Bills Digest
No. 45 2002–03

Workplace Relations Amendment (Simplifying Agreement-making) Bill 2002

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INFORMATION AND RESEARCH SERVICES

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Workplace Relations Amendment (Simplifying Agreement-making) Bill 2002

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Law and Bills Digest Group
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Contents

Workplace Relations Amendment (Simplifying Agreement-making) Bill 2002

Date Introduced: 26 June 2002

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: On Proclamation

Purpose

To streamline the processing measures for Australian Workplace Agreements and Certified Agreements by amending the *Workplace Relations Act 1996.*

Background

Previous similar legislation

This is the fourth introduction of a Bill that includes measures designed to streamline the processes of agreement making.

A version of many proposed industrial relations reforms over the last three years can be found in the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* (known as the MOJO Bill) which reflected the policy commitments of the Government prior to the 1998 election. The MOJO Bill was introduced on 30 June 1999 and a House-amended version was passed in the House on 29 September 1999. The then Senate Employment, Workplace Relations, Small Business and Education Legislation Committee (the Senate WR Committee) reported on the Bill on 29 November 1999 (the MOJO Report). The Bill did not pass in the Senate. The MOJO Bill, among many other things, contained streamlining processes for accessing and facilitating the spread of Australian Workplace Agreements (AWAs) and streamlining processes for making Certified Agreements (CAs).

The second Bill was the *Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000* (the AWA Procedures Bill). That Bill was introduced on 28 June 2000 and passed by the House on 5 October 2000. The Senate WR Committee

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also reported on that Bill as part of its report on a package of Bills in September 2000. The Bill did not pass in the Senate. As the title suggests, the focus of that Bill was limited to AWAs.

The third Bill, like the MOJO Bill, was an omnibus Bill entitled the *Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001*. It was introduced into the House on 30 August 2001 but did not progress before Parliament rose for the last federal election.

The Explanatory Memorandum to the present Bill states that as a result of consultations certain measures have been removed from this Bill that were included in the earlier Bills.[1] For example, additional proposals in the AWA Procedures Bill included:

- removing the requirement that the Employment Advocate refer AWAs to the Australian Industrial Relations Commission (the Commission) where there is concern that it does not pass the no-disadvantage test
- providing an even more streamlined process for AWAs with remuneration rates above $68 000, and
- removing the immunity available if industrial action is taken in support of a claim for an AWA.

These proposals are *not* included in this Bill.

Readers are referred to the general discussion of the history of the provisions and the competing policy perspectives on industrial relations reforms in the Bills Digest on the MOJO Bill. More specific information about similar proposals is contained in the Bills Digests on the AWA Procedures Bill and the *Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001*.

Whilst this Bill involves a significant restructuring of the AWA provisions in particular, the measures can be traced back in some form to these earlier Bills except for the provision empowering the Employment Advocate to revoke an AWA and the broader ability to recover the shortfall in entitlements.

Generic positions

The Government's stated rationale for the introduction of the Bill is to:

- make agreement making easier and more widely accessible
- reduce the formality and cost involved in having an agreement certified, and
- prevent unwarranted interferences by 'third parties' in agreement making.[2]

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The Australian Labor Party's general criticism of this 'streamlining' is that it:

- comes at the cost of procedures that are generally designed to safeguard employees
- promotes individual agreements which
    - undermine collective agreement making, and
    - lead to an inherent imbalance in favour of employers in the employment relationship, and
- is ultimately used to drive down the terms and conditions of employment. [3]

Further discussion of the specific changes is included in the section below.

Main Provisions

The Bill is arranged into 2 Schedules. The first contains amendments relating to Australian Workplace Agreements and the second contains amendments relating to Certified Agreements. A description of the main types of amendments is followed by a brief discussion. Proposed provisions that together make up or which constitute mirror provisions for a particular change are grouped in subject headings.

Schedule 1 - AUSTRALIAN WORKPLACE AGREEMENTS

It is worth noting that rather than setting out specific amendments to the existing provisions of the *Workplace Relations Act 1996*, Schedule 1 of the Bill repeals the relevant Divisions and repeats them with changes. Accordingly, many parts of Schedule 1 are similar to the existing provisions. The significant changes are described below.

