



Western Australia

Owner-Drivers (Contracts and Disputes) Amendment Act 2022

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Owner-Drivers (Contracts and Disputes) Amendment Act 2022

Contents

1.	Short title	2
2.	Commencement	2
3.	Act amended	2
4.	Section 3 amended	2
5.	Section 10A inserted	3
	10A. Prohibited: provisions allowing less than minimum notice period	3
6.	Section 15A inserted	4
	15A. Minimum period of notice for terminating contract	4
7.	Section 18 amended	4
8.	Section 30 amended	4
9.	Section 31 amended	5
10.	Section 31A inserted	6
	31A. Unfair terms	6
11.	Parts 6A and 6B inserted	8
	Part 6A — Misleading or deceptive conduct	
	31B. Misleading or deceptive conduct by hirer	8
	31C. Misleading or deceptive conduct by owner-driver	8
	Part 6B — Discrimination	
	31D. Discrimination against owner-driver	8
12.	Section 32 amended	10
13.	Part 8 Division 1 inserted	10
	Division 1 — Preliminary	
	33A. Term used: record	10

Contents

14.	Part 8 Division 2 heading inserted	10
	Division 2 — Access to records	
15.	Section 34 amended	11
16.	Part 8 Division 3 inserted	11
	Division 3 — Authorised representative's right of entry to conduct investigation	
	34A. Terms used	11
	34B. Authorised representative	12
	34C. Authorised representative who ceases to hold authority or entry permit	13
	34D. Revocation or suspension of authority	13
	34E. Written authority of owner-driver required	15
17.	Section 35 replaced	15
	35. Authorised representative's right of entry	15
	35A. Authority must be shown on request	15
	35B. Conduct in workplace	16
	35C. Authorised representative's powers relating to production and inspection of records or other documents	16
18.	Section 36 amended	18
19.	Section 37 amended	18
20.	Section 38 amended	18
21.	Sections 38A and 38B inserted	19
	38A. Tribunal's power to make summary determination	19
	38B. Tribunal's power to make default determination	20
22.	Section 40 amended	21
23.	Section 41A inserted	21
	41A. When referral not required	21
24.	Section 43 amended	22
25.	Section 47 amended	22
26.	Section 47A inserted	23
	47A. Remedies that may be given	23
27.	Section 48 amended	24
28.	Section 53 amended	24
29.	Part 11 inserted	25
	Part 11 — Transitional provisions	
	60. Notice of termination before commencement day	25
30.	Schedule 1 amended	25

31.	Schedule 1 Division 4 inserted	25
	Division 4 — Termination of contract	
	4. Notice of termination	25
	5. Payment in lieu of notice	26
32.	Schedule 2 clause 1 amended	27



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Owner-Drivers (Contracts and Disputes) Amendment Act 2022

No. 36 of 2022

An Act to amend the *Owner-Drivers (Contracts and Disputes) Act 2007*.

[Assented to 28 October 2022]

The Parliament of Western Australia enacts as follows:

s. 1

1. Short title

This is the *Owner-Drivers (Contracts and Disputes) Amendment Act 2022*.

2. Commencement

This Act comes into operation as follows —

- (a) sections 1 and 2 — on the day on which this Act receives the Royal Assent (*assent day*);
- (b) section 12 — on the day after assent day;
- (c) sections 17 and 18 — immediately after the *Owner-Drivers (Contracts and Disputes) Act 2007* sections 35 and 36 come into operation;
- (d) the rest of the Act — on a day fixed by proclamation.

3. Act amended

This Act amends the *Owner-Drivers (Contracts and Disputes) Act 2007*.

4. Section 3 amended

In section 3 insert in alphabetical order:

minimum notice period, in relation to the termination of an owner-driver contract, is —

- (a) 90 days; or
- (b) if the aggregate term of the original contract and any consecutive series of successive contracts between the same parties that contain substantially similar terms and conditions is less than 90 days — 7 days;

notice period, in relation to the termination of an owner-driver contract, is the period —

- (a) beginning on the day on which one party gives the other party written notice of termination of the contract; and
- (b) ending on the day on which the termination of the contract is to take effect;

prescribed representative body means a body that —

- (a) represents the interests of owner-drivers or hirers; and
- (b) is prescribed by the regulations for the purposes of this definition;

transport association means —

- (a) a representative body prescribed by the regulations for the purpose of this definition; or
- (b) the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch;

5. Section 10A inserted

After section 10 insert:

10A. Prohibited: provisions allowing less than minimum notice period

A provision in an owner-driver contract has no effect if it purports to allow a party to terminate the contract by giving notice of less than the minimum notice period.

