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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

WORKPLACE RELATIONS AMENDMENT (SIMPLIFYING AGREEMENT-MAKING) BILL 2004

REVISED EXPLANATORY MEMORANDUM

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

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED

1) WORKPLACE RELATIONS AMENDMENT (SIMPLIFYING AGREEMENT-MAKING) BILL 2004

OUTLINE

The Bill proposes amendments to the *Workplace Relations Act 1996* (WR Act) which are intended to make agreement making easier and more widely accessible, to reduce the formality and cost involved in having an agreement certified, prevent unwarranted interference by third parties in agreement making and introduce an option of allowing certified agreements to have an extended nominal life of up to five years. Key reforms to be implemented by the Bill are as follows.

In relation to Australian Workplace Agreements (AWAs), the Bill will:

- 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;

- permit employees to sign AWAs at any time after receiving a copy of the information statement prepared by the Employment Advocate and an explanation of the effect of the agreement;

- permit an employee party to an AWA to withdraw consent within a cooling-off period;

- remove the provisions relating to offering AWAs in the same terms to comparable employees;

- simplify the approval process by consolidating the existing assessment of filing requirements and approval requirements into a one step approval process;

- allow the Employment Advocate to revoke an approval or refusal of an AWA, extension agreement, variation agreement or termination agreement (this power does not extend to approval or refusal decisions taken by the Commission); and

- allow an employee, or the Employment Advocate on behalf of an employee, to recover a shortfall in entitlements in specified circumstances where an AWA or related agreement:
  - ceases to have effect;
  - is approved with an employer action or undertakings; or
  - was void.

- retain the current provisions in the Act which relate to the approval process of AWAs and variation agreements by the Employment Advocate.

In relation to certified agreements, the Bill will:

- provide that, in cases where an application to certify, extend, vary or terminate a certified agreement is considered by the Commission, no formal hearing should be held unless it is necessary in the circumstances (although allowing employees and other defined persons to request that the Commission conduct a hearing);

- remove the entitlement of employee organisations to prevent the extension, variation or termination of section 170LK agreements, while still retaining a role for such organisations where requested by a member;

- allow the Commission to certify an agreement, notwithstanding that the agreement was varied during the employee consideration period without the consideration period being recommenced, if the Commission is satisfied that no employee who would be covered by the agreement suffered detriment as a result of the non-recommencement;

- make a number of minor amendments and correct technical defects; and

- retain the Act's existing provisions that certified agreements must have a nominal life of no more than three years after the date on which the agreement comes into operation while introducing the option of allowing certified agreements to have an extended nominal life of up to five years. These 'extended agreements' would need to meet certain requirements which are additional to those which apply to three year certified agreements. The Bill will provide:

  - provide that 'extended agreements' which may have a nominal life of between three and five years may be made under sections 170LK, 170LJ and 170LN of the Act;

  - set out special criteria to be applied by the Commission when certifying 'extended agreements';

  - create a mechanism to enable a party to seek a reassessment by the Commission of the extended agreement any time after it has been operating for at least three years to ensure that it still meets the no-disadvantage test; and

  - allow for extended agreements that are found by the Commission to no longer meet the no-disadvantage test to be varied so that they do pass the no-disadvantage test; or terminated by agreement or in the public interest. If no action is taken by the parties, the extended agreement will reach its nominal expiry date three months after the Commission makes its finding on the no-disadvantage test.

2) FINANCIAL IMPACT STATEMENT

The Bill has no financial impact on the Commonwealth Budget.

(b) REGULATION IMPACT STATEMENT

(c) Certified Agreements

Article II. Problem

1. The introduction of the *Workplace Relations Act 1996* (WR Act) reinforced agreement-making as the primary focus of the workplace relations system. It provides greater choice and flexibility in making both individual and collective agreements.

2. Although the WR Act has increased access to collective agreements, the procedural requirements and prospect of unwarranted interference by third parties can still operate as a disincentive to agreement-making and impose unnecessary procedural burdens (and hence costs) on the parties making the agreement, particularly employers. The current procedures for formalising certified agreements (CAs) are perceived by the parties to be too time consuming, complex, costly and unnecessarily formal.

3. Uncertainty about the current requirement for a 14-day consideration period for an agreement, for example where a new employee begins work during this period, can introduce unnecessary delays in the agreement-making process. Delays can also occur with the requirement that the 'consideration period' recommences with any and each variation to the proposed agreement, regardless of whether the variation is minor or technical in nature.

4. Another concern is that parties must currently attend Commission hearings for agreements to be certified. This means that parties must wait for their application to be listed for hearing and then take time away from their workplaces to participate in hearings in circumstances where the applications could have been dealt with expeditiously and with minimal cost on the basis of written applications only. Similar concerns have been expressed in relation to applications for variation, extension or termination of agreements.

5. There is no current statutory requirement for the Commission to hold formal hearings for certification of agreements but it has become practice.

6. Employers and employer organisations have expressed concerns that a union bound by an agreement made directly with employees under section 170LK of the WR Act may effectively prevent the variation, extension or termination of the agreement, even if the variation has majority employee support. The effect of these provisions is that a union representing the interests of a minority of employees (even as few as a single member) at the enterprise, has the capacity to veto decisions agreed to by employers and the majority of employees covered by the agreement. This is inconsistent with the agreement-making framework established by the WR Act because it has the potential to undermine the capacity of employers and a majority of employees at the workplace or enterprise level to give effect to agreed decisions on matters relating to their working arrangements and terms and conditions of employment.

7. The WR Act imposes a maximum nominal period of operation for a certified agreement of three years. Certified agreement must pass the 'no-disadvantage test' (NDT) at the time of approval – that is, the agreement's certification must not result, on balance, in a reduction in the overall terms and conditions of employment of employees covered by the agreement when compared with the relevant award, or designated award, and the laws the Commission considers relevant.

8. Employer and employer organisations have also expressed concerns that a nominal expiry date of three years is not always long enough for some businesses or projects. This means that

these businesses can face the prospect of an unstable workplace relations environment at crucial times in the business/project cycle. This uncertainty can also be detrimental to the interests of employees and their representatives.

9. The issues outlined above are significant for workplaces that are not currently covered by agreements and also for those workplaces where the parties wish to replace or otherwise update their existing agreements.

.1 Objectives

1. The objectives of the proposed CA provisions are:

- to make agreement-making at the workplace or enterprise level easier and more widely accessible;
- to reduce the formality and cost involved in having an agreement certified;
- to prevent unwarranted interference by third parties in agreement-making and to remove barriers to the effective exercise of agreement-making choices, including workplace choices about the variation, extension or termination of agreements; and
- to provide for the option of making agreements up to a maximum of five years in appropriate circumstances; and
- to provide safeguards for employers and employees entering into these agreement so they are not disadvantaged by extended agreements.

.2 Options

Option 1: Status Quo

Option 2: Amend Part VIB of the Workplace Relations Act 1996

1. To make various amendments to Part VIB of the WR Act, dealing with the negotiation of a CA, the process of having a CA approved, varied, extended or terminated by the Commission, and provide for the certification of agreements with a nominal expiry date of up to five years (an 'extended agreement'). In particular, it is proposed to:

- make it clear that the 14-day period for employees to consider a proposed agreement does not need to recommence if a new employee begins employment during that period;
- provide the Commission with the discretion to waive the requirement for s170LK Agreements that the consideration period recommences if the Agreement is varied once the consideration period has begun, if it is satisfied that not recommencing the period would not be detrimental to the people whose employment would be covered by the agreement;
- remove the ability of an organisation bound to a s170LK agreement to veto its extension, variation or termination, but provide it with the right to make submissions regarding the proposed extension, variation or termination if it has at least one member whose employment is subject to the agreement and has requested the organisation to make a submission (and the organisation is entitled to represent the person/s);

- allow for the approval of a CA without a formal hearing, and make clear that this will be the normal process with hearings only being conducted in limited circumstances; similarly, no formal hearing will be necessary for an application to extend, vary or terminate a CA;

- introduce extended agreement arrangements to be made available for agreements made with employees (under section 170LK), agreements made with organisations of employees (under section 170LJ) and agreements made in settlement of industrial disputes (under section 170LN);

- ensure the Commission must refuse to certify an 'extended agreement' unless it is satisfied that the length of the agreement is appropriate in the circumstances and in the interests of employers and employees. The agreement must also contain a statement to the effect that anytime after three years a party to the agreement may apply to have the agreement reassessed against the no-disadvantage test; and

- provide if an extended agreement that has been in operation for three years or more is retested and found to fail the no-disadvantage test, parties to the agreement have a number of options. They can vary or terminate their agreement within the following three month period. If the agreement is neither varied nor terminated, the 'extended agreement' will reach its nominal expiry date three months after the Commission makes its finding. After termination, or when the new nominal expiry date has passed, the parties will be able to access protected industrial action if they wish to negotiate a new agreement.

.3 Impact analysis

Option 1: Status Quo

Costs

1. The costs of retaining the existing arrangements would be:

- the current requirements for the making and certification of agreements can be too inflexible, complex and costly (although the existing procedures may discourage employers from having a CA it is difficult to quantify the cost of this);

- the procedural requirements are widely regarded as cumbersome and time consuming, involving a high degree of formality and too many steps to undertake before completion;

- the convening of hearings adds to the length of the certification process - at present, applications for certification are generally processed by the Commission within around 30 days;

- the convening of hearings can impose unnecessary costs for the Commission and also for parties who are required to attend;

- the rights available to unions bound by agreements made under section 170LK can prevent effect being given to the wishes of the employer and a majority of employees in respect of the variation, extension or termination of such agreements; and

- the current nominal expiry date does not suit all businesses or projects. This means that some employers and employees may have to renegotiate agreements or face protected industrial action at crucial times in the business cycle. This uncertainty can lead to an

unstable workplace relations environment that is detrimental to the interests of employers and employees.

Benefits

11. The main benefit of remaining with the status quo would be that many parties are familiar with the current arrangements.

Option 2: Amend Part VIB of the Workplace Relations Act 1996

Costs

12. The main cost of the proposed amendments is that the employees and employers that have used the federal agreement-making system in its present form will need to gain an understanding of new arrangements. Initially, employer and employee organisations will need to provide additional advice to their members on the new requirements for the making and certification of agreements.

13. The extended agreement option will be entirely voluntary and will not impose any significant costs or cause any disadvantage to business or employers or employees. In addition, the reassessment mechanism will ensure consistency with the current policy on the no-disadvantage test and existing safeguards for employees in agreement making.

Benefits

11. The benefits of option 2 are:

- the requirements for the making and certification of agreements are more flexible than the present requirements;
- the demands on parties to agreements in terms of time and costs are less onerous than the present arrangements because there will be a substantially reduced need to attend hearings;
- there will be scope to reduce the time taken to certify agreements;
- the costs incurred by the Commission in the certification process will be reduced as a result of the streamlined arrangements for the certification of agreements by the Industrial Registrar and the reduced need for hearings;
- it addresses the problem of unions overriding the wishes of an employer and the majority of employees covered by the agreement, while continuing to provide unions with the capacity to represent the interests of their members;
- it gives effect to the Government's objectives of giving primary focus to agreement-making at the workplace or enterprise level while providing choice as to agreement-making options; and
- the 'extended agreement' option would benefit employers, employees and unions by providing an additional agreement making option. Where it suits the circumstances of the employer and employees, they will be able to gain the additional certainty and stability provided by extended agreements up to a maximum of five years.

.4 Consultation

11. In October/November 1999, public hearings were held and submissions invited from interested parties by the Senate Employment, Workplace Relations, Small Business and Educations Legislation Committee inquiry into the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999. Submissions were received from private individuals, employers, employer groups, employee organisations, community groups and academics.

