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

SUBMISSION TO THE SENATE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

by

THE DEPARTMENT OF EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

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Introduction

The Department of Education, Employment and Workplace Relations (the Department) welcomes the opportunity to provide a written submission to the Senate Committee Inquiry into the Provisions of the Fair Work Amendment (State Referrals and Other Measures) Bill 2009 (the Bill).

The Bill was introduced into the House of Representatives on 21 October 2009. The Bill is part of the commitment of the Australian Government to create a fair, simple, balanced and flexible workplace relations system through establishment of a uniform national workplace relations system for the private sector (National System). The Government outlined the objective of a National System in its *Forward with Fairness* policy implementation plan (*Forward with Fairness*), which it took to the 2007 election.

The Bill amends the *Fair Work Act 2009* (the Fair Work Act) to enable States to refer workplace relations matters to the Commonwealth for the purposes of s.51(xxxvii) of the Constitution.

The Bill also amends the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the T&C Act) to establish arrangements for employees and employers transitioning from referring State systems to the National System, and consequential amendments to other Commonwealth legislation required as a result of these arrangements.

The establishment of a National System has been a topic of discussion for some time and has been recognised by a range of parties as having significant benefits attached.

The Government has led negotiations for a National System through extensive consultation with the States and Territories and through ongoing consultation with other major stakeholders, such as the Australian Chamber of Commerce and Industry, the Australian Council of Trade Unions and the Australian Industry Group. This consultation has been supported through a number of committees such the Workplace Relations Ministers' Council (WRMC) which comprises Commonwealth, State and Territory Ministers for workplace relations and the High Level Officials' Group (HLOG) which comprises senior officials from Commonwealth, State and Territory workplace relations departments.

These consultations and negotiations have already achieved a referral of workplace relations matters to the Commonwealth from Victoria, and have also resulted in South Australia, Tasmania and Queensland introducing referral legislation into their Parliaments during the second half of 2009. The Government of New South Wales is yet to make a decision regarding its participation in the National System, while the Western Australian Government has declared that it will not refer its workplace relations powers to the Commonwealth.

The making of these referrals is a key reform for the Government and brings Australia to the closest point in its history of having a single set of workplace relations laws for the private sector.

Section 1 – The importance of a national workplace relations system

The Australian Government identified in *Forward with Fairness* that a uniform national workplace relations system for the private sector was a critical economic reform for the future economic prosperity of the nation and committed to its creation by utilising all of the Constitutional powers available to Government.

The Government's position has strong support from key stakeholders including business and union representatives and academics. The Australian Chamber of Commerce and Industry, in a 2005 issues paper stated:

> The parallel operation of different federal and State tribunals and federal and State legislation leads to confusion and uncertainty about the rights and obligations of employers and employees. Such a situation benefits no one and creates unnecessary difficulties and technicalities in the labour inspection and enforcement processes. [1]

More recently, Business SA chief executive Peter Vaughan stated that:

> It is utter madness that we are a country of 22 million people with awards covering different people, different states and different situations…[2]

These views are supported by academics Creighton and Stewart who argue that the:

> …relatively small size of the Australian economy, together with its high levels of integration and interdependence, suggest that industrial relations should be a matter of federal responsibility, as is the case in relation to most other fundamental features of economic activity.[3]

The Regulation Impact Statement (RIS) that accompanied the explanatory memorandum to the Bill identified a number of problems that arise under the current duplicate and fractured system of workplace relations regulation in Australia, including:

- Limitations on the corporations power under s.51(xx) of the Constitution – this contributes to higher levels of uncertainty and legal complexity in determining jurisdictional coverage, which can be costly and time consuming to resolve;
- Duplication of systems and legislation – maintaining and enforcing separate workplace relations systems creates administrative inefficiencies and can also lead to increased compliance costs for employers from navigating competing legislation;
- Inconsistency and conflict between systems and legislation – there is often no clear demarcation between federal and State systems and employers must often comply with more than one set of workplace relations obligations. This also creates the potential for inequalities and differences among businesses and employees resulting from different regulations and wages and working conditions depending on the State in which they operate or are employed;
- Reduced productivity and competitiveness – the multiplicity of jurisdictions and laws is generally accepted as a factor which creates barriers to productivity and a uniform national workplace relations system that can rapidly adapt to global markets and competition.

[1] Australian Chamber of Commerce and Industry, '*Functioning federalism and the case for a national workplace relations system: Issues paper*', 2005, p.20

[2] P Vaughan, Chief Executive of Business SA cited in 'No Choice: Time for Fair Work to work', *Adelaide Advertiser*, 3 November 2009, p.8.

[3] B Creighton and A. Stewart, *Labour Law* (4th Ed), Federation Press, Sydney, 2005 cited in P. Prince and T. John, '*The Constitution and industrial relations: Is a unitary system achievable?*', Research Brief No.8, 2005-06, Department of Parliamentary Services (Cwth), Nov 2005, p.21

A copy of the RIS is provided at **Attachment A**.

The RIS details how the creation of the National System and the making of State referrals as provided for under the Bill will address these problems.

There are also a number of transitional arrangements provided by the Bill, which will maintain current employment conditions for some employers and employees transitioning from State workplace relations systems to the National System.

After a measured transition to the National System, employers and employees from referring States will no longer face inequalities and differences in wages and working conditions compared with similar employers and employees in the federal or other State workplace relations systems.

Referring States will ensure certainty of jurisdictional coverage to all their private sector employers and employees, which will eliminate time and costs associated with managing this uncertainty to ensure compliance with the law. Referring Sates will also be able to redirect funding allocated to administering duplicate State workplace relations systems to other objectives.

Combined, these benefits will contribute to the creation of a seamless national economy which is simple, fair and flexible and better able to adapt to global markets and competition.

State support for a national workplace relations system

Section 51(xxxvii) of the Constitution enables the Commonwealth to make laws with respect to matters referred to the Commonwealth by the States.

A referral does not necessarily transfer power to the Commonwealth indefinitely. In 1964, the High Court stated that there is no reason to suppose that the words “matters referred” in s.51(xxxvii) of the Constitution “cannot cover matters referred for a time which is specified or which may depend on a future event even if that event involves the will of the State Governor-in-Council and consists in the fixing of a date by Proclamation.”[4]

Consistent with this, State referral laws generally provide for references to be terminated by the Governor-in-Council on a date fixed by Proclamation.

Even so, a referral of matters to the Commonwealth under section 51(xxxvii) of the Constitution remains a significant undertaking for State and Commonwealth governments and is therefore a matter that is very carefully considered by each party.

Referrals not only require goodwill and cooperation between the Commonwealth and state governments, but also entail significant transfer of responsibility and legislative and administrative change. For the Commonwealth, this can involve implementing services or expanding existing service delivery arrangements to substitute for services previously performed by States. In the case of workplace relations referrals, services include provision of education, information and compliance to employers, employees and the community as well as provision of Tribunal or related services. For states, a referral can provide initial administrative savings from reduced service delivery requirements and maintenance, but a termination of referral will likely involve costs associated with re-establishing those removed services.

Following extensive tripartite consultation with stakeholders, the governments of South Australia, Tasmania and Queensland have identified references as a simpler and more certain approach to co-operative federalism and the achievement of a uniform National System and have each introduced legislation into their Parliaments to support referrals.

[4] *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, at 226.

These announcements represent a major long term commitment from these State governments.

In his second reading speech to the Queensland referral bill, the Queensland Attorney-General and Minister for Industrial Relations, the Hon Cameron Dick stated:

> The Queensland government has not taken this step lightly and not without extensive consultation with Queensland employers and unions. The current State industrial relations system, embodied in the *Industrial Relations Act 1999*, has fairly balanced the interests of employers and employees. However, a national system can achieve comparable results, and that is why Queensland has taken the step to refer State's power on this issue.
>
> …This bill today is a giant step forward in establishing a cooperative system that respects State rights, but also creates an overarching national industrial relations system which is in the best interests of business and workers.[5]

Similar sentiments have been echoed by South Australia and Tasmania. State positions on the National System are further discussed at Section 3 to this submission.

[5] ibid

Section 2 – Consultation preceding the Bill

The Government made a commitment in *Forward with Fairness* to work closely with the States to establish a National System and to provide genuine options for States to achieve this outcome:

> Labor will work cooperatively with the States to achieve national industrial relations laws for the private sector. This will be achieved either by State Governments referring powers for private sector industrial relations or other forms of cooperation and harmonisation.[6]

In keeping with this commitment, the Government has consulted extensively with State governments through the WRMC and HLOG, and through ongoing bilateral discussions.

Workplace Relations Ministers' Council (WRMC)

State and Territory workplace relations ministers have been consulted extensively on the development of the Fair Work Act and the establishment of the National System through WRMC.

The National System was listed as a discussion item at seven of the eight meetings held since the Government came to power in November 2007.

Working through WRMC, Ministers:

- endorsed *Forward with Fairness* as providing the basis for a modern, fair and flexible workplace relations system (February 2008);
- agreed to create a high level officials group to collaborate on the development of the new system and its interface with State systems (February 2008);
- endorsed principles to guide the development of governance arrangements for a stable uniform national system (May 2008);
- committed to several key principles for the National System, including a strong safety net of minimum standards, collective bargaining at the workplace level, protection from unfair dismissal and fair and effective remedies through an independent umpire (May 2008);
- asked senior officials from all jurisdictions to discuss matters concerning the transition to a new national workplace relations system, in particular issues relating to governance and service delivery including compliance and tribunals (November 2008);
- acknowledged the Victorian Government's commitment to refer private workplace relations matters to the Commonwealth from 1 July 2009 (April 2009);
- committed to working to finalise a multilateral IGA by August 2009 (June 2009); and
- agreed to set out the key principles that will underpin the new National System in the multilateral IGA (June 2009).

Ministers from South Australia, Tasmania and Queensland joined Victoria in indicating their intent to make referrals to the Commonwealth in support of the National System at the WRMC meeting of 11 June 2009.

At the most recent meeting of WRMC on 25 September 2009, Ministers unanimously endorsed the *Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector*, with Ministers from Victoria, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory signing the agreement.

[6] Kevin Rudd and Julia Gillard, '*Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces'*, Pre-election policy commitment, Australian Labor Party, April 2007

The multilateral IGA is discussed in more detail at Section 6 of this submission.

The work of Minsters through WRMC was complemented by interaction between Commonwealth, State and Territory officials through Senior Officials' meetings, which are generally held immediately before WRMC, HLOG and bilateral discussions with jurisdictions.

High Level Officials' Group (HLOG)

The HLOG was established by WRMC to facilitate discussion on the development of the Fair Work legislation and to collaborate on the development of the National System and its interface with State workplace relations systems. HLOG membership includes government departmental representatives from all States and Territories.

Since its creation, HLOG has held a total of 12 face-to-face meetings. HLOG meetings generally cover consultation on matters relating to the development and implementation of the Fair Work legislation, including modern awards and transitional arrangements, and the development of the National System, including the multilateral IGA.

The formal HLOG meetings have been supplemented by telephone conferences, informal discussions, telephone calls and written correspondence.

Bilateral consultations between the States and the Commonwealth regarding referrals

In addition to the above forums, the Department has been involved in a number of formal bilateral meetings with all States and the Territories, and in particular those States who have indicated their intention to participate in the establishment of the National System through a referral of workplace relations matters to the Commonwealth. These bilateral discussions are ongoing.

The primary focus of bilateral meetings has been to discuss State-specific arrangements for information, education, compliance and tribunal activities to support employers and employees transitioning to the National System as a result of State referrals. These arrangements will be included in individual State bilateral IGAs, which are discussed further at Section 6 of this submission.

In all cases, the bilateral discussions have been supplemented by informal telephone calls, emails and meetings.

Section 3 – States' participation in the national workplace relations system

The Government stated in *Forward with Fairness*[7] that the National System would be achieved either by State Governments referring powers for private sector industrial relations or other forms of cooperation and harmonisation. In line with this statement, all State governments had three options to facilitate participation in the establishment of the National System:

- *Referral* – Section 51(xxxvii) of the Constitution enables State parliaments to refer matters to the Commonwealth Parliament. The Commonwealth Parliament consequently acquires power to make laws with respect to the referred matters, but only in relation to those States from which the matters are referred.

  A referral of power by a State government would necessarily include an amendment reference to enable amendments to the Fair Work Act to automatically apply in the referring State. Consultation on amendments would be governed by a supporting IGA.

- *Mirror legislation* – This option allows States to enact mirror legislation which is substantially consistent with the Fair Work legislation and that has substantially the same effect as the Fair Work legislation. Mirror legislation would also be subject to a requirement to amend the legislation from time to time so that it is consistent with any amendments to the Fair Work legislation.