6. Section 15A inserted

After section 15 insert:

15A. Minimum period of notice for terminating contract

The provisions in Schedule 1 Division 4 are implied in an owner-driver contract that does not have a valid provision about the notice period required to be given to terminate the contract.

7. Section 18 amended

(1) Delete section 18(3)(b) and insert:

- (b) a representative body prescribed by the regulations for the purposes of this subsection; and

(2) In section 18(3)(c):

(a) delete “Workers” (1st occurrence) and insert:

Workers’

(b) delete “Workers” (2nd occurrence) and insert:

Workers,

8. Section 30 amended

In section 30(2):

(a) delete “in any way”;

- (b) delete “contravened” and insert:

engaged in conduct that is unconscionable in
contravention of
- (c) in paragraph (k) delete “section 27(4).” and insert:

section 27(4);
- (d) after paragraph (k) insert:
 - (l) the terms of an owner-driver contract, including
whether any term of the contract is an unfair
term.

9. Section 31 amended

In section 31(2):

- (a) delete “in any way”;
- (b) delete “contravened” and insert:

engaged in conduct that is unconscionable in
contravention of
- (c) in paragraph (j) delete “faith.” and insert:

faith;

(d) after paragraph (j) insert:

- (k) the terms of an owner-driver contract, including whether any term of the contract is an unfair term.

10. Section 31A inserted

At the end of Part 6 insert:

31A. Unfair terms

- (1) In considering for the purposes of sections 30(2)(l) and 31(2)(k) whether a term of an owner-driver contract is an unfair term, the Tribunal may have regard to the following —
 - (a) whether the term causes a significant imbalance in the parties' rights and obligations arising under the contract;
 - (b) whether the term is reasonably necessary in order to protect the legitimate interests of a party;
 - (c) whether the term would cause significant detriment (financial or otherwise) to a party if it were to be applied or relied on;
 - (d) whether the term provides for the payment by the hirer to the owner-driver of the guideline rate;
 - (e) the intelligibility of the contract generally, and of the term in particular;
 - (f) the extent to which the term, and its legal and practical effect, was accurately explained to a party;

- (g) the extent to which a party understood the term and its effect before the term was agreed to;
 - (h) whether or not it was reasonably practicable for a party to reject, or negotiate for a change to, the term before it was agreed to;
 - (i) the relationship of the term to other terms of the contract;
 - (j) whether a party obtained independent legal or other expert advice before agreeing to the term;
 - (k) whether, at the time the term was agreed, a party knew, or could have found out by asking, that the term would cause the other party hardship;
 - (l) whether the term is usually found in owner-driver contracts of that kind;
 - (m) the justification for the term;
 - (n) whether the term is harsh or oppressive;
 - (o) whether the term is inconsistent with any part of the code of conduct, whether or not that part of the code imposes duties or obligations on a person or prohibits a person from engaging in certain conduct.
- (2) For the purposes of subsection (1)(d), a term of an owner-driver contract that provides for the payment by the hirer to the owner-driver of less than the guideline rate is presumed to be unfair, unless the hirer proves otherwise.
- (3) In considering for the purposes of sections 30(2)(l) and 31(2)(k) whether a term of an owner-driver contract is an unfair term, the Tribunal must not have regard to any unfairness arising out of circumstances

that were not reasonably foreseeable when the parties agreed to the term.

11. Parts 6A and 6B inserted

Before Part 7 insert:

Part 6A — Misleading or deceptive conduct

31B. Misleading or deceptive conduct by hirer

A hirer must not engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, with respect to an owner-driver in relation to the acquisition or possible acquisition by the hirer of services from the owner-driver under an owner-driver contract.

31C. Misleading or deceptive conduct by owner-driver

An owner-driver must not engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, with respect to a hirer in relation to the provision or possible provision by the owner-driver of services to the hirer under an owner-driver contract.

