Workplace Relations Amendment (Work Choices) Bill 2005

Law and Bills Digest Section
Social Policy Section
Economics, Commerce and Industrial Relations Section

Contents

Glossary ............................................................. 7
Purpose.............................................................. 9
Structure of the Bill ..................................................... 9
Scope and structure of the Bills Digest ....................................... 9
Key features of the proposed new law....................................... 10
Key issues in the Bill. ................................................... 12
Key publications accompanying this Bills Digest. ............................... 17
History of this Bill. ..................................................... 17
Discussion of the Bill. ................................................... 19
Schedule 1 of the Bill ................................................. 19
  Part I: Preliminary ................................................... 19
  Background ...................................................... 19
  Main provisions ................................................... 19
  Comment ........................................................ 22
  Part IA: Australian Fair Pay Commission ............................. 23

Warning:
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This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
Main provisions ........................................................ 23
Comment ....................................................................... 24
Part II: Australian Industrial Relations Commission .......... 28
Main provisions ........................................................ 28
Comment ....................................................................... 29
Part IVA: The Employment Advocate ................................ 29
Part V: Workplace inspectors ........................................... 30
Part VA: The Australian Fair Pay and Conditions Standard ... 32
  Background to Part VA ............................................... 33
  Main provisions ........................................................ 33
Part VB: Workplace agreements ........................................ 40
  Background .............................................................. 40
  Main provisions ........................................................ 41
  Comment ..................................................................... 45
Part VC: Industrial action ............................................... 46
  Background .............................................................. 46
  Main provisions ........................................................ 47
  Industrial action, freedom of association and international obligations ............... 50
Part VI: Awards ............................................................. 53
  Main provisions ........................................................ 53
  Comment ..................................................................... 57
Part VIA: Minimum entitlements ........................................ 57
  Division 1—Entitlement to meal breaks .............................. 57
  Division 2—Equal remuneration for work of equal value ............. 57
  Division 3—Termination of employment—unfair dismissal .......... 58
  Division 5—Parental leave ............................................ 61
Part VIIA: Transmission of business rules ........................... 61
  Background .............................................................. 61
  What the Bill does ..................................................... 63
Part VIIA: Dispute resolution processes ................................ 67

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<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Model dispute resolution process</td>
<td>67</td>
</tr>
<tr>
<td>AIRC-conducted alternative dispute resolution</td>
<td>72</td>
</tr>
<tr>
<td>Focus on private dispute resolution</td>
<td>76</td>
</tr>
<tr>
<td>AIRC-conducted ADR and proposed collective agreements</td>
<td>77</td>
</tr>
<tr>
<td>AIRC-conducted ADR and workplace agreements</td>
<td>77</td>
</tr>
<tr>
<td>ADR conducted by another provider</td>
<td>77</td>
</tr>
<tr>
<td>Part VIII: Compliance</td>
<td>78</td>
</tr>
<tr>
<td>Main provisions</td>
<td>78</td>
</tr>
<tr>
<td>Part IX: Union right of entry</td>
<td>81</td>
</tr>
<tr>
<td>Background</td>
<td>81</td>
</tr>
<tr>
<td>Main provisions</td>
<td>82</td>
</tr>
<tr>
<td>Comment</td>
<td>83</td>
</tr>
<tr>
<td>Part XA: Freedom of association</td>
<td>83</td>
</tr>
<tr>
<td>Background</td>
<td>83</td>
</tr>
<tr>
<td>Main provisions</td>
<td>84</td>
</tr>
<tr>
<td>Part XI: Offences</td>
<td>85</td>
</tr>
<tr>
<td>Part XIII: Miscellaneous</td>
<td>85</td>
</tr>
<tr>
<td>Costs orders</td>
<td>85</td>
</tr>
<tr>
<td>Variation of workplace agreements</td>
<td>85</td>
</tr>
<tr>
<td>Part XIV: Jurisdiction of the Federal Court and Federal Magistrates Court</td>
<td>86</td>
</tr>
<tr>
<td>Part XV: Matters referred by Victoria</td>
<td>87</td>
</tr>
<tr>
<td>Referral of constitutional power</td>
<td>87</td>
</tr>
<tr>
<td>Main provisions</td>
<td>88</td>
</tr>
<tr>
<td>Transitional provisions contained in Schedule 1 of the Bill</td>
<td>89</td>
</tr>
<tr>
<td>Amendments to Schedule 1B of the WR Act 1996</td>
<td>89</td>
</tr>
<tr>
<td>New Schedule 13: Transitional arrangements for parties bound by federal awards</td>
<td>90</td>
</tr>
<tr>
<td>New Schedule 14: Transitional arrangements for existing pre-reform Federal agreements etc.</td>
<td>93</td>
</tr>
<tr>
<td>New Schedule 15: State employment agreements and state awards</td>
<td>97</td>
</tr>
</tbody>
</table>

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New Schedule 16: Transmission of business rules (transitional instruments) ........ 101
Schedule 2 of the Bill—Transitional arrangements for State organisations .......... 104
Schedule 3 of the Bill—School-based apprentices .................................... 105
Schedule 4 of the Bill—Transitional and other provisions ............................ 105
Schedule 5 of the Bill—Renumbering the Workplace Relations Act .................. 107
Concluding comments ................................................................................. 107
Constitutional issues .................................................................................... 107
Corporations power ....................................................................................... 108
Will choosing the corporations power simplify the WR system? ...................... 110
Vertical coverage of the WR system—‘covering the field’ .......................... 111
Federal balance ............................................................................................. 111
Express limitations contained in the Constitution ........................................ 112
Circumvention of express limitations in the Constitution ............................... 113
Expropriation on just terms ........................................................................ 113
Implied limitations under the Constitution .................................................. 114
The implied freedom of political communication ...................................... 114
The implied freedom of association ............................................................. 115
Henry VIII clauses and the Commonwealth’s law-making powers ............... 115
Can the use of Henry VIII clause undermine parliamentary supremacy? ....... 116
Can broad executive law-making powers undermine the rule of law? ............ 117
Australia’s international obligations ............................................................. 117
Compliance with the Australia-United States Free Trade Agreement ............. 117
Compliance with ILO Conventions .............................................................. 118
The proposed workplace reforms—potential economic aspects of the changes .. 119
The proposed workplace reforms—important social dimensions of the changes .. 121
Some consider the IR reforms will have social benefits ............................... 121
Some consider the IR reforms will have adverse social impacts .................... 123
Social impact on specific groups ................................................................. 123
Academic opinion on social impacts of the proposed IR reforms .................... 124
Appendix A—Summary of impact of WorkChoices changes on employers ....... 126

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### Glossary

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACCI</td>
<td>Australian Chamber of Commerce and Industry</td>
</tr>
<tr>
<td>ACTU</td>
<td>Australian Council of Trade Unions</td>
</tr>
<tr>
<td>AFPC</td>
<td>Australian Fair Pay Commission</td>
</tr>
<tr>
<td>AFPCS</td>
<td>Australian Fair Pay and Conditions Standard</td>
</tr>
<tr>
<td>AIRC</td>
<td>Australian Industrial Relations Commission</td>
</tr>
<tr>
<td>APCS</td>
<td>Australian Pay and Classification Scales</td>
</tr>
<tr>
<td>AUSFTA</td>
<td>Australia-US Free Trade Agreement</td>
</tr>
<tr>
<td>AWA</td>
<td>Australian Workplace Agreement</td>
</tr>
<tr>
<td>Corporations power</td>
<td>Section 51(xx) of the Constitution</td>
</tr>
<tr>
<td>DEWR</td>
<td>Department of Employment and Workplace Relations</td>
</tr>
<tr>
<td>DR</td>
<td>Dispute Resolution</td>
</tr>
<tr>
<td>EEO</td>
<td>Equal employment opportunity</td>
</tr>
<tr>
<td>Expropriation power</td>
<td>Section 51(xxxi) of the Constitution</td>
</tr>
<tr>
<td>External affairs power</td>
<td>Section 51(xxix) of the Constitution</td>
</tr>
<tr>
<td>FMW</td>
<td>Federal Minimum Wage</td>
</tr>
<tr>
<td>ICTUR</td>
<td>International Centre for Trade Union Rights</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organisation</td>
</tr>
<tr>
<td>ILO Convention No. 87</td>
<td>C87 Freedom of Association and Protection of the Right to Organise Convention, 1948</td>
</tr>
<tr>
<td>IR</td>
<td>Industrial Relations</td>
</tr>
</tbody>
</table>

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<tr>
<th>Labour power</th>
<th>Section 51(xxxv) of the Constitution</th>
</tr>
</thead>
<tbody>
<tr>
<td>MDR</td>
<td>Model Dispute Resolution process</td>
</tr>
<tr>
<td>OEA</td>
<td>Office of the Employment Advocate</td>
</tr>
<tr>
<td>Territory power</td>
<td>Section 122 of the Constitution</td>
</tr>
<tr>
<td>Trade and commerce power</td>
<td>Section 51(i) of the Constitution</td>
</tr>
<tr>
<td>Unfair dismissal and Small Business Senate Inquiry</td>
<td>Senate Employment, Workplace Relations, Small Business and Education References Committee, <em>Unfair dismissal and small business employment</em>, Report, June 2005²</td>
</tr>
<tr>
<td>WorkChoices</td>
<td>WorkChoices—A new workplace relations system (booklet, October 2005)</td>
</tr>
<tr>
<td>WorkChoices Senate Inquiry</td>
<td>Senate Employment, Workplace Relations and Education Legislation Committee, Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005³</td>
</tr>
<tr>
<td>Workplace Agreements Senate Report</td>
<td>Senate Employment, Workplace Relations and Education References Committee, Report on Workplace Agreements, October 2005⁴</td>
</tr>
<tr>
<td>WR Act 1996</td>
<td>Workplace Relations Act 1996 (Commonwealth)</td>
</tr>
<tr>
<td>WR system</td>
<td>Workplace relations system</td>
</tr>
</tbody>
</table>

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Workplace Relations Amendment (Work Choices) Bill 2005

**Date Introduced:** 3 November 2005

**House:** House of Representatives

**Portfolio:** Employment and Workplace Relations

**Commencement:** Sections 1 to 3 of the Workplace Relations Amendment (Work Choices) Bill 2005 will commence with Royal Assent. Schedules 1 to 3 and 5 will commence either on proclamation or on the day after a period of 6 months after the Bill receives royal assent, whichever comes first. Part 1 of Schedule 4 will commence with royal assent and Part 2 of Schedule 4 at the same time as Schedule 1.

**Purpose**

The Workplace Relations Amendment (Work Choices) Bill 2005 (‘the Bill’) proposes to make significant changes to the existing *Workplace Relations Act 1996* (‘WR Act 1996’) to implement the Government’s *WorkChoices* policy.

**Structure of the Bill**

The Bill is an amendment Bill to the current WR Act 1996. The Bill is made up of five Schedules. The amendments to the WR Act are contained in Schedule 1. The reader should note that the Bill will also amend current Schedules 1B and 13–15 of the WR Act 1996, which explains why amendments to these Schedules are located within Schedule 1.

For the convenience of the reader, tables of content of the Bill and the Explanatory Memorandum, complete with corresponding page numbers, have been added to this Bills Digest as Appendices C and D.

**Scope and structure of the Bills Digest**

Readers should note that due to the size of the Bill and the short time between its introduction and its debate in Parliament, the digest focuses on key issues only. It does not attempt to provide a comprehensive list of all possible issues in the Bill that Parliament might consider.

This digest will, first, provide an overview of the key features of the proposed new workplace relations (WR) system, followed by, second, an outline of the potential issues which arise from the changes. Third, readers are referred to several key publications of the Parliamentary Library. Fourth, a brief overview of the historical development of this reform proposal is provided. Fifth, the digest will discuss the main provisions of the Bill.

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As far as possible, the digest tries to follow the order of parts as they will be located in the amended WR Act 1996 after the passing of this Bill. Finally, the digest provides some concluding comments, discussing constitutional and other issues raised by the Bill, and several appendices, which contain further information for the reader.

**RENUMBERING**

**NOTE**: The reader is reminded that Schedule 5 of the Bill will effect a renumbering of the entire amended WR Act 1996. However, this Bills Digest uses the items, clauses and numbering as currently proposed.

**AMENDMENTS**

**NOTE**: Various amendments have been proposed in relation to this Bill, including 98 pages of amendments by the Federal Government, aimed at alleviating some of the concerns voiced in the Senate and the public. These amendments have not been included into the analysis provided in this Bills Digest, but can be accessed via the Parliamentary Library’s Internet guide to the Workplace Relations Amendment (Work Choices) Bill 2005, [http://www.aph.gov.au/library/intguide/law/workchoicesbill.htm](http://www.aph.gov.au/library/intguide/law/workchoicesbill.htm).

**Key features of the proposed new law**

The CCH Special Email Alert Dispatch, issued 3 November 2005, remarks that ‘The federal government’s Work Choices legislation fundamentally changes Australia’s workplace relations system’. The key features of the workplace relations system can be briefly summarised as follows:

- the changes are based on a bundle of constitutional powers of the Commonwealth, with the corporations power at the heart of the reform of the WR system
- the Commonwealth aims at overriding existing industrial relations (IR) state laws to create a unitary WR system
- the proposed new WR system is designed to encourage the negotiation of workplace agreements directly between employers and employees, including without the intervention of third parties
- the existing ‘no-disadvantage test’ will be abolished and substituted with five minimum requirements which must govern future workplace agreements

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workplace agreements generally will become operative upon lodgment with the Office of the Employment Advocate (the OEA)

all workplace agreements must at least meet the legislated pay and conditions standard, and must contain dispute-settling procedures

certain matters will be prohibited and cannot be included in workplace agreements

minimum wages in Australia will be reviewed and set by the Australian Fair Pay Commission (AFPC)

the Australian Industrial Relations Commission’s (AIRC) dispute resolution powers will be limited significantly. However, the AIRC will still have the power to arbitrate certain workplace arrangements in limited circumstances

under the new system, existing award conditions will be preserved, unless they are specifically bargained away. Collective agreements or Australian Workplace Agreements (AWAs) will need to set out how they amend or remove many of these award conditions

award rationalisation and simplification will be achieved by removing certain allowable award matters

unfair dismissal laws will remain largely unchanged, but their application will be limited to businesses with more than 100 employees

employees in businesses to which the unfair dismissal laws apply will not be able to bring unfair dismissal claims if they are dismissed within less than six months’ service for the business, and

employees who have been made redundant will have no redress under the unfair dismissal laws, but will be able to bring claims for unlawful termination.\(^5\)

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Key issues in the Bill

During the preparation of this Bills Digest, the following issues were identified as the key issues in the proposed new WR system.

<table>
<thead>
<tr>
<th>POTENTIAL ISSUES ARISING UNDER THE PROPOSED NEW LAW GENERALLY</th>
</tr>
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<tbody>
<tr>
<td><strong>Constitutional issues</strong></td>
</tr>
<tr>
<td>• Whether a law with respect to workplace relations and employment conditions generally can also be characterised as a law with respect to corporations</td>
</tr>
<tr>
<td>• Whether the Commonwealth Parliament can utilise the corporations power to make laws with respect to the AFPC</td>
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<tr>
<td>• Whether the proposed new law, by relying significantly on regulations, does so to the extent that it:</td>
</tr>
<tr>
<td>− violates general principles of the rule of law because, when passed, it is too uncertain to be properly described as a law</td>
</tr>
<tr>
<td>− cannot be said to be a law of the Commonwealth Parliament because significant aspects of it will be delegated to the executive or can be overridden by executive law-making</td>
</tr>
<tr>
<td>• Whether the attempt to essentially oust states from exercising their concurrent legislative powers over industrial relations may violate the principle of federalism underlying the Constitution</td>
</tr>
<tr>
<td>• Whether certain measures, including the award rationalisation and simplification process and the phasing out of the current awards system, have the potential to amount to the expropriation of rights without just compensation, violating the constitutional injunction in section 51(xxxi) of the Constitution</td>
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<thead>
<tr>
<th><strong>International obligations</strong></th>
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<tr>
<td>• Whether the proposed law has the potential to violate the Australia-US Free Trade Agreement</td>
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<tr>
<td>• Whether certain measures, including for example those restricting employees from taking industrial action and the changes to the unfair dismissal laws, are consistent with Australia’s international obligations in relation to labour, including under International Labour Organisation (‘ILO’) Conventions and the International Covenant on Economic, Social and Cultural Rights</td>
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</table>

<table>
<thead>
<tr>
<th><strong>Economic issues</strong></th>
</tr>
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<tbody>
<tr>
<td>• Whether the proposed reform of the WR system is able to produce more jobs in Australia</td>
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<tr>
<td>• Whether the changes will result in the corporatisation of the workplace and the labour law</td>
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• Whether the proposed WR system will effect equal pay or whether wages will be linked to productivity, creating the risk that employees subsidise an employer’s below average performance through lower wages

Social issues
• Whether the proposed new regime will provide more economic flexibility and better prosperity for the nation or widen income inequality in Australia
• Whether the social impacts of the law have been adequately assessed and balanced against each other
• Whether the proposed new WR system requires additional safeguards for certain groups in society, including, for example, indigenous people, women and young employees

<table>
<thead>
<tr>
<th>POTENTIAL ISSUES ARISING UNDER INDIVIDUAL PARTS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Part I: Preliminary</strong></td>
</tr>
<tr>
<td>• Whether choosing the term ‘constitutional corporation’ will provide a more certain test as to whether a particular employment relationship will be governed by the proposed new WR system given that, to date, the courts have been unable to settle on a precise scope of the corporations power</td>
</tr>
<tr>
<td>• Whether the Commonwealth has effectively evinced an intention to ‘cover the field’</td>
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<tr>
<td><strong>Part IA: Australian Fair Pay Commission</strong></td>
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<tr>
<td>• Whether the abolition of the adversarial procedure governing the wage-setting process will lead to better outcomes</td>
</tr>
<tr>
<td>• Whether the AFPC or the government will determine when and how to review wages in Australia, and whether interested parties will be able to initiate a review by lodging claims</td>
</tr>
<tr>
<td>• Whether—in view of broad executive regulation-making powers—the AFPC will be able to make wage-setting decisions based on the best and most objective information available to it</td>
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<tr>
<td>• Whether the composition of the AFPC will ensure an impartial panel</td>
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<tr>
<td><strong>Part II: The Australian Industrial Relations Commission</strong></td>
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<tr>
<td>• Whether an institution with the ability to make instruments having the effect of law (in the form of awards) can be subjected to ministerial directions</td>
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<tr>
<td>• Whether the AIRC can be further limited in its dispute-resolution and award-making role in the manner envisaged by the Act</td>
</tr>
<tr>
<td><strong>Part VA: The Australian Fair Pay and Conditions Standard</strong></td>
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• Whether the proposed legislation will have unintended or unknown consequences
• Whether parliament should be required by law to periodically review the legislated Federal Minimum Wage level, proposed to be set at $12.75 per hour, to avoid the effective devaluation of the level through inflation. Alternatively, should this level be indexed?

Part VB: Workplace agreements
• Whether the proposed new law should prescribe express minimum requirements for the statutory declaration to be used when lodging a workplace agreement with the OEA
• Whether the WR system should remove the ‘no-disadvantage test’
• Whether the proposed new law should provide employers with the ability to unilaterally impose employment conditions as part of employer ‘greenfields’ agreements
• Whether the proposed protection of award conditions is sufficient
• Whether the broad regulation-making powers specifying prohibited content provide the government with the opportunity to void the content of workplace agreements retrospectively
• Whether broad regulation-making powers with respect to who can be a bargaining agent for an employee may distort the bargaining balance between employees and employers.

Part VC: Industrial action
• Whether additional restrictions on industrial action proposed in the Bill, including:
  – complex additional procedures before action can occur (including mandatory secret ballots)
  – the circumstances in which industrial action can happen, and
  – the limited reasons it can be undertaken for,
  together with the Minister’s power to declare a campaign of industrial action illegal, will in practice make it impossible to conduct any significant industrial action.
• Whether the proposed measures restricting employees from taking industrial action are consistent with Australia’s obligations under ILO Conventions and the International Covenant on Economic, Social and Cultural Rights.

Part VI: Awards
• Whether the safety net for award conditions, as envisaged by the proposed new legislation, will be sufficient
• Whether the simplification and rationalisation of awards may result in an expropriation

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of existing rights under state statute law or at common law through the Commonwealth which may only occur on just terms

**Part VIA: Minimum entitlements**

**Division 3—Termination of employment—unfair dismissal**

- Whether the proposed threshold of 100 people for entities for which unfair dismissal laws apply discriminates between employees working for entities above and below this threshold

- Whether excluding employees from bringing unfair dismissal claims where the dismissal was for ‘operational reasons’ will have the effect of removing a larger proportion of employees from the application of unfair dismissal laws, especially considering the arguable ambiguity of the term ‘operational reasons’.

- Whether, as suggested by the *Unfair dismissal and Small Business Senate Inquiry*, an independent review of the unfair dismissal laws should be conducted before any changes are made

- Whether the proposed measures give effect to or breach Australia’s international obligations, for example, under the ILO Convention relating to the termination of employment.

**Part VII: Dispute resolution**

- Whether, in disputes under awards and in relation to such matters as parental leave, parties should have greater freedom to agree upon a dispute resolution model which suits their needs, rather than being compelled to adopt the Model Dispute Resolution (MDR) process prescribed by the Bill

- Whether the AIRC’s significantly reduced powers in relation to dispute resolution, regardless of what the parties may wish, will likely reduce the possibility of achieving quick and cost-effective outcomes

- Whether despite prescribing that parties have a right to resolve their disputes in courts, the proposed laws are unclear as to whether courts, before hearing a matter, must first determine whether the parties have made a genuine attempt to resolve the matter, therefore adding unnecessary cost

- Whether the MDR introduces a host of ambiguous and undefined terms which have the potential to create uncertainty, and this could lead to delays and increased costs for the parties to a dispute

- Whether parties to disputes should be free to appoint representatives to act on their behalf, in accord with general principles relating to alternative dispute resolution

- Whether a private service provider appointed to resolve disputes could have power far exceeding that of the AIRC, and whether such appointments could lead to significant costs

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### Part IX: Union right of entry

- Whether the proposed limitations on the right of entry, imposing the requirement that permit holders must be ‘fit and proper persons’, could be seen as a reasonable development
- Whether the restrictions on the union’s right of entry to workplaces, especially where all employees are either on AWAs or bound non-union collective agreements, could violate Australia’s international obligations

### Part XA: Freedom of association

- Whether restrictions on the freedom of association may violate the constitutionally guaranteed freedom of political communication
- Whether the proposed measures could be seen as a restriction on the collective rights of the members to maintain internal discipline, therewith potentially breaching Australia’s international obligations

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Key publications accompanying this Bills Digest

The Parliamentary Library has produced a range of publications to accompany the introduction of the proposed new WR system. Readers are encouraged to consult these documents for further information in relation to the proposed changes:

- **Workplace relations reforms: a chronology of business, community and Government responses** (includes a chronology and links to documents from 28 September 2004 onwards)
- **WorkChoices: A New Workplace Industrial Relations System—A Summary** (Parliament House users only; last updated 25 October 2005)
- **Federal workplace relations plans and the States in 2005** (Parliament House users only; last updated 18 October 2005)


History of this Bill

For a detailed overview of developments in relation to workplace relations laws and their proposed reforms in Australia since 1996, readers are referred to the Parliamentary Library’s e-brief **Workplace Relations Legislation: Bills Passed, Rejected or Lapsed, 38th–40th Parliaments (1996–2004)**.

This Bill was developed following representations by employer groups after the Coalition parties won control of both houses of parliament at the federal election of 9 October 2004. Employer groups, especially the Australian Chamber of Commerce and Industry (ACCI), made representations to the Government for a fundamental rewriting of federal labour law, starting with measures which the Senate had previously amended or failed to pass. These representations to the newly re-elected government were reported by the media at the time. For example, *The Australian* commented on 12 October 2004 that:

Coalition workplace reforms blocked in the Senate include compulsory union secret ballots before strikes; a permanent commission to police corruption in the building industry; the spread of non-union individual contracts; and small business exemption from unfair dismissals.

The Australian Chamber of Commerce and Industry urged the Coalition to pursue a much more ambitious agenda, taking full advantage of its likely control of Senate

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numbers for the first time in a generation. ACCI chief executive Peter Hendy said business wanted a long list of legislation that had been blocked by the Senate to be reintroduced so it could be passed after next July, when new senators took their places.

Mr Hendy said the first issue for the Government should be to establish “a national system of industrial relations in this country”. The ACCI’s position, if adopted, would pit the Coalition against Labor state governments in a hostile takeover, seizing control of their state-based systems that still gave unions significant influence over wages and conditions. “You don’t need a review to do this,” Mr Hendy said. “The only review the Government would need is how to put it in place.”

By early 2005, the form of the Bill was becoming apparent and the Minister for Employment and Workplace Relations, the Hon. Kevin Andrews, provided an outline in February 2005. However, a more important address on the framework of the new legislation was made by the Prime Minister, the Hon. John Howard, to the parliament on 26 May 2005. In this address, the Prime Minister revealed, for example, that a new Fair Pay Commission would replace the Australian Industrial Relations Commission. Then, a much larger document, the WorkChoices booklet, foreshadowed the possible structure of the Bill, and for example, itemised transitional arrangements for corporations under state jurisdictions to move to the federal system, and revealed much more.

Despite the fact that the government’s commitment to independent contractors legislation was manifest in its 2004 election policy, key measures in the Bill, including, for example:

• the exclusion from unfair dismissal laws of firms with 100 employees or fewer
• the use of the Constitution’s corporations power to remove large sectors from the state jurisdictions, and
• the replacement of the ‘no-disadvantage test’ with five minima

are, if at all, difficult to be found in the Coalition’s 2004 workplace relations policy.

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Discussion of the Bill

Schedule 1 of the Bill

Part I: Preliminary

Background

Proposed new Part I will set the foundation for the operation of the WR system, proposing its constitutional underpinnings. Specifically, this Part will prescribe, first, the possible ‘horizontal’ coverage of the WR system, that is, who is intended to be covered by the proposed new law and what kind of activities of those who will be covered may be regulated. Second, this Part prescribes what may be called the expected ‘vertical’ coverage of the proposed WR system, that is, how far the changes can reach into the states’ ability to regulate industrial relations.

Main provisions

Item 1 of the Bill will repeal the current principal-objects provision in the WR Act, substituting it with proposed new section 3. This proposed new section will specify the principal objects which the amended WR Act 1996 will have. The principal objects will be modified to reflect the overall changes to the proposed new WR system. The proposed new objects include, for example, the:

- provision of an economically sustainable safety net comprised of minimum wages and conditions (proposed new subsection 3(c))
- provision of a foundation of key minimum standards (proposed new subsection 3(d))
- support of harmonious and productive workplace relations (proposed new subsection 3(h)), and
- balancing of the right to take industrial action with the need to protect the public (proposed new subsection 3(i)).

Item 2 will repeal the current definition section, replacing it with proposed new section 4. This proposed new provision will define essential terms of the proposed new WR system.

Horizontal coverage of the Bill—employers, employees and their relations

Central to the working of the proposed new WR system are proposed new sections 4AA and 4AB. These two proposed provisions will define the terms ‘employee’ and ‘employer’. Of particular importance for the operation of the proposed new law will be the employer—the Commonwealth will use the definition of employers as the anchor point for its constitutional powers, especially its corporations power, in order to regulate employment in Australia.

The definition of the term ‘employer’

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The basic definition of the term ‘employer’ is contained in proposed new subsection 4AB(1). The proposed new definition is descriptive, and relates to individuals and entities over which the Commonwealth can assert regulatory powers by virtue of the powers granted to it under the Constitution. These individuals and entities include:

<table>
<thead>
<tr>
<th>PROPOSED NEW SECTION</th>
<th>INDIVIDUAL OR ENTITY</th>
<th>CONSTITUTIONAL POWER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 4AB(1)(a)</td>
<td>Constitutional corporations</td>
<td>Corporations power, section 51(xx)</td>
</tr>
<tr>
<td>Section 4AB(1)(b)</td>
<td>The Commonwealth</td>
<td>Power to regulate Commonwealth employers and employees, section 52(ii) and section 61</td>
</tr>
<tr>
<td>Section 4AB(1)(c)</td>
<td>Commonwealth authorities, as defined under proposed new section 4</td>
<td>Power to regulate Commonwealth employers and employees, section 52(ii) and section 61</td>
</tr>
<tr>
<td>Section 4AB(1)(d)</td>
<td>Employers of flight crew officers, maritime employees or waterside workers, in connection with their constitutional trade or commerce</td>
<td>Trade and commerce power, section 51(i)</td>
</tr>
<tr>
<td>Section 4AB(1)(e)</td>
<td>Bodies corporate, incorporated in the territories</td>
<td>Territory power, section 122</td>
</tr>
<tr>
<td>Section 4AB(1)(f)</td>
<td>Employers carrying on activities of a commercial, governmental or other nature in a territory</td>
<td>Territory power, section 122</td>
</tr>
</tbody>
</table>

The table above also includes the constitutional powers upon which the Commonwealth bases its regulatory powers over individuals and entities. Whilst many of the provisions of the current WR Act 1996 were based upon the external affairs powers given to the Commonwealth, this power is not mentioned in this list. However, it is nevertheless conceivable that it could play a role: first, in relation to provisions which aim at giving effect to international instruments, and, second, for some measures which may not be supported by the corporations power, but could be implemented by relying on the external affairs power.

Proposed new subsection 4AB(2) contains an exception to the basic definition above, that is, where a contrary intention is expressed, the meaning of the term ‘employer’ does not take the above meaning, but its ordinary meaning. It appears that the proposed new law...
relies on the term’s ordinary meaning where a specific measure can be constitutionally supported without especially relying upon the corporations power. 15 The exception will apply to references which will be specified in proposed new Clause 3 of Schedule 1. 16 It should be noted that this list of references is not conclusive but can be amended by way of regulations.

The definition of the term ‘employee’

Unless the proposed new law expressly provides otherwise, the term ‘employee’ is given the meaning prescribed in proposed new subsection 4AA(1). In essence, this subsection prescribes that employees are individuals who are employed by an employer as defined in proposed new section 4AB referred to above. By creating this link between the employee and the employer, it is envisaged that this relationship can be regulated by the Commonwealth because it is supported by a head of power referred to above.

The term employee as defined in proposed new section 4AA(1) is also subject to the exception that in certain circumstances the ordinary meaning of the term is applicable (proposed new subsections 4AA(2)).

The definition of the term ‘employment’

Under proposed new subsection 4AC(1), the term ‘employment’ will be defined as the relationship between the ‘employer’ and ‘employee’ as defined by proposed new sections 4AA and 4AB. Like before, where reliance on the corporations power is not needed, the provision stipulates that the word employment is to be understood in its ordinary meaning.

Vertical coverage of the Bill—Federal-State relations

Item 9 will add proposed new sections 7C–E, which will determine the vertical coverage of the proposed WR system. Plainly, these provisions aim at ‘covering the field’ in relation to industrial relations. Where the Commonwealth successfully covers the field, the States are precluded from legislating in this area and their existing laws which regulated this area become inoperable. Proposed new section 7C will override:

- ‘State and Territory industrial laws’ (proposed new subsection 7C(1)(a)). This term is defined in proposed new section 4(1). Consequently, the state and territory industrial laws which could be overridden will include:
  - all individual state industrial laws (with the exception of Victoria’s, since Victoria has already referred its industrial relations power to the Commonwealth, see below: Part XV)
  - state and territory legislation which applies to employment generally. To assist in identifying such laws, the definition lists five main purposes which are indicia for such a law
  - all legislative instruments made under state and territory industrial laws or which apply to industrial relations generally, and

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any further state and territory laws the Commonwealth executive has prescribed by regulation as falling within this definition.

- state and territory laws which apply to employment generally, dealing with leave other than long service leave (proposed new paragraph 7C(1)(b))
- state and territory laws establishing state or territory courts or tribunals which can make equal remuneration orders (proposed new paragraph 7C(1)(c))
- state and territory laws which deal with unfair contracts (proposed new paragraph 7C(1)(d)), and
- state and territory laws which regulate union right of entry, except for laws connected with occupational health and safety (proposed new paragraph 7C(1)(e)).

However, some areas in which states still retain some powers to legislate will be expressly excluded from these broad overriding provisions. These areas will be:

- laws which relate to the prevention of discrimination or the promotion of equal employment opportunity (EEO), but only under the proviso that they are not laws amounting to an overridden state and territory industrial law or are contained therein (proposed new paragraph 7C(2)(a))
- laws which are prescribed to be excluded from the operation of subsection 7C(1) by regulation (proposed new paragraph 7C(2)(b))
- laws which deal with so-called ‘non-excluded matters’ (proposed new paragraph 7C(2)(c)).

Proposed new subsection 7C(3) contains a list of those matters which the proposed new law will regard as ‘non-excluded matter’.

Extraterritorial coverage of the proposed WR system

The proposed new laws will also have a certain extraterritorial application. Item 6 will repeal current section 7 of the WR Act and substitute it with proposed new sections 7 and 7AA. Proposed new section 7 will provide that the Regulations can have the effect of changing the application of the proposed new law with respect to Christmas Island and the Cocos (Keeling) Islands. Proposed new section 7AA will extend the application of certain Divisions and Parts of the proposed new law to ‘persons, acts, omissions, matters and things’ outside Australia. Item 8 will add proposed new subsection 7B(2), which will extend the geographical application of the Commonwealth’s Criminal Code to the same extent to which Australia asserts the extraterritorial application of the proposed new WR system.

Comment

The horizontal and vertical coverage of the proposed WR system could potentially raise a number of constitutional questions. According to the states and leading employment and constitutional scholars, some of these issues might soon be pursued in the High Court. A brief discussion of potential issues which may arise as a result of the intended coverage of the Bill is contained in this Bills Digest as part of the Concluding Comments.

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Part IA: Australian Fair Pay Commission

Item 10 will insert proposed new Part IA into the WR Act 1996, setting out the framework for the AFPC. Shifting the responsibility to set minimum wages from the AIRC to the AFPC is an essential cornerstone of the Government’s proposed changes to the WR system.

Main provisions

The Bill establishes the AFPC by virtue of proposed new section 7G. The AFPC’s primary function will be to set wages under proposed new section 7H. In particular the AFPC will:

• set and adjust the federal minimum wage (FMW)
• set and adjust minimum award classification rates of pay
• set and adjust the FMW for juniors, trainees (including school-based apprentices) and employees with disabilities
• set and adjust minimum wages for piece workers, and
• set and adjust casual loadings.

In setting wages, the AFPC’s primary objective will be to promote the economic prosperity of the people of Australia (proposed new section 7J). In achieving this function, it must have regard to:

• the capacity of the unemployed and low paid to obtain and remain in employment
• employment and competitiveness across the economy
• providing a safety net for the low paid, and
• providing minimum wages for junior, trainee and disabled employees to ensure those employees are competitive in the labour market (proposed new section 7J).

This is in contrast to the current requirements for the AIRC which, when determining the level of minimum wages in Australia, is required to have regard to the need to provide fair minimum wages.19

The AFPC will be made up of five members: a Chair who can be appointed for a period of up to five years on a full or part-time basis (proposed new subsection 7G(2)), and four Commissioners, who can be appointed for a period of up to four years on a part-time basis (proposed new subsections 7P(2) and 7Y(2)). The lack of tenure and the possibility of reappointment may raise the issue of independence of the AFPC.20 However, this must be viewed in light of the period for which the members are appointed. Considering that the appointments are for a period which exceeds the lifespan of a parliamentary period, the independence of the AFPC may not be such a significant issue.21

The Chair will be required to have a high level of skill in business or economics (proposed new subsection 7P(3)), while the Commissioners must have experience in one or more of Warning:

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the following: business, community organisations, workplace relations or economics (proposed new subsection 7Y(3)).

