PART 1: WORKPLACE RELATIONS AMENDMENT (AWARD SIMPLIFICATION) BILL 2002…….. 2
OVERVIEW 2
SUMMARY OF PROVISIONS 2
Amendments providing for further award simplification 2
Exceptional matters orders 3
POLICY RATIONALE 4
Changes to allowable award matters 4
Matters to be specified as not allowable 8
Other Amendments 11
PRINCIPAL ISSUES COMMITTEE HAS RAISED FOR CONSIDERATION 14
Effect of reducing Award safety net 14
Importance of Award safety net 14
Process involved in a further Award Simplification including resources required 15
Effect of removing Federal Award provisions and reverting to relying on state laws 15

PART 1: WORKPLACE RELATIONS AMENDMENT (AWARD SIMPLIFICATION) BILL 2002

OVERVIEW

1.1 The Workplace Relations Amendment (Award Simplification) Bill 2002 was introduced into the House of Representatives on 13 November 2002, and debated and passed by the House of Representatives on 1 April 2004.

1.2 On 3 March 2004, the Bill was referred to the Senate Employment, Workplace Relations and Education Committee for consideration.

1.3 The Committee has raised four principal issues for consideration in referring the Bill. Those issues are:

- effect of reducing award safety net;
- importance of award safety net;
- process involved in further award simplification including resources required; and
- effect of removing federal award provisions and reverting to relying on state laws.

These issues are dealt with at paragraphs 1.94 – 1.110.

1.4 The reforms of this Bill are designed to implement the Government's ongoing commitment to maintaining the award system as a safety net of minimum wages and conditions that promotes agreement making at the workplace level.

SUMMARY OF PROVISIONS

Amendments providing for further award simplification

Matters more appropriately dealt with at the workplace level through agreement making

1.5 The Bill will amend subsection 89A(2) to remove the following from the list of allowable award matters:

- paragraph 89A(2)(a) – skill-based career paths;
- paragraph 89A(2)(d) – bonuses (except for outworkers);
- paragraph 89A(2)(g) – the reference to 'cultural leave and other like forms of leave'. The Bill will insert new paragraph 89A(2)(ga) to make clear that ceremonial leave for Aboriginal and Torres Strait Islander peoples and other like forms of leave to meet cultural obligations will remain allowable award matters;
- paragraph 89A(2)(j) – limiting the scope of what may be included as an allowance.

1.6 Subsection 89A(3) provides that the Commission's power to make an award dealing with allowable award matters is limited to making a minimum rates award. Item 13 of the Bill will amend subsection 89A(3) to make clear that the Commission's power to make an award dealing with matters in subsection 89A(2) is limited to the making of a minimum rates award that provides for basic minimum entitlements.

1.7 The Bill will also insert new subsection 89A(3A), which will make clear that certain matters are not allowable award matters. These include:

- new paragraph 89A(3A)(a) – transfers between locations;

- new paragraph 89A(3A)(b) – training or education (except in relation to leave and allowances for apprentices or trainees);
- new paragraph 89A(3A)(c) – recording of the hours employees work, or the times of their arrival or departure from work;
- new paragraph 89A(3A)(d) – payments of accident make up pay by employers;
- new paragraph 89A(3A)(e) – rights of an organisation of employers or employees to participate in, or represent, the employer or employee in the whole or part of a dispute settling procedure, unless the organisation is the representative of the employer's or employee's choice;
- new paragraph 89A(3A)(f) – transfers from one type of employment to another type of employment.
- new paragraph 89A(3A)(g) – provisions specifying the number or proportion of employees that an employer may employ in a particular type of employment or in a particular classification;
- new paragraph 89A(3A)(h) – provisions containing direct or indirect prohibitions on an employer employing employees in a particular type of employment or in a particular classification; and
- new paragraph 89A(3A)(i) – provisions specifying maximum or minimum hours of work for regular part-time employees.

1.8 Subsection 89A(6) currently provides that the Commission may include in an award provisions that are incidental to the matters in subsection 89A(2) and are necessary for the effective operation of the award. Item 17 of the Bill will amend subsection 89A(6) to clarify that matters can only be inserted in awards where they are incidental to an allowable award matter and are for the purpose of making a particular provision operate in a practical way.

