



Fair Work Bill 2008

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Glossary

ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AFA	Award Flexibility Agreement
AFPC	Australian Fair Pay Commission
AFPCS	Australian Fair Pay and Conditions Standard
AiG	Australian Industry Group (formerly the Metal Trades Industry Association or MTIA)
AIRC	Australian Industrial Relations Commission
ALP	Australian Labor Party (Labor)
APCS	Australian Pay and Classification Scales
AWA	Australian Workplace Agreement
BOOT	Better Off Overall Test
DEEWR	Department of Education, Employment and Workplace Relations
FWA	Fair Work Australia
FWF	K. Rudd and J. Gillard: Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces, April 2007 and Forward with Fairness, Implementation Plan, August 2007.
FWO	Fair Work Ombudsman
GEERS	General Employee Entitlements and Redundancy Scheme
IARWD	Industrial Action Related Workplace Determinations
ITEA	Individual Transitional Employment Agreement
NAPSA	Notional Agreement Preserving State Award
NDT	No Disadvantage Test
NES	National Employment Standards
OFWO	Office of the Fair Work Ombudsman
SES	Senior Executive Service
SWA	Safe Work Australia
Transitional Act	<i>Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008</i>
Transitional & Consequential Bill	Proposed to be called the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009
Work Choices	The Workplace Relations Amendment (Work Choices) Act 2005. This Act amended the WR Act as from 2006, and the current WR Act is often referred to as 'Work Choices'.
WR Act	<i>Workplace Relations Act 1996</i>

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Fair Work Bill 2008

Date introduced: 25 Nov 2008

House: House of Representatives

Portfolio: Education, Employment and Workplace Relations

Commencement: The substantive provisions commence on a day or days to be fixed by Proclamation which must be after, but no later than six months after, commencement of the yet to be introduced Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (**item 2**).

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of the Bill is to ultimately replace the current *Workplace Relations Act 1996* (WR Act) with industrial legislation designed to promote collective bargaining and broader workplace rights for employees. At a later time, the Bill may facilitate the referral of powers from the states to the Commonwealth in respect of private sector workplace relations laying the basis for a national approach to workplace relations regulation.

Background

In speeches delivered on 17 September 2008 to the National Press Club (with additional guidance provided in a number of [Fact Sheets](#)) and to the Australian Labour Law Association's conference on 14 November 2008,¹ the Minister for Education, Employment, Social Inclusion and Workplace Relations, the Hon Julia Gillard, provided details about the substantive industrial relations legislation which the ALP announced in the lead up to the federal election in 2007.² The Government subsequently engaged in extensive consultation with major stakeholders, primarily under the auspices of the National Workplace Relations Consultative Committee, to develop both the transitional

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1. J. Gillard: 'Introducing Australia's New Workplace Relations System', *Address to the National Press Club*, Canberra, 17 September 2008, and 'Address to the Australian Labour Law Association' *Speech*, Melbourne, 14 November 2008.
 2. K. Rudd and J. Gillard: *Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces*, April 2007 and *Forward with Fairness, Implementation Plan*, August 2007.

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legislation that was passed by the Parliament in March 2008, and also the Fair Work Bill. The Bill's Explanatory Memorandum details the consultative structures, dates of meetings, names of individuals and organisations involved in the Bill's development.³

Committee consideration

The Bill was referred to the Senate Standing Committee on Education, Employment and Workplace Relations on 25 November 2008 for inquiry and report by 27 February 2009 (the Senate inquiry). The Digest draws on submissions to the inquiry.

Details of the inquiry are at:

http://www.aph.gov.au/Senate/committee/eet_ctte/fair_work/index.htm

Position of significant interest groups/press commentary

Generally, the early press commentary on the Bill has been positive. Thus *The Canberra Times* editorialises that the Bill:

...represents a substantial step forward in restoring balance in the workplace.⁴

The *Courier Mail* argued that the Bill had achieved a balance between employer and employee interests:

Ms Gillard deserves credit for consulting widely and exhaustively with business and employee representatives. The laws she has produced essentially mirror the Forward with Fairness package taken to the election last year – achieving a reasonable balance between interests of employers and workers.⁵

While *The Age* noted that the Coalition had:

... made its final retreat on the issue (of revolutionising) Australia's workplace laws.⁶

Paul Kelly of *The Australian* argued that the introduction of the Bill at a time of global financial crisis was the wrong strategy:

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3. Fair Work Bill 2008, *Explanatory Memorandum*, Parliament of the Commonwealth of Australia (hereon referred to as the Explanatory Memorandum), table A1 under Attachment A, p. ixviii.
 4. 'Bill and advance in workplace balance' (editorial), *The Canberra Times*, 26 November 2008.
 5. 'IR policy has a fair chance of working' (editorial), *Courier Mail*, 27 November 2008.
 6. M. Grattan and B. Schneiders, 'Labor gets OK to dismantle WorkChoices', *The Age*, 26 November 2008.

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A bizarre fate has befallen Australia. At the precise time it faces a global crisis, a business downturn and rising unemployment, the Rudd Government is recasting workplace relations to increase trade union powers, inhibit employment and impose new costs on employers.⁷

Ross Gittins debunked the notions that the Bill put the unions back on top or that the Bill amounted merely to a lighter version of the current WR Act (Work Choices lite)⁸:

Although large slabs of John Howard's Work Choices are retained, the most fundamental elements have been reversed ... As a result, the industrial relations legislation the Government unveiled this week establishes reasonably even-handed treatment of employers, employees and their unions.⁹

The *Australian Financial Review* was concerned that the new bargaining processes could lead to union turf wars, although award modernisation would lead to efficiencies for the corporate sector:

On a greenfields sit or project, prenotification of a proposed agreement seemed destined to create a turf war between competing unions. Australian industry does not need a string of drawn out disputes... The rewriting of awards – due to be introduced by January 2010 – will be likely to reduce red tape as it cuts paperwork and compliance costs, especially for large corporations.¹⁰

Peter Punch, CCH's principal consultant on industrial law summarises the implications of the Bill and its predecessor legislation with the following:

1. The legislative landscape for the regulation of collective and individual employment relationships has been altered from a collection of state and federal laws, regulations and tribunals to one where workplace relations is overwhelmingly regulated at the federal or national level
2. Australia's 100-year-old cultural attachment to compulsory independent third party conciliation and arbitration of collective labour disputes has been debased (indeed close to eradicated) and is unlikely to ever recapture its 'glory days'
3. Direct legislative prescription of certain minimum terms and conditions of employment is now the norm, whereas previously such matters were covered by a

7. P. Kelly, 'IR reforms asking for trouble', *The Australian*, 29 November 2008.

8. Work Choices lite is the disparaging name given by some union representatives to the FWF policy. See Brad Norington, 'As good as it gets for unions, and business is happy', *Australian*, 26 November 2008, p. 1.

9. R. Gittins, 'WorkChoice lite? That's a load of emotive nonsense', *The Age*, 29 November 2008.

10. 'Business needs IR bill rejig', *Australian Financial Review*, 26 November 2008.

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motley combination of award provisions and specific subject legislation (usually at the state level).¹¹

Pros and cons

The Pro case

Supporters would argue that the Fair Work Bill:

- puts in place a new legislative framework for workplace relations with the principle object of recognising the Government's intention to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians
- makes more sense than the WR Act as amended by Work Choices. For example the Bill dispenses with 'protected' and 'preserved' award terms and reintegrates what used to be award wage rates into the body of awards. However at the same time the proposed workplace entry regulations are still tougher than traditional standards to the extent that the Victorian unions have signalled a challenge to the new entry laws as being *contrary* to core ILO conventions, (in addition to a challenge to the restrictions on the right to strike, determination of the level of bargaining and the Bill's ban on pattern bargaining¹²).
- encourages employees and employers to bargain together in good faith and reach agreement voluntarily in a model close to international norms for collective bargaining
- introduces a workplace relations system which is built on a fair and comprehensive safety net of minimum employment conditions which cannot be undercut, a system that has at its heart bargaining in good faith at the enterprise level with an emphasis on improvements in productivity, protections for the low-paid, wider protections from unfair dismissal, a balance between work and family, and the right to be represented in the workplace
- retains the structural features of the WR Act as amended by Work Choices, and in that sense the Bill represents a significant victory to the Coalition as well as for *national* regulation over a key component of the national economy.
- balanced workplace laws are desirable rights in themselves and for this reason China – the international powerhouse of economic growth – has embarked on regulation of its labour market on a far greater scale than that possible from the Fair Work Bill. Australia is thus not the *only* country regulating its labour market in a time of

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11. Peter Punch, 'Fair Work Bill 2008 — A chance for IR stability at last?' in *Australian Industrial Law News*, Issue 11, CCH (www.cch.com.au), 15 December 2008.
 12. B. Norington, 'Push for UN ruling on IR: Unions go global on Rudd', *The Weekend Australian*, 27 December 2008.

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economic downturn.¹³ Indeed economic crises more frequently lead to public demand for greater and more effective regulation, not less. This was the basis for US Congress enacting the *National Labor Relations Act 1935* following the Great Depression.¹⁴

The Con case

Arguments against the Bill rest on it ‘re-regulating’ the national labour market by the following measures:

- the new system will remove the 100 employee exemption introduced under the WR Act and instead introduce new qualifying periods that have to be met before an unfair dismissal claim can be made - 12 months for employees of businesses with fewer than 15 employees and six months for employees in businesses with 15 or more employees (effectively doubling the proportion of the workforce who may seek a dismissal remedy)
- in a transfer of business, transferring employees will be covered by the old employer’s industrial instruments indefinitely (not limited to the current 12 month transmission period). New employees in the business transferred may also be covered in particular circumstances. But most importantly, a transfer of business includes an outsourcing, restructure or other transaction involving use of assets
- the proposed bargaining requirements oblige an employer who is negotiating an enterprise agreement to bargain with a union with one or more members. Furthermore, an employer who does not want an enterprise agreement at all can be compelled to negotiate (but not to agree) if a majority of employees want one
- the requirement to bargain ‘in good faith’ and the ability of Fair Work Australia (FWA) to arbitrate a workplace determination on competing claims if there are serious and repeated breaches of such orders (provided other requirements are also met)
- multi-employer based bargaining for the ‘low paid’ – which means employees employed on, or close to, the award and National Employment Standards (but could potentially extend beyond this). This could easily turn into massive, industry based bargaining and arbitration. Industries particularly affected are likely to include cleaning, retail, hospitality and child care

13. China’s *Labour Contract Law* was passed at the 28th session of the 10th National People’s Congress on Friday 29 June 2007; The PRC State Council issued implementing rules for the law in 2008. These rules interpret and clarify a number of provisions of the labour law and set out how the law will be implemented in practice.

14. As is stated by the US National Labor Relations Board: ‘Congress enacted the National Labor Relations Act in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy’ at NLRB Home Page: http://www.nlr.gov/about_us/overview/national_labor_relations_act.aspx.

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- a union or employee will be able to obtain an injunction preventing an employer breaching an award or enterprise agreement. Examples could include a union obtaining an injunction preventing a restructure if consultation provisions or redundancy procedures in an agreement were not followed
- what will be the cost impacts of minimum terms and conditions resulting from award modernisation from 1 January 2010 – especially for employees who are currently award free? What arrangements will be put into place for transitional award employers and employees?
- a union's right of entry is now linked to either union membership (so they can enter to investigate a breach if they have a member who works on the premises) or union coverage (in the case of entry for discussions) - rather than the union being party to an applicable industrial instrument.¹⁵

Coalition/Greens/Family First policy position/commitments

While the Bill's predecessor, the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008,¹⁶ had a relatively unobtruded passage through the Senate, it appears that the Coalition may oppose the Bill or parts of this Bill in the Senate. The Coalition had earlier indicated that it would limit the number of Labor laws it chooses to oppose in the Senate. Opposition Leader the Hon Malcolm Turnbull had proposed that:

We (the Coalition) must frame our policies in the light of changing circumstances and, most importantly, in the light of the judgment of the people delivered at the election which we heard loud and clear.¹⁷

However Mr Turnbull also believed that Workplace Relations Minister Julia Gillard had exceeded her mandate on some aspects of the industrial relations laws and the Coalition would be closely scrutinising those areas.

Independent Senator Nick Xenophon is also concerned the Government has gone beyond the industrial relations policy put before the Australian people at the last election, particularly over union powers and the potential for a return to pattern bargaining. It has been reported that he is worried the balance has tipped too much to the union side and it could be dangerous in a worsening economy.¹⁸

15. These comments are a summary of a very useful analysis of the key issues of the Bill from an employer's perspective by legal firm Minter Ellisons: 'Fair Work Bill 2008 introduced', *HR IR Update*, 26 November 2008.

16. Now the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008— received Royal Assent on 20 March 2008.

17. D. Shanahan, 'Turnbull rollback to clear IR laws', *The Weekend Australian*, 13–14 December 2008.

18. *ibid.*

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Senator Fielding is reported to have said that neither union officials nor employer organisations should investigate breaches of employment entitlements such as underpayments:

We have got to find something that is fair and reasonable and, frankly, having the unions as the cop on the beat is a joke.¹⁹

The Greens have indicated they will move a number of amendments to the Bill in the Senate including amendments to allow AWAs or ITEAs that do not meet the new ‘better off overall test’ to be terminated. They also expect to move amendments to:

provide equal unfair dismissal protections for all workers, strengthen the safety net, expand the matters that can be contained in collective agreements, provide workers with internationally recognized rights to freedom of association (including the right to take industrial action), and to increase the powers of Fair Work Australia.²⁰

By January 2009, the Coalition position appears to have hardened over the Bill’s workplace entry provisions and its unfair dismissal provisions. Mr Turnbull has indicated that he has become aware of the angst expressed by the (West Australian) mining industry to certain provisions in the Bill and expected to win changes from the Government in the Senate.²¹

Any consequences of failure to pass

The main issue to note is that the Rudd Government refused to accept relatively minor Senate amendments over its legislative reforms to workplace health and safety. It set aside its Safe Work Bill 2008 on 4 December 2008 after the Government (in the House of Representatives) refused to agree to Senate amendments to that Bill.²² A second refusal by the Senate to pass that Bill would create the grounds for a double dissolution of Parliament. What is common between this Bill and the Safe Work Bill is the closer relationship of the Commonwealth to the states over national or joint regulation of aspects of the Australian labour market. Indeed, it appears that Minister Gillard feels that the states could institute Safe Work Australia without support of Commonwealth legislation.²³

19. Senator Fielding quoted in M. Davis, ‘Union right of entry will not be a walkover’, *Sydney Morning Herald*, 11 December 2008.
20. Senator Rachel Siewert, ‘Greens push end for ‘unfair AWAs and ITEAs’, *Media release*, 9 December 2008.
21. N. Butterly, ‘Turnbull in turnaround on Labor’s IR reforms’, *The West Australian*, 2 January 2009.
22. The Safe Work Bill 2008 seeks to replace the national workplace safety regulator, the Australian Safety and Compensation Commission with a body to be called Safe Work Australia (SWA) jointly managed and funded by the States and the Commonwealth.
23. S. Scott, ‘Gillard defies Senate on work safety’, *The Australian Financial Review*, 20 January 2009.

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As the *Australian Financial Review's* editorial notes: 'this may be true, but it is far from ideal'.

If the Fair Work Bill passes Parliament successfully, it could form the basis of further state and Commonwealth co-operation as a blueprint for national workplace relations legislation. As has been pointed out by Professor Andrew Stewart, the Bill does not include provisions dealing with the referral of powers from Victoria, meaning that Victoria may be required to introduce industrial relations legislation in respect of its public services, its unincorporated sector and possibly its local government entities, despite its 1996 referral of industrial powers to the Commonwealth unless some broader initiatives on a national industrial relations system are undertaken.²⁴ On the other hand, provision for the Victorian referral may be included in the forthcoming Transitional and Consequential Bill.

If the Bill fails to pass as with the Safe Work Bill, it becomes a question of whether the Government would seek to submit the Bill a second time per the constitutional requirements for a double dissolution of Parliament²⁵ and whether all parties would see it in their interests to face an early election.

Significant technical flaws

These are likely to be few as the Bill closely follows the structure of the current WR Act and that Act following the Work Choices amendments and the High Court upheld all of the Work Choices provisions.²⁶ On the other hand, some commentators query as to whether the structure of Fair Work Australia may impinge on the separation of powers enunciated by the High Court in its *Boilermakers' case*.²⁷

Financial implications

According to the Bill's Explanatory Memorandum, the financial impact is yet to be determined in consultation with the Department of Finance and Deregulation and once agreed will be included in the relevant appropriation bills.²⁸

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24. A. Stewart, 'Fair Work Bill introduced', *Employment Matters: Special Edition*, www.piperalderman.com.au, November 2008.
 25. Section 57 of the Constitution sets out the requirements for a double dissolution where there is disagreement between the Houses.
 26. High Court of Australia (HCA), *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* (2006) 229 CLR 1.
 27. HCA, *R v Kirby & Ors; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254. These issues are discussed under Chapter 5 of this Digest's Main Provisions.
 28. Explanatory Memorandum, p. iii.

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Main provisions

Framework of the Bill

The Fair Work Bill, in tandem with the proposed Transitional and Consequential Bill, is likely to result in the complete repeal of the current WR Act.

Chapter 1 provides an **introduction** to the Bill and its structure, key definitions (including a Dictionary of terms and definitions, **clause 12**) which go to the constitutional underpinning of the Bill (national system employer: **clause 14**) as well as the timing of its commencement (i.e. not before a to-be-released Transitional and Consequential Bill).

Chapter 2 deals with **terms and conditions of employment**, including the National Employment Standards (NES), modern awards, enterprise agreements and workplace determinations and transmission of business.

Chapter 3 concerns **rights and responsibilities** of employees, employers and organisations, including freedom of association, protection from discrimination, unfair dismissal, industrial action and rights of entry.

Chapter 4 deals with **compliance and enforcement**, including remedies and jurisdiction and powers of the courts.

Chapter 5 contains **administration** provisions, including establishment of Fair Work Australia (FWA) and the Office of the Fair Work Ombudsman.

Chapter 6 addresses a range of **miscellaneous** matters.

The Bill has been commended for being more effective and accessible in its drafting style than the current complex and convoluted WR Act.²⁹ While still lengthy, the Bill is not difficult to follow, is written in relatively clear ‘plain English’ and contains outlines at the beginning of each main part and frequent ‘signposts’ to alert readers to other relevant provisions.

The Bill however does not contain any detail on the transitional arrangements that will apply between the current provisions under the WR Act and the Fair Work Act. These arrangements will be set out in the Fair Work (Transitional Provisions and Consequential Amendments) Bill to be introduced to the Parliament early in 2009. The transitional arrangements will no doubt give rise to complexity and debate, and as has been noted, perhaps for that reason the Government has sought to produce a ‘clean Bill for the new

29. Professor Andrew Stewart, Law School University of Adelaide, Submission No. 98, Senate Education, Employment and Workplace Relations Committee, ‘*Inquiry into the Fair Work Bill 2008*’, p. 2. The inquiry is subsequently referred to as the SEEWRC inquiry.

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system, to keep the focus on that new system, rather than on the complex transitional matters'.³⁰

The Bill is intended to replace the WR Act, although it does not contain provisions providing for the repeal of that Act. Presumably repeal will be achieved through the Transitional and Consequential Bill.

Chapter 1: Introduction

Object of the Bill

Clause 3 sets out the object of the Bill, which is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion by the means set out in **paragraphs 3(a) to 3(f)**. These means reflect the overall changes in the proposed new workplace relations system and include, for example:

- provision of a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders (**paragraph 3(b)**)
- assisting employees to balance work and family responsibilities by providing for flexible working arrangements (**paragraph 3(d)**), and
- achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action (**paragraph 3(f)**).

Definitions

Clause 12 provides a dictionary containing a list of terms defined in the Bill. **Clauses 13–23** contain further more complex definitions such as definitions of the meaning of 'base rate of pay', 'full rate of pay', 'industrial action' and 'small business employer'. The terms are explained where applicable through the Digest.

Constitutional issues—background

A full discussion of the constitutional issues relating to workplace relations is beyond the scope of this Digest. However the following short summary may be useful background.

Under the labour power in section 51(xxxv) of the Constitution, the Commonwealth is only allowed to make laws for the 'conciliation and arbitration' of 'interstate disputes' over 'industrial matters'. These limitations restrict both the types of laws the

30. Peter Punch, op. cit.

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Commonwealth can enact using the labour power and the range of issues that federal bodies can resolve.

As a consequence, the Commonwealth and the states developed six separate but overlapping industrial relations systems. There was no clear demarcation between federal and state systems, and employers would often be required to comply with more than one set of obligations.

Attempts to give the Commonwealth more industrial relations power in a number of referenda have been unsuccessful. The referral power (section 51(xxxvii)) has so far been used only in the case of Victoria, when that state referred key industrial relations powers to the Commonwealth in 1996.³¹

Before the 1990s, federal governments made little use of other powers in the Constitution to make laws on workplace relations, largely because of concern about encroaching on the authority of the states.

However this sensitivity to states' rights was abandoned with the Keating Government's *Industrial Relations Reform Act 1993* and the Howard Government's *Workplace Relations Act 1996*, both of which made use of alternative powers, especially those over corporations and external affairs.

The Work Choices legislation of 2006 saw a more radical reliance on the corporations power with an estimated move of at least 70% of all employers into the national system of workplace relations. Although challenged by the states, Work Choices was upheld by the High Court in *New South Wales v Commonwealth* (2006) 219 CLR 1. While reliance on the corporations power undoubtedly expanded the reach of the Commonwealth system it has brought its own uncertainties. Relying on that power, an employer can only be covered by the federal system if it is a 'constitutional corporation' i.e. a trading, financial or foreign corporation. While there can be no doubt about a proprietary limited company that trades for profit, there is considerable doubt about the status of not-for-profit incorporated organisations and of municipal, charitable and educational corporations.³²

31. 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.