Despite the legislation not having passed through parliament, the government has already announced that Professor Ian Harper will hold the position of Chair of the AFPC.\(^{22}\)

Currently, wages are reviewed on an annual basis by the AIRC on the basis of cases brought before it. However, it must be noted that there is currently no legal obligation upon the AIRC to review minimum wages annually. Further, there is no guarantee that the AIRC makes an award increase. Under this Bill, the AFPC will determine the timing and frequency of wage reviews, as well as the scope and manner in which wage reviews are conducted and the date when wage-setting decisions are to come into effect (proposed new section 7K). Therefore, under the proposed new arrangements, wages will not necessarily be reviewed on an annual basis. The government has indicated that the first decision of the AFPC will be in Spring 2006.\(^{23}\)

Under the current system, the AIRC determines the minimum wage following representations by interested parties, including unions. In relation to the proposed system, the Bill states that the AFPC will determine wage rates through consultation and research and by monitoring the impact of wage-setting decisions (proposed new section 7K). Unions will no longer have an automatic right to be heard, yet they may still be consulted by the AFPC. It should be noted, however, that proposed new subsections 7K(1) and (2) will be subject to changes made by regulations. Such regulations could, for example, prescribe the way the AFPC has to consult and, more importantly, with whom.\(^{24}\) So far, there is no indication when such regulations may be available, but it has been suggested that they will not be available until well into 2006.\(^{25}\) The wage-setting decisions by the AFPC must follow prescribed formal requirements (proposed new subsection 7K(4)). However, the Bill expressly stipulates that any decision will not be a legislative instrument for the purposes of the Legislative Instruments Act 2003 and, as a result, the decision cannot be reviewed and voted upon by parliament.

Under proposed new subsection 7N(1), the AFPC may determine its own operating procedures for the purposes of performing its functions set out above, but regulations may also prescribe the procedures to be used by the AFPC.

The AFPC will be required to report annually to parliament on its operations (proposed new section 7O).

**Item 10**, proposed new Division 3, establishes the AFPC secretariat, which is to assist the AFPC in the performance of its functions.

**Comment**

**Constitutionality of the AFPC**

The question whether the creation of the AFPC, its functions and operation, can survive a constitutional challenge could be one of the potentially crucial issues. The question addressed to the High Court could be whether setting up and regulating the AFPC amounts

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to a law ‘with respect to’ constitutional corporations. Arguably, to find so would require a significant expansion of the incidental scope of the corporations power.\textsuperscript{26}

If the establishment of the AFPC is found not to be supported by the corporations power, the Commonwealth may be required to rely on other heads of power, for example, the external affairs power granted under section 51(xxix). Under this head of power, the AFPC seems to be sustainable, considering that in 1973, Australia ratified the International Labour Organisation’s \textit{C131 Minimum Wage Fixing Convention of 1970}.\textsuperscript{27} Article 1 of this convention requires signatories to establish a system of minimum wages which covers all groups of wage earners whose terms of employment are such that coverage would be appropriate.

The level of minimum wages in Australia

The government has guaranteed that minimum and award classifications wages will not fall below the level set by the AIRC’s 2005 Safety Net Review case.\textsuperscript{28} It also states that decisions of the AFPC will be independent of government.\textsuperscript{29}

However, despite these guarantees, strong concerns have been expressed that under the new pay-setting arrangements, there will be a reduction in the real value of the minimum wages. The Australian Council of Trade Unions (ACTU) has been vehemently opposed to the IR reforms. In relation to minimum wages, the ACTU recently released a fact sheet setting out its concerns about the effect the new law will have on minimum wages and living standards for lower paid workers in Australia. Arguing that the Federal Government’s refusal refuses to give a wages guarantee, the fact sheet states that:

- The Federal Government has refused to guarantee that the FPC will increase minimum and award wages to keep up with the cost of living
- If minimum rates are not regularly increased then the living standards of award wage workers and their families will go backwards
- We have seen this in the US where the minimum wage is just $5.15 an hour and has not increased for 8 years
- Low minimum wages is a significant contributor to inequality and division within society
- ACTU wrote to the PM John Howard on April 11 asking him to guarantee that the real value of minimum and award wages will be maintained and will not be allowed to go backwards.
- In the letter the ACTU sought ‘confirmation that the Government will guarantee the maintenance of the real value of minimum wages in any reforms the government may implement’ – no response has been received
- On June 24, the office of the Workplace Relations Minister Kevin Andrews’ confirmed that the government’s proposed new Fair Pay Commission would not consider any increase in minimum wages for the 1.6 million Australians

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and their families who rely on them until at least spring 2006, and that it was likely there would be no increase at all until well into 2007. (Herald Sun, Friday June 24, 2005).  

The National Assembly of the Uniting Church has expressed fears about the proposed AFPC and the impact that the IR reforms will have on minimum wages and workers generally. In a media release, the National Assembly stated that:

It is our fundamental concern that this new system is creating an uneven playing field for those who have to bargain from a position of weakness. The Fair Pay Commission’s mandate is geared towards keeping wages low rather than assessing the minimum wage according to what workers need to live a decent life …

We are concerned individuals will be considered commodities in the service of greater profits and left open to exploitation. There is more to being human than simply being a piece in the economic jigsaw puzzle.

In a speech to the National Press Club on 9 September 2005, Cardinal George Pell of the Catholic Church articulated his opposition to seeing any drop in the level of minimum wages, stating the following:

I would like to see and I will back systems which increase employment and the market has done that in a way which I didn’t quite anticipate. I realise there is some tension which is often unnoted [sic] between the number of unemployed and the minimum wage of people who are employed but especially today when the ladder is being extended fantastically and some of our top executives are getting enormous salaries, I’m very reluctant and I won’t consent to a reduction in the minimum wages. I can’t see how that is a good thing, although I am keen to free up employment.

The Federal Government argues that the current minimum wages arrangements are ineffective and detrimental to the Australian economy, stating in the Regulation Impact Statement that:

Establishing genuine minimum wages and conditions will assist in achieving increased labour market participation. At present, low skilled workers or the unemployed may be priced out of the labour market. Australia has the highest ratio between the minimum wage and median wage in the OECD—currently 58.8 per cent … Furthermore, Australia has thousands of minimum wages through the award system. Wage increases achieved through safety net adjustments, unlike those achieved through agreement-making, are not based on productivity improvements. Moreover, large award wage increases can adversely impact upon employment opportunities for unemployed people and the low paid, pricing them out of the labour market.

In 2004, the Government undertook a longitudinal study to examine long term outcomes for clients of its employment assistance programs. The study particularly examined how disadvantaged people fare in the labour market up to two years after assistance has ceased. This study confirmed a key finding of a body of related studies in that a substantial number of low paid workers do move to higher paying jobs over time – ‘in the case of more disadvantaged job seekers, taking even low paid, casual

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jobs will increase their chances of finding better paid more permanent employment’[…]

By introducing a genuine safety net, based on minimum standards set by the AFPC and through legislation, more jobs will be available, allowing new entrants and returning and low skilled workers enhanced access to the labour market. This will in turn provide a stepping stone for low paid workers to move into higher paying jobs over time.33

This extract illustrates the Government’s policy rationale in relation to those aspects of the IR legislation which impact upon wages—in effect a more flexible wage-setting system, where minimum wages can be set below those currently determined by the AIRC, will lead to more people entering the workforce. Based on this observation, it would appear that these new arrangements could therefore see a reduction in the real value of minimum wages.

Minimum wages—current procedures, proposed changes and possible impact on wages

Some commentators are quite critical of the current operations of the AIRC, pointing out significant flaws in the way the AIRC conducts wage determinations.34 It has been suggested that the AIRC does not have adequate information about low paid workers, that it does not gather information in an effective way so as to inform itself, and that it increases the minimum wage without proper reasoning. For reasons such as these, it has been argued that the new AFPC may in fact be able to remove some of the flaws in the current system.35

One of the key criticisms in the past has been the adversarial process upon which the AIRC was based. The Regulation Impact Statement notes that this system is based on ‘arbitrary and artificial claims between the employer organisations and unions’, suggesting ‘a long overdue shift from the historically adversarial process for wage setting in Australia.’36 The abolition of the adversarial process will mean:

• **first**—that AFPC hearings cannot be initiated by organisations representing the low paid by bringing claims. Instead, the AFPC will initiate any wage case hearing on its ‘own’ motion which is clearly reflected in the proposed new law. When compared to the current system, it appears that the proposed new system could allow more interest groups, including churches or welfare groups, to exert pressure on the AFPC to review the minimum wages. However, how susceptible the AFPC will be to such pressure remains to be seen once the new regime is in place, and

• **second**—the proceedings will be more consultative, with the AFPC inviting parties to make submissions. Both consultative and adversarial procedures, if conducted properly, can produce excellent results. Adversarial procedures have the advantage that the parties are able to test the veracity of the evidence before the decision maker. However, they are also based on the parties being responsible for conducting the case and it has been argued that parties aggressively contest every conceivable point rather than focussing on the key issues.37 In contrast, the consultative procedure may have the advantage that the AFPC can consult a broader range of sources to inform itself.

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However, much will depend upon the composition of the AFPC, the procedures adopted by it as well as the regulatory framework the Government may decide to impose upon this body by virtue of the regulations.

It has been noted that, unlike the AIRC, the AFPC will be required to set wages on the basis of economical considerations rather than notions of fairness. Robyn May from The Age argued that the changes to the procedures are:

… the real intent behind the establishment of the Australian Fair Pay Commission. Rather than being an instrument to improve low pay, the commission, with its narrow economic and ideological focus, seems designed more as an instrument for lowering wages. Far from being an instrument of regulation, it will become an instrument of labour market deregulation. The notion of fairness, central to the Australian system of industrial relations for the past 100 years, is not part of the commission’s brief. Instead, it is based on a theory that lowering minimum wages will create jobs, without evidence that this will occur.38

However, it seems to be arguable that notions of fairness, whilst currently not expressly mentioned in the Bill, may still be imported as part of the consultative process. It seems to be at least feasible that the AFPC, for example, could seek guidance from international experience or charters. One example, which arguably dwells the notion of fairness, can be found in the European Social Charter of 1977 which applies a so-called ‘decency threshold’ which creates a relationship between minimum wages and average earnings.39

Part II: Australian Industrial Relations Commission

The Bill proposes to further reduce the role of the AIRC in IR dispute resolution and award making.

Main provisions

Item 11 constrains the AIRC’s ability to act on its own motion, that is, where a specified party makes an application for the exercise of the function which the AIRC is to exercise.

Item 20 inserts proposed new Division 3A which deals with general matters relating to the powers and procedures of the AIRC.

Proposed new section 44A allows the AIRC to take into account the public interest, subject to other considerations, for example, the state of the economy, but the section does not apply to AIRC action in relation to awards and industrial action. Proposed new sections 44B–44E require the AIRC to take into account various anti-discrimination conventions and the health and safety of employees.

Proposed new section 44H sets out how the AIRC must conduct its proceedings. These are to be conducted within its discretion, subject to any contrary provisions of the Act.

Proposed new section 44I allows the AIRC to summon any person, compel the production of documents, and dismiss matters. The AIRC may also authorise a person to take

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evidence on its behalf. However, these facilities do not apply to the AIRC in industrial action disputes nor allowable award matters.

Proposed new section 44J allows a matter being heard by a single member to be referred to a full bench by application of a party or the Minister, on the basis that the case is of such importance that it is in the public interest for a full bench to hear it.

Proposed new section 44L allows the Minister to apply to the President for a full-bench review of an award or order; and when such an application is made, the President must establish a full bench to hear the matter.

Proposed new section 44N allows the AIRC to make an award or order in respect of public-sector employment matters, overriding inconsistent Commonwealth or territory laws.

Proposed new section 44O allows the AIRC to order a state tribunal to refrain from dealing with proceedings that are before the AIRC.

Proposed new section 44Q allows a full bench of the AIRC, on application from an organisation or the Minister, to suspend or revoke an award or order on the grounds that an organisation has contravened the WR Act 1996, Schedule 1B or an award or order; or, where a substantial number of members of an organisation have refused to accept employment under the order; or, where the award should be revoked or suspended for some other reason.

Items 21–42 remove former powers of an AIRC full bench so as to correlate with other Schedule 1 amendments, for example, removing appeal rights on common rule awards for Victorian workers, and removing the referral of certified agreement issues from the AIRC.

Comment

The issues affecting the AIRC relate to whether an institution with the ability to make instruments having the effect of law (in form of awards) can be subjected to ministerial direction. Also, whilst previous High Court decisions, for example in Re Pacific Coal Pty Ltd; Ex Parte Construction, Forestry, Mining And Energy Union v The Commonwealth (2000) 203 CLR 346, supported ‘award simplification’ measures and the limitations placed on the AIRC’s dispute resolution and award-making roles as legislated in 1996, it may be asked whether further diminution of the role of the AIRC in relation to these powers will be upheld.

Part IVA: The Employment Advocate

The position of Employment Advocate was established by section 83BA of the WR Act 1996. Item 43 repeals current sections 83BB (Functions) and 83BC (Minister’s directions to Employment Advocate) of the WR Act 1996 and replaces them with proposed new sections 83BB and 83BC. Some of the notable changes to the functions of the Employment Advocate under new section 83BB include:

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new functions such as to ‘promote the making of workplace agreements’ and to ‘promote better work and management practices through workplace agreements’ (proposed new paragraphs (a) and (d))

• a move away from providing assistance and advice for employees and employers about their rights and obligations under the WR Act 1996, to providing assistance and advice to employees and employers (especially employers in small businesses) in relation to workplace agreements, and providing education and information to employers and employees in relation to workplace agreements (proposed new paragraphs (b) and (c))

• the removal of investigative functions of the Employment Advocate in relation to breaches of AWAs and breaches of the freedom of association provisions of the WR Act 1996

• new functions in relation to providing advice to employers and employees about awards and the Australian Fair Pay and Conditions Standard (AFPCS) (proposed new paragraph (f))

• a new requirement to give information and documents to the Minister as required by regulations (proposed new paragraph (i));

• new functions in relation to workplace inspectors (proposed new paragraphs (j) and (k)); and

• a new function to ‘analyse workplace agreements’ (proposed new paragraph (l)).

Proposed new section 83BC provides that the Minister may give directions to the Employment Advocate, by way of legislative instrument, as to how to perform its powers and functions under section 83BB. Proposed new section 83BC prohibits the Minister from giving directions to the Employment Advocate in relation to a particular workplace agreement. However, as was the case under the previous section 83BC, the Employment Advocate must comply with any other direction by the Minister.

Section 83BS of the current WR Act 1996 creates an offence where an ‘entrusted person’ discloses information that will identify a party to an AWA. Item 47 repeals and substitutes proposed new section 83BS, to redefine the offence of disclosing information that will identify a party to an AWA. The penalty for contravention of proposed new section 83BS is six months imprisonment.

Part V: Workplace inspectors

Items 49–70 amend Part V of the Act so as to give effect to the Government’s changes to the regime of workplace inspection. The changes include a change to the heading from ‘inspectors’ to the new term ‘workplace inspectors’.

Item 52 inserts proposed new subsections 84(3) and (3A), which provide, in essence, that the Regulations will govern the length of a person’s appointment as an inspector.

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Item 58 inserts a proposed new subsection 85(3), which will make it an offence for workplace inspectors not to return their identity card within 14 days of their appointment ceasing.

Item 59 inserts a proposed new subsection 86(1), which outlines the purpose for which a workplace inspector’s powers can be exercised. Under the new subsection, the purposes include for determining whether the following are being observed:

- workplace agreements;
- awards
- the AFPCS
- minimum entitlements and orders under Part VIA,
- other requirements under the Act and Regulations (other than section 541—minimum rate of pay)

Items 61 and 62 make amendments expanding the powers of inspectors, so that they will be able to interview any person (currently any employee) at a workplace and require a person to tell them who has custody of a document.

Item 67 inserts proposed new subsections 86(6) and (7). These provisions are aimed at expanding the jurisdiction of inspectors to include premises in Australia’s exclusive economic zone—as defined in the Seas and Submerged Lands Act 1973 (the concept is internationally recognised in the United Nations Convention on the Law of the Sea)—or premises occupied by an Australian employer. This is expressed to be subject to any obligations Australia may have under international law in relation to boarding foreign-flagged ships or aircraft. The extension also applies to areas outside the exclusive economic zone, but over Australia’s continental shelf and only when:

- connected with the exploration of the shelf or exploitation of its resources, and
- prescribed by regulation.

Item 68 inserts a proposed new section 86A relating to disclosure of information by inspectors. The new section makes it lawful for inspectors to disclose information acquired in the course of exercising their powers as such where:

- the inspector considers it necessary or appropriate on reasonable grounds, for the performance of his or her function as an inspector
- the disclosure is to the Minister responsible for immigration, and the inspector considers on reasonable grounds that the information is likely to assist in administering the Migration Act 1958
- the Regulations provide that disclosure is lawful, and
- the disclosure is to an officer of a State who has functions relating to workplace relations, and the inspector considers on reasonable grounds that the information is likely to assist in administering the State’s workplace relations system.

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Item 69 repeals section 87. The effect is that the AIRC will no longer have power under the Act to request that the Department arrange for an inspector to investigate a matter affecting the safety of employees. The Explanatory Memorandum states that this ‘is consistent with the redefined role of the AIRC as a dispute settling body at the request of the parties concerned’.

Item 70 repeals section 88. The effect is that there will no longer be a requirement under the Act for the Secretary of the Department to provide the Minister with a report on the operation of Part V of the Act. The reason for this, according to the Explanatory Memorandum, is that the Public Service Act 1999 already requires the Secretary of the Department to produce an annual report of the Department’s activities.

Part VA: The Australian Fair Pay and Conditions Standard

Item 71 repeals current Part VA (Compliance etc. powers) and Part VI (the AIRC’s powers in respect of dispute prevention and settlement) of the WR Act 1996. Instead, it inserts the following new parts:

   Part VA—The Australian Fair Pay and Conditions Standard
   Part VB—Workplace agreements
   Part VC—Industrial action
   Part VI—Awards
   Part VIAA—Transmission of business rules

Current Part VI has traditionally provided the award safety net and the arbitration and award-making powers of the AIRC. The diminution of the role of the AIRC in dispute resolution and award-making coalesces with the establishment of the AFPC under this Bill, and the responsibilities allocated to the AFPC under new Part VA discussed below.

It has been suggested that these cumulative changes portend damage to the industrial machinery giving effect and interpretation to laws, awards and agreements. The debate about the Bill’s definition of ‘disability’ in the submission and evidence to the WorkChoices Senate Inquiry by ACROD touches on one small element of this machinery and the role it has played, in this case, in introducing and facilitating a supported wage system for disabled workers for almost 20 years. The debate over the Bill has also made reference to the New Zealand experience of labour market deregulation in the 1990s, and the abandonment of the award system there. Proponents of the NZ change point to evidence of people being content with the changes, and the reluctance of the Clark Government to reinstate the award system. It is not often noted, however, that the 1991 legislation established both an Employment Tribunal and an Employment Court to underpin the new system, the system was not based on simple agreement by employers and employees.

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Background to Part VA

Part VA will implement the framework for the Australian Fair Pay and Conditions Standard (AFPCS). The following segment is a brief overview of the main provisions creating this framework. The new AFPCS is likely to have some interesting effects insofar as it may support conditions of employment, especially in relation to leave and hours for formerly award-free employees, who will be ‘constitutionally connected’ to the new regime via their employment.

In 2004, the Australian Bureau of Statistics estimated that over 30 per cent of employees were employed under an individual employment contract. It is not suggested that the Bill will impact on all of these employees; but even if it impacts on half of them, then over one million employees or more are likely to access minimum conditions possibly not set out in previous employment contracts, or underpinning their hours and leave clauses. The *Australian Financial Review* reported that the Bill’s new standards may be imposed on formerly award-free employees. It went on to report that for these people:

… their contracts could fall foul of the (Bill’s) requirement that employees not be required to work more than 38 hours a week, averaged over a year, plus ‘reasonable additional hours’.

Contracts may also fall short of the new entitlement to 10 days’ cumulative paid sick leave a year … The Australian Chamber of Commerce and Industry’s assistant director workplace relations, Scott Barklamb, said it was important in implementing the new rules “that employers retain scope for the employment of executive and managerial staff under traditional flexible practices”.

This suggests, in other words, that the Bill a) may have unintended consequences, and b) amendments may be requested in parliament to exclude these formerly award-free staff from the so-called ‘national’ minimum standards. It is thus important to appreciate the new reach of the minimum standards discussed below, given the history of the limited reach of the traditional award system.

Main provisions

Division 1—Preliminary

The purpose of Part VA under proposed new section 89 is to set out certain key minimum entitlements of employment to those employees who fall within the Act’s constitutional and jurisdictional limits.

The key minimum entitlements that constitute the AFPCS relate to:

- basic rates of pay and casual loadings (proposed new Division 2)
- maximum ordinary hours of work (proposed new Division 3)
- annual leave (proposed new Division 4)
- personal leave (proposed new Division 5), and

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• parental leave and related entitlements (proposed new Division 6).

When workplace agreements expire, employers can meet the various AFPCs of their employees (proposed new section 103L).

The AFPCS would not apply to:

• employees in the transitional conciliation and arbitration award system under proposed new Schedule 13
• employees who are covered by pre-reform certified agreements and pre-reform AWAs under proposed new Schedule 14
• employees who come into the federal scheme and who are covered by agreements made under state systems (proposed new Schedule 15).

Proposed new subsection 89A(2) provides that the AFPCS prevails over the terms of new workplace agreements, thus providing minimum entitlements to wages and conditions for award and agreement-free employees. The AFPCS is supposed to underpin workplace bargaining. Agreements must provide entitlements which are equal to or more favourable than the AFPCS. The AFPCS would apply throughout the life of these agreements, and would prevail over inconsistent agreement terms to the extent that it is more favourable, in a ‘particular respect’, and agreements cannot exclude the AFPCS (proposed new section 89B). The AFPCS would provide the basis for the ‘more generous’ comparison (to be prescribed by regulation) with preserved award terms (proposed new section 117C).

However, it transpires that the AFPCS will be an amorphous concept and, consequently, there is no one AFPCS. Rather, many AFPCS could relate to each employee’s employment status with one employer, giving rise to the potential of millions of AFPCs. This is because the concept of the AFPCS attempts to preserve certain provisions of ‘pre-reform’ employment instruments, such as state and federal awards and possibly state laws or the relevant parts therein.

The potential for determining duplicated AFPCs and within them, Australian Pay and Classification Scales (APCS, see discussion below) also suggests a mountain of work for a five-member AFPC and its secretariat, as each award-reliant employee’s APCS is likely to be different. Also, regulations under proposed new section 89C will allow prescribed employees (of a class) to be excluded from the AFPCS where the Minister is not satisfied that there is a connection between the employee and Australia. This could include, for example, persons such as backpackers, guest-workers, or ship crews engaged on the Australian coastal trade under multiple single-voyage permits.

Division 2—Wages

Subdivision A – Preliminary

This subdivision provides definitions, including, for example:

• APCS (or Australian Pay and Classification Scale)—means a preserved APCS or a new APCS. Proposed new section 90X sets out what must or may be in an APCS

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• **FMW**—the federal minimum wage was defined in proposed section 4

• **Pre-reform federal wage instrument**—will typically mean a federal award but not AWA or certified agreement, or

• **Pre-reform State wage instrument**—will typically mean a state award as defined in proposed new subsection 4(1) or a state law, or provision of a state law, that entitles employees to a particular rate of pay.

The subdivision also provides further definitions, defining terms including basic rates of pay and casual loadings.

**Subdivision B—Guarantee of basic rates of pay**

Proposed new section 90F establishes a statutory guarantee of basic rates of pay. An individual employee’s guaranteed basic periodic rate of pay would depend on whether his/her employment was covered by an APCS or the FMW.

**Subdivision C—Guarantee of casual loadings**

Proposed new section 90H establishes the guarantee of casual loadings for casual employees. A casual loading is only guaranteed if the employee has a guaranteed basic periodic rate of pay. The casual loading percentage would depend on whether the employee’s ‘basic periodic’ rate of pay is determined by an APCS, a workplace agreement or the FMW.

**Subdivision D—Guarantee against reductions below pre-reform commencement rates**

Proposed new section 90L provides a minimum wage guarantee to employees who have a guaranteed basic periodic rate of pay. It would guarantee that the employee cannot be paid less than the basic periodic rate of pay that would have been payable to an employee in the same circumstances as that employee immediately after reform commencement. As the Explanatory Memorandum states:

> This guarantee constrains the exercise of the AFPC’s wage-setting powers to adjust the standard FMW, to adjust an APCS, to determine a new APCS or to revoke an APCS.45

**Subdivision E—The guarantee against reductions below Federal Minimum Wages**

Proposed new section 90O guarantees that an employee (other than an APCS piece rate employee) covered by an APCS cannot be paid less than an applicable FMW (either the standard FMW as determined under proposed new sections 90Q and 90R or a special FMW determined under proposed new section 90S).

**Subdivision F—Federal minimum wages**

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An FMW fixed at $12.75 an hour will be set under proposed **new section 90Q**. It will not apply to juniors, employees with a defined disability, and those on piece rates. There may be variations of the FMW to rates below this level (see also proposed **new section 90ZQ** below).

**Subdivision G—Australian Fair Pay and Classification Scales: general provisions**

Proposed **new section 90W** defines an APCS as a set of provisions that relate to pay and loadings for particular employees, such as rate provisions, classification, casual loading provisions and coverage provisions (meaning whether a federal or state agreement or award applies to the individual). APCSs are to be determined by the AFPC. However, it appears that an APCS will go further than meeting these provisions. In answer to a question from Senator Wong as to how the Bill would ensure, for example, the timely payment of wages, DEWR officials replied:

**Mr De Silva**—If those rate provisions in an award say you get paid in arrears on a fortnightly basis or you get paid in arrears on a monthly basis, those will be brought in—

**Senator Wong**—To what?

**Mr De Silva**—To the APCS, which is the preserved APCS.

Paul Munro, formerly a senior deputy president of the AIRC, explained how the APCS might be applied to a casual worker. He noted that:

An individual casual employee’s guaranteed casual loading percentage would depend on whether the employee’s basic periodic rate of pay is determined by an APCS (a current award), a workplace agreement or the Federal Minimum Wage (FMW).

The guaranteed casual loading percentage would be:

— for a casual employee whose basic periodic rate of pay is determined by an APCS—not less than the casual loading percentage payable to the employee under the APCS;

— for a casual employee whose basic periodic rate of pay is determined by a workplace agreement—the default casual loading percentage, i.e. 20%;

— for a casual employee whose basic periodic rate of pay is the FMW—the default casual loading percentage, i.e. 20%.

This means that while an employee remains under an award which prescribes a casual loading, the employee is guaranteed a casual loading percentage prescribed by that award. If an employee negotiated a workplace agreement with their employer, the employee would be guaranteed the default casual loading percentage as part of the Minimum Standard …

**Subdivision H—Australian Pay and Classification Scales: Preserved APCSs**

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Proposed new section 90ZD sets out the mechanism by which a pre-reform wage instrument is converted into a preserved APCS on the reform commencement. The preserved APCS would include rate provisions, classifications, casual loading provisions, and coverage provisions derived from the pre-reform wage instrument. Proposed new section 90ZE would provide for ‘notional’ adjustments to ensure that all preserved APCSs provide for direct specification of a rate of pay or casual loading as at the reform comparison day.

Subdivision I—Australian Pay and Classification Scales: new APCSs

Proposed new section 90ZJ empowers the AFPC to determine an APCS, subject to limitations. Provisions not complying with the AFPCS are deemed to be excluded.

Subdivision J—Australian Pay and Classification Scales: duration, adjustment and revocation

The AFPC may vary or revoke an APCS, otherwise the APCS continues indefinitely.

Subdivision K—Adjustments to incorporate 2005 Safety Net Review etc.

Proposed new section 90ZN requires the AFPC to increase certain APCSs in line with the AIRC’s Safety Net Review 2005.

Subdivision L—Special provisions for employees with disabilities and employees to whom training arrangements apply

Proposed new section 90ZP allows the AFPC to make a ‘gap-filling’ APCS in relation to a particular employee with a disability who might otherwise fall under another (higher) APCS.

Subdivision M—Miscellaneous

Proposed new section 90ZR sets out the Commonwealth anti-discrimination laws that the AFPC must have regard to. Further provisions set out that the setting of junior rates, disability rates and trainee rates is not to be seen as discriminatory.

Division 3—Maximum ordinary hours of work

Subdivision A—Preliminary

Proposed new section 91B would allow for an employee and his or her employer to agree in writing to an applicable averaging period. It would ensure that one of the ways in which an employer and employee may be taken to have agreed about such a matter is by way of an individual or collective workplace agreement.

Subdivision B—Guarantee of maximum ordinary hours of work

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Proposed **new section 91C** sets out the guarantee of maximum hours of work. It would set the maximum ordinary hours that an employee may be required to work. It would provide that an employer must not require an employee to work more than 38 hours per week over the employee’s *applicable averaging period*, which calculates hours including hours taken as authorised leave. The employer may require the employee to work reasonable additional hours against some specified criteria, although the employee is not able to refuse unreasonable additional hours and a ceiling or maximum amount of hours will not be stipulated by the proposed new law.

For comparison purposes, the standard-hours clause of the Metal, Engineering etc. Award 1998 is attached to this Bills Digest as **Appendix E**. It is not beyond the realm of possibility to expect that the new hours regime, in a *de facto* sense, may become less ‘agreement’ within an APCS and more company policy obligations.

**Division 4—Annual leave**

**Subdivision A—Preliminary**

Regulations to allow piece rate workers to accrue annual leave credits may be made.

**Subdivision B—Guarantee of annual leave**

Proposed **new section 92D** would guarantee that certain employees are entitled to accrue a minimum amount of paid annual leave. The employee is entitled to accrue $\frac{1}{13}$ of the number of nominal hours worked by the employee for the employer during that four-week period. Proposed **new subsection 92D(3)** would provide additional leave for shift-work employees.

Proposed **new subsection 92E(1)** makes the entitlement to cash out two weeks of annual leave conditional on:

- a workplace agreement binding the employee and the employer including a specific provision that entitles the employee to cash out an amount of annual leave
- the employee making a written request to the employer to cash out an amount of annual leave that has been credited to the employee
- the workplace agreement binding the employee and the employer requiring payment in lieu of the amount of annual leave at a rate that is no less than the employee’s basic periodic rate of pay at the time that the cashing out occurs, and
- the employer authorizing the employee to cash out the amount of annual leave.

**Subdivision C—Annual leave rules**

Proposed **new section 92F** would provide the rules for the accrual, crediting and accumulation of annual leave on a monthly basis, as well as the payment of leave credits at an employee’s termination. Further provisions stipulate that there is no minimum amount of leave that must be taken. Employers who ‘unreasonably’ refuse leave requests or cancel leave authorisations may be subject to a penalty.

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Subdivision D—Service: annual leave

Proposed new section 92I would guarantee that a period of annual leave does not break an employee’s continuity of service, and that annual leave normally counts as service for all purposes.

Division 5—Personal leave

Subdivision A—Preliminary

Proposed new section 93B provides for types of agreement between an employee and his/her employer regarding the operation of the personal/carers’ leave guarantee. Other provisions allow for workplace agreement on this leave.

Subdivision B— Guarantee of paid personal/carers’ leave

Proposed new section 93E guarantees that certain employees are entitled to accrue a minimum amount of paid sick leave and paid carer’s leave. Proposed new subsection 93E(1) could make the employee’s entitlement to paid sick leave and paid carer’s leave conditional upon the notice and documentation requirements being satisfied, possibly for even the smallest amount of time taken. The employee is entitled to accrue 1/26 of the number of nominal hours worked by the employee for the employer during a four-week period, and the leave is cumulative (proposed new section 93F). No payment will be made if the employee receives workers’ compensation (proposed new section 93H). Where standard working hours are being worked, an employee could take up to ten days personal leave for the purpose of caring (proposed new section 93I).

Subdivision C—Guarantee of unpaid carer’s leave

Further carer’s leave of two days may be taken as unpaid leave by all employees (casuals) and by ongoing employees where the paid entitlement has been used, subject to documentation requirements being met (proposed new section 93J).

Subdivision D—Notice and evidence requirements

Proposed new section 93M would require an employee to give notice to their employer of an absence due to a personal injury or illness. Proposed new section 93N would allow (but does not compel) an employer to require an employee to provide a medical certificate as soon as reasonably practicable for any period of paid sick leave that has been, or is proposed to be, taken by the employee. One award requirement—evidence of absence, that is, the alternative of a medical certificate, where the employee produces a statutory declaration—is not provided; nor is a number of single-day absences allowed before a medical certificate is required (see for a comparison the Metal, Engineering etc. Award, at Cl 7.2.4(e), Appendix C below). A similar requirement may be made on employees taking paid carer’s leave.

Subdivision E—Guarantee of compassionate leave

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Proposed **new section 93Q** provides a guarantee of paid compassionate leave. An employee (other than a casual employee) would be entitled to take two days paid leave to spend time with a critically ill, injured, or dying person who is a member of the employee’s immediate family or household, and the employer may request evidence of the illness/death.

*Subdivision F—Personal leave: service*

Time taken off for paid and unpaid carer’s leave counts as service.

*Division 6—Parental leave*

*Subdivision A—Preliminary*

This leave applies to all employees whom the Bill seeks to cover, including eligible casual employees (that is, those with more than 12 months service). Proposed **section 94A** defines a number of terms such as *authorised leave*, *day of placement*, *de facto spouse*, *eligible casual employee* and *expected date of birth*.

*Subdivision B—Guarantee of maternity leave*

Proposed **new section 94C** would guarantee an employee’s entitlement to a single, unbroken period of unpaid *ordinary maternity leave* to a maximum of 52 weeks, which may include elements of other leave entitlements. The 12-month continuous-service period to qualify for the leave can contain elements of permanency, regular and systematic casual employment, and authorised leave. Other provisions of subdivisions reflect the statutory parental leave currently found in Schedule 14 of the WR Act 1996, with some improvements, for example, the former statutory provisions did not countenance casual employees accessing this leave, transfer to a safe job has been an award provision for some time and is now incorporated in the statute, as well as the commencement date of leave six weeks before the due birth.

**Part VB: Workplace agreements**

*Background*

According to the Explanatory Memorandum, the intended purpose of Part VB of Schedule 1 is to:

replace the current time consuming and legalistic agreement certification and approval process with a streamlined, simpler and less costly lodgment based process to be administered by the Office of the Employment Advocate (OEA).48

For a general overview of the recent history of workplace agreements, the reader is referred to Chapter 1 of the Senate Employment, Workplace Relations and Education References Committee *Report on Workplace Agreements*, October 2005, (‘Workplace Agreements Senate Report’).49

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Main provisions

Workplace agreements and their operation

Proposed new sections 96–96E will define six types of workplace agreements, being:

- **AWAs**—an individual agreement between an employer and an employee
- **Employee collective agreements**—a collective agreement between the employer and employees of a business
- **Union collective agreements**—a collective agreement between an employer and an organisation of employees
- **Union greenfields agreements**—a collective agreement between an employer and an organisation of employees which relates to the establishment of a new business and is made prior to the employment of any of the regular employees of the business
- **Employer greenfields agreements**—an agreement made by an employer in relation to a new business prior to the employment of any of the regular employees of the business (Employer greenfields agreements are discussed further below)
- **Multiple business agreements**—a collective agreement, being an employee collective agreement, a union collective agreement, a union greenfields agreement or an employer greenfields agreement, which relates to a combination of one or more businesses or one or more parts of a business.

The relationship between the various workplace agreements, awards and Commonwealth laws is dictated by proposed new sections 100A–100C of the Bill. Generally, those sections will enable individual workplace agreements to prevail over collective agreements, and workplace agreements (whether individual or collective) to displace the operation of awards and employment conditions set out in Commonwealth legislation, except for the AFPCS.

Statutory declaration supporting lodgment of certain workplace agreements

As under the WR Act 1996, the employer must lodge with the Employment Advocate a statutory declaration together with an AWA. The employer is expressly required to specify in the statutory declaration that the AWA complies with the content provision, section 170VG of the WR Act. This provision specifies a certain minimum content of agreements between employers and employees.

Under the Bill, certain workplace agreements are still to be lodged with the Employment Advocate, together with a statutory declaration by the employer (proposed new subsections 99B(1) and (2)). Workplace agreements which will have to be lodged under proposed new subsection 99(1) include AWAs, employee collective agreements and union collective agreements.

According to the *WorkChoices* booklet, the statutory declaration must attest that:

… the agreement was negotiated in compliance with the law …

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However, unlike the provisions in the current WR Act 1996, the proposed new law will be silent as to what exactly the employer must declare. Instead, proposed new subsection 99B(3) gives the Employment Advocate a discretion to publish in the Gazette a notice prescribing requirements with which the statutory declaration has to comply. However, even in relation to this notice, the Bill is silent as to what the minimum requirements the Employment Advocate has to prescribe may be. Assistance from the Explanatory Memorandum is limited for two reasons.\footnote{51}

First, it states that it is \textit{intended} that the statutory declaration would require an employer to declare that the agreement was made and/or approved in accordance with the requirements of Divisions 3 and 4 of Part VB.\footnote{52} Plainly, this will leave it to the discretion of the Employment Advocate to actually prescribe this requirement.