12. Employers and employer associations have expressed the view that, for some businesses, the existing procedures are too inflexible, complex and costly. They are also seen as cumbersome,

involving a high degree of formality, unnecessary hearings and involve too many steps before completion. Employee organisations and community groups have expressed the view that any changes to the legislation need to retain adequate protection for low paid or vulnerable workers.

13. The May 1999 ministerial discussion paper, *The continuing reform of workplace relations: Implementation of More Jobs, Better Pay*, also invited written comments or submissions on measures to simplify the agreement-making process.

14. The views expressed by the parties have been taken into account in the preparation of this bill and, in some cases, proposed measures have been modified or removed as a result of these consultations.

.5 Conclusion and recommended option

19. Option 2 is preferred over the status quo because it:

- increases the attractiveness of agreement-making as an option available to the parties to formalise their employment arrangements by removing impediments to genuine choice;
- substantially reduces transaction costs by providing greater flexibility in the agreement-making process and providing for agreements to be certified without the need for hearings (thus reducing delay and costs associated with certification);
- provides appropriate safeguards for the parties, through, for example, provisions that allow parties to request that a formal hearing be held by the Commission;
- meets the Government's objectives of giving primary focus to agreement-making at the workplace or enterprise level while providing choice as to agreement-making options;
- addresses the practical problems that have arisen in connection with the operation of the current legislation;
- enhances the agreement making framework by providing employers and employees with another option for reaching mutually beneficial agreements at the workplace level; and
- provides safeguards for employers and employees entering extended agreements, particularly through the reassessment of the NDT.

.6 Implementation and review

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

(a) Australian Workplace Agreements

Article III. Current Situation

19. Existing agreement-making provisions for Australian Workplace Agreements (AWAs) are contained in Part VID of the *Workplace Relations Act 1996* (WR Act). This Part establishes:

- a two-stage process, whereby AWAs must be filed with the Employment Advocate, after which a filing receipt can be issued (typically takes 3 days) and then approved (typically a

turnaround time of 20 days or less), provided various statutory requirements and tests have been met;

- an employee cannot sign an AWA in the designated 'consideration period' (5 days for a new employee and 14 days for an existing employee);
- an AWA for an existing employee comes into operation when it is approved by the Employment Advocate or on any later date specified in the AWA. An AWA for a new employee comes into operation when the Employment Advocate issues a filing receipt for the AWA[1], on the date specified in the AWA, or when the employment commences, whichever is the latest;
- provision exists for new employees to recover compensation for a shortfall in entitlements in some cases where an AWA ceases to operate;
- the Employment Advocate is not currently empowered to apply for a penalty arising from any breaches of an AWA or recover underpayments; and
- an additional approval requirement that when an employer has not offered an AWA in the same terms to all comparable employees (ie employees engaged in the same kind of work), the employer did not act unfairly in failing to do so.

20. The rate of approval of AWAs by the Office of the Employment Advocate (OEA) is in the vicinity of 5,000 per month, and altogether around 240,000 AWAs have been made since the introduction of the new workplace relations legislation. The May 2000 ABS Survey of Employee Earnings and Hours estimates that federally registered individual agreements (AWAs) cover only 1 per cent of employees in Australia. Another 0.8 per cent of employees are covered by registered individual agreements in State jurisdictions. The total proportion of employees on individual agreements (40 per cent) includes a substantial proportion of employees paid at overaward rates, as well as those on informal individual agreements. Where employees are paid at overaward rates, arrangements may be less flexible as the award cannot be displaced. Therefore, simplifying AWAs may provide a better avenue for employers and employees who have traditionally relied on such overaward arrangements.

Article IV. Problem

19. The introduction of the WR Act reinforced agreement-making as the primary focus of the workplace relations system. It provides greater choice and flexibility in making both individual and collective agreements.

20. The current procedures and tests associated with formalised agreements can be too complex, time-consuming and costly, and potentially discourages the use of individual AWAs. There are numerous steps to be undertaken as a prerequisite for the approval of an AWA. The procedures are seen as involving a high degree of formality, and some parties (particularly employers without in-house access to specialised knowledge and assistance) may be discouraged from negotiating AWAs with their employees.

[1] The Employment Advocate is required to issue a filing receipt when certain procedural requirements are met - see s.170VN(2). The issuing of a filing receipt does not amount to approval of an AWA - assessment of an AWA for compliance with the statutory approval requirements is a separate (and later) process.

21. There are practical concerns that AWAs cannot come into effect as soon as the parties have reached agreement. Even in the case of new employees, employers cannot commence new employees on AWAs until at least a week has elapsed since the job offer.

22. Employers and employees who are keen to use an AWA often inadvertently breach the required period which must be observed between consideration of an AWA, and when it can be signed. The Employment Advocate has indicated that the highest proportion (around 60 per cent) of AWAs refused is due to the employee prematurely signing the AWA.

23. The EA has established an internal review process for reconsideration/revocation of AWA decisions. The scope of the review power is not clearly defined.

24. The expectation that AWAs in the same terms will be offered to all comparable employees at a workplace limits flexibility. This is incompatible with individual agreement-making.

.1 Objectives

19. Broadly, the aim of the AWA provisions is to enable greater flexibility and choice in agreement-making so that agreements can better reflect the local needs and circumstances of employees and employers. In relation to streamlining current arrangements for agreement-making the objectives are to:

- simplify and consolidate the procedures for making AWAs so that it becomes a one-stage, more clearly understood, process;
- remove the delay before an AWA can come into effect
  - this would be counterbalanced by allowing employees a cooling off period during which they could withdraw from the AWA;
- encourage greater use of AWAs; and
- increase scope to tailor AWAs to suit individual employees.

.2 Options

Option 1: Status Quo

Option 2: Amend Part VID of the Workplace Relations Act 1996

19. In order to simplify procedures for making Australian Workplace Agreements (AWAs) and achieve the Government's objectives the following amendments to Part VID of the *Workplace Relations Act 1996* (the WR Act) are proposed:

- simplify the AWA approval process by consolidating the existing filing and approval requirements into a one-step process for approval by the Employment Advocate with provision for referral to the Australian Industrial Relations Commission (the Commission) in certain circumstances;
- enable AWAs to take effect from the day of signing;
- allow employees to sign AWAs at any time after receiving a copy of the information statement from the Employment Advocate and an explanation of the effect of the agreement,

with provision for an employee to be able to withdraw consent to the AWA within a cooling-off period (5 days for new employees and 14 days for existing employees);

- provide the Employment Advocate with express power to revoke AWA decisions;
- allow the Employment Advocate to initiate proceedings to recover unpaid money and pursue penalties on behalf of employees in limited circumstances; and
- remove the comparable employee provisions.

.3 Impact analysis

Option 1: Status Quo

Costs

19. The costs of maintaining the existing arrangements would be as follows:

- employers who might otherwise wish to enter into AWAs with their employees regard the processes for the making and approval of AWAs as too complex, technical and time-consuming (although the existing procedures may discourage employers from using AWAs it is difficult to quantify the cost of this);
- due to the nature of the process, employers who may want to negotiate AWAs with their employees often consider that it is necessary to engage external expertise (such as lawyers or workplace relations consultants) to assist them to meet the legislative requirements. This can be burdensome, particularly to small business employers;
- the statutory period which must 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 application for approval can be made, even if an employee is ready to sign an AWA immediately;
- the comparable employees provisions limit the flexibility to tailor the agreements to suit the needs of individual employees and the employer;
- the implicit powers currently used by the Employment Advocate are not straightforward nor clear in their scope making it difficult for the EA to reconsider and revoke AWA decisions; and
- the requirement that the Employment Advocate issue filing receipts is a time consuming and unproductive task that diverts resources from the more important tasks associated with the approval of AWAs.

Benefits

19. The main benefit of remaining with the status quo would be that many employers and employees are now familiar with the current arrangements.

20. Under the current provisions, which permit only AWAs for new employees to come into effect before they have been approved, there are relatively few situations in which an AWA ceases to operate as a result of approval being refused, and hence, there are relatively few cases in which it is necessary for an employee to seek to recover compensation for shortfalls in entitlements under awards. (In relation to existing employees, as the AWA comes into effect

after it has been approved or at a later date, the only prospect of such an employee incurring a shortfall is if an AWA approval decision is void.)

Option 2: Amend Part VID of the Workplace Relations Act 1996

(i) Costs

19. Those employees and employers that are familiar with the existing requirements will need to acquaint themselves with a new set of arrangements. Similarly, organisations that represent employees and employers will be required to expend resources in advising their members about the new requirements for the making and approval of AWAs.

20. The capacity will be increased for AWAs for existing employees to begin operating before they have been approved by the Employment Advocate. This could lead to a wider range of circumstances in which the need might arise to recover compensation for shortfalls in entitlements under awards. Safeguards such as the cooling-off period and empowering the EA to recover monies will enhance employee protection in these circumstances.

21. The widening of the Employment Advocate's compliance powers is not expected to involve any significant additional costs as the WR Act already empowers the Employment Advocate 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.

Benefits

19. The benefits of option 2 include:

- reduced complexity and cost of procedures and tests;
- a streamlined system of approval which will address the concerns about delays and complexity in the present approval process; and
- a reduction in formality and the number of steps to undertake before the AWA is approved.

20. The proposal to permit the parties to an AWA to agree that it should take effect from the day of signing, or the day specified in the agreement, or the day employment commences will allow 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 Employment Advocate to dispense with the time consuming and resource intensive task of issuing filing receipts.

21. Removing the comparable employee provisions will provide greater flexibility for AWAs to be tailored to suit the needs of the individual employee and the employer.

22. Providing the Employment Advocate with an express power to revoke AWA decisions will define the scope of this power more clearly.

23. Providing for the Employment Advocate to recover penalties for breaches of Part VID will enhance the Employment Advocate's compliance role and reduce the burden on parties who have been affected by breaches of AWAs.

.4 Consultation

19. In October/November 1999, public hearings were held and submissions invited from interested parties by the Senate Employment, Workplace Relations, Small Business and

Educations Legislation Committee inquiry into the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999. Submissions were received from private individuals, employers, employer groups, employee organisations, community groups and academics.

20. Employers and employer associations, such as the Australian Chamber of Commerce and Industry and the Victorian Employers' Chamber of Commerce and Industry, have criticised the current procedures for approval of AWAs as being too time consuming, complex, costly and unnecessarily formal. Additionally, employers have identified the requirements relating to the commencement of AWAs as imposing unnecessary delay. Employee organisations and community groups have expressed the view that any changes to the legislation need to retain adequate protection for low paid or vulnerable workers.

21. In September 2000, the majority of these proposed measures were also considered by the Senate Employment, Workplace Relations, Small Business and Educations Legislation Committee inquiry into the Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000. The May 1999 ministerial discussion paper, *The continuing reform of workplace relations: Implementation of More Jobs, Better Pay*, also invited written comments or submissions on measures to simplify the agreement-making process.

22. The views expressed by the parties have been taken into account in the preparation of this bill, for example, the timeframe for an employer to lodge an AWA with the OEA for approval was reduced as a result of consultations. In other cases, some proposed measures were modified or removed.

23. The OEA has also been consulted and is supportive of the proposed measures to simplify agreement-making.

.5 Conclusion and recommended option

19. Option 2 is preferred as it will:

- reduce the complexity of the agreement-making process and the transaction costs for the parties to the AWA;
- allow AWAs to come into effect on signing, thereby allowing employers and employees to give immediate effect to, and benefit from wages, conditions and working arrangements to which they have agreed;
- provide the potential to substantially improve the OEA's processing times by removing unnecessary processes;
- establish and maintain appropriate safeguards for the parties to the AWA; and
- strengthen the Employment Advocate's role in relation to compliance, providing further safeguards for the parties to the AWA.

