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National Office

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Mr John Carter
Secretary
Senate Employment, Workplace Relations, Small Business
and Education Legislation Committee
S1.61 Parliament House
Canberra ACT 2600

Dear Mr Carter

I have pleasure in submitting the enclosed submission to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee on behalf of the Department of Employment, Workplace Relations and Small Business.

I hope that the submission will be of use to the Committee in its deliberations regarding the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000, Workplace Relations Amendment (Termination of Employment) Bill 2000, Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000 and the Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000.

Yours sincerely

Lynne Tacy
Deputy Secretary

28 August 2000

Senate Employment, Workplace Relations, Small Business and Education Legislation Committee

inquiry into the

Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000

Workplace Relations Amendment (Termination of Employment) Bill 2000

Workplace Relations Amendment (Australian Workplace Agreement Procedures) Bill 2000

Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000

Submission by the Department of Employment, Workplace Relations and Small Business

28 August 2000

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1. Outline of Submission

The Department's submissions address the four bills which the Committee is considering conjointly. These are

- the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000, introduced to the Parliament on 26 June 2000
- the Workplace Relations Amendment (Termination of Employment) Bill 2000, introduced to the Parliament on 27 June 2000
- the Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000, introduced to the Parliament on 28 June 2000; and
- the Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000, introduced to the Parliament on 29 June 2000.

2. These Bills were referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee on 16 August 2000.

3. The submission addresses each of the Bills in the order in which they were first tabled, setting out relevant background, the policy rationale for the proposed amendments, and their intended operation.

OVERVIEW

4. The Coalition's 1998 workplace relations election policy statement, *More Jobs, Better Pay* contained commitments to further legislative reform during the Government's second term of office. These commitments were originally intended to be implemented through the Workplace Relations Legislation Amendment (More Jobs, Better Pay Bill) 1999 (the WRLA(MJPB) Bill). The WRLA(MJBP) Bill was passed by the House of Representatives on 14 October 1999.

5. The overall approach to reform adopted in the WRLA(MJBP) Bill was to reinforce the key principles underpinning the WR Act and ensure their more widespread application. Those principles include:

(a) the workplace relations system should recognise a more direct relationship between employers and employees and be relevant to modern Australia;

(b) a fair go for all;

(c) genuine freedom of association and choice of representation; and

(d) a simplified and more accessible system that puts workers and businesses first, not the system's institutions.

6. The WRLA(MJBP) Bill was referred to this Committee on 11 August 1999. While the majority report of the Committee endorsed the Bill, a minority report prepared by Senator Murray for the Australian Democrats rejected several schedules of the Bill and put the view that others would require amendment to gain support. Senator Murray subsequently expressed a preference for dealing with matters of the nature addressed by the Bill on an issue by issue basis, rather than as an omnibus piece of legislation.[1]

7. Taking these views into account, the Government sought to accommodate the preferences of the Australian Democrats by proceeding with an issue by issue consideration of policy matters arising from the WRLA(MJBP) Bill. The first of these issues was addressed through a the Workplace Relations Amendment Bill 2000, which deals with pattern bargaining and related matters which passed the House of Representatives on 1 June 2000, and has been the subject of a separate Senate Inquiry.

8. The Department's submission draws on its previous submissions to the Committee relating to the WRLA(MJBP) Bill, as the Bills presently before the Committee draw to varying extents on the earlier Bill. Where appropriate, the Department provides additional material relevant to issues arising during the WRLA(MJBP) Inquiry, or relating to proposed new provisions not included in the WRLA(MJBP) Bill. This is particularly the case in relation to the Workplace Relations Amendment (Termination of Employment) Bill 2000, elements of which are new. Some of these proposed amendments result from issues raised in the Senate Inquiry into the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, while others result from recent developments in the operation of the system.

9. Consistent with the Government's overall approach to reform, the four Bills are principally focussed on fostering direct employer and employee involvement in their workplace relations (in particular, those dealing with secret ballots for protected action and further award simplification) and removing procedural burdens from workplace relations

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[1] 'In my view only technical Bills should be general and broad ranging. Policy Bills should be specific. It is far better for a reformist government to deal with one issue at a time on a specific and limited basis.' *Senator Andrew Murray to ACT Industrial Relations Society 6th April 2000;* 'My preference is for reform to be focussed and particular, not general and wholesale. General Bills produce knee jerk reactions and huge campaigns, specific Bills are better assessed on their merits. For instance the government recently had specific Bills on unfair dismissals, youth wages and equal opportunity dealt with. It will soon have a Bill on registered organisations considered. Future reform should be on similar focussed lines.' *Senator Andrew Murray, Australian Industry Group Magazine Jan/Feb 2000;* 'The lesson from this week hopefully is that in sensitive areas like [industrial relations] omnibus Bills are not the way to go.' *Senator Andrew Murray, The Bulletin 14 December 1999*

arrangements (in particular, those dealing with procedures governing claims arising from termination of employment and the processing of AWAs).

10. The following sections of the Department's submission address each of the bills in more detail

2. Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000

BACKGROUND

Secret ballots in the Federal system

The *Workplace Relations Act 1996* (WR Act) provides significant protections for employees and unions organising industrial action in order to advance their claims in respect of a single business certified agreement. This protection is subject to certain procedural requirements and limited to situations where there has been a genuine attempt to reach agreement. Unions and employees complying with these requirements gain immunity from most forms of civil liability that may arise from the industrial action (section 170MT). In addition, employers are prohibited from dismissing or injuring an employee in his or her employment wholly or partly because the employee has taken protected action (section 170MU).

2. At present, there is a requirement that industrial action organised by a union must be duly authorised in accordance with the organisation's rules in order to attract protection (section 170MR). Their rules may require endorsement by members of any proposed action, however, in a matter as important as the taking of protected industrial action, in the Government's view, there should be an explicit requirement in the WR Act that members formally vote to take industrial action or not to take industrial action.

3. Pre-industrial action ballots are an appropriate counterpart to protected action. Protected action is available only in respect of single business certified agreements, reflecting the focus of the WR Act on genuine enterprise-level bargaining, and the decision to take (or not to take) protected action should be made at the workplace level by those employees directly concerned.

4. As recent developments indicate, protected action is being used in support of common claims being brought across an industry or parts of industry sectors, using the device of a common expiry date. Recourse to broadly-based protected action through this device reinforces the policy rationale for secret ballots prior to taking protected action. Such provision would ensure that decisions to access protected action were democratically taken, and that they were taken at the workplace level. Over the longer term, normal recourse to secret ballots where protected action was an issue would contribute to developing a culture of employee involvement in workplace agreement-making.

5. Secret ballots are regularly used in other contexts within the federal system, including to: endorse enterprise agreements; elect union officials; and effect amalgamations and withdrawal from amalgamations.

6. Some changes to the secret ballot provisions of section 135 were introduced in 1996, to reflect the stronger focus of the WR Act on enterprise-level bargaining, and the appropriate linkage between protected action and pre-industrial action ballots; however, secret ballots are

still used infrequently to gauge employee attitudes towards industrial action, and generally only after considerable disputation has already occurred

- Commission statistics indicate that between the commencement of the WR Act on 1 January 1997 and 31 December 1999 only 9 applications were made under section 135 for a secret ballot.

7. A summary of decisions involving secret ballots was provided in the Ministerial Discussion Paper released in August 1998, *Pre-industrial action secret ballots*. This summary included discussion of the *Greyhound* case where the Commission declined to order a secret ballot until the parties had undertaken further negotiations; the bargaining period was suspended during this time.[2]

8. More recently, in 1999, the Commission ordered a secret ballot in relation to two proposed Toyota agreements. In that case the Commission ordered a ballot to assist in settling the industrial dispute after industrial action had already caused significant cost to Toyota, resulting in the stand down of up to 3000 production employees and actual and potential stand downs of employees by some of Toyota's suppliers.[3]

9. Even more recently, Denso Manufacturing applied to the Commission for a secret ballot to test employee attitudes about their final offer agreement after negotiations with unions broke down. Watson SDP did not consider that that the ordering of a ballot of Australian Manufacturing Workers Union members would assist in settling the industrial dispute.[4]

10. In this case and in the *Toyota* case, the Commission's approach to secret ballot orders appears to be one of 'last resort' rather than as a dispute prevention or settlement measure.

11. The Commission has the power to order that secret ballots be held: to test union members' attitudes in relation to an industrial dispute; to test union members' or employees attitudes in relation to industrial action; and for the approval of proposed certified agreements.

12. The particular circumstances in which the Commission may order that a secret ballot be conducted are specified in Division 4 of Part VI of the WR Act as follows:

- where the Commission is dealing with an industrial dispute concerning a registered organisation, and feels that the prevention or settlement of the dispute may be helped by a ballot of the organisation's members (subsection 135(1));

- where industrial action is being taken or is threatened, impending or probable and the Commission considers that a ballot of members might help stop or prevent the action, or help settle the matters giving rise to such action (subsection 135(2));

- where the Commission is not satisfied that the majority of employees have genuinely consented to a certified agreement (subsection 135(2A));

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[2] [Print P1237]

[3] [Print R9223]

[4] [Print S9594]

- where industrial action is being taken or is threatened, impending or probable in relation to a bargaining period and the Commission considers that a ballot of employees might help stop or prevent the action, or help settle the matters giving rise to such action (subsection 135(2B)); or

- where members of that organisation have been requested to engage in industrial action and an application has been made for a secret ballot by at least the prescribed minimum number of relevant affected members[5] (section 136).

13. In most cases the results of secret ballots conducted under these provisions are used to inform the Commission in any conciliation or arbitration proceedings; however, where the ballot relates to the taking of industrial action in pursuit of a certified agreement (under subsection 352(2)), a majority vote against industrial action means that any industrial action taken will not attract protection from civil immunity (section 170MQ).

14. The Commission's power to order a pre-industrial action secret ballot (including on application by members of an organisation) is discretionary.

The international experience

15. In the United Kingdom, compulsory pre-strike ballots are well established, and were retained in the Labour Government's *Employment Relations Act 1999*.

16. Union leaders have acknowledged that requirements for secret ballots for elections and for authorisation of industrial action have assisted in improving democracy within unions. For example, a paper commissioned by the Trade Union Congress in 1994 stated:

> *In recent years there have been encouraging internal democratic reforms (stimulated it must be said in some cases by the 1984 Trade Union Act) which have ensured that leaders have to become more sensitive and directly accountable to their own members, through the introduction of postal ballots for their own elections and before the calling of strikes and other forms of industrial disputation.*[6]

17. Despite changes to the legislation which require that unions meet the full cost of conducting ballots, balloting has become far more widespread in the UK than the law requires. In addition to pre-industrial action balloting, union positions on proposed settlements and employers' last offers are often determined through balloting[7].

18. In addition, the introduction of mandatory pre-strike ballots in 1984 coincided with a substantial reduction in industrial disputation in the UK

- In the 5 years prior to the introduction of mandatory pre-strike ballots (1980-1984) the annual average number of working days lost per thousand employees (WDL/1000e) was 483.8, this declined to 180.2 WDL/1000E for the subsequent 5 year period (1985-1989) [8];

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[5] Defined in section 136(10)

[6] Taylor, T. (1994) *The Future of Trade Unions*, Andre Deutsch Limited, Great Britain, pp220-221.

[7] Undy, R., Fosh, P., Morris, H., Smith, P. and Martin, R. (1996) *Managing the Unions: The Impact of Legislation on Trade Unions' Behaviour*, Clarendon Press, Oxford, p205.

[8] *Labour Market Trends*, June 2000, Government Statistical Service (UK), p260.

19. A range of factors may have contributed to this significant change in levels of industrial action, but researchers have attributed at least part of the decline to the government's legislative reforms, including the introduction of compulsory pre-strike ballots.[9]

20. Legislation mandating pre-industrial action secret ballots has also been introduced in Canada, Greece and Fiji. In Germany, secret ballots are not required by legislation but are used by the courts as one test in determining the legality of strike action.

Levels of industrial action

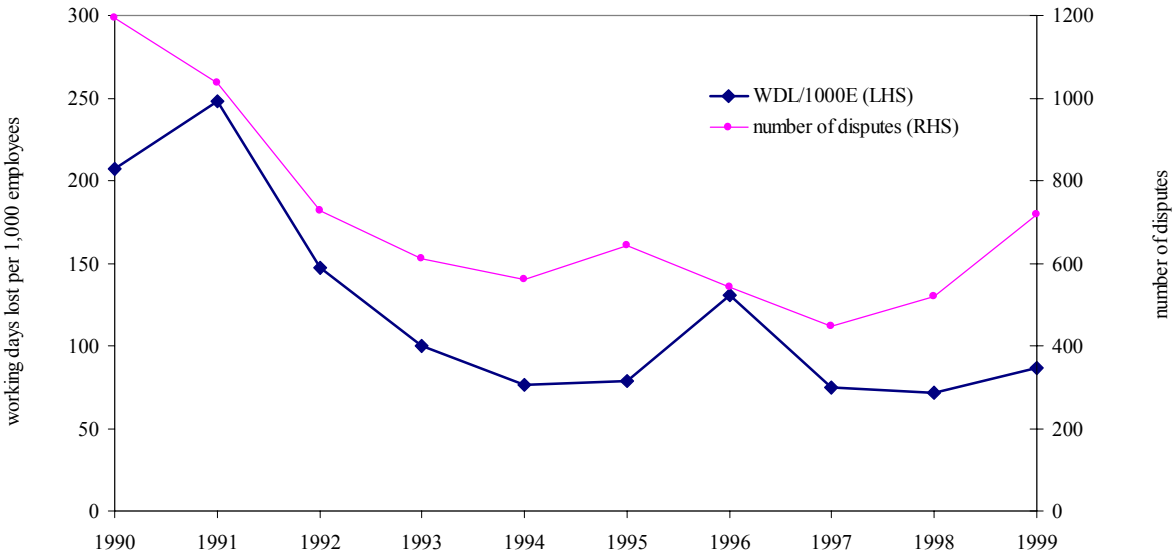
21. Australian Bureau of Statistics data show that, since the enactment of the WR Act at the end of 1996, there has been a reduction in disputation levels in Australia, although levels of industrial disputation increased (in particular industries and particular jurisdictions) in 1999 (Chart 2.1)[10].

22. However, levels of industrial disputation in Australia remain high in relation to comparable countries.

- for example, the annual average number of WDL/1000E for the period 1995 to 1999 was 21.6 in the UK and 88.8 in Australia.[11]

Chart 2.1: Working days lost per 1000 employees and number of disputes

— calendar year



[9] Undy *et al*, p240.

[10] The major cause of the increase in the level of industrial action observed in 1999 was the dramatic increase in the number of working days lost (WDL) to industrial disputation in New South Wales in the Education; Health and community services industry group (from 19,600 WDL in 1998 to 204,300 WDL in 1999).

[11] *Labour Market Trends*, June 2000, Government Statistical Service (UK), p260; and Australian Bureau of Statistics, *Industrial Disputes, Australia* (cat no. 6322.0). Comparisons between different countries' industrial disputes statistics need to be used with great caution as disputes statistics are compiled using widely differing definitions and methods of data collection. For example, in Australia a dispute is included in the official statistics if it causes the loss of ten or more working days; in the UK, a dispute is counted if it involves at least 10 workers stopping for at least 1 day, or if 100 working days are lost.

Source: Australian Bureau of Statistics, Industrial Disputes Australia, 1988, cat. no. 6322.0

POLICY RATIONALE

23. Despite the considerable protections provided under the WR Act for industrial action taken in pursuit of a single business certified agreement, the mechanism for authorisation of industrial action is left to the organisation's rules, and so authorisation may occur at the higher levels of the organisation without reference to the members who will be directly affected. Such a process is inconsistent with the intent of the WR Act to ensure that decisions in relation to agreement-making are made at the workplace level.

24. Even in circumstances where members have the opportunity to vote on proposed industrial action, there is no requirement for the ballot to be conducted secretly, leaving open the possibility that members could be pressured into voting in favour of industrial action.

25. This problem was acknowledged by Professor Niland in the 1989 NSW Green paper, *Transforming Industrial Relations in NSW*; he stated:

> *Concerns are frequently expressed regarding the need for secret ballots, before industrial action is taken to ensure that members can exercise a democratic right. The view is often expressed that the silent and timid majority are outvoted by the industrially militant where open or no votes are taken before industrial action.*[12]

26. A more general problem in relation to union consultation in agreement-making was highlighted by the results of the 1995 Australian Workplace Industrial Relations Survey which shows that, among unionised workplaces with 20 or more employees, unions failed to consult employees in relation to collective agreement negotiations at 27 per cent of workplaces.