Second, the Explanatory Memorandum merely states that employers have to fill in:

\begin{quote}
… \textit{any necessary details}, for example, the name of the agreement, and lodge that standard form declaration along with a copy of the workplace agreement with the Employment Advocate … \footnote{53} (emphasis added)
\end{quote}

The term ‘necessary details’ is ambiguous. On a broad reading, the term may indeed extend to making a declaration in relation to the content or any other division contained in the Part dealing with workplace agreements. However, on a narrow reading of this term, in line with the example provided in the Explanatory Memorandum, such notice may only require an employer to make a statutory declaration with respect to administrative details of the workplace agreement. Following this narrow view, no declaration with respect to content as currently required would be necessary.

However, to know what the precise scope of the content of the statutory declaration must be will be important, especially for employers, because, as the note to new section 99B(2) points out, there are criminal sanctions under the Criminal Code for providing false or misleading information or documents.

Finally, it should be noted that under proposed new subsection 99B(5), the Employment Advocate is not legally required to consider or determine whether, in relation to the making or content of an agreement which has been lodged, the requirements of Part VB (Workplace Agreements) have been met.

Removal of the ‘no-disadvantage test’

One particular aspect of the lodgment procedures under proposed new section 99B is the fact that the Employment Advocate is no longer required to determine if workplace agreements meet the ‘no-disadvantage test’ currently set out in Part VIE of the WR Act 1996.

In evidence to the \textit{WorkChoices Senate Inquiry}, representatives of DEWR have stated that it was often difficult and complex for employers and employees to determine if an agreement met the no-disadvantage test.\footnote{54} However, the removal of the no-disadvantage test has been heavily criticised in other submissions to the Senate Inquiry.\footnote{55}

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Employer greenfields agreements

Proposed new section 96D defines a new type of workplace agreement, the ‘employer greenfields agreement’. Employer greenfields agreements relate to a ‘new business’ (see proposed new section 95B, and discussion below) and are made prior to the employment of employees. For example, they can be used to attract specifically skilled employees with attractive employment packages.

Because employer greenfields agreements are made before any employees are employed, they do not need to be approved by employees (proposed new sections 98 and 98C).

Obviously, a workplace agreement in which the employer can seemingly unilaterally set terms and conditions, and which does not require the approval of employees, will be attractive to employers. It is therefore of concern that the definition of an agreement which relates to a new business is both broad and unclear. Proposed new section 95B provides that an agreement relates to a new business if it relates to:

- a new business, new project or new undertaking the employer is proposing to establish,
- or
- a new activity, if the employer is a Commonwealth, state or territory entity.

The words ‘business’, ‘project’ and ‘activity’ are not defined in the Bill, which makes it difficult to determine the limits in which employer greenfields agreements can be used. However, according to the Explanatory Memorandum, the purpose of the amendment is to make it clear that employer greenfields agreements are not limited to the circumstances where the activities carried on by the business are of a different nature to those previously carried on by the employer. Thus, the intention of the Bill in this respect appears to be to provide employers with a very broad scope in which to use employer greenfields agreements, which, as noted above, provide employers with very favourable conditions in which to set terms and conditions for employment.

Further, the meaning of the term ‘undertaking’, as used in proposed new section 95B, is quite unclear. Proposed new section 95 will define the term ‘undertakings’. Section 23 of the Acts Interpretation Act 1901 states that words in the singular number include the plural and words in the plural number include the singular. Consequently, there seems to be a strong suggestion that the definition using the plural should apply to the term used in the singular in section 95B. However, this suggestion may be viewed in light of the definition of ‘undertakings’, which, linked to proposed new section 103M, relates to undertakings by employers about post-termination conditions.

This is conceptually irreconcilable with the use of the term in proposed new section 95B, and parliament may want to consider whether it is necessary to reword either the definition in proposed new section 95B or the proposed new section 103M to overcome this issue.

Protected award content

Proposed new section 101B applies (in certain circumstances) protected award conditions, such as rest breaks, penalty rates, annual leave loading and public holidays, to workplace...
agreements. However, those protected award conditions can be expressly modified or excluded from a workplace agreement.

Submissions to the *WorkChoices Senate Inquiry* have expressed concern that new section 101B does not in fact protect these types of award conditions, because employers can insert the necessary express modifications or exclusions of the condition into the workplace agreement and offer the agreement to an employee as a ‘take it or leave it’ proposition.\(^56\)

**Prohibited content**

The *WorkChoices* booklet states that ‘[a] range of content will be prohibited from being included in agreements’, and goes on to list clauses that cannot be included in workplace agreements. According to this list, prohibited content will be clauses that:

- prohibit AWAs;
- restrict the use of independent contractors or on-hire arrangements;
- allow for industrial action during the term of an agreement
- provide for trade union training leave, bargaining fees to trade unions or paid union meetings;
- provide that any future agreement must be a union collective agreement;
- mandate union involvement in dispute resolution; and
- provide a remedy for unfair dismissal.\(^57\)

However, the Bill in fact does not prescribe that these types of clauses will be prohibited content. Rather, proposed **new section 101D** provides that regulations (which are yet to be made public) will specify what prohibited content will be for the purposes of the Act. Where a workplace agreement contains clauses which are prescribed to be prohibited content, proposed **new section 101F** expressly states that the workplace agreement is void to the extent of this content.

The combination of proposed **new sections 101D and 101F** raises the possibility that regulations could be used retrospectively to void ‘prohibited content’ in an agreement, regardless of the fact that the content was not prohibited at the time the agreement was approved and lodged with the Employment Advocate. This has the potential to result in a significant uncertainty for the parties. It should be noted, however, that this possibility will depend strongly on how the regulations, once they come into existence, apply to existing workplace agreements.

**Addressing the bargaining power imbalance**

One of the primary concerns in relation to the use of individual workplace agreements is the possible imbalance of bargaining power between employers and employees.\(^58\) The Bill keeps in place some current measures, as well as introducing new measures to address this imbalance.

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Parties to an AWA can appoint a bargaining agent to act on their behalf in relation to the negotiation, variation or termination of an AWA (see proposed new subsection 97A(1)). An employee or employer must not refuse to recognise a bargaining agent appointed by the other party (proposed new subsection 97A(2)), and contravention of subsection 97A(2) is a civil remedy provision.

In order to be a bargaining agent, a person must meet requirements which will be set out in regulation. The ACTU has expressed concern that the regulations may be constructed in such a way as to exclude people that an employee would trust, such as a neighbour, friend or union representative, from being able to be a bargaining agent.59

Proposed new Division 10 of Part VB deals with ‘Prohibited conduct’. A person must not apply duress to an employee or employer in connection with an AWA (proposed new subsection 104(5)). However, it is not duress to require an employee to sign an AWA as a condition of employment (proposed new section 104(6)). While contravention of new subsection 104(5) is a civil remedy provision (proposed new subsection 104(7)), compliance with the section might be enhanced if employers were required, as part of the lodgment procedure, to make a declaration to the effect that the AWA was made in compliance with section 104(5).

Proposed new section 98C outlines the requirements for approval of an AWA. For employees under 18, the AWA must be signed on their behalf by an ‘appropriate person’ to indicate that the person consents to the employee approving the AWA (proposed new paragraph 98C(1)(c)). ‘Appropriate person’ is not defined, but proposed new subparagraph 98C(1)(c)(i) suggests a parent or guardian. This requirement offers a measure of protection to employees under 18, but there may still be an issue where employees do not have a parent or guardian who is able to consent for them.

Other provisions in Part VB

Other provisions in Part VB are:

- pre-lodgment and lodgment procedures for lodging workplace agreements with the Employment Advocate (Divisions 4 and 5)
- procedures for the Employment Advocate to review and remove prohibited content from workplace agreements (Division 7, Subdivision B)
- procedures for varying a workplace agreement (Division 8)
- procedures for terminating a workplace agreement, either by agreement or unilaterally (Division 9).

Comment

Various comments have already been provided in relation to the discussion of the main provisions above. However, it is of value to refer to the inquiry which resulted in the Workplace Agreements Senate Report. The Committee was not able to consider the Bill in detail, and instead was reliant on the proposals as outlined in the WorkChoices booklet. Despite not having the opportunity to review the Bill, the observations and
recommendations contained in the *Workplace Agreements Senate Report*, particularly in relation to AWAs, are worth noting:

- most of the witnesses appearing before the committee were in favour of abolishing AWAs; however, there was acceptance that an enterprise bargaining system should accommodate different types of agreement-making, both collective and individual;
- the Committee believed that legislation should include provisions requiring good-faith bargaining and enabling the AIRC to intervene to assist parties to settle a dispute;
- the Committee heard from witnesses expressing a number of concerns associated with the Office of the Employment Advocate, including:
  - concerns as to the apparent conflict of interest in the OEA’s performance of its duties, specifically given that the OEA is responsible for promoting and approving AWAs, as well as being responsible for compliance;
  - concerns over the OEA’s apparent use of the number of AWAs approved as a performance indicator, and the perceived willingness of the OEA to approve AWAs which ‘almost certainly’ failed to pass the no-disadvantage test;
  - the outsourcing of OEA functions, particularly the functions in relation to the approval of AWAs, which are performed by ‘industry partners’, who also act as consultants to employers to assist in the fast-tracking of AWAs to reduce costs;
  - the lack of review mechanisms in the WR Act 1996 in relation to decisions by the OEA or industry partners in relation to AWAs;
  - the lack of powers available to the OEA to settle disputes between employers and employees over the terms of an AWA, and
  - concerns over delays in the approval of AWAs.

The limited time between the date that the Senate Committee handed down its report on workplace agreements on 31 October 2005, and the introduction of the Bill into Parliament on 2 November 2005, means that the issues and concerns outlined above could not have not been adequately addressed by the Bill.

**Part VC: Industrial action**

**Background**

Strikes are ordinarily regarded as illegal at common law, because they constitute a breach of contract by the employee, giving the employer the right to terminate the contract of employment and to sue for damages. Striking employees and unions are also generally subject to sanctions provided for by legislation or the provisions of awards or agreements, including sanctions such as non-payment of wages, fines or bans clauses.

Creighton and Stewart note that in the 1993 reforms to the (then) *Industrial Relations Act 1988*:

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For the first time in the history of the federal system, the legislation … provided for a measure of protection against civil liability in respect of industrial action during a … ‘bargaining period’.  

The relevant provisions were retained in modified form in the WR Act 1996 (Part VIB, Division 8). Under the current WR Act 1996, a pre-condition for ‘protection’ is that the party taking ‘protected action’ has initiated a ‘bargaining period’ in accordance with section 170MI. Another pre-condition is that such action is preceded by written notice in accordance with section 170MO.

In regard to a bargaining period for a certified agreement, an employee or a union (including its officers or employees) can take industrial action against an employer in the form of a strike or work ban (subsection 170ML(2)). If the prescribed conditions are met, such action is ‘protected’ from legal action, including action in tort (section 170MT). For example, employees who engage in such industrial action can do so without breaching their contract of employment (subsection 170ML(2)). An employer may take industrial action against its employees in the form of a lockout or by standing down employees, without breaching the employment contract (subsection 170ML(4)).

In addition, employers are prohibited from dismissing or injuring an employee because the employee has taken protected action (section 170MU).

Section 127 allows the AIRC to direct that ‘industrial action’ that is ‘happening, or is threatened, impending or probable’ should stop or not occur. However, section 127 orders are not available in relation to ‘protected’ action under Part VIB, Division 8 of the WR Act 1996.

Main provisions

The current Bill repeals the existing provisions in the WR Act 1996 concerning industrial action (items 168 and 193—pages 371 and 394 of the Bill respectively).

The main proposals in the Bill in relation to industrial action are to:

• considerably restrict the circumstances in which protected industrial action can be taken, including complex procedures for mandatory secret ballots with penalty and cost clauses (proposed new Part VC generally)
• provide that industrial action will only be ‘protected’ if:
  – it is undertaken, according to proposed new section 108, by:
    ➢ a party to the negotiations, including a union
    ➢ a union member who is employed by the employer and will be subject to the proposed agreement
    ➢ an officer or employee of a union acting in that capacity, or
    ➢ an employee who is a negotiating party to the proposed agreement

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it is not undertaken during the suspension of a collective bargaining period (proposed new section 108B)

where a bargaining period has been suspended, three days written notice of intention to strike at the end of that period is given to the employer (proposed new section 107K)

its aim is not to encourage prohibited content in a proposed collective agreement (proposed new section 108A)

the employees or union are genuinely trying to reach agreement with the employer (proposed new section 108I)

it is not in support of ‘pattern bargaining’ claims (proposed new section 108D)

it does not occur before the expiry of workplace agreements or determinations (proposed new section 108E), and

it is undertaken only by employees and unions complying with all AIRC orders and directions (proposed new section 108H).

• exclude from industrial action:
  – employers’ actions, other than lockouts (proposed new section 106A)
  – employee workplace absences that are not industrially motivated (proposed new paragraph 106A(1)(f))

• make it mandatory for the AIRC to suspend or terminate a bargaining period if it is satisfied that one of several new circumstances exists. This in turn will restrict opportunities for protected industrial action. Such circumstances include:

  – when industrial action is being ‘taken, or is threatened, impending or probable’ which would adversely affect the employer or employees and also threaten ‘the life, the personal safety or health, or the welfare, of the population or part of it’ or cause ‘significant damage’ to part or all of the Australian economy (proposed new subsection 107G(3))

  – where industrial action is being undertaken by ‘an organisation’ on behalf of employees who are not its members (proposed new subsection 107G(7))

  – where industrial action is being taken because of a demarcation dispute (proposed new section 107G(8))

• add new grounds for terminating or suspending a bargaining period to section 170MW, including where industrial action is taken in support of ‘pattern bargaining’ (proposed new section 107H). In addition, the AIRC will be able to order a ‘cooling off’ suspension of a bargaining period (proposed new section 107I)

• if the AIRC is required to suspend or terminate a bargaining period—it can make an order doing so regardless of the orders actually applied for (proposed new subsection 107H(3))

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require the AIRC to decide whether to terminate a bargaining period within five days. If it cannot decide within this time, it must make an interim order suspending the bargaining period (proposed new subsections 107G(4) and (5))

give the Minister the discretion to issue a declaration terminating a bargaining period in similar circumstances, that is, if satisfied that industrial action which is ‘being taken, or is threatened, impending or probable’ is threatening or would threaten ‘the life, the personal safety or health, or the welfare, of the population or of part of it’ or cause ‘significant damage’ to part or all of the Australian economy (proposed new section 112)

require the AIRC to make a workplace determination if a bargaining period has been terminated and the parties have still not settled matters (proposed new section 113C). This determination will be treated as though it is a collective agreement similar to a section 170MX award under the present system (proposed new section 113F)

to hold a secret ballot before protected industrial action can be taken (proposed new sections 108J and 109ZC). The Bill further prescribes the following prerequisites:

− the union or employees proposing industrial action must apply to the AIRC for an order for a vote to occur (proposed new section 109ZH)
− for industrial action to be approved, at least 50 per cent of employees or union members at the business must vote, and more than 50 per cent must vote in favour of taking the industrial action (proposed new sections 109R and 109ZC)
− the applicant must pay for the cost of the ballot, but will only be required to pay 20 per cent of the cost if it is conducted by the Australian Electoral Commission (proposed new section 109ZC)
− however, an order can only be applied for:
  ➢ after the expiry of the existing agreement (proposed new section 109B)
  ➢ if the AIRC has been notified of a bargaining period, (proposed new section 109D), and
  ➢ if the proposed industrial action is solely for the purpose of promoting claims to include allowable content in the proposed agreement (proposed new section 109D)
− only employees covered by the proposed agreement can vote (proposed new section 109R)

require upon employees the burden of proof if they refuse to work on OHS grounds. Employees must now prove that their action was motivated by reasonable concern of an imminent risk to their health or safety (proposed new paragraph 106A(1)(g))

if the AIRC is satisfied that unprotected industrial action is threatened or occurring—it must order that industrial action ‘stop, not occur and not be organised’ (proposed new section 111)

− the AIRC must if practicable hear an application for such an order within 48 hours (proposed new subsection 111(5))

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any person affected or ‘likely to be affected’ ‘directly or indirectly’ will be able to seek such orders (proposed new subsection 111(4))

section 166A of the WR Act 1996, restricting certain actions in tort, will be repealed. This will give third parties speedier access to the court system when seeking remedies for unprotected industrial action (proposed item 71, p. 64 of the Bill), The removal of existing section 166A which will also, as a consequence, require parties seeking common-law relief in relation to industrial action to first obtain a certificate from the AIRC, which has 72 hours to try to stop the industrial action, including through use of its conciliation powers

• provide for the possibility of imposing civil penalties for unprotected industrial action, including:
  – up to 60 penalty units for individuals ($6600), and
  – up to 300 penalty units for organisations ($33 000), in addition to damages for loss arising from breaches of an AWA (proposed new section 110A and item 176, proposed new subsection 178(4)–(5)).

• require employers not to pay an employee during any industrial action, that is, for example, if the industrial action is for less than four hours, the employer must withhold four hours pay (proposed new section 114).

Industrial action, freedom of association and international obligations

As noted above, the Minister will be able to declare a campaign of industrial action illegal because it threatens the life, personal safety, health or welfare of the population, or is likely to cause significant damage to the economy. According to CCH Industrial Law News, ‘the new laws will make it virtually impossible to conduct any significant industrial action because of the essential services power with which the Minister will be newly invested’.66

In relation to similar proposals about freedom of association in previous legislation,67 the ACTU has said that Australian labour law does not meet the requirements of the ILO Freedom of Association and Protection of the Right to Organize Convention 1948 (Convention No. 87) or the Right to Organise and Collective Bargaining Convention 1949. The ACTU believes such provisions take Australia ‘even further away from a position of conformity with those international instruments to which Australia is a signatory’.68 The ILO Governing Body upheld the ACTU’s complaints in November 2005, asking the Howard Government to amend the laws and keep the ILO informed of its activities.69

In its submission to the WorkChoices Senate Inquiry, the International Centre for Trade Union Rights (ICTUR) said the industrial action and freedom of association provisions of both the current WR Act 1996 and the WorkChoices Bill breached Australia’s obligations under the International Covenant on Economic, Social and Cultural Rights and ILO conventions. According to the ICTUR:

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In the area of the right to strike, both existing Australian law (including the 1996 Act) and the provisions of the 2005 Bill are in clear breach of Australia’s international obligations. That this is so in respect of the 1996 Act is no mere assertion on the part of ICTUR: the ILO’s Committee of Experts has made clear and unequivocal findings to this effect over a number of years. The Committee can be expected to make further findings of breach if the provisions of the 2005 Bill dealing with industrial action and secret ballots pass into law.\textsuperscript{70}

The ICTUR states that the right to strike ‘has been implied from one of the foundational principles of the ILO, i.e. the principle of freedom of association.’\textsuperscript{71} It notes that, in particular, the right to strike has been implied from ‘the right of unions to organise their activities and formulate their programs, including furthering and defending the interests of workers’, enshrined in ILO Convention No. 87.\textsuperscript{72} According to the ICTUR:

> It is important to recognise that the principle of freedom of association is considered so fundamental that Convention No 87 applies regardless of whether a country has ratified it; it applies simply by virtue of membership of the ILO. Further, the jurisprudence developed on the basis of Convention No 87 also applies universally; all members of the ILO, including Australia, are therefore obliged to provide for the right to strike as determined through that jurisprudence.\textsuperscript{73}

Following a submission lodged by the ACTU in 1998, the ILO’s Report of the Committee of Experts on the Application of Conventions and Recommendations found in March 1999 that Australian law restricts the right to strike contrary to Convention No. 87, through provisions of the WR Act 1996 and other legislation which ‘excessively limit the subject-matter of a strike’.\textsuperscript{74} The ILO Committee of Experts observed that:

> … by linking the concept of protected industrial action to the bargaining period in the negotiation of single-business certified agreements, the Act effectively denies the right to strike in the case of the negotiation of multi-employer, industry-wide or national-level agreements, which excessively inhibits the right of workers and their organizations to promote and protect their economic and social interests.\textsuperscript{75}

The ICTUR argues that, rather than rectifying ‘the extensive breaches of Australia’s international obligation to provide for the right to strike’, the Bill will take Australia ‘even further out of compliance with our international obligations regarding the right to strike’.\textsuperscript{76} From the ICTUR’s perspective, provisions in the Bill that cause particular concern include:

- **proposed new section 111**, under which the AIRC must order that industrial action halt or not commence if it appears to the AIRC that the action would be ‘unprotected’. The ICTUR notes that orders could be obtained ‘not only by those directly affected by the unprotected industrial action, but also by other parties who are indirectly affected.’

> Providing for the ability of parties who are only indirectly rather than directly affected to seek such orders represents a wholly unjustifiable and unacceptable curtailment of the right to strike.\textsuperscript{77}

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• proposed **new section 112**, which ‘places a very broad discretionary power in the hands of the Minister to terminate a bargaining period’.\(^78\) The ICTUR states that new sections 111 and 112 together ‘amount to an unacceptable encroachment upon the right to strike’, and would:

… unduly interfere with the capacity of independent judicial and quasi-judicial bodies to determine issues on their merits, by removing from such bodies any discretion as to whether civil liability should flow from the taking of unprotected action.\(^79\)

• **the removal** of existing **section 166A** from the WR Act 1996. The ICTUR notes that ‘removal of section 166A would provide employers with a more direct route to civil remedies against unions, and result in many matters that might otherwise have been resolved in the [AIRC] proceeding to litigation.’\(^80\)

• proposed **new sections 106B, 107H, 108D**, preventing protected industrial action in support of ‘pattern bargaining’. The ICTUR notes that these provisions ‘would further compound the major breach of ILO Convention 87’, highlighted by the ILO Committee of Experts. As the ICTUR notes:

  The 1996 Act has already been condemned by the Committee because of the excessive restrictions it places on industrial action in pursuit of multi-employer or industry-wide agreements.\(^81\)

• the other additional restrictions on industrial action in proposed **new Part VC**. The ICTUR notes that:

  When combined with the proposed new requirements for secret ballots, these limits would also mean that the legal procedures for taking protected action would be so complicated as to make it practically impossible to take any form of legal industrial action in Australia.\(^82\)

• proposed **new provisions requiring a secret ballot** before protected industrial action can be taken. The ICTUR notes that ILO supervisory bodies have taken the view that ‘mandatory pre-strike ballots do not necessarily conflict with the principle of freedom of association’. But they have also maintained that the legal procedures for declaring a strike, such as secret ballots:

  − should be reasonable
  − should not place substantial limitations on the means of action open to trade unions
  − should not be so complicated as to make it practically impossible to declare a legal strike, and
  − are acceptable, and do not involve any violation of the principle of freedom of association, only when they are intended to promote democratic principles within trade union organisations.\(^83\)

The ICTUR states that the secret ballot provisions of the Bill will ‘violate each of these principles’. In its view:

They are unnecessarily complicated and inflexible; indeed, they seem to be intended to frustrate the right to take industrial action by laying a series of trip wires over

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which unions will inevitably fall. In providing employers with rights to oppose the
holding of a ballot (and therefore delay the industrial action), they go far beyond any
objective of promoting democratic decision-making within unions; such matters are
of minimal concern to employers, and should be primarily matters for internal union
governance.

In fact, the extent of the detailed procedural requirements contained in the provisions
reveals their true purpose – they are all about so narrowly confining the right to strike
that its exercise is in most cases impossible, and where possible is of little or no
practical effect. The secret ballot provisions in the Bill will result in no higher
standards of democratic decision-making in unions than are already attained, through
the measures currently taken by unions to consult with their members over whether
industrial action should be taken.84

Part VI: Awards

Main provisions

Division 1—Preliminary

Proposed new section 115 sets out the objects of this Part, which prescribe that
rationalised (less of them) and simplified (fewer provisions) awards are to act as a safety
net of employment conditions for ‘award-reliant’ employees (the Bill and the Explanatory
Memorandum both use this term, see, for example, proposed new subsection 3(g)). The
AIRC is to act in a way which protects the position of youth in the labour market and
promotes community standards.

It should be noted that the provisions below refer to federal employers. The treatment of
existing awards, to be known as ‘transitional awards’ for current employers under federal
awards who are not covered by the proposed constitutional underpinnings—that is,
typically, they are not incorporated—is specified in proposed new Schedule 13. At the
end of five years, the Schedule gives businesses the option to incorporate and so remain in
the federal system, or revert to state award coverage. In the meantime, the AIRC retains
some of the arbitration powers to deal with these awards that it otherwise loses.

Proposed new section 115A will direct the AIRC to have regard to productivity, inflation,
job creation and employment; so that its decisions are not inconsistent with decisions of
the AFPC, and so that safety net conditions do not act as a disincentive to agreement-
making. Proposed new section 115B allows the Minister to exclude prescribed employees
from awards on the basis of insufficient connection to Australia.

Division 2—Terms that may be included

Subdivision A—Allowable award matters

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Proposed new section 116 prescribes allowable award matters. These include:

- ordinary time hours of work; where these are superior to the AFPCS, for example, where the award prescribes 40 hours, the AFPCS standard of 38 hours will ‘prevail’. Times within which ordinary hours may be worked may be specified, as may rest breaks, and notice of variations to start/finish times
- incentive-based payment and bonuses
- annual leave loadings
- ceremonial leave
- public holidays as declared by a state or territory, excluding union picnic days
- monetary allowances for costs, skills or disabilities associated with the work
- penalty rates, that is, for overtime or weekend work
- redundancy pay by an employer of 15 or more employees
- stand-down provisions
- dispute-resolution procedures (each award is to have ‘model’ DR provisions)
- type of employment (for example, casual, on-going, etc., but not transfers between types), and
- certain conditions of employment for outworkers

Non-allowable award matters are prescribed in proposed new section 116B. These are:

- rights of organisations to represent members in dispute resolution
- transfers of employees across employment types (for example, casual to ongoing)
- specifications on proportions of employees under types of employment
- direct or indirect prohibitions on employers employing employees under types of employment
- maximum or minimum hours of work for part-time employees
- restrictions on training arrangements
- restrictions on contractors
- restrictions on labour hire
- union picnic days
- tallies
- dispute resolution training leave
- trade union training leave, and
- any other prescribed matter.

Subdivision B—Other terms that are permitted to be in awards

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Awards may not include terms covered by the AFPCS other than for ordinary time hours; they may not include enterprise flexibility provisions nor right-of-entry provisions, but may include both ‘facilitation’ clauses—whereby employees agree on the operation of award terms—and preserved award terms (see below).

Subdivision C—Terms in awards that cease to have effect

Non-allowable award provisions cease to have effect upon commencement of the Bill, except for ‘preserved’ award provisions.

Subdivision D—Regulations relating to part-time employees

Regulations are required for part-time employees to have the same entitlement to conditions as full-time employees.

Division 3—Preserved award entitlements

Proposed new section 117 stipulates that the following are preserved award terms:

- annual leave
- personal/carer’s leave
- parental leave (including maternity leave and adoption leave)
- long service leave
- notice of termination
- jury service, and
- superannuation (only to 30 June 2008).

These terms do not cease to operate after the Bill comes into effect. Award-reliant workers will have access to these terms where these terms are ‘more generous’ (to be prescribed by regulation) than the AFPCS, but these terms cannot be varied. These terms will carry over to rationalised awards, but only to the respondents of the parent award. New respondents to rationalised awards will not be bound to preserved terms. Certain preserved terms, for example, jury service and long service leave, will prevail over state provisions.

Division 4—Award rationalisation and award simplification

Subdivision A—Award rationalisation

Proposed new section 118 specifies the AIRC’s award rationalisation function. Award rationalisation is to be carried out by a full bench in accordance with a written request (an award rationalisation request) made by the Minister to the President, including the stipulation of principles for rationalising awards and the requirement to complete the rationalisation within three years. The AIRC must ensure that terms and conditions of employment included in awards made or varied as a result of the award rationalisation process are not determined by reference to state or territory boundaries, and that the terms

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of the award apply in each state and territory. Proposed **new section 118F** specifies that the AIRC can only make a new award as part of the rationalisation process.

**Subdivision B—Award simplification**

Proposed **new section 118M** obliges the AIRC to review all awards to ensure that they only contain provisions consistent with Division 2. Regulations may direct the AIRC as to principles it will follow when conducting the review, it may then develop its own principles for varying or revoking awards, including the removal of ‘objectionable provisions’.

**Subdivision C—Special technical requirements**

Proposed **new section 118P** would require the AIRC to include any preserved award term in the award, and identify it as a preserved award term and identify the employers and employees bound by the preserved award term. It would enable the AIRC to condense preserved award terms of the same substantive effect. The AIRC also would be required to identify the employers and employees bound by the condensed term.

**Division 5—Variation and revocation of awards**

**Subdivision A—Variation of awards**

Proposed **new section 119** sets out certain prohibitions and obligations when the AIRC varies awards. Employers, employees or organisations may make applications to vary awards to ensure they act as a safety-net minimum.

**Subdivision B—Revocation of awards**

Proposed **new section 119C** allows the AIRC to revoke awards as a result of rationalisation or simplification or where the award is determined to be obsolete.

**Division 6—Binding additional employers**

Proposed **new section 120A** allows employers only (for example, those from a state system) to apply to be bound by an award for their employees, provided this is supported by a majority of employees to be covered by the application (prescribed under regulations) and no relevant award covers the employer and employee. Proposed **new section 120B** allows an eligible organisation of employees to make an application for an award to bind an employer upon the request of an employee. Proposed **new section 120C** allows a ‘new’ organisation to make an application for the award to bind that organisation.

**Division 7—Technical matters**

Proposed **new section 121A** stipulates that awards and orders must not include matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level. Awards must not prescribe work practices or procedures that restrict or

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hinder the efficient performance of work, and must not restrict or hinder productivity, having regard to fairness to employees.

Comment

It has been noted that:

Awards will continue to operate under the new system subject to further simplification and rationalisation. But, in truth, their role is to be marginalised and they are on the way out … awards are to be reduced, rationalised and grandfathered in their operation. Their replacement as the backdrop to workplace agreements will be the Australian Fair Pay and Conditions Standard.85

Especially in the transitional period, the rationalisation and simplification of awards under the new regime may result in an acquisition of property by the Commonwealth, which may only occur on just terms under section 51(xxxi) of the Constitution. For a more detailed discussion, including the effect proposed new section 358 may have, see the Concluding Comments below.

Part VIA: Minimum entitlements

Items 72–167 (pp. 341–71 of the Bill) make amendments to several Divisions in Part VIA of the WR Act 1996.

Division 1—Entitlement to meal breaks

Item 72 inserts a new Division 1. It provides an entitlement to an unpaid meal break of at least 30 minutes after five hours work to employees ‘constitutionally covered’ by the WR Act 1996 but who are not covered by an award or a workplace agreement, or an industrial instrument prescribed in the regulations (proposed new sections 170AA and 170AB).

Division 2—Equal remuneration for work of equal value

Proposed amended Division 2 gives effect to various international obligations in relation to equal pay for men and women. The external affairs power of the Constitution supports this Division and, on this basis, the Division has universal application to employees in Australia, regardless of the identity or corporate status of their employer. Amongst other things, items 73–80 make amendments to revised Division 2 that:

• clarify the relationship of this Division to other laws providing alternative remedies
• clarify the relationship to decisions of the AFPC, and
• generally take account of the changed constitutional underpinnings to the WR Act 1996.

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Division 3—Termination of employment—unfair dismissal

The Government’s many attempts to reduce the applicability of unfair dismissal laws are well documented. For a more detailed background and history, the reader is referred to the previous Bills Digests and parliamentary committee reports. It is important to note that the Bill does not amend the provisions dealing with unlawful termination.

Unfair or unlawful dismissal?

The WR Act 1996 includes provisions for both unfair dismissal and unlawful termination. Unfair dismissal occurs when the employee’s dismissal is ‘harsh, unjust or unreasonable’. Actions for unfair dismissal are instituted in the AIRC, which must give weight to the interests of the employer and the dismissed employee in determining both the merits of the case and any remedy granted (section 170CB). To be eligible to make a claim for unfair dismissal, employees must have been covered by:

- a federal award or agreement, and their employer was a constitutional corporation, or
- employed in interstate or overseas trade or commerce as a waterside worker, maritime employee or flight crew officer; or a Commonwealth public sector employee, or
- employed in Victoria or in a territory.

Unlawful termination occurs if the termination is based on one or more of a number of reasons listed under the WR Act 1996. These include a failure to meet the required notice provisions (section 170CM) and reasons concerning discrimination on grounds such as sexual preference, age, union membership, religion, race, and family responsibilities (subsection 170CK(2)). Actions for unlawful termination are initiated in the AIRC. The Commission must seek to resolve a claim by conciliation before determining whether to refer it to the Federal Court. All employees nationally are eligible to apply.

Main provisions

The Bill makes the following amendments to the unfair dismissal regime in the WR Act 1996:

- federal termination of employment provisions (for both unfair dismissal and unlawful termination) will cover the field for employees of constitutional corporations. State laws that provide a remedy for termination of employment, including state unfair contracts jurisdictions, will be overridden and left to deal with employees of non-incorporated businesses and other employee groups such as state public servants (item 9, proposed new section 7C).

- employees of businesses which employ up to and including 100 employees (including full-time and part-time employees and casual employees engaged on a regular and systematic basis for a period of 12 months) will be excluded from making an unfair dismissal application (item 113, proposed new subsection 170CE(5E), p. 360 of the Bill).
employees of businesses which employ more than 100 employees will be unable to commence an unfair dismissal claim when any one of the following circumstances apply:

- the employee’s employment has been terminated within the first six months (this is an extension of the current three-month qualifying period) (item 111, proposed amended paragraph 170CE(5B)(a))

- the employee’s employment has been terminated on the ground of operational requirements (item 112, new subsection 170CE(5C)—operational reasons being reasons of an economic, technological, structural or similar nature (proposed new subsection 170CE(5D)), or

- the employee is employed on a seasonal basis (item 91, proposed new paragraph 170CBA(1)(g), item 96, proposed new subsections 170CBA(6A)–(6C)).

the AIRC will in certain circumstances be able to conduct certain unfair dismissal applications ‘on the papers’, that is, without a formal hearing (item 115, new sections 170CEC and 170CED).

clauses providing unfair dismissal remedies will be excluded from workplace agreements. Such clauses are to be ‘prohibited content’, and penalties of up to $33 000 would apply for seeking to include such matters in an agreement (WorkChoices, p. 24). The detail is to be spelt out by regulation. (For further detail in relation to prohibited content, see Part VB: Workplace Agreements)

Pros and cons of a small-business exemption

The following points have been argued in favour of a small-business exemption, including that:

- small business is more adversely affected by unfair dismissal laws and claims than are larger firms which have greater resources for establishing recruitment and termination procedures

- surveys of business indicate that employers are paying former employees somewhere between $5000 and $25 000 rather than defend themselves against speculative and vexatious claims

- the present law disadvantages employers by discouraging small business from taking on additional workers. The Explanatory Memorandum quotes results from the Sensis Business Index for August 2005 and the MYOB Australian Small Business Survey for September 2005, suggesting that over the past year, around 30 per cent of small businesses have not hired additional employees due to fear of unfair dismissal action

- exempting small businesses from unfair-dismissal laws will create jobs and would encourage higher and more stable employment in the small-business sector

- the exemption is consistent with the Government’s stated policy, which was fully canvassed prior to the 2004 general election

- the exemption does not diminish the rights of apprentices or approved trainees, and
• the exemption does not extend to cases of alleged unlawful termination

The following points have been argued against a small-business exemption, including that:

• the nominal size of the small-business exemption (that is, 100 employees) and the exclusion from unfair dismissal claims where the dismissal has been for ‘operational reasons’ have not been endorsed by the electorate (previous proposals were to exempt businesses of up to 20 employees)

• the changes are inequitable: the basic rights of all employees ought to be the same irrespective of the size of their employer

• the changes will result in an increase in more costly litigation under other laws, such as under unlawful termination, under state and federal anti-discrimination laws and under common law

• there is a lack of evidence to support claims that the federal unfair-dismissal laws have acted as a significant brake on employment growth, and furthermore, the claims regarding the cost of dismissals are highly exaggerated. The *Unfair dismissal and Small Business Senate Inquiry* recently inquired into the question of unfair dismissal and small-business employment, and concluded there is no empirical evidence or research to support the Government’s claim that exempting small business from unfair-dismissal laws will create 77,000 jobs. The Committee stated that there continues to be no evidence of a causal link between unfair-dismissal laws and employment growth in the small-business sector.

