

2004-2005

The Parliament of the  
Commonwealth of Australia

THE SENATE

## **Workplace Relations Amendment (Work Choices) Bill 2005**

*(Amendments to be moved by Senator Murray on behalf of the Australian Democrats in committee of the whole)*

- (1) Schedule 1, item 1, page 4 (line 7) to page 5 (line 28), omit section 3, substitute:

### **3 Principal object**

The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

- (a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and
- (b) establishing and maintaining a simplified national system of workplace relations; and
- (c) providing an effective and fair safety net of minimum wages and conditions for those whose employment is regulated by this Act; and
- (d) providing an effective and fair safety net for agreement-making while ensuring that the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level; and
- (e) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances; and
- (f) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them; and
- (g) ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of:
  - (i) employee entitlements; and
  - (ii) the rights and obligations of employers and employees, and their organisations; and

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- (h) providing employees and employers with mechanisms to assist them to resolve disputes between them by conciliation and, where appropriate and within specified limits, by arbitration; and
  - (i) balancing the right to take industrial action for the purposes of collective bargaining at the workplace level with the need to protect the public interest; and
  - (j) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and
  - (k) protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment; and
  - (l) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and
  - (m) respecting and valuing the diversity of the work force by helping to prevent and eliminate 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; and
  - (n) assisting in giving effect to Australia's international obligations in relation to labour standards.

***[Objects of the Act]***

R(2A) Schedule 1 item 9, page 25 (after line 28), insert:

- (n) any application filed or proceedings otherwise commenced and not finally determined prior to the commencement of this Act;
- (o) any cause of action which existed prior to the commencement of this Act.

***[topic]***

(2) Schedule 1, item 10, page 26 (lines 1 to 4), omit subsection 7C(4).

***[executive override state law]***

(3) Schedule 1, item 10, page 28 (after line 10), after paragraph 7H(a), insert:

- (aa) monitor and investigate pay equity and publish annually in relation to wage differentials between men and women in relation to work of equal and comparable value;
- (ab) take into account outcomes of (aa) before setting FMW and AFPCSs;
- (ac) in accordance with 90AA, review any decision in relation to the FMW or APCSs if gender related undervaluation has been identified as a result of a sex discrimination complaint to the Human Rights and Equal Opportunity Commission;
- (ad) provide simplified proceedings for the conduct of matters arising under paragraph (ac) which comply with sections 44F and 44G;

***[monitor complaints of pay inequity]***

(4) Schedule 1, item 10, page 28 (line 20), after “conduct“, insert “annual“.

***[annual wage reviews]***

R(5) Schedule 1, item 10, page 29 (lines 1 to 12), omit section 7J, substitute:

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## 7J AFPC's wage-setting parameters

- (1) The objective of the AFPC in performing its wage-setting function is to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained while promoting economic prosperity of the people of Australia, having regard to the following:
  - (a) the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community;
  - (b) the capacity of the unemployed and low paid to obtain and remain in employment;
  - (c) economic factors, including levels of productivity and inflation, desirability of attaining a high level of employment, employment and competitiveness across the economy;
  - (d) relevant taxation and government transfer payments;
  - (e) the needs of the low paid.
- (2) In performing its functions under this Part, the AFPC must have regard to the following:
  - (a) the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed;
  - (b) the need to support training arrangements through appropriate trainee wage provisions;
  - (c) the need, using a case-by-case approach, to protect the competitive position of young people in the labour market, to promote youth employment, youth skills and community standards and to assist in reducing youth unemployment, through appropriate wage provisions, including, where appropriate, junior wage provisions, taking into account:
    - (i) the extent of labour market disadvantage faced by young workers; and
    - (ii) the work value of young workers at different ages; and
    - (iii) the promotion of skills development and training of young workers to reduce their labour market disadvantages; and
    - (iv) the desirability of minimising discrimination on the basis of age in wage rates only to the extent necessary to further these objectives; and
    - (v) the structural efficiency principle; and
    - (vi) that 18 years of age is considered an adult;
  - (d) the need to provide a supported wage system for people with disabilities;
  - (e) the need to apply the principle of equal pay for work of equal value;
  - (f) the need to prevent and eliminate discrimination because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
- (3) For the purposes of paragraph (2)(f), trainee wage arrangements are not to be treated as constituting discrimination by reason of age if:
  - (a) they apply (whether directly or otherwise) the wage criteria set out in the award providing for the national training wage or wage criteria of that kind; or
  - (b) they contain different rates of pay for adult and non-adult employees participating in an apprenticeship, cadetship or other similar work-based training arrangement.

**[AFPC's wage-setting parameters]**

- (6) Schedule 1, item 10, page 29 (line 15), before "the" insert, "subject to paragraph 7I(a),".

**[annual wage reviews]**

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- (7) Schedule 1, item 10, page 29 (after line 25), after subsection 7K(2), insert:
- (2A) Despite subsection (2), the AFPC must consult with the Human Rights and Equal Opportunity Commission before introducing or changing an APCS.  
**[consultation with HREOC]**
- (8) Schedule 1, item 10, page 29 (lines 26 and 27), omit subsection 7K(3).  
**[executive prescribe process used by AFPC]**
- (9) Schedule 1, item 10, page 30 (lines 25 and 26), omit subsection 7N(3).  
**[executive prescribe procedures to be used by AFPC]**
- (10) Schedule 1, item 10, page 31 (line 4), at the end of subsection 7P(1), add “on receipt of a recommendation based on merit received from the Minister in accordance with section 7PA”.  
**[merit selection]**
- (11) Schedule 1, item 10, page 31 (after line 9), after section 7P, insert:

#### **7PA Procedures for merit selection of appointments under this Subdivision**

- (1) The Minister must by writing determine a code of practice for selecting a person to be appointed by the Commonwealth to a position under this Subdivision, that sets out general principles on which the selections are to be made, including but not limited to:
- (a) merit; and
  - (b) independent scrutiny of appointments; and
  - (c) probity; and
  - (d) openness and transparency.
- (2) After determining a code of practice under subsection (1), the Minister must publish the code in the *Gazette*.
- (3) Not later than every fifth anniversary after a code of practice has been determined, the Minister must review the code.
- (4) In reviewing a code of practice, the Minister must invite the public to comment on the code.
- (5) A code of practice determined under subsection (1) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.  
**[merit selection]**
- (12) Schedule 1, item 10, page 34 (line 17), at the end of subsection 7Y(1), add “on receipt of a recommendation based on merit received from the Minister in accordance with section 7YA”.  
**[merit selection]**
- (13) Schedule 1, item 10, page 34 (after line 26), after section 7Y, insert:

#### **7YA Procedures for merit selection of appointments under this Subdivision**

- (1) The Minister must by writing determine a code of practice for selecting a person to be appointed by the Commonwealth to a position under this Subdivision, that sets out general principles on which the selections are to be made, including but not limited to:
- (a) merit; and
  - (b) independent scrutiny of appointments; and

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- (c) probity; and
  - (d) openness and transparency.
- (2) After determining a code of practice under subsection (1), the Minister must publish the code in the *Gazette*.
  - (3) Not later than every fifth anniversary after a code of practice has been determined, the Minister must review the code.
  - (4) In reviewing a code of practice, the Minister must invite the public to comment on the code.
  - (5) A code of practice determined under subsection (1) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

**[merit selection]**

- (14) Schedule 1, item 20, page 44 (line 17), after “economy“, insert “and society“.

**[public interest]**

- (15) Schedule 1, item 20, page 44 (line 27), after “economy“, insert “and society“.

**[public interest]**

- R(17A) Schedule 1, item 20, page 45 (line 5), omit “without discrimination based on sex“.

**[sex discrimination]**

- (17) Schedule 1, page 57 (after line 10), after item 42, insert:

**42A At the end of section 83BA**

Add, “appointed in accordance with the merit selection process set out in section 83BAA”.

**[merit selection]**

- (18) Schedule 1, page 57 (after line 10), after item 42, insert:

**42B After section 83BA**

Insert:

**83BAA Procedures for merit selection of the Employment Advocate**

- (1) The Minister must by writing determine a code of practice for selecting the Employment Advocate, that sets out general principles on which the selection is to be made, including but not limited to:
  - (a) merit; and
  - (b) independent scrutiny of appointments; and
  - (c) probity; and
  - (d) openness and transparency.
- (2) After determining a code of practice under subsection (1), the Minister must publish the code in the *Gazette*.
- (3) Not later than every fifth anniversary after a code of practice has been determined, the Minister must review the code.
- (4) In reviewing a code of practice, the Minister must invite the public to comment on the code.