27. The proposals for compulsory secret ballots as a pre-condition to accessing protected action were supported by the Australian Chamber of Commerce and Industry in their submission to the 1999 Senate Inquiry into the WRLA(MJPB) Bill "on the basis that it is highly desirable that industrial action not occur unless due democratic processes have been undertaken and are seen to have been undertaken".[13]

28. The Australian Industry Group noted in their submission that they initially had some concerns about compulsory pre-industrial action ballots but, on studying the proposed scheme, believed that a secret ballot process, overseen by the Commission, was "an appropriate precondition for the taking or organising of protected industrial action by employees and organisations of employees".[14]

29. The introduction of statutory link between protected action and secret ballots would provide twofold protection for employees and union members:

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[12] Niland, J. (1989) *Transforming Industrial Relations in New South Wales*, Green Paper Volume 1, p101.

[13] Australian Chamber of Commerce and Industry submission to the Senate Inquiry into the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, p97.

[14] Australian Industry Group and EEASA submission to the Senate Inquiry into the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999.

- The union members or employees who would be directly affected by, and involved in, the proposed industrial action would be able to decide for themselves whether industrial action is warranted; and

- Union members and employees would be able to express their view, away from union or peer pressure, through the mechanism of a secret ballot.

30. This could be achieved while retaining the Commission's discretion to order that secret ballots be held in relation to other matters.

31. The proposal to introduce pre-industrial action ballots is consistent with the provisions applying to the approval of certified agreements. Just as an agreement must be approved by a valid majority of the employees who will be subject to the agreement, so there would be a requirement that industrial action be authorised by those employees or union members who will be most affected by it.

32. Full participation in decision-making about industrial action by the employees most directly affected is critical. It is those employees who will, if industrial action proceeds, lose pay and potentially risk a deterioration in their relationship with their employer. Employees may also be detrimentally affected in the longer term by industrial action that results in economic losses to their employer.

33. In addition to enhancing freedom of choice for employees, the introduction of pre-industrial action ballots would strengthen the accountability and responsiveness of unions to their members by encouraging meaningful consultation. As has been observed in the UK, the use of ballots, once incorporated into unions' consultative processes, may extend beyond the authorisation of industrial action.

34. A statutory requirement for pre-industrial action ballots, which ensured direct and active participation by employees, would also assist in preventing the inappropriate use of protected action by unions in pursuit of pattern bargaining outcomes. Pre-protected action ballots would prevent the situation arising whereby unions organised industrial action in relation to a proposed agreement that failed to meet their "pattern" requirements even though the employees concerned were satisfied with the proposed agreement.

35. The introduction of pre-industrial action ballots would also benefit the community more broadly by discouraging unnecessary, inappropriate and unsupported industrial action, thus minimising disruption to the public, businesses and the economy. As has been the experience in the UK, this may result in a decline in overall levels of industrial action.

36. The proposal to introduce secret ballots as a pre-condition for accessing protected action was part of the Coalition's 1998 election policy platform, *More Jobs, Better Pay*. The proposals of the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000 (WRA(SBPA) Bill) have been developed from that principle. A number of submissions to the 1999 Senate Inquiry into the WRLA(MJBP) Bill criticised the detail of the proposed secret ballots scheme on the basis that it imposed too many impediments to unions and employees accessing protected action.

37. These criticisms must be balanced against the gains in terms of employee participation and accountability discussed above. However, the Government has also indicated a willingness to consider amendments to the current proposal. In his Second Reading Speech

on the WRA(SBPA) Bill to the House of Representatives, the Minister for Workplace Relations, the Hon Peter Reith MP, stated:

> *The Government is prepared to consider amendments to refine the detail of the secret ballots regime proposed by the Bill, if it is the detail that is the barrier to the Bill's passage through the Parliament.*

38. In considering amendments to the detail of the proposals, the Government has indicated its committment to the underlying principle that informs the proposed scheme, which is that secret ballots should be a pre-condition to accessing protected action, which in turn means that they will be workplace-specific. Any amendments to the proposed scheme must retain the Government's key policy objective of fostering the development of a more extensive culture of democratic participation in decision-making at the workplace about industrial action.

SUMMARY OF PROVISIONS

39. The WRA(SBPA) Bill proposes new preconditions for the taking or organising of protected industrial action by employees and organisations of employees.

40. In order to be protected action under the provisions of the WR Act, the WRA(SBPA) Bill will require industrial action to be preceded by a secret ballot process overseen by the Commission.

41. The new provisions are intended to ensure that protected industrial action is not used as a substitute for genuine discussions during a bargaining period, and to ensure that the final decision to take industrial action is made by the employees directly concerned.

42. Under the new provisions, a union or employees would be required to apply to the Commission for an order that a 'protected action ballot' be held.

43. The WRA(SBPA) Bill includes provisions to ensure that where employees wish to initiate a bargaining period or apply for a protected action ballot order, they may do so through an agent, with their identity protected.

44. The Commission would not be able to order a ballot unless a bargaining period is in place, and the applicant has been genuinely negotiating to reach an agreement.

45. The WRA(SBPA) Bill proposes that if a union makes an application for a ballot, only union members whose employment would be covered by the proposed agreement would be entitled to vote in the ballot. If employees who are seeking a non-union agreement make the application, all employees whose employment would be covered by the proposed agreement would be entitled to vote in a ballot. In either case, employees who are party to an Australian Workplace Agreement whose nominal expiry date has not passed would not be eligible to vote.

46. The new provisions set out proposed procedural requirements for ballots, including the requirements for ballot papers.

- The ballot paper must include an explanatory statement, and the question or questions put must detail the precise nature and form of the intended industrial action, the day or days on which it is to take place and its proposed duration.

47. Industrial action would be authorised by a ballot if at least 50 per cent of eligible voters participate in the ballot, and if more than 50 per cent of the votes cast are in favour of the proposed industrial action.

48. Applicants for a protected action ballot will be required to meet some of the cost of conducting the ballot. An applicant will be liable for the cost of a protected action ballot, but will be able to seek reimbursement of 80 per cent of the reasonable costs of the ballot from the Commonwealth. Where joint applicants request reimbursement in other than equal proportions, the Commonwealth is liable to distribute that amount in accordance with the request.

49. The WRA(SBPA) Bill also proposes consequential changes to the existing secret ballot provisions of the WR Act to reflect the proposed new requirements for protected action ballots. The power to order a ballot in connection with an industrial dispute is being retained (subject to the qualification that the power not be exercised where an organisation has initiated a bargaining period for an agreement).

3. Workplace Relations Amendment (Termination of Employment) Bill 2000

Introduction

The Workplace Relations Amendment (Termination of Employment) Bill 2000 (the WRA(TE) Bill) proposes amendments to the termination of employment provisions of the WR Act. The provisions in the WR Act were based on implementing the concept of a 'fair go all round'. They resulted in an improvement in the workability and fairness of the termination of employment provisions compared to those in the former *Industrial Relations Act 1988* (IR Act). The number of claims has been significantly reduced since the WR Act came into effect and the process has become faster and less procedurally oriented, with a better balance in the fairness of the system from the perspective of employees with genuine claims and employers.

2. However, over the period of the operation of the termination of employment provisions in the WR Act, a number of procedural and technical issues have arisen, which if addressed, would further improve the processing of genuine claims in the system. This Bill is designed to maintain the fair balance between the rights of employees and employers while directly addressing the major procedural and technical problems that have become evident during the operation of the WR Act. The amendments will ensure that the provisions operate according to the broad principles intended by the WR Act.

3. The Bill contains a range of provisions designed to reinforce disincentives to speculative and unmeritorious unfair dismissal claims, introduce greater rigour into the processing by the Australian Industrial Relations Commission of unfair dismissal claims, remove jurisdictional uncertainty and unnecessary procedural burdens that unfair dismissal applications place on employers.

4. Some of the amendments in the WRA(TE) Bill have their origin in Schedule 7 of the WRLA(MJBP) Bill. Others result from issues raised in the Senate Inquiry into the Workplace Relations Amendment (Unfair Dismissals) Bill 1998 (WRA(UD) Bill) while others result from recent developments in the operation of the system. The following sections, which discuss the amendments in detail, will note where they differ from the WRLA(MJBP) Bill or where new amendments are proposed. A number of the changes to provisions as compared to the WRLA(MJBP) Bill have been designed to address some of the concerns which have been expressed by the Australian Democrats in the past.

5. There is wide-spread recognition that some changes are necessary to the processes relating to the termination of employment provisions. In the Australian Democrats' Minority Report of the Senate inquiry into the WRLA(MJBP) Bill, Senator Murray stated that "[t]he Democrats have consistently opposed removing the right to access unfair dismissal provisions, but have always supported improvements to process".[15]

6. In the Australian Democrats Minority Report into the WRA(UD) Bill, Senator Murray concluded that "it is in the interests of all parties concerned with unfair dismissals, if the

[15] Report of the Senate Employment, Workplace Relations, Small Business and Eduction Legislation Committee '*Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999)* November 1999 p.396

Commission's processes are made as quick and inexpensive as is consistent with the needs of justice, and if the process of law does not become manipulative".[16]

7. In its submissions to the Senate Inquiry into the WRA(MJBP) Bill, the Business Council of Australia (BCA) have commented that "the BCA supports an unfair dismissal process that:

- Delivers equitable outcomes, after balancing the rights of employees and employers, as well as those seeking work;
- Takes account of all of the circumstances surrounding the dismissal;
- Focuses on dealing with genuine claims, and diverts away from the system those that are vexatious, frivolous or otherwise without merit; and
- Operates in a manner that is administratively efficient and limits the potential for unintended consequences…".[17]

8. In submissions to the Senate Inquiry into the WRLA(MJBP) Bill, Australian Business Limited commented:

> *most of the proposed amendments are refinements relating to the processing of unfair dismissal applications and many of them are consistent with the recommendations made in the Democrats' Minority Report Considerations of the Provisions of the Workplace Relations Amendment (Unfair Dismissal) Bill 1998, February 1999.* [18]

9. The Small Business Coalition (SBC) is an informal grouping of 39 industry associations in Australia with an interest in small business issues. The SBC represents around 600 000 individual small businesses. At a meeting on 17 August 2000 those present unanimously supported a Policy Statement in support of the WRA(TE) Bill (see Appendix 3.1 for a copy of the Policy Statement). The Associations present at the meeting were the Australian Chamber of Commerce and Industry, Printing Industries Association, Enterprise in the Community Inc/Business Enterprise Centres Australia, Council of Small Business Organisations of Australia, Franchise Council of Australia, Insitute of Chartered Accountants in Australia, Australian Retailers Association, Victorian Employers Chamber of Commerce and Industry, Association of Consulting Engineers of Australia, Australian Society of CPAs, Housing Industry Association, Australian Business Ltd, Motor Trades Association of Australia, Real Estate Institute of Australia, Tractor & Machinery Association of Australia, ACT & Region Chamber of Commerce & Industry, Pharmacy Guild of Australia, Master Plumbers and Mechanical Services Association, Tourism Council of Australia, National Institute of Accountants and the Master Builders Australia.

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[16] Report of the Senate Employment, Workplace Relations, Small Business and Eduction Legislation Committee *Consideration of the Provisions of the Workplace Relations Amendement (Unfair Dismissals) Bill 1998*, February 1999 p.62.

[17] Submission 375, Volume 12, p. 2615

[18] Submission 457, Volume 22, p.5402

10. The SBC's Policy Statement states that the provisions will

> *maximise flexibilities, particularly for small employers, when confronted with an unfair dismissal claim. The amendments, if passed, will in a long way address procedural difficulties that were identified during the inquiry by the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee into the More Jobs, Better Pay Bill 1999*.[19]

A. Jurisdictional Provisions

BACKGROUND AND POLICY RATIONALE

Since the WR Act came into force a number of jurisdictional issues have arisen which need to be addressed to ensure certainty and to prevent unintended forum shopping.

2. The WR Act is designed to ensure that 'federal award employees' (i.e. employees employed under a federal award or agreement) who were not employed by an employer within the constitutional reach of the provisions pertaining to harsh, unjust or unreasonable termination of employment can still apply for a State unfair dismissal remedy, where State legislation permits. In practice, however, these arrangements have resulted in 'federal award employees' who are eligible to apply for a remedy under the WR Act in respect of harsh, unjust or unreasonable termination of employment also being able to bring unfair dismissal applications before State tribunals.

3. In other words, the effect of these arrangements is to enable forum shopping between federal and State jurisdictions. Forum shopping can undermine the authority of the legislation, result in inconsistency of treatment and create considerable uncertainty for employers concerning their obligations.

4. To remove this scope for forum shopping, and to ensure that employers and employees have clarity of rights and obligations, the amendments in the Bill will ensure that employees who are eligible to apply for a remedy for harsh, unjust or unreasonable termination under the WR Act will only be able to apply for that remedy. The proposed amendments will augment existing provisions in the WR Act which prevent a person from applying for a remedy in respect of harsh, unjust or unreasonable termination of employment where the employee has already commenced an action for a similar remedy under another Commonwealth, State or Territory law (subsection 170HB(1)).

5. As a consequence, the Bill proposes to insert new section 170CCA into the WR Act, which will provide that the termination of employment of the WR Act provisions 'cover the field' in respect of those people who are eligible to apply under the WR Act for a remedy in respect of harsh, unjust or unreasonable termination.

6. The effect of the amendment will be that those people will not be able to apply for a State unfair dismissal remedy. However, those federal award employees not within the constitutional reach of the federal termination of employment provisions (in other words, federal award employees of unincorporated State employers) will continue to be able to seek a State unfair dismissal remedy.

7. The Bill also proposes amendments to make clear that persons who are excluded, for reasons of policy, from a remedy under the WR Act in respect of harsh, unjust or unreasonable termination do not have the right to apply for a State unfair dismissal remedy, where such legislation would otherwise permit.

8. A different class of employees, those employed under agreements made under the IR Act, appear to have been inadvertently denied access to the unfair dismissal provisions, because the definition of 'federal award employee' does not encompass those agreements.

Accordingly, the Bill contains amendments to ensure these employees do not continue to be excluded from the remedies for unfair dismissal under the WR Act.

9. In relation to ensuring certainty, an amendment is required to ensure that employers can apply at any stage of the proceedings for an application to be dismissed by the Commission for want of jurisdiction. The Bill confirms that, in certain circumstances, a respondent to an application can seek to have a motion for dismissal of the application for want of jurisdiction dealt with at any time. The amendment is different to the version of section 170CEA contained in the WRLA(MJBP) Bill.

10. Another technical issue which has arisen is that there is nothing in the WR Act to prevent a person making a second application in relation to the same termination. The Bill proposes to ensure that only a single application can be made in respect of a dismissal, ensuring that once an employee has had his or her 'day in court' then that settles the matter conclusively. This is consistent with the legal doctrine of *res judicata* which constitutes a bar to a subsequent suit for the same cause of action. The amendment is the same as that proposed in the WRLA(MJBP) Bill.

SUMMARY OF PROVISIONS

Broadening the scope of the termination of employment provisions

11. Item 7 would amend the definition of 'Federal award employee' for the purposes of the termination of employment provisions so that employees whose terms and conditions are governed by agreements under the former IR Act would be expressly covered by Division 3 of Part VIA and able to seek unfair dismissal remedies under the WR Act.

Prevention of forum-shopping

12. Item 6 of the Bill deals with those employees who fall within the scope of subsection 170CB(1) – in other words, those employees who are entitled to seek a remedy under the WR Act in respect of harsh, unjust or unreasonable termination of employment.

13. This item proposes that new section 170CCA would apply in respect of such employees so that they would only be able to claim a remedy in respect of harsh, unjust or unreasonable termination under the WR Act. In other words, they would not have access to similar remedies under State legislation. Proposed subsection 170CCA(3) would also preclude employees that have, for reasons of policy, been excluded from applying for a remedy under WR Act or by the *Workplace Relations Regulations 1996* (for example short-term casual and probationary employees) from being able to apply for State termination of remedies.

14. Schedule 7 of the WRLA(MJBP) Bill also proposed the amendment of subsection 152(1A) of the WR Act. Subsection 152(1A) was included in the Act by the *Workplace Relations and Other Legislation Amendment Act 1996* (WROLA Act 1996), and was subsequently amended by the *Workplace Relations and Other Legislation Amendment Act 1997* (WROLA Act 1997).

15. Subsection 152(1A) is intended to as an exception to subsection 152(1), which states that a federal award prevails over a State law or award to the extent of any inconsistency. Subsection 152(1A) was included to ensure that a federal award employee whose employer

was not a constitutional corporation and therefore not able to apply under the WR Act for a remedy in respect of harsh, unjust or unreasonable termination would not be prevented from applying for and unfair dismissal remedy under State law merely because his or her federal award contained a clause concerning termination of employment – in particular, a clause pertaining to termination, change and redundancy.

