SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

INQUIRY INTO THE PROVISIONS OF THE FAIR WORK AMENDMENT (STATE REFERRALS AND OTHER MEASURES) BILL 2009

DEEWR Question 1 *Structure of the multilateral IGA*

Senator Collins asked on 11 November 2009, EEWR Hansard page 24:

> I remain unconvinced of the mischief that the Ai Group is concerned about, so I am interested in what other IGAs have been structured in similar terms—indeed, whether there is any example of such mischief arising out of those arrangements in other policy areas. I do not know if that sort of information is readily available.

Answer

Each inter-governmental agreement (IGA) associated with particular Commonwealth-State referral schemes is unique. There is no single template governing the form of an IGA and each agreement deals with different areas of government policy. However, it is common for IGAs to include processes for consultation, voting or approval of Commonwealth proposals to amend the national law.

The Council of Australian Governments (COAG) website indicates that IGAs typically comprise the following elements:

- recitals;
- definitions;
- objectives;
- institutional arrangements, if applicable;
- ministerial council(s) involvement and any voting arrangements;
- future legislative commitments, if applicable;
- financial arrangements, if appropriate;
- dispute resolution procedures;
- amendment or variation to the agreement provisions; and
- review provisions and/or a sunset clause, where appropriate.

The *IGA for a National Workplace Relations System for the Private Sector* is consistent with the approach outlined above, but like other IGAs is unique as it reflects negotiations in a particular policy context.

The Department conducted a comparison between the *IGA for a National Workplace Relations System for the Private Sector* and a number of key Commonwealth/State IGAs that also underpin referral legislation, including the:

- *Agreement on Murray Darling Basin Reform – Referral 2008*;
- *Corporations Agreement 2002*; and
- *Personal Properties and Securities Law Agreement 2008*.

Each of these IGAs provides that the Commonwealth must consult with the States and Territories before the Commonwealth proceeds with a Bill to repeal or amend the national law or introduces any subordinate legislation under the referral law, and include a provision which provides that the IGA may be amended with the agreement of all parties to the IGA.

These IGAs also contain provisions relating to gaining approval for legislation to amend or repeal a national law. In the case of the *Agreement on Murray Darling Basin Reform – Referral 2008* all referring Basin States affected by the legislative proposal must first approve the legislation. For the *Corporations Agreement 2002* the approval of three State or Territory Ministers (at least two being State Ministers) is required. For the *Personal Property Securities Law Agreement 2008*, the approval of three State or Territory Ministers (at least two being State Ministers of referring States) is required.

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DEEWR Question 2 *State consultation with stakeholders on referral legislation*

Senator Fisher asked on 11 November 2009, EEWR Hansard pages 24-25:

> Can the Department inform the Committee what consultation each State government undertook with stakeholders, including who was consulted, by whom and when? ...In the process of providing that information, can you provide it with reference to the introduction into the relevant state parliament of their referring legislation?

Answer

The Department contacted those States that have recently introduced, and in some cases passed, referral legislation regarding what consultation each State undertook with stakeholders, including who was consulted, by whom and when. Those States have provided the following responses:

South Australia

The Industrial Relations Advisory Committee (IRAC) which includes most major industry and union groups in South Australia, has been extensively consulted throughout the almost two years leading to the development of what is now the *Fair Work (Commonwealth Powers) Bill 2009 (SA)* (the SA Referral Bill). Other key groups have also been consulted outside of the IRAC process during most of 2009.

The SA Referral Bill was introduced into the SA Parliament on 9 September 2009. IRAC is comprised of representatives of the following organisations:

- Business SA;
- SA Unions;
- Australian Services Union (SA and NT Branch);
- Australian Workers Union (SA Branch);
- Public Service Association of SA;
- Transport Workers Union;
- South Australian Wine Industry Association Inc;
- Engineering Employers Association SA (now the Australian Industry Group SA Branch);
- Master Builders Association of SA;
- South Australian Farmers Federation; and
- Motor Trade Association of SA.

The concepts and/or details of the SA Referral Bill have been discussed at IRAC meetings conducted on 16 April, 28 May and 3 September 2009.