Removal from awards of matters that are duplicated in State, Territory and Federal Legislation

1.9 The Bill will amend subsection 89A(2) to remove the following matters:

- paragraph 89A(2)(f) – long service leave;
- paragraph 89A(2)(n) – notice of termination; and
- paragraph 89A(2)(q) – jury service.

This will reduce the confusion and complexity that arises from the prescription of minimum standards in both awards, and State, Territory or Federal legislation.

Clarification of allowable award matters that were not intended to operate as presently interpreted

1.10 This Bill will amend subsection 89A(2) to clarify the operation of particular allowable award matters:

- paragraph 89A(2)(i) - public holidays that are not declared to be observed generally within a State or Territory; and
- paragraph 89A(2)(m) - to make clear that redundancy pay is an allowable award matter only to the extent that payments relate to a termination that is at the initiative of the employer, and is on the ground of operational requirements.

Exceptional matters orders

1.11 The Bill will amend section 120A to require exceptional matters orders to be made by a Full Bench unless the order relates to a single business.

POLICY RATIONALE

1.12 The content of an award should be sufficient to maintain minimum terms and conditions of employment while leaving to other industrial instruments, such as certified agreements or Australian Workplace Agreements terms and conditions which can satisfy the needs of employers and employees at a particular enterprise or workplace.

1.13 It is important to continue the award simplification process to create more productive workplaces and improve flexibility.

Changes to allowable award matters

The removal of skill-based career paths (while retaining 'classification of employees')

1.14 This would have the effect of removing training and study provisions from awards. Many simplified awards have retained training and study provisions as either directly allowable, or incidental and necessary to, skill-based career paths.

1.15 It was not the intention that training or education provisions would fall within the scope of either subsection 89A(2) or subsection 89A(6) of the WR Act. The Implementation Discussion Paper for the Workplace Relations and Other Legislation Amendment Bill 1996 (the WROLA 96 Implementation Paper) included study leave as an example of matters that would with award simplification 'be for determination at the enterprise or workplace level'.

1.16 Industry training matters are regulated by State and Territory legislation, with opportunity to complement prescribed training arrangements through agreement making. Awards will continue to be able to provide for study leave and allowances for trainees or apprentices.

Removal of bonuses, other than for outworkers

1.17 This would have the effect of removing bonuses from awards. Bonuses are more appropriately decided at the workplace level through agreement between employers and employees. Bonuses are not standard provisions across awards. There is more scope for dealing with different approaches to performance related schemes above the safety net through agreements in a way that allows for tailoring of arrangements to local needs and circumstances.

1.18 Bonuses in awards are not related to production levels in a systematic way, often being a one-off payment when a specified level of production or performance is reached. They are provided in addition to the minimum rates of pay, in contrast to piece rates, which are in alternative to minimum time-based rates of pay.

Removal of long service leave

1.19 Awards should not cover matters dealt with through other forms of legislation.

1.20 Long service leave arrangements are already provided for in all State and Territory jurisdictions though legislation. There are some differences between long service leave provisions across the States/Territories and between the various legislative provisions and federal award provisions. Some federal award provisions are more generous than the State/Territory legislation and others less so. These primarily concern access to entitlements for casuals and timing for pro-rata access to leave but also in some cases the amount of leave available and when an entitlement arises.

1.21 The minimum standard provided by legislation can be enhanced, if the parties agree, through agreements.

1.22 The Bill contains a twelve month transitional period for the removal of all non-allowable provisions including long service leave provisions, from awards, to enable the parties to address any inconsistency between current award arrangements and entitlements that apply under State or Territory legislation. The primary vehicle for addressing these issues would be agreement making.

Omit all words after "bereavement" in paragraph 89A(2)(g), substitute "leave and compassionate leave" (item 4)

1.23 The intention of the *Workplace Relations and Other Legislation Amendment Act 1996* was that the scope of this allowable award matter be limited to leave forms of a specific type, as provided for in the personal/carer's leave test case [Prints L6900 and M6700]. Cultural leave was included to 'permit awards to include provision for leave such as ceremonial leave for persons of Aboriginal or Torres Strait Islander descent'**.** The words 'other like forms of leave' were originally included in paragraph 89A(2)(g) in order to adequately comprehend all relevant forms of expression used in awards to describe 'personal/carer's leave'. With the addition of 'cultural leave', the interpretation of 'other like forms of leave' was unclear.

