Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005

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Australian Government

Department of Employment and Workplace Relations

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

Inquiry into the provisions of the Workplace Relations Amendment (Work Choices) Bill 2005

Submission by the Department of Employment and Workplace Relations

November 2005

INQUIRY INTO THE PROVISION OF THE WORKPLACE RELATIONS AMENDMENT (WORK CHOICES) BILL 2005: SUBMISSION BY THE DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS

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1. OVERVIEW

The Workplace Relations Amendment (Work Choices) Bill 2005 (the Bill) was introduced into the House of Representatives on 2 November 2005.

On 12 October 2005, the Senate passed the following motion:

That:

> (1) Upon the introduction of the Workplace Relations Amendment (Work Choices) Bill 2005 in the House of Representatives, the provisions of the bill be referred to the Employment, Workplace Relations and Education Legislation Committee for inquiry and report by 22 November 2005.
>
> (2) The inquiry not consider those elements of the bill which reflect government bills previously referred to, examined and reported on by the committee; namely those elements which relate to secret ballots, suspension/termination of a bargaining period; pattern bargaining; cooling off periods; remedies for unprotected industrial action; removal of section 166A of the *Workplace Relations Act 1996* (the WR Act); strike pay; reform of unfair dismissal arrangements; right of entry; award simplification; freedom of association; amendments to section 299 of the WR Act; and civil penalties for officers of organisations regarding breaches.

Consistent with the requirements of the Senate's motion, the Department of Employment and Workplace Relations' (the Department's) submission to the inquiry addresses those aspects of the Bill not previously considered by the Committee. These are:

- the national system;
- the Australian Fair Pay Commission;
- the Australian Fair Pay and Conditions Standard;
- a simpler workplace agreement making process;
- the regulation of bargaining periods;
- award matters not relating to award simplification;
- transmission of business;
- the role of the Australian Industrial Relations Commission (AIRC);
- assistance with legal advice on unlawful termination;
- transitional arrangements for Victorian employers and employees;
- compliance; and
- transitional arrangements for state employers and employees becoming part of the national system and federal employers and employees currently in the national system that are not incorporated.

2. REASONS FOR REFORMS

A central objective of this Bill is to encourage the further spread of workplace agreements in order to lift productivity and hence the living standards of working Australians. The Government believes that the best workplace arrangements are those developed between employees and employers at the workplace.

Since coming to office in 1996, the Government has significantly reformed the federal workplace relations system to introduce flexibilities and reduce third party intervention. These reforms have contributed to increased productivity and economic prosperity. However, further reforms are required to meet challenges such as the aging Australian workforce.

The Australian Government believes the current workplace relations system imposes a costly regulatory burden on employers and employees, inhibiting both productivity performance and employment opportunities.

It has been found by the Productivity Commission that the adoption by workplaces of flexible workplace relations arrangements facilitated by past workplace relations reforms has improved productivity performance.[1] Other researchers in Australia including Fry, et al[2] have found that firms adopting workplace relations reform reported higher levels of productivity than competitors. Tseng and Wooden[3], Connolly et al[4], et al have all found that increases in bargaining increased productivity.

International bodies such as the International Monetary Fund and the Organisation of Economic Co-operation and Development have also noted the benefits of flexible workplace relations arrangements in enhancing productivity growth in Australia[5]. The IMF views the proposed reforms as further steps in the same direction as past reforms to increase labour market flexibility and which will help sustain Australia's economic performance. Indeed the fall in productivity over last financial year reinforces the need for further workplace reform to ensure that past gains are not unwound.[6]

The major reforms to be implemented by the Bill will:

- move towards a national workplace relations system that will see the complexity inherent in the existence of six different workplace relations systems simplified;

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[1] Productivity Commission, *Microeconomic Reforms and Australian Productivity: Exploring the Links, Volume 2: Case Studies*, Research Paper, Ausinfo Canberra 1999; *Productivity in Australia's Wholesale and Retail Trade*, Productivity Commission Staff Research Paper, Ausinfo, 2000

[2] T Fry, K Jarvies and J Loundes, *Are Pro Reformers Better performers?*, Melbourne Institute Working Paper, No.18/02, Sept 2002.

[3] Y-P Tseng and M Wooden, *Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey*, Melbourne Institute Working Paper, No.8/01, July 2001.

[4] G Connolly, A Herd, K Chowdhury and S Kompo-Harms, *Enterprise bargaining and other Determinants of Labour Productivity*, Paper presented at the Australian Labour Market Workshop 2004., UWA Http//www.clmr/uwa.edu.au (last accessed 1 feb 2005)

[5]International Monetary Fund, *IMF Survey, Oct 31, 2005*; International Monetary Fund letter to the ACTU President Sharan Burrow, http://www.imf.org/external/np/vc/2005/102705.htm (accessed 10/11/05)
Organisation for Co-operation and Economic Development, *OECD Economic Surveys – Australia 2004*.

[6] ABS, Australian System of National Accounts 2004-05, Cat. No. 5204.0.

- establish the Australian Fair Pay Commission (the Fair Pay Commission), an independent body to set and adjust minimum and classification wages, minimum wages for juniors, trainees/apprentices and employees with disabilities, minimum wages for piece workers and casual loadings;
- enshrine for the first time in federal law minimum conditions of employment: annual leave, personal/carer's leave (including sick leave), parental leave (including maternity leave) and maximum ordinary hours of work, which, together with the minimum and award classification wages set by the Fair Pay Commission, will make up the Australian Fair Pay and Conditions Standard (the Fair Pay and Conditions Standard);
- introduce a more streamlined agreement making process which places greater emphasis on direct bargaining between employers and employees and replaces the current complex and time consuming certification and approval process;
- protect certain award entitlements during bargaining - public holidays, rest breaks (including meal breaks), incentive-based payments and bonuses, annual leave loadings, allowance, penalty rates and shift/overtime loadings. These award conditions can only be modified or removed by specific provisions in the new agreement;
- preserve award conditions dealing with long service leave, superannuation, jury service and notice of termination for all current and new award reliant employees, and permit other award conditions (annual leave, personal/carer's leave, parental leave) to apply to current and new award reliant employees where these award provisions are more generous than the conditions provided in the Fair Pay and Conditions Standard;
- provide greater flexibility and make it simpler to negotiate family-friendly working arrangements;
- encourage employers and employees to resolve their disputes without the interference of third parties by introducing a model dispute settlement procedures;
- improve protections for employers and employees by extending the compliance regime in the *Workplace Relations Act 1996* (the WR Act) to cover the Fair Pay and Conditions Standard, and state awards and agreements that are to be brought into the national system;
- put in place comprehensive transitional arrangements for employers and employees entering the federal system and employers and employees currently in the federal system who will not be covered by the new federal system; and
- provide for the transfer of industrial instruments to a successor, assignee or transmittee employer for a maximum period of 12 months. This will provide for the protection of employee entitlements of employees when a business is bought and sold and employees move to a new employer.

3. TERMS OF REFERENCE

As required by the wording of the motion for the reference of the Bill, this submission will only consider those elements of the Bill that have not been previously referred to, examined and reported on by the Committee. Issues previously examined by the Committee identified in the motion include: secret ballots, suspension/termination of a bargaining period; pattern bargaining; cooling off periods; remedies for unprotected industrial action; removal of section 166A of the WR Act; strike pay; reform of unfair dismissal arrangements; right of entry; award simplification; freedom of association; amendments to section 299 of the WR Act; and civil penalties for officers of organisations regarding breaches.

Secret ballots

Secret ballots was considered by the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee as part of the inquiry into the Provision of Bills to amend the WR Act, conducted in 2002. The Department's submission to that inquiry was submission no.25.

Award simplification

Award simplification was considered by the Senate Employment, Workplace Relations and Education Committee (the Committee) as part of the inquiry into the provisions of the Workplace Relations Amendment (Award Simplification) Bill 2002, Workplace Relations Amendment (Better Bargaining) Bill 2003, Workplace Relations Amendment (Choice in Award Coverage) Bill 2004 and Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004. The Department's submission to that inquiry was submission no.6.

Suspension/termination of a bargaining period

The suspension/termination of a bargaining period was considered by the Committee as part of the Inquiry into the provisions of the Workplace Relations Amendment (Award Simplification) Bill 2002, Workplace Relations Amendment (Better Bargaining) Bill 2003, Workplace Relations Amendment (Choice in Award Coverage) Bill 2004 and Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004. The Department's submission to that inquiry was submission no.6.

Pattern bargaining

Pattern Bargaining was previously considered by the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee as part of the Inquiry into the Considerations of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999. The Department's submission to that inquiry was submission no.329.

Pattern Bargaining was also considered by the Committee as part of the Inquiry into the Building and Construction Industry Improvement Bill 2005 and Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005. The Department's submission to that inquiry was submission no.3.

More recently, pattern bargaining was considered by the Committee as part of the inquiry into the Workplace Agreements. No submission was made by the Department.

Cooling off periods

Cooling off periods were considered by the Committee as part of the Inquiry into the provisions of the Workplace Relations Amendment (Award Simplification) Bill 2002, Workplace Relations Amendment (Better Bargaining) Bill 2003, Workplace Relations Amendment (Choice in Award Coverage) Bill 2004 and Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004. The Department's submission to that inquiry was submission no.6.

Remedies for unprotected industrial action

Remedies for unprotected industrial action were considered by the Senate Employment, Workplace Relations and Education Legislation Committee as part of the Inquiry into the Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2003 and the provisions of the Workplace Relations Amendment (Codifying Contempt Offences) Bill 2003, which concurrently examined the Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill 2002. The Department's submission to that inquiry was submission no.8.

Removal of section 166A of the Workplace Relations Act 1996

Removal of section 166A of the WR Act was considered by the Committee as part of the Inquiry into the Considerations of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999. The Department's submission to that inquiry was submission no.329.

Strike pay

Strike pay was considered by the Committee as part of the Inquiry into the Considerations of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999. The Department's submission to that inquiry was submission no.329.

Reform of unfair dismissal arrangements

Proposed reforms of unfair dismissal arrangements have been before the Committee on several occasions, most recently in the Inquiry into Unfair Dismissal Policy in the Small Business Sector. The Committee reported on 21 June 2005 and the Department's submission to the inquiry was no.11.

The Workplace Relations Amendment (Termination of Employment) Bill 2003, which proposed to amend the WR Act to provide for workers employed by corporations to come within the scope of the Federal unfair dismissal legislation jurisdiction, was referred to the Senate Committee in December 2002. The Committee's report was tabled on 26 March 2003 and the Department's submission to the inquiry was no.14.

Unfair dismissal arrangements have been also considered by the Committee as part of the Inquiry into the Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2003 and the provisions of the Workplace Relations Amendment (Codifying Contempt Offences) Bill 2003, which concurrently examined the Workplace Relations Amendment

(Improved Remedies for Unprotected Action) Bill 2002. The Department's submission to that inquiry was submission no.8.

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Unfair dismissal arrangements have also been considered by the Committee as part of the inquiry into Workplace Relations Amendment (Unfair Dismissal) Bill 1998. The Department's submission to that inquiry was submission no.19.

Right of entry

Right of entry was considered by the Committee as part of the Inquiry into the Provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004. The Department's submission to that inquiry was submission no.16.

Right of entry was also considered by the Committee as part of the Inquiry into the Building and Construction Industry Improvement Bill 2005 and Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005. The Department's submission to that inquiry was submission no.3.

Civil penalties for officers of organisations regarding breaches

Civil penalties for officers of organisations regarding breaches were considered by the Senate Committee as part of the Inquiry into the Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2002, Workplace Relations (Registered Organisations) Bill 2001. The Department's submission to that inquiry was submission no.10.

Freedom of association

Freedom of Association was considered by the Committee as part of the Inquiry into the Building and Construction Industry Improvement Bill 2005 and Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005. The Department's submission to that inquiry was submission no.3.

Freedom of Association was also considered by the Committee as part of the Inquiry into the Considerations of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999. The Department's submission to that inquiry was submission no.329.

4. A NATIONAL SYSTEM[7]

The Bill moves towards a national workplace relations system based on the corporations power in the Australian Constitution.

Australia, although a single economy, currently has six different workplace relations systems with over 4000 different federal and state awards. The Government believes that removing this system of overlapping jurisdictions will reduce complexity and uncertainty will provide an environment for productivity and employment growth.

The Australian Government's view is that a national system is best achieved through agreement with the states. However, in the absence of a referral of industrial relations powers by the states, the Bill is based largely on the corporations power in the Australian Constitution.

Proposed changes

Constitutional basis

The use of the corporations power will allow the Commonwealth to directly establish legislated minimum conditions at a national level. Constitutional corporations are the financial, trading and foreign corporations covered by paragraph 51(xx) of the Constitution.

The national system will cover:

- trading, financial and foreign corporations (constitutional corporations);
- employers and employees in the internal territories (the Australian Capital Territory and the Northern Territory) and Christmas and Cocos Islands;
- the Commonwealth, including its authorities;
- waterside, maritime and flight crew employers; and
- employers and employees in Victoria under the terms of the referral of power.

People employed by employers who do not fall within these categories – including unincorporated businesses in the state system and some state government employees - will (where they are not already in the national system) remain in their respective state systems until state governments refer their workplace relations powers to the Commonwealth.

The system will operate to the exclusion of state industrial relations laws. Employers and employees covered by the national system will not be subject to regulation by state industrial laws. Matters which will remain regulated by the states are those such as occupational health and safety, workers compensation, trading hours, and long service leave.

Some existing federal awards refer to state laws that cover conditions such as long service leave. Employees covered by these awards will continue to have access to these conditions. If the relevant federal award does not include provisions for long service leave, state legislation will continue to apply.

[7] See Schedule 1, item 1 and Schedule 1, item 3 of the Bill (new sections3 and 4AB respectively).

The WR Act will not exclude state laws (such as tax legislation; fair trading legislation; legislation setting out necessary qualifications for certain types of work such as nursing or teaching; and public sector legislation) that are not part of the general workplace relations framework.

Level of coverage

Use of the corporations power, together with other heads of power such as the Territories power and powers referred to the Commonwealth by Victoria to expand the federal system will mean that up to 85 per cent of Australian employees will be covered by the federal system[8]. The remaining 15 per cent of employees will continue to be covered by their respective state jurisdictions. .

Forty-nine per cent of small businesses employing staff are currently incorporated. Most of these would come under the federal system, which would create a single, easy to understand, and less costly system for complying with minimum wages and conditions and procedures for lodging agreements. The Victorian referral of power, and the use of the Territories power in the Australian Capital Territory and Northern Territory, means that federal coverage of small business employees will be increased even further.

Policy rationale

Determining appropriate coverage and managing employees in different jurisdictions is an administrative cost to employers. At present employers may be subject to both state and federal industrial instruments in respect of particular types of employees. With the rise of the internet and other communications media, even small businesses can operate across state boundaries, while some larger businesses have to deal with all six different systems. Small businesses particularly struggle with the current workplace relations system, as they do not have the large human resources infrastructure to deal with the complex and costly procedures imposed by current labour regulation.

The Australian Bureau of Statistics (ABS) provides clear evidence of the confusion caused by the present workplace relations system. The ABS does not publish separate statistics on federal and state award coverage because employers are unable to reliably determine which jurisdiction covers their employees.

The present system also encourages 'jurisdiction shopping' on the part of unions to avoid legislative restrictions. For example, differing federal and state right of entry provisions, which permit union access to workplaces, can be exploited to circumvent access restrictions in a particular jurisdiction.

[8] ABS, *Employee Earnings and Hours*, May 2004 (Cat No 6306.0)

5. AUSTRALIAN FAIR PAY COMMISSION[9]

Wage setting in the workplace relations system will be made simpler and fairer by replacing the adversarial wage setting process undertaken by the AIRC with a new and totally independent wage setting body with the objective of promoting the economic prosperity of the people of Australia. The new body will be the Australian Fair Pay Commission (Fair Pay Commission).