In addition, in the immediate lead up to the finalisation of the SA Referral Bill and its ultimate introduction to the SA Parliament, a special committee of IRAC (including all IRAC members and other organisations with a particular interest in the terms of the proposed legislation and the accompanying *Statutes Amendment (National Industrial Relations System) Bill 2009* (SA)) was formed. This additional consultation involved a comprehensive briefing on 20 August 2009, access to the draft Bills, and an opportunity to subsequently provide submissions – which many organisations did.

Those attending the special committee consultation included the IRAC members outlined above and representatives from the:

- Local Government Association of SA;
- Shop Distributive and Allied Employees Association, SA Branch;
- Australian Hotels Association, SA Branch;
- Australian Manufacturing Workers Union, SA Branch; and
- Public Sector Workplace Relations – Department for Premier and Cabinet.

The details of the Bills were also considered at the subsequent IRAC meeting on 3 September 2009, including discussion of changes made as a result of the earlier special committee consultation.

The consultation and briefings referred to above have been conducted by Minister Caica and/or Senior Officers of SafeWork SA.

Regular out of session updates on developments at a national and local level impacting upon the SA Referral Bill have also been provided to various IRAC and special committee members by SafeWork SA before and following the introduction of the SA Referral Bill.

Earlier consultation on the issues surrounding the SA Referral Bill and related transitional arrangements has also been undertaken by Senior Officers from SafeWork SA with other groups including the Community Employers Association and the State Retailers Association of SA.

Queensland

Queensland undertook the following consultation with stakeholders:

Briefings for Queensland Council of Unions Executive

- 29 January 2008
- 4 February 2008
- 15 April 2008
- 29 September 2008
- 15 December 2008
- 19 December 2008
- 16 April 2009
- 30 April 2009
- 12 June 2009

- 3 September 2009

Briefings for AWU Officials

- 29 January 2008
- 10 March 2008
- 23 September 2008
- 16 December 2008
- 6 April 2009
- 17 April 2009
- 1 May 2009
- 12 June 2009
- 26 August 2009

Briefings for Officials of Australian Services Union, Australian Workers Union and Queensland Council of Unions

- Various dates from 15 September 2009, including 20/10/09.
- 1 September – Australian Services Union

Briefings for Employer Associations

- 18 June 2008 – no attendees listed
- 9 September 2008 – no attendees listed
- 25 September 2008 – no attendees listed
- 19 December 2008 – Australian Industry Group, Chamber of Commerce and Industry, National Retail Association, Queensland Master Builders Association
- 15 September 2009 – Chamber of Commerce and Industry, National Retail Association, Queensland Master Builders Association, AIG (declined)
- Various dates from 15 September 2009 – Australian Industry Group, Master Builders Association Australia, National Retail Association, Chamber of Commerce and Industry Queensland
- 29 September 2009 – Local Government Association of Queensland

Breakfast meetings with Deputy Director General and Director General

- 7 April 2009 – Queensland Council of Unions
- 14 April 2009 – Queensland Master Builders Association
- 15 April 2009 – Australian Services Union
- 21 April 2009 – Australian Industry Group
- 1 May 2009 – National Retail Association

Outcomes meeting on Inter Governmental Agreement and High Level Officers Group

- 22 April 2009 - no record of attendees

In addition to the above meetings, Mr Barry Leahy, Deputy Director General, has had numerous telephone conversations with union and employer organisation representatives regarding referral of industrial relations powers issues. Meetings

have also taken place with other industry representatives such as the Local Government Association of Queensland on these matters.

Victoria

In March 2009 Workforce Victoria (in the Department of Innovation, Industry and Regional Development) wrote to organisations in Victoria including:

- Victorian Employers' Chamber of Commerce and Industry (VECCI);
- Australian Industry Group;
- Australian Retailers Association;
- National Retail Association
- Master Builders Association;
- Housing Industry Association
- Australian Mines and Metals Association;
- Victorian Automobile Chamber of Commerce;
- Australian Hotels Association, Victoria;
- Restaurant & Catering Association of Victoria;
- Victorian Farmers' Federation (VFF);
- Law Institute of Victoria; and
- Clubs Victoria

advising them of the Victorian Government's decision to make a new referral of workplace relations matters to the Commonwealth, and offering a briefing on the proposed new referral. VECCI and VFF took up the offer of further discussions with Workforce Victoria.

