the employee to care for the child if the child:
  - (a) is under school age; or
  - (b) is under 18 and has a disability.

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

- (2) The employee is not entitled to make the request unless:
  - (a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or
  - (b) for a casual employee—the employee:
    - (i) is a long term casual employee of the employer immediately before making the request; and
    - (ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

#### *Formal requirements*

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

#### *Agreeing to the request*

- (4) The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.
- (5) The employer may refuse the request only on reasonable business grounds.

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- (6) If the employer refuses the request, the written response under subsection (4) must include details of the reasons for the refusal.

**66 State and Territory laws that are not excluded**

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

## **Division 5—Parental leave and related entitlements**

### **Subdivision A—General**

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

*Employees other than casual employees*

- (1) An employee, other than a casual employee, is not entitled to leave under this Division (other than unpaid pre-adoption leave) unless the employee has, or will have, completed at least 12 months of continuous service with the employer immediately before the date that applies under subsection (3).

*Casual employees*

- (2) A casual employee, is not entitled to leave (other than unpaid pre-adoption leave) under this Division unless:
  - (a) the employee is, or will be, a long term casual employee of the employer immediately before the date that applies under subsection (3); and
  - (b) but for:
    - (i) the birth or expected birth of the child; or
    - (ii) the placement or the expected placement of the child; or
    - (iii) if the employee is taking a period of unpaid parental leave that starts under subsection 71(6) or paragraph 72(3)(b) or 72(4)(b)—the taking of the leave;the employee would have a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

*Date at which employee must have completed 12 months of service*

- (3) For the purpose of subsections (1) and (2), the date that applies is:
  - (a) unless paragraph (b) or (c) applies:
    - (i) if the leave is birth-related leave—the date of birth, or the expected date of birth, of the child; or



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- (ii) if the leave is adoption-related leave—the day of placement, or the expected day of placement, of the child; or
- (b) for an employee taking a period of unpaid parental leave that is to start within 12 months after the birth or placement of the child under subsection 71(6)—the date on which the employee’s period of leave is to start; or
- (c) for a member of an employee couple taking a period of unpaid parental leave that is to start under paragraph 72(3)(b) or 72(4)(b) after the period of unpaid parental leave of the other member of the employee couple—the date on which the employee’s period of leave is to start.

*Meaning of **birth-related leave***

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

*Meaning of **adoption-related leave***

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

*Meaning of **day of placement***

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

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

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

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

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

(1) If:

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

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

(2) If:

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

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

Note: Steps covered by this subsection include (for example) giving the first employer notice under subsection 74(1), confirmation or advice under subsection 74(4) or evidence under subsection 74(5).

## **Subdivision B—Parental leave**

### **70 Entitlement to unpaid parental leave**

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

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

Note 1: Entitlement is also affected by section 67 (which deals with length of the employee's service) and, for adoption, section 68 (which deals with the age etc. of the adopted child).

Note 2: The 12 months is reduced by the amount of any unpaid special maternity leave the employee has taken (see subsection 80(7)).

### **71 The period of leave—other than for members of an employee couple who each intend to take leave**

#### *Application of this section*

- (1) This section applies to an employee who intends to take unpaid parental leave if:
  - (a) the employee is not a member of an employee couple; or
  - (b) the employee is a member of an employee couple, but the other member of the couple does not intend to take unpaid parental leave.

#### *Leave must be taken in single continuous period*

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

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

#### *When birth-related leave must start*

- (3) If the leave is birth-related leave for a female employee who is pregnant with, or gives birth to, the child, the period of leave may start up to 6 weeks before the expected date of birth of the child, but must not start later than the date of birth of the child.

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

*When adoption-related leave must start*

- (5) If the leave is adoption-related leave, the period of leave must start on the day of placement of the child.

*Leave may start later for employees whose spouse or de facto partner is not an employee*

- (6) Despite subsections (3) to (5), the period of leave may start at any time within 12 months after the date of birth or day of placement of the child if:
- (a) the employee has a spouse or de facto partner who is not an employee; and
  - (b) the spouse or de facto partner has a responsibility for the care of the child for the period between the date of birth or day of placement of the child and the start date of the leave.