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- (5) A code of practice determined under subsection (1) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

**[merit selection]**

- (19) Schedule 1, item 43, page 57 (after line 31), paragraph 83BB(1)(h), insert:

- (ha) investigate, research and regularly publish the results of a representative annual survey of both collective agreements and AWAs for the purpose of determining wage differentials between men and women carrying out work of equal and comparable value;

**[employment advocate function—publish pay equity outcomes]**

- R(19A) Schedule 1, item 43, page 58 (after line 26), insert:

- (c) the principle that men and women should receive equal remuneration for work of equal value.

**[equal remuneration for work of equal value]**

- R(20A) Schedule 1, item 71, page 69 (after line 8), insert:

**90AA HREOC to investigate allegations of discrimination**

In exercising any of its powers under this division, the AFPC is to have regard to any relevant recommendations made by HREOC with respect to discrimination, in accordance with powers conferred upon them under the *Human Rights and Equal Opportunity Act 1986*.

**[HREOC recommendations]**

- R(20B) Schedule 1, item 71, page 70 (lines 23 to 26), omit definition of *employee with a disability*, substitute:

*employee with a disability* is as defined by the *Disability Discrimination Act 1992*.

- R(20C) Schedule 1, item 71, page 70 (line 30), omit “21”, substitute “18”.

**[age of junior employee]**

- (20) Schedule 1, item 71, page 75 (after line 8), after Subdivision A, insert:

**Subdivision AA—Indexation of minimum wage**

**90EA Indexation of minimum wage**

- (1) This Subdivision provides for the indexation of the minimum wage, in line with the Consumer Price Index, to start on commencement of this section.
- (2) The indexation factor is to be worked out in accordance with section 1193 of the *Social Security Act 1991*.
- (3) The rounding off of indexed amounts is to be worked out in accordance with section 1194 of the *Social Security Act 1991*.

**[indexation of minimum wage]**

- (21) Schedule 1, item 71, page 76 (line 29), omit “required“, substitute “required or requested“

**[hours worked]**

- (22) Schedule 1, item 71, page 101 (line 18), omit “required“, substitute “required or requested“.

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**[hours worked]**

(23) Schedule 1, item 71, page 102 (lines 8 to 18), omit subsection 91C(3), substitute:

- (3) For the purposes of this section, the employee's *applicable averaging period* is:
- (a) one month; or
  - (b) such longer period as is agreed to in writing between the employee and the employer.

**[averaging period of one month]**

(24) Schedule 1, item 71, page 102 (lines 26 to 37), omit "required" (twice occurring), substitute "required or requested".

**[hours worked]**

(25) Schedule 1, item 71, page 103 (line 1), omit "requirement", substitute "requirement or request".

**[additional hours]**

(26) Schedule 1, item 71, page 103 (after line 4), at the end of section 91C, add:

*Unreasonable hours*

- (6) An employee must not be requested or required by an employer to work unreasonable hours, whether as additional hours or otherwise.
- (7) For the purpose of subsection (6), the factors to be taken into account in determining whether hours are unreasonable include:
- (a) any risk to the employee's, other employees, customers or clients health and safety; and

Note: For purposes of this paragraph, an example is where truck drivers or doctors in hospitals are given unreasonable hours that endanger the health and safety of others.

- (b) the employee's personal circumstances (including family responsibilities); and
- (c) any notice given by the employer of the requirement or request to work the hours in question.

Note: For example, hours may be unreasonable because the employee is asked to work excessively long hours, or an unreasonably short shift, or shifts broken by an unreasonably short period, or at unreasonably short notice.

**[unreasonable hours]**

(27) Schedule 1, item 71, page 108 (lines 9 to 11), omit subsection 92H(2), substitute:

- (2) To avoid doubt, there is no maximum or minimum limit on the amount of annual leave that an employer may authorise an employee to take, provided that an employee shall be entitled to take at least one period of 14 consecutive days of annual leave in each 52 week period.

**[annual leave—guarantee of 2 weeks leave]**

(28) Schedule 1, item 71, page 110 (lines 15 to 18), omit the definition of *de facto spouse*, substitute:

*de facto spouse*, of an employee, means a person who lives with the employee on a genuine domestic basis although not legally married to the employee.

**[remove discriminatory definition of spouse]**

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R(29)omitted.

- (30) Schedule 1, item 71, page 122 (lines 15 to 18), omit the definition of *de facto spouse*, substitute:

*de facto spouse*, of an employee, means a person who lives with the employee on a genuine domestic basis although not legally married to the employee.

**[remove discriminatory definition of spouse]**

- (31) Schedule 1, item 71, page 126 (line 21), omit “52“, substitute “104“.

**[2 years maternity leave]**

- (32) Schedule 1, item 71, page 133 (lines 3 to 6), section 94K, **TO BE OPPOSED.**

**[removes requirement for post birth leave]**

- (33) Schedule 1, item 71, page 135 (lines 7 to 10), omit subsection 94N(4), substitute:

- (4) The day stated in the notice must be no earlier than the day that is 4 weeks after the day that the notice was given.

**[removes requirement for post birth leave]**

- (34) Schedule 1, item 71, page 137 (after line 30), at the end of section 94R, add:

- (6) Despite anything in this section, the employee is entitled to return to part-time work until such time as the child of the employee reaches school age.

**[entitlement of part-time work]**

- (35) Schedule 1, item 71, page 140 (line 3), omit “52“, substitute “104“.

**[2 years paternity leave]**

- (36) Schedule 1, item 71, page 140 (line 33), after “birth“, insert “and that leave may be taken to a maximum of eight weeks“.

**[8 weeks concurrent leave]**

*(Amendment 37 is an alternative 31, 33, 34, 35, 36).*

- R(37) Schedule 1, item 71, page 159 (after line 16), before Subdivision K, insert:

## **Subdivision JA—Parental leave variations and employment contact**

### **94ZZAA Right to request variations**

- (1) In this section:

*parental leave* means any of the following:

- (a) maternity leave; or
- (b) paid leave under subparagraph 94F(2)(b)(i) or (ii); or
- (c) paternity leave; or
- (d) pre-adoption leave; or
- (e) adoption leave.

- (2) An employee entitled to parental leave pursuant to the provisions of this Division may request the employer to allow the employee:

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- (a) to extend the period of simultaneous unpaid maternity leave, paternity leave or adoption leave up to a maximum of 8 weeks;
  - (b) to extend the period of unpaid parental leave by a further continuous period of leave not exceeding 12 months;
  - (c) to return from a period of parental leave on a part-time basis until the child reaches school age;

to assist the employee in reconciling work and parental responsibilities.

- (3) The employer shall consider the request having regard to the employee's circumstances and, provided the request is genuinely based on the employee's parental responsibilities, may only refuse the request on reasonable grounds related to the effect on the workplace or the employer's business.

Note: The grounds for refusal might include cost, lack of adequate replacement staff, loss of efficiency and impact on customer service.

***[inserts matters from AIRC family provisions case to parental leave]***

R(37A) Schedule 1, item 71, page 159 (after line 16), after 94ZZAA, insert:

**94ZZAB Communication during parental leave**

- (1) Where an employee is on parental leave and a definite decision has been made to introduce significant change at the workplace, the employer shall take reasonable steps to:
  - (2) make information available in relation to any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave; and
  - (3) provide an opportunity for the employee to discuss any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave.
- (4) The employee shall take reasonable steps to inform the employer about any significant matter that will affect the employee's decision regarding the duration of parental leave to be taken, whether the employee intends to return to work and whether the employee intends to request to return to work on a part-time basis.
- (5) The employee shall also notify the employer of changes of address or other contact details which might affect the employer's capacity to comply with (1).

***[inserts matters from AIRC family provisions case to parental leave]***

(38) Schedule 1, item 71, page 160 (after line 3), at the end of Part VA, add:

**Division 7—Public holidays—Preserve Christmas Day**

**Subdivision 1—Preliminary**

**94ZZC Employees to whom Division applies**

This Division applies to all employees.

**94ZZD Definitions**

In this Division:

***employee*** means an employee to whom this Division applies under section 95AA.

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*public holiday* means a day declared by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of that State or Territory, as a public holiday by people who work in that State, Territory or region.

