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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**WORKPLACE RELATIONS AMENDMENT (SIMPLIFYING AGREEMENT-MAKING)
BILL 2002**

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be moved on Behalf of the Government

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

WORKPLACE RELATIONS AMENDMENT (SIMPLIFYING AGREEMENT-MAKING) BILL 2002

OUTLINE

These amendments alter Schedules 1 and 2 of the Bill. The amendments are as follows.

Schedule 1 – Australian Workplace Agreements

The amendment to Schedule 1 of the Bill proposes to retain the current provisions in the *Workplace Relations Act 1996* (the Act) which relate to the approval process of Australian Workplace Agreements (AWA) and variation agreements by the Employment Advocate.

Schedule 2 – Certified Agreements

The Act currently provides that certified agreements must have a nominal expiry date which cannot be more than 3 years after the date on which the agreement comes into operation. The amendments to Schedule 2 of the Bill would introduce into the Act the option of allowing certified agreements to have an extended nominal life of up to five years. These ‘extended agreements’ would need to meet certain requirements which are additional to those which apply to three year certified agreements.

The amendments to Schedule 2 will:

- provide that ‘extended agreements’ which may have a nominal life of between three and five years may be made under sections 170LK, 170LJ and 170LN of the Act;
- set out special criteria to be applied by the Commission when certifying ‘extended agreements’;
- create a mechanism to enable a party to seek a reassessment by the Commission of the extended agreement any time after it has been operating for at least three years to ensure that it still meets the no-disadvantage test; and
- allow for extended agreements that are found by the Commission to no longer meet the no-disadvantage test to be varied so that they do pass the no-disadvantage test; or terminated by agreement or in the public interest. If no action is taken by the parties, the extended agreement will reach its nominal expiry date 3 months after the Commission makes its finding on the no-disadvantage test.

FINANCIAL IMPACT STATEMENT

The Bill has no financial impact on the Commonwealth Budget.

REGULATION IMPACT STATEMENT

Introduction

1. The *Workplace Relations Act 1996* imposes a maximum nominal period of operation for a certified agreement of three years. Certified agreement must pass the ‘no-disadvantage test’ (NDT) at the time of approval – that is, the agreement’s certification must not result, on balance, in a reduction in the overall terms and conditions of employment of employees covered by the agreement when compared with the relevant award, or designated award, and the laws the Commission considers relevant.

Problem

2. Employers and employer organisations have expressed concerns that a nominal expiry date of three years is not always long enough for some businesses or projects. This means that these businesses can face the prospect of an unstable workplace relations environment at crucial times in the business/project cycle. This uncertainty can also be detrimental to the interests of employees and their representatives.

Objectives

3. The objectives of the proposed extended agreement provisions are
- to provide for the option of making agreements up to a maximum of five years in appropriate circumstances; and
 - to provide safeguards for employers and employees entering into these agreements so they are not disadvantaged by extended agreements.

Options

Option 1: *Status Quo*

Option 2: *Amend Part VIB of the Workplace Relations Act 1996*

4. To make various amendments to Part VIB of the WR Act to provide for the certification of agreements with a nominal expiry date of up to five years (‘an extended agreement’).
- These extended agreement arrangements are to be made available for agreements made with employees (under s.170LK), agreements made with organisations of employees (under s.170LJ) and agreements made in settlement of industrial disputes (under s.170LN).
 - The Commission must refuse to certify an extended agreement unless it is satisfied that the length of the agreement is appropriate in the circumstances and in the interests of employers and employees. The agreement must also contain a statement to the effect that anytime after three years a party to the agreement may apply to have the agreement reassessed against the NDT.

- If an extended agreement that has been in operation for three years or more is retested and found to fail the NDT, parties to the agreement have a number of options. They can vary or terminate their agreement within the following three month period. If the agreement is neither varied nor terminated, the extended agreement will reach its nominal expiry date three months after the Commission makes its finding. After termination, or when the new nominal expiry date has passed, the parties will be able to access protected industrial action if they wish to negotiate a new agreement.

Impact analysis

Option 1: Status Quo

Costs

5. The current nominal expiry date of three years does not suit all businesses or projects. This means that some employers and employees may have to renegotiate agreements or face protected industrial action at crucial times in the business cycle. This uncertainty can lead to an unstable workplace relations environment which is detrimental to the interests of employers and employees.

Benefits

6. The main benefit of remaining with the status quo is that the parties are familiar with the current arrangements.

Option 2: Amend Part VIB of the Workplace Relations Act 1996

Costs

7. The proposed amendments will not impose any significant costs or cause any disadvantage to business or employers or employees. The extended agreement option will be entirely voluntary. In addition, the reassessment mechanism will ensure consistency with the current policy on the NDT and existing safeguards for employees in agreement making.

Benefits

8. The amendments would benefit employers, employees and unions by providing an additional agreement making option. Where it suits the circumstances of the employer and employees, they will be able to gain the additional certainty and stability provided by extended agreements up to a maximum of five years.

