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PART 4: WORKPLACE RELATIONS AMENDMENT (SIMPLIFYING AGREEMENT-MAKING) BILL 2004

OVERVIEW

4.1 The Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004 (the SAM Bill) was introduced into to the House of Representatives on the 26 June 2002. The SAM Bill was debated in and passed by the House of Representatives on 12 February 2004. The Government introduced the SAM Bill to the Senate on 1 March 2004. On 3 March 2004 the Senate referred it to the Senate Employment, Workplace Relations and Education Legislation Committee for consideration.

4.2 The Committee has raised three principal issues for consideration in referring this Bill. Those issues are:

- why a party to an agreement should not be involved in its variation;
- practical implications of AWAs operating from the time of signing, particularly if the AWA is not approved; and
- current processes for agreement approval and any evidence of problems with these processes.

4.3 These issues are dealt with in turn in the final section of this Part. The earlier parts of the submission provide a summary of the provisions in the SAM Bill and explain the policy rationale for these measures.

Existing AWA framework

4.4 The requirements for making and approving an AWA are found in Part VID of the *Workplace Relations Act* 1996 (WR Act). Individual employees may make an AWA with their employer. Employees must consider the AWA offer for a set period of time before they can sign the AWA. Then the AWA needs to be lodged with the Employment Advocate (EA) for approval. In the case of an existing employee, the AWA cannot begin to operate until the day after it has been approved. In the case of a new employees, it cannot begin to operate until the day after the EA has issued a filing receipt. The EA is required to be sure that the AWA passes the no-disadvantage test. The relevant test is that the agreement does not result, on balance, in a reduction of the overall terms and conditions of employment under the relevant award (See Part VIE of the WR Act).

Proposed changes to AWAs

4.5 The SAM Bill proposes to amend Part VID of the WR Act to simplify the process for making AWAs and enhance protections for employees. Key reforms include:

- speed up access to AWAs. The measures would remove compulsory waiting periods for signing AWAs provided certain information has been provided to employees. The Bill would also provide that an AWA takes effect from the date it is signed, rather than from when it is approved or a filing receipt is issued by the EA. Employees would be able to change their minds about entering into an AWA during a cooling-off period;
- enhance the EA's enforcement powers by enabling the EA to revoke AWAs in certain circumstances and enable the EA to recover shortfalls in entitlements on behalf of employees;

- remove an existing requirement that requires an employer to justify not offering an AWA in the same terms to all 'comparable employees'; and
- simplify and reorder the current provisions to give clear signposts to employers and employees about the processing of AWAs.

Existing processes for making, varying, extending and terminating Certified Agreements

4.6 Part VIB of the WR Act sets out the requirements for negotiating, making, varying, extending or terminating certified agreements (CAs). CAs are made at the workplace level, directly between employers and employees (under section 170LK) or between employers and employee organisations (sections. 170LJ, 170LL and LN). The Commission certifies CAs and, like AWAs, CAs must pass the no-disadvantage test.

Proposed changes to CA provisions

4.7 The SAM Bill proposes to amend Part VIB of the WR Act to:

- remove the entitlement of employee organisations to prevent the extension, variation or termination of section 170LK agreements, while still retaining a role for employee organisations where a member requests;
- allow the Commission to certify an agreement, notwithstanding that the agreement was varied during the employee consideration period and the employer did not recommence the consideration period. However, the Commission must be satisfied that no employee who would be covered by the agreement suffered detriment as a result;
- provide that the Commission consider applications to certify, extend, vary or terminate certified agreements without a formal hearing, unless it is necessary in the circumstances (although the SAM Bill would allow employees and other defined persons to request that the Commission conduct a hearing); and
- provide an option for 'extended' certified agreements in appropriate circumstances, which could have a nominal expiry date of up to five years – current agreements are limited to three years.

Relationship with previous Government workplace relations bills

4.8 The SAM Bill would retain the role of the Commission in relation to AWAs. This aspect of the SAM Bill differs from that in previous amendments to AWA provisions proposed by the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*;* the Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000 and the Workplace Relations Amendment (Small Business and Other Measures) Bill 2001.

4.9 In relation to certified agreements the SAM Bill generally replicates Schedule 4 of the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001. The key difference is the new amendment to provide for an option for certified agreements to have a nominal life of five years if the Commission considers it appropriate in all the circumstances.

Reason for amendment

4.10 The WR Act has increased access to both collective and individual agreements. The agreement making process can be unnecessarily procedural. At some points in the process, third parties have a more significant role than is appropriate for agreements made directly between employers and employees. The Government considers that unnecessary

procedural burdens (and hence costs) on the parties making an agreement is a disincentive for employers and employees wishing to directly negotiate their terms and conditions of employment at the workplace level. Whilst the productivity impacts of this are difficult to quantify, anecdotal evidence suggests that they are likely to be substantial.

4.11 The Government has reintroduced similar measures because it is committed to simplifying agreement making processes and encouraging employers and employees to negotiate directly without unwarranted interference from third parties. The SAM Bill would help ensure that a broader range of employers and employees can access the flexibilities of the agreement making without compromising employee protections. In the case of AWAs the measures would enhance the existing employee protections available under the WR Act.

SCHEDULE 1: AWAS

AWA take-up rates and barriers

4.12 The rate of approval for AWAs in the month of March 2004 was 12,990 and altogether the EA has approved 458,224 AWAs since March 1997. There are currently[1] 7,728 employers with approved AWAs in their workplaces. In the last two years, 13 per cent of AWAs approved were in the public sector and 87 per cent the private sector.

4.13 The May 2002 ABS survey of Employee Earnings and Hours (EEH survey) estimates that AWAs agreements cover 1.2 per cent of employees in Australia.[2] The OEA estimates that AWAs currently cover 2.5% of employees in Australia. An alternative measure of the impact of AWAs in the Australian workforce is to look at the proportion of employees who are covered by AWAs as a proportion of total employees covered by Federal agreements. By this measure, AWAs cover 12 per cent of the employees currently working under Federal agreements.