Responsibilities of the Australian Fair Pay Commission

The legislation establishes the Fair Pay Commission to set and adjust a single minimum wage, minimum wages for award classification levels, minimum wages for juniors, trainees/apprentices and employees with disabilities, minimum wages for piece workers and casual loadings.

The objective of the Fair Pay Commission will be to promote the economic prosperity of the people of Australia. In giving effect to this objective the Fair Pay Commission will have to consider the following legislative parameters:

a. the capacity for the unemployed and low paid to obtain and remain in employment;
b. employment and competitiveness across the economy;
c. providing a safety net for the low paid; and
d. providing minimum wages for junior employees, and employees to whom training arrangements apply and employees with disabilities that ensure those employees are competitive in the labour market.

The policy objective of legislative parameter (a) is to ensure that, as far as possible, the minimum wages and casual loadings set by the Fair Pay Commission do not price the unemployed out of the labour market and do not place at risk the jobs of the low paid. This parameter recognises the importance of unemployed people gaining a foothold in the labour market to gain skills and experience to progress through the labour market. The parameter reflects the Government's policy to maximise employment opportunities for all Australians.

The factors that the AIRC is required to take into account under the current WR Act do not explicitly refer to the employment needs of the unemployed and the low paid. The only mention of employment is in s.88B(2)(b) "the desirability of attaining a high level of employment" as an economic factor for the AIRC to consider – but not specifically for the unemployed or low paid.

The policy objective of parameter (b) is to encourage employment and competitiveness across the economy. This has a broader focus than parameter (a). Parameter (b) encourages the Fair Pay Commission to contribute to a high level of employment across the economy. The focus on competitiveness encourages the Fair Pay Commission to support the competitive position of Australian industry, both domestically and internationally.

The legislative parameters for the AIRC in the current WR Act encourages the AIRC to consider economic factors including "the desirability of attaining a high level of employment".

The policy objective of parameter (c) is to ensure the maintenance of a safety net for the low paid. The parameter encourages the Fair Pay Commission to maintain a set of minimum wages

[9] See Schedule 1, item 10 of the Bill (new Part 1A) for the Australian Fair Pay Commission; and Schedule 1, item 71, (new Part VA Division 2) for wage setting.

and casual loadings that will form the benchmark for all employees. The wages set by the Fair Pay Commission will also be the wages guaranteed under the Fair Pay and Conditions Standard. All new workplace agreements will be required to meet the Fair Pay and Conditions Standard at all times.

Parameter (c) represents a different focus on the concepts of 'safety net' and 'low paid' than under the current WR Act. Section 88B(2) of the WR Act currently states that the AIRC "must ensure that a safety net of fair minimum wages and conditions is maintained", however, this is not confined to the low paid as it is in the Bill. The amendment reflects the Government's commitment to using the tax transfer system in conjunction with the workplace relations system to address the needs of the low paid.

In setting and adjusting minimum wages for junior employees, employees to who training arrangements apply (i.e. apprentices and trainees) and employees with disabilities, the Bill requires the Fair Pay Commission to have regard to providing minimum wages that ensure those employees are competitive in the labour market [legislative parameter (d)].

These provisions are directed towards supporting youth employment, apprenticeships and traineeships, and employment opportunities for people with disabilities.

The WR Act currently contains several provisions that require the AIRC to have regard to the need to protect the competitive position of young people in the labour market. These provisions are contained in the principal objects of the WR Act [s.3(aa)], the objects of Part VI [s.88A(d)(ii)], the general functions of the AIRC under Part VI [s.88B(3)(ba)], and in the AIRC's award making powers [s.143(1C)(ea)]. These provisions were originally included in the *Workplace Relations Amendment (Youth Employment) Act 1999.*

The Fair Pay Commission provisions are also consistent with current wage-setting arrangements for people with disabilities. Under the provisions of the Supported Wage System that was approved by a Full Bench of the AIRC in 1994, wages for people with disabilities who are unable to earn the minimum wage for their job are pro-rated to reflect the relative productive capacity of the individual employee, ensuring they are competitive in the labour team.

Wages and casual loadings to be set and adjusted

Under the legislation the Fair Pay Commission will set and adjust:

- the Federal Minimum Wage (FMW);
- classification rates of pay;
- federal minimum wages for juniors, employees to whom training arrangements apply and employees with disabilities;
- minimum wages for piece workers; and
- casual loadings.

Federal Minimum Wage

The FMW will be dealt with in legislation for the first time.

The Fair Pay Commission will ensure the maintenance of an effective FMW. The FMW will be the minimum wage for all employees other than junior employees, trainees and apprentices, employees with disabilities and piece workers.

Apart from employees for which the Fair Pay Commission may set a special FMW (junior employees, trainees and apprentices and employees with disabilities), no employee will be able to be paid less than the FMW once the Fair Pay Commission has handed down its first decision.

The weekly FMW following the AIRC's 2005 Safety Net Review of Wages (SNR) is $484.40. The FMW translates to an hourly rate of $12.75 per hour.

Minimum classification rates of pay

Minimum classification rates of pay in the new workplace relations system will initially be derived from the currently applying classification rates of pay – and will be locked in at the level set after the inclusion of the increase from the 2005 SNR.

Minimum classification rates of pay will serve two purposes.

Firstly, they specify minimum pay levels for employees not covered by a workplace agreement.

Secondly, the minimum classification rates of pay set by the Fair Pay Commission form the basis of the wage guarantee in the Fair Pay and Conditions Standard for employees who sign workplace agreements. Under the Fair Pay and Conditions Standard, employees must receive at least their relevant minimum classification rate of pay for each hour they are required to work.

The Bill requires the Fair Pay Commission to publish wage decisions that will determine the appropriate pay for each classification. The Fair Pay Commission may also publish material that will assist employers and employees to understand its decisions or its wage setting functions.

Junior employees

Existing minimum wages for juniors will be locked in at the level set after the increase from the 2005 SNR. Minimum wages for juniors cannot fall below this level and will increase as decided by the Fair Pay Commission.

The Bill allows the Fair Pay Commission to determine one or more Special Federal Minimum Wages for junior employees. For example, the Fair Pay Commission could establish a Special Minimum Wage for juniors who are not covered by a minimum classification rate of pay . Alternatively, a Special FMW could apply as a minimum threshold for one or more Australian Pay and Classification Scales.

In setting and adjusting minimum wages for junior employees, the Bill requires the Fair Pay Commission to have regard to providing minimum wages that ensure they are competitive in the labour market.

As previously, the WR Act currently contains provisions that require the AIRC to have regard to the need to protect the competitive position of young people in the labour market.

Employees to whom training arrangements apply

As for other employees, minimum classification wages specific to apprentices and trainees will be locked in at the level set after the increase from the 2005 SNR and will not fall below this level.

In addition, the Bill contains several provisions which give effect to the Government's election commitment to remove industrial relations barriers to part-time and school-based apprenticeships and traineeships.

These provisions will enhance opportunities for young people to take up these training opportunities. Under the current system, the award must specifically provide for apprenticeship or traineeship wages, or young people cannot be employed as part-time or school-based apprentices and trainees under that award.

The former Ministerial Council on the Australian National Training Authority (ANTA MINCO) recognised this restriction as a problem in 1998 and subsequently agreed on a number of occasions that all governments should give a high priority to removing industrial relations barriers to New Apprenticeships. However, to date Queensland is the only state to have addressed this issue fully.

While some progress in providing appropriate award wages and conditions for school-based traineeships has been achieved, major gaps for school-based apprenticeships still remain under both federal and state awards. Information provided by state governments to the Department of Education, Science and Training as part of a survey indicates that:

- for school-based traineeships, significant gaps in award coverage remain in Western Australia and South Australia; and
- for school-based apprenticeships, almost no state awards in New South Wales, Western Australia, South Australia or Tasmania have been varied to include appropriate wages and conditions.

In the federal jurisdiction the multi-industry National Training Wage Award was varied to include access to school-based traineeships in 1999. However, for school-based apprenticeships, while an AIRC Full Bench in 2000 approved model award provisions that could be inserted on an award-by-award basis, to date only 22 federal awards have been varied to include these provisions.

Prior to the establishment of the Fair Pay Commission, any gaps in relevant federal and state award coverage for school-based apprenticeships and traineeships will be filled by wage provisions to be contained in the legislation (see Schedule 3 to the Bill).

These provisions are expected to be proclaimed before the main provisions of the Bill, to ensure that appropriate wages for school-based trainees and apprentices are available from the beginning of the 2006 school year, including for students commencing at the new Australian Technical Colleges. However, they will not override existing award wages for school-based New Apprentices. They will only apply where there is currently a gap in federal or state awards.

The wage rates established by these provisions are the current rates for school-based trainees under the National Training Wage Award or, for school-based apprentices, the same formula that was agreed to by the Australian Chamber of Commerce and Industry, the Australian Council of Trade Unions (ACTU) and approved by a Full Bench of the AIRC in 2000.

When the Fair Pay Commission begins operation it will be empowered to fill any remaining gaps in minimum wages for employees to whom training arrangements apply (including apprentices and trainees) and periodically adjust these rates (Part VA, Division 2, Subdivision L).

These arrangements will apply only where there are gaps in coverage for apprenticeships and traineeships. Where awards currently contain minimum wage rates for specific categories of apprenticeships or traineeships, including minimum wages for part-time and school-based apprenticeships, those wage rates will be protected as part of the Australian Fair Pay and Conditions Standard.

The Bill also allows the Fair Pay Commission to determine one or more Special Federal Minimum Wages for employees to whom training arrangements apply. This power is the same as that provided in relation to juniors and employees with disabilities.

In setting and adjusting minimum wages for apprentices and trainees, the Bill requires the Fair Pay Commission to have regard to providing minimum wages that ensure those employees are competitive in the labour market.

The Bill provides that restrictions on the range or duration of training arrangements for trainees or apprentices are not allowable award matters. For example, an award term that specifies the duration of an apprenticeship or specifies the limited the circumstances in which the duration could be varied (for example by requiring the agreement of a state or territory training authority) would be non-allowable. This will ensure that awards do not impede the introduction of more flexible apprenticeships and traineeships.

Employees with disabilities

Under the Bill, the Fair Pay Commission will be responsible for setting and adjusting wages for employees with disabilities who are eligible for the Disability Support Pension. Employees who are unable to earn the full minimum wage for their job due to disability may be excluded from employment unless they can be paid pro-rata wages. To ensure that adequate employment opportunities are offered to people with disabilities it is necessary that their wages be set at a level which will make certain they are competitive in the labour market.

To achieve that outcome, the Fair Pay Commission will:

- be required to have regard to providing minimum wages for employees with disabilities that ensure they are competitive in the labour market;
- be required to provide for minimum wages for employees with disabilities by filling gaps in existing coverage if it considers that specific provision should be made for those employees; and
- be empowered to determine a special FMW for all employees with disabilities, or a class of these employees.

In exercising its wage-setting functions, the Fair Pay Commission must have regard to the need to provide pro-rata disability pay methods for employees with disabilities.

Where awards currently specifically include rate provisions for employees with disabilities, those minimum wages will be protected by the Government's guarantee against reductions below commencement levels (as at the reform commencement).

Minimum wages for piece workers

The Bill enables the Fair Pay Commission to set and adjust minimum wages for piece workers. A 'piece rate of pay' is a rate that is expressed as a rate for a quantifiable output or task (as opposed to being expressed as a rate for a period worked).

Consequently, 'piece rates' will be removed from the list of allowable award matters. '[I]ncentive-based payments or bonuses' will remain allowable award matters.

There are two different types of piece rates currently in awards, and each is treated differently in the Bill.

Piece rates in some awards are underpinned by a guaranteed minimum periodic rate of pay (such as a guaranteed minimum weekly rate, regardless of the level of output). If that is the case, the guarantee will apply to the minimum periodic rate of pay. The minimum periodic rate of pay will be protected at the level set after the inclusion of the AIRC's 2005 SNR increase.

For example, a full-time piece worker currently covered by the federal Clothing Trades Award is entitled to a piece rate per item produced, as determined under the provisions of the award. However, such a worker cannot be paid less than the relevant weekly classification rate in the award.

In this type of case, the Fair Pay Commission will set and adjust the converted hourly classification rate, which will continue to underpin the piece rate. The additional performance based provisions will be treated as an incentive-based payment and remain in the award.

Piece rates in other awards are not underpinned by a guaranteed minimum periodic rate of pay, that is, payment is entirely based on output. These piece rate provisions will be removed from awards and set and adjusted by the Fair Pay Commission. Adjustments to piece rates are guaranteed not to result in an employee of average capacity being entitled to less basic pay per week than before the reform commencement.

For example, a fruit picker employed under the federal Horticultural Industry (AWU) Award is entitled to a piece rate determined under the provisions of the Award. There is no guaranteed minimum periodic rate of pay under the award, so if the piece worker works at less than average capacity, they could earn less than the relevant classification rate under the award. The piece rate provisions in the award will be removed and form part of the Australian Pay and Classification Scales (APCS) set and adjusted by the Fair Pay Commission.

The piece rates guarantee, like other minimum wage guarantees, will underpin agreement making.

Casual loadings

The Bill includes casual loadings as part of the Fair Pay and Conditions Standard. On the reform commencement, casual loadings will be extracted from federal and State awards (and any other relevant wage instruments) and form part of the corresponding APCSs.

Casual employees covered by awards will continue to receive the casual loading that was previously prescribed in their award pursuant to the APCS derived from that award, subject to adjustment by the Fair Pay Commission. Casual employees who move onto agreements, and casual employees who are neither covered by an APCS nor a workplace agreement will be entitled to a loading of at least 20 per cent on top of their hourly rate of pay. Where a casual employee is covered by an agreement that is subsequently terminated, they will be covered by the Fair Pay and Conditions Standard, which includes the casual loading set by the Fair Pay Commission.

The policy objective of this change is to provide protection for the basic pay rate for casual employees as part of the Fair Pay and Conditions Standard. Casuals who remain covered by an APCS derived from an award will have their loading unchanged (subject to adjustment by the Fair Pay Commission, but not below levels set as at the reform commencement). Consistent with longstanding custom and practice, the Fair Pay and Conditions Standard for agreement-making excludes casuals from receiving paid annual and personal/carer's leave. The loading of 20 per cent for casuals entering into agreements is designed to compensate them for the lack of paid leave entitlements under the Fair Pay and Conditions Standard.

Award Review Taskforce

The Award Review Taskforce will examine classification wage structures in all current federal awards and state awards that are to be moved to the federal jurisdiction as transitional agreements. That examination is to be undertaken with the objective of recommending to the Fair Pay Commission an approach to rationalising those structures in a way that ensures they are relevant to modern workplaces.

The Taskforce will recommend a more accessible and easily understood list of classifications and pay rates that will simplify the Fair Pay Commission's task of periodically adjusting wages and casual loadings. This simplified list of classifications and pay rates will also make it easier for employers and employees to understand the minimum wages that are applicable to their workplace. This will particularly assist employers and employees seeking to determine their appropriate minimum wage for agreement making under the Australian Fair Pay and Conditions Standard.

The simplification of classification structures will not be a wage cutting exercise. The Bill will preclude the Fair Pay Commission from altering classification arrangements in a manner that would result in classification wages falling below the classification wages set by the 2005 SNR.

Wages protected at Safety Net Review 2005 level

On 7 June 2005, the AIRC granted a $17 increase to all award rates of pay in the 2005 SNR. The increase is currently flowing through to awards in both the federal and state workplace relations systems.

The legislation guarantees that minimum and classification wages will be protected at the level set after the inclusion of the 2005 SNR increase. The Fair Pay Commission will be able to upwardly adjust these wages but they cannot fall below this level. Where awards currently include specific pro-rata wages for juniors, trainees/apprentices and employees with disabilities, those wages will be protected by the Government's guarantee.