## **Subdivision 2—Guarantee of public holidays**

### **94ZZE The guarantee**

- (1) An employee is entitled to the benefit of each public holiday.
- (2) Where an employee does not work on a public holiday, and normally would (as determined by previous months' work pattern), the employee must be paid, either:
  - (a) for the number of hours ordinarily worked by the employee on a daily basis; or
  - (b) 7.6 hours in the case of employees who work an average of 38 hours per week over the employee's applicable averaging period (pro rata in the case of employees who work less than an average of 38 hours per week over the employee's applicable averaging period);whichever is the greater.
- (3) An employee, who is not a salaried employee, who works on a public holiday must be paid not less than two and a half times the basic periodic rate of pay for each hour worked.

***[guaranteed public holidays]***

- (39) Schedule 1, item 71, page 163 (line 28) to page 164 (line 3), omit section 96D, **TO BE OPPOSED.**

***[employer Greenfield arrangements]***

- R(40)Schedule 1, item 71, page 165 (line 22) to page 167 (line 26), omit Division 3, substitute:

## **Division 3—Representation and bargaining agents**

### **97 Qualifications of bargaining agents**

- (1) For the purposes of sections 97A and 97B, a person can be a bargaining agent in relation to a workplace agreement at a particular time only if the person meets the requirements in this section at that time.
- (2) The person must meet the requirements (if any) specified in the regulations.
- (3) If the person is an organisation of employees:
  - (a) at least one person whose employment is or will be subject to the agreement must be a member of the organisation; and
  - (b) the organisation must be entitled to represent the person's industrial interests in relation to work that is or will be subject to the agreement.

### **97A Bargaining agents—AWAs**

- (1) An employer or employee may appoint a person to be his or her bargaining agent in relation to the making, variation or termination of an AWA. The appointment must be made in writing.

Note: Subsection 104(3) provides a civil remedy for coercion in relation to appointments under this subsection.

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- (2) Subject to subsection (3), an employer or employee must not refuse to recognise a bargaining agent duly appointed by the other party for the purposes of subsection (1).
  - (3) Subsection (2) does not apply if the person refusing has not been given a copy of the bargaining agent's instrument of appointment before the refusal.
  - (4) Subsection (2) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

## **97B Bargaining agents—employee collective agreements**

- (1) An employer, or an employee whose employment is or will be subject to an employee collective agreement, may appoint a person as his or her bargaining agent in relation to the making, variation or termination of the agreement.

Note: Subsection 104(4) provides a civil remedy for coercion in relation to requests under this subsection.

- (2) An employee whose employment is or will be subject to an employer greenfields agreement may request another person (the ***bargaining agent***) to represent the employee in meeting and conferring with the employer about the variation of the agreement for a period:
  - (a) beginning 7 days before the agreement or variation is approved in accordance with section 98C or section 102F; and
  - (b) ending when the agreement or variation is approved.

Note: Subsection 104(4) provides a civil remedy for coercion in relation to requests under this subsection.

- (3) Subject to subsection (5), an employer or employee must not refuse to recognise a bargaining agent duly appointed by the other party for the purposes of subsection (1) or (2).
- (4) Subsection (3) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.
- (5) The requirement in subsection (3) ceases to apply to the employer if at any time after the request is made the employee withdraws the request.
- (6) The Employment Advocate may issue a certificate that he or she is satisfied of one of the following matters if he or she is so satisfied:
  - (a) on application by a bargaining agent—that the employee has made a request in accordance with subsection (1) or (2) for the bargaining agent to represent the employee in making, varying or terminating the agreement;
  - (b) on application by the employer—that, after the making of the request, the requirement in subsection (3) for the employer to recognise the bargaining agent, has, because of subsection (5) or section 97, ceased to apply to the employer.
- (7) The certificate must not identify any of the employees concerned. However, it must identify the bargaining agent, the employer and the agreement.
- (8) The certificate is, for all purposes of this Act, prima facie evidence that the employee or employees made the request or that the requirement has ceased to apply.

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## 97BA Recognition of union in union collective agreements

- (1) The majority of employees whose employment is or will be subject to a union collective agreement may authorise an organisation or organisations to represent them in relation to the making, variation or termination of a union collective agreement.
- (2) For the purpose of subsection (1) an employer may, in response to a written request from an organisation or organisations to represent employees in relation to the making of a union collective agreement, voluntarily recognise the organisation or organisations, provided that the organisation or each organisation:
  - (a) has at least one member whose employment in a single business (or part of a single business) of the employer will be subject to the agreement; and
  - (b) is entitled to represent the industrial interests of the member in relation to work that will be subject to the agreement;
- (3) For the purpose of subsection (1), an employer must, in response to a written request from an organisation or organisations to represent employees in relation to the making of a union collective agreement, give all of the persons employed at the time whose employment will be subject to the agreement a reasonable opportunity to decide whether they want to authorise the organisation or organisations to represent them, provided that the organisation (or organisations):
  - (a) has (or have) as its (or their) members the prescribed number of employees whose employment in a single business (or part of a single business) of the employer will be subject to the agreement; and
  - (b) is entitled to represent the industrial interests of the members in relation to work that will be subject to the agreement.For the purpose of subsection (1), prescribed number, in relation to relevant employees is:
  - (a) if there are fewer than 80 relevant employees 4; or
  - (b) if there are at least 80, but not more than 5,000, relevant employees-5% of the number of such employees; or
  - (c) if there are more than 5,000 relevant employees 250 will be subject to the agreement.
- (4) A majority of employees is deemed to have authorised an organisation or organisations to represent them if:
  - (a) the employer has given all of the persons employed at the time whose employment will be subject to the agreement a reasonable opportunity to decide whether they want to authorise the organisation or organisations; and
  - (b) either:
    - (i) if the decision is made by a vote—a majority of those persons who cast a valid vote decide that they want to authorise the organisation or organisations; or
    - (ii) otherwise—a majority of those persons decide that they want to authorise the organisation or organisations.
- (5) An employer must not refuse to recognise an organisation that has been authorised by the majority of employees for the purpose of subsection (1).
- (6) Subsections (3) and (5) are civil remedy provisions.

Note: See Division 11 for provisions on enforcement.

***[require employers to recognise properly authorised bargaining agents and unions on equal footing]***

- (41) Schedule 1, item 71, page 168 (line 27) to page 169 (line 2), omit subsection 98(4), substitute:

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- (4) The information statement mentioned in subsection (2) and paragraph (3)(a) must contain:
- (a) information about the time at which and the manner in which the approval will be sought under section 98C; and
  - (b) if the agreement is an AWA—information about the effect of sections 97 and 97A (which deal with bargaining agents); and
  - (c) if the agreement is an employee collective agreement—information about the effect of sections 97 and 97B (which deal with bargaining agents); and
  - (d) must be appropriate, having regard to the person's particular circumstances and needs, especially if the employee(s) whose employment will be covered by the agreement are women, persons from a non-English speaking background or young persons; and
  - (e) any other information that the Employment Advocate requires by notice published in the *Gazette*.

***[improve genuine consent for vulnerable workers]***

- (42) Schedule 1, item 71, page 172 (lines 30 to 33), omit subsection 99B(5), substitute:

- (5) The Employment Advocate is required to consider and determine whether all of the requirements of this Part have been met in relation to the making or content of anything annexed to a declaration lodged in accordance with subsection (2).

***[lodging of workplace agreement documents with the Employment Advocate]***

- (43) Schedule 1, item 71, page 173 (lines 1 to 10), omit section 99C, substitute:

**99C Employment Advocate must review workplace agreement to ensure compliance with minimum content and issue a receipt for lodgment**

- (1) If a declaration is lodged under subsection 99B(2), the Employment Advocate must, within 14 days of the lodgment of a workplace agreement, review the agreement and determine whether the agreement meets the requirements of Division 7 (relating to the content of agreements).
- (2) Where the Employment Advocate has determined that the workplace agreement does not meet the requirements of Division 7, the Employment Advocate must issue a notice to the employer.
- (3) For the purpose of subsection (2), the notice must identify the requirements of Division 7 that the Employment Advocate has determined are not met and the grounds upon which the Employment Advocate has determined that the agreement does not meet the requirements of Division 7. Where the Employment Advocate has determined that the workplace agreement fails to meet the no-disadvantage test, the Employment Advocate must identify the relevant or designated award that applies to the agreement to which the notice relates.
- (4) The notice must identify a monetary amount, calculated by the Employment Advocate, that represents the value of the entitlements to which the employee would have been entitled under the relevant or designated award if the workplace agreement had not been made, in respect of the employment to which the agreement relates.
- (5) Provided that the requirements of Division 7 have been complied with, the Employment Advocate must issue a receipt for the lodgment.
- (6) The Employment Advocate must give a copy of any notice issued pursuant to subsection (2) or receipt issued pursuant to subsection (5) to:

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- (a) the employer in relation to the workplace agreement; and
  - (b) if the workplace agreement is an AWA—the employee; and
  - (c) if the agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.

