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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

WORKPLACE RELATIONS AMENDMENT (BETTER BARGAINING) BILL 2003

EXPLANATORY MEMORANDUM

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

WORKPLACE RELATIONS AMENDMENT (BETTER BARGAINING) BILL 2003

OUTLINE

The Bill proposes amendments to the *Workplace Relations Act 1996* (WR Act) to:

- ensure that industrial action cannot be taken from the time an agreement, or an award made under subsection 170MX(3), comes into operation until the nominal expiry date of the agreement or award has passed;
- allow the suspension of a bargaining period to allow for a cooling-off period during the negotiations for a certified agreement;
- allow the suspension of a bargaining period on application of a directly affected third party where industrial action is threatening to cause significant harm;
- clarify that protected industrial action is not available in relation to a claim which does not pertain to the employment relationship;
- clarify that protected industrial action cannot be taken where 2 or more employers are being treated as a single employer under sub paragraph 170LB(2)(b); and
- clarify that where parties negotiating a certified agreement and parties outside the agreement take industrial action in concert, this is not protected action.

Financial Impact Statement

The measures in this Bill will have no significant impact on Commonwealth expenditure.

REGULATION IMPACT STATEMENT

Suspension of bargaining periods for cooling-off and third party suspensions

Cooling – off Periods

Background

Under s.170MW of the *Workplace Relations Act 1996* (the WR Act), the Australian Industrial Relations Commission (the Commission) is empowered to suspend or terminate a bargaining period (and thus protected industrial action) on a number of grounds, including that a party is not genuinely trying to reach agreement or that industrial action is threatening to endanger the life, personal safety, health or welfare of the population or a part of it, or to cause significant damage to the Australian economy or a significant part of it.

Termination

If a bargaining period is terminated on the grounds that the protected industrial action is threatening to endanger the life, the personal safety or health, or the welfare, of the population or part of it, or to cause significant damage to the Australian economy or an important part of it the Commission must conciliate and if necessary arbitrate an award under s.170MX to settle the differences between the parties.

Suspension

The power of suspension under s.170MW has been used in a limited number of cases by the Commission and parties as a means of establishing a cooling-off period during the bargaining process to assist the resolution of disputes by enabling parties to negotiate in a less charged atmosphere.

Problem or issue identification

The WR Act does not currently contain any direct provision for cooling-off periods to address cases of stalemate or to act as a circuit breaker in cases of protracted industrial action. While s.170MW provides some limited scope for the Commission to establish informal cooling-off periods, it generally can only be invoked in defined and limited circumstances, for example when industrial action is threatening the national economy.

Cooling-off periods can play a valuable role in the negotiation process and would allow the parties, in the specified circumstances, further time to negotiate without the pressure of continued industrial action. Cooling-off periods would also give the parties time to investigate and consider the use of alternative means for resolving a stalemate situation, for example with the assistance of voluntary conciliation.

The lack of any direct arrangements for establishment of cooling-off periods may also encourage parties to continue with industrial action. For example, parties could contrive protected industrial action to establish the basis for termination of a bargaining period on grounds which result in arbitration as the means to resolve disputes rather than encouraging them to step back from industrial action and settle their differences by negotiation.

Specification of the desired objectives

The Government's broad objective is to provide legislative arrangements that encourage and assist parties to negotiate at the enterprise level without recourse to industrial action and to settle their differences without arbitral intervention.

Identification of options

Options

Option 1: Status quo

Retain the current procedures for suspension of bargaining periods which enable the Commission to grant an informal cooling-off period in situations where the requirements of s.170MW for suspensions can be met.

Option 2: Provide for cooling-off periods

Clear provisions for cooling-off periods could be included in the WR Act by allowing the Commission to suspend a bargaining period on application from a negotiating party in appropriate circumstances where protected action is being taken in respect of the proposed agreement. In deciding if a suspension of a bargaining period would be appropriate, the Commission would have regard to whether or not suspending the bargaining period would assist the negotiating parties to resolve the matters at issue, the duration of any protected action that is being taken (or has been taken) in respect of the proposed agreement, whether or not suspending the bargaining period would be contrary to the public interest or inconsistent with the objects of the Act and any other matter the Commission considers relevant.

If an order suspending a bargaining period was made, the Commission would specify the length of the suspension period. A negotiating party could apply to have the suspension of the bargaining period extended. The Commission would have regard to the same matters listed above, and whether or not the negotiating parties during the period of the suspension had genuinely tried to reach an agreement. An extension of a suspension of a bargaining period could only occur once.