- *Cooperation* – This option allows for States to commit to forms of cooperation and harmonisation other than enacting referrals of power or mirror legislation to achieve a National Workplace Relations System.

  Again, under this option, States retain complete control over the enactment and amendment of their workplace relations legislation with no requirement for the legislation to be substantially consistent with the Fair Work legislation.

In light of these options and the benefits of the National System, States gave careful consideration to their position in determining the extent of their participation in the National System. States' positions are discussed in more detail below.

Victoria

Victoria was the first State to legislate for the referral of workplace relations matters to the Commonwealth. The *Fair Work (Commonwealth Powers) Act 2009* (Vic), which replaced Victoria's existing reference under the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) and gave effect to Victoria's new referral, was passed by the Victorian Parliament on 9 June 2009 and received Royal Assent on 23 June 2009.

In announcing the passage of the legislation through the Victorian Legislative Assembly, the Victorian Minister for Industrial Relations, the Hon Martin Pakula MLC, noted that from 1 July 2009 Australian workplaces will benefit from a simplified award system, balanced unfair dismissal laws, and bargaining laws that focus not on conflict but on facilitating fair agreements that contribute to workplace productivity. The Minister also noted the new system will provide the greatest possible protection to the maximum number of employees and employers across Victoria, including outworkers.

An interim bilateral inter-governmental agreement (IGA) was signed by the Deputy Prime Minister and Minister Pakula at the WRMC meeting of 11 June 2009. The interim bilateral IGA governs the Victorian referral until the multilateral IGA (refer to Section 6 of this submission), which will outline

[7] ibid

the roles and responsibilities of participants in the national system, becomes operational on 1 January 2010.

The *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (Cwth) which, amongst other things gave effect to Victoria's referral on 25 June 2009, enabled all the elements of the National System to apply to referral employers and employees in Victoria with effect from 1 July 2009.

Minister Pakula stated that by paving the way for the referral and signing the bilateral agreement, the Victorian Government was acting to secure jobs for all Victorian working families. According to the Minister, the signing of the bilateral IGA to support a fair, simple and enforceable set of national employment standards ensured that the jobs of Victorian workers are more secure.

South Australia

On 9 June 2009 the South Australian Government announced that it would refer power to enable the National System to apply in respect of its unincorporated private sector employers and employees with effect from 1 January 2010.

In announcing the South Australian Government's decision, the South Australian Minister, the Hon Paul Caica MP, said that this demonstrated the Government's confidence in the new system and its commitment to leading the way towards it. Minister Caica also noted that South Australia's decision followed extensive consultation with employers, unions and other organisations, all of which support the move.

The Minister indicated that a key benefit of the national system is that for the first time South Australian private sector employers and workers will have one set of industrial laws to deal with and that for workers, access to modern awards means simpler, nationally consistent wages, loadings and penalty payments that will be revised on a regular basis. Minister Caica also noted it will be easier to do business in South Australia for companies resident in the State and for those which trade across State borders.

On 9 September 2009, the South Australian Government introduced the Fair Work (Commonwealth Powers) Bill 2009 (the South Australian Bill) into the South Australian Parliament.

In his second reading speech to the South Australian Bill Minister Caica stated:

> There are many benefits for South Australians resulting from the referral of IR powers. A streamlined national system of industrial relations will result in significant red tape reductions for business and greater administrative efficiency by eliminating regulatory overlap and duplication. Businesses will no longer have to deal with complex jurisdictional questions about which system of industrial relations they are operating in.[8]

The South Australian Bill was passed by the South Australian House of Assembly on 13 October 2009 and is currently before the Legislative Council.

Tasmania

On 9 June 2009 the Tasmanian Minister for Workplace Relations, the Hon Lisa Singh MP, announced that Tasmania would refer power in respect of its unincorporated private sector. Minister Singh said the decision was a demonstration of the Tasmanian Government's confidence

[8] The Hon Paul Caica MP, South Australian Minister for Industrial Relations, Second Reading Speech to the Fair Work (Commonwealth Powers) Bill 2009 (SA), delivered to the Parliament of South Australia, 9 September 2009.

in the Fair Work Act and its commitment to improving the ease with which business can be done across borders while protecting the interests of workers.

To support a referral to the Commonwealth, the Tasmanian Government introduced the Industrial Relations (Commonwealth Powers) Bill 2009 (the Tasmanian Bill) into the Tasmanian Parliament on 7 October 2009. The Bill was passed by the Tasmanian House of Assembly on 14 October 2009 and by the Legislative Council on 28 October 2009.

Speaking during debate on the Tasmanian Bill Minister Singh said that referring the balance of Tasmania's private sector industrial relations to the Commonwealth Government would provide a simpler and fairer industrial system for employees and employers. Minister Singh also noted that Tasmania's referral has broad support, will enable all Tasmanian private sector workers to be dealt with under the one system and that this is good sensible policy:

> The reasons for the support of stakeholders include the fact that a contemporary legislative and administrative framework will be introduced ...Participation in the new national workplace relations system will improve rigour, consistency and address the current jurisdictional and procedural problems.
>
> There are a number of important aspects to the national scheme. Firstly, contemporary employment conditions and arrangements for employees and employers: participation in a new national workplace relations system will ensure that Tasmanian workers enjoy the benefits of a contemporary workplace relations system, comprising a safety net of employee conditions and other arrangements that apply nationally and are at least as good as those under Tasmania's Industrial Relations Act. Employers will also enjoy the benefits of safety-net conditions and other arrangements with added flexibility or employer protection.
>
> Secondly, equity within Tasmania and between Tasmania and other States: participation in a new national workplace relations system will ensure that Tasmanian workers have equitable access to the same industrial relations system as their counterparts interstate doing similar work. Participation would also provide a level playing field locally for Tasmanian employers. There is also improved efficiency and economic benefits that flow from elimination of duplication from within the private sector industrial relations system.
>
> Thirdly, clarity concerning Federal coverage for the community services sector and local government: the status of some local government and government-funded community service organisations is currently unclear. Referral will provide that clarity.[9]

It is noteworthy that the Minister said it is one thing to create the jobs, but this needs to be supported by ensuring workers are treated fairly in the workplace and that the Tasmanian referral came about because the *Forward with Fairness* package introduced by the Federal Government reintroduced basic protections and fairness into Australian workplace law once again.

Queensland

On 11 June 2009 the Queensland Industrial Relations Minister, the Hon Cameron Dick MP, announced the Queensland Government's in-principle support for a seamless national industrial relations system for the private sector, noting the benefits for business and for the economy resulting from a reduction of red tape and the increased productivity which will result from a single national workplace relations system.

The Fair Work (Commonwealth Powers) and Other Provisions Bill 2009 (Qld) (the Queensland Bill) was introduced into the Queensland Parliament on 27 October 2009. In announcing the introduction of the Queensland Bill, Minister Dick said the shape of the new national system and its

[9] The Hon Lisa Singh MP, Tasmanian Minister for Workplace Relations, Second Reading Speech to the Industrial Relations (Commonwealth Powers) Bill 2009 (Tas), delivered to the Tasmanian Parliament, 13 October 2009.

underlying safety net means employees and employers will retain access to a fair, balanced and equitable system of industrial relations, overseen by an independent umpire.

The Minister also observed that it has taken more than a hundred years, but finally employers can operate under a seamless system where they know that their obligations in Queensland are no different from those in NSW or Victoria or the ACT.

During the second reading speech for the Bill, Minister Dick noted the consideration that the Queensland Government had undertaken in deciding to make a referral and ultimately noted that the decision was in the best interests of business and workers:

> The Queensland government has not taken this step lightly and not without extensive consultation with Queensland employers and unions. The current State industrial relations system, embodied in the *Industrial Relations Act 1999*, has fairly balanced the interests of employers and employees. However, a national system can achieve comparable results, and that is why Queensland has taken the step to refer State's power on this issue.
>
> …This bill today is a giant step forward in establishing a cooperative system that respects State rights, but also creates an overarching national industrial relations system which is in the best interests of business and workers.[10]

New South Wales

The NSW Government is yet to make a decision about its participation in the national workplace relations system for the private sector. Negotiations between the Commonwealth and NSW are continuing.

Western Australia

In January 2009 the Western Australian Minister for Commerce, the Hon Troy Buswell MP, announced the Western Australia Government had decided against referring its remaining industrial relations powers to the Commonwealth.

According to Minister Buswell, the Western Australian Government's approach will be to work co-operatively with the Commonwealth to build a harmonised industrial relations system without handing over Western Australia's long-held, constitutionally established role and powers.

The Western Australian Government commissioned the *Independent Review of the State Industrial Relations System in Western Australia*, which includes in its terms of reference consideration of the Fair Work Act, with a focus on examining which elements should form part of the State industrial relations system and potential areas for harmonisation.

The Australian Capital Territory and the Northern Territory

Employers and employees in the Territories are covered by the Commonwealth workplace relations system by virtue of s.122 of the Constitution. Both Territories have been active participants in discussions about the National System and both Territory Governments have signed the multilateral IGA.

[10] The Hon Cameron Dick MP, Queensland Attorney-General and Minister for Industrial Relations, Second Reading Speech to the Fair Work (Commonwealth Powers) and Other Provisions Bill (Qld), delivered to Queensland Parliament on 27 October 2009.

Section 4 – Scope of the Bill

The *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (the first referral Act) inserted Division 2A into Part 1-3 of the Fair Work Act with effect from 25 June 2009. Division 2A gave effect to Victoria's workplace relations reference to the Commonwealth, with the effect that all Victorian employers and employees were covered by the Fair Work Act when most of its provisions commenced on 1 July 2009.

Schedule 1 to the Bill will amend Part 1-3 of the Fair Work Act to include Division 2B, which gives effect to State references of workplace relations matters to the Commonwealth after 1 July 2009 but on or before 1 January 2010.

This framework reflects the fact that States are referring at different times.

All referring States refer matters related to the referred provisions – that is, the text of Division 2A or 2B to the extent within each State's legislative power. While similar in content, the referred provisions are different for each referring State as they relate to employers and employees within each State's geographical jurisdiction.

The first referral Act amended the Fair Work Act as originally enacted to give effect to Victoria's referred provisions. This Bill will amend the Fair Work Act as in force before 1 January 2010 to include the referred provisions of any State that refers by that date.

Section 5 – Key features of the Bill

State references of workplace relations matters

Schedule 1 to the Bill would give effect to references of matters relating to workplace relations from States to the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution. These references will enable the Commonwealth to:

- extend the Fair Work Act in referring States to any employers and employees not already within Commonwealth jurisdiction (subject to exceptions relating to State public sector and local government employment) and outworker entities, and extend the operation of the general protections to action in a referring State (this is the *initial reference*);
- amend the Fair Work Act so that it applies uniformly in referring States (this is the *amendment reference*); and
- establish arrangements for the transition of referral employees and employers from State industrial or workplace relations systems to the new national system (this is the *transition reference*).

Initial reference

Division 2B extends the Fair Work Act in referring States by extending the existing definitions of 'national system employee' and 'national system employer'.

The Fair Work Act currently applies to national system employees (sections 13 and 30C) and national system employers (sections 14 and 30D), such as constitutional corporations and employers in the Territories and in Victoria. In most Parts of the Act the terms 'employee' and 'employer' mean national system employee and national system employer and this has the effect of applying the Act to those employees and employers.

New sections 30M and 30N in Division 2B will extend the current national system definitions to include any employees and any employers in a referring State who would otherwise be outside the existing definitions. The effect of this will be to extend the application of the Fair Work Act to all employees and employers in a referring State. This extended application of the Fair Work Act will be subject to any exceptions relating to State public sector employment and local government employment.

New section 30P extends the ordinary meaning of employee and employer to enable Division 2B referring States (should they wish to do so) to deem law enforcement officers to be employees, and certain office holders to be employers of law enforcement officers. The reason for this provision is that law enforcement officers may be employees at common law. While it is anticipated that Division 2B referring States will not refer matters relating to law enforcement officers, these provisions ensure consistency with Division 2A, which reflects Victoria's reference of matters relating to law enforcement officers.

New section 30Q in Division 2B extends the definition of outworker entity. The existing definition of outworker entity in section 12 of the Fair Work Act includes a person (other than in their capacity as a national system employer) who arranges for outwork to be performed and the arrangement is connected with a Territory. Like section 30F of Division 2A section 30Q extends the definition to include a person (other than a national system employer) who arranges for outwork to be performed and the arrangement is connected with a referring State.

New section 30R extends the operation of the Fair Work Act's general protections (Part 3-1) in referring States. Part 3-1 already applies to action by or affecting national system employers and

employees, or action in a Territory or Commonwealth place. Like section 30G in Division 2A new section 30R gives the general protections additional 'reach' in a referring State in the same way that the Part already extends to action in a Territory or in a Commonwealth place. For example, this would provide a remedy for a contractor whose contract was terminated in a referring State by an unincorporated principal because the contractor was a member of a State industrial association.

