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South Australia

Fair Work (Commonwealth Powers) Bill 2009

A BILL FOR

An Act to refer certain matters relating to workplace relations to the Parliament of the Commonwealth for the purposes of section 51(xxxvii) of the *Constitution of the Commonwealth*.

Contents

1 Short title
2 Commencement
3 Interpretation
4 Fundamental workplace relations principles
5 Reference of matters
6 Matters excluded from the reference
7 Termination of references
8 Effect of termination of amendment reference or transition reference before initial reference
9 Period for termination of references

Schedule 1—Text to be included in the provisions of the Commonwealth Fair Work Act

Division 2B—Application of this Act in States that refer matters after 1 July 2009 but on or before 1 January 2010

30K Meaning of terms used in this Division
30L Meaning of *referring State*
30M Extended meaning of *national system employee*
30N Extended meaning of *national system employer*
30P Extended ordinary meanings of *employee* and *employer*
30Q Extended meaning of *outworker entity*
30R General protections
30S Division only has effect if supported by reference

The Parliament of South Australia enacts as follows:

1—Short title

This Act may be cited as the *Fair Work (Commonwealth Powers) Act 2009*.

2—Commencement

(1) This Act will come into operation on a day to be fixed by proclamation.

(2) Section 7(5) of the *Acts Interpretation Act 1915* does not apply to this Act or to a provision of this Act.

3—Interpretation

(1) In this Act, unless the contrary intention appears—

administrative unit means—

(a) a department established as part of the Public Service of the State; or

(b) an attached office under the *Public Sector Act 2009*;

amendment reference means the reference under section 5(1)(b);

Commonwealth Fair Work Act means the *Fair Work Act 2009* of the Commonwealth (as amended from time to time);

employing authority means a person designated as an employing authority, and empowered to employ persons on behalf of the Crown, under an Act;

excluded subject matter means any of the following matters:

(a) a matter dealt with in the *Equal Opportunity Act 1984*;

(b) superannuation;

(c) workers compensation;

(d) occupational health and safety;

(e) matters relating to outworkers (within the ordinary meaning of the term);

(f) child labour;

(g) training arrangements;

(h) long service leave;

(i) leave for victims of crime;

(j) attendance for service on a jury, or for emergency service duties;

(k) declaration, prescription or substitution of public holidays;

(l) the following matters relating to provision of essential services or to situations of emergency:

(i) directions to perform work (including to perform work at a particular time or place, or in a particular way);

(ii) directions not to perform work (including not to perform work at a particular time or place, or in a particular way);

(m) regulation of any of the following:

(i) employee associations;

(ii) employer associations;

(iii) members of employee associations or of employer associations;

(n) workplace surveillance;

(o) business trading hours;

(p) claims for enforcement of contracts of employment, except so far as a law of a State provides for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;

(q) rights or remedies incidental to a matter referred to in a preceding paragraph of this definition,

except to the extent that the *Fair Work Act 2009* of the Commonwealth, as originally enacted, deals with the matter (directly or indirectly), or requires or permits instruments made or given effect under the Commonwealth Fair Work Act so to deal with the matter;

express amendment of the Commonwealth Fair Work Act means the direct amendment of the text of that Act (whether by the insertion, omission, repeal, substitution or relocation of words or matter) but does not include the enactment by a Commonwealth Act of a provision that has, or will have, substantive effect otherwise than as part of the text of the Commonwealth Fair Work Act;

fundamental workplace relations principles—see section 4;

initial reference means the reference under section 5(1)(a);

initial referred provisions means the scheduled text, to the extent to which that text deals with matters that are included in the legislative powers of the Parliament of the State;

law enforcement officer means—

(a) a member of SA Police under the *Police Act 1998*; or

(b) a police cadet, police medical officer or special constable; or

(c) a person employed as a protective security officer under the *Protective Security Act 2007*;

local government sector employee means an employee of a local government sector employer;

local government sector employer means an employer that is—

(a) a council constituted under the *Local Government Act 1999*; or

(b) a subsidiary or regional subsidiary established under the *Local Government Act 1999*; or