4.14 Individual agreements remain the most common method for setting pay and conditions for employees, covering 42 per cent of employees. This figure includes employees paid at over award rates, employees on AWAs as well as those on informal individual agreements. Where employees are paid at over award rates arrangements may be less flexible, as a federal award that applies is not displaced in its entirety, as it can be with an AWA. However, employers and employees who agree on wages and conditions above the award have been reluctant to enter AWAs. They claim that the high degree of formality associated with the AWA approval process discourages them.

4.15 The EEH survey also found that employees in smaller organisations are more likely to have unregistered individual agreements. However, employers and employer representatives have criticised the current AWA provisions as being particularly time consuming and complex for small business. The current provisions present a barrier to employers who wish to rapidly recruit additional employees on AWAs. In this context, simplifying AWA processes and procedures may encourage employers and employers to formalise their individual agreements.

[1] Current AWAs are recorded as AWAs registered in the past two years.
[2] ABS Catalogue No. 6306.0

Speeding up access to AWAs

Current provisions

4.16 The existing process for making an AWA is:

- the parties must agree to the terms of the AWA and reduce them to writing (170VF);
- the employer must provide a declaration that the employer has given the employee a copy of an information statement from the EA (170VO);
- the employer must explain the effect of the AWA to the employee (170VPA);
- an employee must wait for a set period of time before he or she signs the AWA. If the employee is an existing employee he or she must wait at least 14 days. If the employee is a new employee he or she must wait at least five days (s. 170VPA);
- after both parties sign and have the AWA witnessed, they must file it with the EA; and
- the EA will then issue a filing receipt and consider whether to approve the AWA (Division 4, Part VID).

4.17 Subsection 170VJ(2) provides that AWAs take effect for existing employees from whichever of the following occurs last:

- the day after the EA issues an approval notice; or
- the day the AWA specifies as the starting date.

4.18 For new employees, subsection 170VJ(1) provides that AWAs take effect from the latter of:

- the day after the filing receipt is issued;
- the day the AWA specifies as the starting date; or
- the day employment commences.

Reason for amendment

4.19 The current requirements for making and approving an AWA prevents employers and employees from immediately accessing the terms and conditions of employment that they have directly negotiated.

Proposed changes

4.20 The SAM Bill would enable AWAs for both new and current employees to take effect from the date of signing. The AWA may state a later date for commencement, in which case that date will be the date from which it operates. For new employees, the AWA may commence on the day the employment commences (new section 170VBD).

4.21 The SAM Bill will permit employees to sign AWAs at any time after receiving a copy of the information statement prepared by the EA; and an explanation of the effect of the agreement. Employees would have the right to withdraw their consent by written notice to the employer during a cooling-off period. (new section 170VBA).

4.22 The cooling-off periods are equivalent to the existing periods an employee must wait before signing an AWA. The cooling-off period for new employees is 5 days after the day on which a new employee signs the AWA. For existing employees, the period is 14 days (new subsection 170VB(6)).

4.23 Where an AWA ceases to operate, the SAM Bill would enable the employee or the EA to recover compensation for shortfalls in entitlements under the non-AWA instrument that would have otherwise applied to the employee's employment (new section 170VX)).

AWAs may stop operating for specified reasons including refusal by the by the EA to approve the AWA or the AWA is revoked by the EA under section 170WKD (see new section 170VBD).

4.24 Employees must still genuinely consent to the terms of an AWA. If the EA found, after it approved an AWA, that an employee had not genuinely consented to an AWA, the EA would be able to revoke the approval of the AWA.

Policy rationale

4.25 Parties must undertake numerous steps before an AWA can be approved. These procedures are impractical in many cases.

4.26 Some employers and employees who are keen to use AWAs inadvertently sign AWAs before the required consideration period has expired, breaching the WR Act. The EA has indicated that a significant proportion of AWAs refused are those which have been signed before the end of the compulsory waiting period set out in paragraph 170VPA(1). Where this happens, the EA cannot approve the AWA.

4.27 The two stage approval process is cumbersome. An AWA must be filed with the EA, after which the EA can issue a filing receipt (generally this takes about three days) and approve the AWA (generally this takes 20 days or less) provided it meets the statutory requirements and tests. The approval process is unnecessarily time consuming and complex. In the case of new employees, the AWA operates from the issuing of the filing receipt, whereas for existing employees, the EA's approval must be given before the AWA commences.

4.28 The proposed amendments simplify and consolidate the AWA approval process and remove the unnecessary delay before an AWA comes into effect. This is consistent with the Government's objective of facilitating greater flexibility and choice in agreement making, so that agreements can better reflect the local needs and circumstances of employers and employees.

4.29 There are good reasons to support the removal of the statutory waiting periods. Permitting AWAs to take effect from the day of signing allows employers and employees to give immediate effect to, and allow employees to benefit from wages, conditions and working arrangements to which they have agreed. This proposal also enables the EA to dispense with the time consuming and resource intensive task of issuing filing receipts in addition to approval notices.

4.30 DEWR has been informed of cases where employees have been paid under lower certified agreement rates of pay pending the completion of the formal AWA approval processes. Where such employees have pre-existing financial commitments based on previous higher income levels, this may cause financial difficulties for the employee. Proposed amendments to allow for AWAs to have effect from the date of signing would remove this unnecessary red tape and complexity, allowing any employees, either new or transferring, to continue to receive pre-existing higher rates of pay and conditions.

4.31 Employees continue to have time to consider and seek advice about the terms of the AWA during the cooling-off period. Employees may withdraw their consent to the AWA during this period.

4.32 Cooling-off periods are a common feature of legislation protecting consumers in jurisdictions in Australia.[3] Their use ensures that parties to an agreement are able to withdraw their consent from an agreement within a designated period without incurring any costs or penalties.

4.33 If an employee does not withdraw their consent during the cooling-off period, an employee still has the right to approach the EA if they have concerns. The SAM Bill would give the EA the additional power to revoke an AWA if it is later determined that the AWA should not have been approved because it failed a mandatory statutory test. See discussion below about power of revocation in relation to AWAs.

Enhancement of the EA's enforcement powers

Current provisions

4.34 Division 7 sets out the enforcement mechanisms and remedies for contravention of an AWA and provides that an employee may take legal action in a Court to recover shortfalls or underpayments. It also provides that a party to an AWA may seek a penalty arising from a breach of an AWA and recover loss or damage arising from that breach.

