CHAPTER 9

SCHEDULE 8 – CERTIFIED AGREEMENTS
SCHEDULE 9 – AUSTRALIAN WORKPLACE AGREEMENTS

9.1 This chapter deals with amendments proposed in regard to certified agreement provisions, Australian Workplace Agreements (AWAs) and relevant and designated awards. Schedule 8 of the Bill streamlines the requirements for certification of agreements; simplifies processes for making and approving AWAs; and effects a number of technical changes in relation to agreements. The changes are intended to facilitate the spread of agreement making and provide greater encouragement to employers and employees to decide the working arrangements which best suit them.

Schedule 8 – Outline of proposed amendments

9.2 This Schedule proposes amendments principally directed at streamlining the requirements for certification of agreements, including:

- providing for applications for certification of 'Division 2' agreements to be made to the Workplace Relations Registrar, without the need for scrutiny by the Commission;
- providing that applications for certification considered by the Commission need not involve hearings unless necessary in the circumstances;
- clarifying the right to be heard;
- removing the restriction on the certification of an agreement for part of a single business;
- clarifying the obligations of employers in relation to providing employees with 14 days notice in respect of agreements
- providing a mechanism for 'switching' from the section 170LJ stream of agreement-making (agreements with employee organisations) to the section 170LK stream (agreements with employees) in certain circumstances;
- removing the capacity of employee organisations to prevent the variation or extension of section 170LK agreements (while retaining a representation role for organisations, where requested by a member); and
- prohibiting anti-AWA provisions.[1]

9.3 This report does not address the minor technical and consequential amendments also made by this schedule of the Bill.

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1 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2378-9

Evidence

9.4 The Committee received evidence in respect of some, but not all, the changes effected by this schedule. This report focuses on the main aspects.

Certification of agreements by the Registrar, and by the Commission without hearings

9.5 The Department gave evidence that:

> The 'fast track' approach to certification (by the Registrar) is a more targeted approach, and ensures that only those agreements which need to be tested will be tested by the Commission, on an exceptions basis…[2]

> The requirement for parties to attend AIRC hearings for agreements to be certified has been identified as a major concern for parties to agreements and their organisations. The requirement to attend hearings (which are often very brief and straight forward) requires parties to wait for their application to be listed for hearing and then take time away from their workplaces to participate in hearings…where the applications could be dealt with expeditiously and with minimal cost on the basis of written applications only…[3]

9.6 In supporting these amendments, some employer organisations put to the Committee their concerns about what they see as unnecessary formalities surrounding certified agreements. The Australian Chamber of Commerce and Industry submission referred to a case study, in which an agreement was negotiated with staff and included consultation with the relevant union, within about five months, but was followed by a formal certification process which proved to be more onerous and frustrating than negotiating the agreement itself. This culminated in a 10-minute hearing before the Commission, which was best regarded as a formality.[4]

9.7 Australian Business told the Committee of its view that the majority of applications for certified agreements were 'job lots', and in the vast majority of these proceedings the Commission did not require any submission of substance from the parties. In most cases the Commission formed its view on the basis of the agreement and a statutory declaration.[5] Australian Business stated as follows:

> In the case of agreements which clearly pass on the paperwork, the requirement for formalised hearings seems onerous, both on the Commission's time, since the Commission has already come to the view that it is able to certify the agreement without the hearing, and also the time

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2 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2380

3 *ibid*., p. 2381

4 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3289-92

5 Submission No. 457, Australian Business Industrial, vol. 22, p. 5415

> of the parties to the agreement, not all of whom are in capital cities. We are supportive of all these amendments because, in fact, it is not inconsistent with what is happening now and is clearly a saving of time and resources on all parties, including the Commission.[6]

9.8 On the other hand, some unions opposed these amendments. For example, the Shop, Distributive and Allied Employees' Association put to the Committee its view that:

> …the whole purpose of a public hearing is to ensure that the body charged with approval of the certified agreement or AWA has acted properly. It would, in our submission, be a retrograde step to remove from the Commission, or the Workplace Relations Registrar, the obligation to have public hearings for each and every agreement which is to be certified.[7]