**99CA Employer obliged to meet shortfall where the requirements of Division 7 (content of agreements) are not met**

- (1) If a workplace agreement has commenced operation under subsection 100(2), and the agreement does not meet the requirements of Division 7, the employer must compensate the employee(s) for the total value of the entitlements to which the employee(s) would have been entitled for that period under the relevant or designated award, if the workplace agreement had not been made, in respect of the employment to which the agreement relates.

***[shortfall provision if agreement lodged that breaches no disadvantage test]***

- (44) Schedule 1, item 71, page 173 (line 23) to page 175 (line 7), omit section 100, substitute:

**100 When a workplace agreement is in operation**

- (1) A workplace agreement comes into operation on the day the agreement is lodged.
- (2) A workplace agreement comes into operation even if the requirements in Divisions 3, 4 and 7 have not been met in relation to the agreement.
- (3) A multiple-business agreement comes into operation only if it has been authorised under section 96F.
- (4) A workplace agreement ceases to be in operation if:
  - (a) it is terminated in accordance with Division 9; or
  - (b) the Court declares it to be void under paragraph 105F(a).
- (5) A workplace agreement ceases to be in operation in relation to an employee if it has:
  - (a) passed its nominal expiry date; and
  - (b) been replaced by another workplace agreement in relation to that employee.

Note: Part VIAA sets out the circumstances in which a workplace agreement binding an employer because of transmission of business will cease to operate.

- (6) A multiple-business agreement ceases to operate in relation to a single business (or a part of a single business) if:
  - (a) the multiple-business agreement came into operation on a particular day; and
  - (b) an AWA or collective agreement (other than a multiple-business agreement) was lodged on a later day; and
  - (c) the multiple-business agreement and the AWA or collective agreement apply in relation to the same single business (or the same part of the single business).

Example: Employers A, B and C lodge a multiple-business agreement which has a nominal expiry date 5 years after it is lodged. Six months later employer B lodges a collective agreement that applies in relation to its single business. This means that the multiple-business agreement ceases to operate in relation to that single business.

- (7) If a workplace agreement has ceased operating under subsection (4), it can never operate again.
- (8) If a workplace agreement has ceased operating in relation to an employee because of subsection (5), the agreement can never operate again in relation to that employee.

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(9) If a multiple-business agreement has ceased operating in relation to a single business (or a part of a single business), the agreement can never operate again in relation to that single business (or part of a business).

(10) If:

- (a) a person or entity is the employer bound by a workplace agreement; and
- (b) the person or entity ceases to be an employer within the meaning of subsection 4AB(1);

the agreement ceases to be in operation.

(11) Despite subsection (10), if the agreement mentioned in that subsection is a multiple-business agreement, it ceases to be in operation only in relation to a single business or part of a single business carried on by the person or entity.

***[existing agreement cannot be replaced until after nominal expiry date]***

(45) Schedule 1, item 71, page 175 (lines 8 to 23), omit section 100A, substitute:

**100A Relationship between overlapping workplace agreements**

(1) Only one workplace agreement can have effect at a particular time in relation to a particular employee.

(2) If:

- (a) a workplace agreement (the first agreement) binding an employee is in operation; and
- (b) another workplace agreement (the later agreement) binding the employee is lodged before the nominal expiry date of the first agreement;

the later agreement has no effect in relation to the employee until the nominal expiry date of the first agreement.

Note: After that date, the first agreement ceases operating in relation to the employee (see subsection 100(5)), and the later agreement takes effect in relation to the employee.

***[overlapping agreements]***

(46) Schedule 1, item 71, page 177 (lines 14 to 24), omit section 101A, substitute:

**101A Workplace agreement to include anti-discrimination and dispute settlement procedures**

(1) A workplace agreement must include procedures for settling disputes (dispute settlement procedures) about matters arising under the agreement between:

- (a) the employer; and
- (b) the employees whose employment will be subject to the agreement.

(2) If a workplace agreement does not include dispute settlement procedures, the agreement is taken to include the model dispute resolution process mentioned in Part VIIA.

(3) The employer must ensure that the workplace agreement includes the provisions relating to discrimination that are prescribed by the regulations. If the workplace agreement does not include those provisions, the workplace agreement is taken to include those provisions.

***[anti-discrimination and dispute settlement]***

(47) Schedule 1, item 71, page 177 (line 25) to page 179 (line 6), omit section 101B, substitute:

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## 101B No-disadvantage test

- (1) In this section:

*designated award*, in relation to a person to whom a workplace agreement will apply, means an award that the Employment Advocate or the Commission has determined under subsection (5) to be appropriate for the purpose of deciding whether the agreement passes the no-disadvantage test.

*relevant award*, in relation to a person to whom an agreement will apply, means an award:

- (a) regulating any term or condition of employment of persons engaged in the same kind of work as that of the person under the agreement; and
  - (b) that, immediately before the initial day of the agreement, is binding on the person's employer.
- (2) A workplace agreement must not disadvantage employees in relation to their terms and conditions of employment.
- (3) An agreement disadvantages employees in relation to their terms and conditions of employment only if its operation would result, on balance, in a reduction in the overall terms and conditions of employment of those employees under:
- (a) relevant awards or designated awards; and
  - (b) any law of the Commonwealth, or of a State or Territory, that the Employment Advocate or the Commission (as the case may be) considers relevant.
- (4) If:
- (a) an employer proposes to make a workplace agreement with a person; and
  - (b) there is no relevant award in relation to the person;
- the employer must apply in writing to the Employment Advocate for the making of a determination under subsection (5) or (6).
- (5) Upon application, the Employment Advocate must determine, and inform the employer in writing, that an award or awards are appropriate for the purpose of deciding whether the agreement passes the no-disadvantage test.
- (6) For the purposes of subsection (4), the Employment Advocate must determine:
- (a) an award or awards under this Act regulating terms or conditions of employment of employees engaged in the same kind of work as that of the person under the agreement; or
  - (b) if the Employment Advocate is satisfied that there is no such award under this Act—a State award or State awards regulating terms or conditions of employment of employees engaged in the same kind of work as that of the person under the agreement.

***[no disadvantage test in place of protected award matters]***

- (48) Schedule 1, item 71, page 179 (line 7) to page 180 (line 18), omit section 101C, substitute:

## 101C Calling up content of other documents

- (1) A workplace agreement may incorporate by reference terms from a workplace agreement or an award.

***[reference to other documents]***

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(49) Schedule 1, item 71, page 180 (lines 20 to 22), omit section 101D, substitute:

**101D Prohibited content**

- (1) An agreement must not contain terms that discriminate against an employee whose employment will be subject to the agreement, because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
- (2) For the purposes of subsection (1), a provision of an agreement does not discriminate against an employee merely because:
  - (a) it provides for a junior rate of pay; or
  - (b) it provides:
    - (i) for a rate of pay worked out by applying (whether directly or otherwise) the wage criteria set out in the award providing for the national training wage or wage criteria of that kind; or
    - (ii) for different rates of pay for adult and non-adult employees participating in an apprenticeship, cadetship or other similar work-based training arrangement; or
  - (c) it discriminates, in respect of particular employment, on the basis of the inherent requirements of that employment; or
  - (d) it discriminates, in respect of employment as a member of the staff of an institution that is conducted in accordance with the teachings or beliefs of a particular religion or creed:
    - (i) on the basis of those teachings or beliefs; and
    - (ii) in good faith.
- (3) The employer must ensure that the workplace agreement does not include any provisions that prohibit or restrict disclosure of details of the agreement by either party to another person.

***[prohibited content]***

(50) Schedule 1, item 71, page 198 (line 11) to page 199 (line 22), section 103L, **TO BE OPPOSED.**

***[unilateral termination of agreement]***

(51) Schedule 1, item 71, page 202 (line 30), omit paragraph 103R(3)(b).

***[award is default on termination of agreement]***

(52) Schedule 1, item 71, page 203 (lines 25 to 28), omit subsection 104(6), substitute:

- (6) To avoid doubt, an employer is considered to have applied duress to an employee for the purposes of subsection (5) IF the employer requires the employee to make an AWA with the employer as a condition of employment.