Note: An employee whose leave starts under subsection (6) is still entitled under section 76 to request an extension of the period of leave beyond his or her available parental leave period. However, the period of leave may not be extended beyond 24 months after the date of birth or day of placement of the child (see subsection 76(7)).

## **72 The period of leave—members of an employee couple who each intend to take leave**

*Application of this section*

- (1) This section applies to an employee couple if each of the employees intends to take unpaid parental leave.

*Leave must be taken in single continuous period*

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

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

*When birth-related leave must start*

- (3) If the leave is birth-related leave:

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- (a) one employee's period of leave must start first, in accordance with the following rules:
  - (i) if the member of the employee couple whose period of leave starts first is a female employee who is pregnant with, or gives birth to, the child—the period of leave may start up to 6 weeks before the expected date of birth of the child, but must not start later than the date of birth of the child;
  - (ii) if subparagraph (i) does not apply—the period of leave must start on the date of birth of the child; and
- (b) the other employee's period of leave must start immediately after the end of the first employee's period of leave (or that period as extended under section 75 or 76).

*When adoption-related leave must start*

- (4) If the leave is adoption-related leave:
  - (a) one employee's period of leave must start on the day of placement of the child; and
  - (b) the other employee's period of leave must start immediately after the end of the first employee's period of leave (or that period as extended under section 75 or 76).

*Limited entitlement to take concurrent leave*

- (5) If one of the employees takes a period (the **first employee's period of leave**) of unpaid parental leave in accordance with paragraph (3)(a) or (4)(a), the other employee may take a period of unpaid parental leave (the **concurrent leave**) during the first employee's period of leave, if the concurrent leave complies with the following requirements:
  - (a) the concurrent leave must be for a period of 3 weeks or less;
  - (b) unless the employer agrees as referred to in paragraph (c), the concurrent leave must not start before, and must not end more than 3 weeks after:
    - (i) if the leave is birth-related leave—the date of birth of the child; or
    - (ii) if the leave is adoption-related leave—the day of placement of the child;
  - (c) if the employer agrees, the concurrent leave may (subject to paragraph (a)):

- (i) start earlier than is permitted by paragraph (b); or
  - (ii) end up to 3 weeks later than is permitted by paragraph (b).
- (6) Concurrent leave taken by an employee:
- (a) is an exception to the rule that the employee must take his or her leave in a single continuous period (see subsection (2)); and
  - (b) is an exception to the rules about when the employee's period of unpaid parental leave must start (see subsection (3) or (4)).

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

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

*Employer may ask employee to provide a medical certificate*

- (1) If a pregnant employee who is entitled to unpaid parental leave (whether or not she has complied with section 74) continues to work during the 6 week period before the expected date of birth of the child, the employer may ask the employee to give the employer a medical certificate containing the following statements (as applicable):
- (a) a statement of whether the employee is fit for work;
  - (b) if the employee is fit for work—a statement of whether it is inadvisable for the employee to continue in her present position during a stated period because of:
    - (i) illness, or risks, arising out of the employee's pregnancy; or
    - (ii) hazards connected with the position.

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

*Employer may require employee to take unpaid parental leave*

- (2) The employer may require the employee to take a period of unpaid parental leave (the ***period of leave***) as soon as practicable if:
- (a) the employee does not give the employer the requested certificate within 7 days after the request; or

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- (b) within 7 days after the request, the employee gives the employer a medical certificate stating that the employee is not fit for work; or
- (c) the following subparagraphs are satisfied:
  - (i) within 7 days after the request, the employee gives the employer a medical certificate stating that the employee is fit for work, but that it is inadvisable for the employee to continue in her present position for a stated period for a reason referred to in subparagraph (1)(b)(i) or (ii);
  - (ii) section 81 does not apply to the employee.

Note: If the medical certificate contains a statement as referred to in subparagraph (c)(i) and section 81 applies to the employee, the employee is entitled under that section to be transferred to a safe job, or to paid no safe job leave.