Part 6B — Discrimination

31D. Discrimination against owner-driver

- (1) A hirer must not subject or threaten to subject an owner-driver to any detriment for the reason, or for reasons including the reason, that the owner-driver, or a person associated with the owner-driver —
 - (a) has claimed, or proposes to claim, a benefit or exercised, or proposes to exercise, a power or right that the owner-driver or associate is

- entitled to claim or exercise under this Act or the code of conduct; or
- (b) has brought, or proposes to bring, or has otherwise participated in, a proceeding under this Act; or
 - (c) has informed, or proposes to inform, any person of an alleged contravention of this Act, the code of conduct or an order of the Tribunal under this Act; or
 - (d) has participated, or proposes to participate, in joint negotiations relating to owner-driver contracts or the engagement of an owner-driver.
- (2) A hirer must not subject or threaten to subject an owner-driver to any detriment because the owner-driver, or a person associated with the owner-driver —
- (a) has raised, or proposes to raise, issues of health and safety in relation to the performance of services under an owner-driver contract; or
 - (b) has sought, or proposes to seek, to —
 - (i) negotiate a proposed owner-driver contract; or
 - (ii) renegotiate an existing owner-driver contract.
- (3) For the purposes of this section, subjecting an owner-driver to detriment includes doing one or more of the following —
- (a) terminating the owner-driver's owner-driver contract;
 - (b) injuring the owner-driver in relation to the terms and conditions of an owner-driver contract to which the owner-driver is a party;

s. 12

- (c) altering the position of an owner-driver so as to prejudice their interests under an owner-driver contract;
- (d) refusing to engage a person as an owner-driver;
- (e) discriminating against an owner-driver in the terms or conditions on which the owner-driver is to be engaged as an owner-driver.

12. Section 32 amended

Delete section 32(1)(b).

13. Part 8 Division 1 inserted

At the beginning of Part 8 insert:

Division 1 — Preliminary

33A. Term used: record

In this Part —

record means a record required to be kept under the code of conduct.

14. Part 8 Division 2 heading inserted

Before section 34 insert:

Division 2 — Access to records

15. Section 34 amended

- (1) In section 34(2)(a):
- (a) before “records” insert:

hirer’s
 - (b) delete “concerned that are required to be kept by the hirer under the code of conduct; and” and insert:

concerned; and
- (2) In section 34(3):
- (a) in paragraph (c)(ii) delete “or extracts from”;
 - (b) in paragraph (d) delete “seventh” and insert:

7th

Note: The heading to amended section 34 is to read:

Access to and inspection of records

16. Part 8 Division 3 inserted

After section 34 insert:

Division 3 — Authorised representative’s right of entry to conduct investigation

34A. Terms used

In this Division —

authorised representative means a person to whom an authority is issued under section 34B(2);

occupier, of a workplace, includes a person in charge of the workplace;

officer has the meaning given in the IR Act section 7;

organisation has the meaning given in the IR Act section 7.

34B. Authorised representative

- (1) The secretary of an organisation that is a transport association may apply to the Registrar for a person nominated in the application to be issued with an authority for the purposes of this Division.
 - (2) Subject to subsection (3), the Registrar to whom an application is made under subsection (1) must issue a written authority for the purposes of this Division to the person nominated in the application.
 - (3) The Registrar must not issue an authority unless the person nominated in the application —
 - (a) is an officer or employee of the organisation that makes the application under subsection (1); and
 - (b) is the holder of —
 - (i) an authority issued under the IR Act section 49J(1) that was applied for by the secretary of the organisation that makes the application under subsection (1); or
 - (ii) an entry permit issued under the *Fair Work Act 2009* (Commonwealth) section 512 that was applied for by the organisation that makes the application under subsection (1);
- and

- (c) has not previously been issued with an authority that was revoked by the Tribunal under section 34D(3) unless the Tribunal, on application by any person, has ordered that a new authority may be issued.
- (4) Despite section 43, the IR Act section 49 does not apply to a decision of the Tribunal under subsection (3)(c) that a new authority may be issued.
- (5) An authority issued under subsection (2) remains in force until it is revoked or suspended.