Conclusion and recommended option

9. Option 2 is preferred over the status quo because it
- enhances the agreement making framework by providing employers and employees with another option for reaching mutually beneficial agreements at the workplace level;
 - provides safeguards for employers and employees entering extended agreements, particularly through the reassessment of the NDT.

Implementation and review

10. All the proposals require amendments to the WR Act. DEWR will monitor and evaluate the effect of these amendments.

NOTES ON AMENDMENTS

Amendment No 1 – Schedule 1, page 6 (after line 6), after the definition of *State Agreements*

This amendment would insert and define the word ‘*sure*’, in subsection 170VAA, to mean not having any doubts.

Amendment No 2 – Schedule 1, item 1, page 12 (line 9), omit paragraph (d)

This amendment proposes to replace the current provision in paragraph 170VCB(1)(d) that the Employment Advocate must approve an AWA if it passes the no-disadvantage test with the requirement that the AWA must be approved if the Employment Advocate is sure that an AWA passes the no-disadvantage test.

The proposed amendment replicates the existing requirements found in the Act.

Amendment No 3 – Schedule 1, item 1, page 25 (line 21), omit paragraph (d),

This amendment proposes to replace the current provision in paragraph 170VEG(1)(d) with a requirement that the Employment Advocate must approve an AWA if sure that the AWA, as varied, passes the no-disadvantage test.

The proposed amendment replicates the existing requirements found in the Act.

Amendment No 4 – Schedule 2, page 49 (before line 5), before item 1.

New item 1A

This amendment proposes to replace the current definition of the *nominal expiry date* in section 170LD. The new definition contains the elements of the existing definition, but also allows for the nominal expiry date of an extended agreement to be in accordance with proposed section 170MCA. The definition provides that the date is either:

- the date specified in the agreement (new subsection 170LD(a)); or
- the date as extended or further extended under section 170MC (new subsection 170LD(b));
or
- the date taken under proposed new section 170MCA to be the nominal expiry date (new subsection 170LD(c)).

Amendment No 5 – Schedule 2, page 49, after proposed item 1A.

New item 1B

This amendment would insert a new section 170LGA at the end of Division 1 of Part VIB of the WR Act. Proposed section 170LGA defines an *extended agreement* to be an agreement that:

- is made under Division 2 or 3, but not an agreement under section 170LL (new subsection 170LGA(a));

- specifies a nominal expiry date that is more than 3 years after the date on which the agreement comes into operation but not be more than 5 years after that date (new subsection 170LGA(b)); and
- states it is made as an *extended agreement* (new subsection 170LGA(c)).

Amendment No 6 – Schedule 2, page 51 (after line 7) after item 8
New item 8A

This amendment would insert a new paragraph 170LT(3)(c) into subsection 170LT(3) of the WR Act. Subsection 170LT(3) provides that where a certified agreement fails the no-disadvantage test the Commission may nevertheless certify the agreement if it is satisfied it is not contrary to the public interest to do so.

New paragraph 170LT(3)(c) would provide that this option is not available for extended agreements.

Amendment No 7 – Schedule 2, page 51 (after line 11) after item 9
New item 9A

Section 170LT(10) requires that a certified agreement must specify a date as the nominal expiry date and that date cannot be more than 3 years after the date on which the agreement will come into operation.

This amendment would amend section 170LT(10) to allow an extended agreement to have a maximum nominal life of up to 5 years (paragraph 170LT(10)(a)). If the agreement is not an extended agreement, the existing requirement that the nominal expiry date cannot be more than 3 years after the date on which the agreement comes into operation applies (paragraph 170LT(10)(b)).

Amendment No 8 – Schedule 2, page 51 (after line 22), after item 10
New item 10A

Section 170LU sets out requirements additional to those provided under section 170LT, which the Commission must consider before deciding whether or not to certify an agreement.

This amendment would add a new paragraph 170LU(9) to section 170LU of the WR Act which would set out the criteria which must be satisfied before the Commission can certify an extended agreement. The Commission must refuse to certify an extended agreement unless it is satisfied that:

- the agreement's nominal expiry date is appropriate in the circumstances (paragraph 170LU(9)(a)); and
- the agreement's nominal expiry date is in the interests of the employer and the employees who will be bound by the agreement (paragraph 170LU(9)(b)); and
- the agreement contains a statement setting out the right of a party to the agreement to apply for a reassessment of whether the agreement passes the no-disadvantage test.

A proposed note to this provision explains that proposed subsection 170MCA(2) sets out the right of a party to an agreement to apply to the Commission for a reassessment of whether the agreement meets the no-disadvantage test.

Amendment No 9 – Schedule 2, page 52 (after line 21), after item 11
New item 11A

This amendment replaces the current heading of Division 7 of Part VIB of the WR Act with a new heading, Division 7 – Changes to nominal expiry dates. The change in heading reflects the proposed changes to the content of Division 7, which would, as amended, deal with nominal expiry dates. A new Division 7A has been created to deal with varying or terminating agreements.