1.24 In practice, this clause has been used to expand the scope of this allowable matter. Examples include provisions for: leave to attend stop work meetings during working hours to discuss industrial matters; leave to attend industrial proceedings when summonsed as a witness and leave to attend interviews during a period of notice of termination or redundancy (the Award Simplification Decision [Print P7500] and the Like Forms of Leave decision [Print Q9399].

1.25 The amendments to this paragraph, and the insertion of new paragraph 89A(2)(ga), would clarify the original intent of 'cultural leave', so that it is clear that this matter relates to provisions for leave for persons of Aboriginal and Torres Strait Islander descent.

Removal of public holidays not generally observed in a State or Territory

1.26 The Government's policy position is that the allowable award matter of 'public holidays' should only comprehend the entitlement to paid leave on designated public holidays that are gazetted by State or Territory Governments.

1.27 The amendment would give effect to this policy by ensuring that only public holidays that are generally observed and declared to be public holidays by a State or Territory Government are allowable award matters (including regional holidays where they are declared by the relevant State or Territory government).

1.28 The amendment is not intended to preclude substitution arrangements to enable alternative days to be observed as public holidays in the interests of workplace efficiency and flexibility, or the preference of employees.

1.29 This amendment would result in the removal of union picnic days from awards. Union picnic day is not a gazetted public holiday, nor a standard provision across all awards.

1.30 In the Award Simplification Case [Print P7500], the Commission determined that union picnic days fall within the expression 'public holidays' for the purposes of paragraph 89A(2)(i). In coming to this conclusion the Commission noted the Public Holidays Test Case decision and that 'the use of terms in their industrial context is an important element in construing the matters listed in section 89A(2)'.

1.31 The Public Holidays Test Case established a standard of '10 + 1' being 10 specified holidays celebrated throughout Australia and one 'State-specific' holiday. The test case standard allows for the possibility of an entitlement to union picnic day, but only where it is taken in lieu of the one State-specific holiday, not in addition to the State-specific holiday. In the Australian Capital Territory, the *Holidays Act 1958* legislates a union picnic day for employees whose terms and conditions of employment are governed by the 62 federal awards listed in Schedule 1 of the Act. As a result, these employees receive an extra Territory-specific day (in addition to Canberra Day).

Clarifying the scope of the allowable award matter 'allowances'

1.32 The amendment would ensure that only the following allowances are allowable award matters:

- monetary payments to reimburse employees for costs incurred in their employment (for example, purchasing tools and equipment);
- compensation for employees for additional duties that are not already comprehended in their wages and salary (for example, first aid officer allowance); or
- compensation for employees for specific disabilities associated with their work (for example, working in the cold or at heights).

1.33 The amendment is intended to ensure that allowances are payable in respect of costs which are associated with an employee's employment and duties, and it reflects the two general types of allowance that the Full Bench, in the Award Simplification Decision, indicated would be allowable or incidental and necessary to section 89A(2)(j):

> '…provision for payment in addition to minimum rates of pay for:
> disabilities, responsibility and skill; or
> the reimbursement of expenses...'

1.34 This provision will ensure that a range of matters are no longer included in awards, such as education allowances and make-up pay when an employee is receiving workers compensation or is on jury or military service.

1.35 These matters do not form part of the award safety net as they: do not concern matters related to an employee's duties, or are they are more appropriately dealt with at the workplace (for example, education allowances), or are dealt with through legislation (such as compensation related to workplace accidents). (Refer also to item 10 re Jury Service.)

1.36 The amendment will also address specific concerns about the operation of paragraph 89A(2)(j) that were raised by a Full Bench of the Commission when it considered whether or not accident make-up pay was an allowance in the decision in respect of the *Commonwealth Bank of Australia Officers Award 1990* [Print P1297]:

> '…we do not find much assistance from the context in which the term 'allowances' appears in section 89A(2)(j). Certainly it may be accepted that an allowance within the meaning of the term used in that paragraph must be an allowance of a kind appropriately the subject of an industrial award. Essentially the elements of such an allowance…: an entitlement in the employee to a payment notionally distinct from the wage for a purpose connected with the employment relationship, and particularly to compensate for some condition of or related to the work. The statutory context does not contain any detail that points to a construction that only allowances for reimbursable expenses or for compensatory payment for work conditions or disabilities are allowable award matters.'

1.37 The Full Bench concluded that accident pay is a form of allowance, stating that:

> 'The exclusion of accident pay from the allowable award matter 'allowances' would require a narrow and industrially legalistic meaning to be accorded to the latter expression. We do not consider that the expression should be construed in that manner.'