(c) any other entity established under the *Local Government Act 1999*; or

(d) the Local Government Association of South Australia; or

(e) any other entity established by a body referred to in a preceding paragraph;

public sector agency means—

(a) a Minister; or

(b) a chief executive of an administrative unit; or

(c) an administrative unit; or

(d) an employing authority; or

(e) any other agency or instrumentality of the Crown; or

(f) a body corporate—

(i) comprised of persons, or with a governing body comprised of persons, a majority of whom are appointed by the Governor, a Minister or an agency or instrumentality of the Crown; or

(ii) subject to control or direction by a Minister; or

(g) a person or body declared under an Act to be a public sector agency for the purposes of the management or governance of the public sector of the State; or

(h) a subsidiary of a Minister or a person or body referred to in a preceding paragraph,

but does not include a person or body declared under an Act not to be part of the Crown or not to be an agency or instrumentality of the Crown;

public sector employee means a chief executive of an administrative unit or an employee in an administrative unit or other person employed or appointed by a public sector agency;

reference means—

(a) the initial reference; or

(b) the amendment reference; or

(c) the transition reference;

referred subject matters means any of the following:

(a) terms and conditions of employment, including any of the following:

(i) minimum terms and conditions of employment (including employment standards and minimum wages);

(ii) terms and conditions of employment contained in instruments (including instruments such as awards, determinations and enterprise-level agreements);

(iii) bargaining in relation to terms and conditions of employment;

(iv) the effect of a transfer of business on terms and conditions of employment;

(b) terms and conditions under which an outworker entity may arrange for work to be performed for the entity (directly or indirectly), if the work is of a kind that is often performed by outworkers;

(c) rights and responsibilities of persons, including employees, employers, independent contractors, outworkers, outworker entities, associations of employees or associations of employers, being rights and responsibilities relating to any of the following:

(i) freedom of association in the context of workplace relations, and related protections;

(ii) protection from discrimination relating to employment;

(iii) termination of employment;

(iv) industrial action;

(v) protection from payment of fees for services related to bargaining;

(vi) sham independent contractor arrangements;

(vii) standing down employees without pay;

(viii) union rights of entry and rights of access to records;

(d) compliance with, and enforcement of, the Commonwealth Fair Work Act;

(e) the administration of the Commonwealth Fair Work Act;

(f) the application of the Commonwealth Fair Work Act;

(g) matters incidental or ancillary to the operation of the Commonwealth Fair Work Act or of instruments made or given effect under the Commonwealth Fair Work Act,

but does not include any excluded subject matter;

referred transition matters means the matters of the making of laws with respect to the transition from the regime provided for by—

(a) the *Workplace Relations Act 1996* of the Commonwealth (as it continues to apply because of the *Fair Work (Transitional and Consequential Amendments) Act 2009* of the Commonwealth); or

(b) a law of this State relating to workplace relations or industrial relations,

to the regime provided for by the Commonwealth Fair Work Act;

scheduled text means the text set out in Schedule 1;

transition reference means the reference under section 5(1)(c).

(2) Words or phrases in the definition of ***excluded subject matter*** or the definition of ***referred subject matters*** that are defined in the Commonwealth Fair Work Act (other than in Division 2B of Part 1-3 of the Commonwealth Fair Work Act) have the meaning set out in that Act as in force on 1 July 2009.

4—Fundamental workplace relations principles

The following are the fundamental workplace relations principles under this Act:

(a) that the Commonwealth Fair Work Act should provide for, and continue to provide for, the following:

(i) a strong, simple and enforceable safety net of minimum employment standards;

(ii) genuine rights and responsibilities to ensure fairness, choice and representation at work, including the freedom to choose whether or not to join and be represented by a union or participate in collective activities;

(iii) collective bargaining at the enterprise level with no provision for individual statutory agreements;

(iv) fair and effective remedies available through an independent umpire;

(v) protection from unfair dismissal;

(b) that there should be, and continue to be, in connection with the operation of the Commonwealth Fair Work Act, the following:

(i) an independent tribunal system;

(ii) an independent authority able to assist employers and employees within a national workplace relations system.

5—Reference of matters

(1) Subject to the other provisions of this Act, the following matters are referred to the Parliament of the Commonwealth:

(a) the matters to which the initial referred provisions relate, but only to the extent of the making of laws with respect to those matters by including the initial referred provisions in the Commonwealth Fair Work Act, as originally enacted, and as subsequently amended by amendments enacted at any time before this Act commences, in the terms, or substantially in the terms, set out in the scheduled text;

(b) the referred subject matters, but only to the extent of making laws with respect to any such matter by making express amendments of the Commonwealth Fair Work Act;

(c) the referred transition matters.

