

2004-2005

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**WORKPLACE RELATIONS AMENDMENT (WORK CHOICES) BILL 2005**

EXPLANATORY MEMORANDUM

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

## WORKPLACE RELATIONS AMENDMENT (WORK CHOICES) BILL 2005

### OUTLINE

This Bill will amend the *Workplace Relations Act 1996* (the WR Act) to create a more flexible, simpler and fairer system of workplace relations for Australia. The Bill will carry forward the evolution of Australia's workplace relations system to improve productivity, increase wages, balance work and family life, and reduce unemployment.

The major reforms to be implemented by the Bill will:

- simplify the complexity inherent in the existence of six workplace relation jurisdictions in Australia by creating a national workplace relations system based on the corporations power that will apply to a majority of Australia's employers and employees;
- establish an independent body called the Australian Fair Pay Commission (AFPC), to set and adjust minimum and award classification wages, minimum wages for juniors, trainees/apprentices and employees with disabilities, minimum wages for piece workers and casual loadings;
- enhance compliance with the WR Act;
- enshrine in law minimum conditions of employment (annual leave, personal/carer's leave (including sick leave), parental leave (including maternity leave) and maximum ordinary hours of work), which, along with the wages set by the AFPC, will be called the Australian Fair Pay and Conditions Standard (the Standard) and will apply to all employees in the national system;
- place a greater emphasis on direct bargaining between employers and employees by replacing the certification and approval process for making agreements with a simpler streamlined lodgment only process;
- improve regulation of industrial action while protecting the right to take lawful industrial action by requiring the Australian Industrial Relations Commission (AIRC) to determine and application for an order to stop or prevent unprotected industrial action within 48 hours, requiring secret ballots before protected industrial action, expanding the grounds on which the AIRC can suspend or terminate a bargaining period, and creating a new power for the Minister for Employment and Workplace Relations to suspend or terminate a bargaining period in particular circumstances;
- retain a system of awards that will be simplified to ensure that they provide minimum safety net entitlements;
- provide for the transfer of industrial instruments to a successor, assignee or transmittee employer, for a maximum period of 12 months (with the exception of Australian Pay and Classification Scales) and to oblige new employers to give notification to transferring employees. Additionally, to provide for the transfer

of certain entitlements accrued under the Standard to a successor, assignee or transferee employer;

- protect certain award conditions (public holidays, rest breaks (including meal breaks), incentive-based payments and bonuses, annual leave loadings, allowances, penalty rates, and shift/overtime loadings) in the agreement making process so that these conditions can only be modified or removed by specific provisions in an agreement;
- preserve specific award conditions (long service leave, superannuation, jury service and notice of termination) for all current and new award reliant employees, and permit other award conditions (annual leave, personal/carer's leave, parental leave) to apply to current and new award reliant employees if they are better than the conditions provided in the Standard;
- encourage employers and employees to resolve their disputes without the interference of third parties by introducing a model dispute settlement procedure that includes a range of dispute settling options for all award and Standard reliant employers and employees, and employers and employees covered by agreements that do not contain dispute settling procedures;
- improve protections for employers and employees by extending the compliance regime in the WR Act to cover the Standard, agreement making, and State award and agreement reliant employers and employees that are brought into the national system; and
- put in place comprehensive transitional arrangements for employers and employees entering the federal system and employers and employees currently in the federal award system who will not be covered by the new federal system.

## FINANCIAL IMPACT STATEMENT

The Government's proposed workplace relations reforms will move towards a national workplace relations system for the first time and significantly simplify the workplace relations system.

Estimated costs associated with the proposed workplace relations reforms are as follows:

	<b>2005-06 (mill)</b>	<b>2006-07 (mill)</b>	<b>2007-08 (mill)</b>	<b>2008-09 (mill)</b>	<b>Total (mill)</b>
Compliance	\$13.3	\$46.5	\$41.9	\$39.8	<b>\$141.5</b>
Agreement Making	\$6.7	\$14.8	\$18.3	\$21.8	<b>\$61.5</b>
WorkChoices Advertising Campaign	\$44.3				<b>\$44.3</b>
WorkChoices Information and Education	\$10.8				<b>\$10.8</b>
Australian Fair Pay Commission	\$5.8	\$7.7	\$7.8	\$7.8	<b>\$29.1</b>
Awards Review Taskforce	\$7.4	\$1.7	-	-	<b>\$9.0</b>
WorkChoices Legislation Development & Implementation	\$58.5	\$30.4	\$21.1	\$21.2	<b>\$131.3</b>
Unlawful Dismissal	\$4.0	\$11.5	\$6.8	\$6.4	<b>\$28.6</b>
Dispute Resolution	\$0.7	\$2.1	\$3.4	\$5.2	<b>\$11.4</b>
Australian Industrial Relations Commission	\$1.9	\$1.4	-\$3.9	-\$6.1	<b>-\$6.7</b>
Attorney General's Department	\$5.3	\$7.8	\$7.8	\$7.8	<b>\$28.8</b>
<b>Estimated costs:</b>	<b>\$158.7</b>	<b>\$123.9</b>	<b>\$103.2</b>	<b>\$103.8</b>	<b>\$489.6</b>

Final details of these costs will be considered in the Additional Estimates context and will be outlined in appropriation Bills and the Department of Employment and Workplace Relations' Portfolio Additional Estimates Statements when published later this year.

## REGULATION IMPACT STATEMENT

### Background

Since coming to office in 1996, the Australian Government (the Government) has significantly reformed the federal workplace relations system to introduce flexibilities and reduce third party intervention. These reforms have contributed to increased productivity and economic prosperity. However, further Government reform initiatives are required to meet the economic challenges confronting Australia, such as the aging Australian workforce.

Despite the WR Act going some way towards achieving a less prescriptive and more centralised approach to workplace relations, the system still confers significant rights on third parties over and above the rights of employers and employees. It places artificial demands on workplaces and creates barriers to opportunities for genuine direct employer/employee relationships. Application of the federal workplace relations laws is still dependent on interpretation by the Australian Industrial Relations Commission (AIRC), with intervention by unions, which may override the wishes of employees in a workplace. The current system still imposes a complex and costly regulatory burden on employers and employees, resulting in a negative impact on productivity and employment.

While the primary focus of the federal workplace relations system is on workplace agreements underpinned by a minimum safety net, it is not a *genuine* safety net. The current process for reviewing the safety net is subject to AIRC arbitration and union intervention. Unions invariably make ambit claims to raise award wages and conditions above the level which represents a real and effective safety net. The current safety net of complex and prescriptive awards can act as a disincentive to agreement making. There is still a need for establishing genuine minimum standards, over and above which employers and employees at workplace level should be free to negotiate further wages and conditions through simplified agreement making processes without the interference of third parties.

The existing system of six different industrial relations systems creates confusion for enterprises with workplaces in more than one state, resulting in compliance obligations under different industrial laws. The limitations of operating with six different systems have been recognised by numerous stakeholders and commentators from a wide political spectrum for many years.

These problems were recently noted by the International Monetary Fund, which commented:<sup>1</sup>

*Further reforms of industrial relations are needed to expand labor demand and facilitate productivity gains. Labor market reforms to date have substantially reduced rigidities, but centralised awards still set minimum working conditions in 20 areas through the requirement that conditions in collective and individual contracts not fall below those in awards – the no disadvantage test – and large employers face up to six different industrial relations systems at the Federal and State levels.*

Australia currently has over 130 different pieces of employment related legislation, over 4000 different awards and six different workplace relations systems operating across the country. There are too many rules and regulations that make it too hard for many employees and employers to get together and reach agreement. There is also too much red tape, too much complexity, and too much confusion.

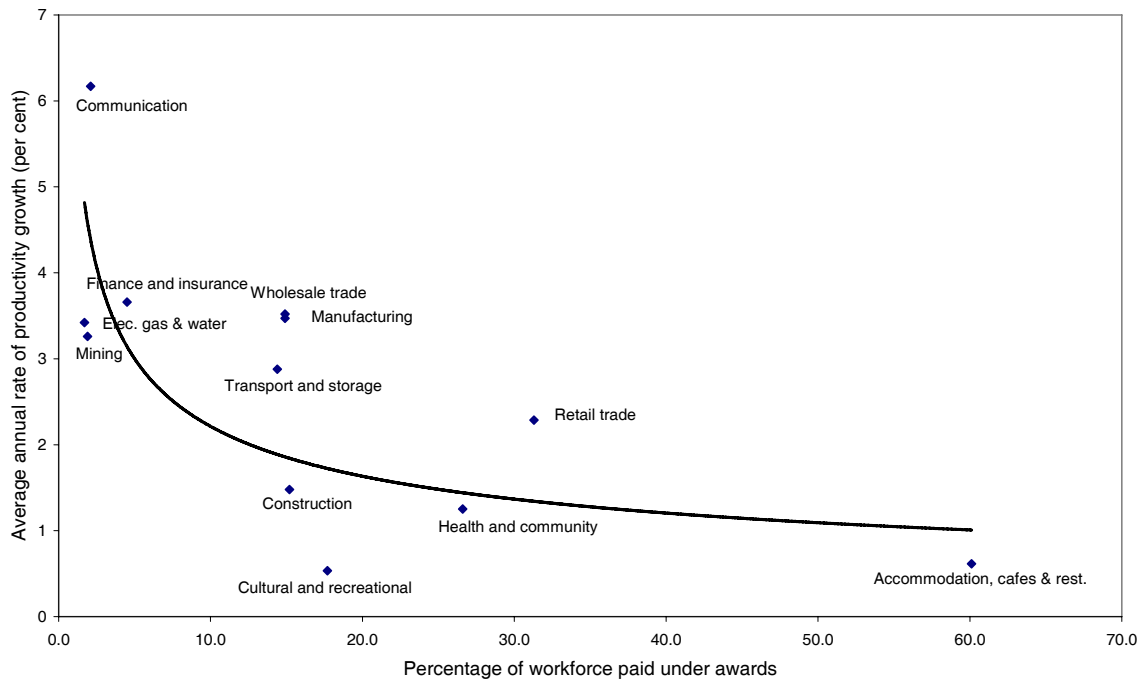
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<sup>1</sup> IMF, *Australia: 2005 Article IV Consultation - Staff Report and Public Information Notice on the Executive Board Discussion*, 24 August 2005

### Agreement Making and Productivity

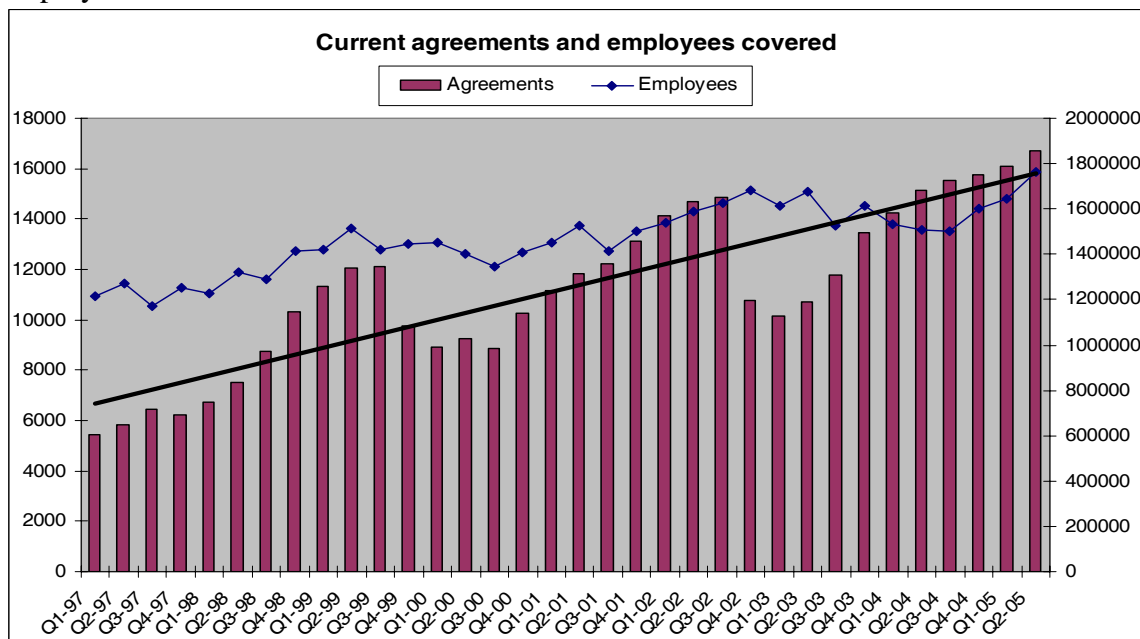
Award wages and conditions form a complex safety net against which employers must negotiate productivity improvements through agreement making. This complicated threshold can act as a disincentive for agreement making and therefore inhibit productivity growth. The chart below shows a reduction in award reliance has had a significant effect on productivity growth.

*Award-reliance by industry as at May 2004 and labour productivity growth by industry June 1990 to June 2004.*



Source: ABS Employee Earnings and Hours, May 2004 (Cat No 6306.0), Table 15; ABS AusStats, National Accounts (Cat No 5204.025).

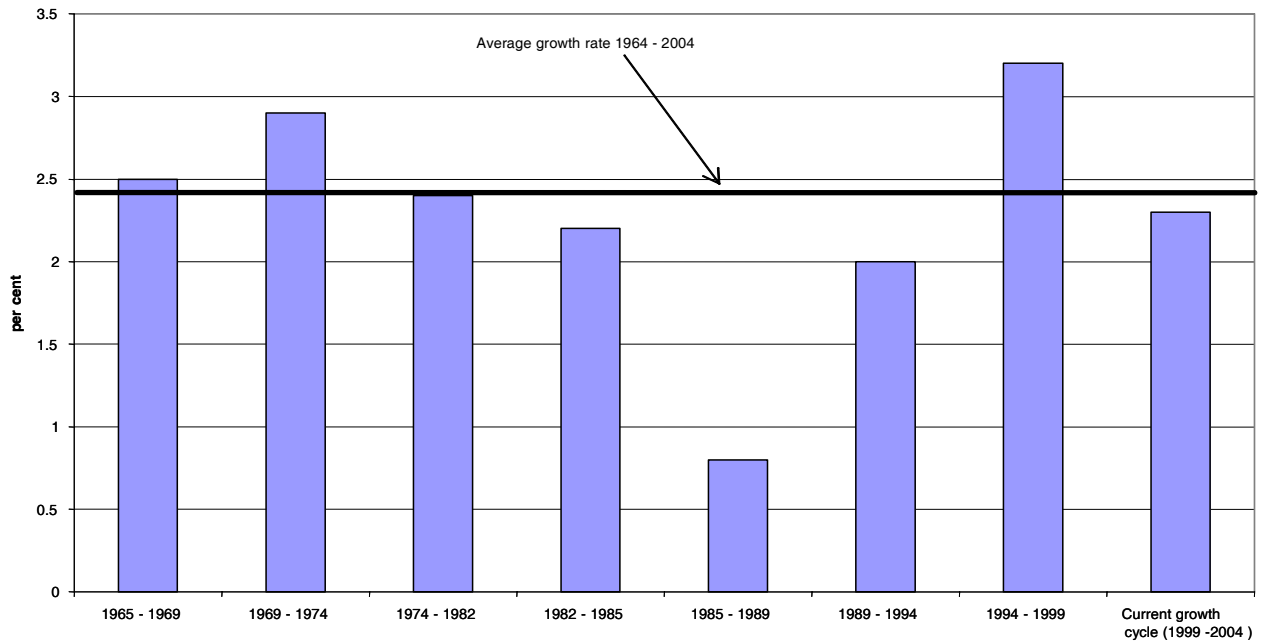
2. The following chart shows the number of current federal agreements and the number of employees covered since March 1997.



Source: Workplace Agreements Database, DEWR

It is clear that agreement making is fairly cyclical with peaks in the number of federal agreements current in each quarter. Agreement numbers and employee coverage within the private sector continue to grow. Individual bargaining allows businesses to tailor arrangements to their needs. Negotiations at workplace level can result in agreements that accommodate productivity offsets, while the award system does not.

The first chart shows a strong correlation between productivity growth and the use of workplace agreements in an industry. However, the chart below shows that there are tentative signs of easing in productivity growth. This chart shows average annual productivity growth in each 'growth cycle' since 1965.



Source: ABS Cat. No. 5204.0, Australian System of National Accounts

Current AIRC agreement making processes are time consuming and expensive for businesses. Further reform is required to drive increased agreement making, facilitate greater flexibility, and increase productivity.

An example of the high cost of AIRC processes is the current practice of conducting formal hearings to vet all collective agreements, despite the fact that this is not a legislative requirement. An instance of where a formal hearing would not have been necessary involves Gibbo's Bulk Haulage (GBH) who lodged an application to certify an agreement on 14 July 2003. GBH is a business based in Coolaman, New South Wales. The AIRC held a hearing into the matter on 7 August 2003 which required a company director, an employee and the company's representative to travel to Sydney. It also meant that GBH could not use one of its trucks that day, causing a loss of income. The AIRC hearing lasted seven minutes and neither the company director nor the employee representative were asked to say anything.

The only result was a request for further information. GBH supplied that information and the AIRC later certified the agreement after a further hearing on 24 September 2003. The Government's view is that there was no need for GBH to waste the time and resources involved in hearings into this agreement.

## Objective

The Government's objective is to move towards a national framework for workplace relations in Australia with the aim of raising productivity and hence living standards. The national framework should be structured to reduce unnecessary restrictions on labour market flexibility and reduce the burden on employers and employees in complying with workplace relations regulation. The Government considers that increased labour market flexibility and reduced regulation will contribute to greater productivity.

## Options

One option (**Option A**) would be to maintain the status quo and not introduce further reforms beyond meeting the Government's election commitments and legislative measures that have previously been either stalled or rejected by the Senate. This option would represent a modest achievement but would not go far enough. For instance, it would not address the complexity arising from having six different workplace relations systems operating across the country.

The preferred option (**Option B**) is to establish a more flexible workplace relations framework which revises methods of setting minimum wages, simplifies agreement making processes and the safety net which underpins agreement making, while retaining appropriate protections for employees. This option will:

- move Australia towards one, simple national system of workplace relations, relying primarily on the corporations power of the Constitution;
- establish the Australian Fair Pay Commission (AFPC) to protect minimum and award classification wages;
- enshrine a set of key minimum conditions of employment in federal legislation for the first time;
- introduce the Australian Fair Pay and Conditions Standard (the Standard) to protect workers' wages and conditions in the agreement-making process;
- simplify the workplace agreement-making process;
- provide modern award protection for those not covered by agreements;
- provide a more flexible framework for dispute resolution;
- better balance the unfair dismissal laws; and
- expand and improve the federal union right of entry regime.

Under this option, awards and the AIRC will continue to operate. The AIRC will concentrate on what should be its key role – the resolution of disputes.

## Impact Analysis

### *Option A – Status Quo*

#### Costs and benefits to business

There is limited benefit to business if the status quo is maintained. Business would benefit from the measures already contained in legislation that the Government will reintroduce into Parliament and the delivery of election commitments. Many business groups have indicated that these measures, while worthwhile, do not go far enough in achieving a genuinely flexible



Australian workplace relations system. For a number of years, business groups have strongly maintained that the current system is unwieldy, costly and unnecessarily bureaucratic. They have consistently called for further deregulation of the labour market and simplification of procedures.

There are costs to business if the current system is maintained without further reforms, not least having to deal with six separate industrial relations systems. The award system is very complex for business. For example, there are approximately 4,000 federal and state awards, and employers often have to grapple with multiple state and federal awards applying to the one business.

With the rise of the internet and other communications media, even small businesses can operate across state boundaries, while some larger businesses have to deal with all six different systems. Small businesses particularly struggle with the current workplace relations system, as they do not have the large human resources infrastructure to deal with the complex and costly procedures imposed by current labour regulation.

#### Costs and benefits to employees

The current workplace relations system will be detrimental to employees over the longer term by failing to stimulate further productivity growth and perpetuating barriers to labour market participation. Continued reform will unlock further gains in productivity and promote employment growth. Wage setting arrangements which pay greater attention to economic considerations are likely to facilitate entry into the labour market for the more disadvantaged job seekers. A failure to reform Australia's wage setting arrangements will see many unemployed persons continue to effectively be locked out of the labour market.

The complexity of the current system also means that many employees are unaware of their current minimum entitlements. In addition, retaining the current certification/approval process means that employees will continue to experience uncertainty arising from processing delays. To the extent that this (combined with the retention of the No Disadvantage Test (NDT)) creates disincentives for agreement-making, employees may also lose out on benefits that result from having industrial instruments which can be tailored to reflect their particular needs and circumstances.

#### Costs and benefits to Government

There is only a modest benefit if the status quo is maintained. While this option would see some further flexibilities in the workplace through implementation of the Government's election commitments and the reintroduction of legislative measures previously stalled in the Senate, fundamental barriers to further productivity improvements and job growth would remain. This would compromise the Government's overall workplace relations reform agenda.

The cost of maintaining the current system without further reforms will be a continuing disincentive to bargaining, and for those employers and employees, continuing reliance on an outdated and complex award system for determining wages and conditions in Australia.

#### Summary

The Government and businesses favour further deregulation to create flexibilities, modify outmoded forms of determining wages and conditions, and simplify procedures for agreements. While some employees may benefit in the short term if the status quo is maintained, there will be longer term costs to productivity, labour market entry and employment growth.

## **Option B – A New Workplace Relations system: Work Choices**

*Move towards one, simple national system of workplace relations, relying on the corporations power of the Constitution*

### Costs and benefits to business

This option would deliver a unified national system for most employers – a reform that business groups have consistently called for. The multiple jurisdictions create complexity and uncertainty around coverage and compliance.

The present system, with state and federal jurisdictions, does not make it clear for employers whether state or federal industrial instruments apply to their employees.<sup>2</sup> It is at present also possible for employers to be subject to both state and federal industrial instruments in respect of particular types of employees. Determining appropriate coverage and managing employees in different jurisdictions is an administrative cost to employers.

The ABS provides clear evidence of the confusion caused by the present workplace relations system. It does not publish separate statistics on federal and state award coverage because employers are unable to reliably determine which award jurisdiction covers their employees.

The present system also encourages ‘jurisdiction shopping’ on the part of unions to avoid legislative restrictions. For example, differing federal and state right of entry provisions, which permit union access to workplaces can be exploited to circumvent access restrictions in a particular jurisdiction.

Use of the corporations power, together with other heads of power such as the Territories power and powers referred by Victoria, to expand the federal system would mean that up to 85 per cent of Australian employees would be covered by the federal system<sup>3</sup>.

The remaining 15 per cent of employees would continue to be covered by their respective state jurisdictions. However, it is possible that states might subsequently choose to refer their powers to the Commonwealth, as maintaining state jurisdictions for such a low proportion of workers may be too costly and difficult.

The corporations power will also introduce a more precise test for determining whether a business falls within the federal workplace relations system, this will make the issue of jurisdiction much more transparent for employers.

If legislated, the proposed reforms would expressly state an intention to ‘cover the field’ thereby ousting any conflicting state law. The states would be limited to regulating only those employers which do not come within the scope of the corporations power, the Territories power, the power covering Commonwealth employees, or the Victorian referral of industrial relations powers.

Forty-nine per cent of small businesses employing staff are currently incorporated and would benefit from coming under the federal system, which would create a single, easy to understand, and less costly system for complying with minimum wages and conditions and procedures for lodging agreements. The Victorian referral of power and the use of the Territories power in the

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<sup>2</sup> The exception to this rule are Victoria, which has already referred its workplace relations power to the Commonwealth, and the ACT and NT.

<sup>3</sup> ABS, *Employee Earnings and Hours*, May 2004 (Cat No 6306.0)

Australian Capital Territory and Northern Territory, means that federal coverage of small business employees will be increased even further.

### Costs and benefits to employees

Many employees currently do not know which award applies to them, or in which jurisdiction they may seek redress for an employer's non-compliance with award provisions. Approximately 50 per cent of Australian workers are currently covered by the federal system. By introducing one set of minimum standards of which employees and employers alike may be aware, through expanded coverage of the proposed federal system, a further 35 per cent of employees would enjoy the benefits of a single, simple system for setting minimum wages and conditions and processing agreements.

Those remaining 15 per cent of employees not covered by the federal system will still be covered by the relevant state jurisdiction. However, it is hoped that states may subsequently decide to refer their workplace relations powers to the Commonwealth.

### Costs and benefits to Government

The Government would benefit from making considerable progress towards a unified workplace relations system, covering up to 85 per cent of the Australian workforce<sup>4</sup>. A unified system would ideally be established by the states referring their powers in this area. However, failing that, the Government can rely on the corporations power to 'cover the field' as far as possible. 'Covering the field' to oust state laws was canvassed by the then Minister for Employment and Workplace Relations and Small Business, the Hon Peter Reith MP, in 2000, and the Government has attempted to use the corporations power in a number of Bills to expand federal coverage in discrete areas.

The Government's proposed workplace relations reforms will, among other things, move towards a national workplace relations system for the first time and significantly simplify the workplace relations system.

The reforms will complement other key Government initiatives such as welfare to work reform by providing enhanced scope for individuals returning to the labour market to negotiate working arrangements to suit their circumstances and improved employment opportunities through a stronger economy. The reforms will also decrease the regulatory burden on business, particularly small business.

### Summary

Assuming that the states do not agree to refer their workplace relations powers to the Government, Option B would rely on the corporations and other powers to extend the coverage of the federal workplace relations system to cover up to 85 per cent of Australian workers<sup>5</sup>. The result would be a single national set of minimum wages and conditions for the overwhelming majority of Australian employees. The system would significantly reduce the current regulatory burden on business, and bring a further 35 per cent of Australian employees under one single fair and balanced workplace relations system.

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<sup>4</sup> ABS, *Employee Earnings and Hours*, May 2004 (Cat No 6306.0)

<sup>5</sup> ABS, *Employee Earnings and Hours*, May 2004 (Cat No 6306.0)

*Establish the Australian Fair Pay Commission to protect minimum and award classification wages*

Under Work Choices the Government will:

- establish the AFPC independent of the Government to set and adjust minimum and classification wages, minimum wages for juniors, trainees/apprentices and employees with disabilities, minimum wages for piece workers and casual loadings;
- guarantee that previously award based classification wages cannot fall below the level set after inclusion of any increase determined by the 2005 Safety Net Review, although they will be capable of upwards adjustment by the AFPC; and
- ensure that the AFPC will meet its primary objective of promoting the economic prosperity of the people of Australia by having regard to:
  - the capacity for the unemployed and low paid to obtain and remain in employment;
  - employment and competitiveness across the economy;
  - providing a safety net for the low paid; and
  - providing minimum wages for junior employees, and employees to whom training arrangements apply to ensure those employees are competitive in the labour market.

Costs and benefits to business

Businesses will benefit from a clearer and simpler system of wage setting. At present the minimum rates of pay are set out in awards and can differ markedly between different industries. Under the proposed reforms the AFPC will set and adjust minimum and classification wages for juniors, trainees/apprentices and employers with disabilities, minimum wages for piece workers and casual loadings. This will provide a more streamlined classification wages structure and will give businesses greater certainty about the appropriate rate of pay for their employees.

In addition, the more consultative approach of the AFPC should lead to decisions which better reflect the needs of all interested stakeholders, including the unemployed.

A cost to businesses will be the need to be conscious of changes to the minimum wages as set and adjusted by the AFPC. However, this does not represent an additional regulatory burden on businesses, as businesses that employ award reliant employees must already be conscious of changes to the minimum wage that occur through the annual *Safety Net Review* case.

In fact, changes to the minimum wage will be easier to follow under Work Choices as minimum wages will change at the same time for all federal employees, and notice of this change will be widely communicated by the AFPC. In contrast, under the present system awards must be individually varied to take into account changes to the minimum wage, and this may occur at any point in time. As a result of this process, employers and employees must be constantly alert for changes to the award.

### Costs and benefits to employees

The Government has guaranteed that minimum and classification wages in awards will be protected at the level set after the increase from the AIRC's 2005 Safety Net Review. Minimum wages and award classification wages will not fall below this level.

Establishing genuine minimum wages and conditions will assist in achieving increased labour market participation. At present, low skilled workers or the unemployed may be priced out of the labour market. Australia has the highest ratio between the minimum wage and median wage in the OECD – currently 58.8 per cent. Our minimum wage is significantly higher than a number of similar countries including New Zealand (53.6 per cent), the UK (43.2 per cent), Canada (39.5 per cent), and the US (32.2 per cent).<sup>6</sup> Furthermore, Australia has thousands of minimum wages through the award system. Wage increases achieved through safety net adjustments, unlike those achieved through agreement-making, are not based on productivity improvements. Moreover, large award wage increases can adversely impact upon employment opportunities for unemployed people and the low paid, pricing them out of the labour market.

In 2004, the Government undertook a longitudinal study to examine long term outcomes for clients of its employment assistance programs. The study particularly examined how disadvantaged people fare in the labour market up to two years after assistance has ceased. This study confirmed a key finding of a body of related studies in that a substantial number of low paid workers do move to higher paying jobs over time – ‘in the case of more disadvantaged job seekers, taking even low paid, casual jobs will increase their chances of finding better paid, more permanent employment’.<sup>7</sup>

Data from the Household Income and Labour Dynamics in Australia survey show that of employees aged 21 years and older who were in low paid jobs in 2001, 37 per cent were in higher paid jobs in 2002 and 43 per cent were in higher paid jobs in 2003. Of employees who were in low paid jobs in 2001 and 2002, 31 per cent were in higher paid jobs in 2003. Less than 20 per cent of all employees were in low paid jobs in 2003.<sup>8</sup>

By introducing a *genuine* safety net, based on minimum standards set by the AFPC and through legislation, more jobs will be available, allowing new entrants and returning and low skilled workers enhanced access to the labour market. This will in turn provide a stepping stone for low paid workers to move into higher paying jobs over time.

### Costs and benefits to Government

The AFPC represents a long overdue shift from the historically adversarial process for wage setting in Australia. At present, the process for varying minimum wages is the AIRC's annual *Safety Net Review* case. This process involves the AIRC making its decision about minimum wages based on the submissions of interested parties. Rather than arbitrary and artificial claims between employer organisations and unions, the AFPC will adopt a consultative approach with all interested stakeholders.

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<sup>6</sup> UK Department of Trade and Industry, *National Minimum Wage – Low Pay Commission Report 2005*, February 2005, p. 237.

<sup>7</sup> *The Sustainability of Outcomes: Job Search Training, Intensive Assistance and Work for the Dole*, DEWR, March 2004, p.20

<sup>8</sup> HILDA Survey, unpublished data. ‘Low paid’ refers to hourly rates below C10, which is the Tradespersons rate in the Metal Industries Award. ‘Higher paid’ refers to hourly rates above C10, adjusted for casual loadings.

The Government, and the economy as a whole, will benefit from the less adversarial approach to wage setting as it will take greater account of the needs of low wage workers and the unemployed and will encourage further employment growth. In this way, the creation of a genuine minima may also help reduce associated welfare costs.

A cost to the Government will be the establishment and ongoing costs of the AFPC. Although, there will also be cost savings for the Government as the AIRC will no longer need to run its annual *Safety Net Review*.

### Summary

A new independent body called the AFPC will be established. The primary objective of the AFPC will be to promote economic prosperity and job creation for the people of Australia. The AFPC will set and adjust minimum and classification wages for juniors, trainees/apprentices and employers with disabilities, minimum wages for piece workers and casual loadings.

### *Enshrine a set of key minimum conditions of employment in federal legislation for the first time*

Under Work Choices the Government will ensure that all federal employees are entitled to the following key minimum conditions of employment which will be set in legislation:

- at least 4 weeks paid annual leave per year;
- at least 10 days paid personal/carer's leave (including sick leave) after 12 months of service;
- at least 52 weeks of unpaid parental leave (including maternity leave) at the time of the birth or adoption of a child; and
- a maximum of 38 ordinary hours of work per week.

### Costs and benefits to business

Businesses will benefit from increased certainty about their obligations, as these key minimum conditions of employment will be enshrined in federal legislation for the first time. This will create a consistent federal standard for all businesses within the federal workplace relations system.

This proposal may create additional costs for businesses as they will be required to meet the key minimum conditions of employment. However, the Government believes these costs are appropriate as the key minimum conditions of employment represent a genuine safety net of employment conditions that should be guaranteed for all employees. In addition, these costs will be offset by the fact that employers will have a simpler system for agreement making. Under Work Choices the complex and subjective NDT will be replaced with the Standard thereby providing a much clearer and simpler test for agreement making.

### Costs and benefits to employees

Employees will benefit from guaranteed minimum conditions of employment which will be enshrined in federal legislation. This legislative approach will ensure that no employee can receive less than the minimum conditions set under Work Choices. In addition, where an award reliant employee's conditions of employment are more generous than the legislative minima, the employee will continue to receive the more generous entitlement. This will apply to both current and future employees who are employed under a particular award.

### Costs and benefits to Government

The provision of legislated key minimum conditions of employment will be a cost neutral proposal for the Government.

### Summary

The Government will enshrine in law key minimum conditions of employment: annual leave, personal/carer's leave (including sick leave), parental leave (including maternity leave) and maximum ordinary hours of work. Employees will be guaranteed these key minimum conditions of employment, and award reliant employees (both current and new) will also retain the benefit of more generous award provisions.

### *Introduce the Australian Fair Pay and Conditions Standard to protect workers' wages and conditions in the agreement-making process*

Under Work Choices the Government will:

- provide that the minimum conditions of employment together with wages as set by the AFPC, will no longer be 'allowable award matters' but instead form the basis of a minimum employment standard for all employees in the federal jurisdiction – the Standard; and
- provide that the Standard will replace the current NDT for all collective and individual agreements with no capacity to 'trade off' these minimum employment standards, other than the ability to cash out up to two weeks worth of annual leave entitlement in any one year.

### Costs and benefits to business

A new system of setting minimum wages and conditions will benefit business. The system will be considerably less complicated and bureaucratic, with employers having to be cognisant of only one set of standards rather than numerous prescriptive awards. Replacing the NDT with a clearer set of minimum wages and conditions will remove a significant layer of complexity with regards to agreement making, and will provide additional incentives to negotiate at the enterprise or workplace level. Under the current NDT, individual conditions of employment may be lower than an award standard but *overall* the agreement must not reduce award standards.

A further benefit for employers will be enhanced choice and flexibility in agreeing directly with employees their workplace pay and conditions beyond the minimum standards. Agreement-making at the workplace level is particularly suited to tailoring working arrangements in ways that assist employees to balance work and family, free from the one-size-fits-all constraints of award prescription. An increasing number of organisations have found that agreement-making under the *Workplace Relations Act 1996* (WR Act) provides a wide variety of options for new and innovative initiatives that benefit both employees and the business.

Business may feel that the proposal does not go far enough in deregulating the workplace relations system. Many business groups have called for more radical cutting back of allowable award matters, or for the abolition of awards altogether. However, the proposed reform represents an evolutionary approach which provides flexibility and reduces complexity while retaining appropriate employee protections.

### Costs and benefits to employees

Employees will benefit from the enhanced choice and flexibility available when agreeing with their employer about workplace pay and conditions beyond the minimum standards. Agreement-making at the workplace level is particularly suited to tailoring working arrangements in ways that assist employees to balance work and family, free from the one-size-fits-all constraints of award prescription. An increasing number of organisations have found that agreement-making under the WR Act provides a wide variety of options for new and innovative initiatives that benefit both employees and the business.

As at 30 June 2005, 94 per cent of employees covered by certified agreements were covered by an agreement with at least one family friendly or flexible hours provision, and 79 per cent were covered by an agreement with at least three such provisions<sup>9</sup>. Over 70 per cent of Australian Workplace Agreements (AWAs) approved in 2002-2003 contained at least one provision relating to either family friendly leave or family friendly flexible work arrangements. Of these agreements, more than half had three or more such provisions. Agreement-making is also delivering tailored working arrangements to the employees who value them most. For example, women covered by certified agreements and AWAs are more likely to have access to family friendly provisions than men.<sup>10</sup>

Aside from providing enhanced options for flexible conditions, the new system will be easier to understand and will be widely promoted through a comprehensive education campaign.

The new system will also be underpinned by employee protections. The WR Act currently provides an extensive compliance regime to ensure that employees get their correct terms and conditions of employment as set out in awards, collective agreements and AWAs. The compliance regime allows specified persons (usually employers, employees, unions or inspectors) to enforce civil penalties and/or recovery of underpayments where employees are not properly paid. The legislation will extend this compliance regime to include enforcing the Standard.