1.38 The Full Bench in the Award Simplification Decision confirmed this interpretation.

Clarifying the scope of the allowable award matter 'redundancy pay'

1.39 The amendment would ensure that redundancy payments are only made to employees whose employment is terminated:

- at the initiative of the employer; and
- on the ground of operational requirements.

1.40 This will accord with the definition of redundancy in the Commission's model redundancy pay clause established by the Award Simplification Decision which has been adopted in a substantial number of simplified awards:

> 'Redundancy occurs when an employer decides that the employer no longer wishes the job the employee has been doing to be done by anyone and this is not due to the ordinary and customary turnover of labour.'

1.41 At present, some awards define redundancy as a situation where an employee ceases to be employed by an employer other than for reasons of misconduct or refusal of duty. Under these awards employees become eligible for redundancy payments in ordinary resignation situations and in other cases which do not constitute redundancy situations as that concept is normally understood in the workplace relations context.

1.42 For example, in a decision relating to various Plumbing Industry Awards [Print Q8609], the Commission held that 'redundancy' had acquired a special meaning in the building and construction trades, and therefore a clause defining 'redundancy' as any situation where an employee ceases to work for an employer (other than for reasons of misconduct or where the employee refuses to work) was allowable.

1.43 The effect of this provision is that if an employee dies while still employed, they are 'redundant' and a redundancy payment has to be made to their estate. Similarly, if an employee resigns their employment, that employee would be entitled to 'redundancy payments'.

1.44 This treatment of redundancy is not an appropriate minimum standard, and should not form part of the award safety net.

Removal of 'notice of termination' from the list of allowable award matters

1.45 Minimum required periods of notice of termination by an employer based on age and years of employment are provided for as a general minimum entitlement by the WR Act. This legislated standard is identical to the award standard for required periods of notice of termination by an employer set by the Termination, Change and Redundancy Test Case [Print F6230].

1.46 Its removal as an allowable award matter is consistent with the view that awards should not cover matters dealt with in legislation.

1.47 It will also remove employer entitlements regarding notice from an employee, which are included in the model termination clause but which are not included in the WR Act.

1.48 The minimum standard provided by legislation can be enhanced, if the parties wish, through agreements.

Removal of the allowable award matter 'jury service'

1.49 Jury service is not a standard provision across all awards and thus not part of the safety net to which all workers have access. Only about one-third of all federal awards contain jury service provisions.

1.50 The Government's policy position is that it is not appropriate for awards to require employers to pay allowances for non-work related maters such as jury service.

1.51 It is appropriate for the remuneration of jurors to be dealt with at State and Territory level, in line with State and Territory regulation of courts. State and Territory legislation already provides for the payment of jury service fees for members of the public who are undertaking jury service. This is generally a daily allowance from the courts, and the actual rates are set by regulation.

1.52 It is the responsibility of the State and Territory Governments to address the issue of recompense. Jury service fees vary significantly across the States and Territories and may be less than the federal minimum wage. For example, in Victoria the fees range from $36/day ($180/week) for the first six days to $72/day ($360/week) from the seventh day onwards.)

1.53 Make-up pay for jury service can be provided for in agreements. About 19% of certified agreements, current as at 31 December 2003, contained provisions for payment of jury service make up pay.

Clarifying that bonuses for outworkers remain allowable award matters

1.54 New paragraph 89A(2)(sa) will provide for a new allowable award matter – 'bonuses for outworkers'. The amendment is required because 'bonuses' generally are to be deleted as an allowable award matter (item 2), but are to be retained as an allowable award matter for outworkers.

1.55 Many outworkers are remunerated through 'payment by results' systems and bonuses and it is important that they continue to have access to this mode of remuneration. Bonuses for outworkers are usually linked closely to productivity and it is appropriate for bonuses to continue to form part of the safety net for outworkers.

1.56 Paragraph 89A(2)(t) already recognises that the pay and conditions for outworkers are allowable award matters. Productivity-linked bonuses often comprise a substantial proportion of the remuneration of outworkers. The continuing allowability of bonuses for outworkers recognises this.

Matters to be specified as not allowable

1.57 The Bill would insert new subsection 89A(3A), which is a list of matters that are specified not to be 'allowable award matters'. This amendment is intended to ensure that particular matters which were not intended to be allowable under the provisions of the WR Act are not included in awards, and would specifically exclude some other matters which are no longer to be allowable.