.6 Implementation and review

19. All of the proposals will require amendments to the WR Act and as a result current processes undertaken by the OEA will require modification. DEWR and the OEA will monitor and evaluate the effect of such legislative change.

NOTES ON CLAUSES

Clause 1 – Short title

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

Clause 2 – Commencement

This clause specifies when various provisions of the Act are proposed to commence.

Clause 3 – Schedule(s)

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

Article V. SCHEDULE 1 – AWAs

a. Part 1 – Amendments

b) *Workplace Relations Act 1996*

Item 1 – Divisions 1, 2, 3, 4, 5 and 6 of Part VID

1.1 Item 1 would repeal existing Divisions 1, 2, 3, 4, 5 and 6 of Part VID of the WR Act, and replace them with new Divisions 1, 2, 3, 4, 5 and 6. Whilst the proposed new Divisions would significantly amend the procedures for the making, approval and enforcement of AWAs, a number of existing provisions would be reinserted in their existing form.

New Division 1 – Preliminary

New Subdivision A – Outline of Part

New section 170VA – Outline of Part

1.2 Proposed section 170VA sets out the contents of Part VID as amended.

New Subdivision B – Interpretation

New section 170VAA – Definitions

1.3 New section 170VAA defines a range of terms to be used in Part VID as amended

New section 170VAB – Proposed AWAs and ancillary documents – interpretation

1.4 New subsection 170VAB(1) would provide that a reference to an Australian Workplace Agreement (AWA) includes a proposed AWA or ancillary documents.

1.5 In a proposed AWA or ancillary documents, a reference to the employer or employee would include a reference to the future employer or employee [new subsection 170VAB(2)].

New Subdivision C – Scope of this Part etc.

New section 170VAC – Scope of this Part

1.6 Proposed section 170VAC reflects the constitutional limitations on the making of AWAs and would require that one of the following criteria apply at the AWA date (as defined in new section 170VAA) for the AWA to have effect:

- the employer is a constitutional corporation;
- the employer is the Commonwealth;
- the employee's primary workplace is in a Territory;
- the employer is a waterside employer, the employee is a waterside worker and the employee's employment is in connection with constitutional trade and commerce;

- the employee is a maritime worker and the employee's employment is in connection with constitutional trade and commerce;

- the employee is a flight crew officer and the employee's employment is in connection with constitutional trade and commerce.

1.7 Existing section 495 provides for the additional operation of Part VID in Victoria.

New section 170VAD – Functions of Commission

1.8 New section 170VAD set outs how the Commission must perform its functions under Part VID as amended. It provides that:

- the Commission must, as far as practicable, perform its functions in a way that furthers the objects of the Act [subsection 170VAD(1)];

- section 90 (which deals with the Commission being required to take into account the public interest when performing its functions) does not apply to functions being exercised by the Commission under this Part [subsection 170VAD(2)]; and

- In performing its functions under this Part, the Commission is not empowered to act under paragraph 111(1)(g) (which deals with when the Commission may dismiss a matter or part of a matter or refrain from further hearing or determining a matter) on the grounds set out in subparagraphs 111(1)(g)(i)(ii) and (iii) [subsection 170VAD(3)].

New section 170VAE - AWAs and ancillary documents only have effect as provided by this Part

1.9 New section 170VAE would provide that AWAs and ancillary documents only have effect as provided for in this Part.

New Division 2 – Making an AWA

New section 170VB – Employer and employee may make an AWA

1.10 New subsection 170VB(1) would provide that an employer and employee may make a written agreement, called an Australian Workplace Agreement or AWA, that deals with matters pertaining to their employment relationship.

1.11 New subsection 170VB(2) would provide that the requirements in new sections 170VBA (which deals with the making of AWAs) and 170VBB (which deals with the content of AWAs) must be met.

1.12 New subsection 170VB(3) would permit an AWA to be made before an employee commences employment. (The term 'new employee' is defined in proposed section 170VAA as an employee who signed an AWA before or at the time of commencing the work to which the AWA relates.)

New section 170VBA – Making an AWA

1.13 New section 170VBA sets out the proposed requirements for making an AWA:

- the AWA must be signed and dated by the employer and the employee who are parties to it [subsection 170VBA(1)];

- the employer must give the employee a copy of the AWA [subsection 170VBA(2)]; and
- before the employee signs the AWA, the employer must give the employee a copy of an information statement prepared by the Employment Advocate and explain the effect of the AWA to the employee [subsection 170VBA(3)].

1.14 Proposed subsection 170VBA(4) sets out the information that would be required to be provided in the information statement referred to in paragraph 170VBA(3)(a).

1.15 Proposed subsection 170VBA(5) would provide that the employee may withdraw his or her consent to the AWA within a cooling-off period by giving notice of the withdrawal to the employer within that period. The cooling-off period is 5 days after the date of signing for new employees and 14 days after signing for existing employees [subsection 170VBA(6)]. A note is inserted to highlight that subsections 170VC(6) and (7) provide that written notice of withdrawal would be required to be given to the Employment Advocate (in cases where the employer has already applied for approval of the AWA) The effect of withdrawing consent is dealt with in new section 170VCA.

New section 170VBB – Content of AWA

1.16 New subsection 170VBB(1) would provide that an AWA must include the provisions relating to discrimination that are prescribed by the regulations. The prescribed provisions relating to discrimination would automatically be included in any AWA that does not include the prescribed provisions.

1.17 New subsection 170VBB(2) would require an AWA to include a dispute resolution procedure. A default procedure (as prescribed by the regulations) would automatically be included in any AWA that does not include a dispute resolution procedure.

1.18 New subsection 170VBB(3) would allow a dispute resolution procedure in an AWA (whether the default procedure or not) to confer powers on the Australian Industrial Relations Commission (the Commission) to settle disputes between the parties to the AWA.

1.19 New subsection 170VBB(4) would provide that the AWA must not include any provisions which would prohibit or restrict either party to the AWA from disclosing details of the AWA to another person.

1.20 New subsection 170VBB(5) would provide that the AWA must not include any objectionable provisions within the meaning of section 298Z of the WR Act. These are provisions that require or permit, or have the effect, or purport to have the effect, of requiring or permitting conduct that would contravene Part XA of the WR Act.

New section 170VBC – Nominal expiry date of AWA

1.21 New section 170VBC would provide that an AWA may specify a nominal expiry date; however, this date could not be more than 3 years after the AWA was signed [new subsection 170VBC(1)]. If no date is specified, then the nominal expiry date would be the third anniversary of the date of signing [new subsection 170VBC(2)].

New section 170VBD – Period of operation of AWA

1.22 Proposed section 170VBD sets out when an AWA would start and stop operating. This provision operates subject to proposed section 170VCD (which deals with the consequences for an AWA of a failure to apply for approval, refusal and approval or referral to the Commission). An AWA would start operating on the later of:

- the AWA date (which is defined in section 170VAA as the date the AWA is signed, or if signed on different dates, the later of those dates) [paragraph 170VBD(1)(a)];
- the date specified in the AWA as the starting day [paragraph 170VBD(1)(b)]; or
- in the case of a new employee (as defined in section 170VAA) as the day the employment commences [paragraph 170VBD(1)(c)].

1.23 An AWA would stop operating at the earlier of any of the following times – subject to 170VCD:

- where the employer fails to make an application for approval of the AWA within the period of 21 days starting on the AWA date or such longer period as the Employment Advocate allows under subsection 170VC(3) - the start of the day after the end of that period [paragraph 170VBD2(a)];
- where approval of the AWA is refused - the end of the day the refusal notice is issued [paragraph 170VBD2(b)];
- where the AWA is terminated under proposed sections 170VFA, 170VFD or 170VFE - the time the termination takes effect under the relevant section [paragraph 170VBD2(c)]; or
- the time when another AWA between the employer and employee starts to operate [paragraph 170VBD2(d)].

1.24 The operation of an AWA would also be affected where an eligible employee withdraws his or her consent to the AWA (see proposed section 170VCA below) or where an AWA stops operating if the Employment Advocate approval of an AWA is revoked under section 170WKD.

New Division 3 – Approval of AWAs

New section 170VC – Applications for approval of AWAs

1.25 Proposed section 170VC would set out the process for applying for an AWA to be approved:

- An employer must make a written application for approval of an AWA to the Employment Advocate unless the employee withdraws his or her consent during the cooling-off period [subsection 170VC(1)];
- the application would be required to be made within the 21 day period starting on the AWA date [subsection 170VC(2)];
- the Employment Advocate may accept an application outside the 21 day period [subsection 170V(3)];

- an application would be required to be accompanied by a copy of the AWA and any other information required by the Employment Advocate. (The Employment Advocate may publish a notice in the *Gazette* specifying information to be provided by applicants) [subsection 170VC(4)].

1.26 Proposed subsection 170VC(5) would permit two or more AWAs to be included in the same notice of application, provided that the same employer is a party to all the agreements. There would be no requirement that multiple AWAs filed in a single application contain the same terms.

1.27 Proposed subsections 170VC(6) and (7) provides for notice requirements to an employer and to the Employment Advocate where before the end of the cooling-off period, an employee withdraws his or her consent to an AWA that has already been lodged with the Employment Advocate for approval. The employee is required to lodge another notice of withdrawal of consent with the Employment Advocate within 7 days after providing such notice to the employer as required under proposed subsection 170VBA95). Notice to the Employment Advocate does not have to be given during the cooling-off period.

1.28 If consent is withdrawn, the employer would not be required to apply for approval of the AWA. However, if the employer applies for the AWA to be approved before consent is withdrawn, the notice of withdrawal would provide a basis for the Employment Advocate to cease dealing with the application.

New section 170VCA – Consequences for AWA of employee's withdrawal of consent

1.29 Proposed section 170VCA would provide that where an employee withdraws his or her consent to the AWA before the end of the cooling-off period, the AWA would be taken not to have started to operate.

New section 170VCB – Employment Advocate or Commission must approve, or refuse to approve, AWA

1.30 Section 170VCB would provide for the approval of AWAs. New subsection 170VCB(1) would require the Employment Advocate to approve an AWA if:

- the application has been made in accordance with section 170VC [paragraph 170VCB(1)(a)];
- the AWA satisfies the requirements of section 170VBA [paragraph 170VCB(1)(b)];
- the AWA complies with section 170VBB [paragraph 170VCB(1)(c)];
- subject to subsection 170VCB(2), the Employment Advocate is sure the AWA passes the no-disadvantage test [paragraph 170VCB(1)(d)];
- the Employment Advocate is satisfied that the employee genuinely consented to the making of the AWA [s170VCB(1)(e)].

1.31 New subsection 170VCB(2) would provide that if the Employment Advocate has any concerns about whether the AWA meets the requirements of subsection 170VCB(1), the Employment Advocate would be required to give the parties to the AWA an opportunity to:

- take any action (including the giving of undertakings) [paragraph 170VCB(2)(a)]; or
- give the Employment Advocate any further information sought by the Employment Advocate [paragraph 170VCB(2)(b)].

1.32 If these steps resolve the Employment Advocate's concerns, the Employment Advocate would then be required to approve the AWA [subsection 170VCB(2)].

1.33 New subsection 170VCB(3) would allow the Employment Advocate to approve an AWA if the only reason for not approving it is because the requirements of subsection 170VBA(1) have not been met (that is, if the AWA has not been signed and dated by all parties). This requirement would only apply where the Employment Advocate is satisfied that the failure to meet those requirements has not disadvantaged, and will not disadvantage, either party to the AWA.