A cost to employees will be the changing basis for the safety net of wages and conditions. The safety net is currently based on the award system but under Work Choices will be based on the wages and conditions contained within the Standard. This change will mean that employees will have a different basis for agreement making and agreements will no longer be required to address all of the allowable award matters.

However, the Standard will provide a clearer basis for agreement making than the present NDT. The Standard will continuously apply to an agreement, whereas the NDT applies only at the time of certification. This means that under the Standard no employee can lawfully receive less than the set minimum wages and conditions, while under the NDT an agreement could comply with its requirements at the time of certification but fall below the minimum standard over the life of the agreement.

In addition, under the NDT all conditions of employment are tradeable, whereas under the Standard these conditions will be enshrined in legislation and in general cannot be traded off as part of an agreement. An exception to this rule is the entitlement to four weeks annual leave, of which, two weeks may be cashed out per year, solely at an employee's request.

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<sup>9</sup> DEWR, Workplace Agreements Database, agreements current as at 30 June 2005.

<sup>10</sup> DEWR, *Agreement Making in Australia under the Workplace Relations Act 1996: 2002 – 2003*, 95.



Critics of the reforms may argue that employees will be disadvantaged by the proposed safety net. However, the reforms will ensure a genuine safety net of conditions exists to underpin agreement making.

On top of the legislated conditions of employment, key award conditions will also be protected under Work Choices, these conditions are:

- public holidays;
- rest breaks (including meal breaks);
- incentive-based payments and bonuses;
- annual leave loadings;
- allowances;
- penalty rates; and
- shift / overtime loadings.

These key conditions will be protected and will only be able to be changed or removed in an agreement where they are expressly changed or removed by an agreement approved by an employee (in the case of an AWA) or group of employees (in the case of a collective agreement). Where an agreement does not specifically alter or remove these protected conditions, the relevant award provision will be read into the agreement.

This protection will supplement the Standard and ensure that employers and employees give due consideration to the protected award conditions when making their agreement.

#### Costs and benefits to Government

The Government and the Australian economy will benefit from introducing this proposed reform. Reducing award matters and having minimum wages and conditions set and adjusted by the AFPC and through legislation will result in a genuine safety net, applying to all employees in the federal jurisdiction. Replacing the current, global NDT with a set of simple and easily comprehended minima will also help the Government clearly communicate to employers and employees the minimum wages and conditions which Australian workers are entitled to receive.

#### Summary

Introduction of the Fair Pay and Conditions Standard will result in a significant simplification of the agreement making process by replacing the current complex and confusing NDT. Business and employees would benefit from this simplified process which would create a genuine minimum safety net.

#### *Simplify the workplace agreement-making process*

Under Work Choices, the Government will replace the current time consuming and legalistic agreement certification and approval process with a streamlined, simpler and less costly lodgment based process to be administered by the Office of the Employment Advocate (OEA).

#### Costs and benefits to business

Business will benefit from replacing the current agreement approval processes with a single, cheap and administratively straight-forward lodgment-only process for all agreements – collective and individual – with the OEA. This was originally included in the Workplace

Relations and Other Legislation Amendment Bill 1996 but omitted in order to secure passage of the legislation. While there is no statutory requirement for the AIRC to hold formal hearings for agreement certification, it has become practice. Unnecessary formal hearings are disruptive and costly for business. Small businesses might sometimes have to close for a day to attend proceedings (refer paragraphs 13 and 14). Employer groups have often identified simplified agreement making processes as essential in reducing the regulatory burden on business.

Average processing times by the AIRC for certified agreements is 26.7 days. Sixty-seven per cent of AWAs lodged with the OEA are approved within 20 working days.

A lodgment only process with the OEA will address the unnecessary administrative burden, reduce lengthy processing times, and provide a greater incentive for employers and employees to embrace agreement making. No approval process would be required, however, agreements will need to comply with the Standard. To ensure employee entitlements are protected, an improved compliance regime will also be introduced as part of the legislation.

In addition, under Work Choices, the OEA will assume responsibility for explaining agreements to employees. This was previously a responsibility of the employer and could represent a significant regulatory burden as employers were required to have regard to the individual needs of employees when explaining the content of new agreements. As the OEA will now take on this function, the proposed reforms will further reduce the regulatory burden of agreement making for businesses.

#### Costs and benefits to employees

Employees will also benefit from a simplified agreement lodgment process. Agreements will come into effect much more quickly and will have to meet a clear, single set of minima, that is, the Standard. The new system will be easier to understand and will be widely promoted through a comprehensive education campaign.

#### Costs and benefits to Government

The current agreement approval process is bureaucratic, requiring an application for certification to the AIRC. Agreements have to be assessed and approved by the AIRC against a number of factors, including the NDT based on any federal or state award covering the employees and any other federal, state or territory law. AWAs are assessed and approved by the OEA, and similarly, a number of factors are considered including the NDT based on awards.

A simplified lodgment process administered by one body, the OEA, will considerably simplify the current process. A simplified lodgment process will remove previous administrative disincentives to agreement making and encourage employers and employees to tailor their working arrangements to their own needs and circumstances. This will benefit the Government through increased productivity growth when compared to productivity levels in award reliant industries. In turn, productivity growth can lead to increased employment growth and eventually increased taxation revenue for the Government and reduced welfare expenditure.

## Summary

Simplified agreement approval processes in the new system will significantly reduce the amount of time and level of bureaucracy associated with agreement making. This will particularly benefit small businesses, which generally lack the capacity of their larger counterparts to absorb the costs of highly prescriptive regulation, such as, by allocating a dedicated human resources infrastructure.

### *Provide modern award protection for those not covered by agreements*

Under Work Choices the Government will:

- establish the Award Review Taskforce to examine and report to Government on an approach to award rationalisation (including consideration of how that process could best be coordinated with award simplification).
- preserve key award conditions covering annual leave, personal/carer's leave and parental leave, for current and future award reliant employees, so that these employees will continue to enjoy these preserved award conditions if they are more generous than the Standard.
- preserve key award conditions covering superannuation (until 30 June 2008), long service leave, jury service and notice of termination, for current and future award reliant employees.

Under Work Choices, awards can continue to contain provisions dealing with the following matters:

- ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours;
- incentive-based payments and bonuses;
- annual leave loadings;
- public holidays;
- ceremonial leave;
- allowances;
- loadings for working overtime or shift work;
- penalty rates;
- redundancy pay for employers with 15 or more employees;
- stand-down provisions;
- dispute settling procedures;
- type of employment, such as full-time employment, casual employment, regular part-time employment and shift work; and
- conditions for outworkers, including non-conditions provisions such as chain of contract arrangements, registration of employers, employer record keeping and inspection.

Changes to allowable award matters – The following matters will be allowed in awards consistent with the list set out above, but with some change from current arrangements, including:

- public holidays – awards will be allowed to provide for those public holidays declared by or under a law of a state or territory to be observed generally within that state or territory, or a region of that state or territory. However, the definition of public holidays will be refined to exclude inappropriate holidays in awards, such as union picnic days.
- redundancy pay – redundancy pay will be allowable only in cases of genuine redundancy.
- part-time employment – all awards under Work Choices must contain provisions permitting the employment of regular part-time workers.
- awards to provide minimum entitlements – the new legislation will specify that awards will provide a safety net of basic minimum entitlements.
- outworker conditions – outworkers’ pay will be removed from awards and be set and reviewed by the AFPC.
  - The Government will also retain additional award protections for outworkers. All outworker provisions that do not relate to pay (including chain of contract arrangements, registration of employers, employer record keeping and inspection) will remain in awards as allowable award matters. Maintaining such matters in awards is designed to avoid any potential problems that could place these workers at a disadvantage.
  - The workplace relations legislation will provide that the relevant award outworker provisions form the ‘minimum’ for agreements between an employer and an outworker (that is, the relevant award outwork provisions will be read into agreements).
- facilitative provisions – an award may include facilitative provisions that allow agreement at the workplace or enterprise level, between employers and employees (including individual employees), on how a term in the award is to operate. For example, employers and employees can agree on variations to the spread of daily hours in a particular enterprise. While this flexibility is supported at the workplace level and facilitative provisions will be retained, the Government believes that, where possible, these matters are best addressed through agreement making such as collective agreements or AWAs. In addition, the new workplace relations legislation will specify that facilitative provisions must not require majority agreements (thus enabling agreement between an employer and an employee).
- allowances – allowances will be defined to specify that awards may only contain monetary allowances in particular instances, such as where the allowance reimburses the employee for expenses incurred in the course of employment.
- incidental matters – the AIRC will be able to include provisions in an award that are incidental to allowable matters where these provisions are essential for making a particular provision operate in a practical way, including machinery provisions (for example, definitions, titles, commencement dates, parties bound).

### Cost and benefits to business

A modern system of award protection will benefit business and employees. Award rationalisation and simplification is a necessary step as awards remain overly prescriptive and detailed documents which are difficult for employers and workers to understand. Further award simplification is also needed to ensure that awards provide a true safety net of minimum conditions for award reliant employees.

Businesses in particular will benefit from increased surety about employee entitlements, as at present it can be very difficult to determine how a particular entitlement should be calculated. This uncertainty may lead to inadvertent breaches of award conditions. The proposed reforms will more clearly set out which employment conditions can be included in awards and will reduce the unnecessary proliferation of awards so that the relevant award can be more easily identified.

A cost for business will be the initial increase in administrative costs, as the employer must keep aware of changes to the award system. However, this administrative burden should only exist while the award rationalisation and simplification processes are being carried out and it is no more onerous than the current requirement to keep abreast of award variations.

### Cost and benefits to employees

Employees will benefit from increased surety about their entitlements. At present it can be difficult for employees to determine which award, if any, applies to the work that they do. The Award Review Taskforce will make recommendations to Government about rationalising the number of awards, so that employees can determine with ease which award applies to their personal circumstance. This will not be an exercise in cutting award conditions.

A potential cost to employees might be the changing range of allowable award matters. However, under Work Choices employees will still be able to enjoy the benefits of their award conditions, as well as, the protection of legislated conditions of employment.

### Cost and benefits to Government

The Government will benefit from the effects of award simplification and rationalisation. Awards are currently overly prescriptive and can act as a barrier to effective workplace bargaining, this in turn may lead to a less efficiently functioning labour market and reduced productivity growth for the economy.

The award rationalisation and simplification processes will be undertaken by the AIRC, following Government consideration of recommendations by the Award Review Taskforce. A cost to Government will be the expense of resourcing these bodies, however the benefits of reform outweigh these administrative costs.

### Summary

Awards have become overly complex and difficult for employers and employees to understand or interpret. The Government will ensure that the award system is reviewed so that it can maintain relevance in a modern workplace relations system.

*Promote responsible bargaining through a more flexible framework for dispute resolution*

Under Work Choices the Government will:

- facilitate greater choice about how to resolve workplace level disputes; and
- provide more effective regulation of industrial action – balancing the right to take protected industrial action when bargaining against protecting the legitimate interests of affected parties.

The Government's proposal will facilitate employers and employees resolving disputes between themselves. Where this fails they should choose how best to manage a dispute. The Government will:

- include a model Dispute Settling Procedure (DSP) in the legislation for employers and employees to use when resolving their workplace disputes. The model DSP will be included in all awards as well as agreements which are lodged without their own DSP; and
- establish a system of registered private alternative dispute resolution (ADR) providers that will support genuine choice between the AIRC's dispute settling expertise and other dispute resolution specialists.

The model DSP sets out a 'staged' approach to dispute resolution commencing with workplace level discussions and proceeding to ADR if the matter remains unresolved. 'ADR' includes mediation, conciliation, and assisted negotiation. The employers and employees can choose between referring a matter to a private ADR provider or to the AIRC for assistance.

Disputes about the application of the award are dealt with under a DSP that is set out in the award. Under Work Choices, DSPs for disputes about the application of the award will remain an allowable matter, but be standardised using the model DSP to ensure that employers and employees are responsible for settling such disputes. The model DSP will replace all award DSPs from the commencement of the new legislation. This will mean that from the commencement of the new legislation, disputes about the application of awards will be settled using the model DSP.

The model DSP will also apply to disputes about the Fair Pay and Conditions Standard.

The model DSP will apply to disputes about the application of an AWA or a collective agreement where that agreement is lodged with the OEA without its own DSP (as a DSP is a compulsory content requirement).

In relation to industrial action, the legislation will ensure that the AIRC will continue to supervise protected industrial action. The AIRC will retain its powers to issue orders to prevent or stop unprotected industrial action.

However, legislation will require that the AIRC hear and determine an application for such an order in a maximum of 48 hours. If the AIRC cannot determine the application to stop or prevent industrial action in that time it will be required to issue an interim order, unless it is contrary to the public interest.

The WR Act will be amended to require secret ballots before protected industrial action can be taken. Employees or the union or unions will apply to the AIRC for a secret ballot order. The AIRC will be able to make such an order only if the employees or union are genuinely trying to reach agreement with the employer, and if no pattern bargaining is taking place.

Protected action can only be taken by:

- a union that is a negotiating party to the proposed agreement; or
- a member of a union who is employed by the employer and will be subject to the proposed agreement; or
- an officer or employee of a union acting in that capacity; or
- an employee who is a negotiating party to the proposed agreement.

To maintain the integrity of workplace agreements, Work Choices will make it clear that industrial action is prohibited during the life of an agreement.

The WR Act will be amended to require the AIRC either to suspend or terminate a bargaining period on particular grounds. In general, the existing grounds set out in the WR Act will be retained.

One existing ground for terminating a bargaining period will be removed. That is where the bargaining period relates to employees covered by a former paid rates award as these have been phased out under the WR Act. Three new grounds will be added:

- suspension or termination if ‘pattern bargaining’ is taking place;
- a cooling-off suspension where this would assist the parties to resolve the matters at issue; and
- a suspension where third parties are threatened with significant harm from industrial action.

The AIRC will be required to suspend or terminate a bargaining period if one of the relevant grounds applies but will retain its discretion to choose suspension or termination. If a bargaining period is terminated because it threatens life, personal safety, health or welfare of the population or is likely to cause significant damage to the economy, the matter will be referred to the AIRC for a Workplace Determination. The AIRC will be required to consider AFPC determinations with respect to wages. In addition, to encourage agreement making, the range of other matters that the AIRC could consider when making Workplace Determinations will be limited to a list set out in the legislation.

The Minister for Employment and Workplace Relations will be permitted to issue a Declaration where protected industrial action threatens life, personal safety, health or welfare of the population or is likely to cause significant damage to the economy. This new remedy is similar to state essential services legislation, and will ensure the Government can respond to industrial action taken by parties covered by Work Choices that has significantly damaging and wide-ranging effects on essential services.

#### Cost and benefits to business

Businesses will benefit from the proposed emphasis on dispute resolution at a workplace level. This will allow businesses to reduce their reliance on institutionalised dispute resolution processes and will ensure that they have a say in how workplace conflict is managed and resolved. Businesses will be able to choose between a greater variety of dispute resolution processes (including mediation) rather than the more formal AIRC processes.

In the event that a dispute escalates and industrial action is taken, businesses will also benefit from the better regulation of industrial action to balance the rights of the bargaining parties against the legitimate interests of affected parties. This will particularly be the case for businesses providing essential services that will benefit from the provisions allowing the Minister to terminate protected action threatening the Australian economy or population.

While businesses may choose to pay for dispute resolution services from a private practitioner, the Government will assist in this respect by subsidising alternative dispute resolution services delivered by registered providers.

#### Cost and benefits to employees

Employees will be able to have a greater say regarding the manner in which disputes are resolved. This is because the legislation will recognise a broader range of dispute resolution mechanisms. The Government will also provide subsidies where the parties opt for a registered provider, thereby facilitating access to private alternative dispute resolution services and providing a genuine choice between the AIRC and non-AIRC practitioners.

Also, as consumers of essential services, employees will benefit from measures to mitigate disruption caused by protected industrial action.

A potential cost to employees is that the proposed system will include a number of measures to protect the legitimate interests of parties affected by industrial disputation. This may constrain protected industrial action in some instances. However, the Government believes this is a necessary balance between the right to take protected industrial action when bargaining and the interests of affected parties.

#### Cost and benefits to Government

The proposed reforms will benefit the Government by promoting more harmonious employment relationships, which in turn should lead to greater economic productivity. It will also benefit the Government by encouraging parties to resolve disputes at the workplace level and assisting to minimise the incidence of economically and socially damaging disputation.

A cost to Government will be the establishment and maintenance of a register of dispute resolution providers. A further cost will also be the provision of subsidies to eligible parties who choose to use a provider listed on the register. However, these costs will be balanced by reduced expenditure on AIRC dispute resolution processes.

#### Summary

The proposed reforms will facilitate greater choice about how to resolve workplace level disputes and will provide more effective regulation of industrial action.

#### *Better balance the unfair dismissal laws*

Under Work Choices the Government will:

- exempt businesses with up to, and including, 100 employees from the operation of unfair dismissal laws, as the costs of unfair dismissal cases weigh more heavily on small and medium businesses than on larger businesses;
- better balance the unfair dismissal laws for businesses with over 100 employees so that employees covered will be required to have been employed for six months before they can



pursue an unfair dismissal remedy. This is an extension of the current three month qualifying period; and

- streamline measures to help ease the burden of unfair dismissal on businesses by allowing the AIRC to conduct specific matters ‘on the papers’, that is, without a formal hearing.

#### Cost and benefits to business

Small to medium businesses will greatly benefit from the proposed reforms to unfair dismissal laws, as the proposed exemption will reduce the costs of recruitment or termination for these businesses. These costs weigh more heavily on small to medium businesses than on larger businesses as they often do not have the necessary expertise or resources to successfully deal with an unfair dismissal claim.

A recent survey of 900 businesses conducted by Australian Business Limited shows that employers are paying former employees \$5000 – \$25,000 rather than defend themselves against speculative and vexatious claims.

A study by Benoit Freyens and Paul Oslington shows that the average cost of contested dismissals can reach almost \$15,000 or 35.7 per cent of annual wage costs. These are costs small and medium sized businesses can ill afford.<sup>11</sup>

The Sensis Business Index for August 2005 confirms that current unfair dismissal laws are a major annoyance for small and medium businesses and inhibit jobs growth. In total, over the past year, 28 per cent of small businesses have not hired additional employees due to fear of unfair dismissal action. Over the past year, 20 per cent of small businesses have faced some sort of unfair dismissal action. Half of these were threatened with action, the other half actually faced action.<sup>12</sup>

The MYOB Australian Small Business Survey for September 2005 similarly shows that 33 per cent of small businesses agree the current unfair dismissal laws were a reason for not recruiting staff.<sup>13</sup>

The results from both the Sensis Business Index and MYOB Australian Small Business Survey reinforce the importance of reforming Australia’s cumbersome unfair dismissal system which is inhibiting jobs growth.

Businesses with more than 100 employees will also benefit from the proposed reforms. The Government will better balance the unfair dismissal laws so that employees covered will be required to have been employed for six months before they can pursue an unfair dismissal remedy. This is an extension of the current three month qualifying period and will allow businesses more time to assess whether an employee is suitable for their business.

Businesses will also benefit from a more streamlined approach to processing unfair dismissal claims. The AIRC will be able to deal with certain matters ‘on the papers’, that is, without a formal hearing and terminations which occur on the ground of operational requirements

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<sup>11</sup> Benoit Freyens and Paul Oslington, *Dismissal Costs and their Impact on Employment: Evidence from Australian Small and Medium Enterprises*, August 2005.

<sup>12</sup> Sensis, *Business Index – Small and Medium Enterprises*, August 2005, page 20.  
[http://www.about.sensis.com.au/media/pdf/mediarelease\\_aug05sbi.pdf](http://www.about.sensis.com.au/media/pdf/mediarelease_aug05sbi.pdf) (accessed 14 September 2005).

<sup>13</sup> MYOB *Australian Small Business Survey*, September 2005.  
[http://myob.com/servlet/Satellite?cid=1124931447336&pagename=MYOB%2FMYOBArticle%2FNewsArticlePage&pageId=1107835709846&site=en\\_AU](http://myob.com/servlet/Satellite?cid=1124931447336&pagename=MYOB%2FMYOBArticle%2FNewsArticlePage&pageId=1107835709846&site=en_AU) (accessed 14 September 2005).

(redundancy) will be excluded from the unfair dismissal regime (but not from the unlawful termination regime). This will reduce the costs of unfair dismissal applications and allow for more timely processing of claims.

A cost to business of the proposed unfair dismissal law exemptions is that employees might instead attempt to make unlawful dismissal claims. However, the reasons for dismissal which would be considered unlawful are already clearly prescribed within the *Workplace Relations Act 1996* and will not be changed as a result of the reforms. Therefore, businesses should already be aware of their obligations under the unlawful dismissal provisions.

The Government will also provide \$5 million for a 'best practice' education and training program on fair and proper employment termination practices. This will assist employers to understand their obligations under the reformed unfair and unlawful termination of employment provisions.

### Cost and benefits to employees

The proposed exemptions will reduce barriers to job creation and will benefit potential employees who may have previously been excluded from the labour market.

Research by the Melbourne Institute of Applied Economic and Social Research at the University of Melbourne, released in October 2001, found that the present unfair dismissal laws made it difficult for the most vulnerable job seekers to find work.<sup>14</sup>

The research, commissioned by the Department of Employment and Workplace Relations, surveyed some 1802 small and medium businesses with less than 200 employees.

The research showed that dismissal laws contributed to the loss of about 77, 000 jobs from businesses which used to employ staff and now no longer employ anyone.

However, the impact on jobs growth would appear to be greater than the estimates in this study as the figures do not take into account jobs that have been lost by businesses which have reduced their workforce due to the laws, but still have employees. Nor do they include jobs which would have been created if there were no unfair dismissal laws.

The survey also showed that the laws impact negatively on the most disadvantaged job seekers. It found that businesses were now less inclined to hire young people, the long-term unemployed, and those with lower levels of education, turning instead to casuals and others on fixed term contracts or longer probationary periods.

Employees will also benefit from a more streamlined approach to processing unfair dismissal claims. The AIRC will be able to deal with certain matters 'on the papers', that is, without a formal hearing. This will reduce the costs of unfair dismissal applications and allow for more timely processing of claims.

A cost to employees is that some employees will no longer be able to seek remedies for unfair dismissal if they are employed by a business with up to, and including, 100 employees. However, it is important to note that employees will continue to enjoy protection against unlawful dismissal. It will remain unlawful to dismiss an employee on the grounds of race, colour, sex, age, union membership, pregnancy, family responsibilities and a range of other

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<sup>14</sup> Harding, D., *The Effect of Unfair Dismissal Laws on Small and Medium Businesses*, Melbourne Institute of Applied Economic and Social Research, University of Melbourne, 2002.

factors. An employer will still be prohibited from dismissing an employee due to the employee holding a position as a health and safety representative or being involved with a health and safety complaint or investigation. Freedom of association laws will continue to ensure that an employer cannot dismiss, or otherwise victimise, an employee because he or she is, or is not, a member of a union. Anti-discrimination laws will continue to protect workers against discrimination and harassment in the workplace.

#### Cost and benefits to Government

The Government, along with the economy as a whole, will benefit from reforms to unfair dismissal laws. The Government believes that the time and cost of defending an unfair dismissal claim, even one without merit, can be substantial and these costs discourage employers from putting on more staff, because they fear that if the employee turns out to be unsuitable the employer may face an unfair dismissal claim without merit. Providing exemptions from unfair dismissal laws for businesses with up to 100 employees will remove this barrier to employment growth among small to medium businesses and could lead to a reduction in the rate of unemployment.

The Government will also benefit from a more streamlined approach to unfair dismissal processing as certain applications will be able to be dealt with 'on the papers', that is, without a formal hearing. This will lead to reduced Government expenditure on AIRC unfair dismissal processing. However, this saving will be balanced by an increase in the number of unfair dismissal applications as more employees will be covered by the federal workplace relations system.

#### Summary

The Government will introduce an exemption from unfair dismissal laws for businesses with up to, and including, 100 employees, as the costs of unfair dismissal claims weigh more heavily on smaller businesses which may not have the necessary expertise or resources to deal with an unfair dismissal claim. The Government will allow larger businesses more time to assess whether an employee is suitable for their business, by requiring that an employee must have been employed for at least six months before an unfair dismissal claim can be made. The Government will also streamline the unfair dismissal application process by enabling the AIRC to deal with certain applications 'on the papers'.

#### *Expand and improve the federal union right of entry regime*

Right of entry provisions will be changed so as to:

- tighten the requirements for the granting of an entry permit, including introducing a 'fit and proper person' test;
- cover the field using the corporations and territories powers so that for businesses in the new system, right of entry can only be exercised under the new legislation;
- make it clear there is no right of entry for discussion purposes where all employees are on AWAs;
- only allow entry to investigate a breach of an AWA if the employee party to the AWA provides written consent;
- require a union official to provide to the employer particulars of a breach that he or she is proposing to investigate;

- confirm a union official can only access the records of union members when investigating a breach, unless an order is made by the AIRC that non-member records can be inspected; and
- require a union official to comply with a reasonable request by an employer that the meeting or interview should be conducted in a particular room or areas of the premises and that a specified route should be taken to that venue.

The new legislation will allow for union entry permits to be either suspended or made subject to limiting conditions by the AIRC in addition to the current power to revoke a permit.

The grounds on which a permit may be revoked will be expanded. The revocation or suspension of a permit will be mandatory in cases where the permit holder has:

- been found by the AIRC to have breached the prohibition on making misrepresentations about his or her powers under their right of entry permit;
- had their right of entry under a state law cancelled, suspended or has been disqualified from exercising or applying for right of entry under a state law;
- been ordered to pay a penalty in respect of a contravention of the right of entry provisions; and
- when exercising a right of entry under an Occupational Health and Safety (OHS) law engaged in conduct that was not authorised by that law.

Instances of systematic abuse of right of entry laws will be limited. The AIRC will be given the ability to make orders if it is satisfied that a union or one of its officials has engaged in improper conduct. The type of orders the AIRC may make include revoking or suspending all permits that have been issued in respect of the union or imposing limiting conditions on some or all of the permits.

The right of entry provisions will still allow a union permit holder entry for OHS purposes under state legislation where the union official has a federal right of entry permit and the official has complied with all requirements of the relevant state OHS legislation.

The conscientious objection provisions of the WR Act will also be improved. The current WR Act requires the Industrial Registrar to issue a conscientious objection certificate to an employer whose conscientious beliefs do not allow them to belong to an association. Where an employer holds a conscientious objection certificate, unions cannot exercise right of entry to hold discussions with employees provided certain conditions are met.

One of the conditions for obtaining a conscientious objection certificate is that all the employer's employees must agree to the certificate being issued. This is an unreasonable restraint on the exercise of the conscientious objection and the Government is proposing to remove this restriction.

#### Cost and benefits to business

This option will deliver a net benefit to business. Constitutional corporations that are currently subject to union entry under multiple federal and state industrial laws and/or instruments will be covered by a single, national right of entry scheme, affording them greater certainty as to their rights and responsibilities. Under this option, employers and occupiers of premises will be protected from union officials exploiting regulatory overlap to ignore certain statutory

responsibilities or unlawfully exercise additional rights. Better controls on permits and an enhanced compliance regime, encompassing a range of new civil penalty provisions, will help ensure that right of entry is exercised responsibly within the new system.

This option will reduce the extent of disruptive union entry into Australian workplaces, contributing to more productive, profitable and higher pay enterprises. This objective will be achieved by improving clarity and strengthening control and compliance mechanisms within the new system, in the manner discussed above, and by imposing further explicit limitations on entry. For example, unions will be required to demonstrate reasonable evidence of a suspected breach affecting their membership prior to entry. Where the union entry is for the purposes of holding discussions with employees, employers and occupiers will have greater control regarding the location of the discussions, while the AIRC will have the power to make orders addressing excessive or disruptive recruitment conduct.

#### Cost and benefits to employees

This option will benefit employees. Providing for the AIRC to make orders in relation to excessive or disruptive recruitment conduct will help to protect employees' rights to freedom of association, by preventing instances of harassment to take out or retain union membership during repeated workplace visits.

Where entering to investigate a suspected breach, union officials' access to non-member records would be restricted, in most instances. This is consistent with the Government's view that unions should operate as membership-based service organisations. It should help unions to provide better services to their members, while ensuring the privacy of non-members. The Office of Workplace Services (OWS) will investigate breaches affecting non-members.

#### Cost and benefits to Government

The option seeks to expand the federal right of entry regime by 'covering the field to the exclusion of state industrial laws and instruments. This could see some costs shifted from state governments to the Australian Government. For example, there may be requirement to administer an increased number of federal permits. This option also introduces new statutory functions for federally funded bodies, including the AIRC (eg issuing orders for abuse of the permit system); the Industrial Registrar (eg approving entry notices, undertaking 'fit and proper person' tests in relation to permit issue); and the Federal Court (issuing interim injunctions to prevent breaches of new and existing civil penalty provisions).

Costs should be more than fully offset by an extensive range of anticipated benefits to the Australian Government and economy, in respect of this option. Benefits may include savings derived from reduced regulatory overlap, and the administration of a simpler and more harmonious regime. Increased certainty regarding rights and responsibilities, and more responsible use of permits, should help to avoid right of entry disputes. The option would also reduce unnecessary and disruptive union entry to workplaces, resulting in more productive, profitable and higher pay enterprises.

#### Summary

This option is expected to reduce the extent of disruptive union entry into Australian workplaces, contributing to more productive, profitable and higher pay enterprises, to the benefit of employers, employees, and Government.

## **Impact on Small Business**

Small business will benefit significantly from Option B, in that it will introduce a simple and more universally applicable and understood set of minimum wages and conditions, as opposed to the myriad of state and federal awards that currently exist. This will facilitate compliance. This will greatly simplify the negotiation of agreements, thereby increasing small business access to the flexibilities to be gained by tailoring arrangements to the needs of the workplace. In addition, a lodgment-only process for all agreements will remove a significant layer of complexity and will reduce the uncertainty and frustration caused by processing delays.

Following the reforms, it is estimated that the federal system will cover up to 85 per cent of employees<sup>15</sup>. About 15 per cent of employees, mainly those employed by small non-incorporated businesses, will not be covered by the federal legislation relying on the corporations power. Unincorporated businesses currently in the federal system will be able to remain covered by federal provisions based on the conciliation and arbitration power for a transitional period of up to five years while they consider whether to incorporate and remain in the federal system, or move into the relevant state system. This will help ensure minimum disruption and loss of flexibility for those employers and their employees. However, it is important to note that 49 per cent of small businesses that employ staff are already incorporated and small businesses operating with the ACT, NT or Victoria will also fall within the federal jurisdiction<sup>16</sup>.

To ensure that small business operators are not confused by the proposed changes, a targeted awareness and education campaign (developed by the Department of Employment and Workplace Relations in consultation with the Office of Small Business) will be undertaken. Additional assistance and advice will be available through the OEA, the Department of Employment and Workplace Relations, and employer organisations.

## **Consultation**

There has been informal consultation with a large number of key stakeholders. They include a range of industry organisations and individual enterprises, unions, and legal firms. Business groups have generally called for a unified system, further simplification of awards and simplified agreement processes. Some have suggested more radical reform. Unions have generally called for retention of the current system, with no contraction of the AIRC's role and no further reduction in allowable award matters.

The proposed changes to the workplace relations system were discussed with State and Territory Ministers at the August 2005 meeting of the Workplace Relations Ministers Council and the June 2005 meeting of the National Workplace Relations Consultative Committee. Further consultation about the proposed reforms is scheduled to take place at a meeting of the Committee on Industrial Legislation (COIL) in November 2005.

## **Conclusion and Recommended Option**

The underlying principle of the Government's workplace relations reform agenda since 1996 has been the establishment of a genuine safety net, with the actual conditions of employment negotiated at the workplace through agreement between employers and employees.

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<sup>15</sup> ABS, *Employee Earnings and Hours*, May 2004 (Cat No 6306.0)

<sup>16</sup> ABS *Australian Bureau of Statistics Business Register: Counts of Businesses - Summary Tables* (Cat No 8161.0.55.001)

Unfortunately, the current safety net is not a genuine one and agreement making remains overly costly and bureaucratic.

The reforms proposed in Options B will balance employee rights with sound economic management. They will deliver a much simplified system based on a genuine safety net of minimum wages and conditions. They will reduce unnecessary regulation and make significant progress towards implementing a single, unified workplace relations system for Australia.

The recommendation to Parliament is that Option B be agreed.

### **Transitional Arrangements**

As a result of the legislation, all employees of constitutional corporations currently covered by state industrial relations systems will move into the federal system. The terms of former state awards and agreements will become enforceable under the federal system as transitional agreements.

Former state agreements will operate under federal legislation in a similar way to federal agreements. They will keep their nominal expiry date, and will continue to operate until terminated or replaced by a new agreement.

Some content in former state agreements, such as union preference clauses, that is currently prohibited, or inhibits the ability of the parties to bargain, will be prohibited.

Constitutional corporations that have employees with terms and conditions covered by a state award will have their awards preserved as transitional agreements between the relevant employers and employees. However, where employees on former state awards have conditions less than the Fair Pay and Conditions Standard, the more generous conditions will apply. This will protect the existing terms and conditions of employment of employees currently covered by state awards other than prohibited content. These transitional agreements will cease to operate after three years.

There will be a separate transitional system for employers and employees currently in the federal system where the employer will not be covered by the new federal system.

This transitional system will operate for a period of five years and be based on the conciliation and arbitration power for a limited period. This transitional arrangement will provide employers that are unincorporated businesses currently in the federal system a chance to decide whether they want to incorporate and remain in the federal system.

Current federal collective agreements in settlement of an industrial dispute will continue to operate after commencement of the new system. These agreements will run for up to five years. Non-constitutional corporations that are part of the transitional system will not be able to negotiate new agreements in the new national system.

At the end of the transitional period transitional agreements will cease to operate, and any unincorporated business remaining in the federal system will automatically revert to the relevant state industrial relations system.

Awards that bind a non-constitutional corporations will become 'transitional' awards at the commencement of the new system. The transitional awards will apply only to non-constitutional corporations covered by awards in the current federal system.

At the end of the transitional period transitional awards covering will cease to operate, and any unincorporated business remaining in the federal system will automatically revert to the relevant state industrial relations system.

### **Implementation and Review**

The proposal requires substantial amendment to the WR Act. The Department of Employment and Workplace Relations will monitor and evaluate the effect of such legislative change.

Broadly speaking, implementation will require carefully developed transitional arrangements which focus on guaranteeing employee protections and a comprehensive targeted communication strategy to widely publicise the reforms.



## 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 would specify when the various provisions of the Bill are proposed to commence. The time of commencement for particular provisions would be set out in a table in subclause 2(1).
3. Item 1 of the table would provide that the preliminary provisions of the Bill (short title, commencement and effect of Schedules) would commence on Royal Assent.
4. Item 2 of the table would provide that Schedule 1 (which contains the principal amendments of the WR Act) would commence on a single day to be fixed by Proclamation. However, if any provisions in Schedule 1 are not proclaimed to commence within six months of the Act receiving Royal Assent, they would commence on the day following that period of six months. It is expected that Schedule 1 would be proclaimed to commence before the expiration of the 6 month period.
5. Item 3 of the table would provide that Schedule 2 would commence in the same way as Schedule 1. It is intended that this Schedule would be proclaimed to commence prior to the reform commencement (ie before Schedule 1 and the principal amendments to the WR Act commence). This would allow state registered associations to transitionally register before the substantive changes to the WR Act commence. As some or all of their members would become covered by the federal system, this would enable the associations to represent those members under the federal system from the reform commencement.
6. Item 4 of the table would provided that Schedule 3 (school-based trainees) would commence in the same way as Schedule 1. It is expected that this Schedule would be proclaimed to commence on 1 January 2006. This is to ensure that the provisions are operational for the 2006 school year.
7. Item 5 of the table would provide that Part 1 of Schedule 4 to the Bill (power to make transitional and consequential regulations) would commence on Royal Assent. This would enable the making of regulations which need to be made so that they can commence at the same time as other provisions of the Bill.
8. Item 6 of the table would provide that Part 2 of Schedule 4 to the Bill (transitional, application and savings provisions) would commence at the same time as Schedule 1 to the Bill.
9. Item 7 of the table would provide that Schedule 5 (renumbering of the Act) would commence in the same way as Schedule 1. It is expected that Schedule 5 would be proclaimed to commence before the expiration of the 6 month period but after the commencement of any amendments made to the Act by regulations.
10. Subclause 2(2) would provide that Column 3 of the table contains additional information that is not part of the amendment Act. Information in this column could be added to or edited in any published version of this Act.