The AIRC's Statement of Principles states that at least 12 months must elapse since an award was updated to include the 2004 SNR wage rise before it can include the 2005 SNR wage rise. A number of awards are not due to receive 2005 SNR until after the Fair Pay Commission is expected to assume responsibility for wage-setting. For those awards that are prevented from receiving 2005 SNR, the Fair Pay Commission will be required to grant 2005 SNR to these awards at the time of its first decision.

Operation of the Fair Pay Commission

Wage inquiry process

The Fair Pay Commission will determine the timing, scope and frequency of its wage reviews, the manner in which wage reviews are to be conducted and the date on which wage-setting decisions are to come into effect.

The policy intent of creating an independent Fair Pay Commission is to enable a more consultative approach to minimum wage setting in Australia.

The Fair Pay Commission wage reviews are designed to be an inclusive process. The Fair Pay Commission will be able to consult with any interested stakeholder, for example the unemployed, not just those industrial players with a direct stake in the outcome.

The Fair Pay Commission can also undertake or commission research and monitor and evaluate the impact of its wage-setting decisions.

The operation of the Fair Pay Commission and the way in which it conducts wage inquiries is consistent with the Government's policy objective to move away from the legalistic and adversarial process of setting minimum and award wages before the AIRC.

Independence from Government

The Fair Pay Commission will be independent of Government. The Fair Pay Commission will not be providing its recommendations to the Government for agreement and will set wages independent of Government's views.

Fair Pay Commission decisions will not be appealable. This again reinforces the independence of the Fair Pay Commission.

Structure of the Australian Fair Pay Commission

The Fair Pay Commission will be made up of five members: a Chairman who can be appointed for a period of up to five years on a full-time or part-time basis, and four Commissioners who can be appointed for a period of up to four years on a part-time basis.

The Chairman of the Fair Pay Commission will be required to have high level skills in business or economics. Other Fair Pay Commission members each must have experience in one or more of the following: business; community organisations; workplace relations; and economics.

The Fair Pay Commission will be supported by a Secretariat, which will be established as an independent statutory agency. The function of the Secretariat is to assist the Fair Pay Commission in the performance of its functions. In practice, the Fair Pay Commission Secretariat will undertake and commission research related to the work of the Fair Pay Commission. The Secretariat will also monitor and evaluate the impact of the Fair Pay Commission's decisions.

6. THE AUSTRALIAN FAIR PAY AND CONDITIONS STANDARD[10]

The Bill enshrines in law minimum conditions of employment: annual leave, personal/carer's leave (including sick leave), parental leave (including maternity leave) and maximum ordinary hours of work, which together with the minimum and award classification wages set by the Fair Pay Commission, will make up the Australian Fair Pay and Conditions Standard (Fair Pay and Conditions Standard). All new agreements will be required to meet the Fair Pay and Conditions Standard throughout the life of the agreement.

The objective of the Fair Pay and Conditions Standard is to provide genuine protection by legislating minimum conditions to protect the rights of Australian workers.

Standard conditions

Annual leave

The policy intent of the annual leave provisions of the Bill is to establish a guaranteed minimum standard for annual leave to apply as part of the Fair Pay and Conditions Standard.

The Bill contains provisions to give effect to:

- an entitlement to an equivalent of four weeks of paid annual leave for each 12 months service. Due to the need to deal with flexible working arrangements, the Fair Pay and Conditions Standard includes a formula for calculating leave entitlements in hours rather than weeks (the formula would result in four weeks leave for employees whose hours do not change, but will also cover those employees hose hour vary over the course of a year);
- an additional week of paid leave for certain types of shift workers; and
- pro-rata arrangements for part-time employees and those who have not yet worked for 12 months.

Casual employees are not entitled to paid annual leave under the Fair Pay and Conditions Standard.

The additional week of annual leave for shift workers preserves an existing entitlement for shift workers who work in businesses that operate 24 hours, seven days a week and are rostered to work regularly on Sundays and public holidays.

Cashing out

Employees may only request to cash out up to two weeks of their accrued annual leave entitlement every 12 months but only where a new agreement provides for this. Subject to the terms of any agreement, an employer may refuse to authorise a request to cash out leave.

Cashing out annual leave provides flexibility for employees, but also ensures that employees will always have leave available in order to take a break from work.

[10] See Schedule 1, item 71 (new Part VA) of the Bill.

The Bill prohibits an employer from exerting undue influence to pressure an employee to cash out their annual leave.

The annual leave provisions are based on the current award standard and Schedule 1A of the WR Act (which provides a minimum standard for annual leave for Victorian workers) and are also consistent with State and Territory legislation.

Where an award provides an employee with a more generous entitlement, that more generous entitlement will continue to apply – this is true for both current and new award-reliant employees.

Personal leave/Carer's leave

Personal/carer's leave refers to:

- leave taken by an employee due to personal illness or injury (sick leave); or
- leave taken by an employee to provide care or support for a member of the employee's immediate family or household who requires care or support due to personal illness or injury, or an unexpected emergency (carer's leave).

A minimum standard for personal/carer's leave will apply as part of the Fair Pay and Conditions Standard.

The Bill contains provisions to give effect to:

- the equivalent of ten days of paid personal/carer's leave per year;
- up to ten days of paid personal/carer's leave in any given year can be used as carer's leave;
- pro-rata arrangements for part-time employees and those who have not yet worked for 12 months;
- a further two days of unpaid carer's leave per occasion in the event of an unexpected emergency for those who have exhausted their paid personal/carer's leave entitlement; and
- two days of paid compassionate leave per occasion to visit a seriously ill or dying relative or attend a funeral.

Personal/carer's leave cannot be cashed out or traded off in an agreement.

Casual employees are not entitled to paid personal/carer's leave under the Fair Pay and Conditions Standard. However, casual employees are entitled to two days unpaid carer's leave per occasion in the event of an unexpected emergency. The unpaid carer's leave entitlement recognises that situations requiring employees to provide care can be unpredictable.

Compassionate leave is wider in scope than bereavement leave and includes leave to visit a seriously ill or dying relative as well as to attend a funeral. The compassionate leave provisions in the Fair Pay and Conditions Standard consolidate existing award entitlements in this area.

The personal/carer's leave provisions in the Fair Pay and Conditions Standard are based on the current award standard and Schedule 1A of the WR Act. The cap of ten days per year for carer's leave and the additional unpaid carer's leave is based on the conciliated outcome of the Family Provisions Case.

To address concerns that employees may lose their current entitlements, award provisions relating to personal leave will be preserved. Where awards currently have personal/carer's leave

provisions that are more generous than the Fair Pay and Conditions Standard, the more generous entitlement will apply to both current and new award-reliant employees.

Regulations may be made to provide that compassionate leave and unpaid carer's leave will apply regardless of any more global generous comparison.

This means that if, for example, an award currently provides for three days of paid bereavement leave on the occasion of the death of a member of the employees immediate family or household, from the commencement of legislation employees covered by that award will receive the entitlement in the Fair Pay and Conditions Standard.

The personal/carer's leave provisions distinguish between:

- reasonable notice that must be provided to the employer (that is, informing the employer as soon as reasonably practicable that an employee is unable to attend work due to personal illness or injury); and
- documentary evidence, if required (that is, providing a medical certificate or statutory declaration to the employer if an employee is requested to do so).

The provisions also make it clear that the notice and documentation requirements do not apply to an employee who could not comply due to circumstances beyond his or her control. This is a subjective test and will depend on the employee's individual circumstances.

The personal leave provisions in the Fair Pay and Conditions Standard will form the benchmark for personal leave in new agreements. No employee can receive less personal leave than is provided in the Fair Pay and Conditions Standard.

Parental leave

The existing parental leave provisions in Schedule 14 of the WR Act and Division 2 of the Workplace Relations Regulations (WR Regulation) will be repealed and replaced by the maternity, paternity and adoption leave entitlement set out in the Fair Pay and Conditions Standard. The Fair Pay and Conditions Standard for parental leave will incorporate aspects of the established award standard for parental leave and aspects of the minimum standard for parental leave for Victorian workers (previously Schedule 1A of the WR Act).

The parental leave provisions apply to full-time, part-time and eligible casual employees with at least 12 months continuous service with their current employer and will include:

- up to 52 weeks of unpaid parental leave (including maternity, paternity and adoption leave) at the time of the birth or adoption of a child shared between both parents;
- other than one week at the time of the birth or three weeks in the case of adoption, both parents cannot be on parental leave at the same time;
- the period of unpaid parental leave is reduced by the amount of any paid leave taken by the employee in relation to the birth (such as personal leave, annual leave, long service leave or parental leave) and by the amount of any paid or unpaid parental leave taken by the employee's spouse;
- special maternity leave of an amount as recommended by a registered medical practitioner in the event that the pregnancy ends other than by a live birth or in the event of pregnancy related illness;
- the right to transfer to a safe job if, in the opinion of a registered medical practitioner, the employee is unable to continue in her present position because of illness or risks arising out of her pregnancy or hazards connected with that position. If it is not reasonably

practicable to transfer the employee to a safe job, then the employee is entitled to take paid leave (or may be directed by the employer to take paid leave) until the earliest of the end of the period stated in the medical certificate or the date of birth. Such paid leave does not reduce the total period of parental leave;

- the right to return to the position the employee held immediately before the start of parental leave or a position that has the same terms and conditions of employment as the former position; and
- in the case of adoption, up to two days of unpaid pre-adoption leave to attend any interviews or examinations required to obtain approval for the adoption unless the employee can take other authorised leave for such purposes.

The changes provide a legislative minimum standard which closely reflects the prevailing community standard for parental leave. The Bill contains amendments to:

- extend eligibility to parental leave to eligible casual employees. An eligible casual employee is defined as a casual employee who has worked on a regular and systematic basis with the current employer for a period or sequence of periods of at least 12 months and has a reasonable expectation of ongoing employment with that same employer;
- include an entitlement to special maternity leave of an amount recommended by a registered medical practitioner in the event that the pregnancy ends other than by a live birth within 28 weeks of the expected date of birth or in the event of pregnancy-related illness;
- include a provision allowing an employee to transfer to a safe job if, in the opinion of a registered medical practitioner, the employee is unable to continue in her present position because of illness or risks arising out of the pregnancy or hazards connected with that position. If it is not reasonably practicable to transfer the employee to a safe job, then the employee is entitled to take paid leave (or may be directed by the employer to take paid leave) until the earliest of the end of the period stated in the medical certificate or the date of birth. Such paid leave does not reduce the total period of parental leave;
- allow employees to elect to start parental leave up to six weeks prior to the expected date of birth; and
- set out details about adoption leave in the body of the legislation rather than in the regulations. Apart from extending the coverage of adoption leave to eligible casuals, the nature of the entitlement to adoption leave is no different from that in existing Division 2 of the WR Regulations.

The parental leave entitlement will apply more broadly than other parts of the Fair Pay and Conditions Standard, including to employees employed by employers other than constitutional corporations. Division 5 of Part VIA of the WR Act extends the parental leave entitlements contained in the Fair Pay and Conditions Standard to those employees in Australia who are not covered by the Fair Pay and Conditions Standard, subject to some limitations. This reflects the application of existing Schedule 14 of the WR Act.

To address concerns that employees may lose their current entitlements, award provisions relating to parental leave will be preserved. Where awards currently have parental leave provisions that are more generous than the Fair Pay and Conditions Standard, the more generous entitlement will apply to both current and new award-reliant employees.

Regulations may be made to provide that special maternity leave from the Fair Pay and Conditions Standard will apply regardless of any more global generous comparison. This means that all employees covered by the parental leave provisions of the Fair Pay and Conditions

Standard will be entitled to receive special maternity leave in line with the provisions in the Fair Pay and Conditions Standard.

Paid parental leave provisions in awards will continue to apply to award-reliant employees, regardless of whether the Fair Pay and Conditions Standard or preserved award unpaid parental leave provisions apply.

Maximum ordinary hours

The policy objective of the maximum ordinary hours provisions is to provide a legislative basis for the already accepted community standard of 38 ordinary hours of work per week.

The Bill will provide for a maximum of 38 ordinary hours of work per week.

Maximum ordinary hours may be averaged over a period of up to 12 months. In the absence of an alternative arrangement under an award or agreement, the default averaging period is twelve months. Averaging ordinary hours of work has become common and specifically allowing for averaging will increase the flexibility available. Allowing averaging over a period of up to 12 months accommodates peak seasonal workloads and provides maximum flexibility.

An employer may require an employee to work reasonable additional hours. An employee may refuse to work additional hours in circumstances where the working of such additional hours would result in the employee working hours which are unreasonable having regard to:

- any risk to employee health and safety;
- the employee's personal circumstances including any family responsibilities;
- the needs of the workplace or enterprise; and
- the notice (if any) given by the employer of the additional hours and by the employee of his or her intention to refuse it.

The Bill will specifically provide that employees must receive at least the relevant minimum hourly wage as set by the Fair Pay Commission for all hours that they are required to work.

Unlike the other conditions of employment contained within the Fair Pay and Conditions Standard, ordinary hours of work will remain an allowable award matter. The rationale for this decision is that the ordinary hours of work provisions in awards cover a wider range of matters than just the quantity of ordinary hours that may be worked. Award provisions will also continue to be able to contain matters such when ordinary hours of work may be performed, notice periods and variations to working hours.

Awards may provide for fewer than 38 hours as ordinary hours, but following a three year transitional period will no longer be able to provide for ordinary working hours above 38 hours per week. This will mean that employees will be entitled to the protection of the Fair Pay and Conditions Standard but will not be deprived of more generous conditions of employment where provided for by an award.

New agreements will be able to provide for fewer than 38 ordinary hours of work per week but will not be able to provide for a higher number of ordinary hours than the Fair Pay and Conditions Standard.

Penalty rates for hours in excess of ordinary hours can be included in awards and agreements. Penalty rates to which an employee is entitled under an award will only be able to be changed or

removed expressly in an agreement approved by an employee (in the case of an AWA) or group of employees (in the case of a collective agreement). Where an agreement, collective or individual, does not specifically alter or remove these protected conditions, the relevant award provision will be read into the agreement.

This protection will supplement the Fair Pay and Conditions Standard and ensure that employers and employees give due consideration to the protected award conditions, including penalty rates, when making their agreement.

Reasonable hours test case

The maximum ordinary hours provision reflects the AIRC reasonable hours test case decision.

An employer may require an employee to work reasonable additional hours. An employee may refuse to work additional hours in circumstances where the working of such additional hours would result in the employee working hours which are unreasonable having regard to:

- any risk to employee health and safety;
- the employee's personal circumstances including any family responsibilities;
- the needs of the workplace or enterprise; and
- the notice (if any) given by the employer of the additional hours and by the employee of his or her intention to refuse it.

Transition to maximum ordinary hours

The vast majority of awards already comply with the 38 hour ordinary time standard. Awards which still provide for more than 38 ordinary hours of work per week will be reviewed by the Awards Review Taskforce and varied by the AIRC to bring these awards into line with the Fair Pay and Conditions Standard. This must occur within three years of the reform commencement.

Existing federal agreements and preserved State agreements will not be required to comply with the Fair Pay and Conditions Standard for the period of their operation as it would be unfair to impose a new benchmark part way through the life of an agreement. However all new agreements made after the commencement of the legislation will be required to comply with the Fair Pay and Conditions Standard, including the maximum ordinary hours of work provision.

Compliance and disputes about the Fair Pay and Conditions Standard

The Bill proposes to extend the compliance regime of the WR Act to cover the Fair Pay Commission Standard, agreement making and state awards and agreements that are brought into the federal system. Currently there are already a wide range of matters in the WR Act the contain compliance mechanisms. Compliance is discussed in detail in section16.

Interactions between the Fair Pay and Conditions Standard and other instruments

The Fair Pay and Conditions Standard applies on an ongoing basis to employees covered by the national system.

In relation to agreements, the Fair Pay and Conditions Standard will apply throughout the life of these agreements, which could be up to five years. Because the Fair Pay and Conditions

Standard represents the minimum entitlements for all employees' wages and conditions, newly lodged agreements will always need to be equal to or higher than the Fair Pay and Conditions Standard (including any changes – for example, to wages - that occur during the life of the agreement).