(2) The reference of a matter under subsection (1) has effect only—

(a) if and to the extent that the matter is not included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference for the purposes of section 51(xxxvii) of the Constitution of the Commonwealth); and

(b) if and to the extent that the matter is included in the legislative powers of the Parliament of the State.

(3) The operation of each paragraph of subsection (1) is not affected by any other paragraph.

(4) For the avoidance of doubt, it is the intention of the Parliament of the State that the Commonwealth Fair Work Act may be expressly amended, or have its operation otherwise affected, at any time after the commencement of this Act by provisions of Commonwealth Acts whose operation is based on legislative powers that the Parliament of the Commonwealth has apart from under the references under subsection (1).

(5) Despite any other provision of this section, a reference under subsection (1) has effect for a period—

(a) beginning when this section commences; and

(b) ending at the end of the day fixed under section 7 as the day on which the reference is to terminate,

but no longer.

6—Matters excluded from the reference

A matter referred by section 5 does not include—

(a) matters relating to Ministers, Members of Parliament, judicial officers or members of tribunals established by or under a law of the State; or

(b) matters relating to public sector employees; or

(c) matters relating to persons engaged as a member of a Minister's personal staff; or

(d) matters relating to persons—

(i) appointed under section 68 of the *Constitution Act 1934*; or

(ii) appointed or engaged by the Governor or a Minister under any other Act, law or authority; or

(e) matters relating to persons holding office as Parliamentary officers or employed under the *Parliament (Joint Services) Act 1985*; or

(f) matters relating to persons holding office or employed under the *Courts Administration Act 1993*; or

(g) matters relating to—

(i) members of SA Police under the *Police Act 1998*; or

(ii) police cadets, police medical officers or special constables; or

(iii) persons employed as protective security officers under the *Protective Security Act 2007*; or

(h) matters relating to local government sector employees.

7—Termination of references

(1) The Governor may, at any time, by proclamation published in the Gazette, fix a day as the day on which—

(a) the references are to terminate; or

(b) the amendment reference is to terminate; or

(c) the transition reference is to terminate.

(2) The Governor may, by proclamation published in the Gazette, revoke a proclamation published under subsection (1), in which case the revoked proclamation is taken (for the purposes of section 5) never to have been published.

(3) A revoking proclamation has effect only if published before the day fixed under subsection (1).

(4) The revocation of a proclamation published under subsection (1) does not prevent publication of a further proclamation under that subsection.

(5) If the amendment reference and the transition reference have been terminated, the expression ***the references*** in subsection (1) refers only to the initial reference.

8—Effect of termination of amendment reference or transition reference before initial reference

(1) If the amendment reference or the transition reference terminates before the initial reference, the termination of the amendment reference or transition reference does not affect—

(a) laws that were made under that reference before that termination (whether or not they have come into operation before that termination); or

(b) the continued operation in the State of the Commonwealth Fair Work Act as in operation immediately before that termination or as subsequently amended or affected by—

(i) laws referred to in paragraph (a) that come into operation after that termination; or

(ii) provisions referred to in section 5(4).

(2) Accordingly, the amendment reference or transition reference continues to have effect for the purposes of subsection (1) unless the initial reference is terminated.

9—Period for termination of references

(1) Subject to subsection (2), a day fixed by a proclamation under section 7(1) must be no earlier than the first day after the end of the period of 6 months beginning on the day on which the proclamation is published.

(2) If—

(a) a proclamation under section 7(1) only provides for the termination of the amendment reference; and

(b) the Governor, as part of the proclamation by which the termination is to be effected, declares that, in the opinion of the Governor, the Commonwealth Fair Work Act—

(i) is proposed to be amended (by an amendment introduced into the Parliament of the Commonwealth by a Commonwealth Minister); or

(ii) has been amended,

in a manner that is inconsistent with 1 or more of the fundamental workplace relations principles,

the day fixed by the proclamation under section 7(1)(b) may be earlier than the day that applies under subsection (1) but must be no earlier than the first day after the end of the period of 3 months beginning on the day on which the proclamation is published.