1.34 New subsection 170VCB(4) would provide the Employment Advocate must refer the AWA to the Commission if the Employment Advocate has concerns about the AWA passing the no-disadvantage test [subsection170VCB(4)(a)].and any undertakings or information provided under s170VCB(2) have not resolved those concerns [paragraph 170VCB(4)(b)].

1.35 New subsection 170VCB(5) would require the Commission to approve the AWA if satisfied the AWA passes the no-disadvantage test [s170VCB(5)(a)] or where a written undertaking from the employer or other action taken by the parties resolves any uncertainty in relation to the no-disadvantage test [paragraph 170VCB(5)(b)].

1.36 New subsection 170VCB(6) would provide that the Commission must approve an AWA if it considers it is not contrary to the public interest to do so. A note provides an example of when the Commission may be satisfied that approving the AWA is not contrary to the public interest, namely where the making of the AWA is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, a business or part of a business.

1.37 New subsection 170VCB(7) would provide that where the Commission is not required to approve the AWA it must refuse to approve it.

1.38 New subsection 170VCB(8) would require the Employment Advocate to refuse to approve an AWA when not required to approve the AWA and does not approve it under subsection 170VCB(3).

1.39 New subsection 170VCB(9) provides that any undertaking accepted by the Employment Advocate or by the Commission is taken to be included in the AWA.

New section 170VCC – Employment Advocate or Commission must issue approval or refusal notice

1.40 New subsection 170VCC(1) would require the Employment Advocate, if he or she approves an AWA, to issue an approval notice to the employer.

1.41 New subsection 170VCC(2) would require that where the Employment Advocate has referred an AWA to the Commission, the Employment Advocate must issue a referral notice to the employer advising of the referral.

1.42 New subsection 170VCC(3) would require that if the Employment Advocate refuses to approve an AWA, the Employer Advocate must issue a refusal notice to the employer.

1.43 New subsection 170VCC(4) provides that an approval notice would be required to include copies of any provisions taken to be included in the AWA by reason of subsections 170VBB(1) (model anti-discrimination provisions), 170VBB(2) (model dispute resolution procedure) or 170VCB(9) (undertakings). The approval notice will also be required to identify the relevant or designated award used for the purposes of applying the no-disadvantage test [section 170WKC].

1.44 New subsection 170VCC(5) provides that if the Commission approves an AWA, it must issue an approval notice to the employer [paragraph 170VCC(5)(a)] and give a copy of the approval notice [paragraph 170VCC(5)(b)] and approved AWA [paragraph 170VCC(5)(c)] to the Employment Advocate. A note is inserted to point out that as an undertaking accepted in accordance with an AWA is deemed to form part of an AWA then a copy of the undertaking will also be sent to the Employment Advocate under this section.

1.45 New subsection 170VCC(6) provides that if the Commission refuses to approve an AWA, it must issue a refusal notice to the employer [paragraph 170VCC(6)(a)] and give a copy of the refusal notice to the Employment Advocate [paragraph 170VCC(6)(b)].

New section 170VCD – Consequences for AWA of failure to apply for approval, refusal of approval or referral to the Commission

1.46 New section 170VCD would set out the consequences for an AWA if it is not approved by the Employment Advocate because of failure to apply for approval of an AWA within 21 days of the AWA (or such longer period as allowed by the Employment Advocate) or if a refusal notice is issued or it is referred to the Commission.

1.47 Proposed subsection 170VCD(1) would provide that if no application is made for approval of an AWA within 21 days of the AWA date, or such longer period as agreed by the Employment Advocate:

- if the AWA has started operating, the AWA stops operating after the end of the 21 day period [paragraph 170VCD(1)(a)];
- if the AWA has not started operating, it does not start operating (an AWA may not have started operating in circumstances in which it has been made well in advance of the commencement of employment or the date specified in the AWA as the start date) [paragraph 170VCD(1)(b)]; and
- where paragraph (a) or (b) applies, the Employment Advocate cannot approve the AWA [paragraph 170VCD(1)(c)].

1.48 New subsection 170VCD(2) would provide that if the Employment Advocate issues a refusal notice in relation to the AWA:

- where the AWA has started operating, the AWA stops operating at the end of the day the refusal notice is issued [paragraph 170VCD(2)(a)];
- if the AWA has not started operating, it does not start operating (an AWA may not have started operating in circumstances in which it is made well in advance of the

commencement of employment or the date specified in the AWA as the start date) [paragraph 170VCD(2)(b)]; and

- where paragraph (a) or (b) applies, the Employment Advocate is not permitted to approve the AWA [paragraph 170VCD(2)(c)].

1.49 New subsection 170VCD(3) would provide that if the Employment Advocate refers an AWA to the Commission:

- where the AWA has started operating the AWA continues to operate [paragraph 170VCD(3)(a)];

- where the AWA has not started operating the AWA stops operating [paragraph 170VCD(3)(b)]; and

- Where paragraph (a) or (b) applies, the Employment Advocate is not permitted to approve the AWA [paragraph 170VCD(3)(c)].

New section 170VCE – Employer must give copies of documents to employee

1.50 Proposed section 170VCE would require that, as soon as practicable after the employer has received a copy of the approval, refusal or referral notice, the employer must provide a copy of the notice to the employee [paragraph 170VCE(1)(a)], together with any material taken to be included in the AWA by reason of section 170VBB(1), 170VBB(2), or 170VCB(9) [paragraph 170VCE(1)(b)] and any other document prescribed by the regulations [subsection 170VCE(2)]. Failure to comply with these requirements exposes the employer to imposition of a penalty.

New section 170VCF – Protocol for referring AWAs to the Commission

1.51 New subsection 170VCF would provide that the Employment Advocate must apply any existing protocol for referring AWAs to the Commission

New Division 4 – Effect of an AWA

New section 170VD – Effect of AWA on awards and agreements

1.52 New section 170VD would set out the effect of an AWA on Awards and Agreements. It replicates, in its entirety, existing section 170VQ of the *Workplace Relations Act 1996*.

1.53 New subsection 170VD(1) would provide that (subject to proposed new subsections 170VD(2) and 170VD(3)), an AWA completely excludes the operation of any federal award which would otherwise apply to the employee's employment. Where the proposed new subsection applies, therefore, there would be no room for the application of award provisions; the AWA would effectively 'cover the field' to the exclusion of any award.

1.54 New subsection 170VD(2) would provide that an award made under subsection 170MX(3) (ie an award made upon the termination of a bargaining period) renders ineffectual an AWA made after the commencement of the award, but before the nominal expiry date of the award.

1.55 New subsection 170VD(3) would provide that an AWA prevails, to the extent of any inconsistency, over an exceptional matters order. In such a case, the AWA will not be taken to 'cover the field' to the exclusion of the exceptional matters order. The exceptional matters order

could operate in conjunction with the AWA, provided that it was not directly inconsistent with the AWA.

1.56 New subsection 170VD(4) provides that an AWA operates to the exclusion of any State award or State agreement that would otherwise apply to the employee's employment.

1.57 New subsection 170VD(5) deals with the order of precedence where a certified agreement and an AWA have been made in respect of the same employee.

1.58 A certified agreement will prevail over an AWA to the extent of any inconsistency if:

- the certified agreement is already in operation but has not passed its nominal expiry date at the time the AWA comes into operation; and
- the certified agreement does not expressly allow a subsequent AWA to displace it or to prevail to the extent of any inconsistency

1.59 A certified agreement will prevail over the AWA to the extent of any inconsistency where the certified agreement comes into operation after the nominal expiry date of the AWA.

1.60 In all other cases, an AWA will operate to the exclusion of a certified agreement.

New section 170VDA – Effect of AWA on other laws

1.61 New section 170VDA would set out the relationship between AWAs and State and other Commonwealth laws.

1.62 New subsection 170VDA(1) would provide that, subject to the exceptions contained in this section, an AWA prevails over conditions of employment specified in State laws to the extent of any inconsistency.

1.63 New subsection 170VDA(2) proposes exceptions to this general rule. Provisions in an AWA which deal with occupational health and safety, workers compensation, apprenticeship or any other matters prescribed by the regulations would operate subject to the provisions of any State law which deal with those matters. This is intended to ensure that these fundamental matters are dealt with consistently while still enabling the parties to address the issue in the AWA if they wish to do so. The regulations could also prescribe other matters that are to operate subject to a State law.

1.64 New subsection 170VDA(3) would ensure that State laws providing a remedy for termination of employment are still to be available, where they are able to operate concurrently with the AWA.

1.65 New subsection 170VDA(4) would provide that to the extent of any inconsistency, an AWA prevails over prescribed conditions of employment which are specified in a Commonwealth law which is prescribed by the regulations.

1.66 New subsection 170VDA(5) defines the terms Commonwealth law, prescribed conditions and State law.

New section 170VDB – Parties must not breach AWA

1.67 New subsection 170VDB would require that a party to an AWA must not breach the AWA. Contravention of this subsection could lead to the imposition of a civil penalty (see section 170VV).

New section 170VDC – Industrial action etc. by party to AWA

1.68 New subsection 170VDC(1) would prevent an employee whose employment is covered by an AWA from engaging in industrial action in relation to the employment to which the AWA relates during the period of operation of the AWA before its nominal expiry date.

1.69 New subsection 170VDC(2) would prevent an employer locking out an employee who is covered by an AWA during the period of operation of the AWA, but before the nominal expiry date of the AWA, for the purpose of supporting or advancing claims in respect of the employee's employment.

1.70 A civil penalty could be imposed in respect of a breach of either subsection 170VDC(1) or (2) (see section 170VV).

New section 170VDD – Employer's successor and AWA to which employer is a party

1.71 Proposed section 170VDD would specify the circumstances in which AWAs bind a successor, transmittee or assignee employer.

1.72 Subsection 170VDD(2) would make it clear that the rights and obligations of the previous employer which arose before the succession of the business or undertaking are not affected.

1.73 Subsection 170VDD(3) would provide that for the purposes of this section, a successor includes a transmittee or assignee.

New Division 5 – Extending or varying an AWA

New Subdivision A – Extension agreements

New section 170VE – Agreement to extend AWA's nominal expiry date

1.74 Proposed section 170VE would allow parties to an AWA to make a written agreement to extend the AWA's nominal expiry date. Such an agreement could only be made before the AWA's nominal expiry date and the extended date could not be more than 3 years after the AWA date [new subsections 170VE(1) and (2)].

1.75 Proposed subsection 170VE(3) would provide that an extension agreement will be made when it is signed and dated by the parties to the agreement.

1.76 An employee may withdraw his or her consent to the extension agreement by giving written notice of the withdrawal of consent to the employer and the Employment Advocate before the end of the cooling off period [new subsection 170VE(4)]. The cooling off period is period of 14 days after the day on which the employee signs the agreement [new subsection 170VE(5)]. Notice to the EA does not have to be given during the cooling off period.

1.77 The agreement would come into effect on the day when both parties have signed the agreement [subsection (170VE(6)], subject to section 170VEC (which deals with the consequences of failing to apply for approval, or refusal of approval, of the variation agreement).

New section 170VEA – Application for approval of extension agreement

1.78 Proposed section 170VEA would set out the application process for approval of extension agreements.

1.79 Under proposed subsection 170VEA(1), an employer would be required to apply for approval of the extension agreement within 21 days of the day when the agreement takes effect.

1.80 Under proposed subsection 170VEA(2), the application would be required to be accompanied by a copy of the agreement, together with any information required by the Employment Advocate (as specified by a *Gazette* notice).