34C. Authorised representative who ceases to hold authority or entry permit

- (1) An authorised representative must, within 28 days after ceasing to hold an authority or permit referred to in section 34B(3)(b), inform the Registrar that they no longer hold the authority or permit.
- (2) A contravention of subsection (1) is not an offence but that subsection is a civil penalty provision for the purposes of the IR Act section 83E.

34D. Revocation or suspension of authority

- (1) Subject to subsection (2), the Registrar must revoke an authorised representative's authority —
 - (a) on application by the secretary of the organisation that made the application under section 34B(1); or
 - (b) if the Registrar becomes aware that the authorised representative no longer holds —
 - (i) an authority issued under the IR Act section 49J(1); or

- (ii) an entry permit issued under the *Fair Work Act 2009* (Commonwealth) section 512.
- (2) The Registrar must not revoke an authority under subsection (1) if proceedings pursuant to an application made under subsection (3) in relation to the authority are pending or in progress.
- (3) The Tribunal may, on application by any person, revoke, or suspend for a period determined by the Tribunal, an authority issued under section 34B(2) if satisfied that the authorised representative —
 - (a) has acted in an improper manner in the exercise of any power conferred by this Division; or
 - (b) has intentionally and unduly hindered a hirer or owner-driver during their work time; or
 - (c) no longer holds —
 - (i) an authority issued under the IR Act section 49J(1); or
 - (ii) an entry permit issued under the *Fair Work Act 2009* (Commonwealth) section 512.
- (4) An application under subsection (3) for the revocation or suspension of an authority must set out the grounds on which the application is made.
- (5) An authorised representative whose authority is revoked must, within 14 days after being informed in writing by the Registrar that their authority is revoked, return their written authority to the Registrar.
- (6) A contravention of subsection (5) is not an offence but that subsection is a civil penalty provision for the purposes of the IR Act section 83E.

34E. Written authority of owner-driver required

An authorised representative is not entitled to exercise a power conferred by this Division for the purpose of conducting an investigation into a suspected breach of an owner-driver contract to which the owner-driver is a party unless the representative is authorised in writing by the owner-driver who is a party to the contract to carry out the investigation.

17. Section 35 replaced

Delete section 35 and insert:

35. Authorised representative's right of entry

An authorised representative may enter any workplace where an owner-driver works, during working hours at the workplace, for the purpose of investigating any suspected breach of —

- (a) this Act; or
- (b) the code of conduct; or
- (c) an owner-driver contract to which the owner-driver is a party.

35A. Authority must be shown on request

An authorised representative must not enter or remain in a workplace if they fail or refuse to show, on request by the occupier, their written authority issued under section 34B(2) to enter the workplace.

35B. Conduct in workplace

- (1) An authorised representative does not have the right under section 35 to enter into any part of a workplace that is principally used for habitation by an occupier or a member of the occupier's household.
- (2) An authorised representative must comply with any reasonable request by an occupier to take a particular route to reach a room or area in the workplace.
- (3) A request under subsection (2) is not unreasonable only because the route is not that which the authorised representative would have chosen.

35C. Authorised representative's powers relating to production and inspection of records or other documents

- (1) For the purpose of investigating a suspected breach referred to in section 35, an authorised representative may —
 - (a) subject to subsection (2), require the hirer to produce for the authorised representative's inspection, during working hours at the workplace or at any mutually convenient time and place, a record or other document kept by the hirer that is related to the suspected breach; and
 - (b) make copies of the record or other document related to the suspected breach; and
 - (c) during working hours at the workplace, inspect, and take photographs, film and audio, video or other recordings of, any work, material, machinery or appliance that is relevant to the suspected breach.

- (2) An authorised representative must not require the hirer to produce a record or other document unless, before exercising the power, the representative has given the hirer —
 - (a) if the record or other document is kept at the workplace where the owner-driver works — at least 24 hours' written notice of the requirement; or
 - (b) if the record or other document is kept elsewhere — at least 48 hours' written notice of the requirement.
- (3) The Tribunal may, on the ex parte application of the authorised representative, waive the requirement under subsection (2) to give the hirer notice of an intended exercise of a power if the Tribunal is satisfied that to give such notice would defeat the purpose for which the power is intended to be exercised.
- (4) If the requirement for notice is waived under subsection (3) —
 - (a) the Tribunal must give the authorised representative a certificate authorising the exercise of the power without notice; and
 - (b) the authorised representative must, after entering the workplace and before requiring the production of the record or other document, give the person who is the occupier of the workplace the certificate or a copy of the certificate.
- (5) Nothing in this section limits or otherwise affects the powers of an inspector under this Act.