In addition, to assist the resolution of the dispute, the Commission would be required to inform the negotiating parties that they may voluntarily submit the matters at issue to an agreed mediator for the purposes of mediation or to the Commission for the purposes of conciliation.

Assessment of impacts (costs and benefits) of each option

Option 1: Status quo

Costs

Because the WR Act does not formally establish provisions for cooling-off periods, application of the suspension powers under s.170MW to establish cooling-off periods is at the discretion of individual members of the Commission with only limited legislative guidance as to how and when these powers should be invoked.

The suspension powers of s.170MW are not well suited to providing for cooling-off periods, they cannot be easily used in this role and cannot be invoked in many circumstances where the suspension of a bargaining period would be appropriate.

Maintaining the existing provisions would prevent many parties from accessing the benefit of cooling-off periods as a circuit breaker in cases of stalemate or protracted disputes. More

businesses are therefore likely to experience situations in which reaching agreement is made more difficult because of the continuation of industrial action during negotiations. Such protracted action can result in substantial long-term costs to employers, employees and to productive workplace relationships.

Similarly, little legislative guidance is provided as to whether the Commission should suspend or should terminate a bargaining period when the relevant criteria are met. This results in some uncertainty amongst the parties regarding the consequences of their actions and may also provide incentive for some parties to escalate industrial action in order to obtain access to the arbitration powers of the Commission under s.170MX.

Benefits

In some cases the Commission has been able to utilise the powers available to it to establish cooling-off periods. The Commission could continue to do so to this limited and informal extent even if the legislation were not amended.

Option 2: Providing for cooling-off period

Costs

The introduction of cooling-off periods will mean that the WR Act contains another regulatory mechanism.

Benefits

The current limited use of s.170MW to establish informal cooling-off periods is recognition of the benefits that can be gained by such an approach. Introducing formal arrangements for cooling-off periods will extend the potential benefits to a much wider range of parties in a wider range of circumstances which have been clearly defined. Cooling-off periods will assist parties to resolve disputes over certified agreements by enabling them to negotiate in a less charged environment than that which is likely to exist when prolonged industrial action is continuing. This will tend to improve the parties' ability to negotiate agreements to their mutual benefit and will concomitantly assist in reducing the overall extent and duration of industrial action and associated costs to employers and employees.

Drawing parties' attention to voluntary mediation and conciliation will assist to resolve disputes without further industrial action.

Consultation

The Department of Employment and Workplace Relations (DEWR) wrote to key stakeholders requesting their views on the proposal to provide for cooling-off periods.

Responses were received from the Northern Territory Office of the Commissioner for Public Employment, the Western Australian Department of Consumer and Employment Protection (WA DCEP), the Australian Council of Trade Unions (ACTU), the Queensland Government, the Victorian Department of Innovation, Industry and Regional Development and the Australian Industry Group (AiG).

The AiG indicated strong support for the measure.

The ACTU noted that as the proposal was the same as that in the Workplace Relations Amendment (Genuine Bargaining) Bill 2002 and the submissions previously made in relation to this matter were still relevant. The ACTU stated previously that 'widening the ability of the IRC to suspend a bargaining period in cases of protracted action…is an attempt to tilt the balance in negotiations even further towards employers, without giving unions and employees any additional access to arbitration of their claims'.

The WA DCEP noted the Commission is already empowered under s.170MW of the WR Act to suspend a bargaining period. Further extension of the Commission's powers to order a cooling-off period would have to be justified on the basis s.170MW was inadequate in practice.

Consideration was given to the ACTU and WA DCEP comments. It was ultimately decided that the benefits from such a suspension mechanism outweighed the cost and that this was the most effective way of balancing the rights and responsibilities with the workplace relations system. Employer groups such as AIG have previously provided evidence of the potential benefits of cooling-off periods.

Conclusion and Recommended Option

The Government believes that the WR Act should explicitly provide for cooling-off periods by amending the current provisions for suspension of bargaining periods. Explicit provision for cooling-off periods will allow the opportunity for parties to resolve issues directly, or with the assistance of voluntary conciliation and/or mediation and will have particular value in cases of protracted action or where a stalemate has arisen.

Implementation and review

The proposal requires amendments to the WR Act. DEWR will monitor and evaluate the effect of such legislative change.