32. New South Wales Office of Industrial Relations, Submission No. 101, SEEWRC inquiry, p. 14. For example: the Federal Court in *AWU (Qld) V Etheridge Shire Council* [2008] FCA 1268 found that a Queensland council is not and cannot be a constitutional corporation; the NSW Industrial Court in *Hardeman v Children's Medical Research Institute* [2007] NSWIRComm 189 (24 September 2007) ruled that that a non-profit organisation, the Children's Medical Research Institute, is not a trading or financial corporation.

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The ALP in *Forward with Fairness*,³³ (FWF) foreshadowed that under a Labor Government there would be a national system of workplace relations for all private sector employers and their employees.³⁴

The Bill however, is more limited in its approach than suggested by FWF. In essence it is based on existing federal constitutional authority thus leaving for another time the question of whether those residual categories of employees still within the state systems will ultimately come into the national system through agreement with the states.³⁵

The Department of Education, Employment and Workplace Relations (DEEWR) submission to the Senate inquiry states that negotiations with the states for a full referral are continuing, although Western Australia has indicated it will not be joining the national system.³⁶

The submission states that the Bill does not currently contain provisions for state referrals into the national system due to the ongoing nature of negotiations in relation to state involvement. Any referrals will require subsequent amendments to the legislation.³⁷

'National system employer' and the Constitutional underpinning of the Bill

The Bill's fundamental basis of coverage is found in the definition of 'national system employer' which is an expression defined in **clause 14** by reference to the scope of the Commonwealth Parliament's constitutional authority.

The new definition of a 'national system employer' 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. Therefore national system employers are any of the following individuals or entities, to the extent that they employ or usually employ an individual:

33. K. Rudd and J. Gillard, op. cit.

34. Peter Punch, op cit.

35. *ibid.*

36. DEEWR, Submission No. 63, SEEWRC inquiry, p. 65.

37. *ibid.*

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CLAUSE	INDIVIDUAL OR ENTITY	CONSTITUTIONAL POWER
Clause 14(a)	Constitutional corporations as defined under clause 12	Corporations power, section 51(xx)
Clause 14(b)	the Commonwealth	Power to regulate Commonwealth employers and employees, section 52(ii) and section 61
Clause 14(c)	Commonwealth authorities, as defined under clause 12	Power to regulate Commonwealth employers and employees, section 52(ii) and section 61
Clause 14(d)	Employers of flight crew officers, maritime employees or waterside workers, in connection with their constitutional trade or commerce	Trade and commerce power, section 51(i)
Clause 14(e)	Bodies corporate, incorporated in the territories	Territory power, section 122
Clause 14(f)	Employers carrying on activities of a commercial, governmental or other nature in a territory	Territory power, section 122

The table above also includes the constitutional powers upon which the Commonwealth bases its regulatory powers over individuals and entities.

'National system employee'

Clause 13 states that national system employees are individuals who are employed by a national system employer. By creating this link between the employee and the employer, the relationship can be regulated by the Commonwealth because it is supported by a head of power referred to above.

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'Usually employs'

The definition of national system employer includes a constitutional corporation that *usually employs* an individual and a national system employee includes an individual *usually employed* by a national system employer. The Explanatory Memorandum states that the term 'usually employed' has been judicially considered to include casual or daily hire employees.³⁸ **Clause 13** clarifies that 'usually employed' as used in the definition of 'national system employee' does not include a person on a vocational placement.

Ordinary meaning of the terms employer and employee

In addition to the terms national system employer/employee, the Bill in various Parts also uses the terms 'ordinary meanings of employer and employee' (**clause 15**). The ordinary meanings are used for example in those Parts where rights and obligations may be imposed on any employer or any employee without Constitutional limitations, or because references to employers and employees are incidental to other substantive rights. The Explanatory Memorandum provides examples of the Parts in which this occurs.³⁹

Comment on the Constitutional coverage

In essence, the Bill has the same coverage as the existing Work Choices regime— that is, Commonwealth Government employees, employees in territories, and most significantly employees of the overwhelming majority of corporations, leaving state government employees, sole traders/partnerships and some employees of 'non trading corporations' still within the state jurisdiction (except possibly in Victoria).⁴⁰ According to DEEWR, this approach will bring up to 85% of all employees across Australia into the national system of workplace relations.⁴¹ However it will not provide a national system of workplace relations for all private sector employers and their employees — only clear referrals by the states will do this.

Interaction between the Fair Work Bill and state and territory industrial laws

Clauses 24 to 30 deal with how the proposed Act will affect the operation of certain state and territory laws. **Subclause 26(1)** states that the proposed Act is intended to exclude all state and territory industrial laws so far as they would otherwise apply in relation to a national system employer or national system employee. In other words **clause 26** intends that the proposed Fair Work Act should cover the field in relation to industrial relations to

38. Explanatory Memorandum, p. 11.

39. *ibid*, pp. 5–6.

40. In contrast to the WR Act, the Bill does not include provisions relying on a referral of power from Victoria. It is possible that the Transitional and Consequential Bill may provide for the Victorian referral.

41. DEEWR, Submission No. 63, SEEWRC inquiry, p. 64.

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the extent that it is constitutionally possible. Where the Commonwealth successfully covers the field the states and territories are precluded from legislating in this area and their existing laws which regulated this area become inoperable. Note that this approach was also adopted in the Work Choices legislation (existing section 7C of the WR Act) and was generally upheld by the High Court in *New South Wales v Commonwealth* (2006) 219 CLR 1.

Subclause 26(2) defines a ‘State or Territory industrial law’ for the purposes of clarifying which laws are excluded. These are:

- general state industrial laws and related legislative instruments (such as the *Industrial Relations Act 1996* (NSW))
- employment laws which have a main purpose of regulating workplace relations. To assist in identifying such laws the definition lists six main purposes which are indicia for such a law.
- state and territory laws which apply to employment generally, dealing with leave other than long service leave or leave for victims of crime
- state and territory laws establishing courts or tribunals which can make equal remuneration orders
- state and territory laws which deal with unfair contracts
- state and territory laws which regulate union right of entry,⁴² and
- state and territory laws and statutory instruments that are prescribed by the regulations.

However, some areas in which states and territories still retain some powers to legislate are to be expressly excluded from these broad overriding provisions. **Clause 27** provides that these ‘saved’ areas or laws which will continue to operate are:

- laws which deal with discrimination and/or the promotion of equal employment opportunity
- laws prescribed by regulations made under the Act
- laws which deal with so-called ‘*non-excluded matters*’ as set out in **subclause 27(2)**, and
- laws dealing with rights and remedies incidental to any of these laws.

Some of the more significant ‘*non-excluded matters*’ in **subclause 27(2)** include:

- superannuation

42. Although right of entry provisions in occupational health and safety laws and outworker laws would be ‘saved’ under **subclause 27(2)**.

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- workers compensation
- occupational health and safety
- outworkers
- child labour,
- long service leave, but not for employees who have long service leave entitlements under the NES, and
- regulation of employer and employee organisations and their members

Clauses 28 to 30 provide further clarification on the relationship between the Bill and state and territory laws and largely replicate existing sections of the WR Act. **Subclause 29(1)** provides that a modern award or enterprise agreement prevails over a state or territory law to the extent of any inconsistency. However **subclause 29(2)** clarifies that a modern award or enterprise agreement is subject to any of the ‘saved’ state or territory laws mentioned above or any of the excluded laws prescribed by regulation.

Clause 40 deals with the interaction between Fair Work instruments and public sector employment laws. In general, a public sector employment law would prevail over a fair work instrument⁴³ that deals with public sector employment to the extent of any inconsistency. There appears to be no equivalent provision in the existing WR Act.

Extraterritorial coverage of the Bill

Like the WR Act, the Bill will also have a certain extraterritorial application (**clauses 32 to 34**). **Clause 32** will provide that the regulations can have the effect of changing the application of the proposed new law with respect to the waters out to the limits of the territorial sea, Christmas Island and the Cocos (Keeling) Islands.

Miscellaneous provisions

Clauses 37 to 39 are standard clauses dealing with binding the Crown, not exceeding Commonwealth power and acquisition of property on ‘just terms’.

Chapter 2: Terms and Conditions

Part 2–1: Core provisions of Chapter 2

The main terms and conditions of employment provided for by the Bill are: the National Employment Standards (NES), a modern award, and an enterprise agreement or a

43. A fair work instrument is defined in **clause 12** as a modern award, an enterprise agreement, a workplace determination and an order of the FWA.

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workplace determination, while other terms and conditions include national minimum wage orders and an equal remuneration order (**Clause 43**).

The Bill provides for 10 national employment standards that act as a minimum safety net for all employees. These will replace and enhance the five matters currently covered by the Australian Fair Pay and Conditions Standard.

Clause 44 prohibits employers from contravening the NES (see further below under compliance).

Awards cannot exclude the NES (**clause 55**). Modern awards may *apply* to an employee when the award *covers* the employee and no other instrument based on a provision of the Bill, applies to the employee (**clause 47**). **Clause 48** stipulates that an award *covers* an employee, employer or organisation or outworker entity if it is expressed to so cover. **Clause 48** also allows an award to cover (or not cover) an employee by a provision of the Act, order of the FWA or order of a court. A modern award is in operation on 1 July in the next financial year after it is made, or on 1 July in a financial year if it is made on 1 July. Alternatively, if the FWA specifies another day, it comes into operation on that day (**subclause 49(2)**). A modern award continues in operation until it is revoked (**subclause 49(7)**). Enterprise agreements cannot exclude the NES (**clause 55**).

Enterprise agreements may cover employees. Under **clause 52** an enterprise agreement applies to an employee when the agreement is in operation, the agreement covers the employee, employer or organisation and no other provision has the effect of the agreement not applying. An enterprise agreement *covers* an employer and its employees if it is expressed to cover the employer and employees. An enterprise agreement covers an employee organisation if the FWA has approved the agreement to so cover the organisation. For greenfields agreements,⁴⁴ the organisation is covered where the agreement is made by the organisation (**clause 53**).

Modern awards and enterprise agreements can supplement the NES providing there is no detriment to employees (**subclause 55(4)**), may include certain terms about the NES (**subclause 55(2)**), but must not exclude the NES (**subclause 55 (1)**).

Clause 57 makes clear that a modern award does not apply to an employee (or employer or employee organisation) at a time when an enterprise agreement applies. **Clause 58** sets out the interaction and application of enterprise agreements including old and new agreements as well as any multi site agreements. It stipulates that only one enterprise agreement may apply to an employee.

44. See subclauses 172(2)–172(4).

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Part 2-2: National Employment Standards

The Bill retains the substance of the NES announced in June 2008 with some amendments.⁴⁵ The significant changes are:

- employees who are not covered by a modern award or enterprise agreement are able to cash out annual leave in certain circumstances, including a requirement that this be by written agreement with their employer and the employee retains at least four weeks' annual leave after cashing out
- employees with less than six months' service are not entitled to the minimum notice of termination prescribed by the NES. For small business employers (who employ fewer than 15 people), this exclusion applies if the employee has worked for less than 12 months
- the Bill has also added a section to the NES dealing with various other matters such as leave entitlements while on workers' compensation.

In addition, the Bill clarifies the relationship between the NES, modern awards and enterprise agreements. As noted, modern awards or enterprise agreements cannot exclude any provision of the NES, but may include certain provisions permitted by the section of the Bill which deals with the particular NES matter, such as cashing out of leave and substitution of public holidays.

Maximum weekly hours

As with the WR Act, maximum weekly hours will remain at 38 hours per week (**clause 62**). An employee may be required to work in excess of the standard 38-hour week but the employee cannot be required to work unreasonable additional hours (**subclause 62(2)**).

In determining whether additional hours are reasonable the following factors under **subclause 62(3)** must be taken into account:

- any risk to employee health and safety from working the additional hours
- the employee's personal circumstances, including family responsibilities
- the need of the workplace or enterprise in which the employee is employed
- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for working additional hours
- the notice (if any) given by the employer of any request or requirement to work the additional hours

45. J. Gillard, 'New National Employment Standards Released', *Media Release*, 16 June 2008.

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- the notice (if any) given by the employee of his/her intention to refuse to work the additional hours, and
- any other relevant matter.

Unlike the WR Act the NES do not provide rules for the averaging of hours, although averaging of hours over 26 weeks is available for award/agreement free employees (**clause 64**). Averaging of hours arrangements are dealt with under modern awards and enterprise agreements, which the NES expressly allow for (**clause 63**).

Requests for flexible working arrangements

Clause 65 provides that this entitlement will apply if the employee:

- is a parent of a child under school age (under a state law that sets out when a child must start attending school), or
- has a responsibility for the care of a child under school age.

The employee will be required to make a request in writing setting out the details as to the changes sought to be made to the current working arrangements and the reasons supporting such change. The employer must respond to this request in writing within 21 days. If the employer refuses the request, written reasons for such refusal must be provided. A refusal can only be made on 'reasonable business grounds'. In cases where a refusal is made, it is open to the employer or employee to suggest a modification to the employee's request that might be more easily accommodated by the employer. It is unclear what sanctions, if any, will apply in the case of an unreasonable refusal by an employer to either type of request.

There is no definition of flexible working hours. Types of flexible working arrangements being suggested are a reduction in hours of work (eg to part-time work), a change to non-standard start or finish times, working from home or another location, working split shifts or job sharing arrangements.⁴⁶ If more beneficial arrangements are available to an employee under state or territory laws, these are not excluded (**clause 66**).

Alexandra Heron, European employment law author, argues that based on her experience working in Europe on discrimination and other workplace issues, clause 65 is too weak and is unlikely to be the catalyst for a serious move to substantial change in the workplace towards 'caring friendly' working hours and practices. She argues for amendments that would:

- require the employer to hold a face-to-face meeting with the employee before reaching a decision, specify a timeframe for meeting then communicating a decision, and provide an effective way to enforce the timetable

46. The Note to subclause 65(1) provides examples.

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- restrict the grounds for rejecting employee requests
- provide for ‘independent, accessible and effective’ review of employer decisions, and
- ensure a review of the right to request provisions after three years to establish its effectiveness and whether it should be extended to all employees.⁴⁷

Parental leave and related entitlements

This standard continues the AFPCS provision for the granting of parental leave (maternity, paternity and adoption-related forms of leave) provided by the WR Act as well as by predecessor federal legislation since 1994. **Clause 67** requires, as a general rule, that an employee must have 12 months continuous service (other than for accessing unpaid pre-adoption leave). A casual employee employed on a systematic and regular basis over at least a 12-month period prior to the expected date of birth of the child is also entitled to unpaid parental leave.

The NES standard provides an enhancement whereby each parent is entitled to up to an extra 12 months' unpaid parental leave in connection with the birth or adoption of their child (**clauses 71 and 72**).

Notice of an intention to take unpaid parental leave must be provided to the employer at least 10 weeks before starting the leave, if practicable (**clause 74**). The mother of a child could take 12 months' leave at the time of the birth of a child and then return to work, at which point the father (alternatively, ‘the other member of the employee couple’⁴⁸) could take 12 months of unpaid leave. Where the family prefers, one parent could take a longer period of unpaid leave up to an additional 12 months (**clause 76**).

Clause 80 allows a female employee to take special (unpaid) maternity leave due to a pregnancy related illness. The rules as to the required notice to be given for the taking of parental leave and the right of return to the position occupied prior to the taking of parental leave remain largely unchanged (**clause 84**).

Annual leave

As with the AFPCS standard, the NES standard provides for four weeks' paid annual leave per year (**clause 87**). Certain types of shift workers will be entitled to an additional week making a total of five weeks' leave per year (**clause 87(1)(b)**), also provided currently under the AFPCS.

47. Alexandra Heron, Submission No. 34, SEEWRC inquiry, pp. 1–2.

48. The definitions of ‘employee couple’ and ‘de facto partner’ in **clause 12** would provide coverage for same sex couples.

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Subclause 87(2) specifies that annual leave accrues during periods of the employee's 'service'. An employee's entitlement accrues progressively during a year of service according to the employee's ordinary hours of work.

Service is defined as all periods of employment other than:

- unpaid leave (eg leave without pay or unpaid parental leave)
- unpaid absence (other than community service leave)
- unauthorised absence (eg unprotected industrial action).

Clause 89 specifies that annual leave is not to absorb public holidays. **Clause 92** prohibits the cashing out of annual leave for award/agreement employees except in accordance with the subsequent clauses. **Clauses 93** and **94** authorise the cashing out of annual leave for award/agreement covered employees and award/agreement free employees respectively.

Rules as to the taking of annual leave and the granting of such by the employer remain broadly unchanged. An employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave (**subclause 88(2)**).

Personal/carer's leave and compassionate leave

This form of leave remains unchanged from that specified by the WR Act except that carer's leave is no longer capped at 10 days per year. This means that provided the rules for the taking of such leave are satisfied and the employee has accrued the required amount of personal leave covering the period of absence on carer's leave, the employee is entitled to the payment for the leave so taken. As with annual leave, an employee is not taken to be on personal/carer's leave during a public holiday (**clause 98**). Award/agreement covered employees may cash out personal leave (assuming the employer agrees) providing a balance of 15 days remains (**clause 101**). **Clause 102** provides an entitlement to 2 days unpaid carer's leave for emergencies per *permissible occasion*. Similarly, **clause 104** provides employees with 2 days compassionate leave for each permissible occasion. **Clause 107** stipulates the notice and evidence requirements for taking personal/carer's leave, while **subclause 107(5)** allows awards/agreements to also specify evidence requirements.

Community service leave

Community service leave provisions feature in certain awards and agreements, however the Bill elevates this form of leave as a national standard. The Howard Government recognised community service by preventing the dismissal of community service volunteers (currently under the WR Act at paragraph 659(2)(i) and subsections 659(6) to 659(8)).

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The community service leave provisions will provide employees engaged in prescribed *eligible community service activity* (**clause 109**) the right to unpaid leave for a *reasonable* period so engaged (**clause 108**), which includes certain travel time. The proposed standard sets out that an employee carries out a voluntary emergency management activity if:

- the employee carries out an activity that involves dealing with an emergency or natural disaster
- the employee carries out the activity on a voluntary basis
- the employee is a member of, or has a member-like association with, a recognised emergency management body

either:

- the employee was requested by or on behalf of the body to carry out the activity, or
- no such request was made, but it would be reasonable to expect that, if the circumstance had permitted the making of such request, it is likely that such a request would have been made.

To be entitled to leave the employee must comply with notice and evidence requirements set out in the NES (**clause 110**). Notice must be provided to the employer as soon as practicable and indicate the period or expected period of absence.

Jury service is also classified under this standard as community service leave and an employee, other than a casual employee, is entitled to be paid by the employer for the first 10 days jury service (**clause 111**). The amount paid by the employer can be reduced by the quantum of jury service pay received by the employee.

Long service leave

Clause 113 provides that non agreement employees are entitled to long service in accordance with applicable award-derived long service leave terms, and the Bill does not exclude state and territory laws that deal with long service leave (**Clause 27**). In conjunction with other provisions of the Bill, the effect of clause 113 is to prevent long service leave provisions being traded away in agreement-making.

Public holidays

Clause 114 sets out the right of an employee to be absent from work on a public holiday. An employer is entitled to request that an employee work on a public holiday, if the request is reasonable. Conversely, the employee may refuse the request to work the holiday on the basis that the request is not reasonable or if the employee's refusal to work is reasonable. This entitlement will have the effect of protecting public holidays declared by state and territory governments.

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Clause 115 stipulates the following days as public holidays:

- 1 January (New Year's Day)
- 26 January (Australia Day)
- Good Friday
- Easter Monday
- 25 April (Anzac Day)
- the Queen's birthday holiday (on the day on which it is celebrated in a state or territory)
- 25 December (Christmas Day)
- 26 December (Boxing Day), and
- any other day, or part-day, declared or prescribed by or under a law of a State or Territory to be observed within the State or Territory as a public holiday. Award/agreement employees may agree on the substitution of a day that would otherwise be regarded as a public holiday.

Clause 116 requires that an employee who is absent from work on a public holiday is entitled to be paid for his/her ordinary hours that would have been worked at their base rate of pay (which includes incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, or any other similar separately identifiable amounts). A note advises that if an employee would not have worked any ordinary hours on the public holiday, the employee is not entitled to be paid for the public holiday.

Notice of termination and redundancy pay

Clause 117 provides that an employer shall not terminate an employee's employment without prior written minimum period of notice of the termination, determined in accordance with the following table (or pay in lieu of notice):

Employee's period of continuous service with the employer at the end of the day the notice is given	Period
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

Notice periods for the termination of an employee's employment have been prescribed in federal legislation since 1997. The notice periods proposed by this NES are the same as currently prescribed under the AFPCS, with provision for payment in lieu of the prescribed notice or a combination of written notice and payment in lieu. However, **subclause 117(2)** provides that an employer must not terminate an employee's

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employment unless they have given the employee the necessary period of notice worked out under **subclause 117(3)**, or they have paid the employee in lieu of that notice. The Explanatory Memorandum notes that the intention of **paragraph 117(2)(b)** is

to impose on an employer that makes the payment in lieu of notice, an obligation to pay either to (or for the benefit of or on behalf of) the employee, everything which the employee would have been entitled to receive had the employee worked out the required period of notice.⁴⁹

Clause 119 stipulates that an employee is entitled to be paid redundancy pay according to the schedule of payments below. The schedule of payments mirror the redundancy payments prescribed in federal awards (since 2004).