• the Bill readily accepts that an action for unfair dismissal may harm the employer, but underplays the likely effect on the worker of losing his or her job

• the Bill may encourage some employers to create artificial business entities to avoid the law by reducing the nominal size of their workforce below the statutory threshold

• the removal of access to unfair-dismissal remedies further enhances the bargaining power of many employers. This, it may also be argued, undermines the basis for genuine/free collective agreement-making

• the various changes to the WR Act 1996 enacted since 1994 redress any legislated bias against employers. These changes, it is argued, have not only reduced levels of litigation, but have also lowered the risk to all employers of being subject to an adverse finding. Relevant changes include:
  – introduction of the ‘fair go all round’ test
  – more realistic remedies
  – introduction of a filing fee, and
  – extending the AIRC’s capacity to award costs.

These changes appear to have gone some way to shielding employers—small and large—from unreasonable claims, and

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Comment

The proposed unfair-dismissal exemption is far more comprehensive that any previous legislative proposals. The combined effect of 'covering the field', raising the small-business threshold to 100 employees and excluding all employees where dismissal is for ‘operational reasons’ will mean that a much larger proportion of Australian employees will be left without a remedy for unfair dismissal. For example, 2001 figures from the Australian Bureau of Statistics indicated that 62 per cent of people employed by businesses worked for firms with fewer than 100 staff. Based on 2005 ABS labour force data, this amounts to some 4.2 million employees.

Given the extent of this reform, parliament may wish to consider the recent recommendation made by the *Unfair dismissal and Small Business Senate Inquiry* that no further changes to unfair dismissal laws be made until an independent expert review has been conducted into the causal link between unfair dismissal and employment growth.

Division 5—Parental leave

New Division 5 of Part VIA (p. 370 of the Bill) would extend the parental-leave entitlements (as set out in proposed Division 6 of Part VA, under the new AFPCS) to those employees in Australia who are not covered by the AFPCS. The effect would be that the parental-leave standards would have universal application for employees in Australia, regardless of the identity of the employer. This amendment is based on the external affairs power in the Constitution.

Part VIIA: Transmission of business rules

Background

When a business is transferred to a new owner, the transferring employees will be covered by existing awards and agreements, but only for a maximum period of 12 months after transmission.

To be a transferring employee, the person must be re-engaged by the new employer within two months of transmission.

Transferring employees include those who are terminated by the original owner for operational reasons in the month prior to transmission of the business. Employees who are terminated for operational reasons more than one month prior to transmission are not transferring employees and will not be covered by existing awards and agreements if they are engaged by the new owner.

Awards and agreements are the mechanism by which certain entitlements are currently preserved. Unless preserved by virtue of proposed new section 7C(3), there seems to be scope for employers to structure their employment arrangements so as to deprive...
transferring employees of their accumulated entitlements after the 12-month transmission period has expired (or earlier, if any of the conditions for earlier termination of the existing award or agreement prevail).

There is, furthermore, scope for companies to ‘transmit’ business units and their employees within a corporate group so as to take advantage of the new rules. An employer could transfer employees between entities and, after a maximum period of 12 months, the new entity could engage the employees on, say, AWAs which do not preserve respective entitlements.

These provisions are concerned with the transmission of a ‘business’, and not with the sale or transmission of a company (or more correctly the shares in a company). When a company is transmitted (by sale, for instance), there is generally no discontinuity of employment because the employer (the company) remains the same.

By contrast, a business is not a separate legal thing. Rather, it is a combination of the people who are employed and the things that are used to operate the business (like stock and other assets, premises and licences). To illustrate the point, when a ‘business’ is sold, for instance, the contract of sale will deal separately with all of the elements of the business that are to be transferred.

When a business is transmitted, some or all of the employees of the old owner will continue to work in the business after it is transmitted to the new owner. For this to happen, the employment relationship between those employees and the old owner must come to an end and a new relationship must be established with the new owner. With some exceptions, the employer must, at the time of transmission, treat the end of the employment relationship as if it was a normal termination of employment.94

Two issues arise as a result of such arrangements. Firstly, what happens to any accrued rights, such as annual and long service leave, of transferring employees? Secondly, under what terms are the transferring employees engaged?

In the usual case, where employment comes to an end and the employee commences with a new employer, rights that are accrued with the old employer do not continue to accrue with the new employer. Similarly, the terms under which the employee is engaged will probably be different under the old and new employers.

When a business is transmitted, however, the position is modified. The changes made by the Bill can be seen against the background of the current position which is set out in general terms in the next five paragraphs.

Accrued rights

In relation to accrued rights, the position generally is that the transmission of the business is deemed not to interrupt the services of transferring employees. This means that, for the purpose of working out certain accrued rights, the employee’s service with the old owner of the business is deemed to be service with the new owner. In consequence, in relation to a transmission of a business, the new owner will assume certain obligations—in relation to

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annual and long service leave, for instance—and adjustments will be made to the price to compensate for the assumption of these obligations.

Terms of employment

As a general proposition, upon the transmission of a business, the new owner would be bound by the same terms of employment under which the employee was engaged by the former owner of the business.

For instance, for employees engaged under certified agreements, current section 170MB provides that, subject to any order of the AIRC under section 170MBA, certain new owners (the ones in relation to which the Commonwealth has a constitutional power) will be bound by the certified agreement. (Section 170MBA, by amendments made in 2004, allows the AIRC to order that the certified agreement does not apply, or applies to a different extent.)

For employees engaged under AWAs, current section 170VS provides that certain new owners will be bound in the event of transmission of a business.

Current paragraph 149(1)(d) is of the same effect in relation to employees under awards.

What the Bill does

The Bill repeals all of the provisions mentioned above and replaces them with an alternative scheme. The new scheme continues to provide for the continued application of existing awards and agreements. However, it does so in relation to a smaller class of employees and for a maximum 12-month period after transmission.

This Part of the Bill is structured in the following way:

• Division 2—meaning of transferring employee
• Division 3—transmission of AWAs
• Division 4—transmission of collective agreements
• Division 5—transmission of awards
• Division 6—transmission of APCSs
• Division 7—entitlements, such as parental leave, under the Australian Fair Pay and Conditions Standard
• Division 8—notice requirements on employers, and associated civil penalties
• Division 9—the making of regulations.

Division 2—Who is a transferring employee?

The continued application of any award, agreement or APCS depends upon the employee being a "transferring employee" in relation to that instrument. The definition includes the obvious case of the employee whose service in the business is effectively continuous; that

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is, the person who is employed by the old employer immediately before transmission and by the new employer immediately after transmission.

The definition extends to those who are engaged by the new employer up to two months after transmission (proposed new subsection 123A(1)). The definition also extends to those who are terminated by the old employer, for operational reasons, up to one month prior to transmission if they are later engaged by the new employer (again within two months). These are restrictions not found in the current law.

A further restriction on the continued application of an award, agreement or APCS is that the nature of the transferring employee’s employment must be such—and continue to be such—that the relevant instrument is ‘capable of applying to employment of that nature.’ (proposed new section 123B).

Division 3—Transmission of AWAs

If, immediately before transmission (or immediately before termination by the old employer, if that took place for operational reasons within one month of transmission), the old employer and the transferring employee were bound by an AWA, the new employer will be bound by the AWA.

However, the new employer is bound by the AWA for a limited period. The maximum period is 12 months (called the ‘transmission period’). The period may be shorter if:

• it is terminated (there are some protections against certain types of termination)
• it is replaced by another AWA
• the AWA is no longer capable of applying to the employee because of the nature of the employee’s employment.

Division 4—Transmission of collective agreements

If, immediately before transmission (or immediately before termination by the old employer, if that took place for operational reasons within one month of transmission), the old employer and the transferring employee(s) were bound by a collective agreement, the new employer will be bound by the collective agreement.

As in the case of AWAs, the new employer is generally bound by the collective agreement for a limited period. The maximum period is 12 months. The period may be shorter if:

• it is terminated (proposed new paragraph 125(2)(a)) (there are some protections against certain types of termination in proposed new section 125C)
• there are no more transferring employees in relation to the collective agreement (either because there are no more transferring employees or because the collective agreement ceases to be capable of applying to the employment of those employees because of the nature of their employment). (proposed new paragraph 125(2)(b))

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• the new employer ceases to be bound by the collective agreement in relation to all the transferring employees for that agreement. (proposed new paragraph 125(2)(c))

In relation to particular transferring employees, the new employer may cease to be bound by the collective agreement sooner than the end of the 12-month period. The circumstances in which this can occur are:

• the new employer makes an AWA with the transferring employee (proposed new paragraph 125(3)(a)). This terminates, rather than suspends, the transmitted collective agreement in relation to that employee (proposed new subsection 125B(2))

• a new collective agreement is made with the transferring employees (proposed new paragraph 125(3)(b)). This terminates, rather than suspends, the transmitted collective agreement in relation to those employees (proposed new subsection 125B(3))

• the new employer ceases to be generally bound by the collective agreement under subsection 125(2) above (proposed new paragraph 125(3)(c))

• the transferring employee is not, or ceases to be, employed in the business that was transferred (proposed new subsection 125(4))

If the collective agreement ceases to apply because the transmission period (12 months) ends, any collective agreement of the new employer that would, by its terms, apply to the transferring employee, will apply from that time on (proposed new section 125A).

AIRC’s powers to modify the effect of transmitted collective agreement

While the transmitted collective agreement will bind the new employer, this is subject to an order of the AIRC (proposed new subsection 125(5)). The AIRC may order that the new employer is not bound by the collective agreement or is bound to an extent specified in the order (proposed new sections 125D–125I).

The order must not be retrospective (proposed new section 125E). It may be made prior to transmission, but cannot apply prior to that time (proposed new subsection 125E(1)). Prior to transmission, only the old employer may apply for an order (proposed new subsection 125G(1)). After transmission, the new employer, the transferring employees and certain of their representatives may apply (proposed new subsection 125G(2)). The AIRC must allow submissions to be given by specified interested parties, the details of which are set out in proposed new section 125I.

Division 5—Transmission of awards

If, immediately before transmission (or immediately before termination by the old employer, if that took place for operational reasons within one month of transmission), the old employer was bound by an award, the new employer will be bound by the award in relation to any transferring employees (proposed new section 126).

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As with collective agreements and AWAs, there is a limit to the period in which the new employer will be bound by the award. The maximum period is 12 months (proposed new paragraph 126(2)(d)). However, it may be shorter if:

- the award is revoked (proposed new paragraph 126(2)(a))
- there are no more transferring employees in relation to the award (either because there are no more transferring employees, or because the award ceases to be capable of applying to the employment of those employees because of the nature of their employment) (proposed new paragraph 126(2)(b))
- the new employer ceases to be bound by the award in relation to all the transferring employees for that agreement (proposed new paragraph 126(2)(c)).

In relation to particular transferring employees, the new employer may cease to be bound by the award sooner than end of the 12-month period. The circumstances in which this can occur are:

- the new employer makes an AWA with the transferring employee (proposed new paragraph 126(3)(a)). This terminates, rather than suspends, the transmitted collective agreement in relation to that employee (proposed new subsection 126B(2))
- a new collective agreement is made with the transferring employees. (proposed new paragraph 126(3)(b)). This terminates, rather than suspends, the transmitted award in relation to that employee (proposed new subsection 126B(3))
- the new employer ceases to be generally bound by the collective agreement under proposed new subsection 126(2) above (proposed new subsection 126(3)(c)).

The extent to which a new employer is bound will depend on any orders made by the AIRC. See the section on the AIRC’s powers above.

Division 6—Transmission of APCS

If, immediately before transmission (or immediately before termination by the old employer, if that took place for operational reasons within one month of transmission), a transferring employee’s employment is covered by an APCS, the new employer will be bound by the APCS in relation to any transferring employees (proposed new section 127).

The application of the APCS is not limited to 12 months as in the other cases. However, transferring employees will cease to be covered by the APCS if they cease to be transferring employees because the APCS is no longer capable of applying to the employees because of changes in the nature of their employment.

Division 7—Entitlements under the Australian Fair Pay and Conditions Standard

A new employer becomes liable for any parental-leave entitlements under the AFPCS if the old employer was liable for them (proposed new subsection 128(1)). Service with the old employer—and service recognised for these purposes by the old employer—count as service for the purpose of working out parental-leave entitlements (proposed new subsection 128(2)).

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Proposed **new sections 128A and 128B** allow for a new employer to assume liability for—or recognise continuity of service in relation to—a transferring employee’s other entitlements under the AFPCS.

**Division 8—Notice requirements and enforcement**

Where an employee is to be covered by transmitted AWA, collective agreement or award, provision is made requiring the new employer to give notice to the transferring employee (proposed **new subsection 129(2)**). The notice must specify certain matters (proposed **new subsection 129(3)**). The notice must be lodged with the Employment Advocate (proposed **new subsection 129A**). Failure to lodge a complying notice can lead to civil penalty (proposed **new section 129C**).

**Division 9—Regulations**

Provision is made for regulations to be made in relation to the effects that the transmission of business may have on the obligations of employers and the terms and conditions of employees.

**Part VIIA: Dispute resolution processes**

The objects of this Part are to:

- encourage dispute resolution *at the workplace level*, and
- introduce greater flexibility into the dispute resolution process by allowing parties to determine the best forum for resolution (proposed **new section 171**).

**Model dispute resolution process**

The model dispute resolution process (MDR) will be the dispute resolution process in:

- all awards (proposed **new section 116A**)
- workplace agreements (proposed **new subsection 101A(2)**) where no other MDR is specified
- disputes about:
  - the AFPCS (proposed **new section 89E**), for example, maximum ordinary hours of work, annual leave, personal leave
  - meal breaks (proposed **new section 170AC**), and
  - parental leave (proposed **new section 170KD**).

These examples are listed in a Note to **Division 2**, proposed **new section 173**. It is not an exhaustive list.

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The following sets out a flowchart of the MDR process. It encompasses recourse to alternative dispute resolution (ADR) if there is no resolution at the first stage of dispute resolution at the workplace level.

Freedom to choose

The WorkChoices booklet notes that the purpose of MDR is to ‘facilitate choice’ and ‘encourage parties to consider alternatives to the AIRC’.97

The Explanatory Memorandum notes that:

As under the current system, employers and employees remain free to choose the most appropriate arrangements for attempting to settle disputes at the workplace level.98

If a dispute cannot be settled at the workplace level, and the MDR process applies to the particular dispute, there is only one of the following two choices to be made by the employer and employee:

• deciding who will conduct the ADR process: the AIRC or a private service provider, or
• deciding whether to pursue court action instead of MDR/ADR.

Under the current WR Act 1996, there are various provisions relating to the inclusion of dispute settlement procedures in certified agreements (sections 170LT(8) and 170LW),

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AWAs (subsections 170VG(3) and (4)) and awards (section 91). Only in the case of AWAs is the model procedure prescribed by the regulations taken to apply if no other procedure is included in an AWA. These current provisions provide a considerable degree of leeway for the parties to determine the most appropriate procedure, including the option to appoint the AIRC to settle disputes.

The key differences in relation to the current dispute-resolution process are that the MDR:

- significantly reduces the options available to parties to determine dispute settlement procedures between themselves, in relation to the application of awards or in relation to certain disputes such as parental leave. In relation to workplace agreements and collective agreements, parties may opt for a different form of dispute resolution to these provisions, but the MDR will be the default procedure, and
- limits the AIRC’s powers regardless of the party’s wishes (see later discussion).

Reservations have been expressed as to the freedom of choice available. The joint submissions of the Governments of New South Wales, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory to the WorkChoices Senate Inquiry expressed strong objections to the displacement of dispute resolution processes that had previously been agreed to by parties to state instruments:

The Joint Governments consider such an imposition to be in stark contradiction of the supposed objects of the Bill, in particular object 3(d) which states ‘…the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level’.99

There is also a broader question about the extent of choice in dispute resolution under the Bill in general. It is stated in the WorkChoices booklet, for example, that agreements will not be able to mandate union involvement in dispute resolution.100 And the following extract from the Workplace Agreements Senate Report raises a general concern about an employee’s capacity to make choices as to how disputes are resolved:

While all agreements, individual and collective, must include a dispute-settling mechanism, the act does not stipulate what must be included in the provision or what form it must take. If an AWA lacks a dispute resolution procedure, the provision that is provided as a template in the act will be deemed to apply.

The committee believes that the WR Act’s dispute resolution provision gives employers a considerable advantage over employees, especially where terms and conditions which employees have signed up to are left to the employer’s discretion. It is increasingly common, for example, for AWAs to include entitlements to four weeks annual leave but not mention when the employee can take leave, whether the employer or employee is required to give notice and under what circumstances leave can be refused. It would be up to the employer to decide these issues, whereas under the relevant award system they are set out in clear and simple terms. In these circumstances employers hold the advantage because it would be acceptable for an AWA to set out a dispute resolution procedure which states that the decision of the human resources manager or general manager is to be taken as final. To the

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committee’s surprise the Employment Advocate, Mr Peter McIlwain, confirmed at the committee’s Sydney hearing that an AWA would be approved if, meeting all other conditions under the act, it contained a dispute resolution procedure which said the employees’ avenue of appeal in the event of a dispute was, for argument’s sake, the employer’s grandmother.101

Right to take court action

Court action is the only alternative to the ADR processes.

Proposed new section 172 provides that the right of a party to take court action to resolve a dispute is not affected by this Part.

While it is clearly possible for a party to commence litigation, it is less clear as to whether a court may stay proceedings if it believes that the party has not complied with the terms of the MDR. By comparison, in relation to commercial contracts, it is not unusual for a court to order that parties abide by the dispute resolution terms in a contract before initiating court action. Therefore, it is possible that a court would not proceed unless satisfied that the parties have made ‘a genuine attempt’ at resolution in line with the MDR requirements.

‘Genuine attempt’

The MDR firstly provides that parties must ‘genuinely attempt’ to resolve disputes at the workplace level (proposed new section 174). According to the Explanatory Memorandum, ‘[t]he “genuineness” of dispute resolution attempts would be demonstrated by the parties engaging with each other in a cooperative and timely way to attempt to resolve the dispute’.102 The Note to this section states:

This may involve an affected employee first discussing the matter in dispute with his or her supervisor, then with more senior management.

This is in keeping with the facilitative approach taken to solving workplace disputes in their early stages. For example, the ‘genuine attempt’ concept is incorporated in the current Prescribed Model Dispute Resolution Procedure under Schedule 9 of the Regulations in relation to AWAs.

In contrast, under the current WR Act 1996, the AIRC, in considering whether to exercise its powers, is to have regard to whether parties bound by an award have complied with the award’s dispute settlement procedure (section 92). In doing so, it may have regard to ‘the circumstances of any compliance or non-compliance with the procedures.’ The term ‘a genuine attempt’ is not used in this section. The term is arguably open to different interpretations, and as it will be used to determine whether parties can access ADR or not, it should be more precisely explained.

There is a great risk that the term will give rise to further dispute and, as a consequence, substantial delays.

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It is worthwhile noting that the AIRC, under the current WR Act 1996, only needs to determine if ‘a genuine attempt’ has been made in two specified circumstances. Those circumstances relate to the AIRC determining whether to settle an ‘exceptional matter’ (current subsection 89A(7)) and in the course of a conciliation in which the parties consent to recommendations being made by the AIRC (current section 111AA). In both these circumstances, the purpose of determining whether there has been ‘a genuine attempt’ is not to establish the AIRC’s right to exercise its powers, but to consolidate and extend its authority. In contrast, under the new provisions, the purpose of establishing whether ‘a genuine attempt’ has been made is to set a benchmark by which to determine whether there should be any right at all to make application for AIRC-conducted or privately-conducted ADR.

Proposed new section 175(6) further provides that if an ADR process is used, parties ‘must genuinely attempt to resolve the dispute using that process’. However, it is unclear who will determine this or what will be the results of a failure to make a genuine attempt, given the limited powers of the AIRC. It is logical that the AIRC determines whether there has been a genuine attempt to resolve a dispute at the workplace level or to agree on who should conduct an ADR, because it has the power to refuse an application for AIRC-conducted ADR if no genuine attempt has been made. But once an ADR proceeds, the AIRC does not have the power to terminate an ADR process (see discussion under ‘Limited powers of AIRC’). As noted above, it is possible that this determination may be made by a court.

An employee’s obligations during a dispute

During the time a dispute is being resolved, an employee in dispute with an employer must:

- continue to work in accordance with his/her contractual terms, unless s/he has ‘a reasonable concern about an imminent risk to his or her health or safety’ (proposed new paragraph 176(1)(a)), and
- ‘comply with any reasonable direction given by his or her employer to perform other available work, either at the same time workplace or at another workplace’ (proposed new paragraph 176(1)(b)).

If the employee is to perform other available work, an employer must have regard to:

- Commonwealth and state and territory occupational health and safety laws that apply to that employee or that other work (proposed new paragraph 176(2)(a)), and
- whether that work is appropriate for the employee to perform (proposed new paragraph 176(2)(b)).

In relation to these provisions, there may be concerns regarding:

- what constitutes ‘a reasonable concern’ and ‘an imminent risk’
- whether the employee may consult an OHS officer or expert on what may constitute ‘a reasonable concern’ about ‘an imminent risk’

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• what constitutes a ‘reasonable direction’

• whether the matter in dispute concerns the contractual terms. Who will determine what work is ‘in accordance’ with those terms?

• what immediate recourse the employee may have to question the employer’s judgement

• whether the employee is able to bring any section 176 issue into the MDR process.

Notably, under proposed **new section 44E**, the AIRC, in performing its functions, must take into account state and territory laws relating to the safety, health and welfare of employees in relation to their employment. The AIRC therefore is obligated to perform this function as part of its general functions, but under Division 2 of this Part has no function to perform which would allow it take into account those laws; it is for the employer to have regard to those laws relating to safety, health and welfare of employees.

**AIRC-conducted alternative dispute resolution**

**Division 3** provides for an ADR process to be conducted by the AIRC under the MDR. ADR includes conferencing, mediation, assisted negotiation, conciliation, arbitration, or other determination of the rights and obligations of the parties in dispute (proposed **new section 176A**). It is available if there is a dispute (under award, workplace determination, workplace agreement or other provision of the Act, or otherwise), and no resolution of this dispute has been achieved at workplace level.

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Dispute is one that is allowed to be resolved by MDR but unable to be resolved at workplace level (s. 176R(1))

‘A person’ may apply: in prescribed form signed by applicant, describing matters in dispute and specifying ADR to be used (s. 176B(2)); AIRC may request further information about matter(s) in dispute and steps taken at workplace level (s. 176B(3))

AIRC must refuse application if not a dispute resolvable by MDR, or may refuse because no genuine attempt (a) to resolve at workplace level or (b) to agree on who will conduct ADR (s. 176C)

AIRC-conducted ADR
Substance and procedure guided by parties
Limited powers of AIRC
Power to prevent and limit representation
Focus on private dispute—no precedent value (See below for full discussion)

Limited powers of Australian Industrial Relations Commission

The AIRC’s role in an ADR is set out in new section 176D, and is focussed on assisting the parties ‘as is appropriate’ (new subsection 176D(1)) and arranging conferences (new subsection 176D(2)). These provisions reflect those in current section 102 relating to conciliation proceedings, with the exception that, under the new ADR provisions, the nature of the assistance is to be determined by the parties. Under the WR Act 1996, it is for the AIRC to offer assistance ‘that appears to the member to be right and proper’ (subsection 102(1)).

The AIRC must act quickly, in a way that avoids unnecessary technicalities and legal forms, and in accordance with any agreement between parties as to the process for dispute resolution (proposed new subsection 176D(3)). There are similar provisions in the WR Act 1996 (see sections 98, 98A, 110(2)(c)).

Under proposed new subsection 176D(4), the AIRC has no power, even if the parties agree, to:

• compel a person to do anything
• arbitrate the matters in dispute or otherwise determine the rights or obligations of a party to the dispute unless the parties agree (proposed new subsection 176D(5))
• make an award
• make an order in relation to the matter(s) in dispute, or

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• appoint a board of reference.

It has the power to make recommendations ‘about particular aspects of a matter’ but not the matter itself (proposed new subsection 176D(7)).

The more extensive powers given to the AIRC under Subdivision B of Division 3A of Part II do not apply in relation to:

• an AIRC-conducted ADR under Division 3 (proposed new subsection 176D(8))
• Division 4 with respect to collective agreements (proposed new subsection 176I(8)), and
• Division 5 with respect to workplace agreements (proposed new subsection 176N(4)).

Therefore, the AIRC in an ADR will be, for example, unable to take evidence on oath, compel the production of documents, determine periods for fair and adequate presentation of the respective cases or to order compulsory conferences. This is intended to address the full bench of the AIRC’s decision in *Re: Telstra Ltd & Communications, Electrical and Plumbing Union* (2004) 54 AILR ¶100–132, in which it was held that where a dispute-settlement provision in a certified agreement was silent as to the powers of the AIRC in a private arbitration, then the AIRC could exercise all of its powers available to it under its dispute settlement functions under the WR Act 1996. This will not be possible under the new ADR provisions, except with respect to workplace agreements, where such powers will be allowed if expressly provided for in the workplace agreement—see further commentary under Division 5—AIRC-conducted ADR and workplace agreements.

However, the general matters that the AIRC is to take into account (under Subdivision A of Division 3A of Part II) have not been specifically excluded, and will therefore apply in an ADR process. That is, the AIRC is to take into account the public interest, discrimination issues and respective Commonwealth legislation, the Family Responsibilities Convention, and the safety, health and welfare of employees. The difficulty will be that the AIRC, with its very limited powers under the dispute resolution provisions, could take such matters into account, but perhaps to little effect, because its major purpose is to assist, not to make findings or determinations.

There is also a possibility that the AIRC may not be able to fulfil its mandate under the new provisions, for example, as far as practicable, to act quickly, if it does not have the necessary powers to expedite matters and to effect procedural compliance. Under the current Act, for example, its procedural powers extend to informing itself ‘on any matter in such manner as it considers just’ (section 110(2)(b)). It is possible that an ADR could stall because of a refusal by one party to actively partake in an ADR, and the AIRC will be unable to prevent this.

Notably, the only notification provision is the 14 days that the Industrial Registrar must give to parties to consider the ADR options. There are no notification provisions under the ADR processes, as is usual for ADR processes, detailing written requirements or time limits. It is common practice to incorporate a timetable into an agreement so as to ensure effectiveness, and importantly, to provide a deadline after which other options, such as

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court action, may be pursued. It is perhaps envisaged that the parties may agree to a timetable once the dispute is referred to ADR.

An ADR process is only ‘complete’ when the parties agree that the matters are resolved, or if the party which elected to use the ADR process informs the AIRC that it no longer wishes to continue the process (proposed new section 176F). This structures the ADR process in favour of the applicant, by giving an unequal weighting to the wishes of the applicant. It also appears inconsistent with the ADR process, that is, to provide an agreed dispute-resolution process. Whereas the ADR process may begin as an agreed process, the terms of completion have the potential to make it mandatory and yet, the AIRC’s limited powers mean it may not be able to ensure an outcome.

In contrast, under section 103 of the WR Act 1996, conciliation is complete if there is agreement, or the parties inform the AIRC that agreement is unlikely and the AIRC accepts this, or the AIRC is satisfied itself that there is no likelihood of agreement. Under the new ADR provisions, the AIRC has no authority to make such a determination. Nor is there an automatic default position, as under the current Act, whereby, once conciliation fails, a matter is then to be settled by arbitration (section 104(1)). The default position is to pursue court action.

Power to prevent and limit representation

The AIRC will have the power to ‘permit’ representation and to impose ‘reasonable limitations’ on that representation (proposed new subsection 176D(6)). The Explanatory Memorandum states that this ‘would allow the parties to a dispute … to be represented.’104 The WorkChoices booklet provides a similar description of this power.105 Whilst this is correct, the AIRC may also disallow representation. This is an unusual power for a mediator or arbitrator, for example, to hold. More commonly, this is a matter left to the parties to decide. It also sits at odds with the AIRC’s role as stated in the Explanatory Memorandum, according to which the AIRC is to be guided by the parties:

It is intended that the AIRC would proceed in accordance with the wishes of the parties, rather than the AIRC being primarily responsible for choosing the ways in which dispute resolution should be attempted or guiding the parties to what the AIRC considers being the most appropriate outcome.106

The WorkChoices booklet notes that:

This measure helps to protect the parties to a dispute while preventing settlement of disputes being undermined by people or organisations that are not party to the dispute.107

It is unclear how the measure protects parties if the parties want representation, especially expert representation. It is equally unclear what is meant by representatives not being a party to the dispute when representatives, whether before a court or otherwise, are always considered to be representatives of a party and not party to the dispute.

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As a point of contrast, Schedule 9 of the Regulations is currently the prescribed model dispute-resolution procedure for AWAs that do not already include dispute resolution. It provides that both parties have the right to appoint a representative in relation to resolving disputes at the workplace level, and in relation to mediation.

The Explanatory Memorandum states, with respect to ADR conducted by another provider under Division 6, that this power to prevent or limit representation ‘is consistent with processes before the AIRC, in which representation is subject to leave being granted (section 42 of the WR Act).’ This is correct to the extent that the AIRC may grant leave to be represented. However, the AIRC has three grounds on which it may grant leave: where there is the consent of all parties, special circumstances or where the AIRC is satisfied that the party can only adequately be represented by counsel, solicitor or agent. Under the new provisions, no such criteria are set out. Neither the AIRC nor a private provider is obliged to base a decision not to grant representation on any particular criteria.

See further commentary below on Division 4—‘AIRC-conducted ADR and proposed collective agreement’ and Division 6—‘ADR conducted by another provider’.

**Focus on private dispute resolution**

ADR processes are to be held in private (new subsection 176E(1)). According to the Explanatory Memorandum, ‘[t]his means that the AIRC may not publish transcripts or decisions with respect to a dispute that is conducted under this Division.’ Documents and other information cannot be disclosed unless in certain circumstances (new subsection 176E(2)). The private nature of the ADR processes under the Bill will ensure that there is no body of precedent in relation to MDR disputes.

Whilst it is usual for ADR to be a confidential process, this contrasts with the current public role of the AIRC. Under the WR Act 1996, the settlement of industrial disputes is public, with the exception of privileged conciliation proceedings, and AWA matters which must be heard in private (section 170WHD). The Presidenti al Member must publish reasons for not referring an alleged industrial dispute for conciliation (subsection 100(2)). The AIRC’s findings are recorded (paragraph 101(1)(b)), and have value as precedent (subsection 101(2)). The AIRC currently has the power to hold proceedings in private (paragraph 111(1)(k)), but this is optional. Notably, with the exception of termination of employment matters:

> On finalisation of a case, the case file, including transcript and exhibits are generally available for perusal by the public in the Registry.

The shift to private dispute resolution, and the Government’s stated encouragement to consider the use of the services of a private dispute resolution provider rather than the AIRC, has the potential to add an unknown financial cost to the dispute resolution process. This may be exacerbated by the fact that the only alternative to the MDR/ADR process is court action, itself a potentially costly option. (See further commentary under Division 6—‘ADR conducted by another provider’).

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AIRC-conducted ADR and proposed collective agreements

**Division 4** provides for the use of ADR processes in a proposed collective agreement if all parties agree (proposed new subsection 176G(1)). The AIRC’s powers mirror those set out above, with the exception that the AIRC does not have power to arbitrate or otherwise determine the rights or obligations of a party even if the parties agree (proposed new subsection 176I(5)). The Explanatory Memorandum notes that ‘[t]his is consistent with the existing position in the WR Act where the AIRC’s role during collective bargaining negotiations is confined to exercising conciliation powers (pre-reform section 170NA)’.

The same potential restrictions as above apply on representation (proposed new subsection 176I(6)). The AIRC’s power to prevent or limit representation is far broader than the current provision relating to certified agreements (subsection 170NA(2)), which provides that the AIRC ‘may order that all of the organisations be represented … by a single person or group of persons, where the person or persons are authorised by the organisations to represent them’. The current provision is directed at the AIRC allowing representation ‘for the purposes of conciliating the matter’ and is not directed at preventing representation for any purpose.

In contrast to the Division 3 completion provision, the ADR process is only complete when the parties agree that the matters in dispute are resolved (proposed new section 176K).

AIRC-conducted ADR and workplace agreements

**Division 5** provides for AIRC-conducted ADR under the terms of a workplace agreement (proposed new subsection 176L(1)). The powers of the AIRC will be determined by workplace agreement or otherwise agreed by parties (proposed new subsection 176N(1)), but cannot include the power to make orders (proposed new subsection 176N(2)). As noted above, subsection 176N(4) excludes the Commission’s powers under Subdivision B of Division 3A of Part II. However, the Explanatory Memorandum states that, under Division 5, ‘the parties may expressly agree to give the AIRC particular powers by reference to other Parts of the Act (ie, the power to compel the production of relevant evidence)’ which is a power under Subdivision B of Division 3A of Part II.

There is no provision that allows the AIRC to determine whether a party can be represented or not.

ADR conducted by another provider

**Division 6** provides for ADR conducted by another provider (not the AIRC). That provider has the right to determine whether it is appropriate for a party to be represented (proposed new subsection 176Q(1)) and may set ‘reasonable limits on the conduct of the representative in relation to the process’ (proposed new subsection 176Q(2)). If the ADR is conducted under a workplace agreement, the provider must allow representation in accordance with the agreement (proposed new subsection 176Q(3)). However, as subsection (2) is not subject to (3), it may be that if the workplace agreement does not

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adequately cover the nature of the representation, or ensure very broad terms for representation, the person conducting the process could still set the terms of the representation under subsection (2). The Explanatory Memorandum also supports this view, in that it refers only to whether there can be representation and makes no mention of the conduct of the representative in relation to the ADR process.

Privacy provisions that relate to the AIRC also relate to the person conducting an ADR process under this Division, and civil penalties attach for any contravention.

There are no completion provisions in Division 6. This absence, along with the powers of the private service provider, which are not specifically subject to any limitations unless otherwise agreed by the parties, has the potential to give the private service provider powers which far exceed those available to the AIRC in an AIRC-conducted ADR.

A private service provider could potentially be more effective because the powers available to that provider may be far broader than those available to the AIRC. It may be able to act in circumstances where the AIRC would be prevented from doing so because of the limitations on its powers. But what may prove problematic is the lack of any checks or balances on the powers of private service providers. Even if a party seeks recourse in the courts, what occurs before a private service provider remains confidential unless otherwise agreed between the parties. In other words, there will be no opportunity to assess whether this form of dispute resolution is most appropriate for both parties.

There are no specific provisions setting out how a private service provider would be remunerated or who would pay for this cost. However, the Regulation Impact Statement in the Explanatory Memorandum states that the government proposes to establish a system of registered private ADR providers, and the government will subsidise the services delivered by these providers. There is no further comment on how the total costs would be paid. As the cost of such providers is usually quite significant, how these costs are paid will be of fundamental concern to both parties.

**Part VIII: Compliance**

**Main provisions**

Proposed new section 177A defines an ‘applicable provision’ in relation to a ‘person’ who is eligible to make an application to an ‘eligible court’.

An ‘applicable provision’ would be a term of either an AWA, the AFPCS, an award, a collective agreement or an order of the AIRC. An ‘applicable provision’ would include a provision dealing with meal breaks (section 170AA) and extended entitlement to parental leave (section 170KB).

A workplace determination and an undertaking are to be treated as though they were a collective agreement—this means they are subject to the same enforcement mechanisms and standing rules as apply to collective agreements.

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Eligible court

Proposed new section 177A defines an eligible court to mean: the Court, Federal Magistrates Court, District, County, or Local Court, a magistrates court, Industrial Relations Court of South Australia or any other State or Territory Court prescribed by regulation.

Standing

Proposed new section 177AA sets out the requirements for a person to be granted standing to apply for remedies for breach of an ‘applicable provision’.

For a trade union to have the necessary standing to apply to an eligible court, it must have been requested by a member, in writing, to make an application on the member’s behalf (proposed new subsection 177AA(2)).

A trade union would only be permitted to act for an employee where a breach ‘relates to, or affects’ the member—or work carried on by the member—for the respondent employer.

Standing is quarantined to the relevant employer, employee and union directly representing the employee (as authorised in writing by the employee) in respect of a particular breach.