16. Item 4 of Schedule 7 of the WRLA(MJBP) Bill proposed to amend subsection 152(1A) so that it would not apply to those federal award employees who were eligible to apply under the WR Act for a remedy in respect of harsh, unjust or unreasonable termination.

17. However, since those amendments were proposed, the Department has received legal advice to the effect that, as a result of the limits placed on the Commission's arbitral power by section 89A of the WR Act and associated provisions, federal awards can no longer be said to 'cover the field' with respect of termination of employment. Accordingly, subsection 152(1A) of the WR Act is no longer necessary, and the present Bill proposes its repeal.

Apply for dismissal of a termination application for want of jurisdiction at any time

18. Item 12 would create a new provision, section 170CEA, which would provide that, in certain circumstances, a respondent to an application in respect of termination of employment can seek to have a motion for dismissal of the application for want of jurisdiction dealt with at any time.

19. Where the respondent moves for the dismissal of an application on jurisdictional grounds prior to the matter being referred for conciliation by the Commission, and the respondent has not made a previous jurisdictional objection, new subsection 170CEA(2) would require the Commission to deal with the motion for dismissal before taking any other action in relation to the application, unless the respondent employer indicates that the jurisdictional objection may be dealt with at a later time.

20. Where the respondent moves for the dismissal of an application on jurisdictional grounds, and has done so previously, the Commission must deal with the motion, but new subsection 170CEA(3) would provide that the Commission may do so at any time it considers appropriate. These amendments will ensure certainty and assist in the speedy resolution of applications.

One application per termination

21. New section 170HBA would expressly provide that a further application under section 170CE cannot be made in respect of a termination that has already been the subject of an application under that section.

B. Clarifying Eligibility

BACKGROUND AND POLICY RATIONALE

Recent decisions by the Federal Court and the Commission have given rise to issues concerning the broad scope of the termination of employment provisions – most notably, the ability of independent contractors, and employees who have been demoted, to apply for a remedy in respect of termination of employment.

Independent contractors

2. The intention of the termination of employment provisions of the WR Act, as with those of the former IR Act, is that they should provide a remedy for people in employment relationships, as distinct from independent contractors. This is consistent with the fact that, except in the limited circumstances set out in section 127A, the WR Act generally does not purport to regulate the commercial relationships between parties that contract for the provisions of services. These amendments are new and were not contained in the WRLA(MJBP) Bill.

3. The position on the ability of independent contractors to apply for a remedy in respect of termination of employment was thought to be well-settled, until the Federal Court's judgment in *Konrad v. Victoria Police (State of Victoria) and another*[20] (*Konrad*). In that case, which dealt with the interpretation of the expression 'employee' in the termination of employment provisions of the WR Act, the Court formed the view, after examining the objects of Part VIA of the IR Act and the *Termination of Employment Convention*, *1982* (ILO C158), that it should be should be given a broad definition and not be limited by its common law meaning.

4. In particular, Finklestein J queried whether the traditional distinction between contracts of service and contracts for services was justified, suggesting that the concept of 'employee' included 'dependent' contractors (ie independent contractors who sell their labour to a limited number of providers).

5. In *T Sammartino v Mayne Nickless Express t/a Wards Skyroad,* [21] the Full Bench of the Commission considered the applicability of *Konrad* in the context of the termination of employment provisions of the WR Act, and disagreed that the wider notion of 'employee' identified in *Konrad* included independent contractors. Accordingly, the Commission held that no independent contractor would fall within the meaning of 'employee' in section 170CE.

6. The amendment proposed by the Bill is intended to resolve the confusion caused by *Konrad*, and to reinforce the Commission's view as to the scope of the termination of employment provisions of the WR Act.

Remedies for demoted employees

7. The Bill proposes amendments to clarify the statutory intention in respect of demoted employees. The effect of these amendments will be that, unless the demotion results in a

[20] [1999] FCA 988 Ryan, North and Finkelstein JJ, 6 August 1999.

[21] Print S6212, Munro J, Duncan DP, Jones C, , 23 May 2000.

significant reduction in remuneration, the employee will have to have ended the employment relationship before being able to apply for a remedy in respect of termination of employment.

8. Where the employee experiences a significant reduction in remuneration with the same employer it would be open to him or her to remain in employment and lodge a termination of employment claim or to elect to leave the employment and still be eligible to lodge a termination of employment claim. The amendments will ensure a 'fair go all round' for both employees and employers in relation to demotion.

9. In the context of federal termination of employment provisions, the accepted position was that an employee who had been demoted had to leave his or her employment before being eligible to apply for a remedy. In *Brackenridge v Toyota Motor Corporation Australia Ltd,*[22] the Industrial Relations Court of Australia held that a demotion by the employer did give rise to a remedy under the termination of employment provisions in the federal jurisdiction where the applicant continued to be employed by the respondent.

10. The Court (Wilcox CJ, von Doussa and Marshall JJ), found that the definition of 'termination of employment' under the former IR Act had the same meaning as under the *Termination of Employment Convention* (ILO C158). Following earlier precedent, the Court held that the expression 'termination of employment' under the former IR Act referred to the end of the relationship between the employer and the employee, and therefore did not include the case where the employee had been demoted. In other words, for a remedy to exist under the IR Act, *both* the contract of employment and the employment relationship had to have ended.

11. However, in South Australia and New South Wales, where the relevant legislation uses the expression 'dismissal' rather than 'termination of employment', tribunals have held that an employee who has been demoted and who remains with his or her employer is eligible to apply for a remedy in respect of unfair dismissal.

12. *Advertiser Newspapers P/L v Industrial Relations Commission of South Australia and Grivell* [23] involved an employee who continued to work for the same employer after having been demoted, but who at the same time vigorously protested his demotion. The South Australian Supreme Court distinguished *Brackenridge* on the basis that the termination of employment provisions of the former IR Act differed from those under the *Industrial and Employee Relations Act 1994* (SA) (IERA). The Court concluded that the expression 'dismissal' should not be read as being synonymous with the expression 'termination of employment', as the meaning of the latter expression was affected by the *Termination of Employment Convention, 1982* (ILO C158).

13. As to the meaning of the expression 'dismissal' in the IERA, the Court adopted a 'plain English' meaning of the term. The Court, applying common law principle associated with the law of employment, found that the employer, by demoting Mr Grivell, had committed a repudiatory breach of the contract, and also found that Mr Grivell had not accepted the employer's repudiatory conduct, despite continuing to work for the employer. Hence, Mr Grivell was entitled to apply for an unfair dismissal remedy under the IERA.

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[22] (1996) 142 ALR 99.

[23] [1999] SASC 300, Doyle CJ, Bleby and Martin JJ.

14. *Grivell* was followed by the New South Wales Industrial Relations Commission (NSWIRC), in *Dawson v Northern Rivers Health Service.* [24] As with the IERA, the *Industrial Relations Act 1996* (NSW) is expressed to provide a remedy for (harsh, unfair and unjust) 'dismissal' rather than 'termination of employment'. The NSWIRC, adopting the reasoning in *Grivell*, held that *Brackenridge* did not apply, and the term 'dismissal' in the NSW Act was to be given its plain English meaning.

15. *Brackenridge* dealt with the interpretation of the termination of employment provisions of the former IR Act, which were exclusively based on the Commonwealth's power to make laws with respect to external affairs. The termination of employment provisions of the WR Act, on the other hand, rely on a range of constitutional powers. Although the external affairs power continues to form the basis of the unlawful termination provisions (Subdivisions C, D and E of Division 3 of Part VIA), the provisions relating to harsh, unjust or unreasonable termination do not rely on the external affairs power. These provisions rely on the power of the Commonwealth to make laws with respect to the following subject matters: corporations, trade and commerce, territories, and Commonwealth employment.

16. The issue of whether the expression 'termination of employment' under the WR Act should be interpreted differently given the reduced reliance on the external affairs power has been considered in a number of Commission decisions. For example, Raffaelli C in *Australian Workers' Union v. Rail Services Australia*[25], Raffaelli C queried the applicability of *Brackenridge* in light of *Grivell,* and the fact that, since the amendments to the termination of employment provisions made by the *Workplace Relations and Other Legislation Amendment Act 1996,* the provisions dealing with harsh, unjust or unreasonable termination were no longer based on the Commonwealth's power to make laws with respect to external affairs. In *Boo Hwa Chan v Christmas Island Administration,*[26] Polites SDP did not express a final view on the correctness of *Grivell*, but indicated that, if he were required to do so, he would be inclined to find that *Grivell* applied.

17. The amendment proposed by the Bill is intended to give effect to the legislative intention of the termination of employment provisions, and resolve the apparent conflict between Brackenridge and Grivell. In other words, the amendments will, in respect of most demoted employees, affirm the prior legal position – that is, that there has to be a termination of both the contract of employment, and the employment relationship as a whole, before an employee will be eligible to apply for a remedy in respect of termination of employment. The exception will be employees whose demotion results in a significant reduction in remuneration. They will be able to pursue their claim whilst remaining in employment with their employer.

SUMMARY OF PROVISIONS

Independent contractors

18. Item 8 proposes to insert new subsection 170CD(1A), which will make clear that persons engaged under a contract for services (ie independent contractors) are not entitled to apply for a remedy under the Act in respect of termination of employment.

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[24] NSWIRC, 22 October 1999, Cambridge C.

[25] Print S3359, 29 February 2000.

[26] Print S1443, Polites SDP, 2 December 1999.

Demotion

19. Item 9 proposes to insert new subsection 170CD(1B), which will provide that, for the purposes of the termination of employment provisions of the Act (Division 3 of Part VIA), the expressions 'termination', or 'termination of employment', do not include a demotion in employment if the demotion does not involve a significant reduction in the remuneration of the demoted employee, and the demoted employee remains employed with the employer who effected the demotion.

C. Discouraging unmeritorious applications

BACKGROUND AND POLICY RATIONALE

The unfair dismissal provisions require the striking of a balance between the legitimate rights of employees to be treated fairly and of employers to conduct their operations without unnecessary regulation and interference. One way to help ensure that the balance is fair is to remove incentives for a party to pursue unmeritorious claims or engage in conduct that is merely designed to put pressure on the other party to settle irrespective of the merits of the case. The removal of such incentives also assists applicants who have genuine claims, as the Commission can concentrate on settling those claims, rather than having to spend time and resources 'weeding out' claims without merit.

2. The available evidence suggests that some applicants do attempt to the use the provisions of the Act, which are designed to assist those who genuinely have been treated unfairly, to make ambit claims in the hope that the application will effectively pressure the employer to settle rather than face the costs of defending the action.[27]

3. One factor potentially motivating applicants to pursue such actions is the engagement of legal representatives or other advisers on 'no-win, no-fee' arrangements. These arrangements may both encourage an applicant to pursue a claim on the basis that he or she has nothing to lose because the action does not cost them anything, and encourage advisers to advocate the lodgment and continuation of claims, no matter how speculative. The requirement that advisors and legal practitioners disclose the fact that they are operating on a contingency basis will assist in determining the extent to which these arrangements are encouraging unmeritorious claims.

4. This phenomenon was acknowledged by Senator Murray, in his address to the Industrial Relations Society of New South Wales on 19 May 2000, where he said:

> *...we acknowledge that the unfair dismissals laws are to some degree being abused with speculative claims by employees, sometimes encouraged by lawyers on contingency fees. I have constantly stated the Democrats view that it is necessary to reform process and cost issues in unfair dismissal cases. I think this is an area of law that does need some further refinement to ensure the laws do provide the 'fair go all round' they were designed to deliver.*

5. A number of measures have been included in the Bill to reduce the incentives to pursue unmeritorious, vexatious or frivolous claims. The amendments concerning access to costs will ease the tests as to when costs can be ordered and will ensure they can be ordered in relation to the full range of proceedings under the termination provisions. These amendments have been proposed in response to the uncertainty created by a number of Commission decisions as to whether the provisions concerning costs apply to matters that are ancillary to

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[27] See, for example: evidence to the Senate Employment, Workplace Relations, Small Business and Education Committee Inquiry into the *Workplace Relations Amendment (Unfair Dismissals) Bill* 1998, Hansard, 29/1/99, p.6; Submission No. 399 by the Australian Chamber of Commerce and Industry to the Inquiry into the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, vol. 15, p. 3382.

unfair dismissal applications.[28] Providing the Commission with the power to require applicants to lodge a security for costs will have a similar effect.

6. In addition, the amendments to the conciliation process are designed to ensure that parties have a clearer view of the merits of the case at an early stage of the proceedings.

7. The amendments also address the role of legal representatives and advisers by enabling the Commission to ascertain if an adviser is engaged on a costs or contingency arrangement and prohibiting legal practitioners and advisers from encouraging employees to make or pursue applications that have no reasonable prospect of success.

Conciliation and the outcomes of applications

8. Between 31 December 1996 (the commencement date of the amendments to the termination of employment provisions of the WR Act) and 30 June 2000, 26, 982 applications in respect of termination of employment have been filed in the Commission. Table 3.1 shows that the majority of applications were settled at the conciliation stage, and a substantial minority were withdrawn or discontinued before the commencement of conciliation. Twenty-one per cent of cases were unable to be settled before the end of the conciliation stage, and resulted in a certificate being issued. These statistics underscore the importance of the conciliation process in the claims resolution process.

Table 3.1 – Federal applications for unfair or unlawful termination – 1997 to present

Description	No. of cases	%
Pending for conciliation by AIRC	1824	7%
Dismissed on jurisdictional grounds at preliminary stage	812	3%
Withdrawn or discontinued before conciliation	4738	18%
Settled by conciliation	14038	52%
Certificates issued	5570	21%
Total	**26982**	**100%**

9. Table 3.2 gives a breakdown on outcomes of the twenty-one per cent of applications that resulted in certificates being issued following conciliation (as at 30 June 2000). As can be seen, approximately 60 per cent of these cases were finalised after conciliation, but before arbitration.

Table 3.2 – Federal cases where certificates issued – 1997 to present

Unlawful termination (to be heard by a court)		108
Unfair dismissal	Finalised after conciliation but before arbitration	3284
	Arbitrated	1266
	Yet to be arbitrated	912
Total		**5570**

[28] For example, *Lloyd v International Health & Beauty Aids Pty Ltd t/as Elly Lukas Beauty College* (Print Q5446, 28 August 1998); cf *Curd v Le Pine Funeral Services* (Print Q3959, 24 July 1998).

10. One explanation for the high rate of settlement of claims at the conciliation stage was provided in the course of this Committee's inquiry into the WRA(UD) Bill. During that inquiry, the Committee received evidence that '…many employers settle unfair dismissal cases even where there was no merit in the case in order to avoid additional costs in both time and money to their businesses'.[29] The majority report of the Committee cited evidence from Australian Business Limited, to the following effect:

> *...I would estimate that at least three-quarters* [of the cases dealt with by Australian Business during 1998] *were settled without regard to the question of merit, of relative strength. They were settled on the basis that…it was going to cost X dollars; it could be got out of for a figure somewhat less than X to settle it. Colloquially it is known as 'piss off' money. You get an awful lot of applicants who will try it on in the sure and certain knowledge that they will obtain something. And that is a reflection of a system which is distortionary.*[30]

11. In the Australian Democrats' minority report of the Committee's inquiry, Senator Murray acknowledged '…that there may be deliberate time wasting and cost pressure put on applicants or respondents for tactical reasons.' Accordingly, the Australian Democrats recommended, at 5(a), that:

> *a greater onus needs to be placed on the Commission to establish at the conciliation stage the merits of an employer or employee's case, and to provide preliminary advice accordingly. That might include a warning that in any subsequent award of costs, or decisions as to orders, such preliminary advice might prejudice such costs or orders if the parties ignore advice which is subsequently upheld, or if the matter is not settled by agreement within a reasonable but short period, or if the matter is subsequently contested, and lost by the party which ignores such advice.*

12. This matter was acknowledged by the Leader of the Australian Democrats, Senator Lees, in an address to the Victorian Employers' Chamber of Commerce and Industry on 27 October 1999. There, Senator Lees stated:

> *I think there are still some problems in the way that unfair dismissal applications are dealt with by the Commission. ...But there is some scope at least, to simplify the Commission's proceedings to prevent employers being forced to pay 'hush' money to litigious but unworthy employees.*

13. To improve the effectiveness of conciliation as a process for sifting out of claims without merit, the Bill proposes a range of amendments which will place the onus on the Commission to make a finding at the conciliation stage and prevent applications in respect of harsh, unjust or unreasonable termination from proceeding to arbitration where the Commission is satisfied that an applicant's claim does not have a substantial prospect of success.