Changed filing and approval process

Currently, under Divisions 4 and 5 of Part VID, there is a two-stage process for approving AWAs (and ancillary agreements).[4] The first stage is that the Employment Advocate checks documents and issues a filing receipt. As set out in section 170VO, these filing requirements state:

- that the AWA must be signed and dated by each of the parties, and
- the employer must declare that: the AWA meets dispute resolution and transparency requirements; employees were given an information statement; and whether the AWA offered the same terms for comparable employees, and

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- the employer has provided any other information that the Employment Advocate required.

There is a second approval stage where the Employment Advocate or the Commission can further scrutinize the AWA. At this stage, under the existing process set out in subsection 170VPA(1), the 'additional approval requirements' include scrutiny of whether the employee genuinely consented to making the AWA and whether the employer acted unfairly or unreasonably in failing to offer the same terms to all comparable employees.[5] Agreements cannot actually be signed until 14 days after an existing employee first receives a copy and 5 days for new employees.

Proposed Divisions 2 and 3 set up a new process for making and approving AWAs. The employee and employer first sign the AWA (**proposed subsection 170VBA(1)**) and the employee may then withdraw their consent within a cooling off period as set out in **proposed subsection 170VBA (5).** If the application for approval has already been made and the employee subsequently withdraws their consent within the cooling off period, the employee must lodge a written notice of withdrawal of consent within 7 days of notifying the employer (**proposed subsection 170VC(6)**). In practical terms, this means that the agreement can be signed immediately after the information statement is given to the employee. The cooling off periods are 5 days for new employees and 14 days for existing employees (**proposed subsection 170VBA(6)**). The employer must apply in writing for the approval of an AWA within 21 days from the signing date (**proposed subsection 170VC(1)**). The Employment Advocate may extend the period for making the application (**proposed subsection 170VC(3)**).

Proposed section 170VBA also retains the obligations that, before the employee signs the AWA, the employer give the employee a copy of an information statement prepared by the Employment Advocate and explain the effect of the AWA. The information statement must include, but is not limited to, information about the Commonwealth statutory entitlements, occupational health and safety law, services provided the Employment Advocate, and the appointment of bargaining agents.

Time of operation

Proposed subsection 170VBD(1) states that an AWA starts operating on the last of the following dates:

- the signing date, or
- the day specified in the AWA as the starting day, or
- the day a new employee commences.

Under existing section 170VJ, the AWA is taken to have commenced after approval (the second stage) for existing employees or after the filing date for new employees.

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The Government argues that the proposed scheme for making AWAs would dispense with 'time consuming and resource intensive' task of issuing filing receipts.[6] It has also been argued that it is simpler to have immediate commencement [7] and that the capacity to withdraw in a cooling off period is an appropriate safeguard. [8]

The current delay before signing is intended to allow employees to receive independent advice on the AWA before they sign it. The proposed commencement presumes compliance and reverses the current process because the document becomes legally operative and allows commencement to be effective from the signing date which is before the Employment Advocate and the Commission can scrutinise the document for potential disadvantage. It has been argued that this creates a pressure on the Employment Advocate because any claims about the agreement would be about signed agreements already in operation and should therefore be approved to avoid claims for arrears of wages.[9] It has also been added that as a general rule, 'employees will always be in a more difficult position if they must withdraw from an agreement they have previously accepted.' [10]

Comparable employees

Existing paragraphs 170VPB(1)(b) and 170VPA(1)(e) require that the Employment Advocate be satisfied that employers did not act unfairly or unreasonably in failing to offer the same terms to all comparable employees. This is one of the general additional approval requirements set out for an AWA and variation agreement. It is worth noting that existing section 170VO(1)(b)(iii) only requires the employer to declare (rather than explain) whether they have offered an AWA in the same terms to all comparable employees.

