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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

WORKPLACE RELATIONS AMENDMENT (CHOICE IN AWARD COVERAGE) BILL 2002

EXPLANATORY MEMORANDUM

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

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OUTLINE

This Bill proposes amendments to Part VI (Dispute Prevention and Settlement) and Part IX (Registered Organisations) of the *Workplace Relations Act 1996* to amend provisions concerning the roping-in of employers to federal awards.

These amendments are directed towards:

- providing all businesses with more information about their rights regarding, and the processes involved with, roping-in claims;
- restraining the ability of unions to rope small businesses which employ no union members into the federal jurisdiction; and
- requiring the Commission to inquire into the views of unrepresented small business employers potentially affected by a roping-in claim.

FINANCIAL IMPACT STATEMENT

The proposals contained in the Bill are budget neutral.

REGULATION IMPACT STATEMENT

Constrain Roping-in of Small Business Employers to Federal Awards

Problem:

Small businesses can be roped-into federal awards without being fully aware of the processes involved and the impact that it will have on the business. For example, there is a current claim by the Shop Distributive & Allied Employees' Association (the SDA) to rope in tens of thousands of small Victorian retail businesses into a federal award. Currently, these businesses (formerly covered by the Victorian state system before the Victorian Government referred most of its industrial relations powers to the Commonwealth) are covered by the legislated minimum conditions in Schedule 1A to the *Workplace Relations Act 1996* (WR Act) which make no provision for a number of minimum entitlements common in federal awards such as overtime and penalty rates. Thus a move to a federal award may have significant cost implications for many of the businesses concerned.

Most of the businesses covered by the roping-in claim by the SDA are not members of a registered employer organisation. Most would not have known what to make of the log of claims contained in the letter sent from the SDA to initiate the roping-in and dispute finding procedures before the Australian Industrial Relations Commission (the Commission). They would not, for example, have been aware that such logs are typically ambit in nature. The majority of small businesses have been unrepresented in the Commission hearings which have been held and have had no opportunity to influence the Commission's eventual decision. While roping-in exercises on the scale of the SDA claim are unusual, even smaller scale claims are bewildering to most of the small businesses involved.

Current Situation:

Roping-in claims occur because federal awards do not operate on a common rule basis (except in the ACT and Northern Territory), that is, a business (other than a respondent organisation) must be individually named as a respondent to an award for the terms and conditions in the award to apply to the employees and employer in that business. This is due to the limitation of the conciliation and arbitration power in the Constitution which underpins the Commission's powers in the federal jurisdiction. State awards do not suffer from this limitation and most operate on a common rule basis, that is, they apply across a sector or occupation within the state.

If a union wants a federal award to apply to a business it must 'rope' the business into the award. For this to happen the union must make a log of claims on the business, usually with a high degree of ambit in it (eg. 26 weeks annual leave) so that the employer could never agree with the claims, and then ask the Commission to find that a dispute exists between the union and the employer. This paper 'dispute' is commonly resolved by the employer being made a respondent to the award. Small businesses which do not belong to an employer organisation often do not respond to the union's claims, are not represented before the Commission, and may sometimes not even be aware they have been roped into a federal award.

Objectives:

The Government's objectives are to:

- provide all businesses with more information about their rights and the processes involved with roping-in claims;
- require the Commission to inquire into the views of unrepresented small business employers affected by a roping-in claim; and
- constrain the ability of unions to rope small businesses which employ no union members into the federal jurisdiction.

Option:

This option contains a number of measures which are complementary. Where an alleged dispute is notified on the ground that the employer has not agreed to demands set out in a log of claims, the Commission would be required not to make any finding of dispute, unless satisfied that:

- the log of claims, when served, was accompanied by a notice containing prescribed information;
- the alleged dispute was not notified until at least 28 days after service of the log;
- the party notifying the alleged dispute had given the employer at least 28 days notice of the time and place for hearing of the dispute notification; and
- the log of claims does not include any demand that requires conduct or provisions contrary to the freedom of association provisions of the Act, or not pertaining to the relationship between employers and employees.

The Commission would be required to inquire as to the views of small business employers affected by the making of an award, rather than only attending to the views of employers who appear or are represented at hearings. A dispute with a small business employer, that is an employer with less than 20 employees, would only be taken to exist, in a roping-in or log of claims process, where the union has a member employed by the employer.

Impact analysis (costs and benefits) of the option:

(a) Effect on employers

The first measure would ensure that any employer subject to a roping-in claim would be more aware of what the process involved and would have more time to consider alternative responses.