4.35 Currently, the EA cannot apply for a penalty arising for any breaches of an AWA or to recover underpayments. The EA can investigate possible breaches of AWAs and complaints relating to AWAs.

4.36 Currently, subsection 83BB(1)(g) allows the EA to provide free legal representation to a party to a proceeding for breach of an AWA under Part VID if it considers that it would promote the enforcement of the provisions of that Part.

4.37 However, subsection 170VV(3) provides that only a party to an AWA may actually initiate legal action in relation to a breach of the AWA. The EA cannot take action on the employee's behalf.

4.38 AWAs come to an end when they are terminated or when they are replaced by a new AWA. Before the nominal expiry date of an AWA, the only way that the AWA may be terminated is by agreement between the parties. There is no express power for the EA to revoke an AWA under the existing provisions. Cases where revocation may be appropriate are where, subsequent to the approval of an AWA, it is evidence that the AWA should not have been approved, or the AWA was made was made under duress.

4.39 The EA has established an internal review process for reconsideration/revocation of AWA decisions. However, the scope of the review power is not clearly defined in the existing legislation.

Reason for amendment

4.40 The EA does not have sufficient powers to enforce or revoke AWAs in appropriate circumstances.

Proposed changes

4.41 The SAM Bill would strengthen the EA's enforcement powers and give greater certainty to employees who may be entitled to recover underpayments. It would allow the EA to initiate proceedings to recover penalties and underpayments in respect of breaches of

[3] Section 32 of the *Retirement Villages Act 1999 (NSW).* Section 29CA of the *Motor Dealers Act 1974 (NSW);* Section 1019B of the *Corporations Act 2002 (Cth)*

AWAs. Section 170VX of the SAM Bill includes a comprehensive table setting out when an employee, or the EA on behalf of the employee, is entitled to recover shortfalls or underpayments where an AWA or related agreement is revoked or stops operating (see new subsection170VBD(2); section170WKD).

4.42 Section 170WKD would give the EA an express power to revoke a decision to approve or a refuse to approve an AWA, extension, variation or termination agreement. The SAM Bill would also provide that an employer's failure to give an employee a copy of the revocation notice is a civil penalty provision.

Policy rationale

4.43 The WR Act does not empower the EA to apply for a penalty or recover underpayments on behalf of an employee. While the EA can assist an employee in taking his or her own action, this remains a daunting prospect for most employees. Each jurisdiction has a different process for bringing action. Most employees would not have brought such legal action before and consequently may experience difficulty in fulfilling the procedural requirements of lodging a claim. Allowing the EA to take such action on behalf of an employee is consistent with the provisions of the WR Act that operate with respect to CAs and awards. These provisions allow inspectors appointed under the WR Act to bring actions to recover penalties and underpayments in respect of those instruments.

4.44 Under section 170VM of the WR Act, the only option for terminating an AWA before its nominal expiry date, is for the employer and employee to agree in writing to terminate the AWA. This option will not be available if one of the parties employer does not wish to terminate the AWA.

4.45 An express power allowing the EA to revoke AWAs would ensure that, if it is subsequently found that requirements for making an AWA were not properly fulfilled, there is a mechanism for the EA to revoke approval for the AWA. Circumstances in which this may be appropriate are where new facts come to light after the approval of an AWA that mean the AWA does not meet the no-disadvantage test.[4]

4.46 Similarly, there is no power to revoke an AWA found to have been entered into without the employee's genuine consent. The lack of this power has been commented on by the Federal Court. In *Schanka v Employment National (Administration) Pty Ltd* Moore J noted that there was no express conferral of power for the EA nullify the operation and effect of an AWA which had been entered into under duress.[5]

4.47 The proposed amendments are consistent with the Government's objective of establishing and maintaining appropriate safeguards for the parties to an AWA. The proposed amendments also strengthen the EA's role in relation to compliance, providing further safeguards for the parties to AWAs.

4.48 In this context, the amendments provide the EA with an express power of revocation, combined with the improved ability to recover shortfalls available under the proposed section 170VX. This means that future cases would be resolved more quickly without the additional step of referring the matter to the Commission. It would also ensure that employees covered by AWAs have access to similar protections available to employees covered by CAs, through the Commission.

[4] (PR904659, Duncan SDP, 25 May 2001)
[5] 2001 FCA 1623 at 65

No requirement to offer the same AWA to like employees

Current provisions

4.49 Under the current framework for making AWAs, an employer must declare whether or not it has offered an AWA in the same terms to all comparable employees. If it has not done so, it must show that it did not act unfairly or unreasonably in failing to do so.

Reason for amendment

4.50 The current requirement that an employer offer AWAs in the same terms to all comparable employees limits workplace flexibility.

Proposed changes

4.51 The SAM Bill would remove the requirement to offer AWAs with the same terms to comparable employees (the existing section 170VPA).

Policy rationale

4.52 The current requirement limits the flexibility to tailor agreements to suit the needs of individual employees and the employer.

4.53 The requirement is incompatible with the WR Act's framework for individual agreement making. Employees and employers should be able to negotiate AWAs on the basis of their particular needs. For example, employees who have greater job experience or perform more effectively should be able to negotiate higher rates of pay. Similarly, employees with family responsibilities should be able to negotiate specific family friendly provisions into their AWAs.

4.54 Removing the requirement will facilitate greater choice and flexibility in making individual agreements. This change may assist parties in developing individually tailored flexible leave provisions.

Simplifying the current provisions

Current provisions

4.55 The current provisions for the negotiation, making and approval of an AWA and ancillary documents, are located in six different divisions of Part VID of the WR Act. The current procedures for making, varying and terminating AWAs are scattered over the various Divisions.

Reason for amendment

4.56 The existing provisions are difficult to follow and difficult for users to apply.

Proposed changes

4.57 The amendments would consolidate and reorder the existing legislative provisions in the Bill.

4.58 This means a single Division in Part VID would contain all the relevant information about a particular topic.

4.59 The SAM Bill would insert notes in relevant provisions to make it clear that a particular subsection is a civil penalty provision. The SAM Bill would also insert other notes to signpost sections relevant to a particular provision or action an employer must take.

