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Volume 2: sections 258–678

Volume 3: sections 679–800

Schedules

Endnotes

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Division 4—Intractable bargaining workplace determinations

269 When the FWC must make an intractable bargaining workplace determination

If an intractable bargaining declaration has been made in relation to a proposed enterprise agreement, the FWC must make a determination (an *intractable bargaining workplace determination*) as quickly as possible:

- (a) if there is a post-declaration negotiating period for the declaration under section 235A—after the end of that period; or
- (b) otherwise—after making the declaration.

Note: The FWC must be constituted by a Full Bench to make an intractable bargaining workplace determination (see subsection 616(4)).

270 Terms etc. of an intractable bargaining workplace determination

Basic rule

- (1) An intractable bargaining workplace determination must comply with subsection (4) and include:
 - (a) the terms set out in this section; and
 - (b) the core terms set out in section 272; and
 - (c) the mandatory terms set out in section 273.

Note: For the factors that the FWC must take into account in deciding the terms of the determination, see section 275.

Agreed terms

- (2) The determination must include the agreed terms (see subsection 274(3)) for the determination.

Terms dealing with the matters at issue

- (3) The determination must include the terms that the FWC considers deal with the matters that were still at issue:
- (a) if there is a post-declaration negotiating period under section 235A for the declaration concerned—after the end of that period; or
 - (b) otherwise—after making the declaration.

Note: Any such terms must comply with section 270A.

Coverage

- (4) The determination must be expressed to cover:
- (a) each employer that would have been covered by the agreement; and
 - (b) the employees who would have been covered by that agreement; and
 - (c) each employee organisation (if any) that was a bargaining representative of those employees.

270A Terms dealing with matters at issue

- (1) This section applies if, immediately before the determination is made, an enterprise agreement applies to one or more employees who will be covered by the determination.
- (2) A term that is included in the determination to comply with subsection 270(3), and that deals with a particular matter, must be not less favourable to each of those employees, and any employee organisation that was a bargaining representative of any of those employees, than a term of the enterprise agreement that deals with the matter.
- (3) If a term to be included in the determination is not less favourable to a class of employees to which a particular employee belongs, the FWC is entitled to assume, in the absence of evidence to the contrary, that the term is not less favourable to the employee.

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- (4) Subsection (2) does not apply to a term that provides for a wage increase.

271 No other terms

An intractable bargaining workplace determination must not include any terms other than those required by subsection 270(1).

Division 5—Core terms, mandatory terms and agreed terms of workplace determinations etc.

272 Core terms of workplace determinations

Core terms

- (1) This section sets out the core terms that a workplace determination must include.

Nominal expiry date

- (2) The determination must include a term specifying a date as the determination's nominal expiry date, which must not be more than 4 years after the date on which the determination comes into operation.

Permitted matters etc.

- (3) The determination must not include:
- (a) any terms that would not be about permitted matters if the determination were an enterprise agreement; or
 - (b) a term that would be an unlawful term if the determination were an enterprise agreement; or
 - (c) any designated outworker terms.

Better off overall test

- (4) The determination must include terms such that the determination would, if the determination were an enterprise agreement, pass the better off overall test under section 193.

Safety net requirements

- (5) The determination must not include a term that would, if the determination were an enterprise agreement, mean that the FWC could not approve the agreement:

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Section 273

- (a) because the term would contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); or
- (b) because of the operation of Subdivision E of Division 4 of Part 2-4 (which deals with approval requirements relating to particular kinds of employees).

273 Mandatory terms of workplace determinations

Mandatory terms

- (1) This section sets out the mandatory terms that a workplace determination must include.

Term about settling disputes

- (2) The determination must include a term that provides a procedure for settling disputes:
 - (a) about any matters arising under the determination; and
 - (b) in relation to the National Employment Standards.
- (3) Subsection (2) does not apply to the determination if the FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraphs 186(6)(a) and (b) (which deal with terms in enterprise agreements about settling disputes).

Flexibility term

- (4) The determination must include the model flexibility term unless the FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraph 202(1)(a) and section 203 (which deal with flexibility terms in enterprise agreements).

Consultation term

- (5) The determination must include the model consultation term unless the FWC is satisfied that an agreed term for the determination

would, if the determination were an enterprise agreement, satisfy subsection 205(1) (which deals with terms about consultation in enterprise agreements).

Delegates' rights term

- (6) The determination must include a delegates' rights term for the workplace delegates to whom the determination applies.

Note: *Delegates' rights term* is defined in section 12.

- (7) The delegates' rights term must not be less favourable than the delegates' rights term in any modern award that covers a workplace delegate to whom the determination applies.

274 Agreed terms for workplace determinations

Agreed term for an industrial action related workplace determination

- (2) An **agreed term** for an industrial action related workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at the end of the post-industrial action negotiating period, agreed should be included in the agreement.

Note: The determination must include an agreed term (see subsection 267(2)).

Agreed term for an intractable bargaining workplace determination

- (3) An **agreed term** for an intractable bargaining workplace determination is:
- (a) a term that the bargaining representatives for the proposed enterprise agreement concerned had agreed, at the time the application for the intractable bargaining declaration concerned was made, should be included in the agreement; and

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- (b) any other term, in addition to a term mentioned in paragraph (a), that the bargaining representatives had agreed, at the time the declaration was made, should be included in the agreement; and
- (c) if there is a post-declaration negotiating period for the declaration—any other term, in addition to a term mentioned in paragraph (a) or (b), that the bargaining representatives had agreed, at the end of the period, should be included in the agreement.

Note: The determination must include an agreed term (see subsection 270(2)).

275 Factors the FWC must take into account in deciding terms of a workplace determination

The factors that the FWC must take into account in deciding which terms to include in a workplace determination include the following:

- (a) the merits of the case;
- (c) the interests of the employers and employees who will be covered by the determination;
- (ca) the significance, to those employers and employees, of any arrangements or benefits in an enterprise agreement that, immediately before the determination is made, applies to any of the employers in respect of any of the employees;
- (d) the public interest;
- (e) how productivity might be improved in the enterprise or enterprises concerned;
- (f) the extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement;
- (g) the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements;
- (h) incentives to continue to bargain at a later time.