Workforce Victoria also had discussions with the Victorian Trades Hall Council, the ACTU and public sector unions regarding the new referral between February and March 2009.

Tasmania

Tasmania undertook significant consultation with a number of peak groups and other parties namely the:

- Tasmanian Chamber of Commerce and Industry (TCCI);
- Unions Tasmania (U TaS);
- The Tasmanian Small Business Council (TSBC);
- Australian Services Union (ASU);
- Health and Community Sector Union (HACSU);
- Local Government Association of Tasmania (LGAT) – noting that local government has been covered by the federal jurisdiction for a number of years;
- Tasmanian Council of Social Service (TasCOSS);
- Tasmanian Department of Health and Human Services (DHHS); and
- James O'Neil and Associates

Consultation Time table

Date	Organisation	Present	Comment
28 April 2009	ASU	Minister, State Secretary Federal Industrial Officer, Departmental Officers	Support referral for Local Government , Community Sector, Private Sector
26 May 2009	Unions Tas	Minister, State Secretary, Departmental Officers	Support referral Local Government , Community Sector, Private Sector
27 May 2009	Council of Small Business	Minister, Chair, Executive Officer, Departmental Officers	Expressed concerns over potential increased employment costs through award modernisation processes
4 June 2009	TCCI	Minister, Chief Workplace Relations Officer, Departmental Officers	Support referral for Local Government , Community Sector, Private Sector
10 June 2009	HACSU	State Secretary, Assistant Secretary, Departmental Officers	Support referral for Local Government , Community Sector
14 July 2009	DHHS (funding body for large part of community Sector)	Departmental Officers	Support referral for Community Sector
9 September 2009	TASCOSS	CEO, Departmental Officers	Support for single IR system for Community Sector (Federal)
29 September 2009	Unions Forum	Departmental Officers, State Director FWO, Various Union Secretaries and officials	Briefing and Questions and Answers
Phone Discussion	LGAT	CEO, Departmental Officer	Support for referral of Local Government
Phone Discussion	James O'Neil and Associates(represents a number of small employers in the Community Sector)	James O'Neil Departmental Officer	Support referral of Community Sector

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DEEWR Question 3 *Commonwealth consultation with stakeholders on referral legislation*

Senator Fisher asked on 11 November 2009, EEWR Hansard page 25:

> Since the election of this government have there been any other bills to amend the workplace relations legislation that were not the subject of a COIL meeting?

Answer

There have not been any other bills to amend the workplace relations legislation that were not the subject of a COIL meeting.

However, as is clear from the Department's response to Questions 2, State Governments have consulted extensively with a wide range of employer and union stakeholders regarding referrals.

The Workplace Relations Ministers from each of the new referring States of South Australia, Tasmania and Queensland have emphasised this extensive consultation when introducing referral legislation into their respective State parliaments.

In his second reading speech to the South Australian Parliament on the Fair Work (Commonwealth Powers) Bill 2009 (SA), the South Australian Minister for Industrial Relations, the Hon Paul Caica MP, noted that:

> South Australia's private sector participation in the national industrial relations system has been the subject of extensive and detailed consultation with members of the Industrial Relations Advisory Committee and other key stakeholders. There is general support for our participation in the national system and for the proposed text based referral of powers to the commonwealth.

In her second reading speech to the Tasmanian Parliament on the Industrial Relations (Commonwealth Powers) Bill 2009 (Tas), the Tasmanian Minister for Workplace Relations, the Hon Lisa Singh MP, noted that:

> As part of the lead-up to this decision [to refer] I consulted with Unions Tasmania, TCCI [Tasmanian Chamber of Commerce and Industry] and the Small Business Council of Australia.

In his second reading speech to the Queensland Parliament on the Fair Work (Commonwealth Powers) and Other Provisions Bill 2009 (Qld), the Queensland Minister for Industrial Relations, the Hon Cameron Dick MP, noted that:

> The Queensland government has not taken this step [to refer] lightly and not without extensive consultation with Queensland employers and unions.

