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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**WORKPLACE RELATIONS AMENDMENT (CODIFYING CONTEMPT OFFENCES)  
BILL 2003**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations, the  
Honourable Tony Abbott MP)

## **WORKPLACE RELATION AMENDMENT (CODIFYING CONTEMPT OFFENCES) BILL 2003**

### **OUTLINE**

The Bill proposes to amend the *Workplace Relations Act 1996* (WR Act) to modernise certain offences that relate to proceedings of the Australian Industrial Relations Commission (the Commission). This will enhance certainty about, and accessibility of, the criminal law that operates to protect the integrity of Commission proceedings.

Paragraph 299(1)(e) of the WR Act is contained within Part XI of the WR Act which is titled “Offences”. Paragraph 299(1)(e) makes it an offence to engage in conduct in relation to the Commission that would be contempt of court were the Commission a court of record. Contempt of court arises under the common law. It includes a range of conduct, which interferes with the administration of a justice, which is punishable by the court.

Schedule 1 to the Bill proposes to codify paragraph 299(1)(e) so that separate offences set out the acts or omissions that amount to contempt of the Commission.

To achieve this, the Bill would repeal the paragraph and replace it with offences prohibiting a person from:

- engaging in conduct which contravenes an order of the Commission;
- publishing a false allegation of misconduct affecting the Commission;
- inducing a person to give false evidence to the Commission.

Consistent with the *Criminal Code Act 1995*, the physical and fault elements of these offences will be clear from the terms of the offences.

Certain contemptuous conduct in relation to the Commission is prohibited by the operation of generally applying Commonwealth legislation, such as the *Crimes Act 1914* (the Crimes Act) and the *Criminal Code*. The Bill proposes to insert legislative notes referring to the relevant offences.

Schedule 1 to the Bill also proposes a new offence prohibiting the giving of false evidence to the Commission.

Schedule 2 to the Bill would update the penalties for offences in Part XI of the WR Act, including section 299. It also proposes to insert legislative notes after certain provisions of the WR Act. These notes refer to the relevant offences in Part XI that may apply when a person fails to fulfil certain requirements of those provisions.

### **FINANCIAL IMPACT STATEMENT**

The proposals contained in the Bill are budget neutral.

## **NOTES ON CLAUSES**

### **Clause 1 – Short title**

This is a formal provision specifying the short title of the Act.

### **Clause 2 – Commencement**

This clause specifies when various provisions of the Act are proposed to commence. Sections 1 to 3 and anything in the Act not elsewhere covered by the table will commence on the day on which the Act receives Royal Assent. The amendments set out in Schedules 1 and 2 will commence on the 28<sup>th</sup> day after the day on which the Act receives the Royal Assent.

### **Clause 3 – Schedule(s)**

Clause 3 provides that an Act specified in a Schedule to this Act is amended or repealed as set out in the Schedule, and that any other item in a Schedule operates according to its terms.

## **SCHEDULE 1 – CONTEMPT OFFENCES**

### *Workplace Relations Act 1996*

#### **Item 1 – Paragraph 299(1)(d)**

- 1.1 This item is an amendment consequential upon the repeal of paragraph 299(1)(e) which is proposed by item 2.

#### **Item 2 – Paragraph 299(1)(e)**

- 1.2 This item proposes the repeal of paragraph 299(1)(e).
- 1.3 The earlier paragraphs in subsection 299(1) create offences that prohibit conduct in relation to the Commission. For example, they prohibit interrupting Commission proceedings or using words calculated to improperly influence members of the Commission and witnesses to Commission proceedings. Paragraph 299(1)(e) makes it an offence to do “any other act or thing that would, if the Commission were a court of record, be a contempt of that court.”
- 1.4 Contempt of court arises under common law. It enables a court to impose punishment on those who interfere with its proceedings or with the administration of justice. Common law contempt does not apply to proceedings of commissions or tribunals. These bodies are often protected by statutory provisions that prohibit interference with their proceedings. Provisions in the form of paragraph 299(1)(e) are sometimes referred to as “deemed contempt” provisions. This sort of provision applies the whole of common law contempt, as it operates with respect to courts, to the relevant commission or tribunal.
- 1.5 The report of the Australian Law Reform Commission (ALRC) on the law of contempt in Australia (1987) identified certain difficulties with deemed contempt provisions. It noted the difficulty in transplanting the technical notion of contempt from its judicial context to the administrative context of tribunals and commissions. Such provisions do not clearly identify the conduct that can result in an offence being committed. The report recommended that such provisions be repealed and replaced by specific statutory offences that identify contemptuous conduct.