The requirement to meet the conditions of the Fair Pay and Conditions Standard will only apply to agreements made in the new national system. Agreements made under the old system at either a state or federal level will continue to operate in their current form up to their nominal expiry date. However, they will not be able to be varied or extended but will be able to be replaced by agreements made under the national system.

Current award provisions covering annual leave, personal/carer's leave and parental leave will be preserved and continue to apply to existing and new employees still covered by awards. Preserved award conditions will not form part of the Fair Pay and Conditions Standard for agreement making.

Employers in the national system that have employees with terms and conditions covered by a state award will have their awards preserved as transitional agreements between the relevant employers and employees. The Fair Pay and Conditions Standard applies to these employees. However, where employees on former state awards have annual leave, personal/carer's leave or parental leave more than the Fair Pay and Conditions Standard, the more generous conditions will continue to apply. Transitional arrangements are discussed in more detail in section 17.

7. AGREEMENTS[11]

The key to greater productivity in the workplace is an increased emphasis on direct bargaining between employers and employees. Agreements must be easier to make. A streamlined, simpler and less costly agreement making process is proposed.

Simpler agreement making

The Bill will simplify the process for making both collective agreements and AWAs.

Lodgement process requirements

The lodgment only process moves away from the costly and time consuming process of certification for collective agreements and approval for AWAs. Average processing times by the AIRC for certified agreements is 26.7 days after an application for certification is lodged. Sixty-seven per cent of AWAs lodged with the EA are approved within 20 working days. With the lodgment only process, all new agreements will commence on lodgment.

Prior to seeking employees' approval of an agreement, employers will be required to provide a consideration period of at least seven days. At no later than the beginning of the seven day consideration period, employers will be required to provide employees with ready access to the proposed agreement along with an information statement from the Employment Advocate (EA).

The EA information statement will ensure employees have information about the agreement making process. It will inform employees that they can obtain advice about agreement making from the EA. It will include the date and method of approving the agreement.

The seven day consideration period can be waived by the employees, but only where all employees who would be covered by the agreement do so in writing.

For collective agreements, a majority of employees will need to approve the agreement.

Genuineness of approval of agreements will be protected through an enhanced compliance regime.

All agreements that are lodged will need to be accompanied by a declaration signed by the employer. The declaration must attest to compliance with the requirements for agreement making and agreement content. It will be unlawful to provide a false or misleading declaration. Providing a false of misleading declaration may be punished by up to 12 months in prison.

Employers will be required to lodge an agreement within 14 days of the agreement being approved by employees. There will be penalties against employers for late lodgment of agreements. However, an agreement that is lodged outside the 14 day period will still come into operation when it is lodged. Further, the employer will be required to notify employees that the agreement has been lodged.

There will be a remedy against an employer lodging an agreement that has not been approved.

[11] See Schedule 1, item 71 (new Part VB) of the Bill.

Variation and termination

The process for varying agreements or terminating them by approval will be simplified and will be similar to that for lodging new agreements.

Prior to seeking employees' approval of a variation or termination, employers will be required to provide a consideration period of at least seven days. At no later than the beginning of the seven day consideration period, employers will be required to provide employees with ready access to the proposed variation or termination with an information statement from the EA.

The EA information statement will ensure employees have information about the agreement variation and termination process. It will inform employees that they can obtain advice about varying and terminating an agreement from the EA. It will include the date and method approval for the variation or termination.

The seven day consideration period can be waived by the employees, but only where all employees who are or covered by the agreement agree to do so in writing at the time of the variation or termination.

For collective agreements, a majority of employees will need to approve a variation or termination by approval.

Where an employer varies or terminates an agreement by approval, lodgment will need to be accompanied by a declaration signed by the employer. The declaration must attest to compliance with the requirements for agreement variation and termination and agreement content in the instance of variation. It will be unlawful to provide a false or misleading declaration. Providing a false of misleading declaration may be punished by up to 12 months in prison.

Employers will be required to lodge the variation or termination within 14 days of the variation or termination being approved by employees. There will be penalties against employers for late lodgment of variations or terminations. However, a variation or termination that takes place outside the 14 day period will still take effect when it is lodged. Further, the employer will be required to notify employees that the variation and termination has been lodged.

Unilateral termination of agreements with 90 days notice

Agreements that have passed their nominal expiry date may be terminated by any party to the agreement giving 90 days' written notice to the other parties. After the 90 days, the person terminating the agreement can lodge a declaration with the EA terminating the agreement.

When an agreement is terminated and not replaced by another agreement, the minimum terms and conditions of employment will be those in the Fair Pay and Conditions Standard. All employees will have the protection of the Fair Pay and Conditions Standard despite an agreement being terminated.

If an employer terminates the agreement by 90 days' written notice, they can provide undertakings about the terms and conditions of employment above the Fair Pay and Conditions Standard that will apply when the agreement is terminated. Such undertakings will need to be in writing and will need to be lodged with the EA. These undertakings will be enforceable by the Office of Workplace Services (OWS).

When an agreement made under the current system is terminated, the minimum terms and conditions of employment will be those of the Fair Pay and Conditions Standard and the relevant award. Agreements made under the current legislation can be terminated using the current rules for terminating agreements.

Protections for vulnerable employees making agreements

Protections for vulnerable employees are the same regardless of whether an agreement is being lodged, varied or terminated.

The EA will explain new agreements, variations and terminations of agreements to employees, taking into account the circumstances of particular employees including persons from non–English speaking backgrounds and young persons. This responsibility currently resides with employers.

For employees under the age of 18, there will be the additional protection of both the employee and appropriate adult, such as a parent or guardian, having to sign a new agreement or variation to an AWA or termination agreement.

The EA, through promotional, education and information activities, will continue to encourage the parties in agreement making to take into account the needs of these groups and the need to prevent and eliminate discrimination.

A broad range of remedies will apply where agreements are lodged, varied or terminated without the consent of employees.

Compliance and agreement making

To ensure that employers meet the procedural requirements for agreement making, there will be an improved compliance regime with financial penalties for failing to follow the procedural requirements.

A broader range of remedies, including: setting aside or varying an agreement; compensation; financial penalties; and injunctive relief, will be available against any employer who lodges an agreement without obtaining employee approval, and against anyone who makes a false or misleading statement or engage in coercion or duress during the agreement making process.

Employers and employees bound by the agreement will be able to bring these claims to the OWS for assistance with enforcement and if necessary prosecution for breach. Prosecutions may be pursued by:

- an employer who is or will be bound by the agreement;
- an employee who is or will be bound by the agreement;
- a union that is or will be bound by the agreement;
- a union on behalf of an employee bound by the agreement (provided an employee has asked the union to act on his/her behalf, the union has a member in the workplace and the union is entitled to represent the industrial interests of the employee in relation to the work carried out by the employee under the agreement);
- if the agreement is an AWA, a bargaining agent of an employee or employer bound by the agreement;
- a workplace inspector; and

- any other person specified in regulations.

Claims against any employer who lodges an agreement without obtaining employee approval, and against anyone who makes a false or misleading statement or engages in coercion or duress during the agreement making process can be brought to the OWS.

These protections will ensure that employees' approval of the agreement was genuine.

Assistance with agreement making

Employees making an agreement will be able to appoint a bargaining agent of their own choosing to assist them in making an agreement. Employees will still be able to elect to have a union as their representative, however they may instead choose to have legal counsel or a workplace relations consultant to meet and confer with the employer about the agreement.

The EA's role will include providing advice to both employers and employees on agreement making. This will be similar to its current functions under the WR Act, which requires the EA to provide advice and assistance to employees and employers on their rights and obligations in relation to AWAs. This service will be free, and available to all employees and employers. However, the advice will not replace or prevent employers and employees seeking their own legal advice and assistance. Employees will of course be able to have access to their union representatives and the right to appoint and consult with a bargaining agent (who can act on their behalf in relation to an AWA or an employee collective agreement).

The EA will also provide employers with an information statement that employers must give employees when seeking their approval of an agreement. The information statement will include employer rights and responsibilities in agreement making and the protections and services available to employees during the agreement making process.

The expanded EA advisory service will replace the previous onus on employers to explain the terms of the agreement under s170LK(7) and s170LJ(3) of the WR Act. This will streamline the agreement making process for employers and ensure that employees will have access to independent advice on agreement making.

The EA will also be able to explain the content of agreements in ways appropriate to an employee's specific needs including, for example, the circumstances of persons from a non-English speaking background and young persons.

An appropriate person, such as a parent or guardian) will be required to consent to the content of an AWA on behalf of any employee under 18. This is in recognition of the fact that younger employees are less likely to have bargaining skills or experience in negotiating their own terms and conditions of employment. This protection will also compel employers to be accountable for the wages and conditions they offer younger employees through AWAs.

Employers and employees will be able to ask the EA to check agreements before they are lodged to ensure that they do not contain prohibited content. This will give added surety to agreement making parties, as prohibited content which is included in an agreement will be unenforceable after the commencement of the legislation.

The EA will provide employers with a declaration form to be used when lodging agreements. This will assist employers to ensure that they are providing accurate information when lodging agreements.

Types of agreements

Under the Workplace Relations Amendment (Work Choices) Bill 2005 there will be six types of agreements. These are:

- Employee collective agreements;
- Union collective agreements;
- Australian Workplace Agreements (AWAs);
- Union Greenfield agreements;
- Employer greenfields agreements; and
- Multiple business agreements

All agreements will have a maximum nominal expiry date of 5 years, other than greenfields agreements which will have a maximum nominal expiry date of twelve months.

Employee collective agreements

Employee collective agreements are agreements negotiated between a group of employees in a workplace and an employer that will provide the wages and conditions of the group.

Currently under the WR Act employers do not need to inform unions of their intention to make a non-union agreement, however they do need to inform their employees of the entitlement to seek union representation under s170LK (4).

A union can currently represent an employee and meet and confer with an employer in relation to a non-union agreement. If the agreement is approved, the union may then apply to the AIRC to be bound to that agreement. This relationship is not the same as being a party to the agreement as it is still an agreement directly between the employer and the employees.

However, at present unions bound to non-union agreements have the power to veto the variation, extension or termination of that agreement, even though the change may have been agreed to by a majority of the employees.

Currently only a union may be an employee representative under s170LK(4) when negotiating an agreement and there is no wider recognition of bargaining agents for collective agreements.

Under the Bill, unions would no longer be able to be bound to an employee collective agreement. Unions will be able to represent employees in negotiations but the Bill will not allow the union the right to over-ride employee preferences in relation or variation or termination.

The category of bargaining agents would be broadened so that unions will no longer be the only employee representatives in negotiations for employee collective agreements. For example, a solicitor, a trade union representative, employee representatives or any other person who could provide advice would be able to assist employees during negotiations. While representation will no longer be restricted to unions, employees will still be able to elect to have a union as their representative if they so choose.

Expanding the range of bargaining agents provides a greater choice for employees when selecting suitable representation in relation to a proposed agreement, or a variation or termination of an agreement.

Union collective agreements

Union collective agreements are agreements negotiated between employers and unions that represent employees in a workplace.

Currently, for union collective agreements to be certified they must be approved by a valid majority of the employees the agreement will cover.

The process for making union collective agreements will be simplified through the new lodgment only process.

Australian Workplace Agreements (AWAs)

Australian Workplace Agreements (AWAs) are individual agreements between an employer and an employee. Whilst they may be negotiated collectively, they must be signed individually.

An employee or employer negotiating the AWA may appoint a bargaining agent when making an AWA. A bargaining agent can be a trade union representative, a friend, a relative, a solicitor, or any other adult person whose advice an employee can rely on.

AWAs are currently assessed and approved by the EA.

The system for approving AWAs will be further simplified through a new lodgment process.

For employees under 18 years of age the Bill ensures that all AWAs require the approval of a parent or guardian before the agreement can be lodged with the EA.

AWAs enable people to be able to negotiate their wages and conditions directly with their employer which can be tailored to their individual circumstances. For example, women covered by certified agreements and AWAs are more likely to have access to family friendly provisions than men. AWAs allow both parties to take into account the needs and circumstances of the workplace and of the capacities and performance of individual employees.

Union greenfields agreements

Currently, greenfields agreements may be made where an employer is establishing or proposes to establish a new business. Greenfields agreements can only be made with unions who could have members in the workplace, if the workplace had employees.

Greenfields agreements currently have a nominal expiry date of up to three years.

In the new system, if an employer makes an AWA with an employee covered by a union greenfields agreement, the AWA will prevail over the union Greenfield agreement.

Union greenfields agreements will have a nominal expiry date of twelve months.

In the new system, a greenfields agreement may be made where an employer is establishing or proposing to establish a new business, new project or new undertaking. The Bill contains

remedies against making greenfields agreements where there is not a new business, project or undertaking.

The Australian Government policy is to streamline agreement making by introducing a simpler and less costly process which all collective and individual agreements will be approved on lodgment with the EA and encourage agreement making between employees and employers at the workplace level.

The change to the nominal expiry date of three years to twelve months for greenfields agreements will still allow new businesses the advantages of greenfields agreements, such as, certainty about labour costs and a stable working environment.

Employer greenfields agreements

Employer greenfields agreements are a new type of agreement introduced in the Bill. Employer greenfields agreements have all the same characteristics of union greenfields agreements with the exception that the employer makes the agreement without negotiating with a union.

As with union greenfields agreements there will be remedies against making an employer greenfields agreements where there is not a new business, project or undertaking.

Employer greenfields agreements will also have a nominal expiry date of up to 12 months.

After the nominal expiry date the agreement can continue to operate, but employers will be able to take protected action to bargain for a new agreement.

Employers that are establishing, or proposing to establish a new business that wish to operate in a non-union environment now have the option to bring a greenfields agreement into operation without negotiating with a union.

This would benefit particular type of business including franchise operations and small employers in sectors such as retail and hospitality who have not traditionally engaged in agreement making.

Multiple business agreements

Multiple business agreements are used where there are a number of businesses carrying on the same type of business that wish to offer their employees the same working conditions. This type of agreement is predominately used by franchise operations.

Currently, multi-employer agreements are vetted by the AIRC to assess whether they meet the requirements of agreement making. Under section 170LC of the WR Act, two or more employers may make an agreement with a registered organisation and/or employees where they are granted AIRC Full Bench approval and pass a public interest test. The test includes assessment of whether the matters dealt with by the agreement could have been served by an agreement other than a multi-employer agreement.

Prior to lodging a multiple business agreement it will be necessary to obtain authorisation from the EA that such an agreement will not be, in the circumstances, contrary to the public interest.

The EA will not have the power to refuse to lodge a multiple business agreement. Instead, a penalty regime would cater for those circumstances where an agreement is non compliant with the WR Act.

Government policy is to streamline agreement making, by a simpler and less costly process in which all collective and individual agreements will be approved on lodgment with the EA.

Prior to lodging a multiple business agreement it will be necessary to obtain authorisation from the EA that such an agreement will not be, in the circumstances, contrary to the public interest. To obtain the authorisation, the agreements and a declaration will have to be lodged with the EA. The EA will then administer a test 'on the papers' (i.e. the EA may want the parties to provide written submissions outlining the reasons for wanting a multiple business agreement) to approve the authorisation. This will prevent pattern bargaining.

The additional level of scrutiny for multiple business agreements is considered necessary because multiple-business agreements, like pattern agreements, can provide a common 'one-size-fits-all' outcome for a range of businesses regardless of the individual circumstances of those businesses.

Protecting award conditions in bargaining

Proposed changes

The Bill will protect certain award conditions when new workplace agreements are negotiated. The protected award conditions are:

- public holidays;
- rest breaks (including meal breaks);
- incentive-based payments and bonuses;
- annual leave loadings;
- allowances;
- penalty rates; and
- shift/overtime loadings.