1.81 Two or more extension agreements negotiated collectively could be included in the same notice of application for approval. The agreements need not be in the same terms [new subsection 170VEA(3)].

1.82 If an employee withdraws his or her consent to the extension agreement during the cooling-off period and the employer has already lodged the extension agreement for approval by the Employment Advocate, then the employee must provide written notice to the Employment Advocate of their withdrawal of consent [new subsection 170VEA(4)]. The written notice must be lodged within 7 days after giving notice of withdrawal to the employer [new subsection 170VEA(5)]. The written notice to the Employment Advocate may be provided after the cooling-off period has ended.

New section 170VEB – Employment Advocate must approve, or refuse to approve, extension agreement

1.83 New section 170VEB would require the Employment Advocate to approve an extension agreement if the application has been made in accordance with section 170VEA [new paragraph 170VEB(1)(a)] and the agreement satisfies the requirements of section 170VE [new paragraph 170VEB(1 (b)] and the Employment Advocate is satisfied the employee genuinely consented to the making of the agreement [new paragraph s170VEB(1)(c)].

1.84 New subsection 170VE(3) would allow the Employment Advocate to approve an extension agreement if the only reasons for not approving it is because the requirements set out in section 170VE(3) have not been met (that is, if the extension agreement has not been signed and dated by all parties). This requirement would only apply where the Employment Advocate is satisfied that the failure to meet those requirements has not disadvantaged, and will not, disadvantage either party to the AWA [subsection 170VEB(2)].

1.85 New subsections 170VEB(3), (4), (5) and (6) would set out the proposed requirements in relation to the issuing of approval and refusal notices by the Employment Advocate and the provision of a copy of the notice, the approved agreement and any other prescribed information to the employee. Failure to comply with provision of documents to an employee exposes an employer to imposition of a civil penalty.

New section 170VEC – Consequences for extension agreement of failure to apply for approval or refusal of approval

1.86 Proposed subsection 170VEC(1) would provide that if an employer fails to apply for approval of an extension agreement within 21 days of the starting day of the agreement, the

agreement would cease operating after the end of that period and the Employment Advocate cannot approve the extension agreement.

1.87 Under proposed subsection 170VEC(2), the issuing of a refusal notice in relation to an extension agreement would cause the extension agreement to cease to operate from the end of the day on which the notice was issued. An extension agreement would also cease to have effect if the Employment Advocate's approval of the extension agreement is revoked under section 170WKD.

New Subdivision B – Variation agreements

New section 170VED – Agreement to vary an AWA

1.88 New subsection 170VED(1) would provide that parties to an AWA may enter into a written agreement to vary the terms of the AWA. (A variation agreement may vary the AWA's nominal expiry date. That is, where the parties agree to vary the nominal expiry date as well as other terms of the agreement, it would not be necessary to make separate extension and variation agreements). A variation agreement would be made when it is signed and dated by the parties to the agreement.

1.89 New subsections 170VED(2) and (3) would provide for a cooling-off period during which an employee may withdraw his or her consent to the variation agreement. The cooling-off period is the period of 14 days after the day on which the employee signs the agreement. This cooling-off period would operate in the same manner as the cooling-off period applicable to AWAs as would the requirement to inform the Employment Advocate of a withdrawal of consent if the employer has already lodged the variation agreement.

1.90 New subsection 170VED(4) would provide that subject to sections 170VEF (which deals with withdrawal of consent) and 170VEJ (which deals with the consequences of failure to apply for approval and refusal of approval) a variation agreement takes effect on the day on which the parties sign the agreement (or the later day if signed on different days), or, if later, on the day specified in the agreement.

1.91 New subsection 170VED(5) would provide that proposed subsections 170VBA and 170VBB would apply to the AWA as varied. That is, the employee would be required to genuinely consent to the terms and conditions in the variation agreement, the employer would be required to give the employee a copy of the agreement and before the employee signs the agreement, the employer would be required to give the employee a copy of an information statement prepared by the Employment Advocate and explain the effect of the agreement to the employee. The AWA as varied would have to include the prescribed anti-discrimination provisions and a dispute resolution procedure. The AWA as varied could not include any provisions which would prohibit or restrict either party to the AWA from disclosing details of the AWA to another person and could not include any objectionable provisions within the meaning of section 298Z of the WR Act.

New section 170VEE – Applications for approval of variation agreements

1.92 Proposed section 170VEE would set out the requirements for applications for approval of variation agreements. These requirements would operate in the same way as the proposed requirements for applications for approval of an AWA, other than the Employment Advocate is

unable to extend the period of time in which the variation agreement may be lodged beyond 21 days.

New section 170VEF – Consequences for variation agreement of employee's withdrawal of consent

1.93 New section 170VEF would set out the consequences of the employee's withdrawal of consent. If an eligible employee withdraws his or her consent to the variation agreement before the end of the cooling-off period, the agreement would be taken not to have started to operate.

New section 170VEG – Employment Advocate or Commission must approve, or refuse to approve, variation agreement

1.94 New section 170VEG proposes requirements for approval of a variation agreement. These requirements would operate in the same way as the proposed requirements for approval of an AWA as set out in section 170VCB, noting that the 21 day period for application for approval of a variation agreement cannot be extended.

New section 170VEH – Employment Advocate and Commission must issue approval, referral or refusal notice

1.95 New section 170VEH proposes requirements applicable to the issuing of approval, referral and refusal notices in respect of variation agreements. New subsection 170VEH(1) would require the Employment Advocate to issue an approval notice in respect of an approved variation agreement and provide a copy of the notice and the agreement to the employer. New subsections 170VEH(2) and 170VEH(3) would require the Employment Advocate to issue to the employer either a referral or a refusal notice in respect of a variation agreement that has been either referred to the Commission or refused.

1.96 New subsection 170VEH(4) would provide that the Commission must issue an approval notice in respect of an approved variation agreement to the employer and provide a copy to the Employment Advocate. New subsection 170VEH(5) would require the Commission to issue a refusal notice to the employer and provide a copy to the Employment Advocate.

New section 170VEI – Employer must give copies of documents to employee

1.97 New section 170VEI would specify the information that the employer must provide to the employee after receiving an approval or refusal notice from the Employment Advocate. Proposed subsection 170VEI(1) would require that as soon as practicable after the employer has received a copy of the approval or refusal notice, the employer must provide a copy of the notice to the employee, together with a copy of the variation agreement and any material taken to be included in the AWA as varied by reason of paragraph 170VEG(1)(c) (model anti-discrimination provisions and model dispute resolution procedure) or 170VEG(8) (undertakings).

1.98 New subsection 170VEI(2) would provide for regulations to prescribe additional requirements as to material to be provided to the employee. Failure to comply with requirements to provide documents to an employee exposes an employer to imposition of a penalty.

New section 170VEJ – Consequences for variation agreement of failure to apply for approval, refusal of approval or referral to Commission

1.99 New section 170VEJ would set out what happens when a variation agreement is not approved because of either failure to apply for approval within 21 days of the AWA date or the issuing of either a refusal or referral notice.

1.100 Proposed subsection 170VEJ(1) would provide that if no application for approval has been made before the end of the 21 day period referred to in subsection 170VEE(2):

- where the variation agreement has already taken effect, it ceases to have effect after the end of the 21 day period [paragraph 170VEJ(1)(a)];
- if the variation agreement has not already taken effect, it does not take effect [paragraph 170VEJ(1)(b)]; and
- where paragraph (a) or (b) applies, the Employment Advocate cannot approve the AWA [paragraph 170VEJ(1)(c)].

1.101 New subsection 170VEJ(2) would provide that if the Employment Advocate or Commission issues a refusal notice:

- where the variation agreement has already taken effect, it ceases to have effect at the end of the day the refusal notice is issued [paragraph 170VEJ(2)(a)]; and
- if the variation agreement has not already taken effect, it does not take effect [paragraph 170VEJ(2)(b)].

1.102 New subsection 170VEJ(3) would provide that if the Employment Advocate refers the variation agreement to the Commission:

- where the variation agreement has already taken effect, it continues to have effect [paragraph 170VEJ(3)(a)];
- if the variation agreement has not already taken effect, it does not take effect [paragraph 170VEJ(3)(b)]; and
- the Employment cannot approve the variation agreement [paragraph 170VEJ93)(c)].

New section 170VEK – Protocol for referring variation agreements to the Commission

1.103 New section 170VEK would provide that, in deciding whether to refer a variation agreement to the Commission, the Employment Advocate must apply the referral protocol.

New Division 6 – Terminating an AWA

New Subdivision A – Preliminary

New section 170VF – Terminating an AWA

1.104 New section 170VF would set out the three ways in which an AWA may be terminated:

- by a termination agreement as provided for in Subdivision B [sections 170VFA, 170VFB and 170VFC];
- by the Commission on application of an AWA party as provided for in Subdivision D [section 170VFD]; and
- in accordance with a provision in the AWA as provided for in Subdivision D [sections 170VFE and 170VFF].

New Subdivision B – Termination agreement

New section 170VFA – Termination agreement

1.105 New subsection 170VFA(1) would allow the parties to an AWA at any time to make a written agreement to terminate the AWA. Proposed subsection 170VFA(2) would provide that the termination agreement will be made when it is signed and dated by the parties to the agreement.

1.106 An employee may withdraw his or her consent to the termination agreement by giving written notice of the withdrawal of consent to the employer and the Employment Advocate before the end of the cooling off period [new subsection 170VFA(3)]. The cooling off period is period of 14 days after the day on which the employee signs the agreement [new subsection 170VFA(4)]. Advice to the Employment Advocate does not have to be given during the cooling off period.

1.107 A termination agreement would be required to be approved by the Employment Advocate, and if approved, it would come into effect on the day on which the approval notice is issued, or a later date if specified in the termination agreement [subsection 170VFA(5)]. If the agreement is not approved by the Employment Advocate, it does not take effect. A termination agreement ceases to have effect if the Employment Advocate's approval is revoked under proposed section 170WKD.

New section 170VFB – Application for approval of termination agreement

1.108 New section 170VFB would set out the requirements for an application for approval of a termination agreement.

1.109 Under proposed subsection 170VFB(1), an employer would be required to apply in writing to the Employment Advocate for approval of the termination agreement. The application

would have to be made within 21 days of the agreement being made [new subsection 170VFB(2)].

1.110 Under proposed subsection 170VFB(3), the application would be required to be accompanied by a copy of the agreement, together with any information required by the Employment Advocate (as specified by a *Gazette* notice).

1.111 Two or more agreements could be included in the same notice of application for approval. The agreements need not be in the same terms [new subsection 170VFB(4)].

1.112 If an employee withdraws his or her consent to the termination agreement during the cooling-off period and the employer has already lodged the termination agreement for approval by the Employment Advocate, then the employee must provide written notice to the Employment Advocate of their withdrawal of consent [new subsection 170VFB(5)]. The written notice must be lodged within 7 days after giving notice of withdrawal to the employer [new subsection 170VFB(6)]. The written notice to the Employment Advocate may be provided after the cooling-off period has ended.

New section 170VFC – Employment Advocate must approve, or refuse to approve, termination agreement

1.113 New section 170VFC would require the Employment Advocate to approve a termination agreement if the application has been made in accordance with section 170VFB and the agreement satisfies the requirements of section 170VFA and he or she is satisfied the employee genuinely consented to the making of the termination agreement [new subsection 170VFC(1)].

1.114 New subsection 170VFC(2) would allow the Employment Advocate to approve a termination agreement if the only reason for not approving it is because the requirements of subsection 170VFA(2) have not been met (that is, if the AWA has not been signed and dated by all parties). This requirement would only apply where the Employment Advocate is satisfied that the failure to meet those requirements has not disadvantaged, and will not disadvantage, either party to the AWA.