Provision for suspensions by third parties

Background

Under subsection 170MW(3) of the WR Act the Commission may suspend or terminate a bargaining period where industrial action is threatening to endanger the life, the personal safety or health, or the welfare, of the population or part of it, or to cause significant damage to the Australian economy or an important part of it. In these particular circumstances the Commission can act on its own initiative or on application by the Minister, rather than being limited to only making an order on application by a negotiating party.

Termination

If a bargaining period is terminated under subsection 170MW(3) of the WR Act, the Commission must conciliate and the Commission must, if it considers appropriate, arbitrate to settle the matters.

Problem or issue identification

The WR Act does not currently contain any direct provisions for providing relief for third parties that may be suffering significant harm as a result of industrial action.

Currently under s.170MW of the WR Act relief to third parties is only indirectly provided. The Commission may suspend or terminate a bargaining period where industrial action is threatening to endanger life or the personal safety, health, or welfare of the population or to cause significant damage to the economy. However, in these circumstances the Commission may only grant an order on application by a negotiating party, the Minister or when acting on its own initiative. Other parties, despite sustaining significant harm, are unable to gain direct relief from the Commission from the impact of the industrial action.

For a business and employees of a business that are not party to industrial action, but are affected by the action, such interference can potentially result in loss of profits and wages and even business closure. For third parties in the community more generally, industrial action can cause significant disruptions resulting in financial and non-financial losses.

Providing third parties with a remedy against harm from industrial action has the potential to lessen the impact and the extent of losses and harm incurred.

Specification of the desired objectives

The Government's broad objective is to provide legislative arrangements that encourage and assist parties to negotiate at the enterprise level without recourse to industrial action and to settle their differences without arbitral intervention.

Identification of options

Options

Option 1: Status quo

Retain the current procedures for suspending or terminating a bargaining period whereby the Commission may only grant an order on application by a third party where the third party is the Minister and the industrial action is threatening to endanger life or the personal safety, health, or welfare, of the population or part of it, or to cause significant damage to the Australian economy or an important part of it.

Option 2: Provide for suspensions by third parties

Provisions to allow for suspension of bargaining periods where significant harm is being done to a third party could be included in the WR Act by allowing the Commission to suspend a bargaining period on application by or on behalf of an organisation, a person or a body directly affected by the action (other than a negotiating party) or the Minister, if industrial action is being taken in respect of a proposed agreement. In deciding if the suspension of a bargaining period would be appropriate, the Commission would consider whether the action is threatening to cause significant harm to any person (other than the negotiating party) and would have regard to whether suspending the bargaining period would be contrary to the public interest or inconsistent with the objects of the WR Act and any other matters that the Commission considers relevant.

In considering whether the action is threatening to cause significant harm to any person the Commission may have regard to particular factors:

- if the person is an employee, the extent to which the action affects the interests of the person as an employee;
- the extent to which the person is particularly vulnerable to the effects of the action;
- the extent to which the action threatens to:
  - damage the ongoing viability of a business carried on by the person;
  - disrupt the supply of goods or services to a business carried on by the person;
  - make the person unable to perform a condition of a contract to which he or she is a party;
  - cause other economic loss to the person; and
  - any other matters that the Commission considers relevant.

Assessment of impacts (costs and benefits) of each option

Option 1: Status quo

Costs

Because the WR Act does not provide third parties with the means to gain specific relief where industrial action is causing them significant harm, third parties will continue to incur significant harm as the result of the action.

Benefits

Under s.170MW of the WR Act the Commission may provide relief indirectly to third parties by suspending or terminating a bargaining period where an application is made by a negotiating party, the Minister or the Commission acts on its own initiative, and industrial action is threatening to endanger life, the personal safety or health, or the welfare of the population or to cause significant damage to the economy. The Commission could continue in this limited way to provide occasional indirect relief to third parties even if the legislation was not amended.

Option 2: Provide for suspensions by third parties

Costs

Providing for the suspension of a bargaining period on the application of third parties will mean that the WR Act contains another regulatory mechanism.

Benefits

Providing for the suspension of the bargaining period on the application of third parties will enable third parties to seek relief from the Commission when they are being significantly harmed by industrial action.

Consultation

The Department of Employment and Workplace Relations (DEWR) wrote to key stakeholders requesting their views on the proposal to provide for the suspension of bargaining periods on application third parties.

Responses were received from the Northern Territory Office of the Commissioner for Public Employment, the Western Australian Department of Consumer and Employment Protection (WA DCEP), the Australian Council of Trade Unions (ACTU), the Queensland Government, the Victorian Department of Innovation, Industry and Regional Development and the Australian Industry Group (AiG).