9.9 The Community and Public Sector Union referred to the importance of public hearings to ensure what appears on paper is genuine. They state in their submission that:

> There have been many cases of agreements coming before the Commission for certification where employer declarations and submissions, particularly in relation to the no-disadvantage test and process requirements, have been found to be superficial or misleading. These deficiencies are exposed only through the submissions of union parties or inquiries by the Commission itself in a public hearing.[8]

Switching from s170LJ stream to s170LK stream, and extension, variation and termination of agreements made under s170LK

Switching between section 170LJ agreements and section 170LK agreements

9.10 Proposed section 170LVA allows the Commission to certify an agreement purportedly made under section 170LJ (ie. an agreement negotiated with one or more unions) as an agreement made under section 170LK (ie. an agreement made directly with employees) if a valid majority of employees who would be covered by the agreement have approved the agreement, in circumstances where one of the unions which negotiated the agreement later claims that it did not validly execute the agreement.

9.11 In support of the amendment, the Department submitted:

> This amendment will address concerns raised by employer organisations about situations in which unions have purported to make agreements under section 170LJ...and the union subsequently claims, for example, that the person purporting to enter into the agreement was not authorised to do so. In

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6 Evidence, Mr Dick Grozier, Sydney, 26 October 1999, p. 399

7 Submission No. 414, Shop Distributive and Allied Employees Association, vol. 17, p. 3715

8 Submission No. 379, Community and Public Sector Union (PSU Group), vol. 13, p. 2727

> these circumstances, an employer is currently obliged to repeat the entire agreement making process in order to make an agreement in the same terms directly with employees under section 170LK.[9]

9.12 Some employer groups provided evidence about cases where senior officials of particular unions had refused to sign off agreements made by other union officers because they did not comply with union 'policy'.[10]

9.13 The Australian Chamber of Commerce and Industry provided the example of the refusal of the Australian Manufacturing Workers' Union to sign off an agreement negotiated by another union (the Australian Workers' Union) under section 170LJ at Crown Scientific and Pharmaglass Pty Ltd. The AMWU had only 4 members at the workplace, but refused to sign the agreement because it did not contain the common expiry date for the AMWU's 'Campaign 2000'.[11]

9.14 There was little evidence from other witnesses about the proposed amendment.

Extending, varying and terminating section 170LK agreements

9.15 Under the current provisions of the WR Act, unions can become bound by an agreement made directly between an employer and employees under section 170LK. This often occurs where unions have some members at a workplace covered by a section 170LK agreement.

9.16 In circumstances where a union is bound by such an agreement, the union currently has the right to veto any proposed changes to the agreement. The Bill amends the provisions of the WR Act to remove the capacity of unions to prevent the variation, extension, or termination of section 170LK agreements, while still retaining a role for such organisations, where requested by a member, to represent the interests of employees.[12] The Department submitted that:

> The existing provisions are inconsistent with the agreement-making framework established by the WR Act because they have the potential to undermine the capacity of employers and a majority of employees...to give effect to agreed decisions on matters relating to their working arrangements.[13]

9.17 Some employers supported the proposed amendments:

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9 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2382

10 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3098

11 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3293

12 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2382

13 *ibid*, p. 327

> It is inappropriate for an employee organisation that may be representing only a minority of employees (indeed, only one employee) to have a right of veto over the extension or variation or termination of a certified agreement or the right to apply for termination of a certified agreement.[14]

9.18 Unions generally opposed the proposed amendments:

> This reform proposal is designed to further circumscribe unions' democratic rights to properly represent the interests of their members. Not only is this proposal contrary to principles of natural justice, but it runs counter to the continuous nature of collective bargaining which must be able to adapt to changing circumstances.[15]

Prohibition of anti-AWA provisions in certified agreements

9.19 The Bill will prohibit the certification of agreements which purport to restrict the use of AWAs. The Department stated to the Committee that:

> The capacity of collective agreements to restrict or prevent individual agreements represents a curtailment of the freedom of individual agreement making, and tends to put the collective rights of a majority ahead of individual rights…[16]