Deeming

If a person commits two or more breaches in the same ‘course of conduct’, they would be ‘deemed’ by proposed new subsection 178(2) to have committed one breach only. If an eligible court makes an order in respect of the breach, then repetition of the behaviour will be treated as a fresh breach.

Penalties

The maximum applicable penalties are 60 penalty units ($6600) for an individual and 300 penalty units ($33 000) for a body corporate.

Orders for loss or damages

Proposed new subsection 178(5) would allow an eligible court to order the payment of an amount for loss or damages where it considers that one party to an AWA has sustained loss or damage caused by the party which has breached the relevant applicable provision.

Independent contractors

Proposed repeal of current subsection 178(9) changes the definition of ‘employee’ to exclude independent contractors. Independent contractors will not be entitled to seek orders from an eligible court in respect of a breach of an applicable provision.

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Time limit

Proposed new section 179 provides that an employee suing for recovery of wages or superannuation payments required to be paid on their behalf, has up to six years to make application to an eligible court.

Under proposed new section 179AA, a party to an AWA has up to six years to make application to an eligible court.

Interest on judgment

Under proposed new section 179B, interest accrues on a debt under judgment from the date the judgment is entered or an order is made.

Civil remedies

Proposed new section 189 draws on the civil penalty model set out in the Building and Construction Industry Act 2005. A person who is ‘involved in’ a contravention of a civil remedy provision is treated as having personally breached the provision.

The meaning of ‘involved in’ includes having: aided, abetted, counselled, or induced the contravention in any way by act or omission—directly or indirectly. The person must have been ‘knowingly concerned’ in the contravention. The scope of the definition is very broad, and could be used as a mechanism for imposing a penalty on a union which provided advice on a proposed course of conduct by an employee.

Criminal proceedings

An eligible court cannot make a ‘pecuniary penalty’ order against a person who has been subject to a criminal penalty for that same course of conduct (proposed new section 192).

A civil-penalty proceeding is stayed if criminal proceedings are brought against the person for the conduct grounding the civil proceeding. The civil-penalty proceedings may be resumed if the person is not convicted under the criminal proceedings (proposed new section 193).

Evidence given in respect of a civil proceeding is not admissible in criminal proceeding where the same course of conduct would ground both actions (proposed new section 195).

Civil double jeopardy

Proposed new section 196 protects a person from ‘civil double jeopardy’—that is, a person cannot be subjected to a pecuniary penalty for one course of conduct under more than one Commonwealth law.

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Part IX: Union right of entry

The right of union officials to enter workplaces to inspect conditions, standards and documents, or talk to employees for purposes of information-gathering or recruitment, is currently governed by Part IX of the WR Act 1996.117 *Item 193* repeals and replaces Part IX, making significant changes to the right-of-entry regime.

**Background**

For a fuller background and history of right of entry, the reader is referred to the *Bills Digest* for the Workplace Relations Amendment (Right of Entry) Bill 2004118 and to the Senate Employment, Workplace Relations and Education Committee report into that Bill.119

Union right of entry to workplaces for the purposes of consulting with members and those eligible to become members has been seen as fundamental to the core purpose of trade union organisation, as lawyers Shaw and Walton have observed:

> It is plain that effective trade union organisation of employees cannot occur without access on the part of the union and its authorised representatives to workplaces in order to recruit non-unionists, to communicate with union members and take up their concerns and to police award prescriptions and occupational health and safety requirements by inspecting the workplace.120

ILO Convention No. 87,121 which Australia has ratified, protects two basic rights: the right of workers and employers to form and join organisations of their choice, and the organisational autonomy of trade union and employer associations.122

In interpreting the principles of freedom of association and the right to organise, the Freedom of Association Committee of the Governing Body of the ILO has held that:

> Workers’ representatives should enjoy such facilities as may be necessary for the proper exercise of their functions, including the right of access to workplaces.123

Nevertheless, alive to widespread changes in employer recognition of unions, the ILO also has recently observed that life has become harder for unions:

> In recent years, across the world there has been widespread deunionisation, particularly in industrialised market economies … there has also been an erosion of the strength of freedom of association. Some countries have made it harder to organise or bargain collectively, many have chipped away at bargaining rights and many have pushed collective bodies such as unions to a more marginal role in social policy.124

However, it is also valid to argue that unbridled intrusion by unions into the workplace can interfere with the conduct of business, and as Professor William Ford has noted, balance is the key to facilitating entry and preventing intrusion:
the difficult policy problem [that] right of entry arrangements have always had to address—that of striking an appropriate balance between the interest unions have in, at the very least, monitoring compliance with the terms of industrial instruments and the interest employers have in carrying on business without unreasonable interference or interruption—remains the same [after the WR Act 1996].

Main provisions

The Bill makes the following key changes to the right-of-entry regime:

- **one national regime**: currently, rights of entry and inspection differ under Commonwealth and various state laws. Under the Bill, federal law will override state right-of-entry systems where the relevant employer is a constitutional corporation or the premises are in a territory or a Commonwealth place (item 9, proposed new paragraph 7C(1)(a))

- **conditional permits**: under the WR Act 1996, union officials must have a permit issued by the Industrial Registrar before they may exercise rights of entry and inspection. Proposed new section 202 will allow the Industrial Registrar to impose conditions on a union official’s permit. The registrar is to have regard to the factors listed under proposed new subsection 203(2) in deciding whether to impose any conditions

- ‘fit and proper person’: under proposed new section 203, the Industrial Registrar must not issue a right-of-entry permit unless the applicant is a ‘fit and proper person’

- **revocation, suspension and banning of officials**: proposed new sections 205–207 expand the circumstances and processes for revocation and suspension of right-of-entry permits

- **new restrictions on exercise of inspection rights and the right to hold discussions with employees**: in particular:
  - there is no union right of entry to investigate a breach of an agreement not binding on the union (proposed new subsection 208(1))
  - no right of entry for breach of an AWA unless the union receives a written request by the employee involved (proposed new subsection 208(1))
  - no right of entry for discussion purposes where all employees at the workplace are on AWAs, or at workplaces covered by non-union collective agreements (proposed new section 221)
  - unions (officials or their employees) must have reasonable grounds for suspecting a breach of an industrial law or instrument before entering premises
  - entry will not be authorised unless a permit-holder complies with ‘reasonable requests’ of an occupier or affected employer to, inter alia, produce documents evidencing their authority to enter and observe a specified route upon entry if directed.

- **right of entry** under state occupational health and safety (OH&S) laws is retained but regulated: the union official seeking entry under state OH&S laws must hold a permit

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under the WR Act 1996; must give 24 hours notice; and must comply with certain other conditions under this Act (proposed new sections 217–220), and

- **civil penalties** for contravention of provisions in chapter 9 are significantly increased—in comparison to the WR Act 1996—to 300 penalty units ($33 000) for bodies corporate and 60 penalty units ($6600) for individuals.

**Comment**

Employer submissions to the Senate report on right of entry in 2005 suggest employers prefer to see union right of entry tightened. The ACCI has also commented:

ACCI welcomes the prospect of further, more fundamental reform to the Australian labour market and workplace relations system in 2005 noting that a fresh round of microeconomic reform (including labour market reform) is needed to strengthen the Australian economy. We support already announced moves to simplify collective and AWA agreement making, allow the term of some collective agreements to be extended to 5 years, give precedence to federal over state right of entry laws and clarify the right of employers to determine the location of union right of entry […]^{126}

The ACTU, on the other hand, has criticised recent attempts to amend the right-of-entry regime, and pointed to:

- a cumbersome and rigid set of requirements for unions seeking to enter workplaces, including the requirement to give unnecessarily detailed information in a written notice, and
- lifetime bans from visiting workplaces for union officers who infringe the law’s strict requirements—a more severe penalty than for most drink-drivers.

The requirement for permit holders to be ‘fit and proper persons’ would appear to be a reasonable development, and the move towards one right-of-entry regime is likely to be welcomed by businesses currently dealing with both state and federal right-of-entry regimes. However, the removal of union right of entry in workplaces where all employees are either on AWAs or bound by non-union collective agreements might be seen, in light of the ILO’s comments above about countries deunionising workforces, as ‘chipping away’ at union organisation and collective bargaining.

**Part XA: Freedom of association**

**Background**

The concept of ‘freedom of association’ embodied in and protected by both the WR Act 1996 and the Bill concerns the right of individuals to belong or not to belong to a union, employer organisation or other industrial association. Creighton and Stewart contrast this with the understanding of ‘freedom of association’ as it appears in ILO instruments. That understanding is exclusively concerned with the right of employees to organise autonomously and effectively, not with the right of individuals not to belong to an association.^{127}

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On the face of it, these two concepts are not incompatible. For example, the protection against discrimination and prejudice provided by proposed new section 253 protects union members as well as non-union members. For practical purposes, this is the provision that will protect union members from discrimination, thereby protecting freedom of association in the ILO sense.128

However, the two concepts can conflict when protection of individuals’ rights not to belong to or not to follow the orders of an association involves legislative restrictions on the rights of associations to act autonomously and devise their own rules. Such a conflict might be seen in proposed new section 259, which limits actions that may be taken by an association against its members for, among other things, failure to participate in industrial action. On the one hand, this can be seen as protection of that individual member’s right to determine his or her own level of involvement in industrial action. One the other hand, it can be seen as a restriction on the collective rights of the members to maintain internal discipline.

**Main provisions**

The Bill replaces the freedom of association provisions in existing Part XA of the WR Act 1996 with new provisions.

Conduct presently made unlawful by the WR Act 1996—for example, discriminating against employees or independent contractors because they are or are not members or officers of a union—will continue to be unlawful.

The main proposals in the Bill in relation to freedom of association are:

- to add or expand types of prohibited conduct to:
  - coercing a person to become, not become, remain or cease to be a member or officer of a union (proposed new section 250)
  - making false or misleading statements about membership of associations (proposed new section 251)
  - taking industrial action because another person is or is not a member of a union (proposed new section 252)
- a new penalty has been created to prevent discrimination against employers based on the particular type of workplace agreement they have, or who the workplace agreement is with (proposed new section 265). This appears to be directed to protecting subcontractors from termination or non-engagement where the sub-contractor has AWAs, an employee collective agreement or an agreement with a union different from the union with which the principal contractor has its own agreement.
- these laws will apply both in current employment situations and also where there is a ‘refusal to employ’ (proposed new section 253)
- the reverse onus of proof will not apply to an application for an interim injunction (proposed new section 270). Currently, where an allegation is made about a person’s

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conduct on certain prohibited grounds, the person against whom the allegation is made must prove the relevant motivation.

- the Office of Workplace Services will become responsible for the enforcement of freedom-of-association breaches and incidents of duress.

Part XI: Offences

A penalty of imprisonment for 12 months can be applied for offences such as:

- contravening an order of the AIRC (proposed new subsection 299(3)), and
- publishing false allegations of misconduct affecting the AIRC (proposed new subsection 299(5)).

A person found to have made a false statement in an application for a protected action ballot order is liable to a penalty of 30 penalty units ($3300).

Part XIII: Miscellaneous

Costs orders

Proposed new subsection 347(1A) enables a court hearing proceedings in a WR Act 1996 matter to order one party to pay some or all of the costs incurred by another party—if that party has, by an ‘unreasonable’ act or omission, caused another party to incur otherwise unnecessary costs. The costs order can be made regardless of the outcome of the proceedings.

Variation of workplace agreements

Sex discrimination

A workplace agreement can be varied to remove discrimination, if the agreement is referred to the AIRC under section 46W of the Human Rights and Equal Opportunity Act 1986 (proposed new section 352A).

Unfair contracts

‘Harsh’ or ‘unfair’ contracts can be varied or set aside by the Federal Court of Australia (proposed new subsection 352B(2)). The court has power in relation to independent contractors.

The court is entitled to make a finding that a contract is harsh or unfair even if the submission is not directly raised in the proceeding (proposed new subsection 352B(6)).

The court may set aside a contract wholly or in part (proposed new subsection 352C(1)). Interim orders may be made to preserve the positions of parties to the contract (proposed new subsection 352C(3)).

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Conferral of jurisdiction on state or territory courts

Jurisdiction in respect of certain provisions of the WR Act 1996 can be conferred on state or territory courts by regulation under proposed **new subsection 359(4)**.

Infringement notices

Proposed **new subsection 359(5)** sets out an ‘infringement notice’ option in respect of offences contained in the regulations. That is, a person may pay an amount up to one-fifth of the maximum applicable penalty for the contravention as an alternative to prosecution (proposed **new subsection 359(6)**).

Proposed **new subsection 359(7)** provides an option for a person alleged to have breached a civil remedy provision contained in the regulations. A person may pay an amount up to one-tenth of the maximum applicable pecuniary penalty for the contravention as an alternative to facing proceedings.

**Part XIV: Jurisdiction of the Federal Court and Federal Magistrates Court**

**Items 223–239** amend Part XV of the WR Act 1996 by changing the heading to include a reference to jurisdiction of the Federal Magistrates Court and by adding provisions to the Part vesting jurisdiction in the Federal Magistrates Court. Several parts of the Bill confer jurisdiction in matters arising under the Act on the Federal Magistrates Court, as well as on the Federal Court, and the provisions inserted by the Bill into **Part XIV** ensure that jurisdiction is vested in the Court so as to enable it to carry out those functions conferred on it.

Matters which may now be dealt with in the Federal Magistrates Court include:

- Part VB—Workplace agreements
- Part VC—Industrial action
- Part VIAA Transmission of business rules
- Section 170BGB—Penalties and compensation for threats or retaliation by employer for lodging application or obtaining order under Division 1 of Part VIA—entitlement to meal breaks
- Division 3 of Part VIA—Termination of employment
- Part IX—Right of entry
- Part XA—Freedom of association.

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Part XV: Matters referred by Victoria

Referral of constitutional power

Under section 51(xxxvii) of the Constitution, the Commonwealth can make laws with respect to ‘matters referred to the Parliament of the Commonwealth’ by any state. Importantly, however, any law the Commonwealth makes in this way ‘shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law’. In other words, the Federal Government would need the cooperation of all states to put in place a national industrial relations law based on the referral power in the Constitution.

In 1996, Victoria referred legislative power over industrial relations to the Commonwealth in the **Commonwealth Powers (Industrial Relations) Act 1996 (Vic)**. This Act contains a list of matters in the industrial relations area which are specifically referred to the Commonwealth, and a list of matters that are excluded from the referral.

Matters included in Victoria’s referral are:

- conciliation and arbitration for the prevention and settlement of industrial disputes within the limits of the state
- agreements about matters pertaining to the relationship between an employer or employers in the state and an employee or employees in the state
- minimum terms and conditions of employment for employees in the state
- termination, or proposed termination, of the employment of an employee, other than a law enforcement officer
- freedom of association, namely the rights of employees, employers and independent contractors in the state to join an industrial association of their choice, or not to join such an association
- setting and adjusting of minimum wages for employees in the state within a work classification that, immediately before the commencement of the sub-section, is a declared work classification under the **Employee Relations Act 1992 (Vic)**, or has been declared, by the Commission within the meaning of that Act, to be an interim work classification
- making of an award or order as, or declaring any term of an award or order to be, a common rule in the state for an industry, but so as not to exclude or limit the concurrent operation of any law of the state.

There is a long list of excluded matters. Some examples are:

- the number, identity, appointment (other than terms and conditions of appointment) or discipline (other than matters pertaining to the termination of employment) of employees, other than law enforcement officers, in the public sector

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• matters pertaining to the number, identity, appointment (other than matters pertaining to terms and conditions of appointment not referred to in the paragraph), probation, promotion, transfer from place to place or position to position, physical or mental fitness, uniform, equipment, discipline or termination of employment of law enforcement officers

• matters pertaining to the following subject matters—
  (i) workers’ compensation;
  (ii) superannuation;
  (iii) occupational health and safety;
  (iv) apprenticeship;
  (v) long service leave;
  (vi) days to be observed as public holidays;
  (vii) equal opportunity

• matters pertaining to persons holding senior executive offices in the service of a Department within the meaning of the Public Sector Management Act 1992 (Vic).

Main provisions

Part XV of the WR Act 1996, concerning matters referred to the Commonwealth by Victoria under the Commonwealth Powers (Industrial Relations) Act 1996 (Vic), will be replaced by a proposed new Part XV. The provisions of new Part XV, except for Division 10 (employment agreements) do not apply to employees who are already covered by federal law under the Bill, that is, those employed by ‘constitutional corporations’ and others included in the definition of employer in proposed new subsection 4AB(1). New Part XV applies to other employees in Victoria, including those employed by unincorporated bodies or incorporated entities that do not meet the test for ‘constitutional corporation’ as laid down by the High Court.129

• New Part XV replaces the minimum conditions in Schedule 1A of the current WR Act 1996 with the AFPCS in new Part VA of the Bill
  – provisions concerning various forms of leave in current Schedule 1A—annual, personal, sick, carer’s, bereavement, maternity, paternity and adoption—will be replaced by the provisions governing leave in the AFPCS
  – the specific provisions regarding part-time employment and termination of employment in current Schedule 1A will not be replaced in the new Bill.

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Transitional provisions contained in Schedule 1 of the Bill

Amendments to Schedule 1B of the WR Act 1996

Schedule 1B of the WR Act 1996 provides for the registration of employers associations, employee associations (unions) and enterprise associations (of employees) under the WR Act 1996, which allows such bodies to gain right of entry, collective agreements and awards, and eligibility rights to membership, as well as providing scope and limits on internal rules of registered organisations (for example, the conduct of internal elections, responsibilities of officials, etc.).

Item 289 repeals and replaces section 18 of Schedule 1B with proposed new sections 18, 18A, 18B and 18C. These provisions introduce new organisations: those which are ‘federally registrable’ and which may have ‘federal system employees’ as members. The provisions aim to change the constitutional base for the registration of employer and employee organisations from the Constitution’s labour power (section 51(xxxv) to the corporations power (section 51(xx)). Other provisions rule out the registration of organisations of employees, even if they are currently registered, where they do not have a majority of federal system employees as members. However, new provisions provide ‘more generous’ registration criteria for enterprise associations—their employer only need be a constitutional corporation or, it can be registered if it falls under other heads of power (proposed new subsection 18C(2)), and only 20 members will be needed for their registration. Further provisions allow an employer to supply an enterprise association with services, and such assistance will not be seen as improper influence.

Additional grounds for deregistering organisations are included in proposed new subparagraphs of section 28 of Schedule 1B. These go to continued breaches of awards and agreements.

Item 314 extends the period in which an application for a ballot to approve a disamalgamation can be made to 3–5 years (or later if prescribed by regulation) after the Bill comes into effect, depending on when the amalgamation took place: before or after 31 December 1996.

Item 322 requires the Australian Industrial Registrar to register the part of the organisation which has withdrawn from an amalgamated body as an organisation in its own right, at which point it will also gain coverage to the parent organisation’s existing collective agreements (proposed new section 113A).

Item 326 allows regulations to be made to determine the representation rights of state-registered organisations and transitionally registered organisations.

Item 341 adds proposed new Part 3 of Chapter 9, setting out the general duties in relation to orders and directions applying to organisations. Provisions under this Part establish duties on officers and employees of organisations not to act in a manner which would have the organisation contravene a Federal Court or AIRC direction or order.

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Where an organisation is directed not to engage in certain behaviour, this is taken to mean that officers and employees not engage in that behaviour.

**New Schedule 13: Transitional arrangements for parties bound by federal awards**

Proposed new Schedule 13 (pp. 518–83 of the Bill) provides transitional arrangements for (non-corporate) employers under federal awards to remain respondent to those awards for a transitional period of five years.

**Part 1—Preliminary—continuing operation of awards**

The schedule allows for the continued operation of existing awards for employers (to be defined as transitional employers) bound by the award immediately before the Bill’s commencement that are not covered by the new definition of employer, that is, typically, this means the business is not incorporated. It is not countenanced that new employers may be bound by transitional awards (proposed new subclause 4(4)). Award provisions may transmit to successor employers, providing they are transitional employers. Employees and employers who cease to be members of their respective registered organisations will cease to be covered by the transitional award (proposed new clause 5).

Proposed new clause 6 stipulates that these awards will terminate at the end of five years.

**Part 2—Performance of Commission’s functions**

This part allows the AIRC to vary the terms of transitional awards. Provisions under proposed new clause 7 prevent the AIRC from making new awards. Other obligations require the AIRC to have consideration for the costs to transitional employers of the award system vis-a-vis employers in the mainstream federal system (that is, under the AFPCS). Provisions of proposed new clause 8 require the AIRC to have regard to decisions of the AFPC on wage fixation when adjusting award rates and that such rates, while constituting a minimum safety net, be set so as to retain an incentive to bargain. Proposed new clause 9 sets out anti-discrimination measures which the AIRC should observe, for example, conventions concerning workers with family responsibilities, equal remuneration and disability-pay principles. The AIRC must have regard to clauses 8 and 9 in relation to future variations of awards under proposed clause 29. Transitional awards are to have allowable award matters under proposed clause 17, matters which will be non-allowable (proposed clause 18), and only certain allowable matters can be varied (proposed clause 29).

The following matters will be allowable:

- ordinary-time hours of work
- the time within which ordinary-time hours of work are performed
- rest breaks
- notice periods and variations to working hours
- rates of pay

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• incentive-based payments, piece rates and bonuses
• annual leave and annual-leave loadings
• personal/carer’s leave
• ceremonial leave
• parental leave
• certain days as public holidays,
• monetary allowances, for example, for expenses incurred
• loadings for working overtime or for casual or shift work
• penalty rates for, for example, weekend work or shift work
• redundancy pay in establishments of 15 employees or more
• stand-down provisions
• dispute-settling procedures
• type of employment, such as full-time employment, casual employment, regular part-time employment
• conditions for outworkers, including chain-of-contract arrangements, registration of employers, employer recordkeeping and inspection.

Non-allowable transitional matters:

• rights of an organisation in dispute-settlement representation
• transfers from one type of employment to another type of employment
• the number or proportion of transitional employees that a transitional employer may employ in a particular type of employment
• direct or indirect prohibition on employment types
• maximum hours for part-time workers
• restrictions on the duration of training
• restrictions on independent contractors
• restrictions on labour hire
• union picnic days
• tallies
• dispute-resolution training leave
• trade union training leave
• discriminatory and preference provisions
• right-of-entry provisions
• additional matters prescribed by regulation

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Proposed new subclause 22(2) provides that a preserved transitional award term is a term of a transitional award that is about a matter listed in proposed new subclause 22(3): long service leave, notice of termination, jury service or superannuation. Preserved transitional award terms continue to operate—proposed new subclause 22(5) would provide that a preserved transitional award term continues to have effect for the purposes of the Schedule. Such terms may not be varied. A preserved award term about superannuation would cease to have effect at the end of 30 June 2008 (proposed new subclause 22(6)).

Proposed new clause 27 stipulates that non-allowable provisions cease to have effect immediately upon enactment (for example, transfer of casuals to full-time employment provisions).

Proposed new clause 28 provides that the AIRC may only vary an award where it is dealing with an industrial dispute; to remove ambiguity or uncertainty, or where an award is a discriminatory award. Generally, the AIRC must not vary preserved award terms, and then only to keep the award as a minimum entitlement award (proposed new clause 29). Provisions in transitional awards which can be varied include:

- rates of pay
- incentive-based payments, piece rates and bonuses
- annual-leave loadings
- monetary allowances
- loadings for working overtime or for casual or shift-work penalty rates
- pay for outworkers
- any other allowable transitional award matter prescribed by the regulations.

Proposed new clause 33 provides for the notification of alleged industrial disputes. Further provisions replicate some of the functions found in current Part VI, for example, reference of certain matters to the Full Bench.

Part 4—Ballots ordered by Commission

The AIRC may, under this Part, order a secret ballot, so as to find out the attitude of members of an organisation concerning an industrial dispute (proposed new clause 52).

Part 5—Circumstances in which transitional awards cease to be binding

Proposed new clause 57 allows transitional award parties to make a state employment agreement, so as to cease being bound by the federal award. The employer may cease to be bound by a transitional award, if he fails to secure a state employment agreement (proposed new clause 58).

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Part 6—Technical matters relating to transitional awards

This Part deals with the manner in which AIRC orders on transitional awards are to be made, for example, they are required to be expressed in plain English, the parties are bound, and so on.

Part 7—Matters relating to Victoria

Proposed new Part 7 would provide special provisions in respect of transitional awards that cover employees in Victoria who are within the referral of power from Victoria to the Commonwealth but are not ‘employees’ within the meaning of the Bill—that is, workers formerly under Schedule 1A but now covered by the Commonwealth common-rule awards from January 2005, whose employment is likely to be not under a company. These provisions for Victoria include the continuation of a system of common-rule awards for the transitional period (proposed new clause 82).

New Schedule 14: Transitional arrangements for existing pre-reform Federal agreements etc.

Proposed new Schedule 14 (pp. 583–99 of the Bill) puts in place the transitional provisions for:

• ‘pre-reform certified agreements’—certified agreements made under the current Division 2 (agreements with constitutional corporations or the Commonwealth) or Division 3 (agreements about industrial disputes and situations) of Part VIB of the Act before the commencement of reforms in the Bill
• ‘pre-reform AWAs’—AWAs made before the reforms in the Bill commence
• ‘section 170MX awards’— awards made by the AIRC under section 170MX(3) of the WR Act 1996 following the termination of a bargaining period
• ‘old IR agreements’—agreements certified under the provisions of the Industrial Relations Act 1988.

Main provisions

Part 2—Pre-reform certified agreements

Proposed new clause 2 allows for the continued operation of pre-reform certified agreements, by providing for the continued application of certain provisions of the WR Act 1996 to the pre-reform agreement, despite those provisions being repealed or amended by the Bill.

Proposed new clause 3 sets out when pre-reform certified agreements will cease to operate.

A pre-reform certified agreement ceases to operate in relation to an employee if that employee becomes subject to a collective agreement or workplace determination (proposed new subclause 3(1)). In those circumstances, the pre-reform certified agreement ceases to operate in relation to that employee.

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agreement cannot operate in relation to the employee again (proposed new subclause 3(5)).

Proposed new subclause 3(2) expressly excludes the operation of a pre-reform certified agreement in relation to an employee once the employee becomes subject to an AWA.

Pre-reform certified agreements cease to operate if they are terminated under the following sections of the WR Act 1996 (proposed new subclause 3(3)):

- section 170LV—order by the AIRC to terminate an agreement where an undertaking by one of the parties has not been complied with, or
- sections 170MG, 170MH or 170MHA—voluntary termination.

In these cases, once the pre-reform certified agreement ceases to operate, it cannot be revived (proposed new subclause 3(4)).

A pre-reform certified agreement will also not operate where subsection 170LY(2)—which deals with awards made by the AIRC under section 170MX(3)—of the current WR Act 1996 applies (proposed new subclause 3(5)).

A pre-reform certified agreement can be set aside where it is found to be a discriminatory agreement pursuant to current section 113(2A), proposed new subclause 3(6).

Proposed new clause 4 prohibits the:

- use, or threatened use, of industrial action; or
- refraining, or threatening to refrain, from any action

as a means of coercing the termination of a pre-reform certified agreement.

Enforcement provisions in the current Division 10 of Part VIB of the WR Act 1996 apply to a contravention of this prohibition.

Proposed new clause 5 excludes the operation of preserved state agreements and notional agreement preserving state awards (as defined in proposed new Schedule 15, see discussion below) in relation to an employee on a pre-reform certified agreement. Clause 5 also excludes, to the extent of inconsistency, the operation of any award in relation to a person on a pre-reform certified agreement.

Proposed new clause 6 provides that certain provisions of the WR Act 1996 apply to pre-reform certified agreements as if they were collective agreements. The provisions of the WR Act 1996 which will apply include provisions in relation to workplace inspectors, compliance provisions, and union right of entry.

Proposed new clause 7 excludes the operation of a pre-reform certified agreement in relation an employee who has been subject to an AWA, when the AWA is subsequently terminated.

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Proposed new clause 8 applies the prohibited content provisions of the Bill, namely new sections 101F–L, to ‘anti-AWA terms’ in pre-reform certified agreements. ‘Anti-AWA terms’ are defined as a term in a pre-reform certified agreement that prevents an employer from making an AWA or pre-reform AWA with the employee. The prohibited content provisions are discussed above in relation to Part VB of the Bill.

Proposed new clause 9 allows for the content of a pre-reform certified agreement to be incorporated by reference in a workplace agreement, as provided for in proposed new section 101C.

Division 2 of Part 2 (proposed new clauses 11–16) makes special provision for Division 3 pre-reform certified agreements with excluded employers. Proposed new clause 10 sets out the technicalities of when the general provisions in Division 1 (clauses 2–10) will apply to Division 3 pre-reform certified agreements. Proposed new clause 11 sets out when Division 2 will apply to Division 3 certified agreements.

Part 3—Pre-reform AWAs

Proposed new clause 17 allows for the continued operation of pre-reform AWAs, by providing for the continued application of certain provisions of the WR Act 1996 to the pre-reform AWA, despite those provisions being repealed or amended by the Bill.

Proposed new clause 18 sets out when pre-reform AWAs cease to operate, namely:

• when an AWA comes into operation in respect of the employee, in which case the pre-reform AWA cannot be revived in relation to the employee
• when the pre-reform AWA is terminated under the termination provisions in the WR Act 1996, in which case the pre-reform AWA cannot operate again.

Proposed new clause 19 provides that where a pre-reform AWA is in operation, then the pre-reform AWA operates to the exclusion of:

• a collective agreement
• a workplace determination
• an award, and
• preserved state agreements and notional agreements preserving state awards (see discussion on the proposed new Schedule 15).

Proposed new clause 20 provides that certain provisions of the WR Act 1996 apply to pre-reform AWAs as if they were AWAs. The provisions of the WR Act 1996 which will apply include provisions in relation to workplace inspectors, compliance provisions, and union right of entry.

Proposed new clause 21 allows for the content of a pre-reform AWA to be incorporated by reference in a workplace agreement, as provided for in proposed new section 101C.

Part 4—Section 170MX awards

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Proposed new clause 23 allows for the continued operation of section 170MX awards, by providing for the continued application of certain provisions of the WR Act 1996, despite the provisions being repealed or amended by the Bill.

Proposed new clause 24 provides that certain provisions of the WR Act (as amended by the Bill) apply to section 170MX awards as if they were a workplace determination. The provisions of the WR Act 1996 which will apply include provisions in relation to workplace inspectors, compliance provisions, and union right of entry.

Proposed new subclause 25(1) provides that, where an AWA is in operation in relation to an employee, then a section 170MX award cannot apply to that employee.

Proposed new subclause 25(2) provides that a section 170MX award ceases to operate when an employee becomes subject to a collective agreement or a workplace determination.

Proposed new subclause 25(3) provides that, where an employee is subject to a section 170MX award, then the following have no application to the employee to the extent they are inconsistent with the section 170MX award:

- an award, and
- preserved state agreements and notional agreements preserving state awards (see discussion on the proposed new Schedule 15).

Proposed new clause 26 expressly states that section 170MX awards cannot be revived in relation to an employee who has been subject to an AWA when the AWA has subsequently been terminated.

Part 6—Old IR agreements

Proposed new clauses 28 and 29 deal with old IR agreements. Old IR agreements will cease to operate within three years of the commencement of reforms under the Bill. Once an old IR agreement has ceased operating, it cannot be revived.

Old IR agreements have no effect on employees who are subject to workplace agreements or workplace determinations.

Old IR agreements cannot be varied once the reforms in the Bill commence.

Part 7—Pre-reform agreements and the AFPCS

Proposed new clause 30 excludes the operation of the AFPCS in relation to pre-reform certified agreements, pre-reform AWAs and section 170MX awards.
Part 8—Certification and approval of agreements before reform

Proposed new Part 8 provides that pre-reform certified agreements and pre-reform AWAs which are lodged for certification or approval prior to the reforms in the Bill commencing, can be certified or approved under the applicable pre-reform provisions in the WR Act.

Part 9—Transitional arrangements for Victoria

Proposed new clauses 33–39 provide for the transition arrangements for Victorian pre-reform agreements.

Obviously, the provisions in Part 9 (or in the rest of Schedule 14 as it applies to Victoria) only operate to the extent that the provision is supported by the referral of legislative power from Victoria to the Commonwealth (proposed new clause 34).

The transitional arrangements are such that Part 9 applies proposed clauses 2, 17 and 23 of Schedule 14 to Victorian pre-reform certified agreements, pre-reform AWAs and section 170MX awards respectively, to enable those agreements to continue operating.

New Schedule 15: State employment agreements and state awards

Proposed new Schedule 15 (pp. 599–631 of the Bill) puts in place transitional arrangements for dealing with:

• ‘preserved State agreements’—agreements existing prior to the commencement of the reforms in the Bill, regulating terms or conditions of employment which were previously regulated under a state employment agreement (the ‘original agreement’) (proposed new clause 3)
• ‘notional agreements preserving State awards’ (‘notional agreements’)—agreements formed upon the commencement of the reforms in the Bill, covering terms and conditions of employment which were previously covered by a state award (‘original State award’) or state or territory industrial law (proposed new clause 31).

Main provisions

Part 2—Preserved state agreements

Preserved state agreements cease to operate when (proposed new clause 5):

• they are terminated under clause 21 of Schedule 15, or
• when the employee becomes subject to a workplace agreement or workplace determination.

Proposed new clause 6 establishes that the provisions of Part 2 of Schedule 15 prevail over the terms and conditions of the preserved state agreement. The terms and conditions of the preserved state agreement have effect only in accordance with its terms and conditions, and those terms and conditions are not enforceable under state laws.

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Awards and the AFPCS do not apply in relation to employees who are subject to a preserved state agreement (proposed new clauses 7 and 8 respectively).

The terms of a preserved state agreement include (proposed new clause 11):

- the terms of the original agreement
- the terms of a state award which applied to the employment relationship prior to the commencement of the reforms, and
- the provisions of a state or territory industrial law which applied to the employment relationship prior to the commencement of the reforms.

Proposed new clause 12 provides for the nominal expiry date of preserved state agreements to be the earlier of:

- the date on which the original agreement would have expired, or
- three years from the commencement of the original agreement.

Proposed new clause 13 expressly excludes state industrial authorities from exercising any powers or functions conferred on them by the preserved state agreement. However, parties to the preserved state agreement may agree to confer powers and functions on the AIRC, so long as the power or function does not relate to dispute resolution.

Proposed new clause 14 requires that all preserved state agreements contain a term directing that disputes about the application of the preserved state agreement are to be settled in accordance with the model dispute resolution process.

Terms of a preserved State agreement which contains prohibited content are void to the extent of that prohibited content (proposed new clause 15, see also discussion on prohibited content above in relation to Part VB: Workplace agreements).

Proposed new Division 3 of Part 2 (proposed new clauses 16–19) sets out the means for varying terms of a preserved state agreement. The provisions in Division 3 are the only way of varying a preserved state agreement following commencement of the reforms in the Bill, and they relate to variation to remove:

- ambiguity or uncertainty (proposed new clause 17)
- discrimination (proposed new clause 18), or
- prohibited content (proposed new clause 19).

Proposed new clause 20 sets out the enforcement provisions in relation to preserved state agreements.

Proposed new clause 21 provides for the termination of preserved state agreements following the commencement of reforms.

Proposed new clause 22 prohibits the:

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• use, or threatened use, of industrial action, or
• refraining, or threatening to refrain, from any action
as a means of coercing the termination of a preserved state agreement.

**Division 6 of Part 2** sets out provisions for engaging in industrial action in relation to preserved state agreements.

Proposed **new clause 26** provides for the content of a preserved state agreement to be incorporated by reference in a workplace agreement, as provided for in proposed new section 101C.

**Part 3—Notional agreements preserving state awards**

The provisions in Part 3 do not apply to a person who is subject to a preserved state agreement (proposed new **subclauses 3(b) and 32(9)**).

A notional agreement ceases to operate (proposed **new clause 33**):

• three years from the commencement of reforms in the Bill
• when an employee becomes subject to a workplace agreement or workplace determination, or
• when an employee becomes subject to an award.

The provisions of Part 2 of Schedule 15 prevail over the terms and conditions of the notional agreement (see proposed **new clause 34**). The terms and conditions of the notional agreement have effect only in accordance with its terms, and those terms are not enforceable under state laws.

The terms of a notional agreement include (proposed **new clause 35**):

• the terms of the original state award, and
• the provisions of a state or territory industrial law which applied to the employment relationship prior to the commencement of the reforms.