The AiG indicated strong support for the measure.

The ACTU stated that the WR Act already provides appropriate relief for third parties in that subsection 170MW(3) provides for a bargaining period to be suspended or terminated where industrial action may threaten the health and welfare of the population or cause significant damage to the Australian economy.

The WA DCEP considered it inappropriate for third parties to intervene as proposed.

While the comments from the ACTU and the WA DCEP were considered it was ultimately decided that the benefits from such a suspension mechanism outweighed the cost and that this was the most effective way of balancing the rights and responsibilities with the workplace relations system.

Conclusion and Recommended Option

The Government believes that the WR Act should provide for third parties to seek direct relief from the Commission by way of a suspension of a bargaining period, when they are being significantly harmed by industrial action. This provision will place some break on the harm that can be incurred by third parties due to the action of parties negotiating an agreement.

Implementation and review

All of the proposals would require amendments to the WR Act. DEWR would monitor and evaluate the effect of such legislative change.

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. The amendments set out in Schedule 1, 2, 3, 4 and 5 will commence 28 days after the Act receives Royal Assent.

Clause 3 – Schedule(s)

3. This clause provides that an Act that is specified in the Schedule is amended or repealed as set out in the Schedule, and any other item in a Schedule operates according to its terms.

SCHEDULE 1 – INDUSTRIAL ACTION AND LOCKOUTS BEFORE EXPIRY OF AGREEMENT etc.

Workplace Relations Act 1996

Item 1 – Subsection 170MN(1)

1. This item proposes to omit words from subsection 170MN(1) and substitute new words to ensure that industrial action cannot be taken from the time an agreement or an award made under subsection 170MX(3), comes into operation until the nominal expiry date of the agreement or award has passed.

2. Existing section 170MN provides that, from the time when a certified agreement or an award made under subsection 170MX(3) comes into operation, until its nominal expiry date has passed, an employee, organisation or officer covered by the agreement or award must not, for the purposes of supporting or advancing claims against the employer in respect of the employment of employees whose employment is subject to the agreement or award, engage in industrial action. Section 170MN is a penalty provision.

3. In *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2003] FCAFC 183 (*Emwest*), the Full Federal Court found that under the current section 170MN, protected industrial action could be taken, prior to a certified agreement passing its nominal expiry date, provided the protected action was in relation to claims not already covered in the agreement.

4. While proposed new subsection 170MN(1) is designed to remedy the decision of the Full Federal Court in *Emwest*, it goes further by prohibiting all industrial action, irrespective of its purpose, until the nominal expiry date of an agreement or an award made under s.170MX(3) has passed. For example, as a result of the proposed amendments to section 170MN, industrial action directed at a third party rather than the employer would be prohibited during the life of a certified agreement.

Item 2 – Subsection 170MN(4)

5. Item 2 proposes a similar amendment, as proposed in Item 1, to lockouts.

Item –3 – Application

6. This item proposes that the amendments proposed by Items 1 and 2 will only apply in relation to engaging in or organising industrial action or lockouts on or after the commencement of this Schedule.

SCHEDULE 2 - SUSPENSION OF BARGAINING PERIODS

Workplace Relations Act 1996

Item 1 – After section 170MWA

170MWB – Power of Commission to suspend bargaining period to allow for cooling-off application by negotiating party

7. This item proposes to insert new section 170MWB to provide the Commission with discretion to suspend a bargaining period to allow for a cooling-off period. The intention of the cooling-off period is to remove, for a period of time, the pressure of protected industrial action from the negotiations for a certified agreement, allowing parties room to continue negotiations in a less charged environment.

8. Proposed paragraphs 170MWB(1)(a)-(c) allows the Commission to order a cooling-off period if a number of consider a number of requirements are met.

9. Proposed paragraph 170MWB(1)(a) ensures that a suspension for cooling-off is only available to parties negotiating in relation to the proposed agreement. The remedy is not available to any parties outside the proposed agreement.

10. Proposed paragraph 170MWB(1)(b) refers to protected action taking place. This is not limited to situations where industrial action is actually taking place. This is consistent with the Full Bench decision in *State of Victoria and Health Services Union* [Print L9810].

11. Proposed subparagraphs 170MWB(1)(c)(i)-(iv) list factors for the Commission to consider in deciding whether a suspension is appropriate. The Commission is not confined to the factors provided.