Transfers between locations

1.58 This provision is intended to remove from the scope of awards provisions such as those setting out conditions applicable to transfers or selection for transfer from one work location to another. It is not intended to prevent the inclusion of provisions that permit the transfer of employees to a work location other than their usual location where the employer is not able to usefully employ them because of any strike, breakdown of machinery or any stoppage of work for any cause for which the employer cannot reasonably be held responsible.

1.59 Arrangements for consulting and informing employees about possible transfers, and an entitlement for an employee to indicate a preference for transfer, are matters of detail which can be dealt with by agreement at the workplace or enterprise level.

Training or education (except in relation to leave and allowances for trainees or apprentices)

1.60 This would make it clear that training and education matters are generally not a matter for award inclusion.

1.61 It was not the intention that trade union training leave (TUTL) or other training and education provisions would fall within the scope of either subsection 89A(2) or subsection 89A(6) of the WR Act – the WROLA96 Implementation discussion paper notes:

> 'Consistent with the focus of awards on safety net minimum standards and, as outlined in *Better Pay for Better Work*, the process of award simplification will be expedited. Accordingly, it is intended that the Commission's jurisdiction (and thus the capacity of the parties) to incorporate matters in awards will be confined to certain prescribed matters. All other matters in awards should generally be determined at the enterprise or workplace level, whether in formal agreements or informally. …Further matters that generally would be for determination at the enterprise or workplace level include…study leave…trade union training leave.'

1.62 The uncertainty in relation to these matters was borne out in the Like Forms of Leave decision [Print Q9399] which determined that training specifically directed at enhancing the operation of dispute settling procedures might be incidental to an allowable matter and necessary for the effective operation of the award and study/training leave clauses which are '…directed to the attainment of qualifications which are a prerequisite to progress through an award classification structure may be allowable under certain circumstances pursuant to section 89A(6) as incidental to section 89A(2)'.

1.63 These matters are more appropriately dealt with by agreement at the workplace or enterprise level.

Award provisions requiring employees to record their hours of work, or their times of arrival at or departure from work

1.64 Exclusion of these provisions from allowable award matters is consistent with the view that awards should not cover matters dealt with through legislation and that the award safety net is a true minimum. Section 353A of the WR Act provides for the making of regulations in relation to employment records which may include records of the hours worked by employees. Part 9A of the Workplace Relations Regulations contains detailed requirements in relation to the keeping of employee records, by an employer.

Payment of 'accident make-up pay' by employers

1.65 Awards should not deal with matters dealt with through legislation.

1.66 Weekly payments to injured employees are already regulated by the relevant workers' compensation legislation in each jurisdiction.

1.67 Regulation of accident make-up pay in awards increases the complexity of awards. If parties want to increase the amount paid to injured employees above the statutory provisions, this should be dealt with through agreement-making, not through the award safety net.

Award provisions giving organisations of employers or employees exclusive rights to represent employers or employees in a dispute-settling procedure

1.68 This provision would exclude from awards dispute settling procedures that provide for an organisation of employers or employees to participate in, or represent an employer or employee in the whole or part of the dispute settling process but do not allow the employer or the employee the right to represent their own interest or to choose a representative other than a particular organisation or organisations. This limitation is not intended to exclude organisations from involvement in dispute settling procedures, but rather to ensure that award-based procedures provide choice as to representation.

1.69 This provision ensures freedom of association is protected in line with paragraph 3(f) of the WR Act.

Award provisions about transfers from one type of employment to another type of employment

1.70 "Types of employment" refers to categories such as full time employment, casual employment, regular part time employment and shift work. It is not intended to refer to types of work or duties (as distinct from types of employment) and would not preclude the inclusion of award provisions that permit transfer of employees to different duties where the employer is not able to usefully employ them to perform their usual duties because of any strike, breakdown of machinery or any stoppage of work for any cause for which the employer cannot reasonably be held responsible.

Award provisions setting a limit on the number or proportion of employees that an employer may employ in a particular type of employment or in a particular classification

1.71 Awards should not include provisions that impose, or would have the effect of imposing a limit or quota on the number of persons of that employment type or classification or requiring the number of persons (or minimum or maximum numbers of persons) in a particular type of employment or classification. This extends present paragraph 89A(4)(a) provisions to include classifications as well as types of employment as these are matters better dealt with through agreement at the workplace or enterprise level.