Amendment reference

Schedule 1 to the Bill would give effect to references enabling the amendment of the Fair Work Act so far as this would otherwise be outside Commonwealth power. The Bill's amendment reference provisions will enable the Fair Work Act to be amended to apply to all employers and employees in referring States uniformly. Consultation on amendments would be governed by a supporting inter-governmental agreement.

The description of the subject matter of the amendment reference corresponds with the matters regulated by the Fair Work Act, such as:

- terms and conditions of employment (such as in minimum standards or instruments, or in relation to bargaining or transfer of business); and
- rights and responsibilities of employees and employers and other persons (such as in relation to freedom of association, industrial action, unfair dismissal and right of entry).

Some subject matters reflecting areas of State regulatory responsibility (such as equal opportunity and discrimination, occupational health and safety, public holidays and workplace surveillance) are excluded from the subject matter of the amendment reference.

However, these exclusions will not prevent the Commonwealth from amending the Fair Work Act in relation to any of these matters to the extent that the Fair Work Act as originally enacted deals with them or enables modern awards and enterprise agreements to deal with these matters. For example, the States' amendment references would enable the Commonwealth to uniformly amend the general protections provisions of the Fair Work Act (Part 3-1) that protect an employee from adverse action because of discrimination on the basis of the employee's race, sex or other characteristics. By way of further example, an enterprise agreement made under the Fair Work Act could include terms dealing with occupational health and safety training.

Termination of reference

New subsection 30L(6) provides that if a State terminates any or all of the initial, amendment or transitional references it will cease to be a referring State unless subsections 30L(7) or (8) apply. This means that the Fair Work Act would no longer apply so far as supported by the State reference, but it would continue to apply to employees and employers in that State to the extent supported by existing Commonwealth power.

New subsections 30L(7) and (8) will enable referring States to terminate their amendment references and remain in the national system in the following circumstances:

- by proclamation of the State Governor with six months notice, if the amendment references of other referring States all terminate on the same day; or
- by proclamation of the State Governor with three months notice, if the Governor considers that an amendment to the Fair Work Act is inconsistent with the fundamental workplace relations principles.

The fundamental workplace relations principles are consistent with those set out in the multilateral IGA and outline requirements that the Fair Work Act should provide for, and continue to provide, for:

- a strong, simple and enforceable safety net of minimum employment standards;
- genuine rights and responsibilities to ensure fairness, choice and representation at work;
- collective bargaining at the enterprise level with no provision for individual statutory agreements;
- fair and effective remedies through an independent umpire;
- protection from unfair dismissal; and
- an independent tribunal system and an independent authority able to assist employers and employees within a national workplace relations system.

Terminating the amendment reference would require three months notice and would mean that the Commonwealth could not, after the date of effect of the proclamation, rely on the relevant referral to enact amendments to the Fair Work Act in relation to that State.

Amendments enacted after the date of effect of the proclamation would only apply in the relevant State to employers and employees who are already within Commonwealth power and would not apply to referral employers and employees.

These arrangements protect the States' long term interests in a cooperative workplace relations system. They were developed in close consultation with the States and provide an assurance of the Commonwealth's intention to work cooperatively with them on amendments into the future. However, they are not anticipated to be used in any but the most extreme circumstances. For example, in his second reading speech to the South Australian Bill, Minister Caica noted that:

> It is envisaged that if all jurisdictions were meeting their obligations under the intergovernmental agreement, the provisions of this bill for the termination of the amendment reference because of inconsistency with the fundamental workplace relations principles would not need to be applied and, in effect, would only be contemplated in the most extreme circumstances, where the agreed fundamentals of the national system are threatened.[11]

Transition reference

New subsection 30L(5) requires a referring State to refer matters relating to the transition to the National System.

The State referral bills would all refer to power to enable to the Commonwealth to legislate in respect of the following matters:

- the transition of employers and employees from regulation by State workplace relations or industrial relations frameworks to the regime provided for by the Fair Work Act;
- the transition of unincorporated employers and employees that are currently covered by federal awards and agreements created in reliance on the conciliation and arbitration power of the Constitution from the coverage of the *Workplace Relations Act 1996* as continued in force by the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the T&C Act) to the regime provided for by the Fair Work Act

[11] The Hon Paul Caica MP, South Australian Minister for Industrial Relations, Second Reading Speech to the Fair Work (Commonwealth Powers) Bill 2009 (SA), delivered to the Parliament of South Australia, 9 September 2009.

Transitional arrangements

Employees and employers covered by federal awards and agreements created in reliance on the conciliation and arbitration power of the Constitution

Part 1 of Schedule 2 establishes arrangements for the transition of employers and employees covered by federal awards and agreements made in reliance on the conciliation and arbitration power to the new national workplace relations system. As was done in reliance on Victoria's reference, the constitutional basis of transitional awards and these agreements would be changed to reflect reliance on State references. As a result the sunset date of 26 March 2011 will no longer apply to the extent that these transitional instruments cover State referral employers and employees (items 1-121 of Schedule 2).

For employers and employees in referring States covered by transitional awards, these awards will generally be replaced by modern awards from 1 January 2010.

Incoming State employers and employees

Part 1 of Schedule 2 to the Bill also inserts new Schedule 3A into the T&C Act (item 54 of Schedule 2) and amends related provisions of the T&C Act to provide for the transition of employers and employees in referring States to the new national workplace relations system.

At the referral commencement, federal awards and agreements in the same terms as State awards and State employment agreements would be deemed to come into existence (new items 3 and 5 of Schedule 3A T&C Act, item 54 of Schedule 2). These are known as Division 2B State awards and Division 2B State employment agreements (collectively, Division 2B State instruments).

The transitional arrangements that the Bill proposes for incoming State instruments are, as far as possible, similar to the transitional arrangements that were put in place in the T&C Act for the transition of federal instruments to the national workplace relations system.

Minimum entitlements and instruments for incoming State employers and employees

Application of National Employment Standards and national minimum wage order

The National Employment Standards (NES) and the transitional national minimum wage order (in the case of parties not covered by a State award) will apply to incoming employees and employers from 1 January 2010, and will prevail over a Division 2B State instrument where the instrument is detrimental in comparison. To the extent appropriate, current NES transition rules for national system employers and employees set out in the T&C Act will also operate in relation to incoming State reference employers and employees (new items 37-40 of Schedule 3A T&C Act, item 54 of Schedule 2 (NES) and items 16-17 of Schedule 9 T&C Act, item 70 of Schedule 2 (NMWO)).

Division 2B State awards and transition to modern awards

A Division 2B State award will govern the terms and conditions of employment for the relevant Division 2B State reference employees from the Division 2B referral commencement (anticipated to be 1 January 2010) for a period of 12 months. After that time, a modern award will come into operation (new item 21 of Schedule 3A T&C Act, item 54 of Schedule 2).

The 12 month rule does not apply to Division 2B State enterprise awards (i.e. State awards that apply to a single enterprise) – these will be subject to the separate enterprise award modernisation process provided for by Schedule 6 to the T&C Act (items 57-61 of Schedule 2).

During the 12 month period Fair Work Australia (FWA) will be required to consider whether a modern award should be varied to provide appropriate transitional arrangements for incoming State employees and employers. This would be subject to the existing rules in the Fair Work Act about what may be included in modern awards (new item 29 of Schedule 3A T&C Act, item 54 of Schedule 2).

Given that the Australian Industrial Relations Commission (AIRC) will have determined transitional arrangements for employers and employees covered by NAPSAs which are derived from State awards, there will be a framework already in place for translating Division 2B State reference employers and employees to coverage by modern awards.

In this context, the Government provided a full five year phase in period so that employers and employees would gradually move from arrangements in old State and federal awards to a new modern award. The AIRC is using that period in full. The Government envisages that Fair Work Australia will apply these transitional arrangements to the transition of Division 2B referral State award-covered employees to modern award coverage.

FWA will also be able to make remedial take-home pay orders where the take-home pay of one or more employees is reduced as a result of movement from the Division 2B State award to the modern award (new items 31-36 of Schedule 3A T&C Act, item 54 of Schedule 2).

Given the industry and occupational coverage of modern awards, it is expected that Division 2B State awards will be fully replaced by modern awards on 1 January 2011. However, if there are parties covered by a Division 2B State award for which there is no corresponding modern award at that time, they will be covered by the miscellaneous modern award.

State employers and employees who are not covered by a State award at referral commencement but who are capable of being covered by a modern award will become covered by that modern award from referral commencement.

During the 12 month period Division 2B State awards will only be able to be varied to:

- ensure effective operation with the NES (new item 40 of Schedule 3A T&C Act, item 54 of Schedule 2);
- remove any ambiguity or uncertainty in the instrument (new item 19 of Schedule 3A T&C Act, item 54 of Schedule 2);
- remove inconsistency with the general protections or to remove provisions that are discriminatory (on referral by the Australian Human Rights Commission) (new item 20 of Schedule 3A T&C Act, item 54 of Schedule 2); or
- reflect minimum wage adjustments by FWA (new items 18-20 of Schedule 3A T&C Act, item 54 of Schedule 2).

State employment agreements

Consistent with federal transition rules for agreements, all Division 2B State employment agreements would have the same content as they do now (new items 5 and 8 of Schedule 3A T&C Act, item 54 of Schedule 2), subject to the NES (applied on a no detriment basis) (new item 37 of Schedule 3A T&C Act, item 54 of Schedule 2), and modern award (or national minimum wage order) rates of pay (new item 17 of Schedule 9 T&C Act, item 70 of Schedule 2). .

- If there is a relevant modern award that would cover employees to which a Division 2B State employment agreement applies, the modern award rates of pay are relevant for the comparison, but if there is no relevant modern award, then it is the national minimum wage order rate that is relevant.

State rules about interaction between instruments would also be preserved (new item 11 of Schedule 3A T&C Act, item 54 of Schedule 2). Division 2B State employment agreements would also prevail over modern awards to the extent of inconsistency (new item 41 of Schedule 3A T&C Act, item 54 of Schedule 2). This is consistent with the fact that the relevant State employment agreements currently prevail over State awards to the extent of any inconsistency.

Consistent with variation rules for federal transitional agreements, Division 2B State employment agreements will only be able to be varied by FWA:

- to resolve ambiguity or uncertainty in the instrument (new item 19 of Schedule 3A T&C Act, item 54 of Schedule 2);
- to ensure that the instrument interacts effectively with the NES (new item 40 of Schedule 3A T&C Act, item 54 of Schedule 2) or a modern award (new item 19 of Schedule 3A T&C Act, item 54 of Schedule 2); or
- to remove inconsistency with the general protections or to remove provisions that are discriminatory (on referral by the Australian Human Rights Commission) (new item 20 of Schedule 3A T&C Act, item 54 of Schedule 2).

The Bill also contains provisions governing the treatment of Division 2B individual State employment agreements (new items 24-26 of Schedule 3A T&C Act, item 54 of Schedule 2). The arrangements for these agreements will be generally consistent with arrangements that currently apply in relation to individual statutory agreements in the federal system.

Long service leave (LSL)

Incoming State reference employees who derive their LSL entitlement from a State LSL law would continue to derive their entitlement from that law because of the existing saving of State LSL laws in section 27 of the Fair Work Act.

At the Division 2B referral commencement, some State reference employees may have entitlements under federal transitional awards made in reliance on the conciliation and arbitration power. Section 113 of the Fair Work Act will be amended so that LSL entitlements from these instruments are included as part of the LSL NES (items 125-128 of Schedule 2).

Modern awards cannot deal with LSL but some incoming State system employees may have LSL entitlements under State awards. FWA will be given power to make orders preserving those LSL entitlements from 1 January 2010, which would operate alongside the modern award that covers an affected employee (new item 30 of Schedule 3A T&C Act, item 54 of Schedule 2).

These State-award based LSL entitlements would be preserved for a maximum period of 5 years from 1 January 2010, pending the development of a national uniform LSL NES.

Better off overall test

An enterprise agreement made in the national system after 1 January 2010 will be required to result in Division 2B referral employees being better off overall than:

- an applicable Division 2B State award, if an application for approval of the enterprise agreement is made to FWA in the 12 month period during which State awards are preserved; or

- an applicable modern award, if an application for approval of an enterprise agreement is made to FWA after the 12 month transitional period; or
- an applicable Division 2B State enterprise award.

Transfer of business

The new transfer of business rules in the Fair Work Act will apply to transfers that occur on or after the referral commencement. Division 2B State employment agreements and Division 2B State awards will be transferable instruments for the purposes of the Fair Work Act transfer of business provisions (new items 14-16 of Schedule 11 T&C Act, item 74 of Schedule 2). This approach maintains FWA's powers to make certain orders in relation to coverage of transferable instruments with some modification.