**Clause 3 – Schedule(s)**

11. This clause would provide 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 ~ Main Amendments**

### **Item 1 – section 3**

1. Proposed item 1 would repeal section 3 in the pre-reform Act and replace it with a new principal object section.

#### *Proposed section 3 – Principal object*

2. Proposed section 3 would describe the principal object of the *Workplace Relations Act 1996* (WR Act) that reflects the proposed more flexible, simpler and fairer system of workplace relations for Australia

### **Item 2 – Section 4**

3. Proposed item 2 would repeal section 4 in the pre-reform Act and replace it with a new definitions section.

4. Proposed subsection 4(1) would provide that in this Act the following definitions apply unless a contrary intention appears. This means that the replacement definitions in subsection 4(1) would apply across the whole Bill unless expressly or impliedly displaced by the context in which they are used.

5. Proposed subsection 4(1) contains a number of proposed ‘sign post’ definitions including those relating to agreements, awards and the Standard. These definitions would refer the reader to particular provisions which provide substantive definitions.

6. Proposed ‘sign post’ definitions relating to awards include definitions for:

- allowable award matters;
- award rationalisation request;
- award simplification process;
- pre-reform award;
- preserved award entitlement;
- preserved award term.

7. Proposed ‘sign post’ definitions relating to the Standard include definitions for the:

- APCS;
- Australian Fair Pay and Conditions Standard (the Standard);
- new APCS;
- preserved APCS.

8. Otherwise, only key definitions are explained below. The definitions appear in alphabetical order in the Bill. The key definitions that are explained here are in alphabetical order.

*Definitions – Section 4(1)*

9. The proposed definition of *applies to employment generally* is used in the definition of *State or Territory industrial law* in subsection 4(1) and in paragraph 7C(1)(a) (which would exclude the operation of such laws to employers and employees within the general constitutional coverage of the amended WR Act). The definition would be used for the purpose of describing certain State and Territory laws. It would identify a State or Territory law that applies to all employers and employees in the relevant State or Territory even though:

- for constitutional reasons, the law does not or is not intended to apply to certain employers and employees (for instance, employers and employees bound by federal awards or Commonwealth employers and employees);
- some categories of employers and employees are excluded from the operation of the law (for instance, by industry sector or by classification of employee);
- the law applies to other persons (for instance, independent contractors or industrial arbitrators); or
- an exercise of power under the law does not affect all the employers and employees (or other persons) to whom the law applies (for instance, an exercise of power to make an award or to dismiss an unfair dismissal application).

10. The proposed definition would encompass laws such as the industrial relations Acts named in paragraph (a) of the definition of *State or Territory industrial law* in subsection 4(1), a long service leave law applying to all employers and employees subject to exclusions (such as for public sector employers and employees), a law applying minimum conditions of employment for the relevant State or Territory and a law that provides leave entitlements to all employees except casual employees.

11. The proposed definition would not encompass a law which, for instance, applies only to an industry sector (such as a law regulating employment conditions in the coal mining industry or a public sector employment law) and to a law that regulates only one employer and its employees (such as a law establishing a body corporate and making provision for the determination of conditions of employment of employees of that body corporate).

12. The proposed definition of *Australian-based employee* would be used for the purposes of the provisions of the amended WR Act which would give extraterritorial operation to provisions of the amended WR Act (see proposed section 7AA).

13. Proposed paragraph (a) of the definition would specify as an Australian-based employee an employee whose primary place of work is in Australia, or in *Australia's exclusive economic zone* or in, on or over *Australia's continental shelf* (as defined in subsection 4(1)). The expression 'primary place of work' would not be defined. An Australian-based employee would

be an employee working primarily (although not necessarily exclusively) in Australia or the defined areas of Australian waters.

14. Proposed paragraph (b) of the definition would specify as an Australian-based employee a Commonwealth employee or an employee of a *Commonwealth authority* (as defined in subsection 4(1)). An exception would be made for employees engaged outside Australia and the external Territories to perform duties outside Australia and those Territories (for instance, locally engaged staff engaged under section 74 of the *Public Service Act 1999*).

15. Proposed paragraph (c) of the definition would specify as an Australian-based employee an employee prescribed by the regulations as an Australian-based employee. This would allow regulations to be made in cases where, for instance, there is doubt about whether the primary place of work of a class of employees is in Australia.

16. The proposed definition of *Australian employer* would be used for the purposes of the provisions of the amended WR Act which would give extraterritorial operation to provisions of the amended WR Act (see proposed section 7AA).

17. Proposed paragraphs (a) to (e) of the definition would specify as Australian employers the Commonwealth and the entities listed in the definition of *employer* in proposed subsection 4AB(1) which are formed in Australia. Proposed paragraph (f) of the definition would specify as an Australian employer an employer that carries on activities in Australia (or Australia's exclusive economic zone or continental shelf) whose central management and control is in Australia. The employers who would be covered by paragraphs (a) to (f) of the definition would be the employers within the general constitutional coverage of the amended WR Act who have a substantial connection with Australia.

18. Proposed paragraph (g) of the proposed definition would authorise the making of regulations to prescribe an employer as an Australian employer. This would allow regulations to be made to prescribe employers as Australian employers in other cases where it is considered desirable that the amended WR Act should apply to the employers as Australian employers on the basis of a connection with Australia.

19. The proposed definition of *Australia's continental shelf* would be used for the purposes of the provisions of the amended WR Act which would give extraterritorial operation to certain provisions of the amended WR Act (see proposed section 7AA and the proposed definitions of *Australian-based employee* and *Australian employer*).

20. The proposed definition of *Australia's exclusive economic zone* would be used for the purposes of the provisions of the amended WR Act which would give extraterritorial operation to certain provisions of the amended WR Act (see proposed section 7AA and the proposed definitions of *Australian-based employee* and *Australian employer*).

21. The proposed definition of *award* at subsection 4(1) is an award made by the AIRC under section 118E or a pre-reform award.

22. The proposed definition of *Commonwealth authority* would define the expression to mean both a body corporate established for a public purpose under a Commonwealth law and a body incorporated under a law in which the Commonwealth has a controlling interest. The proposed definition would be used in a number of provisions of the amended WR Act, including the definition of *employer* in proposed subsection 4AB(1) (specifying the employers who would fall within the general constitutional coverage of the amended WR Act).

23. The proposed definition of *constitutional corporation* would define the expression to mean a corporation to which paragraph 51(xx) of the Constitution (the corporations power) applies. The corporations power applies to a trading or financial corporation formed within the limits of the Commonwealth and to a foreign corporation. The proposed definition would be used in a number of provisions of the amended WR Act, including the definition of *employer* in proposed subsection 4AB(1) (specifying the employers who would fall within the general constitutional coverage of the amended WR Act).

24. The proposed definition of *constitutional trade or commerce* would define the expression to mean trade or commerce between Australia and a place outside Australia, among the States, between a State and a Territory, between 2 Territories or within a Territory. This is trade and commerce to which paragraph 51(i) of the Constitution applies (the interstate and overseas trade and commerce power), and trade and commerce which the Commonwealth can regulate under section 122 of the Constitution (the Territories power). The proposed definition would be used in the definition of *employer* in proposed subsection 4AB(1) (specifying the employers who would fall within the general constitutional coverage of the amended WR Act).

25. The proposed definition of *Peak Council* would be a national or State council or federation that is effectively representative of a significant number of organisations representing employers or employees in a range of industries. The only change from the existing definition in the WR Act is the addition of the words 'or State'. This would enable State council or federations who meet the requirements of this definition to have the same rights in relation to the representation of parties before the AIRC, as set out in section 42 of the WR Act, as national councils or federations.

26. The proposed definition of *State or Territory industrial law* in subsection 4(1) would be used in the provision of the amended WR Act excluding the operation of certain State and Territory laws (see proposed paragraph 7C(1)(a)) and in other provisions of the amended WR Act, including provisions dealing with union right of entry and preserved State instruments. It would identify certain State and Territory laws dealing wholly, or in a substantial aspect, with industrial matters, and laws prescribed for the purposes of the definition.

27. Paragraph (a) of the proposed definition would specify the present industrial relations Acts of those States that have not referred industrial relations power to the Commonwealth, as amended from time to time (see section 10A of the *Acts Interpretation Act 1901*).

28. Paragraph (b) of the proposed definition would specify any State or Territory Act which applies generally to employers and employees in the State or Territory (and not, for instance, only to a particular industry sector – see the proposed definition of *applies to employment*

*generally*) and which has a main purpose of regulating industrial matters (such as settling industrial disputes, regulating industrial action, determining minimum or other terms and conditions of employment, providing for employment agreements and regulating termination of employment or freedom of association).

29. Paragraph (c) of the proposed definition would specify legislative instruments (such as regulations) made under a State or Territory Act described in either paragraph (a) or paragraph (b) of the definition of *State or Territory industrial law*.

30. Paragraph (d) of the proposed definition would authorise the making of regulations to prescribe a State or Territory law (whether an Act or other law, and including a provision of a law) as a *State or Territory industrial law*.

### **Item 3 – After section 4**

31. This item would insert new sections 4AA, 4AB and 4AC which are explained below.

#### *New section 4AA – Employee*

32. Proposed subsection 4AA(1) would operate in conjunction with proposed section 4AB (which defines *employer* for the purposes of the amended WR Act) to provide the constitutional underpinnings for much of the amended WR Act. Subsection 4AA(1) would define an *employee* for the purposes of the amended WR Act as, in essence, an individual so far as he or she is employed by an employer. Subsection 4AB(1) would define *employer* as listed persons or entities whose industrial rights and obligations can be regulated by the Commonwealth. Subsection 4AA(1) would therefore define *employee* as a person employed by one of the persons or entities listed in proposed subsection 4AB(1).

33. Much of the amended WR Act (for example, the provisions in relation to the Standard, awards, agreement making and unfair dismissal, and most of the industrial action provisions) would operate by reference to the meanings of employer and employee in proposed sections 4AA and 4AB. In the substantive provisions, industrial rights and obligations would be imposed on employers and employees (such as the Standard), and references to employer and employee would have the meaning given by subsections 4AA(1) and 4AB(1). By this mechanism, the provisions imposing the industrial rights and obligations would be confined to regulation of rights and obligations within Commonwealth legislative power.

34. The legislative note to subsection 4AA(1) would make clear that the definition of *employee* in that subsection (read with the definition of *employer* in subsection 4AB(1)) would not cover all of the employees whose industrial rights and obligations would be regulated by the amended WR Act. Part XV would extend the application of the amended WR Act to employees and employers in Victoria who would not fall within the definitions in subsections 4AA(1) and 4AB(1) (supported by the industrial relations powers referred to the Commonwealth by the *Commonwealth Powers (Industrial Relations) Act 1996 (Vic)*).

35. Proposed subsection 4AA(2) would provide an exception to the meaning of *employee* given by subsection 4AA(1). It would provide that a reference to *employee* would have its

ordinary meaning if the reference is listed in clause 2 of Schedule 1. This list would be able to be amended by regulations (see proposed clause 5 of Schedule 1).

36. The list would be included in the amended WR Act because the word *employee* would be used in a range of contexts in the amended WR Act and, in some of those contexts, the word would be used in its ordinary meaning of a person employed by another person or an entity.

37. For instance, Part IX (Right of entry) and Part XA (Freedom of association) would use the words in their ordinary meaning because they operate in relation to premises and conduct respectively (not employers and employees) and the constitutional support for those Parts depends on limitations within those Parts as to the premises and conduct regulated by those Parts. Thus the meaning of employer and employee would not be, and would not need to be, limited to the meaning given by proposed subsections 4AA(1) and 4AB(1).

38. Other examples of the use of the word ‘employee’ in its ordinary meaning would be references to State or Territory laws dealing with employees, and references to associations or organisations of employees. In both cases, the reference would be to employees generally, not to employees of the employers listed in proposed subsection 4AB(1).

39. The list in clause 2 would be used to clarify the intention in some cases of use of the ordinary meaning of *employee*, but not in every case where the word is not used in its constitutionally linked meaning. Proposed subsection 4AA(2) would be expressed not to limit the circumstances in which a contrary intention may appear for subsection 4AA(1) purposes. In many instances, the context in which the word *employee* is used would indicate a sufficiently clear contrary intention for the purposes of subsection 4AA(1) so that the word would in any case be construed according to its ordinary meaning.

40. In addition, in some parts of the amended WR Act (such as Part VIA in relation to unlawful termination and Part XV in relation to Victoria), *employee* would in any case be defined differently for the purposes of the provisions in question (generally because the constitutional support for the provisions would not be the same as for most of the amended WR Act). In those cases, a contrary intention for the purposes of subsection 4AA(1) would be expressed.

41. Whether or not *employee* is used in the constitutionally linked meaning or the ordinary meaning, proposed section 4AA would provide that *employee* extends to a person usually employed (in the ordinary sense) and does not extend to a person on a vocational placement (see proposed subsections 4AA(1), (3) and (4)).

#### *New section 4AB – Employer*

42. As explained in relation to proposed section 4AA, proposed section 4AB would operate in conjunction with proposed section 4AA (which would define *employee* for the purposes of the amended WR Act) to provide the constitutional underpinnings for much of the amended WR Act. Proposed subsection 4AB(1) would define *employer* as listed persons or entities whose industrial rights and obligations may be regulated by the Commonwealth. The inclusion of the persons and entities listed in subsection 4AB(1) would rely on the corporations power (paragraph



51(xx) of the Constitution), the Commonwealth's power to regulate Commonwealth employers and employees, the trade and commerce power (paragraph 51(i) of the Constitution) and the Territories power (section 122 of the Constitution).

43. Legislative note 1 to proposed subsection 4AB(1) would note that, for the purposes of proposed paragraph 4AB(1)(f), Australia includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands. This means that the definition of *employer* would not extend to an employer carrying on an activity in an external Territory unless the employer falls within one of the paragraphs of proposed subsection 4AB(1) other than paragraph (f).

44. Legislative note 2 to proposed subsection 4AB(1) would perform the same function as the legislative note to proposed subsection 4AA(1).

45. Proposed subsection 4AB(2) would perform the same function, in relation to *employer*, as corresponding subsection 4AA(2) performs in relation to *employee*. The explanatory notes in relation to subsection 4AA(2) apply equally to the operation of subsection 4AB(2).

46. Whether or not *employer* is used in the constitutionally linked meaning or the ordinary meaning, proposed section 4AB would provide that *employer* extends to a person or entity who is usually an employer (in the ordinary sense) (see the references to 'usually employs' in each paragraph of proposed subsection 4AB(1), and proposed subsection 4AB(3)).

#### *New section 4AC – Employment*

47. Proposed subsection 4AC(1) would provide that, subject to a contrary intention, employment means employment of an employee by an employer where *employee* and *employer* have their constitutionally linked meaning (the meanings given by subsections 4AA(1) and 4AB(1)).

48. Proposed subsection 4AC(2) would perform the same function, in relation to *employment*, as corresponding subsections 4AA(2) and 4AB(2) perform in relation to *employee* and *employer*. The explanatory notes in relation to subsection 4AA(2) apply equally to the operation of subsection 4AC(2).

#### **Item 4 – Section 4A**

49. Section 4A presently gives effect to Schedule 1B to the WR Act. Section 4A would be repealed and replaced with a new provision that would give effect to Schedule 1B and to the new Schedules to the WR Act. The note explains the subject matter of each Schedule.

#### **Item 5 – Sections 5 and 5AA**

50. This item would repeal sections 5 and 5A of the WR Act. Those provisions extend the operation of the present provisions of the WR Act in reliance on the interstate trade and commerce power in paragraph 51(i) of the Constitution. Under the amended Act, the trade and commerce power would be attracted by paragraph (d) of the definition of *employer* in subsection 4AB(1).

## **Item 6 – Section 7**

51. This item would insert new sections 7 and 7AA which are explained below.

### *Section 7 – Modifications for Christmas Island and Cocos (Keeling) Island*

52. Proposed section 7 would authorise the making of regulations modifying the operation of the amended WR Act to the Territories of Christmas Island and Cocos (Keeling) Islands. This would enable a modified workplace relations regime to be applied in those Territories if circumstances in those Territories make modification necessary or desirable.

53. Under the present WR Act, section 7 provides an equivalent regulation making power in relation to Christmas Island but not Cocos (Keeling) Islands. The proposed provision would extend the power to make modifications of the WR Act for Cocos (Keeling) Islands. This would mean that the capacity to modify the WR Act would be available for both external Territories to which the WR Act applies. Where appropriate, the same modifications could be made for both Territories, although the regulation making power would extend to making different modifications for each Territory or making modifications for one but not the other.

54. Proposed section 7 would not expressly extend the amended WR Act to Christmas Island (as it does under the present WR Act). The amended WR Act would apply to persons, acts, omissions, matters and things in Australia, including Christmas Island and Cocos (Keeling) Islands (see legislative Note 1 to proposed subsection 7AA(1)). It is not necessary to make provision to extend the amended WR Act to Christmas Island or Cocos (Keeling) Islands.

### *New section 7AA – Extraterritorial application*

55. In the absence of express provision, the amended WR Act would generally apply only to persons, acts, omissions, matters and things in and of Australia. Australia, for this purpose, includes the coastal sea and Christmas Island and Cocos (Keeling) Island (see legislative Note 1 to proposed subsection 7AA(1)).

56. Various provisions of the Bill would extend the application of the amended WR Act to persons, acts, omissions, matters and things outside Australia. Proposed subsection 7AA(1) would insert a table showing the provisions which would be given extraterritorial application and identifying each extraterritorial application provision.

57. Broadly, the scheme of the extraterritorial application provisions would be to apply minimum Australian terms and conditions of employment (the Standard and awards) to Australian-based employees of Australian employers who are outside the Australian exclusive economic zone and continental shelf. But the provisions would also allow workplace agreements to be made by Australian employers with non-Australian-based employees, and by non-Australian employers with Australian-based employees, wherever the work was to be performed. In those cases, the Standard would apply in respect of that employment.

58. Equal remuneration orders would be available in relation to remuneration regulated by Australian law or a contract made in Australia. Termination of employment remedies would be available to an Australian-based employee wherever the termination conduct occurred. Freedom

of association remedies would be available in relation to conduct by a registered organisation or an Australian-based employee (or a group including either of these) which adversely affects an Australian employer, and in relation to conduct by an Australia employer (or a group including an Australian employer) which adversely affects an Australian-based employee. Right of entry by workplace inspectors and unions, and industrial action remedies, would not be available outside Australia and Australia's exclusive economic zone and continental shelf.

59. The extraterritorial application of the amended WR Act would be within recognised limits under international law – that is, in general terms, there must be a sufficient connection between the law and Australia. However, as with any extraterritorial application of law, an inconsistency might arise between the provisions of the amended WR Act and the legislation of a country outside Australia in whose territory work was performed. In those circumstances, it may not be possible to enforce the provisions of the amended WR Act.

60. Special provision would be made for application of the amended WR Act in the waters of the Australian exclusive economic zone and continental shelf. The extraterritorial extensions would apply in the exclusive economic zone only to employees of Australian employers. However, regulations could extend the operation of provisions of the amended WR Act to other employees in the exclusive economic zone. In making regulations, account would be taken of Australia's international law obligations in relation to foreign-flagged ships and foreign-registered aircraft.

61. Any extraterritorial application of the provisions of the amended WR Act to employees in, on or over the continental shelf beyond the exclusive economic zone would be prescribed by regulation. In making regulations, account would be taken of Australia's international law obligations in relation to foreign-flagged ships and foreign-registered aircraft and its obligations in relation to matters concerning the continental shelf (including under agreements with other countries in relation to particular areas of the continental shelf).

62. Provisions of the amended WR Act (sections 89C and 115B) would also authorise the making of regulations to dis-apply the Standard or awards (or both) to employees in Australia on the basis of insufficiency of connection between the employment and Australia (for example, flight crew of a foreign airline who transit in and out of Australia).

63. Proposed subsections 7AA(2) and (4) would authorise the making of regulations modifying the operation of the amended WR Act to all or parts of Australia's exclusive economic zone or the continental shelf beyond the exclusive economic zone. This would enable a modified workplace relations regime to be applied in those areas of waters if the circumstances in those areas make modification necessary or desirable. The modifications could be made in relation to different parts of the exclusive economic zone and continental shelf (see proposed subsections 7AA(3) and (5)).

64. Proposed subsection 7AA(6) would define *modifications* to include additions, omissions and substitutions so that a broad range of modifications would be authorised by subsections 7AA(2) and (4).

65. Proposed subsection 7AA(6) would also provide a specific definition of *this Act* for the purposes of section 7AA. This is because the definition of *this Act* in subsection 4(1) (which would otherwise apply) does not extend to the Registration and Accountability of Organisations Schedule and regulations made under it. The specific definition would ensure that subsections 7AA(2) and (4) would authorise modifications of that Schedule and those regulations.

**Item 7 – Section 7B**

**Item 8 – At the end of section 7B**

66. Item 7 would make a minor amendment consequential on the amendment made by Item 8.

67. Item 8 would insert a proposed subsection 7B(2) that deals with the application of Criminal Code

68. Proposed subsection 7B(2) would displace the application of Part 2.7 of the *Criminal Code* to the extent that Part 2.7 would otherwise be relevant to the amended WR Act. Part 2.7 provides for the geographical jurisdiction applicable to offences under Commonwealth laws. Proposed section 7AA and the extraterritorial application provisions mentioned in that section, and proposed subsections 86(6) and (7), would implement a scheme for the extraterritorial application of the amended WR Act. That scheme would be appropriate to the workplace relations regime that would exist under the amended WR Act. That scheme would extend to the offence provisions of the amended WR Act and it would not be necessary or appropriate to rely on the operation of Part 2.7 of the *Criminal Code* in relation to the application of those provisions.

**Item 9 – At the end of Part I**

69. This item would insert new sections 7D, 7D and 7E which are explained below.

*New section 7C – Act excludes some State and Territory laws*

70. Proposed section 7C would ensure that the amended WR Act would operate to the exclusion of present and future State and Territory industrial regimes in their application to employers and employees who would fall within the general constitutional coverage of the amended WR Act (that is, employers and employees within the meaning of proposed subsections 4AA(1) and 4AB(1)).

71. This object would be achieved, first, by the exclusion by proposed paragraph 7C(1)(a) of a *State or Territory industrial law* in its application to constitutionally covered employers and employees.

72. The proposed definition of *State or Territory industrial law* in subsection 4(1) would specify the present industrial relations Acts of the States by name, and paragraph 7C(1)(a) would exclude those Acts in their application to constitutionally covered employers and employees.

73. The proposed definition would also specify any State or Territory Act which applies generally to employers and employees in the State or Territory and which has a main purpose of

regulating industrial matters (such as settling industrial disputes, regulating industrial action, determining minimum or other terms and conditions of employment, providing for employment agreements and regulating termination of employment or freedom of association). Paragraph 7C(1)(a) would therefore also exclude the application (to constitutionally covered employers and employees) of State or Territory Acts, other than the Acts mentioned by name in the definition of *State or Territory industrial law*, that deal wholly with the regulation of industrial matters or contain substantial provision for the regulation of industrial matters.

74. The proposed definition of *State and Territory industrial law* would also specify legislative instruments (such as regulations) made under a State or Territory Act (mentioned by name or not) described in the definition, and State or Territory laws prescribed for the purpose. These laws would therefore also be excluded by paragraph 7C(1)(a) in their application to constitutionally covered employers and employees.

75. Proposed paragraphs 7C(1)(b), (c), (d) and (e) would exclude the application of State or Territory laws dealing with certain other industrial matters in their application to constitutionally covered employers and employees. The excluded laws would be laws applying to employers and employees generally which deal with forms of leave other than long service leave and laws providing for equal remuneration and unfair contracts remedies and for union right of entry. These exclusions would apply to any provision of an Act or other law (such as regulations). They would apply even if the law was not, or was not contained in, a *State or Territory industrial law* as defined in subsection 4(1).

76. The *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) would not be excluded by the operation of proposed subsection 7C(1). That Act would not itself regulate workplace relations and would not be a *State or Territory industrial law*. In any case, subsection 7C(1) would exclude State and Territory laws only so far as they would otherwise apply in relation to a constitutionally covered employee or employer. The referral of matters to the Commonwealth by the Victorian Commonwealth Powers Act does not apply to employees or employers whether constitutionally covered or not (it provides powers to the Commonwealth) but, in any case, the Victorian Commonwealth Powers Act refers matters only to the extent not otherwise within Commonwealth legislative power (and constitutionally covered employers and employees are within Commonwealth legislative power).

77. Proposed subsection 7C(2) would make clear that certain State or Territory laws that might otherwise be excluded in their application to constitutionally covered employers and employees would be intended to apply to constitutionally covered employers and employees.

78. Proposed paragraph 7C(2)(a) specifies a law dealing with the prevention of discrimination or the promotion of EEO (or both) as a law which would not be excluded by proposed subsection 7C(1). But this would apply only where the law is not itself, or is not contained in, a *State or Territory industrial law* (as defined in subsection 4(1)). The proposed paragraph would, for instance, save the application (to constitutionally covered employers and employees) of State and Territory anti-discrimination legislation (such as the *Anti-Discrimination Act 1977* (NSW) and the *Equal Opportunity Act 1994* (WA)). However, it would not, for instance, save the application to those employers and employees of provisions contained

in State industrial relations Acts which prohibit termination of employment on the grounds of sex, race, pregnancy or the like.

79. The reference to EEO in proposed paragraph 7C(2)(a) would be read in its ordinary meaning which is ‘a government policy to ensure that people with equal ability to do a job will have an equal chance of being hired for or promoted to it, meaning that extraneous factors such as sex, race, ethnic origin or marital status will not influence their chances of recruitment or promotion’ (*Macquarie Dictionary*, revised 3<sup>rd</sup> edition).

80. Proposed paragraph 7C(2)(b) would authorise the making of regulations to prescribe a law (whether an Act or other law, and including a provision of a law) of a State or Territory as a law which is not excluded by proposed subsection 7C(1).

81. Proposed paragraph 7C(2)(c) would provide that a law dealing with a matter described in proposed subsection 7C(3) (a *non-excluded matter*) would not be excluded by proposed subsection 7C(1).

82. Proposed subsection 7C(3) would list a range of non-excluded matters including, for instance, workers compensation, occupational health and safety, long service leave, jury service leave and industrial action affecting essential services. Laws dealing with those matters regulate relationships between employers and employees and, in the absence of the proposed subsection, some of these laws would, and others might, have been excluded in their application to constitutionally covered employers and employees by proposed subsection 7C(1). Paragraph 7C(2)(c), read with subsection 7C(3), would ensure that laws dealing with the non-excluded matters would apply to constitutionally covered employers and employees.

83. The legislative note to subsection 7C(3) would deal with union right of entry under a State or Territory occupational health and safety law. Paragraph 7C(1)(e) would exclude State or Territory laws providing for union right of entry. However, paragraph 7C(2)(c), read with paragraph 7C(3)(c), would save State or Territory laws dealing with occupational health and safety, including union right of entry under an occupational health and safety law. The legislative note would note that, despite this, union right of entry under a State or Territory occupational health and safety law would be subject to the requirements imposed by proposed Part IX.

84. The application to constitutionally covered employers and employees of laws described in proposed subsection 7C(2) (including laws dealing with the non-excluded matters) would be subject to proposed subsection 7C(4) (regulations), proposed section 7D (exclusion by award or workplace agreement) and inconsistent provisions elsewhere in the amended WR Act.

85. Proposed subsection 7C(4) would authorise the making of regulations to prescribe a State or Territory law as a law which is excluded by the operation of the amended WR Act. This provision would allow a law to be prescribed for the purpose of exclusion without prescribing it as a *State or Territory industrial law* (a definition which would be used in the amended WR Act in contexts other than that of excluding State and Territory laws).

86. Proposed subsection 7C(5) would provide a specific definition of *this Act* for the purposes of section 7C. This is because the definition of *this Act* in subsection 4(1) (which would otherwise apply) does not extend to the Registration and Accountability of Organisations Schedule and regulations made under it. The specific definition would ensure that State or Territory laws could be excluded by that Schedule and those regulations.

*New section 7D – Awards, agreements and Commission orders prevail over State and Territory laws etc*

87. Proposed subsection 7D(1) would provide that an award or workplace agreement prevails over a State or Territory law, a State award or a State employment agreement to the extent of any inconsistency. For this purpose a ‘State award’ includes an award, order, decision or determination of a State industrial authority (see definitions of *State award* and *State industrial authority* in subsection 4(1)).

88. This subsection would indicate the Parliament’s intention that the provisions of the amended WR Act which authorise the making of the instruments covered by subsection 7D(1) authorise exhaustive regulation of the subject-matter dealt with by those instruments to the exclusion of State or Territory law, State awards and State agreements. To the extent that such a law, award (including order etc) or agreement is not excluded by the operation of section 7C, its operation would be excluded by an inconsistent award or workplace agreement made under the amended WR Act.

89. For instance, proposed paragraphs 7C(2)(c) and 7C(3)(e) would provide that a State or Territory long service leave law would not be excluded in its application to a constitutionally covered employer and employee. However, if the employer is bound by a federal award which gives the employee a long service leave entitlement, the award entitlement would prevail over the State or Territory law.

90. Another instance would be a workplace agreement which made provision for a dispute resolution process in respect of a dispute arising under the workplace agreement. The process in the agreement would prevail over any State or Territory law that purported to provide a different mechanism for resolving a dispute arising out of the workplace agreement (such as provisions for conciliation and arbitration of an industrial dispute in a law applying only to an industry sector).

91. Proposed subsection 7D(2) would ensure that, despite proposed subsection 7D(1), an award or workplace agreement would operate subject to State or Territory laws dealing with specified matters, that is occupational health and safety, workers compensation, apprenticeship and matters as prescribed.

92. Proposed subsection 7D(3) would make provision similar to proposed subsection 7D(1) in relation to an order of the AIRC made under Part VIA of the amended WR Act (equal remuneration and termination orders). The subsection would indicate the Parliament’s intention that Part VIA authorises the AIRC to make orders which operate to the exclusion of State or Territory laws, State awards and State employment agreements. Thus, for instance, an order of the AIRC in an unlawful termination proceeding would prevail over an order of a State or

Territory court or tribunal in relation to the same termination (under, for instance, an anti-discrimination law).

*New section 7E – Act may exclude State and Territory laws in other case*

93. Proposed subsection 7E(1) would indicate that proposed sections 7C and 7D do not comprehensively state the Parliament's intention in relation to the interaction between the amended WR Act and State or Territory law and instruments.

94. As the legislative note to subsection 7E(1) would make clear, there would be other provisions of the amended WR Act that would provide expressly for the relationship, in particular circumstances, between provisions of the amended WR Act and State or Territory law and instruments.

95. In addition, subsection 7E(1) would make clear that:

- where no express provision is made about the relationship between the amended WR Act and State or Territory law and instruments, other provisions of the amended WR Act might nevertheless, by implication, leave no room for the operation of State or Territory law; and
- the existence of sections 7C and 7D should not affect the drawing of that implication.

96. Subsection 7E(2) would provide a specific definition of *this Act* for the purposes of section 7E. This is because the definition of *this Act* in subsection 4(1) (which would otherwise apply) does not extend to the Registration and Accountability of Organisations Schedule and regulations made under it. The specific definition would ensure that subsection 7E(1) would apply to that Schedule and those regulations.

### **Item 10 – After Part 1**

97. This item would insert a new Part 1A in the WR Act to make provision for the Australian Fair Pay Commission (AFPC).

#### **Part 1A – Australian Fair Pay Commission**

98. This Part would provide for the establishment of the AFPC. The AFPC will set and adjust:

- the standard Federal Minimum Wage;
- special Federal Minimum Wages for junior employees, employees with disabilities or employees under training arrangements;
- basic periodic rates of pay and basic piece rates of pay payable for APCS classification levels; and
- casual loadings.



## **Division 1 – Preliminary**

### *Section 7F – Definitions*

99. Proposed section 7F would provide various definitions for Part 1A. Only key definitions are explained here.

100. *AFPC* would mean the Australian Fair Pay Commission established under proposed section 7G.

101. *Wage review* would mean a review conducted by the AFPC to determine whether it should exercise any of its wage-setting powers.

102. *Wage-setting decision* would mean a decision made by the AFPC in the exercise of its wage-setting powers.

103. *Wage-setting function* would be defined by proposed section 7I.

104. *Wage-setting powers* would be defined to mean the powers of the AFPC under Division 2 of Part VA.

## **Division 2 – Australian Fair Pay Commission**

105. This Division would establish the AFPC and set out its powers and functions, including its wage setting functions and parameters and provide for the arrangements for the appointment and entitlements of the AFPC Chair and AFPC Commissioners.

### **Subdivision A – Establishment and functions**

#### *Section 7G – Establishment*

106. Proposed section 7G would establish the AFPC and provide that it consists of the AFPC Chair and four AFPC Commissioners.

#### *Section 7H – Functions of the AFPC*

107. Proposed section 7H would set out the functions of the AFPC. Broadly, these are to exercise its wage-setting function (defined in proposed section 7I), any other functions conferred on the AFPC, and promoting understanding of matters related to these functions.

### **Subdivision B – AFPC’s wage-setting function**

#### *Section 7I – AFPC’s wage-setting function*

108. Proposed section 7I would set out the AFPC’s wage-setting function which is to conduct wage reviews, and exercise its wage-setting powers as necessary depending on the outcomes of these wage reviews.

109. The legislative note would explain that the wage-setting powers are set out in Division 2 of Part VA.

*Section 7J – AFPC’s wage-setting parameters*

110. Proposed section 7J would provide that the objective of the AFPC is to promote the economic prosperity of the people of Australia having regard to:

- the capacity of the unemployed and low paid to obtain and remain in employment;
- employment and competitiveness across the economy;
- providing a safety net for the low paid; and
- providing minimum wages for junior employees, and employees to whom training arrangements apply and employees with disabilities that ensure those employees are competitive in the labour market.

*Section 7K – Wage reviews and wage-setting decisions*

111. Proposed section 7K would outline the operation of the AFPC in relation to its wage-setting function. Subsection 7K(1) would provide that the AFPC may determine the timing, scope and frequency of wage reviews, the manner in which wage reviews are to be conducted and when wage-setting decisions are to come into effect. Subsection 7K(2) would provide that for the purposes of performing its wage-setting function the AFPC may inform itself in any way it thinks appropriate, including by:

- undertaking or commissioning research;
- consulting with any other body, person or organisation; or
- monitoring and evaluating the impact of its wage-setting decisions.

112. Subsection 7K(3) would provide that subsections 7K(1) – (2) would have effect subject to the WR Act and any regulations made under the Act. Subsection 7K(4) would require the AFPC’s wage-setting decisions to be expressed as decisions of the AFPC as a body, to be in writing and include reasons. It would also make clear that a wage-setting decision is not a legislative instrument.

*Section 7L – Constitution of the AFPC for wage reviews*

113. Proposed section 7L would provide that for the purposes of exercising its wage-setting powers the AFPC must be constituted by the AFPC Chair and four AFPC Commissioners.

114. However, subsection 7L(2) would provide that if the AFPC Chair considers it necessary due to the unavailability of an AFPC Commissioner, the AFPC may be constituted by the AFPC Chair and not less than two AFPC Commissioners.

115. Subdivision D (AFPC Chair) and Subdivision E (AFPC Commissioners) set out additional requirements concerning appointments to the AFPC.

*Section 7M – Publishing wage-setting decisions etc.*

116. Proposed section 7M would provide that the AFPC must publish its wage-setting decisions and may publish other information about wages or its wage-setting function. Subsection 7M(3) provides that the publication may be done in a way the AFPC considers appropriate.

**Subdivision C – Operation of the AFPC**

*Section 7N – AFPC to determine its own procedures*

117. Proposed section 7N would provide that the AFPC may determine the procedures it would use in performing its functions, subject to Subdivision B of this Division and any procedures prescribed by regulations.

*Section 7O – Annual report*

118. Proposed section 7O would require the AFPC to provide an annual report on the operation of the AFPC to the Minister for presentation to Parliament. The report would be prepared as soon as practicable after the end of each financial year.

119. It is envisaged that this report and the annual report by the AFPC Secretariat under section 7ZJ would be published and presented to Parliament concurrently.