***[requiring an AWA as a condition of employment is duress]***

(53) Schedule 1, item 71, page 206 (line 26), after paragraph 105d(2)(b), insert:

- (ba) for subsection 97BA(3)—60 penalty units;
- (bb) for subsection 97BA(5)—60 penalty units;

***[civil penalty for failure to recognise authorised union]***

(54) Schedule 1, item 71, page 211 (line 30) to page 213 (line 5), omit section 106B, substitute:

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## 106B Meaning of *pattern bargaining*

*What is pattern bargaining?*

- (1) For the purposes of this Part, a course of conduct by a person is ***pattern bargaining*** if:
  - (a) the person is a negotiating party to 2 or more proposed collective agreements; and
  - (b) the course of conduct involves seeking common wages or conditions of employment for 2 or more of those proposed collective agreements; and
  - (c) the course of conduct extends beyond a single business.

*Exception: terms or conditions determined as national standards*

- (2) The course of conduct is not pattern bargaining to the extent that the negotiating party is seeking, for 2 or more of the proposed collective agreements, terms or conditions of employment determined by the Full Bench in a decision establishing national standards.

*Exception: genuinely trying to reach an agreement for a single business or part of a single business*

- (3) The course of conduct, to the extent that it relates to a particular single business or part of a single business, is not pattern bargaining if the negotiating party is genuinely trying to reach an agreement for the business or part.
- (4) For the purposes of subsection (3), factors relevant to working out whether the negotiating party is genuinely trying to reach an agreement for a single business or part of a single business include (but are not limited to) the following:
  - (a) demonstrating a preparedness to negotiate an agreement which takes into account the individual circumstances of the business or part; or
  - (b) demonstrating a preparedness to negotiate a workplace agreement with a nominal expiry date which takes into account the individual circumstances of the business or part; or
  - (c) negotiating in a manner consistent with wages and conditions of employment being determined as far as possible by agreement between the employer and its employees at the level of the single business or part; or
  - (d) agreeing to meet face-to-face at reasonable times proposed by another negotiating party; or
  - (e) considering and responding to proposals made by another negotiating party within a reasonable time; or
  - (f) not capriciously adding or withdrawing items for bargaining.
- (5) Whenever a person asserts that a person is engaged in pattern bargaining, the person has the burden of proving that subsection (3) does not apply.

*Exception: claims seeking equal pay for work of equal value*

- (6) The course of conduct is not pattern bargaining to the extent that the negotiating party is seeking, for 2 or more of the proposed collective agreements, terms or conditions of employment that are claimed to ensure equal pay for work of equal value.
- (7) This section does not affect, and is not affected by, the meaning of the term “genuinely trying to reach an agreement“, or any variant of the term, as used elsewhere in this Act.

***[pattern bargaining]***

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(55) Schedule 1, item 71, Division 4, page 240 (line 10) to page 266 (line 22), omit the Division, substitute:

## **Division 4—Secret ballots on proposed protected action**

### **Subdivision A—General**

#### **109 Object of Division and overview of Division**

##### *Object*

- (1) The object of this Division is to establish a transparent process which allows union members directly concerned to choose, by means of a fair and democratic secret ballot, whether to authorise industrial action supporting or advancing claims by unions.

##### *Overview of Division*

- (2) Under Division 8, industrial action by union members is not protected action unless it has been authorised by:
  - (a) the relevant union; or
  - (b) a secret ballot of relevant union members; or
  - (c) the Commission.
- (3) A secret ballot is required if it has been:
  - (a) requested by a relevant union member; or
  - (b) ordered by the Commission.
- (4) A secret ballot is conducted according to:
  - (a) the rules of the relevant union; or
  - (b) if there are no union rules, the model rules established by the Commission;and, in any case, union rules must be adopted within 9 months of the commencement of this provision.
- (5) The rule that industrial action by employees is not protected action unless it has been authorised does not apply to action in response to an employer lockout (see section 170MO).

#### **109A Definitions**

In this Division:

***ballot order*** means an order made under section 109H requiring a protected action ballot to be held.

***bargaining period*** has the same meaning as in subsection 170MI(1).

***negotiating party*** has the same meaning as in subsection 170MI(3).

***party***, in relation to an application for a ballot order, means either of the following:

- (a) the applicant;
- (b) the employer of the relevant union members.

***proposed agreement***, in respect of a bargaining period, means the proposed agreement in respect of whose negotiation the bargaining period has been initiated.

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*protected action ballot* means a secret ballot under this Division.

*relevant union*, in relation to proposed industrial action against an employer in respect of a proposed agreement, means any union which is a negotiating party to the agreement.

*relevant union member*, in relation to proposed industrial action against an employer in respect of a proposed agreement, means any member of the relevant union who is employed by the employer and whose employment will be subject to the agreement but does not include a union member who is a party to an AWA whose nominal expiry date has not passed.

## **Subdivision B—Authorising protected action**

### **109B How is protected action authorised**

Industrial action by employees is not protected action unless it has been authorised by:

- (a) the relevant union; or
- (b) a secret ballot of relevant union members; or
- (c) the Commission.

### **109C How and when a union can authorise protected action**

- (1) A relevant union may, subject to subsection (3), make a declaration to authorise industrial action by relevant union members as protected action in accordance with its rules, provided that:
  - (a) if there is only one existing agreement—the action commences during the 30-day period beginning on whichever is the later of the following:
    - (i) the date of the declaration; or
    - (ii) the nominal expiry date of the existing agreement; or
  - (b) if there are 2 or more existing agreements—the action commences during the 30-day period beginning on whichever is the later of the following:
    - (i) the date of the declaration; or
    - (ii) whichever is the last occurring of the nominal expiry dates of those existing agreements; or
  - (c) if there is no existing agreement—the action commences during the 30-day period beginning on the date of the declaration.

Note: Industrial action must be authorised under this Division if it is to be protected action under Division 8—see section 170MR.

- (2) However, the action is not authorised to the extent that it occurs after the end of the bargaining period.

Note: If another bargaining period is initiated later, and industrial action is proposed for that later period, it can only be authorised if a fresh application for a ballot order is granted, and the other steps required by this Division are completed, during that later period.

- (3) If a relevant union does not have in place rules that establish how protected action may be authorised, then protected action requested by a relevant union member may only be authorised according to a secret ballot conducted under the Commission's model rules according to section 109L.
- (4) A relevant union may not authorise protected action under subsection (1) if a secret ballot is required under section 109D.

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**109D When is a secret ballot required to authorise protected action**

A secret ballot is required, and no protected action will be otherwise authorised, if it has been:

- (a) requested by a relevant union member as provided by the rules; or
- (b) ordered by the Commission.

**109E Secret ballot may be requested by relevant union member**

A relevant union member may, during a bargaining period for the negotiation of a proposed agreement under Division 2 of this Part, request the relevant union to which the member belongs to hold a protected action ballot to determine whether proposed industrial action has the support of the majority of relevant union members.

**109F Secret ballot may be ordered by Commission**

- (1) A party referred to in subsection (2) may, during a bargaining period for the negotiation of a proposed agreement under Division 2 of this Part, apply to the Commission for an order for a ballot to be held to determine whether proposed industrial action has the support of a majority of relevant union members.

Note: For the duration of a bargaining period, see sections 170MK (when it begins) and 170MV (when it ends).

- (2) The following parties may apply:
  - (a) the relevant union to which the relevant union members mentioned in subsection (1) belong; or
  - (b) any employer or organisation of employers who is a negotiating party to the proposed agreement.

**190G Commission must be satisfied of various matters**

The Commission may grant an application for a ballot order, but must not grant the application unless it is satisfied that:

- (a) any court, judicial inquiry or Royal Commission findings justify such an order; or
- (b) any other particular and significant circumstances exist that mean such an order is appropriate.

**109H Grant of application—order for ballot to be held**

If the Commission grants the application, the Commission must order a protected action ballot to be held by the relevant union.

Note: The Commission may make an order requiring a secret ballot to be held for one or more bargaining periods.

**Subdivision C—Conduct and results of protected action ballot****109I Ballot must be secret**

A protected action ballot must be a secret ballot.

**109J How is a secret ballot to be conducted**

- (1) Subject to subsection (2), a secret ballot is conducted according to:
  - (a) the rules of the relevant union; or
  - (b) if there are no union rules, the model rules established by the Commission.

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- (2) Before conducting a secret ballot a union must give its relevant union members:
    - (a) reasonable notice that the secret ballot will be held; and
    - (b) information as to the matters which are to be dealt with in the proposed agreement and the general nature of the proposed industrial action.