Under the new one step approval process, the absence of this particular additional approval requirement potentially broadens the scope for performance pay.[11] The Minister noted that this improves flexibility and is in keeping with the 'concept of individual agreement-making'[12] and referred to the safeguard that the Employment Advocate can still refer to the Commission if there is doubt about whether the no disadvantage test is satisfied. The proposed removal of this requirement has been criticised because it allows for different pay and conditions among employees for performing similar work and has the potential to allow employers to progressively bid down wages and conditions through the selective application of AWAs to individual employees.[13]

Revised process for ancillary agreements

Under existing Division 3 of Part VID, separate approvals are required before variation (section 170VL), extension (subsection 170VH(3)) and termination (section 170VM) can take effect. At present, variation and termination agreements commence on the later of the day on which the approval notice is issued or a day specified in the agreement. Extension agreements must have a filing receipt issued 21 days before the nominal expiry date and commence the day after an approval notice is issued for the extension agreement. These

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ancillary agreements are currently subject to the same filing and approval processes noted above.

Proposed Division 5 sets out a significantly restructured process for extending (**new subdivision A)** or varying (**new subdivision B**) an AWA. **Proposed Division 6** deals separately with the process for the termination of AWAs. The proposals now incorporate cooling-off periods.

Extension Agreement process

Similar to the commencement provisions for making agreements, **proposed section 170VE** sets up a process where an extension agreement would take effect on the day on which the employer and employee sign the agreement, or if they sign on different days, the later of the days (**proposed subsection 170VE(6)**). The cooling off period is 14 days after signing (**proposed subsection 170VE(5**)). Under **proposed section 170VEA**, the application process is the same as for making AWAs described above. The employer must apply in writing for the approval of an extension of an AWA within 21 days from the signing date (**proposed subsection 170VEA(1)**). However, unlike for the making of AWA, the application period cannot be extended beyond 21 days. If the application for approval has already been made and the employee subsequently withdraws their consent within the cooling off period, the employee must lodge a written notice of withdrawal of consent within 7 days of notifying the employer (**proposed subsection 170VEA(5)**). **Proposed subsection 170VEB(1)** requires that the Employment Advocate must approve the extension agreement if made properly and he or she is satisfied that the employee genuinely consented. **Proposed subsection 170VEB(2)** allows the Employee Advocate to approve an extension when an agreement has not been signed if he or she is satisfied that it would not disadvantage either party to the AWA.

Variation agreement process

Proposed sections 170VED-VEK set out an equivalent process for variation agreements to that set out for extension agreements with the following differences. Under **proposed section 170VEG**, the Employment Advocate must approve a variation agreement if the AWA as varied:

- satisfies the requirements of **proposed section 170VBA** noted above, and
- meets the transparency, openness and dispute resolution content requirements set out in **proposed section 170VBB,** and
- passes the no-disadvantage test.[14]

As in the approval process for the making of agreements under **proposed section 170VCB,** under **proposed subsection 170VEG(2)**, the Employment Advocate again must approve the AWA if a party has taken action or given information to resolve concerns about whether the AWA meets the conditions set out in **proposed subsection 170VEG(1)**.

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Termination agreements

There are 3 ways an AWA can be terminated:

- agreement between the parties
- termination in accordance with a procedure set out in the AWA, and
- termination by the Commission

Subdivision B of Division 6 (proposed sections 170VFA-VFC) which deals with termination agreements between the parties sets out a similar process to the processes described above. However, despite the equivalent signing process, the termination agreement would be required to be approved by the Employment Advocate before it could come into effect.

Proposed section 170VFE covers termination by a process set out in the AWA. A party to the AWA may seek the approval of the Employment Advocate to terminate the AWA in the manner provided for in the AWA. The other party must be notified as soon as possible. The application to the Employment Advocate must be accompanied by the process for termination set out in the AWA and any information the Employment Advocate requires for the purpose of performing his or her functions.

Proposed section 170VFA repeats the Commission termination provisions set out in current subsections 170VM(3-5).

Revocation

Proposed section 170WKD makes it explicit that the Employment Advocate may revoke an approval or refusal of an AWA, or the extension, variation or termination of agreements. At present, it is not clear whether the Employment Advocate has this power. In analysing the present situation, it was found in *Schanka v Employment National (Administration) Pty Ltd* [2001] that the Employment Advocate is unlikely to have such a power. [15] Moore J found that a withdrawal of an approval is not an 'instrument' such as a statutory rule, regulation or by-law, under subsection 33(3) of the *Acts Interpretation Act 1901*: 'On present authority, such an instrument must be of a legislative character whereas an approval notice issued by the Employment Advocate appears to be executive in character.'[16] This finding means that the revocation, being characterised as executive in nature, would not be subject to the normal rule of statutory interpretation that the 'power to make' includes the 'power to revoke'.