Other transitional arrangements

Part-heard proceedings and pre-reference conduct

As a general rule, proceedings in relation to conduct that occurred before the referral commencement will remain subject to State laws and be dealt with in State systems. So, for example, where an employee is dismissed from employment before the referral commencement, that employee will be able to seek a remedy under the relevant State law, even if the employee makes his or her application after the referral commencement.

Part-heard proceedings commenced before 1 January 2010 involving the making, variation or termination of State awards will terminate on 1 January 2010.

Relief proceedings

Relief proceedings, which have been initiated before referral commencement, will continue in State systems after 1 January 2010 (new item 60 of Schedule 3A T&C Act, item 54 of Schedule 2).

Subject to the provisions dealing with instrument related proceedings, proceedings to enforce a right or obligation in relation to conduct that occurred before referral can still be dealt with in State systems.

Appeals against decisions in relief proceedings can also be initiated in State systems after 1 January 2010, but not after six months of referral.

Instrument-related proceedings

If an application to certify or approve, vary or terminate an agreement has been made in a State system before 1 January 2010 but has not been finalised by that date, a State tribunal can continue to deal with the application after 1 January 2010. The Bill will integrate the outcomes of these applications into the Division 2B State employment agreement framework (new items 56 and 58 of Schedule 3A T&C Act, item 54 of Schedule 2).

Appeals against State tribunal decisions to approve, vary or terminate an agreement, or to vary or terminate an award, could continue (if part-heard at 1 January 2010), or be instituted within 21 days of the date of decision (new items 55 and 57 of Schedule 3A T&C Act, item 54 of Schedule 2). In the interests of certainty, appeals will lapse on 1 July 2010.

Appeals against a decision to make, or not to make, an award will lapse on 1 January 2010.

In general terms, if a decision is made in an award appeal, an agreement proceeding or agreement appeal under a State law that affects a source award or source agreement for a Division 2B State instrument, the change will be reflected in the Division 2B State instrument in the same way and from the same time as the source award or source agreement. However, this rule does not apply to decisions made in award appeals, in agreement proceedings or in agreement appeals that affect the coverage terms of a source award or source agreement for a Division 2B State instrument to ensure certainty for parties bound to such instrument (new item 58 of Schedule 3A T&C Act, item 54 of Schedule 2).

Bargaining and industrial action processes

Consistent with T&C Act arrangements, bargaining and industrial dispute processes under State systems will not be carried over into the new system. Bargaining participants will either have to complete the bargaining process (that is, lodge an agreement for approval with a State industrial body) before the referral commencement or commence bargaining for a new enterprise agreement under the Fair Work Act.

FWA will be able to take into account conduct of bargaining representatives in bargaining for a State system collective agreement when it is exercising its discretion under the bargaining and industrial action provisions of the Fair Work Act (items 104 and 105 of Schedule 2).

Consistent with these arrangements, protected industrial action will not be able to be taken or bargaining orders applied for in the national system before the nominal expiry date of a Division 2B State employment agreement. The nominal expiry date is either the term which the agreement is expressed to have as its nominal expiry date, or three years from the Division 2B referral commencement, whichever is the earlier.

Disputes arising under State awards and State agreements

The Bill provides a model dispute resolution term to be prescribed by the regulations which applies in relation to Division 2B State awards the model dispute resolution term will be based on the model dispute resolution terms developed by the Australian Industrial Relations Commission for inclusion in modern awards (new item 7 of Schedule 3A T&C Act, item 54 of Schedule 2).

In relation to Division 2B State employment agreements, this Bill enables dispute resolution terms in State employment agreements to continue as terms of the Division 2B State employment agreements derived from them (new item 8 of Schedule 3A T&C Act, item 54 of Schedule 2).

Parties may apply to FWA to vary the dispute resolution terms in their Division 2B State employment agreement by consent, and for FWA to make such variation (new item 8 of Schedule 3A T&C Act, item 54 of Schedule 2). Such variation could include giving FWA a role in dispute resolution (including arbitration by consent of the parties).

Where a Division 2B State employment agreement confers power on a State industrial body to resolve a dispute, the State industrial body could continue to do so in its capacity as an independent third party (rather than in its capacity as a State industrial body). However, because the dispute resolution power would arise under a federal instrument, it (like any other third party) would be required to exercise that power in a manner consistent with the Fair Work Act. In particular, the State industrial body could only arbitrate disputes with the consent of the parties, such as where this is provided for in an agreement, and would be limited to making a final determination that is consistent with the parties' rights and obligations under the Fair Work Act or under the instrument.

Coverage of public sector and local government employees

Referring States can choose the extent to which matters relating to State public sector or local government employment are referred or excluded from references. This is in line with the Government's commitment in *Forward with Fairness* that:

> Current arrangements for the public sector and local government can continue with many of these workers regulated by State industrial relations jurisdictions.
>
> State Governments, working with their employees, will be free to determine the appropriate approach to regulating the industrial relations arrangements of their own employees and local government employees.[12]

Proposed subsection 30L(2) enables a State to exclude matters relating to State public sector employment and local government employment from its reference and be a referring State (item 39 of Schedule 1).

Victoria has referred to the Commonwealth power in relation to its public sector and local government, subject to certain limitations set out in section 5 of the *Fair Work (Commonwealth Powers) Act 2009* (Vic), for example in relation to redundancy.

It is anticipated that:

- Tasmania will refer matters relating to local government employment but not public sector employment under the Industrial Relations (Commonwealth Powers) Bill 2009 (Tas); and
- South Australia and Queensland will exclude matters relating to public sector and local government employment from their references under (respectively) the Fair Work (Commonwealth Powers) Bill 2009 (SA) and the Fair Work (Commonwealth Powers) and Other Provisions Bill 2009 (Qld).

Item 2 of Schedule 3 to the Bill also amends the Fair Work Act to also enable States to exclude certain State public sector and local government employers over which the Commonwealth would otherwise have jurisdiction (such as constitutional corporations) from the Fair Work Act definition of national system employer. This recognises that certain entities are integral to State and Territory public administration and that their employment relationships may be appropriately regulated by States and Territories for this reason.

Such declarations would be able to be made in relation to current and future:

- entities established for a public purpose by or under a State or Territory law;
- entities established for local government purposes by or under a State or Territory law (local government entities); and
- wholly-owned or wholly-controlled subsidiaries of local government entities.

The Government recognises that some State public sector employers may be appropriately regulated in State systems, but considers that other entities should remain in the national system.

The Bill allows a State or Territory to make a declaration in relation to entities established for a public purpose by or under a State or Territory law, but not universities nor electricity, gas, water, rail or port utilities. These limitations reflect a distinction between entities engaged primarily in State public interest or regulatory activity (which may be declared) and those in key areas of importance to the national economy that should be subject to nationally consistent workplace relations regulation (which may not be declared).

[12] Kevin Rudd and Julia Gillard, '*Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces'*, Pre-election policy commitment, Australian Labor Party, April 2007

To be effective, a declaration would need to be endorsed by the Commonwealth Minister administering the Fair Work Act. Consistent with the Government's commitments in *Forward with Fairness* that State governments are free to determine under which workplace relations system their local government sector will operate, should a State government make a declaration to exclude a local government entity from the application of the Fair Work Act consistent with the provisions of the Bill, the Minister will endorse that declaration.

The Commonwealth Minister will also be able to revoke or amend an endorsement if the entity's circumstances change.

To ensure transparency of coverage endorsement instruments would be tabled before the Parliament. To ensure certainty of coverage of entitlements of employers and employees subject to an endorsed declaration, the endorsement instrument would not be subject to disallowance or sunsetting.

It would not be desirable for a situation to arise in which an entity was in a State system on tabling of the Commonwealth Minister's endorsement instrument but reverted to the national system after a short time if an endorsement instrument were disallowed. Similarly it would not be desirable for such instruments to be subject to sunsetting, as this would cause uncertainty for the relevant employers and employees.

The effect of an endorsed State declaration would be that the named employers and their employees would not generally be covered by the Fair Work Act other than by Parts 6-3 and 6-4 relating to unlawful termination and parental leave, which are supported by the external affairs power of the Constitution and apply to all Australian employers and employees. The named employers and employees will then be subject to the workplace relations arrangements prescribed by the relevant State or Territory.

Other amendments

Schedule 1 to the Bill makes a number of amendments to Division 2A of Part 1-3 of the Fair Work Act (which gave effect to Victoria's reference) to ensure consistency with the arrangements set out in new Division 2B. These changes are reflected in the Victorian Fair Work (Commonwealth Powers) Amendment Bill 2009. This includes provisions that enable Victoria (like Division 2B referring States) to terminate its amendment reference and remain in the national system (items 14, 17, 18, 26 and 31 of Schedule 1):

Also for consistency with new Division 2B, Schedule 1 inserts new definitions of:

- excluded subject matter (item 15 of Schedule 1);
- law enforcement officer (item 19 of Schedule 1);
- local government employee and local government employer (items 20 and 21 of Schedule 1); and
- State public sector employer (item 25 of Schedule 1).

Schedule 1 also makes a number of minor technical amendments to Division 2A, including amendments consequential on the creation of Division 2B (item 11 and items 32-37 of Schedule 1).

Following consultations with States, Schedule 3 to the Bill would amend the Fair Work Act to:

- enable Ministers with portfolio responsibility for workplace relations from a referring State or a Territory to apply to FWA for orders to suspend or terminate protected industrial action (items 4-6 of Schedule 3);

- enable State and Territory workplace relations Ministers to intervene in court proceedings and make submissions in relation to matters before FWA (items 10-13 of Schedule 3);
- enable appeals from a decision of an eligible State or Territory court exercising summary jurisdiction to that State or Territory court, or another eligible State or Territory Court (items 7-9 of Schedule 3); and
- require the President of FWA to perform his or her functions in a manner that not only facilitates, but also encourages, cooperation between FWA and prescribed State industrial authorities (item 17 of Schedule 3).

Future referrals

The Department is still working closely with States on details of their referrals, and, subject to the Government's legislative approval processes, there may be amendments required to the Bill as a result of those discussions.

Section 6 – Governance arrangements for the national workplace relations system

Multilateral Inter-governmental Agreement

Governance arrangements for the National System for the private sector were developed through extensive consultation between the Commonwealth and the States and Territories.

WRMC provided the platform for the cooperative engagement between the Commonwealth and the States and Territories about governance of the new National System.

The *Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector* was signed by the Commonwealth, Victoria, South Australia, the Northern Territory, the ACT and Tasmania at the WRMC meeting of 25 September 2009. The multilateral IGA outlines the roles and responsibilities of participants in the national system and sets out the key principles that will underpin the new national system into the future.

Specifically, the multilateral IGA:

- sets out the roles and responsibilities of the parties and different levels of rights of States depending on whether they choose to participate in the national system via a referral, mirror legislation or other method of cooperation;
- provides for the establishment of the WRMC – Referring States and the Territories Subcommittee and the Senior Officials' Group – Referring States and the Territories subcommittee;
- provides for referral of a Commonwealth proposal or amendment to the Fair work legislation to the WRMC – Referring States and the Territories Subcommittee if the proposal or amendment is considered to undermine one or more of the principles. It envisages the matter being resolved by endorsement of a two-thirds majority of that subcommittee.
- includes provisions identifying the consequence where a vote of the WRMC – Referring States and the Territories Subcommittee does not support a Commonwealth proposal to amend the Fair Work legislation; and
- includes provisions linking the voting arrangements and the principles of the national system.

The finalisation of the multilateral IGA signified a major step towards achievement of the National System.

Bilateral Inter-governmental Agreements

In addition to the multilateral IGA the governance framework for the National System provides for the establishment of bilateral agreements between the Commonwealth and individual jurisdictions.

In contrast to the matters included in the multilateral IGA, bilateral agreements are intended to set out State and Territory specific arrangements for service delivery (the education, information and compliance activities to be undertaken in respect to the new system); tribunal related matters and other arrangements relevant to the referral of powers in the individual jurisdictions concerned.

Where appropriate, bilateral agreements may be supplemented by other forms of agreement including for example heads of agreements, memoranda of understanding and contracts of service setting out terms for delivery of service and other arrangements between specific Commonwealth and State and Territory agencies.

Section 7 – Conclusion

The Bill offers the opportunity to create a fair, simple, balanced and flexible national workplace relations system for the private sector.

It was developed in close consultation and cooperation with the State and Territory governments and reflects the benefits of cooperative federalism.

A national workplace relations system for the private sector has significant benefits for Australian employers, employees, and the community including consistency and certainty of jurisdictional coverage and reduced legal complexity and compliance costs.