*When the period of leave must end*

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

*Special rules about the period of leave*

- (4) The period of leave:
  - (a) is an exception to the rule that the employee must take her unpaid parental leave in a single continuous period (see subsection 71(2) or 72(2)); and
  - (b) is an exception to the rules about when the employee's period of unpaid parental leave must start (see subsections 71(3) and (6), or subsection 72(3)).

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

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

## 74 Notice and evidence requirements

### *Notice*

- (1) An employee must give his or her employer written notice of the taking of unpaid parental leave under section 71 or 72 by the employee.
- (2) The notice must be given to the employer:
  - (a) at least 10 weeks before starting the leave; or
  - (b) if that is not practicable—as soon as practicable (which may be a time after the leave has started).
- (3) The notice must specify the intended start and end dates of the leave.

### *Confirmation or change of intended start and end dates*

- (4) At least 4 weeks before the intended start date specified in the notice given under subsection (1), the employee must:
  - (a) confirm the intended start and end dates of the leave; or
  - (b) advise the employer of any changes to the intended start and end dates of the leave;unless it is not practicable to do so.

### *Evidence*

- (5) An employee who has given his or her employer notice of the taking of unpaid parental leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person:
  - (a) if the leave is birth-related leave—of the date of birth, or the expected date of birth, of the child; or
  - (b) if the leave is adoption-related leave:
    - (i) of the day of placement, or the expected day of placement, of the child; and
    - (ii) that the child is, or will be, under 16 as at the day of placement, or the expected day of placement, of the child.
- (6) Without limiting subsection (5), an employer may require the evidence referred to in paragraph (5)(a) to be a medical certificate.



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*Compliance*

- (7) An employee is not entitled to take unpaid parental leave under section 71 or 72 unless the employee complies with this section.

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

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

*Application of this section*

- (1) This section applies if:
- (a) an employee has, in accordance with section 74, given notice of the taking of a period of unpaid parental leave (the ***original leave period***); and
  - (b) the original leave period is less than the employee's available parental leave period; and
  - (c) the original leave period has started.
- (2) The employee's ***available parental leave period*** is 12 months, less any periods of the following kinds:
- (a) a period of concurrent leave that the employee has taken in accordance with subsection 72(5);
  - (b) a period of unpaid parental leave that the employee has been required to take under subsection 73(2) or 82(2);
  - (c) a period by which the employee's entitlement to unpaid parental leave is reduced under paragraph 76(6)(c);
  - (d) a period of special maternity leave that the employee has taken.

*First extension by giving notice to employer*

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

*Further extensions by agreement with employer*

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

*No entitlement to extension beyond available parental leave period*

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

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

*Employee may request further period of leave*

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

*Making the request*

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

*Agreeing to the requested extension*

- (3) The employer must give the employee a written response to the request stating whether the employer grants or refuses the request. The response must be given as soon as practicable, and not later than 21 days, after the request is made.
- (4) The employer may refuse the request only on reasonable business grounds.
- (5) If the employer refuses the request, the written response under subsection (3) must include details of the reasons for the refusal.

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*Special rules for employee couples*

- (6) The following paragraphs apply in relation to a member of an employee couple extending a period of unpaid parental leave in relation to a child under this section:
- (a) the request must specify any amount of unpaid parental leave and unpaid special maternity leave that the other member of the employee couple has taken, or will have taken, in relation to the child before the extension starts;
  - (b) the period of the extension cannot exceed 12 months, less any period of unpaid parental leave or unpaid special maternity leave that the other member of the employee couple has taken, or will have taken, in relation to the child before the extension starts;
  - (c) the amount of unpaid parental leave to which the other member of the employee couple is entitled under section 70 in relation to the child is reduced by the period of the extension.