(3) If the Governor terminates the amendment reference and fixes a day under subsection (2), the Minister must, as soon as practicable after the publication of the relevant proclamation, prepare a report on the matter and cause copies of that report to be laid before both Houses of Parliament.

Schedule 1—Text to be included in the provisions of the Commonwealth Fair Work Act

Division 2B—Application of this Act in States that refer matters after 1 July 2009 but on or before 1 January 2010

30K—Meaning of terms used in this Division

(1) In this Division:

amendment reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30L(4).

excluded subject matter means any of the following matters:

(a) a matter dealt with in a law referred to in subsection 27(1A) of this Act;

(b) superannuation;

(c) workers compensation;

(d) occupational health and safety;

(e) matters relating to outworkers (within the ordinary meaning of the term);

(f) child labour;

(g) training arrangements;

(h) long service leave;

(i) leave for victims of crime;

(j) attendance for service on a jury, or for emergency service duties;

(k) declaration, prescription or substitution of public holidays;

(l) the following matters relating to provision of essential services or to situations of emergency:

(i) directions to perform work (including to perform work at a particular time or place, or in a particular way);

(ii) directions not to perform work (including not to perform work at a particular time or place, or in a particular way);

(m) regulation of any of the following:

(i) employee associations;

(ii) employer associations;

(iii) members of employee associations or of employer associations;

(n) workplace surveillance;

(o) business trading hours;

(p) claims for enforcement of contracts of employment, except so far as a law of a State provides for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;

(q) rights or remedies incidental to a matter referred to in a preceding paragraph of this definition;

except to the extent that this Act as originally enacted deals with the matter (directly or indirectly), or requires or permits instruments made or given effect under this Act so to deal with the matter.

express amendment means the direct amendment of the text of this Act (whether by the insertion, omission, repeal, substitution or relocation of words or matter), but does not include the enactment by a Commonwealth Act of a provision that has, or will have, substantive effect otherwise than as part of the text of this Act.

fundamental workplace relations principles: see subsection 30L(9).

initial reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30L(3).

law enforcement officer means:

(a) a member of a police force or police service; or

(b) a person appointed to a position for the purpose of being trained as a member of a police force or police service; or

(c) a person who has the powers and duties of a member of a police force or police service;

and, without limiting paragraphs (a), (b) and (c), includes a police reservist, a police recruit, a police cadet, a junior constable, a police medical officer, a special constable, an ancillary constable or a protective services officer.

local government employee, of a State, means:

(a) an employee of a local government employer of the State; or

(b) any other employee in the State of a kind specified in the regulations.

local government employer, of a State, means an employer that is:

(a) a body corporate that is established for a local government purpose by or under a law of a State; or

(b) a body corporate in which a body to which paragraph (a) applies has, or 2 or more such bodies together have, a controlling interest; or

(c) a person who employs individuals for the purposes of an unincorporated body that is established for a local government purpose by or under a law of a State; or

(d) any other body corporate that is a local government body in the State of a kind specified in the regulations; or

(e) any other person who employs individuals for the purposes of an unincorporated body that is a local government body in the State of a kind specified in the regulations.

referral law, of a State, means the law of the State that refers matters, as mentioned in subsection 30L(1), to the Parliament of the Commonwealth.

referred provisions means the provisions of this Division to the extent to which they deal with matters that are included in the legislative powers of the Parliaments of the States.

referred subject matters means any of the following:

(a) terms and conditions of employment, including any of the following:

(i) minimum terms and conditions of employment, (including employment standards and minimum wages);

(ii) terms and conditions of employment contained in instruments (including instruments such as awards, determinations and enterprise-level agreements);

(iii) bargaining in relation to terms and conditions of employment;

(iv) the effect of a transfer of business on terms and conditions of employment;

(b) terms and conditions under which an outworker entity may arrange for work to be performed for the entity (directly or indirectly), if the work is of a kind that is often performed by outworkers;

(c) rights and responsibilities of persons, including employees, employers, independent contractors, outworkers, outworker entities, associations of employees or associations of employers, being rights and responsibilities relating to any of the following:

(i) freedom of association in the context of workplace relations, and related protections;

(ii) protection from discrimination relating to employment;

(iii) termination of employment;

(iv) industrial action;

(v) protection from payment of fees for services related to bargaining;

(vi) sham independent contractor arrangements;

(vii) standing down employees without pay;

(viii) union rights of entry and rights of access to records;

(d) compliance with, and enforcement of, this Act;

(e) the administration of this Act;

(f) the application of this Act;

(g) matters incidental or ancillary to the operation of this Act or of instruments made or given effect under this Act;

but does not include any excluded subject matter.

referring State: see section 30L.