1.115 New subsections 170VFC(3), (4), (5) and (6) would set out the proposed requirements in relation to the issuing of approval and refusal notices by the Employment Advocate and the provision of a copy of the notice, the approved agreement and any other prescribed information to the employee. Failure to provide relevant documents to employees exposes an employer to the imposition of a penalty.

New Subdivision C – Termination by Commission

New section 170VFD – Termination by Commission

1.116 New section 170VFD would provide that an AWA party may apply to the Commission to have the AWA terminated after the nominal expiry date of the AWA and that the Commission may terminate the AWA if it considers it is not contrary to the public interest to do so [new subsection 170VFD(1)].

1.117 The Commission would be required to issue a copy of its determination to the parties and the Employment Advocate [new subsection 170VFD(2)].

1.118 If the Commission determines that the AWA should be terminated, the termination would take place at the end of the day the copies of the determination are issued or at a later time specified in the determination [new subsection 170VFD(3)].

New Subdivision D – Termination in accordance with AWA

New section 170VFE – Termination in accordance with the AWA

1.119 New section 170VFE would provide for the termination of an AWA in the manner provided for in the AWA. Such terminations would need to be approved by the Employment Advocate to ensure that they comply with the terms of the relevant AWA. Applications would be required to be made in writing to the Employment Advocate after the AWAs nominal expiry date [new subsection 170VFE(1)]. The applicant would be required to provide written notice of the application to the other party to the AWA as soon as practicable after it is made [new subsection 170VFE(2)].

1.120 New subsection 170VFE(3) would set out the requirements for an application under subsection 170VFE(1). The application would be required to be accompanied by details of the manner of termination provided for in the AWA and any other information the Employment Advocate requires (as specified by a *Gazette* notice).

1.121 The termination of two or more agreements could be covered in the same notice of application if the applicant is the employer and the employer is a party to all the AWAs to which the notice of application applies. The terminations need not be in the same terms [new subsection 170VFE(4)].

1.122 New subsection 170VFE(5) would provide that the termination must be approved by the Employment Advocate and that the termination comes into effect on the day on which the approval notice is issued, or a later date if specified in the application. If the Employment Advocate refuses to approve the termination, it does not take effect.

New section 170VFF – Employment Advocate must approve, or refuse to approve, terminations under AWAs

1.123 New section 170VFF would require the Employment Advocate to approve an application under proposed section 170VFE if it has been made in accordance with section 170VFE, the applicant has notified the other party of the application and the termination is in accordance with the AWA [new subsection 170VFF(1)].

1.124 New subsections 170VFF(2), (3), (4) and (5) would set out the proposed requirements in relation to the issuing of approval and refusal notices by the Employment Advocate and the provision of a copy of the notice and any other prescribed information by the applicant to the other party.

Item 2 – At the end of subsection 170VV(1)

1.125 Section 170VV sets out the penalties for contravening certain provisions of Part VID. This item proposes to add a new provision to make it clear that the penalties are civil penalties. A legislative note would replace the existing heading to the section, ‘Penalties for contravening this Part’, with a new heading, ‘Civil penalties’.

Item 3 – Subsection 170VV(3)

1.126 Subsection 170VV(1) provides that an eligible court may impose a penalty on a person who contravenes a penalty provision. Existing subsection 170VV(3) provides that an application for an order under subsection 170VV(1) that relates to an AWA or ancillary document may be made by a party to the AWA or ancillary document. New subsection 170VV(3) would permit an application for an order under subsection 170VV(1) to be made by the Employment Advocate or an authorised officer (as defined in section 83BG) or by a party to the AWA or ancillary document.

Item 4 – Subsection 170VV(4) (definition of *penalty provision*)

1.127 This item would repeal existing subsection 170VV(4), which lists the sections of Part VID which are penalty provisions, and replace it with a revised list reflecting the repeal and insertions of sections to which penalties apply.

Item 5 – After section 170VV

New section 170VVA – Eligible court may order employer to pay underpayment to employee

1.128 This item would insert new section 170VVA, which would permit a court, in a proceeding under section 170VV, to order an employer to make a payment to an employee in respect of any underpayment of entitlements under an AWA. The power to make such an order is additional to the power to impose a penalty under subsection 170VV(1).

1.129 New subsection 170VVA(2) would limit the scope of orders under subsection 170VVA(1) to exclude underpayments relating to any period more than 6 years before the commencement of the proceedings. This limit is consistent with the time limit on recovery of underpayments imposed by subsection 178(7) in respect of breaches of awards and certified agreements.

Item 6 – At the end of section 170VW

1.130 This item would insert new subsection 170VW(3) into section 170VW (which deals with damages for breaches of an AWA) to ensure that an employee who received compensation for an underpayment under new section 170VVA could not also recover compensation for the same underpayment under section 170VW (this would not prevent an employee from receiving compensation for any additional loss or damage that has not been recovered under section 170VVA).

Item 7 – Section 170VX

1.131 This item would repeal existing section 170VX (which deals with compensation for shortfalls for new employees whose AWAs are subsequently refused approval) and insert a new section 170VX providing for substantially wider circumstances in which compensation may be recovered. The new section takes account of the proposed new section providing for the commencement of AWAs and variation agreements, the effect of which would be that most AWAs and variation agreements (including those for existing employees) would start to operate before they are assessed by the Employment Advocate. Consequently, the proposed new section would allow for compensation in a broader range of circumstances.

New section 170VX – compensation for shortfall in entitlements

1.132 Proposed new subsection 170VX(1) would contain a table setting out the circumstances and bases of compensation for shortfalls in entitlements. It would provide that if an item in the second column of that table ('When shortfalls can arise') applies to an AWA and the amount referred to in the third column of that table ('Incorrect amounts') is less than the amount in the fourth column of that table ('Correct amounts') then the difference between the correct amount and the incorrect amount is payable to the employee by the employer. The employee, the Employment Advocate or an authorised officer on the employee's behalf are entitled to recover the difference from the employer in an eligible court [new paragraph 170VX(1)(d)].

1.133 The table also addresses cases where the AWA is taken never to have operated (for instance the approval of the AWA is void). In these circumstances an employee would be entitled to his or her 'non-AWA entitlements for that period'. 'Non-AWA entitlements' are defined in proposed subsection 170VX(2).

1.134 It should be noted that in all these circumstances, the employee will be entitled to receive the higher amount. If the AWA, extension agreement, variation agreement or termination agreement provided for a higher amount than the 'correct amount' (as defined) then the employee would not be required by the Act to pay back that higher amount.

Item 8 – At the end of subsection 170WE(1)

1.135 This item would amend subsection 170WE(1) by inserting a note indicating that a civil penalty is applicable to a breach of this provision.

Item 9 – Before section 170WF

1.136 This item would insert a new section 170WEA into Division 9, setting out requirements relating to bargaining agents.

New section 170WEA – Bargaining agents

1.137 New subsection 170WEA(1) would provide that either of the parties may appoint a bargaining agent to negotiate an AWA or ancillary document. This appointment would be required to be in writing. New subsection 170WEA(5) would provide that a bargaining agent may be a group of persons.

1.138 New subsection 170WEA(2) would provide that a party must not refuse to recognise the appointment of a duly appointed bargaining agent by the other party for the purposes of new subsection 170WEA(1) [subject to subsection 170WEA(3)]. Contravention of this section could lead to the imposition of a monetary penalty. If a person did not wish to negotiate the making of an AWA, that would not constitute a refusal to recognise a bargaining agent.

1.139 New subsection 170WEA(3) would provide that a party is not in breach of new subsection 170WEA(2) if they were not given a copy of the bargaining agents instrument of appointment before the refusal.

1.140 New subsection 170WEA(4) would provide that a party must not coerce or attempt to coerce the other party:

- to appoint or not to appoint a particular person as their authorised bargaining agent; or

- to terminate the appointment of their authorised bargaining agent.

1.141 The contravention of this provision could lead to the imposition of a civil penalty.

Item 10 – At the end of subsection 170WF(1)
Item 11 – At the end of subsection 170WG(1)
Item 12 – At the end of subsection 170WG(2)

1.142 These items would amend subsections 170WF(1), 170WG(1) and 170WG(2) by inserting notes indicating that civil penalties are applicable to breaches of these provisions.

Item 13 – Section 170WH

New section 170WH – Information must not be false or misleading

1.143 This item would repeal existing section 170WH and replace it with a new provision to the effect that a person must not give the Employment Advocate information for the purposes of this Part that the person knows or ought reasonably to know is false or misleading.

1.144 The contravention of this provision could lead to the imposition of a civil penalty.

1.145 In determining whether a person ought reasonably to know that information is false or misleading, it would be appropriate to have regard to the persons abilities, experience, qualifications and other attributes and to all the other circumstances surrounding the alleged contravention.

Item 14 – Subsection 170WHA(1)
Item 15 – Subsection 170WI(1)
Item 16 – Paragraph 170WI(2)(a)
Item 17 – Paragraph 170WI(2)(c)

1.146 These items propose minor technical amendments consequent upon the replacement of filing requirements with approval requirements.

Item 18 – After section 170WKA

1.147 This item would insert new sections dealing with variation of the referral protocol, content of notices given by the Employment Advocate and Commission and the power of the Employment Advocate to revoke approval of an AWA.

New section 170WKB – President may vary the referral protocol

1.148 Proposed new subsection 170WKB(1) would provide that the President of the Commission may vary the referral protocol (the referral protocol sets out general guidelines for the referral of AWAs or variation agreements to the Commission by the Employment Advocate). Any variation to the referral protocol must have the concurrence of the Employment Advocate [170WKB(2)].

New section 170WKC – Content of notices given by Employment Advocate

1.149 Proposed new subsection 170WKC would provide that when the Employment Advocate issues an approval notice, referral notice or refusal notice under Part VID, the notice must

identify the relevant or designated award that applies to the AWA or agreement in question (for the purposes of applying the no-disadvantage test).

New section 170WKD – Employment Advocate may revoke approval of AWAs etc.

1.150 Proposed new section 170WKD deals with revocation of a decision by the Employment Advocate.

1.151 Proposed new subsection 170WKD(1) would provide that the Employment Advocate may revoke an approval of, or a refusal to approve, an AWA, extension agreement, variation agreement or termination agreement.

1.152 Proposed new subsection 170WKD(2) would provide that if an approval is revoked, then

- the AWA stops operating; or
- the extension agreement or variation agreement ceases to have effect; or
- the termination agreement ceases to have effect and the AWA to which it relates starts operating again

on and from the day specified in the revocation order. The revocation order may specify the date the order is made or any later day.

1.153 If the Employment Advocate revokes a refusal to approve, then the Employment Advocate must deal with the application as though the refusal had not occurred [new subsection 170WKD(3)].

1.154 The Employment Advocate must issue a notice of revocation of an approval or a refusal to approve to the employer who is a party to the AWA or agreement [new subsection 170WKD(4)]. The employer must give the employee with whom the AWA or agreement was made a copy of the notice as soon as practicable after receiving the notice from the Employment Advocate [new subsection 170WKD(5)].

Item 19 – Paragraph 170WL(d)

1.155 This is a consequential amendment to remove existing paragraph 170WL(d), which provides that the regulations may make provision in relation to the witnessing of signatures on AWAs or ancillary documents. Under other amendments proposed in this Schedule, an AWA, extension agreement, variation agreement or termination agreement will be required to be signed only by the employer and employee parties to the AWA. As a consequence, the regulation-making power in paragraph 170WL(d) will no longer be necessary.