#### **Item 3 – At the end of section 299**

- 1.6 This item would insert new offences that codify certain forms of contempt. It would also insert 2 notes at the end of section 299 identifying other offences relating to improper influence of the Commission and interference with its proceedings.

#### *Legislative notes*

- 1.7 At common law, conduct which interferes with a court’s proceedings through improperly influencing judges or witnesses is contempt. Paragraphs in subsection 299(1) make it an offence to engage in some such conduct.
- 1.8 Proposed note 1 refers to other provisions creating offences that relate to improper influence on a member of the Commission. These offences are in Chapter 7 of the *Criminal Code* which deals with the proper administration of Government.

- 1.9 The offences prohibit certain dishonest conduct, conspiracy to defraud, making unwarranted demands of a Commonwealth public official, bribery of a Commonwealth public official and corrupting benefits given to or received by a Commonwealth public official.
- 1.10 These offences apply to conduct undertaken in relation to Commonwealth public officials performing their duties. “Commonwealth public official” is defined in the dictionary of the *Criminal Code* to include an individual who exercises powers, or performs functions, conferred on the person by or under a law of the Commonwealth. This includes a member of the Commission.
- 1.11 The maximum penalties under the *Criminal Code* that may be imposed on a person who commits these offences range from 5 to 12 years imprisonment.
- 1.12 Proposed note 2 refers to other provisions creating offences that relate to interference with proceedings. Two of the relevant offences prohibit conduct by and in relation to witnesses and are contained in the WR Act.
- 1.13 The other offences that the note refers to are contained in Part III of the Crimes Act which deals with offences relating to the administration of justice. These offences prohibit the intimidation of witnesses, corruption of witnesses, deceiving witnesses, destroying evidence and preventing witnesses from attending Court.
- 1.14 These offences apply in relation to judicial proceedings. Judicial proceedings are defined in section 31 of the Crimes Act to mean “a proceeding in or before a federal court, court exercising federal jurisdiction or a court of a territory, and includes a proceeding before a body or person acting under the law of the Commonwealth, or of a Territory, in which evidence may be taken on oath.” The Commission is such a body. Paragraph 111(1)(a) of the WR Act provides that the Commission may take evidence on oath in relation to industrial disputes. Subsection 111(2) of the WR Act has the effect of extending this power to other proceedings of the Commission.
- 1.15 The maximum penalties under the Crimes Act that may imposed on a person who commits these offences range from 1 to 5 years imprisonment.

*Contravening an order of the Commission*

- 1.16 Proposed subsection 299(3) would establish an offence of contravening an order of the Commission. At common law, this form of contempt is sometimes called “disobedience contempt”. It occurs where a person to whom an order of a Court is directed has not complied with that order. It ensures that the authority of a court is upheld and that its orders are effective.
- 1.17 The fault elements that operate with respect to a failure to comply with an order of the Commission are recklessness and intention. These fault elements are defined in Chapter 2 of the *Criminal Code*.
- 1.18 The maximum penalty that will apply to this offence is imprisonment for 12 months. Subsection 4B(2) of the Crimes Act establishes a formula by which a term of imprisonment can be converted into a pecuniary penalty. The formula multiplies the number of months of imprisonment by 5. The resulting number is the number of penalty units used to calculate the maximum pecuniary penalty. Section 4AA of the Crimes Act provides that a penalty unit is \$110. This would make the maximum pecuniary penalty for this offence 60 penalty units, that is, \$6,600.

- 1.19 Subsection 4B(3) of the Crimes Act provides that when a body corporate is convicted of an offence the court may, so long as a contrary intention does not appear, impose a penalty not exceeding five times the maximum penalty that could be imposed on a natural person. For this offence, the maximum penalty for a body corporate would be 300 penalty units, that is, \$33,000.
- 1.20 Proposed subsection 299(4) defines “engage in conduct” for the purpose of 299(3) to mean to do an act or to omit to perform an act.