### **109K Union rules for conduct of secret ballot**

- (1) A secret ballot is to be conducted according to the rules of the relevant union.
- (2) If the relevant union does not have rules in place in accordance with subsection (1) for the conduct of a secret ballot to authorise protected action then the secret ballot is to be conducted in accordance with the model rules established by the Commission under section 109L.
- (3) A union must adopt its own rules or the Commission's model rules within 9 months of the commencement of this Division.

### **109L Commission model rules for conduct of secret ballot**

The Commission must issue model rules for the conduct of secret ballots.

### **109M Declaration of ballot results**

As soon as practicable after the end of the voting, the union must, in writing:

- (a) make a declaration of the result of the ballot; and
- (b) inform the relevant union members, negotiating parties and the Industrial Registrar of the result.

### **109N Effect of ballot**

- (1) Industrial action is authorised under this Division if more than 50% of the votes validly cast were votes approving the action and:
  - (a) if there is only one existing agreement—the action commences during the 30-day period beginning on whichever is the later of the following:
    - (i) the date of the declaration of the results of the ballot; or
    - (ii) the nominal expiry date of the existing agreement; or
  - (b) if there are 2 or more existing agreements—the action commences during the 30-day period beginning on whichever is the later of the following:
    - (i) the date of the declaration of the results of the ballot; or
    - (ii) the last occurring of the nominal expiry dates of those existing agreements; or
  - (c) if there is no existing agreement—the action commences during the 30-day period beginning on the date of the declaration of the results of the ballot.

Note: Industrial action must be authorised under this Division if it is to be protected action under Division 8—see section 170MR.

- (2) However, the action is not authorised to the extent that it occurs after the end of the bargaining period.

Note: If another bargaining period is initiated later, and industrial action is proposed for that later period, it can only be authorised if a fresh application for a ballot order is granted, and the other steps required by this Division are completed, during that later period.

- (3) The Commission may, by order, extend the 30-day period mentioned in paragraph (1)(a), (b) or (c) by up to 30 days if the employer and the applicant for the ballot order jointly apply to the Commission for the period to be extended.

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- (4) The Commission must not make an order under subsection (3) extending the 30-day period if that period has been extended previously.
  - (5) If industrial action commences during the 30-day period, stops and re-starts within a reasonable period after the 30-day period, no new authorisation is required if the industrial action is substantially the same.
  - (6) Industrial action is taken, for the purposes of this Division, to be duly authorised even though a technical breach has occurred in authorising the industrial action, so long as the person or persons who committed the breach acted in good faith.

## **Subdivision D—Funding of ballots**

### **109O Liability for cost of ballot**

#### *Union member initiated ballot*

- (1) The relevant union is the party liable for the cost of holding the protected action ballot, if a relevant union member initiated that ballot under section 109E.

#### *Commission ordered ballot*

- (2) If the Commission ordered the ballot to be conducted, the applicant for a ballot order is the party liable for the cost of holding the ballot.
- (3) Subsections (1) and (2) have effect subject to subsection 109P(3).

### **190P Commonwealth has partial liability for cost of ballot**

- (1) If:
  - (a) the liable party notifies the Industrial Registrar of the cost incurred by the relevant union in relation to the holding of the ballot; and
  - (b) does so within a reasonable time after the completion of the ballot;the Industrial Registrar must determine how much (if any) of that cost was reasonably and genuinely incurred by the relevant union in holding the ballot. The amount determined by the Industrial Registrar is the *reasonable ballot cost*.
- (2) The Commonwealth is liable to pay to the liable party 80% of the reasonable ballot cost.
- (3) If the Commonwealth becomes liable to pay to the liable party 80% of the reasonable ballot cost, the liable party for the ballot order is:
  - (a) to the extent of the Commonwealth's liability, discharged from liability under section 109O for the cost of holding the ballot; and
  - (b) liable to pay 20% of the reasonable ballot cost within 30 days after the Industrial Registrar's determination.
- (4) The regulations may prescribe matters to be taken into account by the Industrial Registrar in determining whether costs are reasonable and genuinely incurred.

***[union secret ballots]***

(56) Schedule 1, page 273 (line 7) to page 275 (line 19), Division 7, **TO BE OPPOSED**.  
***[ministerial declarations terminating bargaining period]***

R(57A) Schedule 1, item 71, page 288 (lines 19 and 20), omit paragraph (e).  
***[hours of work for regular part-time employees]***

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- (57) Schedule 1, item 74, page 344 (line 29) to page 345 (line 4), omit subsections 170BAC(2) and (3).

***[ensure AIRC can deal with any equal pay application]***

- (58) Schedule 1, items 81 to 114, page 349 (line 30) to page 357 (line 10), **TO BE OPPOSED.**  
***[termination of employees]***

*(Amendment 59 is an alternative to amendment 58 and 63)*

- (59) Schedule 1, item 112, page 355 (line 23) to page 356 (line 3), **TO BE OPPOSED.**  
***[operational reasons]***

*(Amendment 60 is an alternative to amendment 59, 64 and 68)*

- (60) Schedule 1, item 112, page 355 (lines 27 and 28), omit “employee’s employment was terminated for genuine operational reasons or for reasons that include genuine operational reasons”, substitute “employee was made redundant for genuine operational reasons”.  
***[operational reasons]***

- (61) Schedule 1, item 113, page 356 (line 8), omit “employer employed“, substitute “employer and any related employers collectively employed“.  
***[restructuring to avoid unfair dismissal claims]***

- (62) Schedule 1, item 113, page 356 (line 21), at the end of subsection 170CE(5F), add:
- (c) employers are taken to be related if:
    - (i) they carry on a business, project or undertaking as a joint venture or common enterprise; or
    - (ii) they are related corporations within the meaning of the *Corporations Act 2001*; or
    - (iii) one supplies labour for use in the other’s business or undertaking, other than as part of a business of supplying labour to employers generally.
- [restructuring to avoid unfair dismissal claims]***

- (63) Schedule 1, item 115, page 357 (line 11) to page 360 (line 5), omit the item, substitute:

## **115 After section 170CEA**

Insert:

### **170CEB Dismissal of applications relating to vexatious and frivolous claims**

- (1) This section applies if an application is made, or is purported to have been made, under subsection 170CE(1):
  - (a) on the ground referred to in paragraph 170CE(1)(a); or
  - (b) on grounds that include that ground.
- (2) If the Commission is satisfied that, because of another provision in this Division, the application cannot be made under subsection 170CE(1) on the ground referred to in paragraph 170CE(1)(a), the Commission must:
  - (a) if paragraph (1)(a) of this section applies—make an order that the application is not a valid application; or
  - (b) if paragraph (1)(b) of this section applies—make an order that the application is not a valid application to the extent that it is made on that ground.

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Note 1: The Commission is not required to hold a hearing in relation to the making of such an order. See subsection (4).

Note 2: Where the Commission is satisfied that the application can be made, the Commission may continue to deal with the application as provided elsewhere in this Act, including by holding a hearing.

(3) If the Commission is satisfied that the application can be made under subsection 170CE(1), but is frivolous, vexatious or lacking in substance, in relation to the ground referred to in paragraph 170CE(1)(a), the Commission must:

(a) if paragraph (1)(a) of this section applies—make an order dismissing the application; or

(b) if paragraph (1)(b) of this section applies—make an order dismissing the application to the extent that it is made on that ground.

Note 1: The Commission is not required to hold a hearing in relation to the making of such an order. See subsection (4).

Note 2: Where the Commission is satisfied that the application is not frivolous, vexatious or lacking in substance, the Commission may continue to deal with the application as provided elsewhere in this Act, including by holding a hearing.

(4) The Commission is not required to hold a hearing in relation to the making of an order under this section. In deciding whether to hold a hearing, the Commission must take into account the cost that would be caused to the employer's business by requiring the employer to attend a hearing.

Note: It would be expected that the relative cost of attending a hearing would be greater for a small business employer. Consequently the Commission would be expected to give greater weight to this factor where the employer is a small business.

(5) Before the Commission makes an order under this section in relation to an application, the Commission:

(a) must, by notice in writing to the employee and the employer, invite the employee and the employer to provide, by the time specified in the notice, further information that relates to the application and that is relevant to whether subsection (4) requires the order to be made; or

(b) may invite the employee, in the time specified in the notice, to be heard before the Registrar or Commissioner without the need for the employer to be present, so long as the employer has the right to provide any further information that is relevant to whether this section requires the order to be made; and

(c) must take account of any such information so provided by the employee and/or the employer.

Note: An employer shall not be required to attend before the Commission merely because an election is made by an employee under this section.