Employee's period of continuous service with the employer on termination	Redundancy pay period
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks
At least 9 years but less than 10 years	16 weeks
At least 10 years	12 weeks

An entitlement to redundancy pay is conditional on the employer no longer requiring the job be done by anyone, except where this is due to the ordinary and customary turnover of labour, or because of the insolvency or bankruptcy of the employer.

There is no entitlement to redundancy pay where the employee is employed by a business with fewer than 15 employees (including the employee whose employment is terminated on the ground of redundancy), or for employees with less than 12 months.

Where the employer arranges alternative employment for a redundant employee, FWA will determine what pay if any is to apply and may also reduce an entitlement on the grounds of the employer's incapacity to pay (**clause 120**). **Clause 122** deals with redundancy situations where businesses are sold (transfer of business). An employee's service with a former employer does not have to be recognised by the new employer. However where previous service is not recognised by the new employer the old employer

49. Explanatory Memorandum p. 77.

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will be required to pay out the employee's redundancy pay.⁵⁰ **Clause 123** sets out the employees excluded from the notice of termination requirements (such as casual employees and other classes).

Fair Work Information Statement

A previous WR Act provision obliging employers to provide their employees with a Fact Sheet outlining certain aspects of their employment conditions was repealed by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*. However the NES now include an obligation to provide employees with a Fair Work Information Statement.

The Fair Work Information Statement will be determined and published by FWA (**clause 124**) and will contain information about:

- the NES
- modern awards
- agreement making
- workplace rights, eg the right of freedom of association, and
- the role of Fair Work Australia.

It will be a requirement that an employer provide a copy of the statement to each new employee as soon as practicable after they commence employment. Such a requirement will not apply with respect to existing employees (**clause 125**).

Other provisions allow for school-based apprentices/trainees to receive allowances in lieu of certain leave (**clause 126**). **Clause 127** allows regulations to be made to allow awards or agreements to include terms which might be contrary to the NES. **Clause 128** allows award/agreement free employees to agree on certain prescribed matters under the NES. **Clause 129** allows regulations to be made to permit award/agreement free employees to agree with employers over matters which might be contrary to the NES. Regulations may also be made to limit the scope of such agreements. **Clause 130** prevents an employee from taking or accruing any leave while receiving workers compensation benefits.

Part 2–3: Modern Awards

Awards used to be both the cornerstone of Australia's wage safety net and the focal point for 'over-award' bargaining in turn leading to enterprise agreements. They were made either by consent or arbitration to settle industrial disputes in respect of occupations and industries. In recent years they have become a midlevel point of the wage and employment

50. Explanatory Memorandum p. 79.

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safety net, nesting between the Australian Fair Pay Standard (now NES) and workplace (now enterprise) agreements.

As a result of the expansion of the federal industrial system from 2006, there are currently about 6,000 awards (including related instruments). The *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* commenced a process to restructure the contents of awards and rationalize their number. The award modernisation process began in April 2008 in accordance with a request made to the AIRC by the Minister for Education, Employment and Workplace Relations on 28 March 2008. The AIRC is required to complete the process by 31 December 2009.

First Modern Awards

Rationalized awards will be called ‘modern awards’. The first 17 ‘priority’ awards to be finalised under award modernisation were published by the AIRC on 19 December 2008 but are not due to come into effect until January 2010 (or thereafter). Award modernisation is being undertaken in four stages—each of which involves pre-drafting consultations, the release of exposure draft awards, further consultation on the drafts and the publication of modern awards. The 17 modern awards will replace some 500 awards that currently cover those industries and occupations.⁵¹ The Stage 1 draft awards are:

- Black Coal Mining Industry Award 2010
- Clerks — Private Sector Award 2010
- Fast Food Industry Award 2010
- General Retail Industry Award 2010
- Hair and Beauty Industry Award 2010
- Higher Education Industry — Academic Staff — Award 2010
- Higher Education Industry — General Staff — Award 2010
- Horse and Greyhound Training Award 2010
- Hospitality Industry (General) Award 2010
- Manufacturing and Associated Industries and Occupations Award 2010
- Mining Industry Award 2010
- Pharmacy Industry Award 2010
- Racing Clubs Events Award 2010
- Racing Industry Ground Maintenance Award 2010

51. AIRC, [Award Modernisation Stage 1 Decision](#) 19 December 2008.

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- Rail Industry Award 2010
- Security Services Industry Award 2010
- Textile, Clothing, Footwear and Associated Industries Award 2010

Clause 134 stipulates that the modern awards objective requires FWA to ensure that modern awards, along with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- relative living standards and the needs of the low paid
- the need to encourage collective bargaining
- the need to promote social inclusion through increased workforce participation
- the need to promote flexible modern work practices and the efficient and productive performance of work
- the principle of equal remuneration for work of equal or comparable value
- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards, and
- the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

These points constitute the *modern award objective*. **Clause 135** allows award minimum wages only to be varied for work value reasons or to remove ambiguities or correct anomalies. Other provisions allow an annual wage review and award reviews to be conducted every four years (see below). **Clause 136** circumscribes what may or may not be included in awards.

Terms of modern awards

Awards will build on the minimum entitlements guaranteed in the NES. Under **clause 139** modern awards will deal with:

- minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and skill-based classifications and career structures; and incentive-based payments, piece rates and bonuses
- the type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities

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- arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours
- overtime rates
- penalty rates, including for: employees working unsocial, irregular or unpredictable hours; employees working on weekends or public holidays and shift workers
- annualised wage arrangements that: have regard to the patterns of work in an occupation, industry or enterprise; and provide an alternative to the separate payment of wages and other monetary entitlements; and include appropriate safeguards to ensure that individual employees are not disadvantaged
- allowances, including expenses incurred in the course of employment or responsibilities or skills that are not taken into account in rates of pay and disabilities associated with the performance of particular tasks or work in particular conditions or locations, providing that all allowances are separately identified (**subclause 139(2)**).
- leave, leave loadings and arrangements for taking leave
- superannuation
- procedures for consultation, representation and dispute settlement.

Clause 140 allows the FWA to include terms in awards relating specifically to the direct or indirect employment and remuneration of outworkers by an outworker entity, if the entity is aware that work is reasonably likely to be performed by an outworker at the time work is arranged to be performed.

Clause 141 allows awards to contain industry-specific redundancy schemes, where the redundancy scheme was included in the award as a result of the modernisation process provided that the scope of coverage is not increased.

Clause 142 allows awards to include incidental terms for the purpose of making a term in a practical way and machinery terms (title, content etc).

Certain terms must be included in awards. **Clause 143** requires awards to express the coverage of a particular award; the award *may* cover one or more specified employee organisations. Employers and outworker entities may be covered specifically by name or by inclusion in a specified class. Employees must be specified by inclusion in a specified class. Employees not traditionally covered by awards due to the nature or seniority of their role must not be covered by modern awards.

Award flexibilities

Clause 144 requires awards to have flexibility terms permitting employers and individual employees to negotiate individual agreements on certain matters. According to Bill's Explanatory Memorandum, a flexibility term must not require that any individual flexibility arrangement be approved, or consented to, by another person meaning that the

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flexibility term could not require any individual flexibility agreement to be approved by a trade union or employer association) (**subclause 144(5)**). The employer and employee must genuinely agree to any individual flexibility arrangement, the arrangement must be in writing and signed, and the employer must ensure that the arrangement would result in the employee being ‘better off overall’ (**paragraph 144(4)(c)**).

Flexibilities available, for example, under the draft Manufacturing and Associated Industries and Occupations Award have been identified by Australian Business P/L. They identify the following provisions which may be altered by individual agreement:

- minimum engagement for part-time employees
- variation to hours of part-time employees
- minimum engagement for casuals
- annualised salary arrangement
- tool allowance
- make-up time
- meal break
- time off in lieu of for overtime
- rest period after overtime
- rest break.

The following provisions may be altered by either a majority agreement or by individual agreement:

- period of casual election to convert to on-going employment
- payment of wages
- ordinary hours of work for day workers on weekends
- variation to the spread of hours for day workers and shift workers
- methods of arranging ordinary working hours
- working in excess of five hours without a meal break
- substitution of public holidays.

Provisions that may be changed by both the employer and the majority of employees in the establishment, or a section or sections within a workplace, include:

- ordinary hours of work, continuous shift workers
- ordinary hours of work, non-continuous shift workers

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- 12-hour shifts
- public holiday shifts
- conversion of annual leave to hourly entitlement
- annual close down.⁵²

As can be seen, most of these flexibility provisions relate to the method of working ordinary hours within a workplace. Nevertheless, in certain sectors, particularly in retailing, trade association representatives have warned of significant lay-offs amid mounting concerns the new awards will lead to higher costs for employers. The WA Independent Grocers Association and Master Grocers Australia, for example, have claimed that:

many employees, particularly casuals, faced inevitable unemployment after the award increased Sunday penalty rates and casual loadings in most States.⁵³

However these concerns appear to overlook the ability under the Bill to phase out state-based differences over a five year period (see below), as well as the award in question not coming into effect until at least January 2010.

Clause 145 deals with the situation where an individual flexibility arrangement does not meet a requirement of clause 144. In this situation, the arrangement still has effect as if it were an individual flexibility arrangement, but can be terminated by the employee giving 28 days notice, as well, the employer may be liable to a civil remedy penalty for contravention of an enterprise flexibility term. **Clause 146** requires awards to include terms for settling disputes about any award matter or in relation to the NES. **Clause 147** requires awards to specify ordinary hours of work for each classification of employee covered and each type of employment. If the award includes piecework and pieceworkers, the award must specify base and full rates of pay (**clause 148**). **Clause 149** allows the FWA to vary allowances when wage rates in the award are varied, where considered appropriate to vary.

Prohibited terms

The following clauses deal with terms that must not be included in awards:

-
52. This analysis of award flexibilities has been prepared by Australian Business Pty Ltd, see: 'Modern awards - coverage and flexibility', *Workplaceinfo.com.au*, 29 September 2008.
53. B. Spencer, 'Shop worker penalty rates a 'threat to jobs' *The West Australian*, 27 December 2008.

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- objectionable terms meaning terms which offend the Bill's general protections to employers and employees (Part 3) or the payment of bargaining services fee (**clause 150**)
- terms including *unreasonable* payments and deductions for the employer's benefit (other deductions from employees' pay are authorised by the Bill); or unreasonable terms in relation as to how employees spend their remuneration (**clause 151**)
- terms about right of entry (**clause 152**)
- terms that are discriminatory, other than those required for a particular position and other than those made in connection with an institution conducted according religious tenets (**clause 153**)
- terms that contain State-based differences, allowing for a 5 year transition period to remove such differences (**clause 154**)
- terms that deal with long service leave, in anticipation that the NES will be developed to include terms on such leave (**clause 155**).

Updating awards

The Bill requires FWA to review modern awards every four years (**clause 156**). At this time, FWA may make new awards, or vary or revoke existing awards. During these reviews, FWA may vary minimum wages in awards only if this is justified for work value reasons. FWA may create, vary or revoke modern awards outside the four year review period if it considers this is necessary to achieve the modern awards objective (**clause 157**), to update the names of employers, organisations or outworker entities bound by the awards (**clause 159**), to remove ambiguity or uncertainty or correct an error (**clause 160**), or if the award is referred to it under the *Human Rights and Equal Opportunity Commission Act 1986* (**clause 161**).

FWA's award powers

Clauses 162 to 168 deal with specific aspects of the FWA's powers relating to awards. These are in addition to those specified in Chapter 5 of the Bill. **Clause 163** directs the FWA not to restrict award coverage unless satisfied that the relevant employers and employees will be covered by another award; and in the possibility of making a new modern award, to ascertain whether an existing modern award could have its coverage extended. Also a modern award cannot cover an organisation unless the relevant organisation is entitled to represent the employers' or employees' industrial interests. **Clause 164** prevents FWA from revoking a modern award unless it has become obsolete and those covered by the award are covered by another award. **Clause 165** specifies that award determinations (other than wage determinations) come into effect, mainly, on the day after the determination is made. FWA may make retrospectively only in certain circumstances. **Clause 166** requires determinations affecting award minimum wages to have effect from 1 July in the next financial year, unless FWA considers another date

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appropriate. A determination may be made to apply retrospectively to correct errors etc or where there are ‘exceptional circumstances’. **Clause 167** provides an immunity to a person who has contravened a retrospective term. **Clause 168** requires awards to be published.

Modern awards will not apply to ‘high income employees’ (**Clause 47(2)**) with a ‘guarantee of annual earnings’ (**Clause 329**) above a certain amount (\$100,000, indexed from 27 August 2007).⁵⁴ The concept of a ‘guarantee of annual earnings’ is discussed below. High income employees will still be covered by the NES.

Part 2–4: Enterprise Agreements

This Part of the Bill facilitates the making of enterprise agreements through collective bargaining, primarily at the enterprise level. **Clause 171** sets out the objectives of the Part which, inter alia, include providing a simple, flexible and fair framework that enables collective bargaining in good faith at the enterprise level, and allowing FWA to make orders for this end as well facilitating prompt approval of agreements.

Types of agreements

Enterprise agreements may be made about matters pertaining to the relationship between employer and employee; employers, employees employer organisation and employee organisations; deductions from wages authorised by an employee under an agreement and about how the agreement will operate (**subclause 172(1)**).

Collective agreements may be made as either single-enterprise agreements (**subclause 172(2)**), multi-enterprise agreements (**subclause 172(3)**) or greenfields agreements if the agreement relates to a genuine new enterprise (**subclause 172(4)**). Greenfields agreements can only be made with employee organisations, before the employer employs any employees. Single and multi-enterprise agreements can be made as greenfields agreements. The enterprise must be ‘new’, not an existing enterprise acquired as a going concern (refer to definition in **clause 12**).

Unlike agreements under the WR Act, there is no distinction made between ‘union’ agreements and ‘employee’ (non union) agreements. Enterprise agreements thus appear to resemble previous non union agreements, i.e. made with employees, and if a union is involved it is as a bargaining agent (not party principal). A union may apply to FWA to be covered (**clause 183**). These arrangements have been used previously with non union agreements where a union has members; reflected, for example, in respect of a 2001 employee section 170LK certified agreement applying to the Department of the Senate. There, the relevant union was able to be bound under the terms of the agreement:

54. Explanatory Memorandum, p. xxviii.

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... in accordance with s.170M of the Workplace Relations Act 1996 (the Act), the Commission hereby orders that the CPSU, the Community and Public Sector Union, is bound by the Department of the Senate Certified Agreement 2001 - 2003.⁵⁵

Representation and bargaining

An employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement must take reasonable steps to give notice of the right to be represented by a bargaining representative to each employee within 14 days of the *notification time* (which inter alia includes the time when the employer agrees to or initiates bargaining). **Clause 174** sets out the contents requirements for representational rights notice which allow an employee to appoint a bargaining agent and where such appointment is not made and the employee is a member of an employee organisation, that organisation automatically becomes the bargaining agent. **Clause 175** requires *relevant employee organisations* to be given notice of an employer's intention to make a greenfields agreement. **Clause 176** sets out persons who are bargaining representatives for enterprise agreements which include: the relevant employer, employee organisations which have members and are entitled to represent those members, a person appointed by an employee or by the employer. **Clause 177** sets out the appointment of bargaining representatives for greenfields agreements. **Clause 178** stipulates that an appointment of a bargaining representative comes into force as specified in the instrument of appointment. **Clause 179** prevents employers or their representatives from refusing to recognise other representatives.

Approval of enterprise agreements

An employer may request the employees to approve an agreement by voting for it (**clause 181**). This request must not be made until at least 21 days after the day on which the employer gave notice of the employees' representational rights. Before an employer requests that employees approve an enterprise agreement, it must take all reasonable steps to ensure that for a period of seven days the employees are given a copy of or access to the agreement (**clause 180**). The employer must also notify the employees of the time and place at which the vote will occur and what voting method will be used. The employer must take all reasonable steps to ensure that the terms of the agreement and the effect of those terms are explained to the employees (**subclause 180(3)**). This explanation must be provided in an appropriate manner, taking into account the particular circumstances and needs of the relevant employees. These needs include culturally and linguistically diverse backgrounds, youth and the absence of a bargaining representative.

An enterprise agreement is made when a majority of employees vote to approve the agreement. A multi-enterprise agreement is made when a majority of employees of one of

55. *Department of the Senate Certified Agreement 2001 – 2003*, p. 1.

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the employers covered by the agreement vote to approve the agreement. A greenfields agreement is made when it is signed by the employer and each union that will be covered by the agreement (**clause 182**). **Clause 184** allows a multi-enterprise agreement which did not receive support from a majority of employees of the employers it was designed to cover, to be varied so that it applies only to those employers and employees who supported the agreement.

After an enterprise agreement is made, an employee organisation that was a bargaining representative may give FWA a written notice stating that it wants the agreement to be approved (**clause 183**). This application must be accompanied by a signed copy of the agreement and any declarations (eg that the agreement has been genuinely agreed to by the employees covered by it) that are required by the procedural rules to accompany that application (**clause 185**). **Clause 185** requires the application to be made within 14 days after the agreement is made; it also requires the agreement to specify its nominal expiry date (being not more than four years from the approval date); the FWA to be satisfied that the terms of the agreement do not contravene the NES; that it does not contain unlawful terms and that the group of employees to be covered by the agreement were 'fairly chosen' (**clause 186**).

Clause 187 stipulates additional requirements for approval such as the FWA being satisfied that employees have genuinely agreed to the terms of the proposed agreement, while **clause 188** stipulates that the FWA must not approve the agreement if there are reasonable grounds to believe that the agreement was not genuinely agreed to. FWA may refuse to certify an agreement if it considers that compliance with the agreement may result in a breach of a Commonwealth law (**clause 192**).

Better off overall test (BOOT)

Clause 189 enables the FWA to approve an agreement which does not pass the *better off overall test*, if because of exceptional circumstances, approval of the agreement would not be contrary to the public interest. These might include the agreement being a part of a reasonable strategy for revival of an enterprise from a short term crisis. FWA may also approve an agreement under **clause 190** where it does not meet certain provisions under clauses 186, 187 and 189 where the employer gives undertakings to the FWA to remedy or address the perceived shortcomings of the proposed agreement. Note that the undertakings are taken to be a term of the agreement (**clause 191**).

FWA will approve the agreement if it is satisfied that the agreement has been genuinely agreed to by the employees (**clause 186**) and it passes the *better off overall test* in respect of each employee (**clause 193**). There are additional requirements in relation to multi-enterprise agreements. An enterprise agreement passes the better off overall test if FWA is satisfied, as at the *test time*, that each award-covered employee (and prospective award-covered employee) would be better off overall if the agreement applied than if the applicable modern award applied to the employee. The test time is the time the application

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for approval of an agreement is made. Enterprise agreements come into effect seven days after FWA approval.

Unlawful terms in enterprise agreements

Clause 194 specifies enterprise agreement terms that are unlawful. These include:

- a *discriminatory term* as defined in clause 195. Under **clause 195** a term is a discriminatory term where it discriminates against an employee covered by the agreement because of, or for reasons including, the employee's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. Exceptions are made in relation to the inherent requirements of the employment, requirements due to religious beliefs and certain wage arrangements (such as those for juniors, trainees and those with disabilities).
- an *objectionable term* (as defined in clause 12)
- a term giving an unfair dismissal remedy to an employee who otherwise has not completed the applicable minimum employment period
- a term which excludes or modifies the application of the unfair dismissal provisions in Part 3-2
- a term which is inconsistent with a provision of Part 3-3 (industrial action)
- certain terms which may be inconsistent with the right of entry of Part 3-4, however other right of entry terms may be permitted, such as entry to assist in dispute resolution.

These are the provisions which unions and the ACTU in particular, have criticised:

The government has broken its election promise to allow 'free bargaining', particularly by prohibiting bargaining for better unfair dismissal rights, better union entry rights, and by prohibiting parties from agreeing to 'reserve' certain matters for future bargaining. In particular, the restriction on bargaining better union entry rights:

- undermines employees' fundamental right to representation
- is uncertain (since it is not clear which 'purposes' a union can enter a workplace for)
- will undermine genuine bargaining (since making a claim that is honestly thought to be lawful, but which turns out not to be so, will prevent a party from obtaining FWA orders, taking protected industrial action, or having an agreement approved), and

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- will force parties to enter into ‘side deals’ (which are inefficient, and do not give parties sufficient certainty that their rights are enforceable).⁵⁶

Clauses 196 to 200 set out additional approval requirements in respect of shiftworkers, pieceworkers, school-based apprentices and trainees and outworkers. **Clause 201** requires the FWA to note that the agreement includes both a model flexibility term and a model consultation term (to be developed in the Bill’s regulations), that the agreement covers an employee organisation where it has applied to be covered and to note where employer undertakings have been accepted.

Mandatory terms of enterprise agreements

Enterprise agreements must include:

- a flexibility term - enabling the employer and an employee to genuinely agree on arrangements which vary the effect of the agreement, providing that term leaves the employee better off overall (**clauses 202 and 203**). **Clause 204** sets out protections and remedies to an employee, where a flexibility term is agreed to but does not meet the requirements of clause 203.
- a consultation term - requiring the employer to consult the employees about major workplace changes (**clause 205**).

Clause 206 stipulates that an agreement’s base rate of a pay is not to be less than the applicable modern award rate or the national minimum wage order rate.