Prohibition (directly or indirectly) on an employer employing employees in a particular type of employment or in a particular classification

1.72 Awards should not contain prohibitions (whether direct or indirect) on an employer employing persons in a particular type of employment or classification. This is a matter that is better dealt with through agreement at the workplace or enterprise level.

1.73 This limitation is not intended to preclude an award from including provisions that stipulate that particular competencies, qualifications or licences must be held in order to perform certain duties.

The maximum or minimum number of hours regular part-time employees can work

1.74 This is already provided for in paragraph 89A(4)(b).

Other Amendments

Repeal subsection 89A(4) (item 15)

1.75 The matters that are dealt with in subsection 89A(4) (prohibition on award provisions that limit the number or proportion of employees that an employer can employ in a particular type of employment, and provisions that set maximum or minimum hours of work for regular part time employees) would now be included in proposed subsection 89A(3A).

Omit '(4)(b)', substitute '(3A)(i)' from subsection 89A(5) (item 16)

1.76 This amendment is consequential upon the repeal of subsection 89A(4). It replaces a reference to present paragraph 89A(4)(b) with a reference to the corresponding new paragraph 89A(3A)(i).

1.77 This item also includes a note to insert a subsection heading 'Other provisions that the Commission may include in an award' above subsection 89A(5). This will be a heading for subsections 89A(5), 89A(6) and proposed subsection 89A(6A).

Clarifying the scope of 'incidental and necessary' matters

1.78 This item amends subsection 89A(6) to clarify the scope of 'incidental' matters that can be included in awards. The amendment would require a matter to be incidental to a substantive provision of the award in question, and essential for the practical operation of an award provision before it could be included in an award under subsection 89A(6).

1.79 The Supplementary Explanatory Memorandum to the Workplace Relations and Other Legislation Amendment Bill 1996 makes clear that the intention of subsection 89A(6) was not to expand the scope of the allowable award matters. The present Bill will bring subsection 89A(6) more into line with the original intention of the provision.

1.80 In practice, the use of subsection 89A(6) provisions has varied considerably from case to case.

1.81 This has resulted in an uncertain standard and little guidance on what may be 'necessary for the effective operation of the award'.

1.82 In some cases subsection 89A(6) has been used to include a range of matters that either add unnecessarily to the detail covered by the award or which were not envisaged as falling within the 'allowable matters' under WROLA96, e.g. training or consultation.

1.83 In the *Metal Industry Award* decision there were over 25 matters which relied on section 89A(6) for allowability, either solely or as a fallback if a particular section 89A(2) matter did not apply, including consultation mechanisms and a range of apprenticeships and training matters.

1.84 In the Like Forms of Leave decision [Print Q9399] the Full Bench indicated that two matters that were not considered to be allowable pursuant to section 89A(6).

1.85 To complement the amendments to subsection 89A(6), the Bill will also insert new subsection 89A(6A) to clarify that machinery provisions (provisions setting out titles, definitions, parties bound and commencement) can be included in awards, even though there is no specific 'allowable matter' to which these types of provisions relate.

Facilitative provisions

1.86 This item inserts a new subsection 89A(8A) to clarify that award provisions that are permitted by subsection 113A and subsection 143(1C) can be included in awards, even though there may be no specific 'allowable matter' to which these types of provisions relate and these provisions include

1.87 These subsections allow enterprise flexibility provisions; facilitative provisions to allow agreements at the workplace and enterprise level; provisions entitling the employment of regular part time workers; provisions providing support to training arrangements, through appropriate trainee wages and a supported wage system to people with disabilities; provisions dealing with youth unemployment issues and non-discrimination.

Repeal subsection 113A(2) (item 20)

1.88 This item repeals subsection 113A(2) which no longer be necessary because of the amendment proposed in item 19 which would have the effect of ensuring that the capacity of the Commission to include enterprise flexibility provisions in an award is not limited by subsection 89A(2).

Exceptional matters orders

1.89 This item would amend subsection 120A(4) so that exceptional matters orders may only be made by a Full Bench of the Commission. At present, a single Commissioner may make an exceptional matters order that relates to a single business.

1.90 Section 120A of the WR Act provides that the Commission can make an order on an exceptional matter (which is in dispute) if it is in the public interest to do so and is consistent with the objects of the WR Act.