Policy rationale

4.60 All parties will be better able to understand and make use of AWAs.

SCHEDULE 2: CERTIFIED AGREEMENTS

Certified agreement take-up rates and barriers

4.61 As at December 2003, there were 13,059 current[6] certified agreements covering 1,588,600 employees.[7] There have been 45,965 agreements certified under the WR Act from
9 December 1996 until 31 December 2003. There are currently 5,137,700 employees covered by certified agreements made since the commencement of the WR Act. The May 2002 EEH survey estimates that some kind of workplace agreement covers 79.5 per cent of employees with federally registered collective agreements covering 23 per cent of employees in Australia.

4.62 Of all current agreements recorded on the Workplace Agreements Database, 19.9 per cent were made under section 170LK, 66.1 per cent were made under section 170LJ, 6.0 per cent were made under section 170LL and 7.9 per cent were made under section 170LN. Whilst agreement coverage continues to expand to encompass a greater percentage of the workforce, there remain procedural barriers.

4.63 Section 170LK agreements are increasing as a proportion of all agreements and generally unions are not bound by these agreements - the Workplace Agreements database indicates that unions are bound by only 6.7 per cent of these agreements. Whilst section 170LK agreements constitute 19.9 per cent of all agreements certified, they cover 10.3 per cent of the employees. This suggests that this form of agreement is particularly appealing to small businesses that are likely to benefit from the simplification of the agreement making process.

4.64 As workplaces and enterprises become more familiar with bargaining they are increasing the operational length of their agreements. The average duration[8] of agreements has increased from 1.9 years in 1996 to 2.7 years since 2001. Similarly, there is some evidence that there are substantial lags in the renegotiation of nominally expired agreements. Of the 13,059 federal certified agreements that were current at 31 December 2003, just over 4,600 were operating in replacement of a previous agreement and can provide information on the time it takes to renegotiate agreements. The average renegotiation lag between the nominal expiry date of agreements and the certification date of their replacement is 8.4 months. This could be indicative of potential problems with the certification process whereby these employees are covered by nominally expired agreements while negotiations and procedural steps are taken to certify replacement

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[6] Current collective agreements are those agreements that have been certified and have not reached their expiry date nor been terminated at the given date.
[7] www.workplace.gov.au/ trends in enterprise bargaining, December quarter 2003.
[8] Duration is measured from the formal certification date to the expiry date although agreements may effectively commence prior to the certification date.

agreements. The longest renegotiation lags are evident in those industries that have not been traditionally involved in enterprise level bargaining such as the service sector.

Role of employee organisations in the extension, variation or termination of section 170LK agreements

Current provisions

4.65 The Commission may extend, vary and terminate a certified agreement before its nominal expiry date where a valid majority of employees covered by the agreement have agreed to the proposed change. The relevant provisions governing this process are in Division 7 of Part VIB.

4.66 Where a union is bound, the employer and the union must together make an application to the Commission seeking the change. (see current subsections 170MC(1), 170MD(1), 170MG(1)).

How does a union become bound by an agreement

4.67 A certified agreement made under section 170LJ, 170LN and 170LL is made between an employer and the employee organisation. Both of these parties are bound by the agreement.

4.68 This is to be contrasted with a situation where an employer makes an agreement under section 170LK directly with its employees. In this case, the parties are the employees and the employer.

4.69 A union may become bound by a section 170LK agreement. The organisation must apply to be bound before the agreement is certified. It must also satisfy the Commission one of its members covered by the agreement has requested that the union be bound by the agreement (section 170M(3)).

4.70 Once a union is bound by a section 170LK agreement, its position is elevated to the same status in relation to certain processes as the parties, although it is not a party in the same sense as is the case in section 170LJ agreements.

4.71 The distinction has been noted by the Commission:

In *Re Salmat Teleservice Pty Ltd*, (PR941979; Lawler; DP; 16 Dec 2003) the Australian Services Union (ASU) attempted to argue that the Salmat Teleservices Pty Ltd Enterprise Agreement had not been validly made under section 170LK. Sixty four percent of employees voted in favour of the agreement.

During the ballot the returning officer, an employee of Salmat not covered by the agreement, sat in an office while a single employee voted at a time. This process was set up to ensure the integrity of the voting process. Vice President Lawler rejected the ASU argument that a confidential petition from seven employees, out of a total of 78 employees covered by the agreement, objecting to the ballot process used by Salmat meant that the agreement had not been validly made. He considered that the petition on its own was of 'dubious weight' as evidence because the Commission was unable to test the petitioners' assertions and the ASU had not cross-examined the returning officer.

The Commission ordered that the ASU be bound by agreement but would not allow it to intervene in the certification process because it was not a party to the agreement.

The Commission did allow the ASU to make submissions as an agent for one existing employee who was a party to the agreement. The Commission accepted that the employee's desire to keep his or her identity confidential was reasonable. The Commission found Salmat had demonstrated compliance with the WR Act's requirements and certified the agreement.

Reason for amendment

4.72 A bound employee organisation may prevent changes to an agreement made directly with employees under section 170LK, even where the changes have majority employee support.

Proposed changes

4.73 The SAM Bill would provide that a union would not need to consent to the making of an application to the Commission to vary, terminate or extend a section 170LK agreement.

4.74 An organisation bound by a section 170LK agreement may make submissions to the Commission in relation to the proposed extension, variation or termination, however, only where a member of the organisation has requested it to do so.

Policy rationale

4.75 The Government's policy places primary responsibility for agreement-making with employers and employees at the enterprise or workplace level. The WR Act gives employers and employees a choice about whether to negotiate an agreement directly or whether to negotiate the agreement with a union. These options allow employers and employees to decide their preferred form of agreement at the workplace level. The flexibility this framework offers allows parties to tailor agreements to the nature of the workplace and allows the parties involved to exercise choice.

4.76 The question of who can apply to have an agreement varied, terminated and extended should reflect the choices employees make about the role of a union. The requirement that a non-party union must agree before a termination, extension or variation to a section 170LK agreement can go ahead is inconsistent with the choice employees have made about to negotiate directly with their employer.