9.20 The Business Council of Australia supported this view in its submission, stating that:

> [An Anti-AWA provision] in effect imposes the collective (or majority) will of employees over those of the individual – even if the individual and his/her employer are in agreement. This seems inappropriate in these circumstances where the legislation has specifically provided for individual arrangements.[17]

9.21 In supporting the amendments, the Australian Industry Group put to the Committee that:

> If a collective agreement is on foot and applies to the workplace, why cannot the employer have the opportunity to offer individual contracts to people in the workforce? At the moment in union shops that is not open to you. In most cases unions will prevent AWAs being made by forcing the employer to make an agreement in their collective certified agreement that AWAs will not be made for the life of the agreement. The employer is therefor hamstrung for the life of that agreement. If they want to choose a

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14 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3099

15 Submission No. 430, Newcastle Trades Hall Council, vol. 20, p. 5012

16 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2383

17 Submission No. 375, Business Council of Australia, vol. 12, p. 2594

> group of employees or one employee in respect of whom they wish to make an AWA – it cannot be done.[18]

9.22 Some union groups stated their opposition to the amendment. The Australian Liquor, Hospitality and Miscellaneous Workers Union told the Committee that:

> It is not unusual for collectively bargained agreements to contain a non-AWA provision. This merely reflects the choice of the employees and their employer to enter into collective agreements. …The proposed amendment is, in effect, saying that people are not free to make this choice…indeed…it is a choice that is not legal.[19]

9.23 The Newcastle Trades Hall Council argued that the provision did not allow employers and employees to determine what the most appropriate agreement should be. They stated that:

> This reform is dictating the contents of agreements and is thus contrary to the WR Act.[20]

Schedule 9 – Outline of proposed amendments

9.24 In summary, these amendments make AWAs more widely accessible, easier to make, and provide scope for greater flexibility to encourage working arrangements which better suit the needs of business and employees. The major amendments include removing the current requirement that an employer provide an employee with a copy of an AWA at least 5 days (or in some cases 14 days) before signing it; permitting AWAs to take effect from the day of signing; removing the requirement that identical AWAs be offered to comparable employees; introducing modified 'no disadvantage test' procedures for AWAs with employees whose remuneration is more than $68 000; removing requirement that Employment Advocate refer AWAs to the Commission where there is concern that the AWA does not pass the 'no disadvantage test'; removing the current ability to take protected industrial action in support of a claim for an AWA; allowing an AWA to prevail over a certified agreement; and giving the Employment Advocate power to take legal action against employers who breach AWAs.

Evidence

Filing and approval of AWAs

9.25 The Bill removes the requirement that an employer provide an employee with a copy of an AWA at least 5 days (or in some cases 14 days) before signing it, and permits AWAs to take effect from the day of signing. The Department's submission stated:

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18 Evidence, Mr Roger Boland, Canberra, 1 October 1999, p. 48

19 Submission No. 326, Australian Liquor, Hospitality and Miscellaneous Workers Union, vol. 10, p. 1885

20 Submission No. 430, Newcastle Trades Hall Council, vol. 20, p. 5013

> The proposal to permit parties to an AWA to agree that it should take effect from the day of signing allows employers and employees to give immediate effect to, and benefit from wages, conditions and working arrangements to which they have agreed. It also enables the Employment Advocate to dispense with the time consuming and resource intensive task of issuing filing receipts.[21]

9.26 In supporting these amendments, some employer groups suggested that the current provisions in these regards are a disincentive to adopt AWAs, especially in the recruitment of new staff. The Australian Chamber of Commerce and Industry referred in its submission to:

> A recent (and not isolated) case where a manager recruited 23 staff with the intention of offering them AWAs…the recruits had already commenced when the offer of an AWA was made. They had to be employed under Award conditions for several weeks until the offer was made and fourteen days had elapsed. Both the manager and the recruits found this situation convoluted and absurd.[22]

9.27 The SDA was one of the unions which criticised these amendments suggesting that:

> …the Government's approach is to put the 'cart before the horse', namely to provide that an AWA will become legally operative from the date it is signed or from the date the employment commences, even though that AWA has not been sighted or approved by the Employment Advocate.[23]