Proposed **new clause 36** expressly excludes state industrial authorities from exercising any powers or functions conferred on them by the notional agreement. However, parties to the notional agreement may agree to confer powers and functions on the AIRC, so long as the power or function does not relate to dispute resolution.

Proposed **new clause 37** requires that all notional agreements contain a term directing that disputes about the application of the notional agreement are to be settled in accordance with the model dispute resolution process.

Terms of a notional agreement which contains prohibited content are void to the extent of that prohibited content (proposed **new clause 38**, see also discussion on prohibited content above in relation to Part VB: Workplace agreements).

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Division 3 of Part 3 (proposed new clauses 39-42) sets out the means for varying terms of a notional agreement. The provisions in Division 3 are the only way of varying a notional agreement following commencement of the reforms in the Bill, and they relate to variation to remove:

- ambiguity or uncertainty (proposed new clause 40)
- discrimination (proposed new clause 41), or
- prohibited content (proposed new clause 42).

Proposed new clauses 43 and 44 set out the enforcement provisions in relation to preserved state agreements.

Division 5 of Part 3 introduces the concepts of ‘preserved notional terms’ and ‘preserved notional entitlements’ in a notional agreement.

A preserved notional term in a notional agreement relates to any of the following matters (proposed new clause 45):

- annual leave
- personal/carer’s leave
- parental leave
- long service leave
- notice of termination
- jury service, or
- superannuation.

A preserved notional entitlement is an entitlement that an employee who is subject to a notional agreement has in relation to a preserved notional term (proposed new subclause 46(1)).

Proposed new subclause 46(2) provides that, where a preserved notional entitlement in relation to annual leave, personal/carer’s leave or parental leave is more generous than the corresponding term in the AFPCS, then the term in the AFPCS does not apply to the employee. If the AFPCS term is more generous than the preserved notional entitlement, then the AFPCS term applies.

Where an employee has a preserved notional entitlement under a preserved notional term in relation to annual leave, personal/carer’s leave or parental leave, and the corresponding term under the AFPCS does not apply to them, then the preserved notional term applies (proposed new subclause 46(3)).

Where an employee is the subject of a notional agreement with preserved notional terms in relation to long service leave, notice of termination, jury service or superannuation, then those terms will apply to the employee (proposed new subclause 46(3)).

Proposed new clause 50 sets out provisions for preserved notional terms to be included in awards.

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Proposed **new clause 51** excludes the operation of Division 3 of Part VA (which sets out the maximum ordinary hours of work) in relation to employees who are subject to a notional agreement.

**Division 6** of **Part 3** introduces the concept of ‘protected notional conditions’, which are terms in notional agreements relating to protected allowable award matters (for a discussion on protected allowable award matters, refer to the section of the Bills Digest on Part VB: Workplace Agreements). Essentially, the provisions in Division 6 preserve protected notional conditions in relation to employees who are the subject of workplace agreements, where the protected notional conditions would apply to the person’s employment.

Proposed **new clause 52A** provides for the content of a preserved state agreement to be incorporated by reference in a workplace agreement, as provided for in new section 101C.

**New Schedule 16: Transmission of business rules (transitional instruments)**

Proposed **new Schedule 16** (pp. 631–58 of the Bill) puts in place the transitional provisions for the transmission of these instruments:

- ‘pre-reform AWAs’—AWAs made before the reforms in the Bill commence
- ‘pre-reform certified agreements’—certified agreements made under the current Division 2 (agreements with constitutional corporations or the Commonwealth) or Division 3 (agreements about industrial disputes and situations) of Part VIB of the Act before the commencement of reforms in the Bill
- State transitional agreements—‘preserved state agreements’ and ‘notional agreements’:
  - ‘preserved state agreements’—agreements formed after the commencement of the reforms in the Bill, covering terms or conditions of employment which were previously regulated under a state employment agreement (the ‘original agreement’) (proposed **new clause 3**)
  - ‘notional agreements preserving State awards’ (‘notional agreements’)—agreements formed after the commencement of the reforms in the Bill, covering terms and conditions of employment which were previously covered by a state award (‘original State award’) or state or territory industrial law.

Who is a transferring employee?

Schedule 16 uses the same definition for this term as Part VlAA.

**Transmission of pre-reform AWAs**

On transmission of a business, pre-reform AWAs are treated in much the same way as post reform AWAs are under new Part VlAA.

That is, if, immediately before transmission (or immediately before termination by the old employer, if that took place for operational reasons within one month of transmission), the

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old employer and the transferring employee were bound by a pre-reform AWA, the new employer will be bound by the pre-reform AWA.

However, the new employer is bound by the pre-reform AWA for a limited period. The maximum period is 12 months (called the ‘transmission period’). The period may be shorter if:

- it is terminated under subsection 170VM(1) of the WR Act 1996
- it is replaced by another AWA
- the AWA is no longer capable of applying to the employee because of the nature of the employee’s employment.

Transmission of pre-reform certified agreements

On transmission of a business, pre-reform certified agreements are treated in much the same way as collective agreements are under proposed new Part VIAA (see above pages xxx).

If, immediately before transmission (or immediately before termination by the old employer, if that took place for operational reasons within one month of transmission), the old employer and the transferring employee(s) were bound by a pre-reform certified agreement, the new employer will be bound by the pre-reform certified agreement.

The new employer is bound by the certified agreement for a limited period. The maximum period is 12 months. The period may be shorter if:

- it is terminated (proposed new paragraph 10(2)(a))
- there are no more transferring employees in relation to the certified agreement (either because there are no more transferring employees, or because the certified agreement ceases to be capable of applying to the employment of those employees because of the nature of their employment). (proposed new clause 10(2)(b))
- the new employer ceases to be bound by the certified agreement in relation to all the transferring employees for that agreement (proposed new paragraph 10(2)(c)).

In relation to particular transferring employees, the new employer may cease to be bound by the certified agreement sooner than the end of the 12-month period. The circumstances in which this can occur are:

- the new employer makes an AWA with the transferring employee (proposed new paragraph 10(3)(a)). This terminates rather than suspends the transmitted certified agreement (proposed new clause 12)
- a collective agreement is made with the transferring employees (proposed new paragraph 10(3)(b))
- the new employer ceases to be generally bound by the certified agreement under subclause 10(2) above (proposed new paragraph 10(3)(c))

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• the transferring employee is not, or ceases to be, employed in the business that was transferred (proposed new subclause 10(4))

If the certified agreement ceases to apply because the transmission period (12 months) ends, any collective agreement of the new employer that would, by its terms, apply to the transferring employee, will apply from that time on (proposed new clause 11).

Commission’s powers to modify the effect of transmitted pre-reform certified agreements

The Commission’s power in relation to transmitted pre-reform certified agreements are, in general terms, the same as in relation to collective agreements under Part VIAA.

Transmission of state transitional agreements

On transmission of a business, state transitional agreements are treated in much the same way as pre-reform AWAs and certified agreements.

That is, if, immediately before transmission (or immediately before termination by the old employer, if that took place for operational reasons within one month of transmission), the old employer and transferring employee were bound by a state transitional agreement, the new employer will be bound by the state transitional agreement in relation to any transferring employees (proposed new clause 19).

There is a limit to the period in which the new employer will be bound by the award. The maximum period is 12 months (proposed new paragraph 19(2)(d)). However, it may be shorter if:

• for preserved state agreements, the instrument ceases to operate under Schedule 15 (proposed new paragraph 19(2)(a))
• for a notional agreement preserving state awards, the instrument ceases to be in operation at the end of three years after reform commencement (proposed new paragraph 19(2)(b))
• there are no more transferring employees in relation to the state transitional instrument (either because there are no more transferring employees or because the instrument ceases to be capable of applying to the employment of those employees because of the nature of their employment) (proposed new paragraph 19(2)(c))
• the new employer ceases to be bound by the state transitional agreement in relation to all the transferring employees for that agreement (proposed new paragraph 19(2)(d)).

In relation to particular transferring employees, the new employer may cease to be bound by the state transitional agreement sooner than end of the 12-month period. The circumstances in which this can occur are:

• the new employer makes a workplace agreement with the transferring employee (proposed new paragraphs 19(3)(a) and (b))
• for a notional agreement preserving state awards, the transferring employee becomes bound by an award (proposed new paragraph 19(3)(c))

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• the new employer ceases to be generally bound by the state transitional agreement under subclause 19(2) above (proposed new paragraph 19(3)(d))
• the transferring employee is not, or ceases to be, employed in the business that was transferred (proposed new subclause 19(4)).

If a preserved state agreement ceases to apply because the transmission period (12 months) ends, any collective agreement of the new employer that would, by its terms, apply to the transferring employee, will apply from that time on (proposed new clause 20).

The extent to which a new employer is bound will depend on any orders made by the AIRC (proposed new subclause 19(5)). Matters relating to the AIRC’s powers are set out in clauses 22–27. These are substantially the same as the AIRC’s powers in relation to transmitted pre-reform certified agreements. See the section on the Commission’s powers in the material on Part VIAA.

Notice requirements and enforcement

Where an employee is to be covered by a transmitted AWA, pre-reform certified agreement or state transitional agreement, provision is made requiring the new employer to give notice to the transferring employee (proposed new subclauses 28(1) and (2)). The notice must specify certain matters (proposed new subclause 18(3)). The notice must be lodged with the Employment Advocate (proposed new clause 29). Failure to lodge a complying notice can lead to civil penalty (proposed new clause 31).

Regulations

Provision is made for regulations to be made in relation to the effects that the transmission of business may have on the obligations of employers and the terms and conditions of employees under transitional industrial agreements (proposed new clause 36).

Schedule 2 of the Bill—Transitional arrangements for State organisations

This Schedule of the Bill (pp. 659–65 of the Bill) inserts proposed new Schedule 17 into the WR Act 1996.

Proposed new clause 2 of Schedule 17 allows a state-registered association which has members bound by preserved state agreements or an agreement preserving state awards, where the association is not a federal organisation or a branch of a federally registered organisation, to apply for transitional registration.

Proposed new clause 4 allows regulations to be made for the AIRC to make orders concerning membership, for example, taking into account any previous demarcation orders.

Proposed new clause 5 provides the grounds for the Federal Court to deregister a transitional organisation, mainly where it or its members are in breach of agreements and the WR Act 1996.
Proposed **new clause 6** provides the transitional organisation three years to become an association, that is, presumably through an amalgamation, or cease its transitional registration under this Schedule.

Proposed **new clause 7** allows the ‘conveniently belong’ rule to be modified under regulations, in its application to the transitional registration of an association.

### Schedule 3 of the Bill—School-based apprentices

According to the DEWR submission to the *WorkChoices Senate Inquiry*, any gaps in relevant federal and state award coverage for school-based apprenticeships and traineeships will be filled by wage provisions to be contained in Schedule 3 to the Bill:

> These provisions are expected to be proclaimed before the main provisions of the Bill, to ensure that appropriate wages for school-based trainees and apprentices are available from the beginning of the 2006 school year, including for students commencing at the new Australian Technical Colleges. However, they will not override existing award wages for school-based New Apprentices. They will only apply where there is currently a gap in federal or state awards.\(^{130}\)

**Item 1** inserts proposed new **Part XVII—School-based apprentices and trainees**.

Proposed **new section 551** makes it clear that state and territory laws are not excluded. Proposed **new section 552** allows otherwise applicable wage instruments for school-based apprentices to be converted into hourly rates, thus permitting remunerated work to be performed, for example, on one day. The formula would provide that the rate of pay payable to a school-based apprentice is the rate for the corresponding full-time first-year apprentice (as contained in the relevant wage instrument) multiplied by 1.25. Proposed **new section 553** provides that a school-based apprentice is entitled to the conditions of a corresponding full-time apprentice. Proposed **new section 554** provides that, if a school-based apprentice continues an apprenticeship after finishing school, half the time spent as a school-based apprentice will count as time spent as a full-time apprentice, for the purpose of determining any applicable wage scale.

Proposed **new section 555** provides a specific rate of pay for school-based trainees. The minimum rate of pay for a school-based trainee enrolled in a year up to and including Year 11 would be $7.27 per hour, payable only for work on-the-job, not attending training (proposed **new section 556**). The minimum rate of pay for a school-based trainee enrolled in Year 12 or a later year would be $7.99 per hour. These rates are drawn from hourly rates of pay for trainees under the *National Training Wage Award 2000*.

### Schedule 4 of the Bill—Transitional and other provisions

**Item 1** enables regulations to be made of a transitional, saving or application nature, for example, in relation to hearings by the AIRC or the Federal Court on WR Act 1996 provisions to be repealed by this Bill. Those hearings could continue. These regulations,

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and those made under provisions below, may take effect from a date before the regulations are registered under the Legislative Instruments Act.

**Item 2** allows regulations to be made which will make amendments to the WR Act 1996 and other Acts which are consequential to amendments made by the Bill.

This provision contains a so-called Henry VIII clause, giving the Executive far-reaching regulation-making powers. In essence, these provisions allow the Executive to override laws made by Parliament. The constitutionality of such provisions is discussed in the ‘Concluding comments’ below.

**Item 4** provides that awards in force prior to the Bill’s enactment continue in force. ‘Old’ awards will only bind employees who were members of respondent organisations. After enactment of the Bill, the award will bind all employees.

**Item 5** provides for the application of redundancy pay under the current award redundancy-pay provision to an employee served with redundancy notice prior to the Bill’s enactment. The provision refers mainly to employees of businesses with fewer than 15 employees.

**Item 6** provides that employees will not lose accrued rights to provisions which will be removed as non-allowable award matters, for example, long-service-leave accruals.

**Item 7** provides that certain amendments to the termination-of-employment provisions (for example, in respect of seasonal workers) come into effect upon the Bill’s commencement.

**Item 8** ensures that the extension of the termination qualifying period to six months applies to employees whose employment commences after the Bill’s commencement.

**Item 9** provides that applications for AIRC orders about the redundancy of 15 or more workers under section 170GA can continue to be heard, if the application is made on or after the Bill’s commencement.

**Item 10** provides that a number of industrial instruments are to be regarded as ‘awards’ for the purposes of Divisions 3 and 4 of the WR Act 1996’s termination provisions in Part 6A.

**Item 12** intends to apply the Bill’s prohibitions on revealing the identity of AWA parties under proposed section 83BS, to ‘old’ AWAs as well.

**Item 14** provides that information given to the Building Industry Taskforce shall be treated as if it had been given to the Australian Building and Construction Commission.

**Item 15** provides a three-year transitional period for award provisions on hours of work. Thereafter, an award provision that provides for a lower standard will not operate.

**Item 16** provides that the Bill’s provisions on transmission of business apply on or after the Bill’s commencement.

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**Item 17** proposes that the Bill’s proposed conciliation and mediation provisions would apply only after the Bill’s commencement.

**Item 18** provides that the repeal of legislated parental-leave provisions will not apply to employees under current state or federal instruments.

**Item 20** provides that the AIRC’s conciliation’s role in respect of certified agreements will continue for three months after the Bill’s commencement.

**Item 22** ensures that right-of-entry permits in force continue to operate.

**Item 24** stays the deregistration of currently registered organisations for three years, where they may no longer be federally registrable (that is, reference to the constitutional basis for registration).

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**Schedule 5 of the Bill—Renumbering the Workplace Relations Act**

This Schedule renumbers Parts, Divisions and sections of the WR Act 1996 so that they are numbered consecutively.

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**Concluding comments**

The following Concluding comments will briefly look at the potential constitutional issues this Bill may raise, as well as providing a brief comment on the possible economic and social issues the reform may raise.

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**Constitutional issues**

The constitutional issues raised by this proposed law may be significant. This is reflected in the strong reaction by the States and the Unions, all announcing their preparedness to challenge the Bill, or parts thereof, in the High Court.\(^{131}\) It is likely that the challenges will canvass a wide range of constitutional issues, some of which may go to the heart of Australia’s federal compact.

The constraints of this Bills Digest prevent a more detailed discussion of the often very complex constitutional arguments and analysis. Instead, the reader is referred to the following publication of the Parliamentary Library which provides a detailed discussion of the constitutional background to the WR reform: P. Prince and T. John, ‘The Constitution and industrial relations: is a unitary system achievable?’, *Research Brief*, no. 8, Parliamentary Library, Canberra, 2005–06).

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Corporations power

Despite other constitutional powers underpinning the proposed laws, the main focus, no doubt, will rest with the corporations power, section 51(xx). This power enables the Commonwealth to make laws with respect to foreign, trading and financial corporations in Australia. After laying dormant for many years, this power has been described recently as the:

….the brightest star in the Commonwealth’s constitutional firmament.\(^{132}\)

How bright this star will shine in relation to the proposed new laws will heavily depend upon the High Court’s interpretation of, first, the scope of the corporations power and, second, the character of the proposed law—in relation to both, the law as a whole or individual measures.\(^{133}\) The aim of this interpretation or ‘characterisation’ is to ascertain whether there is a sufficient connection between the law purportedly made under the head of power and the head of power itself. The process is difficult and complex and has been described as being ‘not an exact science’.\(^{134}\) However, it is of utmost importance because once it is established that there is:

a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice.\(^{135}\)

Where the connection is held to be insufficient, the law is regarded to be beyond the Commonwealth’s legislative powers and therefore void.

For legislation to be supported by the corporations power, it would have to be a law with respect to the regulation of constitutional corporations. The relevant inquiry is based on two separate steps: first, whether a particular entity is a ‘constitutional corporation’, that is a foreign corporation or a trading or financial corporation formed within the limits of the Commonwealth, and, second, whether the activities of this constitutional corporation can be regulated under this head of power.

The first question assists in identifying those entities which can be covered by the proposed new laws, consequently determining how many employees will be covered by the new regime.

The second question ascertains which activities of constitutional corporations can be regulated by the Commonwealth using the corporations power.

However, providing answers to both questions will be extremely complex despite the power’s deceptive textual simplicity. So far, any attempt to ascertain the real scope of the corporations power has resulted in deep divisions amongst the Justices of the High Court. In fact, to date, the divisions have not been resolved, or, as leading labour law scholar Professor Stewart, put it:

there has never really been a definitive High Court case on [the corporations power’s] scope.\(^{136}\)

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The complexity will be further amplified due to two further circumstances:

- **first**, the High Court was never required to provide a more comprehensive statement as to whether the corporations power is capable of supporting a comprehensive workplace relations regime such as this proposed one. Instead, even in the so-called Industrial Relations Case, *Victoria v The Commonwealth* (1996) 187 CLR 416, the High Court accepted that key measures of the legislation, including those relating to minimum wages, wrongful dismissal or the right to strike, were based on the external affairs power, not the corporations power. Instead, the potential scope of the corporations power was not in issue. Rather, as Professor Zines recently pointed out:

  Western Australia conceded that the Commonwealth had power to control all the industrial relations of the corporations even though this went beyond the ratio of Tasmanian Dam, which was limited to the control of acts done for the purposes of trade.\(^ {137}\)

As the *WorkChoices Senate Inquiry* has pointed out, in recent High Court decisions, some members of the High Court have commented that the corporations power may be used to regulate comprehensively the workplace relations of constitutional corporations. However, it may be necessary to distinguish between the exclusive use of this power to support workplace relations laws *per se*, and the use of the power as a supplement to other powers.\(^ {138}\)

- **second**, the membership of the Court has changed completely since the last major case in 1995 on the scope of the corporations power. Prince and John noted that

  The current High Court is indeed very different to the one that decided *Re Dingjan* in 1995. All of the judges who supported a broad view of the corporations power have now resigned (Mason, Deane, Gaudron and McHugh). Similarly, none of the judges advocating a narrower role for s. 51(20) (Brennan, Dawson and Toohey) remain on the High Court.\(^ {139}\)

  With the change in the composition of the High Court, the jurisprudential orientation of the bench has changed, from supporting more a liberal legal approach to proposing rather more conservative views.\(^ {140}\)

As a result of this complex situation, it is almost impossible to predict which way the High Court may find. Prince and John have pointed out the various views the High Court has developed and opined that so far, none of them commands a solid majority.\(^ {141}\)

The Commonwealth has taken care to set the right constitutional parameters for the WR system, including some *prima facie* indicia which are easily discernible: **first**, the quintessential regulatory lynchpin for the law is the employer, per definition a constitutional corporation, from which the law unfolds its regulatory effects. **Second**, by using language suggesting that the Commonwealth aims at regulating ‘workplace relations’ rather ‘industrial relations’, the Commonwealth may try to emphasise that it asserts its powers in relation to a particular aspect of industrial relations, namely those concerning entities which can be regulated by the Commonwealth.
However, whether this will sufficiently shield the law will have to be seen. Especially measures at the margin of what can be regulated under the corporations power may be at risk of being excluded from this power’s support, should the High Court apply a narrow test. One of the measures that may be affected could be the wage-setting AFPC. In any event, if the test applied by the High Court reveals that the Commonwealth exceeded its power, the challenged law will be void unless it can be saved by resorting to other heads of power, including for example the external affairs power.

**Will choosing the corporations power simplify the WR system?**

A related constitutional issue, and arguably a very practical question, may be whether the choice of the corporations power will in fact lead to a simplification of the WR system. The Federal Government explained in its Explanatory Memorandum that it chose to rely on the corporations power to simplify:

> ...the complexity inherent in the existence of six workplace relation jurisdictions in Australia by creating a national workplace relations system based on the corporations power that will apply to a majority of Australia’s employers and employees.\(^{142}\)

(emphasis added)

The Federal Government argues that focussing on the Commonwealth’s corporations power will achieve this, amongst other objectives, by introducing:

> ... a more precise test for determining whether a business falls within the federal workplace relations system, [and] will make the issue of jurisdiction much more transparent for employers.\(^ {143}\)

(emphasis added)

Quintessential to the operation of the proposed new WR system will be the ‘constitutional corporation’ (see above, Part I). The Bill defines this term, as encompassing trading and financial corporations. This terminology is taken straight from the constitution.

Deploying language used in the constitution as a definition in the Bill has *prima facie* advantages for the legislature. **First**, it limits one risk that the law will fall outside the scope of the Commonwealth power because the definition will take its meaning from decisions handed by the High Court. **Second**, at the time of debate and passing the Bill into law, Parliament will not be required to make a final decision as to who will be covered by the law—this decision will be made, ultimately, by the High Court.

However, Parliament may want to consider that the High Court has acknowledged that this approach is less than satisfactory. In *R v Federal Court of Australia; Ex parte Western Australia Football League Inc.* (1979) 143 CLR 190, Chief Justice Barwick described choosing constitutional terms as definitions in legislation as ‘convenient to the Parliament and the parliamentary draftsman’, but he pointed out that:

> … in the long run such a course may well prove highly inconvenient and costly to those affected by the statute. As in this case, the citizen may find himself litigating a constitutional question of some dimension. If I may venture to say so, it would be better if the Parliament and its draftsman assayed a definition, eg as in this case of a trading corporation, which covered those described bodies which the Parliament

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wished to embrace within the operation of its legislation, making for this purpose its own judgment of the ambit of its constitutional power.144

The lack of clear precedents as to what is a constitutional corporation within the meaning of the Bill has the potential to translate into a lack of legal certainty for certain legal entities, especially for small businesses and the not-for-profit sector. These entities may have to resort to expensive legal advice or even constitutional litigation to ascertain whether or not they will be covered by the proposed WR system.145

Vertical coverage of the WR system—‘covering the field’

It has been doubted whether the Commonwealth sufficiently evidenced its intention to cover the field (that is, to exclude the operation of State legislation) in relation to workplace relations in Part I of the Bill.146 The High Court held that where the Commonwealth evinces such an intention:

then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent.147

This view, expressed by Justice Dixon (as he then was), has been endorsed unanimously by the High Court more recently in *Telstra Corp Ltd v Worthing* (1999) 197 CLR 61.148 The essence of this intention is to remove any opportunity for state laws with the same subject matter to operate.149

The intention to cover the field can be stated expressly150 or may be deduced from, for example, ‘extremely elaborate and detailed’ regulations which suggest such intention.151 A separate inquiry is whether the Commonwealth effectively covers the field: this question will be assessed on the basis of, first, the actual subject matter of the federal law, and, second, the validity of the law. The second step is important because if the High Court finds the law to be invalid, an inconsistency issue can not arise.152

At least based on the detail with which the Bill sets out the envisaged vertical coverage in Part I, including listing express exemptions to the coverage, it seems feasible that the Commonwealth does enough to demonstrate the intention to cover the field. In any event, the Bill expressly singles out the States’ Industrial Relations laws, rendering them inoperative on the basis of a direct inconsistency.153

Federal balance

The federal system which underlies the Australian constitution may raise another fundamental constitutional issue which could present the basis for a constitutional challenge to the proposed new laws.

When confronted with a constitutional challenge to this legislation, the High Court may find, first, that the legislative measures are within the scope of the constitutional heads of power chosen by the Federal Government to support it, however, second, the law is

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nevertheless invalid because it violates the doctrine of federalism upon which the Australian Constitution is based.

The most obvious limitation in a federal system is the need to ensure the survival of state governments as effective entities. As (then) Justice Dixon said in the Melbourne Corporation case (1947):

The foundation of the Constitution is the conception of a central government and a number of State governments separately organised. The Constitution predicates their continued existence as independent entities.\footnote{154}

The doctrine of federalism may prove to be a test for the proposed new WR system, because it may raise the question of whether, and if so, to what extent, there are boundaries on how far federal workplace laws can encroach on the operation of state governments. In Re Australian Education Union (1995) 184 CLR 188, the High Court noted that the protection for the states in the Constitution has two elements:

- first, Commonwealth laws cannot discriminate against or single out one or more of the states for special treatment. This means that legislation creating a national industrial relations system will need to be of general application and not be aimed at particular states, and
- second, ‘the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments’ (emphasis added).\footnote{155}

This second element could concern the High Court, asking whether the protection of the states provided by the doctrine of federalism can limit the Federal Government’s ability to regulate private-sector employment. \textit{Prima facie}, it seems difficult to argue that the proposed horizontal coverage of the law may curtail the continued existence of the States or their capacity to function as governments considering that Victoria has referred its powers to regulate industrial relations upon the Commonwealth (see above, Part XV). However, the High Court may take a different view because the conferral of this state power was voluntary, an expression of cooperative federalism expressly sanctioned under the Constitution. For further detailed information and background on the possible impact of the doctrine of federalism, the reader may refer to the Research Brief prepared by the Parliamentary Library.\footnote{156}

**Express limitations contained in the Constitution**

The Constitution also contains express constitutional limitations which could restrict, to an extent, the vertical and horizontal coverage of the proposed new law. Such restrictions could be applicable because all constitutional powers conferred upon the Commonwealth under section 51 are subject to the remaining provisions of the Constitution. Therefore, the corporations power must be read subject to any applicable express limitation in the Constitution.

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Circumvention of express limitations in the Constitution

The High Court has applied express limitations, for example, in relation to the Commonwealth’s attempts to regulate interstate banking. In the decision Bourke v State Bank of New South Wales (1990) 170 CLR 276, the High Court decided that a state bank, whilst being a financial corporation within the scope of section 51(xx), could not be regulated by the Commonwealth using the corporations power because the Commonwealth’s power relating to banking (section 51(xiii)) contains an express injunction against Commonwealth regulation of intra-state banking. Section 51(xiii), the Court concluded, imposed a pervasive injunction upon the Commonwealth’s legislative power and prevented it from using the corporations power to by-pass this injunction and regulate the state bank.157

It seems possible that a similar conclusion could be reached in relation to this Bill. The Commonwealth was granted an express power to regulate industrial relations: the labour power in section 51(xxxv). This power is subject to an injunction, that is, the Commonwealth’s power to make laws with respect to industrial relations was intended to be limited to certain situations only, that is, to regulate the prevention and settlement of industrial interstate industrial disputes.

The injunction in section 51(xxxv) could be found to limit the corporations power, prohibiting the Commonwealth from bypassing the limitations of the labour power by using the corporations power. However, the High Court may find that this injunction may not amount to an express limitation, but a broad limitation which is not able to restrict the scope of the corporations power.158

Expropriation on just terms

Some measures in this Bill could possibly be affected by another express limitation. Section 51(xxxi) of the Constitution enables the Commonwealth to expropriate property, but this power is subject to the proviso that it can only do so on just terms. This ‘ban on unauthorised takings’159 may raise a constitutional issue, as it appears to be possible that certain provisions of the Bill have the effect of extinguishing existing employees’ rights.160 If so, this extinction, or acquisition of property rights, must occur on just terms.

This argument has been put to the courts before: in Quickenden v O’Connor (2001) 184 ALR 260, the Full Court of the Federal Court dismissed the argument, but only because there was insufficient evidence to prove the rights which were alleged to exist.161 Accordingly, the issue is likely to be still very much alive. Measures of the Bill which may be of particular interest include the award simplification and rationalisation provisions, which can have the result of extinguishing pre-existing rights as a result of the simplification, as well as the provisions which deal with the making of new agreements.

That a violation of this constitutional guarantee is a potential issue, apparently has been accepted by the Commonwealth: if certain measures proposed under the Bill, or certain repeals or amendments either by subsequent legislation or regulation, will have the effect
of expropriating property, proposed new section 358B will deem the measure, repeal or amendment inoperative to the extent it violates the constitutional provision.

Implied limitations under the Constitution

The proposed restrictions on union involvement in industrial matters may attract a constitutional challenge based on the alleged violation of the implied freedoms of political communication and association.\(^{162}\)

The implied freedom of political communication

The High Court has declared that it is an inherent requirement of the system of representative and responsible government that the Australian people must be able to communicate about political and other matters that could influence their choice of government.\(^{163}\) According to the High Court in the decision in *Lange v The ABC* (1992), a law cannot restrict freedom of political communication unless:

- **first**, it is enacted to fulfil a legitimate purpose (of Australia’s constitutional system), and
- **second**, the restriction is appropriate and adapted to fulfilment of that purpose.

This implied freedom of political communication does apply in the workplace, as the recent Federal Court decision in *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 204 ALR 119 has demonstrated. In this case, Justice Finn held that the key regulation underpinning the official secrecy regime for Commonwealth public servants was so sweeping that it infringed the implied freedom.

One issue which may be raised in relation to a challenge on the basis of this implied freedom has been noted by labour law experts Creighton and Stewart, who asked:

> whether trade union activities might be protected as “political” expression under this principle and hence be immune from certain kinds of legislative sanction.\(^{164}\)

Plainly the freedom of political communication is not limited to verbal communication, but extends to any non-verbal actions which are intended and are capable of expressing ideas about government and the policies/politics of the Commonwealth or the states. This includes, for example, expressive *conduct* such as protests.\(^{165}\) As such, industrial action and other activities by trade unions (and others) may amount to expressive conduct on political matters, and could therefore be protected by the implied freedom. However, there are two considerable counter-arguments to this suggestion:

- **first**, actions by unions or others to achieve a wage increase or other improved conditions are unlikely to be regarded as ‘political’, and the implied freedom would not limit Commonwealth regulation of this type of action.\(^{166}\)
- **second**, even if industrial action is ‘political’, the freedom is still subject to the proportionality doctrine, which assesses whether the law restricting the freedom was:

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… enacted to satisfy a legitimate end compatible with the maintenance of representative and responsible government under the Constitution and [was] reasonably appropriate and adapted to achieving that legitimate end.\textsuperscript{167}

**The implied freedom of association**

A further issue which may arise is whether the Constitution contains an implied freedom of association. Professor Williams argued in 1998 that it could arguably protect unions in this country:

> It is difficult to see how some version of a freedom to associate could not be implied in the Constitution. The ability to associate for political purposes is obviously a cornerstone of representative government as embodied in the Constitution … Given the strong links between the union movement and Australia’s political parties, particularly the Australian Labor Party, it is arguable that any such freedom might also apply to industrial organisations. Such a freedom might bolster the guarantee of freedom of association contained in Part XA of the Workplace Relations Act.\textsuperscript{168}

However, in the most recent case dealing with this issue, *Mulholland* (2004) 209 ALR 582, only Justices McHugh and Kirby agreed that the Constitution contained a ‘freestanding’ right of association on political matters. Other judges either rejected the existence of any such right or thought that it might only exist as a corollary to the implied freedom of political communication.

**Henry VIII clauses and the Commonwealth’s law-making powers**

One issue which has potential constitutional ramifications is the Bill’s broad subordinate legislation-making powers. Indeed, it has been foreshadowed that this could be a ‘vulnerable’ area of the law and consequently an option for a High Court challenge.\textsuperscript{169}

The legislation confers very broad law-making power upon the Executive, including provisions which enable the Executive to make, for example, regulations capable of overriding state laws as well as of changing this proposed law itself. Provisions which authorise the Executive to make such broad regulations and determinations include, for example:

- proposed **new subsection 7C(4)**—which will permit the executive to make subordinate legislation which purports to override state laws
- proposed **new subsections 7K(3) and 7N(3)**—which will permit the executive to change the wage-setting procedures to be applied by the Australian Fair Pay Commission and, as a possible result, the outcomes of wage-setting decisions
- proposed **new section 101D**—which will permit the Executive to prescribe prohibited content by way of regulation
- proposed **new section 112**—which grants the Minister the power to declare the termination of a bargaining period (this only has to be gazetted and is not subject to parliamentary scrutiny), and

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• proposed new subclause 2(1) of Part 1 of Schedule 4—which will enable the Executive to make regulations which amends Acts generally, including the WR Act as amended, at least during the period in which the transitional provisions will be applicable, and with retrospective effect.

**Can the use of Henry VIII clause undermine parliamentary supremacy?**

In so far as these provisions permit subordinate legislation to change the law of the enabling Act, the provisions can be referred to as Henry VIII clauses.170

The authorisation of executive law-making through parliament has been accepted by the High Court as constitutional, despite the pervasive doctrine of the separation of powers.171 Indeed, the High Court has upheld the delegation of very broad powers, including, for example, where the Executive was enabled to formulate and implement its own policies172 and the use of Henry VIII clauses.173 However, despite the extent to which authorisation was accepted, some limitations do apply, including:

• the delegated power must remain within the scope of those powers granted to the Commonwealth under the Constitution (enumerated powers doctrine), and

• the delegation of power may not be so vague or wide-reaching that the delegation becomes invalid, and

• the delegation may not amount to an abdication of power.174

Whether the delegations envisaged under this proposed legislation will comply with constitutional principles will depend upon the way in which the High Court views the scope of regulation-making powers conferred upon the Executive. For example, it seems at least possible that the High Court may accept arguments to the effect that these clauses enable the Executive to impose its own intent upon the Federal Parliament, something which could be regarded as running contrary to the notion of parliamentary supremacy.

On the other hand, whether the delegation will comply with the enumerated powers doctrine will depend first, upon the way the delegated power will be exercised by the Executive, but, second, also upon the way in which the High Court will view the Commonwealth’s law-making powers in relation to industrial relations based predominantly on the corporations power.

And finally, whilst Professor Lane noted that, based on past decisions of the High Court, delegated legislation ‘is unlikely to fail for uncertainty or width’, the Court has made obiter comments to the effect that a threshold from whereon the law becomes invalid does exist.175

One issue which cannot be addressed at this point in time are possible constitutional implications which may arise as a result of the subordinate legislation to be made under the proposed new laws, including questions whether the regulations may be oppressive in nature or for an improper purpose, is uncertain or unreasonable.176

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Can broad executive law-making powers undermine the rule of law?

The Henry VIII clauses, but also proposed provisions which grant broad regulation-making powers to the Executive, including, for example, proposed new section 101D which could permit the Executive to prescribe retrospectively prohibited content by way of regulation, may have the potential to deprive the proposed new law of its required certainty. However, certainty is a fundamental aspect of the rule of law, as only certainty will be able to ensure that the law effectively guides human behaviour.177 In the Canadian context, this principle has been given the status of a:

[…] principle of fundamental justice… [according to which] a statute is ‘void for vagueness’ if its prohibitions are not clearly defined. A vague law offends the values of constitutionalism. It does not provide sufficiently clear standards to avoid arbitrary and discriminatory applications by those charged with enforcement. It does not provide reasonable notice of what is prohibited so that citizens can govern themselves safely.178

Professor Cheryl Saunders and Katherine Le Roy identified the core principles of the rule of law, one of which is that the law must be governed by general rules which are made in advance. The authors continued, stating that:

More can be said about each of these principles, in order to secure their purpose. There is no point in laying rules down in advance unless they operate prospectively, are publicly available, can be understood, are susceptible of obedience, individually and collectively, and are not changed unreasonably often.179

These principles apply because the laws in Australia are made under, and consistent with, the Australian Constitution, which assumes the existence of the rule of law.180

Australia's international obligations

Compliance with the Australia-United States Free Trade Agreement

It has been suggested to the WorkChoices Senate Inquiry that the Bill may violate Australia’s obligations under the Australia-United States Free trade Agreement (‘AUSFTA’).181 Made in 2004, the AUSFTA imposes obligations on Australia about labour laws. However, only one of these obligations falls within the scope of the Dispute Settlement Proceedings in Article 21.2 and is, therefore, enforceable.182 That is the obligation not to fail to effectively enforce Australia’s labour laws in a manner that affects trade.