The second measure would improve the prospect that small business would not be inappropriately affected by federal awards, but would still depend on the Commission's exercise of its discretion.

The third measure would effectively prevent the vast majority of small businesses not currently in the federal jurisdiction from being roped-in to a federal award. It is broadly estimated that around 6 percent of small businesses have at least one employee who is a union member. Those small business employers not currently covered by respondent federal awards and without any employees who are union members would remain covered by state awards and agreements or in the case of Victoria by Schedule 1A minima, or in the case of the Territories by common rule federal awards, or would remain award free.

(b) Effect on employees

Employees in small businesses which were not roped-in to a federal award under the above proposals would be covered by state awards or agreements, or would remain award free or, in Victoria would remain covered by Schedule 1A in the WR Act, or in the case of the Territories could be covered by common rule federal awards.

The impact of these proposals would be different for employees who are or become union members, as roping-in of their employers would not be precluded.

(c) Effect on consumers and Australian economy

The third measure would effectively prevent future large scale roping-in exercises such as the current SDA claim. Where the small businesses were otherwise award free or in Victoria covered by Schedule 1A conditions this would prevent potentially significant cost increases being imposed on small businesses, for example through the imposition of new conditions such as overtime penalty rates, and the possibility that these costs would be passed onto consumers. Avoiding these potentially significant cost increases would also prevent any associated job losses. The potential cost increases of changing from a state award to a federal award would be less significant as state awards generally provide for penalty and overtime rates although these do vary between and amongst state and federal awards.

Consultation:

The measures contained in this bill are drawn from the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 and the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001. No specific consultation has occurred for this most recent proposal. However, there have previously been formal and informal consultations with small business operators through which the impact of workplace relations regulation on small business operators has been broadly identified by employers.

Implementation and Review:

All of the proposals would require amendments to the WR Act. DEWR would monitor and evaluate the effect of such legislative change.

NOTES ON CLAUSES

Clause 1 - Short title

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

Clause 2 - Commencement

2. This clause specifies when the 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 the Royal Assent. The amendments set out in Schedule 1 will commence on a single day to be fixed by proclamation, subject to subsection (3).

3. Clause 2 has the effect that the item in the table is not proclaimed to commence within six months of the Act receiving Royal Assent, it will commence on the day following that period of six months.

Clause 3 – Schedule(s)

4. This clause provides that an Act that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule operates according to its terms.

SCHEDULE 1 – FEDERAL AWARDS

Part 1 – Amendments

Workplace Relations Act 1996

Item 1 – Subsection 101(1)

1.1 This amendment is consequential upon the amendment proposed by item 2. It would provide, in relation to an alleged industrial dispute notified in the Commission, that the Commission's powers to determine the parties to the industrial dispute, the matters in dispute and to record its findings are subject to the requirements set out in proposed new sections 101A and 101B.

Item 2 – After section 101

New section 101A – When Commission must not make findings under section 101

1.2 New section 101A would provide that where an alleged industrial dispute has been notified to the Commission on the grounds that a party has not agreed to demands set out in a log of claims, the Commission must not make any findings under section 101 unless it is satisfied that the requirements set out in paragraphs (a) to (d) were met.

1.3 Proposed new paragraph (a) would require the log of claims served by the party notifying the alleged industrial dispute be accompanied by a notice containing prescribed information.

1.4 The purpose of the requirement contained in paragraph (a) is to ensure that the recipients of logs of claims, especially recipients that are unfamiliar with the log of claims process, such as small business or new business operators, are provided with basic information about the process and their rights and obligations at the time the log is served.

1.5 Proposed new paragraph (b) would require that the alleged industrial dispute was notified under section 99 of the Act at least 28 days after the service of the log.

1.6 Proposed new paragraph (c) would require that the party notifying the alleged industrial dispute had, at least 28 days before the day fixed for the initial proceedings in relation to the alleged dispute, served each person alleged to be a party to the dispute with a notice of the time and place fixed for proceedings.

1.7 The purpose of the requirements contained in paragraphs (b) and (c) is to ensure that the recipients of logs of claims and notices of proceedings, especially recipients that are unfamiliar with the logs of claims process, such as small business employers, are allowed adequate time to seek advice about their rights and obligations, and to prepare for any relevant proceedings.

1.8 Proposed new paragraph (d) would require that the log of claims does not include any demand that:

- requires conduct that would contravene Part XA of the Act;

- an objectionable provision (within the meaning of section 298Z, for example, provisions that require or permit or have the effect of requiring or permitting any conduct that would contravene the freedom of association provisions) be included in an award or agreement; or

- does not pertain to the relationship between employers and employees.