*Publishing false allegation of misconduct affecting the Commission*

- 1.21 Proposed subsection 299(5) would establish an offence of publishing a false allegation of misconduct affecting the Commission. This offence is drawn from scandalising, a form of contempt at common law which prohibits the publication of certain allegations against judges or courts. The purpose of scandalising at common law is to maintain public confidence in judges and the judiciary. Sanctions may apply regardless of the truth of the allegations.
- 1.22 The ALRC’s report on the law of contempt noted that this form of contempt may inhibit freedom of expression to an unacceptable degree. It recommended a narrower form of scandalising where an allegation which imputes misconduct is published and the publication is likely to cause serious harm to the reputation of the judge in his or her official capacity.
- 1.23 The offence proposed by this Bill has a slightly narrower operation than that recommended by the ALRC. To commit the offence, the publication must be likely to have a significant adverse effect on public confidence that the Commission is properly performing its functions and exercising its powers. The effect must be on the institution of the Commission rather than merely having causing harm to an individual member of the Commission. This offence balances the importance of freedom of expression and open justice with the need to protect the integrity of, and maintain confidence in, the Commission.
- 1.24 Consistent with the ALRC’s recommendation, the offence will not be committed where there was misconduct as alleged by the published allegation, that is, where the allegation was true. The person engaging in the conduct of intentionally publishing the statement would need to be reckless as to whether the alleged misconduct is true or not. The person would need also need to be reckless as to the likelihood of the statement having a significant adverse effect. Recklessness as a fault element is defined in section 5.4 of the *Criminal Code*.
- 1.25 The maximum penalty for this offence is 12 months imprisonment. See paragraphs 1.18 and 1.19 for an explanation of how this penalty may be converted into a pecuniary penalty and how it operates with respect to a body corporate by operation of the Crimes Act.
- 1.26 At the end of this item, a note refers to a new heading for subsection 299(1).

**Item 4 – Application of new offences in section 299**

- 1.27 This item would clarify the application of the new offences proposed in subsections 299(3) and (5).

- 1.28 Subitem (1) notes that the new offence proposed in subsection 299(3) will only apply to conduct that takes place after commencement of the subsection. However, the offence may apply with respect to an order that was made before, on or after that commencement.
- 1.29 Subitem (2) notes that the new offence proposed in subsection 299(5) will only apply to statements published after the commencement of that subsection. However the offence may apply with respect to a statement made before, on or after that commencement.

### **Item 5 – At the end of section 303**

#### *Giving False Evidence*

- 1.30 This item would insert two new offences relating to false evidence.
- 1.31 Proposed subsection 303(3) will create a new offence of giving false evidence in the Commission. This is not a form of contempt at common law. This conduct is generally prohibited with respect to Courts by an offence of perjury.
- 1.32 Section 35 of the Crimes Act prohibits the giving of false testimony in judicial proceedings. In *Edwards v Director of Public Prosecutions* (1987) 62 ALJR 38 the High Court found that it would be incorrect to interpret “testimony” in section 35(1) of the Crimes Act as including an unsworn statement. This decision was made even though subsection 35(2) provides that for the purpose of section 35 it is immaterial whether the evidence was given on oath or not on oath.
- 1.33 The Commission may take unsworn evidence. This proposed offence applies to evidence given on oath or not on oath, or given orally or in writing. Unlike section 35 of the Crimes Act, the offence does not require that the false evidence touches on a matter material to the proceeding. This provision is not meant to preclude the operation of section 35 of the Crimes Act.
- 1.34 The maximum penalty for this proposed offence is imprisonment for 12 months. See paragraph 1.18 for an explanation of how this penalty may be converted into a pecuniary penalty by operation of the Crimes Act.

#### *Inducing another person to give false evidence*

- 1.35 Proposed section 303(4) will create a new offence of inducing another person to give false evidence. It is contempt at common law to interfere with the giving of evidence by witnesses. The WR Act already contains some protection for witnesses, with section 301 prohibiting threatening, intimidation or coercion of a witness. This offence does not extend to offering benefits to a person to give false evidence.
- 1.36 The offence proposed by this item clarifies that it is an offence to intentionally induce a person who is called as a witness before the Commission to give false evidence. It does not matter that the evidence was given on oath or not on oath, or was given orally or in writing. It does not matter whether the relevant person gives false evidence. This provision is not meant to preclude the operation section 37 of Crimes Act, which makes it an offence to engage in similar conduct.
- 1.37 The maximum penalty for this proposed offence is imprisonment for 12 months. See paragraphs 1.18 and 1.19 for an explanation of how this penalty may be converted into a pecuniary penalty and how it operates with respect to a body corporate by operation of the Crimes Act.
- 1.38 This item contains notes referring to heading changes for section 303.