A breach of the other obligations may give rise to a right of consultation only. These other obligations are that Australia:

• ‘reaffirms’ its obligations as a member of the International Labour Organisation (ILO) (clause 18.1)
‘reaffirms’ its commitment under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998)* (*ILO Declaration*) (clause 18.1)

shall “strive to ensure” the recognition and protection of

- (a) the right of association
- (b) the right to organize and bargain collectively
- (c) a prohibition on the use of any form of forced or compulsory labour
- (d) labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour, and
- (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health
- (f) the principles in the *ILO Declaration*

shall ensure that persons with a legally recognised interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial, or labour tribunals for the enforcement of the Party’s labour laws (clause 18.3)

shall ensure that the proceedings of its administrative, quasi-judicial, judicial, or labour tribunals for the enforcement of its labour laws are fair, equitable, and transparent

shall provide that the parties to such proceedings may seek remedies to ensure the enforcement of their rights under its labour laws, and

shall promote public awareness of its labour laws by ensuring that information is available to the public regarding its labour laws and enforcement and compliance procedures.

It has been suggested that especially the US *Labour Advisory Committee for Trade and Negotiations and Trade Policy* (*LAC*) may take an issue with Australian labour standards. Andrew Stoler has noted that that the LAC has criticised Australia in relation to the measures contained in the current *WR Act 1996* for its ‘onerous restrictions on workers’ right to freedom of association and their right to organise and bargain collectively’. While there are no remedies (other than consultation) for a breach of these obligations, this does not necessarily deprive them of any force. Much would depend on the nature of any breach, its effect on trade and the complexion of the Government of each country.

**Compliance with ILO Conventions**

There is a strong possibility that the proposed measures are in breach of Australia’s international obligations under various conventions administered by the ILO. The relevant conventions have been referred to throughout this Bills Digest. Recently, the ILO Governing Body has vindicated the trade unions’ view that various measures in the *Building and Construction Industry Improvement Bill 2003* are in breach of these
Considering that the proposed measures are even tougher, it is likely that they too will be in breach of the relevant conventions.

**The proposed workplace reforms—potential economic aspects of the changes**

To a large extent, the arguments over the proposed new WR system reflect age-old arguments about the nature of the labour market and the economic system more generally. When people express a clear view about the positive effects of industrial relations reform on employment and GDP, they tend to reflect a view that the industrial relations reforms will have the effect of lowering wages and that lower wages will increase employment. No-one in the debate to our knowledge has put the proposition that the proposed WR changes will increase wages.

The bulk of the debate reflects two extreme views with various shades of grey between them. What could be termed the ‘deregulate-the-labour-market-will-boost-employment’ view reflects a particular view of the world associated with the neoclassical school of thought. A feature of this school is its general belief that an economy with minimal government interference is likely to give the optimal macroeconomic outcome from the perspective of employment, production, productivity and inflation. This is the self-regulating economic model that produces full employment as a natural outcome of market forces. Any regulation, including labour market regulation, interferes with that result and so gives a worse outcome. Hence, the policy objective is to reform the economy by removing the regulation and so get back to the ideal generated by a free market. Of course that outcome will have implications for the distribution of incomes but the view is that ‘factors of production’ get what they deserve through the objective mediation of the market.

This view of the economy, which can also be labelled the ‘market optimism view’, is that held by the majority of economists and taught in the majority of university economics departments. Nevertheless, most economists would also hold a pragmatic perspective on the labour market question, mindful that the perfect theory does not always apply to the real world and that some regulation or intervention may be necessary on pragmatic grounds. Examples would be where there is unequal information between the worker and the employer about the likelihood of the employer going broke and being able to pay the wages bill.

The alternative view, which can be called the market pessimism, view is that the distribution of incomes between different factors of production is driven by social and other factors, including bargaining strengths. The aggregate outcomes for output and employment reflect developments on the demand side, including global competitiveness, government policies and the incentive to invest. There may be some minor feedback mechanisms going from factor shares to aggregate demand but these may even go in the opposite direction with higher wages generating higher employment levels. Higher wages will tend to encourage higher production and employment in industries that produce consumer goods. On the other hand higher wages reduce profits and so may reduce investment, at least to the extent that investment is financed out of retained earnings. We

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can label the alternative view the ‘market pessimism view’ since it doubts markets can solve economic problems without government intervention.

The market optimism view suggests that a reduction in wages may cause some incidental change in employment but the direction of the effect is ambiguous and the effect is probably weak. Keynes admitted that there may be tendencies that produce the market optimism result in the long run. However, he doubted the practical relevance of those tendencies when he famously quipped ‘in the long run we are all dead’.188

The Productivity Commission would not generally be inclined to the market pessimism view, but did express the opinion that the reforms envisaged in the Bill have weak impacts. It said:

Reform is important in other key policy areas, including industrial relations and taxation, but there would be little pay-off from new nationally coordinated initiatives.189

The debate about flexible terms and conditions are largely an extension of the debate over wages generally. It is also probably fair to point out that the market optimists claim to have the empirical support,190 while the market pessimists claim to have won the logical/theoretical debate.191 Not surprisingly, business and business groups tend to reflect the market optimism view. People from the labour movement tend to reflect the market pessimism view.

There are other ways of looking at the flexibility issue. The Chief Executive of Woolworths put the business perspective very well when he supported the government’s industrial relations reforms and said:

Anything that frees up the flexibility of the labour market and enables labour to be flexible and more like any other resource is in the long term a way of generating productivity and generating wealth.192

This perspective compares labour with ‘any other resource’ that is owned by business and able to be used entirely at the discretion of business. The ideal is presumably when business is entirely free to use labour as business sees fit. There is not much that can be said other than to observe that the tension between the interests of business and workers over the organisation of work has waged since the dawn of the industrial revolution.

Another factor to be taken into account is that the proposed reforms are likely to increase the dispersion of wages, even for particular types of labour. Generally there is a presumption in economics that competition will tend to produce uniform prices and wages throughout the economy. However, business appears to want to use direct bargaining as a means of keeping wages in line with productivity. The ACCI says that the:

problem with award wage increases is that they are not linked to enterprise-level productivity’.193

Of course, that is equally the outcome under competition where employers compete for labour. For a firm with low productivity it may suit if its own workforce is paid less than
the going rate. However, the employer is really asking its own workers to subsidise the firm’s below average performance. There are always firms entering and exiting the market place. Indeed, that is one of the elements of flexibility thought to be desirable in raising economic growth and living standards. To the extent that lower wages in a declining firm prolongs the survival of that firm, the economic outcome may be worse. This is the industrial relations equivalent of arguing for tariff protection for ailing industries facing chronic foreign competition.

The comments here only touch on the surface. There are a host of other issues that should be discussed, including:

- poverty traps and the relationship between the labour market and social security
- gender relativities and other issues
- labour market flexibility and income security
- income security and ability to obtain housing finance
- flexibility and the work, leisure relationship
- fixed child responsibilities and flexible work patterns
- the ability of small business to manage its own industrial relations, and
- flexibility and macroeconomic volatility.

This list is of course far from exhaustive.

**The proposed workplace reforms—important social dimensions of the changes**

There has been much comment about the potential impact of the proposed new IR law on the industrial relations area and also about the economic impact the changes may effect. However, there has also been some comment on the potential social impact of the proposed new law. Given that IR reforms of such magnitude have not previously been undertaken in Australia, all of the comments on the potential social impact, both beneficial and adverse, can of course only be opinion.

**Some consider the IR reforms will have social benefits**

The government’s claim is that the proposed IR reforms are aimed at better prosperity for the future of Australia. This was spelt out in the second reading speech to the Bill, presented by the Minister for Employment and Workplace Relations, Hon. Kevin Andrews. The Minister emphasised when presenting the Bill that:

That is what Work Choices is all about—securing the future prosperity of Australian individuals and families. Work Choices does this by accommodating the greater demand for choice and flexibility in our workplaces. It continues a process of evolution, begun over a decade ago, towards a system that trusts Australian men and women to make their own decisions in the workplace and to do so in a way which

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best suits them. In the end, this is not an economic argument. It is a moral argument. Australia can and should be a country where those who are able to work can find work. Too many Australians are not participating in the workforce. Too many Australians still struggle to find work. And too many Australian children are growing up in households where no parent is working. These fellow citizens deserve a brighter future. Work Choices will give them a brighter future. […] and further …] The key to advancing prosperity and fairness together is higher productivity. Australia’s economic strength and the living standards of our people depend, ultimately, on the productivity of our workplaces.195

Accordingly, the government claims that the IR reform has social aims as well as industrial-relations-reform aims. Others share this view, arguing that there will be social benefits with the reforms. The President of the Business Council of Australia, Mr Hugh Morgan, said on 9 October 2005 that:

The Business Council believes that these changes, along with the reforms to taxation, infrastructure and regulation that we have advocated, can sustain prosperity … In supporting further workplace reform, the BCA and its Member companies—which collectively employ nearly 1 million Australians and account for 20 per cent of the nation’s economic activity—aim to sustain high levels of job creation, flexible workforces that support high productivity, and reward employees in line with these outcomes.196

The Minerals Council of Australia also thought the proposed IR reforms have social benefits. It stated that:

The proposed reforms will be enthusiastically embraced by Australians keen on improving the work/family life balance, improving flexibility in their workplace arrangements, seeking to be rewarded for individual performance, and wanting to be part of businesses that consider mutually beneficial relationships key to improved productivity, growth and profitability, Mr Hooke said. The reforms announced today strike the right balance. The beneficiaries will be the employees who are the backbone of the Australian minerals industry, the shareholders who risk their capital in the exploration, extraction and processing of minerals, and the families and communities across the nation who depend on the minerals industry to underpin Australia’s terms of trade and subsequently a vibrant and growing Australian economy.197

Heather Ridout, Chief Executive Officer for the Australian Industry Group, also referred to social imperatives necessitating these proposed IR reforms on ‘Meet the Press’, 6 November 2005. Asking where the old WR system came from, she stated that:

It grew out of Federation, it grew out of a century of a closed economy with high tariff protection; we had low immigration, we had a whole lot of things that were all about trying to protect a system that no longer existed. At the beginning of the 21st century, we’re a global economy, whether you’re operating in the Illawarra or Timbuktu, you’re operating in a global economy, and I think industry needs industrial regulation that’s consistent with that. Also we have an ageing population and we have a population that has all sorts of different needs—working family, carers, older parents, older workers wanting to work part-time towards the end of their working
career. We have a very diverse workforce and I think those two big changes—the end of the closed economy and the more diverse needs of the workforce and employers—is really the genesis of the 21st Century reforms.  

Some consider the IR reforms will have adverse social impacts

Other commentators and stakeholders disagree with the view espoused above, expressing the view that the proposed IR reforms will have adverse social impacts. The President of the ACTU, Sharan Burrow, observed on 24 October 2005:

… how poorly conceived these laws are, because it highlights the problem when ideology prevails and reason is lost from the law-making process. On any measure the WorkChoices legislation will be bad law. Not just because it is unjustified by any credible economic argument. Not only because of the social impact, and the damage to our social cohesion and social progress. But also because it will not meet any of the acceptable tests for the making of good regulation. The ACTU opposes this package on social and economic grounds.

Others have expressed concerns that the vulnerable in the workforce and their families may be adversely affected. Anglican Archbishop Peter Jensen expressed these concerns on 8 October 2005, arguing that:

Vulnerable workers, or those who have less bargaining power need to be protected from unintended effects of the reforms. It seems at this point that the proposals shift the differential of power in favour of employers, who can have a propensity to mistreat workers in the interests of the business. Further increased casualisation of the workforce should be avoided. Casual workers are disadvantaged if there is a greater shift towards 24/7 work schedules because while it increases flexibility for employers it decreases future work certainty for casual employees. This nation and its political leaders must be committed to ensuring optimum working conditions for the nations’ workers; a living wage that will mean everyone has the ability to provide for themselves and their families the necessities of life; strong unions that will represent workers; and the preservation of leisure time for families to be together for rest and recreation and to maintain their relationships.

Social impact on specific groups

Eva Cox from the Women’s Electoral Lobby has expressed concerns that the proposed IR reforms may have an adverse impact on women:

The federal government’s new workplace legislation will increase inequalities in Australian society and particularly disadvantage women, the Women’s Electoral Lobby (WEL) says. WEL chair Eva Cox today called on women in the Senate to delay the passage of the bill so its impact on women and pay rates could be properly investigated. “While there will be many males whose skills are in demand so they will benefit (from the legislation), most women will do badly under the new regime,” Ms Cox said in a statement. WEL said there were a raft of problems that would make it harder for women to be treated fairly. These include uncertainty surrounding future

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pay equity cases, which have until now been run as part of state based industrial claims and benefit low-paid professions where women often make up the majority of workers. The industrial changes also mean the loss of the no-disadvantage test, a move Ms Cox says will put at risk women in low paid jobs who lack negotiating skills, particularly if they are from non-English speaking backgrounds. “Low paid areas like personal care, which want to reduce costs, will be able to pressure vulnerable workers into agreements which may include anti-social hours and broken shifts,” she said. “Parents with limited time will have to take lower pay and poor conditions so they can fit their hours to family requirements.” Ms Cox said there was also evidence that women, even in higher positions, did not negotiate as effectively on their own conditions as their male counterparts. “We ask that women in the Senate vote to delay this bill so these issues can be considered properly, or women’s pay will further reduce compared with men’s.”

Pru Goward, Sex Discrimination Commissioner, Human Rights and Equal Opportunity Commission, in giving evidence to the WorkChoices Senate Inquiry on 17 November 2005, also expressed some concerns about the potential social impacts of the Bill:

However, HREOC does have grave concerns about the implications of dismantling or removing any significant planks of a social, legal and economic contract in Australia which has evolved over 100 years and around which a variety of institutions, policies, cultures and government programs have grown up. Unless careful adjustments are made to surrounding institutions, laws and policies, inevitably that whole contract is challenged. The Work Choices bill, particularly in conjunction with the Welfare to Work changes, represents a wholesale change to the way Australian workplaces operate and, as a consequence, will have major implications for the Australian community more broadly.

Ms Goward also expressed concerns about potential adverse impacts on specific groups:

Finally, HREOC is concerned that the bill fails to adequately protect vulnerable employees and job seekers, particularly workers with disabilities, Indigenous people, people moving between welfare dependency and paid work, and those in low-paid wage jobs, for which there are many competitors and who consequently have little individual bargaining power.

Academic opinion on social impacts of the proposed IR reforms

There have been some speculative academic opinions provided about the potential for the IR reforms and their social impact. However, considering that the legislation was only made public when presented to parliament on 2 November 2005, there has been, as yet, little comment or study considering the actual proposals. Barbara Pocock, a research fellow at the University of Adelaide, has provided some comment about the Work Choices proposal. She noted that:

‘WorkChoices’ will foster growth in unsocial and long hours, given that loadings for overtime and unsocial hours are not protected. Control of working time, avoidance of unsocial hours and protection of common family time are key issues for families. Each of these is further compromised by ‘Work Choices’ in a situation where almost

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two-thirds of Australians already work sometimes or often at unsocial times. International evidence of negative effects on marital stability, and on workers’ and children’s well being, is compelling.204
Appendix A—Summary of impact of *WorkChoices* changes on employers\textsuperscript{205}

**AA: Incorporated employers**

<table>
<thead>
<tr>
<th>Award/agreement coverage—current</th>
<th>Effect of new legislation</th>
<th>Employer entering into new agreement</th>
<th>If employer does nothing</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>State award</strong> (common rule or single enterprise)</td>
<td>Deemed a <em>notional agreement preserving State awards</em> (Sch 15 of the Bill) Terms except those below AFPCS and prohibited content federally enforceable Three-year nominal expiry date</td>
<td>Can be replaced by new federal agreement before expiry date. Existing agreement cannot be varied or extended. (Sch 15)</td>
<td>Move to most appropriate federal award after expiry date of notional agreement. AIRC to determine appropriate federal award coverage. (Part 6)</td>
</tr>
<tr>
<td><strong>State agreement</strong> (eg NSW enterprise agreement)</td>
<td>Deemed a <em>preserved state agreement</em> Terms except prohibited content federally enforceable Retain nominal expiry date (Sch 15)</td>
<td>Can be replaced by new federal agreement before expiry date subject to Australian Fair Pay and Conditions Standard (AFPCS) Existing agreement cannot be varied or extended.</td>
<td>Continue in effect until replaced or terminated but subject to AFPCS after nominal expiry date</td>
</tr>
<tr>
<td><strong>Federal award</strong></td>
<td>Continues to apply. Four allowable matters (jury service; superannuation; notice of termination and long service leave) not able to be put into new awards or varied. Superannuation continues only until 30 June 2008 Wages set by AFPC Annual, personal, carer’s and parental leave removed unless more generous than AFPCS (Part 6)</td>
<td>May enter collective or individual agreement subject to AFPCS Some award conditions continue to apply unless explicitly excluded by agreement Agreement lodged with OEA Agreement commences when lodged (Part 5B)</td>
<td>Award continues to apply</td>
</tr>
<tr>
<td><strong>Federal agreement</strong> (Div)</td>
<td>Continues to apply and retains current nominal</td>
<td>May enter new collective or individual agreement subject to AFPCS</td>
<td>Agreement continues to apply after nominal expiry</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>2 or 3 certified agreement; AWA</th>
<th>expiry date.</th>
<th>Some award conditions continue to apply unless explicitly excluded by agreement, for example, personal leave.</th>
<th>date unless replaced or terminated</th>
<th>Relevant conditions subject to AFPC minimum</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Current terms apply</td>
<td>Agreement lodged with OEA. Agreement commences when lodged (Part 5B)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Award free</td>
<td>No change</td>
<td>May enter agreement subject to AFPCS (Part 5B)</td>
<td>Contract of employment continues to apply</td>
<td>State and federal legislation continue to apply</td>
</tr>
<tr>
<td></td>
<td>May seek federal award coverage</td>
<td>Agreement lodged with OEA. Agreement commences when lodged</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
## AB: Unincorporated employers

<table>
<thead>
<tr>
<th>Award/agreement coverage—current</th>
<th>Effect of new legislation</th>
<th>Employer entering into new agreement</th>
<th>If employer does nothing</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>State award</strong> <em>(common rule or single enterprise)</em></td>
<td>No change—state system continues to apply</td>
<td>Agreement made under state rules</td>
<td>State award continues to apply</td>
</tr>
<tr>
<td><strong>State agreement (eg NSW enterprise agreement)</strong></td>
<td>No change—state system continues to apply</td>
<td>Agreement made under state rules</td>
<td>Agreement continues in effect subject to state laws</td>
</tr>
<tr>
<td><strong>Federal award</strong></td>
<td>Deemed <em>transitional award</em> and allowable matters continue to apply <em>(Sch 13)</em> Superannuation continues only until 30 June 2008 AIRC able to vary wages, allowances in transitional award having regard to AFPC decisions</td>
<td>May negotiate state agreement or decide to revert to state award(s) May apply to AIRC to be released from federal system if intractable industrial dispute</td>
<td>Transitional award expires and coverage reverts to state system</td>
</tr>
<tr>
<td><strong>Federal agreement (Div 3 CA)</strong></td>
<td>Deemed <em>transitional agreement</em> <em>(Sch 14)</em> Five-year nominal expiry date</td>
<td>May negotiate state agreement or decide to revert to state award(s). May apply to AIRC to be released from federal system if intractable industrial dispute</td>
<td>Transitional agreement expires and coverage reverts to state system</td>
</tr>
<tr>
<td><strong>Award free</strong></td>
<td>No change</td>
<td>May enter state agreement subject to state rules</td>
<td>Contract of employment continues to apply. State and federal legislation continues to apply</td>
</tr>
</tbody>
</table>


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Appendix B—Estimates of impact on coverage under state jurisdictions

‘New South Wales:’ Estimated coverage by the Corporations power is 75 per cent of all NSW workers, a spokesperson for IR Minister John Della Bosca said. This could be less than in some other states because NSW has a fair amount of public sector workers. While a NSW Office of IR analysis of prosecution compliance activity put the coverage at 65 per cent, this figure would not have captured everyone.

Western Australia: 60 per cent of WA’s public sector workforce is expected to be affected by the Howard Govt’s IR changes. The state employs 120,000 public sector workers, from a total workforce of just over a million people (equating to 11 per cent of the total workforce).

Queensland: the Qld Dept of IR put the current breakdown at 70 per cent (approx 1.1m workers) in the state system; 30 per cent (approx 400,000 workers) in the federal system. Following the reforms, the picture is expected to be 40 per cent (approx 630,000) workers left in the state system, and 60 per cent (approx 940,000) brought under the federal system. Some 70 per cent of all Qld workers are under state awards.

South Australia: the figure is likely to be upwards of 65 per cent, workers of incorporated entities making up 61.7 per cent of workers, unincorporated workers: 18.1 per cent, federal govt workers: 2.7 per cent; state govt workers 13.1 per cent; state govt corporations 2.8 per cent and local govt workers 1.9 per cent.

Tasmania: it is estimated 75 per cent to 85 per cent of the state’s private sector workforce would be brought under the federal jurisdiction. Some state govt employment could also be caught by the Corporations power. All federal govt workers in Tas would come under the new system; as would virtually all local govt employees. It is estimated 50 per cent to 55 per cent of all Tassie workers are under state awards and agreements, including award-free workers covered by state laws.

Australian Capital Territory, all workers will automatically be affected by the reforms. The territory has 101,000 private sector workers (approx 56 per cent of all workers); 60,300 Commonwealth public sector workers (approx 34 per cent); and 19,100 territory public sector workers (approx 10 per cent).

In Victoria and the Northern Territory, all employers and employees will be covered by WorkChoices.

Nationally, WR Minister Kevin Andrews has said some 80 per cent to 85 per cent of workers would be covered by the new federal arrangements.

(Source: Workforce, Issue 1515, 28 October 2005)
Appendix C—Table of contents for the Bill

<table>
<thead>
<tr>
<th>SCHEDULE 1 MAIN AMENDMENTS</th>
<th>4</th>
</tr>
</thead>
<tbody>
<tr>
<td>PART 1A AUSTRALIAN FAIR PAY COMMISSION</td>
<td>27</td>
</tr>
<tr>
<td>Division 1 Preliminary</td>
<td>27</td>
</tr>
<tr>
<td>Division 2 Australian Fair Pay Commission</td>
<td>28</td>
</tr>
<tr>
<td>Subdivision A – Establishment and functions</td>
<td>28</td>
</tr>
<tr>
<td>Subdivision B – AFPC’s wage setting function</td>
<td>28</td>
</tr>
<tr>
<td>Subdivision C – Operation of the AFPC</td>
<td>30</td>
</tr>
<tr>
<td>Subdivision D – AFPC Chair</td>
<td>31</td>
</tr>
<tr>
<td>Subdivision E – AFPC Commissioners</td>
<td>34</td>
</tr>
<tr>
<td>Division 3 AFPC Secretariat</td>
<td>37</td>
</tr>
<tr>
<td>Subdivision A – Establishment and function</td>
<td>37</td>
</tr>
<tr>
<td>Subdivision B – Operation of the AFPC Secretariat</td>
<td>37</td>
</tr>
<tr>
<td>Subdivision C – The Director of the Secretariat</td>
<td>38</td>
</tr>
<tr>
<td>Subdivision D – Staff and consultants</td>
<td>41</td>
</tr>
<tr>
<td>Division 3A General matters relating to the powers and procedures of the Commission</td>
<td>44</td>
</tr>
<tr>
<td>Subdivision A – General matters Commission to take into account</td>
<td>44</td>
</tr>
<tr>
<td>Subdivision B – Particular powers and procedures of the Commission</td>
<td>46</td>
</tr>
<tr>
<td>PART V WORKPLACE INSPECTORS</td>
<td>60</td>
</tr>
<tr>
<td>PART VA THE AUSTRALIAN FAIR PAY AND CONDITIONS STANDARD</td>
<td>65</td>
</tr>
<tr>
<td>Division 1 Preliminary</td>
<td>65</td>
</tr>
<tr>
<td>Division 2 Wages</td>
<td>68</td>
</tr>
<tr>
<td>Subdivision A – Preliminary</td>
<td>68</td>
</tr>
<tr>
<td>Subdivision B – Guarantee of basic rates of pay</td>
<td>75</td>
</tr>
<tr>
<td>Subdivision C – Guarantee of casual loadings</td>
<td>77</td>
</tr>
<tr>
<td>Subdivision D – Guarantee against reductions below pre-reform commencement rates</td>
<td>79</td>
</tr>
<tr>
<td>Subdivision E – The guarantee against reductions below Federal Minimum Wages (FMWs)</td>
<td>82</td>
</tr>
<tr>
<td>Subdivision F – Federal Minimum Wages (FMWs)</td>
<td>83</td>
</tr>
<tr>
<td>Subdivision G – Australian Pay and Classification Scales (APCSs): general provisions</td>
<td>86</td>
</tr>
<tr>
<td>Subdivision H – Australian Pay and Classification Scales: Preserved APCSs</td>
<td>90</td>
</tr>
<tr>
<td>Subdivision I – Australian Pay and Classification Scales: new APCSs</td>
<td>95</td>
</tr>
<tr>
<td>Subdivision J – Australian Pay and Classification Scales: duration, adjustment and revocation of APCSs (preserved or new)</td>
<td>95</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Subdivision K – Adjustments to incorporate 2005 Safety Net Review etc</th>
<th>96</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subdivision L – Special provisions relating to APCSs for employees with disabilities and employees to whom training arrangements apply</td>
<td>97</td>
</tr>
<tr>
<td>Subdivision M – Miscellaneous</td>
<td>99</td>
</tr>
<tr>
<td><strong>Division 3 Maximum ordinary hours of work</strong></td>
<td>100</td>
</tr>
<tr>
<td>Subdivision A – Preliminary</td>
<td>100</td>
</tr>
<tr>
<td>Subdivision B – Guarantee of maximum ordinary hours of work</td>
<td>101</td>
</tr>
<tr>
<td><strong>Division 4 Annual leave</strong></td>
<td>103</td>
</tr>
<tr>
<td>Subdivision A – Preliminary</td>
<td>103</td>
</tr>
<tr>
<td>Subdivision B – Guarantee of annual leave</td>
<td>105</td>
</tr>
<tr>
<td>Subdivision C – Annual leave rules</td>
<td>107</td>
</tr>
<tr>
<td>Subdivision D – Service: annual leave</td>
<td>109</td>
</tr>
<tr>
<td><strong>Division 5 Personal leave</strong></td>
<td>109</td>
</tr>
<tr>
<td>Subdivision A – Preliminary</td>
<td>109</td>
</tr>
<tr>
<td>Subdivision B – Guarantee of paid personal/carer’s leave</td>
<td>112</td>
</tr>
<tr>
<td>Subdivision C – Guarantee of unpaid carer’s leave</td>
<td>115</td>
</tr>
<tr>
<td>Subdivision D – Notice and evidence requirements</td>
<td>116</td>
</tr>
<tr>
<td>Subdivision E - Guarantee of compassionate leave</td>
<td>119</td>
</tr>
<tr>
<td>Subdivision F – Personal leave: service</td>
<td>120</td>
</tr>
<tr>
<td><strong>Division 6 Parental leave</strong></td>
<td>121</td>
</tr>
<tr>
<td>Subdivision A – Preliminary</td>
<td>121</td>
</tr>
<tr>
<td>Subdivision B – Guarantee of maternity leave</td>
<td>124</td>
</tr>
<tr>
<td>Subdivision C – Maternity leave: documentation</td>
<td>128</td>
</tr>
<tr>
<td>Subdivision D – Maternity leave: from start to finish</td>
<td>132</td>
</tr>
<tr>
<td>Subdivision E – Guarantee of paternity leave</td>
<td>138</td>
</tr>
<tr>
<td>Subdivision F – Paternity leave: documentation</td>
<td>141</td>
</tr>
<tr>
<td>Subdivision G – Paternity leave: from start to finish</td>
<td>143</td>
</tr>
<tr>
<td>Subdivision H – Guarantee of adoption leave</td>
<td>147</td>
</tr>
<tr>
<td>Subdivision I – Adoption leave: documentation</td>
<td>151</td>
</tr>
<tr>
<td>Subdivision J – Adoption leave: from start to finish</td>
<td>155</td>
</tr>
<tr>
<td>Subdivision K – Parental leave: service</td>
<td>159</td>
</tr>
<tr>
<td><strong>PART VB WORKPLACE AGREEMENTS</strong></td>
<td>160</td>
</tr>
<tr>
<td><strong>Division 1 Preliminary</strong></td>
<td>160</td>
</tr>
<tr>
<td><strong>Division 2 Types of workplace agreements</strong></td>
<td>162</td>
</tr>
</tbody>
</table>

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This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
| Division 3 Bargaining agents | 165 |
| Division 4 Pre-lodgment procedure | 167 |
| Division 5 Lodgment | 171 |
| Division 6 Operation of workplace agreements and persons bound | 173 |
| Division 7 Content of workplace agreements | 176 |
| Division 8 Varying a workplace agreement | 184 |
| Division 9 Terminating a workplace agreement | 192 |
| Division 10 Prohibited conduct | 203 |
| Division 11 Contravention of civil remedy provisions | 204 |
| PART VC INDUSTRIAL ACTION | 209 |
| Division 1 Preliminary | 209 |
| Division 2 Bargaining periods | 213 |
| Division 3 Protected action | 229 |
| Division 4 Secret Ballots on proposed protection action | 240 |

**Warning:**

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
Subdivision B – Application for order for protected action ballot to be held | 242
Subdivision C – Determination of application and order for ballot to be held | 245
Subdivision D – Conduct and results of protected action ballot | 254
Subdivision F – Funding of ballots | 259
Subdivision G – Miscellaneous | 261

Division 5 Industrial action not to be engaged in before nominal expiry date of workplace agreement or workplace determination | 266
Division 6 Orders and injunctions against industrial action | 270
Division 7 Ministerial declarations terminating bargaining periods | 273
Division 8 Workplace determinations | 275
Division 9 Payments in relation to periods of industrial action | 278

PART VI AWARDS | 282
Division 1 Preliminary | 282
Division 2 Terms that may be included in awards | 285
Subdivision A – Allowable award matters | 285
Subdivision B – Other terms that are permitted to be in awards | 290
Subdivision C – Terms in awards that cease to have effect | 293
Subdivision D – Regulations relating to part-time employees | 293
Division 3 Preserved award entitlements | 294
Division 4 Award rationalisation and award simplification | 299
Subdivision A – Award rationalisation | 299
Subdivision B – Award simplification | 303
Subdivision C – Special technical requirements | 305
Division 5 Variation and revocation of awards | 306
Subdivision A – Variation of awards | 306
Subdivision B – Revocation of awards | 309
Division 6 Binding additional employers, employees and organisations to awards | 310
Division 7 Technical matters | 313

PART VIAA TRANSMISSION OF BUSINESS RULES | 317
Division 1 Introductory | 317
Division 2 Application of Part | 318
Division 3 Transmission of AWA | 320
Division 4 Transmission of collective agreement | 322
Subdivision A – General | 322

**Warning:**
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
## Subdivision B – Commission’s powers

### Division 5 Transmission of award

### Division 6 Transmission of APCS

### Division 7 Entitlements under the Australian Fair Pay and Conditions Standard

### Division 8 Notice requirements and enforcement

### Division 9 Miscellaneous

## PART VIIA DISPUTE RESOLUTION PROCESSES

### Division 1 Preliminary

### Division 2 Model dispute resolution process

### Division 3 Alternative dispute resolution process conducted by Commission under model dispute resolution process

### Division 4 Alternative dispute resolution process used to resolve other disputes

### Division 5 Dispute resolution process conducted by the Commission under workplace agreement

### Division 6 Dispute resolution process conducted by another provider

## PART IX RIGHT OF ENTRY

### Division 1 Preliminary

### Division 2 Issue of permits

### Division 3 Expiry, revocation, suspension etc of permits

### Division 4 Right of entry to investigate suspected breaches

### Division 5 Entry for OHS purposes

### Division 6 Right of entry to hold discussions with employees

### Division 7 Prohibitions

### Division 8 Enforcement

### Division 9 Powers of the Commission

## PART XA FREEDOM OF ASSOCIATION

### Division 1 Preliminary

### Division 2 Conduct to which this Part applies

### Division 3 General prohibitions relating to freedom of association

### Division 4 Conduct by employers etc.

### Division 5 Conduct by employees etc.

### Division 6 Conduct by industrial associations etc.

### Division 7 Conduct in relation to industrial instruments

### Division 8 False or misleading representations about bargaining services fees etc.

### Division 9 Enforcement

---

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<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Division 10 Objectionable provisions</td>
<td>447</td>
</tr>
<tr>
<td>Division 11 Miscellaneous</td>
<td>448</td>
</tr>
<tr>
<td>PART XIV JURISDICTION OF THE FEDERAL COURT OF AUSTRALIA AND FEDERAL MAGISTRATES COURT</td>
<td>458</td>
</tr>
<tr>
<td>PART XV MATTERS REFERRED BY VICTORIA</td>
<td>460</td>
</tr>
<tr>
<td>Division 1 Introduction</td>
<td>460</td>
</tr>
<tr>
<td>Division 2 Pay and conditions</td>
<td>461</td>
</tr>
<tr>
<td>Division 3 Workplace agreements</td>
<td>466</td>
</tr>
<tr>
<td>Division 4 Industrial action</td>
<td>469</td>
</tr>
<tr>
<td>Division 5 Meal breaks</td>
<td>472</td>
</tr>
<tr>
<td>Division 6 Termination of employment</td>
<td>473</td>
</tr>
<tr>
<td>Division 7 Freedom of association</td>
<td>474</td>
</tr>
<tr>
<td>Division 8 Right of entry</td>
<td>474</td>
</tr>
<tr>
<td>Division 9 Transmission of business</td>
<td>475</td>
</tr>
<tr>
<td>Division 10 Employment agreements</td>
<td>477</td>
</tr>
<tr>
<td>Division 11 Exclusion of Victorian laws</td>
<td>482</td>
</tr>
<tr>
<td>Division 12 Additional effect of other provisions of this Act</td>
<td>483</td>
</tr>
<tr>
<td>PART 3 GENERAL DUTIES IN RELATION TO ORDERS AND DIRECTIONS</td>
<td>507</td>
</tr>
<tr>
<td>Division 1 Preliminary</td>
<td>507</td>
</tr>
<tr>
<td>Division 2 General duties in relation to orders and directions</td>
<td>507</td>
</tr>
<tr>
<td>PART 4B FUNCTIONS AND POWERS OF THE COMMISSION</td>
<td>513</td>
</tr>
<tr>
<td>SCHEDULE 1 EXTRA PROVISIONS RELATING TO DEFINITIONS</td>
<td>516</td>
</tr>
<tr>
<td>SCHEDULE 13 TRANSITIONAL ARRANGEMENTS FOR PARTIES BOUND BY FEDERAL AWARDS</td>
<td>518</td>
</tr>
<tr>
<td>PART 1 PRELIMINARY</td>
<td>519</td>
</tr>
<tr>
<td>Division 1 Objects of Schedule</td>
<td>519</td>
</tr>
<tr>
<td>Division 2 Interpretation</td>
<td>519</td>
</tr>
<tr>
<td>Division 3 Continuing operation of awards</td>
<td>525</td>
</tr>
<tr>
<td>PART 2 PERFORMANCE OF COMMISSION’S FUNCTIONS</td>
<td>526</td>
</tr>
<tr>
<td>PART 3 POWERS AND PROCEDURES OF THE COMMISSION FOR DEALING WITH INDUSTRIAL DISPUTES</td>
<td>530</td>
</tr>
<tr>
<td>Division 1 Settlement of industrial disputes</td>
<td>530</td>
</tr>
<tr>
<td>Subdivision A – Scope of industrial disputes</td>
<td>530</td>
</tr>
<tr>
<td>Subdivision B – Allowable transitional award matters</td>
<td>531</td>
</tr>
</tbody>
</table>