1.91 The Bill will amend subsection 120A(4) to require *all* exceptional matters orders to be made by a Full Bench of the Commission, regardless of whether the order relates to a single business.

1.92 Exceptional matters orders are only made in extreme circumstances where there is no reasonable prospect of agreement being reached between the parties. Such circumstances indicate that the dispute is of such complexity and importance that it deserves the experience of a Full Bench in order to reach a practical and lasting resolution.

1.93 Examples of decisions made under section 120A include:

1.93.1 In *Department of Premier and Cabinet (Victoria) and CPSU* [PR940109], Commissioner Smith made an exceptional matters order to provide for provisions dealing with career structure (namely descriptors, occupational reviews and progression steps). The making of the Order followed a recommendation issued by Commissioner Smith and was the parties' preferred alternative to full blown arbitration. The Order commenced operation on 1 November 2003 and will remain in force for a period of 12 months.

1.93.2 In *The Maritime Union of Australia & Ors and ASP Ship Management Pty Ltd & Anor* [PR920954] Senior Deputy President Watson issued an interim exceptional matters order that prevented ANL Container Line Pty Ltd (which used the vessel) from disposing of its interest in the vessel *OOCL Australia*, and the employer of the crew from terminating any of the crew engaged on the vessel. SDP Watson was satisfied that the Order related to a single matter, being a process required to maintain the status quo in relation to the industrial dispute until the jurisdiction of

the Commission could be exercised. His Honour also held the Order to be in the public interest, consistent with the WR Act, and related to a single business, thereby satisfying each of the matters in sections 89A(7) and 120A.

The Order was to remain in force for a period of three months, but was withdrawn as a result of settlement negotiations between the parties.

SDP Watson's decision has potentially significant ramifications. It provides for an exceptional matters order to operate as a form of injunction that prevents an employer from engaging in particular actions. It is likely that unions may seek to rely on this decision to pursue interim exceptional matters orders in similar circumstances in the future. Given their significance and necessary complexity, exceptional matters orders of this kind should only be made by a Full Bench of the Commission.

1.93.3 In *Australian Nursing Federation & Anor and The Honourable Minister for Health & Anor* [PR912571] and [PR914192] a Full Bench of the Commission made an exceptional matters order in relation to the regulation of the workload of nurses employed under the Nurses (ANF – WA Public Sector) Award 1994. The Commission considered the exceptional matters order a means of ensuring an orderly and appropriately balanced process for addressing a significant workplace issue, which, if left free of industrial regulation, could have generated serious conflict affecting delivery of patient care services.

Although the Commission refused to impose a duty to observe a prescribed nurse/patient ratio, the Order did impose a series of more general duties, being a duty to prevent sustained unreasonable workload; a duty to allocate and roster nurses in accordance with reasonable workload principles; and a duty to consult and constructively interact about health service provision to patients.

The Order commenced on 1 March 2002 and expired on 28 February 2004.

1.93.4 In *Re Entertainment and Broadcasting Industry Actors (Theatrical) Award 1998* [Print R7370], a Full Bench of the Commission made an exceptional matters order requiring respondents to the Award to engage performers pursuant to a standard contract. The Commission considered sections 89A(7) and 120A to be satisfied. The Commission found the basis of engagement of performers to be an exceptional issue because employment in the live theatre industry is normally of short duration, employees are often engaged through agents, and company size, time and financial constraints generally preclude negotiation of certified agreements. Moreover, the Commission considered that a harsh outcome would have arisen if the Order was not made, given that the purpose of the standard contract was to ensure that performers are engaged in accordance with safety net conditions.

1.93.5 In *Commonwealth Bank of Australia Officers Award 1990* [Print P1297], a Full Bench of the Commission rejected a claim by the Finance Sector Union of Australia for an exceptional matters order to provide for impairment insurance. The union argued that the matter was an allowable matter or a permissible award provision pursuant to subsection 89A(6) or alternatively, that an EMO should be made. The Commission held that the matters involved were not exceptional and that a harsh or unjust outcome would result if the order was not made, and accordingly the requirements of subsection 89A(7) were not satisfied.

1.93.6 In *Re Coal Mining Industry (Supervision and Administration) Interim Consent Award* 1990, Queensland [Print R0474] a Full Bench of the Commission refused an application by the Australian Collieries' Staff Association for an EMO to provide for a variation to the award to provide for the reduction of hands to be determined by seniority (last on first off). In refusing the application, the Commission found that the matters involved were not exceptional and accordingly the requirements of subsection 89A(7) were not met.