For governments, a national workplace relations system for the private sector will provide administrative efficiencies and deliver real savings that States can redirect to other public services.

Combined, these benefits will reduce barriers to productivity and contribute to the creation of a seamless national economy which is better able to adapt to global markets and competition.

The States of Victoria, South Australia, Tasmania and Queensland have made commitments to participate in a national workplace relations system for the private sector and each have outlined the benefits to their employers, employees and the community of this decision. These States have introduced legislation into their respective parliaments in anticipation of the Bill's passage through the Commonwealth Parliament.

The bill underpins a significant national reform which is strongly supported by these States and the Commonwealth due to its capacity to provide certainty and stability for Australia's private sector employers and employees into the future.

ATTACHMENT A

REGULATION IMPACT STATEMENT

A NATIONAL WORKPLACE RELATIONS SYSTEM FOR THE PRIVATE SECTOR

PROBLEM

The presence of multiple workplace relations systems in Australia, that is, overlapping federal and state workplace relations regulation, is characterised by high levels of uncertainty and legal complexity. This is costly for business to navigate and comply with and for governments to administer. These costs have been widely recognised for decades by business, unions and governments.

This regulatory overlap is attributable to the limitations on the Commonwealth's constitutional powers to regulate workplace relations, whether under the corporations power or the conciliation and arbitration power.

Corporations power

Section 51(xx) of the Australian Constitution, typically referred to as the 'corporations power', allows the Commonwealth to make laws with respect to "foreign corporations, and financial or trading corporations formed within the limits of the Commonwealth." Collectively, such corporations are known as constitutional corporations. Financial and trading corporations are generally recognised by the courts as bodies incorporated under an Australian law and engaged in, or substantially engaged in, trading or financial activities.[13]

Utilising the corporations power, the *Fair Work Act 2009* (Cth) (the FW Act) applies to the following entities and their employees:

- constitutional corporations;
- the Commonwealth and its authorities; and
- employers who employ flight crews, maritime employees or waterside workers in connection with interstate or overseas trade and commerce.

The FW Act also applies to employers and employees in Victoria as a result of that State referring its powers in relation to workplace relations matters to the Commonwealth in 1996 to support the application of the *Workplace Relations Act 1996* (WR Act) to all employers and their employees in Victoria. In 2009 Victoria enacted new referral legislation to support the extension of the FW Act to all employers and employees in that State. The Victorian Government at the time in enacting the

[13] *R v Judges of the Federal Court of Australia; Ex Parte Western Australian National Football League* (1979) 143 CLR 190

referral, argued that having a single system of workplace relations would reduce the regulatory burden for employers in the State.

The FW Act applies to employers and employees in the Northern Territory and Australian Capital Territory by virtue of section 122 of the Constitution, which allows the Commonwealth to make laws for the government of Australia's territories.

Despite the Commonwealth's reliance on the corporations power to support the FW Act, the corporations power has its limitations. Apart from unincorporated bodies, for instance small businesses such as sole traders or partnerships, incorporated entities that are not 'trading', 'financial' or 'foreign' are also beyond the scope of the corporations power.[14]

The practical effect of this gap is that the Commonwealth is unable to comprehensively regulate workplace relations for the private sector.

Definition of constitutional corporation

In addition to the above mentioned gap, there are inherent difficulties in determining what constitutes 'substantial' financial or trading activities when determining whether an entity is a constitutional corporation for the purposes of the FW Act and whether corporations that lack a commercial focus fall within the corporations power. This is particularly an issue for entities that operate in the charitable or community services sectors.[15]

This uncertainty adds another level of complexity to an already over regulated area of economic activity. For some businesses there may be no clear answer, with the issue only able to be resolved before a court of law.[16] Having to resort to legal proceedings to clarify which workplace relations system applies to a particular business is expensive both in terms of direct costs such as legal costs and the risk of orders to back-pay wages in the event the wrong system and obligation has been applied, but also the opportunity costs for business owners regarding the time they have to devote to lengthy legal proceedings (even in the absence of any appeal proceedings).

The uncertainty and complexity of the existing overlapping workplace relations regulation has been of concern to employers, employees, unions and governments for decades.

Private sector coverage of the Fair Work Act 2009

The reliance of the FW Act on the corporations power sees approximately 80.5 per cent of all Australian non-managerial private sector employees being definitively covered by the federal workplace relations system (see Table 1). A further 1.6 per cent of non-managerial private sector employees are definitively covered by State workplace relations systems (see Table 1).

Jurisdictional coverage of the remaining 17.9 per cent of all non-managerial private sector employees remains unclear from the Australian Bureau of Statistics (ABS) data. In other words, for almost one in five employees it is not clear what workplace relations arrangements apply. These

[14] Peter Prince and Thomas John, '*The Constitution and industrial relations: Is a unitary system achievable?*', Research Brief No.8, 2005-06, Department of Parliamentary Services (Cth), Nov 2005, p.21
[15] Ibid, p.21
[16] Prince and Thomas op cit, p.22

employees, according to the ABS, are employed by unincorporated businesses and are either paid by an award, an unregistered collective agreement or individual arrangement, either in the federal transitional system or a state system. The available ABS data does not allow the determination of the jurisdiction of these employees.

Table 1 shows the proportion of non-managerial private sector employees broken down by state and territory that are definitively covered by the state and federal workplace relations systems. The percentages for federal and state coverage of non-managerial private sector employees differ between states.

The proportion of non-managerial private sector employees covered by state workplace relations systems includes those employed by unincorporated bodies and subject to state-registered collective agreements. The proportion of non-managerial private sector employees covered by the federal system is derived by combining figures for those employees definitively covered by the federal transitional system and those covered through the corporations power, a referral of power and by virtue of section 122 of the Constitution. The remaining proportion of employees refers to those employees whose coverage remains unclear for the reasons outlined above.

TABLE 1: Coverage of non-managerial private sector employees[(a)] (%) under the state and federal workplace relations systems, August 2008

Jurisdiction	State coverage (%)	Federal coverage (%)			Jurisdictional coverage is unclear (%)
		Corporation Power, Vic, ACT and NT	Federal transitional coverage	Total[(b)]	
New South Wales	1.2	76.3	1.9	78.2	20.6
Victoria	-	100.0	-	100.0	-
Queensland	3.5	65.4	3.3	68.7	27.9
South Australia	3.3	68.0	6.9	74.9	21.8
Western Australia	2.2	58.3	6.6	64.9	32.9
Tasmania	2.1	65.1	3.4	68.5	29.5
Northern Territory	-	100.0	-	100.0	-
Australian Capital Territory	-	100.0	-	100.0	-
Australia	**1.6**	**78.0**	**2.5**	**80.5**	**17.9**

Sources: ABS *Employee Earnings and Hours* (EEH) (Cat No 6306.0), August 2008 (unpublished data) and ABS, *Employment and Earnings, Public Sector* (Cat No 6248.0.55.002), 2007-08.

Notes: The EEH survey shows that there were 8,812,300 employees in August 2008. Of these, 6,433,500 were non-managerial private sector employees.

As estimates have been rounded, discrepancies may occur between sums of the component items and totals.

(a) The EEH survey does not include self-employed persons or employees in the Agriculture, forestry and fishing industry.

(b) These figures are derived by adding together the estimates of coverage for the corporations power and transitional coverage.

'Federal transitional coverage' in the above table describes the significant number of employers who are not constitutional corporations and who were previously covered by federal instruments made under the conciliation and arbitration power, which was the primary constitutional underpinning of the federal workplace relations system until early 2006. In the absence of referrals of power from all States, these federal transitional awards are scheduled to lapse in March 2011, with the relevant employers and employees 'falling out' of the national workplace relations system and back to the state systems. For example, federal transitional awards apply to many employers in the pastoral industry (with members of the National Farmers Federation bound by federal awards) and the social and community services sector.

Duplication and inconsistency

Separate workplace relations systems are currently maintained by the Commonwealth and five of the six states. The primary pieces of workplace relations legislation that govern the separate workplace relations systems are the:

- *Fair Work Act 2009* (Cth)
- *Industrial Relations Act 1996* (NSW)
- *Industrial Relations Act 1999* (Qld)
- *Fair Work Act 1994* (SA)
- *Industrial Relations Act 1979* (WA)
- *Industrial Relations Act 1984* (Tas)

In addition, while the FW Act explicitly seeks to exclude State industrial legislation from the regulation of the workplace relations of corporations, not all matters are excluded. Section 27 of the FW Act preserves the operation of State and Territory laws dealing with matters of regulatory interest to States, including among other matters:

- anti-discrimination and equal employment opportunity;
- workers compensation;
- occupational health and safety; and
- child labour.

The presence of these factors creates duplication that results in costly inefficiencies, conflict and inconsistency, confusion and uncertainty about coverage and which set of laws apply.

Reduced productivity and competitiveness

The multiplicity of jurisdictions and laws is generally accepted as a factor which creates barriers to productivity.[17] For example, it has been stated:

[17] Ibid, p.20

> The cost of excessive regulation is felt throughout the economy. For consumers it means higher prices and less choice; for employees, fewer jobs and lower real wages; and for shareholders, lower returns on investment and fewer funds for retirement. While very real, these costs can be difficult to quantify.[18]

The Business Council of Australia (BCA) has also noted that firms have expressed increasing concern that the overall regulatory environment in Australia is working against entrepreneurial risk taking and business transformation, and expressed its own concerns that:

> These unnecessary regulatory imposts add costs and make it more difficult for companies to compete in international markets against companies from countries that have comparatively less onerous regulatory systems. Of greatest concern are those instances where the regulatory burden is sufficiently large to make businesses think twice and forego or defer expansion.[19]

Inefficiencies of competing workplace relations system

The presence of competing systems, which overlap in workplaces, also creates significant costs for taxpayers in maintaining and enforcing those separate systems. Each of the states maintain their own workplace relations systems, each with an industrial tribunal or court similar to Fair Work Australia as well as separate Government departments for policy development, programme and education management, compliance and tribunal services.[20] Based on state annual reports, the cost to the taxpayer and the community of providing these services is upwards of $60 million per year. Delivery of these services by the Commonwealth alone will remove the service delivery duplication, thus providing efficiencies of scale and significantly reducing the overall costs to the taxpayer and the community. Precise costings for the Commonwealth delivery of these services and the savings and efficiencies which will be realised, will be determined once all states have indicated whether they intend to refer their workplace relations powers.

Competing systems also lead to increased compliance costs for individual workplaces which operate in more than one state or territory as they need to understand and comply with different and potentially competing legislation.[21]

Conflict and uncertainty caused by multiple systems

There is no clear demarcation between federal and state systems, and employers must often comply with more than one set of obligations.[22] For example, a recent research paper compiled by the NSW Parliamentary Library Research Service noted that:

[18] Alexander J Brown and Jennifer A Bellamy (eds), '*Federalism and Regionalism in Australia: New Approaches, New Institutions?*', ANU Press, Canberra, ACT, 2007 cited in Business Council of Australia, '*Improving International Competitiveness in Australian Business*', Submission by the Business Council of Australia to the Review of Export Policies & Programs, June 2008, p.33
[19] Business Council of Australia, '*Improving International Competitiveness in Australian Business*', Submission by the Business Council of Australia to the Review of Export Policies & Programs, June 2008, p.35
[20] Fair Work Australia replaced the Australian Industrial Relations Commission on 1 July 2009
[21] Department of Employment, Workplace Relations and Small Business (DEWRSB) (Cth), '*Breaking the Gridlock: Towards a Simpler National Workplace Relations System, Discussion Paper 1: The Case for Change',* 2000, p 14
[22] Prince and Thomas op cit, p.12

> …since the Fair Work reforms, both the Fair Work Act 2009 (Cth) and relevant State laws have provisions with respect to long service leave. Which Act applies depends on a series of circumstances, including whether an employee is covered by a modern award, pre-modernised award or enterprise agreements, as well as the commencement date of the award or agreement. [23]

This conflict creates a great deal of uncertainty for businesses and employees, and was highlighted by the Australian Chamber of Commerce and Industry (ACCI) in an issues paper where it stated:

> The parallel operation of different federal and State tribunals and federal and State legislation leads to confusion and uncertainty about the rights and obligations of employers and employees. Such a situation benefits no one and creates unnecessary difficulties and technicalities in the labour inspection and enforcement processes. [24]

Where there is uncertainty of jurisdictional coverage or duplication or overlap in the application of legislation, a great deal of time and resources may have to be spent by courts and tribunals to determine which jurisdiction matters should be heard in, and in some cases may require the matter to be heard concurrently in separate jurisdictions.[25]

This is particularly the case for organisations that are unable to determine whether or not they are constitutional corporations. For example, some not-for-profit bodies (such as those providing community or municipal services) may engage in trading activities that are largely incidental to their core business, but which may be sufficient to bring them into the definition of “trading corporation”. For example, a charitable organisation providing assistance to people with an illness or disability may operate a shop to raise funds. Some local councils that have corporate status by virtue of their establishing legislation may provide some services on a commercial basis and so be held to be ‘trading corporations’.