4.77 The requirements mean that a union representing the interests of a minority of employees at the enterprise (even as few as a single member or, at the time of the application, no members at all), has the capacity to veto decisions agreed to by an employer and the majority of its employees.

4.78 Section 170LK agreements are made between employers and employees directly. Accordingly, the Government believes that external parties should only have a role where a direct party to the agreement requests that they do so.

4.79 The existing provisions give organisations of employees' greater rights when varying, extending or terminating a section 170LK agreement than they have in its negotiation or certification. Employees must specifically request the involvement of a union in the negotiation or certification of an agreement, but once bound, the union can exercise these powers without a request (see ss. 170LK(5) and 170M(3)).

4.80 If employees wish the union to be a party to the agreement, they have the option of seeking a section 170LJ agreement.

4.81 By limiting the involvement of a union in section 170LK agreement variations to cases where an employee has requested that involvement, the SAM Bill's provisions would retain an appropriate role for unions that is consistent with the fact that the primary agreement was made between the employer and employees.

Variations during the 14 day consideration period

Current provisions

4.82 Section 170LK of the WR Act sets out the procedures required for an employer/employee agreement to be made. It provides procedural steps in the making of the agreement. These steps are:

- the employer must take reasonable steps to ensure that all employees have at least 14 days written notice of an intention to make an agreement (s170LK(2));
- the employer must take reasonable steps to ensure all employees have access to the proposed agreement (s170LK(3));
- the notice of intention must state that the person who is a member of an organisation of employees who is entitled to represent an employee may request that organisation to represent the person in meeting and conferring with the employer (s170LK(4));
- if an employee requests a union to represent him or her, then the employer must give the union a reasonable opportunity to meet and confer with the employer about the agreement (s170LK(5)); and
- the employer must take reasonable steps to ensure the terms of the agreement are explained to all employees before the agreement is made (s170LK(7)).

4.83 If an agreement is varied, even in a minor or technical way, after the employer gives notice of their intention to make the agreement, the employer must re-issue the notice and restart the steps above.

Reason for amendment

4.84 Uncertainty and delays can result from the rigid application of the 14 day consideration period in the agreement-making process.

Proposed changes

4.85 The SAM Bill would allow the Commission to waive the requirement to re-issue a notice where there has been a variation to the agreement during the 14 day notice period and the employer did not re-issue the notice. The Commission would, however, need to be satisfied that no employee who the agreement covers would suffer detriment (proposed subsection 170LT(11)).

4.86 These amendments would also provide that, where an employee or employees commence work with the employer during the 14 day period before 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. However, the WR Act will continue to require employers to explain the terms of the agreement to all persons whose employment will be subject to the agreement before approval.

Policy rationale

4.87 Currently if a proposed agreement under section 170LK is changed in any way after the notice of intention is given, the employer must repeat the entire process, starting with the giving of a new notice of intention [s170LK(8)], which can result in unnecessary delays.

4.88 The Commission clearly put the problem of a literal interpretation of the current provision in the National Wine Centre Certified Agreement 2001 that "*To apply those requirements to employees joining the employment after the notice has been issued would potentially mean that an employer would be continually issuing the notice and could in some circumstances never conclude the 14 days notice as required by the Act.*"[9]

4.89 It has been acknowledged that giving undue literal emphasis to procedural requirements may undermine the overall object of a framework. In considering the extent to which there must be compliance with procedural requirements, the High Court has noted:

> *A directory construction will not assist in securing validity unless, despite the non-compliance which is the occasion for invoking that construction, there may nevertheless be seen to be substantial compliance with the general object at which the statutory provision aims. Sometimes the stipulation which has not been complied with is, in its context, so relatively unimportant to the attainment of the general object that, although there has been total non-compliance, a directory construction may be appropriate. In such cases, it may not matter that the non-compliance is complete, not partial. Indeed the stipulation in question may be of a kind which is incapable of partial compliance; to give to such a stipulation a directory interpretation recognises that it may be wholly disregarded without prejudice to validity because of its relative unimportance in the attainment of the general statutory object and also, perhaps, because of the far-reaching and undesirable consequences of treating its non-observance as invalidatory .*[10]

4.90 This amendment would allow the parties to make minor variations without the need for increased procedural burden. Support for such an approach has been acknowledged by the Commission:

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[9] PR910912; Hampton DP; 8 November 2001.

[10] Victoria v the Commonwealth and O'Connor; Barwick CJ, McTiernan, Gibbs, Stephen, Mason and Jacobs JJ (1975) 134 CLR 81 at 179. See also High Court in *Australian Broadcasting Corp v Redmore Pty Ltd* (1989) 84 ALR 199.

In the *Sheldon College Corporate Staff – Certified Agreement 2004*[11], a variation made to the date of a pay rise was included in the agreement. The employer did not restart the 14 day period but included the variation in the agreement which was voted on by the employees.

Commissioner Richards noted that the non-compliance with section 170LK(8) that resulted in the agreement not being certified would have achieved 'the imposition of a mandatory requirement that would result in invalidity that would be to no discernible legislative end.' The Commission noted the employer had been 'transparent' in its dealings with its employees and had disclosed all relevant information, conferred with them about the amendment and had sought their support to the amendment, through a show of hands, before including it in the body of the agreement.

Commissioner Richards also found that there was nothing in the facts before him that gave him reason to conclude that non-compliance with s170LK(8) offended the object and intent of the Act which was to promote agreement making and certification at the single business or workplace level.

4.91 However, the two examples below highlight the different approaches that the Commission takes to minor variations to the agreement that occur to agreements during the 14 days consideration period required by s170LK(8) and the 14 day notice period to employees required under s170LK(2).

In *AA Scott Pty Ltd trading as McGlashan's Transport* [12] an earlier agreement was lodged 9 days out of the time specified in section 170LM of the WR Act. Generally, the Commission waives these requirements.[13] However, in this case the Commission refused to waive the timing requirement because in the relevant nine day period two employees had left the company and one new employee had commenced. Originally, 11 employees voted to accept the agreement with 9 employees voting against.