These protected award conditions can be the subject of bargaining by employees and employers but can only be modified or removed by specific provisions in the new agreement. If these award conditions are not specifically extended or modified in a new agreement, the award conditions will be read into the agreement and apply to employees.

The policy objective of protecting these award conditions in bargaining is to provide certainty and clarity for employees and employers wishing to negotiate an agreement. In particular, any changes made to these conditions in agreements must be clearly identified so that the employees affected are aware of the modifications to their entitlements.

Agreement content

All new agreements will include conditions, including wages, that meet the Fair Pay and Conditions Standard.

All workplace agreements will include wages that are no less than the relevant award classification wage as set by the Fair Pay Commission from time to time. For casual employees,

the Fair Pay and Conditions Standard will include a minimum casual loading of 20 percent (subject to future consideration by the Fair Pay Commission). In the event that a casual employee is not covered by an award classification, the adult casual wage will be the federal minimum wage (plus the "default" loading of 20 per cent for casual employees).

The Fair Pay and Conditions Standard is the benchmark for agreement making. Where an agreement does not provide for conditions at least as good as those in the Fair Pay and Conditions Standard, the Fair Pay and Conditions Standard will apply.

Mandatory content

Agreements may include a nominal expiry date (up to a maximum of one year for greenfields agreements and a maximum of five years for other agreements) and must include dispute settlement procedures (DSPs).

In relation to DSPs, the Bill ensures that parties to agreements have more control over the resolution of disputes. It does this by allowing parties to exercise a genuine choice about who and how workplace level disagreements are resolved.

Specifically, the amending legislation:

- continues to provide that dispute settlement procedures (DSPs) are required content for agreements;
- maintains the ability of parties to an agreement to negotiate their own DSPs (agreed DSPs);
- makes necessary changes to the AIRC's powers where it is appointed as a dispute resolution body under an agreed DSP;
- sets out a model DSP for agreements lodged without their own procedures; and
- provides greater flexibility regarding the resolution of disputes arising during agreement-making.

The EA will be able to advise employees and employers about best practice model clauses.

Prohibited content

Prohibited content in an agreement will include anything in an agreement that requires or obliges certain things with respect to the terms and conditions paid by contractors or labour-hire (on-hire) companies to their employees.

A range of content will be prohibited from being included in agreements. Consistent with the current legislative requirements, clauses which do not 'pertain to the employment relationship', or which breach freedom of association provisions will not be permitted. In addition, clauses in agreements which purport to restrict the offering of AWAs in a workplace or restrict the use of independent contractors will also be prohibited.

Clauses that cannot be included in agreements include those:

- prohibiting AWAs;
- restricting the use of independent contractors or labour-hire (on-hire) arrangements;
- allowing for industrial action during the term of an agreement;
- that provide for trade union training leave, bargaining agent's fees or paid union meetings;
- requiring the employer to negotiate the next agreement with the union;
- requiring union involvement in dispute resolution regardless of whether that employee is a union member or who that employee would like to represent them;

- providing a remedy for unfair dismissal; and
- other matters proscribed by regulation/legislation.

If an agreement includes prohibited content, that prohibited content will be void and the EA will be able to remove it from the agreement. However, the agreement will come into operation and continue to operate. In addition, employers, unions and employees will not be able to take protected industrial action in support of claims for an agreement that includes prohibited content.

There will be penalties of up to $6,600 for individuals and $33,000 for corporations that seek to include prohibited content in an agreement or lodging an agreement containing prohibited content. It will be a defence to such penalties if the employer has obtained advice from the EA prior to lodging the agreement that the content is not prohibited content.

Transitional arrangements for current agreements

Current agreements in the federal system for constitutionally covered employers staying the in the federal system

An agreement in place at the commencement of the new legislation will continue to operate until terminated or replaced. These old agreements may be terminated after their nominal expiry date using the termination provisions which currently apply.

The parties to a federal agreement made under the old legislation will stay the same when the new legislation comes into effect. Protected action will not be able to be taken prior to the old agreement's nominal expiry date. Old agreements will not be able to be varied or extended after the commencement of the new legislation. The agreement will not be required to comply with the Fair Pay and Conditions Standard for the period of its operation.

Parties will be able to lodge agreements in the new system as soon as they can reach agreement. Parties do not need to wait for the expiry of their current agreement. However, parties will not be able to take protected action if their current agreement has not passed its nominal expiry date.

Current agreements in state systems for employers moving to the national system

Former state agreements will operate under federal legislation in a similar way to federal agreements. They will keep their nominal expiry date, and will continue to operate until terminated or replaced by a new agreement in the national system. Protected industrial action for a new agreement will not be able to be taken before the former state agreement's nominal expiry date. However employers and employees can reach and lodge a new agreement in the national system prior to the nominal expiry date of the old state agreement.

The employees and employers that are party to that former state agreement stay the same. Organisations (such as unions) that register in the national system will retain their rights to enforce the terms of the agreement.

Some content in former state agreements, such as union preference clauses, or those which are currently prohibited in the federal system will be unenforceable, like compulsory union bargaining fees for non union members.

This prohibited content will be unenforceable from the commencement of the new legislation and subject to removal by the EA. Former state agreements will not be able to be varied or

extended following their transition. They will not be required to comply with the Fair Pay and Conditions Standard for the period of their operation as it would be unfair to impose a new benchmark part way through the life of an agreement.

Current agreements in the federal system for employers moving to the state system

Current federal collective agreements applying to non-constitutional corporations will be subject to a five year transitional period from the commencement of the new system. The transitional arrangements will apply only to non-constitutional covered employers that have agreements in the current federal system.

These transitional agreements will run for the period of the transitional system – up to five years. Non-constitutionally covered employers that are part of the transitional system will not be able to negotiate new agreements in the new national system unless they become constitutionally covered employers (for example by incorporating). They will be able to make state agreements after the nominal expiry date or their federal agreement.

At the end of the transitional period transitional agreements applying to unincorporated businesses will cease to operate,.

Transitional provisions are discussed in more detail in section 17.

Agreement dispute resolution

Under the current system, employers and employees have primary responsibility for determining matters affecting their relationship at the workplace or enterprise level. Consequently, this Bill attempts to give parties to an agreement greater control over this area of their relationship. In particular, it ensures that for disputes arising under agreements, employers and employees have a genuine choice over who, but also how their disagreements are settled.

Proposed changes

The Bill ensures that parties to agreements have more control over the resolution of their disputes. Specifically, the Bill:

- continues to provide that dispute settlement provisions (DSPs) must be included in agreements;
- maintains the ability of parties to an agreement to negotiate their own DSP (an agreed DSP);
- makes changes to the AIRC's powers where it is appointed as a dispute resolution body under an agreed DSP;
- sets out a model DSP for agreements lodged without their own DSPs; and
- provides greater flexibility regarding the resolution of disputes arising during agreement-making.

Agreed DSPs

The Bill maintains the capacity of parties to an agreement to negotiate their own DSP. It also continues to allow parties to agree to appoint the AIRC as their preferred dispute resolution body.

Where the parties agree to appoint the AIRC as their preferred dispute resolution body, the Bill provides that it can only exercise those powers conferred under the workplace agreement or as

otherwise agreed to by the parties. The rationale is to reverse the current presumption that (in the absence of such a conferral), the AIRC has its 'usual' powers to settle the dispute. This (in practice) has meant that parties have been subject to processes and powers that they did not anticipate would apply. Also, where the AIRC is appointed as the preferred dispute resolution body, it must refuse applications if the dispute is not one which (under the terms of the agreement) can be resolved by it, or if any conditions precedent have not been satisfied. This is to ensure that the AIRC is satisfied that it has jurisdiction to settle a dispute and addresses the present situation whereby the AIRC may deal with a matter even though its powers have not been properly invoked.

Agreements lodged without a DSP

Where parties lodge an agreement without a DSP the model DSP as set out in the Bill will be deemed to apply.

The model DSP sets out a staged approach to dispute resolution, encouraging parties to genuinely attempt to settle the matter between themselves before seeking third party assistance. In particular, it gives parties a choice about whether to refer disputes to the AIRC or to a private alternative dispute resolution (ADR) provider. Nevertheless, if the parties cannot reach agreement on who should resolve their disagreement, the dispute may be referred to the AIRC. The rationale is to ensure that both parties' consent is required for a matter to be referred to a private ADR provider and to prevent disputes becoming deadlocked over this issue.

The Model DSP is discussed in more detail in section 12.

Disputes arising during bargaining

The Bill allows the AIRC to provide voluntary dispute resolution for matters arising during negotiations for a collective agreement. This provision is similar to the existing section 170NA(1), but instead requires that both parties agree to the AIRC being involved. Also, instead of exercising its traditional powers of conciliation, the AIRC must take appropriate action to assist the parties to resolve the dispute, including organising meetings between the parties and their representatives. It may also make recommendations where both parties consent. However, the AIRC cannot:

- issue orders or make awards;
- make binding determinations;
- arbitrate;
- compel a person to do anything; or
- appoint a board of reference.

Alternatively, the parties could agree to refer these matters to a private ADR provider instead.

8. IMPROVING REGULATION OF BARGAINING PERIODS[12]

This section deals with industrial action matters that have not been dealt with in previous bills inquiries by the Committee.

Section 1 directs the Committee to the Department's previous statements on industrial action.

As is currently the case, the AIRC will have the capacity to suspend or terminate a bargaining period. However, the Bill will amend the Act to remove the AIRC's discretion to suspend or terminate on certain grounds.

In general, the existing grounds for suspending and terminating a bargaining period set out in the WR Act will be retained, that is, where:

- a party has failed to genuinely try and reach agreement with other parties;
- there has been a failure to comply with an AIRC direction or order;
- a union is organising industrial action in relation to employees who are not eligible to be members;
- the industrial action relates to a demarcation dispute; or
- the industrial action is threatening to endanger life, personal safety, health or welfare, or to cause significant economic damage.

One existing ground for terminating a bargaining period will be removed. That is where the bargaining period relates to employees covered by a former paid rates award. This provision is no longer considered necessary as paid rates awards have been phased out under the WR Act.

Three new grounds will be added:

- suspension or termination if "pattern bargaining" is taking place;
- a cooling-off suspension where this would assist the parties to resolve the matters at issue; and
- a suspension where third parties are threatened with significant harm from industrial action.

The AIRC will be required to make an order where the relevant ground is made out, but would be able to select between suspension or termination as the most appropriate remedy. Requiring the AIRC to either suspend or terminate if the relevant grounds are proven will provide more certainty to applicants that they will be able to obtain a remedy. However, allowing the AIRC to retain an ability to select between suspension or termination will provide a capacity for the AIRC to ensure the remedy provided is appropriate to the matters at issue.

Limiting the AIRC to suspending bargaining periods in cases of cooling-off and third party damage, is preferable to a termination, which could lead to deadlocked negotiations with no discernable remedy.

Providing for suspension where third parties are suffering significant harm from industrial action is focused on providing an opportunity for third parties to minimise any harm they may suffer

[12] See Schedule 1 item 71 of the Bill (new Part VC, Division 2 for Bargaining periods; new Part VC, Division 6 for Orders and injunctions against industrial action; new Part VC, Division 7 for Ministerial declarations terminating bargaining periods; new Part VC, Division 8 for Workplace determinations).

from further industrial action. The AIRC will be able extend the initial period of the suspension if the industrial action is likely to continue to cause harm. However, the AIRC can only extend the suspension once.

The length of a third party suspension will be capped at three months (including any possible extension) to ensure that the AIRC does not suspend a bargaining period for such an extended period as to constitute a de facto termination. Capping the length of such a suspension will also assist in responding to criticism that arbitration should be available where parties are unable to take industrial action due to such "public interest" concerns. Currently, the other public interest ground of threat to the economy, life, personal safety, health or welfare sets a higher threshold than that required for third party suspension and allows the AIRC to terminate the bargaining period and move to arbitration.

If a bargaining period is terminated because it threatens life, personal safety, health or welfare of the population or is threatening to cause significant damage to the economy, the matter will be referred for a workplace determination.

Essential services

The Bill contains new provisions which will allow the Minister for Employment and Workplace Relations to issue a Declaration where protected industrial action threatens life, personal safety, health or welfare of the population or is likely to cause significant damage to the economy. This new remedy is similar to state essential services legislation, and will ensure the Government can respond to industrial action taken by parties covered by the new workplace relations system that has significantly damaging and wide-ranging effects on essential services.

The Declaration will terminate the bargaining period and authorise the Minister to issue Directions to ameliorate the threat to essential services. Such directions might include:

- requiring employees to lift work bans or return to work; and
- requiring the employer to allow employees back onto the worksite in the case of a lockout.

The parties will have access to Workplace Determinations in these circumstances.

Many other countries limit the circumstances in which community services (eg. police and health workers) can take lawful industrial action and the nature of such action.

Workplace Determinations

Proposed changes

Amendments to the industrial action provisions relating to the making of binding determinations are similar to the existing powers of the AIRC to make awards under subsection 170MX(3) of the WR Act.

Firstly, these instruments will be referred to as Workplace Determinations rather than awards. This is because they are distinct from awards in a number of ways. For example, these Workplace Determinations are not made in settlement of interstate 'paper' disputes and are not limited to allowable award matters. Rather, they are made in place of an agreement and to provide a final resolution to damaging industrial disputes.

Under the Bill, the grounds for making Workplace Determinations will change to ensure that they are available only in appropriate instances. Consequently, the AIRC will no longer have a specific power to terminate a bargaining period and make determinations for former paid rates award employees. These powers will be removed because they allow bargaining to be terminated using a very low threshold and replace the Fair Pay and Conditions Standard and protected award conditions as the relevant protections for employees on agreements. However, the AIRC will have a new power to make Workplace Determinations where the Minister has made a Declaration terminating a bargaining period to prevent damaging industrial action from taking place. Since in this instance the parties can no longer take protected industrial action, making a Workplace Determination is necessary to finally settle the dispute.

The amendments also contain a number of measures to ensure that the availability of Workplace Determinations do not create disincentives to bargain. Firstly, the AIRC will only be able to make workplace determinations after a 21 day negotiation period (and any extension of that period) has expired and the parties still have not reached agreement. This underscores the policy intent that Workplace Determinations are remedies of last resort. Similarly, the grounds that the AIRC must have regard to when making a Workplace Determination have been expanded to include (among other things) encouraging agreement-making where possible (see below). Also, in order to encourage bargaining, the Bill allows collective agreements to come into effect before the nominal expiry date of a Workplace Determination. Lastly, Workplace Determinations may have a nominal expiry date of up to five years. This is so that they are long enough to prevent the reoccurrence of damaging industrial action, but not so long as to prevent genuine agreement-making. It also ensures that they are consistent with the length of agreements under the new system.

To signify the seriousness of making Workplace Determinations, the Bill continues to provide that they only be made by a Full Bench of the AIRC. In addition, there are significant benefits in having these disputes settled by more than one Commissioner given the range of complex issues likely to be involved. However, the Full Bench will be required to make Workplace Determinations as quickly and practicably after the negotiation period ends. This will provide greater certainty to parties and ensure that serious disputes do not fester.

In addition, the Bill contains measures related to the content of Workplace Determinations. Firstly, Workplace Determinations may only deal with the matters in dispute. This ensures that the issues over which the parties could not agree are finally resolved. However, these Workplace Determinations must not contain prohibited content. This avoids creating incentives to take serious industrial action for the purpose of accessing entitlements which would otherwise be prohibited if the bargaining period was not terminated.

The Bill also changes the AIRC's powers with respect to the making and ongoing operation of Workplace Determinations. Firstly, the proposed amendments remove AIRC's powers of conciliation and arbitration as the basis for the making of these instruments. This reflects the attempt to cover the field using the corporations power and is consistent with the fact that the AIRC will no longer exercise compulsory powers of conciliation and arbitration as they are traditionally understood. The Bill also removes the AIRC's discretion to consider matters beyond those listed in the legislation when making a Workplace Determination. The matters that the AIRC must consider are:

- the matters at issue during the bargaining period;
- the merits of the case;
- the interests of the negotiating parties and the public interest;

- how productivity might be improved;
- the extent to which behaviour during the negotiating period was reasonable;
- incentives to encourage parties to pursue negotiated outcomes at a later stage **(new);**
- the employer's capacity to pay **(new);**
- decisions of the Fair Pay Commission **(new);** and
- any other factors specified in the regulations **(new)**.