*No extension beyond 24 months after birth or placement*

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

**77 Reducing period of unpaid parental leave**

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

**78 Employee who ceases to have responsibility for care of child**

- (1) This section applies to an employee who has taken unpaid parental leave in relation to a child if the employee ceases to have any responsibility for the care of the child.
- (2) The employer may give the employee written notice requiring the employee to return to work on a specified day.
- (3) The specified day:
  - (a) must be at least 4 weeks after the notice is given to the employee; and

- (b) if the leave is birth-related leave taken by a female employee who has given birth—must not be earlier than 6 weeks after the date of birth of the child.
- (4) The employee’s entitlement to unpaid parental leave in relation to the child ends immediately before the specified day.

### **79 Interaction with paid leave**

- (1) This Subdivision (except for subsections (2) and (3)) does not prevent an employee from taking any other kind of paid leave while he or she is taking unpaid parental leave. If the employee does so, the taking of that other paid leave does not break the continuity of the period of unpaid parental leave.
  - Note: For example, if the employee has paid annual leave available, he or she may (with the employer’s agreement) take some or all of that paid annual leave at the same time as the unpaid parental leave.
- (2) An employee is not entitled to take paid personal/carer’s leave or compassionate leave while he or she is taking unpaid parental leave.
- (3) An employee is not entitled to any payment under Division 8 (which deals with community service leave) in relation to activities the employee engages in while taking unpaid parental leave.

### **Subdivision C—Other entitlements**

#### **80 Unpaid special maternity leave**

##### *Entitlement to unpaid special maternity leave*

- (1) A female employee is entitled to a period of unpaid special maternity leave if she is not fit for work during that period because:
  - (a) she has a pregnancy-related illness; or
  - (b) she has been pregnant, and the pregnancy ends within 28 weeks of the expected date of birth of the child otherwise than by the birth of a living child.
- Note: Entitlement is also affected by section 67 (which deals with the length of the employee’s service).

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*Notice and evidence*

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

*Taking of special maternity leave reduces entitlement to unpaid parental leave*

- (7) A female employee's entitlement to 12 months of unpaid parental leave associated with the birth of a child (see section 70) is reduced by the amount of any unpaid special maternity leave taken by the employee while she was pregnant.

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

## **81 Transfer to a safe job**

*Application of this section*

- (1) This section applies to a pregnant employee if:
  - (a) she is entitled to unpaid parental leave; and
  - (b) she has already complied with the notice and evidence requirements of section 74 for taking unpaid parental leave; and
  - (c) she gives her employer evidence that would satisfy a reasonable person that she is fit for work, but that it is

inadvisable for her to continue in her present position during a stated period (the **risk period**) because of:

- (i) illness, or risks, arising out of her pregnancy; or
- (ii) hazards connected with that position.

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

- (2) Without limiting paragraph (1)(c), an employer may require the evidence referred to in that paragraph to be a medical certificate.

*Employee entitled to appropriate safe job or paid no safe job leave during risk period*

- (3) If this section applies to an employee:
  - (a) if there is an appropriate safe job available—the employer must transfer the employee to that job for the risk period, with no other change to the employee’s terms and conditions of employment; or
  - (b) if there is no appropriate safe job available—the employee is entitled to take paid no safe job leave for the risk period.
- (4) An **appropriate safe job** is a safe job that has:
  - (a) the same ordinary hours of work as the employee’s present position; or
  - (b) a different number of ordinary hours agreed to by the employee.

*Payment to employee if transferred to appropriate safe job*

- (5) Without limiting paragraph (3)(a), if the employee is transferred to an appropriate safe job for the risk period, the employer must pay the employee for the safe job at the employee’s full rate of pay (for the position she was in before the transfer) for the hours that she works in the risk period.

*Payment to employee if on paid no safe job leave*

- (6) If the employee takes paid no safe job leave for the risk period, the employer must pay the employee at the employee’s base rate of pay for the employee’s ordinary hours of work in the risk period.

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*Risk period ends if pregnancy ends*

- (7) If the employee's pregnancy ends before the end of the risk period, the risk period ends when the pregnancy ends.