Variation and termination of agreements

Provisions of **clause 207** provide that an employer or all of the employers in the case of a multi-employer agreement can make a variation with affected employees, providing the agreement has already met the BOOT test and the variation is approved by FWA. **Clause 208** allows an employer to request employees to vote on the variation (by a range of methods). **Clause 209** stipulates that a variation takes effect on the date of approval, however a multi-enterprise agreement cannot be varied on an enterprise by enterprise basis, but must be approved by a majority of employees in each of the enterprises. A representative of any of the employer, employees or organisation must apply to FWA to approve the variation within 14 days of the variation’s agreement (**clause 210**).

Clause 211 sets out similar rules to the approval of variations as to the approval of agreements— that is, the variation must pass the BOOT test, employees must have genuinely agreed but any existing individual flexibility arrangement will be disregarded by FWA. **Clauses 212 and 213** allow for variations to be approved subject to undertakings of the employer being provided, with such undertakings being taken to be terms of the variation. **Clause 214** allows FWA to refuse to authorise a variation where it potentially

56. ACTU, Submission No. 13, SEEWRC inquiry, p. 31.

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involves a breach of a Commonwealth law. A variation comes into operation on the day specified in the approval (**clause 216**). **Clause 217** allows an application to be made to FWA to vary an agreement to remove an ambiguity. **Clause 218** allows the Sex Discrimination Commissioner to make a submission to FWA alleging that an enterprise agreement term requires a person to do an unlawful (discriminatory) act and for FWA to correct the agreement.

Agreements can be terminated when an employer (or all employers in the case of multi-enterprise agreements) and a majority of employees covered by the agreement vote to terminate it (**clause 219**). In the case of terminating a greenfields agreement, the enterprise would have actually had to employ person/s before the termination can be approved. **Clause 220** allows employers to request employees to terminate an agreement providing certain formalities such as notice about the termination are met. **Clause 221** stipulates the form of agreement required for its termination and **clause 222** allows a bargaining agent then to make an application to the FWA. FWA must terminate the agreement having ascertained that the required formalities have been met (**clause 223**), with the termination taking effect on the date specified in the decision (**clause 224**). **Clauses 225 to 227** deal with the termination of an agreement beyond its nominal expiry date, allowing FWA to terminate such an agreement where it is not contrary to the public interest.

FWA's general role in facilitating bargaining

Bargaining representatives (for both employers and employees) must meet good faith bargaining requirements (**clause 228**). If an existing enterprise agreement is in operation, a bargaining representative cannot be required to comply with the good faith bargaining requirements if it is more than 90 days before the nominal expiry date of the current agreement (**subclause 229(3)**).

Good faith bargaining requires bargaining agents to:

- attend at and participate in meetings at reasonable times
- disclose relevant information (other than confidential or commercially sensitive information) in a timely manner
- respond to proposals in a timely manner
- give genuine consideration to proposals and reasons for responses to those proposals, and
- refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining.

However, these requirements do not require a bargaining representative to make any concessions or reach any agreement.

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If a bargaining representative does not meet these requirements, or bargaining is being thwarted or delayed, another bargaining agent may apply to FWA to make a *bargaining order* (**clause 229**). Bargaining orders must specify a variety of matters including the actions to be taken to comply with good faith bargaining obligations (**clause 231**). **Clause 232** addresses the operation of a bargaining order and the circumstances for its revocation. Failure to comply with an order exposes a bargaining representative to court orders for contravening a civil remedy provision (**clause 233**). FWA can exclude certain parties from bargaining and require multiple bargaining representatives of employees to appoint one of them to represent the others. If non-compliance with a bargaining order is sustained, another bargaining representative may apply for a *serious breach declaration* (**clauses 234 and 235**).

If an employer is not prepared to bargain, a bargaining representative of the employees can apply (under **clause 236**) to FWA for a *majority support determination* that a majority of the employees who will be covered by the agreement want to bargain with the employer (**clause 237**). If an employer ignores this determination, another bargaining agent may apply to FWA for a bargaining order (as above).

If a bargaining representative for a single enterprise agreement believes that the bargaining is not proceeding efficiently or fairly because the proposed agreement will not cover all appropriate employees or will cover inappropriate employees, that representative can apply to FWA for a *scope order* (**clause 238**). Scope orders will specify the employees to be covered by the proposed agreement. Breach of a scope order risks an application for a bargaining order (**clause 239**). **Clause 240** allows a bargaining agent to apply to FWA for assistance in disputes over single enterprise bargaining. In the case of multi-enterprise bargaining, all bargaining agents will need to support such an application (other than where a low-paid authorisation is in operation).

Low-paid bargaining

The Bill provides access to a separate multi-employer bargaining stream for the low-paid. The Bill does not define low-paid, however the Bill's Explanatory Memorandum refers to certain employees in the community services sector and the cleaning and child care industries who might access this stream.⁵⁷

Bargaining representatives may apply on behalf of employers or employees for a low paid authorisation which will allow for FWA to facilitate bargaining for a specified list of employers (**clause 242**). FWA will consider a range of factors to determine if the proposed bargaining is in the public interest (**clause 243**). These factors include the history of bargaining in the industry where the employees work and whether the granting of the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates. FWA will be able to facilitate

57. Explanatory Memorandum, p.157.

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bargaining in this stream by the use of compulsory conferences and good faith bargaining orders which would not otherwise be available in multi employer bargaining. Protected industrial action will not be available. FWA must take account of the views of employers and employees who will be covered by the agreement and the extent to which the applicant is prepared to respond reasonably to the needs of individual employers (i.e. prevent ‘pattern bargaining’).

Clause 244 allows FWA to vary a low-paid determination to remove or add employers to the determination. **Clause 245** allows FWA to remove an employer from a low-paid determination when an enterprise agreement or workplace determination comes into effect and **clause 246** allows FWA to provide appropriate assistance to the parties.

Clause 247 enables the Minister to make a declaration that two or more employers (for example franchisees) may bargain together for a proposed enterprise agreement. The employers specified in the declaration may apply under **clause 248** to FWA for a *single interest authorisation*. FWA must make such an authorisation under **clause 249**, while **clause 250** specifies the content of such an authorisation, and **clauses 251 and 252** allows for variations either to add or remove employers or to extend the period of the authorisation.

Clause 253 stipulates that non permissible and unlawful terms of an agreement have no effect. **Clause 255** prevents the FWA from making orders concerning the inclusion or exclusion of certain content from agreements or on the approval process for agreements. **Clause 257** enables agreements to include documents as in force from time to time, such as extracts from modern awards or other laws.

Note that it is the Bill’s low paid bargaining provisions which has attracted strong criticism from employer organisations. For example, the Australian Industry Group claims:

The low paid bargaining stream, which would have the effect of reintroducing compulsory arbitration, would undermine Australia’s enterprise bargaining system and add a further layer of arbitrated employment conditions above the safety net. It should be scrapped.⁵⁸

Part 2–5: Workplace Determinations

The current WR Act introduced new provisions (Division 8 of Part 9) allowing the Minister for Education, Employment and Workplace Relations to issue a Declaration where protected industrial action threatened life, personal safety, health or welfare of the population or was likely to cause significant damage to the economy. The Declaration terminates the bargaining period and authorises the Minister to issue directions to ameliorate the threat to ‘essential’ services. Such directions might include: requiring

58. AiG, Submission No. 118, SEEWRC inquiry, p. 6.

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employees to lift work bans or return to work and requiring the employer to allow employees back onto the worksite in the case of a lockout. A Declaration allows the AIRC to make a Workplace Determination. These provisions relating to the making of binding determinations were similar to the previous powers of the AIRC to make awards under subsection 170MX of the WR Act (prior to the Work Choices amendments) and so had been a feature of the federal industrial legislation over the 1990s. In any case, use of these determinations has been very limited, with two applications lodged and one determined in 2007-08.⁵⁹

Low-paid workplace determinations

Clause 260 allows that an application may be made to the FWA (Full Bench⁶⁰) for a low-paid workplace determination. These determinations may be made as *consent low-paid determinations* or *special low paid determinations* depending on the bargaining stream and are available where an low-paid authorisation is in force, and one or more of the bargaining representatives are unable to agree about the terms that should be included in the agreement. Requirements for the FWA's approval set out in **clause 262** are that:

- the bargaining representatives are genuinely unable to reach agreement on the terms of the proposed enterprise agreement and there is no reasonable prospect of agreement being reached.
- at the time of the application, the terms and conditions of the employees who will be covered by the determination were substantially equivalent to the minimum safety net of terms and conditions provided by modern awards together with the NES – in other words, the employees are paid at or just above the safety net.
- the FWA is satisfied that the determination will promote bargaining for a future enterprise agreement and will assist productivity and efficiency in the enterprises concerned and it is in the public interest to make the workplace determination.

Additional requirements set out in **clause 263** are that the relevant employer is not also included in a consent low-paid workplace determination application, or is not covered, or previously has not been covered by an enterprise agreement, or another workplace determination, appropriate to the work to be performed by the employees. **Clause 264** stipulates the core terms, the mandatory terms, the agreed terms and any other pertinent term to be included in a low-paid determination, while **clause 265** prevents other matters being included.

59. AIRC, Annual Report of the President of the Australian Industrial Relations Commission and Annual Report of the Australian Industrial Registry, 1 July 2007 to 30 June 2008, p. 8.

60. **Subclause 616(4)** requires that determinations made under Part 2–5 must be made by a Full Bench.

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Industrial action related workplace determinations (IARWD) relate to and may follow the termination of protected industrial action either by the FWA for reasons that the action was causing significant economic harm to the parties or to the Australia economy or the Minister made a declaration. **Clause 266** provides that the FWA must make an IARWD at the end of the post-industrial action negotiating period where a termination of industrial action instrument (either an FWA order under **clause 423** or **clause 424**, or a Ministerial declaration under clause 431) and the bargaining representatives have not settled all of the bargaining matters. The post-industrial action negotiating period is the period that starts on the day on which the termination of industrial action instrument is made and ends either 21 days after that day, or if FWA has extended the period under **subclause 266(4)**, then 42 days after that day.

Clause 267 sets out the core terms, the mandatory terms, the agreed terms and any other pertinent term which can be included in an IARWD. **Clause 268** prevents other terms being included.

Clause 269 requires the FWA to make a bargaining-related workplace determination soon after the end of the post-declaration negotiating period being the period that starts on the day on which the serious breach declaration is made and ends either 21 days after that day, or if FWA has extended the period under **subclause 269(3)**, then 42 days after that day, if a serious breach declaration has been made and bargaining issues are still outstanding. **Clause 270** sets out the core terms, the mandatory terms, the agreed terms and any other pertinent term which can be included in a bargaining-related workplace determination, and which parties the determination will cover. **Clause 271** prevents other terms than those expressed in clause 270 being included in a determination.

Core terms specified in **clause 272** include a date as the determination's nominal expiry date, which must not be more than four years after the date on which the workplace determination comes into operation, and terms which would pass the BOOT test. Unlawful etc terms are not core terms.

Mandatory terms specified in **clause 273** include a procedure for settling disputes about any matters arising under the determination and in relation to the NES, a model flexibility term and a model consultation term.

Agreed terms are set out in **clause 274** and are those agreed by the bargaining representatives to be included in the workplace determination.

Other terms set out in **clause 275** are those FWA considers necessary to the determination and may relate to the merits of issues, interests of employer and employees, productivity improvement measures and certain others.

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Operation, coverage and interaction etc. of workplace determinations

Clause 279 provides that, subject to exceptions specified in the clause, the Bill applies to a workplace determination as if it were an operative enterprise agreement. A workplace determination operates from the day it is made (**clause 276**). It terminates according to either clause 224 or clause 227, as these are applied by clause 279. Under **clause 277** a workplace determination covers an employer, employee or employee organisation if the determination is expressed to cover the employer, employee or employee organisation, or where a provision of the Bill, and FWA order or court order has the effect that the determination covers the employer, employee or employee organisation. **Clause 278** specifies that where an earlier determination applies to an employee and an enterprise agreement or a later determination comes into operation, the earlier determination ceases to apply.

Other matters

Clause 280 stipulates that a person must not contravene a workplace determination (subject to a civil remedy). **Clause 281** allows an application for a workplace determination to be made by one bargaining representative of an employer providing other employer representatives have agreed. Where a single interest employer authorisation is in place, in relation to the proposed enterprise agreement, the representative specified in the authorisation may make the application.

Part 2–6: Minimum Wages

This Part of the Bill specifies the objectives of minimum wage setting as applied to employees under modern awards and those without award coverage (under the NES). The minimum wage functions of FWA set out here relate to provisions setting up FWA under Chapter 5.

Clause 284 sets out the Bill's minimum wage objectives. The minimum wages objective requires FWA to establish and maintain a safety net of fair minimum wages, taking into account: the performance and competitiveness of the national economy, including productivity; business competitiveness and viability; inflation and employment growth; promoting social inclusion through increased workforce participation; relative living standards and the needs of the low paid; the principle of equal remuneration for work of equal or comparable value; and providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability. Modern award minimum wages are defined as wage rates in modern awards including wage rates for junior employees, trainees and employees with disabilities as well as: casual loadings and piece rates. FWA is given the power to *set* or *vary* these rates.

Clause 285 requires FWA to conduct annual wage reviews each year to review modern award minimum wages (as defined in **subclause 284(3)**) by making one or more determinations to set, vary or revoke modern award minimum wages and FWA must also

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review the national minimum wage order and must make a new national minimum wage order in each annual wage review. **Clauses 286 and 287** specify when annual wage review determinations come into effect for modern awards and minimum wage orders, which is generally from 1 July the next financial year.

Clauses 289 to 292 address the conduct of annual wage reviews. Reviews are open to everyone to make submissions; these must be published and submitters may comment on the submissions of others. In other words the conduct is not of a court but more similar to the pay scale reviews currently conducted by the Australian Fair Pay Commission. FWA may commission and must publish any research. Any new wage rates must be published by 1 July each year.

Clause 293 stipulates that employers must not contravene minimum wage orders. **Clause 294** stipulates the content of a national minimum wage order which goes to: the national minimum wage and special national minimum wages for *all* award/agreement free employees where they are: junior employees, trainees and employees with disabilities. The order must also include the casual loading for award/agreement free employees. Also, the order must oblige employers to meet the rates stipulated in the order. Wage rates must be expressed as hourly rates while the casual loading must be expressed as a percentage. **Clause 296** prevents a national minimum wage order from being varied except to remove ambiguity or uncertainty or to correct an error. Where this occurs, **clause 298** ensures that a person who has contravened a term of the national minimum wage order or an enterprise agreement due to a retrospective amendment of a national minimum wage order under **clause 297** is not liable to pay a penalty in respect of the contravention. **Clause 299** provides that a national minimum wage order operates until replaced by the next national minimum wage order.

Part 2–7: Equal Remuneration

Clause 302 allows FWA to make an equal remuneration order, where it considers appropriate to ensure equal remuneration for men and women workers for performing work of equal or comparable value in relation to the employees to whom the order will apply. Such orders can only be made on application from an employee, and employee organisation or the Sex Discrimination Commissioner. Any order must not provide for a reduction in an employee's rate of remuneration (**clause 303**), and it may be implemented in stages (**clause 304**).

Part 2–8: Transfer of Business

Business outsourcings involving the transfer of employees will result in industrial instruments transferring from the employer to the new service provider. As the Bill's Explanatory Memorandum states:

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The circumstances in which a transfer of business occurs under Part 2-8 are broader than those contemplated by the current transmission of business provisions contained in Part 11 of, and Schedule 9 to, the WR Act.⁶¹

The Bill introduces a new test for determining when, (under new terminology), a *transfer of business* occurs for the purposes of determining whether industrial instruments transmit to a new employer. It provides a definition of transfer of business and allows for the circumstances in which a transfer of business can occur. It also sets out the definitions of old employer, new employer and transferring work.

The new test (**clause 311**) provides that an industrial instrument will transfer to the new employer where an employee has been terminated by the *old* employer and within three months is re-employed by the *new* employer, and there is a connection between the old and new employer as provided for in **subclauses 311(3) to (6)**. These provisions go to a transfer of assets, outsourcing or a cessation of an outsourcing arrangement (insourcing) or where the new employer is an associated entity of the old employer or a transfer between related companies. A further requirement is that the work (the *transferring work*) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for their old employer (**paragraph 311(1)(c)**). The new test focuses on there being a similarity in the work performed by employees, rather than looking at whether a business (or part of a business) has been transferred as is currently the case.

Clause 312 stipulates *transferable instruments* which include an enterprise agreement, a workplace determination and a 'named employer award'. **Clause 313** binds the transferable instrument that covered an old employer and a transferring employee immediately before that employee's employment was terminated and covers the new employer and the transferring employee in relation to the transferring work. This instrument displaces any other instruments applying to the new employer. **Clause 314** enables the transferable instrument to cover other employees than those transferred subject to an FWA order. **Clause 315** enables an employer and employee organisation to be covered by a named employer award (or enterprise agreement). **Clause 316** obliges a new employer to meet a guarantee of earnings provided by the former employer except in relation to the part of the guaranteed period before the transferring employee became employed by the new employer and to the extent that it requires the new employer to pay an amount of earnings at a higher rate than the annual rate of the guarantee of annual earnings. **Clause 318** provides that FWA may make orders in relation to a new employer and a transferring employee and applicable instruments, as well as setting who may make applications for such orders. **Clause 319** enables the FWA to make orders in relation to a new employer and a non-transferring employee and applicable instruments, as well as setting out who may make applications for such orders. **Clause 320** permits FWA to vary

61. Explanatory Memorandum, p. 191.

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a transferable instrument to remove terms that are not or will not be capable of meaningful operation because of the transfer of business to the new employer.

Part 2–9: Other terms and conditions of employment

Payment of wages

Clause 323 requires employers to pay employees any amounts payable to the employees in relation to the performance of work in full (except as permitted by clause 324), in money and at least monthly.

Clause 324 contains provisions regulating *permitted deductions* from employee remuneration payments. The provisions require any deductions to be authorised in writing and principally for the employee's benefit. Note however clause 151 which provides that a term of an enterprise agreement, award or a contract of employment will be of no effect to the extent that it permits deductions from an employee's remuneration if the deduction is directly or indirectly for the benefit of the employer. **Clauses 325** and **326** prevent employers from directing employees as to how they might spend their earnings and is unreasonable in the circumstances.

Guarantee of annual earnings

The Bill provides employees with an ability to enter into a *guarantee of annual earnings* agreement with high income employees (**clause 328**). The Explanatory Memorandum proposes that the *high income threshold* amount will be \$100,000 subject to indexation from 27 August 2007, and to be expressed by regulation.⁶²

Clause 330 defines a guarantee of annual earnings to be a written undertaking given by an employer to an employee who is covered by a modern award, which guarantees the employee payment of earnings over a period of 12 months or more, in return for the performance of work by the employee. An employee must be covered by a modern award that is in operation in order to be employed on the basis of a guarantee of annual earnings, but not an enterprise agreement. The employer and employee must reach agreement about the undertaking and the employee's acceptance of the undertaking before it commences operation, and no later than 14 days after the employee is employed, or the parties agree to vary the employee's terms and conditions of employment.

Modern awards will not apply to employees who have entered into such agreements (see clause 47). **Clause 332** specifies the earnings that are to be included when making this calculation. The earnings do not include payments which cannot be determined in advance (some examples are: commissions, incentive based payments and bonuses and overtime, unless the payment is guaranteed), and compulsory superannuation contributions.

62. Explanatory Memorandum, p. 208.

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Chapter 3: Rights and responsibilities

Part 3-1: General protections from adverse action

Part 3–1 of the Bill is notable in that it consolidates, and in some cases, expands a number of previously substantive protections into one Part. It has been commended for rationalising and streamlining the various prohibitions on discriminatory or wrongful treatment into a single set of ‘general protections’.⁶³ **Part 3-1** will contain general protections dealing with workplace and industrial rights, including freedom of association, protection against discrimination, unlawful termination and sham arrangements in respect of independent contractors.

Application

Clauses 335 and **clauses 337 to 339** set out how Part 3-1 would apply and are complex. The constitutional basis is different to the main provisions of the Bill which regulate the rights and obligations of national system employees and employers. Instead, in Part 3–1, the terms ‘employer’ and ‘employee’ have their ordinary meaning (**clause 335**). Part 3-1 then regulates the conduct of all employers and employees (and a range of other persons and entities such as independent contractors and industrial associations) but only to the extent where the conduct is connected to the constitutional powers that support the main provisions of this Bill (eg the corporations power or the Territories power) (**clause 338**).⁶⁴

Protections of work place rights

Clauses 340 to 345 deal with protections of work place rights. A ‘workplace right’ is defined in **clause 341** and includes:

- a person’s entitlements, benefits, responsibilities under a workplace law or workplace instrument⁶⁵,
- a person’s ability to initiate or participate in proceedings or a process under workplace laws and instruments— examples of such proceedings include: court action or conference proceedings; protected industrial action; and making an enterprise agreement (**subclause 341(2)**)
- the ability to make a complaint or inquiry to certain persons, including the person’s employer or the Workplace Ombudsman.

63. Professor Andrew Stewart, Submission No. 98, SEEWRC inquiry, p. 2.

64. The Explanatory Memorandum provides further explanation and examples of the Constitutional basis of Part 3-1 at pp. 213 to 216.

65. As defined in **clause 12**.

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Significantly, **subclause 341(3)** provides that *prospective* employees are in most cases also taken to have these workplace rights.

Clause 340 prohibits a person (including an employer, employee and industrial association) from taking ‘*adverse action*’ against another person who has, or exercises, a ‘workplace right’, or preventing the exercise of a workplace right by another person.

Adverse action

The new concept of *adverse action* is central to a number of the substantive protections in this Part including workplace rights, industrial activities and discrimination in employment.