This is consistent with the policy objective that where possible, employers and employees should be supported to come to an agreement themselves; but that if a Workplace Determination is unavoidable, there should be appropriate limits on the AIRC's discretion.

Finally, the Bill contains amendments which treat the ongoing operation of Workplace Determinations as if they were collective agreements and removes the AIRC's powers to deal with these instruments as if they were awards. The rationale behind these changes is the fact that (as stated above) these instruments are analogous to collective agreements.

Policy rationale

The provisions build on the existing legislation and add specific measures to ensure that workplace determinations are made in appropriate instances and do not create disincentives to bargain. In particular, the proposed changes continue to ensure that the AIRC can respond effectively to damaging industrial action in a way that provides certainty to the parties involved, but also to those whose interests either are currently being affected or at risk of being affected.

To underscore that the making of workplace determinations should be exceptional, the Bill includes changes to ensure that they are only made where the industrial action has had to be ended in the public interest, and not as a substitute for agreement-making or providing arbitrated entitlements beyond the award safety net and legislated minimum wages and awards.

Damaging industrial action in state systems

The Bill also includes new provisions to deal with damaging industrial action being taken by state system participants where this affects employers and employees who are a part of the national system. Damaging industrial action would involve a substantial loss or damage to the business of a constitutional corporation. If such action is taking place, then the AIRC will be required to make an order that the industrial action stop, not occur and not be organised.

If the AIRC order is not complied with, then enforcement would be by way of an injunction (and consequent remedies) or in the normal way for breach of an AIRC order.

9. AWARDS[13]

The Government will be retaining a system of federal awards. At the commencement of the legislation, all current federal awards will remain in place. However, awards will be simplified to ensure that they provide a simple and up to date minimum safety net of entitlements. In order to reduce the number of overlapping awards, awards will also be rationalised.

Protecting award conditions

The policy intent of the allowable award matters provisions of the Bill is to provide a genuine safety net of entitlements for award-reliant employees.

The Bill will preserve a range of award terms that are to be removed from the list of allowable award matters to provide added protection for award-reliant employees.

There are two different categories of preserved award terms – those types of leave that are also dealt with by the Fair Pay and Conditions Standard and those award terms legislated for elsewhere.

The preserved award terms relating to leave that are also dealt with by the Fair Pay and Conditions Standard are:

- annual leave;
- personal carer's leave (which includes war service sick leave, infectious diseases sick leave, and other like forms of sick leave); and
- parental leave, including maternity and adoption leave.

Where current award provisions covering annual leave, personal/carer's leave and parental leave are 'more generous' than the corresponding entitlement under the Fair Pay and Conditions Standard, the award provisions will continue to apply to existing and new employees employed under the award. This is to ensure that no employees are disadvantaged by this change. However, the 'more generous' award provisions will not form part of the Fair Pay and Conditions Standard for the purposes of agreement making.

Some provisions in the Fair Pay and Conditions Standard apply to employees regardless of what is in their awards. Compassionate leave provisions in the Fair Pay and Conditions Standard apply in lieu of award provisions for compassionate or bereavement leave (which will not be preserved). Special maternity leave provisions in the Fair Pay and Conditions Standard apply in addition to any preserved award provision for unpaid parental leave. Unpaid carer's leave provisions in the Fair Pay and Conditions Standard apply in addition to any preserved award provision for paid personal/carer's leave.

Paid parental leave provisions in awards will continue to apply to award-reliant employees, regardless of whether the Fair Pay and Conditions Standard or preserved award unpaid parental leave provisions apply.

The award matters that are provided for in specific federal or state/territory legislation are:

- long service leave;

[13] See Schedule 1, item 71, (new Part VI) of the Bill for awards.

- jury service;
- notice of termination; and
- superannuation (until 30 June 2008 – see below).

However, current award entitlements for these matters will continue to apply to existing and new award-reliant employees in order to provide certainty for employees and employers.

Again these matters will not form part of the Fair Pay and Conditions Standard for the purposes of agreement making.

Specific federal legislation covering minimum entitlements to notice of termination and superannuation will not be overridden by federal agreements.

Federal agreements can include provisions dealing with long service leave and jury service (including those provided under state or territory laws). Those provisions can be varied in the agreements. Where federal agreements are silent on long service leave or jury service, these matters will not be read into the agreements.

The content of an award should be sufficient to maintain minimum safety net entitlements while leaving to it other industrial instruments, such as collective agreements or Australian workplace agreements, to establish terms and conditions which can satisfy the needs of employers and employees at a particular enterprise or workplace.

Superannuation

Under the Bill superannuation is to be removed from the list of allowable award matters. As indicated award terms covering superannuation will be preserved in awards until 30 June 2008.

Nominating 30 June 2008 will allow the transitional arrangements to operate on a basis consistent with amendments made to the *Superannuation Guarantee (Administration) Act 1992* which will standardise earnings bases for all employees after 30 June 2008.

Superannuation will not be included in any new awards because Superannuation Guarantee legislation already comprehensively provides a minimum level of superannuation to a majority of wage and salary earners.

In 2004, with the passage of the *Superannuation Laws Amendment (2004 Measures No. 2) Act*, the Government announced that all employees would be treated in a consistent manner for superannuation guarantee purposes. From 1 July 2008, ordinary time earnings as defined in the superannuation guarantee legislation will be the earnings base for determining the superannuation guarantee liability of all employers. Accordingly, award-based earnings bases for superannuation purposes will cease to have effect from that date. The reforms are consistent with this legislation.

Role of the AIRC in relations to awards

The AIRC will only be able to make new awards or vary existing awards as part of the process of award rationalisation. The Award Review Taskforce will be required to make recommendations to Government on ways in which this process can be pursued and the AIRC will be tasked by the Government to undertake the rationalisation process after the Taskforce's recommendations have been made. The AIRC will also have a role in the award simplification process.

The AIRC will retain certain of its existing powers to vary awards (including to remove uncertainty or ambiguity, remove discriminatory provisions and to reflect changes in the names of organisations or persons bound by an award). The AIRC will not be able to vary or adjust preserved award terms in awards from the commencement of the reforms. The AIRC will be tasked with making new awards and varying existing awards as part of the processes of both award rationalisation and award simplification.

Awards may also be varied where the variation is considered to be essential to the maintenance of minimum safety net entitlements, and:

- is not inconsistent with Fair Pay Commission decisions;
- is not inconsistent with outcomes from the award rationalisation and simplification processes;
- maintains minimum safety net entitlements for award reliant employees; and
- promotes agreement making at the workplace level.

The AIRC will retain the power to revoke awards in limited circumstances.

The AIRC will also have an important role in determining, on application award coverage for award-free employers, employees and certain new organisations.

The AIRC will have a role in a transitional system based on the conciliation and arbitration power for a transitional period of five years. This will include resolving industrial disputes that are able to be resolved within the limits of the AIRC's powers and deciding applications from parties who wish to be released from the federal system. The AIRC may vary wage rates and other 'monetary' entitlements in transitional awards (i.e. incentive-based payments, piece rates and bonuses, annual leave loadings, allowances, overtime, casual and shift work loadings and penalty rates). However, during the transitional period, the AIRC will not be able to make new awards for businesses operating in the transitional system.

In summary, the AIRC will retain a role in federal awards in the following circumstances:

- rationalising the award system;
- making new awards and varying existing awards (as part of the process of award rationalisation);
- simplifying awards;
- orders to vary or revoke awards to remove discriminatory clauses;
- revoking awards that are obsolete or no longer operational;
- varying awards where it is essential to do so to maintain minimum safety net entitlements;
- varying awards to remove ambiguity or uncertainty or to resolve technical issues (i.e. change of name etc);
- determining applications by award-free employers and employees and certain new organisation to be bound by an award; and
- publishing awards and orders.

In relation to transitional federal awards (under conciliation and arbitration power), the AIRC will have a role, including:

- revoking transitional awards;
- varying specified matters in transitional awards; and
- making orders to enable parties to opt out of the transitional system (in specified circumstances).

Interaction between types of awards, other instruments and the Fair Pay and Conditions Standard

Interaction between awards and workplace agreements – section 100B

An award has no effect in relation to an employee while a workplace agreement operates in relation to the employee.

The effect of this rule is that the award is entirely displaced by a workplace agreement while the latter is in operation.

Workplace agreement is defined in subsection 4(1) of the WR Act to mean an Australian workplace agreement or a collective agreement.

Collective agreement is defined in subsection 4(1) of the WR Act to mean an employee collective agreement, a union collective agreement, an employer greenfields agreement, a union greenfields agreement or a multiple-business agreement.

Interaction between awards and workplace determinations – subsection 113F

A workplace determinations made under the new Division 8 of Part VC displaces an award, as the WR Act applies to a workplace determination as if it were a collective agreement in operation (subsection 113F).

Interaction between awards and pre-reform certified agreements – Schedule 14, clauses 5 and 15

While a pre-reform certified agreement is in operation, it prevails over an award to the extent of any inconsistency. This reflects the interaction rule that was in place when the agreement was made.

A pre-reform certified agreement is defined in clause 1 of Schedule 14 of the Bill to mean an agreement that was made under the WR Act before the commencement of the new legislation.

Interaction between awards and pre-reform AWAs – Schedule 14, clause 19

An award has no effect in relation to an employee while a pre-reform AWA operates in relation to the employee. This reflects the interaction rule that was in place when the agreement was made.

Pre-reform AWA is defined to mean an AWA that was made before the commencement of the reform legislation and which received the appropriate approval from the EA.

The effect of this rule is that the award is entirely displaced by an AWA while the latter is in operation.

Interaction between awards and section 170MX awards – Schedule 14, clause 25

A federal award has no effect in relation to an employee to the extent to which it is inconsistent with a section 170MX award that operates in relation to the employee.

Section 170MX award is defined to mean an award under subsection 170MX(3) of the WR Act.

Interaction between awards and preserved state agreements – Schedule 15, clause 7

An award has no effect in relation to an employee while the terms of a preserved state agreement operate in relation to the employee. This reflects the interaction rule that was in place when the agreement was made.

Under clause 3 of Schedule 15 of the Bill, if a term or condition of employment of a person or persons by an employer (as that term is defined in subsection 4AB(1) of the WR Act) was regulated under a state employment agreement immediately before reform commencement, a preserved state agreement is taken to come into operation on the reform commencement.

The effect of this rule is that the award is entirely displaced by a preserved state agreement while the latter is in operation.

Interaction between awards and notional agreement preserving state awards – Schedule 15, clause 33

Under clause 31 of Schedule 15 of the Bill, a notional agreement preserving a state award would come into operation on the commencement of the reforms where the terms and conditions of a persons employment was regulated under a state award or a state or territory industrial law and the person was employed by an employer who is joining the national system.

Notional agreements preserving a state award cease to operate after three years, but during this period, people who are bound by one of these agreements may become bound to an award. The award coverage for employees covered by notional agreements will be determined by the AIRC on the recommendation of the Award Review Taskforce.

Interaction between awards and protected award conditions – Part VB, Division 7, section 101B

Protected award conditions are taken to be included in workplace agreements and have effect in relation to an employee's employment, subject to any terms of the workplace agreement that expressly exclude or modify all or part of the term.

This rule applies if the employee's employment is subject to a workplace agreement and the protected award condition would have effect, but for the agreement, in relation to the employment of that person.

Award dispute resolution

Proposed changes

Awards will continue to have DSPs. The Bill sets out a model DSP which will be deemed to apply to all current awards, therefore replacing any existing award DSPs.

The model DSP sets out a staged approach to dispute resolution, encouraging parties to genuinely attempt to settle the matter between themselves before seeking third party assistance. In particular, it gives parties an express choice about whether to refer disputes to the AIRC or a private alternative dispute resolution (ADR) provider. Nevertheless, if the parties cannot reach agreement on who should resolve their disagreement then either may apply to have the AIRC help settle the matter. The rationale is to: firstly, ensure that both parties' consent is required for

a matter to be referred to a private ADR provider; and secondly, to prevent disputes becoming deadlocked over who will conduct the dispute settlement process.

These provisions will remain an allowable award matter. However, the AIRC will not be able to vary the model DSP. This is to prevent award respondents from applying to the AIRC to have it returned as the sole dispute resolution body under awards, contradicting the policy intent of the amendments.

The operation of the model DSP is discussed in greater detail in section 12.

Award Review Taskforce

The Government's 26 May 2005 statement, A New Workplace Relations System: A plan for a modern workplace, and the Prime Minister's statement to the Parliament on the same day, announced that a review of existing awards and award classification structures would be undertaken by a special taskforce and completed within 12 months.

There are currently over 4,000 different awards and more than 30,000 classification levels. This is complex and creates confusion. The review of these matters is intended to reduce complexity and enable greater focus at the workplace. The work of the Taskforce will not be a wage or benefit-cutting exercise.

Details about the Award Review Taskforce, including its Terms of Reference, were included in the WorkChoices – A New Workplace Relations System document (publicly released on 9 October 2005).

The Award Review Taskforce will undertake two projects:

- Examination of classification wage structures in all current federal awards, and state awards that are to be moved to the federal jurisdiction

    ⇒ The Taskforce will report to the Minister for Employment and Workplace Relations on its recommended strategy for rationalising existing wage and classification structures by end January 2006.

    ⇒ Following a decision by Government on that methodology, the Taskforce will undertake an initial rationalisation of wage and classification structures by the end of July 2006, for consideration by the Fair Pay Commission prior to its first wage adjustment.

- Examination of current federal awards with a view to recommending an approach to rationalising those awards.

    ⇒ As part of this exercise, the Taskforce will consider how award rationalisation can best be coordinated with award simplification.

    ⇒ The Taskforce will report to the Minister for Employment and Workplace Relations on its recommended strategy for the rationalisation of current federal awards by the end of January 2006.

⇒ Following a decision by Government on that methodology, the AIRC will be formally tasked with undertaking the award rationalisation project.

The Taskforce has been established with a Chair, who is supported by a reference group comprising people with employee and employer backgrounds. Mr Matthew O'Callaghan, Senior Deputy President of the AIRC, is to undertake the position of Chair. SDP O'Callaghan's appointment was publicly announced on Friday 28 October 2005. Reference group members are yet to be announced. A Secretariat to the Taskforce has been established within the Department of Employment and Workplace Relations.

11. TRANSMISSION OF BUSINESS[14]

The Bill protects the entitlements of employees in circumstances where an existing business is sold or otherwise passes to another, either in part or in its entirety.

The transmission of business provisions of the WR Act provide that an industrial instrument binds a new employer following a transmission, succession or assignment of a business, or a part of a business, from one employer to another.

The Bill does not contain a definition of transmission of business. This is because since the decisions of the High Court in PP Consultants v Finance Sector Union (2000)[15] and more recently in Health Services Union v Gribbles (2005)[16], the definition of transmission of business appears to be relatively settled.

The Bill will therefore protect the employee's entitlements where a business is transmitted from one employer to another. However, a transferring instrument will only bind a new employer in relation to transferred employees so that if no employees transfer with the business, the old employer's instrument will not bind the new employer.

Where employees do transfer, the Bill provides for the transfer of an instrument to a new employer upon transmission of business, so that a successor, assignee or transmittee to a business, or part thereof, will be bound by an award, agreement or APCS which was binding on the original business. The Bill will also provide that most transitional instruments transfer to a new employer. It is unnecessary for conditions contained in the Fair Pay and Conditions Standard to transfer, as the Fair Pay and Conditions Standard applies universally, regardless of the transmission of business provisions.