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

*Employer may ask employee to provide a medical certificate*

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

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

*Employer may require employee to take unpaid parental leave*

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

*Entitlement to paid no safe job leave ends*

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

*When the period of leave must end etc.*

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

**83 Consultation with employee on unpaid parental leave**

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

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

- (2) The employee's *pre-parental leave position* is:
- (a) unless paragraph (b) applies, the position the employee held before starting the unpaid parental leave; or
  - (b) if, before starting the unpaid parental leave, the employee:
    - (i) was transferred to a safe job because of her pregnancy; or
    - (ii) reduced her working hours due to her pregnancy;the position the employee held immediately before that transfer or reduction.

#### **84 Return to work guarantee**

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

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

#### **85 Unpaid pre-adoption leave**

##### *Entitlement to unpaid pre-adoption leave*

- (1) An employee is entitled to up to 2 days of unpaid pre-adoption leave to attend any interviews or examinations required in order to obtain approval for the employee's adoption of a child.

Note: Entitlement is also affected by section 68 (which deals with the age etc. of the adopted child).

- (2) However, an employee is not entitled to take a period of unpaid pre-adoption leave if:
- (a) the employee could instead take some other form of leave; and
  - (b) the employer directs the employee to take that other form of leave.
- (3) An employee who is entitled to a period of unpaid pre-adoption leave is entitled to take the leave as:
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- (a) a single continuous period of up to 2 days; or
- (b) any separate periods to which the employee and the employer agree.

*Notice and evidence*

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

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

## **Division 6—Annual leave**

### **86 Division applies to employees other than casual employees**

This Division applies to employees, other than casual employees.

### **87 Entitlement to annual leave**

#### *Amount of leave*

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

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

#### *Accrual of leave*

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

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

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*Award/agreement free employees who qualify for the shiftworker entitlement*

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

**88 Taking paid annual leave**

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

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

*Public holidays*

- (1) If the period during which an employee takes paid annual leave includes a day or part-day that is a public holiday in the place

where the employee is based for work purposes, the employee is taken not to be on paid annual leave on that public holiday.

*Other periods of leave*

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

**90 Payment for annual leave**

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

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

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

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

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

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

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

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

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

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

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

*Terms about cashing out paid annual leave*

- (1) A modern award or enterprise agreement may include terms providing for the cashing out of paid annual leave by an employee.
- (2) The terms must require that:
  - (a) paid annual leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks; and
  - (b) each cashing out of a particular amount of paid annual leave must be by a separate agreement in writing between the employer and the employee; and
  - (c) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

*Terms about requirements to take paid annual leave*

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

*Terms about taking paid annual leave*

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

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

*Agreements to cash out paid annual leave*

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

*Requirements to take paid annual leave*

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

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

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

*Agreements about taking paid annual leave*

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

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

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

## **Division 7—Personal/carer's leave and compassionate leave**

### **Subdivision A—Paid personal/carer's leave**

#### **95 Subdivision applies to employees other than casual employees**

This Subdivision applies to employees, other than casual employees.

#### **96 Entitlement to paid personal/carer's leave**

##### *Amount of leave*

- (1) For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave.

##### *Accrual of leave*

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

#### **97 Taking paid personal/carer's leave**

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

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

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



**98 Employee taken not to be on paid personal/carer's leave on public holiday**

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

**99 Payment for paid personal/carer's leave**

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

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

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

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

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

## **Subdivision B—Unpaid carer's leave**

### **102 Entitlement to unpaid carer's leave**

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

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

### **103 Taking unpaid carer's leave**

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

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

## **Subdivision C—Compassionate leave**

### **104 Entitlement to compassionate leave**

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

- (a) contracts or develops a personal illness that poses a serious threat to his or her life; or
- (b) sustains a personal injury that poses a serious threat to his or her life; or

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(c) dies.