Recover the shortfall

Proposed section 170VX replaces existing section 170VX with a detailed table of compensation for the shortfall in entitlements. Given the new earlier commencement provisions and the power to revoke agreements noted above, there are more circumstances in which recovery for a shortfall becomes available. The employee or their agent, or the

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Employment Advocate, would be entitled to recover any shortfall in specified circumstances where an AWA or related agreement:

- ceases to have effect
- is approved with an employer action or undertakings; or
- was void.[17]

Approval for shortfall is currently limited to new employees. Note that there is nothing that expressly authorises the Employment Advocate to carry out these particular additional functions, but they are consistent with the functions of the Employment Advocate as set out in section 83BB including providing free legal representation to a party if he or considers that it would assist in the enforcement of Part VID.

In the light of the other proposals for commencement on signing and the revocation power noted above, this proposal seeks to ensure that employees who cannot take action themselves are not disadvantaged.[18]

No disadvantage test

At present, under existing paragraph 170VPB(1)(a), the Employment Advocate must approve an AWA for which a filing receipt has been issued if he or she *is sure* that the AWA passes the no disadvantage test. Under **proposed paragraph 170 VCB(1)(d),** the Employment Advocate must approve an AWA 'if… the AWA *passes* the no disadvantage test'.[19]

This semantic distinction may be relevant in so far as it may be interpreted to have the effect of weakening the obligation upon the Office of the Employment Advocate to exercise its power directly. In existing section 170VA, 'sure' is defined to mean 'not having any doubts'. In any case, the Employment Advocate has publicly stated that 'we will be checking that all the AWAs pass the no disadvantage test.'[20] Doubts about the process form part of general criticism that this Bill weakens the application of the no disadvantage test. The Employment Advocate's fast track arrangements mean that the Employment Advocate would to some degree be relying on employers or their consultants to certify that the agreements pass the no disadvantage test. [21]

Schedule 2 - CERTIFIED AGREEMENTS

Schedule 2 proposes amendments to the Act in the usual fashion, using specific items to repeal and insert particular provisions.

Consideration period

Currently, under existing subsection 170LK(2), it is unclear whether the 14 day consideration period for a certified agreement must start again every time an employee

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joins during a consideration period, ie. whether this falls within the reasonable steps that an employer must take to give notice of an intention to make an agreement as required by that subsection. **Item 3** inserts **proposed subsection 170LK(2)** which allows the employer to make an agreement without restarting the consideration period of 14 days when new employees commence. **Item 1** inserts **proposed paragraphs 170LJ(3)(a) and (aa)** which spell out that employers must take reasonable steps to ensure that an employee joining within the consideration period has, or has ready access to, the agreement before the approval is given. **Item 7** inserts **proposed paragraphs 170LR (2)(a) and (aa)** which repeat the proposal. Requirements that the terms of the agreement be explained to all the employees are unchanged.[22]

Notification and explanation requirements

Currently, subsection 170LK(8) requires that if a proposed agreement is varied for any reason after notice is given, the Commission must ensure that the employer give notice of intention to make and provide access to the agreement, explain the agreement, and provide employees with an opportunity to confer with the employee organisation. **Item 10** inserts **proposed subsection 170LT(11)** which states that the Commission can forgo these notification and explanation requirements and certify an agreement if it is satisfied that no employee suffered detriment as a result of that failure.

The Explanatory Memorandum states that this is an administrative saving because it eliminates a process which consumes time and resources for possibly quite minor technical amendments.[23] It also indicates that the Commission must still be satisfied that no employee has suffered detriment as a result of the failure. Nevertheless, arguably, it removes an automatic procedure through which every variation of an agreement is assessed and potentially reduces the likelihood of scrutiny.

Hearings not required

Although it is not a statutory requirement, it is currently the Commission's practice to hold formal hearings to decide whether to certify an agreement.[24] **Item 11** inserts **proposed section 170LVA.** This new section requires the Commission to certify, extend, vary or terminate a certified agreement without holding a hearing unless:

- the Commission is not satisfied that it can make a decision with the information available to it, or
- an affected or prescribed party has requested a hearing and it is satisfied that there are reasonable grounds for doing so.