Transferred employees are those employees who were employed by the old employer at the time of transmission, or who were dismissed by the old employer within one month of transmission because of operational requirements, and then employed by the new employer, within two months of the transmission of business.

The two month period would prevent employers from avoiding the operation of the provisions by engaging employees of the old employer after the time of transmission.

The one month period will prevent the unfair result of employees losing the coverage of their industrial instrument in a transmission of business, because they were terminated prior to the transmission for genuine operational reasons.

In order to provide a better balance for the protection of employee entitlements and the existing arrangements of the new employer, the Bill will also provide that the transferring employee will have the protection of their instrument with the new employer, for a maximum period of 12 months (excluding an Australian Pay and Classification Scale which will transfer to bind a new employer indefinitely).

[14] See Schedule 1, item 71 (new Part VIAA) for Transmission of business.
[15] 2001 CLR 628
[16] HCA 9

The 12 month period gives the new employer and transferring employees the opportunity to negotiate, if necessary, more suitable arrangements for their employment relationship, while affording transferring employees the protection of their current instrument while these negotiations take place.

This Bill also ensures that during the 12 month period, a new employer will not be able to unilaterally terminate an agreement, even where it has reached its nominal expiry date. Therefore, a transferred agreement may only be terminated in this period, by approval of the relevant employees. Alternatively, the new employer and transferred employees could agree to replace the transferred instrument with a new workplace agreement. However, without the agreement of the transferred employees, the transferring instrument will continue to bind the new employer for the 12 month period.

The Bill also assists transferring employees when making future employment choices, by requiring the new employer to comply with notification requirements. Under the Bill, where an employee accepts employment with the new employer, in most cases the new employer will be required to provide them with information about their current and potential terms and conditions of employment. A civil penalty may be imposed by a Court where an employer fails to provide this information.

12. THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION[17]

The AIRC will have responsibility for simplifying awards, regulating industrial action, registered organisations and right of entry, and an ongoing role in relation to termination of employment.

Dispute resolution

Voluntary dispute resolution

The AIRC will continue to be able to resolve disputes and will have specific powers relevant to the exercise of that function.

The AIRC will provide voluntary dispute resolution services,. This will be achieved via:

- a model DSP to be set out in the Bill;
- changes to the AIRC's powers to resolve disputes arising under agreements; and
- reforms to the way that the AIRC seeks to settle disputes arising during negotiations for agreements.

The model DSP and the AIRC

The model DSP applies to disputes about the application of:

- awards;
- agreements lodged without their own DSP;
- the Fair Pay and Conditions Standard;
- workplace determinations; and
- legislated minimum entitlements to meal breaks and parental leave.

Where a dispute is governed by the model DSP, the parties are required to make genuine attempts to resolve the matter at the workplace level before engaging the services of a third party. However, if third party assistance is required, parties can choose to refer the matter to a range of ADR providers, including the AIRC. If the parties cannot reach agreement on who should conduct the dispute resolution process, then the dispute may be referred to the AIRC.

If a dispute is referred to the AIRC under the model DSP, it must refuse to provide assistance if the matter is not one to which the model DSP applies. The AIRC may also refuse an application for assistance if the parties have not made genuine attempts to resolve the matter or to agree on who should conduct ADR. These measures are intended to address the current situation whereby the AIRC may proceed to deal with a dispute even though it does not properly have the jurisdiction to deal with it.

When dealing with a dispute under the model DSP, the AIRC must take appropriate action to assist the parties to resolve the matter, including arranging conferences between the parties and their representatives. The AIRC can only exercise determinative powers where both parties agree. The AIRC cannot assert that it has these powers without the parties' consent. This

[17] See Schedule 1, item 168 of the Bill (new Part VIIA) on Dispute resolution.

underscores the voluntary nature of the dispute resolution and is consistent with the kind of powers typically exercised by private ADR providers.

The model DSP requires the AIRC to conduct dispute resolution in private and places limits around: the admissibility of evidence in related court action; and use and disclosure of information or documents. This is to encourage candour during dispute resolution and reflects safeguards common to ADR in other contexts.

Dispute resolution by the AIRC under agreements

Parties to an agreement may negotiate their preferred mechanism for handling disputes rather than follow the model DSP. It remains open to the parties to choose to appoint the AIRC as the dispute resolution provider under an agreed DSP in an agreement.

However, to ensure that employers and employees can control the manner in which disagreements are resolved, the AIRC will only be able to exercise those powers expressly conferred on it by the parties themselves. This addresses the current situation where some parties fail to specify how the AIRC should determine disputes only to discover that they are subject to processes and powers that they did not anticipate would apply.

The AIRC must refuse an application for dispute resolution if the matter is one that under the terms of the agreement, may not be settled by the AIRC or any conditions precedent in the agreement have not been complied with. This is to ensure that the AIRC only helps to resolve matters where it has jurisdiction to do so.

Also (and as is the case under the model DSP – see above), the Bill requires the AIRC to conduct dispute resolution in private and places limits around the use and disclosure of information or documents.

Dispute resolution by the AIRC during bargaining

The Bill allows the AIRC to provide voluntary dispute resolution for matters arising during negotiations for a collective agreement. This provision is similar to existing section 170NA(1) of the WR Act, but instead requires that <u>both</u> parties agree to the AIRC being involved. Also, instead of exercising its traditional powers of conciliation, the AIRC must take appropriate action to assist the parties to resolve the disputes, including by arranging conferences between the parties and their representatives. The AIRC may also make recommendations where both parties agree, but cannot:

- issue orders or make awards;
- make binding determinations;
- arbitrate;
- compel a person to do anything; or
- appoint a board of reference.

In addition, the AIRC may provide voluntary dispute resolution where a bargaining period has been:

- suspended to provide a ‘cooling off’ period; or
- terminated (either by the AIRC or by a Ministerial declaration to that effect) and the 21 day negotiation period (and any extension of that time granted by the AIRC) has not expired.

As is currently the case, the Bill for parties to agree to refer each of these matters to a private ADR provider instead.

The Bill also contains transitional arrangements which allow the AIRC (for a period of three months) to continue dealing with matters arising during negotiations for a certified agreement:

- that arose before the commencement of the Bill under section 170NA of the WR Act; and
- where the AIRC has already begun to exercise its conciliation powers in relation to the matter.

This provides certainty to parties who have already engaged the AIRC to resolve a dispute under the provisions of the current legislation.

AIRC's compulsory powers

The AIRC will retain compulsory powers for:

- disagreements about trade union right of entry;
- applications for unfair dismissal and unlawful termination (noting that the AIRC's jurisdiction with respect to unfair dismissal will change);
- applications for orders relating to unprotected action;
- where a bargaining period has been terminated; and
- awards.

Managing private ADR

The Bill enshrines a choice between referring a matter to a private ADR provider or the AIRC for disputes:

- about the application of awards, agreements, the Fair Pay and Conditions Standard, workplace determinations and legislated minimum entitlements to meal breaks and parental leave;
- arising during negotiations for a collective agreement;
- where a bargaining period has been suspended to provide a 'cooling off' period; and
- where a bargaining period has been terminated in the public interest and before the 21 day negotiation period (and any extension of that period) has expired.

The Bill does not regulate the type of private ADR practitioners that may resolve disputes arising under the legislation. It also provides a non-exhaustive definition of ADR so that parties can agree to use dispute settlement mechanisms beyond those specified in the Bill.

Under the proposed legislation, ADR providers are required to conduct the proceedings in private and must abide by provisions restricting the use and disclosure of information and documents. Also, the Bill restricts the admissibility of anything said or done during ADR in related court action.

Parties may be represented during private ADR where the provider believes that it is appropriate (the consent of the other party is not required). However, if an agreement makes provision for a party to be represented, then the provider must allow that person to be represented in accordance with the agreement. Also, private providers can set reasonable limits around representatives' conduct.

Register of ADR providers

To support the choice between referring disputes to the AIRC or private ADR providers, the Government will establish a register of practitioners. The register will be set up administratively rather than via legislation. Consequently, it is not referred to in the Bill.

Policy rationale

The satisfactory resolution of workplace disputes is not simply achieved by providing a legislative basis for dealing with grievances. It also requires giving people control over the dispute resolution process itself.

However, Australia's system of compulsory conciliation and arbitration gives parties little say over how, but also who resolves their disagreements. Moreover, by allowing the jurisdiction of the AIRC to be invoked even for minor, localised matters, the system fails to encourage parties to resolve their differences at the workplace level. It also perpetuates an institutional reliance on more formal, interventionist models of dispute resolution.

This explains why the Bill (for certain disputes) requires parties to make genuine attempts to resolve the issue at the workplace level before engaging a third party of their own choosing. Furthermore, by limiting the use of interventionist dispute resolution methods by the AIRC to where both parties agree, the Bill recognises that settlements can be more durable where they are the product of consensual processes.

However, the Government considers that there are some disputes where special public interest concerns mean that is appropriate for the AIRC to continue exercising compulsory powers of conciliation and arbitration. These include matters relating to unprotected industrial action as well as serious industrial disputes threatening the public interest.

The AIRC's other roles in the new workplace relations system

Other roles of the AIRC in the new system

While the future role of the AIRC to be a dispute resolution body with limited arbitral powers, the AIRC will continue to have a role in many areas of the legislation.

Proposed changes

In the Bill, the AIRC will retain a role in areas of the legislation including:

- Regulating industrial action including:
  - ⇒ receiving and processing notifications of bargaining periods;
  - ⇒ ordering and overseeing secret ballots;
  - ⇒ suspending or terminating a bargaining period;
  - ⇒ making workplace determinations where a bargaining period has been terminated in the public interest; and
  - ⇒ issuing orders to prevent or stop unprotected industrial action.[18]

[18] See Schedule 1, Item 71 of the Bill (new Subsections 106 – 112A)

- Making workplace determinations:
  - ⇒ A determination can be made where parties are unable to reach agreement within a certain period of time; and bargaining has been suspended in the public interest as industrial action is threatening to endanger life, personal safety, health or welfare of the population, or is likely to cause significant economic damage, or where a declaration has been issued under the essential services provisions.[19]

- Regulating right of entry including:
  - ⇒ revoking or suspending individual permits;
  - ⇒ revoking or imposing conditions on permits for unions and officials; and
  - ⇒ resolving disputes over right of entry.[20]

- Federal awards:
  - ⇒ federal award variations in regard to allowable award matters to remove uncertainty or ambiguity and where it is considered essential to maintain safety net conditions;
  - ⇒ orders to vary or set aside awards to remove discriminatory clauses;
  - ⇒ rationalise the award system (following Taskforce recommendations) – this may include making new awards or varying existing awards, as well as terminating awards;
  - ⇒ termination of awards that are obsolete or no longer operational;
  - ⇒ determining parties who are bound by an award including parties previously in state jurisdictions; and
  - ⇒ publishing awards and orders.[21]

- Transitional federal awards (under conciliation and arbitration power) including:
  - ⇒ setting aside or revoking transitional awards;
  - ⇒ making orders to enable parties to opt out of transitional awards (in limited circumstances); and
  - ⇒ vary transitional awards (having regard to the list of allowable matters that are able to be varied).[22]

- Unfair dismissal in accordance with the new legislation and conciliation of unlawful termination applications.[23]

- Making orders with respect to equal remuneration in respect of agreements.[24]

- Voluntary settlement of disputes arising during negotiations for a collective agreement.
  - ⇒ The AIRC will retain its powers to resolve disputes arising under agreements. Where the agreement itself confers this function, the AIRC will only have the powers to resolve the dispute that are expressly set out in the agreement . Where the AIRC is acting under the model dispute resolution process, it will have the powers set out in the model dispute resolution Part of the Bill. The AIRC will also retain its power to assist parties to resolve matters arising during the negotiation of an agreement.[25]

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[19] See Schedule 1, Item 71 of the Bill (new Subsections 113-114B).
[20] See Schedule 1, Item 193 of the Bill (new Part IX, Subsections 197-238).
[21] See Schedule 1, Item 71 of the Bill (new Part Part VI, Subsections 113-114B).
[22] See Schedules 13 – 15, Item 359, Subsections 1-108 of the Bill.
[23] This power is retained from the current WR Act.
[24] This power is retained from the current WR Act.
[25] See Schedule 1, Item 71, of the Bill (new subsection 170G and see Divisions 4 and 6 of Part VIIA).

13. PROTECTIONS FOR EMPLOYEES[26]

Protections for vulnerable workers will be maintained, including protection against discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin. Specific provisions will also relate to persons from a non-English speaking background, young people and to contract outworkers in the Victorian textile, clothing and footwear industries.

Protecting vulnerable workers

To protect vulnerable workers, the Bill contains provisions which guide the AIRC, the EA and the Fair Pay Commission to take account of the needs of certain vulnerable groups, and to prevent and eliminate discrimination in the workplace.

The Bill also contains measures designed to protect vulnerable workers from exploitation in certain areas (for example, agreement making, and termination of employment) and ensures that employers comply with provisions through enforcement mechanisms.

The protection of vulnerable workers will remain as a key object in the legislation. This is reflected in the principle object of the Bill, which contains a commitment to balancing work and family responsibilities, respecting diversity and preventing and eliminating discrimination. The Bill contains protections for women, persons from a non-English speaking background, young people and contract outworkers in the Victorian textile footwear and clothing industries will be directly provided for.

The AIRC will retain its specific powers to resolve disputes arising under awards or agreements where those functions are expressly conferred on it by the parties. In addition, individual employees will continue to be able to make complaints of discrimination or harassment to the Human Rights and Equal Opportunity Commission (HREOC) based on their age, race, colour, descent or national or ethnic origin, sex, pregnancy, marital status or disability. However, where an individual takes a complaint to HREOC, he or she would not also be able to take the same dispute to the AIRC, and vice versa. This is to ensure that there is no "cherry-picking" of jurisdictions.

As part of the simplified agreement process, explanation of the contents of agreements will be provided to employees by the EA. This service will be free and available to all employees, and will be relevant to employees' specific needs, including, for example, the circumstances of women, persons from a non-English speaking background and young people.

The EA will also undertake promotional, educational and information activities which will encourage parties in agreement making to take into account the needs of vulnerable workers and the need to prevent and eliminate discrimination at the workplace.

[26] See Schedule 1, item 20, new section 44B for protections for vulnerable workers in relation to the AIRC; Schedule 1, item 43, new section 83BB for protections for vulnerable workers in relation to the EA; and Schedule 1, item 71, new section 90ZR for protections for vulnerable workers in relation to the Fair Pay Commission.

In addition, there will be a significant increase in the education and compliance resources of the Office of Workplace Services to ensure that employee and employer rights and obligations are protected in the simplified agreement making environment.

Employees will continue to have the right to be represented by a union, and to have a bargaining agent of their choice involved in negotiations for Australian Workplace Agreements (AWAs).

Unlawful termination

The existing unlawful termination provisions of the WR Act will remain, ensuring that it will be prohibited to dismiss an employee on a number of discriminatory grounds, including:

- temporary absence from work because of illness or injury;
- trade union membership or participation in trade union activities;
- non-membership of a trade union;
- seeking office as, or acting or having acted in the capacity of, a representative of employees;
- the filing of a complaint, or the participation in proceedings, against an employer;
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- refusing to negotiate, make, sign, extend, vary or terminate an AWA;
- absence from work during maternity leave or other parental leave; or
- temporary absence from work because of the carrying out of a voluntary emergency management activity.

The AIRC will continue to attempt to conciliate applications for unlawful termination, including whether proper notice has been given to an employee whose employment has been terminated.

To protect workers who consider they have been unlawfully terminated, the Australian Government will provide eligible employees with up to $4,000 worth of independent legal advice to determine whether their claim for unlawful termination has merit and should proceed to court. To complement this support, the Government will also provide $5 million for a 'best practice' education and training programme on fair and proper employment termination practices to increase employers' understanding of, and compliance with, the reformed unfair and unlawful termination of employment provisions.