### **105 Taking compassionate leave**

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

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

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

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

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

## **Subdivision D—Notice and evidence requirements**

### **107 Notice and evidence requirements**

#### *Notice*

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

#### *Evidence*

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

#### *Compliance*

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

#### *Modern awards and enterprise agreements may include evidence requirements*

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

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

## **Division 8—Community service leave**

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

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

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

### **109 Meaning of *eligible community service activity***

#### *General*

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

#### *Voluntary emergency management activities*

- (2) An employee engages in a ***voluntary emergency management activity*** if, and only if:
  - (a) the employee engages in an activity that involves dealing with an emergency or natural disaster; and
  - (b) the employee engages in the activity on a voluntary basis (whether or not the employee directly or indirectly takes or agrees to take an honorarium, gratuity or similar payment wholly or partly for engaging in the activity); and

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

*Regulations may prescribe other activities*

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

## **110 Notice and evidence requirements**

### *Notice*

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

### *Evidence*

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

### *Compliance*

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

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

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

### *Application of this section*

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



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*Employee to be paid base rate of pay*

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

*Evidence*

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

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

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

*Payment only required for first 10 days of absence*

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

*Meaning of jury service pay*

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

*Meaning of jury service summons*

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

**112 State and Territory laws that are not excluded**

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

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

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

## Division 9—Long service leave

### 113 Entitlement to long service leave

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

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

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

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

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

- (3) ***Applicable award-derived long service leave terms***, in relation to an employee, are:
- (a) terms of an award, or a State reference transitional award, that (disregarding the effect of any instrument of a kind referred to in subsection (2)):

- (i) would have applied to the employee at the test time (see subsection (3A)) if the employee had, at that time, been in his or her current circumstances of employment; and
    - (ii) would have entitled the employee to long service leave; and
  - (b) any terms of the award, or the State reference transitional award, that are ancillary or incidental to the terms referred to in paragraph (a).
- (3A) For the purpose of subparagraph (3)(a)(i), the test time is:
- (a) immediately before the commencement of this Part; or
  - (b) if the employee is a Division 2B State reference employee (as defined in Schedule 2 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*)—immediately before the Division 2B referral commencement (as defined in that Schedule).
- Entitlement in accordance with applicable agreement-derived long service leave terms*
- (4) If there are applicable agreement-derived long service leave terms (see subsection (5)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.
  - (5) There are ***applicable agreement-derived long service leave terms***, in relation to an employee if:
    - (a) an order under subsection (6) is in operation in relation to terms of an instrument; and
    - (b) those terms of the instrument would have applied to the employee immediately before the commencement of this Part if the employee had, at that time, been in his or her current circumstances of employment; and
    - (c) there are no applicable award-derived long service leave terms in relation to the employee.
  - (6) If FWA is satisfied that:
    - (a) any of the following instruments that was in operation immediately before the commencement of this Part contained terms entitling employees to long service leave:
      - (i) an enterprise agreement;
      - (ii) a collective agreement;
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- (iii) a pre-reform certified agreement;
- (iv) an old IR agreement; and
- (b) those terms constituted a long service leave scheme that was applying in more than one State or Territory; and
- (c) the scheme, considered on an overall basis, is no less beneficial to the employees than the long service leave entitlements that would otherwise apply in relation to the employees under State and Territory laws;

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

*References to instruments*

- (7) References in this section to a kind of instrument (other than an enterprise agreement) are references to a transitional instrument of that kind, as continued in existence by Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

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

- (1) This section applies if:
  - (a) an instrument (the *first instrument*) of one of the following kinds that came into operation before the commencement of this Part applies to an employee on or after the commencement of this Part:
    - (i) an enterprise agreement;
    - (ii) a workplace agreement;
    - (iii) a workplace determination;
    - (iv) a preserved State agreement;
    - (v) an AWA;
    - (vi) a pre-reform certified agreement;
    - (vii) a pre-reform AWA;
    - (viii) an old IR agreement;
    - (ix) a section 170MX award; and
  - (b) the instrument states that the employee is not entitled to long service leave; and

