

2002

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**WORKPLACE RELATIONS AMENDMENT (IMPROVED REMEDIES FOR
UNPROTECTED ACTION) BILL 2002**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations,
the Honourable Tony Abbott MP)

WORKPLACE RELATIONS AMENDMENT (IMPROVED REMEDIES FOR UNPROTECTED ACTION) 2002

OUTLINE

The Bill proposes to amend the *Workplace Relations Act 1996* (WR Act) to strengthen section 127 of that Act, under which orders may be made by the Australian Industrial Relations Commission (the Commission) to stop unprotected industrial action or to prevent industrial action from occurring.

The Bill includes a requirement that the Commission have regard to the undesirability of the occurrence of unprotected action when considering section 127 applications, particularly where it occurs during the term of an existing certified agreement.

The Bill proposes to allow applications for section 127 orders to be heard and determined in a more timely manner and to increase the effectiveness of these orders in stopping unprotected industrial action.

As a result of these amendments, the Commission will be required to hear and determine applications for section 127 orders as far as practicable within 48 hours. Where an application cannot be heard and determined within 48 hours, the Commission will have the discretion to issue an interim order to stop or prevent industrial action. The Commission will also be able to make an interim order where the industrial action has not commenced but is imminent and the Commission is likely to be unable to determine the application prior to the industrial action commencing.

The Bill provides factors to guide the Commission in exercising its discretion as to whether to issue an interim section 127 order.

NOTES ON CLAUSES

Clause 1 – Short title

1. This is a formal provision specifying the short title of the Act.

Clause 2 – Commencement

2. This clause specifies when various provisions of the Act are proposed to commence. Sections 1 to 3 and anything in the Act not elsewhere covered by the table will commence on the day on which the Act receives the Royal assent.
3. The amendments set out in Schedule 1 will commence on a single day to be fixed by proclamation, subject to subsection (3). The measures contained in Schedule 1 will only apply to applications made under section 127 of the *Workplace Relations Act 1996* after the commencement of the Schedule but will be able to operate by reference to past events such as related industrial action prior to the commencement of the Schedule.
4. Subsection (3) has the effect that if the Bill is not proclaimed to commence within six months of the Act receiving Royal Assent, it will commence on the day following that period of six months.

Clause 3 – Schedule(s)

5. This clause provides that the Act specified in the Schedule to this Act is amended as set out in Schedule 1, and that any other item in the Schedule operates according to its terms.

SCHEDULE 1 – IMPROVED REMEDIES FOR UNPROTECTED ACTION

Part 1 – Amendments

Workplace Relations Act 1996

Item 1 – Subsection 127(3)

1. This item proposes to repeal existing subsection 127(3), under which the Commission must hear and determine an application for an order under section 127 as soon as practicable, and substitute new subsections.
2. Proposed subsection 127(3) will require the Commission to hear and determine an application for a section 127 order, as far as is practicable, within 48 hours.
3. Proposed subsection 127(3A) will expressly empower the Commission to make an interim order to stop industrial action, or to prevent industrial action from occurring. This power to make an interim order under subsection 127(3A) is in addition to the general power of the Commission to make interim orders under subparagraph 111(1)(b)(ii). In *Transfield Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [Print 908202], Munro J noted the difficulty in producing an adequately reasoned decision in the limited time available and issued an interim order to cease industrial action. The order applied until Munro J finally determined the matter.
4. Proposed paragraph 127(3A)(b) will provide that, prior to making an interim order the Commission must either be satisfied that the industrial action is not protected action or has not formed a view about whether or not the industrial action is protected action. The Commission can make an interim order with respect to industrial action which may subsequently be determined to be protected action. However, an immunity as described in Item 4, will apply where the industrial action is protected action
5. Before the Commission can make an interim order, it will have to be satisfied that it will be unable to hear and determine the application within 48 hours (subparagraph 127(3A)(c)(i)).
6. In the alternative, the Commission will be able to make an interim order where the industrial action has not commenced, but is likely to do so within 48 hours, and the Commission will be unable to determine the application prior to its commencement (subparagraph 127(3A)(c)(ii)). The purpose of this proposal is to encourage the making of an interim order in time to prevent the industrial action from commencing if the Commission is satisfied that this is appropriate.
7. Proposed subsection 127(3B) will provide that an interim order will cease to have effect if the section 127 application is determined. This will apply where the Commission has not stipulated in an order the time at which the order will lapse.
8. Proposed subsection 127(3C) will list a number of factors that the Commission must have regard to when exercising its discretion to issue an interim order. The provision does not, in listing these factors, prevent the Commission from taking into account other relevant factors when exercising its discretion.