1.93.7 In *CFMEU v Pacific Coal Pty Ltd and Others* [PR935308], the CFMEU sought an application for an exceptional matters order, the operative obligation of which sought to ensure Pacific Coal companies 'give preference of employment' and 'are required to employ' sixteen named individuals at the Hail Creek mine when a decision is made to increase hands. A Full Bench of the Commission were prepared to find a new dispute and grant the exceptional matters order sought on the basis of two logs of claims served by the CFMEU on 13 February 2003 and 5 March 2003. The exceptional matters order proposed to operate from 25 July 2003 and bind CFMEU and Hail Creek Coal for two years.

PRINCIPAL ISSUES COMMITTEE HAS RAISED FOR CONSIDERATION

Effect of reducing Award safety net

1.94 The reforms to awards in this Bill will continue to maintain a safety net of minimum wages and conditions to protect the low paid and disadvantaged in the work force.

1.95 The award simplification process under the 1996 Act has been beneficial to employers and employees. Since 1997 over 1480 awards have been set aside and over 1220 have been simplified.

1.96 Award simplification has established a more streamlined safety net of minimum wages and conditions of employment and has also facilitated agreement making. This is turn leads to more productive workplaces.

1.97 This Bill contains measures for further targeted simplification. Overly complex and restrictive awards hinder agreement making at individual workplaces and can act as a barrier to continued employment growth.

1.98 The provisions of the award safety net will be clarified by these amendments, in particular by removing provisions which duplicate other legislative entitlements.

Importance of Award safety net

1.99 The Government is committed to awards operating as an appropriate safety net of fair minimum wages and conditions.

1.100 The overwhelming majority of Australian employees in the federal workplace relations system are now employed under enterprise or workplace agreements – whether individual or collective. Awards still play a significant role in providing a safety net of fair wages and conditions for employees. As at May 2002, around one in five employees (20.5 %) were solely reliant on awards for pay setting arrangements.

1.101 The purpose of the 1996 amendments to the awards provisions was to fundamentally refocus the role of the award system as a safety net of minimum wages and conditions of employment that would not operate as a disincentive to agreement making.

1.102 The Principal Object of the WR Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the Australian people. The WR Act is designed to do this by, among other things, providing the means to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment [section 3(d)(ii)]. Awards act as a safety net of fair minimum wages and conditions of employment [section 88A(b)].

Process involved in a further Award Simplification including resources required

1.103 At the commencement of the award simplification process in 1997 there were some 3222 federal awards. Since then 916 have been set aside via the simplification process, another 567 awards set aside or superseded via the section 151 award review process and 252 other awards deemed to have ceased operation.

1.104 By end February 2004 only 89 awards (less than 4 percent of the current 2227 awards) remained to be simplified.

1.105 The proposed amendments are an extension of the award simplification process undertaken by the Commission in accordance with the transitional provisions from Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act 1996.*

1.106 Of the awards in place at the beginning of the simplification process in 1997, some 97 per cent have been either:

- simplified in accordance with the transitional provisions from Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act 1996*;
- set aside (through award simplification or reviews pursuant to section 151 of the WR Act);
- did not require review; or
- have been deemed by the Commission to have ceased operation.

1.107 Under the WR Act the role of awards is to provide an effective safety net of minimum conditions of employment that do not act as a disincentive to agreement making.

1.108 The task before the Commission in implementing these amendments is nowhere near the scale and size of the original award simplification exercise. Award simplification has been a complex task to date. The Government is confident that the Commission will continue with its efforts in relation to award simplification.

Effect of removing Federal Award provisions and reverting to relying on state laws

1.109 It is important for Australia to maintain a safety net of award terms and conditions that is appropriate for current working conditions. At times, the safety-net needs to be reformed and adjusted in order to have ongoing relevance for employers and employees. Over time therefore, what is appropriate for the safety net will change and evolve.

1.110 Removing the following from awards will reduce the confusion and complexity that arises from the current prescription of minimum standards in State, Territory and/or Federal legislation:

- training and education provisions relating to apprentices and trainees;
- long service leave;
- notice of termination;
- jury service;
- records of hours of work/arrival and departure times of employees; and
- accident make-up pay.