- (c) the instrument ceases, for whatever reason, to apply to the employee; and
  - (d) immediately after the first instrument ceases to apply, an enterprise agreement (the *replacement agreement*) starts to apply to the employee.
- (2) The replacement agreement may include terms to the effect that an employee's service with the employer during a specified period (the *excluded period*) (being some or all of the period when the first instrument applied to the employee) does not count as service for the purpose of determining whether the employee is qualified for long service leave, or the amount of long service leave to which the employee is entitled, under this Division or under a law of a State or Territory.
- (3) If the replacement agreement includes terms as permitted by subsection (2), the excluded period does not count, and never again counts, as service for the purpose of determining whether the employee is qualified for long service leave, or the amount of long service leave to which the employee is entitled, under this Division or under a law of a State or Territory, unless a later agreement provides otherwise. This subsection has effect despite sections 27 and 29.
- (4) References in this section to a kind of instrument (other than an enterprise agreement) are references to a transitional instrument of that kind, as continued in existence by Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

## **Division 10—Public holidays**

### **114 Entitlement to be absent from employment on public holiday**

*Employee entitled to be absent on public holiday*

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

*Reasonable requests to work on public holidays*

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

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

### **115 Meaning of *public holiday***

#### *The public holidays*

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

#### *Substituted public holidays under State or Territory laws*

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

#### *Substituted public holidays under modern awards and enterprise agreements*

- (3) A modern award or enterprise agreement may include terms providing for an employer and employee to agree on the



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substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

*Substituted public holidays for award/agreement free employees*

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

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

**116 Payment for absence on public holiday**

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

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

## **Division 11—Notice of termination and redundancy pay**

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

#### **117 Requirement for notice of termination or payment in lieu**

##### *Notice specifying day of termination*

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

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

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

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

##### *Amount of notice or payment in lieu of notice*

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

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

- (b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

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

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

**Subdivision B—Redundancy pay**

**119 Redundancy pay**

*Entitlement to redundancy pay*

- (1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:
- (a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
  - (b) because of the insolvency or bankruptcy of the employer.

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

*Amount of redundancy pay*

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

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

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

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

### **121 Exclusions from obligation to pay redundancy pay**

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

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

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

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

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

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

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

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

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

## **Subdivision C—Limits on scope of this Division**

### **123 Limits on scope of this Division**

*Employees not covered by this Division*

- (1) This Division does not apply to any of the following employees:
  - (a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;
  - (b) an employee whose employment is terminated because of serious misconduct;
  - (c) a casual employee;
  - (d) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement;

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- (e) an employee prescribed by the regulations as an employee to whom this Division does not apply.
- (2) Paragraph (1)(a) does not prevent this Division from applying to an employee if a substantial reason for employing the employee as described in that paragraph was to avoid the application of this Division.

*Other employees not covered by notice of termination provisions*

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

*Other employees not covered by redundancy pay provisions*

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

## **Division 12—Fair Work Information Statement**

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

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

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

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

### **125 Giving new employees the Fair Work Information Statement**

- (1) An employer must give each employee the Fair Work Information Statement before, or as soon as practicable after, the employee starts employment.
- (2) Subsection (1) does not require the employer to give the employee the Statement more than once in any 12 months.

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



## **Division 13—Miscellaneous**

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

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

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

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

### **127 Regulations about what modern awards and enterprise agreements can do**

The regulations may:

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

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

The National Employment Standards have effect subject to:

- (a) an agreement between an employer and an award/agreement free employee or a requirement made by an employer of an

award/agreement free employee, that is expressly permitted by a provision of this Part; or

- (b) an agreement between an employer and an award/agreement free employee that is expressly permitted by regulations made for the purpose of section 129.

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

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

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

The regulations may:

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

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

- (1) An employee is not entitled to take or accrue any leave or absence (whether paid or unpaid) under this Part during a period (a **compensation period**) when the employee is absent from work because of a personal illness, or a personal injury, for which the employee is receiving compensation payable under a law (a **compensation law**) of the Commonwealth, a State or a Territory that is about workers' compensation.
- (2) Subsection (1) does not prevent an employee from taking or accruing leave during a compensation period if the taking or accruing of the leave is permitted by a compensation law.
- (3) Subsection (1) does not prevent an employee from taking unpaid parental leave during a compensation period.

**Chapter 2** Terms and conditions of employment

**Part 2-2** The National Employment Standards

**Division 13** Miscellaneous

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### **131 Relationship with other Commonwealth laws**

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