Amendment 10 - Schedule 2, page 53 (after line 11) after item 14
New item 14A

This amendment would insert a new subsection 170MC(3A). New subsection 170MC(3A) would require the Commission to decide whether or not to extend an agreement under section 170MC without holding a hearing unless it is not satisfied that it can make that decision with the information available to it, or a hearing is requested by one of the persons listed in paragraph 170MC(3A)(b). The persons who may request a hearing are:

- the employer (subparagraph 170MC(3A)(b)(i));
- a person whose employment is subject to the agreement (subparagraph 170MC(3A)(b)(ii));
- one or more of the organisations bound by the agreement (subparagraph 170MC(3A)(b)(iii); and
- a person prescribed by the regulations (subparagraph 170MC(3A)(b)(iv)).

This amendment is consistent with the provisions in the Bill about who may request a hearing in relation to the certification of an agreement (proposed section 170LVA), and the termination or variation an agreement (proposed section 170MHB).

Amendment 11 - Schedule 2, Item 16, page 53 (lines 24 to 28)

This amendment would replace the current paragraph 170MC(5)(a) to exclude extended agreements from the types of agreements which may have the nominal expiry date extended under section 170MC provisions.

The current prohibition in paragraph 170MC(5)(b) on extending the nominal expiry date of agreements certified under section 170LT(3) will remain.

Amendment 12 – Schedule 2, page 53 (after line 28) after item 16.
New item 16A

This amendment would insert a new mechanism which would provide a party to an extended agreement a right to apply to the Commission to have the agreement reassessed to determine whether it passes the no-disadvantage test. The amendment would allow a reassessment any

time after the extended agreement has been operating for more than 3 years, but before the nominal expiry date (new subparagraph 170MCA(2)(a)).

An application for a reassessment of the no-disadvantage could only be made once (new subparagraph 170MCA(2)(b)).

If on conducting the reassessment the Commission decides that the extended agreement does not pass the no-disadvantage test and the Commission has not varied the agreement under section 170MD before the end of the period commencing 3 months after the finding, then the nominal expiry date is taken to be the last day of the 3 month period (new subsection 170MCA(1)).

If during the 3 month period the Commission decides that the extended agreement has been appropriately varied by the parties under section 170MD so that it passes the no disadvantage test then the nominal expiry date will remain the date specified in the agreement.

The parties may also terminate the agreement under Division 7A or allow the agreement to reach its new nominal expiry date (see note to proposed subsection 170MCA(1)).

As the nominal expiry date will not have passed until the end of the three month period commencing from the date of the Commission's finding, protected industrial action is not available during this period.

Amendments 13 – Schedule 2, page 53

New item 16B

This amendment would insert a new Division 7A with a new heading as part of the consequential amendments arising from splitting the current Division 7 into two separate divisions.

Division 7A would deal with varying or terminating certified agreements.

Amendment 14 – Schedule 2, item 23, (lines 28 to 30)

Section 170MH currently provides that the Commission may terminate a certified agreement in the public interest after the nominal expiry date has passed.

This amendment would replace subsection 170MH(1) and insert a new subsection 170MH(1A) to allow extended agreements to be terminated under section 170MH if the Commission finds under proposed new section 170MCA that the extended agreement no longer passes the no-disadvantage test.

This option would be available during the 3 month period commencing on the day of the Commission's finding that the agreement does not pass the no-disadvantage test.

The persons who would be able to apply for a certified agreement to be terminated under this provision are:

- the employer (subparagraph 170MH(1A)(a));
- a majority of the persons whose employment is subject to the agreement (subparagraph 170MH(1A)(b));

- if the agreement was made in accordance with section 170LJ or 170LL or Division 3 - an organisation of employees that is bound to the agreement and that has at least one member whose employment is subject to the agreement (subparagraph 170MH(1A)(c)).

Amendments 15, 16, 17 – Schedule 2, item 27, pages 56 and 57

These amendments would make amendments consequential to the limiting of the content in Division 7 to nominal expiry dates and the creation of new Division 7A that deals with varying and terminating agreements.

Item 15 substitutes the reference to Division 7 in item 27 of the Bill with the correct reference to Division 7A of Part VIB.

Item 16 removes the reference to ‘extend’ in subsection 170MHB(1) of new Division 7A as extending agreement would be dealt with in Division 7.

Item 17 is a consequential amendment that removes the reference to section 170MC – extending an agreement - from subparagraph 170MHB(2)(a) as this is now dealt in the amendment to new subsection 170MC(3).

Amendments 18 and 19 – Schedule 2, item 28, page 58, lines 3 and 4

These amendments to Part 2 of Schedule 2, page 58, item 28 change the numbering in the application provisions of the Bill to reflect the changes made by these amendments.