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DEEWR Question 4 *Providing the IGA to stakeholders*

Senator Fisher asked on 11 November 2009, EEWR Hansard page 25:

> May I have the Australian Industry Group provided with a copy of the IGA?

Answer

Consistent with the Government's intention to always make the *Multi-lateral Inter-Governmental Agreement (IGA) for a National Workplace Relations System for the Private Sector* (the Multilateral IGA) publicly available, the Department provided the following stakeholders with copies of the Multilateral IGA on 12 November 2009:

- Australian Industry Group;
- Australian Council of Trade Unions; and
- Australian Chamber of Commerce and Industry.

A copy of the Multilateral IGA was also posted on the Workplace Relations Ministers' Council page on the Department's internet site on 12 November 2009. The relevant address is:
http://www.deewr.gov.au/WorkplaceRelations/WRMC/Pages/Communiqués.aspx

The Department notes that prior to the above steps it had not received any requests from stakeholders or other interested parties for a copy of the Multilateral IGA.

The Department would have no objection to the Committee publishing the Multilateral IGA as part of its report should it wish to do so.

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DEEWR Question 5 *Definitions of 'Mirroring jurisdiction', 'Cooperating jurisdiction' and 'Referring State'*

Question

Senator Fisher asked on 11 November 2009, EEWR Hansard page 27:

> Can the department provide the committee with a table that explains the difference in definition between the terms 'mirroring jurisdiction' and 'cooperating jurisdiction' used in the IGA, particularly in clause 2.8, and the definitions in the bill of a referring state which does not then terminate either its initial or an amending reference and of a referring state that may well remain a referring state but which terminates an amendment reference under either clause 30G or 30L of the bill?

Answer

The three methods of participation in the national workplace relations system for the private sector (i.e. cooperating, mirroring or referring) reflect the Government's commitments as made in Forward with Fairness that a national system:

> …will be achieved either by State Governments referring powers for private sector industrial relations, or other forms of cooperation and harmonisation.

Each of the three methods of participation in the national system is described in more detail below.

Term	Definition	Comment
Mirroring Jurisdiction	The Inter-Governmental Agreement (IGA) defines a Mirroring Jurisdiction as a State in which the Parliament enacts Mirror Legislation, and amends such legislation from time to time so that it is consistent with any amendments to the Fair Work legislation (clause 3.6). The IGA defines Mirror Legislation as legislation enacted by a State Parliament that is substantially consistent with the Fair Work legislation and that has substantially the same effect as the Fair Work legislation (clause 3.6).	Mirror legislation would be legislation of a State Parliament and would be administered by that State.

Cooperating Jurisdiction	The IGA defines Cooperating Jurisdiction as a State (other than a Referring State or Mirroring Jurisdiction) which is committed to forms of cooperation and harmonisation other than enacting referrals of power or mirror legislation to achieve a National Workplace Relations System (clause 3.6). The IGA defines cooperation and harmonisation as legislative and administrative measures by a State, other than the enactment of a referral of power or mirror legislation, to implement an element or elements of the Fair Work legislation in accordance with that State's commitment to pursue alignment with the National Workplace Relations System in that State (clause 3.6).	A Cooperating jurisdiction could choose the manner in which it wished to cooperate, including through legislation. Any such legislation would be legislation of a State Parliament and would be administered by that State.
Referring State	The IGA defines Referring State as a referring State within the meaning of the *Fair Work Act 2009* (FW Act) as in force on 1 January 2010 (clause 3.6).	The term Referring State has the meaning given by subsection 30B of the FW Act and by proposed subsection 30L in item 39 of the Fair Work Amendment (State Referrals and Other Measures) Bill 2009. A State that terminates its amendment reference in accordance with subsections 30B(7) or 30B(8), or in accordance with proposed subsections 30L(7) or 30L(8), would continue to be a Referring State under the FW Act, and therefore would be a Referring State within the meaning of clause 3.6 of the IGA.