Although the majority of employers who operate across state boundaries are trading corporations, there are a significant number of employers whose status as a ‘trading corporation’ is not clear and who are continuing to operate in multiple state systems, perhaps also with a federal transitional award. As previously mentioned, clarifying their coverage through the courts is a very expensive exercise which would be avoided by the certainty provided by a national workplace relations system for the private sector.

On this the ACCI noted:

> …the existence of federal and State systems inevitably raises jurisdictional issues, which can be costly and difficult to resolve, and can result in delays in handling the real issues in dispute, and increase legal costs.[26]

[23] Jason Arditi, ‘*Industrial relations: The referral of powers*’, Briefing Paper No.7/09, NSW Parliamentary Library research Service, 2009, p.20
[24] Australian Chamber of Commerce and Industry, ‘*Functioning federalism and the case for a national workplace relations system: Issues paper*’, 2005, p.20
[25] Jason Arditi, ‘*Industrial relations: The referral of powers*’, Briefing Paper No.7/09, NSW Parliamentary Library research Service, 2009, p.21
[26] Australian Chamber of Commerce and Industry, ‘*Functioning federalism and the case for a national workplace relations system: Issues paper*’, 2005, p.19

The complexity and uncertainty is compounded by the degree of uncertainty over the legal test to be applied to determine whether or not a particular entity is or is not a trading corporation was outlined by Professor Andrew Stewart and Professor George Williams in their analysis of the 2007 Work Choices decision of the High Court:

> ***The Next (Legal) Battleground: Defining a Trading Corporation***
>
> In the Territories and the Commonwealth public sector, all employers are covered by the federal Workplace Relations Act. In the case of the Territories, this is possible because of the broad legislation power granted to the Commonwealth under section 122 of the Constitution. And unless Victoria revokes its 1996 reference of powers to the Commonwealth, all employers in that State too will be subject to the federal regulation.
>
> But in other States an employer will generally come within the federal system only if they area a "constitutional corporation": that is, a trading, financial or foreign corporation as listed in section 51(20) of the Constitution.
>
> As explained in Chapter 4, any company that is in business to make a profit is plainly a trading corporation. But on the current approach taken by the courts, a not-for-profit association can also be a trading corporation, provided it is incorporated and has enough trading activities. This can catch bodies such as sporting clubs, private schools, charities, community service organisations and the like. Most of these raise some of their income from selling goods or providing services in return for a fee. Even if this trading generates less than 10 per cent of their annual revenue, on the current view this may be enough to satisfy the requirement that they engage in "significant" or "substantial" trading activities.
>
> The same is true of a range of statutory corporations, such as local councils, universities and even public hospital. They may be established under State or Territory legislation to provide public services. But they can still qualify as trading corporations if they raise enough income from selling goods, providing services, renting out property and so on.
>
> In the Work Choices case, Justice Callinan noted that the question as to which corporations should be characterised as trading or financial corporations was "a very big question indeed, and (one) which will occupy, I believe, a deal of the time of the courts in the future." [27]

Inconsistency of multiple workplace relations systems

Under the current fractured system of workplace relations regulation in Australia there is the potential for inequalities and differences to occur among businesses and employees resulting from different regulations and wages and working conditions depending on the state in which they operate or are employed.[28]

Again, to quote ACCI:

[27] Andrew Stewart and George Williams, *Work Choices: What the High Court Said*, federation press, 2007 at p.153
[28] Joe Catanzariti, *'What should the IR system in NSW look like?*, Industrial Relations Society of NSW, Annual Convention, Blue Mountains, 13 May 2005, pp 2 – 3

One of the key reforms in many policy areas has been the rationalisation of competing and overlapping federal and state regulation. While the creation of rational/uniform approaches to regulation has been successfully achieved in many policy areas (e.g. Australia's uniform national corporations law), it has remained elusive in the area of workplace relations.

This is a major national failing - the regulation of how we work is of vital national importance and is an area where good policy must prevail over political pragmatism. Workplace relations policy is too important for horse and buggy era approaches to persist.

Having six separate workplace relations systems is bad enough, but the level of regulatory overlap and complexity in the interaction of our state and federal workplace relations systems provides an additional imperative for urgent reform.

Businesses in the same industry, and even those operating on the same street, can be subject to entirely different workplace laws – with one business under one (state) set of laws and obligations and another under separate (federal) laws and obligations. Even worse, many businesses are subject to overlapping, multiple sets of regulation (both state and federal) within the one workplace. For example production staff may be under one federal award, transport staff under another federal award and clerical staff under a separate state award – all containing differing rights and obligations.

This creates a situation in which employers and employees face profound difficulties in identifying workplace rights and obligations. This is contrary to the interests of employers and employees and detracts from the capacity of the workplace relations system to secure desired policy outcomes (including the protection of core employment standards for employees).

The level of complexity created by competing state and federal workplace relations systems is a decades-old problem which has been thrown into sharp relief by our contemporary market economy. Replication, overlap and confusion between state and federal workplace regulation has become increasingly unsustainable.[29]

Forum shopping

Forum shopping' is a strategy employed by parties to achieve favourable outcomes and in relation to workplace relations matters can involve 'shopping' around jurisdictions to find those most likely to provide access to working conditions or requirements that may be denied or not available in other jurisdictions.[30] Although 'forum shopping' is less common now than in the past, it undermines the integrity of the law in any one jurisdiction[31] and can result in costly legal argument about jurisdictional issues.[32]

In the current context, 'forum shopping' arises due to the different application of workplace relations laws and instruments to a business dependent on its status as a trading corporation. This may operate as an irrational factor in the decision a business makes about the trading structure it should adopt. For example:

[29] ACCI, '*ACCI Welcomes Historic Workplace Relations Reforms*' Media Release, 26 May 2005
[30] ACCI, *Functioning federalism and the case for a national workplace relations system: Issues paper*',2005 p.20
[31] DEWRSB op cit, p.14
[32] ACCI, op cit, p.20

- a professional services business (medical, legal, accounting, consultancy) that is incorporated will fall in the federal workplace relations system, while partnerships will fall in the State system

- A farmer may face different award obligations depending on whether he or she trades through a corporate structure or not. By incorporating, a farm business may lose access to drought relief or tax concessions.

This adds a complex additional factor to be considered by a business owner in deciding on the appropriate trading structure for their business.

OBJECTIVES OF THE NATIONAL WORKPLACE RELATIONS SYSTEM

The Australian Government's *Forward with Fairness*[33] policy provides that the Government will seek to achieve nationally consistent workplace relations laws for the private sector, either by governments referring powers for private sector workplace relations or other forms of cooperation and harmonisation.

The Government's objective is to deliver on its commitment to create a uniform national workplace relations system for the private sector and to reduce complexity and duplication and provide certainty of coverage to private sector employers and employees.

In recognition of the rights of states to manage their own workforces in the manner they choose, the Government has specifically allowed states to exclude state public sector and local government employees from the scope of this commitment. In particular, *Forward with Fairness* states:

> Current arrangements for the public sector and local government can continue with many of these workers regulated by State industrial relations jurisdictions.
>
> State Governments, working with their employees, will be free to determine the appropriate approach to regulating the industrial relations arrangements of their own employees and local government employees.[34]

Victoria has elected to refer workplace relations powers in respect of its own public sector and local government employees.

OPTIONS

This regulation impact statement examines two possible paths of Government action in relation to the identified problem:

- State referrals of power for workplace relations matters through either a subject or text-based referral; and

[33] Kevin Rudd and Julia Gillard, '*Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces'*, Pre-election policy commitment, Australian Labor Party, April 2007, p.6
[34] Ibid

- Maintaining the status quo.

Alternatives to state referrals of power are:

- harmonisation of workplace relations legislation through the enactment by State governments of legislation that mirrors the FW Act; and
- cooperation between governments to align State workplace relations legislation with the FW Act.

However, the alternatives are considered sub-optimal in that they would in large part deliver an outcome similar to the status quo. For instance, employers whose constitutional status is unclear, and their employees, would continue to face uncertainty over which jurisdiction applied to them and would continue to face jurisdictional arguments, notwithstanding the relevant laws were harmonised. Similarly, merely harmonising workplace relations with the federal system would mean that states continue to maintain significant workplace relations infrastructure for those private sector employers that are not constitutional trading corporations, at a cost to their taxpayers.

Given the above, these alternatives are not assessed for the purposes of this regulatory analysis.

The options of referral and the status quo are examined in more detail below.

Option 1 – Referral of power

Section 51(xxxvii) of the Constitution provides a mechanism through which state parliaments can refer powers over matters to the Commonwealth Parliament. The Commonwealth Parliament is consequently provided the power to make laws with respect to those referred matters, but only for those states from which the matter is referred.

It is important to note here that without enabling state legislation, the Commonwealth has no power to legislate over the referred matters.

Under this option, state governments can choose to make either a subject matter referral or text-based referral of power over workplace relations matters for the unincorporated private sector to the Commonwealth.

In line with the Government's commitments in *Forward with Fairness* such a referral is not intended to include public sector entities or employees, or local government entities and their employees covered by state law unless otherwise requested by the relevant state and agreed by the Commonwealth, and would include mechanisms to provide for such exclusions.

A referral of power would result in the application of the FW Act to private sector entities and their employees within the referring state who are currently not covered by the federal workplace relations system; that is, unincorporated organisations, partnerships and sole traders. Referral would also reduce the uncertainty of the workplace relations jurisdiction of those bodies where there is some ambiguity regarding their status as constitutional corporations, such as local government, not-for-profit and some incorporated associations.

A referral of power by a state government would necessarily include an amendment reference to enable amendments to the FW Act to automatically apply in the referring state. Consultation on amendments would be governed by a supporting inter-governmental agreement.

Option 2 – Status quo

This option involves maintaining the status quo. That is, that the Commonwealth and remaining state workplace relations legislation continue to operate in a juxtaposed regulatory manner.

IMPACT ANALYSIS

Option 1 – Referral of power

Benefits of Referral

As noted above, the existence of six separate workplace relations systems operating in Australia causes a significant number of problems. In particular, the regulatory overlap creates ongoing uncertainty and legal complexity for Australian businesses and employees in terms of determining the jurisdiction and laws by which they are covered. Further, the duplication across the various jurisdictions creates inefficiencies in terms of the use of government resources, as well as inconsistencies and conflict between the laws operating in the various systems.

Ultimately, all Australians pay the price for this through reduced economic activity as resources are directed away from productive activities/investment to unproductive expenses associated with clarifying coverage/meeting compliance costs.

Option 1 provides for states to be able to refer their workplace relations powers to the Commonwealth to create a national workplace relations system for the private sector in Australia. This option will enable many of the problems noted above to be rectified and will provide businesses and employees with a simpler system and increased certainty and consistency with respect to workplace relations matters.

The section below outlines these benefits. While it is not possible to definitively quantify the magnitude of these benefits, the Government and other key stakeholders believe them to be significant.

More efficient use of community resources

The existence of numerous workplace relations systems creates significant costs for taxpayers and the community in maintaining those separate systems.[35] Access Economics in their *June 2009 Business Outlook* expressed support for the creation of a national system:

[35] Jason Arditi *'Industrial Relations: The referral of powers'*, NSW Parliamentary Library Briefing Paper No. 7/09, 2009 p.19

> …the Feds are trying hard to create a national system of regulation for industrial relations…We are big supporters of this…the costs of admin and compliance in State-based IR systems has been too big for too long.[36]

By referring their workplace relations powers to the Commonwealth, states will be able to reduce the taxpayer funds and government resources dedicated to operating and regulating the workplace relations system in their jurisdiction. Nationally, state governments spend upwards of $60 million of taxpayers' money each year maintaining duplicate administrative functions and regulation.