Part 2 – Application and saving provisions

Item 20 – Application of items 1, 4, 7, 9 and 13 to 18

1.156 This item would provide that items 1, 4, 7, 9 and 13 to 18 apply only to AWAs, extension agreements, variation agreements and termination agreements made on or after the commencement of those items.

Item 21 – Application of items 3, 5 and 6

1.157 The effect of this item is that items 3, 5 and 6 would apply to AWAs, extension agreements, variation agreements and termination agreements irrespective of the date they are or were made.

Item 22 – Saving – AWAs
Item 23 – Saving – extension agreements
Item 24 – Saving – variation agreements
Item 25 – Saving – termination agreements

1.158 The effect of these items is to provide for the continuing effect of AWAs, extension agreements, variation agreements and termination agreements approved in accordance with the requirements that applied before the commencement of the new approval provisions.

Item 26 – Saving – regulations made for purposes of former sections 170VG and 170VR

1.159 This item would save regulations made for the purposes of former subsections 170VG(1) and (3) and 170VR(4). These regulations would continue to have effect as if they had been made under the corresponding new provisions (as indicated in the table set out in this item) that would be inserted by item 1, that is, subject to any new regulations made for the purposes of the new provisions.

Item 27 – Saving – *Gazette* notices

1.160 This item would save *Gazette* notices published for the purposes of former paragraphs 170VO(1)(c), (3)(c), (4)(b), (5)(b) and (6)(b). These notices would continue to have effect as if they had been made under the corresponding new provisions (as indicated in the table set out in this item) that would be inserted by item 1, that is, subject to any new *Gazette* notices published for the purposes of the new provisions.

Item 28 – Saving – *prescribed conditions*

1.161 This item would save regulations made for the purposes of former subsection 170VR(5). These regulations would continue to have effect as if they had been made for the purposes of the definition of 'prescribed conditions' in new subsection 170VDA(5), that is, subject to any new regulations made for the purposes of the new definition.

Item 29 – Saving – appointment of bargaining agent

This item would save appointments of bargaining agents made under former subsection 170VK(1). Such appointments would continue in force as if they had been made under new subsection 170WEA(1).

Item 30 – Variations of the section 170VPE protocol

1.162 This item would provide that any variations made by the President of the Commission to the referral protocol before the commencement of this schedule are taken to have had effect accordingly.

Item 31 – Definitions

1.163 This item defines the terms 'amended Act', 'former provision' and 'new provision' as used in Part 2 of this Schedule.

SCHEDULE 2 – CERTIFIED AGREEMENTS

a. Part 1 – Amendments

c) Workplace Relations Act 1996

Item 1A – Section 170LD

2The item proposes to replace the current definition of the ***nominal expiry date*** in section 170LD. The new definition contains the elements of the existing definition, but also allows for the nominal expiry date of an extended agreement to be in accordance with proposed section 170MCA. The definition provides that the date is either:

- the date specified in the agreement [new subsection 170LD(a)]; or
- the date as extended or further extended under section 170MC [new subsection 170LD(b)]; or
- the date taken under proposed new section 170MCA to be the nominal expiry date [new subsection 170LD(c)].

Item 1B – At the end of Division 1 of Part VIB

New section 170LGA – Extended agreement

2.2This item would insert a new section 170LGA at the end of Division 1 of Part VIB of the WR Act. Proposed new section 170LGA defines an ***extended agreement*** to be an agreement that:

- is made under Division 2 or 3, but not an agreement under section 170LL [new subsection 170LGA(a)];
- specifies a nominal expiry date that is more than three years after the date on which the agreement comes into operation but not more than five years after that date [new subsection 170LGA(b)]; and
- states it is made as an extended agreement [new subsection 170LGA(c)].

Item 1 – Paragraph 170LJ(3)(a)

2.3 This item proposes an amendment to address a technical defect, concerning the process for approval by employees of agreements made under section 170LJ (agreements between employers and organisations of employees). It is intended to provide that, where a new employee or employees commence work with the employer during the 14 day period prior to approval of the agreement, the employer must take steps to provide those employees with access to the agreement before approval is given. The requirement for a minimum of 14 days notice would not apply in relation to such employees. (Paragraph 170LJ(3)(b) continues to require that the agreement be explained, before approval, to all persons whose employment will be subject to the agreement.)

Item 2 – After subsection 170LJ(3)

2.4 This item relates to proposed new section 170LVA, which will provide that the Australian Industrial Relations Commission (AIRC) should generally determine whether or not to certify an agreement without conducting a hearing. However, that section also specifies persons who may apply to the AIRC to request a hearing be conducted in respect of a proposed agreement. One such person is a person whose employment will be subject to the agreement.

2.5 This item will insert a new subsection 170LJ(3A), which will require an employer to take reasonable steps, within 7 days of the agreement being approved by a valid majority of employees, to inform each person whose employment will be subject to the agreement of their right to request such a hearing and that the request must be made no later than 28 days after the agreement is approved.

Item 3 – Subsection 170LK(2)

2.6 This item would effect an amendment to address a technical defect, concerning the process for approval by employees of agreements made under section 170LK (agreements between employers and their employees). It is intended to provide that, where a new employee or employees commence work with the employer during the 14 day period prior to approval of the agreement, the employer must take steps to provide those employees with access to the agreement before approval is given. The requirement for a minimum of 14 days notice would not apply in relation to such employees (new paragraph (c) would require that the agreement be explained, before it is made, to all persons whose employment will be subject to the agreement.)

2.7 This item would also incorporate into subsection 170LK(2) the existing requirement in subsection 170LK(7) for the employer to take reasonable steps to ensure that the terms of the agreement are explained to all the persons employed at the time whose employment will be subject to the agreement.

Item 4 – Subsection 170LK(7)

2.8 This item would repeal existing subsection 170LK(7) [which would be incorporated into new subsection 170LK(2)] and insert a new subsection 170LK(7). The new subsection 170LK(7) would require an employer to take reasonable steps, within 7 days of the agreement being approved by a valid majority of employees, to inform each person whose employment will be subject to the agreement of their right to request the Commission to conduct a hearing regarding whether or not to certify the agreement and that the request must be made no later than 28 days after the agreement is approved (hearings are dealt with in proposed new section 170LVA).

Item 5 – Subsection 170LK(8)

2.9 This item proposes consequential amendments to reflect the changes made by items 3 and 4.

Item 6 – At the end of section 170LK

2.10 This item proposes to add a note after subsection 170LK(8). The note would refer readers to the Commission's power under the proposed new subsection 170LT(11) to dispense with compliance with subsection 170LK(8) in certain cases.

Item 7 – Paragraph 170LR(2)(a)

2.11 This item proposes an amendment to address a technical defect, concerning the process for approval by employees of agreements made under Division 3 (agreements between employers and organisations of employees). It is intended to provide that, where an employee or employees commence work with the employer during the 14 day period prior to approval of the agreement, the employer must take steps to provide those employees with access to the agreement before approval is given. The requirement for a minimum of 14 days notice would not apply in relation to such employees. (Paragraph 170LR(2)(b) continues to require that the agreement be explained, before approval, to all persons whose employment will be subject to the agreement.)

Item 8 – At the end of section 170LR

2.12 This items proposes a new subsection 170LR(3) which would require an employer to take reasonable steps, within 7 days of the agreement being approved by a valid majority of employees, to inform each person whose employment will be subject to the agreement of their right to request such a hearing and that the request must be made no later than 28 days after the agreement is approved (hearings are dealt with in proposed new section 170LVA).

Item 8A – After paragraph 170LT(3)(b)

2.13 This item would insert a new paragraph 170LT(3)(c) into subsection 170LT(3). Subsection 170LT(3) provides that where a certified agreement fails the no-disadvantage test the Commission may nevertheless certify the agreement if it is satisfied it is not contrary to the public interest to do so.

2.14 New paragraph 170LT(3)(c) would provide that this option is not available for extended agreements.

Item 9 – Subsection 170LT(7)

2.15 This item updates references in subsection 170LT(7) to other subsections that will be renumbered as a consequence of other proposed amendments.

Item 9A – Subsection 170LT(10)

2.16 Section 170LT(10) requires that a certified agreement must specify a date as the nominal expiry date and that date cannot be more than three years after the date on which the agreement will come into operation.

2.17 This item would amend section 170LT(10) to allow an extended agreement to have a maximum nominal life of up to five years [new paragraph 170LT(10(a)]. If the agreement is not an extended agreement, the existing requirement that the nominal expiry date cannot be more than three years after the date on which the agreement comes into operation applies [new paragraph 170LT(10)(b)].

Item 10 – At the end of section 170LT

2.18 This item proposes a new subsection 170LT(11). This would allow the Commission to certify an agreement if the requirements of subsection 170LK(8)(which deals with the variation of a proposed agreement) were not satisfied. The amendment would allow the Commission to

certify the agreement if it was satisfied that no person whose employment would be covered by the proposed agreement suffered detriment as a result of that failure.

Item 10A – At the end of section 170LU

2.19 Section 170LU sets out the requirements additional to those provided under s170LT, which the Commission must consider before deciding whether or not to certify an agreement.

2.20 This item would add a new paragraph 170LU(9) which would set out the criteria which must be satisfied before the Commission can certify an extended agreement. The Commission must refuse to certify an extended agreement unless it is satisfied that:

- the agreement's nominal expiry date is appropriate in the circumstances [new paragraph 170LU(9)(a)]; and
- the agreement's nominal expiry date is in the interests of the employer and the employees who will be bound by the agreement [new paragraph 170LU(9)(b)]; and
- the agreement contains a statement setting out the right of a party to the agreement to apply for a reassessment of whether the agreement passes the no-disadvantage test [new paragraph 170LU(9)(c)].

Item 11 – After section 170LV

New section 170LVA – Hearings not required

2.21 This item would insert a new section 170LVA, which would require the Commission to decide whether or not to certify an agreement without holding a hearing unless it is not satisfied that it can make that decision with the information available to it or a hearing is requested by one of the persons set out in subsection 170LVA(b) and the Commission is satisfied that there are reasonable grounds for doing so.

2.22 The persons who may request a hearing are:

- the employer [subparagraph 170LVA(1)(b)(i)];
- a person whose employment will be subject to the agreement [subparagraph 170LVA(1)(b)(ii)];
- for section 170LJ, 170LL or Division 3 agreements– the one or more organisations of employees that made the agreement with the employer [subparagraph 170LVA(1)(b)(iii)];
- for section 170LK agreements – an organisation of employees that has notified the Commission, and the employer, in writing that it wants to be bound by the agreement [subparagraph 170LVA(1)(b)(iv)];
- a person prescribed by the regulations [subparagraph 170LVA(1)(b)(v)].

2.23 New subsection 170LVA(2) would require that the application requesting a hearing must be made within 28 days of the agreement being approved or made.

New Division 7 – Changes to nominal expiry dates

Item 11A – Division 7 of Part VIB (heading)

2.24 This item replaces the current heading of Division 7 of Part VIB with a new heading. The change in the heading reflects the proposed changes to the content of Division 7, which would, as amended, deal with nominal expiry dates. A new Division 7A has been created to deal with varying or terminating agreements.

Item 12 – Subsection 170MC(1)
Item 13 – Paragraphs 170MC(1)(a) and (b)
Item 14 – After subsection 170MC(2)
Item 14A – After subsection 170MC(3)
Item 15 – After subsection 170MC(4)
Item 16 – Subsection 170MC(5)

2.25 These items will make a number of changes to section 170MC, which deals with extending the nominal expiry date of a certified agreement (where a valid majority approves).