9.28 In relation to the repeal of provisions requiring employees to receive a proposed AWA 5 or 14 days prior to signing it, the Community and Public Sector Union state that:

> Substituting a cooling-off period will be to the detriment of the employee interest, as it will allow an employer to press for an immediate signature. Employees will always be put in a more difficult position if they have to withdraw from an agreement they have previously accepted.[24]

AWAs for comparable employees

9.29 The Bill will removing the requirement that identical AWAs be offered to comparable employees. The Department put to the Committee that:

> The obligations imposed by the current provision can be confusing for employers (for example, many employers are unaware that individual

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21 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2385

22 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, pp. 3281-2

23 Submission No. 414, Shop Distributive and Allied Employees' Association, vol. 17, p. 3695

24 Submission No. 379, Community and Public Sector Union (PSU group), vol. 13, p. 2733

> performance may be taken into account in determining what conditions should be offered) and can limit the scope for flexibility in tailoring AWAs to the particular circumstances of both employees and employers (for example, improved balance between work and family commitments).[25]

9.30 The ACCI put its support for this amendment as follows:

> In one line of business fifteen comparable staff were offered AWAs. …Eleven wanted to tailor the contract to align with their personal requirements. They rejected the AWA because it did not have this flexibility. One staff member complained 'these are not individual contracts. People who have asked for minor alterations have been told it cannot be changed. It is a sham. …'[26]

9.31 Some witnesses opposed this amendment, on the basis that it may allow employers to provide different pay and conditions to employees performing the same job. For example, the National Union of Workers stated in their submission that:

> Employers will be free to discriminate between employees and will be free to progressively bid down wages and conditions through the selective application of AWAs to individual employees.[27]

AWAs for high income earners

The Bill introduces modified 'no disadvantage test' procedures for AWAs with employees whose remuneration is more than $68 000; and removes the requirement that the Employment Advocate refer AWAs to the Commission where there is concern that the AWA does not pass the 'no disadvantage test'. The Department submitted to the Committee that:

> The current requirement that the Employment Advocate refer an AWA to the Commission where there is concern about whether the AWA passes the no disadvantage test adds an unnecessary layer to the approval process, places additional resource demands on both the Commission and the parties to the AWA, and delays commencement of AWAs…According to statistics provided by the Office of the Employment Advocate in the period 20 April 1998 to 31 July 1999 only…1.8 per cent of all AWAs processed during this period…were referred to the AIRC. Of the 972 AWAs which have been dealt with by the AIRC…only 106 AWAs were refused approval. However, from the time an AWA was referred to the AIRC to when the EA was notified of the result, has been' on average 151 calendar days.[28]

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25 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2386

26 Submission No. 329, Australian Chamber of Commerce and Industry, vol. 15, p. 3282

27 Submission No. 126, National Union of Workers, vol. 2, p. 466

28 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2386

9.32 The Australian Council of Trade Unions did not support the amendment and stated that:

> …it is important that the EA be required to refer cases where there is concern about whether the no-disadvantage test has been complied with…to the Commission. A number of such cases have been referred to the Commission, which has produced reasons for decisions which are important in maintaining at least a little confidence in the integrity of the system.

9.33 The Australian Manufacturing Workers Union opposed the amendment relating to the application of the no-disadvantage test for higher income earners. They put to the Committee that the no-disadvantage test should not be waived for AWAs with remuneration greater than $68,000 because it could not be assumed that these workers were any more informed about their award entitlements or that they are in a stronger bargaining position.[29] However, the Committee notes that an employee in these circumstances is able to request that the Employment Advocate assess the AWA for the purposes of the no-disadvantage test.