Adverse action is defined broadly in **clause 342** to include a wide range of actions which vary according to the nature of the workplace relationship between the persons (for example: action by an employee against their employer; action by a prospective employer against a prospective employee; action by a union against a person; actions by a principal against an independent contractor; and action by an independent contractor against its contractors or employees).

Subclause 342(1) contains a table setting out circumstances in which a person takes *adverse action* against another person. The circumstances include for example where:

- an *employer* dismisses the employee, discriminates against the employee, injures them to their detriment, or alters the employee’s position to their prejudice
- a *prospective employer* refuses to employ or discriminates against a prospective employee in the terms and conditions being offered
- an *employee* ceases work in the service of the employer or takes industrial action against an employer
- where an *industrial association* or one of its officers takes industrial action against a person, or prejudices the person’s employment
- in the case of *independent contract arrangements*: where a principal terminates an independent contractor’s contract or refuses to supply goods or services to the independent contractor; or where an independent contractor ceases work under the contract.

Subclause 342(2) further broadens the meaning of adverse action to include threatening to take adverse action and organising such action— for example, adverse action could include an employer threatening to dismiss an employee. **Subclause 342(3)** provides that action is not adverse action if it is authorised by or under this Bill, any law of the Commonwealth, or by a State or Territory law prescribed by the regulations.

Clauses 343 to 345 set out additional prohibitions relating to coercion, undue influence and misrepresentation in relation to workplace rights.

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Protections relating to industrial activities

Clauses 346 to 350 deal with protections relating to industrial activities and would replace the freedom of association provisions (Part XA) in the WR Act.

Clause 346 prohibits a person from taking adverse action (as defined above) against another person because the other person:

- is or is not, an officer or member of an industrial association⁶⁶
- engages in *industrial activity* as defined in **paragraphs 347(a) and (b)** (i.e. lawful industrial activity), or
- does not engage in *industrial activity* as defined in **paragraphs 347(c) and (g)** (i.e. unlawful industrial activity).

Engages in industrial activity is defined broadly in **clause 347** and is divided into lawful and unlawful activities. *Lawful activities* are listed in **paragraphs 347(a) and (b)** and include: becoming or ceasing to be an officer or member of an industrial association; encouraging or participating in lawful activity for or on behalf of an industrial association; and paying fees to an industrial association. *Unlawful activities* are listed in **paragraphs 347(c) to (g)** and include: organising, promoting and participating in unlawful activity in relation to an industrial association; and taking part in industrial action⁶⁷.

Clauses 348 and 349 set out additional prohibitions relating to coercion and misrepresentation in relation to industrial activity. **Clause 350** broadly covers existing section 794 of the WR Act and prohibits an employer from inducing an employee to be or not be a member or officer of an industrial association.

Protections against discrimination in employment

Clause 351 prohibits an employer from taking adverse action⁶⁸ against a person who is an employee, former employee or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. However there are exceptions as set out in **subclause 351(2)** so that an action will not be an adverse action where: the action is authorised under a State or Territory anti-discrimination or equal opportunity law; if it is taken because of the inherent requirements of the particular position; or where the action is taken for genuine religious reasons.

66. Industrial associations include unions and employer associations (**clause 12**).

67. Defined in **clause 19**.

68. See above at p. 52.

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Clause 351 is intended to broadly cover paragraph 659(2)(f) of the WR Act, which makes it unlawful to dismiss an employee for discriminatory reasons. However, the protection in clause 351 has been expanded to prohibit any adverse action⁶⁹ on discriminatory grounds— not just dismissal. **Clause 351** has also been expanded to include a person’s carer’s responsibilities as a ground upon which adverse action is prohibited.

Other protections

Part 3-1 also provides other protections. For example, **clause 352** (equivalent of paragraph 659(2)(a) of the WR Act) prohibits an employer from dismissing an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations. **Clause 353** (equivalent of section 801 of the WR Act) prohibits an industrial association, or its member and officers from demanding payment of a bargaining services fee.

Protections against sham arrangements for independent contractors

A sham arrangement in the context of employment has been described as

An arrangement through which an employer seeks to cloak a work relationship to falsely appear as an independent contracting arrangement in order to avoid responsibility for legal entitlements due to employees.⁷⁰

Clauses 357 to 359 deal with protections against sham arrangements in employment and broadly correspond to existing sections 900 to 903 of the WR Act. These provisions were introduced in 2006 as part of the independent contractor legislation.⁷¹

Clause 357 prohibits an employer misrepresenting an employment or proposed employment relationship as an independent contracting relationship. The provision broadly corresponds to sections 901 and 902 and contains similar defences.

Clause 358 prohibits an employer from dismissing (or threatening to dismiss) an employee who performs particular work for the employer, in order to engage the individual as an independent contractor to perform the same, or substantially the same work under a contract for services. The clause broadly covers section 902 of the WR Act, although notably, does not contain the ‘sole or dominant purpose’ reason test, which was the subject of some criticism at the time of its introduction in 2006. Whereas existing section 902 prohibits dismissal of an employee with the sole or dominant purpose of re-

69. As defined in **subclause 342(1)** above.

70. For further background, the reader is referred to: Mary Anne Neilsen, Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006, Bills Digest, no. 20, 2006–07 and Mary Anne Neilsen, Independent Contractors Bill 2006, Bills Digest, , no. 19, 2006–07.

71. *ibid.*

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engaging them as an independent contractor, **clause 358** will prohibit the dismissal if it is one amongst other reasons.⁷²

Clause 359 prohibits a person from knowingly making a false statement to a current or former employee with the intention of persuading or influencing that worker to become an independent contractor to do the same, or substantially the same work. It is intended to broadly cover section 903 of the WR Act.

Ancillary rules

Clauses 360–362 contain important rules that apply generally to all contraventions under Part 3–1. They include:

- The ‘sole or dominant test’ does not apply—rather the reason for a person’s action can be one of a number of reasons and must be ‘an operative or immediate reason for the action’ (**clause 360**).⁷³ This is an easier test to prove.
- The onus of proof is generally reversed in all civil proceedings involving contraventions under Part 3–1 (**clause 361**). This reflects existing section 809 of the WR Act.
- **Clause 362** provides further general prohibitions involving advising, encouraging, inciting, or taking any action with intent to coerce another person to breach any of the Part 3–1 provisions.

Compliance with Part 3.1

All the prohibitions in Part 3–1 are civil remedy provisions under Part 4–1. There are monetary penalties, and remedies would include injunctions, compensation and reinstatement in the case of dismissal (**clauses 539 and 545**).

Dismissal-related contraventions

Dismissal-related contraventions in Part 3–1 (eg termination for a discriminatory reason) are to be dealt with differently to other contraventions. Where there is a dispute about dismissal it must generally be dealt with by a FWA conference⁷⁴ in the first instance

72. It was argued that the requirement that re-engagement as an independent contractor be the sole or dominant reason for dismissal could create a serious barrier for applications. For example restructuring the enterprise or financial difficulties may be reasons which prompt a desire to cut labour costs, and the change of status may be a subordinate result of these larger considerations. See Bills Digest, no. 20, 2006–07. See also **clause 360** below.

73. Federal Court of Australia, *Maritime Union of Australia v CSL Australia Pty Limited*, [2002] FCA 513, See Explanatory Memorandum, p. 234.

74. Note 2 in **clause 368** provides that FWA may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion. The requirement of

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(**clause 368**). Such applications do not require agreement of both parties, may be made by either the employee dismissed or an industrial association entitled to represent the interests of that person (**clause 365**), and must generally be made to FWA within 60 days (**clause 366**). If the dispute remains unsettled after the conference, the dismissed employee can proceed to court (**clauses 369 and 371**). Where there is a request for an interim injunction (for example to stop a threatened dismissal), an employee could make a court application without requiring a FWA conference (**clause 371**).

Contraventions other than dismissals

In disputes other than dismissals, a conference is not obligatory, although the parties may agree to apply to FWA for a conference to deal with the dispute (**clause 374**). Where the parties do not agree on a FWA conference, the person alleging the contravention can still make an application to the Federal Court or the Federal Magistrates Court for orders.

Lawyers costs

Clause 376 would allow FWA to make costs orders against lawyers and paid agents where it is satisfied that the lawyer or paid agent encouraged the Part 3–1 application when it was reasonably apparent there were no reasonable prospects of success.

Part 3–2: Unfair dismissal

The Bill, as foreshadowed in FWF,⁷⁵ proposes significant changes to the unfair dismissal regime. Amongst other things, it removes the exclusions which deny unfair dismissal rights to employees in businesses which employ 100 or fewer employees⁷⁶ and to employees dismissed for ‘operational reasons’. In addition the Bill makes changes to some of the unfair dismissal procedural matters with the stated aim of allowing ‘prompt, practical economical and fair processes’.⁷⁷

a conference and conciliation is broadly consistent with unlawful termination applications under the current WR Act.

75. See footnote 2 above.

76. The Howard Government’s many attempts to reduce the applicability of unfair dismissal laws are well documented. For a more detailed background and history, and for arguments for and against a small business exemption, the reader is referred to S. O’Neill, , ‘Unfair dismissal and the small business exemption’, *Background Note*, Parliamentary Library, Department of Parliamentary Services, 11 March 2008 and previous Bills Digests and parliamentary committee reports.

77. Peter Punch, *op. cit.*, p. 4.

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The unfair dismissal provisions are located under Part 3-2, **clauses 379 – 405** of the Bill.⁷⁸ The key elements are as follows.

The scheme applies to national system employees (**clause 380**).⁷⁹ Such employees will be eligible to bring an action for unfair dismissal where:

- the employee was employed by a small business (i.e. less than 15 employees at the time of dismissal)⁸⁰ and was employed for more than 12 months
- for all other employers, the employee was employed for more than 6 months (**clauses 382 and 383**).

In addition, the employee must be covered by an award or enterprise agreement or earn less than the high income threshold⁸¹(**subparagraph 382(b)(iii)**).

The Australian Chamber of Commerce and Industry (ACCI), while noting the Government's clear intention to re-introduce unfair dismissal rights questions the validity and impact of re-exposing small business to unfair dismissal claims, particularly in the current economic climate.⁸²

Against this argument, a number of submissions to the Senate inquiry generally in support of opening up unfair dismissal rights, have been critical of the qualifying periods of 6 and 12 months and have recommended that all employees should be protected from unfair dismissal after a three-month probation period.⁸³ The ACTU, for example argues that the qualifying period of 12 months would operate almost as harshly as the total ban on unfair dismissal claims that workers in small businesses face under the Work Choices legislation.⁸⁴

78. Note there is a distinction between unfair dismissal and unlawful dismissal. The provisions of the Bill dealing with unlawful termination are set out in Parts 3–1 and 6–4 of this Digest.

79. For the meaning of national system employees see above at p. 19.

80. A small business employer is defined in **clause 23**. All employees employed by the employer will be counted, including all casual employees who have been employed on a regular and systematic basis and employees employed by associated entities (as defined in **clause 12**).

81. The high income threshold is the amount prescribed by regulations (**clause 333**). It was set at \$100,000 and indexed from 27 August 2007.

82. ACCI, Submission No. 58, SEEWRC inquiry, pp. 49.

83. For example Australian Workers' Union, Submission No. 81, p. 5; Australian Services Union Victorian Private Sector Branch, Submission No. 79, p. 23.

84. ACTU, Submission No. 13, SEEWRC inquiry, p. 48.

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Clause 385 sets out the test for unfair dismissal. A person has been unfairly dismissed, when FWA is satisfied that all of these factors exist:

- the person has been dismissed
- the dismissal was harsh, unjust or unreasonable
- the dismissal was not a case of genuine redundancy, and
- in relation to small businesses, that the dismissal was not consistent with the Small Business Fair Dismissal Code.

Clause 386 sets out the meaning of ‘dismissed’. A person is dismissed if the person’s employment was terminated on the employer’s initiative, or if they resigned from their employment but were forced to do so because of conduct engaged in by their employer. **Subclause 386(2)** sets out exemptions which include circumstances relating to termination of seasonal and contract workers and trainees.

Clause 387 sets out the factors FWA must take into account when considering whether a dismissal was harsh, unjust or unreasonable. These include, amongst other things: whether there was a valid reason for the dismissal related to the person’s capacity or conduct; whether the person was notified of that reason; whether the person had been warned about any unsatisfactory performance connected to the dismissal; the size of the enterprise and its possible impact on the procedures followed in the dismissal; and any other matters that FWA considered relevant. It is similar to subsection 652(3) of the WR Act with an additional factor in **paragraph 387(d)** that the FWA must take into account any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal.

Subclause 388(1) enables the Minister to declare a Small Business Fair Dismissal Code by legislative instrument. If a small business employee’s dismissal is consistent with the Small Business Fair Dismissal Code then the dismissal will be considered fair and the other factors relating to unfair dismissal do not need to be considered.

The ACCI, whilst not agreeing with the merits of re-introducing the full force of the unfair dismissal system against small businesses, welcomes the effort to create the Fair Dismissal Code and the attempt to have it generate some level of security and navigability for small business.⁸⁵

A [draft code](#) has been released and some of the submissions to the Senate inquiry expressed concerns about its content— particularly the provisions relating to summary dismissal and warnings about under performance.⁸⁶ The draft Code sets out the circumstances in which a summary dismissal (a dismissal without notice or warning) is

85. ACCI, Submission No. 58, SEEWRC inquiry, p. 51.

86. ACTU, Submission No. 13, SEEWRC inquiry, p. 48.

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warranted, including cases of alleged theft, fraud or violence. The ACTU expressed concern that there is no requirement for the employer's suspicion to be correct, or for the employer to provide the employee with procedural fairness. For under-performing employees, the Code requires the employer to give the employee a valid reason (based on the employee's conduct or capacity to do the job) why the employee is at risk of being dismissed and a reasonable chance to rectify the problem. Multiple warnings are not required. The ACTU suggests that the Code should be redrafted so as to better reflect the jurisprudence of the courts and the AIRC. It also suggests that the Code be incorporated into the Bill or, at a minimum, that the Senate should view the final version of the Code before it approves the Bill.⁸⁷

If a dismissal is a genuine redundancy it will not be an unfair dismissal. **Paragraph 389(1)(a)** provides that a person's dismissal will be a genuine redundancy if his or her job was no longer required to be performed by anyone because of changes in the operational requirements of the employer's enterprise and providing the relevant award provisions for redundancy are complied with. However **subclause 389(2)** provides an exemption, so that a dismissal is not a genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within the employer's enterprise, or within the enterprise of an associated entity⁸⁸ of the employer. This exception is aimed at preventing employers abusing the redundancy or operational reason defence for dismissal.

The remedies available for unfair dismissal in **clauses 390 to 392** are essentially the same as under the existing regime and include reinstatement/reemployment, remuneration for lost pay, or monetary compensation. FWA must not order the payment of compensation unless satisfied that reinstatement is inappropriate and payment of compensation is appropriate in all the circumstances (**clause 390**). Under **clause 392**, compensation can be an amount consisting of up to 26 weeks remuneration, with many similar limitations and restrictions as currently exist.

In terms of procedural matters, in general there would be limited representation and appeal rights, and FWA would have significant discretion as to how it will deal with an unfair dismissal matter. For example, the unfair dismissal claim will— in the absence of exceptional circumstances— have to be made within 7 days of the dismissal. Currently the time limit is 21 days. This shortened time frame has been criticised for being unduly harsh, counter-productive and out of line with the 60 day time frame for Part 3.1 dismissals.⁸⁹

87. *ibid.*

88. Associated entity is defined in **clause 12** to have the meaning given by section 50AAA of the *Corporations Act 2001*.

89. The ACTU submission to the Senate inquiry argues that a week is too short a period to obtain advice about whether to make a claim. Further it will encourage dismissed employees to lodge claims simply to preserve their legal position while they seek legal advice and will

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FWA will be responsible for reviewing each application and, before considering its merits, must consider whether the employee was protected from unfair dismissal, whether it was a genuine redundancy and whether the time period for applications was complied with (**clause 396**).

Where there are no facts in dispute, FWA has discretion as to whether to hold a conference or a hearing (**clause 397**). Where it does hold a conference, FWA must take into account ‘any difference in the circumstances of the parties’, including their advocacy experience, and the procedural ‘wishes’ of the parties, including in relation to the location of the conference or the method of conducting it. A conference may be conducted by a member or a delegate of FWA (**clause 398**).

Under **clause 596** parties will not be entitled to be represented by a lawyer or a paid agent in most matters before FWA, including unfair dismissals, without FWA’s permission. The FWA may only grant permission where the matter could be conducted more effectively, or where it would be unfair not to allow the person to be represented. However this does not prevent an employee or employer being represented by a lawyer or agent who is an officer or employee of the person, or a member, officer or employee of an organisation of which they are a member (e.g. a trade union), or a bargaining representative (**subclause 596(4)**).

FWA may only grant permission to appeal an unfair dismissal decision on public interest grounds, unless the appeal question is one of fact and concerns a significant error of fact (**clause 400**).

Comment

The restoration of unfair dismissal rights and in particular the abandonment of the exclusion of employees dismissed by firms with less than 100 workers has been welcomed in a number of submissions to the Senate inquiry. However, as noted above, many of those in support of unfair dismissal rights have questioned some of the exclusions and conditions imposed, particularly on small business employees. The most common criticism has been in relation to the 7 day time frame for lodging unfair dismissal claims.

While the introduction of a Code for small business has been seen as innovative and worthwhile, there have also been criticisms of the draft Code for its apparent abandonment of procedural fairness in relation to employees and for the lower standard of conduct expected of employers.

Part 3–3: Industrial action

Industrial action refers to action in which employees work in a manner different from the customary manner. It includes restrictions, limitations, or bans upon work and in respect

increase the workload for FWA by increasing requests for extension of time. Submission, op. cit., pp. 47–48.

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of employers, industrial action usually refers to some form of lock-out. The Bill retains many of the current rules relating to industrial action, including requirements that protected industrial action is only permissible in support of enterprise bargaining agreement negotiations, a mandatory secret ballot be held and approved by the workforce and that strike pay not be paid. Changes introduced however address the procedural requirements parties must comply with in order to take protected industrial action and payments to employees during industrial action (whether protected or not).

Clause 406 provides a general overview of Part 3-3. **Clause 408** defines *protected industrial action* as either: employee claim action, employee response action or employer response action. *Employee claim action* is industrial action organised by employees or and their representatives against an employer to support claims about permitted matters which may be included in an enterprise agreement. It must be authorised by a protected action ballot and not concern a demarcation dispute, nor should it involve ‘pattern bargaining’ (pursuit of a common outcome across many enterprises). *Employee response action* is defined by **clause 410** to be industrial action organised in response to industrial action undertaken by an employer in relation to a proposed enterprise agreement. It must not be undertaken in relation to a demarcation dispute. *Employer response action* is defined by **clause 411** to be employer industrial action undertaken in response to industrial action conducted by employees or their representatives. *Pattern bargaining* is defined in **clause 412** is a course of conduct by a bargaining representative for two or more proposed enterprise agreements. That course of conduct must involve the bargaining representative seeking the inclusion of common terms in two or more proposed enterprise agreements.

Clause 413 sets out common requirements for industrial action to be protected industrial action. These are that industrial action cannot relate to a proposed greenfields agreement or multi-enterprise agreement; persons organising or engaging in industrial action must be genuinely trying to reach an agreement; notice requirements for the action must be met; the action must not contravene FWA orders or Ministerial Declarations. **Clause 414** specifies notice requirements the parties must meet before engaging in protected industrial action. For employee claim action, bargaining representatives must provide written notice of the intended industrial action to the employer. That notice must be given at least three working days prior to any industrial action unless FWA has specified a longer period (of up to seven working days) in a protected action ballot order, and must not be given until the results of the required ballot have been declared. For employee response action, a bargaining representative of an employee must provide written notice of the intended industrial action to the employer of the employee. For employer response action, the employer need only provide notice to all employees who may be affected as to the nature of the industrial action and the day the employer action will commence.

Clause 415 confirms that where a person is engaged in protected industrial action, immunity from civil liability exists in respect of an action under any law in force in a State

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or Territory, or under common law actions.⁹⁰ **Clause 416** allows an employer engaged in employer response action to refuse to make payments to employees in relation to the period of the action.

Clause 417 prohibits persons from engaging in industrial action before the nominal expiry date of an enterprise agreement or workplace determination, subject to Federal Court (or Federal Magistrates Court) injunction, or other order available under Part 4-1.

Clause 418 requires FWA to make a *stop order* that industrial action stop or not be organised if it appears to FWA that the industrial action being organised is not protected industrial action. FWA may make the order on its own initiative or on application of a person (or organisation) who is or may be affected by the action. **Clause 419** requires FWA to make stop orders in relation to non national system employers and employees, where the action has the potential to cause loss or damage to a constitutional corporation. **Clause 420** stipulates that FWA must determine the application within two days, but if it cannot so determine it must make an interim order ceasing the action.

Clause 422 authorises the Federal Court or Federal Magistrates Court to grant an injunction against industrial action of employees (claim action) and the bargaining representative is engaging in pattern bargaining.