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This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
| Subdivision C – Other terms that may be included in transitional awards | 535 |
| Subdivision D – Terms in transitional awards that cease to have effect | 538 |
| **Division 2 Variation and revocation of transitional awards** | 538 |
| **Division 3 Procedure for dealing with industrial disputes** | 542 |
| **Division 4 Powers of Commission for dealing with industrial disputes** | 552 |
| **Division 5 Other powers of the Commission** | 555 |
| **PART 4 BALLOTS ORDERED BY COMMISSION** | 557 |
| **PART 5 CIRCUMSTANCES IN WHICH TRANSITIONAL AWARDS CEASE TO BE BINDING** | 559 |
| **PART 6 TECHNICAL MATTERS RELATING TO TRANSITIONAL AWARDS** | 561 |
| **PART 7 MATTERS RELATING TO VICTORIA** | 565 |
| **Division 1 Matters referred by Victoria** | 565 |
| Subdivision A – Introduction | 565 |
| Subdivision B – Industrial disputes | 567 |
| Subdivision C – Allowable transitional award matters | 567 |
| Subdivision D – Preserved transitional award terms | 568 |
| Subdivision E – Common rules | 571 |
| Subdivision F – Transmission of business | 576 |
| Subdivision G – Modification of certain provisions of this Act | 577 |
| **Division 2 Other matters** | 577 |
| Subdivision A – Allowable transitional award matters | 577 |
| Subdivision B – Preserved transitional award terms | 577 |
| Subdivision C – Modification of certain provisions of this Act | 580 |
| **PART 8 MISCELLANEOUS** | 581 |
| **SCHEDULE 14 TRANSITIONAL ARRANGEMENTS FOR EXISTING PRE-REFORM FEDERAL AGREEMENTS ETC.** | 583 |
| **PART 1 PRELIMINARY** | 583 |
| **PART 2 PRE-REFORM CERTIFIED AGREEMENTS** | 584 |
| **Division 1 General** | 584 |
| **Division 2 Special Rules for Division 3 pre-reforment certified agreements with excluded employers** | 588 |
| **PART 3 PRE-REFORM AWAS** | 591 |
| **PART 4 AWARDS UNDER SUBSECTION 170MX(3) OF THE PRE-REFORM ACT** | 593 |
| **PART 5 EXCEPTIONAL MATTERS ORDERS** | 594 |
| **PART 6 OLD IR AGREEMENTS** | 595 |

**Warning:**

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
| PART 7 RELATIONSHIPS BETWEEN PRE REFORM AGREEMENTS ETC. AND AUSTRALIAN FAIR PAY AND CONDITIONS STANDARD | 595 |
| PART 8 APPLICATIONS FOR CERTIFICATION ETC BEFORE REFORM COMMENCEMENT | 596 |
| PART 9 MATTERS RELATING TO VICTORIA | 596 |
| SCHEDULE 15 TRANSITIONAL TREATMENT OF STATE EMPLOYMENT AGREEMENTS AND STATE AWARDS | 599 |
| PART 1 PRELIMINARY | 599 |
| PART 2 PRESERVED STATE AGREEMENTS | 600 |
| Division 1 Preserved State agreements | 600 |
| Division 2 Terms of preserved State agreements | 603 |
| Division 3 Varying a preserved State agreement | 605 |
| Division 4 Enforcing preserved State agreements | 608 |
| Division 5 Terminating a preserved State agreement | 609 |
| Division 6 Industrial action | 610 |
| Division 7 Miscellaneous | 613 |
| Division 8 Regulations | 614 |
| PART 3 NOTIOINAL AGREEMENTS PRESERVING STATE AWARDS | 614 |
| Division 1 Notional agreements preserving State awards | 614 |
| Division 2 Terms of notional agreement | 618 |
| Division 3 Varying a notional agreement preserving State awards | 620 |
| Division 4 Enforcing the notional agreement | 623 |
| Division 6 Preserved notional terms and preserved notional entitlements | 624 |
| Division 6 Protected conditions | 629 |
| Division 7 Miscellaneous | 630 |
| Division 8 Regulations | 631 |
| SCHEDULE 16 TRANSMISSION OF BUSINESS RULES (TRANSITIONAL INSTRUMENTS) | 631 |
| PART 1 INTRODUCTORY | 631 |
| PART 2 APPLICATION OF SCHEDULE | 634 |
| PART 3 TRANSMISSION OF PRE-REFORM AWAS | 635 |
| PART 4 TRANSMISSION OF DIVISION 2 PRE-REFORM CERTIFIED AGREEMENTS | 637 |
| Division 1 General | 637 |
| Division 2 Commission’s powers | 641 |
| PART 5 TRANSMISSION OF STATE TRANSITIONAL INSTRUMENTS | 644 |

*Warning:*
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Division 1 General</td>
<td>644</td>
</tr>
<tr>
<td>Division 2 Commission’s powers</td>
<td>648</td>
</tr>
<tr>
<td>PART 6 NOTICE REQUIREMENTS AND ENFORCEMENT</td>
<td>651</td>
</tr>
<tr>
<td>PART 7 MATTERS RELATING TO VICTORIA</td>
<td>656</td>
</tr>
<tr>
<td>PART 8 TRANSITIONAL INSTRUMENTS AND TRANSMITTED POST-REFORM INSTRUMENTS</td>
<td>657</td>
</tr>
<tr>
<td>PART 9 MISCELLANEOUS</td>
<td>658</td>
</tr>
<tr>
<td>SCHEDULE 2 TRANSITIONAL ARRANGEMENTS FOR STATE ORGANISATIONS</td>
<td>659</td>
</tr>
<tr>
<td>SCHEDULE 3 SCHOOL-BASED APPRENTICES AND TRAINEES</td>
<td>666</td>
</tr>
<tr>
<td>SCHEDULE 4 TRANSITIONAL AND OTHER PROVISIONS</td>
<td>674</td>
</tr>
<tr>
<td>SCHEDULE 5 RENUMBERING THE WORKPLACE RELATIONS ACT 1996</td>
<td>685</td>
</tr>
</tbody>
</table>

With acknowledgments to the NSW Office of Industrial Relations.
Law and Bills Digest Section, Parliamentary Library, Canberra, November 2005

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## Appendix D—Table Of Contents for the Explanatory Memorandum

<table>
<thead>
<tr>
<th>OUTLINE</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>FINANCIAL IMPACT STATEMENT</td>
<td>3</td>
</tr>
<tr>
<td>REGULATION IMPACT STATEMENT</td>
<td>4</td>
</tr>
<tr>
<td>NOTES ON CLAUSES</td>
<td>32</td>
</tr>
<tr>
<td>SCHEDULE 1</td>
<td>34</td>
</tr>
<tr>
<td>PART 1A – AUSTRALIAN FAIR PAY COMMISSION</td>
<td>47</td>
</tr>
<tr>
<td>Division 1 Preliminary</td>
<td>48</td>
</tr>
<tr>
<td>Division 2 Australian Fair Pay Commission</td>
<td>48</td>
</tr>
<tr>
<td>Division 3 AFPC Secretariat</td>
<td>53</td>
</tr>
<tr>
<td>Division 3A General matters relating to the powers and procedures of the Commission</td>
<td>60</td>
</tr>
<tr>
<td>PART VA – THE AUSTRALIAN FAIR PAY AND CONDITIONS STANDARD</td>
<td>76</td>
</tr>
<tr>
<td>Division 1 Preliminary</td>
<td>77</td>
</tr>
<tr>
<td>Division 2 Wages</td>
<td>80</td>
</tr>
<tr>
<td>Division 3 Maximum ordinary hours of work</td>
<td>104</td>
</tr>
<tr>
<td>Division 4 Annual leave</td>
<td>107</td>
</tr>
<tr>
<td>Division 5 Personal leave</td>
<td>113</td>
</tr>
<tr>
<td>Division 6 Parental leave</td>
<td>120</td>
</tr>
<tr>
<td>PART VB – WORKPLACE AGREEMENTS</td>
<td>145</td>
</tr>
<tr>
<td>Division 1 Preliminary</td>
<td>145</td>
</tr>
<tr>
<td>Division 2 Types of workplace agreements</td>
<td>148</td>
</tr>
<tr>
<td>Division 3 Bargaining agents</td>
<td>152</td>
</tr>
<tr>
<td>Division 4 Pre-lodgment procedure</td>
<td>155</td>
</tr>
<tr>
<td>Division 5 Lodgment</td>
<td>159</td>
</tr>
<tr>
<td>Division 6 Operation of workplace agreements and persons bound</td>
<td>163</td>
</tr>
<tr>
<td>Division 7 Content of workplace agreements</td>
<td>168</td>
</tr>
<tr>
<td>Division 8 Varying a workplace agreement</td>
<td>178</td>
</tr>
<tr>
<td>Division 9 Terminating a workplace agreement</td>
<td>188</td>
</tr>
<tr>
<td>Division 10 Prohibited conduct</td>
<td>203</td>
</tr>
<tr>
<td>Division 11 Contravention of civil penalty provisions</td>
<td>205</td>
</tr>
<tr>
<td>PART VC – INDUSTRIAL ACTION</td>
<td>209</td>
</tr>
<tr>
<td>Division 1 Preliminary</td>
<td>209</td>
</tr>
<tr>
<td>Division 2 Bargaining periods</td>
<td>210</td>
</tr>
</tbody>
</table>

**Warning:**

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
| Division 3 Protected action | 217 |
| Division 4 Secret ballots of proposed protection action | 222 |
| Division 5 Industrial action not to be engaged in before nominal expiry of workplace agreement or workplace determination | 237 |
| Division 6 Orders and injunctions against industrial action | 238 |
| Division 7 Ministerial declarations terminating bargaining periods | 239 |
| Division 8 Workplace determinations | 240 |
| Division 9 Payments in relations to periods of industrial action | 242 |

### PART VI AWARDS

| Division 1 Preliminary | 244 |
| Division 2 Terms that may be included in awards | 245 |
| Division 3 Preserved award entitlements | 247 |
| Division 4 Award rationalisation and award simplification | 248 |
| Division 5 Variation and revocation of awards | 249 |
| Division 6 Binding additional employers, employees and organisations to awards | 250 |
| Division 7 Technical matters | 251 |

### PART VIAA TRANSMISSION OF BUSINESS RULES

| Division 1 Introductory | 252 |
| Division 2 Application of Part | 253 |
| Division 3 Transmission of AWA | 254 |
| Division 4 Transmission of collective agreement | 255 |
| Division 5 Transmission of award | 256 |
| Division 6 Transmission of APCS | 257 |
| Division 7 Entitlements under the Australian Fair Pay and Conditions Standard | 258 |
| Division 8 Notice requirements and enforcement | 259 |
| Division 9 Miscellaneous | 260 |

### PART VIIA DISPUTE RESOLUTION PROCESSES

| Division 1 Preliminary | 261 |
| Division 2 Model dispute resolution process | 262 |
| Division 3 Alternative dispute resolution process conducted by Commission under model dispute resolution process | 263 |
| Division 4 Alternative dispute resolution process used to resolve other disputes | 264 |
| Division 5 Dispute resolution process conducted by the Commission under workplace agreement | 265 |
| Division 6 Dispute resolution process conducted by another provider | 266 |

**Warning:**

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
<table>
<thead>
<tr>
<th>PART IX RIGHT OF ENTRY</th>
<th>363</th>
</tr>
</thead>
<tbody>
<tr>
<td>Division 1 Preliminary</td>
<td>363</td>
</tr>
<tr>
<td>Division 2 Issue of permits</td>
<td>365</td>
</tr>
<tr>
<td>Division 3 Expiry, revocation, suspension etc of entry permits</td>
<td>366</td>
</tr>
<tr>
<td>Division 4 Right of entry to investigate suspected breaches</td>
<td>368</td>
</tr>
<tr>
<td>Division 5 Entry for OHS purposes</td>
<td>372</td>
</tr>
<tr>
<td>Division 6 Right of entry to hold discussions with employees</td>
<td>374</td>
</tr>
<tr>
<td>Division 7 Prohibitions</td>
<td>376</td>
</tr>
<tr>
<td>Division 8 Enforcement</td>
<td>377</td>
</tr>
<tr>
<td>Division 9 Powers of the Commission</td>
<td>377</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>PART XA FREEDOM OF ASSOCIATION</th>
<th>380</th>
</tr>
</thead>
<tbody>
<tr>
<td>Division 1 Preliminary</td>
<td>381</td>
</tr>
<tr>
<td>Division 2 Conduct to which this Part applies</td>
<td>382</td>
</tr>
<tr>
<td>Division 3 General prohibitions relating to freedom of association</td>
<td>383</td>
</tr>
<tr>
<td>Division 4 Conduct by employers etc.</td>
<td>384</td>
</tr>
<tr>
<td>Division 5 Conduct by employees etc.</td>
<td>384</td>
</tr>
<tr>
<td>Division 6 Conduct by industrial associations etc.</td>
<td>385</td>
</tr>
<tr>
<td>Division 7 Conduct in relation to industrial instruments</td>
<td>388</td>
</tr>
<tr>
<td>Division 8 False or misleading representations about bargaining services fees etc.</td>
<td>388</td>
</tr>
<tr>
<td>Division 9 Enforcement</td>
<td>389</td>
</tr>
<tr>
<td>Division 10 Objectionable provisions</td>
<td>390</td>
</tr>
<tr>
<td>Division 11 Miscellaneous</td>
<td>391</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>PART XIV JURISDICTION OF THE FEDERAL COURT OF AUSTRALIA AND FEDERAL MAGISTRATES COURT</th>
<th>398</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>PART XV MATTERS REFERRED BY VICTORIA</th>
<th>401</th>
</tr>
</thead>
<tbody>
<tr>
<td>Division 1 Introduction</td>
<td>401</td>
</tr>
<tr>
<td>Division 2 Pay and conditions</td>
<td>403</td>
</tr>
<tr>
<td>Division 3 Workplace agreements</td>
<td>410</td>
</tr>
<tr>
<td>Division 4 Industrial action</td>
<td>411</td>
</tr>
<tr>
<td>Division 5 Meal breaks</td>
<td>413</td>
</tr>
<tr>
<td>Division 6 Termination of employment</td>
<td>413</td>
</tr>
<tr>
<td>Division 7 Freedom of Association</td>
<td>414</td>
</tr>
<tr>
<td>Division 8 Right of entry</td>
<td>414</td>
</tr>
<tr>
<td>Division 9 Transmission of business</td>
<td>416</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Part/Division</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Division 10</td>
<td>Employment agreements</td>
<td>417</td>
</tr>
<tr>
<td>Division 11</td>
<td>Exclusion of Victorian laws</td>
<td>420</td>
</tr>
<tr>
<td>Division 12</td>
<td>Other provisions of this Act</td>
<td>421</td>
</tr>
<tr>
<td>PART 3</td>
<td>GENERAL DUTIES IN RELATION TO ORDERS AND DIRECTIONS</td>
<td>437</td>
</tr>
<tr>
<td>Division 1</td>
<td>Preliminary</td>
<td>437</td>
</tr>
<tr>
<td>Division 2</td>
<td>General duties in relation to orders and directions</td>
<td>437</td>
</tr>
<tr>
<td>PART 4B</td>
<td>FUNCTIONS AND POWERS OF THE COMMISSION</td>
<td>441</td>
</tr>
<tr>
<td>SCHEDULE 1</td>
<td>EXTRA PROVISIONS RELATING TO DEFINITIONS</td>
<td>443</td>
</tr>
<tr>
<td>SCHEDULE 13</td>
<td>TRANSITIONAL ARRANGEMENTS FOR PARTIES BOUND BY FEDERAL AWARDS</td>
<td>444</td>
</tr>
<tr>
<td>PART 1</td>
<td>PRELIMINARY</td>
<td>445</td>
</tr>
<tr>
<td>Division 1</td>
<td>Objects of Schedule</td>
<td>445</td>
</tr>
<tr>
<td>Division 2</td>
<td>Interpretation</td>
<td>446</td>
</tr>
<tr>
<td>Division 3</td>
<td>Continuing operation of awards</td>
<td>446</td>
</tr>
<tr>
<td>PART 2</td>
<td>PERFORMANCE OF COMMISSION'S FUNCTIONS</td>
<td>448</td>
</tr>
<tr>
<td>PART 3</td>
<td>POWERS AND PROCEDURES OF COMMISSION FOR DEALING WITH INDUSTRIAL DISPUTES</td>
<td>451</td>
</tr>
<tr>
<td>Division 1</td>
<td>Settlement of industrial disputes</td>
<td>451</td>
</tr>
<tr>
<td>Division 2</td>
<td>Variation and revocation of transitional awards</td>
<td>461</td>
</tr>
<tr>
<td>Division 3</td>
<td>Procedure for dealing with industrial disputes</td>
<td>464</td>
</tr>
<tr>
<td>Division 4</td>
<td>Powers of Commission for dealing with industrial disputes</td>
<td>466</td>
</tr>
<tr>
<td>Division 5</td>
<td>Other powers of the Commission</td>
<td>467</td>
</tr>
<tr>
<td>PART 4</td>
<td>BALLOTS ORDERED BY THE COMMISSION</td>
<td>469</td>
</tr>
<tr>
<td>PART 5</td>
<td>CIRCUMSTANCES IN WHICH TRANSITIONAL AWARDS CEASE TO BE BINDING</td>
<td>470</td>
</tr>
<tr>
<td>PART 6</td>
<td>TECHNICAL MATTERS RELATING TO TRANSITIONAL AWARDS</td>
<td>472</td>
</tr>
<tr>
<td>PART 7</td>
<td>MATTERS RELATING TO VICTORIA</td>
<td>475</td>
</tr>
<tr>
<td>Division 1</td>
<td>Matters referred by Victoria</td>
<td>475</td>
</tr>
<tr>
<td>Division 2</td>
<td>Other matters</td>
<td>481</td>
</tr>
<tr>
<td>PART 8</td>
<td>MISCELLANEOUS</td>
<td>482</td>
</tr>
<tr>
<td>SCHEDULE 14</td>
<td>TRANSITIONAL ARRANGEMENTS FOR EXISTING PRE-REFORM AGREEMENTS ETC</td>
<td>483</td>
</tr>
<tr>
<td>PART 1</td>
<td>PRELIMINARY</td>
<td>483</td>
</tr>
<tr>
<td>PART 2</td>
<td>PRE-REFORM CERTIFIED AGREEMENTS</td>
<td>483</td>
</tr>
<tr>
<td>Division 1</td>
<td>General</td>
<td>483</td>
</tr>
</tbody>
</table>

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PART 3 TRANSMISSION OF PRE-REFORM AWA 524
PART 4 TRANSMISSION OF DIVISION 2 PRE-REFORM CERTIFIED AGREEMENTS 526
Division 1 General 526
Division 2 Commission’s Powers 530
PART 5 TRANSMISSION OF STATE TRANSITIONAL INSTRUMENTS 532
Division 1 General 533
Division 2 Commission’s powers 536
PART 6 NOTICE REQUIREMENTS AND ENFORCEMENT 539
PART 7 MATTERS RELATING TO VICTORIA 542
PART 8 TRANSITIONAL INSTRUMENTS AND TRANSMITTED POST-REFORM INSTRUMENTS 545
PART 9 MISCELLANEOUS 545
SCHEDULE 2 TRANSITIONAL ARRANGEMENTS FOR STATE ORGANISATIONS 546
SCHEDULE 3 SCHOOL-BASED APPRENTICES AND TRAINEES 551
SCHEDULE 4 TRANSITIONAL AND OTHER PROVISIONS 557
SCHEDULE 5 RENUMBERING THE WORKPLACE RELATIONS ACT 1996 565

With acknowledgments to the NSW Office of Industrial Relations.
Law and Bills Digest Section, Parliamentary Library, Canberra, November 2005

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This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
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Appendix E—Metal, Engineering etc Award 1998

6.1.1 Ordinary Hours of Work—Day Workers

6.1.1(a) Subject to subclause 6.1.4, the ordinary hours of work for day workers are to be an average of 38 per week but not exceeding 152 hours in 28 days.

6.1.1(b) The ordinary hours of work may be worked on any day or all of the days of the week, Monday to Friday. The days on which ordinary hours are worked may include Saturday and Sunday subject to agreement between the employer and the majority of employees concerned. Agreement in this respect may also be reached between the employer and an individual employee.

6.1.1(c) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 6.00 am and 6.00 pm. The spread of hours (ie. 6.00am to 6.00 pm) may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned or in appropriate circumstances, between the employer and an individual employee.

6.1.1(d) Any work performed outside the spread of hours is to be paid for at overtime rates. However, any work performed by an employee prior to the spread of hours which is continuous with ordinary hours for the purpose, for example, of getting the plant in a state of readiness for production work is to be regarded as part of the 38 ordinary hours of work.

6.1.1(e) Where agreement is reached in accordance with 6.1.1(b) the minimum rate to be paid for a day worker for ordinary time worked between midnight on Friday and midnight on Saturday shall be time and a half.

6.1.1(f) Where agreement is reached in accordance with 6.1.1(b) the minimum rate to be paid for a day worker for ordinary time worked between midnight on Saturday and midnight on Sunday shall be double time.

6.1.2 Ordinary Hours of Work—Continuous Shift Workers

6.1.2(a) Continuous shiftwork means work carried on with consecutive shifts of employees throughout the 24 hours of each of at least six consecutive days without interruption except for breakdowns or meal breaks or due to unavoidable causes beyond the control of the employer.

6.1.2(b) Subject to 6.1.2(c) the ordinary hours of continuous shiftworkers are, at the discretion of the employer, to average 38 hours per week inclusive of meal breaks and must not exceed 152 hours in 28 consecutive days. Continuous shift workers are entitled to a 20 minute meal break on each shift which shall be counted as time worked.

6.1.2(c) By agreement between the employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is achieved over a period which exceeds 28 consecutive days but does not exceed 12 months.

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6.1.2(d) Except at the regular change-over of shifts, an employee shall not be required to work more than one shift in each 24 hours.

6.1.3 Ordinary Hours of Work—Non-Continuous

6.1.3(a) Subject to 6.1.3(b), the ordinary hours of work for non-continuous shift workers are to be an average of 38 per week and must not exceed 152 hours in 28 consecutive days.

6.1.3(b) By agreement between the employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is allowed over a period which exceeds 28 consecutive days but does not exceed 12 months.

6.1.3(c) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer.

6.1.3(d) Except at change-over of shifts an employee will not be required to work more than one shift in each 24 hours.

6.1.4 Methods of Arranging Ordinary Working Hours

6.1.4(a) Subject to the employer's right to fix the daily hours of work for day workers from time to time within the spread of hours referred to in 6.1.1(c) and the employer's right to fix the commencing and finishing time of shifts from time to time, the arrangement of ordinary working hours is to be by agreement between the employer and the majority of employees in the enterprise or part of the enterprise concerned. This does not preclude the employer reaching agreement with individual employees about how their working hours are to be arranged.

6.1.4(b) Matters upon which agreement may be reached include:

(i) how the hours are to be averaged within a work cycle established in accordance with 6.1.2 and 6.1.3

(ii) the duration of the work cycle for day workers provided that such duration shall not exceed 3 months

(iii) rosters which specify the starting and finishing times of working hours

(iv) a period of notice of a rostered day off which is less than four weeks

(v) substitution of rostered days off

(vi) accumulation of rostered days off

(vii) arrangements which allow for flexibility in relation to the taking of rostered days off

(viii) any arrangements of ordinary hours which exceed 8 hours in any day

6.1.4(c) By agreement between an employer and the majority of employees in the enterprise or part of the enterprise concerned, 12 hour days or shifts may be introduced subject to:

(i) Proper health monitoring procedures being introduced;

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(ii) Suitable roster arrangements being made;
(iii) Proper supervision being provided;
(iv) Adequate breaks being provided;
(v) An adequate trial or review process being implemented through the consultative process in clause 3.1.

6.1.4(d)(i) Where an employee works on a shift other than a rostered shift (as defined), he/she shall:

(1) if employed on continuous work, be paid at the rate of double time; or
(2) if employed on other shiftwork, at the rate of time and one half for the first three hours and double time thereafter.

(ii) The provision of 6.1.4(d)(i) do not apply when the time is worked:

(1) by arrangement between the employees themselves;
(2) for the purposes of effecting the customary rotation of shifts; or
(3) on a shift to which the employee is transferred on short notice as an alternative to standing the employee off in circumstances which would entitle the employer to deduct payment for the day in accordance with clause 4.6.(there are further provisions re shiftworkers whose roster requires work on public holidays etc)

Endnotes

1 Authors contributing to this Bills Digest included: Jane Grace, Mary Anne Nielsen, Steve O’Neill, Ann Palmer, Katrina Gunn, Susan Dudley, Moira Coombs, Peter Yeend, Dave Richardson, Peter Prince, Jerome Davidson, Jonathan Chowns, Effi Tomaras, Patrick O’Neill and Thomas John. The authors express their gratitude to Scott Barklamb and Igor Nossar who kindly volunteered to act as external readers for the Digest.

2 Unless indicated otherwise, references to the views of this Senate Committee are references to the views of the Senate Committee’s majority opinion.

3 ibid.

4 ibid.

5 In parts, this list is based on the CCH Special Email Alert Dispatch, issued 3 November 2005.


7 Hon. Kevin Andrews, ‘Where do we want workplace relations to be in five years time?’, speech to the Committee for the Economic Development of Australia, Melbourne, 25 February 2005.


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11 ibid.

12 The reader should note that Victoria has referred its powers concerning industrial relations to the Commonwealth. This aspect, including the constitutional aspects of such referral, is further discussed under Part XV below.


14 The High Court was satisfied in *Victoria v The Commonwealth* (1996) 187 CLR 416 that the external affairs power could support, on the basis of Australia’s international obligations, measures such as minimum wages, wrongful dismissal or the right to strike. Whether these measures were supported by the corporations power was not in issue, after Western Australia conceded that the corporations power covered the regulation of industrial relations throughout the Commonwealth.


16 Clause 3 of Schedule 1 can be found on page 517 of the Bill.

17 ‘Shaw upbeat on IR challenge, as unions and states engage top silks’, *Workplace Express*, 8 November 2005.

18 For further information on the constitutional background of this reform, the reader is referred to P. Prince and T. John, ‘The Constitution and industrial relations: is a unitary system achievable?’, *Research Brief*, no. 8, Parliamentary Library, Canberra, 2005–06.

19 Section 88B of the WR Act 1996.


21 The method of appointing for periods longer than the lifespan of Parliament to guarantee the independence of a particular body is applied in other countries. Examples include the appointments of justices to the Constitutional Court in Germany.


23 ibid.

24 The reader may consider whether, as a practical perspective, the AFPC or a government could exclude unions or employees from a minimum wage setting inquiry.


26 For more detail in relation to this issue, the reader is referred to further observations made under the Concluding Comments as well as Prince and John, op. cit..

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28 Andrews, Professor Ian Harper Fair Pay Commission Chairman, op. cit.
29 ibid.
31 National Assembly of the Uniting Church in Australia, Policy before religion in the Fair Pay Commission, media release, 14 October 2005.
32 Cardinal G. Pell, speech to National Press Club, Canberra, 21 September 2005 (transcript prepared by the Parliamentary Library).
33 Explanatory Memorandum, p. 12.
36 Explanatory Memorandum, p. 12.
40 Explanatory Memorandum, p. 75.
41 ibid., pp. 75–6.
43 ABS, Employee Earnings and Hours, Cat. No. 6306, May 2004.
45 Explanatory Memorandum, p. 88.
48 Explanatory Memorandum, p. 16.

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49 As noted in the *Workplace Agreements Senate Report*, the committee did not have the opportunity to review and analyse the Bill. However, the committee did refer to *WorkChoices* to comment on the proposals for Workplace Agreements to be introduced by the Bill.


51 Assistance from the *Explanatory Memorandum* may be drawn upon under section 15AB of the *Acts Interpretation Act 1901*.


53 ibid.

54 J. Kovacic, Group Manager, Workplace Relations Policy Group, Department of Employment and Workplace Relations, in evidence to the *WorkChoices Senate Inquiry*, *Proof Committee Hansard*, 14 November 2005, pp. 15–16.

55 See the following submissions to the *WorkChoices Senate Inquiry*: Uniting Church in Australia, p. 25; Community and Public Sector Union, p. 13; joint submission of the Governments of New South Wales, Queensland, Western Australia, Tasmania, Australian Capital Territory and the Northern Territory, p. 18.

56 See the following submissions to the *WorkChoices Senate Inquiry*: joint submission of the Governments of New South Wales, Queensland, Western Australia, Tasmania, Australian Capital Territory and the Northern Territory, pp. 21–2; and submission of the Human Rights and Equal Opportunity Commission.


59 See the ACTU submission to the *WorkChoices Senate Inquiry*, p. 48.

60 *Workplace Agreements Senate Report*, p. 20.

61 ibid., p. 32.

62 ibid., pp. 32–5.


68 See the ACTU submission to the Senate Inquiry into the Building and Construction Industry Improvement Bill 2003, December 2003, p. 30.


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See the International Centre for Trade Union Rights submission to the WorkChoices Senate Inquiry, p. 38.

ibid., p. 38.

ibid., pp 38–9.

ibid., p. 39.


ibid.

International Centre for Trade Union Rights submission, op. cit, p. 44.

ibid., p. 45.

ibid.

ibid., p. 46.

ibid. p. 46, footnote 49.

ibid.

ibid., pp 47–8.

ibid., p. 51.

ibid., pp. 51–2.


ibid.

ibid.

Liberal National Coalition, Flexibility and productivity in the workplace: the key to jobs, op. cit.

Senate Employment, Workplace Relations, Small Business and Education References Committee, Unfair dismissal and small business employment, op. cit., pp. 31–2.

See the International Centre for Trade Union Rights submission to the WorkChoices Senate Inquiry, passim.

Sources for these figures are Small Business in Australia, 2001, ABS Cat No. 1321.0; Australian Bureau of Statistics Business Register, Counts of Businesses—Summary tables, June 2004, ABS, Cat No. 8161.0.55.01; Labour Force Australia, Detailed, Electronic Delivery, Quarterly, August quarter 2005, ABS, Cat No. 6291.0.55.001; Wage and Salary Earners, Public Warning:
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Sector, Australia, June quarter 2005, ABS, Cat No. 6248.0.55.001. It must be noted, however, that not all of these employees will be employed by constitutional corporations or entities which will be governed by the proposed new WR system.

94 Current section 170CM deals with notices of termination.

95 The expression ‘new owner’ is used in place of the legislative terminology ‘successor, transmittee or assignee’.


97 WorkChoices, op. cit., p.39.

98 Explanatory Memorandum, p. 343.

99 See the joint submission of the Governments of New South Wales, Queensland, Western Australia, Tasmania, Australian Capital Territory and the Northern Territory to the WorkChoices Senate Inquiry, p. 15.

100 WorkChoices, op. cit., p. 23.

101 Workplace Agreements Senate Report, Chapter 2, pp 34–5, paras 2.60–2.61.

102 Explanatory Memorandum, p. 343.


104 Explanatory Memorandum, p. 349.

105 WorkChoices, op. cit., p. 40.

106 Explanatory Memorandum, p. 348.


108 Explanatory Memorandum, p. 354.

109 ibid., p. 349.


111 Explanatory Memorandum, p. 351.

112 ibid., p. 354.

113 ibid., p. 355.

114 ibid., p. 21.

115 ibid., p. 23.


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122 ibid., articles 2 and 3.


125 Ford, op. cit., p. 9.

126 ACCI, New Year’s message—Business view of the next 12 months, media release, 31 December 2004.

127 Creighton and Stewart, op. cit., p. 372.


129 See the discussion in the Concluding Comments as well as Prince and John, op. cit., pp. 21–6.

130 DEWR submission to the WorkChoices Senate Inquiry, November 2005, p. 16.

131 ‘Shaw upbeat on IR challenge, as unions and states engage top silks’, Workplace Express, 8 November 2005


133 This interpretation process is usually referred to as characterisation. Professor Zines noted that characterisation is undertaken by the courts to answer first, what the scope of the subject matter of the head of power may be, and, second, whether the law can be described as a law on that particular subject matter so defined. L. Zines, The High Court and the Constitution, Butterworths, 1997, p. 17. See also Grain Pool of Western Australia v The Commonwealth (2002) 202 CLR 479, p. 493.


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139 Prince and John, op. cit., p. 61.

140 ibid.

141 Prince and John, op. cit., pp. 31-3, with further references.

142 Explanatory Memorandum, p. 1.

143 ibid., p. 9.

144 R v Federal Court of Australia; Ex parte Western Australia Football League Inc. (1979) 143 CLR 190, p. 199.

145 Prince and John, op. cit., pp. 20–1.

146 Punch, op. cit., p. 7.


150 Wenn v The Attorney-General of Victoria (1948) 77 CLR 84.


154 Melbourne Corporation Case (1947) 74 CLR 31, p. 82.


156 Prince and John, op. cit., pp. 43-50.

157 Bourke v State Bank of New South Wales (1990) 170 CLR 276, pp. 291–2. A similar point has already been made by Chief Justice Latham and Justices Rich and Williams and in Bank of New South Wales v The Commonwealth (1948) 76 CLR 1, pp. 184 and 256 respectively. Justice Windeyer held in Strickland v Rocla Concrete Pipes Ltd (1971) 124 CLR 468, p. 507, that: ‘... when there is to be found a limit in the definition of one subject matter the others should not be construed as enabling parliament, by legislation on a different subject matter, to override that express restriction.’

158 Prince and John, op. cit.


160 Such rights may stem from states’ statute laws, which will be overridden by federal law, or from common law. Rights created under common law are called choses in action, which were held to be property for the purposes of section 51(3xxi): Georgiadis v The Australian and Overseas Telecommunication Corp (1994) 179 CLR 297, p. 305.

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161 Prince and John, op. cit., pp. 29–30, with further references
162 ibid., pp. 56–8.
164 Creighton and Stewart, op. cit., p. 117.
166 As Professor George Williams has noted: ‘… it is unlikely that actions such as picketing will be protected by the implied freedom unless they can be seen as containing a political element. Picketing merely as part of an ongoing industrial campaign will be difficult to include within the ambit of the freedom. On the other hand, picketing seen as part of a more general protest against the policies of a government, such as ‘Green Bans’ by unions upon certain development as part of a protest against government environmental policies, may amount to protected political communication.’ Williams, op. cit., pp. 40–1.
168 Williams, op. cit., pp. 41–2.
169 ‘Shaw upbeat on IR challenge, as unions and states engage top silks’, *Workplace Express*, 8 November 2005.
170 Referring to the British *Donoughmore Report*, the Queensland Scrutiny of Legislation Committee noted in its 1997 report on Henry VIII clauses that this name fits for two reasons, including that ‘that King is regarded popularly as the impersonation of executive autocracy and because of its actual use by that monarch.’ [emphasis added in the original source]. Queensland Scrutiny of Legislation Committee, *The use of “Henry VIII Clauses” in Queensland Legislation*, Brisbane, 1997, p. 2.
171 *Victorian Stevedoring & General Contracting Co Pty Ltd. & Meakes v Dignan* (1931) 46 CLR 73.
172 ibid.
173 *Grace Brothers Pty Ltd v The Commonwealth* (1931) 44 CLR 492, p. 284.
175 ibid., p. 432. The cases which Professor Lane refers to include *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, p. 257, and *Victorian Stevedoring & General Contracting Co Pty Ltd. & Meakes v Dignan* (1931) 46 CLR 73, pp. 119–20.

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See the following submissions to the WorkChoices Senate Inquiry: joint submission of 151 Industrial Relations, Labour Market and Legal Academics, Submission No. 175, p. 5.

It must be noted, however, that scholars have argued that the requirement to effectively enforce a country’s labour laws is highly problematic. C. Nyland, Submission to the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Submission no. 497, para. 3.2, citing M. S. Weis, Symposium Two Steps Forward, One Step Back—or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America and Beyond., 37 University of San Francisco Law Review 689


All ILO conventions referred to in this Bills Digest are reproduced on the International Labour Organisation’s website at http://www.ilo.org/ilolex/english/convdisp2.htm.

Skulley, op. cit.

See for example the IMF country report on Australia, IMF, Australia: 2005 Article IV Consultation, 12 September 2005.

As might be imagined, there are countless exceptions and qualifications to this characterisation that would take us too far from the main themes.


D. Burton, Director, Asia and Pacific Department, IMF, A response to the President of the Australian Council of Trade Unions (ACTU), 27 October 2005.


201 E. Cox, *Women will be disadvantaged by IR laws*, media release, Women’s Electoral Lobby, Sydney, 4 November 2005.


203 ibid., p. 16.


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