**Item 6 – Application of new offences in section 303**

- 1.39 Subitem (1) notes that the new offence proposed in subsection 303(3) will only apply to the giving of false evidence after commencement of the subsection. The proceeding in which false evidence is given may be instituted before, on or after that commencement.
- 1.40 Subitem (2) notes that the new offence proposed in subsection 303(4) will only apply to inducement that takes place after commencement of the subsection. The proceeding in relation to which the inducement occurs may be instituted before, on or after that commencement.



## **SCHEDULE 2 – OTHER AMENDMENTS RELATING TO OFFENCES**

### *Workplace Relations Act 1996*

#### **Item 1 – At the end of subsection 83BH(5)**

- 2.1 Section 83BH sets out powers of authorised offices, including the power to require a person to produce documents. Section 305A makes it an offence to not produce documents as required under section 83BH by an authorised officer
- 2.2 This item would insert a note at the end of subsection 83BH(5) referring to the relevant offence.

#### **Item 2 – At the end of subsection 86(2)**

- 2.3 Section 86 sets out powers of inspectors, including the power to require that a person produce documents. Section 305 makes it an offence to not produce documents as required under subsection 86(2).
- 2.4 This item would insert a note at the end of subsection 86(2) referring to the relevant offence.

#### **Item 3 – At the end of subsection 119(1)**

- 2.5 Under subsection 119 (1), the Commission may direct a person to attend a conference in relation to an industrial dispute. Section 300 makes it an offence to not attend a conference as directed under subsection 119(1).
- 2.6 This item would insert a note at the end of subsection 119(1) referring to the relevant offence.

#### **Item 4 – At the end of subsection 138(1)**

- 2.7 Under subsection 138(1), the Commission may give directions in relation to the conduct of a secret ballot it has ordered under subsections 135 or 136 of the WR Act. Section 308 makes it an offence to not comply with a direction under subsection 138(1).
- 2.8 This item would insert a note cross at the end of subsection 138(1) referring to the relevant offence.

#### **Item 5 – Subsection 299(1) (penalty)**

- 2.9 Subsection 299(1) creates offences that apply to certain conduct in relation to the Commission. The maximum penalty for this offence is expressed to be \$500 for a natural person or imprisonment for 6 months or both. The maximum penalty for a body corporate is expressed to be \$1,000. Section 4AB of the Crimes Act provides a formula for converting penalties expressed in dollars to penalty units.
- 2.10 This item proposes to increase the maximum penalty for the offences in subsection 299(1) to 12 months imprisonment. This penalty is the same for other offences created by section 299.

- 2.11 See paragraphs 1.18 and 1.19 for an explanation of how this penalty may be converted into a pecuniary penalty and how it operates with respect to a body corporate by operation of the Crimes Act.

**Item 6– Section 300 (penalty)**

- 2.12 Section 300 makes it an offence to fail to attend a compulsory conference as directed under subsection 119(1). The maximum penalty is expressed to be \$1,000. Section 4AB of the Crimes Act provides a formula for converting penalties expressed in dollars to penalty units.
- 2.13 This item proposes a new maximum penalty for this offence of 20 penalty units. See paragraphs 1.18 and 1.19 for an explanation of how this penalty may be converted into a pecuniary penalty and how it operates with respect to a body corporate by operation of the Crimes Act.

**Item 7 – Section 301**

- 2.14 Section 301 makes it an offence to threaten, intimidate, coerce or prejudice witnesses to Commission proceedings. The maximum penalty is expressed to be \$500 for natural person or imprisonment for 6 months or both. The maximum penalty for a body corporate is expressed to be \$1,000. Section 4AB of the Crimes Act provides a formula for converting penalties expressed in dollars to penalty units.
- 2.15 The item proposes a new maximum penalty for this offence of imprisonment for 12 months. See paragraphs 1.18 and 1.19 for an explanation of how this penalty may be converted into a pecuniary penalty and how it operates with respect to a body corporate by operation of the Crimes Act.

**Item 8 – Paragraphs 301(f) and (g)**

- 2.16 This item would repeal the existing penalties in section 301 consequent upon the amendment in item 7.

**Item 9 – Section 302 (penalty)**

- 2.17 Section 302 makes it an offence to create a disturbance in or near the Commission. The maximum penalty is expressed to be \$500 or imprisonment for 6 months or both. Section 4AB of the Crimes Act provides a formula for converting penalties expressed in dollars to penalty units.
- 2.18 This item proposes a new maximum penalty for this offence of imprisonment for 6 months. See paragraphs 1.18 and 1.19 for an explanation of how this penalty may be converted into a pecuniary penalty and how it operates with respect to a body corporate by operation of the Crimes Act.