Clause 423 authorises FWA to order the suspension or termination of protected industrial action on the basis that it is causing significant economic harm to employers and/or employees when it is satisfied certain requirements have been met. **Subclauses 423(2), (3), (5) and (6)** set out the requirements. If the protected industrial action is employee claim action, FWA must be satisfied that the action is causing or threatening to cause significant economic harm to any employer and any employees who will be covered by the agreement. If the protected industrial action is employee response action or employer response action, FWA must be satisfied only that the action is causing or threatening to cause significant economic harm to any of the employees who will be covered by the agreement. If the protected industrial action is threatening to cause significant economic harm, FWA must be satisfied that the harm is imminent. **Subclause 423(4)** sets out the factors that FWA is to take into account in deciding whether protected industrial action is causing or is threatening to cause significant economic harm, including: the source, nature and degree of harm suffered or likely to be suffered; the likelihood that the harm will continue to be caused or will be caused; the capacity of those persons to bear the harm; the views of those persons and the bargaining representatives for the enterprise agreement as well as the parties are genuinely unable to reach and whether there is no reasonable prospect of agreement being reached.

90. Unless the industrial action involves, or is likely to involve, personal injury, reckless destruction of property, or unlawful taking or use of property (**paragraphs 415(1)(a)–(c)**).

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Under **clause 424** FWA must make an order (within five days where practical) suspending or terminating protected industrial action if it is satisfied that the protected industrial action has threatened, is threatening or would threaten to endanger the life, the personal safety, health or welfare of the population (or part of it) or to cause significant damage to the Australian economy (or an important part of it). **Clause 425** enables FWA to suspend the taking of protected industrial action to provide for a cooling-off period when a suspension would assist the parties to reach agreement and such suspension would be in the public interest. Protected industrial action cannot be *terminated* on this ground. **Clause 426** requires FWA to suspend protected industrial action if the industrial action is adversely affecting any employer or any employee who will be covered by the proposed enterprise agreement (**subclause 426(2)**) and the industrial action is threatening to cause significant harm to a person other than a bargaining representative for the agreement or an employee (**subclause 426(3)**). **Clauses 427** and **428** authorises FWA to specify the period of industrial action suspension and to extend the period. **Clause 429** enables employee claim action to be resumed without recourse to another protected action ballot in certain circumstances, such as where some of the industrial action authorised by the required protected action ballot is yet to be taken.

Part 3–4: 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 set out in Part 3-4, **clauses 478 – 521** of the Bill. The provisions have in some respects generated controversy.

Background

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.⁹¹

91. J. Shaw and C. Walton, 'A Union's Right of Entry to the Workplace', *Journal of Industrial Relations*, vol. 36, no. 4, 1994, p. 546.

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ILO Convention No. 87,⁹² 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.⁹³

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.⁹⁴

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

Union right of entry legislative provisions at federal level were first introduced in 1973 into the *Conciliation and Arbitration Act 1904*⁹⁵ and these provisions were largely incorporated into the *Industrial Relations Act 1988*. Substantial changes to the regulation of right of entry occurred under the Howard Government with the *Workplace Relations Act 1996* with further significant restrictions introduced in 2006 through *Work Choices*.⁹⁶

Main Provisions

The key elements of the proposed right of entry regime are as follows.

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92. ILO, [C87 Freedom of Association and Protection of the Right to Organise](#), 1948; Australian Treaty Series, [1974, No 3](#).
 93. *ibid.*, articles 2 and 3.
 94. Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, [Consideration of the Provisions of the Workplace Relations Legislation Amendment \(More Jobs, Better Pay\) Bill 1999](#), Canberra, 1999, p. 192.
 95. Prior to 1973 any rights that federally-registered trade unions had to enter the workplaces of employers arose under awards.
 96. 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 2004 Bills Digest, no. 117, 2004–05; to the Senate Employment, Workplace Relations and Education Committee report into that Bill; and to the table entitled *Comparative Analysis of Key Right of Entry Requirements - Industrial Relations Act to Fair Work Bill*. The table was prepared by DEEWR and presented on 11 December 2008 at hearings of the Senate inquiry into the Bill.

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The terms employees and employers have their ordinary meaning in this Part (**clause 479**)—in other words the scheme is not limited to national system employees and employers.⁹⁷

Under the Bill, union officials with a right of entry permit are able to visit employees in their workplace in three circumstances:

- to investigate suspected breaches of industrial laws and fair work instruments⁹⁸ in relation to or affecting their union members working on the premises (**clause 481**)
- to hold discussions with employees who are, or are eligible to be, members of their union (**clause 484**), or
- to investigate breaches of state occupational health and safety laws (**clause 494**).

These three permitted purposes exist in the current WR Act, although arguably they have been broadened in two significant respects.

Union entry for discussion purposes

Under section 221 of the WR Act, right of entry for discussion purposes is not available where all employees at the workplace are on AWAs, or at workplaces covered by non-union collective agreements. In other words, unions even with substantial membership in a workplace may be excluded merely because a non-union collective agreement (or an agreement with another union) has been voted up by other workers at that site. In contrast, under **clause 484** this limitation is removed and a permit holder could enter a workplace to hold discussions provided that the premises has just one or more employees whose industrial interests the union is entitled to represent.

The ACCI is critical of this broadening of union right entry for discussion purposes and argues it is contrary to the Government's commitment that "Labor's new system builds certainty and stability into our workplaces by ensuring that...existing right of entry laws will be retained". Furthermore ACCI believes the broadening under **clause 484** will result in a system inferior the existing regime by encouraging disputation between employers and unions seeking entry, creating uncertainty, and providing an open door to entry.⁹⁹

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97. The ordinary meaning of employer/employee is discussed above at p. xxx. The Explanatory Memorandum at p. 293 explains the Constitutional coverage of this Part and how because the regime is incidental to other Parts of the Bill it could in some situations extend beyond national system employers and employees.
98. A fair work instrument is defined in **clause 12** as a modern award, an enterprise agreement, a workplace determination and an order of the FWA.
99. ACCI, Submission No. 58, SEEWRC inquiry, pp. 35–36.

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Inspection of records to investigate suspected breaches

Clause 482 lists the rights the permit holder can exercise while on premises to investigate a suspected breach under clause 481. These are the right to:

- inspect work, processes or objects
- interview people who agree to be interviewed
- require the occupier or an affected employer to allow the inspection and copying of *any record or document relevant to the suspected breach*, kept on, or accessible from the premises.

The broadening of the right to inspect *any records relevant to the suspected breach* has been the main source of concern with the proposed right of entry provisions.¹⁰⁰ Whereas existing subsection 209(4) denies union access to non union employee records¹⁰¹ **clause 482** would allow it but only to the extent that it is relevant to the suspected breach that the permit holder is investigating.¹⁰² The ACCI in its Senate submission argues that the extended access raises significant concerns for individuals' freedom of association, and in relation to what a union may do with private information of non-members. The submission states that there are dangers of fishing expeditions and an unacceptably dangerous exposure of personal information to third parties.¹⁰³

However, to counteract the widening access to records, the Bill creates a new prohibition on using or disclosing employee records obtained by permit holders if such use or disclosure is for a purpose other than the primary purpose of the record's collection (**clause 504**). This is in line with National Privacy Principle 2 of the *Privacy Act 1988*.¹⁰⁴ It covers conduct not just of the permit holder but also by any other person who has received the information as a result of the permit holder acquiring it. The clause is a civil remedy provision with a maximum penalty of \$6,600 for an individual and \$33,000 for a union. In addition, a person affected by a breach of the Privacy Act may complain to the Privacy Commissioner who can investigate and resolve the complaint. A further penalty

100. S. Scott, 'Union plan could reveal personal data: bosses', *Australian Financial Review*, 12 December 2008.

101. Although note that under existing section 748 unions do have the right to inspect the records of non-members, with the specific permission of the AIRC.

102. Note also access is further limited. Under **subclause 481(1)** the permit holder is limited to investigating suspected contraventions relating to a member of the permit holder's organisation and under **subclause 481(3)** the permit holder must also reasonably suspect that the contravention has occurred and has the burden of proving this.

103. ACCI, Submission No. 58, SEEWRC inquiry, p. 37.

104. National Privacy Principle 2 requires that subject to listed exceptions an organisation must not use or disclose personal information about an individual for a purpose other than the primary purpose of collection.

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would be imposed via **clause 510**, which requires that FWA must revoke or suspend a union official's permit for either unauthorised disclosure of employee records or in cases where the Privacy Commissioner has substantiated a complaint about the permit holder relating to employee records (**paragraphs 510(1)(b) and (c)**).

A number of submissions to the Senate inquiry noted that these provisions relating to misuse of information could be improved. Liberal Senator George Brandis in questioning DEWR officials at hearings pointed to drafting problems that could mean the Bill provides inadequate protection for employee related information other than employee records.¹⁰⁵ The Office of the Federal Privacy Commissioner submission states that the use of the term 'employee record' in the Bill has the potential to create confusion and uncertainty and that an alternate such as 'employee personal information' may be more appropriate.¹⁰⁶

The Bill largely retains the current requirements in the WR Act that relate to the entry permits for union officials, many of which were introduced under Work Choices.

For example:

- the union official must produce an entry permit on entering the premises (**clause 489**)
- the union official must be considered a 'fit and proper person' before being issued an entry permit (**clause 512**). FWA will make this determination according to the strict criteria set out in **clause 513**.
- union officials may only enter the workplace if they give an entry notice to the occupier of the premises during working hours at least 24 hours, but not more than 14 days, before the entry
- FWA may impose conditions on an entry permits (**clause 515**)
- FWA may revoke and suspend entry permits and may ban for a specified period the issue of entry permits in relation to the permit holder or to the permit holder's organisation. **Clause 510** lists the circumstances under which FWA *must* revoke or suspend a permit holder's entry permits.
- Civil penalties for contravention of the provisions relating to right of entry remain the same as those introduced under the Work Choices legislation—— 300 penalty units (\$33,000) for bodies corporate and 60 penalty units (\$6,600) for individuals
- entry will not be authorised unless a permit-holder complies with 'reasonable requests' of an occupier or affected employer to, produce documents evidencing their authority to enter and observe a specified route upon entry if directed (**clause 492**).

105. Senator George Brandis, Senate Standing Committee on Education, Employment and Workplace Relations, *Committee Hansard*, 11 December 2008, [Proof copy], EEWR p.29.

106. Office of the Privacy Commissioner, Submission No. 138, SEEWRC inquiry, p. 6.

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The Bill makes some other minor changes relating to permits. For example if the union official enters the workplace to investigate breaches, the Bill provides that he or she must give the entry notice to any affected employer (**clause 487**) in addition to the current requirement to give the notice to the occupier of the premises.

The Bill also adds additional content requirements for entry notices. In the case of a suspected breach, they will have to contain a declaration that the permit holder's union is entitled to represent the industrial interests of an affected member (**subclause 518(2)**). In the case of entry to hold discussions with employees, they will have to contain a declaration that the permit holder's union is entitled to represent the industrial interests of a person who performs work on the premises (**subclause 518(3)**). In both cases, the notice will have to refer to the provision of the union's rules that creates such an entitlement.

Comment

While the Bill retains much of the current right of entry regime, as introduced by Work Choices, it does expand union rights in two significant respects: namely to allow union access to non-union employee records in certain circumstances; and to remove the prohibition on union right of entry for discussions with employees in workplaces where all employees are either on AWAs or bound by non-union collective agreements.

However, as DEEWR departmental officers have pointed out in evidence to the Senate inquiry into the Bill, these two changes are not new and existed in the pre-Work Choices WR Act.¹⁰⁷ It could also be argued that the proposed extended union access is appropriately balanced with other union obligations. In particular, the new penalties introduced for abusing the scrutiny of employee records provisions, plus the retention of the fairly onerous obligations on permits holders to be 'fit and proper persons' should allay concerns that the new rights could be abused by unions.

Part 3–5: Stand down

Part 3–5 deal with the power of an employer to stand down employees without pay in certain circumstances. It applies to national system employers and national system employees (**clause 523**) and broadly equates to sections 691A– 691C of the WR Act.

Clause 524 provides that an employer may stand down an employee during a period in which the employee cannot usefully be employed because of:

- industrial action (other than such action organised or engaged in by the employer)

107. Ms Natalie James, Chief Counsel, Workplace Relations Legal Group, DEEWR, Senate Standing Committee on Education, Employment and Workplace Relations, *Committee Hansard*, 11 December 2008, [Proof copy], EEWR p. 22.

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- a break down of machinery or equipment, (providing the employer cannot reasonably be held responsible), or
- a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

Subclause 524(2) provides that these statutory provisions are subject to any relevant enterprise agreement or employment contract stand down provisions.

AiG, in its submission to the Senate inquiry strongly supports the need for stand down rights noting that though they are rarely accessed they are essential. However the submission is critical of the qualification placed on breakdowns and the use of phrase '*the employer cannot reasonably be held responsible for the breakdown*'. AiG argues that it is likely to lead to disputes about the level of preventative maintenance carried out on a company's machinery whenever an employer seeks to stand down employees because of a breakdown. Furthermore, the qualification is a departure from wording which has been in common usage in the industrial relations system for many decades.¹⁰⁸

The ACTU, in its submission to the Senate inquiry argues for an amendment of **clause 524** so as to clarify that an employer cannot stand down employees taking protected industrial action.¹⁰⁹

Chapter 4: Compliance and enforcement

Part 4-1: Compliance framework

The enforcement and compliance provisions of the Bill are similar to those in the WR Act but notably have been rationalised and consolidated into one Chapter.

Proposed Part 4-1 establishes a single compliance framework for the new workplace relations system. **Clause 539** sets out in table form all civil remedy provisions in the Bill. Each entry in the table identifies: the section number; who may apply to enforce the civil remedy provision; the courts to which a person may apply; and the maximum penalties available to courts in enforcing the provisions. Most enforcement matters will be heard by the Federal Court or the new Fair Work Division of the Federal Magistrates Court, but state and territory courts will be able to hear matters relating to underpayment of wages.

Clauses 545 and **546** deal with orders. The Federal Court and the Federal Magistrates Court can make any orders they consider appropriate to remedy a contravention of a civil remedy provision including injunctions, compensation and reinstatement orders. State or territory courts may make 'underpayment' orders. The maximum pecuniary penalties are in the main 60 penalty units (i.e. \$6,600) for individuals and 5 times that amount (\$33,000) for bodies corporate. These amounts are in line with the WR Act.

108. AiG, Submission No. 118, SEEWRC inquiry, p. 105.

109. ACTU, Submission No. 13, SEEWRC inquiry, p. 95.

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Clause 548 deals with small claims procedure. Small claims procedures can be heard in the Federal Magistrates Court or state magistrates courts. The cap on awards has been increased from \$10,000 to \$20,000 or a higher amount if prescribed by regulation. Small claims matters are to be dealt with in an informal manner and without regard to legal forms and technicalities. Lawyers can represent parties only with the leave of the court, although the limitation on representation by lawyers does not preclude representation by the party's in house lawyers (**subclause 548(7)**). Union representation would only be available if there is a regulation to that effect (**subclause 548(8)**). The ACTU, in its submission to the Senate inquiry argues that this provision be amended so as to clarify that an employee has the right to be represented by a union.¹¹⁰

Clause 549 to **559** contain general rules relating to civil remedy provisions and essentially replicate existing provisions in the WR Act. They include the following.

Clause 550 confirms that contravention of a civil remedy provision is not a criminal offence and cannot result in a criminal conviction.

If a person commits two or more breaches in the same 'course of conduct', they would be 'deemed' by **clause 557** 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 (**subclause 557(3)**).

Clauses 552 to **554** deal with the interaction between civil and 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 (**clause 552**). A civil-penalty proceeding is stayed if criminal proceedings are brought against the person for the conduct grounding the civil proceeding (**clause 553**). Evidence given in respect of a civil proceeding is not admissible in criminal proceeding where the same course of conduct would ground both actions (**clause 555**).

Clause 556 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.

Part 4–2: Jurisdiction and powers of courts

Proposed Part 4–2, (**clauses 562** to **568**) sets out the jurisdiction and powers of the Federal Court and the Federal Magistrates Court. The Federal Court has jurisdiction in both civil and criminal matters (**clause 562**) whereas the Federal Magistrates Court has jurisdiction only in civil matters (**clause 566**). The jurisdiction is generally required to be exercised in the Fair Work Divisions of those courts.

Clause 570 deals with costs and provides that costs can only be ordered if:

110. *ibid.*, p. 96.

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- the party instituted the proceedings vexatiously or without reasonable cause
- the party's unreasonable act or omission cause the other party to incur the costs, or
- the party unreasonably refused to participate in a matter before FWA and the matter arose from the same facts.

Clause 569 allows the Minister to intervene on behalf of the Commonwealth in proceedings providing the Minister believes it is in the public interest. Orders of costs can be made against the Commonwealth, despite the rule in **clause 570** that costs are not normally ordered (**subclause 569(3)**).

Chapter 5—Administration

Part 5-1: Fair Work Australia

According to the Explanatory Memorandum, the proposed FWA will be established as an independent statutory agency and will replace five existing agencies (the AIRC, the AIR, the AFPC, the AFPC Secretariat and the Workplace Authority) with the current functions of these five agencies being transferred to the new entity.¹¹¹ The inclusion of the ABCC into FWA is subject to a report to Minister Gillard by Justice Wilcox.¹¹²

Proposed Part 5-1 primarily deals with the institutional aspects of FWA by establishing and conferring functions; conduct of matters; organisational issues; appointments of members and their terms and conditions; cooperation with State Commissions; the FWA seal, reports and reviews, and information disclosure; FWA staffing arrangements including the General Manager and offences relating to FWA.

Proposed Part 5-2 of Chapter Five establishes the Office of the Fair Work Ombudsman (OFWO) by setting out functions of the Fair Work Ombudsman (Division 2) and OFWO staffing arrangements and Fair Work Inspector compliance powers (Division 3).

Establishment and functions of FWA

Under **clause 575** the FWA will be structured into three tiers consisting of a President, an unspecified number of Deputy Presidents and Commissioners and a minimum of four and a maximum of six Minimum Wage Panel Members.

Clause 576 (1) provides a subject matter list of functions to be undertaken by FWA with the details of each function provided in relevant clauses dealing with each subject matter. The Explanatory Memorandum states that, in the main, these functions are conferred on

111. Explanatory Memorandum, p. 340.

112. Refer to developments via www.workplace.gov.au/wilcox.

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the FWA as an organisational entity rather than on office holders themselves.¹¹³ The functions ascribed are:

- The National Employment Standards (Part 2-2)
- Modern awards (Part 2-3)
- Enterprise agreements (Part 2-4)
- Workplace determinations (Part 2-5)
- Minimum wages (Part 2-6)
- Equal remuneration (Part 2-7)
- Transfer of business (Part 2-8)
- General protections (Part 3-1)
- Unfair dismissal (Part 3-2)
- Industrial action (Part 3-3)
- Right of entry (part 3-4)
- Stand down (part 3-5)
- Other rights and responsibilities (Part 3-6)
- Extension of the National Employment Standards entitlements (Part 6-3)
- Unlawful termination protections (Part 6-4)

Clause 576(2) limits FWA dispute resolution functions to those covered in **clause 595**, requires FWA to promote public understanding of its functions and activities including providing assistance and advice and outlines administrative support arrangements with state industrial authorities as covered in **clause 650**.

Clause 577 directs FWA to perform its functions and exercise its power in a fair and just manner which deals with matters quickly and avoids unnecessary technicalities, is open and transparent and promotes positive workplace relations. In doing so, **clause 578** requires FWA to take into account the objects contained in the Bill; equity, good conscience and the merits of the issue; and help prevent and eliminate workplace discrimination through respecting and valuing workforce diversity. The Bill requires FWA to take into account Australia's international labour obligations as contained in ratified ILO Conventions.¹¹⁴

Clause 579 provides FWA with the privileges and immunities of the Crown in right of the Commonwealth reflecting the fact that FWA will be established as an independent

113. Explanatory Memorandum, p. 341.

114. See the objects clause, **paragraph 3(a)**.

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statutory agency. **Clause 580** provides individual FWA members with the same protections and immunities as a Justice of the High Court of Australia.

Clause 581 to **clause 584** deal with the functions and powers of the President as the head of FWA. **Clause 581** makes the President responsible ensuring FWA is efficient and serves the needs of employers and employees in the manner in which it performs its functions and exercises its powers. **Subclause 582(1)** provides that the President may give directions as to the manner in which particular functions are to be performed to (**subclause 582(2)**) an FWA member, a Full Bench, the Minimum Wage Panel and the General Manager. However, **subclause 582(3)** protects the independence of FWA members in their decision making by prohibiting such a direction to focus on a decision by FWA. **Clause 582(4)** lists some examples of the types of directions which the President can give (including various reviews and work process issues such as dealing with two matters jointly or transferring matters between FWA members or Full Benches) whilst **subclause 582(5)** requires the person given such a direction to comply. **Subclause 582(6)** specifies that a Presidential direction given in writing is not a legislative instrument.

Reflecting the fact that FWA is to operate as an independent statutory agency, **clause 583** specifies that the President is not subject to direction by or on behalf of the Commonwealth. **Clause 584** states that the President can delegate any or all of Presidents functions and powers to a Deputy President except those under **clause 620** (dealing with Minimum Wage Panels) and **clause 625** (dealing with delegations to General Manager and FWA staff).

The manner in which matters are to be conducted before FWA are prescribed in **clauses 585 to 595**. Whilst **clause 585** stipulates that applications to FWA must be in accordance with relevant procedural rules, **clause 586** introduces a degree of flexibility by providing FWA with the discretion to allow corrections or amendments to applications or other documents or to waive an irregularity in the form or manner in which an application is made.

Subclause 587(1) states, without prohibiting other grounds, that FWA may dismiss an application on the grounds that it is not made in accordance with this Act; is frivolous or vexatious; or has no reasonable prospect of success. However, **subclause 587(2)** prohibits FWA from dismissing an application concerning dismissals (**clause 365**) or terminations (**clause 773**) on the ground that it is frivolous or vexatious or that it has no reasonable prospect of success. **Subclause 587(3)** makes it clear that FWA may dismiss an application on its own initiative or on application by one of the parties. Applications may be discontinued by an applicant in accordance with relevant procedural rules, whether or not the matter has been settled (**clause 588**).