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[29] Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of the Provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998,* February 1999, p. 24.

[30] ibid, p. 24.

14. These amendments will enable parties to a case to have a clearer view of the merits of the case at an earlier stage, to reduce pressure to agree to inappropriate settlement outcomes. In other words, the amendments are also designed to focus the conciliation process on the merits of the case, rather than the conciliation being merely a process whereby the parties to the claim haggle over a settlement figure.

15. During the Committee's inquiry into the WRLA(MJBP) Bill, a number of submissions argued that the amendments will result in parties to an unfair dismissal claim being required to 'run a mini hearing' at the conciliation stage.[31] In this regard, it should be noted that the amendment is framed in a way that permits Commission members to run the conciliation process in the manner that they consider most appropriate in the circumstances of the particular case.

Issues arising from the operation of the costs provisions

16. Section 170CJ of the WR Act enables the Commission to order the payment of costs where it is satisfied that an application for a remedy was made vexatiously or without reasonable cause (subsection 170CJ(1)), or where a person has unreasonably failed to discontinue proceedings or agree to a settlement, after the Commission has begun arbitrating (subsection 170CJ(2)), or after an election to proceed to arbitration has been made (subsection 170CJ(3)). The Commission has utilised these provisions to award costs in a number of circumstances against both employers and employees.

17. For example, in *Downes v Albany Printing Machinery Pty Ltd*,[32] an order for costs was made against a respondent employer who had raised a jurisdictional objection to the employee's application, but then withdrawn it. The withdrawal had caused the applicant employee to incur unnecessary costs, and led to a delay in having the matter conciliated. The Commission held that the respondent had acted unreasonably in failing to withdraw the jurisdictional objection.[33]

18. In *McDonald v Melbourne Precast Concrete Panels*[34] costs were awarded to the applicant employee because the employer had unreasonably avoided settlement that could have led to discontinuance of the matter.

19. In *M Blagojevich v Kaplan Services Pty Limited*[35] the Commission (applying the decision of the Federal Court of Australia which had quashed the Commission's previous decision refusing the applicant leave to appeal against the decision of a single member refusing to award costs[36]) held that the respondent employer had acted unreasonably in rejecting the applicant's offer of settlement. This was because the respondent was found to have known, at the time of refusing the offer of settlement, that the evidence that it proposed

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[31] See, for example: Australian Council of Trade Unions, *Submissions,* vol. 19, p. 4456; Australian Mines and Metals Association, *Hansard,* 8 October 1999, EWRSBE, p. 278.

[32] Print P3527, Watson SDP, 25 July 1997.

[33] Further similar examples include *Wibrow v Windsor Hotels* (Print 8287, Whelan C, 22 January 1998); *Brabyn v PJQHA Morgan Investments* (Print P9328, Eames C, 10 March 1998); and *Miotti v Mickless Pty Ltd t/as Zampelis* (Print P8842, Whelan C, 13 February 1998).

[34] Print P8754, Watson SDP, 11 February 1998.

[35] Print S9124, Giudice J, Acton SDP, Whelan C, 15 August 2000.

[36] *Blagojevich v Australian Industrial Relations Commission* [2000] FCA 483, Moore, Marshall and Lehane JJ, 18 April 2000.

to rely on to defend the unfair dismissal claim had been fabricated. The respondent had argued that its refusal to accept the settlement offer was not unreasonable, on the basis that it was more than the maximum amount of compensation that the applicant would have received, had the matter proceeded to arbitration. However, the Commission observed that,

> *[w]hilst an offer of settlement may be pitched so high that its rejection is quite reasonable, all of the circumstances must be taken into account. In this case the level at which the offer was pitched must be considered in light of the real strength of the respondent's case and the fact that the case was to be carried forward by dishonest means.*

20. Costs have also been awarded against employees for similarly unreasonably failing to discontinue proceedings,[37] and for instituting proceedings without reasonable cause.[38]

21. While costs have been awarded in some cases, the Commission has generally adopted a very cautious approach to awarding costs. In applying section 170CJ(1), the Commission has been guided by Court decisions on the interpretation of section 347 of the WR Act (which provides for cost orders to be made in cases other than unlawful termination matters to be made only where a claim is instituted 'vexatiously or without reasonable cause'):

- An application will be found to be instituted vexatiously where the predominant purpose in instituting the proceeding is to harass or embarrass the other party, or to gain a collateral advantage: *Nilsen v Loyal Orange Trust* (11 September 1997, unreported);

- An application instituted 'without reasonable cause' is one in which on the applicant's own version of the facts, it is clear that the proceeding must fail. An application will not be found to be without reasonable cause simply because success depends upon the resolution in the applicant's favour of one or more arguable points of law: *Kanan v Hawkins* (1992) 43 IR 257; and

- The test is a substantial one. Great care must be exercised to ensure that a party is not improperly deprived of the freedom from liability to pay the costs of an opposing party: *Heidt v Chrysler* (1976) 26 FLR 257.

22. A possible difficulty with following Court decisions on section 347 is that the policy underpinning that section is different from the policy underpinning section 170CJ. The policy behind section 347 is to allow parties to institute proceedings without the risk of paying their opponents' costs. The only exceptions to the freedom from liability to pay costs are where proceedings have been instituted vexatiously or where the applicant's case is utterly hopeless. By contrast, section 170CJ contains an express conferral of power to award costs in specified circumstances. Whilst the Commission has noted this distinction (see *Henderson v Mainpoint Enterprises Australia Pty Ltd*, Print Q3750), its approach to costs has reflected the extremely cautious approach of the Federal Court.

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[37] *Cooms v Australian Meat Holdings* (Print P6341, Bacon C, 29 October 1997) and *Four Trade Only Business Forms v Damman* (Print P4296, Watson SDP, 21 August 1997).

[38] For example, *Mainpoint Enterprises (Aust) Pty Ltd v Henderson* (M Print P9204, Foggo C, 2 March 1998); *Dames & Moore v Vincent* (Print 2084, Watson SDP, 19 June 1997); and *Ainslie v Ericsson Australia Pty Ltd* (Print P8061, Williams SDP, 15 January 1998).

23. In applying section 170CJ(2), the Commission has noted that the provision differs from section 170CJ(1) [i.e. section 170CJ(2) refers to 'acted unreasonably' and section 170CJ(1) refers to 'without reasonable cause']. However, for practical purposes, the test is essentially the same. This has tended to undermine the potential for the other circumstances in which costs might be ordered (subsections 170CJ(2) and (3)) to operate as genuine alternatives to s170CJ(1).

24. An applicant will be found to have acted unreasonably in failing to discontinue a matter only if, *upon the facts apparent to the applicant at the relevant time*, there was not a substantial prospect of success. The fact that the Commission does not prefer the applicant's version of the facts or finds that the applicant's understanding of the facts is not reasonably held does not mean that the applicant will be found to have acted unreasonably in failing to discontinue a matter (see *Stagno v Frews Wholesale Meats*[39]).

25. The Commission has also held that, in the absence of an adverse finding about an applicant's credit in giving evidence during arbitration, it is not unreasonable for an applicant to continue to arbitration even when the Commission issued a certificate stating, '[s]hould the evidence support the position outlined by the respondent the application…does not have substantial merit' (see *I McKenzie and McDonald Murholme v Meran Rise Pty Ltd t/as Nu Force Security Services*[40]).

26. In relation to elements of proceedings ancillary to applications in respect of termination of employment, the Commission has been much less clear on the scope for costs to be awarded. In *Lloyd v International Health & Beauty Aids Pty Ltd t/as Elly Lukas Beauty College*,[41] a Full Bench held that a section 170CJ application for costs could not be made in respect of termination of employment appeals under section 45. By contrast, in an earlier decision, *Curd v Le Pine Funeral Services*,[42] Smith C adopted a broad approach in construing the term 'matter' in section 170CJ(2) and found that hearings in relation to costs could themselves be the subject of a costs claim.

27. The amendments proposed by the Bill to the costs provisions will resolve these difficulties by giving the Commission greater power to award costs against parties where the circumstances warrant.

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[39] Print Q8637, Munro J, Duncan DP, Jones C, 12 November 1998.

[40] Print S4692, Giudice J, Watson SDP, and Whelan C, 7 April 2000.

[41] Print Q5446, Ross VP, Watson SDP, and Whelan C, 28 August 1998.

[42] Print Q3959, Smith C, 24 July 1998.

Ability of the Commission to order costs against third parties

28. The issue of the Commission's power to award costs against representatives of applicants has also arisen in a number of cases, most recently in *I McKenzie and McDonald Murholme v Meran Rise Pty Ltd t/as Nu Force Security Services.*[43] In that case, the Full Bench of the Commission observed that the WR Act did not make reference to a power to award costs against a representative of a party, and noted that '…we doubt whether there is such a power unless it can be said to be a necessary incident of the power to award costs against a party.' The Commission then stated:

> *We think it proper to point out that because of the manner in which Mr McKenzie's application has been prosecuted the respondent has been put to a significant amount of trouble and expense. This is to be deplored. …We have little doubt that in the civil courts the respondent would have recovered costs against Mr McKenzie and against Mr McKenzie's solicitors personally. As we have pointed out, however, the Commission's power to award costs in termination of employment cases is limited by the terms of s.170CJ.* ***What has occurred in this case indicates that a reconsideration of the limits currently imposed by s.170CJ may be desirable in the interests of justice*** [emphasis added].

29. Conferring power on the Commission to award costs against third parties could amount to an exercise of judicial power by a body other than a court. This is because the imposition of costs on account of improper conduct by a third party involves the imposition of a penalty, as distinct from the power to award costs against an unsuccessful party.

30. Accordingly, the Bill proposes to introduce new Subdivision G, to allow parties to a claim in respect of harsh, unjust or unreasonable termination of employment to apply to the Federal Court of Australia for a penalty against an adviser who encourages an applicant to institute or pursue a speculative or unmeritorious claim. This amendment is designed to meet the Commission's concerns in relation to its inability to award costs against third parties, in a manner that does not involve the exercise of judicial power by the Commission.

Regulating the role of advisers

31. In the Senate inquiry into the WRLA(UD) Bill, a number of employer associations claimed that the WR Act encouraged the unnecessary engagement of legal representatives in unfair dismissal claims, particularly in the pre-arbitration stage, and that this has made the process unnecessarily legalistic.

32. In particular, the use of costs agreements and 'no win, no fee' arrangements was thought to encourage applicants to continue proceedings rather than reach reasonable settlements. Settlement amounts may also be increased because of the engagement of legal representation, and so the incurring of costs, at the pre-arbitration stage. This places burdens on respondent employers, particularly small business employers. During this Committee's Inquiry into the WRLA(MJBP) Bill, witnesses appearing on behalf of the Victorian Automobile Chamber of Commerce noted:

> *Small businesses such as those that we represent generally are employers who work their way up through the trades themselves. They run a small shop,*

[43] Print S4692, Giudice J, Watson SDP, and Whelan C, 7 April 2000.

> *perhaps a panel beating shop or something like that, where they are actually out there doing the work alongside their staff. There really is no-one there to run or manage the business whilst they are absent, so they are really keen to resolve the matter as quickly as possible. It usually involves settling on something, and it usually means settling on a sum, particularly if those applicants are represented by consultants or lawyers, to the satisfaction that they will be able to pay their legal fees as the first priority, and then receive a minimum of whatever that may be.*[44]

33. This Committee, during its Inquiry into the WRA(UD) Bill, also heard evidence of employers settling unfair dismissal cases without regard to the merits of the case, in order to avoid additional costs in both time and money to their businesses associated with defending claims in further proceedings. In addition, there was evidence of parties to an unfair dismissal claim deliberately abusing the process for tactical reasons.[45]

34. In the Australian Democrats' Minority report of that Inquiry, Senator Murray's recommendations included:

> *5 (b) if either party, in the opinion of the Commission, is abusing the process, deliberately wasting time or deliberately applying costs pressures, the Commission should be given the power to award costs against that party's legal practitioners, or those advising the applicant and respondent, which should be specifically precluded from recovery from the client.*
>
> *(c) cases being conducted on a 'no win, no fee, contingency' basis should be made a matter of public record.*
>
> *(d) the Commission must have regard to disciplining any legal firm whose ethical approach is coloured by commercial predation.*

35. These recommendations led to the inclusion in the WRLA(MJBP) Bill, and in the present Bill, of the following amendments:

- New section 170CIA – which would require the Commission to ask representatives of parties to an proceeding for a remedy in respect of harsh, unjust or unreasonable termination whether they are engaged on a 'costs arrangement' or, in the case of a legal practitioner, a 'contingency fee agreement'; and
- New Subdivision G, which would allow parties to apply to the Federal Court of Australia for a remedy against an adviser who has encouraged an applicant to institute, or pursue, a speculative or unmeritorious claim in respect of harsh, unjust or unreasonable termination.

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[44] Evidence, Mrs Leyla Yilmaz, 7 October 1999, EWRSBE 187.

[45] Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of the Provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998,* Feburary 1999, p. 24.

SUMMARY OF PROVISIONS

New arrangements regarding conciliation

36. Items 13 to 22 of the Bill propose to introduce a new process in relation to progress to arbitration by the Commission of an application for a remedy in respect of harsh, unjust or unreasonable (i.e. unfair) termination of employment.

37. There is a significant difference between the amendments in the present Bill, and those proposed by the WRLA(MJBP) Bill. The amendments proposed by the WRLA(MJBP) Bill would have prevented an applicant for a remedy in respect of harsh, unjust or unreasonable termination from proceeding to arbitration on that ground where the Commission had certified that, on the balance of probabilities, the application was unlikely to succeed at arbitration. The Government has revised these provisions, in part, to take into account views arising from the Senate committee hearings and reports in 1999, and subsequent consultations.

38. The amendments in the present Bill would still require the Commission to make an initial assessment of whether the application (to the extent that it deals with the ground of harsh, unjust or unreasonable termination) is, on the balance of probabilities, likely to succeed at arbitration. However, if the Commission finds that the application is not likely to succeed, it must provide the applicant with an opportunity to provide further information in support of the ground of harsh, unjust or unreasonable termination. If the applicant does not provide that further information, or if, after consideration of that additional material, the Commission concludes that the applicant has a substantial prospect of being unsuccessful at arbitration, it must issue a certificate to that effect. If the Commission issues a certificate, then the application will taken to be dismissed from the date of the certificate.

Requirements of the Commission's certificate

39. Item 13 proposes new requirements for conciliation certificates, which vary according to whether the application includes grounds for unlawful or harsh, unjust or unreasonable termination, or a mixture of both.

40. This item would create a new provision, paragraph 170CF(2)(aa), which would require the conciliation certificate in respect of an application under paragraph 170CE(1)(a) (that is, a claim for a remedy in respect of harsh, unjust or unreasonable termination) to state whether, on the balance of probabilities, the applicant's claim in respect of harsh, unjust or unreasonable termination is likely to succeed.

41. In addition, new paragraph 170CF(2)(b) would require the Commission, in respect of grounds other than that of harsh, unjust or unreasonable termination, to indicate to the parties its assessment of the merits of the application insofar as it relates to that other ground or grounds. This provision is necessary because the requirements of the conciliation certificate will vary according to the grounds of complaint; items 13 – 22 would not change certificate requirements in respect of allegations of unlawful termination.

42. Item 14 proposes to insert new subsections 170CF(3), (4) and (5), which will apply where the Commission has indicated, pursuant to paragraph 170CF(2)(aa), that, on the balance of probabilities, an application in respect of harsh, unjust or unreasonable termination is unlikely to succeed.

43. New subsection 170CF(3) will require the Commission to invite the applicant to provide further information in support of that ground within the period specified by the Commission. If the applicant does not provide further information, or, after consideration of that additional material, the Commission concludes that the applicant has a substantial prospect of being unsuccessful at arbitration, subsection 170CF(4) will require it to issue a certificate to that effect. New subsection 170CF(5) will provide that the application (to the extent that it deals with the ground of harsh, unjust or unreasonable termination) is dismissed, with effect from the date of the issue of the certificate.

Electing to proceed to arbitration

44. Items 15 to 22 of the Bill would outline the next step after conciliation for the various types of applications that can be lodged under section 170CE and the different types of findings in the new conciliation certificate. In summary, where any certificate deals with the ground referred to in paragraph 170CE(1)(a), the Commission must find either that, on the balance of probabilities, the applicant is likely to succeed at arbitration in respect of the unfair dismissal claim, or alternatively, that the applicant does not have a substantial prospect of being unsuccessful at arbitration. If the Commission finds that the applicant is, on the balance of probabilities, unlikely to succeed, or (where the applicant provides further information) that the application has a substantial prospect of being unsuccessful, the unfair dismissal aspects of the application will be taken to be dismissed from the date that the certificate was issued.