**Item 10 – Subsection 303(1) (penalty)**

- 2.19 Section 303 creates an offence that applies to certain conduct by witnesses before the Commission. The maximum penalty is expressed to be \$500 or imprisonment for 6 months or both. Section 4AB of the Crimes Act provides a formula for converting penalties expressed in dollars to penalty units.

- 2.20 This item proposes a new maximum penalty for this offence of imprisonment for 6 months. See paragraphs 1.18 and 1.19 for an explanation of how this penalty may be converted into a pecuniary penalty and how it operates with respect to a body corporate by operation of the Crimes Act.

**Item 11 – Subsection 307(1) (penalty)**

- 2.21 Section 307 creates an offence to make false or misleading statements in relation to an application for a secret ballot under subsection 136(1). The maximum penalty for this offence is expressed to be \$1,000. Section 4AB of the Crimes Act provides a formula for converting penalties expressed in dollars to penalty units.
- 2.22 This item proposes a new maximum penalty for this offence of 30 penalty units. See paragraphs 1.18 and 1.19 for an explanation of how this penalty may be converted into a pecuniary penalty and how it operates with respect to a body corporate by operation of the Crimes Act.

**Item 12 – Subsection 308(1) (penalty)**

- 2.23 Section 308 makes it an offence to fail to comply with certain directions in relation to secret ballots. The maximum penalty for this offence is expressed to be \$500 for natural person or imprisonment for 6 months or both. The maximum penalty for a body corporate is expressed to be \$1,000. Section 4AB of the Crimes Act provides a formula for converting penalties expressed in dollars to penalty units.
- 2.24 This item proposes a new penalty for this offence of 30 penalty units. See paragraphs 1.18 and 1.19 for an explanation of how this penalty may be converted into a pecuniary penalty and how it operates with respect to a body corporate by operation of the Crimes Act.

**Item 13 – At the end of subsections 317(1), (2) and (3)**

- 2.25 Section 317 creates certain offences in relation to secret ballots. The maximum penalty that is expressed to apply to these offences is \$500 or 6 months imprisonment or both. Section 4AB of the Crimes Act provides a formula for converting penalties expressed in dollars to penalty units.
- 2.26 The penalty does not appear at the foot of section 317 as required by section 4D of the Crimes Act.
- 2.27 This item proposes a maximum penalty for these offences of 30 penalty units each to be inserted at the end of subsections 317 (1), (2) and (3). See paragraphs 1.18 and 1.19 for an explanation of how this penalty may be converted into a pecuniary penalty and how it operates with respect to a body corporate by operation of the Crimes Act.

**Item 14 – Subsection 317(4) (penalty)**

- 2.28 This item proposes to repeal the existing penalty and replace it with a maximum penalty of 30 penalty units be inserted at the end of subsection 317(4). See paragraphs 1.18 and 1.19 for an explanation of how this penalty may be converted into a pecuniary penalty and how it operates with respect to a body corporate by operation of the Crimes Act.

**Item 15 – Section 338 (penalty)**

- 2.29 Section 338 makes it an offence for an employment agency to make an employment agreement for an employee on terms and conditions less favourable than a relevant award, order or certified agreement. The maximum penalty for this offence is expressed to be \$500. Section 4AB of the Crimes Act provides a formula for converting penalties expressed in dollars to penalty units
- 2.30 This item proposes a new penalty for this offence of 20 penalty units. See paragraphs 1.18 and 1.19 for an explanation of how this penalty may be converted into a pecuniary penalty and how it operates with respect to a body corporate by operation of the Crimes Act.

**Item 16 – Subsection 339(1) (penalty)**

- 2.31 Section 339 makes it an offence to publish trade secrets. The maximum penalty for this offence is expressed to be \$1,000 for a natural person or imprisonment for 6 months or both. The maximum penalty in the case of a body corporate is expressed to be \$1,000. Section 4AB of the Crimes Act provides a formula for converting penalties expressed in dollars to penalty units.
- 2.32 This item proposes a new maximum penalty for this offence of 20 penalty units.

**Item 17 – At the end of subsection 355(5)**

- 2.33 Subsection 355(5) enables the Court or the Commission to direct that trade secrets provided as evidence in proceedings not be published. Section 339 creates an offence of publishing such information.
- 2.34 This item would insert a note at the end of section 355(5) referring to the relevant offence.