The employer recommenced the agreement making process in accordance with s170LK. During this second process one new employee commenced during the 14 day s170LK(2) consideration period with another two existing employees becoming eligible to be covered by the agreement. These three employees were advised that they were entitled to request a union represent them but were not given a formal section 170LK(4) notice. There was evidence presented by the employer, which had already been given to the employee representatives, that these employees were not union members.

These three employees voted in the second ballot. Twenty one employees were eligible to vote. The ballot result was 10 to 9 in favour of the agreement. Despite the Commission finding the new employees were 'clearly not disadvantaged' the Commission decided that the s170LK(4) provisions were mandatory and declined to certify the agreement.

The Department has been advised by the Scott Group of Companies that it has been trying to negotiate and certify the McGlashan's agreement for over two years. It is the company's view

[11] PR944163; Richards C; 5 March 2004
[12] PR936648; Dangerfield C; 21 August 2003
[13] PR937270; PR937273

that the technical provisions of the WR Act are the only barriers to this agreement being certified.

In *Sunway Metway Staff Pty Ltd*[14] the section 170LK agreement was varied after the agreement had been voted and accepted by the employees to include a specific date as the nominal expiry date in place of a reference to the NED as October 2004. At the hearing the Commission accepted that the employee representatives and the employer had agreed to amend the date. The Commission found the change to the NED amounted to a variation under s170LK(8) of the WR Act. However, the Commission noted that if the agreement had no NED whatsoever, s170LT(10) of the Act would have allowed the Commission to accept undertakings under s170LV(1) and certify the agreement. The Commission decided the agreement could be certified because the "deficiency did not taint the validity of the application for certification."

4.92 By making it clear that the 14 day consideration period for employees to consider a proposed agreement does not need to recommence if an employee begins employment in that period, the demands on the parties in terms of red tape requirements and practices will be significantly lessened.

No formal hearing required

Current Provisions

4.93 The WR Act is silent regarding whether the Commission should hold formal hearings when determining whether to certify, extend, vary or terminate an agreement. In practice, the Commission regularly holds formal hearings before making a decision.

Need for amendment

4.94 The requirement to attend hearings can be an unnecessary imposition on parties to agreements, particularly small businesses.

Proposed changes

4.95 New sections 170LVA, 170MC and 170MHB of the SAM Bill would provide that the Commission must make a decision to certify, extend, vary or terminate an agreement without holding formal hearings unless certain circumstances exist. The Commission would be able to hold a hearing where:

- the Commission is not satisfied that it can make a decision based on the information provided to it; or
- an employee, the employer, one or more organisations bound by the agreement or a person prescribed by regulation requests a hearing and the Commission considers there are reasonable grounds for holding a hearing.

4.96 The SAM Bill imposes additional notification responsibilities on employers to ensure employees are aware they can request the Commission to hold a formal hearing. The SAM Bill stipulates a seven day timeframe during which an employer must inform employees covered by an agreement that they can request the Commission to hold a hearing.

[14] PR936046; Richards C; 15 August 2003

Policy rationale

4.97 The average time to process an agreement is approximately 1 month. Sometimes, it can take even longer than this. In the case of *Knightwatch Security Pty Ltd* (PR943374) the processing time in the Commission was 11 months.

4.98 The requirement for a hearing adds time, extra costs and an unnecessary procedural burden on parties.

4.99 Hearings are often very brief and straightforward. However, hearings require parties to wait for the Commission to list their application and takes time away from their workplaces to participate in the hearings. This often occurs in circumstances where the Commission could deal with applications expeditiously and with minimal cost on the basis of written applications only. The example below highlights these issues.

> On 14 July 2003 Gibbo's Bulk Haulage (GBH) lodged an application to certify an agreement. GBH is a business based in Coolaman, New South Wales. The Commission held a hearing into the matter on 7 August 2003 which required a company director, the elected employee representative and the company's representative to travel to Sydney. It also meant that GBH could not use one of its trucks that day, causing a loss of income. The Commission hearing lasted seven minutes and neither the company director nor the employee representative was asked to say anything.
>
> The only result was a request for further information. GBH supplied that information and the Commission later certified the agreement after a further hearing on 24 September 2003. The Government's view is that there was no need for GBH to waste the time and resources involved in a hearing into this agreement. Had the Commission requested the further information in writing to the company's representative, GBH would have provided it and the result would be the same. However, the costs GBH incurred in the process would be substantially lower.[15]

4.100 The proposed amendments simplify the agreement making process and remove the requirement for parties to attend hearings which is a major impediment to formalising agreements at the workplace level. These amendments would substantially reduce the demands on parties to agreements in terms of time and costs. Importantly, these amendments would provide safeguards for the parties, through provisions that allow parties to request a formal hearing where this is appropriate.

Extended agreements

Current processes

4.101 The current provisions provide that the nominal expiry date of an agreement cannot be more than 3 years after the date on which the agreement comes into operation - see subsection 170LT(10). An agreement continues to operate after its nominal expiry date, until it is replaced by a new agreement.

4.102 Section 170XA sets outs when an agreement passes the no-disadvantage test. The no-disadvantage test is met when 'on balance' the agreement, when compared against the relevant or designated award, does not result in a reduction in the overall terms and conditions of employment of the relevant employees.

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[15] *Re Gibbo's Bulk Haulage Pty Ltd* (PR939501; Larkin C; 22 October 2003)

4.103 In order to certify an agreement the Commission must be satisfied that the agreement meets the no-disadvantage test, or where an agreement does not meet the no-disadvantage test, that it would not be against the public interest to certify the agreement. For example, s170LT(4) provides an example of where the making of the agreement is part of a reasonable strategy to deal with a short-term crisis, in or assist in the revival of, the business would not be contrary to the public interest.

Reason for amendment

4.104 In some cases, three years is not long enough to enable stable terms and conditions of employment over the course of a businesses cycle or project.

Proposed changes

4.105 The SAM Bill proposes to insert a new section 170LGA to provide for extended agreements. An extended agreement would be a certified agreement that has an expiry date which is more than three years after the agreement comes into operation, but not more than five years after that date. Greenfields agreements would remain excluded from being able to be extended past their existing nominal expiry dates.