The following people can request a hearing: [25]

- the employer
- a person whose employment will be subject to the agreement

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- employee organisations that have made an agreement directly with the employer
- employee organisations who have volunteered to be bound by an agreement between employees and employers, or
- a person prescribed by the regulations.

Proposed subsection 170LVA(2) requires that an application requesting a hearing must be made within 28 days of the agreement being approved or made.

Item 2 inserts a **proposed subsection 170LJ(3A)** which requires an employer to take reasonable steps, within 7 days of the day of approval, to inform each person whose employment will be subject to the agreement that they can request the Commission to hold a hearing in relation to whether the agreement should be certified no later than 28 days after the agreement is approved. **Items 15, 19, and 22** insert **proposed subsections 170MC(4A) and (4B), 170MD(5A) and (5B),** and **170MG(5) and (6)** which are identical provisions for the extension, variation and termination days respectively.

The Government argues that a written process only is sufficient in most cases and the Commission can call a hearing when satisfied that it is necessary. [26] It also notes that it is sensible that agreements are only to be tested on 'an exceptions basis' which saves time away from workplaces. [27] Contrary to this, employee organisations argue that it reduces overall scrutiny because it removes the general obligation that a public hearing always be held.[28]

Employee organisation consent for 170LK agreements

Existing paragraphs 170MC(1)(a) and (b), 170MD(1)(a) and (b), and 170MG(1)(a) and (b) deal with who may extend, vary or terminate a certified agreement respectively. Under the present system, the employer and an organisation bound by the certified agreement must both consent in writing to apply to the Commission for the approval of an extension, variation or termination of a current certified agreement (subsections 170MC(3), 170MD(3) and 170MG(3)).

Items 13, 17 and 20 insert **proposed paragraphs 170MC(1)(a) and (b)**, **170MD(1)(a) and (b)**, and **170MG(1)(a) and (b)**. The effect of the proposed provisions would be to remove employee organisations from this initial approval process for section 170LK agreements. Section 170LK agreements are agreements directly between employers and employees. The Explanatory Memorandum states that the amendments proposed by these items are 'intended to remove the entitlement of employee organisations to prevent the extension [variation/termination] of section 170LK agreements, while still retaining a role for such organisations where requested by a member.[29] The requirement that the Commission must approve the extension, variation or termination if satisfied that a valid majority of employees genuinely approve remains unchanged.

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Items 14, 18 and 21 insert **proposed subsections 170MC(2A) and (2B), 170MD(2A) and (2B),** and **170MG(2A) and (2B)** which require the Commission to give organisations an opportunity to make submissions before approving an extension, variation or termination of a 170LK agreement.[30] Submissions can only be made by organisations that have at least one member:

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

The Explanatory Memorandum states that employee organisations should not be able to veto agreements to which they are not directly a party and that this would prevent employee organisations from blocking certified agreements that the majority of employees support.[31] It also notes that members who are a party to the agreement can still invite their employee organisations to make submissions with regard to the agreement. Arguments against this include that it removes any meaningful right of employee organisations to be involved on equal terms in ancillary agreement making with the result that employees will be less likely to be properly represented in the negotiation process.

Concluding Comments

There has already been much commentary on the industrial relations reforms introduced by the Government since it came to power.[32]

In relation to the provisions simplifying the approval of certified agreements in particular, it is interesting to note that the reduction in formal scrutiny procedures appears to be contrary to the evidence presented to the Cole Royal Commission. It has been reported that "Royal commission analysts found 16 agreements certified by the Australian Industrial Relations Commission contained serious omissions, irregularities and breaches of the Workplace Relations Act."[33] Additionally, Waring and Lewer have calculated that over 2000 AWAs have been certified by the Commission and submit that it is probable that these AWAs were passed as not contrary to the public interest even though they did not meet the no disadvantage test. [34] An example of a case that is not contrary to the public interest is where making the agreement is part of a reasonable strategy to deal with a short-term crisis in and assist with the revival of a single business. [35]

The proposals to introduce cooling off periods may have the practical effect of increasing the pressure on an individual to sign an AWA. [36] The Bill also removes a right of the employee organisation to consent to an extension, variation or termination of a section 170LK certified agreement. However, in these few cases, it could be argued that those employee organisations do not need employee approval before they can opt to be bound

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by the agreement and should not therefore be able to prevent a change to the certified agreement.