The ACCI, speaking on a national workplace relations system stated:

> Current spending by the States of more than $100 million a year on State industrial systems that broadly duplicate the institutional structures of the Commonwealth system is a very questionable use of taxpayer funds. It will not be long before State industrial systems simply cover the corner fish and chip shop and milk bar and no workplaces in corporate Australia. At that point it will be very difficult to justify millions of dollars in expenditure on separate employment courts, tribunals and industrial inspectorates other than by reference to political opportunism or partisan allegiance to vested interests.[37]

The ACCI went further to suggest:

> A country of 20 million people, with less than half the population in the workforce, should no longer sustain six separate, different and overlapping workplace relations systems. Australia also needs a more flexible and less complex system that focuses on workplaces, not the sources of law. A national government should regulate workplace relations on a national basis, just as it makes national laws about taxation, trade practices and corporations.[38]

And the Australian Industry Group has also noted the complexity and wastefulness of multiple systems:

> On top of this, all but one of the states continued to develop and enhance their own industrial systems. No matter how well many of these systems operate the fact remains that no employer wants to be faced with dealing with six different systems in order to expand its business throughout Australia. The intermeshing and clash of these systems has nourished generations of industrial lawyers.[39]

The Productivity Commission has also pointed to cases where multiple agencies in a jurisdiction perform the same function, and noted that the cost of running these public agencies is a major impost on Australian taxpayers and there is clearly an opportunity for rationalisation of the number of regulatory agencies.[40]

While states will still be required to maintain some infrastructure in order to administer their public sector workplace relations system and fulfil their service obligations agreed to under the referral,

[36] Access Economics '*Business Outlook'* June 2009, p60
[37] ACCI, op cit, p.30
[38] ACCI, op cit, p.30
[39] Australian Industry Group, Chief Executive Heather Ridout, *Keeping the Edge, Australia needs workplace relations reform to stay in the global game,* October 2005
[40] Productivity Commission, '*Potential benefits of the National Reform Agenda*', Report to the Council of Australian Governments, 2006, pp.134-135

the savings as a result of referral of powers to the Commonwealth are likely to be substantial. This will represent significant savings to taxpayers and the community.

Reduced legal complexity and compliance costs

The uncertainty regarding workplace relations coverage for some business under the corporations power often results in businesses, even small non-profit businesses, workers and unions, being forced to seek potentially expensive constitutional law advice and/or legal proceedings to clarify or determine whether they are covered by the federal or state workplace relations system. Uncertainty and duplication can also lead to increased compliance costs for individual workplaces needing to comply with competing legislation.

While talking more broadly in terms of the costs of federalism, Access Economics in a report for the Business Council of Australia (BCA) noted that:

> …the costs of an inefficient federation in these areas usually falls on businesses as higher costs of compliance with for example, eight regulatory regimes instead of one.[41]

Further, uncertainty of jurisdictional coverage or duplication or overlap in the application of legislation can result in a great deal of time and resources being spent by courts and tribunals in determining which jurisdiction matters should be heard in. In some cases this may require the matter to be heard concurrently in separate jurisdictions. This has the potential to be extremely frustrating for businesses involved in such legal proceedings. There is also the opportunity cost of the courts being caught up in proceedings which would be avoided were a national workplace relations system for the private sector in place.

Uncertainty and complexity also creates practical difficulties for enforcement agencies to ensure compliance with the correct workplace relations legislation and enforce such compliance. The creation of a national system also enables governments to achieve savings due to only requiring the enforcement of one set of workplace relations laws.

A uniform national system for the private sector removes jurisdictional uncertainty, eliminates much duplication and overlap in legislation and reduces business compliance costs.

Increased consistency and certainty

A uniform national workplace relations system would remove most of the inequalities and differences that currently occur among businesses and employees resulting from different regulations, wages and working conditions depending on the jurisdiction in which they operate or are employed.

For example, a company which falls within a state jurisdiction may be required to pay different minimum wages or conditions to its employees under a relevant state award compared with a company undertaking the same work in a similar location that falls within the federal jurisdiction. Similarly, there are on occasion considerable differences between the various state jurisdictions. Therefore, this inequality can impact on businesses both within and across state boundaries. Not

[41] Access Economic '*The costs of Federalism'*, Report prepared for the Business Council of Australia, 2006, p45.

only does this potentially result in a competitive disadvantage for companies, but also creates inequalities between employees performing the same work.

Some differences will persist as a result of the effect of s.27 of the FW Act, even with referral of powers, however the scope of differences that currently apply will be significantly reduced.

Further, a referral of power would provide businesses with greater certainty with respect to the set of laws applying to their business. This would reduce costs associated with seeking advice on their obligations and reduce the risk of non-compliance resulting from uncertainty. It should be observed that where relevant award obligations are substantially different between state and federal systems (for example if a test case wage increase has been awarded in one jurisdiction but not the other), the risk to a business of being in error about its status as a 'trading corporation' and being held to be in breach of award, obligations may be catastrophic.

Increased productivity and competitiveness

Reducing the number of jurisdictions, laws and regulations governing workplace relations will remove barriers to productivity growth stemming from duplication and inefficiencies. This will allow the workplace relations system to more readily adapt to global markets and competition.

This benefit has been recognised by a number of stakeholders, including the BCA, which has noted the costs of duplication and excessive regulation on several occasions:

> The economic costs of regulation include the opportunity costs of foregone business activity due to overlapping regulation (particularly between the Commonwealth and the States) and disincentives to invest, innovate or expand.[42]
>
> These unnecessary regulatory imposts add costs and make it more difficult for businesses to compete in international markets, particularly against businesses from countries with far more streamlined systems.
>
> Sometimes these imposts are merely a small nuisance, but at other times they require substantial business investment in compliance activities using resources that could be better deployed elsewhere. Of greatest concern are the instances where the impost is sufficiently large to make businesses think twice about investment or expansion, resulting in an 'opportunity cost' of activity forgone that ultimately affects us all.[43]

The BCA has gone on to advocate that a simpler national regime for regulating workplace relations is one of a number of government reforms imperative to increasing Australia's international competitiveness and productivity.[44]

[42] Business Council of Australia, Improving International Competitiveness in Australian Business, Submission by the Business Council of Australia to the Review of Export Policies & Programs, June 2008.
[43] BCA, 'Making Federalism Work: The Economic Imperatives', Address to the Australia and New Zealand School of Government, 12 September 2008.
[44] BCA, 'Improving International Competitiveness in Australian Business', Submission by the Business Council of Australia to the Review of Export Policies & Programs, June 2008.

Business Impact

State referral of workplace relations powers for private sector unincorporated businesses is expected to incur only minor transitional costs to businesses in terms of their understanding and compliance with the FW Act.

However, these minimal costs will be far outweighed by the benefits of the simplicity, clarity, transparency and accessibility of the new streamlined workplace relations system. As outlined above, the economic benefits of a national workplace relations system for the private sector will benefit not only employers and employees but also the wider community as a result of the significant government efficiencies flowing from a national system.

Transition to the Fair Work system

Any transitional costs to business are likely to be one-off, short-term costs associated with becoming familiar with the federal workplace relations system under the FW Act.

While there may be some other minor costs for business such as updating payroll systems and human resources practices to take account of new pay rates and conditions under federal awards, these costs are also incurred under the existing arrangements when implementing award variations and/or enterprise agreements. As such, no additional cost is assessed as arising in this area.

In terms of familiarisation with the FW Act, the Department of Education, Employment and Workplace Relations has in place a Fair Work Education and Information Program. Under the Program, the Australian Government is providing $12.9m in funding to selected community, employee, employer and small business organisations to deliver free education and information programs, including webinars (online seminars), across Australia to help inform employees, employers and small businesses on how the FW Act will affect them.

A key focus of the Fair Work Education and Information Program is to ensure employers, particularly small businesses, learn about the new system and comply with it, including new aspects such as the Fair Dismissal Code for Small Business.

In addition to the Fair Work Education and Information Program, the Government has provided detailed information on the new system on the fairwork.gov.au website and is providing telephone advice services. The Government also proposes to further support workers and employers in referring states to successfully transition to the national workplace relations system through the implementation of a transitional educational service.

The transitional educational service will be contracted to state governments where possible and managed by the Commonwealth Fair Work Ombudsman (FWO) at a cost to the Government. This will allow the Commonwealth to utilise existing state education and advisory services.

The transitional educational service will include conducting face-to-face interactions with employers called Transitional Education Visits (TEVs). TEVs would be free, unobtrusive and focused exclusively on supporting employers to understand their workplace obligations. These activities are in addition to those which may be provided by industry organisations to their member businesses.

Transition to modern awards

The modernisation of the award system by the Australian Industrial Relations Commission (AIRC) involves the reduction and simplification of thousands of awards and instruments in the state and federal workplace relations systems to around 130 modern awards. Among other things, paragraph 576A(2)(a) of Schedule 2 to the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* requires that:

> Modern awards must be simple to understand and easy to apply and must reduce the regulatory burden on business.

The award modernisation request made by the Minister for Employment and Workplace Relations to the President of the AIRC states that the modernisation of awards is not intended to, inter alia, disadvantage employees or increase costs for business.

Against that background, the impact of changes to pay and conditions as a result of this process for employees transferring into the federal system will be different for each employee and employer, depending on their current minimum pay and conditions compared with the modern award.

Award modernisation will have minimal, or no impact on employers who currently pay their employees above minimum rates. In this regard, it is important to note that 83.5 per cent of employees are currently paid above the minimum rate of pay and that the impact on this group of any increase to minimum rates of pay is less significant. [45]

The award modernisation process has been overwhelmingly supported by employer and union groups who acknowledge the difficulty of the task and benefits which will accrue from its completion.

The Government has carefully monitored the award modernisation process and responded quickly to legitimate concerns raised by employer associations, business groups and unions regarding the potential for the award modernisation process to unreasonably increase costs for employers or reduce wages for employees in specific industries or industry sectors.

In this regard, the Government has made seven variations to the Award Modernisation Request and nine submissions to the AIRC. For instance, on 26 August 2009, the Government varied the award modernisation request to address concerns raised by the horticulture, retail, pharmacy and call centre industries. For example, in relation to the horticulture industry, the variation asked the AIRC to:

- enable employers in the horticulture industry to continue to pay piece rates of pay to casual employees who pick produce, as opposed to a minimum rate of pay supplemented by an incentive based payment;
- have regard to the perishable nature of the produce grown by particular sectors of the horticulture industry when setting hours of work provisions for employees who pick and pack such produce; and

[45] ABS data show that only 16.5 per cent of employees were paid the exact minimum rate of pay in August 2008 (ABS *Employee Earnings and Hours* Cat No 6306.0, August 2008)

- provide for roster arrangements and working hours in the horticulture industry that are sufficiently flexible to accommodate seasonal demands and restrictions caused by weather.

These changes have received strong support from stakeholders. For instance, a number of horticulture employer organisations, including AUSVEG CEO Mr Richard Mulcahy, welcomed Employment and Workplace Relations Minister Julia Gillard's intervention on behalf of the horticulture industry regarding the proposed awards modernisation process.

> We are delighted that the Minister has requested that the Commission continue to enable employers in the horticulture industry to pay piece rates of pay to casual employees who pick produce. This will avoid wage increases and allow the industry to continue to be a major employee of Australian workers," said Mr Mulcahy.
>
> Furthermore, we are impressed that the Minister has asked that the Commission take stock of the perishable nature of produce grown in this industry and to set hours of work provisions accordingly, said Mr Mulcahy.
>
> In addition, we support the call for the provision of roster arrangements and working hours in the horticulture industry that will be sufficiently flexible to accommodate seasonal demands and restrictions caused by weather.
>
> These changes will avoid excessive wage increases, job losses and business failure.[46]

In its decision of 2 September 2009, the AIRC indicated that it was prepared to re examine issues relating to piecework provisions and provisions relating to hours of work, overtime and penalties.

In addition to addressing stakeholder concern through award modernisation request variation and submissions, the Government has provided for the inclusion of transitional provisions in modern awards that enable a phased transition over a five year period (generally in five equal instalments) to new pay rates.

In its 2 September 2009 decision referred to above, the AIRC explained how the transition to modern awards will work in practice:

> We have decided that phasing should apply both to increases in the specified wages and conditions and reductions in those wages and conditions and in most cases will be in five equal instalments. We have decided to utilise five instalments because that number was the one most commonly selected by parties who supported phasing…… We have decided that phasing should commence on 1 July 2010…… There will be a further four instalments on 1 July of each year concluding on 1 July 2014.[47]

These dates will synchronise with the dates when any changes to modern award minimum wages determined by Fair Work Australia will take effect.

Stakeholders have overwhelmingly expressed support for these provisions:

[46] AUSVEG Media Release 28 August 209 – "AUSVEG welcomes Ministerial Intervention to Horticulture Industry Award"
[47] Australian Industrial Relations Commission Decision, 2 September 2009 – transitional provisions for priority and Stage 2 modern awards, [2009] AIRCFB 800, paragraphs 28 and 30.