45. Item 15 would replace existing subsection 170CFA(1) with a new provision, which would apply where the Commission indicates that, on the balance of probabilities, the applicant is likely to succeed in arbitration on the ground referred to in paragraph 170CE(1)(a) (that is, that the termination was harsh, unjust or unreasonable). In that circumstance, the applicant can elect either to proceed to arbitration to determine whether the dismissal was harsh, unjust or unreasonable, or to discontinue the application.

46. Item 16 would amend existing subsection 170CFA(2), which details an applicant's options once a certificate has been issued following the unsuccessful conciliation of an application concerning both harsh, unjust or unreasonable termination (that is, under paragraph 170CE(1)(a)) and alleged contravention requirements for provision of notice of termination in section 170CM. Where the certificate states that, on the balance of probabilities, the applicant's claim in respect of the ground of harsh, unjust or unreasonable termination is likely to succeed, the applicant's options remain the same as those under the existing provisions. In other words, the applicant can either:

- proceed to arbitration to determine whether the termination was harsh, unjust or unreasonable; and/or
- begin proceedings in a court of competent jurisdiction in respect of the alleged contravention of section 170CM; or
- not pursue either ground of the application.

47. Item 17 would insert new subsection 170CFA(2A), which would apply where the Commission's conciliation certificate identifies the grounds of harsh, unjust or unreasonable termination and the failure to provide notice in accordance with section 170CM as grounds where conciliation is unlikely to be unsuccessful, and where the Commission subsequently

concludes in a certificate given under new subsection 170CF(4) that the applicant's claim in respect of the ground of harsh, unjust or unreasonable termination has a substantial prospect of being unsuccessful at arbitration. In this circumstance, the applicant would only be able to begin proceedings in a court of competent jurisdiction in respect of the section 170CM aspect of the application, with the other aspect of the complaint being taken to have been dismissed from the date of the issue of the subsection 170CF(4) certificate.

48. Item 18 would amend existing subsection 170CFA(3), which details an applicant's options once a certificate has been issued following the unsuccessful conciliation of an application concerning both harsh, unjust or unreasonable termination and alleged contravention of sections 170CK, 170CL or 170CN (all of which are grounds of unlawful termination). In this situation, where the certificate states that the applicant is likely to succeed in arbitration in relation to the ground of harsh, unjust or unreasonable termination, the applicant would be able to elect to proceed to arbitration to determine whether the dismissal was harsh, unjust or unreasonable, or to begin proceedings in the Federal Court of Australia in respect of the alleged contraventions of one or more of sections 170CK, 170CL or 170CN. Alternatively, the applicant can elect not to pursue either aspect of the application.

49. Item 19 proposes to insert new subsection 170CFA(3A), which would apply where the Commission's conciliation certificate identifies the same grounds as those mentioned in subsection 170CFA(3) as grounds where conciliation is likely to be unsuccessful, and where the Commission subsequently concludes in a certificate given under new subsection 170CF(4) that the applicant's claim in respect of harsh, unjust or unreasonable termination has a substantial prospect of being unsuccessful at arbitration. In this circumstance, the applicant could elect to commence proceedings in the Federal Court of Australia in respect of the unlawful termination aspects of the application. The aspect of the application pertaining to harsh, unjust or unreasonable termination would be taken to be dismissed from the date of the subsection 170CF(4) certificate.

50. Item 20 would amend existing subsection 170CFA(5), which details an applicant's options once a certificate has been issued following the unsuccessful conciliation of an application concerning both harsh, unjust or unreasonable termination, alleged contravention of the notice provisions in section 170CM, and one or more of the other unlawful termination provisions. In this situation, where the Commission's certificate states that the applicant is likely to succeed at arbitration on the ground of harsh, unjust or unreasonable termination, the applicant can:

- elect to have the harsh, unjust or unreasonable termination ground of the application arbitrated by the Commission and do nothing else; or
- elect to have the harsh, unjust or unreasonable termination ground of the application arbitrated by the Commission, and apply to a court of competent jurisdiction for an order in respect of the alleged contravention of the requirement to provide notice of termination or compensation in lieu (section 170CM); or
- apply to the Federal Court of Australia for a remedy in respect of the alleged contravention of one or more of sections 170CK, 170CL or 170CN, as well as a remedy in respect of the contravention of section 170CM; or
- do none of the above.

51. Item 21 proposes to insert new subsection 170CFA(5A), which would apply in the situation where the conciliation certificate identifies the same grounds as those mentioned in subsection 170CFA(5) as grounds where conciliation is likely to be unsuccessful and where the Commission subsequently concludes in a certificate given under new subsection 170CF(4) that the applicant's claim in respect of harsh, unjust or unreasonable termination has a substantial prospect of being unsuccessful at arbitration. In these circumstances, the applicant would only be able to elect whether to proceed in respect of unlawful termination aspects of the application, and the application, to the extent that it deals with the ground of harsh, unjust or unreasonable termination, would be taken to have been dismissed from the date of the subsection 170CF(4) certificate.

52. Item 22 proposes consequential amendments to subsections 170CFA(6) and (7), to reflect the inclusion of new subsections 170CFA(2A), 170CFA(3A) and 170CFA(5A).

Additional powers of the Commission

53. Item 30 proposes to insert new section 170CIB, which would allow the Commission to dismiss an application under section 170CE where the applicant fails to attend a proceeding. The Commission would be required to give the applicant a reasonable opportunity to be heard prior to dismissing the application.

Amendments in relation to costs

New tests for awarding of costs by the Commission

54. Items 31 to 33 propose amendments that would make costs more readily available in respect of frivolous or vexatious claims.

55. Item 31 would insert new tests to determine liability for costs and simplify existing tests so that both employees and employers can more easily obtain costs where proceedings in relation to termination of employment matters are instituted without merit.

56. The item proposes to amend subsection 170CJ(2) to allow the Commission to award costs where it should have been reasonably apparent to the party that commenced a proceeding that that proceeding did not have a substantial prospect of success. The test is not as onerous as that contained in existing subsection 170CJ(1), which requires the party applying for costs to demonstrate that the proceedings were 'vexatious or without reasonable cause'.

57. The existing test for the award of costs in subsection 170CJ(2) (that is, that the Commission is satisfied that a party to the proceeding has acted unreasonably in failing to discontinue a matter, or to agree to terms of settlement that would lead to discontinuance of the matter) would be place in new subsection 170CJ(3), minus the requirement that the Commission must have begun arbitrating an application under section 170CE.

58. Proposed subsection 170CJ(4) would introduce an avenue for obtaining costs where an unreasonable act or omission of a party caused the other party to the proceedings to incur costs (for example, withdrawing an application at an unreasonably late time).

59. It is worth noting that the Bill proposes to amend subsection 170CJ so that liability for costs can mostly be determined under each test in relation to any Commission proceeding that

may arise in relation to an application for a remedy in respect of termination of employment. Item 33 would reinforce this intention by adding a list of the types of proceedings contemplated by this amendment.

Security for costs

60. Items 4 and 34 would confer power on the Commission in its discretion to order a person bringing an application in respect of termination of employment to provide security in the event that costs are awarded against that person. Where security was not provided, the Commission would have power to dismiss the application.

61. The Commission may only make an order in exceptional circumstances. This is different from the version of the amendment contained in Schedule 7 of the WRLA(MJBP) Bill, which did not impose any conditions on the exercise of the Commission's discretion to order security for costs. The Government would anticipate this power being used sparingly by the Commission, and only as the case requires in the Commission discretion. The issue for Parliament is, however, that in the absence of such a power the orders cannot be made in any case without statutory amendment.

62. Item 4 confers power on the President of the Commission to make rules relating to the provision of that security.

Regulating the role of advisers

Contingency fee arrangements

63. Item 30 proposes to introduce a new requirement that representatives for either side that have a costs agreement in place in relation to termination of employment proceedings disclose that arrangement to the Commission. This requirement in new section 170CIA would apply to both members of the legal profession and other types of advisers.

Prohibition on encouragement of unmeritorious or speculative claims

64. Item 40 would add a new Subdivision G to Division 3 of Part VIA of the WR Act, that would allow the Federal Court to award a penalty against an adviser for encouraging a party to pursue an unmeritorious or speculative application for a remedy in respect of harsh, unjust or unreasonable termination.

65. Such an application will be able to be made by an applicant for a remedy in respect of harsh, unjust or unreasonable termination, a respondent to such an application, or the Minister. The test for determining liability (in new section 170HE) is, if on the facts that have been disclosed or that ought reasonably to have been apparent to the adviser, the adviser should have been, or should have become, aware that the application had no reasonable prospect of success. Under new section 170HG, once the applicant has established a prima facie case that there has been a contravention, the adviser would bear the onus of showing that the criteria in section 170HE have not been satisfied.

66. The scope of proposed Subdivision G is narrower than that proposed by item 33 of Schedule 7 of the WRLA(MJBP) Bill. The provisions in the WRLA(MJBP) Bill were expressed to apply to all advisers, including 'volunteers'. The amendments in the present Bill meet concerns raised in this regard by being framed so that they effectively apply only to

advisers who are engaged for a fee or reward to represent an applicant in an application in respect of harsh, unjust or unreasonable termination.

D. Additional criteria for deciding unfair dismissal applications

BACKGROUND AND POLICY RATIONALE

Unfair dismissal claims can be a particular burden upon certain types of businesses, especially small businesses, and in certain circumstances. The Bill contains a number of provisions to assist in reducing such special burdens.

2. Crucial amongst these is the proposal to require the Commission when determining whether a termination was harsh, unjust or unreasonable to have regard to the size of an employer's operations and the degree to which this would be likely to affect the procedures followed by the employer. This amendment is the same as that which was proposed in Schedule 7 of the WRLA(MJBP) Bill.

3. The small business sector has held longstanding concerns in respect of its capacity to effectively participate in Commission processes. *Time for Business*, the 1996 report of the Small Business Deregulation Task Force, identified that small business found the Commission was not user friendly or tailored to their needs. For example, the formal nature of its proceedings and documentation made it difficult to participate in Commission's processes. In addition, little or no account was taken of the circumstances in which small businesses find themselves as employers. Unlike large employers, they do not generally have regular access to the legal expertise in fields ranging from common law to workers compensation when dealing with employment-related matters in the workplace.

4. In deciding whether a termination was harsh, unjust or unreasonable the Commission must have regard to various matters. The Bill adds the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination as an additional matter to be considered. In doing so, the Bill responds to small business concerns that the size of their operation, in particular the general lack of a comprehensive human resources function, is taken into account in the Commission's decision-making.

5. The Small Business Coalition is unanimously supportive of the amendments in the Bill, particularly the requirement that the Commission should have regard to the size of an employer's operations when determining whether a termination was harsh, unjust or unreasonable. The Coalition has stated that 'the proposals contained in the Bill, in our view, are constructive, valid and consistent with the concept of a 'fair go all round''.[46] (See Appendix 3.1 for the Coalition's full Policy Statement).

6. This amendment was supported by a number of organisations who participated in the Committee's inquiry into the WRLA(MJBP) Bill. For example, the Australian Catholic Commission for Employment Relation (ACCER), in expressing its support for the amendment, stated:

> *The ACCER supports the requirement to take into account the size of the employer's business when examining the procedures followed in the termination of an employee. As an example, the Explanatory Memorandum states that the Commission should take into account the fact that a small business does not have a human resources function. This recognises the*

[46] Policy Statement of the Small Business Coalition, 17 August 2000.

> *reality of different workplaces. It is misguided to expect the same degree of procedural documentation from a small business as from a larger enterprise, especially where the former would not have in-house employment advisers. However, the principle of procedural fairness should apply, irrespective of the size of the employer.*[47]

7. Termination on the ground of operational requirements is a particular situation in which it is inappropriate for there to be scope for unfair dismissal claims to be made. Such situations of redundancy are difficult for employers and employees alike and if an employer establishes that terminations were genuinely required for operational reasons, the employer should not then be required to justify the fairness of those terminations in the Commission. The proposed amendments would preclude the Commission from making a finding that the termination of an employee or group of employees was harsh, unjust or unreasonable where the respondent employer establishes that the employment was terminated on the ground of the operational requirements of the employer's business, unless the circumstances are exceptional.

8. This amendment differs to the amendment proposed in the WRLA(MJBP) Bill in two respects; these changes are designed to address concerns raised by the Australian Democrats in relation to this amendment. Firstly, the WRLA(MJBP) Bill would have prevented the Commission from finding that a termination was harsh, unjust or unreasonable where operational requirements was one of the grounds of termination. The present Bill provides that the prohibition on the Commission finding that a termination was harsh, unjust or unreasonable will apply only where the employer establishes that the reason for termination was operational requirements. The last phrase 'unless the circumstances are exceptional' is also new.

9. If the employer, when terminating an employee's employment on the ground of operational requirements, also relies on a prohibited ground such as race, sex or age, union membership or non-membership, then an employee would still be able to obtain a remedy under Subdivision C of Division III of Part VIA of the WR Act under these amendments. In this context, it is appropriate that a termination genuinely on the ground of operational requirements, in the absence of other motives, should not be susceptible to challenge on the basis that it is harsh, unjust or reasonable.

10. The amendments concerning scope for applications to be made out of time are intended to reflect a test for extensions of time similar to the test that applied under the former IR Act. Though the wording of the provisions dealing with extensions of time was amended by the WROLA Act 1996, it was not intended that the Commission would take a more generous approach than that which applied under the former IR Act. Accordingly, this amendment proposes to clarify in what circumstances out of time applications should be accepted.

11. The leading case under the previous Act was *Brodie-Hanns v MTV Publishing Limited*[48] where the Industrial Relations Court held that the time limit should be complied with unless there is an acceptable explanation of the delay that makes it equitable to extend it. In particular, the Court noted that considerations of fairness, although relevant to the exercise of its discretion, were not in themselves decisive.

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[47] Submission, Australian Catholic Commission for Employment Relations, vol. 4, p. 746.

[48] (1995) 67 IR 298.

12. In *Kornicki v Telstra Network Technology Group*[49] the Full Bench of the Commission noted the different language chosen by Parliament in enacting subsection 170CE(8) of the WR Act to that which appeared in subsection 170EA(3) of the former IR Act and considered this to be indicative of a legislative intention that a broader approach be taken to the exercise of the discretion to accept an application that is lodged out of time. *Kornicki* has since been regularly applied by the Commission.

13. This broader approach has the potential to undermine the effectiveness of the time limits provided by the Act and so increases the uncertainty for employers in regard to termination. This is particularly a problem for small businesses that are less likely to have or to maintain the written records that can be necessary to assist in making their case before the tribunal; when an extension of time is granted it may exacerbate the difficulties for such an employer in providing evidence to support their case. The proposed amendments are the same as those proposed in Schedule 7 of the WRLA(MJBP) Bill except that they make it clearer that the criteria to which the Commission can have regard are derived from principles employed by the Industrial Relations Court of Australia in *Brodie-Hanns v MTV Publishing Ltd*.

Compensation for shock, humiliation and distress

14. The Bill proposes amendments to make clear that the Commission cannot include in an amount to be paid to an employee in lieu of reinstatement a component by way of compensation for shock, humiliation or distress arising from the manner of the termination. It was not the intention of the 1996 amendments that such compensation would be available in the federal jurisdiction.

15. It is the Government's view that the remedies in respect of termination of employment should either be either reinstatement, or compensation in lieu of reinstatement (that is, subject to the statutory limits, compensation for remuneration lost as a result of the termination and an amount in recognition of the finding by the Commission that the termination was harsh, unjust or unreasonable). To ensure consistency in dealing with termination of employment claims the Bill also proposes amendments to preclude the Federal Court of Australia from awarding compensation for shock, humiliation and distress arising from the manner of termination.

16. This matter was highlighted in the recent decision of the Commission in *Coms21 v Liu &Others,*[50] a Full Bench considered an employer's appeal against a decision by Commissioner Lawson. Lawson C had ordered, amongst other things, that each applicant in an unfair dismissal case receive $4 000 compensation for shock, humiliation and distress. The Full Bench upheld the original decision on the question of law, but found that none of the applicants had produced enough evidence to warrant compensation for shock, humiliation and distress.

17. The Full Bench referred to a decision by the Industrial Relations Court of Australia (IRCA) in *Burazin v Blacktown City Guardian*[51] where compensation for shock and humiliation was awarded in an unlawful termination matter lodged under the former IR Act. The Full Bench applied *Burazin* to the current case, taking the view that the WR Act would

[49] Print P3168, Ross VP, Watson SDP, Gay C, 22 July 1997.

[50] Print S3571, Giudice J, Duncan DP, Larkin C, 25 February 2000.