Main Provisions Table

The following table repeats and summarises the main aspects of the Main Provisions section above:

Proposals	Status Quo	Comments and Pros / Cons
AUSTRALIAN WORKPLACE AGREEMENTS		
Part VID, Div 3 Removes the current filing process and **streamlines the approval process** into a one step process.	Part VID, Div 4 and 5 Employment Advocate checks documents and issues filing receipt and then there is a second process where the Employment Advocate or the Commission (depending on the issues) can further scrutinize the AWA.	+ dispense with 'time consuming and resource intensive' task of issuing filing receipts. [37] + simpler to have immediate commencement [38] - becomes legally operative and allows signing before even the Employment Advocate, yet alone the Commission, can check the document for potential disadvantage
ss. 170VBA(5) Agreement can be **signed immediately** after information statement is given to employee. Introduces **cooling off periods.** 5 days for new employees and 14 days for existing employees. Cooling off periods are introduced for the extension, variation and termination of agreements (**Divisions 5&6**)	ss. 170VPA(1) Additional approval requirements for making and varying AWAs mean that agreements cannot be signed until 14 days after existing employees first receive a copy and 5 days for new employees.	The current delay is intended to allow employees to receive independent advice on the AWA before they sign it. + avoid costs and time wasting in delayed commencement whilst still providing capacity to withdraw in cooling off period [39] - pressure the Employment Advocate and give rise to claims that agreements are already in operation and should be approved to avoid claims for arrears of wages [40]

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s. 170VBD AWA to **commence on signing date.** The new commencements without prior approval, set up 'exceptions-based' conditions where the approvals must be given unless there is a disadvantage to a party to the agreement.	s. 170VJ Commencement after approval (the second stage) for existing employees or after filing date for new employees	See arguments above. - 'employees will always be in a more difficult position if they must withdraw from an agreement they have previously accepted' [41]
Removes the 'additional approval requirements' that the Employment Advocate be satisfied that the employer has not acted unfairly or unreasonably in failing to offer AWAs on same terms to **comparable employees.**	Paras. 170 VPB(1)(b) and 170VPA(1)(e) These provisions require that the *Employment Advocate* be satisfied that employers did not act unfairly or unreasonably in failing to offer the same terms to all comparable employees. Note that s.170VO(1)(b)(iii) only requires the employer to declare (cf. explain) whether they have offered an AWA in the same terms to all comparable employees.	Potentially broadens the scope for performance pay.[42] + improves flexibility and is in the compatible with the 'concept of individual agreement-making'.[43] + Employment Advocate can still refer to Commission if doubt about no disadvantage test (NDT) - allows for different pay and conditions among employees for performing similar work - potential to progressively bid down wages and conditions through the selective application of AWAs to individual employees.[44]
s.170WKD Employment Advocate may **revoke an approval or refusal of AWAs**, or extension, variation or termination agreements	It is not clear whether the Employment Advocate has this power.	In analysing the present situation, it was found in *Schanka* that the Employment Advocate is unlikely to have such a power. Moore J found that a withdrawal of an approval is not an 'instrument' under s. 33(3) of the Acts Interpretation Act: "On present authority, such an instrument must be of a legislative character whereas an approval notice issued by the Employment Advocate appears to be executive in character." [45]