18. Section 36 amended

- (1) In section 36(1) delete “entry to a workplace by a person entitled to enter the workplace under section 35(2).” and insert:

an authorised representative’s entry to the workplace under section 35.

- (2) In section 36(2) delete “or obstruct a representative in the exercise of the powers conferred by section 35.” and insert:

an authorised representative exercising a power under this Division.

Note: The heading to amended section 36 is to read:

Prohibiting obstruction or delay of exercise of power

19. Section 37 amended

- (1) In section 37(1) delete the definition of *transport association*.
- (2) In section 37(1) in the definition of *dispute* delete “contract;” and insert:

contract.

20. Section 38 amended

In section 38(1):

- (a) in paragraph (b) delete “Part.” and insert:

Part; and

- (b) after paragraph (b) insert:
 - (c) enquire into, deal with, hear and determine any matter referred to in Part 8 in relation to an authorised representative; and
 - (d) make a summary determination in accordance with section 38A; and
 - (e) make a default determination in accordance with section 38B.

21. Sections 38A and 38B inserted

After section 38 insert:

38A. Tribunal's power to make summary determination

- (1) The Tribunal may determine (a *summary determination*) a dispute or matter referred under this Part without a hearing if —
 - (a) each party to the proceedings has had a reasonable opportunity to be heard; and
 - (b) the Tribunal is satisfied that —
 - (i) a person has frivolously or vexatiously referred or defended a dispute or matter; or
 - (ii) a party's case has no merit.
- (2) The Tribunal may, upon making a summary determination, make 1 or more of the orders or declarations set out in section 47A.
- (3) The power in subsection (1) may be exercised —
 - (a) in relation to all or part of a dispute or matter; and

- (b) either —
 - (i) on the Tribunal’s own initiative; or
 - (ii) on the application of a party to the proceedings.
- (4) The Tribunal may set aside a summary determination and may do so on conditions as to the payment of costs or as to other matters.
- (5) Despite section 43, the IR Act section 49 does not apply to a decision of the Tribunal —
 - (a) to refuse to make a summary determination; or
 - (b) to set aside a summary determination.

38B. Tribunal’s power to make default determination

- (1) This section does not apply to —
 - (a) a failure to comply with the determination of a dispute or matter by the Tribunal; or
 - (b) an order made in, or as a consequence of, the determination of a dispute or matter by the Tribunal.
- (2) The Tribunal may make a determination (a *default determination*) against a party to the proceedings without a hearing if the party —
 - (a) does not comply with a direction, order or declaration made by the Tribunal during the course of the proceedings; or
 - (b) fails to file a response within the prescribed period.
- (3) The Tribunal may, upon making a default determination, make 1 or more of the orders or declarations set out in section 47A.

- (4) The Tribunal may set aside a default determination and may do so on conditions as to the payment of costs or as to other matters.
- (5) Despite section 43, the IR Act section 49 does not apply to a decision of the Tribunal —
 - (a) to refuse to make a default determination; or
 - (b) to set aside a default determination.

22. Section 40 amended

- (1) In section 40 delete “A dispute” and insert:

- (1) A dispute

- (2) At the end of section 40 insert:

- (2) Despite subsection (1), a dispute or matter under or in relation to an owner-driver contract cannot be referred to the Tribunal under subsection (1)(a) or (c) more than 12 months after the contract expires.

23. Section 41A inserted

After section 41 insert:

41A. When referral not required

- (1) This section applies if a payment dispute (the *first payment dispute*) arising under, or in relation to, an owner-driver contract is referred to the Tribunal under this Part.

s. 24

- (2) When determining the first payment dispute, the Tribunal may determine a subsequent payment dispute if the subsequent payment dispute —
 - (a) arises under the same owner-driver contract; and
 - (b) is substantially similar to the first payment dispute.
- (3) Subsection (2) applies whether or not the subsequent payment dispute is referred to the Tribunal under this Part.