12. Under proposed subsection 170MWB(2), the appropriate length of a "cooling-off" period is at the discretion of the Commission.

13. Under proposed subsection 170MWB(3), the Commission has discretion to extend the period of a suspension of the bargaining period. An extension may only be made on the application of a negotiating party in respect of the proposed agreement. In considering whether an extension should be ordered, the Commission will have regard to the same factors it considered in ordering a suspension. Also the Commission will consider whether the negotiating parties have used the cooling-off period genuinely try to reach an agreement.

14. Proposed subsection 170MWB(4) provides that a cooling-off period may only be extended once.

15. In the interests of procedural fairness, under proposed subsection 170MWB(5), the Commission must give the negotiating parties the opportunity to be heard when considering an application for the extension of a cooling-off period.

16. To facilitate the parties resolving the matters at issue between them, proposed subsection 170MWB(6) requires the Commission to inform the negotiating parties that mediation and conciliation are available to them during the suspension period.

17. A cooling-off period is intended to provide a circuit break in protracted negotiations for a certified agreement, therefore, under new subsection 170MWB(7), parties cannot take protected industrial action during a cooling-off period.

18. A suspension under proposed section 170MWB differs from a suspension under existing section 170MW in that it is intended to provide a break in the industrial action to facilitate parties resolving the issues between them. Section 170MW gives the Commission discretion to put a stop to industrial action in specified circumstances set out in existing subsections 170MW(2)-(7).

170MWC – Power of Commission to suspend bargaining period – significant harm to third party

19. This item proposes to insert new section 170MWC to give the Commission the discretion to suspend a bargaining period where third parties are threatened with significant harm as a result of industrial action.

20. Proposed subsection 170MWC(1) requires the Commission to consider a number of factors in exercising its discretion to suspend a bargaining period. The factors to be considered by the Commission are, whether:

- industrial action is being taken which threatens to cause significant harm to any person. This includes the organising of industrial action but is not limited to situations where industrial action is actually taking place. This is consistent with the Full Bench decision in *State of Victoria and Health Services Union* [Print L9810].
- the application is made by, or on behalf of, a person directly affected by the industrial action, or by the Minister. The remedy is not available to parties negotiating for the proposed agreement; and
- suspending the bargaining period would not be contrary to the public interest.

21. Proposed subsection 170MWC(2) provides factors for the Commission to consider when determining whether significant harm is threatened. The factors are not exclusive; the Commission may consider any other matters it considers relevant.

22. Proposed paragraphs 170MWC(2)(a) and (c) can address situations where industrial action taken in one business may cause significant damage to another business or to employees in another business. These circumstances commonly arise in the car industry where, for example, industrial action taken by a components manufacturer has a flow on effect to major manufacturers and their employees.

23. Proposed paragraph 170MWC(2)(b) can address situations where a particularly vulnerable third party action may suffer the consequences of the industrial action.

24. Under proposed subsection 170MWC(3), the appropriate length of a suspension is at the discretion of the Commission.

25. Under proposed subsection 170MWC(4), the Commission has discretion to extend the period of a suspension of the bargaining period. An extension may only be made on the application by or on behalf of a party directly affected by the industrial action or by the Minister. In considering whether an extension should be ordered, the Commission is to have regard to the same factors it considered in ordering the suspension.

26. Under proposed subsection 170MWC(5), only one extension of the suspension period is allowed. The appropriate length of an extension of a suspension period is at the discretion of the Commission.

27. In the interests of procedural fairness, under proposed subsection 170MWC(6) the Commission must give the negotiating parties the opportunity to be heard when considering an application for a third party suspension or extension of a suspension on the basis of threatened significant harm to a third party.

28. To facilitate the parties resolving the matters at issue between them, proposed subsection 170MWC(7) requires the Commission to inform the negotiating parties that mediation and conciliation are available to them during the suspension period.

29. Proposed subsection 170MWC(8) provides that any industrial action taken in respect of the proposed agreement where a bargaining period has been suspended is not protected action.

Item 2 – Application of amendment

30. This item proposes that the amendments in Item 1 will only apply to bargaining periods which began on or after the commencement of this Schedule.