**Subdivision D – AFPC Chair**

*Section 7P – Appointment*

120. Proposed section 7P would provide for the AFPC Chair to be appointed by the Governor-General by written instrument. Subsection 7P(2) would provide that the AFPC Chair can be appointed on either a full-time or part-time basis for the period (not exceeding 5 years) specified in the instrument of appointment.

121. Subsection 7P(3) would require that the AFPC Chair have high levels of skills and experience in business or economics. Section 33 of the *Acts Interpretation Act 1901* provides that appointment includes re-appointment.

*Section 7Q – Remuneration*

122. Proposed section 7Q would provide for the Remuneration Tribunal to determine the remuneration of the AFPC Chair. In the absence of a determination, the AFPC Chair would be paid the remuneration and allowances that are prescribed.

123. Subsection 7Q(3) would provide that this section has effect subject to the *Remuneration Tribunal Act 1973*. This will ensure that general provisions of that Act are not displaced by this section.

*Section 7R – Leave of absence*

124. Proposed section 7R would provide that if the AFPC Chair is appointed on a full-time basis the Remuneration Tribunal is to determine his or her recreation leave entitlements.

125. The Minister may grant a full-time AFPC Chair leave of absence, other than recreation leave, on such terms and conditions as he or she determines.

126. Subsection 7R(2) would allow the Minister to grant a part-time AFPC Chair leave of absence, including recreation leave, on such terms and conditions as he or she determines.

*Section 7S – Engaging in other paid employment*

127. Proposed section 7S would require a full-time AFPC Chair to obtain approval from the Minister before engaging in other paid employment.

*Section 7T – Disclosure of interests*

128. Proposed section 7T would require the AFPC Chair to give the Minister notice in writing of all financial or other interests that could conflict with the proper performance of the AFPC Chair's duties.

*Section 7U – Resignation*

129. Proposed section 7U would provide that the AFPC Chair may resign by written notice given to the Governor-General and sets out when the resignation takes effect.

*Section 7V – Termination of appointment*

130. Proposed subsection 7V(1) would allow the Governor-General to terminate the appointment of the AFPC Chair if the AFPC Chair:

- becomes bankrupt or takes specified steps related to insolvency; or
- contravenes, without reasonable excuse, the requirement to disclose to the Minister any interest that could conflict with his or her duties (proposed section 7T); or
- has or acquires interests (including by being an employer or employee) that the Minister considers could conflict unacceptably with the proper performance of his or her duties; or
- in the case of a full-time AFPC Chair, is absent from duty (except on authorised leave) for 14 consecutive days or for 28 days in any 12 month period, or engages in other paid employment without the Minister's approval (proposed section 7S); or
- in the case of a part-time AFPC Chair, is absent from duty (except on authorised leave) to an extent that the Minister considers excessive.

131. Subsection 7V(2) would allow the Governor-General to terminate the AFPC Chair's appointment for misbehaviour or on the ground of physical or mental incapacity. To avoid doubt, subsections 7V(3)–(4) would set out certain limitations on termination on the ground of physical or mental incapacity.

*Section 7W – Other terms and conditions*

132. Proposed section 7W would provide that the AFPC Chair holds office on the terms and conditions that are determined by the Minister in relation to matters not covered by the WR Act.

*Section 7X – Acting AFPC Chair*

133. Proposed section 7X would provide that the Minister may appoint a person who meets the requirements set out in subsection 7P(3) as an acting AFPC Chair when necessary, including on a recurring basis. Subsection 7X(2) would provide that any act done under such an appointment is not to be invalid only because of a defect or irregularity in connection with the appointment.

**Subdivision E – AFPC Commissioners**

*Section 7Y – Appointment*

134. Proposed section 7Y would provide for an AFPC Commissioner to be appointed by the Governor-General by written instrument. Subsection 7Y(2) would provide that an AFPC Commissioner is to be appointed on a part-time basis for the period (not exceeding four years) specified in the instrument of appointment. Subsection 7Y(3) would require that an AFPC Commissioner have experience in one or more of the areas of business, economics, community organisations or workplace relations. Section 33 of the *Acts Interpretation Act 1901* provides that appointment includes re-appointment.

*Section 7Z – Remuneration*

135. Proposed section 7Z would provide for the Remuneration Tribunal to determine the remuneration of an AFPC Commissioner. In the absence of a determination, an AFPC Commissioner would be paid the remuneration and allowances that are prescribed. Subsection 7Z(3) would provide that this section has effect subject to the *Remuneration Tribunal Act 1973*. This will ensure that general provisions of that Act are not displaced by this section.

*Section 7ZA – Leave of absence*

136. Proposed section 7ZA would provide that the AFPC Chair may grant an AFPC Commissioner leave of absence on such terms and conditions as he or she determines.

*Section 7ZB – Disclosure of interests*

137. Proposed section 7ZB would require an AFPC Commissioner to give the Minister notice in writing of all financial or other interests that could conflict with the proper performance of his or her duties.

*Section 7ZC – Resignation*

138. Proposed section 7ZC would provide that an AFPC Commissioner may resign by written notice given to the Governor-General and sets out when the resignation takes effect.

*Section 7ZD – Termination of appointment*

139. Subsection 7ZD(1) would allow the Governor-General to terminate the appointment of an AFPC Commissioner if the AFPC Commissioner:

- becomes bankrupt or takes specified steps related to insolvency; or
- contravenes, without reasonable excuse, the requirement to disclose to the Minister any interest that could conflict with his or her duties (proposed section 7ZB);
- has or acquires interests (including by being an employer or employee) that the Minister considers could conflict unacceptably with the proper performance of his or her duties; or
- is absent from duty (except on authorised leave) to an extent that the Minister considers excessive.

140. Subsection 7ZD(2) would allow the Governor-General to terminate an AFPC Commissioner's appointment for misbehaviour or on the ground of physical or mental incapacity. To avoid doubt, subsections 7ZD(3) – (4) would set out certain limitations on termination on the ground of physical or mental incapacity.

*Section 7ZE – Other terms and conditions*

141. Proposed section 7ZE would provide that an AFPC Commissioner would hold office on the terms and conditions that are determined by the Minister in relation to matters not covered by this Act.

*Section 7ZF – Acting AFPC Commissioners*

142. Proposed section 7ZF would provide that the Minister may appoint a person who meets the requirements set out in subsection 7Y(3) as an acting AFPC Commissioner when necessary, including on a recurring basis. Subsection 7ZF(2) would provide that any act done under such an appointment is not to be invalid only because of a defect or irregularity in connection with the appointment.

**Division 3 – AFPC Secretariat**

143. This Division would establish the AFPC Secretariat as a separate statutory agency to assist the AFPC and provide for appointment of the Director of the Secretariat and the engagement of staff and consultants.

**Subdivision A – Establishment and function**

*Section 7ZG – Establishment*

144. Proposed subsection 7ZG(1) would establish the AFPC Secretariat.

145. Subsection 7ZG(2) would provide that the AFPC Secretariat consists of the Director and the staff of the Secretariat.

*Section 7ZH – Function*

146. Proposed section 7ZH would provide that the function of the AFPC Secretariat is to assist the AFPC in the performance of its functions.

**Subdivision B – Operation of the AFPC Secretariat**

*Section 7ZI – AFPC Chair may give directions*

147. Proposed section 7ZI would allow the AFPC Chair to give directions to the Director of the Secretariat about the performance of the function of the AFPC Secretariat and require the Director to comply with such directions.

148. To avoid doubt, subsection 7ZI(3) would provide that the AFPC Chair cannot give directions in relation to the performance of functions or powers by the Director under the *Financial Management and Accountability Act 1997* or the *Public Service Act 1999*.

*Section 7ZJ – Annual report*

149. Proposed section 7ZJ would require the Director of the Secretariat to provide an annual report on the operation of the AFPC Secretariat to the Minister for presentation to Parliament. The report must be prepared as soon as practicable after the end of each financial year.

150. It is envisaged that this report and the annual report by the AFPC under section 7O would be published and presented to Parliament concurrently.

**Subdivision C – The Director of the Secretariat**

*Section 7ZK – Appointment*

151. Proposed section 7ZK would provide for the Director of the Secretariat to be appointed by the Minister by written instrument.

152. Subsection 7ZK(2) would provide that the Director of the Secretariat is to be appointed on a full-time basis for the period (not exceeding five years) specified in the instrument of appointment.

*Section 7ZL – Remuneration*

153. Proposed section 7ZL would provide that the Remuneration Tribunal is to determine the remuneration of the Director of the Secretariat. In the absence of a determination, the Director of the Secretariat would be paid the remuneration and allowances that are prescribed.

154. Subsection 7ZL(3) would provide that this section has effect subject to the *Remuneration Tribunal Act 1973*. This would ensure that general provisions of that Act are not displaced by this section.

*Section 7ZM – Leave of absence*

155. Proposed section 7ZM would provide for the Remuneration Tribunal to determine the recreation leave entitlements of the Director of the Secretariat.

156. Subsection 7ZM(2) would allow the Minister to grant the Director of the Secretariat leave of absence, including recreation leave, on such terms and conditions as he or she determines.

*Section 7ZN – Engaging in other paid employment*

157. Proposed section 7ZN would require the Director of the Secretariat to obtain approval from the Minister before engaging in other paid employment.

*Section 7ZO – Disclosure of interests*

158. Proposed section 7ZO would require the Director of the Secretariat to give the Minister notice in writing of all financial or other interests that could conflict with the proper performance of his or her duties.

*Section 7ZP – Resignation*

159. Proposed section 7ZP would provide that the Director of the Secretariat may resign by written notice given to the Minister and sets out when the resignation takes effect.

*Section 7ZQ – Termination of appointment*

160. Proposed subsection 7ZQ(1) would allow the Minister to terminate the appointment of the Director of the Secretariat if the Director of the Secretariat:

- becomes bankrupt or takes specified steps related to insolvency; or
- contravenes, without reasonable excuse, the requirement to disclose to the Minister any interest that could conflict with his or her duties (proposed section 7ZO); or
- has or acquires interests (including by being an employer or employee) that the Minister considers could conflict unacceptably with the proper performance of his or her duties; or
- engages in other paid employment without the Minister's approval (proposed section 7ZN); or
- is absent from duty (except on authorised leave) for 14 consecutive days or for 28 days in any 12 month period.

161. Subsection 7ZQ(2) would require the Minister to terminate the Director of the Secretariat's appointment if the Minister is of the opinion that the Director's performance has been unsatisfactory for a significant period of time.

162. Subsection 7ZQ(3) would allow the Minister to terminate the Director of the Secretariat's appointment for misbehaviour or on the ground of physical or mental incapacity.

163. To avoid doubt, subsections 7ZQ(4) – (5) would set out certain limitations on termination on the ground of physical or mental incapacity.



*Section 7ZR – Other terms and conditions*

164. Proposed section 7ZR would provide that the Director of the Secretariat would hold office on the terms and conditions that are determined by the Minister in relation to matters not covered by the WR Act.

*Section 7ZS – Acting Director of the Secretariat*

165. Proposed section 7ZS would provide that the Minister may appoint an acting Director of the Secretariat when necessary, including on a recurring basis. Subsection 7ZS(2) would provide that any act done under such an appointment is not to be invalid only because of a defect or irregularity in connection with the appointment.

**Subdivision D – Staff and consultants**

*Section 7ZT – Staff*

166. Proposed section 7ZT would provide that the staff of the AFPC Secretariat are to be engaged under the *Public Service Act 1999* (subsection 7ZT(1)).

167. Subsection 7ZT(2) would provide that for the purposes of the *Public Service Act 1999* the Director of the Secretariat and staff of the AFPC Secretariat would constitute a Statutory Agency with the Director as the Head of that Statutory Agency.

*Section 7ZU – Consultants*

168. Proposed section 7ZU would provide that the Director of the Secretariat may, on behalf of the Commonwealth, engage consultants with suitable qualifications and experience for the AFPC or the AFPC Secretariat. The terms and conditions of engagement of consultants would be determined by the Director of the Secretariat and recorded in writing.

**Item 11 – New section 33**

169. This item repeals pre-reform section 33, which provides that the AIRC may exercise powers on its own motion or after an application by a specified party, subject to any limitation or restriction in the WR Act or Schedule 1B.

170. Proposed section 33 would provide a general position that the AIRC may perform a function or exercise a power on its own initiative, but would not be able to do so if the function or power is:

- one that may be performed or exercised on application by a specified person or class of persons; and
- there is not an express provision allowing the AIRC to perform the function or exercise the power on its own initiative.

171. This will mean that the AIRC can act on its own motion in appropriate circumstances.

**Item 12 – Subsection 36(3)**

172. This item would repeal pre-reform subsection 36(3) as it relates to pre-reform section 111AAA of the WR Act, which is being repealed.

**Item 13 – Section 39**

173. This item would repeal pre-reform section 39, which requires the President of the AIRC convene a conference of the AIRC at least once a year to discuss matters relating to the operation of pre-reform Part VI and Part II of the WR Act and, in particular, to discuss means for ‘ensuring speed in the settlement of industrial disputes’.

174. The repeal of this provision would not prevent the President of the AIRC, at his or her discretion, from convening a conference of members of the AIRC to discuss the AIRC’s operations and how it performs its functions.

**Item 14 – At the end of Division 2 of Part II**

175. This item would insert new sections 41A and 41B into the WR Act.

*New section 41A – Co-operation with the States by President*

*New Section 41B – Co-operation with the States by Registrar*

176. These sections would deal with co-operation by the President of the AIRC and the Industrial Registrar with their respective State counterparts. They replace pre-reform sections 171 and 172, which would be repealed.

177. Proposed sections 41A and 41B would provide the President and Industrial Registrar with the discretion to invite their State counterparts to hold discussions, rather than the mandatory requirement in pre-reform sections 171 and 172 to make such invitations.

**Item 15 – Subsection 42(3)**

178. This item would repeal and replace subsection 42(3) and insert new subsections 42(3A) – (3D).

179. Proposed subsection 42(3) would provide that a party to a proceeding (including an *employing authority*) before the AIRC may be represented by counsel, solicitor or agent, if the following two conditions are satisfied:

- all parties to the proceedings expressly agreed that the party be represented by counsel, solicitor or agent; and
- the AIRC grants leave for the party to be represented.

180. Proposed subsection 42(3A) would also provide that a party to a proceeding (including an *employing authority*) before the AIRC may be represented by counsel, solicitor or agent if:

- a party applies to the AIRC to be represented by counsel, solicitor or agent; and

- the AIRC grants leave for the party to be represented.

181. There are no limitations or restrictions on who can be an ‘agent’ for the purposes of proposed subsections 42(3) and 42(3A). As there is no professional or regulating body for agents, unlike the legal profession, there is no independent body to discipline an agent who systematically acts unethically from representing parties. Applicants also have no avenue for complaint if an agent acts improperly in their individual cases.

182. This can cause problems, as stated by the AIRC in *Oram v Derby Gem Pty Ltd* [Print PR946375] (Oram). In Oram, the applicant’s application was dismissed by the AIRC as a result of her agent continually failing to comply with the directions of the AIRC. This included failing to appear when directed and failing to file documents as required. In making its decision, the AIRC commented on its limited power to ameliorate the effect of its decision on the applicant.

183. Proposed subsection 42(3B) would require the AIRC to take a range of factors into consideration when deciding whether or not to grant leave to a representative, to prevent unfair results like that in Oram. Where all the parties have consented to the representation under proposed subsection 42(3), the factors to be considered are:

- whether being represented by counsel, solicitor or agent would assist the party concerned to bring the best case possible;
- the capacity of the particular counsel, solicitor or agent to represent the party concerned; and
- the capacity of the particular counsel, solicitor or agent to assist the AIRC in performing the AIRC’s functions under the Bill.

184. Proposed subsection 42(3C) would establish additional factors for the AIRC to consider when deciding whether or not to grant leave for an application made under subsection 42(3A) where all parties to the proceeding have not agreed to have the particular representative represent the relevant party. The additional factors are:

- the complexity of the factual and legal issues relating to the proceeding; and
- whether there are any special circumstances that make it desirable that the party concerned be represented by counsel, solicitor or agent.

185. These ‘special circumstances’ might include the inability of the party to represent themselves, due to a lack of understanding of, or familiarity with the AIRC and its processes, especially where the other party to the proceeding is represented by counsel with a high level of experience or knowledge.

186. These provisions are not intended to limit a party’s ability to be represented before the AIRC generally. Rather the proposed subsections would ensure that, for example:

- the AIRC has some control over who comes before it;

- that parties to a proceeding are represented only by persons who can assist them, and the AIRC; and/or
- the AIRC plays a role in achieving a ‘level playing field’ for parties to a proceeding.

187. Proposed subsection 42(3D) would ensure that a decision made in relation to an application for leave under proposed subsections 42(3) or (3A) would not be appealable to a Full Bench of the AIRC.

**Item 16 – At the end of paragraphs 42(7)(a) and (b)**

**Item 17 – At the end of subsection 42(7)**

188. Item 17 would amend subsection 42(7), which deals with who may represent a party before the AIRC, to include a bargaining agent (as defined in proposed Part VB, dealing with agreement making).

189. Item 16 is a technical amendment.

**Item 18 – Subsection 43(1)**

**Item 19 – Subsection 43(2)**

190. Item 19 repeals subsection 43(2) as there would no longer be a certification process for agreements.

191. Item 18 makes a technical amendment consequential to the repeal of subsection 43(2) in Item 19.

**Item 20 – After Division 3 of Part II**

192. This item would insert a new Division 3A into Part II of the WR Act.

193. Proposed Division 3A would set out certain powers and procedures of the AIRC and matters the AIRC must take into account in respect of proceedings before the AIRC. These provisions would apply to the AIRC’s functions under the WR Act generally, unless specifically excluded. Other Parts of the WR Act will contain additional powers and functions of the AIRC relevant to those particular Parts.

194. Proposed Division 3A would replace the powers and procedures set out in pre-reform Part VI of the WR Act. The provisions in proposed Division 3A are based on powers and procedures set out in pre-reform Part VI.

## **New Division 3A – General matters relating to the powers and procedures of the Commission**

### **Subdivision A – General matters Commission to take into account**

195. Proposed Subdivision A would set out general matters that the AIRC must take into account in the performance of its functions under the WR Act. Certain general matters do not apply to the AIRC's performance of its functions under specified parts of the WR Act. This is where the general matter is not relevant to the performance of such a function under a particular Part, or a matter is otherwise expressly provided for in a particular Part of the Bill.

#### *New section 44A – Commission to take into account the public interest*

196. Proposed section 44A would require the AIRC to take into account the public interest when performing its functions under the WR Act or Schedule 1B to the Act.

197. When considering the public interest, the AIRC would be required to have regard to:

- when dealing with a matter under the WR Act, the objects of the Act (proposed paragraph 44A(1)(a));
- when dealing with a matter under Schedule 1B, the Parliament's intention in enacting the Schedule (proposed paragraph 44A(2)(a)); and
- the state of the national economy and the likely effect that an order the AIRC is considering or proposing to make will have on the national economy, particularly the likely effects on the level of employment and inflation (proposed paragraphs 44A(1)(b) and 44A(2)(b)).

198. Proposed subsection 44A(3) would provide that this subsection does not apply to the performance of a function under Part VC (Industrial Action) or Part VI (Awards) of the Bill, as those Parts provide their own factors that the AIRC must take into account when making orders or awards under those Parts.

#### *New section 44B – Commission to take into account discrimination issues*

199. Proposed section 44B would require the AIRC to take into account the need to:

- apply the principle of equal pay for work of equal value without discrimination based on sex (proposed paragraph 44B(a)); and
- prevent and eliminate discrimination on certain specified grounds (proposed paragraph, 44B(b)).

#### *New section 44C – Commission to take account of Racial Discrimination Act, Sex Discrimination Act, Disability Discrimination Act and Age Discrimination Act*

200. Proposed section 44C would require the AIRC to have regard, in performing its functions, to the principles relating to discrimination in relation to employment in specified anti-discrimination legislation.

*New section 44D – Commission to take account of Family Responsibilities Convention*

201. Proposed section 44D would require the AIRC to take into account, in performing its functions, the principles embodied in the Family Responsibilities Convention particularly, but without being limited to, those relating to:

- preventing discrimination against workers who have family responsibilities (proposed paragraph 44D(1)(a)); and
- helping workers to reconcile their employment and family responsibilities (proposed paragraph 44D(1)(b)).

202. Proposed section 44D would not apply to the performance of the AIRC's functions under Part VC (Industrial Action).

*New section 44E – Safety, health and welfare of employees*

203. Proposed subsection 44E(1) would require the AIRC to take into account the provisions of any State or Territory law relating to the safety, health and welfare of employees in relation to their employment.

Proposed subsection 44E(2) would provide that proposed section 44E would not apply to the performance of a function under proposed Division 2 of Part VIA, which deals with equal remuneration for work of equal value.

*New section 44F – Commission to act quickly*

204. Proposed section 44F would require that the AIRC must perform its functions as quickly as practicable.

*New section 44G – Commission to avoid technicalities and facilitate fair conduct of proceedings*

205. Proposed section 44G would provide that the AIRC must carry out its functions in a way which avoids unnecessary technicalities and that promotes the fair and practical conduct of any proceedings under the WR Act or Schedule 1B.

**Subdivision B – Particular powers and procedures of the Commission**

206. Proposed subdivision B would provide for particular powers and procedures of the AIRC. The powers and procedures contained in this subdivision are based upon the existing powers and procedures of the WR Act but have been modified, in part to make changes consequential to the changed constitutional underpinnings of the WR Act.

*New section 44H Procedure of Commission*

207. Proposed subsection 44H(1) would set out the manner in which the AIRC must act in a proceeding under the WR Act or Schedule 1B. It would provide that:

- the procedure of the AIRC is within its discretion, subject to any contrary provisions of the WR Act, Schedule 1B and the Rules of the AIRC (proposed paragraph 44H(1)(a));

- the AIRC is not bound by the rules of evidence or bound to act in a formal manner (proposed paragraph 44H(1)(b)); and
- the AIRC must act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms (proposed paragraph 44H(1)(c)).

208. Proposed subsection 44H(2) would provide that the AIRC may determine the periods that would be reasonably necessary for the fair and adequate presentation of the cases of parties to proceedings and allow the AIRC to require cases to be presented in those periods.

209. Proposed subsection 44H(3) would provide that the AIRC may determine what evidence or argument it may require to be presented in writing and what evidence or argument it will hear orally.

*New section 44I – Particular powers of Commission*

210. Proposed section 44I draws upon the powers of the AIRC set out in pre-reform section 111 of the WR Act. Various modifications have been made to reflect the proposed changed role of the AIRC, such as the AIRC no longer having a role in certifying agreements. In addition, modifications have been made where the existing powers relate to, or rely upon, the conciliation and arbitration power.

211. Proposed subsection 44I(1) would provide particular powers in respect of proceedings before the AIRC, including the power to:

- dismiss a matter or part of a matter if it is trivial, or if further proceedings are not necessary or desirable in the public interest (proposed paragraph 44I(1)(e));
- summon any person who the AIRC considers would assist in relation to the proceeding (proposed paragraph 44I(1)(n));
- compel the production of documents and other things relating to the proceeding (proposed paragraph 44I(1)(o));
- make interim decisions (proposed paragraph 44I(1)(p)); and
- make a final decision in respect of a matter to which the proceeding relates (proposed paragraph 44I(1)(q)).

212. Proposed subsection 44I(2) would provide that the AIRC may, in writing, authorise a person to take evidence on its behalf. The person so authorised has all the powers of the AIRC to secure:

- the attendance of witnesses (proposed paragraph 44I(2)(a));
- the production of documents and things (proposed paragraph 44I(2)(b)); and
- the taking of evidence on oath or affirmation (proposed paragraph 44I(2)(c)).

213. The AIRC may impose limitations on how the person takes evidence.

214. Proposed subsections 44I(3) – (5) would specify that particular provisions in proposed subsections 44I(1) and 44I(2) do not apply to the performance of certain functions under Parts VC and VIA of the Bill, either because similar powers are provided expressly in those Parts or because those powers are inappropriate to the performance of the functions of the AIRC under those Parts.

215. Proposed subsections 44I(6) and 44I(7) would provide that where the WR Act or Schedule 1B specifies a time or a period in respect of any matter or thing, the AIRC may not extend that time or period unless it is expressly permitted to do so by the WR Act or Schedule 1B.

216. Proposed subsection 44I(8) would provide that the reference to varying or revoking an order in subsection 44I(1)(d) does not extend to awards or award-related orders. This is because Part VI which deals with awards contains particular provisions dealing with the variation or revocation of awards or award-related orders.

*New section 44J – Reference to proceedings to Full Bench*

217. Proposed section 44J would provide the manner in which proceedings may be referred to a Full Bench.

218. Proposed subsection 44J(1) would provide that where proceedings are before a single member of the AIRC, or where the AIRC is not constituted by a Full Bench, a party to the proceeding or the Minister may apply for the proceeding to be dealt with by a Full Bench on the basis that the case is of such importance that it is in the public interest that a Full Bench deal with it. Any such application must be referred to the President of the AIRC (proposed paragraph 44J(2)(a)).

219. If the President forms the opinion that the matter is of such importance that it should be dealt with by a Full Bench, the President must grant the application (proposed subsection 44J(3)) and a Full Bench must hear and determine the referred proceeding (proposed subsection 44J(4)), subject to proposed subsection 44J(5).

220. In dealing with the proceeding, the Full Bench may do either or both of the following:

- have regard to any evidence and arguments raised in the original proceeding (proposed paragraph 44J(5)(a));
- refer a part of the proceeding to a single member, which might include the member from whom the proceeding was originally referred, for hearing and determination (proposed paragraph 44J(5)(b)).

221. The President may authorise a member of the AIRC to take evidence for the purposes of the proceeding, prior to a Full Bench being established to deal with the matter, and the Full Bench must have regard to that evidence (proposed subsection 44J(6)).



222. The President or the Full Bench may direct a member of the AIRC to provide a report in relation to a specified matter. This report must be provided to either the President or Full Bench (proposed subsections 44J(7) and 44J(8)).

*New section 44K – President may deal with certain proceedings*

223. Proposed subsection 44K(1) would provide that the President of the AIRC may decide to deal with a proceeding before the AIRC, even if another member of the AIRC has already begun dealing with the proceeding.

224. If the President decides to deal with the proceeding, he or she must hear and determine the proceeding or refer it to a Full Bench (proposed subsection 44K(2)).

225. Proposed subsections 44K(3)-(5) and (7)-(8) relevantly mirror those in proposed subsections 44J(4)-(9).

*New section 44L – Review on application by Minister*

226. Proposed subsection 44L(1) would provide that the Minister may apply to the President of the AIRC for a Full Bench review of an award, order, or a decision relating to the making of an award or order, made by a member of the AIRC under the WR Act or Schedule 1B. The Minister may make such an application if it appears to the Minister that the award, order or decision is contrary to the public interest.

227. When the Minister makes an application for a review, the President must establish a Full Bench to hear and determine the application (proposed subsection 44L(2)).

228. The Full Bench must carry out a review if it considers that the matter is of such importance that in the public interest the award, order or decision should be reviewed (proposed subsection 44L(3)). The AIRC must ensure that each person or organisation bound by the award, or who otherwise has an interest in the review, is made aware of the review and the Minister has a right to intervene (proposed subsection 44L(6)).

229. The powers of the AIRC when dealing with appeals under subsections 45(4)-(8) and subsections 45A(4)-(8) relevantly apply in relation to a review under this section.

230. Nothing in proposed section 44L would affect the right of appeal or any power of a Full Bench under sections 45 or 45A. Any appeals under those sections may be dealt with at the same time as a review under proposed section 44L (proposed subsections 44L(8) – (9)).

231. Proposed subsection 44L(7) would provide that each provision of the WR Act relating to the performance of the AIRC's functions in relation to awards, also applies to the AIRC's performance of functions when undertaking a review.

*New section 44M – Compulsory conferences*

232. Proposed section 44M would provide that, for the performance of a function, or the exercise of a power under the WR Act or Schedule 1B, a member of the AIRC may direct a person to attend a conference presided over by a member of the AIRC or another person nominated by the President. The direction may be made on the initiative of the member or on application made by a party to, or an intervener in, the proceeding (proposed subsection 44M(1)).

233. The member of the AIRC may direct anyone to attend a conference if the member considers that his or her presence would assist in the performance of a function under the WR Act or Schedule 1B (proposed subsection 44M(2)).

234. The conference must be held in private, unless the person presiding over the conference directs otherwise (proposed subsection 44M(3)).

235. Proposed subsection 44M(4) would provide that proposed section 44M would not apply to the operation of the performance of a function under Part VC (Industrial Action).

*New section 44N – Power to override certain laws affecting public sector employment*

236. Proposed subsection 44N(1) would provide that, where the AIRC is performing a function that involves public sector employment, the AIRC may make an award or order that is not, or in its opinion may not be, consistent with a *relevant law* of the Commonwealth or of an internal Territory. *Relevant law* is defined in proposed subsection 44N(2) to mean specified laws or a prescribed Act or enactment, or prescribed provisions of an Act or enactment.

237. Proposed subsection 44N(3) would provide that proposed section 44N does not apply to the performance of a function under Part VIA.

*New section 44O – State authorities may be restrained from dealing with matter that is before the Commission*

238. Proposed section 44O would allow the AIRC to make an order restraining a State industrial authority from dealing with a matter that is the subject of a proceeding before the AIRC under the WR Act or Schedule 1B. A State industrial authority would be required to cease dealing or refrain from dealing with the matter (proposed subsection 44O(2)). An award, order, decision or determination of a State industrial authority made in contravention of an order of the Full Bench under this proposed section would be void to the extent of the contravention (proposed section 44O(3)). This proposed section is based on section 128 of the WR Act.

*New section 44P – Joint sessions of Commission*

239. Proposed section 44P would provide that the President may direct the AIRC to form a joint session for the purpose of taking evidence or hearing an argument, in circumstances where the President considers that a question is common to two or more proceedings before the AIRC.

*New section 44Q – Revocation and suspension of awards and orders*

240. Proposed section 44Q would deal with the revocation and suspension of awards and orders.

241. An organisation, an interested person or the Minister could apply to the President for action by a Full Bench under proposed section 44Q(1). The President would be required to refer the application to a Full Bench for hearing and determination (proposed subsection 44Q(2)).

242. In addition, a member of the AIRC or a Registrar could refer a matter to the President for action under proposed subsection 44Q(1)). The President could establish a Full Bench to hear and determine the matter, but would not be required to do so (proposed subsection 44Q(3)).

243. Under proposed subsection 44Q(4), the Full Bench could make an order revoking, or suspending for a period of time, an award or order or any terms of an award or order, if it appeared to the Full Bench that:

- an organisation had contravened the WR Act, Schedule 1B or an award or order of the AIRC; or
- a substantial number of members of an organisation refuse to accept employment either at all or in accordance with certain terms of an existing award or order; or
- the award or order should be suspended or revoked in whole or in part for any other reason.

244. The Full Bench would have certain specified powers to make other orders as it thinks appropriate in relation to the operation of the revocation or suspension of any other award or order in accordance with proposed subsection 44Q(5). Under proposed subsection 44Q(6), the revocation or suspension of all or any terms of an award or order, may be expressed to apply only in relation to:

- a particular person or organisation bound by the award or order;
- a branch of an organisation;
- a class of members of an organisation; or
- a particular locality.

General Powers of the Commission

245. The following proposed amendments relate to appeals to the Full Bench and references to a court.

**Item 21 – Paragraph 45(1)(a)**

**Item 22 – Paragraph 45(1)(b)**

**Item 23 – Paragraph 45(1)(d)**

- Item 24 – Paragraph 45(1)(da)**
- Item 25 – Paragraphs 45(1)(e) and (eaa)**
- Item 26 – Paragraph 45(1)(eba)**
- Item 27 – Paragraphs 45(1)(ea) and (eb)**
- Item 28 – Paragraph 45(1)(ed)**
- Item 29 – Paragraphs 45(3)(ab) and (ac)**
- Item 30 – Paragraphs 45(3)(ad), (b) and (ba)**
- Item 31 – Subparagraphs 45(3)(baa)(i) and (ii)**
- Item 32 – Paragraph 45(3)(bab)**
- Item 33 – Paragraph 45(3)(bb)**
- Item 34 – Subsection 45(3) (note)**
- Item 35 – Subsection 45(3A)**
- Item 36 – Subsection 45(3B)**
- Item 37 – Paragraph 45(7)(d)**
- Item 38 – Subsection 45(9)**
- Item 39 – Paragraph 45A(1)(b)**
- Item 40 – Paragraph 45A(1)(d)**
- Item 41 – Paragraph 45A(7)(d)**
- Item 42 – Subsections 48(1A) and (1B)**

246. Items 21, 22, 32 and 39 would make amendments that are consequential to the changes to the constitutional underpinnings of the provisions.

247. Items 23, 26, 33, 37, 40, 41 and 42 would amend paragraphs 45(1)(d), 45A(1)(d) and 45(1)(eba) to update cross references to other provisions of the WR Act to take into account other amendments proposed by the Bill.

248. Item 25 would repeal pre-reform paragraphs 45(1)(ea) and (eb) which purport to confer jurisdiction on the Full Bench of the AIRC to hear appeals against opinions, orders or decisions of the AIRC made under sections 127A and 127B. These paragraphs are no longer required because the jurisdiction of the Full Bench of the AIRC to hear unfair contracts matters under pre-reform sections 127A and 127B was removed by the *Industrial Relations Reform Act 1993* and vested in the Federal Court of Australia.

249. Item 27 would repeal paragraphs 45(1)(ea) and (eb). These paragraphs refer to the AIRC hearing matters about independent contractors. Since 1993 independent contractor matters have been heard by the Federal Court.

250. Item 28 would make a consequential amendment to pre-reform paragraph 45(1)(ed) to omit ‘certified agreement’ and substitute ‘workplace agreement’ to reflect a change in

terminology. This paragraph would provide that an appeal lies to the Full Bench of the AIRC from a decision of the AIRC to vary, or not to vary, an award or workplace agreement referred to the AIRC by the Human Rights and Equal Opportunity Commission (HREOC).

251. Item 31 would repeal subparagraphs 45(3)(baa)(i), which refers to ‘a person bound by the certified agreement’, and (ii), which refers to ‘an employee whose employment is subject to the certified agreement’, and replace it with a reference that now refers to ‘an employer, employee or organisation bound by the award’.

252. Items 24, 30, 34, 35 and 36 make amendments to the provisions relating to Victoria.

253. Item 24 would repeal paragraph 45(1)(da) – which provides an appeal right in relation to aspects of common rule. The changes proposed to Part VI of the WR Act include removing specific provision for making common rule orders. This paragraph is therefore no longer required.

254. Item 30 would repeal paragraph 45(3)(ad) which specifies who can bring an appeal under paragraph 45(1)(da). This amendment is consequential upon item 24, which would repeal paragraph 45(1)(da).

255. Item 34 would repeal the legislative note to subsection 45(3). The legislative note refers to subsection 170MBA(2) as applied and modified by section 494 of the WR Act. Significant changes are proposed to the agreement making provisions of the WR Act, including in relation to the manner in which such agreements come into operation. As the AIRC will no longer have a role in relation to workplace agreements, it is not necessary to provide for appeals against AIRC decisions.

256. Item 35 would repeal subsection 45(3A), which provides a Minister of Victoria with a right to intervene in certain AIRC proceedings. This provision would be replaced, in part, by proposed subsection 504(2), which would require the AIRC to grant leave to intervene in an appeal against a decision of the AIRC under subsection 107G(1) in certain circumstances. The repeal of paragraph 45(3A)(b) is also consequential upon item 240, which would repeal Part XV, including section 501.

257. Item 36 would repeal subsection 45(3B) which provides a Minister of Victoria with a right to intervene in certain AIRC proceedings relating to common rule orders. The changes proposed to Part VI of the WR Act include removing specific provision for making of common rule orders. This paragraph is therefore no longer required.

258. Item 38 would repeal subsection 45(9), which relates to the hearing or determination of an industrial dispute to the hearing or determination of an appeal. The existence or otherwise of an industrial dispute will no longer be relevant to the AIRC’s jurisdiction or powers.