1.9 Proposed new paragraph (d) is designed to ensure that where a log of claims is served with a view of notifying the Commission of an alleged industrial dispute in relation to the log, such a log of claims should only include demands in respect of matters that may be included in an award or agreement under the Act.

New section 101B – Findings in relation to employers in small business

1.10 New section 101B would provide that where an alleged industrial dispute has been notified to the Commission on the grounds that a party has not agreed to demands set out in the log of claims, the Commission must not make any findings under section 101 unless it is satisfied that the requirements set out in subsections (1) to (3) are met.

1.11 Proposed new subsection 101B(1) states that it applies where an organisation of employees notifies an alleged industrial dispute on the grounds that one or more employers (notified employers) have not agreed to demands set out in a log of claims served by that organisation on those employers.

1.12 The purpose of the requirement contained in subsection 101B(1) is to make clear that it applies where an organisation of employees notifies an alleged industrial dispute.

1.13 Proposed new subsection 101B(2) would require that, before making any dispute finding in respect of such an alleged industrial dispute, the Commission give each notified employer a notice in writing requesting that the employer inform the Commission within the time specified in the notice, whether the employer employed less than 20 people on the service day (defined in subsection 101B(5) as the day the log of claims was served on the employer).

1.14 The purpose of the requirement contained in subsection 101B(2) is to give all small business employers an opportunity to identify themselves to the Commission. The Commission would accept the employer's statement as prima facie evidence that they are a small business employer unless evidence to the contrary was provided. The notice is intended to contain a warning that providing any false or misleading information to the Commission may result in prosecution under the *Criminal Code Act 1995* (Cth). Where evidence that contradicts the employer's assertion is provided, the Commission must weigh up whether it accepts that the employer fits the definition of a small business. The Commission would provide a list of all employers identifying as small businesses to the relevant organisation(s) of employees, in order for the organisation to have an opportunity to satisfy the Commission that the employer was not a small business, or employs a union member.

1.15 Proposed new subsection 101B(3) prevents the Commission from determining that a notified employer is party to any dispute finding in respect of such an alleged industrial dispute unless:

- the Commission is not satisfied that the employer who informed the Commission under subsection 101B(2) was a small business on the service day; or

- the Commission is satisfied that the employer employs a member of the relevant organisation.

1.16 The purpose of the requirement contained in subsection 101B(3) is to ensure that a small business employer who identifies themselves to the Commission and who does not employ a union member is not determined to be a party to a dispute finding in respect of an alleged industrial dispute. (New section 290A, proposed by item 3 of this Schedule, would allow an organisation of employees to apply to the Industrial Registrar to obtain a certificate that states that a particular small business employer employs a member of the organisation.)

1.17 Proposed new subsection 101B(4) would require the Commission, before making an award in relation to such a dispute, to give a notice in writing inviting each party determined to be a party to that dispute, who the Commission is satisfied employed less than 20 people on the service day, to make comments on the proposed award within the period specified in the notice.

1.18 The purpose of the requirement contained in subsection 101B(4) is to ensure the Commission provides an opportunity for the views of unrepresented small business employers potentially affected by a roping in claim (ie those businesses employing at least one union member) to be expressed, by a means other than attending a hearing.

1.19 Proposed new subsection 101B(5) defines 'service day', in relation to a notified employer, as the day on which the log of claims was served on the employer.

1.20 Proposed new subsection 101B(6) makes clear that, for the purposes of working out whether a notified employer employed less than 20 people on the service day, a casual employee who had been engaged on a regular and systematic basis for a sequence of periods of employment of at least 12 months should be counted, but not any other casual employee.

Item 3 – After section 290

New section 290A – Certificate to the effect that an employee is a member of an organisation

1.21 New section 290A would provide that an organisation of employees, for the purposes of section 101B, may apply to the Industrial Registrar for a certificate certifying that an employee is a member of that organisation. The certificate will identify the organisation and the employer and is for all purposes of the Act evidence of what it certifies.

1.22 The purpose of the section is to provide a mechanism for an organisation of employees to apply to the Industrial Registrar to prove that a small business employer employs their members. The certificate will identify the employer and the organisation of employees but will assure employee confidentiality as it will not identify employees.

Part 2 – Application provision

Item 4 – Application of items 1, 2 and 3

1.23 This item proposes that the amendments made by items 1, 2 and 3 of this Schedule, which would restrict the capacity for small business employers to be roped-in to Federal awards, apply to alleged industrial disputes notified after the commencement of this Schedule.