State public sector employee, of a State, means:

(a) an employee of a State public sector employer of the State; or

(b) any other employee in the State of a kind specified in the regulations;

and includes a law enforcement officer of the State.

State public sector employer, of a State, means an employer that is:

(a) the State, the Governor of the State or a Minister of the State; or

(b) a body corporate that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or

(c) a body corporate in which the State has a controlling interest; or

(d) a person who employs individuals for the purposes of an unincorporated body that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or

(e) any other employer in the State of a kind specified in the regulations;

and includes a holder of an office of the State whom the State's referral law provides is to be taken, for the purposes of this Act, to be an employer of law enforcement officers of the State.

transition reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30L(5).

(2) Words or phrases in the definition of ***excluded subject matter*** in subsection (1), or in the definition of ***referred subject matters*** in subsection (1), that are defined in this Act (other than in this Division) have, in that definition, the meanings set out in this Act as in force on 1 July 2009.

30L—Meaning of *referring State*

Reference of matters by State Parliament to Commonwealth Parliament

(1) A State is a ***referring State*** if the Parliament of the State has, after 1 July 2009 but on or before 1 January 2010, referred the matters covered by subsections (3), (4) and (5) in relation to the State to the Parliament of the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution:

(a) if and to the extent that the matters are not otherwise included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference under paragraph 51(xxxvii) of the Constitution); and

(b) if and to the extent that the matters are included in the legislative powers of the Parliament of the State.

This subsection has effect subject to subsection (6).

(2) A State is a ***referring State*** even if:

(a) the State's referral law provides that the reference to the Parliament of the Commonwealth of any or all of the matters covered by subsections (3), (4) and (5) is to terminate in particular circumstances; or

(b) the State's referral law provides that particular matters, or all matters, relating to State public sector employees, or State public sector employers, of the State are not included in any or all of the matters covered by subsections (3), (4) and (5); or

(c) the State's referral law provides that particular matters, or all matters, relating to local government employees, or local government employers, of the State are not included in any or all of the matters covered by subsections (3), (4) and (5).

Reference covering referred provisions

(3) This subsection covers the matters to which the referred provisions relate to the extent of making laws with respect to those matters by amending this Act, as originally enacted, and as subsequently amended by amendments enacted at any time before the State's referral law commenced, to include the referred provisions.

Reference covering amendments

(4) This subsection covers the referred subject matters to the extent of making laws with respect to those matters by making express amendments of this Act.

Reference covering transitional matters

(5) This subsection covers making laws with respect to the transition from the regime provided for by:

(a) the *Workplace Relations Act 1996* (as it continues to apply because of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*); or

(b) a law of a State relating to workplace relations or industrial relations;

to the regime provided for by this Act.

Effect of termination of reference

(6) Despite anything to the contrary in a referral law of a State, a State ceases to be a ***referring State*** if any or all of the following occurs:

(a) the State's initial reference terminates;

(b) the State's amendment reference terminates, and neither of subsections (7) and (8) apply to the termination;

(c) the State's transition reference terminates.

(7) A State does not cease to be a ***referring State*** because of the termination of its amendment reference if:

(a) the termination is effected by the Governor of that State fixing a day by proclamation as the day on which the reference terminates; and

(b) the day fixed is no earlier than the first day after the end of the period of 6 months beginning on the day on which the proclamation is published; and

(c) that State's amendment reference, and the amendment reference of every other referring State (other than a referring State that has terminated its amendment reference in the circumstances referred to in subsection (8)), terminate on the same day.