**Item 43 – Sections 83BB and 83BC**

259. This item would repeal and replace sections 83BB and 83BC.

*New section 83BB – Functions of the Employment Advocate*

260. This section would set out the functions of the person appointed by the Governor-General under section 83BI as the Employment Advocate. A list of those functions would appear in subsection 83BB(1). The major functions in that list include:

- promoting the making of workplace agreements;
- the provision of assistance and advice to employees and employers (especially small business) in relation to workplace agreements and the Standard;
- providing education and information to employees and employers in relation to workplace agreements;
- promoting better work and management practices through workplace agreements; and
- accepting lodgment of workplace agreements and notices about the transmission of instruments.

261. The list in this subsection would not be an exhaustive list of the Employment Advocate's functions. Paragraph 83BB(1)(m) would allow the Employment Advocate to perform any other function conferred upon him or her by the WR Act, another Act, the regulations or Schedule 1B.

262. Subsections 83BB(2) and (3) would provide that the Employment Advocate must, in performing his or her functions, have regard to certain considerations.

263. Subsection 83BB(4) would provide that when the Employment Advocate is giving the Minister information and copies of documents (as part of his or her functions pursuant to paragraph 83BB(1)(i)), the regulations may require those documents to be given with such deletions as are necessary to prevent the identification of the individuals to whom those documents refer. This would allow the Employment Advocate to give non-identifying information about agreements to the Minister.

*New section 83BC – Minister's directions to Employment Advocate*

264. This proposed section would allow the Minister to give directions to the Employment Advocate specifying how the Employment Advocate must perform his or her functions. These directions would be made by legislative instrument in accordance with the *Legislative Instruments Act 2003*. Under this proposed section, the Employment Advocate would be required to comply with any direction made by the Minister. However, the Minister would not be permitted to give directions about any particular workplace agreement.

**Item 44 – Subsection 83BE(2)**

265. This item would amend subsection 83BE(2) to restrict the Employment Advocate's delegation of his or her functions relating to the authorisation of multiple-business agreements (under paragraph 83BB(1)(h)) to his or her staff only. Under proposed section 96F, the Employment Advocate may, upon the application of an employer, authorise the making of multiple-business agreements provided certain conditions listed in that section are satisfied.

**Item 45 – Subsection 83BE(3)**

266. This item would repeal subsection 83BE(3) which presently allows the Employment Advocate to delegate certain of his or her functions to 'any person'. This capacity has never been utilised and the Employment Advocate would still be able to delegate his or her functions under subsection 83BB(1) to any person employed or appointed by the Commonwealth or a State or Territory.

**Item 46 – Division 2 of Part VIA**

267. This item would repeal Division 2 of Part VIA relating to the appointment, powers and functions of authorised officers. Under the Bill, enforcement and compliance activities related to AWAs (currently performed by authorised officers) would be performed by workplace inspectors under Part V.

**Item 47 – Section 83BS**

268. This item would repeal section 83BS and substitute a new section 83BS

*New section 83BS – Identity of parties to AWAs not to be disclosed*

269. Proposed section 83BS would simplify the existing offence provision about disclosure of information identifying a person as having made an AWA.

270. A person would commit an offence if:

- he or she discloses information that the person acquired in the course of performing duties as workplace agreement official or who acquired it from a workplace agreement official;
- that person had reasonable grounds to believe that information would identify a person as an AWA party; and
- that disclosure is neither made in the course of the person's duties as a workplace official nor required or permitted under legislation nor with the consent of the AWA party concerned.

271. The proposed maximum penalty for this offence would be 6 months imprisonment.

272. Subsection 83BS(2) would define *workplace agreement official* to mean the Employment Advocate, a delegate of the Employment Advocate or a member of the Employment Advocate's staff.

### Illustrative Example

Bob (a workplace agreement official) and Sam are having a drink after work. Bob recently discovered, in the course of performing his usual duties, that their mutual friend, Lisa, is engaged on an AWA. Bob accidentally mentions this to Sam. Under proposed section 83BS, Bob has committed an offence because the disclosure of the information was not in the course of his duties and was not authorised. It could also be an offence for Sam to disclose the information about Lisa she has acquired from Bob to any other person.

### Item 48 – Section 83BT

273. This item would amend section 83BT which allows the Employment Advocate to publish or make available copies of, or extracts from, AWAs or ancillary documents. This proposed amendment would replace the reference in that section to ‘AWAs or ancillary documents’ with ‘workplace agreements’, thereby broadening the application of this section to include individual agreements and collective agreements. This is consistent with the Employment Advocate’s new broader role with respect to agreement making generally.

### Item 49 – Part V (heading)

274. This item would repeal the current heading to Part V and insert a new heading which reflects the change in title of inspectors to workplace inspectors.

### Item 50 – Subsection 84(1)

275. This item would amend the reference to inspectors in this subsection bringing it in line with the change in title to workplace inspectors.

### Item 51 – Subsection 84(2)

276. This item would repeal and replace subsection 84(2) which establishes who the Minister may appoint to be an inspector under the WR Act.

277. Proposed subsection 84(2) would allow the Minister to appoint, by instrument, two classes of person as workplace inspector. The first is a person who has been appointed or is employed by the Commonwealth; the second is any other person. The term ‘instrument’ is not intended to refer to a legislative instrument for the purposes of the *Legislative Instruments Act 2003*, but rather to a written document.

### Item 52 – Subsection 84(3)

278. This item would repeal pre-reform subsection 84(3) which allows the making of arrangements with State or Territory governments for officers of the relevant State or Territory Public Service to undertake inspector functions. Such an arrangement is not required given that the Minister is able to appoint any person under proposed paragraph 84(2)(b) which would include an officer of a State or Territory public service.

279. Proposed subsection 84(3) would provide that a person appointed as a workplace inspector under paragraph 84(2)(a) (ie a Commonwealth officer or employee) holds that



appointment for the length of time specified in the regulations. Subsection 84(3A) would provide that a person appointed as a workplace inspector under paragraph 84(2)(b) (ie any other person) would hold that appointment for a period specified in the instrument of appointment. However that period could not be longer than the period specified in the regulations.

**Item 53 – Subsection 84(4)**

**Item 54 – Subsection 84(4A)**

280. These items would amend subsections 84(4) and 84(4A) which set out the powers of inspectors appointed under subsections 84(2)(a) and (b). These amendments reflect the fact that workplace inspectors will be required to enforce the provisions of a range of industrial instruments provided for in the Bill.

**Item 55 – Subsection 84(5)**

281. Subsection 84(5) presently provides that the Minister may issue directions to inspectors by notice published in the Gazette. This item would amend subsection 84(5) to refer to such directions as legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

**Item 56 – Subsection 84(6)**

**Item 57 – Subsection 85(2)**

282. These items would amend references to inspectors in these subsections bringing them in line with the change in title to workplace inspectors. They would also make technical amendments, replacing ‘shall’ with ‘must’. This is consistent with current drafting practice.

**Item 58 – At the end of section 85**

283. This item would add a new subsection to section 85 which relates to the issuing of identity cards to workplace inspectors. This proposed subsection would introduce a new offence provision relating to a workplace inspector who fails to return their identity card upon ceasing their appointment. Under this provision, a person who ceases to be a workplace inspector must return their identity card to the Secretary of the Department within 14 days of the end of their appointment. This would be a strict liability offence within the meaning of the Criminal Code.

284. The proposed maximum penalty for this offence would be 1 penalty unit.

285. It is important that identity cards be returned as soon as practicable after a workplace inspector ceases their appointment in order to prevent the improper use of such cards.

286. This is an administrative obligation provision, with a small penalty attached where strict liability is commonly applied under Commonwealth law.

**Item 59 – Subsection 86(1)**

287. This item would repeal and replace pre-reform subsection 86(1) which deals with when an inspector can exercise his or her powers of entry and inspection. The proposed subsection will reflect the range of industrial instruments provided for in the Bill.

288. Proposed subsection 86(1) would establish that a workplace inspector may exercise his or her powers for the purposes of determining whether the following are being, or have been, observed:

- workplace agreements;
- awards;
- the Standard;
- minimum entitlements and orders under Part VIA; and
- the requirements of the WR Act (other than section 541) and the regulations; or
- for the purposes of a provision of the regulations that confers powers or functions on a workplace inspector.

289. A legislative note would be inserted after this subsection to clarify that workplace inspectors have powers in relation to workplace determinations (made under Division 9 of Part VC) and undertakings (made under section 103M) because these instruments are enforceable as though they are collective agreements.

**Item 60 – Subparagraph 86(1A)(a)(i)**

290. This item would amend the purposes for which a workplace inspector may, without force, enter premises. Proposed subparagraph 86(1A)(a)(i) would permit a workplace inspector to enter a premises where he or she has reasonable cause to believe that work is being performed pursuant to an industrial instrument or entitlement under subparagraphs 86(1)(a)(i) – (iv). The amendment is necessary to reflect the range of industrial instruments provided for in the Bill.

**Item 61 – Subparagraph 86(1A)(b)(iii)**

291. This item would amend pre-reform subparagraph 86(1A)(b)(iii) to provide that a workplace inspector can interview any person, rather than just any employee as provided in the current subparagraph, when on the premises or in a place referred to in paragraph 86(1A)(a).

**Item 62 – At the end of paragraph 86(1A)(b)**

292. This item would add a new subparagraph at the end of paragraph 86(1A)(b) to allow a workplace inspector to require a person to tell them who has custody of a particular document. This proposed subparagraph would allow workplace inspectors to more quickly and accurately identify documents which are relevant to their investigations.

**Item 63 – Paragraph 86(1A)(c)**

293. This item is a technical amendment which removes redundant words in the pre-reform paragraph. These words are no longer required because proposed subsection 86(1) makes clear that workplace inspectors may only exercise their powers for the purposes set out in that provision.

**Item 64 – At the end of subsection 86(1A)**

294. This item would insert a note after subsection 86(1A) to make clear that a contravention of either the requirement to produce a document to an inspector made under subparagraph 86(1A)(b)(iv) or paragraph 86(1A)(c) may be an offence under section 305 (non-compliance with requirement made by an inspector).

**Item 65 – Subsection 86(4B)**

295. Subsection 86(4B) presently provides that a person is not excused from producing a document under paragraph 86(1A)(c) on the ground that the production of the document may tend to incriminate the person. This item would add the production of document pursuant to subparagraph 86(1A)(b)(iv) to this proposed subsection so that documents required to be produced to a workplace inspector under the two provisions are treated in the same way.

**Item 66 – Subsection 86(4C)**

296. Subsection 86(4C) presently provides for limited use immunity for a document produced to an inspector under paragraph 86(1A)(c) so that the document and information obtained as a consequence of the production of the document are not admissible as evidence in criminal proceedings, except in proceedings for an offence against section 305 (non compliance with a requirement of an inspector). This proposed amendment is consequential to the amendment at item 64 so that it provides protection against criminal prosecution where a person is compelled to produce a document despite the fact that it may incriminate them.

**Item 67 – Subsections 86(6) and (7)**

297. This item would repeal both subsection 86(6) and (7). Provisions relating specifically to Victoria are located in Parts XV and XVI. The item would insert new subsections 86(6) and (7).

*New subsections 86(6) and (7) – Extraterritorial extension*

298. Proposed subsection 86(6) would extend the application of subsection 86(1A) (powers of inspectors to enter premises and make inquiries) to premises in Australia's exclusive economic zone owned or occupied by an Australian employer (as defined in subsection 4(1)). The subsection would have effect subject to Australia's international law obligations in relation to foreign-flagged ships and foreign-registered aircraft so that consideration would need to be given to those obligations in any case where it was intended to seek to board a foreign-flagged ship or foreign-registered aircraft.

299. Proposed subsection 86(7) would extend the application of subsection 86(1A) (powers of inspectors to enter premises and make inquiries) to premises in, on or over a prescribed part of Australia's continental shelf beyond the exclusive economic zone. The extension would operate only if the premises were connected with the exploration of the continental shelf or the exploitation of its resources and the requirements prescribed in the regulations were met. In making regulations, account would be taken of Australia's international law obligations in relation to foreign-flagged ships and foreign-registered aircraft and its obligations in relation to matters in, on or over the continental shelf (including under agreements with other countries in relation to particular areas of the continental shelf). The legislative note to subsection 86(7)

would make clear that the regulations could prescribe different requirements for different parts of the continental shelf, including for reasons connected with Australia's international obligations.

**Item 68 – After section 86**

300. This item would insert a new section.

*New section 86A – Disclosure of information by inspectors*

301. This proposed section would set out the circumstances in which a workplace inspector could disclose information to another person.

302. Under this proposed section, the disclosure of information by a workplace inspector would be authorised where that workplace inspector considered, on reasonable grounds that the disclosure is:

- necessary or appropriate in the course of exercising his or her functions or duties and an inspector;
- likely to assist an officer in the administration of the *Migration Act 1958*; or
- likely to assist a officer of a State who has powers or functions in relation to the administration of a workplace relations or other employment related system.

303. This proposed section would also allow the making of regulations to prescribe Commonwealth officers to whom a workplace inspector could disclose prescribed kinds of information.

304. Proposed section 86A would provide an authorisation for disclosure of information pursuant to Information Privacy Principle 11(1)(d) of the *Privacy Act 1988*.

**Item 69 – Section 87**

305. This item would repeal pre-reform section 87 which allows the AIRC to request that the Secretary of the Department arrange for an inspector to investigate a matter affecting the safety of employees. The repeal of this section is consistent with the redefined role of the AIRC as a dispute settling body at the request of the parties concerned.

**Item 70 – Section 88**

306. This item would repeal pre-reform section 88 which requires the Secretary of the Department to prepare and provide to the Minister a report on the operation of Part V. The original purpose of this section was to implement the reporting provisions in article 20 of ILO Convention (No. 81) Concerning Labour Inspection in Industry and Commerce which require the central inspection agency to produce an annual report.

307. In Australia, unlike some other countries, the central inspection agency is the Department. Under section 63 of the *Public Service act 1999*, the Secretary of the Department is required to produce an annual report detailing the Department's activities for tabling in

Parliament. Therefore the reporting obligations under article 20 of ILO Convention No. 81 are already addressed by the requirements of the *Public Service Act 1999*. Accordingly, the repeal of section 88 would not affect Australia's compliance with its international legal obligations.

### **Item 71 – Parts VA and VI**

308. This item would repeal Parts VA and VI and substitute the following Parts:

- Part VA ~ The Australian Fair Pay and Conditions Standard;
- Part VB ~ Workplace agreements;
- Part VC ~ Industrial action;
- Part VI ~ Awards; and
- Part VIAA ~ Transmission of business rules

#### **New Part VA – The Australian Fair Pay and Conditions Standard**

309. Proposed Part VA would provide for the *Australian Fair Pay and Conditions Standard* (the Standard). The Standard will comprise the following key minimum entitlements for the employees to whom it applies:

- basic rates of pay and casual loadings (proposed Division 2);
- maximum ordinary hours of work (proposed Division 3);
- annual leave (proposed Division 4);
- personal leave, including sick, carer's and compassionate leave (proposed Division 5); and
- parental leave, including maternity, paternity and adoption leave (proposed Division 6).

310. The Standard would be subject to the general constitutional limits of the WR Act, and the jurisdictional limits set out in proposed sections 89C and 89D.

311. Specific arrangements apply in respect of some employees in Victoria who are within constitutional coverage solely due to the Victorian referral legislation (proposed Part XV).

312. The Standard would also not apply to:

- employees in the transitional conciliation and arbitration award system (Schedule 13);
- employees who are covered by pre-reform certified agreements and AWAs (Schedule 14);

- employees who come into the system and who are covered by agreements made under State systems (Schedule 15).

313. The various Divisions of Part VA also set out the types of employees to whom particular provisions of the Standard apply.

314. The Standard would perform a number of functions.

315. First, it would provide guaranteed minimum entitlements to wages and conditions for award and agreement-free employees.

316. Second, it would underpin workplace bargaining. New agreements made under the WR Act must always provide entitlements which are equal to or more favourable than the Standard. The Standard would apply throughout the life of these agreements, and would prevail over inconsistent agreement terms to the extent that it is more favourable, in a particular respect (proposed section 89A).

317. Third, it would provide the basis for the 'more generous' comparison with preserved award terms (proposed section 117C).

### **Division 1 – Preliminary**

#### *New section 89 – Purpose of Part*

318. Proposed section 89 would provide that the purpose of Part VA is to set out certain key minimum entitlements of employment, which together constitute the Standard. The key minimum entitlements that comprise the Standard relate to:

- basic rates of pay and casual loadings (proposed Division 2);
- maximum ordinary hours of work (proposed Division 3);
- annual leave (proposed Division 4);
- personal leave (proposed Division 5); and
- parental leave and related entitlements (proposed Division 6).

#### *New section 89A – Operation of the Australian Fair Pay and Conditions Standard*

319. Proposed section 89A would outline the way in which the Standard operates.

320. Subsection 89A(1) would provide that the Standard provides key minimum entitlements of employment for the employees to whom it applies (as noted above, the Standard does not apply to all employees).

321. A legislative note would point readers to the fact that the various Divisions of Part VA set out the employees to whom particular provisions of the Standard apply – for example, certain provisions relating to wages and casual loadings would only apply to casual employees. A

further legislative note would provide that the Standard is not relevant for some employees – for example those employees who are covered by pre-reform certified agreements and AWAs.

322. Subsection 89A(2) would provide that the Standard prevails over a workplace agreement or a contract of employment to the extent that it provides a more favourable outcome for the employee.

323. This provision serves two purposes.

- it would provide guaranteed minimum entitlements to wages and conditions for award – and agreement-free employees; and
- it would enable the Standard to underpin workplace bargaining.

324. New agreements made under the WR Act would be required to provide entitlements which are equal to or more favourable than the Standard. The Standard would apply throughout the life of these agreements, and would prevail over inconsistent agreement terms to the extent that it is ‘more favourable, in a particular respect’.

#### Illustrative Examples

Natalie is a waitress. Under the terms of the Bonny Teashoppe Collective Agreement which regulates Natalie’s employment, she works 38 ordinary hours per week, and is entitled to 114 hours (the equivalent of 15 days) annual leave each year. Natalie’s entitlement under the Standard would be 152 hours (the equivalent of 20 days) annual leave each year. As her entitlement under the Standard provides a more favourable outcome than under the workplace agreement, Natalie will be entitled to 152 hours (or 20 days) annual leave.

James is a hairdresser in an upmarket salon in Sydney. Under his contract of employment, he is entitled to wages of \$476 each week for 38 ordinary hours. Under the Standard, he would be entitled to the FMW of \$12.75 per hour, which equates to \$484.50 for a 38 hour week (as James is not covered by an award). As his entitlement under the Standard provides a more favourable outcome than under his contract, James will be entitled to be paid \$484.50 each week.

Lucy is a gym instructor. Her AWA states that she is entitled to maternity leave of 52 weeks, the first 6 weeks of which would be paid leave. The Standard provides for 52 weeks unpaid leave, reduced by any related authorised leave (such as paid maternity leave) she takes, and any parental leave taken by her spouse. As Lucy’s AWA is more favourable in providing paid leave, her AWA prevails in this regard.

325. Proposed subsection 89A(3) would provide that regulations may prescribe for the purposes of subsection 89A(2):

- what a ‘particular respect’ is, or is not; and
- the circumstances in which the Standard provides or does not provide a more favourable outcome in a particular respect.

326. A legislative note would provide that, for example, the regulations could prescribe the way in which particular amounts of annual leave are accrued as a particular respect under paragraph 89A(3)(a).

327. A legislative note would set out an example of a circumstance in which the Standard does not provide a more favourable outcome.

*New section 89B – Australia Fair Pay and Conditions Standard cannot be excluded*

328. Proposed section 89B would provide that a term of a workplace agreement or contract has no effect to the extent to which it purports to exclude the Standard or any part of it.

**Illustrative Example**

Mandy is a shop assistant. Her contract of employment states that she is entitled to five days personal leave and that the Standard does not apply to her employment. To the extent that a term of Mandy's contract purports to exclude the Standard, it has no effect. As the Standard provides for 10 days personal leave, and that entitlement is more favourable than under Mandy's contract of employment, she would be entitled to 10 days personal leave.

*New section 89C – This Part does not apply in relation to prescribed employees in Australia*

329. Proposed subsection 89C(1) would authorise the making of regulations to prescribe employees in Australia (by class or otherwise – see Note 1 to the subsection) to whom the provisions of the Standard do not apply. If an employee is prescribed, the Standard would not apply to the employee's employer in respect of that employee. Legislative note 1 to subsection 89C(1) would explain that, for the purposes of proposed section 89C, *Australia* includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea.

330. The purpose of the regulation making power in subsection 89C(1) would be to dis-apply the Standard on the basis of insufficiency of connection between the employee's employment and Australia. Proposed subsection 89C(2) would require that the Minister be satisfied that there was not a sufficient connection between the employee's employment and Australia. Although it would be open to the Commonwealth to apply the Standard to any employee in Australia, it may be impracticable or inappropriate to apply the Standard to some employees in Australia (for example, flight crew of a foreign airline who transit in and out of Australia, or an employee of a foreign employer on a short visit to, or tour of, Australia), and the regulation making power could be used to dis-apply the Standard to those employees.

*New section 89D – Extraterritorial operation*

331. Proposed subsection 89D(1) would extend the application of the Standard (and related provisions of the WR Act) to certain employees outside Australia and to their employers. The legislative note to subsection 89D(1) would note that, for the purposes of section 89D, *Australia* includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea.



332. In Australia's exclusive economic zone, the Standard would apply to employees of Australian employers (as defined in subsection 4(1)), unless regulations were made to dis-apply the Standard to such an employee (proposed paragraph 89D(2)(a)). Regulations could also extend the operation of provisions of the amended WR Act to other employees in the exclusive economic zone (proposed paragraph 89D(2)(b)). In making regulations, account would be taken of Australia's international law obligations in relation to foreign-flagged ships and foreign-registered aircraft.

333. In relation to employees in, on or over Australia's continental shelf beyond the exclusive economic zone, the Standard would apply only if regulations prescribed the part of the continental shelf where the employee was located and the employee met the requirements prescribed by the regulations (proposed subsection 89D(3)). In making regulations, account would be taken of Australia's international law obligations in relation to foreign-flagged ships and foreign-registered aircraft and its obligations in relation to matters in, on or over the continental shelf (including under agreements with other countries in relation to particular areas of the continental shelf). The legislative note to subsection 89D(3) would make clear that the regulations could prescribe different requirements for different parts of the continental shelf, including for reasons connected with Australia's international obligations.

334. Outside Australia and the exclusive economic zone and continental shelf, the Standard would apply to Australian-based employees of Australian employers (as those expressions would be defined in subsection 4(1)). In addition, proposed section 95E would have the effect of allowing workplace agreements to be made by Australian employers with non-Australian-based employees, and by non-Australian employers with Australian-based employees, wherever the work was to be performed. In those cases, the Standard would apply in respect of that employment. In all cases, regulations could be made to prescribe an employee outside Australia and the exclusive economic zone and continental shelf as an employee to whom the Standard does not apply (proposed subsections 89D(4) and (5)).

335. Subsection 89D(6) would provide a specific definition of *this Act* for the purposes of section 89D. This is because the definition of *this Act* in proposed subsection 4(1) (which would otherwise apply) does not include the Registration and Accountability of Organisations Schedule and regulations made under it. The specific definition would ensure that the extraterritorial extension under subsection 89D(1) would apply to that Schedule and those regulations so far as they relate to Part VA.

#### *New section 89E – Model dispute resolution process*

336. Proposed section 89E would provide that the model dispute resolution process set out in Part VIIA applies to disputes about the entitlements provided by Divisions 3 – 6 of the Standard.

## **Division 2 – Wages**

### **Subdivision A – Preliminary**

#### *Section 90 – AFPC's wage-setting parameters etc.*

337. Proposed section 90 would require the AFPC to act in accordance with its general wage-setting parameters under proposed section 7J when exercising its powers under this Division.

The Division also sets out additional considerations bearing on the exercise of the AFPC's powers.

*Section 90A – AFPC to have regard to recommendations of Award Review Taskforce*

338. Proposed section 90A provides that the AFPC shall have regard to any relevant recommendations made by the Award Review Taskforce (ART).

*Section 90B – Definitions*

339. Proposed section 90B would set out various terms used in this Division. Only key definitions are explained here.

340. *APCS* (or Australian Pay and Classification Scale) would mean a preserved APCS or a new APCS. Proposed section 90X sets out what must or may be in an APCS.

341. *APCS piece rate employee* would mean an employee who is paid a basic piece rate of pay under an APCS that determines one or more basic piece rates of pay.

342. *Basic periodic rate of pay* would be defined to exclude incentive-based payments and bonuses, loadings, monetary allowances, penalty rates or any other similar separately identifiable entitlements. This reflects the division between what matters can be contained in an APCS and what can remain in awards as allowable matters.

343. *Basic piece rate of pay* would mean a *piece rate of pay*, other than a piece rate of pay that is underpinned by a guaranteed basic periodic rate of pay. A piece rate of pay other than a basic piece rate of pay would be characterised as an incentive-based payment or bonus, which would be allowable award matters.

Illustrative Example

Keith is employed as a fruit picker by Thunder Orchards Pty Ltd which is bound by the Horticultural Industry (AWU) Award 2000. Under the award, Keith is entitled to be paid \$28 for each bin of fruit he fills. If Keith fills two bins per day, he is entitled to \$56. If he fills ten bins, his entitlement is \$280.

Under the award, Keith is not guaranteed a minimum periodic rate of pay (eg weekly rate).

Following the reform commencement, Keith would be classified as an APCS piece rate employee. His guaranteed basic piece rate of pay under the APCS derived from the Horticultural Industry (AWU) Award 2000 would be \$28 per bin of fruit.

344. *Coverage provisions* would mean provisions that determine whether a particular employee is covered by a pre-reform wage instrument as in force on the reform comparison day (the day immediately after the Bill commences) or an APCS.

345. Proposed section 90ZD sets out those provisions from a pre-reform wage instrument that are taken to be incorporated into a preserved APCS. At least initially, a preserved APCS would have the same coverage provisions as the pre-reform wage instrument from which it was derived.

346. The coverage provisions for a pre-reform wage instrument are to include legislated 'transmission of business' rules affecting coverage (if any).

347. *Employee with a disability* would mean an employee who is or would be qualified for a disability support pensions under section 94 or 95 of the *Social Security Act 1991*, but for paragraph 94(1)(e) or 95(1)(c) of that Act (which deal with the residential status of the employee).

348. *Piece rate of pay* would mean a rate of pay that is expressed as a rate for a discrete or ascertainable output or task. This rate may incorporate a piece rate loading and/or casual loading.

349. *Pre-reform federal wage instrument* would include any of the following, as in force immediately before reform commencement:

- an award (as defined in subsection 4(1) of the WR Act as in force immediately before the reform commencement), but excluding an order under section 120A of the WR Act or an award under section 170MX of the WR Act, as then in force;
- proposed sections 552 and 555 of the WR Act as in force immediately before the reform commencement. These sections would establish minimum wages and conditions for school-based apprentices and trainees, who would not otherwise be covered by an appropriate instrument; or
- any Commonwealth law or an instrument made under such a law identified in regulations made for the purposes of the definition.

350. *Pre-reform non-federal wage instrument* would mean a pre-reform State wage instrument or a pre-reform Territory wage instrument.

351. *Pre-reform State wage instrument* would mean any of the following, as in force immediately before reform commencement:

- a State award (as defined in subsection 4(1) as in force immediately before the reform commencement);
- a State law, or provision of a State law, that entitled employees or a class of employees, to a particular rate of pay; or
- a State law or provision of a State law, or an instrument made under such a law or provision that is specified, or is of a kind specified, in regulations made for the purposes of the definition.

352. *Pre-reform Territory wage instrument* would mean any of the following, as in force immediately before reform commencement:

- a Territory law, or provision of a Territory law, that entitled employees, or a particular class of employees to a particular rate of pay; or
- a Territory law or provision of a Territory law, or an instrument made under such a law or provision that is specified, or is of a kind specified, in regulations made for the purposes of the definition.

353. *Pre-reform wage instrument* would mean a pre-reform federal wage instrument or a pre-reform non-federal wage instrument. Proposed section 90ZD would establish the process by which a preserved APCS is derived from a pre-reform wage instrument.

354. *Pro-rata disability pay method* would mean a method for determining a rate of pay for employees with a disability by reference to their relative capacity, for example, a method that implements the supported wage system.

355. *Reform comparison day* would mean the day before the day this Part commences.

356. *State or Territory training authority* would mean a body authorised by a law or award of a State or Territory for the purpose of overseeing arrangements for the training of employees.

357. *Training arrangement* would mean a combination of work and training that is subject to a training agreement or a training contract between the employee and employer which is registered with the relevant State or Territory training authority or under a law of a State or Territory. This means that a training arrangement can only operate if the agreement or contract is registered in the appropriate way.

#### *Section 90C – Meaning of casual loading provisions*

358. Proposed section 90C would define *casual loading provisions* as provisions that determine a loading payable to a casual employee or a casual employee of a particular classification under a pre-reform wage instrument or an APCS.

359. Subsection 90C(2) would set out a non-exhaustive list of ways in which a casual loading may be determined which include a direct specification of a monetary amount or percentage or a method for calculating the loading payable.

360. Subsection 90C(3) would provide, subject to the regulations, that where a method for calculating a loading provided for a determination by a person or body, that determination would be taken to have been specified by the loading provisions.

361. This provision needs to be read in conjunction with:

- subsection 90X(3) which is intended to prevent an APCS from containing ‘self executing’ casual loading provisions that would otherwise provide automatic loading increases, without anyone having to take any further action; and

- paragraph 90X(4)(c) which is intended to prevent the AFPC from empowering the AIRC to determine a rate of pay or loading in a new APCS, or adjust a preserved or new APCS to do so.

*Section 90D – Meaning of classification*

362. Classification provisions are necessary in order to determine what rate of pay a particular employee is entitled to under a pre-reform wage instrument or an APCS.

363. Proposed section 90D would provide that a *classification* of employees may be described by reference to a non-exhaustive list of indicia such as the nature of the work performed and the skills or qualifications of employees. For example, a classification could set out a skills-based career path or provide specific pay rates for junior employees (eg scale of rates).

*Section 90E – Meaning of rate provisions*

364. Proposed section 90E would define *rate provisions* as provisions in a pre-reform wage instrument or an APCS that determine a basic periodic rate of pay or basic piece rates of pay for an employee of a particular classification. Subsection 90E(2) sets out a non-exhaustive list of ways in which a basic rate of pay may be determined which include a direct specification of a monetary amount, and by reference to another instrument or a method for calculating the monetary amount. For example, a rate provision may set out a method for calculating the basic rate of pay for a junior employee as a percentage of the basic rate of pay for an adult employee (21 years or older).

365. Subsection 90E(3) would provide, subject to the regulations, that where a method for calculating a rate provided for a determination by a person or body, that determination would be taken to have been specified by the rate provisions.

366. This provision needs to be read in conjunction with:

- subsection 90X(3) which is intended to prevent an APCS from containing ‘self executing’ rate provisions that would otherwise provide automatic rate increases, without anyone having to take any further action; and
- paragraph 90X(4)(c) which is intended to prevent the AFPC from empowering the AIRC to determine a rate of pay or a casual loading in a new APCS, or adjust a preserved or new APCS to do so.

**Subdivision B – Guarantee of basic rates of pay**

*Section 90F – The guarantee*

*Section 90G – Provisions affecting what hours count as hours worked*

367. Proposed section 90F would establish a statutory guarantee of basic rates of pay. An individual employee’s *guaranteed basic periodic rate of pay* would depend on whether his or her employment was covered by an APCS or an FMW. The *guaranteed basic periodic rate of pay* would be:

- for an employee whose employment is covered by an APCS (other than an APCS piece rate employee) – not less than the basic periodic rate of pay payable to the employee under the APCS (subsection 90F(1));
- for an APCS piece rate employee – not less than the basic piece rates of pay payable to the employee under the APCS (subsection 90F(2)). An employee could not be paid a basic piece rate of pay unless their employment was covered by an APCS and the rate provisions of the APCS determined one or more basic piece rates of pay that applied to the employment of the employee;
- for an employee who is not covered by an APCS (other than a junior employee, an employee with a disability, or an employee to whom a training agreement applies) – not less than the standard FMW (subsection 90F(3)); or
- for an employee who is not covered by an APCS and for whom there is a special FMW – not less than the special FMW (subsection 90F(4)).

368. These provisions, together with subsection 90G(1), would require an employee to be paid at least his or her guaranteed basic periodic rate of pay for each hour required to be worked (or pro-rated for parts of hours required to be worked).

369. Subsection 90G(2) would guarantee that, other than for a casual employee, an hour (or part thereof) that would have been worked by an employee had it not been a public holiday, would count as an hour (or part thereof) worked by the employee for the purposes of the guarantee under subsections 90F(1), (3) or (4). This provision would not guarantee any additional allowance or loading for any hours actually worked on a public holiday. Any such allowance or loading may be determined by the applicable award or workplace agreement.

370. Subsection 90G(3) would define a *public holiday* to expressly exclude a union picnic day or any other day or kind of day excluded by the regulations.

371. Subsection 90G(4) would clarify that an APCS may provide that hours attending off-the-job training by employees to whom training agreements apply may count as hours worked for the purpose of calculating the total monetary amount payable.

372. Subsection 90G(5) is an avoidance of doubt provision which would specify that any hours worked by an employee do not count as hours worked for the purpose of calculating the total monetary amount payable if the employer is prohibited from paying strike pay under section 114.

### Illustrative Example

Danielle is a piece worker who is employed by Bell Fashions Pty Ltd which is bound by the Clothing Trades Award 1999. Under the award, Danielle received a piece rate of pay per garment produced of \$12 per pair of trousers produced. It usually takes Danielle between 30 and 45 minutes to produce one pair of trousers. However, Danielle's award also stipulated that she must not be paid less than \$13.20 per hour for each hour worked, which is the minimum hourly classification rate for her skill level in the award.

After reform commencement, Danielle would not be an APCS piece worker because her piece rate of pay would be underpinned by a guaranteed basic periodic rate of pay. Danielle's piece rate of pay would be characterised as an incentive-based payment and remain in her award. The basic periodic rate of pay guaranteed for Danielle under the APCS derived from the Clothing Trades Award 1999 would be \$13.20 per hour. Danielle would continue to receive \$12 per pair of trousers produced, but could not be paid less than her guaranteed basic periodic rate of pay under the APCS for each hour worked. For example, if Danielle worked for 38 hours per week and produced 50 pairs of trousers, she would be paid \$600 (50 pairs multiplied by \$12 per pair). However, if she worked for 38 hours per week and only produced 20 pairs of trousers, she would be paid \$501.60 (38 hours multiplied by \$13.20 per hour).

## **Subdivision C – Guarantee of casual loadings**

### *Section 90H – The guarantee*

373. Proposed section 90H would establish the guarantee of casual loadings for casual employees. It makes it clear that a casual loading is only guaranteed if the employee has a guaranteed basic periodic rate of pay under proposed section 90F. The intention behind proposed section 90H is to ensure that employees who are covered by an APCS are guaranteed the casual loading under that instrument. It also ensures that casual employees covered by a workplace agreement or whose guaranteed rate of pay is the FMW are guaranteed the default casual loading.

374. Subsection 90H(1) provides that the guarantee of casual loadings does not apply to a casual employee covered by an APCS if that APCS does not contain an applicable casual loading provision, and the casual employee is was not covered by a workplace agreement.

375. Subsection 90H(2) would require a casual employee (other than a casual employee excluded under subsection 90H(1)) to be paid a casual loading that was at least equal to the amount determined by multiplying the employee's guaranteed casual loading percentage by his or her actual basic periodic rate of pay. For example, if the actual basic periodic rate of pay for an employee is \$15.00 per hour and the APCS contains a casual loading provision that provides for a 25 per cent loading, a casual employee whose employment is covered by the APCS would be entitled to \$18.75 per hour for each hour worked.

376. An individual casual employee's guaranteed casual loading percentage would depend on whether the employee's basic periodic rate of pay is determined by an APCS, a workplace agreement or the FMW. The *guaranteed casual loading percentage* would be:

- for a casual employee whose basic periodic rate of pay is determined by an APCS – not less than the casual loading percentage payable to the employee under the APCS (paragraph 90H(3)(a));
- for a casual employee whose basic periodic rate of pay is determined by a workplace agreement – the default casual loading percentage (paragraph 90H(3)(b)); or
- for a casual employee whose basic periodic rate of pay is the FMW – the default casual loading percentage (paragraph 90H(3)(c)).