[51] (1996) 142 ALR 144

have expressly over-ruled *Burazin* if it was intended that compensation for shock, humiliation and distress should not be available.

SUMMARY OF PROVISIONS

Termination on the ground of operational requirements

18. Item 27 proposes the insertion of new subsection 170CG(4). This amendment would preclude the Commission from making a finding that the termination of an employee or group of employees was harsh, unjust or unreasonable where the respondent employer establishes that the employment was terminated on the ground of the operational requirements of the employer's undertaking, establishment or service, unless the circumstances are exceptional.

19. An employee who claims that his or her selection for redundancy was for a prohibited reason [that is, in contravention of a ground or grounds in subsection 170CK(2)] would not be prevented from seeking relief in the Federal Court of Australia for a remedy in respect of unlawful termination.

20. Item 25 proposes the removal from paragraph 170CG (3)(a) of the reference to a valid reason for termination based on the operational requirements of the employer's undertaking, establishment or service. This is consequential upon the amendment proposed by item 27.

Size of employer's establishment

21. Item 26 proposes to add to the matters to which the Commission must have regard in determining whether a termination was harsh, unjust or unreasonable. In addition to the other matters listed in subsection 170CG(3), the Commission would also be required to have regard to the degree to which the size of the employer's undertaking, establishment or service would be likely to have on the procedures followed in effecting the termination.

Criteria for accepting out-of-time applications

22. Item 11 proposes the repeal of the existing subsection 170CE(8), and the insertion of new subsections 170CE(8) and (8A).

23. Proposed subsection 170CE(8) would change the current test for accepting applications lodged out of time from requiring an assessment of whether 'it would be unfair not to do so' to whether 'it would be equitable to accept the application'.

24. Proposed subsection 170CE(8A) requires the Commission, in determining whether it would be equitable to accept an out-of-time application, to have regard only to the matters contained in the provision.

25. Item 36 proposes to amend the existing provisions pertaining to the discretion of the Federal Court to grant an extension of time to an applicant to lodge an application for a remedy in respect of unlawful termination.

26. The proposed new test (which is that the Court must be satisfied that it would be 'equitable' to accept the application), and the criteria to which the Federal Court is to have regard, are similar to those proposed by item 11.

No compensation for shock, distress and humiliation

27. Item 29 proposes to insert new subsection 170CH(7) into the Act. This provision would preclude the Commission from including in an amount to be paid to an employee in lieu of reinstatement a component by way of compensation for shock, humiliation, distress or other analogous hurt, caused by the manner of terminating the employee's employment.

28. Item 28 proposes an amendment to subsection 170CH(7); this amendment is consequential upon the inclusion of new subsection 170CH(7A) by item 29.

29. Item 38 also proposes amendments to section 170CR to preclude the Federal Court of Australia from awarding compensation for shock, humiliation and distress or other analogous hurt arising from the manner of termination.

Appendix 3.1

Workplace Relations Amendment (Termination of Employment) Bill 2000

Small Business Coalition Policy

August 2000

The Coalition is supportive of amendments to the Workplace Relations Act to maximise flexibilities, particularly for small employers, when confronted with an unfair dismissal claim. The amendments contained in this Bill in our view is consistent with maximising flexibilities and further is consistent with Small Business Coalition policy.

The proposals contained in the Bill, in our view are constructive, valid and consistent with the concept of 'fair go all round'. Further, the amendments, if passed, will in a long way address procedural difficulties that were identified during the inquiry by the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee into the More Jobs, Better Pay Bill 1999.

The amendments referred to are:

- The requirement of the Commission to consider the size of the business in terms of any effect on the procedures in a termination
- Commission to dismiss the application where the applicant does not show for proceedings
- Removal of a genuine redundancy from unfair dismissal provisions
- Limitations to acceptance of out of time applications
- Review of the provisions relating to costs orders and their tests
- Exclusion of independent contractors from the unfair dismissal procedures
- Removal of a demotion from the definition of a termination of employment
- Introduction of an opportunity to make a motion to dismiss the application at any time during the proceedings
- Amendments to the section relating to issuing of certificates
- Exclusion of compensation for shock, humiliation, distress or other hurt caused by the termination.
- Disclosure of contingency payments

The above amendments have the unanimous support of the Small Business Coalition.

4. Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000

BACKGROUND

The WR Act introduced a new form of individual agreement, Australian Workplace Agreements (AWAs), to provide more effective choice and flexibility for employers and employees in reaching agreements. Like certified agreements (CAs), AWAs meet the objective of placing primary responsibility for workplace relations and terms and conditions with employers and employees at the workplace. AWAs may be negotiated with employees on an individual or collective basis (but must be signed individually).

2. The policy underpinning the agreement making provisions of the WR Act was summarised by the then Minister for Industrial Relations in his Second Reading Speech on the *Workplace Relations and Other Legislative Amendments Bill 1996* as follows:

> *... under the Bill, the options for agreement-making will be significantly expanded and simplified. Employers and employees in the federal jurisdiction will be able to choose whether they want informal overaward arrangements, or whether they want to formalise their agreements.*
>
> *For those who want formalised individual agreements, we have provided Australian Workplace Agreements (AWAs).*[52]

3. Key safeguards and protections for employees which currently apply when making AWAs include:

- AWAs cannot be made without the genuine consent of the employee concerned;
- It is unlawful to dismiss an employee for refusing to negotiate in connection with, make, sign, extend, vary or terminate an AWA;[53]
- It is also unlawful to apply duress in connection with an AWA[54] or to make false or misleading statements in relation to an AWA, for the purposes of encouraging another person to enter into an AWA;
- Employers must provide employees with a copy of an information statement prepared by the EA as well as an explanation of the proposed agreement in relation to which their approval is sought;
- Employees may choose to have their interests represented by organisations (or by other persons) as bargaining agents when making AWAs;
- Like CAs, AWAs must pass a no-disadvantage test (NDT).[55] The test is global in nature and is designed to provide workplace flexibility as well as a fair benchmark for wages and conditions;

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[52] House of Representatives Hansard, 23 May 1996, p1300

[53] Paragraph 170CK(2)(g).

[54] Paragraph 170WG

- Anti-discrimination provisions and freedom of association protections apply to AWAs;[56] and

- AWAs must contain dispute resolution procedures.

4. In addition, under the current framework for making AWAs, an employer must declare whether or not they have offered an AWA in the same terms to all comparable employees. If they have not done so, they must show that they did not act unfairly or unreasonably in failing to do so[57]. Protected industrial action, which confers certain legal immunity, can be taken in support of claims for AWAs, but industrial action cannot be taken during the nominal life of an agreement.

5. The Act provides for formal, independent approval processes for AWAs and the variation, extension or termination of such agreements[58]. The Office of the Employment Advocate (OEA) was established to facilitate the operation of AWAs, as well as to foster proper understanding and application of the opportunities, rights and obligations provided for by the WR Act.

6. Currently, employees must be given either 5 days (in the case of new employees) or 14 days (in the case of existing employees) to consider an AWA before it can be signed and forwarded to the OEA for filing. AWAs must be filed with the OEA before the agreement is then subsequently approved or rejected by the OEA. In order to be filed, the AWA must be signed by both employee and employer after the waiting period has elapsed, and in the presence of witnesses. Employees must receive an information package from the OEA while considering the agreement, informing them of their rights. Other statutory requirements must also be satisfied.[59] The OEA issues a filing receipt for the agreement once it has ensured that the necessary statutory requirements for filing the AWA have been met.

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[55] An agreement passes the no-disadvantage test if its approval would not result, on balance, in a reduction in the overall terms and conditions of employment of the relevant employee under any federal or State award that applies to the employee or has been designated for the purposes of the test and any relevant federal, State or Territory law - see s.170XA of the WR Act. In the case of the requirement that an AWA pass the 'no-disadvantage test', if the EA has concerns about whether the test is satisfied, and those concerns cannot be resolved by action by the parties, the EA must refer the AWA to the Australian Industrial Relations Commission to determine whether the AWA passes the test [s. 170VPB(3)]. The Commission must approve AWAs that it considers pass the test and must also approve AWAs that do not pass the test if their approval would not be contrary to the public interest [s170VPG(4)].

[56] AWAs must include an anti-discrimination clause to safeguard against discrimination on the same grounds as those applicable in respect of certified agreements.

[57] Subsection 170VPA(1)(e).

[58] Sections 170V0, 170VPA, 170VPB, 170VPC, 170VPG and 170VPH.

[59] Sections 170VO, 170VG and 170VPA.

7. After a filing receipt has been issued by the OEA, the OEA determines whether the AWA meets the additional approval requirements[60] which include whether the employee genuinely consented to making the agreement (a letter (or other form of contact) is sent from the EA to the employee on this issue.). The agreement is also assessed against the relevant or designated award[61] for the purposes of the NDT to determine whether it should be approved or not. Where the OEA has concerns over the agreement, it can request undertakings from the parties to address concerns it has over the proposed agreement. If the EA is still not satisfied the agreement should be approved, it can be referred by the EA to the Commission for further consideration to determine if it passes the NDT. In some cases, the Commission can still proceed to pass the AWA on public interest grounds, even if it does not meet the NDT. After the agreement is approved, an approval certificate is issued by the EA or the Commission.

8. For existing employees, the AWA can only take effect from the day of approval at the earliest, but can take effect from the date of filing in the case of new employees (with the proviso that if any shortfall becomes apparent subsequently in relation to the NDT, any outstanding monies can be recovered by the employee).

Experience with Australian Workplace Agreements

9. The take-up rate of AWAs increased markedly since their introduction. Eleven thousand AWAs were approved in the first 12 months of the operation of the new legislation, but by 1999 AWA approvals were averaging approximately 3,000 per month, and more recently in 2000, approvals have been running at 4,500 per month. Overall, as at 31 July 2000, over 118,000 AWAs had been approved.

10. This pattern of take-up reflects the significant adjustment required from both employers and employees in making the transition from a more centralised arrangement to an approach in which employment arrangements can be determined on a localised basis. This pattern also reflects an increasing awareness by both employers and employees of the potential benefits available through innovative approaches to the management of employment arrangements at the workplace level.

11. AWAs appear to have extended to all industry groups. As at 31 July 2000, employers making AWAs were most commonly found in Retail Trade (14.8 per cent of all AWAs), Property and Business Services (13.9 per cent), Transport and Storage (11 per cent), Manufacturing (9.6 per cent), Health and Community Services (9.1 per cent), and Government, Administration and Defence (7.4 per cent). Conversely, employers using AWAs were least likely to be found in Communication Services (0.8 per cent) and in Education (1.2 percent),

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[60] Section 170VPA. These include (a) the AWA complies with s170VG of the WR Act ie that the AWA must include the provisions relating to discrimination and dispute resolution as stated in the regulations of the WR Act. If the AWA does not include these provisions, they are taken to be included in the AWA. The AWA also must not prohibit the disclosure details of the parties, that is, the employer must ensure that the AWA does not include any provisions that prohibit or restrict disclosure of details of the AWA by either party to any person; (b) the employee received the AWA the required number of days before signing the AWA; (c) the employer explained the effect of the AWA to the employee between the time the employee first received a copy of the AWA and the time when the employee signed the AWA; and (d) the employee genuinely consented to making the AWA; and (e) in a case where the employer failed to offer an AWA in the same terms to all comparable employees-the employer did not act unfairly or unreasonably in doing so.

[61] A designated award, in relation to a person to whom an agreement will apply, means an award that the EA or the Commission has determined to be appropriate for the purpose of deciding whether the agreement passes the no-disadvantage test (refer sections 170XE and 170XF).

Agriculture, Forestry and Fishing (1.3 per cent), and Electricity, Gas and Water Supply (1.7 per cent).

12. Ninety per cent of employers making AWAs were based in the private sector (with the remaining ten per cent of employers making AWAs in the public sector). In terms of the status of employees making AWAs, it appears that 63 per cent of employees making AWAs were existing employees while new employees accounted for 37 per cent of employees making AWAs. Looking at a gender breakdown, 57 per cent of AWAs were made by male employees while 43 per cent were made by female employees, which is broadly consistent with the male/female ratios in the workforce overall. [62]

13. AWAs are also being used by employers in small businesses -- employers with fewer than 20 employees now account for 41 per cent of employers using AWAs. Employees in establishments with fewer than 20 employees account for 6 per cent of AWAs made. Most AWAs made for employees are still concentrated in large establishments (establishments with 100-499 employees and over 500 employees accounting for 42 per cent and 37 per cent respectively of employees with approved AWAs).

14. AWAs have been used to introduce a range of new flexible working arrangements. The main areas of change introduced by AWAs include new working time arrangements, performance linked remuneration, training and skills development measures, and altered leave arrangements. Many AWAs, because of their individual nature, contain family friendly provisions, as well as provisions dealing with performance management and remuneration. Family friendly provisions being used in AWAs include provisions allowing control over start and finish times, provisions relating to flextime and time off in lieu of overtime (TOIL), paid parental leave and child care support, the use of sick leave for family reasons, negotiable annual leave provisions as well as paid maternity and paternity leave. These provisions have enabled parents and those with caring responsibilities to better meet their family commitments.

15. Service standards have been set by the OEA for the handling of AWAs, which require at least 80 per cent of AWAs to be processed for filing within 3 working days from receipt at the OEA's national mailing address, and at least 80 per cent of AWA approvals to be completed within 20 working days of receipt. These standards are met for the large majority of applications, and email lodgement is expected to become available later this year.

16. In light of the continuing growth in the use of AWAs, and concerns which have been raised about the efficacy of the current processes for making AWAs, both by employers and the OEA itself (these are discussed in more detail below), it is therefore appropriate to simplify those processes. If not, it may become difficult, as demand continues to grow for making AWAs, to maintain and improve on the current service standards set by the OEA. There will of course be no change to key safeguards for employees making AWAs-for example, the requirements for the employer to explain the AWA, and for genuine consent, as well as for assessment against the NDT. However, the focus will be placed more clearly on ensuring a simpler, more efficient process for making and approving AWAs, as well as broadening access to AWAs.

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[62] Unpublished ABS Labour Force Data for November 1999 shows females accounted for 46 per cent of employees across all industries.

Capacity for collective agreements to provide for Australian Workplace Agreements

17. The existing WR Act made provision for AWAs to operate in conjunction with collective agreements. Subsection 170VQ(6) of the WR Act provides that an AWA operates to the exclusion of any certified agreement that would otherwise apply to an employee's employment, unless

- the certified agreement is in operation at the time the AWA commences, has its nominal expiry date after the date the AWA commences and does not expressly allow a subsequent AWA to operate to the exclusion of the certified agreement or to prevail over it to the extent of any inconsistency; or

- the certified agreement comes into operation after the nominal expiry date of the AWA, in which case the certified agreement prevails over the AWA to the extent of any inconsistency.

18. The effect of the first provision has been to constrain the potential use of AWAs, in cases where CAs have been made and have not included express provision for AWAs at a later date. As can be seen from the table below, the great majority of certified agreements (typically between 80 to 90 per cent, apart from the March quarter 2000 data) made still make no express provision for AWAs. However, the data below also show that on occasion, when some large agreements have been certified (and account for only a small proportion of agreements made), it appears that a large number of employees have been affected by the provisions enabling AWAs – for example, in the case of public sector employees in 1998[63].

19. Table 4.1 shows the proportion of certified agreements containing clauses to either provide for, or exclude, the operation of AWAs in conjunction with the certified agreement, along with the percentage of employees affected by those CA provisions. Clauses in CAs which exclude AWAs appear to be characteristically associated with agreements made with unions rather than those made directly with employees and are likely to reflect consistently stated opposition to AWAs on the part of unions.

[63] Large public sector agreements certified in 1998 with provision for AWA clauses included the Telstra Corporation 1998/2000 Enterprise Agreement (49,300 employees), the Defence Employees Industrial Agreement 1998-99 (17,800 employees), the ATO (General Employees) Agreement 1998 (16,800 employees), the Telstra Corporation Customer Field Workforce Agreement 1998/2000 (16,700 employees) and the Victoria Police Force Certified Agreement 1998 (10,000 employees).