***[dismissal of vexatious claims]***

*(Amendment 64 is an alternative to amendment 58 and 63)*

(64) Schedule 1, item 115, page 359 (line 5) to page 360 (line 5), section 170CEE, **TO BE OPPOSED.**

***[dismissal of application—termination for operational reasons]***

*(Amendment 65 is an alternative to amendment 59, 64 and 68)*

(65) Schedule 1, item 115, page 359 (lines 16 to 18), omit “employee’s employment was terminated for genuine operational reasons or for reasons that include genuine operational reasons“, substitute “employee was made redundant for genuine operational reasons“.

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***[operational reasons]***

*(Amendment 66 is an alternative to amendment 59, 64 and 68)*

- (66) Schedule 1, item 115, page 359 (lines 20 to 23), omit “employee’s employment may have been terminated for genuine operational reasons or for reasons that include genuine operational reasons“, substitute “employee may have been made redundant for genuine operational reasons“.

***[operational reasons]***

- (67) Schedule 1, items 116 to 166, page 360 (line 6) to page 370 (line 6), **TO BE OPPOSED.**

***[arbitration/termination]***

*(Amendment 68 is an alternative to amendment 58 and 63)*

- (68) Schedule 1, item 122, page 360 (lines 26 to 28), **TO BE OPPOSED.**

***[operational requirements]***

- (69) Schedule 1, item 168, page 371 (line 18) to page 385 (line 15), **TO BE OPPOSED.**

***[dispute resolution processes]***

- (70) Schedule 1, page 371 (after line 17), after item 167, insert:

**167A After subsection 170MW(2)**

Insert:

- (2A) Genuinely trying to reach agreement includes bargaining in good faith.

***[genuine bargaining]***

- (71) Schedule 1, page 371 (after line 17), after item 167, insert:

**167B After subsection 170MW(2)**

Insert:

- (2B) In considering whether or not a negotiating party has met or is meeting its obligation to genuinely try to reach an agreement with the other negotiating parties, the Commission must consider whether or not the party has bargained or is bargaining in good faith.

Bargaining in good faith includes:

- (a) agreeing to meet face-to-face at reasonable times proposed by another party;
- (b) attending meetings that the party has agreed to attend;
- (c) complying with negotiating procedures agreed to by the parties;
- (d) disclosing relevant information, subject to appropriate undertakings as to confidentiality, for the purposes of negotiations;
- (e) stating a position on matters at issue, and explaining that position;
- (f) considering and responding to proposals made by another negotiating party;
- (g) adhering to commitments given to another negotiating party or parties in respect of meetings and responses to matters raised during negotiations;
- (h) dedicating sufficient resources and personnel to ensure genuine bargaining;
- (i) not capriciously adding or withdrawing items for negotiation;
- (j) not refusing or failing to negotiate with one or more of the parties;

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- (k) in or in connection with the negotiations, not refusing or failing to negotiate with a person who is entitled under this Part to represent an employee, or with a person who is a representative chosen by a negotiating party to represent it in the negotiations;
  - (l) in or in connection with the negotiations, not bargaining with, attempting to bargain with, or making offers to persons other than another negotiating party, about matters which are the subject of the negotiations;
  - (m) any other matters which the Commission considers relevant.

***[good faith bargaining]***

(72) Schedule 1, item 193, page 403 (line 23) to page 404 (line 11), omit section 208, substitute:

### **208 Right of entry to investigate breach**

*Right of entry for breach of Commonwealth industrial law etc.*

If a permit holder for an organisation suspects, on reasonable grounds, that a breach has occurred, or is occurring, of:

- (a) this Act; or
- (b) an AWA; or
- (c) an award or collective agreement or an order of the Commission under this Act;

then, for the purpose of investigating the suspected breach, the permit holder may, during working hours, enter premises if:

- (d) work is being carried out on the premises by one or more employees who are members of the permit holder's organisation; and
- (e) the suspected breach relates to, or affects, that work or any of those employees.

***[right of entry where union has coverage]***

(73) Schedule 1, item 193, page 412 (lines 7 to 16), omit section 221, substitute:

### **221 Right of entry to hold discussions with employees**

A permit holder for an organisation may enter premises for the purposes of holding discussions with any eligible employees who wish to participate in those discussions. For this purpose, *eligible employee* means any employee who carries out work on the premises, and is a member of the permit holder's organisation or is eligible to become a member of that organisation.

***[right of entry where union has coverage]***

(74) Page 673 (after line 27), after Schedule 3, insert:

## **Schedule 3A—Outworkers in the textile, clothing and footwear industry**

### ***Workplace Relations Act 1996***

#### **1 Part XVI (heading)**

Repeal the heading, substitute:

### **XVI Outworkers**

#### **2 Section 537**

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Repeal the section, substitute:

### **537 Object of Part**

The objects of this Part are to:

- (a) eliminate the exploitation of outworkers in the textile, clothing and footwear industry;
- (b) provide protection for what has universally been recognised as a class of extremely vulnerable workers;
- (c) provide for uniform rights for outworkers as employees and impose obligations upon those who engage outworkers, irrespective of the form, structure or substance of the particular contractual arrangement by which the work of an outworker is managed or controlled;
- (d) provide for the continuation of regulation, inspection and enforcement provisions relating to right of entry powers and prosecution rights of unions; and
- (e) prevent the avoidance of obligations through non bona fide contractual arrangements by making provision for outworkers to recover unpaid monies from parties in the contractual relationship.

### **3 Section 538 (definition of *contract outworker*)**

Repeal the definition, substitute:

*outworker* means:

- (a) a person or entity however described, directly or indirectly engaged in or about a private residence or other premises that are not necessarily business or commercial premises to perform textile, clothing and footwear industry and includes a contract outworker; and
- (b) a person engaged in outwork regardless of the nature or form of any contractual arrangement under which the person performs work; and
- (c) a person engaged in outwork notwithstanding that the person performs the work as, through, or for a business entity of any description.

Note: Entity includes:

- (a) a company;
- (b) a trust;
- (c) a business partnership; or
- (c) a corporation sole.

### **4 Section 538 (definition of *employee*)**

Repeal the definition, substitute:

*employee* has the same meaning as in Part XV and includes an outworker.

### **5 After section 538**

Insert:

#### **538A Outworkers are employees and those who employ them are employers**

For the purposes of this Act:

- (a) a person who engages an outworker is an employer;
- (b) the contract between an outworker and a person who engages him or her is a contract of employment;

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- (c) the conditions on or under which an outworker performs work are conditions of employment;
  - (d) the relationship between an outworker and a person who engages him or her is an employment relationship.

## 6 After section 538

Insert:

### 538B No AWAs for outworkers

An AWA or ancillary document has no effect where it is made with or for an outworker, unless it is in excess of the conditions applicable under subsection 544K(2).

## 7 After section 544

Insert:

### 544A Definitions

- (1) In this Subdivision:

*remuneration* includes:

- (a) any remuneration or other amount, including commission, payable in relation to work done by an outworker;
- (b) amounts payable to an outworker in respect of annual leave or long service leave;
- (c) an amount for which an outworker is entitled to be reimbursed or compensated for an expense incurred or loss sustained by the outworker.

*unpaid remuneration claim* means a claim for unpaid remuneration under section 544B.

- (2) For the avoidance of doubt, a reference in this Subdivision to remuneration includes a reference to any amount to which an outworker is entitled in accordance with section 544J.

### 544B Claims by outworkers for unpaid remuneration

- (1) An outworker may make a claim under this section for any unpaid remuneration against the person the outworker believes is his or her employer (the *apparent employer*) if the employer has not paid the outworker all or any of the remuneration for work done by the outworker for the employer (the *unpaid remuneration*).
- (2) The claim must be made within 6 months after the work is completed.
- (3) The claim is to be made by serving a written notice on the apparent employer that:
  - (a) claims payment of the unpaid remuneration; and
  - (b) sets out the following particulars:
    - (i) the name of the outworker;
    - (ii) the address at which the outworker may be contacted;
    - (iii) a description of the work done;
    - (iv) the date on which the work was done;
    - (v) the amount of unpaid remuneration claimed in respect of the work.
- (4) The particulars set out in the unpaid remuneration claim must be verified by statutory declaration.

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- (5) This section applies only in respect of remuneration for work carried out after the commencement of this section.