*Section 90I – Default casual loading percentage*

*Section 90J – Adjustment of default casual loading percentage*

*Section 90K – Only one default casual loading percentage*

377. Proposed section 90I would set the *default casual loading percentage* at 20 per cent.

378. Proposed section 90J would allow the AFPC to adjust the default casual loading percentage, subject to various considerations that limit or affect the AFPC's wage-setting powers. For example, the AFPC would be required to ensure that the guaranteed casual loading percentage for a particular employee is not less than the guaranteed casual loading percentage that the employee would have received immediately after reform commencement.

379. To avoid doubt, proposed section 90K would provide that in exercising its wage-setting powers, the AFPC must ensure that there is only one default casual loading percentage at any given time.

**Illustrative Example**

Mark is employed as a casual cleaner by Jacqui's Sparkling Cleaners in Melbourne under the Building Services (Victoria) Award 2003. Under the award, Mark is entitled to a casual loading of 25 per cent on top of his basic periodic rate of pay.

Following reform commencement, Mark's casual loading percentage of 25 per cent would be part of the APCS derived from the Building Services (Victoria) Award 2003.

While Mark remained employed under the award, he would be guaranteed a casual loading percentage of 25 per cent under the APCS.

If Mark negotiated a workplace agreement with his employer, he would be guaranteed the default casual loading percentage as part of the Standard. If the workplace agreement was subsequently terminated, Mark would be guaranteed the casual loading percentage of 25 per cent from his APCS.

**Subdivision D – Guarantee against reductions below pre-reform commencement rates**

380. Subdivision D would guarantee that the minimum rates of pay or casual loading for an employee cannot be less than the minimum rates of pay or casual loading that would have been payable to the employee had he or she been in their current circumstances of employment



immediately after reform commencement. This guarantee would be maintained by imposing limitations on the exercise of the AFPC's wage-setting powers to adjust the standard FMW, to adjust an APCS, to determine a new APCS or to revoke an APCS. This guarantee relies on the following key concepts:

- *commencement guaranteed basic periodic rate* – which would mean the guaranteed basic periodic rate of pay for the employee if he or she had, at that time, been in his or her current circumstances of employment immediately after the reform commencement (paragraph 90L(1)(c));
- *resulting guaranteed basic periodic rate* – which would mean the guaranteed basic periodic rate of pay for the employee immediately after the AFPC's exercise of wage-setting powers takes effect (paragraph 90L(1)(b));
- *commencement guaranteed casual loading percentage* – which would mean the guaranteed casual loading percentage for the employee if he or she had, at that time, been in his or her current circumstances of employment immediately after reform commencement (paragraph 90N(3)(b));
- *resulting guaranteed casual loading percentage* – which would mean the guaranteed casual loading percentage for the employee immediately after the AFPC's exercise of wage-setting powers takes effect (paragraph 90N(3)(a)); and
- *current circumstances of employment* – in relation to an employee, includes any current circumstances of or relating to the employee's employment (proposed section 90B). This involves looking at a range of factual issues such as whether the employee is covered by an APCS, who the employee's employer is, whether the employee was employed by that employer at reform commencement, whether the business commenced after the reform commencement and whether there has been a transmission of business.

*Section 90L – The guarantee where only basic periodic rates of pay are involved*

381. Proposed section 90L would provide a minimum wage guarantee to employees who have a guaranteed basic periodic rate of pay. It would guarantee that the employee cannot be paid less than the basic periodic rate of pay that would have been payable to an employee in the same circumstances as that employee immediately after reform commencement. This guarantee constrains the exercise of the AFPC's wage-setting powers to adjust the standard FMW, to adjust an APCS, to determine a new APCS or to revoke an APCS.

382. Subsection 90L(3) would require the AFPC to take into account the effect of any other exercise of its powers taking effect at the same time.

383. Subsection 90L(4) would exclude the section's operation in relation to the AFPC's power to make an APCS pursuant to proposed sections 90ZP or 90ZQ (special APCSs in relation to employees with a disability or employees to whom training arrangements apply).

### Illustrative Example

Jacob is employed as a full-time boilermaker in a small factory in Western Sydney owned by Barker Boilermakers. The business was started up by Barker Boilermakers after the reform commencement.

Barker Boilermakers is currently covered by a preserved APCS that was derived from a federal pre-reform wage instrument, the Metal, Engineering and Associated Industries Award 1998. Barker Boilermakers is covered by that APCS because it is a member of an employer association that is covered by the APCS.

To determine whether there is a commencement guaranteed basic periodic rate of pay for Jacob, it is necessary to work out whether there would have been a guaranteed basic periodic rate of pay for Jacob immediately after the reform commencement, had he been, at that time, in his current circumstances of employment. Accordingly, it is necessary to consider what Jacob's situation would have been had the business been in existence at that time.

If Jacob had been in his current circumstances of employment immediately after the reform commencement, his employment would have been covered by his current APCS. Jacob's commencement guaranteed rate would be worked out by looking at his classification and rate of pay in the preserved APCS as it was immediately after the reform commencement.

### Illustrative Example

Samantha is employed as a full-time clerical worker for Waterhouse Fabrics, a manufacturer based in Sydney, NSW. Samantha joined Waterhouse Fabrics before the reform commencement.

Before the reform commencement, Samantha's employment was covered by the NSW Clerical and Administrative Employees (State) Award. On reform commencement, a preserved APCS was derived from that award, and from that time covered Samantha's employment. The preserved APCS was revoked and replaced by a new APCS made by the AFPC, which consolidated and simplified a number of APCSs. The coverage rules for the new APCS were not described by reference to State or Territory boundaries.

Samantha's commencement guaranteed basic periodic rate of pay is her guaranteed basic periodic rate of pay as it was under the preserved APCS immediately after the reform commencement.

When making the new APCS, the AFPC would have been required to ensure that Samantha's basic periodic rate of pay did not fall below her commencement guaranteed basic periodic rate of pay, or the FMW, whichever was higher.

### *Section 90M – The guarantee where basic piece rates of pay are involved*

384. Proposed section 90M would provide a minimum wage guarantee to APCS piece rate employees. It would guarantee that an APCS piece rate employee cannot be paid less than the basic pay per week that an APCS employee of average capacity in the same circumstances as

that employee would have been paid immediately after reform commencement. Accordingly, the AFPC must exercise its wage-setting powers in a way that it considers will not result in an employee of average capacity affected by the decision being entitled to less pay per week than would have been payable to that employee immediately after reform commencement.

385. This provision deals with situations where the AFPC makes or adjusts an APCS basic piece rate of pay for an employee (whether or not that employee was an APCS piece rate employee prior to the AFPC's decision taking effect) or adjusts an APCS so that an employee who was an APCS piece rate employee immediately before the decision is paid a basic periodic rate of pay immediately after the AFPC's decision takes effect.

386. Where an employee would be entitled to a basic piece rate after the AFPC's decision takes effect and that employee would have had a guaranteed piece rate of pay immediately after reform commencement, the AFPC must exercise its powers in a way that it considers will not result in that employee receiving a lower basic piece rate than would have been payable to that employee had he or she been in their current circumstances of employment immediately after reform.

387. However, if the employee was either:

- entitled to a periodic rate of pay before the AFPC exercised its wage-setting powers, but would be entitled to a piece rate of pay after the AFPC exercised its wage-setting powers; or
- entitled to a piece rate of pay before the AFPC exercised its wage-setting powers, but would be entitled to a periodic rate of pay after the AFPC exercised its wage-setting powers;

the AFPC must use the concept of the 'employee of average capacity'.

388. The inclusion of this concept would enable basic piece rates of pay to be converted into a basic periodic rate of pay or vice versa for the purposes of making comparisons under this Subdivision. For example, if the AFPC adjusts an APCS so that an employee that was an APCS piece rate employee at reform commencement becomes entitled to a guaranteed basic periodic rate of pay after the AFPC decision takes effect, the AFPC must set that basic periodic rate of pay at a level that it considers would not be less than an APCS piece rate employee of average capacity in the same circumstances as the employee would have received as basic pay immediately after reform commencement.

389. Subsection 90M(3) would require the AFPC to take into account the effect of any other exercise of its powers taking effect at the same time.

390. Subsection 90M(4) would exclude the section's operation in relation to the AFPC's power to make an APCS pursuant to proposed section 90ZP or 90ZQ (special APCSs in relation to employees with a disability or employees to whom training arrangements apply).

*Section 90N – The guarantee for casual loadings that apply to basic periodic rates of pay*

391. Proposed section 90N would provide a guarantee to a casual employee that if the AFPC proposes to exercise any of its powers listed in paragraph 90N(1)(a) such as adjusting the default casual loading percentage or an APCS, it must ensure that the casual loading percentage that applies to the basic periodic rate is not less than the casual loading percentage that would have been payable to that employee had he or she been in their current circumstances of employment immediately after reform commencement.

392. The guarantee would require there to be both a resulting guaranteed casual loading percentage and a commencement guaranteed casual loading percentage for the employee affected by the decision. Accordingly, the guarantee could not apply to an employee who became an APCS piece rate employee after the AFPC's decision took effect or who was an APCS piece rate employee at reform commencement.

393. If the resulting guaranteed casual loading percentage was the default casual loading percentage, subsection 90N(4) would deem that the commencement guaranteed casual loading percentage would be the initial legislated default casual loading percentage of 20 per cent.

394. Subsection 90N(5) would require the AFPC to take into account the effect of any other exercise of its powers taking effect at the same time.

**Subdivision E – The guarantee against reductions below Federal Minimum Wages (FMWs)**

*Section 90O – The guarantee*

395. Proposed section 90O would guarantee that an employee (other than an APCS piece rate employee) covered by an APCS cannot be paid less than an applicable FMW (either the standard FMW as determined under proposed sections 90Q and 90R or a special FMW determined under proposed section 90S).

396. Subsection 90O(1) would require the AFPC to ensure that the basic periodic rate of pay that would be payable to an employee under an APCS immediately after the exercise of power by the AFPC is not below an FMW that covers that employee.

397. The legislative note would make it clear that the guarantee does not apply to basic periodic rate of pay initially included in a preserved APCS that is derived from a pre-reform wage instrument. Proposed section 90O would only apply to any subsequent adjustment of those basic periodic rates of pay, or to any new APCS that replaced the preserved APCS.

398. Subsection 90O(3) would provide that the guarantee that an employee cannot be paid less than an applicable special FMW does not apply unless:

- the AFPC determined that the special FMW in question would operate as a minimum standard for one or more APCSs (proposed section 90T); and
- the exercise of wage-setting powers by the AFPC affects one of the APCSs covered by that special FMW.

399. Subsection 90O(4) would require the AFPC to take into account the effect of any other exercise of power by the AFPC taking effect at the same time.

### **Subdivision F – Federal Minimum Wages (FMWs)**

400. Proposed Subdivision F would establish a Federal Minimum Wage (FMW) and empower the AFPC to determine special FMWs.

#### *Section 90P – When is there an FMW for an employee*

401. Proposed section 90P would set out when there is an FMW for a particular employee.

402. Subsection 90P(1) would establish that the standard FMW applies to every employee covered by the federal workplace relations system other than:

- a junior employee (paragraph 90P(1)(a));
- an employee with a disability (as defined in proposed section 90B) (paragraph 90P(1)(b));
- an employee to whom a training agreement applies (including ‘school-based apprenticeships’) (paragraph 90P(1)(c)); or
- an APCS piece rate employee (paragraph 90P(1)(d)).

403. Subsections 90P(2) – (4) would set out when there is a special FMW for a junior employee, an employee with a disability, or an employee to whom a training agreement applies. For example, there would be a special FMW for a junior employee if the AFPC set a special FMW under proposed section 90S for junior employees and the special FMW either applied to all junior employees or to a class of junior employees that included the particular junior employee.

404. Where there is no applicable FMW, the employee would be guaranteed the basic periodic rate of pay as provided under Subdivision B.

#### *Section 90Q – Standard FMW*

#### *Section 90R – Adjustment of standard FMW*

405. Proposed section 90Q would fix the initial standard FMW at \$12.75 per hour, subject to the power of the AFPC to adjust the standard FMW.

406. Proposed section 90R would empower the AFPC to adjust the standard FMW, subject to various considerations or limitations on the exercise of its wage-setting powers. For example, paragraphs 90R(2)(b) – (c) would guarantee that the standard FMW could not be adjusted below the initial legislated rate of \$12.75 per hour.

*Section 90S – Determination of special FMWs*

*Section 90T – AFPC to state whether special FMW is a minimum standard for APCSs*

*Section 90U – How a special FMW is to be expressed*

*Section 90V – Adjustment of a special FMW*

407. Proposed section 90S would empower the AFPC to determine a special FMW for any of the following groups:

- all junior employees, or a class of junior employees (paragraph 90S(a));
- all employees with a disability, or a class of employees with a disability (paragraph 90S(b)); or
- all employees to whom training agreements apply, or a class of employees to whom training agreements apply (paragraph 90S(c)).

408. Proposed section 90T would empower the AFPC to determine whether a special FMW should operate as a minimum standard. The AFPC may determine that a special FMW should operate as a minimum standard for all APCSs, for a class of APCSs or for a single APCS. For example, the AFPC could determine a special FMW for all junior employees that operates as a minimum standard. This special FMW could set out a scale of rates according to the age of the junior.

409. Subsections 90T(2) – (4) would prescribe how the instrument determining the special FMW should be expressed so as to identify which APCS the special FMW applies to.

410. Proposed section 90U would require a special FMW to be expressed in a way that produces a monetary amount per hour. It would make clear that this includes (but is not limited to) direct specification of a single dollar amount per hour (eg \$13.75 per hour), several monetary amounts per hours (eg a scale of rates) or by specifying a method or methods for calculating a dollar amount per hour (eg as a percentage of another rate).

411. Proposed section 90V would empower the AFPC to adjust a special FMW, subject to the provisions listed in subsection 90V(2). To avoid doubt, subsection 90V(3) would make it clear that the AFPC may adjust a statement determining a special FMW, including which APCSs the special FMW applies to.

**Subdivision G – Australian Pay and Classification Scales (APCSs): general provisions**

412. Proposed Subdivision G would establish the legal framework for APCSs.

*Section 90W – What is an APCS?*

413. Proposed section 90W would define an APCS as a set of provisions that relate to pay and loadings for particular employees such as rate provisions (as defined in proposed section 90E), classifications (as defined in proposed section 90D), casual loading provisions (as defined in proposed section 90C) and coverage provisions (as defined in proposed section 90B).

414. Subsection 90W(2) would clarify that an APCS includes both a preserved APCS (an APCS that is derived from a pre-reform wage instrument under proposed section 90ZD) or a new APCS that is determined by the AFPC under proposed section 90ZJ.

*Section 90X – What must or may be in an APCS*

415. Proposed section 90X would prescribe content rules for APCSs. Subsection 90X(1) would provide that an APCS must contain:

- rate provisions that set out basic periodic and/or piece rates of pay (paragraph 90X(1)(a));
- classifications – where the rate provisions provide different basic periodic and/or piece rates of pay depending on the particular classification (paragraph 90X(1)(b)); and
- coverage provisions so as to determine which employees are covered by the APCS (paragraph 90X(1)(c)).

416. Subsection 90X(2) would provide that an APCS may also contain:

- casual loading provisions for casual employees (other than piece rate employees – whose casual loading, if any, may be factored into their basic piece rates of pay) (paragraph 90X(2)(a));
- classifications – where the loading provisions provide different casual loadings depending on the particular classification (paragraph 90X(2)(b));
- provisions relating to employees to whom training arrangements apply that stipulate whether hours attending off-the-job training (including hours attending an educational institution) count as hours worked (paragraph 90X(2)(c)). This affects an employee’s guaranteed basic periodic rate of pay under proposed section 90F; and
- other incidental provisions (paragraph 90X(2)(d)) such as provisions that may prescribe when an employee actually receives wages. For example, many wage instruments provide that wages are paid fortnightly in arrears.

417. Subsections 90X(3) – (6) would set out a range of provisions that cannot be included in an APCS. For example, subsection 90X(3) would prevent the AFPC from including a provision in an APCS that would otherwise automatically enable a rate or casual loading to be increased. The legislative note would set out some common examples of the types of ‘self-executing’ provisions that would be excluded from rate and loading provisions in APCSs. The legislative note would make it clear that the subsection does not prevent the AFPC from determining that an APCS, or an adjustment to an APCS, takes effect from a specified date.

418. Subsection 90X(4) would prevent the AFPC from including a provision in an APCS that would determine whether an employer who acquired a business (whether by transfer or in some other way) was covered by the APCS (paragraph 90X(4)(a)). Part VIAA sets out transmission of

business rules. Subsection 90X(4) would also prohibit provisions that allow a person or body to determine whether a particular employee was covered by an APCS (paragraph 90X(4)(b)) or which allow the AIRC to determine a rate of pay or casual loading (paragraph 90X(4)(c)).

419. The legislative note would make it clear that subsection 90X(4) would not prevent a preserved APCS from containing provisions otherwise prohibited by subsection 90X(4) that were contained in the pre-reform wage instrument from which the APCS was derived. The effect of such provisions, however, would be limited by proposed section 90Z (which sets out when the employment of a particular employee is covered by a particular APCS) and proposed section 90ZE (which allows for notional adjustments to be made to preserved APCSs immediately after reform commencement).

420. Subsection 90X(5) would prevent the AFPC from including a provision in an APCS that purports to limit the duration of an APCS. This means that, subject to the power of the AFPC to revoke an APCS, once made an APCS will operate indefinitely.

421. Subsection 90X(6) would, subject to the regulations, prevent the AFPC from including in an APCS any provisions other than those required or allowed under this Subdivision.

*Section 90Y – How pay rates and loadings are to be expressed in an APCS*

422. Proposed section 90Y would set out the rules for how rate provisions and casual loadings are expressed in an APCS. It would require basic periodic rates of pay to be expressed as monetary amounts per hour, basic piece rates of pay to be expressed as a monetary amount and casual loading provisions to be expressed as a percentage of the basic periodic rate of pay.

423. Proposed section 90E, which defines rate provisions, makes it clear that a rate provision may specify or refer to a rate of pay, or specify or refer to a method for calculating a rate. Similarly, proposed section 90C, which defines casual loading provisions, makes it clear that a loading provision may specify or refer to a loading, or specify or refer to a method for calculating a loading.

424. Note that proposed section 90ZG provides for notional adjustments to preserved APCSs to ensure that basic periodic rates of pay are expressed as hourly rates of pay and casual loading provisions are expressed as percentages of the basic periodic rates of pay.

425. Subsection 90Y(4) would require the AFPC to comply with these rules when exercising its powers to make a new APCS or adjust an APCS.

*Section 90Z – When is employment covered by an APCS?*

426. Proposed subsection 90Z(1) would provide that the coverage provisions in an APCS determine when a particular employee is covered by that APCS.

427. To avoid doubt, subsection 90Z(2) would provide that provisions determining whether an employer who acquired a business (whether by transfer or in some other way) was covered by the preserved APCS only have effect in relation to acquisitions of businesses before the reform



commencement. Part VIAA sets out transmission of business rules after reform commencement which affect whether an employee is covered by a particular APCS.

428. Similarly, to avoid doubt, subsection 90Z(3) would provide that provisions which allow a person or body to determine whether an employee is covered by a preserved APCS only have effect in relation to decisions made before the reform commencement. After reform commencement only the AFPC can adjust coverage provisions of an APCS.

*Section 90ZA – What if 2 or more APCSs would otherwise cover an employee?*

429. Proposed section 90ZA would provide for priority rules to determine when one APCS prevails over another APCS.

*Section 90ZB – AFPC to remove coverage rules described by reference to State or Territory boundaries*

430. Proposed section 90ZB would require the AFPC to ensure that three years after reform commencement the coverage provisions in an APCS must not be determined by reference to State or Territory boundaries. The AFPC would fulfil this obligation by exercising its powers to adjust, revoke or make new APCSs.

431. To avoid doubt, subsection 90ZB(2) would provide that in fulfilling its obligation under this section, the AFPC must comply with obligations imposed by this Division (eg ensuring that the guaranteed basic periodic rate of pay for an employee does not fall below the pre-reform basic periodic rate of pay or an applicable FMW).

*Section 90ZC – Deeming APCS rates to at least equal FMW rates after first exercise of AFPC's powers takes effect*

432. Proposed section 90ZC would provide that an employee (other than an APCS piece rate employee) cannot be paid less than an applicable FMW, irrespective of the rate provisions in an APCS that cover that employee. This guarantee comes into operation after an exercise of the AFPC's wage-setting powers for the first time takes effect.

433. Proposed section 90ZC would provide that where an employee is covered by an APCS and an FMW, the employee is guaranteed to be paid whichever basic periodic rate of pay is higher. For example, if the employee is guaranteed \$12.50 under an APCS and would be covered by the standard FMW (see proposed section 90P), after the AFPC's exercise of wage setting powers takes effect for the first time, that employee would be guaranteed the standard FMW as it would be higher (ie \$12.75 per hour). This guarantee only applies if there is an FMW that applies to the particular employee. For example, if the AFPC determines that a special FMW will operate as a minimum standard for all junior employees and the rate of pay under that special FMW is higher than the junior rate of pay under an applicable APCS, a junior employee covered by that APCS would be entitled to be paid the rate of pay set out in the special FMW.

### Illustrative Example

Darrin is employed by DDS Pedigree Stud Farm as a Stablehand Grade I under the Federal *Horse Training Industry Award 1998*. Darrin's weekly rate of pay under the award is \$503.70.

In the award, ordinary hours of work are 40 hours per week. On reform commencement and following notional adjustments under proposed section 90ZG, Darrin's guaranteed basic periodic rate of pay will be his pre-reform weekly rate divided by the ordinary hours of work in his award.

Under this formula, Darrin's hourly rate would be \$12.59.

If the APCS that covers Darrin's employment was adjusted by the AFPC so that guaranteed basic periodic rate of pay under the APCS was higher than the FMW, Darrin would be guaranteed the basic periodic rate of pay under the APCS.

Assuming that at its first wage-setting decision, the AFPC does not adjust the APCS that covers Darrin's employment, immediately after that first wage decision takes effect, Darrin will be guaranteed the FMW as it will be higher than the basic periodic rate of pay under the APCS.

## **Subdivision H – Australian Pay and Classification Scales: preserved APCSs**

### *Section 90ZD – Deriving preserved APCSs from pre-reform wage instruments*

434. Proposed section 90ZD sets out the mechanism by which a pre-reform wage instrument, (as defined in proposed section 90B) is converted into a preserved APCS on the reform commencement. The preserved APCS would include rate provisions (as defined in proposed section 90E), classifications (as defined in proposed section 90D), casual loading provisions (as defined in proposed section 90C) and coverage provisions (as defined in proposed section 90B) derived from the pre-reform wage instrument.

435. Subsection 90ZD(3) would provide that, subject to regulations and after notional adjustments have been made to a preserved APCS under proposed sections 90ZE – 90ZH, any provision that does not comply with requirements for what an APCS must or may contain (proposed section 90X) or how rates of pay and casual loadings are to be expressed in an APCS (proposed section 90Y) is deemed not to be included in the APCS.

436. Subsection 90ZD(4) would, subject to the regulations, provide for the order of notional adjustments in proposed sections 90ZE – 90ZH are to be made.

437. Proposed section 90ZI would specify when regulations made for the purpose of subsection 90ZD(3) – (4) could be expressed to take effect.

*Section 90ZE – Notional adjustment: rates and loadings determined as for reform comparison day*

438. Proposed section 90ZE would provide for notional adjustments to ensure that, subject to subsections 90ZE(2) – (4), all preserved APCSs provide for direct specification of a rate of pay or casual loading as at the reform comparison day. For example, if an APCS specified a method for determining a junior rate of pay for each employee aged 16 to 20 by reference to a percentage of the adult rate of pay, subsection 90ZE(1) would notionally adjust the APCS to produce a specific rate of pay for each junior classification. Accordingly, if the adult wage rate was \$14 and junior rates of pay were determined as follows: 50% of the adult rate of for a 16 year old junior employee, 60 % for a 17 year old, 70% for an 18 year old, 80% for a 19 year old and 90% for a 20 year old, the notional adjustment would remove the link between adult rates of pay and junior rates of pay. Instead, the APCS would specify a rates of pay as follows: \$7 per hour for a 16 year old, \$8.40 per hour for a 17 year old, \$9.80 per hour for an 18 year old, \$11.20 per hour for a 19 year old and \$12.60 per hour for a 20 year old. This would allow the AFPC to adjust adult and junior rates of pay under the preserved APCS independently of each other.

439. Subsections 90ZE(2) – (4) provide that subsection 90ZE(1) does not apply in relation to:

- a preserved APCS derived from sections 552 and 555 of the WR Act as in force immediately before the reform commencement (which provides a method for determining basic rates of pay for school-based trainees and school-based apprentices);
- the rate provisions in an APCS that determine a rate of pay for an employee with a disability by reference to his or her assessed capacity (pro-rata disability pay method); and
- rate provisions that determine a basic piece rate of pay by (or by referring to) a method.

440. Subsection 90ZE(5) would allow for regulations to prescribe other situations where notional adjustments under subsection 90ZE(1) would not apply, or would only apply with specified modifications.

441. Subsection 90ZE(6) would provide for notional adjustments to a preserved APCS immediately after the reform commencement to ensure that casual loading provisions in that APCS provide for a direct specification of the loading as at the reform comparison day.

*Section 90ZF – Notional adjustment: deducing basic periodic rate of pay and casual loading from composite rate*

442. Proposed section 90ZF would operate where a preserved APCS specifies a basic periodic rate of pay for a casual employee that is higher than a basic periodic rate of pay for a non-casual employee and does not specifically determine a casual loading for the casual employee (ie the basic periodic rate of pay for a casual employee has an in-built casual loading). In these circumstances, proposed section 90ZF would notionally adjust the APCS immediately after the reform commencement so that the composite rate was broken down into its component parts so

that rate provisions for a casual employee covered by the APCS are expressed as a basic rate of pay without that built-in casual loading and a separate casual loading.

443. The division of the composite rate in this way would ensure that the guarantees in Subdivisions B and C operated in a consistent way for casual employees for whom there would be a basic periodic rate of pay.

*Section 90ZG – Notional adjustment: how basic periodic rates and loadings are expressed*

444. Proposed section 90ZG would provide for notional adjustments to a preserved APCS to ensure that immediately after the reform commencement all basic periodic rates would be expressed as a rate of pay per hour and all casual loadings would be expressed as a percentage of the basic periodic rate.

*Section 90ZH – Regulations dealing with notional adjustments*

445. Proposed section 90ZH would provide for regulations to prescribe other adjustments that could be taken to have been made to a preserved APCS.

446. Subsection 90ZH(2) would also enable the regulations to determine the methods for working out the adjustments in proposed sections 90ZE – 90ZG, or to otherwise clarify any aspect of those sections. Those sections would have effect accordingly.

447. Proposed section 90ZI would specify when regulations made for the purpose of the subsection could be expressed to take effect.

*Section 90ZI – Certain regulations relating to preserved APCSs may take effect before registration*

448. Proposed section 90ZI would provide for regulations made for the purpose of any of the provisions listed in subsection 90ZI(1) to take effect before their registration under the *Legislative Instruments Act 2003*.

449. Subsection 90ZI(3) would describe the interaction between regulations which would, under the section, take effect before their registration under the *Legislative Instruments Act 2003*, and the operation of the listed proposed sections.

450. While this provision allows for regulations to operate prior to their registration, it does not permit retrospective operation. However, these regulations could affect what an employee's commencement guaranteed basic periodic rate or commencement guaranteed casual loading percentage is taken to be in any prospective comparative assessment by the AFPC.

**Subdivision I – Australian Pay and Classification Scales: new APCSs**

*Section 90ZJ – AFPC may determine new APCSs*

451. Proposed section 90ZJ would empower the AFPC to determine an APCS (designated a new APCS), subject to the various considerations set out in subsection 90ZJ(2) that limit or affect the AFPC's power to determine an APCS.

**Subdivision J – Australian Pay and Classification Scales: duration, adjustment and revocation of APCSs (preserved or new)**

*Section 90ZK – Duration of APCSs*

452. Proposed section 90ZK would provide that an APCS continues indefinitely, unless it is revoked or adjusted by the AFPC or its operation is affected by proposed section 90ZA which sets out when one APCS prevails over another APCS.

*Section 90ZL – Adjustment of APCSs*

453. Proposed subsection 90ZL(1) would provide that the AFPC may adjust an APCS, subject to the various considerations set out in subsection 90ZL(2) that limit or affect the AFPC's power to adjust an APCS.

*Section 90ZM – Revocation of APCSs*

454. Proposed subsection 90ZM(1) would provide that the AFPC may revoke an APCS, subject to the various considerations set out in subsection 90ZM(2) that limit or affect the AFPC's power to revoke an APCS.

**Subdivision K – Adjustments to incorporate 2005 Safety Net Review etc.**

*Section 90ZN – Adjustments to incorporate 2005 Safety New Review*

455. Proposed section 90ZN would require the AFPC to adjust certain preserved APCSs to increase the rate provisions consistently with the AIRC's 2005 Safety Net Review decision [Print PR002005].

456. Subsection 90ZN(1) would provide that a preserved APCS can only be adjusted to accommodate the AIRC's 2005 Safety Net Review decision if before the reform commencement the wage instrument from which the preserved APCS was derived:

- was not adjusted by the AIRC in accordance with the 2005 Safety Net Review and was adjusted by the AIRC's 2004 Safety Net Review; or
- did not come into operation until after the AIRC's 2004 Safety Net Review.

457. This section ensures that an award that would have received the wage increase under the AIRC's 2005 Safety Net Review decision, but for the establishment of the AFPC, will receive that increase at the AFPC's first wage adjustment.

### Illustrative Example

Branko is employed as a Category 2 Master and Engineer under the federal *Tugboat Industry Award 1999*. The *Tugboat Industry Award 1999* received the 2004 safety net adjustment of \$19 to all award rates on 27 April 2005. In the 2005 Safety Net Review of Wages, the AIRC granted a \$17 increase to all award rates of pay. Under the AIRC's wage fixing principles, an award cannot receive the 2005 safety net adjustment until at least 12 months after it received the 2004 safety net adjustment. The earliest this could happen would be 27 April 2006.

If the AFPC assumed responsibility for setting and adjusting minimum wages for award classifications prior to this date the AIRC would no longer be able to adjust the *Tugboat Industry Award 1999*. Branko would receive his \$17 increase when the AFPC made its first wage adjustment, which would be expected to occur in Spring 2006.

458. Subsection 90ZN(3) would provide that the AFPC must exercise its powers under Subdivision K when it first exercises its powers under Division 2.

459. Subsection 90ZN(4) would provide that where the rate provisions of a preserved APCS have been adjusted to accommodate the 2005 Safety Net Review decision, the guarantee against reductions below a pre-reform basic periodic rate of pay under proposed section 90L applies to the adjusted rate provisions.

### *Section 90ZO – Regulations may require adjustments to incorporate other decisions*

460. Proposed subsection 90ZO(1) would provide that regulations may be made to require the AFPC to adjust rate provisions in a class of particular APCSs, to increase those rate provisions to take account of decisions made before commencement of the reforms but not given effect in the particular APCSs.

461. Subsection 90ZO(2) would provide that regulations made under subsection 90ZO(1) may modify the application of proposed section 90L in relation to an APCS adjusted under subsection 90ZO(1).

### **Subdivision L – Special provisions relating to APCSs for employees with disabilities and employees to whom training arrangements apply**

462. Subdivision L would remove major barriers to the employment of persons with a disability or apprentices or trainees. Where an APCS inhibits the employment of a particular category of apprentice or trainee or a person with a disability because it does not make specific provision for them, proposed sections 90ZP and 90ZQ would require the AFPC to ensure that appropriate minimum wages are available.

463. This would help ensure that all APCSs that the AFPC considers should have specific rates of pay for a class of employees with disabilities and/or a class of employees to whom training arrangements apply (eg part-time trainees or apprentices) do in fact contain such a specified rate of pay for that class.

*Section 90ZP – Employees with disabilities*

464. Proposed section 90ZP would empower the AFPC to make a ‘gap filling’ APCS to cover the employment of employees with a disability.

465. Subsection 90ZP(1) would require that where the AFPC considers that there should be an APCS that determines basic rates of pay for all, or a class of, employees with a disability, it must determine an APCS specifically for those employees.

466. Subsection 90ZP(2) would require that where the AFPC determines an APCS under subsection 90ZP(1), it must expressly state that the APCS was determined for the purpose of proposed section 90ZP.

467. Subsection 90ZP(3) would set out when an APCS made under subsection 90ZP(1) applies. It would provide that a *special APCS* operates in relation to a particular employee with a disability only where:

- another APCS does not cover that employee; or
- another APSC covers the employee but it does not determine a basic periodic rate of pay that specifically applies to a class of employees with a disability covered by the special APCS to which the employee belongs.

468. In other words, where another APCS covers an employee with a disability and that APCS specifically determines basic rates of pay for the class of employees with a disability covered by the special APCS, that APCS will prevail over the special APCS.

469. Subsection 90ZP(4) would provide that proposed section 90ZP, including subsection 90ZP(3), does not limit the powers of the AFPC to determine, revoke or adjust APCSs.

**Illustrative Example**

Anna has an intellectual disability and is qualified for a disability support pension as set out in section 94 or 95 of the *Social Security Act 1991*. King Meats operates a meat processing plant and would like to offer Anna full-time employment as a clerk, but is concerned about the employment costs associated with employing her. The APCS that would apply to Anna’s employment was derived from an award that did not include the standard supported wage system or equivalent provisions to provide for a capacity-based pay method. In the absence of such provisions, King Meats would be required to pay Anna the applicable full-time rate of pay. Anna would stand a better chance of receiving a job offer from King Meats if her basic periodic rate of pay was a pro-rata wage rate based on her assessed productive capacity.

Under proposed section 90ZP the AFPC has determined a special APCS that specifies that the standard supported wage system applies to the employment of employees with a disability. This special APCS would provide that Anna be paid the pro-rata wage rate based on her assessed productive capacity. This would provide Anna with a better chance of gaining full-time employment as an assistant administrative clerk at the meat processing plant.

*Section 90ZQ – Employees to whom training arrangements apply*

470. Proposed section 90ZQ would empower the AFPC to make a ‘gap filling’ APCS to cover the employment of employees to whom training arrangements apply.

471. Subsection 90ZQ(1) would require that, where the AFPC considers that there should be an APCS that determines basic rates of pay for all, or a class of employees to whom training arrangements apply (for example part-time trainees or apprentices), it must determine an APCS specifically for those employees.

472. Subsection 90ZQ(2) would provide that where the AFPC determines an APCS under subsection 90ZQ(1), it must expressly state that the APCS was determined for the purpose of proposed section 90ZQ.

473. For example, the AFPC could determine one or more APCSs that set out specific minimum wages for apprentices and trainees employed under full-time, part-time and school-based arrangements, undertaking apprenticeships and traineeships at different qualification levels, in different occupations and in different industries, involving different combinations of work and training, and with different progression arrangements. It would also ensure that the AFPC establishes appropriate minimum wages where State and Territory training systems develop new types of apprenticeships, traineeships or other training arrangements.

474. Subsection 90ZQ(3) would set out when an APCS made under subsection 90ZQ(1) applies. It would provide that a *special APCS* operates in relation to a particular employee to whom a training arrangement applies only where:

- another APCS does not cover that employee; or
- another APCS covers the employee but it does not determine a basic periodic rate of pay that specifically applies to a class of employees to whom a training arrangement applies covered by the special APCS to which the employee belongs.

475. In other words, where another APCS covers an employee to whom a training arrangement applies and that APCS specifically determines basic rates of pay for the class of employees to whom a training arrangement applies covered by the special APCS (for example part-time trainees or apprentices), that APCS will prevail over the special APCS.

476. Subsection 90ZQ(4) would require the AFPC to consider whether it should determine APCSs for the purpose of this section as part of its first exercise of powers under this Division. To avoid doubt, subsection 90ZQ(4) would provide that this requirement would not prevent the AFPC from re-considering the issue at any other time.

477. Subsection 90ZQ(5) would provide that proposed section 90ZQ, including subsection 90ZQ(3), does not limit the powers of the AFPC to determine, revoke or adjust APCSs.