> The transitional provisions released today by the AIRC are sensible and adopt a number of key Ai Group proposals. The AIRC's approach will assist employers and employees in understanding all of the new requirements and will greatly alleviate the financial impacts upon employers and employees (Chief Executive of the Australian Industry Group, Heather Ridout, 2 September).
>
> "The gradual phase in of wage bill increases under the new retail award will give small retailers time to accommodate the changes and allow them to concentrate on holding onto staff at a time when security is a vital ingredient in continuing economic recovery (Yvonne Anderson, ARA employment relations spokeswoman, reported in the Daily Advertiser.)
>
> The Australian National Retailers Association welcomes the support of the Deputy Prime Minister for a five year transition to higher penalty rates under the modern retail award. "The Deputy Prime Minister's announcement today will ease some of the pressure on retailers who are doing all they can to retain staff… ANRA commends the Deputy Prime Minister for responding to employers' concerns (Australian National Retailers Association CEO Margy Osmond).

The Government has also ensured that an employee cannot have his or her take-home pay reduced as a result of the making of a modern award by introducing take home pay orders through the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.

Businesses and employees will have access to an information and education program outlined and costed below, which will provide businesses with information on how to comply with the federal laws.

As a result of the Government's actions with respect to the award modernisation process, the existence of transitional provisions in modern awards and the provision of comprehensive information and education to employers and employees on the FW Act and modern awards, it is expected that the costs for employers associated with moving from state systems to the federal system will be negligible and considerably overweighed by the benefits of a simpler and more accessible system.

Calculation of impact

As a result of the free education and information services provided by the Government, the business cost associated with becoming familiar with the federal workplace relations laws would primarily relate to the staff time required to attend or undertake the Government run education sessions.

Businesses will receive the range of benefits noted in the previous section, due to the savings in time and money associated with reduced compliance costs and increased simplicity and certainty. While it is difficult to quantify these benefits, they will significantly outweigh the small additional cost to business associated with undertaking any familiarisation activity. It is also worth noting that the benefits will be ongoing, while the familiarisation costs will be a one-off cost. This is why the benefits are assessed as significantly outweighing the minimal costs associated with moving to a national workplace relations system.

Australian Bureau of Statistics (ABS) data is used to identify the number of affected businesses in each state.[48] The business cost is calculated under the assumption that one staff member from each business would be required to attend a Commonwealth funded education session for half a day (4 hours). The business benefit is calculated under the assumption that it would save the manager of each business one day of work (8 hours). Given the ongoing nature of the benefits of moving to a national system, this one-off quantification of the benefits significantly underestimates the value of the benefits to business and also completely ignores the wider community benefits that would flow from a national workplace relations system for the private sector, e.g. the over $60 million per annum which States currently spend on their workplace relations infrastructure.

In order to quantify the value of the staff time ABS estimates for average hourly ordinary time earnings for full-time adult managers of unincorporated businesses in each state are used.[49]

The business costs and benefit for each state, except Western Australia, have been calculated below using the methodology outlined in the Office for Best Practice Regulation's Business Cost Calculator.

Western Australia has been excluded from the calculations on the basis that the Western Australian Government has indicated that it does not intend to make a referral of power to the Commonwealth, but will instead participate in a national system through other means of cooperation and harmonisation. All other states have either indicated their intention to make a referral of power or are yet to make a decision on referral.

South Australia

ABS data show that there are 32,947 employing unincorporated businesses in South Australia. On average managers of unincorporated businesses in South Australia earn $27.80 per hour, equating to a cost of **$111 per business** to undertake the half day of education. Overall, there would be an additional business cost of **$3,663,706** for unincorporated businesses in South Australia.

The saving of one day of the manager's work equates to a benefit of **$222 per business**, or an overall benefit of **$7,327,413** for unincorporated businesses in South Australia.

This equates to a net benefit of **$111 per business** or **$3,663,706** for all unincorporated businesses in South Australia.

Tasmania

ABS data show that there are 9,455 employing unincorporated businesses in Tasmania. On average managers of unincorporated businesses in Tasmania earn $23.10 per hour, equating to a cost of **$92 per business** to undertake the half day of education. Overall, there would be an additional business cost of **$873,642** for unincorporated businesses in Tasmania.

The saving of one day of the manager's work equates to a benefit of $**185 per business**, or an overall benefit of **$1,747,284** for unincorporated businesses in Tasmania.

[48] ABS Counts of Australian Businesses (Cat. No. 8165.0), June 2007, unpublished data
[49] ABS *Employee and Earnings and Hours* (Cat. No. 6306.0), August 2008, unpublished data

This equates to a net benefit of **$92 per business** or **$873,642** for all unincorporated businesses in Tasmania.

New South Wales

ABS data show that there are 110,293 employing unincorporated businesses in New South Wales. On average managers of unincorporated businesses in New South Wales earn $36.00 per hour, equating to a cost of **$144 per business** to undertake the half day of education. Overall, there would be an additional business cost of **$15,882,192** for unincorporated businesses in New South Wales.

The saving of one day of the manager's work equates to a benefit of **$288 per business**, or an overall benefit of **$31,764,384** for unincorporated businesses in New South Wales.

This equates to a net benefit of **$144 per business** or **$15,882,192** for all unincorporated businesses in New South Wales.

Queensland

ABS data show that there are 88,068 employing unincorporated businesses in Queensland. On average managers of unincorporated businesses in Queensland earn $26.50 per hour, equating to a cost of **$106 per business** to undertake the half day of education. Overall, there would be an additional business cost of **$9,335,208** for unincorporated businesses in Queensland.

The saving of one day of the manager's work equates to a benefit of **$212 per business**, or an overall benefit of **$18,670,416** for unincorporated businesses in Queensland.

This equates to a net benefit of **$106 per business** or **$9,335,208** for all unincorporated businesses in Queensland.

Overall

Overall, ABS data show that there are 240,763 employing unincorporated businesses in the states of South Australia, Tasmania, Queensland and New South Wales. For these states there will be an average cost of **$124 per business** to undertake the half day of education, with a total additional cost for unincorporated businesses in these states of **$29,754,748.**

The overall saving of one day of the manager's work equates to an average benefit of **$247 per business**, or an overall benefit of **$59,509,497** for unincorporated businesses in these four states.

This equates to a net benefit of **$124 per business** or **$29,754,748** for all unincorporated businesses in South Australia, Tasmania, Queensland and New South Wales.

It should be noted that in the absence of state referrals, businesses covered by the transitional federal system that have been in the federal system for a significant period of time (perhaps always) will transfer from the federal to a state system on 27 March 2011. These businesses will incur the full costs associated with ensuring they comply with the state workplace relations system. These costs will not be incurred by employers if their states refer.

Option 2 – Status Quo

Benefits and Costs

While there would be no additional regulatory or business costs associated with maintaining the status quo and states not referring their workplace relations powers to the Commonwealth, as noted above, the problems and costs associated with the current workplace environment will persist. These include a continuation of State governments spending over $60 million per annum to maintain their existing workplace relations infrastructure as well as the potentially significant costs incurred by business in clarifying their workplace relations coverage.

However, it is important to note that those businesses covered by the transitional federal system that have been in the federal system for a significant period of time (perhaps always) will transfer from the federal to a state system on 27 March 2011 in the absence of their state referring workplace relations powers. These businesses will incur the costs associated with becoming familiar with a new workplace relations system. These costs would be avoided under a national system for the private sector.

Some may argue that there are benefits from maintaining separate workplace relations systems in terms of competitive federalism and providing local flexibility. By maintaining the status quo, however, the costs to business from uncertainty, inefficiencies and additional compliance costs associated with duplication and inconsistencies among the various workplace relations laws will continue. Further, the inefficient allocation of taxpayer resources associated with maintaining and administering six different workplace relations system, along with the barriers to productivity and competitiveness resulting from the rigidities of a multi-jurisdiction system will continue to hamper the Australian economy.

Accordingly, the overall ongoing costs associated with this option far outweigh the small benefit associated with not placing any additional short-term regulatory or cost burden on businesses.

CONSULTATION

The Australian Government has been engaged in broad and ongoing consultation with stakeholders regarding the development of a national workplace relations system for the private sector.

Discussions with the states and territories about the creation of a national workplace relations system have been ongoing under the aegis of the Workplace Relations Ministers' Council (WRMC) since February 2008.

The Government understands that state and territory governments have also undertaken significant consultation with relevant stakeholders within their respective jurisdictions regarding their government's decisions to participate in the national system.

The Government has also consulted directly with a number of state-based stakeholders who have raised concerns regarding their respective state government's decisions whether or not to participate in the national system.

Wherever stakeholders have raised concerns regarding state referrals and the likely impact of this action on their jurisdictional coverage, the Government has considered those concerns and accommodated requests directed at ensuring certainty as to which workplace relations system (i.e. federal or state) will apply to their circumstance.

Broadly, there appears to be a prevailing view among governments and stakeholders that the development of a single workplace relations system for the private sector by way of state referrals of power would be beneficial not only to Australia as a nation, but also to those businesses and employees seeking certainty of jurisdictional coverage. Organisations that are recorded as supporting such action include the:

- Australian Chamber of Commerce and Industry;
- Australian Council of Trade Unions;
- National Farmers Federation;
- Australian Industry Group;
- Business Council of Australia; and
- Australian Mines and Metals Association.

CONCLUSION AND RECOMMENDED OPTION

As previously noted, there are a number of problems associated with Option 2, that is maintaining the status quo regarding workplace relations regulation in Australia, which will continue to place a burden on Australian businesses and hamper the Australian economy, including:

- uncertainty of jurisdictional coverage;
- inefficiencies with maintaining and administering six different workplace relations systems; and
- additional compliance costs associated with duplication and inconsistencies among the various workplace relations laws.

These costs outweigh the relatively small benefits associated with not placing any additional short-term regulatory or cost burden on businesses.

In contrast, Government pursuit of Option 1 is not only expected to address many of the problems currently associated with the status quo, including greater certainty to business and greater equality in working conditions for employees, but is also expected to incur relatively small costs associated with information and education to ensure compliance with the new workplace relations system. These costs to business are also expected to be further reduced by Government intervention by providing information and education through the provision of a Fair Work Education and Information Program and Transitional Education Visits. As outlined, beyond the transition period, the benefits to employers of a single, transparent and simple national workplace relations system will be of significant benefit to them over time.

It is the Department's view that the significant benefits associated with Option 1 far outweigh the associated short-term costs, and that conversely, the costs of maintaining the status quo under Option 2 far outweigh the benefits associated with not placing any additional short-term regulatory or cost burden on businesses.

Based on this assessment, Option 1 is the strongly recommended option.

IMPLEMENTATION AND REVIEW

Implementation

As Option 1 is the recommended option, it will be necessary for the Commonwealth and those states that choose to refer their private sector workplace relations powers to the Commonwealth to enact legislation to effect such referrals.

Referring states will be required to enact legislation which specifies those matters that are to be referred to the Commonwealth, to allow the Commonwealth to enact corresponding legislation regarding those referred matters.

In addition to Victoria, the state governments of South Australia and Tasmania have committed to referring their private sector workplace relations powers to the Commonwealth. The Queensland Government has indicated in-principle support for joining the national system subject to a number of key issues being resolved. The New South Wales Government has yet to confirm its position while the Western Australian Government has indicated its intention to consider opportunities for harmonisation with the new national workplace relations system.[50]

The Governments of South Australia and Tasmania have recently introduced legislation into their respective Parliaments to progress their referrals.

As earlier stated, the Northern Territory and ACT are currently covered by the federal workplace relations system by virtue of the Commonwealth's legislative power in relation to the Territories (see section 122 of the Constitution).

Inter-governmental agreement

States' participation in the proposed national workplace relations system for the private sector will also be governed by the Multilateral Intergovernmental Agreement (IGA) for a National Workplace Relations system for the Private Sector (the multilateral IGA), which outlines the principles of the national workplace relations system and the roles and responsibilities of the Commonwealth and participating states and the territories.

At a meeting of WRMC on 25 September 2009, the Commonwealth, Victoria, South Australia, the Northern Territory, the ACT and Tasmania agreed to and have signed the multilateral IGA.

[50] WRMC Communiqué, 11 June 2009

At the same meeting of WRMC, the Queensland Government agreed to the text of the multilateral IGA and indicated that, subject to resolving remaining issues, it would be prepared to sign the IGA at a later date.

The New South Wales Government is yet to determine whether or not it will refer its workplace relations powers to the Commonwealth, but indicated were it to do so it would not seek any amendment to the multilateral IGA.

Western Australia has noted the content of the IGA and the provisions that would apply in the event it elected to sign the IGA as a cooperating jurisdiction.

The Queensland and New South Wales Governments have agreed to work with the Commonwealth to resolve outstanding issues by late October 2009.

Review

The multilateral IGA, the text of which has been agreed by all states and territories except Western Australia, requires that the operation of the agreement be reviewed no later than 3 years from the date of commencement, or as otherwise agreed by the parties to the agreement.

The multilateral IGA also provides consultation and voting mechanisms for participating states and territories regarding amendments to the FW Act and related legislation and regulations.