Procedural and interim decisions are covered by **clause 589** which, without limiting FWA ability to make decisions, provides FWA with the power to decide as to how, when and where a matter is to be dealt with, including the ability to make an interim decision. These decisions can be made by FWA on its own initiative or on application.

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Clause 590 grants FWA wide powers to inform itself in relation to matters before it, including requiring attendance; inviting oral or written submissions; requiring provision of documents, records or other information; taking evidence under oath or affirmation; requiring a FWA Member, a Full Bench or the Minimum Wage Panel to prepare a report; conducting an inquiry; undertaking or commissioning research; conducting a conference or by holding a hearing. **Clause 591** provides that FWA is not bound by rules of evidence and procedure in relation to matters before it.

FWA conferences are controlled by **clause 592** which stipulates that FWA may choose to inform itself by holding a conference and can direct a person to attend at a specified time and place. Such conferences are to be conducted by a FWA Member or a delegate of FWA and are generally held in private – except for conferences conducted regarding unfair dismissal or general protection matters (see clauses 368, 374, 398 and 776). Minimum Wage Panel Members are prohibited from conducting conference (see Part 2-6).

In line with Government policy to move away from overly formal, adversarial processes¹¹⁵, **clause 593** stipulates that FWA, except as specifically provided by the Act, is not required to hold a hearing in order to perform its functions or exercise its powers. All such hearings are required to be held in public unless, due to the confidential nature of any evidence or for other reasons, FWA issues orders enabling the hearing to be conducted in private. A suppression order prohibiting or restricting the publication of information or evidence can be made by FWA, under **clause 594**, if it is satisfied that this is desirable course of action. However, suppression orders can not be made regarding submissions to an annual wage review (see clause 289).

Under **clause 595** FWA may deal with disputes only where it is expressly authorised to do so and, in dealing with such disputes, the FWA use methods it considers appropriate including mediation or conciliation or by making a recommendation or expressing an opinion. The ‘authorised disputes’ are: bargaining disputes under Part 2-4; general protections disputes under Part 3-1; right of entry disputes under Part 3-4; stand down disputes under Part 3-5; and procedural disputes regarding modern awards, enterprise agreements, workplace determinations or contracts of employment. However, FWA may only deal with a dispute using arbitration where it is expressly authorised by the Act to do so. FWA has the power to arbitrate a bargaining dispute or a Part 6-2 dispute where the parties to the dispute have agreed that it may arbitrate and in right of entry and stand down disputes—with or without agreement of the parties. In dealing with disputes FWA may exercise its powers to inform itself and to hold conferences or hearings.

Another element of the Government’s policy to ensure that FWA shifts away from formal, adversarial processes, including legal representation and intervening parties, toward an efficient and informal operating system is a more restrictive approach toward legal

115. Explanatory Memorandum, p. lxx.

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representation in matters¹¹⁶. Reflecting this policy, **clause 596** specifies that, except for written submissions regarding modern awards and minimum wages or regarding procedural rules, a person may only be represented by a lawyer or a paid agent with the permission of FWA. Further, FWA may only grant permission if doing so would allow the matter to be dealt with more efficiently; or that it would be unfair not to allow representation due to an inability of the person to represent themselves effectively or taking into account fairness between the parties. Importantly, however, where the lawyer or paid agent is an employee of the person; or an employee of an organisation, bargaining representative or peak body representing the person; or is a bargaining representative then FWA permission is not required. **Clause 597** entitles the Minister to make a submission in relation to a matter before the FWA only if the matter is before the Full Bench and it is in the public interest for the Minister to do so or if the matter involves public sector employment. This entitlement applies regardless of the method adopted by FWA to deal with the issue, i.e. whether or not a hearing is held.

Clauses 598 to 603 deal with decisions of FWA. For the purposes of this Part of the Bill, **clause 598** defines a FWA decision in broad terms to include any decision, however described, but which does not include an outcome of a dispute process (**subclause 595(2)**) unless such an outcome is a result of arbitration. As courts and tribunals often make decisions by order, **subclause 598(3)** stipulates that a decision of FWA that is described as an order must be made by order and **subclause 598(4)** provides discretion to FWA to make any of its other decisions by order. Another element in the policy to allow FWA to operate in a manner which is fair, just and avoids unnecessary technicalities, **clause 599** provides that, except as provided by the Bill, FWA is not required to make a decision in relation to an application in the terms applied for. Further, to avoid delays **clause 600** allows FWA to determine a matter in the absence of a person who has been required to attend before it.

In setting out FWA writing and publication requirements **clause 601** specifies that certain decisions must be written in plain English including a decision or an interim decision made under another part of the Bill and a decision relating to an appeal or review. Whilst FWA has discretion to provide written reasons for any decision made, the Explanatory Memorandum states that there is an expectation that FWA will provide written reasons for all significant decisions.¹¹⁷ In promoting this transparency FWA is required to publish, as soon as practicable, a decision required to be in writing and an approved enterprise agreement. However, in order to reduce FWA workload decisions relating to right of entry permits and conscientious objection certificates are exempt from publication requirements.¹¹⁸ **Clause 602** allows FWA, on its own initiative or on application, to correct any obvious error, defect or irregularity in relation to a decision but modern awards

116. *ibid.* see also *Forward with Fairness* op cit., p. 18.

117. Explanatory Memorandum, p. 352.

118. *ibid.* p. 353.

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and national wage minimum wage order are exempt from this provision. **Clause 603** provides that, on its own initiative or on application by an affected person, FWA may vary or revoke a decision except where that decisions related to modern awards, enterprise agreements, workplace determinations, minimum wages, transfer of business, protected action ballots, partial work bans and those prescribed by the regulations that cannot be varied or revoked under this section. A note explains that FWA can vary or revoke decisions, or instruments made by decisions, under other provisions of the Bill.

Clauses 604 to 608 deal with the manner in which FWA handles appeals, reviews and referring questions of law. **Clause 604** provides that a person aggrieved by a FWA decision may apply to a Full Bench for permission to appeal that decision and, without limiting circumstances for approving appeals, if FWA is satisfied that it would be in the public interest to do so it must grant permission. The appeal would also be heard by a Full Bench. This provision does not apply to a decision of a Full Bench or the Minimum Wage Panel and a note states that unfair dismissals, which are dealt with by **clause 400**, are also not covered by the clause. The Explanatory Memorandum states that only in situations where the Full Bench identifies some error on the part of the primary decision-maker can these powers be exercised.¹¹⁹ Further, where a significant level of discretion was acted upon in the original decision, the Full Bench should only intervene if the original decision-maker had acted upon a wrong principle, been guided by irrelevant factors, mistaken the facts or failed to take some material consideration into account. The concept of *permission* expressed in this clause replaces the current concept of *leave* and, other than in the specified case of the public interest, would call up all the existing jurisprudence about granting leave to appeal thus ensuring that FWA has broad discretion in granting permission to appeal.

Clause 605 allows the Minister to apply to a Full Bench for a review of a FWA decision where the Minister believes that the decision is contrary to the public interest and, without limiting circumstances for approving reviews, if FWA is satisfied that it would be in the public interest to do so it must conduct a review. Where a review is conducted FWA must ensure that each person with an interest in the review is made aware and the Minister is entitled to make a submission for consideration in the review. **Clause 606** provides that, where FWA hears an appeal or conducts a review under **clauses 604** or **605**, FWA may order that all or part of the decision be stayed until a decision relating to the appeal or review is made or a further order issued. This clause does not apply to a protected action ballot order.

In dealing with the process for hearing an appeal or conducting a review **clause 607** states the FWA must hold a hearing unless it is satisfied that the appeal or review can be adequately determined without presentation of oral submissions for consideration and where the persons who would otherwise be entitled to make such a submission consents to the appeal or review proceeding without a hearing. In dealing with appeals and reviews

119. Explanatory Memorandum, p. 354.

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FWA may admit further evidence and take into account other information and evidence. With regard to the outcome of an appeal or review, FWA may confirm, quash or vary the original decision, make a further decision in relation to the said matter, or refer the said matter to a FWA Member who would be required to deal with the subject matter or to act in accordance with the directions of FWA.

In dealing with referring questions of law, **clause 608** requires the President to refer a question of law to the Federal Court for an opinion of the Full Court. Unless the question of law deals with the exercise of FWA powers, FWA may still make a decision in the matter. However, if that decision is inconsistent with the opinion expressed by the Federal Court, FWA must vary the decision to make it consistent with the Federal Court determination. If FWA did not make a decision whilst the Federal Court was determining the question of law then FWA may only make a decision which is consistent with such a determination.

Clause 609 provides that the President may, after consultation with FWA members, make procedural rules relating to the practice and procedure to be followed by FWA or the conduct of business in relation to matters dealt with by FWA, including procedural rules relating to functions conferred on FWA by other Commonwealth laws. Such procedural rules include the procedural requirements concerning applications, submissions, directions, notifications and the making of FWA decisions. **Clause 610** provides that FWA procedures may be mandated through regulations if deemed necessary.

With regards to costs, **clause 611** states that a person must bear their own costs in relation to matters before FWA. However, in circumstances where FWA is satisfied that a person made an application vexatiously or without reasonable cause, or the application or response to the application had no reasonable prospect of success, the FWA may order the person to bear some or all of the costs of another person. A note advises that such orders can be made against lawyers and paid agents in termination and unfair dismissal matters.

Organisation of FWA

Clauses 612 to 625 deal with the organisation of FWA—including which persons may or must perform functions and the delegation of FWA's functions and powers to the FWA General Manager and staff. The Explanatory Memorandum states that powers and functions are generally conferred on FWA as an entity as opposed to individual statutory officeholders. As such, functions will usually be performed by a single FWA Members with FWA staff, under supervision of FWA Members, performing ancillary non-determinative functions (e.g. gathering and collating relevant information and making recommendations). This part of the Bill deals with exceptions to these work processes.

After confirming that a function or power of FWA may be performed or exercised by a single FWA Member, **clause 612** acknowledges exceptions to this rule provided under this sub-section including that actions taken with regard to misuse of right of entry provisions

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must be taken by a Deputy President unless the President directs that a Full Bench deal with the matter.

Clause 613 provides that generally appeal decisions must be made by a Full Bench (see **clauses 604** and **607**) except that where the decision appealed was made by the FWA General Manager or staff under delegation, the President or Deputy President may make the appeal decision. **Clause 614** provides that a review decision based on **clause 605** (Ministerial application to review FWA decision) must be made, and if required, determined by a Full Bench. **Clause 615** enables the President to direct that a function or power of FWA, either generally or with regard to a matter or class of matters, is to be performed or exercised by a Full Bench.

Clause 616 states that the following functions must be performed by a Full Bench (or more than one Full Bench):

- Making of a modern award (Part 2-3)
- Conducting a four yearly review of a modern award (Part 2-3)
- Making a determination that varies or revokes a modern award in a four yearly review
 - A single FWA Member may make a determination that varies or revokes a modern award if the determination is not made as part of a review.
- Making a workplace determination (Part 2-5).

Clause 617 provides that the wages functions of conducting an annual wage review (Part 2-6) and any subsequent making or varying of a national wage order or determination, must be performed by a Minimum Wage Panel (see **clause 620**).

In dealing with the constitution and decision-making of a Full Bench, **clause 618** requires that in composing a Full Bench the President must ensure it comprises of at least three FWA Members including at least one Deputy President (a Minimum Wage Panel Member may also form part of a Full Bench). A decision of the majority of the Full Bench prevails and, where no majority is formed, the decision of the FWA Member who has seniority prevails. **Clause 619** sets out the order of seniority of FWA Members—President; Deputy Presidents (according to the day on which their appointments to this position took effect and, where two or more Deputy Presidents were appointed on the same day, according to the precedence assigned them in the instruments of appointment). The FWA Member with seniority is also responsible for managing the Full Bench in performing functions and exercising powers of the FWA.

As set out in **clause 620**, the constitution of a Minimum Wage Panel is at the discretion of the President but must consist of seven FWA members of which one must be the President and at least three must be specialist Minimum Wage Panel Members. The President can select the remaining members from either FWA Members or Minimum Wage Panel Members. The President is also responsible for managing the Minimum Wage Panel in

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performing functions and exercising its powers and if there is no majority decision then the decision of the President prevails.

To ensure that matters continue to be dealt with when a FWA Member becomes unavailable **clause 621** provides that, in the case of a single FWA Member, the President must direct another FWA Member to deal with the matter. Similarly, **clause 622** applies if the unavailable FWA Member forms part of a Full Bench or the Minimum Wage Panel. In these instances the matter can continue to be dealt with without the unavailable member provided:

- The Minimum Wage Panel still consists of the President and at least three Minimum Wage Panel Members or
- A Full Bench still consists of at least three FWA Members including at least one Deputy President.

If those conditions are not met the President must direct another FWA Member to form part of the Minimum Wage Panel or Full Bench before the matter can continue to be dealt with. **Clause 623** states that in the above situations the new FWA Member must take into account everything that occurred before FWA and that FWA did on the matter at hand. Further, **clause 624** provides that a decision is not invalidated merely due to the fact that a Minimum Wage Panel or a Full Bench was constituted otherwise than provided for.

For FWA to operate efficiently and effectively the President requires the ability to delegate certain powers and functions to either the General Manager or OFWA staff. To achieve this, **clause 625** enables the President, in writing, to delegate a range of procedural, non-determinative powers to the General Manager or OFWA staff. Further, the President may delegate certain substantive functions and powers to the General Manager, SES or acting SES staff, or a member of OFWA staff who is a class of persons prescribed by regulation. In addition to publishing, these responsibilities include endorsing conscientious objection certificates, dealing with entry permits, entry notices and certificates.

Clauses 626 to 648 deal with FWA Members. The Explanatory Memorandum states that the Government's intention is that all current AIRC members will be statutorily appointed to FWA.¹²⁰ **Clause 626** provides that new FWA Members are to be appointed by the Governor-General by written instrument which must specify the category the member will hold (see clause 575) and, if required, assign a precedence to the FWA Member (see clause 619). In recognition of the diverse roles and responsibilities across FWA, **clause 627** sets out the qualifications and experience required for each category of FWA Member. **Clause 628** provides that the President, Deputy President or a Commissioner hold office on a full-time basis with the latter two categories being able to work part-time

120. Explanatory Memorandum, p. 363.

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with approval of the President. Minimum Wage Panel appointments are made on a part-time basis.

In setting out the relevant periods of appointment for FWA Members **clause 629** provides that: generalist FWA members hold office until 65 years of age unless they resign or are terminated; Minimum Wage Panel Members for a period not exceeding five years as specified in their instrument of appointment; and, for a member of a prescribed State industrial authority appointed to FWA, for the period specified in their instrument of appointment. To facilitate the appointment judges to FWA, **clause 630** confirms that where a judge of a federal court is appointed or serves as a FWA Member the judges' tenure of office as a Judge and all rights and privileges will not be affected. **Clause 631** provides for dual federal and State appointments of suitably qualified persons to concurrent positions in both FWA and a prescribed State industrial authority. **Clause 632** provides for similar arrangements between FWA and Territory appointments. In addition to reinforcing the general requirement that FWA Members must not, without the prior approval of the President, engage in paid employment outside FWA **clause 633** also provides the exception that if the employment is within the Defence Force such prior approval is not required. **Clause 634** requires an FWA Member to take an oath or affirmation prior to discharging the duties of office.

Concerns have been raised that the new remuneration arrangements, which provide for the Remuneration Tribunal to determine pay levels for FWA Members (excluding the President) may have unintended longer term consequences for FWA. Former Senior Deputy President of the AIRC, the Hon Paul Munro, has suggested that the proposed severing of the link between FWA Members' remuneration and that of Federal Court judges, combined with changes regarding retirement incomes, will make it more difficult to recruit talented lawyers to FWA. He has argued that ensuring a well qualified pool of presidential members, capable of legal analysis, is critical for FWA to perform its functions.¹²¹

Clause 635 provides that, if the President is from a non-judicial background, the applicable salary is linked to the salary payable to the Chief Justice of the Federal Court. If the President is from a judicial background but whose judicial salary is less than the Chief Justice of the Federal Court then an allowance which would increase the President's salary to that level is payable. **Clause 636** provides that the President is eligible to be covered by the *Judges' Pension Act 1968* but can choose to stay in the public sector superannuation scheme. **Clause 637** provides that the salaries of FWA Members, other than the President, are to be determined by the Remuneration Tribunal.

121. 'Bill's changes to FWA pay makes it harder to attract top lawyer', *workplace express.com.au*, 28 November 2008.

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Clause 638 provides that Deputy Presidents or Commissioners may get approval from the President to work part-time under a written agreement specifying workload and **clause 639** deals with an FWA Member's leave entitlements including recreational leave.

In dealing with disclosure of interests, **clause 640** requires that an FWA Member (other than the President) who is dealing, or will deal, with a matter in which they have a potential conflict of interest that Member must disclose this fact to the President. If the President determines that the Member should not deal with the matter then the President must remove the Member from dealing with the matter.

Clause 641 specifies the manner and processes involved in the Governor-General terminating the appointment of an FWA member on the grounds of misbehaviour or incapacity whilst **clause 642** enables the Governor-General to suspend from office, on full pay, an FWA Member (other than the President) on the grounds of misbehaviour or incapacity. **Clause 643** requires the Governor-General to terminate the appointment of an FWA Member on grounds of bankruptcy, excessive unauthorised leave, or the Member fails to properly comply with disclosure of interest requirements. **Clause 644** deals with termination of FWA Members for unauthorised outside employment and **clause 645** states that FWA Members may resign their appointment by providing the Governor-General with a written resignation stating date of effect. Where they are not covered by this Bill, **clause 646** permits the Governor-General to determine the terms and conditions by which an FWA Member holds office.

Clause 647 enables the appointment of an acting President, by the Governor-General, during a vacancy in the office or when the President is absent or otherwise unable to attend to the duties of office. Acting appointments must be made on the same basis as appointments but are limited to a maximum 12 month term. **Clause 648** enables the Governor-General to appoint acting Deputy Presidents for a specified period with the approval of the Minister. Acting appointments must be made on the same basis as appointments but in the case of Deputy Presidents can exceed a 12 month term. Both clause 647 and 648 provide that a person over the age of 65 can be appointed to the acting positions and that the actions of a person purporting to act as President or Deputy President would not be invalid merely due to certain specified defects or irregularities.

Clauses 649 and **650** promote cooperative arrangements between FWA and State industrial authorities. **Clause 649** provides that the President must perform the functions and exercise the powers of office in a manner that facilitates cooperation between FWA and State industrial authorities. **Clause 650** allows the President to enter into arrangements with a State industrial authority, on a fee for service basis¹²², for FWA to provide administrative support to the authority or for the authority to provide administrative support to FWA.

122. Explanatory Memorandum, p. 371.

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Clauses 651 to 655 deal with the FWA seal, reviews and reports, and information disclosure. **Clause 651** provides that FWA must have a seal inscribed with the words “The Seal of Fair Work Australia” and that all courts, judges and persons acting judicially must presume that a document bearing them was duly sealed by FWA, unless evidence to the contrary exists. **Clause 652** requires the President to provide the Minister with an annual report on the operations of FWA as soon as practicable after each financial year. The annual report must include a financial statement and comply with Section 34C of the *Acts Interpretation Act 1901*. **Clause 653** requires the General Manager to conduct a review and prepare a report on the effects of enterprise agreement making on certain vulnerable groups at the end of each three year period. The written report must be provided to the Minister within six months of the end of the period the report covers and tabled in Parliament by the Minister within 15 sitting days of receipt. Previously these reports on the effects of enterprise bargaining were written by the Department.

Clause 654 requires the President to provide the Minister and the FWO with certain publicly available information to inform them about trends, research and matters before the FWA. **Clause 656** provides that information acquired by FWA may be disclosed if the President reasonably believes it is required in the course of performing functions or exercising powers or if it likely to assist in the administration or enforcement of the law.

Clauses 656 to 673 deal with the FWA General Manager, staff and consultants. **Clause 656** establishes the General Manager position and **clause 657** provides that the General Manager’s role is to assist the President in ensuring that FWA performs its functions and exercises its powers. As stated in clause 582, the General Manager is subject to directions from the President however **clause 658** provides that the General Manager is not required to comply with a direction from the President to the extent that compliance with the direction would be inconsistent with the General Manager’s performance, functions, or exercise of powers under the *Financial Management and Accountability Act 1997* or the *Public Services Act 1999* or if the direction relates to the review of enterprise agreement making under clause 653. **Clause 659** makes it clear that, except as provided by this or another Act, the General Manager is not subject to direction by or on behalf of the Commonwealth.

Clause 660 provides that the Governor-General will appoint the FWA General Manager by written instrument, on a full-time basis, and for a period not exceeding five years (see also clauses 668 and 669). **Clause 661** provides that the General Manager’s remuneration is to be determined by the Remuneration Tribunal or, if not determination in operation, by the regulations. Allowances prescribed in the regulations are also payable. **Clause 662** states that the Remuneration Tribunal also determines the General Manager’s recreation leave entitlements and that the Minister may grant other leaves of absence.