### Illustrative Example

Lloyd is offered a carpentry and joinery apprenticeship by KE Jones Carpentry Pty Ltd. At this stage KE Jones Carpentry is only in a position to employ him four days a week, including one day a week in off-the-job training at TAFE. The APCS that would apply to Lloyd does not include wage rates for part-time apprentices.

In the absence of such provisions, KE Jones Carpentry would have to employ Lloyd on a full-time basis which it cannot afford to do. Under proposed section 90ZQ the AFPC has determined a special APCS that provides minimum wage rates for all part-time carpentry and joinery apprentices.

By virtue of proposed section 90ZQ(3), the special APCS will allow KE Jones Carpentry to engage Lloyd thereby enabling him to commence his apprenticeship on a part-time basis.

## **Subdivision M – Miscellaneous**

### *Section 90ZR – Anti-discrimination considerations*

478. Proposed section 90ZR would set out anti-discrimination considerations that the AFPC must have regard to or apply in exercising its wage-setting powers under Division 2. This section is intended to ensure that there are appropriate anti-discrimination safeguards to protect vulnerable employees.

479. Subsection 90ZR(2) would provide that, for the purpose of the Commonwealth anti-discrimination legislation specified in subsection 90ZR(1), the AFPC does not discriminate against an employee or employees by determining or adjusting rate provisions in an APCS or a special FMW determined under proposed section 90S to provide for a junior rate of pay, a trainee or apprentice rate of pay or to provide for a pro-rata disability pay method (as defined in proposed section 90B).

## **Division 3 – Maximum ordinary hours of work**

### **Subdivision A – Preliminary**

#### *New section 91 – Employees to whom Division applies*

480. Proposed section 91 would provide that this Division applies to all employees (as defined in proposed subsection 4AA(1)).

#### *New section 91A – Definitions*

481. Proposed section 91A would define concepts that are used in this Division.

482. The definition of *authorised leave* includes periods of paid or unpaid leave or absence that are authorised by the employer, and leave to which an employee is otherwise entitled under either a term or condition of employment or legislation.

*New section 91B – Agreement between employees and employers*

483. Proposed section 91B would allow for an employee and his or her employer to agree in writing to an applicable averaging period.

484. Proposed section 91B would ensure that one of the ways in which an employer and employee may be taken to have agreed about such a matter is by way of an individual or collective workplace agreement (subsection 91B(1)).

485. Subsection 91B(2) would provide that an employer and employee are taken to agree about a particular matter if and as specified in an award that binds them.

486. Subsection 91B(3) would clarify that employees and employers may agree about matters by other means.

**Subdivision B – Guarantee of maximum ordinary hours of work**

*New section 91C – The guarantee*

487. Proposed section 91C would set out the guarantee of maximum hours of work.

488. Subsection 91C(1) would set the maximum ordinary hours that an employee may be required to work. Paragraphs 91C(1)(a)-(b) would provide that an employer must not require an employee to work more than 38 hours per week over the employee's applicable averaging period. Subject to subsection 91C(5), the employer may require the employee to work reasonable additional hours.

489. Subsections 91C(2) and (3) would define the *applicable averaging period*.

490. For an employee employed by the same employer for a continuous period of less than 12 months, subsection 91C(2) would provide that the applicable averaging period will be the entire employment period, or a shorter 'rolling' period agreed between the employer and employee that finishes at the end of any particular employment period.

491. For an employee employed by the same employer for a continuous period of at least 12 months, subsection 91C(3) would provide that the averaging period will be a 'rolling' period of any 12 months of the employment period, or a shorter period agreed between the employer and employee that finishes at the end of any particular employment period.

492. Subsection 91C(4) would ensure that authorised leave taken by an employee is not to affect the calculation of the average number of hours that an employee has worked per week over the applicable averaging period.

493. Subsection 91C(5) would set out a non-exhaustive list of factors that must be taken into account in determining what are reasonable additional hours for the purposes of proposed paragraph 91C(1)(b). These factors are consistent with the AIRC Full Bench decision in the 'Working Hours Test Case' [Print 0792002].

Illustrative Example for calculating hours worked over an averaging period (1)

Ivanka is employed by ABC Pty Ltd (ABC). Ivanka and ABC have agreed, in writing, that Ivanka's applicable averaging period is 4 weeks.

On 2 January 2006 Ivanka has been employed by ABC for a continuous period of 11 months. To calculate whether Ivanka has been required to work more than an average of 38 hours per week over her most recent averaging period, Ivanka or ABC must:

- work out the applicable averaging period (in this case the 4 week period starting on 5 December 2005 and ending on 1 January 2006);
- add up how many hours Ivanka was required to work during that period, including any hours of authorised leave taken by Ivanka during that period (in this case, Ivanka was required to work 38 hours the first week, 46 hours the second week, 30 hours the third week and took 38 hours of authorised leave the fourth week, giving a total of 152 hours); and
- divide the number of hours worked by the number of weeks in Ivanka's averaging period (giving 38 hours).

In this example, Ivanka was not required to work more than an average of 38 hours per week over her most recent applicable averaging period.

Illustrative Example for calculating hours worked over an averaging period (21)

On 1 March 2006 Ivanka has been employed by ABC for a continuous period of 13 months, under the same agreement (which provides that her averaging period is 4 weeks). To calculate whether Ivanka has been required to work more than an average of 38 hours per week over her most recent averaging period, Ivanka or ABC must:

- work out the applicable averaging period (in this case, the 4 week period starting on 1 February 2006 and ending on 28 February 2006);
- add up how many hours Ivanka was required to work during that period, including any hours of authorised leave taken during that period (in this case, Ivanka was required to work 42 hours the first week, 41 hours the second week, 38 hours the third week and 43 hours the fourth week, giving a total of 164 hours); and
- divide the number of hours (164) by the number of weeks in her averaging period (4), giving 41 hours.

In this example, Ivanka was required to work more than an average of 38 hours per week over her most recent averaging period. If those additional hours were not reasonable additional hours, determined by taking into account all relevant factors, ABC will have breached Ivanka's guarantee of maximum ordinary hours of work.

## **New Division 4 – Annual leave**

### **New Subdivision A – Preliminary**

#### *New section 92 – Employees to whom Division applies*

494. Proposed section 92 would provide that this Division applies to all employees (as defined in proposed subsection 4AA(1)).

#### *New section 92A – Definitions*

495. Proposed section 92A would define a number of concepts that are used regularly in this Division. The main definitions are explained below.

496. The definition of *authorised leave* includes periods of paid or unpaid leave or absence that is authorised by the employer, and leave to which an employee is otherwise entitled under either a contract of employment or legislation.

497. This definition is relevant to the definition of *continuous service* (explained below). Paid authorised leave is included in the calculation of nominal hours worked which forms the basis for the annual leave entitlement guaranteed by this Division.

498. The definition of *continuous service* is relevant to the calculation of an employee's annual leave entitlement – which accrues in respect of the *nominal hours worked* over each four week period of continuous service with the same employer.

499. The definition of *nominal hours worked* means the sum of the number of hours that the employee was required to work, and did work (excluding any reasonable additional hours that the employee was required to work, and did work) and the number of hours of paid authorised leave taken by the employee during a particular period. Periods of unpaid leave and authorised absences are not captured by the definition. *Nominal hours worked* is relevant to how leave is accrued over a period of continuous service.

500. The definition of *shift worker* specifies a particular category of shift workers who are entitled to extra annual leave under subsection 92D(3). A *shift worker* is defined as an employee who:

- is employed in a business in which shifts are continuously rostered 24 hours a day for seven days a week;
- is regularly rostered to work those shifts; and
- regularly works on a Sunday or public holiday.

501. Continuous shift work is where a business uses continuous shifts of workers to operate 24 hours a day, seven days a week, without interruption except during breakdowns or meal breaks or due to unavoidable stoppages outside the employer's control. Continuous shift work is usually made up of two to three shifts per day. An eligible shift work employee will be one who is required to work one of those shifts each day (except for rostered days off). This results in

regular work on Sundays and public holidays – this is the key reason for the additional annual leave entitlement in the Standard.

502. Regulations may add to the categories of employees who are considered to be shift workers.

*New section 92B – Agreement between employees and employers*

503. Some aspects of this Division allow for agreement between an employee and his or her employer.

504. Proposed section 92B would ensure that one way in which an employer and employee may be taken to have agreed about such a matter is by way of an individual or collective workplace agreement (subsection 92B(1)).

505. Subsection 92B(2) would clarify that employees and employers may agree by other means about how annual leave is to be taken.

*New section 92C – Regulations may prescribe different definitions for piece rate employees*

506. Proposed section 92C would allow the making of regulations to ensure the annual leave guarantee for piece rate employees. It is intended that regulations will only be made to the extent needed to give effect to the annual leave guarantee. It is anticipated that this will only occur where it is apparent that the pre-reform definitions or rules contained in this Division are frustrated by the fact that piece rate employees are not remunerated by reference to hours worked. The regulation making power is not intended to be a device to diminish the annual leave guarantee that would be provided by this Division.

**New Subdivision B – Guarantee of annual leave**

*New section 92D – The guarantee*

507. Proposed section 92D would guarantee that employees to whom this Division applies (proposed section 92) are entitled to accrue a minimum amount of paid annual leave.

508. Subsection 92D(2) would guarantee all employees an entitlement to accrue an amount of paid annual leave for each completed four weeks of continuous service with an employer. The employee is entitled to accrue  $\frac{1}{13}$  of the number of nominal hours worked by the employee for the employer during that four week period.

509. This is equivalent to four weeks annual leave for employees whose hours do not change over the course of a 12 month period – for example, an employee whose nominal hours worked for a 12 month period were 38 hours per week would be entitled to 152 hours of annual leave (which is four weeks of 38 hours each). However, the formula also ensures that employees whose hours vary accrue appropriate amounts of annual leave.

510. Subsection 92D(3) would provide additional leave for shift work employees (as defined in proposed section 92A). The additional leave recognises the special circumstances of continuous shift workers and seven-day shift workers. These types of shift workers are regularly

called upon to work on Sundays and public holidays. The additional annual leave entitlement in part compensates for the social and domestic inconvenience that continuous or seven-day shift work can cause. The additional annual leave for shift workers is accrued on a pro-rata basis in respect of periods during which an employee is working as a shift worker.

#### Illustrative Example

Denis is employed by Daytown Power Station (DPS) as a production officer under the Electricity Industry Award 2000. DPS is a 24 hours a day, seven days a week business operation. Production officers at DPS work on a roster cycle of 18 weeks that comprises nine weeks of continuous shift work (12 hour shifts over seven days), and nine weeks of 9am-5pm, Monday-Friday work. Over a year this roster cycle is repeated – meaning that over a 12 month period Denis works six months on continuous shift work and six months on a Monday-Friday day shift. Denis is therefore entitled to half a week of the additional annual leave entitlement – the additional entitlement he receives is proportionate to the time he spends working on a continuous shift during the year.

#### *New section 92E – Entitlement to cash out annual leave*

511. Subsection 92E(1) would allow an employee to request to cash out a period of annual leave each year.

512. Subsection 92E(1) makes the entitlement to cash out annual leave conditional on:

- a workplace agreement binding the employee and the employer including a specific provision that entitles the employee to cash out an amount of annual leave;
- the employee making a written request to the employer to cash out an amount of annual leave that has been credited to the employee – it is not possible to cash out leave in advance of it being credited;
- the workplace agreement binding the employee and the employer requiring payment in lieu of the amount of annual leave at a rate that is no less than the employee's basic periodic rate of pay at the time that the cashing out occurs; and
- the employer authorizing the employee to cash out the amount of annual leave.

513. It is anticipated that an employer would only refuse an employee's request to cash out an amount of accrued annual leave on reasonable grounds. Otherwise, the employer may be in breach of the workplace agreement that creates an employee entitlement to cash out an amount of annual leave.

514. Subsection 92E(2) would cap the amount of annual leave that may be cashed out by an employee each year. An employee would not be entitled to cash out an amount of annual leave that is greater than  $\frac{1}{26}$  of the nominal hours worked by the employee for the employer during the previous 12 months. (This is equivalent to two weeks annual leave for employees whose hours

do not change over the course of a 12 month period.) This will ensure that employees have access to a reasonable period of annual leave for rest and recreation each year.

515. Subsection 92E(3) would prohibit an employer from requiring an employee to cash out an entitlement to annual leave, or exerting undue influence or undue pressure on an employee in relation to a decision about whether or not to cash out a period of annual leave.

516. Proposed section 101D would allow regulations to be made specifying matters that may not be included in a workplace agreement (prohibited content). Prohibited content in a workplace agreement would be void. It is proposed that a term in a workplace agreement that requires an employee to cash out a period of annual leave will be prescribed as prohibited content.

#### Illustrative Example

Antonia is employed by Steve at Belissimo Bread Bakery Pty Ltd. The collective agreement permits the cashing out of the equivalent of two weeks of annual leave every 12 months. Antonia would like to cash out two weeks of her leave so she can prepare for her upcoming trip to Italy which she has been diligently saving for. Antonia knows she will have enough annual leave credits for when she takes the trip, so she would like some extra cash now to buy some new suitcases.

Antonia provides her request to Steve in writing as required by the collective agreement. Steve agrees. Her next pay includes payment for the additional two weeks on top of her ordinary salary.

#### **New Subdivision C – Annual leave rules**

##### *New section 92F – Annual leave – accrual, crediting and accumulation rules*

517. Proposed section 92F would provide the rules for the accrual, crediting and accumulation of annual leave. An employee may only take paid annual leave once an entitlement to such leave has been accrued and credited in accordance with this section.

518. Subsection 92F(1) would provide that paid annual leave accrues on a pro-rata basis.

519. Subsection 92F(2) would provide for the crediting of annual leave each month. If an employee's working hours were variable from month to month, the amount of accrued leave credited each month would vary accordingly.

520. Subsection 92F(3) would provide for the annual crediting of any additional leave due to shift workers.

521. Subsection 92F(4) would provide that annual leave is cumulative.

*New section 92G – Annual leave – payment rules*

522. Proposed section 92G would provide an entitlement to payment when an employee takes annual leave under this Division.

523. Subsection 92G(1) would provide that the employer must pay the employee an amount that is at least the employee's basic periodic rate of pay immediately before the period of leave starts. This provision does not affect any entitlement that the employee may have under an award or agreement to be paid an annual leave loading.

524. Subsection 92G(2) would provide that if the employee's employment ends, the employee's untaken accrued leave balance must be paid out at a rate that is at least the employee's basic periodic rate of pay at the time that the employment ends.

*New section 92H – Rules about taking annual leave*

525. Proposed section 92H would provide a number of rules regarding the taking of paid annual leave under this Division.

526. Subsection 92H(1) would provide generally that an employee may take paid annual leave for a period provided that:

- the employer has authorised the leave; and
- the employee has an annual leave credit that is equal to or greater than the amount proposed to be taken as annual leave. The Standard would not provide for an employee to take paid annual leave in advance of accruing that entitlement.

527. Subsection 92H(2) would make clear that, subject to the requirement that sufficient leave credits be available, there are no other limits on the amount of paid annual leave that an employer may authorise an employee to take. In particular, there is no minimum amount of annual leave that the employee must take on each occasion that leave is authorised.

528. Subsection 92H(3) would allow an employer to refuse to authorise a proposed period of annual leave if this is necessary because of the operational requirements of the workplace or enterprise in respect of which the employee is employed.

529. However, subsection 92H(4) would provide that an employer must not unreasonably:

- refuse to authorise any period(s) of annual leave; or
- revoke a previous authorisation of annual leave during a particular period.

530. An employer who is found to have contravened this section may be penalised (see Division 2 of Part VIII – Penalties and other remedies for contravention of applicable provisions).



531. Subsection 92H(5) would enable an employer to direct any of its employees to take paid annual leave for a particular period when the employer shuts down the business, or any part of the business, in which the employee(s) concerned work(s). Annual shut-downs are a common occurrence for Australian businesses – for example, many businesses shut down between Christmas and New Year’s Day, during January, or over Easter, since these periods are often characterised by slow trading.

532. An employer may only direct an employee to take annual leave where that employee has an annual leave credit that is at least equal to the proposed shut down period.

533. Subsection 92H(6) would enable an employer to direct an employee to take a period of paid annual leave if the employee has an annual leave credit greater than  $\frac{1}{13}$  of the number of nominal hours worked over a two year period (an amount equivalent to 8 weeks for an employee working 38 hours per week over that period). In this situation, the employer may direct the employee to take up to  $\frac{1}{4}$  of his or her annual leave credit. The intention of this provision is to ensure that:

- employees regularly take periods of leave for rest and recreation, and
- employers are not required to pay out excessive untaken leave accruals when an employee’s employment ends.

#### Illustrative Example

Lucas has been employed by Chocolates Galore Pty Ltd for four and a half years, working 38 nominal hours each week. In that time, he has accrued 684 hours (the equivalent of 90 days) of annual leave, of which he has taken 228 hours (the equivalent of 30 days), leaving a balance of 456 hours (or 60 days).

As Lucas enjoys his job he’s only ever taken a week or two of his annual leave each year to go surfing.

Lucas’s current balance of annual leave is more than 304 hours (or 40 days), which is what he would normally accrue over a 24 month period.

In this case, his employer could direct him to take up to one quarter (or 76 hours) of his accrued annual leave balance.

#### **New Subdivision D — Service: annual leave**

##### *New section 92I – Annual leave—service*

534. Proposed section 92I would guarantee that a period of annual leave does not break an employee’s continuity of service, and that annual leave counts as service for all purposes, subject to any exceptions prescribed by the regulations.

## **New Division 5 — Personal leave**

### **New Subdivision A — Preliminary**

*New section 93 – Employees to whom this Division applies*

535. Proposed section 93 would identify the employees who are entitled to personal leave (including carer's leave) under this Division.

536. Subject to subsection 93(3), subsection 93(1) would provide that this Division applies to all employees, other than casual employees, within the meaning of proposed subsection 4AA(1).

537. Subsection 93(2) would provide that Subdivision C of this Division, which provides a guarantee for unpaid carer's leave, and sections 93O – 93P, which deal with notice and documentation requirements apply to all employees including casual employees.

*New section 93A – Definitions*

538. Proposed section 93A would define a number of terms that are used regularly in this Division. The main definitions are explained below.

539. The definition of *authorised leave* includes periods of paid or unpaid leave or absence that is authorised by the employer, and leave to which an employee is otherwise entitled under either a contract of employment or legislation.

- This definition is relevant to the definition of *continuous service* (explained below). Paid authorised leave is included in the calculation of nominal hours worked which forms the basis for the personal leave entitlement guaranteed by this Division.

540. The definition of *continuous service* is relevant to the calculation of an employee's personal leave entitlement – which accrues in respect of the nominal hours worked over each four week period of continuous service with the same employer.

541. The definition of *nominal hours worked* means the sum of the number of hours that the employee worked (excluding periods of unauthorised leave and any reasonable additional hours that the employee was required to work, and did work) and the number of hours of paid authorised leave taken by the employee during a particular period. Nominal hours worked is relevant to how leave is accrued over a period of continuous service.

542. The definitions of *child*, *de facto spouse*, and *immediate family* are relevant to the circumstances in which carer's leave and compassionate leave may be taken under this Division. These definitions are broad and expansive, and are intended to cover extended and blended families, including de facto marriages, step-relationships, and adoptive relationships. *Immediate family* is defined as the employee's spouse (including de facto spouse, former spouse, or former de facto spouses), child, parent, grandparent, grandchild or sibling. In addition, *immediate family* includes the child, parent, grandparent, grandchild or sibling of the employee's current or former spouse (including de facto spouses). A *de facto spouse* is defined as a person of the opposite sex to the employee who lives with the employee on a genuine domestic basis as the employee's husband or wife, without being legally married.

*New section 93B – Agreement between employees and employers*

543. Proposed section 93B would provide for types of agreement between an employee and his or her employer regarding the operation of some aspects of this Division.

544. Subsection 93B(1) would provide that one way in which an employer and employee may be taken to have agreed about such a matter (for example, how periods of unpaid carer's leave (see proposed section 93K) or compassionate leave (see proposed section 93R) may be taken) is through a workplace agreement that binds the employee (subsection 93B(1)).

545. Subsection 93B(2) would confirm that employees and employers may agree by other means about how unpaid carer's leave or compassionate leave is to be taken (for example, a written contract).

*New section 93C – Regulations may prescribe different definitions for piece rate employees*

546. Proposed section 93C would enable regulations to be made to ensure the personal leave guarantee for piece rate employees. It is intended that regulations will only be made to the extent needed to give effect to the personal leave guarantee. It is anticipated that this would only occur where it is apparent that the pre-reform definitions or rules contained in this Division are frustrated by the fact that piece rate employees are not remunerated by reference to hours worked. The regulation making power is not intended to diminish the personal leave guarantee that would be provided by this Division.

*New section 93D – Meaning of personal/carer's leave*

547. Proposed section 93D would define sick leave and carer's leave for the purposes of personal leave under this Division.

548. Sick leave is paid leave taken by an employee because the employee has a personal illness or injury.

549. Carer's leave is paid or unpaid leave taken by an employee to provide care or support for a member of the employee's immediate family or household. Carer's leave is available where a member of the employee's immediate family or household is ill or injured, or there is an unexpected emergency affecting a family or household member. For example, an unexpected emergency could include the employee being asked to meet with a school teacher to discuss the employee's child's learning requirements or to take a household member to a medical practitioner.

## **New Subdivision B—Guarantee of paid personal/carer’s leave**

### *New section 93E – The guarantee*

550. Proposed section 93E would guarantee that employees to whom this Division applies (see proposed section 93) are entitled to accrue a minimum amount of paid sick leave and paid carer’s leave.

551. Subsection 93E(1) would make the employee’s entitlement to paid sick leave and paid carer’s leave conditional upon the notice and documentation requirements contained in Subdivision D being satisfied, and provided that none of the exceptions contained in Subdivision B apply.

552. Subsection 93E(2) would set out that an employee is not entitled to personal leave under this Division if he or she has failed to comply with the notice and documentation requirements in Subdivision D. An employee complies with these rules if the required notice or document is presented either before or after the leave starts.

553. A legislative note would indicate that a required document may be a medical certificate or a statutory declaration (depending on the circumstances).

### *New section 93F – Paid personal/carer’s leave – accrual, crediting and accumulation rules*

554. Proposed section 93F would set out the basis for the accrual, crediting and accumulation of personal leave. Subsection 93F(1) would provide that an employee is entitled to take paid sick leave or paid carer’s leave once the entitlement to such leave has accrued and been credited in accordance with this section.

555. Subsection 93F(2) would guarantee all employees an entitlement to accrue an amount of paid personal leave for each completed four weeks of continuous service with an employer. The employee is entitled to accrue 1/26 of the number of nominal hours worked by the employee for the employer during that four week period.

556. This is equivalent to two weeks of personal leave for employees whose hours do not change over the course of a 12 month period – for example, an employee whose nominal hours worked for a 12 month period were 38 hours per week would be entitled to 76 hours of personal leave (which is two weeks of 38 hours each). However, the formula also ensures that employees whose hours vary accrue appropriate amounts of personal leave.

557. If the employee’s working hours were variable from month to month, the amount of accrued leave credited each month would vary accordingly.

558. Subsection 93F(3) would confirm that paid personal leave accrues on a pro-rata basis.

559. Subsection 93F(4) would provide for the crediting of paid personal leave each month. For example, the employer may credit leave on the first day of each month, or on the first Monday of every month (except for public holidays, when the leave will be credited the next business day).

If an employee's working hours were variable from month to month, the amount of accrued leave credited each month would vary accordingly.

560. Subsection 93F(5) would provide that paid sick leave and paid carer's leave is cumulative.

#### Illustrative Example

Roland is a butcher. He is employed subject to The Other Cheek Pty Ltd Agreement, which was made after the commencement of the Work Choices Act 2005. The workplace agreement provides for the accrual of 84 hours of paid personal leave per year (credited monthly), based on Roland having nominal hours worked of 38 hours per week. The agreement also provides that paid personal leave shall accumulate for a period of no longer than four years from the end of the year in which it accrues.

The personal leave guarantee contained in the Standard means that Roland will be allowed to accumulate paid personal leave indefinitely and it would no longer 'expire' after four years.

#### *New section 93G – Paid personal/carer's leave – payment rules*

561. Proposed section 93G would provide an entitlement for payment when an employee takes sick leave or carer's leave under this Subdivision. The employer must pay the employee an amount that is equivalent to what the employee would reasonably have expected to receive had the employee worked during the period of leave.

#### *New section 93H – Paid sick leave – no entitlement if workers' compensation received*

562. Proposed section 93H would create an exception to taking paid sick leave in relation to workers' compensation. An employee is not entitled to take paid sick leave to cover an absence from work because of personal illness or injury if the employee is receiving workers' compensation payments under a Commonwealth, State or Territory law.

#### *New section 93I – Paid carer's leave – annual limit*

563. Proposed section 93I would insert an annual cap on an employee's entitlement to take paid carer's leave where the employee has provided more than 12 months continuous service to the employer.

564. Subsection 93I(2) would provide that paid carer's leave may not be taken at a particular time if, during the previous 12 months, the employee has already taken paid carer's leave of more than 1/26 of the nominal hours worked.

565. In effect, an employee would be entitled to use up to 10 days of paid personal leave each year for the purposes of caring for members of the employee's immediate family or household who are sick and require care and support, or who require care due to an unexpected emergency. The remainder of the employee's accrued personal leave entitlement would be reserved to be taken as paid sick leave when the need arises.

## **New Subdivision C—Guarantee of unpaid carer’s leave**

### *New section 93J – The guarantee*

566. Proposed section 93J would guarantee that all employees (including casual employees (see proposed section 93)) are entitled to two days of unpaid carer’s leave on each occasion that a member of the employee’s immediate family or household requires care and support due to being ill, injured, or affected by an unexpected emergency

567. Subsection 93J(2) would make the employee’s entitlement to unpaid carer’s leave conditional upon the notice and documentation requirements contained in Subdivision D being satisfied and provided that none of the exceptions contained in Subdivision C apply.

568. Subsection 93J(3) would set out that an employee is taken not to be entitled to unpaid carer’s leave if the employee has failed to comply with the notice and documentation requirements in Subdivision D.

### *New section 93K – Unpaid carer’s leave – how taken*

569. Proposed section 93K would allow an employee who is entitled to unpaid carer’s leave to take that leave in one continuous period (ie two consecutive working days), or in distinctly separate periods as agreed between the employer and the employee. For example, an employer and an employee could agree that the employee will take unpaid carer’s leave as four consecutive half-days, so that the employee could share caring duties with someone else.

### **Illustrative Example**

New Horizons Pty Ltd employs Brendan as an architect. Brendan and his wife, Rachel, have three children who have all caught the chicken pox. Two months ago, Brendan had used all of his paid sick leave when he contracted glandular fever. Caring for three sick children at once is ‘a bit of a handful’, so Brendan and his manager have agreed that he can take unpaid carer’s leave over the next four days. The plan is for Brendan to spend the next four mornings at home caring for the children, followed by ‘some respite’ at work in the afternoons. Rachel has agreed a similar arrangement at her workplace, so she can be the carer during the afternoons. One parent will be at home to care for the children at all times.

### *New section 93L – Unpaid carer’s leave – paid personal leave exhausted*

570. Proposed section 93L would make the employee’s entitlement to take unpaid carer’s leave under this Subdivision conditional upon the employee not having any accumulated paid carer’s leave or any other authorised leave for caring purposes.

## **New Subdivision D—Notice and evidence requirements: personal/carer’s leave**

### *New section 93M – Sick leave – notice*

571. Proposed section 93M would require an employee to give notice to their employer that he or she is or will be absent from work due to a personal injury or illness. The notice must be given to their employer as soon as reasonably practicable. However there is no requirement that the notice must be in writing (eg it may be given verbally over the phone). It is intended that the

employee's notice requirement will be waived if the employee is unable to comply due to circumstances beyond the employee's control – for example, if the employee is comatose, or is suffering severe mental or physical impairment that would make compliance with the notice provision impractical.

572. The note would confirm that the use of personal information given to an employer under this section is subject to the *Privacy Act 1988*.

*New section 93N – Sick leave – medical certificate*

573. Proposed section 93N would allow (but does not require) an employer to require an employee to provide a medical certificate as soon as reasonably practicable for any period of paid sick leave that has been, or is proposed to be, taken by the employee.

574. Subsections 93N(2) – (3) would not allow the employee to access their paid sick leave entitlement if the employee has failed to take reasonably practicable steps to comply with the employer's request for a medical certificate.

575. Subsection 93N(4) would prescribe that the medical certificate must include a statement about the employee's unfitness to work due to personal illness or injury.

576. Subsection 93N(5) would exempt an employee from the requirement to present a medical certificate if the employee is unable to comply due to circumstances beyond the employee's control – for example, if the employee is comatose, is suffering severe mental or physical impairment, has been transferred to another city for medical treatment, or has since died.

577. The note would confirm that the use of personal information given to an employer under this section is subject to the *Privacy Act 1988*.

*New section 93O – Carer's leave notice*

578. Proposed section 93O would require an employee to give notice to their employer that he or she is or will be absent from work for to provide care or support to a member of the employee's immediate family or household. The notice must be given to their employer as soon as is reasonably practicable. However there is no requirement that the notice must be in writing (eg it may be given verbally over the phone). It is intended that the employee's notice requirement will be waived if the employee is unable to comply due to circumstances beyond the employee's control.

*New section 93P – Carer's leave – documentary evidence*

579. Proposed section 93P would allow (but does not require) an employer to obtain documentary evidence from an employee to substantiate a claim for paid carer's leave that has been, or is proposed to be, taken by the employee. An employee would comply with an employer's request for the required document as soon as reasonably practicable. The required document may be in the form of a medical certificate in relation to the member being cared for, or a statutory declaration.

580. Subsections 93P(2) – (3) would not allow the employee to access their paid carer’s leave entitlement if the employee has failed to take reasonably practicable steps to comply with the employer’s request for documentation.

581. Subsections 93P(4)-(5) would prescribe that the required document must include a statement that the employee needs to take leave to provide care or support to a member of their immediate family or household who is ill, injured, or affected by an unexpected emergency.

582. Subsection 93P(6) would exempt an employee from the requirement to present the required document if the employee is unable to comply due to circumstances beyond the employee’s control.

583. The note would confirm that the use of personal information given to an employer under this section is subject to the *Privacy Act 1988*.

### **New Subdivision E — Guarantee of compassionate leave**

#### *New section 93Q – The guarantee*

584. Proposed section 93Q would provide a guarantee of paid compassionate leave. An employee (other than a casual employee) would be entitled to take two days paid leave to spend time with a critically ill, injured, or dying person who is a member of the employee’s immediate family or household.

585. An employee may take up to two days compassionate leave upon the death of a member of their immediate family or household.

586. An employee does not need to start taking a period of compassionate leave immediately when the illness, injury or death occurs.

587. The employee must present evidence of the illness, injury, or death that gives rise to the entitlement for compassionate leave where the employer makes a reasonable request for proof.

588. The note would confirm that the use of personal information given to an employer under this section is subject to the *Privacy Act 1988*.

#### *New section 93R – Taking compassionate leave*

589. Proposed section 93R would allow an employee who is entitled take compassionate leave to take that leave in one continuous period (ie two consecutive working days), or two single periods of one day each, or in distinctly separate periods as agreed between the employer and the employee.

590. The employee may use their two days paid compassionate leave immediately after the death to personally grieve. Alternatively, the employer and employee may agree that the employee take separate periods of leave spread over a number of days.



### Illustrative Example

Felicity is an employee of Rashaan's HomeComfort Pty Ltd. Felicity's grandmother has died suddenly. Felicity and her supervisor have agreed that she may use her two days of paid compassionate leave over three days. Felicity will take paid compassionate leave for a half day to make funeral arrangements. To attend the funeral, Felicity will take one day's paid compassionate leave. She will also take leave for half of the next working day to grieve with her family.

### *New section 93S – Compassionate leave – payment rules*

591. Proposed section 93S would provide an entitlement to payment when an employee takes compassionate leave under this Subdivision. The employer must pay the employee an amount that is equivalent to what the employee would reasonably have expected to receive had the employee worked during that period of leave.

### **Subdivision F—Personal leave: service**

#### *New section 93T Paid personal leave – service*

592. Proposed section 93T would guarantee that a period of paid personal leave under this Division does not break an employee's continuity of service.

593. Subsection 93T(2) would guarantee that periods of paid leave taken in accordance with this Division will count as service for all purposes except as provided by the regulations.

#### *New section 93U – Unpaid carer's leave – service*

594. Proposed section 93U would guarantee that a period of unpaid carer's leave taken in accordance with Subdivision C does not break an employee's continuity of service.

595. Subsection 93U(2) would make clear that a period of unpaid carer's leave does not otherwise count as service unless provided for in a workplace agreement, award, or contract of employment, legislation, or as prescribed by the regulations.

### **New Division 6 – Parental leave**

596. This Division would set out entitlements for employees to parental leave and related entitlements. The Division would cover:

- maternity leave, including special maternity leave (proposed Subdivisions B-D));
- paternity leave (proposed Subdivisions E – G); and
- adoption leave (proposed Subdivisions H – J).

597. Proposed Subdivisions A and K would deal with general matters applying to all types of parental leave.

## **New Subdivision A – Parental leave: preliminary**

### *New section 94 – Employees to whom Division applies*

598. Proposed section 94 would identify the employees entitled to parental leave under this Division. The entitlement applies to all *employees* (as defined in proposed subsection 4AA(1)), other than casual employees who are not *eligible casual employees* (defined in proposed section 94B).

- The parental leave entitlements provided by the Standard would also be extended beyond the employment relationships to which the rest of the Standard applies (by proposed new Division 5 of Part VIA), so they apply to all equivalent employees regardless of whether they are employees within the meaning of section 4AA. This extension gives effect to international obligations.

### *New section 94A – Definitions*

599. Proposed section 94A would define a number of concepts that are used regularly in this Division.

600. The definition of *adoption agency* includes any entity that is able to perform functions relating to adoption, including authorising adoptions. The definition would extend to adoption agencies set up under a law of a foreign country. This would allow employees to access adoption leave under the Standard where the adoption is authorised in Australia or a foreign country.

601. The definition of *authorised leave* includes any period of paid or unpaid leave or absence authorised by the employer, and leave to which an employee is otherwise entitled under either a contract of employment or legislation.

602. The definition of *continuous service* is relevant to whether an employee is entitled to access parental leave under this Division. An employee must have at least 12 months continuous service at the relevant time, or be an eligible casual employee – which incorporates a 12 month service requirement – to be entitled to parental leave (see proposed sections 94C, 94T and 94ZL). Continuous service includes periods of *authorised leave* taken by an employee, other than where the employment for the period as a casual employee is not regular and systematic.

603. The definition of *day of placement* (which relates to adoption leave) would extend to inter-country adoptions, where the parents generally have to travel to the county from which the child is adopted to collect the child. The definition would allow the employee to access adoption leave in order to travel overseas to collect a child. Proposed paragraph (b) of that definition would deal with the situation where a child is placed with couple for a trial period of foster care pending authorisation of adoption.

604. The definitions of *de facto spouse* and *spouse* would be relevant to the circumstances in which parental leave may be taken under this Division and how other related authorised leave taken by a spouse affects the total parental leave entitlement (for example, see proposed sections 94D and 94U).

605. The definition of *expected date of birth* (which is relevant to comply with the notice and documentation requirements for maternity and paternity leave) would clarify that the relevant date is the date specified in the medical certificate required to be provided to the employer, or if this requirement is not able to be complied with for reasons beyond the employee's control, the date of birth that could reasonably be expected if the pregnancy were to go full term. This would cover the case where, for example, an employee was seriously ill in hospital and unable to obtain a medical certificate at the time when she was required to give notice to her employer of the expected date of birth.

*New section 94B – Meaning of eligible casual employee*

606. Proposed section 94B would define an *eligible casual employee* for the purposes of determining the circumstances in which a casual employee would be entitled to parental leave. An employee would be an eligible casual employee where they have been employed with a particular employer on a regular and systematic basis over a continuous period of at least 12 months, and the employee has a reasonable expectation of continuing engagement with that employer.

607. Subsection 94B(2) would further provide that an employee is an eligible casual employee for the purpose of this Division even if his or her regular and systematic casual employment is terminated by the employer before 12 months continuous employment, in circumstances where the employee is again engaged by the employer on a regular and systematic basis within three months. In these circumstances the combined period of employment must be at least 12 months. As with eligible casuals generally, the employee must have a reasonable expectation of continuing engagement with the same employer.