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DEEWR Question 6 *Amendments to the Fair Work Regulations and Small Business Fair Dismissal Code*

Senator Fisher asked on 11 November 2009, EEWR Hansard page 28:

> What about an amendment to the regulations under the Fair Work Act? Could that violate the fundamental principles? What about an amendment to the code of practice for unfair dismissals? Would an amendment to that potentially violate the fundamental principles of the workplace relations act and be able to kick-start subclause 30L(7) or (8)?

Answer

It is difficult to envisage a circumstance in which an amendment to the Fair Work Regulations would offend the fundamental workplace relations principles.

It is conceivable that, in circumstances where amendments to the Small Business Fair Dismissal Code had the practical effect of narrowing access to an unfair dismissal remedy under the Fair Work Act, a referring State might consider that this was inconsistent with the fundamental workplace relations principles.

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DEEWR Question 7 & 8 *Termination of an amendment reference*

Senator Fisher asked on 11 November 2009, EEWR Hansard page 29:

> Can the department inform the committee as to why it is not satisfactory for the bill to simply provide that one or more states may terminate their initial reference, their amending reference or their transitional reference on the provision of three months notice?
>
> Can the department inform the committee as to why it is not satisfactory for the bill to simply provide that one or more states may terminate their initial reference, their amending reference or their transitional reference on the provision of six months notice?

Answer

A referring State may terminate any or all of its initial, amendment or transitional references at any time but would cease to be a referring State unless proposed subsections 30B(7), 30B(8), 30L(7) or 30L(8) apply.

A State can remain a referring State under those provisions if its amendment reference is terminated by the Governor of the State:

- with six months notice and the amendment references of all other referring States terminate on the same day; or

- with three months notice, if the State Governor considers that an amendment to the *Fair Work Act 2009* is inconsistent with the fundamental workplace relations principles.

These arrangements were developed in discussions with States on the national system and provide an assurance of the Commonwealth's intention to work with them on amendments into the future.

Other reference schemes make provision for a State to remain in the scheme if it terminates its amendment reference in certain circumstances. For example, under subsections 18B(7) and (8) of the *Water Act 2007* a State can remain a referring State despite termination of its amendment reference:

- with six months notice and the amendment references of all other referring States terminate on the same day (subsection 18B(7)); or

- if particular types of amendments are proposed and (subject to certain conditions) the State Governor issues a notice stating that the State has not agreed to the amendment (subsection 18B(8)).

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DEEWR Question 9 *Termination of an amendment reference*

Senator Fisher asked on 11 November 2009, EEWR Hansard page 29:

> I would ask the department on notice to provide the committee with a table that sets out the law that would apply in the event of the triggering of clauses 30L(7) or (8).
>
> I ask the department to provide the committee on notice with a table that sets out the legislation that would apply to a referring state that initially refers workplace relations powers to the Commonwealth and then terminates an amending reference. In particular, what then happens to the status of the laws in that place in respect of the initial referral? Do the laws of that state then fall to be governed by what the federal laws were as at the date of referral and as at the date of the termination of the amending reference?
>
> I ask the department to provide a table setting out the effect of what then happens if that same state, which is still a referring state, decides that, despite there being a second amendment to the federal Workplace Relations Act, post that state's initial referral, that state is not unhappy about that amendment to the Workplace Relations Act so decides that it will have that amendment, thanks very much? Can that happen under the bill and what will be the effect? I then ask for a table with the same effect in the event that all initial referring states decide to terminate an amendment reference when there is a first amendment made to the Workplace Relations Act post initial referral and, secondly, all states then decide that, when there is a subsequent amendment to the Workplace Relations Act, those states are not unhappy about that subsequent amendment and wish to have that amendment effective in their states. Is that possible? What legislation will prevail?

Response

A State can remain a referring State if its amendment reference is terminated by the State Governor by proclamation with six months notice and the amendment references of all other referring States terminate on the same day (proposed subsections 30B(7) and 30L(7)).

A State can also remain a referring State if its amendment reference is terminated by the State Governor by proclamation with three months notice, if the Governor considers that an amendment to the *Fair Work Act 2009* (FW Act) is inconsistent with the fundamental workplace relations principles (proposed subsections 30B(8) and 30L(8)). The Commonwealth could not, after the date of effect of the proclamation, rely on the relevant referral to amend the FW Act in relation to that State.