Clause 663 prohibits the General Manager from outside employment without prior approval of the President and **clause 664** directs the General Manager to disclose, in writing, all interests that conflict or could conflict with the performance of his or her duties. **Clause 665** provides that a General Manager may resign his or her appointment by

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providing the Governor-General with a written resignation stating date of effect. **Clause 666** sets out the circumstances which would lead to the termination of the appointment of General Manager. The Governor-General *may* terminate for misbehaviour or incapacity but *must* terminate for bankruptcy, excessive unapproved absenteeism, engaging in unapproved outside paid employment, or failure to disclose interests that conflict or could conflict with the proper performance of functions. **Clause 667** specifies that any matters concerning the terms and conditions of the General Manager's appointment not covered by this Act are to be determined by the Governor-General in consultation with the President. **Clause 668** enables the appointment of an acting General Manager, by the Minister in consultation with the President, during a vacancy in the office or when the General Manager is absent or otherwise unable to attend to the duties of office. Acting appointments must be made on the same basis as appointments but are limited to a maximum 12 month term. Anything done by or in relation to a person purporting to act as General Manager are not invalid merely due to certain specified defects or irregularities. **Clause 669** requires the Minister to Consult the President prior to appointing the General Manager (see clause 660).

Clause 670 provides that FWA staff must be engaged under the *Public Service Act 1999* and that for the purpose of that act the General Manager and staff together constitute a Statutory Agency with the General Manager as its Head. **Clause 671** allows the General Manager, in writing, to delegate his or her functions or power to a member of the FWA staff who is an SES, or acting SES, employee or to a person who is in a class of employees prescribed by regulation. **Clause 672** allows FWA to be assisted by: employees of other APS agencies; or by officers and employees of a State or Territory; or by officers and employees of a Commonwealth, State or Territory authority. **Clause 673** allows the General Manager to engage suitably qualified and experienced person as consultants to FWA.

Clauses 674 to 678 set out the offence provisions relating to FWA. The Explanatory Memorandum states the these provisions replicate a number of existing provisions contained in sections 814 to 823 of the WR Act and are consistent with equivalent provisions in that Act.¹²³ However it would seem that in some cases the penalties have been increased.¹²⁴ **Clause 674** provides that a maximum penalty of 12 months imprisonment may apply for the following offences: insulting or disturbing an FWA Member; using insulting language; interrupting matters before FWA; creating or continuing a disturbance; improper influence of FWA Members (including delegates); adversely affecting public confidence in FWA. **Clause 675** provides that a maximum penalty of 12 months imprisonment applies to a person who engages in conduct which contravenes an order of FWA. However, this does not apply to orders relating to: modern

123. Explanatory Memorandum, p. 377.

124. For example: under section 817 of the WR Act, the penalty for creating a disturbance near a Commission hearing is 6 months imprisonment, whereas the equivalent offences in **clause 674** have a maximum penalty of 12 months.

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awards; bargaining orders; scope order; minimum wage order; equal remuneration order; transfer of business order; a suspension or termination of protected industrial action order; orders relating to a protected action ballot; or an order dealing with stand down. **Clause 676** provides that a maximum penalty of 12 months imprisonment will apply to a person if they threaten, intimidate, coerce or prejudice another person because that person has, or proposes, to provide information to FWA. **Clause 677** provides that a maximum penalty of six months will apply to a person who: a person who is required to attend before FWA but fails to do so; the person attends before FWA but refuses or fails to be sworn in or to make an affirmation; the person attends before FWA but refuses or fails to answer questions or produce documents. However, the above actions do not apply if the person has a reasonable excuse. **Clause 678** provides that a maximum penalty of 12 months imprisonment applies to a witness who provides false or misleading evidence in connection with a FWA proceedings and the same penalty applies to an offender who induces, threatens or intimidates a witness to give false or misleading evidence in a matter.

Part 5-2: Office of the Fair Work Ombudsman

Clauses 681 to 686 deal with the establishment and the functions and powers of the Fair Work Ombudsman (FWO). **Clause 681** establishes the position of the FWO whilst **clause 682** sets out the FWO's functions which include: promoting harmonious and cooperative workplace relations and compliance with the Act and fair work instruments by providing education, assistance and advice; monitor, inquire and investigate compliance issues; commence enforcement actions before a court or FWA; represent employees in enforcement actions where this promotes compliance; and refer matters to relevant authorities.

In recognising that many of day-to-day functions of the FWO will be conducted by staff of the Office of the Fair Work Ombudsman (OFWO) or inspectors, **clause 683** allows the FWO to delegate, in writing, any of his or her functions and powers to an OFWO staff member or an inspector. To provide for appropriate levels of supervision, accountability and consistency, the delegate must comply with any directions given by the FWO in performing functions or exercising powers under the delegation.

Clause 684 provides that the Minister may, by legislative instrument, give written directions of a general nature to the FWO who must comply. The requirement that these directions be made by legislative instrument will provide Parliament with some degree of oversight and assist in ensuring transparency, although significantly the directions are not disallowable (see **Note, clause 685(1)**). Compliance by the FWO is not required with a direction to the extent that it relates to the performance of functions or the exercise of power under the *Public Service Act 1999*. **Clause 685** allows the Minister to direct the FWO, in writing, to provide specific reports on FWO functions. These reports are not required to be tabled. In addition, **clause 686** also requires the FWO to prepare and provide an annual report to the Minister, for tabling in Parliament, consistent with the annual report rules contained in section 34C of the *Acts Interpretation Act 1901*.

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Clauses 687 to 695 deal with the FWO's appointment and terms and conditions of employment. **Clause 687** provides that, subsequent to the Minister being satisfied that the person has suitable qualifications or experience and is of good character, the Governor-General may, by written instrument, appoint that person as the FWO. The appointment is required to be on a full-time basis for a specified period of not more than 5 years, as contained in the instrument of appointment. A note reminds the reader that the FWO can be reappointed. **Clause 688** states that the FWO's remuneration is to be determined by the Remuneration Tribunal but that such a determination has not been made the FWO will be paid the remuneration prescribed by regulation. In addition, the FWO is entitled to such allowances as prescribed by regulation. **Clause 689** deals with FWO recreational and other leave entitlements whilst **clause 690** prevents the FWO from paid employment outside the OFWO unless approved by the Minister. To avoid actual or perceived conflicts of interest and to assist with impartiality, **clause 691** requires the FWO to disclose, in writing, all interests that could conflict with the performance of the FWO's functions.

Clause 692 allows the FWO to resign by providing the Governor-General with a written resignation notice. **Clause 693** provides that the Governor-General *may* terminate the FWO's appointment for misbehaviour or physical or mental incapacity but *must* terminate the appointment where the FWO: becomes bankrupt, has excessive unapproved absences, engages in paid employment outside the duties of office without the Minister's consent, or fails, without reasonable excuse, to disclose interests that conflict or could conflict with proper performance of functions. **Clause 694** allows the Governor-General to determine terms and conditions of the FWO appointment that are not determined by this Act. In order to cover periods where the FWO is absent or otherwise unable to perform the duties of office, **clause 695** enables the Minister to appoint an acting FWO with the acting appointment made on the same basis as the appointment but limited to a maximum term of 12 months under the *Acts Interpretation Act 1901*.

The OFWO is established by **clause 696** which also provides that the OFWO will comprise the FWO, the staff of the OFWO and the inspectors appointed under **clause 700**. **Clause 697** provides that OFWO staff must be engaged under the *Public Service Act 1999* and, for the purposes of that Act, the FWO and the staff of the OFWO together comprise a Statutory Agency with the FWO as its Head. In addition, **clause 698** allows the FWO to be assisted by: employees of other APS agencies; or by officers and employees of a State or Territory; or by officers and employees of a Commonwealth, State or Territory authority. **Clause 699** states that the FWO may engage suitably qualified persons as consultants to the OFWO.

The appointment of Fair Work Inspectors (inspector) is dealt with by **clause 700** which restricts such appointments to persons of good character already appointed or employed by the Commonwealth or already employed by a State or Territory. An inspector may be appointed for a period not exceeding four years as specified in the instrument of employment. **Clause 701** clarifies that the FWO is also an inspector. Note that *prima facie*,

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clause 700 may be seen not to fully comply with the ILO Labour Inspection Convention. The short term contracts may not be in line with the requirement that:

... the inspection staff shall be composed of public officials whose status and conditions of service are such that they are assured of stability of employment and are independent of changes of government and of improper external influences.¹²⁵

Clause 702 provides that all inspectors must be provided with an identity card, in a form approved by the FWO and containing a recent photo, which must be carried by an inspector when performing functions or exercising powers. Due to the potential consequences of a person misusing this identity card, when a person ceases to be an inspector they must return their identity card within 14 days. It is a strict liability offence not to do so albeit if the identity card was lost or stolen strict liability does not apply but the evidential burden is born by the ex-inspector.

Clause 703 provides that the compliance powers conferred on an inspector are specified in his or her instrument of appointment. **Clause 704** provides that the FWO may, by legislative instrument, give a written direction of a general nature to inspectors relating to the manner in which they discharge their duties as inspectors. In addition, **clause 705** allows the FWO to give specific directions to a particular inspector about the performance of that inspector's functions or exercise of powers. Unlike the general directions in clause 704, these particular directions are not legislative instruments hence the former will come under Parliamentary scrutiny whilst the latter will not.

Clause 706 provides that an inspector may exercise compliance powers for one or more specified compliance purposes including to determine if provisions of this Bill or a fair work instrument are being or have been complied with or to determine whether there has been a contravention of a safety net contractual entitlement. However, an inspector can only exercise compliance powers with regard to a safety net contractual entitlement if the inspector reasonably believes that one party to the contract has not complied with one or more of the following: a provision of the NES, or a term of: a modern award; an enterprise agreement; a workplace determination; a national wage case order or an equal remuneration order.

Clause 707 enables an inspector to exercise compliance powers during working hours or any other time reasonably deemed necessary by the inspector for compliance purposes. **Clause 708** provides that an inspector may enter premises if the inspector has a reasonable belief the work related to this Act or a fair work instrument is being undertaken. Similarly, an inspector can enter business premises if the inspector has a reasonable belief records or documents relevant to compliance purposes are stored in, or accessible from, the premises. In gaining entry, an inspector must not use force but does not require the consent of the occupier. Additionally, an inspector must not enter a part of the premises used for

125. ILO, [C81 Convention concerning Labour Inspection in Industry and Commerce 1947](#), Australian Treaty Series 1976, No 14, at Article 6.

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residential purposes unless a reasonable belief exists that relevant work is being carried out on that part of the premises — this provides the required access to deal with contraventions relating to outworkers whilst protecting privacy at residential premises. Either before or as soon as practicable afterwards an inspector must show his or her identity card to the occupier or the occupiers' representative.

In dealing with the powers an inspector can exercise whilst on premises, **clause 709** provides that an inspector may:

- inspect any work, process or object
 - provided there is a connection to compliance purposes
- interview any person
 - with their consent, either whilst on premises or at another agreed time or place
- identify who has relevant documents
 - authorises an inspector to require a person to identify who has custody of, or access to a document relevant for compliance purposes
- request records or documents
 - permits an inspector to require a person who has custody of, or access to, relevant documents to produce those documents, either at that time or within a specified period
- inspect and copy documents
 - allows an inspector to inspect and make copies of any relevant record kept on the premises or accessible from a computer on the premises
- take samples
 - enables an inspector to take samples of any goods or substances in accordance with the regulations.

In order to facilitate compliance inspection processes, **clause 710** provides that a suitably qualified and experienced person may accompany, without consent of the occupier, an inspector as an assistant where the FWO is satisfied that the assistance is necessary and reasonable. FWO approval is required in respect of each assistant and for each occasion that an assistant accompanies an inspector under this clause. The assistant is required to follow the direction of the inspector but must not do anything that the inspector does not have power to do. For accountability purposes, anything done by an assistant is taken to have been done by the inspector. Examples provided in the Explanatory Memorandum as to the types of assistants who could facilitate compliance inspection processes include translators/interpreters, forensic accountants or IT specialists.¹²⁶

126. Explanatory Memorandum, p. 397.

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Where an inspector reasonably believes that a person has contravened a civil remedy provision, **clause 711** requires that person to provide name and address details when requested to do so by an inspector. Additionally, if the inspector reasonably believes that a false name or address was provided the person can be asked to show proof of identification, such as a driver's licence. A person must comply with these requirements if the inspector explains that failure to do so may contravene a civil remedy provision and the inspector shows his or her OFWO inspector identification card. If a person has a reasonable excuse then the requirement that they provide name and address details to the inspector does not apply but the evidentiary burden to demonstrate they have a reasonable excuse falls to the individual involved.

In addition to the power under clause 709 to require records or documents to be produced whilst an inspector is on the premises, **clause 712** provides that an inspector may, by a written notice served on the person, require the person to produce the record or document at a specified place with a specified period of at least 14 days. The person who is served the notice must not fail to comply without a reasonable excuse. Further, **clause 713** provides that self-incrimination is not a reasonable excuse for failure to comply with the notice. The Explanatory Memorandum explains that whilst this abrogates the common law privilege against self-incrimination, this is balanced by the fact that 'documents produced and any information or thing obtained as a direct or indirect consequence will not be admissible as evidence against the individual in any criminal proceedings'.¹²⁷

In the normal course of events an inspector would be expected to copy and return original documents however, where documents are to be produced in court or an inspector reasonably believes that they may be destroyed or altered **clause 714** provides that an inspector may, in addition to inspecting and making copies, also keep the records or documents for such period as necessary. However, during the period the inspector is in possession of the records or documents, the person who produced them and any person entitled to possession or authorised by a person entitled to possession may inspect or make copies at all reasonable times.

To provide the FWO with a range of options in dealing with non-compliance, as alternative to pursuing court proceedings, the Bill provides for enforceable undertakings and compliance notices. **Clause 715** provides that, where the FWO reasonably believes that a person has contravened a civil remedy provision, the FWO may accept a written undertaking from that person in relation to the contravention. In order to prevent the FWO or an inspector from pursuing multiple enforcement mechanisms in relation to the same contravention, the FWO cannot accept an enforceable undertaking from a person already issued with a compliance notice nor can an inspector apply for an order under Division 2 of Part 4-1 if the person has not withdrawn any enforceable undertaking previously given. With the consent of the FWO, a person may withdraw or vary the undertaking at any time. If the FWO considers that the person who gave the undertaking has breached any of its

127. *ibid.* p. 399.

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terms the FWO may apply to a court of jurisdiction for an order. If the court is satisfied that the breach occurred, the court may make: an order requiring the person to comply with the relevant term; an order awarding compensation to a person suffering loss due to the contravention; any other order the court considers appropriate.

Alternatively, where an inspector reasonably believes that a person has contravened an 'entitlement provision' contained in the NES or in a term of a modern award, enterprise agreement, workplace determination, national minimum wage order, or an equal remuneration order, a compliance notice may be issued under **clause 716**. The notice will require the person to do either or both of the following:

- take specified action to remedy the direct effects of the contravention identified
- produce reasonable evidence of the person's compliance with the notice.

The notice must also contain a range of information including the name of the person to whom the notice was issued and the inspector who issued the notice, details of the contravention and must explain that failure to comply may contravene a civil remedy provision and that the person may apply to a court of jurisdiction for a review of the notice. A person must not, without reasonable excuse, fail to comply with the notice. As stated above, a compliance notice cannot be issued if the person has given an enforceable undertaking (**clause 715**) in relation to the contravention which has not been withdrawn.

Clause 717 provides that a person given a compliance notice can apply to the court for a review of the notice on either or both of the following grounds:

- the person has not committed a contravention set out in the notice
- the notice does not comply with the content requirements as set out in clause 716.

After the application is made the court may stay the operation of the notice as it considers appropriate and may confirm, cancel or vary the notice following the review.

In dealing with the disclosure of information by the OFWO, **clause 718** states that the information covered by this clause includes any information acquired by the FWO, inspectors, assistants, staff and consultants in the course of performing their functions or exercising their powers. Further, the FWO may disclose, or authorise the disclosure of, information if the FWO reasonably believes that doing so is necessary or appropriate in the course of performing functions or exercising powers or that the disclosure is likely to assist in the administration or enforcement of Commonwealth, State, or Territory law. The clause also allows the FWO to provide the information to the Minister if the FWO believes the disclosure is likely to assist the Minister to consider a complaint or issue in relation to a matter arising under the Act. To further facilitate Ministerial access, the FWO may also provide the information to the Secretary or staff of the Department for the purpose of briefing the Minister on the relevant matter.

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The Explanatory Memorandum states that **clause 718** operates in conjunction with relevant provisions in the *Privacy Act 1988*, the *Public Service Act 1999* and the *Public Service Regulations 1999* (including the APS Code of Conduct).

Chapter 6: Miscellaneous

Part 6–1: Multiple actions

Clause 721 prevents FWA dealing with an application for an equal remuneration order under clause 302 if there is an adequate alternative remedy that would ensure equal remuneration for work of equal or comparable value for the relevant employees. **Clause 722** provides that FWA must not make an order under subclauses 532(1) or 787(1), which require an employer to consult with any relevant employee industrial association(s) in circumstances where it is proposed to terminate 15 or more employees if there is an acceptable alternative remedy. **Clause 723** prevents a person from making an unlawful termination application under Part 6-4 if they are able to make an application under the general protection provisions in Part 3-1 in relation to the same termination of employment. **Clause 724** prevents FWA dealing with an application for an equal remuneration order in relation to an employee if proceedings for an alternative remedy have commenced under a law of the Commonwealth (other than the equal remuneration provisions in Part 2-7) or a law of a State or Territory. **Clause 725** stipulates that as a general rule a person who has been dismissed must not make an application of a kind referred to in clauses 726 to 732 in relation to a dismissal if any other of those sections applies. Under **clause 734** a person must not make a general protections court application where an application for a remedy has been made under other Commonwealth or State or Territory laws.

Part 6–2: Dealing with disputes

Clause 737 requires the regulations to prescribe a model term for dealing with disputes that could be included in an enterprise agreement. **Clause 739** sets out what FWA can and cannot do when dealing with disputes under a term of a modern award, enterprise agreement or contract of employment. **Clause 740** authorises persons to deal with an enterprise dispute by arbitration and make a binding decision where, in accordance with such a term, the parties have agreed to this.

Part 6–3: Extension of National Employment Standards entitlements

Clause 743 provides that the object of this Part is to give effect, or further effect, to Australia's international treaty obligations by providing for a system of unpaid parental leave. **Clause 744** extends the application of the Bill's parental leave to a non-national system employee. **Clause 747** ensures that State or Territory laws that provide employee entitlements in relation to the birth or adoption of children are not excluded and continue

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to apply to non-national system employees where they provide more beneficial employee entitlements than the extended parental leave provisions.

Clauses 758 and 759 extend the Bill's entitlement to notice of termination or payment in lieu of notice to non-national system employees. **Clause 762** ensures that State or Territory laws that provide employee entitlements in relation to notice of termination of employment (or payment in lieu of notice) are not excluded and continue to apply to non-national system employees where they provide more beneficial employee entitlements than the extended notice of termination provisions.

Part 6–4: Additional provisions relating to termination of employment

Part 6–4 essentially replicates the existing unlawful termination provisions in the WR Act. Like the WR Act provisions, Part 6–4 has wider application than national system employees.

Part 3–1 includes protections from unlawful termination but only in connection with national system employers and employees. In contrast, through its reliance on the external affairs power (based on Australia's international treaty obligations regarding termination of employment) Part 6–4 has capacity to provide a remedy for *all employees* in regard to unlawful termination. The Bill is drafted so as to restrict the use of Part 6–4 to those employees not covered by Part 3–1 (**clause 723**). The net result is that unlawful termination protection is available for all employees.

Clause 771 names the various international treaties that support the constitutional basis and give effect to the unlawful termination provisions.

Clause 772 prohibits termination of employment for any reason listed in **paragraphs 772(1)(a) to (h)** including:

- temporary absence from employment due to illness or injury (**paragraph 772(1)(a)**)
- trade union membership or non-membership (**paragraphs 772(1)(b) and (c)**)
- filing a complaint or legal proceedings against the employer (**paragraph 772(1)(e)**)
- the employee's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (**paragraph 772(1)(f)**). **Paragraph 772(1)(f)** has also been expanded to include a person's carer's responsibilities as a ground upon which termination of employment is prohibited.

There are exceptions namely: where the action is authorised under a state or territory anti-discrimination or equal opportunity law; if it is taken because of the inherent requirements of the particular position; or where the action is taken for genuine religious reasons (**subclause 772(2)**).

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The procedures and process for dealing with unlawful termination in **clause 772** essentially replicate the Part 3–1 dismissal related procedures. For example the dispute must generally be dealt with by a FWA conference in the first instance (**clause 776**); may be made by either the employee dismissed or the industrial association entitled to represent the interests of that person (**clause 773**); and must generally be made to FWA within 60 days (**clause 774**). If the dispute remains unsettled after the conference, the dismissed employee can proceed to court (**clause 779**). Where there is a request for an interim injunction, an employee could make a court application without requiring a FWA conference (**clause 779**).

Concluding comments

One question likely to emerge from parliamentary debate on the Fair Work Bill is whether it will engender a relative period of peace and calm in Australian industrial relations. The period of the previous 10 years industrial relations reform has been described as controversial, while the period since ‘Work Choices’ has been described as ‘chaotic’.¹²⁸ Thus many practitioners may be looking forward to the Bill delivering a relative period of stability, particularly given the Opposition’s initial commitments not to block the passage of the Bill. It also delivers some clarity in its layout and expression and as Peter Punch has observed, employers have generally indicated a propensity to either work with or cope with its provisions. At its base, the Bill delivers a system which employer and employee organisations will be reasonably familiar with. On the negative side, the Bill does not incorporate transitional provisions and therefore is not as complete as Work Choices was. No doubt, considerable additional detail will need to be incorporated into the pending Transitional and Consequential Bill.

128. Peter Punch, *op. cit.*

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