2.26 At present, an organisation of employees bound by an agreement made in accordance with section 170LK (ie an agreement between an employer and the employer's employees) must consent to an extension. The amendments proposed by these items are intended to remove the entitlement of employee organisations to prevent the extension of section 170LK agreements, while still retaining a role for such organisations where requested by a member

2.27 Item 13 would replace paragraphs 170MC(1)(a) and (b). New paragraphs (1)(a) and (b) would provide that an application for Commission approval of an extension to the nominal expiry date must be made by:

- in the case of an agreement between an employer and one or more employee organisations under section 170LJ or Division 3 (the duration of a 'greenfields' agreement made under section 170LL may not be extended) - the employer and one or more of the organisations bound by the agreement; or

- in the case of an agreement between an employer and the employer's employees made in accordance with section 170LK – the employer.

2.28 Item 14 proposes to insert new subsections (2A) and (2B) to ensure that an organisation bound by a section 170LK agreement could make submissions in relation to the proposed extension if asked to do so by a member of the organisation:

- whose employment is subject to the agreement; and

- whose industrial interests the organisation is entitled to represent.

2.29 Item 14A proposes to insert a new subsection 170MC(3A). New subsection 170MC(3A) would require the Commission to decide whether or not to extend an agreement under section 170MC without holding a hearing unless it is not satisfied that it can make that decision with the information available to it, or a hearing is requested by one of the persons listed in paragraph 170MC(3A)(b). The persons who may request a hearing are:

- the employer (subparagraph 170MC(3A)(b)(i));
- a person whose employment is subject to the agreement [subparagraph170MC(3A)(b)(ii)];
- one or more of the organisations bound by the agreement [subparagraph 170MC(3A)(b)(iii)]; and
- a person prescribed by the regulations [subparagraph 170MC(3A)(b)(iv)].

2.30 This amendment is consistent with the provisions of the Bill about who may request a hearing in relation to the certification of an agreement (proposed section 170LVA), and the termination or variation an agreement (proposed section 170MHB).

2.31 Item 15 would insert new subsections 170MC(4A) and 170MC(4B) that will require an employer to take reasonable steps, within 7 days of the employer or the employer and the organisation(s) bound to the agreement extending the agreement, to inform each person whose employment will be subject to the agreement, of their right to request such a hearing and that the request must be made no later than 28 days after the agreement is approved [although the employer, or the employer and the organisation(s) bound to the agreement may, in writing, extend the agreement, this has no effect unless the Commission approves it – see existing s170MC(2)].

2.32 Item 16 would replace the current paragraph 170MC(5)(a) to exclude extended agreements from the types of agreements which may have the nominal expiry date extended under section 170MC provisions. The current prohibition in paragraph 170MC(5)(b) on extending the nominal expiry date of agreements certified under section 170LT(3) will remain.

2.33 Item 12 proposes a consequential amendment.

Item 16A – After section 170MC

New section 170MCA – Bringing forward the nominal expiry if an extended agreement fails the no-disadvantage test

2.34 This item would insert a new mechanism which would provide a party to an extended agreement a right to apply to the Commission to have the agreement reassessed to determine whether it passes the no-disadvantage test. The amendment would allow a reassessment any time after the extended agreement has been operating for more than 3 years, but before the nominal expiry date [new subparagraph 170MCA(2)(a)].

2.35 An application for a reassessment of the no-disadvantage could only be made once [new subparagraph 170MCA(2)(b)].

2.36 If on conducting the reassessment the Commission decides that the extended agreement does not pass the no-disadvantage test and the Commission has not varied the agreement under section 170MD before the end of the period commencing 3 months after the finding, then the nominal expiry date is taken to be the last day of the 3 month period [new subsection 170MCA(1)].

2.37 If during the 3 month period the Commission decides that the extended agreement has been appropriately varied by the parties under section 170MD so that it passes the no disadvantage test then the nominal expiry date will remain the date specified in the agreement.

2.38 The parties may also terminate the agreement under Division 7A or allow the agreement to reach it new nominal expiry date (see note to proposed subsection 170MCA(1)).

2.39 As the nominal expiry date will not have passed until the end of the three month period commencing from the date of the Commission's finding, protected industrial action is not available during this period.

New Division 7A – Varying or terminating certified agreements

Item 16B – Before section 170MD

2.40 This item would insert a new Division 7A with a new heading as part of the consequential amendments arising from splitting the current Division 7 into two separate Divisions.

Item 17 – Paragraphs 170MD(1)(a) and (b)
Item 18 – After subsection 170MD(2)
Item 19 – After subsection 170MD(5)

2.41 These items propose amendments to section 170MD, which deals with variation of a certified agreement (where a valid majority approve).

2.42 At present an organisation of employees bound by an agreement made in accordance with section 170LK (ie an agreement between an employer and the employer's employees) must consent to a variation. The amendments proposed by these items are intended to remove the entitlement of employee organisations to prevent the variation of section 170LK agreements, while still retaining a role for such organisations where requested by a member.

2.43 Item 17 would replace paragraphs 170MD(1)(a) and (b). New paragraphs (1)(a) and (b) would provide that an application for Commission approval of a variation must be made by:

- in the case of an agreement between an employer and one or more employee organisations under section 170LJ, section 170LL or Division 3 - the employer and one or more of the organisations bound by the agreement; or

- in the case of an agreement between an employer and the employer's employees made in accordance with section 170LK – the employer

2.44 Item 18 proposes to insert new subsections (2A) and (2B) to ensure that an organisation bound by a section 170LK agreement could make submissions in relation to the proposed variation if asked to do so by a member of the organisation:

- whose employment is subject to the agreement; and

- whose industrial interests the organisation is entitled to represent

2.45 Consistent with provisions for application for certification of an agreement, item 19 would insert new subsections 170MD(5A) and 170MD(5B) that will require an employer to take reasonable steps, within 7 days of the employer, or the employer and the organisation(s) bound to the agreement, extending the agreement, to inform each person whose employment will be

subject to the agreement, of their right to request such a hearing; and that the request must be made no later than 28 days after the variation of the agreement is approved [although the employer, or the employer and the organisation(s) bound to the agreement may, in writing, vary the agreement, this has no effect unless the Commission approves it – see existing s170MD(2)].

Item 20 – Paragraphs 170MG(1)(a) and (b)
Item 21 – After subsection 170MG(2)
Item 22 – At the end of section 170MG

2.46 Items 20, 21 and 22 propose amendments to section 170MG, which deals with termination of a certified agreement at any time (where a valid majority approves).

2.47 At present, an organisation of employees bound by an agreement made in accordance with section 170LK (ie an agreement between an employer and the employer's employees) must consent to a termination. The amendments proposed by these items are intended to remove the entitlement of employee organisations to prevent the termination of a section 170LK agreement, while still retaining a role for such organisations where requested by a member.

2.48 Item 20 would replace paragraphs 170MG(1)(a) and (b). New paragraphs (1)(a) and (b) would provide that an application for Commission approval of a termination must be made by

- in the case of an agreement between an employer and one or more employee organisations under section 170LJ, section 170LL or Division 3 - the employer and one or more of the organisations bound by the agreement; or

- in the case of an agreement between an employer and the employer's employees made in accordance with section 170LK – the employer

2.49 Item 21 proposes to insert new subsections (2A) and (2B) to ensure that an organisation bound by a section 170LK agreement could make submissions in relation to the proposed termination if asked to do so by a member of the organisation:

- whose employment is subject to the agreement; and

- whose industrial interests the organisation is entitled to represent

2.50 Consistent with provisions for application for certification of an agreement, item 21 would insert new subsections 170MG(5) and 170MG(6) that will require an employer to take reasonable steps, within 7 days of the employer, or the employer and the organisation(s) bound to the agreement extending the agreement, to inform each person whose employment will be subject to the agreement, of their right to request such a hearing; and that the request must be made no later than 28 days after the termination of the agreement is approved (although the employer, or the employer and the organisation(s) bound to the agreement may, in writing, vary the agreement, this has no effect unless the Commission approves it – see existing subsection 170MG(2)).

Item 23 – Paragraph 170MH(1)(c)

2.51 Section 170MH currently provides that the Commission may terminate a certified agreement after the nominal expiry date. Such an agreement may be terminated where to do so is not contrary to the public interest

2.52 This item would replace subsection 170MH(1) with a new subsection 170MH(1A) to allow extended agreements to be terminated under section 170MH if the Commission finds under proposed new section 170MCA that the extended agreement no longer passes the no-disadvantage test.

2.53 The persons who would be able to apply for a certified agreement to be terminated under this provision are:

- the employer [new subparagraph 170MH(1A)(a)];
- a majority of the persons whose employment is subject to the agreement [new subparagraph170MH(1A)(b)];
- if the agreement was made in accordance with section 170LJ or 170LL or Division 3 - an organisation of employees that is bound to the agreement and that has at least one member whose employment is subject to the agreement [new subparagraph 170MH(1A)(c)].

Item 24 – After subsection 170MH(2)

2.54 Item 24 proposes to insert new subsection 170MH(2A). The amendment would provide that the Commission may only obtain the views of an organisation bound by a section 170LK agreement in respect of a proposed termination if it has been requested to make a submission by at least one member whose employment is subject to the agreement, and whose industrial interests the organisation is entitled to represent in relation to work that is subject to the agreement.

Item 25 – Paragraph 170MHA(2)(c)
Item 26 – After subsection 170MHA(3)

2.55 Items 25 and 26 propose amendments to section 170MHA, which deals with termination of a certified agreement in a manner provided for by the agreement

2.56 Under subsection (1), an application for termination of an agreement that has passed its nominal expiry date may be made by the employer, a valid majority of employees or an organisation bound by the agreement

2.57 The effect of the amendment proposed by item 25 would be to remove the entitlement of employee organisations to seek termination of a section 170LK agreement.

2.58 Such organisations would retain, as a result of amendments proposed by item 26, a right to make submissions in relation to a proposed termination if asked to do so by a member of the organisation:

- whose employment is subject to the agreement; and

- whose industrial interests the organisation is entitled to represent.

Item 27 – At the end of Division 7 of Part VIB

New section 170MHB – Hearings not required

2.59 This item would insert a new section 170MHB, which would require the Commission to decide whether or not to vary or terminate an agreement without holding a hearing unless it is not satisfied that it can make that decision with the information available to it or a hearing is requested by one of the persons set out in paragraph 170MHB(1)(b) and the Commission is satisfied that there are reasonable grounds for doing so.

2.60 The persons who may request a hearing are:

- the employer [subparagraph 170MHB(1)(b)(i)];
- a person whose employment will be subject to the agreement [subparagraph 170MHB(1)(b)(ii)];
- one or more of the organisations bound by the agreement [subparagraph 170MHB(1)(b)(iii)]; and
- a person prescribed by the regulations [subparagraph 170MHB(1)(b)(iv)].

2.61 New subsection 170MHB(2) would require that the application requesting a hearing must be made within 28 days of the agreement to extend, vary or terminate, or, in the case of sections 170MH(1) and 170MHA(1), within 28 days of the application to terminate being made to the Commission.

Part 2 – Application and transitional provisions

Item 28 – Application of items 1A to 11

2.62 This item provides that the amendments made by items 1A to 11 would apply in relation to any agreement where the application to certify the agreement is made on or after the commencement of the Schedule. The amendments also apply in relation to the applications to certify those agreements.

Item 29 – Application of items 12 to 27

2.63 This item provides that the amendments made by items 12 to 27 would apply to a decision made by the Commission on or after the commencement of the Schedule, about the extension, variation or termination of a certified agreement in respect of applications for the extension, variation or termination made on or after that commencement.