(8) A State does not cease to be a ***referring State*** because of the termination of its amendment reference if:

(a) the termination is effected by the Governor of that State fixing a day by proclamation as the day on which the reference terminates; and

(b) the day fixed is no earlier than the first day after the end of the period of 3 months beginning on the day on which the proclamation is published; and

(c) the Governor of that State, as part of the proclamation by which the termination is to be effected, declares that, in the opinion of the Governor, this Act:

(i) is proposed to be amended (by an amendment introduced into the Parliament by a Minister); or

(ii) has been amended;

in a manner that is inconsistent with one or more of the fundamental workplace relations principles.

(9) The following are the ***fundamental workplace relations principles***:

(a) that this Act should provide for, and continue to provide for, the following:

(i) a strong, simple and enforceable safety net of minimum employment standards;

(ii) genuine rights and responsibilities to ensure fairness, choice and representation at work, including the freedom to choose whether or not to join and be represented by a union or participate in collective activities;

(iii) collective bargaining at the enterprise level with no provision for individual statutory agreements;

(iv) fair and effective remedies available through an independent umpire;

(v) protection from unfair dismissal;

(b) that there should be, and continue to be, in connection with the operation of this Act, the following:

(i) an independent tribunal system;

(ii) an independent authority able to assist employers and employees within a national workplace relations system.

30M—Extended meaning of *national system employee*

(1) A ***national system employee*** includes:

(a) any individual in a State that is a referring State because of this Division so far as he or she is employed, or usually employed, as described in paragraph 30N(1)(a), except on a vocational placement; and

(b) a law enforcement officer of the State to whom subsection 30P(1) applies.

(2) This section does not limit the operation of section 13 (which defines a national system employee).

Note—

Section 30S may limit the extent to which this section extends the meaning of ***national system employee***.

30N—Extended meaning of *national system employer*

(1) A ***national system employer*** includes:

(a) any person in a State that is a referring State because of this Division so far as the person employs, or usually employs, an individual; and

(b) a holder of an office to whom subsection 30P(2) applies.

(2) This section does not limit the operation of section 14 (which defines a national system employer).

Note—

Section 30S may limit the extent to which this section extends the meaning of ***national system employer***.

30P—Extended ordinary meanings of *employee* and *employer*

(1) A reference in this Act to an employee with its ordinary meaning includes a reference to a law enforcement officer of a referring State if the State's referral law so provides for the purposes of that law.

(2) A reference in this Act to an employer with its ordinary meaning includes a reference to a holder of an office of a State if the State's referral law provides, for the purposes of that law, that the holder of the office is taken to be the employer of a law enforcement officer of the State.

(3) This section does not limit the operation of section 15 (which deals with references to employee and employer with their ordinary meanings).

Note—

Section 30S may limit the extent to which this section extends the meanings of ***employee*** and ***employer***.

30Q—Extended meaning of *outworker entity*

(1) An ***outworker entity*** includes a person, other than in the person's capacity as a national system employer, so far as:

(a) the person arranges for work to be performed for the person (either directly or indirectly); and

(b) the work is of a kind that is often performed by outworkers; and

(c) one or more of the following applies:

(i) at the time the arrangement is made, one or more parties to the arrangement is in a State that is a referring State because of this Division;

(ii) the work is to be performed in a State that is a referring State because of this Division;

(iii) the person referred to in paragraph (a) carries on an activity (whether of a commercial, governmental or other nature) in a State that is a referring State because of this Division, and the work is reasonably likely to be performed in that State;

(iv) the person referred to in paragraph (a) carries on an activity (whether of a commercial, governmental or other nature) in a State that is a referring State because of this Division, and the work is to be performed in connection with that activity.

(2) This section does not limit the operation of the definition of ***outworker entity*** in section 12.

Note—

Section 30S may limit the extent to which this section extends the meaning of ***outworker entity***.

30R—General protections

(1) Part 3-1 (which deals with general protections) applies to action taken in a State that is a referring State because of this Division.

(2) This section applies despite section 337 (which limits the application of Part 3-1), and does not limit the operation of sections 338 and 339 (which set out the application of that Part).

Note—

Section 30S may limit the extent to which this section extends the application of Part 3-1.

30S—Division only has effect if supported by reference

A provision of this Division has effect in relation to a State that is a referring State because of this Division only to the extent that the State's referral law refers to the Parliament of the Commonwealth the matters mentioned in subsection 30L(1) that result in the Parliament of the Commonwealth having sufficient legislative power for the provision so to have effect.