4.106 Under proposed section 170LU(9) the Commission must certify an extended agreement where:

- the agreement's nominal expiry date is appropriate;
- the agreement's nominal expiry date is in the interests of the employer and employees; 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 NDT.

4.107 Proposed subsections 170MC(2A) and (2B) would provide that the Commission must, before approving the extension, give each organisation that a section 170LK agreement binds, an opportunity to make submissions. However, the organisation can only make a submission if it has at least one member:

- whose employment is subject to the agreement;
- whose industrial interests the organisation is entitled to represent in relation to the work that is subject to the agreement; and
- who requested the organisation to make a submission.

4.108 Proposed section 170MCA would provide a mechanism for the application of the NDT to extended agreements after an initial period. A party to the agreement would be able to request the Commission conduct a reassessment of whether the agreement passes the NDT at any point at least three years after the agreement came into effect and before the nominal expiry date. Reassessment can only occur once during the term of the extended agreement.

4.109 If the extended agreement does not pass the NDT the parties may:

- vary the agreement so that it passes the NDT;
- agree to terminate the agreement; or
- apply to the Commission for a termination.

4.110 If none of these events occur within three months of the Commission's finding, the agreement will be taken to have passed its nominal expiry date.

Policy rationale

4.111 The Governments objective is to encourage an agreement making framework which places primary responsibility on employers and employees – with a view to promoting an environment where mutually beneficial productivity gains can be achieved at the workplace level. In this context, extended agreements would benefit employers and employees by providing an additional agreement making option.

4.112 Employers and employer organisations have expressed concerns that a nominal expiry date of three years is not always long enough for some businesses or projects. These businesses can face the prospect of an unstable workplace relations environment at crucial times in the business/project cycle which was foreseen but for which the Act presently makes no allowance. This uncertainty can also be detrimental to the interests of employees and their representatives.

4.113 In particular, the mining industry has noted that the current three year limitation inhibits its ability to finance and plan large projects typically lasting more than three years. The development phase of mining projects often extend beyond a three year timeframe, requiring companies to re-negotiate agreements while entering the closing stages of the development period – a time when they are more vulnerable to industrial action.

4.114 The increasing use of contract mining in the industry has made the option of extended agreements more attractive. Agreements could then be made for the life of the contract – up to five years, rather than requiring companies to renegotiate agreements for a short period prior to the cessation of the contract – making them more vulnerable and injecting financial uncertainty into fixed cost contracts.

Employee safeguards

4.115 In response to this uncertainty, the Government's primary concern was to ensure that the no-disadvantage test, which underpins the safety net for employees covered by CAs, should not be compromised. This is why additional safeguards have been built into both the initial approval process of extended agreements by the Commission and the continuation of the agreement once it has been operating for three years.

4.116 Agreements made under these provisions would be required to be clearly identified as extended agreements and can be made directly with employees (under section 170LK); or their representatives (section 170LJ) or in settlement of industrial disputes (under section 170LN).

4.117 These agreements will not apply to Greenfields agreements (s170LL). Greenfields agreements apply to a new business that an employer proposes to establish. These agreements are made with employee organisations, not future employees. In this context, the Government recognises that extended agreements are not appropriate in workplaces where none of the employees have had an opportunity to be involved in the making of the agreement.

4.118 The Commission would only be able to certify an extended agreement if it is satisfied that the extended nominal expiry date is in the interests of the employer and the employees who will be bound to the agreement and is appropriate in all the circumstances.

4.119 Another key safeguard for employees would be the requirement that an extended agreement must contain as a term of the agreement a statement setting out the rights of a party to the agreement to apply to the Commission for a reassessment of the no-

disadvantage test. This reassessment will be available anytime after the extended agreement has been operating for at least three years.

4.120 A further safeguard is that the SAM Bill will provide that the public interest provisions in subsection 170LT(3) cannot be a factor when the Commission is considering the whether to certify an extended agreement.

4.121 The amendments introducing the option of extended agreements mark a significant development in the federal workplace relations system. The provision of extended agreements enhances the federal agreement making framework and reflects the Government's confidence in the maturity of employers and employees to reach mutually beneficial bargaining outcomes at the workplace.

PRINCIPAL ISSUES COMMITTEE HAS RAISED FOR CONSIDERATION

Why a party to a variation should not be involved in its variation

4.122 The SAM Bill's proposed amendments would not affect the rights of a party to an agreement to be involved in its variation. The amendments only affect the role of a party which has become bound to an agreement made between employers and employees under s. 170LK.

4.123 Paragraphs 4.67 – 4.71 note the distinction between parties to agreements and persons who have become bound by agreements. Parties are those who made the agreement. In the case of a s. 170LK agreement, a 'bound' union does not have the same status as the parties, that is, the employer and employees, who made the agreement. On the other hand, a union is a party to a s. 170LJ agreement, because the agreement has been made between the employer and the union.

4.124 At present an employer must seek the concurrence of a union which has become bound by a section 170LK agreement in making changes to that agreement. As noted earlier, this may be despite majority support amongst the employees the agreement covers. The effect of these provisions is that a union representing the interests of a minority of employees (even as few as a single member or none at all) at the enterprise which was not a direct party to the agreement, has the capacity to veto decisions the employer and a majority of employees have agreed to.

4.125 The Government considers that there is a real distinction between the appropriate role for a union which is bound to a section 170LK agreement made directly between the employer and employees and a union which is a direct party to an agreement, as is the case with agreements made under sections170LJ, LL and LN. In the latter case, employees have chosen a form of agreement negotiated with a union. In the former case, they chosen an agreement that is directly negotiated with their employer.

4.126 Unions that are 'bound' to a s. 170LK agreement may still be involved in its variation. The SAM Bill would enable such an organisation to make submissions to the Commission in relation to proposed variations (and terminations and extensions). But this right will only arise where an employee who is a member of the union requests that it is involved. This is consistent with the way in which unions are treated when section 170LK agreements are negotiated and certified, that is, there must be a request from a member before a union is entitled to meet and confer with the employer on behalf of members or before they may be bound to the agreement.

4.127 Unions will retain their rights, as a party, in relation to the variation of s. 170LJ agreements.

4.128 The Government considers the SAM Bill measures provide for an appropriate role for organisations in these circumstances.