Table 4.1: Certified agreements with provision for, or exclusion, of AWAs, by sector, 1997, 1998, 1999 and March quarter 2000[64]

		Provision for AWAs		Exclusion of AWAs		Neither exclude nor prohibit AWAs	
		% agts	**% emps**	**% agts**	**% emps**	**% agts**	**% emps**
1997	**Public**	2.2	15.0	4.9	5.7	92.6	79.0
1997	**Private**	1.0	4.0	4.7	3.7	94.1	92.2
1998	**Public**	12.7	50.7	4.1	2.5	81.4	43.4
1998	**Private**	1.5	17.6	9.5	8.4	86.6	73.7
1999	**Public**	8.2	37.4	3.8	3.6	87.7	58.9
1999	**Private**	1.6	2.3	14.9	16.3	83.2	80.9
March qtr 00	**Public**	15.4	17.1	5.5	28.2	77.5	38.0
March qtr 00	**Private**	2.8	4.8	32.5	21.7	64.7	73.1

Note: `% of agreements' represents the proportion of agreements in the respective sectors that contain the listed provisions. `% of employees covered' represents the proportion of agreement-covered employees (in their respective sectors) who are covered by an agreement that contains the listed provision. Source: DEWRSB, Workplace Agreements Database.

20. Table 4.1 shows that the proportion of CAs explicitly providing for AWAs is higher in the public sector than in the private sector, especially once employee coverage is taken into account. In the private sector, the proportion of agreements precluding AWAs appears to be higher and increasing.[65] As noted above (and in column 3 of Table 4.1), the great majority of agreements do not explicitly either provide for or prohibit AWAs. In effect, this means people covered by those agreements are excluded from making AWAs (along with those people covered by agreements which explicitly exclude AWAs). AWAs can only be accessed where a current CA which has not passed its nominal expiry date makes clear provision for them, which accounts for only a relatively small proportion of CAs overall.

21. Where clauses in CAs preclude the use of AWAs, or make no express provision for AWAs, the choice for employers and employees about the most appropriate working arrangements is effectively constrained for the period of the CA.

POLICY RATIONALE AND PROPOSED AMENDMENTS

22. The proposed amendments to the AWA provisions of the Act (Part VID) were outlined in the *More Jobs, Better Pay Implementation Discussion Paper.* The broad objective of the amendments, which are largely technical, is to create an environment where AWAs become more widely accessible, easier to make, and have the scope for greater flexibility to encourage working arrangements that better suit the needs of the business and its employees.

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[64] Note that percentages will not always add up to 100%. There are a small proportion of agreements which make reference to AWAs which neither provides for nor excludes AWAs.

[65] In the March quarter 2000, a total of 364 agreements (covering 13,200 employees) contained clauses prohibiting the making of AWAs. The majority, 334 agreements covering 10,900 employees, were found in the Construction and Manufacturing industries. Removing these agreements from the table, the proportion of private sector agreements certified in the March quarter 2000 which exclude AWAs falls to 2.7% of agreements certified at this time.

23. Given the increasing popularity of AWAs, with the monthly take-up rate now over 4500 per month, it is clear that more employers and employees are taking advantage of the opportunities and protections such agreements can offer for allowing working arrangements to be determined on an individual basis.

24. The Australian Democrats are on record acknowledging the continuing role for AWAs in the workplace relations system and supported their introduction into the system in 1996.

> *AWAs have a good place as part of the agreements mix. A limited number of employees, particularly better paid high-skilled employees, where the 'one size fits all' award could be an impediment to productivity, do well under AWAs …*[66]

The Democrats also readily acknowledge the safeguards afforded employees making AWAs in the Australian context

> *AWAs are particularly useful in the private sector where four out of five workers are not in unions ...*
>
> *Workplace Relations Law allows the development of pro-forma and standardised individual agreements which protect workers entitlements and conditions against a determined set of standards and a global no-disadvantage test which uses the appropriate award as its base.*[67]

25. The measures in the proposed Bill are a mix of technical amendments aimed at improving the processes for approving AWAs, streamlining the approval process in certain cases, as well as ensuring better access to AWAs, by clarifying the relationship between AWAs and other industrial instruments. They preserve however key safeguards in the system put in place to protect employees making AWAs. These safeguards distinguish the processes for making AWAs in Australia from the processes for making individual agreements operating in other overseas countries, including New Zealand.

Overall

26. The complexity of the current statutory procedures for the making and approval of AWAs has been criticized. In their responses to the *More Jobs, Better Pay Implementation Discussion Paper,* as well as in their submissions to the Senate inquiry into the WRLA(MJBP) Bil, employers saw great value in AWAs and supported their ongoing role in the system, but thought that they could be further improved through streamlining and the adoption of less complex processes. The procedures are also seen as involving a high degree of formality; some parties (particularly small business employers without in-house access to specialised knowledge and assistance) are discouraged from negotiating AWAs. Concerns have also been expressed about the fact that an AWA cannot come into effect as soon as the parties have reached agreement.

27. The OEA has identified key aspects of the current processes for making AWAs which require improvement, to simplify and speed up the approval process. In particular it has advocated the need to consolidate the current filing and approval procedures into a single step for users, as well as enabling AWAs to operate from the day of signing (if this is considered

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[66] Senator Andrew Murray, Press Release No:00/313, 01/06/00.

[67] Senator Andrew Murray, Press Release No: 00/220, 19/04/00.

desirable by both parties), with the provision of "cooling off" periods to replace the current periods which apply before AWAs can be signed by employees. It has also advocated changes to the EA's powers to allow the legal pursuit of breaches of Part VID, in order to enhance the protections available to employees. (It is understood the OEA will present a separate submission dealing with these issues in more detail.)

28. The current Bill proposes the amendment of the WR Act to reform and strengthen the WR Act's provisions relating to AWAs, which are contained in Part VID of the Act. The amendments would repeal and replace all of Part VID, except Division 7 (enforcement and remedies) and Division 9 (miscellaneous), which will be amended.

29. The key amendments to Part VID of the Act involve technical measures to improve the processing and operation of AWAs:

- omitting the existing requirement that an employee receive an AWA at least 5 or 14 days before signing, effectively replacing the current two stage filing and approval process with a single stage approval process;
- permitting AWAs to commence immediately on signing; and
- a complementary enhancing of the enforcement powers of the OEA.

30. Other measures streamline AWA processes in particular circumstances:

- AWAs for employees with remuneration in excess of $68000 will be deemed to comply with the statutory NDT but will not be administratively analysed by the EA against the NDT prior to approval, unless requested by the employee;
- in addition, the EA will now be responsible for approving or rejecting all AWAs – the small percentage currently referred to the Commission will no longer need to be referred to the Commission (the Commission will be able, however, to establish certain approval principles governing the EA's decisions in these cases); and
- the current requirement in relation to offering 'like' AWAs to comparable employees will be removed.

31. Changes to the relationships between AWAs and other industrial instruments will broaden access to AWAs. Protected action by employees in the case of AWAs will no longer be allowed; in addition, there are provisions to extend the same arrangements as currently apply for awards, in relation to transmission of business, when employees have previously been covered by AWAs.

32. Each of the major amendments is now discussed separately below.

Improving the Process: AWA to take effect from date of signing or as otherwise specified

33. The Bill would:

- provide for AWAs to take effect on the date of signing or, if later, the date specified in the AWA as the commencing day, or, in the case of a new employee, the date the employment commences (new section 170VBD);

- permit employees to sign AWAs at any time after receiving a copy of the information statement prepared by the EA and an explanation of the effect of the agreement (new section 170VBA); and

- permit an employee party to an AWA that provides for remuneration of $68,000 per year or less to withdraw consent within a cooling-off period (new section 170VBA).

34. The proposal to permit the parties to an AWA to agree that it should take effect from the day of signing allows employers and employees to give immediate effect to, and benefit from wages, conditions and working arrangements to which they have agreed. It also enables the EA to dispense with the time consuming and resource intensive task of issuing filing receipts.

35. The statutory period which must currently be allowed for an employee to consider an offer of an AWA delays the process of applying for an AWA to be approved, as the full period must elapse before an AWA can be signed and an application for approval can be made, even if an employee is ready to sign an AWA immediately. OEA data shows that of the AWAs refused, the highest proportion (61 per cent) are due to the employee prematurely signing the AWA. Employees too will likely support the removal of the statutory waiting periods before signing can take place.

36. The proposed amendment will complement the amendment permitting AWAs to commence on signing. Employees are protected by the requirement of genuine consent to the terms of an AWA and employee parties to AWAs that provide for remuneration of $68000 per year or less have the right to withdraw consent during a cooling off period. The cooling off periods are equivalent to the previous statutory periods which applied before signing.

37. Where an AWA subsequently ceases to operate (for specified reasons including refusal by the EA), provision is made for the employee to recover compensation for shortfalls in entitlements under an award that would have otherwise applied to the employee's employment.

Enhancement of the EA's enforcement powers in respect of AWAs already in operation.

38. The Bill also makes provision to strengthen the EA's enforcement powers by providing for the EA to initiate proceedings to recover penalties and underpayments in respect of breaches of AWAs. The EA's power to recover underpayment of wages rather than an employee having to do so offers stronger employee protections.

39. Whilst the WR Act currently empowers the EA to investigate alleged breaches of AWAs, alleged contraventions of Part VID and any other complaints relating to AWAs and to provide free legal representation to a party to a proceeding under Part VID (if the EA considers that would promote the enforcement of the provisions of that Part), the EA is not empowered to apply for a penalty or recover underpayments. This is inconsistent with the provisions of the Act that allow an inspector appointed under the WR Act to bring an action to recover penalties and underpayments in respect of breaches of awards and certified agreements.

Streamlining: Removing provision for AWAs to be referred to the Commission where they fail the NDT

40. The Bill removes the requirement that the EA refer AWAs to the Australian Industrial Relations Commission, for application of the public interest test, where there is concern that the AWA does not pass the NDT – the EA would apply the no-disadvantage test and public interest test, if appropriate, in all cases (subject to principles which may be developed by the President of the Commission).

41. The current requirement that the EA refer an AWA to the Commission where there is concern about whether the AWA passes the NDT adds an unnecessary layer to the approval process, places additional resource demands on both the Commission and the parties to the AWA, and delays the commencement of AWAs. Apart from the duplication of effort involved in two statutory bodies assessing such AWAs, the administrative burdens generated by this requirement include:

- the extra paperwork required in order to transfer the application for approval of the AWA from the EA to the Commission; and

- the Commission's practice of holding formal hearings to determine whether the AWA passes the no-disadvantage test requires the parties to the AWA to put formal submissions as to this issue, and may effectively impose representational or opportunity costs.

42. According to statistics provided by the OEA in the period March 1997 to 30 June 2000, the vast majority of AWAs submitted to the OEA (96.7 per cent) have been approved.

43. Only 1.9 per cent of AWAs processed are referred to the Commission. Of the AWAs which have been dealt with by the Commission, 70.5 per cent were ultimately approved, 17.8% were withdrawn after referral to the Commission, and only 11.7 per cent were refused approval. However, the time elapsed between the referral of an AWA to the Commission, and the notification to the EA of the result, has been, on average, 151 calendar days.

44. As indicated above, the Bill also provides for the President of the Commission to develop principles for application by the EA in the exercise of the public interest test, for AWAs that do not pass the NDT.

Fast-track approval of AWAs for high income earners

45. The Bill provides a more streamlined process for AWAs that provide rates of remuneration in excess of $68,000 per year. An AWA that is accompanied by a declaration that the employee's annual rate of remuneration under the AWA is more than $68,000, is taken to pass the no-disadvantage test. That is, the EA is not required to assess the AWA for the purposes of the NDT. However, an employee may request that the EA assess the AWA for the purposes of the NDT, in which case the agreement would need to meet the requirement of the NDT for it to be approved by the EA. Such a request must be signed by the employee and accompany the application for approval of the AWA.

46. Other key protections will of course still apply in relation to AWAs for high income employees, in particular the requirement for genuine consent, for the terms of the agreement to

be explained, as well as protections in relation to the exercise of duress during the process of making an AWA.

47. The benefits of streamlined approval procedures applicable to AWAs for employees whose remuneration is in excess of $68 000 per annum (and who are more likely to already enjoy greater bargaining and market power) are that the approval process will be simpler and faster, which will be of benefit to both parties to the AWA. For the EA, the cost of automatically administering the no-disadvantage test in respect of AWAs providing remuneration of over $68 000 is avoided. Estimates provided by the OEA suggest that approximately 20 per cent of AWAs would be affected.

48. In particular, the new procedures will avoid the need for the OEA to devote resources to identify a designated award to apply to these high-income earners for the purposes of the NDT, as these employees are more likely to be award free.

No requirement to offer the same AWA to like employees

49. The Bill removes the requirement relating to offering identical AWAs to comparable employees (the existing section 170VPA).

50. The obligations imposed by the current provision can be confusing. Many employers are unaware that individual performance may be taken into account in determining what conditions should be offered, for example, and the provision effectively discourages the use of AWAs to tailor working arrangements to the particular circumstances of both employees and employers.

51. It is also inconsistent with the concept of individual agreements to limit scope to take account of individual circumstances and requirements.

52. Issues have been raised about employers offering AWAs in a common form, with some arguing that this constitutes employer pattern bargaining, even though the commonality being referred to was within the one workplace or enterprise. (These issues were raised, for example, in the recent debate on the *Workplace Relations Amendment Bill No.1,2000* on pattern bargaining.) The requirement to comply with s170VPA is likely to have been a key factor influencing employer approaches. Removing this requirement would address the issues raised.

Improving Access: Clarifying the relationship between AWAs and CAs and other industrial instruments

53. New section 170VD sets out the relationship between AWAs and awards (including State awards), certified agreements and State agreements. During its period of operation (as provided for in section 170VBD), an AWA:

- operates to the exclusion of any federal award (including an award made under subsection 170MX(3) of the Act but not an exceptional matters order) that would otherwise apply to the employee's employment [new subsection 170VD(1)];

- prevails to the extent of any inconsistency over any exceptional matters orders that would otherwise apply to the employee's employment [new subsection 170VD(2)];

- operates to the exclusion of any State award or State agreement that would otherwise apply to the employee's employment [new subsection 170VD(3)];

- operates to the exclusion of any certified agreement or old IR agreement that would otherwise apply to the employee's employment unless subsection (5) or (6) applies [new subsection 170VD(4)];

- prevails to the extent of any inconsistency over any certified agreement or old IR agreement that would otherwise apply to the employee's employment, if the AWA expressly provides that it does not operate to the exclusion of the certified agreement or old IR agreement [new subsection 170VD(5)]; and

- is prevailed over to the extent of any inconsistency by any certified agreement that comes into operation after the AWA's nominal expiry date if the certified agreement makes express provision to that effect [new subsection 170VD(6)].

54. Under the current arrangements, agreement-making options have been reduced by the limited scope for AWAs to operate before the nominal expiry date of a relevant certified agreement. Whilst this has been the main constraint, other limitations have also arisen because of the current provisions which apply in relation to how AWAs interact with the other specified industrial instruments.

55. Overall, the amendments free up the interaction between AWAs and certified agreements and other industrial instruments so that the workplace relations system provides parties with effective choice about the regulation of terms and conditions of employment in ways that suit their particular circumstances. Under the existing provisions these options have been limited. Flexibility to use AWAs during the life of certified agreements can assist, for example, where market rates for particular groups of specialists move erratically and an employer wishes to use AWAs to retain such staff. Where a certified agreement is in place, or the other prescribed instruments such as an MX award or exceptional matters order, employers and employees should not be precluded from further negotiation of terms and conditions of employment.

Additional Measures: Repeal of provisions enabling protected action to be taken in the negotiation of an AWA

56. The WR Act currently provides a right to take protected action and a right to lock out in relation to bargaining for an AWA provided certain conditions are met (see Division 8 of Part VID). It is proposed to repeal these provisions enabling protected action to be taken in the negotiation of AWAs, as they are not relevant to the negotiation of individual as distinct from collective agreements.

57. The AWA industrial action provisions appear to have been used only in very rare circumstances. Some isolated instances have occurred in the meat industry, mainly employer action ie lockouts. In the event that protected action for an AWA occurs, either through an employer lockout or by employee action, there is currently no provision for access to any mechanism to bring such industrial action to a stop.

Transmission of business and AWAs

58. Existing section 170VS provides for AWAs to bind a successor, transmittee or assignee employer (where the new employer is one which could enter into an AWA, being a constitutional corporation or other entity listed in section 170VC).

59. New section 170VDD will allow the EA to order that an AWA has limited or no binding effect on a successor, transmittee or assignee employer. This will bring the successor provision in relation to AWAs into line with equivalent provisions regarding award respondency (section 149). Such an order may be made on application by the employer, after the EA gives the AWA parties an opportunity to be heard.

60. This amendment is consistent with the inherent nature of AWAs as individual agreements between one employer and one employee not intended to bind third parties or affect the terms under which third parties (other employees or employers) may agree on industrial matters.