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s. 170VX Enable the Employment Advocate to **recover the shortfall** in entitlements in specified circumstances where an AWA or related agreement: ceases to have effect; is approved with an employer action or undertakings; or was void. [46]	s. 170VX Approval for shortfall is currently limited to new employees. Note that there is nothing that expressly authorises the Employment Advocate to carry these additional functions, but they are consistent with the functions of the Employment Advocate as set out in s. 83BB	+ in light of the other proposals for commencement on signing and the revocation power, this ensures that employees that cannot take action themselves are not disadvantaged [47]
p. 170 VCB(1)(d) The Employment Advocate must approve an AWA if 'the AWA *passes* the **no disadvantage test (NDT)**'.	p. 170VPB(1)(a) The Employment Advocate must approve an AWA for which a filing receipt has been issued if the Employment Advocate *is sure* that the AWA passes the NDT.	+ Employment Advocate has stated that 'we will be checking that all the AWAs pass the NDT.' [48] - this forms part of general criticism that this Bill weakens the application of the NDT.[49] Employment Advocate's partnership arrangements mean that the Employment Advocate would to some degree be relying on employers or their consultants to certify that the agreements pass the NDT.
CERTIFIED AGREEMENTS		
ss. 170LJ(3)(a), 170LK(2), 170LR(2)(a) Allows the Commission to certify an agreement without restarting the **consideration period** of 14 days when new employees commence. Employer to take 'reasonable steps' to ensure agreement terms are explained.	p. 170LJ(3)(a) Currently, it is unclear whether the consideration period for a certified agreement must start again every time an employee joins during a consideration period, ie. whether this falls within the reasonable steps to be taken.	+ this measure addresses a 'technical defect'. [50]

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ss. 170LT(11) If a proposed agreement is varied for any reason after notice is given, the Commission can **forgo notification and explanation requirements** and certify an agreement if it is satisfied that no employee suffered detriment as a result of that failure.	ss. 170LK(8) If a proposed agreement is varied for any reason after notice is given, the Commission must ensure that the employer give notice of intention to make and provide access to the agreement, explain the agreement, and provide employees with an opportunity to confer with the employee organisation.	+ an administrative saving in so far as it eliminates a process that consumes time and resources for minor technical amendments + the Commission must still be satisfied that no employee has suffered detriment as a result of the failure - nevertheless, arguably, it removes a procedure through which every variation is assessed and potentially reduces the likelihood of scrutiny
s. 170LVA Dispense with **formal hearings** before the Commission to certify, extend, vary or terminate a CA unless an affected or prescribed party has requested a hearing or the Commission is not satisfied that it can make a decision with the information available to it.	Although it is not a statutory requirement, it is currently the Commission's practice to hold formal hearings.[51]	+ written process only is sufficient in most cases and the Commission can call a hearing when satisfied that it needs to [52] + otherwise, agreements are only to be tested on 'an exceptions basis' which saves time away from workplaces [53] - reduces overall scrutiny because it removes the general obligation that a public hearing always be held.[54]
ss. 170MC(1), 170MD(1) and 170MG(1) removes the requirement that **employee organisations must consent** to the initial bringing of a s. 170LK agreement (agreements directly between employers and employees) to extend, vary or terminate a current CA. Employee organisations can volunteer to be bound by 170LK agreements (cf. 170LJ agreements to which they are actually a party).	ss.170MC(1),170MD(1) and 170MG(1) For 170LK agreements, both the employer and the employee organisation must consent to extend, vary or terminate a current CA.	+ prevents employee organisations from blocking CAs that the majority of employees support [55] + employee organisations should not be able to veto agreements to which they are not directly a party + members can still invite the employee organisations to make submissions with regard to the agreement - reduces the real bargaining power of employee organisations by giving a higher status to employer in these negotiations.

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Endnotes

1 Explanatory Memorandum to the Workplace Relations Amendment (Simplifying Agreement-Making) Bill 2002, (the WRA (SAM) Bill 2002), p. 6.

2 'Third parties' technically includes employer associations, unions, and the Australian Industrial Relations Commission.

3 The following general comments are drawn from Mr Robert McClelland MP's Second Reading Speech to AWA Procedures Bill 2000, House *Hansard*, 4–5 October 2000.

4 In accordance with the revised structure in the Bill, the discussion of the similar schemes for making ancillary (extending, varying, terminating) agreements are described separately below.

5 See discussion of comparable employees below.

6 Department submission, MOJO Report, p.103.

7 Department and Australian Chamber of Commerce and Industry submissions noted in the MOJO Report, p. 103.

8 Explanatory Memorandum to the WRA (SAM) Bill 2002, pp. 37–38.

9 McClelland, Second Reading Speech to AWA Procedures Bill 2000, House *Hansard*, 4-5 October 2002.

10 Community and Public Sector Union submission, MOJO Report, p. 103.

11 See for example, Ms Karen Batt, Department of Education evidence, MOJO Report, p. 312.

12 The Hon. Tony Abbott MP, *Second Reading Speech* to the WRA (SAM) Bill 2002.

13 National Union of Workers submission – MOJO Report, p. 104 and see also Human Rights and Equal Opportunity Commission, MOJO Report, p. 312.