Practical implications of AWAs operating from the time of signing, particularly if the AWA is not approved

4.129 The Government considers that there is no reason why an AWA cannot operate from the date of signing.

4.130 The OEA cites the a significant proportion of refusals to approve AWAs occurs because the AWA has been signed prior to the end of the required consideration period. In the four year period between 1998 to 2001 a total of 3,018 AWAs were refused with 60% or 1,818 of these AWAs refused because the employer/employer signed the AWA before the compulsory waiting period had ended.

4.131 The OEA also advises that two out of the three most common complaints from employers – largely in small businesses – relate directly to this issue, that is, the required number of days the employee must have access to the AWA before signing; and the fact that, for an existing employee, the AWA does not start operating until it is approved.

4.132 Various Australian Public Service agencies have also expressed the view that when replacing an existing AWA, the legal requirement to wait 14 days before signing the AWA is unnecessary.

4.133 The SAM Bill would address this. It would retain protections for employees by providing that if an AWA operates from the time it is signed, the employee would have a cooling-off period of either 5 days in the case of a new employee, or 14 days for an existing employee. If the AWA is not approved then the SAM Bill's provisions in section 170VX would operate and the employee would be entitled to the shortfall, if any, between the amount paid under the AWA and the amount the employee would have received if he or she had not signed the AWA.

4.134 Under the SAM Bill, in cases such as this the employee would not be required to personally commence any legal action, as the EA would be able to recover any shortfall. The current provisions in the WR Act require the employee to take any action to recover a shortfall.

4.135 The SAM Bill proposal to give the EA an express power of revocation provides additional employee protections where an AWA is initially approved and it is later determined that it should not have been approved. The EA expects that this will be a rare occurrence.

4.136 This aspect of the SAM Bill would remove a significant impediment to the EA approving AWAs. It will also provide employees and employers with a clear simplified process to follow in cases where the EA does not approve an AWA.

Current processes for agreement approval and any evidence of any problems with these processes

4.137 As at December 2003, there were 13 059 current certified agreements covering 1 588 600 employees.[16] Of all current agreements recorded on the Workplace Agreements

[16] www.workplace.gov.au/ trends in enterprise bargaining, December quarter 2003.

Database, 19.9 per cent were made under section 170LK, 66.1 per cent were made under section 170LJ, 6 per cent were made under section 170LL and 7.9 per cent were made under section 170LN. Whilst agreement coverage continues to expand to encompass a greater percentage of the workforce, there remain procedural barriers to the full take up rate of certified agreements.

4.138 The DEWR has received information from employers and employer organisations that the procedural aspects of the agreement making process can be time consuming, complex, costly and unnecessarily formal. The existing procedures can discourage employers/employees from developing agreements. Whilst the magnitude is difficult to quantify, anecdotal evidence suggests that it is likely to be substantial.

4.139 It is interesting to note that section 170LK agreements are increasing as a proportion of all agreements. Whilst section 170LK agreements constitute 19.9 per cent of all agreements certified, they cover 10.3 per cent of the employees. This suggests that this form of agreement is particularly appealing to small businesses that are likely to benefit from the simplification of the agreement making process.

4.140 The AIRC Annual report 2002-03 indicates that the average agreement processing time for section 170LJ agreements was 62 days in 2001-02 and 28 days in 2002-03. The average processing time for section 170LK agreements was 30 days in 2001-02 and 32 days in 2002-03. If the proposed amendments are passed, it is anticipated that the agreement processing time could decline significantly because the parties will no longer be required to attend hearings and most applications could be dealt with on the basis of written applications only. This will reduce transaction costs for employer, employees and their representatives which could be a further incentive for agreement making.

4.141 The body of the submission notes problems that arise from some of the procedural requirements for making and certifying agreements (see paragraphs 4.82 – 4.100). It provides examples of where the rigid compliance with the 14 day consideration period has been found to be too inflexible, including by the Commission. It also notes the delays and costs associated with formal hearings, which the Government considers are not always necessary.

4.142 The *Ahrens* case illustrates the difficulties that some parties face in correctly fulfilling the existing procedural requirements. On two occasions Ahrens had completed what they believed was the correct process for making a CA under s. 170LK. However, they had no independent advice on the matter and were incorrect both times. As a result O'Callaghan SDP refused to certify the agreement both times.

4.143 On the second occasion, he noted the Commission's role in facilitating agreement making. So, he spelt out six matters that would assist Ahrens to be "third time lucky." O'Callaghan SDP warned that the specific factual circumstances in each case are important and that the six matters should only be taken as general guidance. The fact that parties require such guidance from the Commission demonstrates the need for simplifying the process.[17]

4.144 The SAM Bill does not remove these procedures, which are important and useful, but gives the Commission the discretion and flexibility to deal with these issues as it thinks best.

[17] *Ahrens Engineering Pty Ltd (PR943578)*

4.145 The SAM Bill clarifies that the 14 day consideration period does not recommence if a new employee begins work during this period as uncertainty about this requirement can introduce unnecessary delays in the agreement-making process.

4.146 The SAM Bill will allow minor variations to take place without restarting the agreement-making process. This will reduce the procedural burden when correcting faults in the agreement or where the variation is minor or technical in nature.

4.147 Proposed new subsection 170LT(11) would grant the Commission discretion to certify an agreement even where the requirements of subsection 170LK(8) are not satisfied, that is, where the agreement making process was not restarted after a variation had been made. This discretion may only be exercised where the Commission is satisfied that no person whose employment would be covered by the proposed agreement suffered detriment as a result of that failure.

4.148 Under the WR Act, there is no legislative requirement to hold a formal hearing but it has become practice. Unnecessary formal hearings can cause disruption and additional cost to business and especially small business. In most cases an application for certification (or variation, extension or termination) of a certified agreement could be dealt with expeditiously and with minimal cost on the basis of written applications only. The SAM Bill would explicitly allow the approval, variation, extension or termination of a certified agreement without a formal hearing. Hearings will only be required where a party to the agreement has requested one and the Commission is satisfied that there are reasonable grounds for the request.