CONCLUSION

61. The amendments are designed to make individual agreement making at the workplace or enterprise level easier and more widely accessible, to reduce the formality and cost involved in having an AWA approved, and to remove barriers to the effective exercise of agreement - making choices, including workplace choices about the type of agreement to be made and variation, extension or termination of agreements. While streamlining procedural requirements, the amended provisions continue to provide employee protections such as the no disadvantage test, the genuine consent requirement and provisions requiring AWAs to be explained to employees so that AWAs are entered into on a mutually beneficial basis.

5. Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000

BACKGROUND

The WR Act provided a substantially changed role for awards within the legislative framework. In particular, in the new framework, awards are to provide a genuine safety net of fair minimum wages and conditions. Award simplification is integrally linked to the process of establishing direct and cooperative employer-employee relations.

2. Refocusing of the award system to meet the safety net objective and to encourage enterprise and workplace agreements are the overriding considerations in the simplification of awards. Within this framework of simplified awards, employers and employees are able to tailor their own workplace arrangements in their mutual interests. The legislative scheme for award simplification is intended to produce modernised awards.

3. Part VI of the WR Act has as key objectives:

- awards acting as a safety net of fair minimum wages and conditions of employment [s.88A(b)]; and

- awards being simplified and suited to the efficient performance of work according to the needs of particular workplaces or enterprises [s.88A(c)].

4. To support these objectives, s.89A(2) of the WR Act sets out the allowable award matters. Tallies are included in paragraph (d), dealing with "piece rates, tallies and bonuses". Union picnic days have been included in awards by decisions of the Commission under the more general allowable matter of public holidays (paragraph (i)).

Relationship to More Jobs, Better Pay

5. The WRLA(MJBP) Bill sought to remove both tallies and bonuses (but not piece rates) and union picnic days from the category of allowable award matters.

6. The Government has also considered concerns that previous proposals to remove bonuses from the allowable award matters may render remuneration bonuses for clothing outworkers a non-allowable matter. In the Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000 (WRA(TPD) Bill) this will no longer be an issue.

Award tally provisions

7. Tallies are not standard provisions across awards, they are found only in the meat processing sector. Tallies are based on inputs, in contrast to piece rate systems, which are based on outputs. As such tallies may impede productivity, unlike piece rate systems such as those payable to outworkers in the clothing, textile and footwear industries, which provide a simple, payment-per-article alternative to regular time-based arrangements, designed to promote productivity at the workplace.

8. The remuneration systems in the federal meat industry awards were originally restricted to payment for time worked. Indeed, piecework or tally systems were prohibited. From 1958 onward, however, awards began to provide for tally schemes to be introduced with the approval of the union or the then Commonwealth Conciliation and Arbitration Commission.

9. The scheme of an award prescription of a uniform tally system for federal awards dates from 1970. The move towards uniformity appears to have been motivated by a desire to reinstate some control over industry practice. By 1970 tally systems, with or without the formal agreement of the union (as required by the then award) were well established throughout the industry.

10. In September 1999, a Full Bench of the Commission decided, as part of award simplification hearings, that it would delete the tally system from the Federal Meat Industry Processing Award 1996.[68] It decided to replace the tally system with a provision allowing for the implementation of incentive payment schemes.

11. The Full Bench found that the award tally provisions were inconsistent with the WR Act and included matters of detail more appropriately dealt with at the workplace level. The tally provisions were also found to restrict or hinder the efficient performance of work and to be obsolete.

12. In issuing its Decision, the Full Bench referred the matter to Commissioner Leary to hear submissions from the parties and interveners about the Full Bench's provisional determinations and report back to the Bench. The report of Commissioner Leary was circulated to the relevant parties on 9 August 2000 and the matter was listed before a Full Bench of the Commission on 23 August for final submissions. The Full Bench has reserved its decision.

13. All parties to the proceedings conceded that the appendix in the award which details the tally system is difficult to understand and not expressed in "plain English".[69]

14. The 'one-size fits all' system, represented by the award tallies provisions is complex and detailed in its prescription, with clear evidence of systematic inadequacy.[70] The provisions lack the flexibility needed to meet the variety of work methods employed in the various plants covered by the award and appear to be seriously out-of-date.[71] The practical effect of this situation is that the award tally provisions rarely operate without modification.

15. In the current competitive environment, the fundamental weaknesses of a highly prescriptive, industry-based incentive payment scheme are now being exposed. Differences in the capacity of employees, work arrangements, plant layout and design and technology cannot be properly addressed in such a scheme. Employers have adjusted by moving outside the award through formal and informal arrangements. This was recognised by the Commission's Inquiry into the Meat Industry, which stated that

> *...no universal tally system appears to be acceptable and that the appropriateness of any particular system depends on factors such as flexibility of production levels, plant design, manning levels, and the extent of mechanical aids.*[72]

16. There is now a diversity of arrangements applying across the range of enterprises and workplaces covered by the award. This diversity is the result of parties reaching local or plant

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[68] Federal Meat Industry Decision, Print R9075

[69] Exhibit Commonwealth 3, Commonwealth Submission to the Australian Industrial Relations Commission in the Federal Meat Industry (Processing) Award 1996 simplification matter, p. 28, paragraph 161.

[70] Print R9075, p.50.

[71] Print R9075, p.49.

[72] Inquiry into the Meat Industry, Print K3313, p.8.

level agreements aimed at overcoming or reducing the inappropriate impact of the award provisions as they affect their particular enterprise or workplace. This has led to a spread of different arrangements applying at workplaces covered by the award instead of the award provisions.

17. Provisions regulating tally systems also exist in a number of other federal awards regulating meat processing which are yet to be simplified.

The 1998 Productivity Commission report into the meat industry processing sector

18. The Productivity Commission's 1998 report *'Work Arrangements in the Australian Meat Processing Industry'* is one of a series of research reports requested by the Commonwealth Government on work arrangements in key industry sectors. The report raises a number of issues about the economic circumstances of the meat processing industry and the impact on workplace relations that are relevant to the Senate Committee's consideration of the WRA(TPD) Bill.

19. Meat processing is a significant manufacturing activity in Australia. It is part of a complex production chain consisting of livestock production and transport, meat processing, meat transport and sale on domestic and export markets. The Productivity Commission estimates that the red meat industry contributed $4.5 billion in value added in 1993-94. The processing sector accounted for 27 per cent of this total.[73]

20. The Productivity Commission notes that Australia's share of the international red meat market has declined since 1996. Despite world trade in beef and veal increasing by 30 per cent, over this period Australian beef and veal exports grew by only 15 per cent. Over the same period, beef and veal exports from the US, Canada and Argentina increased by 207 per cent, 201 per cent and 60 per cent respectively.[74]

21. The report notes that, historically, Australian meat processes were insulated from competitive pressures on the international market in particular. This meant that there was little incentive to improve productivity or minimise costs; increased cost of production could often be passed on in the form of higher prices.[75]

22. The Productivity Commission report analyses the way in which increased competitive pressures in recent years, allied with the reform of the workplace relations' framework, have brought changes in work arrangements as meat processors strive to improve their performance.

23. The Productivity Commission found that significant changes in work arrangements have occurred in recent years. A major factor driving change has been the changes to the workplace relations system that have provided a framework for bargaining at the workplace or enterprise level. However, the report argues that more needs to be done.[76]

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[73] Productivity Commission 1998, *Work Arrangements in the Australian Meat Processing Industry,* AusInfo, Canberra, p. 12.

[74] Productivity Commission 1998, p.23

[75] Productivity Commission 1998, p.xviii

[76] Productivity Commission 1998, p.16.

24. A number of work arrangements were examined which had been identified by the Productivity Commission as impeding firm performance in the late 1980s and early 1990s. The award tally system was one of these work arrangements.

25. The Productivity Commission notes that the effect of tallies as prescribed in the major industry awards is to increase unit wage costs once output exceeds minimum and maximum tally levels. The application of award tallies introduces a number of disincentives that may limit throughput. In turn, this can lead to significant under-utilisation of capital, thus reducing capital productivity.

26. The report said:

> *…there are two forms of tally – head tallies and unit tallies…The simple effect of the unit tally…is to increase unit labour costs as output exceeds minimum and then maximum tally…Both head and unit tallies are based on inputs – such as number of heads – rather than a measure of output, such as weight processed, yield per animal, or any other measure of quality. This has implications for the impact of the tally on incentives facing both employees and managements. Unit tallies in particular are complex and prescriptive.*[77]

27. Managers also told the Productivity Commission that any improvements in technology over time had resulted in shorter employee working hours rather than improvements in overall firm performance.[78]

28. A key finding of the report is that the most important change in work arrangements has been a move away from the highly prescriptive tally systems in industry awards, which involve complex formulae for allocating workers and remunerating them, based on the number of head processed. Increasingly, larger firms are basing remuneration on time worked and/or modified incentive payment systems with, in some cases, payment based on factors such as yield and quality. However, many firms, particularly smaller ones, still operate tally systems that continue to constrain performance.[79] Only boners, slicers and slaughterers, typically 30 per cent of the workforce in a plant, are engaged as tally workers.[80]

Support for the statutory removal of tallies from awards

29. There is support for the WRA(TPD) Bill as expressed by both the National Farmers Federation and the Cattle Council of Australia.

30. The National Farmers Federation, in a recent press release, said that the:

> *statutory abolition of the meat industry tally system is also critical to creating a more flexible and export responsive meat processing sector….We welcome the Bill that will make meat industry tallies a non-allowable award matter as this will bring a clean and final end to a system that has no logic and which hampers productivity.*[81]

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[77] Productivity Commission 1998, p.94

[78] Productivity Commission 1998, p.xxi-xxii.

[79] Productivity Commission 1998, p.xvi

[80] Print R9075, p.9

[81] National Farmers Federation, News Release (NR 86/00), *IR Reform Critical for Export Future*, 27 June 2000.

31. Along similar lines, the Cattle Council of Australia also supports the statutory abolition of the tally system. In a June 2000 publication '*Australia's Beef Industry: a new era',* the Council noted that:

> *Tallies as they operate in the meat processing industry are anathema to efficiency and productivity…We believe that the abolition of the tally system would send the correct signals to suppliers of meat processing plants that politicians of all persuasions are serious about ridding the Australian economy of inefficient practices.*[82]

Award provisions for union picnic day

32. A public holidays test case standard was established for federal awards by a series (four) of Full Bench decisions in late 1994 and early 1995.[83] These decisions collectively established a standard of ten plus one days, being ten specific holidays celebrated throughout Australia and one State-specific holiday (for example, Melbourne Cup Day, Adelaide Cup Day, Canberra Day *et cetera*).

33. The test case standard also provides a mechanism for substitution of public holidays for another day through a facilitative provision. The standard allows for the possibility of an entitlement to union picnic day, but only where it is taken in lieu of the State-specific holiday provided for in the minimum entitlement.

34. In the *Award Simplification Decision*, the Full Bench of the Commission (on an interpretation of the current Act) determined that union picnic days fall within the expression 'public holidays' for the purposes of section 89(2)(i) of the WR Act.[84] In coming to this conclusion, the Commission cited the *Public Holidays Test Case Decision,* and noted that 'the use of terms in their industrial context is an important element in construing the matters listed in section 89(2)(i)'.

35. Union picnic day is not a standard provision across all awards. About 750 awards (around one-third of all federal awards) contain union picnic day provisions, including 40 of the top 100 awards. Most provide for a day off for all employees, although a minority contain provisions requiring proof of attendance at the picnic in order to be paid for picnic days.

36. In some awards the public holiday provisions are above the test case standard with union picnic day being provided in addition to all other public holidays.

37. Union membership is less than 20 per cent in the private sector in today's labour market. Union picnic days, if they are to be observed, should be the subject of local agreement at the workplace level. As Senator Murray noted in a recent speech to the Industrial Relations Society of New South Wales, a very significant trend which is transforming industrial relations in Australia, and which the industrial relations laws need to be overhauled to properly address, is the decline of union membership and award coverage.[85]

Proclamation of public holidays by States/Territories

38. The proclamation of public holidays is regulated by State and Territory governments.

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[82] Cattle Council of Australia, *Australia's Beef Industry: a new era,* June 2000, p.16.
[83] Prints L4532, L7799, L7971, and L9178.
[84] Print P7500, p.25-26.
[85] Speech by Senator Andrew Murray to the Industrial Relations Society of New South Wales, 19 May 2000, p 2-3.

39. New South Wales has fewer gazetted public holidays than other States and Territories. Some awards thus nominate another day to be observed as the additional day in New South Wales, such as Easter Tuesday.[86] Union picnic day is also sometimes specified as the additional day for NSW employees.[87]

40. In the ACT, union picnic day is legislated as a holiday for all employees covered by 64 nominated awards.[88]

POLICY RATIONALE

41. Tallies apply only in the meat processing industry. A Full Bench of the Commission decided to delete the tally system from the major federal award covering the industry, noting that:

> *the evidence has exposed the near impossibility of applying a prescriptive system to a range of different types of plants. That finding leads to the conclusion that the manner of operation of incentive systems is best left to negotiation at the employer or enterprise level, a course in harmony with the scheme of the Act.*[89]

42. It is appropriate that, having got to this stage in the Commission processes, this outcome be reinforced through legislation to avoid continuing debate in respect to other awards.

43. If the parties wish to use tally systems, they are most appropriately designed and implemented having regard to the particular circumstances of particular workplaces.

44. Union picnic day should be the subject of local agreement at the workplace level, particularly as it is not relevant to the majority of workers who are not members of unions. Awards should only prescribe those public holidays that are generally observed and declared to be public holidays by State and Territory governments, or other days which are substituted for efficiency reasons. For example, in Victoria where most hospitality sector employees do not receive a holiday under their award on Melbourne Cup Day, but instead receive a substitute holiday on Show Day being the fourth Thursday in September. Show Day is no longer gazetted by the State government as a public holiday.

SUMMARY OF PROVISIONS

Tallies

45. The proposed amendments would remove tallies from the allowable award matters set out in subsection 89A(2) of the WR Act – that is, those matters which may be the subject of an industrial dispute, for the purposes of the exercise by the Commission of the powers set out in subsection 89A(1). This is because the Government considers that tallies are more appropriately dealt with at the enterprise or workplace level.

46. Proposed new paragraph 89A(3A)(b) would provide that tallies do not come within the scope of the allowable award matters. The purpose of this provision is to make clear that

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[86] For example, the Metal, Engineering and Associated Industries Award 1998 – Part I (M1913).

[87] For example, the Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998 (H0008)

[88] Section 5 of the *ACT Holidays Act 1958*.

[89] Print R9075, p.72.

tally arrangements cannot otherwise be included in awards as a form of piece rate or method of payment.

Picnic days

47. Proposed new paragraph 89A(3A)(a) would provide that union picnic days do not come within the scope of the allowable award matters. This would have the effect that an award may not (directly or indirectly) make provision for the observance by employees of, or payment in relation to, union picnic days, however described.

48. These provisions are not intended to set out exhaustively the range of non-allowable matters, but rather to provide certainty as to these particular matters.

Application, transitional and savings provisions

49. The proposed amendments provide for the simplification of awards, that is, review and variation of existing awards to bring them into line with section 89A of the Act as amended by this legislation. These provisions are similar in nature to the transitional provisions of the WROLA Act 1996*,* which removed the legal effect of award provisions which did not relate to allowable award matters, and allowed for the consequential review and variation of awards by the Commission. The interim period proposed by the present Bill, during which award parties would be able to apply to vary awards so that they relate only to allowable matters, is 6 months from the day on which the amendments commence.

Abbreviations and acronyms

ABS	Australian Bureau of Statistics
ACCER	Australian Catholic Commission for Employment Relations
AWA	Australian Workplace Agreement
BCA	Business Council of Australia
CA	Certified Agreement
Commission	Australian Industrial Relations Commission
DEWRSB	Commonwealth Department of Employment, Workplace Relations and Small Business
EA	Employment Advocate
IERA	*Industrial and Employee Relations Act 1994 (SA)*
IR Act	*Industrial Relations Act 1988*
NDT	No Disadvantage Test
NSWIRC	New South Wales Industrial Relations Commission
OEA	Office of the Employment Advocate
SBC	Small Business Coalition
WAD	Workplace Agreements Database
WDL	Working Days Lost
WDL/1000E	Working Days Lost per 1000 Employees
WR Act	*Workplace Relations Act 1996*
WRAB	Workplace Relations Amendment Bill 2000
WRA(AWAP) Bill Procedures) Bill 2000	Workplace Relations Amendment (Australian Workplace Agreements
WRA(SBPA) Bill	Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000
WRA(TE) Bill	Workplace Relations Amendment (Termination of Employment) Bill 2000
WRA(TPD) Bill	Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000
WRLA(MJBP)	Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999
WROLA Act 1996	*Workplace Relations and Other Legislation Amendment Act 1996*
WROLA Act 1997	*Workplace Relations and Other Legislation Amendment Act 1997*