14 See comments on no disadvantage test under separate heading below.

15 *Schanka v Employment National (Administration) Pty Ltd* [2001] FCA 1623 at para 54.

16 Ibid., and see also *Australian Capital Equity Pty Ltd v Beale* (1993) 41 FCR 242 at 256-257, *Minister for Immigration & Multicultural Affairs v Sharma* (1999) 90 FCR 529 at [82], *Dutton v Republic of South Africa* (1999) 162 ALR 625 at [32]).

17 Given the proposals for immediate commencement and the revocation power, the circumstances for potential shortfalls have increased.

18 MOJO Report, p. 107.

19 Italics inserted.

20 Mr Robert McClelland MP, 'New Bill would further undermine AWA safeguards', *Media Release*, 26 June 2002.

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21 Ibid. In particular, Mr McClelland notes that 'Under a special fast track programme, the Employment Advocate relies on assurances by employers or private consultants that AWAs meet the no-disadvantage test. But any delegation of the function of checking AWAs to make sure they comply to somebody other than a public servant is unlawful.

22 Existing paragraph 170LR(2)(b) and proposed paragraph 170LK(2)(c).

23 Explanatory Memorandum to the WRA (SAM) Bill 2002, p. 3.

24 Ibid.

25 Proposed paragraphs 170LVA(1)(b)(i-v)

26 MOJO Report p. 98.

27 Ibid., p. 98.

28 Ibid., p. 99.

29 Explanatory Memorandum to the WRA (SAM) Bill, p. 42.

30 Sections 170MH and 170MHA are separate and mirror provisions for the termination of certified agreements after the nominal expiry dates. Items 24 and 26 insert equivalent provisions regarding making submissions.

31 Explanatory Memorandum to the WRA (SAM) Bill, p. 5.

32 As well as the Bills Digests mentioned above, readers are referred to the Employment and Workplace Relations Department website at www.workplace.gov.au, and the Library's general Industrial Relations resources guide.

33 Paul Robinson, 'Industrial commission branded negligent' *The Age*, 7 February 2002.

34 John Lewer and Peter Waring, 'The no disadvantage test: failing workers', *Labour and Industry*, 2001, Vol. 12 (10), pp. 65–86 at 71.

35 Note to subsection 170VPG(4), *Workplace Relations Act 1996.* Waring and Lewer actually refer to the equivalent provisions for Certified Agreements when discussing AWAs, ie. subsections 170LT(3)and(4), but the effect is the same.

36 MOJO Report, p. 103.

37 Ibid.

38 Ibid.

39 Explanatory Memorandum to the WRA (SAM) Bill 2002, pp. 37-38.

40 McClelland, Second Reading Speech to AWA Procedures Bill 2000, House *Hansard*, 4-5 October 2002.

41 MOJO Report, p. 103.

42 Ibid., p. 312.

43 The Hon. Tony Abbott MP, *Second Reading Speech* to the WRA (SAM) Bill 2002.

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44 National Union of Workers – MOJO Report, p. 104.

45 *Schanka v Employment National (Administration) Pty Ltd* [2001] FCA 1623 at para 54. See also *Australian Capital Equity Pty Ltd v Beale* (1993) 41 FCR 242 at 256-257, *Minister for Immigration & Multicultural Affairs v Sharma* (1999) 90 FCR 529 at [82], *Dutton v Republic of South Africa* (1999) 162 ALR 625 at [32]).

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47 MOJO Report p. 107.

48 Mr Robert McClelland MP, 'New Bill would further undermine AWA safeguards', *Media Release*, 26 June 2002.

49 Ibid.

50 Explanatory Memorandum to the WRA (SAM) Bill 2002, pp. 37–38.

51 Ibid., p. 3.

52 MOJO Report p. 98.

53 Ibid.

54 Ibid., p. 99.

55 Explanatory Memorandum to the WRA (SAM) Bill, p. 5.

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