9. The aim of the factors in subsection 127(3C) is to highlight circumstances that have previously been problematic in relation to the making of timely and effective section 127 orders. Some of the factors are similar to those identified by Munro J in *Transfield Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [Print 908287], including damage to business, the time needed to determine the application and whether or not the industrial action has escalated since the application was made.

10. Paragraph 127(3C)(d) identifies that occurrence of a sequence of related industrial action as a factor to be considered by the Commission. This acknowledges that a sequence of unprotected action, even where each instance lasts only 24 or 48 hours, can result in significant damage to an employer and previous conduct of this nature should be considered by the Commission.

11. The factors also include lack of proper notice of the industrial action (paragraph 127(3C)(f)). Where industrial action is not properly notified, it makes it more difficult for the Commission to hear and determine applications in time to make an order preventing the industrial action from proceeding. Also, for the purposes of conducting protected action, it is necessary, among other things, to provide at least 3 days notice of the proposed industrial action. Accordingly, lack of appropriate notice is highly indicative of unprotected action.

12. Proposed subsection 127(3D) will set out matters that the Commission must have regard to when considering whether to issue a section 127 order, as follows.

13. A key indicator that unprotected action is occurring is where a party engages in industrial action even though the party is subject to a certified agreement that has not reached its nominal expiry date. Industrial action taken in such circumstances is prohibited by section 170MN of the Act. Paragraph 127(3D)(a) addresses this issue.

14. There have been instances where the Commission has exercised its discretion under existing subsection 127(1) to not make an order even though unprotected industrial action was occurring. However, any unprotected industrial action is undesirable. Accordingly, proposed paragraph 127(3D)(b) will require the Commission to have regard to the undesirability of the occurrence of unprotected action when considering applications both for orders under subsection 127(1) and for interim orders.

15. Proposed notes to subsection 127(3D) will note the prohibition in section 170MN and that industrial action that is not protected action may be in breach of contract, or may be a common law tort.

Item 2 – Subsection 127(4)

16. Existing subsection 127(4) provides that the power to make an order under section 127 is in addition to the powers conferred on the Commission elsewhere in the WR Act. This item proposes a consequential amendment to remove a reference to subsection (1) and substitute references to subsections (1) and (3A).

Item 3 – Subsection 127(5)

17. This item proposes a consequential amendment to subsection 127(5), which expressly states that a person or organisation against whom or which an order is made must comply expressly

with that order. This item inserts a reference to subsection (3A) after the reference to subsection (1). This is to ensure that the requirement for persons or organisations named in the orders to comply with those orders is extended to those persons or organisations named in interim orders.

Item 4 – After subsection 127(5)

18. Subsection 170MT(1) of the WR Act provides an immunity to ensure that section 127 orders do not apply to unprotected action. This item along with Item 7 and Item 8 combine to relocate the immunity from section 127 orders from protected action from section 170MT to section 127 for plain language purposes.

Item 5 – Subsection 127(6)

19. This item proposes a consequential amendment to subsection 127(6), which provides discretion to the Court to issue an injunction where a person or organisation bound by a section 127 order has breached that order. This item inserts a reference to subsection (3A) after a reference to subsection (1).

Item 6 – At the end of section 127

20. This item proposes the insertion of a definition into section 127 by creating a new subsection 127(8). The definition will clarify that the “protected action” referred to in section 127 is protected action under Division 8 of Part VIB of the WR Act.

Item 7 – Subsection 170MT(1)

Item 8 – At the end of section 170MT

21. As noted above, these items propose consequential amendments to section 170MT to remove the reference to the immunity under which section 127 orders do not apply to protected action from section 170MT and to place that immunity in section 127. Item 7 repeals subsection 170MT(1) and Item 8 inserts a note at the end of section 170MT to cross reference the provision in subsection 127(5A).