SCHEDULE 3 - CLAIMS NOT PERTAINING TO EMPLOYMENT RELATIONSHIP

Workplace Relations Act 1996

Item 1 – After subsection 170ML(6)

31. This item proposes the insertion of a new subsection (6A) into section 170ML. Section 170ML identifies certain action as protected action to which the immunity provision in section 170MT applies. This section renders protected action immune from section 127 orders to stop or prevent industrial action. It also renders protected action immune from legal action unless it involves personal injury, wilful or reckless destruction of, or damage to property or the unlawful taking, keeping or use of property. An action for defamation arising out of protected action, however, is not prevented.

32. Existing subsections 170ML(2) and (3) provide that employees and employers may, during a bargaining period, take protected action or organise a lockout for the purpose of supporting or advancing claims made in respect of the proposed agreement. Proposed paragraph 170ML(6A)(a) clarifies that, in relation to an agreement proposed to be certified under Division 2, Part VIB of the Act, protected action is not available in relation to a claim about a matter that does not pertain to the employment relationship mentioned in section 170LI. Proposed paragraph 170ML(6A)(b) similarly clarifies that in relation to a certified agreement proposed to be certified under Division 3, Part VIB of the Act, protected action is not available in relation to a claim about a matter that does not pertain to the relationship between employers and employees to which the relevant or potential industrial dispute relates.

33. This item clearly sets out the policy intention that protected action is not able to be taken in relation to matters that do not pertain to the employment relationship. This amendment does not concede in any way that the decision of the Full Court of the Federal Court in *Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Electrolux Home Products Pty Limited* [2002] FCAFC 199 (*Electrolux*) is correct. In *Electrolux*, the Full Court held that protected industrial action could be taken in relation to a claim which is genuinely made in respect of the proposed agreement, regardless of whether the claim pertained to the employment relationship.

Item 2 – Application of amendment

34. This item proposes that the amendments made by Item 1 will only apply to bargaining periods initiated after the commencement of this Schedule. The proposed amendment will not impact on industrial action taken prior to the enactment of the amendments.

SCHEDULE 4 - PROTECTED ACTION AND RELATED CORPORATIONS

Workplace Relations Act 1996

Item 1 – After subsection 170ML(3)

35. The Act provides that agreement can be made between employers and employees in a single business of the employer. The Act also provides that, in relation to specific circumstances, a multiple business agreement can be made which can involve more than one employer. Protected action is not available in relation to a proposed multi- business agreement.

36. Subsection 170LB(2) provides a means whereby 2 or more employers can be treated as a single business and a single employer for the purposes of making and certifying agreements. In particular, paragraph 170LB(2)(b) provides that if 2 or more corporations that are related to each other for the purposes of the *Corporations Act 2001* each carry on a single business, they may be treated as one employer and the businesses may be treated as one business.

37. Subsections 170ML(2) and (3) provide that employees and employers may, during a bargaining period, take protected action or organise a lockout for the purpose of supporting or advancing claims made in respect of the proposed agreement.

38. This item proposes to insert a new subsection 170ML(3A) after the existing subsection 170ML(3). Proposed subsection 170ML(3A) provides that, for the purposes of subsection 170ML(2) and subsection 170ML(3), 2 or more corporations cannot be treated as a single employer under sub paragraph 170LB(2)(b).

39. The item is designed to make it clear that protected industrial action may not be taken in relation to 2 or more corporations who are treated as a single employer for the purposes of section 170LB(2)(b).

Item 2 – Application of amendment

40. This item proposes that the amendments made by Item 1 will only apply to bargaining periods initiated after the commencement of this Schedule. The proposed amendment will not impact on industrial action taken prior to the enactment of the amendments.

SCHEDULE 5 – PROTECTED ACTION AND INVOLVEMENT OF NON – PROTECTED PERSONS

Workplace Relations Act 1996

Item 1 – Section 170MM

1. This item repeals section 170MM and substitutes a new section 170MM. The proposed section is designed to make clear that protected industrial action can only be taken by parties to whom the proposed agreement will apply (ie, a union, employer, or employee that is a negotiating party in respect of the agreement or a member of a union negotiating party whose employment will be subject to the proposed agreement).

2. Industrial action will lose its protected status if it is organised or engaged in in concert with any person or organisation of employees that is not protected in respect of the specific industrial action being taken, (ie action solely in pursuit of a specific agreement by those who it is proposed will be subject to that agreement).

3. The heading of the section is changed to make it clear that the section applies to any circumstance in which industrial action is engaged in, in concert with person who are not protected for that action.

Item 2 – Application of amendment

41. This item proposes that the amendments in the Schedule will only apply in relation to engaging in or organising industrial action on or after the commencement of this Schedule.