AWAs and protected industrial action

9.34 The Bill removes the current ability to take protected industrial action in support of a claim for an AWA. The Committee notes the following comments made in the Department's submission:

> The Implementation Discussion Paper…foreshadowed that provisions enabling protected action to be taken in the negotiation of AWAs would be repealed as they are not relevant to the negotiation of individual, as distinct from, collective, agreements…the AWA industrial action provisions only appear to have been used in very rare circumstances…[30]

9.35 Some employer groups stated their support for this amendment. For example, the Australian Industry Group said:

> AI Group strongly supports AWAs as an important agreement making option for employers and employees and in the light of the experience of the use of AWAs, believes the amendments which are proposed are necessary and appropriate.[31]

9.36 Some other witnesses opposed the amendment. For example, the Australian Catholic Commission for Employment Relations stated:

> While it is acknowledged that it might be an unusual occurrence for an individual employee to take protected industrial action, nevertheless this

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29 Submission No. 424, Australian Manufacturing Workers Union, vol. 20, p. 4784

30 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2392

31 Submission No. 392, Australian Industry Group/Engineering Employers' Association South Australia, vol. 14, p. 3101

> could arise in some circumstances. This provision also creates an inconsistency in the legislation as protected industrial action is allowed during the bargaining of a certified agreement.[32]

Allowing an AWA to prevail over a certified agreement

9.37 The Department put to the Committee that:

> Overall, the amendments free up the interaction between AWAs and certified agreements so that the workplace relations system provides parties with effective choice about the regulation of terms and conditions of employment in ways that suit their particular circumstances. Under the existing provisions, these options have been limited. Flexibility to use AWAs during the life of certified agreements can assist, for example, where market rates for particular groups or specialists move erratically and an employer wishes to use AWAs to retain such staff. Where a certified agreement is in place, employers and employees should not be precluded form further negotiation of terms and conditions of employment.[33]

9.38 The Shop, Distributive and Allied Employees' Association linked this amendment with the amendment prohibiting certified agreements from containing anti-AWA clauses and said:

> …not only can an employer, during the life of a validly operating collective agreement enter into AWA's, but…each AWA which comes into existence after and during the life of a certified agreement will prevail over the contents of the certified agreement.
>
> In other words, AWA's are given absolute paramountcy over collective agreements…
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> …This…is nothing more or less than a total attack on the whole concept of collective agreement making.[34]

9.39 The New South Wales Minerals Council in support of the amendment stated:

> …the ability of Australian Workplace Agreements to operate over Certified Agreements to the extent of any inconsistency is important in order to give affect to individual requirements in the workplace and to prevent persons taking the best from both types of agreements.[35]

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32 Submission No. 167, Australian Catholic Commission for Employment Relations, vol. 4, p. 750

33 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2387-8

34 Submission No. 414, Shop, Distributive and Allied Employees' Association, vol.17, p. 3713

35 Submission No. 497, New South Wales Minerals Council, vol. 24, p. 6366

Enforcement powers of the Employment Advocate

9.40 Amendments contained in the Bill will give the Employment Advocate the power to take legal action against employers who breach AWAs. In supporting these amendments, the Employment Advocate said:

> …it would be better for the Employment Advocate to have the power to actually take legal action in its own right for breaches of part VID and…breaches of AWAs and…seek recovery of any shortfall that occurred, rather than having to rely on the party doing it themselves…[A]t the end of the day it should be the primary responsibility of the parties to protect their rights. I think practical experience shows that really it is important to have a body that can assist employees, particularly, to ensure that their rights are observed.[36]

9.41 A majority of the Committee also believes that providing the Employment Advocate with enhanced powers to enforce AWAs will improve the operation of the Act and ensure that employees who cannot afford to take legal action themselves are not disadvantaged.

Conclusion

9.42 A majority of the Committee supports the facilitation of agreements at the workplace; removing obstacles to choices about agreements; reducing the cost and formality involved in having an agreement approved; and preventing unwarranted interference by third parties in agreement making. Making legislative requirements as simple and straight forward as possible will assist employers and employees in taking more direct responsibility for determining their own employment conditions.

9.43 A majority of the Committee believes that the Bill achieves these aims, at the same time as maintaining and improving important protections for employees. In particular, a majority of the Committee agrees that providing the Employment Advocate with enhanced powers to enforce AWAs will improve the operation of the Act and ensure that employees who cannot afford to take legal action themselves are not disadvantaged.

Recommendation

9.44 A majority of the Committee **recommends** the enactment of the amendments in Schedules 8 and 9.

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36 Evidence, Mr Jonathan Hamberger, 28 October 1999, p. 488