#### **544C Liability of apparent employer for unpaid remuneration for which an unpaid remuneration claim has been made**

- (1) Except as provided by subsection (4), an apparent employer served with an unpaid remuneration claim under section 544B is liable (subject to any proceedings as referred to in section 544E) for the amount of unpaid remuneration claimed.
- (2) An apparent employer may, within 14 days after being served with an unpaid remuneration claim, refer the claim in accordance with this section to another person the apparent employer knows or has reasonable grounds to believe is the person for whom the work was done (the *actual employer*).
- (3) An apparent employer refers an unpaid remuneration claim in accordance with this section by:
- (a) advising the outworker concerned in writing of the name and address of the actual employer; and
  - (b) serving a copy of the claim (a *referred claim*) on the actual employer.
- (4) The apparent employer is not liable for the whole or any part of an amount of unpaid remuneration claimed for which the actual employer served with a referred claim accepts liability in accordance with section 544D.
- (5) An apparent employer cannot refer an unpaid remuneration claim under this section to a person that is a business or body corporate owned or managed by the outworker who made the claim.

#### **544D Liability of actual employer for unpaid remuneration for which an unpaid remuneration claim has been made**

- (1) An actual employer served with a referred claim under section 544C may, within 14 days after the service, accept liability for the whole or any part of the amount of unpaid remuneration claimed by paying it to the outworker concerned.
- (2) An actual employer who accepts liability must serve notice in writing on the apparent employer of that acceptance and of the amount paid.
- (3) If the apparent employer has paid to the outworker concerned any part of the amount of unpaid remuneration claimed for which the actual employer served with the referred claim has not accepted liability, the apparent employer may deduct or set-off the amount the apparent employer has paid to the outworker from any amount that the apparent employer owes to the actual employer (whether or not in respect of work the subject of the referred claim).

#### **544E Recovery of amount of unpaid remuneration**

- (1) Sections 544L and 544M apply to recovery of an amount payable to an outworker from an apparent employer who fails to make a payment in respect of an amount of unpaid remuneration for which the employer is liable under section 544C.
- (2) In proceedings referred to in subsection (1), an order for the apparent employer to pay the amount concerned must be made unless the apparent employer proves that the work was

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not done or that the amount claimed for the work in the unpaid remuneration claim is not the correct amount in respect of the work.

#### **544F Offences relating to unpaid remuneration claims and referred claims**

A person must not:

- (a) make any statement that the person knows is false or misleading in a material particular in any referred claim under section 544C or any notice served for the purposes of section 544D; or
- (b) serve a referred claim on a person under section 544C that the person does not know, or have reasonable grounds to believe, is an actual employer.

Penalty: 120 penalty units.

#### **544G Effect of sections 544A to 544F**

- (1) Sections 544A to 544F do not limit or exclude any other rights of recovery of remuneration of an outworker, or any liability of any person with respect to the remuneration of an outworker, whether or not arising under this Act or any other law or a common rule order.

Note: An outworker may, for example, seek an order from the Magistrates' Court under section 544L instead of making an unpaid remuneration claim under section 544B.

- (2) Nothing in subsection 544D(3) limits or excludes any right of recovery arising under any other law with respect to any amount of money owed by the apparent employer to the actual employer.

#### **544H Liability of principal contractor for remuneration payable to outworkers of subcontractor**

- (1) This section applies where:
  - (a) a person (the *principal contractor*) has entered into a contract for the carrying out of work by another person (the *subcontractor*); and
  - (b) outworkers employed or engaged by that subcontractor are engaged in carrying out the work (the *relevant outworkers*); and
  - (c) the work is carried out in connection with a business undertaking of the principal contractor.
- (2) The principal contractor is liable for the payment of any remuneration of the relevant outworkers that has not been paid for work done in connection with the contract during any period of the contract unless the principal contractor has a written statement given by the subcontractor under this section for that period of the contract.
- (3) The principal contractor may withhold any payment due to the subcontractor under the contract until the subcontractor gives a written statement under this section for any period up to the date of the statement. Any penalty for late payment under the contract does not apply to any payment withheld under this subsection.
- (4) Sections 544L and 544M apply to the recovery of remuneration payable by a principal contractor under this section as if a reference in those sections to an employer were a reference to the principal contractor.

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#### **544I Written statements for the purposes of section 544H**

- (1) The written statement referred to in section 544H is a statement by the subcontractor that all remuneration payable to relevant outworkers for work under the contract done during that period has been paid.
- (2) The regulations may prescribe the form and content of the written statement.
- (3) The subcontractor must keep a copy of any written statement under this section for at least 6 years after it given.
- (4) The written statement is not effective to relieve the principal contractor of liability under section 544H if the principal contractor, when given the statement, had reason to believe it was false.
- (5) A subcontractor must not give the principal contractor a written statement knowing it to be false.

Penalty: 120 penalty units.

#### **544J Operation of section 544H**

- (1) Section 544H does not apply in relation to a contract if the subcontractor is in receivership or in the course of being wound up or, in the case of an individual, is bankrupt, and if payments made under the contract are made to the receiver, liquidator or trustee in bankruptcy.
- (2) Nothing in section 544H or this section limits or excludes any liability with respect to payment of remuneration by a person who is a principal contractor arising under this Act or any other law or any common rule order.
- (3) A principal contractor is not excluded from liability for the payment of any remuneration of a relevant outworker under section 544H only because the subcontractor is a business or body corporate owned or managed by the relevant outworker.

#### **544K Minimum conditions for outworkers**

- (1) An outworker engaged by a person is entitled to the same benefits, terms and conditions as those that would apply under any federal award applicable to the textile, clothing and footwear industry if the person were bound by the award and the outworker were an employee of the person.
- (2) A person who engages an outworker must not provide a condition of employment to the outworker that is less than a condition that would apply under any federal award applicable to the textile, clothing and footwear industry if the person were bound by the award and the outworker were an employee of the person.

Penalty: 120 penalty units.

- (3) An entitlement otherwise conferred by subsection (1) or an obligation otherwise imposed by subsection (2) does not apply if the same kind of entitlement or obligation is conferred or imposed by a federal award or an Act of the Commonwealth.

#### **544L Recovery of money owed**

- (1) An outworker who is owed any money by an employer under relevant industrial legislation, or under any contract of employment, may take proceedings in the Industrial

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Division of Magistrates' Court to recover the money owing. The debt must arise out of the employment relationship.

- (2) The proceedings must be started within 6 years after the outworker's entitlement to the money arises.
- (3) Before proceedings may be started under this section, the employer must be given a written demand for the money owed.
- (4) If the Court is satisfied that the employer:
  - (a) had reasonable notice of the outworker's claim; and
  - (b) had no reasonable grounds on which to dispute the claim; and
  - (c) in the circumstances should have paid the claim without the need for proceedings being taken to establish the validity of the claim;the Court may order the employer to pay interest to the outworker on top of any other amount to which the outworker is entitled.
- (5) The interest must not be greater than the rate fixed under section 2 of the *Penalty Interest Rates Act 1983* that applies at the time the Court makes the order.
- (6) If a claim is made under this section by an outworker's personal representative, subsections (4) and (5) apply despite anything to the contrary in section 29 of the *Administration and Probate Act 1958*.

#### **544M Court may order payment of arrears on finding of guilt**

- (1) If the Industrial Division of a Magistrates' Court finds an employer guilty of an offence relating to the underpayment of an outworker, the Court may order the employer to pay the outworker any amount that the outworker was underpaid and that is still owed to the outworker, in addition to imposing a penalty for the offence.
- (2) However, under this section the Court may only order the employer to pay an amount in respect of a period of up to 6 years.
- (3) Subsections (4), (5) and (6) of section 544L apply to this section.
- (4) An order under this section may be enforced as if it were an order made by the Court in a civil proceeding. However, if any amount remains to be paid after all reasonable means of civil enforcement have been tried, the order may be enforced as if it were a fine imposed by the Court.
- (5) Nothing in this section limits an outworker's rights under section 544L, and nothing in that section limits the power of the Court under this section.

#### **544N Representation in Magistrates' Court proceedings**

- (1) An outworker may be represented in any proceeding referred to in section 544L or 544M by a person who is an employee or agent of:
  - (a) a registered organisation of which the outworker is a member or eligible to become a member; or
  - (b) a peak body of which an organisation representing the outworker is a member.
- (2) An employer may be represented in an proceeding referred to in section 544L or 544M by a person who is an employee or agent of:
  - (a) a registered organisation of which the employer is a member or eligible to become a member; or
  - (b) an interested organisation of which the employer is a member or eligible to become a member; or

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(c) a peak body of which an organisation representing the employer is a member.

***[protection for outworkers]***

(75) Schedule 4, item 2, page 674 (lines 16 to 19), omit subitem (1).

***[executive to have power to amend Act]***