Women

Women will continue to be able to access remedies in relation to pay discrimination. The AIRC will continue to be able to make orders to ensure equal remuneration for men and women workers for work of equal value in agreements, without discrimination based on sex. In relation to remaining award matters, the AIRC will also be able to consider and address equal remuneration (for example, penalty rates and overtime payments).

The revised equal remuneration provisions under the Bill will provide that an employer cannot dismiss or otherwise cause detriment to any of his or her employees as a result of an equal remuneration proceeding. In addition, the Fair Pay Commission will consider equal remuneration in the setting of wages.

The Fair Pay and Conditions Standard will set in legislation the following family friendly leave arrangements:

- Ten days of paid personal/carer's leave per year (except for casual employees), with pro-rata arrangements for part-time employees. Up to ten days of paid personal/carer's leave in any given year can be used as carer's leave; a further two days of unpaid carer's leave per occasion will be available in the event of an unexpected emergency for casual employees or those who have exhausted their paid personal/carer's leave entitlement; and two days of paid compassionate leave per occasion (except for casual employees) to visit a seriously ill or dying relative or attend a funeral;
- Up to 52 weeks of unpaid parental leave at the time of the birth or adoption of a child for full-time, part-time and regular casual employees with 12 months of service with the same employer; and
- Hours of work set at a maximum of 38 ordinary hours per week. An employer may require an employee to work reasonable additional hours, but an employee can refuse to work reasonable additional hours in circumstances where it would be unreasonable having regard to, among other factors, the employee's family responsibilities.

Young workers

Protections will be introduced for minors (under 18 years of age) when signing AWAs. There will be a requirement for a parent, guardian, or an 'appropriate adult' (ie parent or guardian, but not an employer) to give consent for a person under 18 years to sign an agreement. This is in recognition of the fact that younger employees are less likely to have bargaining skills or experience in negotiating their own terms and conditions of employment. This protection will also compel employers to be accountable for the wages and conditions they offer younger employees through AWAs.

Existing provisions under the WR Act which deal with junior rates will remain under the reformed system. Minimum wages for junior employees will be locked in at the level set after the increase from the 2005 Safety Net Review and will not fall below this level.

People with disabilities

The same will apply to existing minimum wages for employees with disabilities – these minimum wages will be locked in at, and will not fall below, the 2005 Safety Net Review level. Where awards currently include appropriate pro-rata wages for employees with disabilities who are unable to earn the full minimum wage for their job, those wages will be protected by the Government's guarantee.

In addition, in those areas where there are not currently appropriate pro-rata wages for employees with disabilities who are unable to earn the full minimum wage for their job, the Fair Pay Commission will be empowered to enhance employment opportunities by making pro-rata wages, such as the supported wage system, more widely available for these employees.

Textile, clothing and footwear (TCF) industry outworkers

Under the existing WR Act, awards are allowed to contain provisions covering the pay and conditions of outworkers to the extent necessary to ensure their overall pay and conditions are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant award(s) for employees who perform the same kind of work at an employer's business or commercial premises.

Under the Bill, the pay of outworkers will be removed from awards and set and reviewed by the Fair Pay Commission. The Fair Pay and Conditions Standard will apply to outworkers in the

same way as to other employees. However, given the special position of outworkers, where conditions of employment applying to outworkers are not covered by the Fair Pay and Conditions Standard, they would continue to be allowable in awards and agreements.

This means that some unique features in awards relating to outworkers such as provisions governing the relationship between parties in the contracting or production chain, detailed record-keeping requirements, and union inspection mechanisms, would continue to be regulated in awards. The relevant award provisions will also be read into all agreements covering outworkers to ensure that outworker agreements meet the 'minimum' standards provided by the award provisions.

Equal remuneration

The AIRC will continue to be able to make orders to ensure equal remuneration for men and women workers for work of equal value , without discrimination based on sex. The AIRC will continue to be under an obligation to ensure that remaining allowable award maters (eg penalty rates and overtime payments) are non-discriminatory. Finally, the AIRC will retain the ability to vary an agreement or award to remove discrimination based on sex.

As well as providing specific remedies for discrimination, the Bill encourages women to take advantage of the flexibilities which can be offered at the workplace level. The flexibility offered by the Government's reforms will play a crucial role in the creation of high productivity and high pay workplaces which provides the greatest opportunity for women to achieve their personal preferences.

Proposed changes

As noted above, women will continue to be able to access remedies in relation to pay discrimination.

More specifically, the Bill requires the AIRC to attempt to resolve, by conciliation/mediation, an application for an equal remuneration order, before proceeding to determine whether to grant such an order. Alternatively, the AIRC may refer the matter to some other independent party for mediation at the request or consent of the parties prior to the AIRC determining whether to make an order. This is consistent with the Governments' focus on encouraging the parties to reach mutually beneficial solutions at the workplace level.

Currently, employees have a choice as to whether to pursue an equal remuneration order in the state or Federal jurisdiction. The constitutional coverage is being expanded so that the provisions will cover the field with respect to employees who come within the federal system. This is consistent with the shift to a unified workplace relations system.

In addition, the revised equal remuneration provisions will explicitly state that an employer can not dismiss or otherwise cause detriment to any of their employees as a result of an equal remuneration proceeding.

In addition, the Fair Pay Commission is to apply the principle that men and women should receive equal remuneration for work of equal value. In this way, the Fair Pay Commission will have responsibility for giving effect to equal remuneration in the setting of minimum wages.

The amendment preventing applications for the same remedies in relation to the same matter, being made to both the AIRC and HREOC is designed to prevent employers from being faced with multiple claims in different forums in relation to a single alleged instance of inequality of remuneration. However, the Bill makes it clear that an employee is still able to go to HREOC to claim compensation for unequal remuneration that occurred in the past, and also go to the AIRC for prospective orders to ensure equal remuneration is provided in the future.

HREOC will retain its current responsibilities in relation to equal remuneration including discrimination and harassment. In this way, the provisions promoting equal pay will complement the existing provisions of the Sex Discrimination Act. Complaints relating to federal awards and agreements will be referred to the AIRC for action.

14. ASSISTANCE WITH LEGAL ADVICE ON UNLAWFUL TERMINATION

Protection against unlawful termination

The Bill does not change the current provisions of the WR Act regarding unlawful termination. Irrespective of business size or legal status of employer, an employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons:

- temporary absence from work because of illness or injury within the meaning of the regulations;
- trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;
- non-membership of a trade union;
- seeking office as, or acting or having acted in the capacity of, a representative of employees;
- the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- refusing to negotiate in connection with, make, sign, extend, vary or terminate an AWA;
- absence from work during maternity leave or other parental leave;
- temporary absence from work because of the carrying out of a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.

As is currently the case, employees who believe their employment has been terminated unlawfully can make an application to the AIRC on one or more grounds specified in the Bill. The AIRC has to attempt to conciliate and if that is unsuccessful must produce a certificate on the merits of the application. At that point the employee will have to chose whether to proceed to hearing in the Federal court.

The Government will introduce a financial assistance scheme to provide legal advice to employees who believe their employment may have been terminated unlawfully and will fund a programme to educate and train employers on their legal obligations in this regard. To be assessed as eligible for assistance, an applicant must have received a certificate from the AIRC indicating that the case has merit. In addition, applications will be assessed against a 'financial need' criterion. The income threshold level to determine 'financial need' will be set at average weekly total earnings for adult full-time non-managerial employees.

The scheme will not be part of legislation. However, one legislative change will be required - (which will be going through as an amendment to the Bill) which relates to extending the period to elect to proceed to hearing to 28 days (for unlawful terminations only - not unfair dismissals) to allow sufficient time for legal advice to be obtained.

Applications for discrimination in the recruitment process and during employment may still be made to HREOC under the *Racial Discrimination Act 1975*, the *Disability Discrimination Act 1992*, the *Age Discrimination Act 2004*, and the *Sex Discrimination Act 1984*. The Disability and Sex Discrimination Acts also make it unlawful to subject an employee to 'any other detriment' in employment. Applications cannot be made to both the AIRC and HREOC – applicants must choose one jurisdiction.

15. VICTORIA[27]

Because Victoria led the way in referring its workplace relations powers to the Australian Government, employees in Victoria, regardless of whether they are employed by a constitutional corporation or not, will continue to be part of the national system.

Unlike other states, Victoria has referred powers with respect to workplace relations to the Commonwealth. Because of this, all employees in Victoria subject to the terms of the referral will continue to be covered by the federal system regardless of whether they are employed by constitutional corporations or not. If other states were to refer their powers, then like Victoria now, their employees would be able to make agreements, access termination of employment remedies and have coverage under other parts of the WR Act, no matter what the status of their employers.

Employees of constitutional corporations in Victoria will be subject to the same minimum terms and conditions as employees of corporations elsewhere in Australia. The minimum conditions in Schedule 1A will be replaced by the Fair Pay and Conditions Standard.

At the same time, unique features of the system will be retained such as continued provision for Victorian employment agreements made under the old Victorian system.

[27] See Schedule 1, item 240 of the Bill (new Part XV) for Victoria.

16. COMPLIANCE[28]

The compliance regime in the WR Act will be extended to cover the Fair Pay and Conditions Standard, individual agreement making and state awards and agreements that are to brought into the federal system. Unions will still be able to commence enforcement proceedings in the new system.

The role of the OWS in compliance

The role of the OWS will be expanded so that all enforcement functions under the WR Act be undertaken by the one agency. This includes compliance with agreement making – both individual and collective – as well as Freedom of Association. The enforcement activities currently undertaken by the EA will be transferred to the OWS, so that the OWS will become a "one-stop-shop" for compliance.

The justification for having the compliance functions of the EA transferred to the OWS is to provide further protection to employees across the board by having a single agency to work with. OWS inspectors will work as advisors to businesses and employees informing them of their options, rights and obligations.

The OWS will also undertake an increased number of targeted education and compliance campaigns to protect the rights of workers and to inform employers of their obligations.

The role of unions in enforcement

A unions' capacity to commence proceedings under the WR Act will generally be aligned with the right of a union to enter a premises to investigate breaches of industrial instruments (for example, awards and collective agreements).

A union could also have an enforcement role in relation to AWAs where the employee party to the AWA provides a written request and the union has a member working for the employer

Unions will also be able to enforce the Fair Pay and Conditions Standard if they have a member working for the relevant employer and the breach affects the union member or work of the union member.

[28] See Schedule 1, items 49 – 70 of the Bill (new Part V) on compliance and the OWS.

17. TRANSITIONAL ARRANGEMENTS[29]

Constitutional corporations currently in the state system moving in to the federal system

There will be comprehensive transitional arrangements for employees of employers who are currently in the state systems but will be moving to the federal system.

Employers who are constitutional corporations and their employees who are entering the national system for the first time from the state systems will have a maximum three year transitional period.

Under the Bill existing wages and conditions in former state awards and agreements will be protected. Their current state agreements and awards will become transitional federal agreements. The terms and conditions of their current state awards will not change unless the conditions in the Fair Pay and Conditions Standard are more generous. If this is the case the more generous conditions will apply.

As a result of the legislation, all employees of constitutional corporations currently covered by state industrial relations systems will move into the federal system. The terms of former state awards and agreements will become enforceable under the federal system as transitional agreements. Employees who are currently not covered by a state industrial instrument but who are employed by a constitutional corporation will be subject to the Fair Pay and Conditions Standard.

Former state agreements will operate under federal legislation in a similar way to federal agreements. They will keep their nominal expiry date, and will continue to operate until terminated or replaced by a new agreement.

Some content in former state agreements, such as union preference clauses, that is currently prohibited, or inhibits the ability of the parties to bargain, will be prohibited.

Constitutional corporations that have employees with terms and conditions covered by a state award will have their awards preserved as notional agreements preserving state awards between the relevant employers and employees. However, where employees on former state awards have conditions less than the Fair Pay and Conditions Standard, the more generous conditions will apply. This will protect the existing terms and conditions of employment of employees currently covered by state awards other than prohibited content.

These transitional agreements will cease to operate after three years, but the persons bound by the notional agreements may become bound by an award. The award coverage for employees covered by notional agreements will be determined by the AIRC on the recommendation of the Award Review Taskforce.

[29] See Schedules 2 and 4 of the Bill for transitional arrangements.

Transition for federal award and agreement covered employees of non-constitutional corporations

The Government will put in place comprehensive transitional arrangements for employers and employees who are currently part of the federal system, but cannot be part of the new national system.

Under the Bill there will be a separate transitional system for employers and employees currently in the federal system where the employer will not be covered by the new federal system. This transitional system will operate for a period of five years and be based on the conciliation and arbitration power.

Current federal collective agreements in settlement of an industrial dispute will continue to operate after commencement of the new system. These agreements will run for up to five years. Non-constitutional corporations that are part of the transitional system will not be able to negotiate new agreements in the new national system.

At the end of the transitional period transitional agreements will cease to operate, and any unincorporated business remaining in the federal system will automatically revert to the relevant state industrial relations system.

Awards that bind non-constitutional corporations will become 'transitional' awards at the commencement of the new system. The transitional awards will apply only to non-constitutional corporations covered by awards in the current federal system. At the end of the transitional period transitional awards covering will cease to operate, and any unincorporated business remaining in the federal system will automatically revert to the relevant state industrial relations system.

Transition for state registered organisations

Currently both state and federal registered organisations represent employers and employees in their respective systems. Many organisations are bound to industrial instruments within the state systems. As a result of the Bill many employers, employees and industrial instruments will be transferring into the national system.

The Bill provides transitional arrangements to allow state registered organisations of employers and employees to retain their coverage of members and application to industrial instruments.

Under the Bill a new Schedule 17 to the WR Act entitled 'Transitionally registered associations' will allow state registered employer and employee associations which have rights under state industrial laws to represent members moving into the federal system, to gain transitional registration status under the WR Act and thereby retain their right to represent those members.

A transitionally registered association would have three years to become fully registered under the federal legislation (Schedule 1B (section 6) of the WR Act). During that transitional period, the associations activities would continue to be governed by its state registration regime.

However, it would be given the same rights and obligations as a registered organisation has under the WR Act. For example, it would be able to enter into collective agreements, apply for

right of entry permits, and engage in protected industrial action.

The Schedule would set out a scheme for transitional registration, including the criteria for registration and cancellation of transitional registration provisions. It would also provide that regulations may be made that would affect the way in which the registration provisions in of Schedule 1B would apply to transitionally registered associations seeking full federal registration. It is intended that those regulations would make the 'conveniently belong rule' not applicable to transitional registered associations applying for full registration. It is also intended that they would provide that transitionally registered associations which are substantially or effectively the same to an organisation (or part of an organisation) already registered under Schedule 1B would not be entitled to fully register.

Regulations would also be able to be made which would require the AIRC to take appropriate account of any state demarcation orders and whether those demarcations should be maintained in the federal system (section 4 of the WR Act).

The Bill's transitional arrangements will guarantee the continued industrial representation of employee and employer members of state-registered organisations which, under the Bill, would move into the federal system. It will also guarantee, for a minimum of three years, the continued existence of state-registered organisations with such members.

It would achieve this:

- by allowing state-registered associations to transitionally register for three years; and
- by making the 'conveniently belong rule' not apply to transitionally-registered associations applying for full registration.

If the 'conveniently belong' rule did apply on application for full registration, a significant proportion of transitionally-registered associations would not be able to fully register and, as a result, would lose their membership and potentially their existence. As such, the Bill would operate to preserve the existing arrangements (to the extent desired by organisations and their members) and prevent the monopolisation of industrial representation at the federal level. Allowing state-registered associations which are identical to a federal organisation (or part of a federal organisation) to transitionally register, but not fully register, would ensure seamlessness in terms of industrial representation on the transition to the unified system but prevent, in effect, an organisation being registered twice in the federal system and the various difficulties associated with that.

The Bill will also facilitate the maintenance of state demarcation orders in the federal system and thereby preserve industrial peace at sites governed by those orders.