The effects of such terminations are set out in the attached table.

Whether the amendment reference is terminated with six months or three months notice, termination of the amendment reference would not affect:

- amendments made in reliance on the amendment reference before the termination (whether or not they have commenced before that termination); nor

- the continued operation of the FW Act as in force immediately before the termination, or as amended by amendments made before the termination.

This is the effect of the following provisions in the States' referral legislation:

- Section 7 of the *Fair Work (Commonwealth Powers) Act 2009* (Vic) (together with amendments proposed to be made by the Fair Work (Commonwealth Powers) Amendment Bill 2009 (Vic));

- Clause 8 of the Fair Work (Commonwealth Powers) Bill 2009 (SA);

- Clause 8 of the Industrial Relations (Commonwealth Powers) Bill 2009 (Tas); and

- Clause 8 of the Fair Work (Commonwealth Powers) and Other Provisions Bill 2009 (Qld).

This means that:

- the FW Act as in force immediately before the date of effect of the termination proclamation (or as amended by an amendment made before termination but that commences after the termination) would continue to apply in the relevant State in relation to all national system employers and national system employees, including those within the scope of a State reference; but

- any amendments made after the date of effect of the termination proclamation would only apply in the relevant State to employers and employees who are within the scope of the Commonwealth's own legislative powers and would not apply to employers and employees within the scope of a State reference.

Only if a State terminated its initial reference would it be necessary for a State to 'revive' its workplace relations system.

Question	Answer
If all referring States terminate their amendment references with six months notice (but leave their initial references in place) what law will apply?	If all referring States terminate their amendment references on the same day: • the FW Act in force immediately before the date of effect of the termination proclamation, as amended by an amendment made before termination (whether the amendment actually commences before or after the termination) would continue to apply in the relevant State to all national system employers and national system employees, including those within the extended meaning of those terms because of State references; but • any amendment made after the date of effect of the termination proclamation would only apply in the relevant State to employers and employees who are within the scope of the Commonwealth's own legislative powers and would not apply to employers and employees within the scope of a State reference.
If a referring State terminates its amendment reference with three months notice, what law will apply?	The FW Act as in force immediately before the date of effect of the termination proclamation (i.e. as amended by an amendment made before termination, whether the amendment actually commences before or after the termination) would continue to apply in the relevant State to all national system employers and national system employees, including those within the scope of the extended meaning of those terms because of State references. Any amendment made after the date of effect of the termination proclamation would only apply in the relevant State to employers and employees who are within the scope of the Commonwealth's own legislative powers and would not apply to employers and employees within the scope of a State reference.
If a referring State has terminated its amendment reference with three months notice but subsequently accepts a proposed Commonwealth amendment, what law will apply?	If a referring State terminates its amendment reference it cannot subsequently 'accept' amendments by reinstating its amendment reference. Proposed subsection 30L(1) only contemplates references of matters after 1 July 2009 but on or before 1 January 2010. The Government is considering a technical amendment to subsection

	30B(1) to ensure consistency of approach between Division 2A and Division 2B. The FW Act as in force immediately before the date of effect of the termination proclamation (as amended by any amendment made before the termination proclamation) would apply in relation to employers and employees within the scope of a State reference.
If all referring States have terminated their amendment references with six months notice but subsequently accept a proposed Commonwealth amendment, what law will apply?	If referring States terminate their amendment references they cannot subsequently 'accept' amendments by reinstating their amendment references. Proposed subsection 30L(1) only contemplates references of matters after 1 July 2009 but on or before 1 January 2010. The Government is considering a technical amendment to subsection 30B(1) to ensure consistency of approach between Division 2A and Division 2B. The FW Act as in force immediately before the date of effect of the termination proclamation would apply in relation to employers and employees within the scope of a State reference.
If a referring State terminates its initial reference, what law will apply?	If a referring State terminates its initial reference: • the FW Act would continue to apply to national system employers and national system employees within the scope of the Commonwealth's own legislative powers but would not apply to employers and employees within the scope of a State reference from the date the initial reference is terminated; and • State legislation would apply to employers and employees outside the scope of Commonwealth legislative power.