24. Section 43 amended

In section 43(1) delete “The” and insert:

Except as otherwise provided, the

25. Section 47 amended

- (1) Delete section 47(1) and insert:
 - (1) The Tribunal may hear and determine a dispute for the purposes of section 38(1)(a) and enquire into and deal with a matter for the purposes of section 38(1)(b) if the dispute or matter is not —
 - (a) resolved by conciliation under section 44; or
 - (b) disposed of by the Tribunal making a summary determination under section 38A; or
 - (c) disposed of by the Tribunal making a default determination under section 38B.
- (2) Delete section 47(2).

- (3) In section 47(3) before “matter” insert:

dispute or

- (4) Delete section 47(4) and (5).

26. Section 47A inserted

After section 47 insert:

47A. Remedies that may be given

- (1) In making a determination under section 38A(1), 38B(2) or 47(1), the Tribunal may do one or more of the following —
- (a) order the payment of a sum of money —
 - (i) found by the Tribunal to be owing by one party to another party; or
 - (ii) by way of damages (including exemplary damages and damages in the nature of interest); or
 - (iii) by way of restitution;
 - (b) order the refund of any money paid under an owner-driver contract;
 - (c) make an order in the nature of an order for specific performance of an owner-driver contract;
 - (d) declare that a debt is, or is not, owing;
 - (e) order a party to do, or to refrain from doing, something;

s. 27

- (f) make any other order the Tribunal considers fair.
- (2) Without limiting subsection (1), if the Tribunal determines that a hirer or owner-driver has engaged in conduct that is unconscionable having regard to an unfair term of the owner-driver contract, the Tribunal may do one or more of the following —
 - (a) declare a term of the contract void;
 - (b) insert a new term into the contract;
 - (c) vary a term of the contract.

27. Section 48 amended

In section 48(1) delete “section 47” and insert:

section 47A

28. Section 53 amended

In section 53

- (a) delete “any” (1st occurrence) and insert:

a

- (b) delete “duty” and insert:

performing their function

29. Part 11 inserted

After section 59 insert:

Part 11 — Transitional provisions

60. Notice of termination before commencement day

- (1) In this section —
commencement day means the day on which the *Owner-Drivers (Contracts and Disputes) Amendment Act 2022* sections 5 and 31 come into operation.
- (2) Section 10A and Schedule 1 Division 4 do not apply in relation to a notice of termination of an owner-driver contract given before commencement day.

30. Schedule 1 amended

Delete the reference after the heading to Schedule 1 and insert:

[s. 13, 14, 15, 15A and 16]

31. Schedule 1 Division 4 inserted

At the end of Schedule 1 insert:

Division 4 — Termination of contract

4. Notice of termination

- (1) A party may terminate this contract by giving the other party written notice of termination.

- (2) A written notice of termination must state —
 - (a) the day on which the notice is given; and
 - (b) the day on which the termination of this contract is to take effect.
- (3) A notice of termination given under subclause (1) has no effect if the notice period is less than the minimum notice period.
- (4) Subclause (3) does not apply if this contract is terminated due to —
 - (a) a material breach of the contract; or
 - (b) the serious and wilful misconduct of the owner-driver; or
 - (c) exceptional circumstances beyond the control of the terminating party that were not reasonably foreseeable at the time of entering into this contract.

5. Payment in lieu of notice

Despite clause 4(3), the hirer may terminate this contract by paying the owner-driver —

- (a) if the termination is to take effect immediately — the total amount that would be payable under this contract in respect of the minimum notice period, less 25%; or
- (b) if a notice period is given but it is less than the minimum notice period —
 - (i) the amount payable for work performed by the owner-driver during the notice period; and
 - (ii) the amount that would be payable under this contract in respect of the balance of the minimum notice period, less 25%.

32. Schedule 2 clause 1 amended

- (1) In Schedule 2 clause 1:
- (a) delete “A Council” and insert:
 - (1) A Council
 - (b) delete “his or her” and insert:
 - their
- (2) At the end of Schedule 2 clause 1 insert:
- (2) Despite subclause (1), if the term of office of a member of the Council expires by effluxion of time without a person having been appointed to fill the vacancy, the member continues in office until the earlier of the following —
- (a) the vacancy is filled (whether by the re-appointment of the member or the appointment of a new member);
 - (b) the member resigns under clause 3(1)(a);
 - (c) the member is removed from office under clause 3(2);
 - (d) the member dies.