**New Subdivision B – Guarantee of maternity leave**

*New section 94C – The guarantee*

608. Proposed section 94C would guarantee an employee's entitlement to unpaid maternity leave under this Division.

609. Paragraph 94C(1)(a) would provide that an employee is entitled to unpaid *special maternity leave* if she has a pregnancy related illness or her pregnancy ends within 28 weeks before the expected date of birth otherwise than by the birth of a living child. For example, an employee would be entitled to special maternity leave if she suffers a miscarriage within 28 weeks before the expected date of birth.

610. Paragraph 94C(1)(b) would provide that an employee is entitled to a single, unbroken period of unpaid *ordinary maternity leave* (under subsection 94C(2)) in respect of the birth or expected birth of a child.

611. Leave taken in a continuous, unbroken period does not preclude the employee from adding other types of authorised leave, such as annual leave or paid maternity leave, to the total leave period taken (up to a maximum of 52 weeks), but the maternity leave period cannot be broken up into separate periods of leave.

612. Subsection 94C(2) would make the employee's entitlement to maternity leave conditional upon 12 months continuous service with the same employer or engagement as an eligible casual employee (which incorporates a 12 month service requirement, proposed section 94B refers). The 12 month continuous service period can contain elements of permanency, regular and systematic casual employment, and authorised leave. At the time when the question of entitlement to parental leave arises, no matter how the continuous service period is made up, the employee must be either permanent or an eligible casual. That is, any 'casual period' would have to precede the employee attaining permanent or eligible casual status.

613. The entitlement to maternity leave is also subject to the restrictions in proposed sections 94D and 94E and proposed Subdivision D.

614. Subsection 94C(3) would set out the circumstances under which an employee would not be entitled to maternity leave (these relate to the failure to provide the required documentation to the employer).

615. An employee would be able to take special maternity leave, ordinary maternity leave or both, depending on individual circumstances (subsection 94C(4)).

*New section 94D – Period of maternity leave*

616. Proposed section 94D would set out a method for calculating the period of unpaid maternity leave that is available to an employee who has satisfied the eligibility criteria under proposed section 94C.

617. Subsection 94D(3) would provide that the maximum total amount of unpaid maternity leave, including both special and ordinary maternity leave, is 52 weeks. However, any amount of *related authorised leave* taken by the employee or her spouse would reduce the total amount of maternity leave available.

618. The term *related authorised leave* is defined in subsection 94D(1). It would include periods of authorised leave taken by the employee because of:

- her pregnancy;
- the birth of the child;
- the end of her pregnancy otherwise than by the birth of a living child;
- the death of the child.

619. *Related authorised leave* would not include periods of authorised leave taken by the employee's spouse, such as annual leave, taken while an employee is on maternity leave. Therefore, it is only periods of paternity leave and any other authorised leave of the same type as paternity leave (such as paid paternity leave) taken by an employee's spouse which would reduce the amount of ordinary maternity leave available (in addition to any authorised leave taken by the employee set out in paragraph 94D(1)(a)).

620. The Standard will not, by itself, restrict the amount of *related authorised leave* the employee and her spouse may take in respect of the birth of a child. Rather, if the *related authorised leave* amounts to 52 weeks, the employee's unpaid maternity leave entitlement (under the Standard) would be reduced to zero.

621. The entitlement to maternity leave is expressed in absolute terms. An employee or her spouse may be prevented from taking (or may change their minds and not wish to take) formerly intended periods of related authorised leave. Such formerly intended leave, if not ultimately taken, would not reduce the employee's entitlement to ordinary maternity leave.

*New section 94E – Period of special maternity leave*

622. Proposed section 94E would set out the conditions for accessing a period of special maternity leave and how this entitlement would interact with ordinary maternity leave. A period of special maternity leave must not be longer than the period set out in a medical certificate given to the employer (see proposed section 94G). The period of leave must end before the employee starts a continuous period of leave including ordinary maternity leave.

*New section 94F – Transfer to a safe job*

623. Proposed section 94F would provide that, where an employee gives her employer a medical certificate stating that she is fit to work, but that illness or risks arising out of the pregnancy or hazards connected with the work assigned to her make it inadvisable for her to continue her present work, the employer must transfer her to a safe job. The job must be at the same rate of pay and on the same terms and conditions of employment as her pre-transfer position. If it is not reasonably practicable to transfer the employee to a safe job, the employee may take (or be required by her employer to take) paid leave.

624. Subsection 94F(1) would provide that this entitlement is available to an employee if she is eligible for maternity leave and has complied with the relevant documentary requirements in proposed Subdivision C. The employee must also provide the employer with a medical certificate stating that she is fit to work but that, in the opinion of her medical practitioner, it is inadvisable for her to continue in her present position. The medical certificate may be provided voluntarily by the employee or requested by the employer within the six weeks before the estimated day of birth (see subsection 94F(5), and proposed section 94L – Requirement to take leave—within 6 weeks before birth).

625. Subsection 94F(2) would provide that where the employee's medical certificate states that she is fit to work but the employer does not think it to be reasonable practicable to transfer her to a safe job, the employee may take paid leave. Paragraph 94F(4)(b) would end this period of leave at the earliest of:

- the date stated in the medical certificate;
- the end of the day before birth; or
- if pregnancy ends other than by the birth of a living child – the end of the day before the end of pregnancy.

626. In respect of any period of leave under this provision, subsection 94F(3) would require the employer to pay the employee at least the amount she would have reasonably expected to be paid if she had worked during that period. For example, the rate of pay could constitute the employee's base periodic rate of pay plus the amount of any additional amounts (such as shift penalties) if they are part of the employee's regular pay.

#### Illustrative Example

Jenny has been working full-time with her employer Louise for three years. She has applied for ordinary maternity leave and has complied with the documentation requirements under proposed sections 94H and 94I.

Five weeks before the expected date of birth, Louise requests that Jenny provide an additional medical certificate under proposed section 94L stating whether Jenny is fit to continue work in her present position. Jenny provides a medical certificate stating that she is fit to continue working until the expected date of birth, but that it is inadvisable for her to continue working in her present position because of hazards connected with the position.

Under section 94F, Louise must transfer Jenny to a safe job with the same terms and conditions of employment as her previous position, if this is reasonably practicable. If it is not reasonably practicable for Louise to transfer Jenny to a safe job, then Jenny can take (or Louise can require Jenny to take) paid leave until the day before the expected date of birth. The paid leave is in addition to any other leave that Jenny is entitled to and does not reduce the period of maternity leave to which she is entitled.

If Jenny had failed to provide a medical certificate within 7 days of Louise's request, then Louise could require Jenny to start her ordinary maternity leave as soon as reasonably practicable under proposed section 94L. Such leave would be unpaid and would reduce the total period of maternity leave available to Jenny.

#### **New Subdivision C – Maternity leave: documentation**

##### *New section 94G – Special maternity leave—documentation*

627. Proposed section 94G would set out the documentary requirements for an application for special maternity leave.

628. Subsection 94G(1) would require an employee to provide a written application to her employer. Where leave is sought for a pregnancy related illness, the application must be accompanied by a medical certificate stating the period that the employee is (or was) unfit for work because of a pregnancy-related illness (subsection 94G(2)).

629. If the pregnancy ends otherwise than with the birth of a living child, subsection 94G(3) would provide that the application must be accompanied by a medical certificate and statutory declaration that attests to particular facts.

630. In both cases, the application must be given to the employer before, or as soon as reasonably practicable after, starting the special maternity leave (subsection 94G(4)). However, the requirements of this provision would not apply where there are circumstances beyond the

employee's control which would prevent her from providing the medical certificate or statutory declaration (if required) (subsection 94G(5)). Subsection 94G(5) is intended to ensure against the possibility that an employee in this situation would be considered to be on unauthorised leave.

631. The Note to this section would remind readers that the use of personal information provided to an employer by an employee under this section may be subject to the *Privacy Act 1988*.

*New section 94H – Ordinary maternity leave—medical certificate*

632. Subsections 94H(1) – (3) would require a medical certificate to be given to the employer no later than ten weeks before the expected date of birth. The medical certificate must state that the employee is pregnant and the expected date of birth.

633. If there is a premature birth or other compelling reason which would mean that it would not be reasonably practicable for the employee to comply with the documentary requirements within that time frame, subsections 94H(4) – (5) would allow the medical certificate to be provided as soon as reasonably practicable (which may be before or even after maternity leave has commenced).

634. However, under subsection 94H(6), the requirements of this provision would not apply where circumstances beyond the employee's control prevent compliance.

635. The Note to this section would remind readers that the use of personal information provided to an employer by an employee under this section may be subject to the *Privacy Act 1988*.

*New section 94I – Ordinary maternity leave—application*

636. Proposed section 94I would set out the documentary requirements for an application for ordinary maternity leave.

637. Subsections 94I(1) – (2) would require the written application to be given to the employer at least four weeks before the first day of leave sought. If there is a premature birth or other compelling reason which mean that it would not be reasonably practicable for the employee to comply with the documentary requirements within that time frame, subsections 94I(3) – (4) would allow the application to be provided as soon as reasonably practicable (which may be before or even after the maternity leave has commenced).

638. Subsection 94I(5) would set out the requirements of the statutory declaration which would form part of the ordinary maternity leave application.

639. Subsection 94I(6) would provide that the requirements of this provision would not apply where circumstances beyond the employee's control prevent compliance.

640. The Note to this section would remind readers that the use of personal information provided to an employer by an employee under this section may be subject to the *Privacy Act 1988*.

### **New Subdivision D – Maternity leave: from start to finish**

#### *New section 94J – Maternity leave—start of leave*

641. Proposed section 94J would provide that an employee may commence a period of leave including or constituted by ordinary maternity leave at any time within six weeks before the expected date of birth – as set out in the medical certificate required under section 94H. The period of leave including or constituted by ordinary maternity leave must be a continuous period of leave.

#### *New section 94K – Requirement to take leave—for 6 weeks after birth*

642. Proposed section 94K would require a compulsory period of leave to be taken for the six weeks following the birth of the child.

#### *New section 94L – Requirement to take leave—within 6 weeks before birth*

643. Proposed section 94L would provide the commencement of ordinary maternity leave for an employee who is entitled to such leave (proposed section 94C), and who has complied with the documentation requirements under proposed sections 94H and 94I.

644. Where an employee continues to work during the period of six weeks before the expected date of birth, proposed subsection 94L(2) would allow the employer to request a medical certificate from the employee stating that she is fit to continue working (either in her current job or in a safe job under proposed section 94F).

645. The Note to subsection 94L(2) would refer readers to the fact that, if the employee gives the employer a medical certificate under proposed section 94L stating that he or she is fit to continue working within the six weeks before birth but not in her current job, the employee would be entitled to be transferred to a safe job or to take paid leave (depending on the circumstances).

646. Subsection 94L(3) would enable the employer to direct the employee to start a continuous period of leave including or constituted by ordinary maternity leave if the requested certificate is not provided within seven days, or if the medical certificate states she is not fit to continue work.

#### *New section 94M – End of pregnancy—effect on ordinary maternity leave entitlement*

647. Proposed section 94M would provide that if the pregnancy ends otherwise than by the birth of a living child (for example, by still-birth or miscarriage), the employee:

- would not be entitled to a period of ordinary maternity leave if it had not yet commenced (subsection 94M(2)). In this situation, an employee may be entitled to take special maternity leave; or



- would be entitled to continue taking leave if it had already started (subsection 94M(3)).

648. The Note under subsection 94M(3) confirms that if the period of leave has commenced, the employee may shorten the leave with the agreement of the employee under proposed section 94P. However, to take advantage of the return to work guarantee (see proposed section 94R), the employee must give four weeks notice to her employer of the day she intends to return to work (see proposed paragraph 94R(1)(a)).

*New section 94N – Death of child—effect on ordinary maternity leave entitlement*

649. Proposed section 94N would apply if the employee gives birth to a living child who later dies and the employee has commenced a period of ordinary maternity leave.

650. Subsection 94N(2) would allow the employee to continue the period of leave in these circumstances. However, subsection 94N(3) would enable the employer to cancel the remaining period of ordinary maternity leave by providing written notice that the leave ends with effect from a stated day (which, under subsection 94N(4), must be at least four weeks from the day the notice is given, but may not be within six weeks of the date of birth).

*New section 94O – End of ordinary maternity leave if employee stops being primary care-giver*

651. Proposed section 94O would require the period of ordinary maternity leave to end where the employee ceased being the primary care-giver of the child.

652. Under subsections 94O(1) – (2), maternity leave would be cancelled on the provision of at least four weeks notice by the employer if the employee:

- is not the primary care-giver of the child for a substantial period; and
- it is reasonable to expect that the employee will not resume being the child's primary care-giver within a reasonable period.

653. Subsection 94O(3) would provide that the period of maternity leave ends with effect from the date stated in the notice given to the employee by the employer.

*New section 94P – Variation of period of ordinary maternity leave*

654. Proposed section 94P would allow an employee to extend or shorten a period of ordinary maternity leave after it has commenced. This provision would be subject to the limitations in proposed Subdivision B and sections 94N and 94O (which would place a maximum limit of 52 weeks on the total amount of ordinary maternity leave available, and also impose other conditions on the leave in the event of the death of the child or where the employee ceases to be the primary care-giver respectively).

655. Subsection 94P(2) would enable the employer to grant a request for an extension of the maternity leave period provided the appropriate notice is given. Any further extension is by agreement between the employer and employee (paragraph 94P(2)(b)). Subject to the requirement to take leave for the six week period after birth (see proposed section 94K), the

leave may be shortened by an agreement in writing between the employer and employee (subsection 94P(3)).

*New section 94Q – Employee’s right to terminate employment during maternity leave*

656. Subsection 94Q(1) would confirm the employee’s right to terminate her employment at any time during a period of maternity leave. Subsection 94Q(2) would provide that the employee’s right to terminate is subject to any relevant notice or procedural requirements in either a contract of employment or legislation.

657. Termination of employment at the initiative of the employer is not covered by the Standard as it would be subject to other remedies under the WR Act (see Part VIA) and, in appropriate cases, under discrimination legislation.

*New section 94R – Return to work guarantee—maternity leave*

658. Proposed section 94R would set out the return to work guarantee. The guarantee would apply in circumstances in which an employee returns to work following a period of leave including, or made up of, maternity leave. In these circumstances, the employee is entitled to return to the position she held immediately before a period of maternity leave.

659. Paragraph 94R(1)(a) would provide that the guarantee applies if the employee gives the employer at least four weeks written notice of the proposed date of her resuming work. Paragraph 94R(1)(b) would provide that the return to work guarantee applies if the leave the employee has taken includes or is constituted solely by a period of special maternity leave. Paragraph 94R(1)(c) would also extend the return to work guarantee to the situations where an employee gives birth to a living child who later dies (see proposed section 94N) and where the employee stops being the primary care-giver of the child (see proposed section 94O).

660. Subsection 94R(2) would ensure that the guarantee also applies where an employee has taken paid leave under proposed subsection 94R(2) (instead of being transferred to a safe job).

661. Subsection 94R(3) would provide that an employee is entitled to return:

- to the position she held immediately before starting a period of leave including or constituted by maternity leave;
- to a position she was promoted to or voluntarily transferred to during her leave; or
- if she was transferred to a safe job (see proposed section 94F) or started part-time work because of the pregnancy (as distinct from a situation of an employee who usually works part-time) – to the position she held immediately before the transfer or part-time work.

662. If the employee had been transferred to a safe job under paragraph 94F(2)(a) because of the pregnancy, subsection 94R(4) would entitle the employee to return to the position she held immediately before being transferred to the safe job.

663. Subsection 94R(5) would provide that if the employee's former position no longer exists, and the employee is qualified for, and can perform the duties of, other positions in the employer's employment, the employer must employ her in whichever of those positions is nearest in status and remuneration to the former position.

*New section 94S – Replacement employees—maternity leave*

664. Proposed section 94S would require the employer to tell any replacement to an employee on maternity leave that:

- the engagement is temporary; and
- the employee on maternity leave has a right to return to her position she held immediately before taking maternity leave under proposed section 94R.

665. The employer would be required to provide this information to both a *primary replacement* (subsection 94S(1)) and *secondary replacement* (subsection 94S(2)). Subsection 94S(3) would provide that for the purposes of this notification obligation, an *employee* includes a casual employee.

666. The section would not prevent the employer engaging a permanent employee and use that employee to fill the position temporarily. So, for example, an employer could legitimately offer someone a permanent engagement, on the basis that for the first six months the new employee would fill in for the employee on maternity leave, and then afterwards the employer would assign the new employee to work elsewhere in the organisation.

**New Subdivision E — Guarantee of paternity leave**

*New section 94T – The guarantee*

667. Proposed section 94T would guarantee a male employee's entitlement to unpaid paternity leave.

668. Paragraph 94T(1)(a) would provide that an employee is eligible for *short paternity leave*, which consists of one unbroken week of unpaid leave taken from the day his spouse commences childbirth.

669. Paragraph 94T(1)(b) would provide that an employee is entitled to a single, unbroken period of *long paternity leave*, which is unpaid leave taken in respect of the birth of a living child so the employee can be the primary care-giver. Leave taken in a continuous, unbroken period does not preclude the employee from adding other types of authorised leave, such as annual leave or long service leave to the total leave period taken, but the leave period cannot be broken up into separate periods of leave. The combined total of paternity and maternity taken must not exceed 52 weeks (see subsection 94U(3)).

670. Subsection 94T(2) would make the employee's entitlement to paternity leave conditional upon 12 months continuous service with the same employer or engagement as an eligible casual employee (which incorporates a 12 month service requirement – see proposed section 94B). The

12 month continuous service period can contain elements of permanency, regular and systematic casual employment, and authorised leave. At the time when the question of entitlement to parental leave arises, no matter how the continuous service period is made up, the employee must be either permanent or an eligible casual. That is, any ‘casual period’ would have to precede the employee attaining permanent or eligible casual status.

671. The entitlement to paternity leave is also subject to the restrictions in sections 94U and 94W and proposed Subdivision G.

672. Subsection 94T(3) would set out the circumstances under which an employee would not be entitled to paternity leave (these relate to failure to provide the required documentation to the employer).

673. Subsection 94T(4) would provide that an employee may take either short paternity leave, long paternity leave or both. However, because of the operation of other provisions of this Division, long paternity leave may only be taken if the employee is the primary care-giver of the child or his spouse is not taking a period of leave including or constituted by maternity leave.

*New section 94U – Period of paternity leave*

674. Proposed section 94U would set out a method for calculating the period of unpaid paternity leave that is available to an employee who has satisfied the eligibility criteria under proposed section 94T.

675. Subsection 94U(2) would provide that the maximum total amount of unpaid paternity leave, including both short and long paternity leave, is 52 weeks. However, any amount of *related authorised leave* taken by the employee or his spouse would reduce the total amount of paternity leave available.

676. The term *related authorised leave* is defined in subsection 94U(1). It would include periods of authorised leave taken by the employee because of:

- the birth of the child;
- the death of the child.

677. *Related authorised leave* would not include periods of authorised leave taken by the employee’s spouse, such as annual leave, taken while an employee is on paternity leave. Therefore, it is only periods of maternity leave and any other authorised leave of the same type as maternity leave (such as paid maternity leave) taken by an employee’s spouse which would reduce the amount of long paternity leave available (in addition to any authorised leave taken by the employee set out in paragraph 94U(1)(a)).

678. The Standard will not, by itself, restrict the amount of other related authorised leave the employee and his spouse may take in respect of the birth of a child. Rather, if the related authorised leave amounts to 52 weeks, the employee’s unpaid long paternity leave entitlement (under the Standard) would be reduced to zero.

679. The entitlement to paternity leave is expressed in absolute terms. An employee or his spouse may be prevented from taking (or may change their minds and not wish to take) formerly intended periods of related authorised leave. Such formerly intended leave, if not ultimately taken, would not reduce the employee's entitlement to paternity leave.

*New section 94V – Short paternity leave–concurrent leave taken by spouse*

680. Proposed section 94V would provide that short paternity leave and any period of authorised leave taken by his spouse in relation to the birth may be taken at the same time. Simultaneous leave of greater than one week for birth could be provided by agreement between the parties.

*New section 94W – Long paternity leave–not to be concurrent with leave taken by spouse*

681. Proposed section 94W would provide that long paternity leave and any period of maternity leave or leave of the same type as maternity leave (such as paid maternity leave) taken by his spouse in relation to the birth may not be taken at the same time.

**New Subdivision F — Paternity leave: documentation**

*New section 94X – Paternity leave–medical certificate*

682. Subsections 94X(1) – (3) would require a medical certificate to be given to the employer. Generally the certificate must be given to the employer at least 10 weeks before the date of expected or actual birth provided in the certificate. However, if there is a premature birth or other compelling reason which means that it would not be reasonably practicable for the employee to comply with the requirement within that time frame, subsection 94X(4) would allow the medical certificate to be provided as soon as reasonably practicable (which may be before or even after the paternity leave has commenced).

683. Under subsection 94X(5), the requirements of this provision would not apply where circumstances beyond the employee's control prevent compliance.

684. The Note to this section would remind readers that the use of personal information provided to an employer by an employee under this section may be subject to the *Privacy Act 1988*.

*New section 94Y – Short paternity leave–application*

685. Proposed section 94Y would require an employee to submit a written application for short paternity leave to his employer.

686. Subsection 94Y(1) would require that the application state the first and last days of the period in which leave is sought. The maximum amount of short paternity leave to which an employee is entitled is one week starting from the time of birth (see proposed paragraph 94T(1)(a)).

687. Subsection 94Y(2) would require the application to be given to the employer as soon as reasonably practicable on or after the first day of leave.

688. Under subsection 94Y(3), the requirements of this provision would not apply where circumstances beyond the employee's control prevent compliance.

689. The Note to this section would remind readers that the use of personal information provided to an employer by an employee under this section may be subject to the *Privacy Act 1988*.

*New section 94Z – Long paternity leave–documentation*

690. Proposed section 94Z would set out the documentary requirements for an application for long paternity leave.

691. Subsections 94Z(1) – (2) would require the written application to be given to the employer at least ten weeks before the first day of leave sought. If there is a premature birth or other compelling reason which mean that it would not be reasonably practicable for the employee to comply with the documentary requirements within that time frame, subsection 94Z(3) would allow the application to be provided as soon as reasonably practicable (which may be before or even after the paternity leave has commenced).

692. Subsection 94Z(4) would set out the requirements of the statutory declaration which would form part of the long paternity leave application.

693. Subsection 94Z(5) would provide that the requirements of this provision would not apply where circumstances beyond the employee's control prevent compliance.

694. The Note to this section would remind readers that the use of personal information provided to an employer by an employee under this section may be subject to the *Privacy Act 1988*.

**New Subdivision G — Paternity leave: from start to finish**

*New section 94ZA – Short paternity leave–when taken*

695. Proposed section 94ZA would allow an employee to take short paternity leave at any time within the week starting on the day his spouse beings to give birth.

*New section 94ZB – Long paternity leave–when taken*

696. Proposed section 94ZB would provide that an employee may take long paternity leave at any time before the child's first birthday.

*New section 94ZC – End of pregnancy–effect on paternity leave*

697. Proposed section 94ZC would preclude an employee from being entitled to a period of paternity leave if the pregnancy for which the leave was being taken ends otherwise than by the birth of a living child. However, subsection 94ZC(3) would provide that any short paternity leave already taken is unaffected.

*New section 94ZD – Death of child – effect on paternity leave*

698. Proposed section 94ZD would apply when an employee's spouse has given birth but the child later dies.

699. Subsection 94ZD(2) would provide that the employee would no longer be entitled to paternity leave if the leave had not yet started at the time of the child's death.

700. Subsection 94ZD(3) would allow the employee to continue taking a period of leave that has already commenced in the event of the death of the child.

- The Note to this subsection would confirm that although the period of paternity leave which has started is unaffected, the employee may (where the period of leave is longer than 4 weeks) give the employer at least four weeks notice of his return to work if he wishes to do so under section 94ZH.

701. Subsection 94ZD(4) would enable the employer to cancel the remaining period of paternity leave by providing at least four weeks written notice. The employee's entitlement to leave ends on the day specified in such a notice (subsection 94ZD(5)).

*New section 94ZE – End of long paternity leave if employee stops being primary care-giver*

702. Proposed section 94ZE would require the period of long paternity leave to end where the employee ceased being the primary care-giver of the child.

703. Under subsections 94ZE(1) – (2), long paternity leave would be cancelled on the provision of at least 4 four weeks notice by the employer if the employee:

- is not the primary carer giver for a substantial period while the employee is on long paternity leave; and
- it is reasonable to expect that the employee will not resume being the primary care-giver within a reasonable period.

704. Subsection 94ZE(3) would provide that the period of paternity leave ends with effect from the date stated in the notice by the employer.

*New section 94ZF – Variation of period of long paternity leave*

705. Proposed section 94ZF would allow an employee to extend or shorten a period of long paternity leave after it has commenced. This provision would be subject to the limitations in proposed Subdivision E and sections 94ZB, 94ZD and 94ZE (which would place a maximum limit of 52 weeks on the total amount of long paternity leave available, and also impose other conditions on the leave in the event of the death of the child or where the employee ceases to be the primary care-giver respectively).

706. Subsection 94ZF(2) would enable the employer to grant a request for an extension of long paternity leave provided the appropriate notice is given. Any further extension is by agreement between the employer and employee (paragraph 94ZF(2)(b)).

707. Under subsection 94ZF(3), the leave may be shortened by an agreement in writing between the employer and employee.

*New section 94ZG – Employee’s right to terminate employment during paternity leave*

708. Subsection 94ZG(1) would confirm the employee’s right to terminate his employment at any time during a period of paternity leave. Subsection 94ZG(2) would provide that the employee’s right to terminate is subject to any relevant notice or procedural requirements in either a contract of employment or legislation.

709. Termination of employment at the initiative of the employer is not covered by the Standard as it would be subject to other remedies under the WR Act (see Part VIA) and, in appropriate cases, under discrimination legislation.

*New section 94ZH – Return to work guarantee–paternity leave*

710. Proposed section 94ZH would set out the return to work guarantee. The guarantee would apply in circumstances in which an employee returns to work following a period of leave including or made up of paternity leave. In these circumstances, the employee is entitled to return to the position he held immediately before a period of paternity leave.

711. Paragraph 94ZH(1)(a) would provide that the return to work guarantee applies if the *paternity-related leave period* (that is, leave taken in relation to the birth, including or constituted by paternity leave) is less than four weeks. Paragraph 94ZH(1)(b) would provide that the guarantee applies if employee gives the employer four weeks written notice of the proposed date of his resumption of work where the *paternity-related leave period* is greater than four weeks. Paragraph 94ZH(1)(c) would also extend the guarantee to the situation where the employee’s spouse gives birth to a living child who later dies (see proposed section 94ZD) and where the employee ceases to be the primary care-giver of the child (see proposed section 94ZE).

712. Subsection 94ZH(2) would provide that an employee is entitled to return:

- to the position he held immediately before starting a period of leave including or constituted by paternity leave;
- to a position he was promoted to or voluntarily transferred to during his leave; or
- if he started part-time work because of his spouse’s pregnancy (as distinct from the situation of an employee who usually works part-time) – to the position he held immediately before he commenced part-time work.

713. However, subsection 94ZH(3) would provide that if the employee’s former position no longer exists, and the employee is qualified for, and can perform the duties of, other positions in the employer’s employment, the employer must employ him in whichever of those positions is nearest in status and remuneration to the former position.



*New section 94ZI– Replacement employees–long paternity leave*

714. Proposed section 94ZI would require the employer to tell any replacement to an employee on long paternity leave that:

- the engagement is temporary; and
- the employee on long paternity leave has a right to return to the position he held immediate before taking long paternity leave under proposed section 94ZH.

715. The employer would be required to provide this information to both a *primary replacement* (94ZI(1)) and *secondary replacement* (94ZI(2)). Subsection 94ZI(3) would provide that for the purposes of this notification obligation, an *employee* includes a casual employee.

716. The section would also not prevent the employer engaging a permanent employee and using that employee to fill the position temporarily. An employer could legitimately offer someone a permanent engagement, on the basis that for the first six months the new employee would fill in for the employee on long paternity leave, and then afterwards the employer would assign the new employee to work elsewhere in the organisation.

**New Subdivision H – Guarantee of adoption leave**

*New section 94ZJ Meaning of eligible child*

717. Proposed section 94ZJ would define an *eligible child* for the purposes of the adoption leave entitlements in this Division.

718. For an employee to be eligible for adoption leave, the child that the employee intends to adopt:

- must be less than five years old (paragraph 94ZJ(a));
- must not have not previously lived with the employee at any stage for a continuous period of over six months (paragraph 94ZJ(b)); and
- must not be a child or step child of the employee or the employee’s spouse (paragraph 94ZJ(c)).

*New section 94ZK guarantee—pre-adoption leave*

719. Proposed section 94ZK would provide an entitlement to two days of unpaid leave to attend any interview or examination required for the purpose of obtaining approval to adopt a child.

720. Subsection 94ZK(1) would provide that the entitlement is available to an employee seeking approval to adopt an eligible child. There is no qualifying continuous service test for entitlement to this leave.

721. Subsection 94ZK(2) would provide that the maximum amount of *pre-adoption leave* available is two days of unpaid leave.

722. Subsection 94ZK(3) would require an employee to take other authorised leave for the same period instead of the pre-adoption leave where the employee could use other leave, and the employer directs the employee to use that other leave.

723. Subsection 94ZK(4) would allow the leave to be taken in a single, unbroken period of up to two days or any separate periods as agreed between the employer and employee (up to a maximum of two days). This agreement can occur through an AWA or collective workplace agreement made under the WR Act (subsection 94ZK(5)), or by other means subsection 94ZK(6).

*New section 94ZL – The guarantee—adoption leave*

724. Proposed section 94ZL would provide that the entitlement to adoption leave is to:

- a single, unbroken period of up to three weeks unpaid leave taken within the three weeks from the day of placement – ie *short adoption leave*; or
- a single, unbroken period of unpaid leave taken after the day of placement so the employee can be the primary care-giver of the child – ie *long adoption leave*.

725. Leave taken in a continuous, unbroken period does not preclude the employee from adding other types of authorised leave, such as annual leave or long service leave, to the total leave period taken, but the leave period cannot be broken up into separate periods of leave; the maximum amount of leave must not exceed 52 weeks (subsection 94ZM(3)).

726. Paragraph 94ZL(2)(a) would require an employee to satisfy the documentation requirements set out in proposed Subdivision I. Paragraph 94ZL(2)(b) would make the employee's entitlement to adoption leave conditional upon 12 months continuous service with the same employer or engagement as an eligible casual employee (which incorporates a 12 month continuous service requirement – see proposed section 94B). The 12 month continuous service period can contain elements of permanency, regular and systematic casual employment, and authorised leave. At the time when the question of entitlement to parental leave arises, no matter how the continuous service period is made up, the employee must be either permanent or an eligible casual. That is, any 'casual period' would have to precede the employee's attaining permanent or eligible casual status.

727. The entitlement to adoption leave is also subject to the restrictions in proposed sections 94ZM and 94ZO and proposed Subdivision J.

*New section 94ZM – Period of adoption leave*

728. Proposed section 94ZM would set out a method for calculating the period of unpaid adoption leave that is available to an employee who has satisfied the eligibility criteria under section 94ZL.

729. Subsection 94ZM(3) would provide that the maximum total amount of unpaid adoption leave, including both short and long adoption leave, is 52 weeks. Subsection 94ZM(2) would enable an employee to take other forms of authorised leave in conjunction with, or in addition to,

adoption leave. However, any amount of *related authorised leave* would reduce the total amount of adoption leave available.

730. The term *related authorised leave* is defined in subsection 94ZM(1). It would include periods of authorised leave taken by the employee because of the placement of the child with the employee. It would also include periods of adoption leave, or leave of the same type as adoption leave (such as paid adoption leave) taken by the spouse because of the placement of the child with the employee.

731. The Standard will not, by itself, restrict the amount of other *related authorised leave* the employee is entitled to take in respect of the placement of a child. Rather, if the *related authorised leave* amounts to 52 weeks, the employee's unpaid long adoption leave entitlement (under the Standard) would be reduced to zero.

732. The entitlement to adoption leave is expressed in absolute terms. An employee or his or her spouse may be prevented from taking (or may change their minds and not wish to take) formerly intended periods of related authorised leave. Such formerly intended leave, if not ultimately taken, would not reduce the employee's entitlement to adoption leave.

*New section 94ZN – Short adoption leave—concurrent leave taken by spouse*

733. Proposed section 94ZN would provide that short adoption leave and any period of authorised leave taken by his or her spouse in relation to the placement of a child may be taken at the same time. Simultaneous leave greater than three weeks for adoption could be provided for by agreement.

*New section 94ZO – Long adoption leave—not to be concurrent with leave taken by spouse*

734. Proposed section 94ZO would provide that long adoption leave and any period of authorised leave taken by his or her spouse in relation to the placement of a child may not be taken at the same time.

**New Subdivision I — Adoption leave: documentation**

*New section 94ZP Adoption leave—notice*

735. Proposed section 94ZP would set out the notice requirements that need to be satisfied where an employee intends to take a period of adoption leave.

736. Subsection 94ZP(1) would oblige an employee to satisfy the notice requirements set out in the section as a prerequisite to a period of short or long adoption leave.

737. Subsection 94ZP(2) would require an employee to provide written notice to the employer of his or her intention to apply for adoption leave as soon as reasonably practicable after the employee has received notice of approval of the placement (a *placement approval notice*).

738. Subsection 94ZP(3) would require an employee to give written notice to the employer of the actual day when the placement is to commence as soon as reasonably practicable after the employee is made aware of the expected day (a *placement notice*).

739. Subsection 94ZP(4) would require the employee to give notice of the periods of leave of both short and long adoption leave sought or any other authorised leave the employee intends to take because of the placement of the child. This notice must be in writing and provided:

- within eight weeks of receiving a *placement approval notice* if a *placement notice* has been received by the employee within eight weeks of receiving the *placement approval notice*; or
- as soon as practicable after receiving the *placement notice* if that notice is received more than eight weeks after the *placement approval notice* is received.

740. Subsection 94ZP(5) would apply where the employee decides to adopt a child who is a relative of the employee and authorisation of the placement of the child with the employee is pending. Paragraphs 94ZP(5)(a)-(b) would provide that the notice of the decision to take the child into custody must be made as soon as practicable after the decision has been made. The notice requirements under subsections 94ZP(2) – (4) must also be satisfied.

741. Subsection 94ZP(6) would provide that where the employee is a new employee and he or she has already commenced the process for adoption approval, the employee must provide the relevant notices required by this section to his or her new employer as soon as reasonably practicable. The Note to this subsection would confirm, however, that an employee is only entitled to take either short or long adoption leave if the employee will have completed 12 months continuous service with the new employer before the first day of leave sought, or the employee is eligible casual employee under proposed section 94ZL.

742. Subsection 94ZP(7) would provide that if the employee is unable to comply with the notice requirements due to:

- the day when the placement is expected to start; or
- any other compelling reason,

notice must be given to the employer of those events as soon as reasonably practicable before the first day of adoption leave.

743. Subsection 94ZP(8) would define *relative* (of an employee). For the purpose of this section, *relative* would mean a grandchild, nephew, niece or sibling of the employee or the employee's spouse.

744. The Note to this section would remind readers that the use of personal information provided to an employer by an employee under this section may be subject to the *Privacy Act 1988*.

### Illustrative Example

Kevin is a courier employed by Kosta's Taxi Truck Pty Ltd. He has a niece called Belinda who is under five years of age.

Due to a fatal motor vehicle accident involving her parents, Belinda has been orphaned. Her grandparents are too frail to care for her. Her Aunt and Uncle, Kaye and Kevin, wish to become Belinda's primary care-givers and so decide to adopt her.

In this instance, Kevin would have to notify his employer of their decision to adopt Belinda as soon as reasonably practicable after they make their decision. He must also satisfy the notice criteria set out in subsections 94ZP(2) – (4) while the placement of Belinda undergoes the relevant approval process prior to authorisation.

### *New section 94ZQ – Short adoption leave—application*

745. Proposed section 94ZQ would require an employee to submit a written application for short adoption leave to the employer.

746. Subsection 94ZQ(1) would require that the application state the first and last days of the period in which leave is sought. The maximum amount of short adoption leave is three weeks starting from the day of placement of the child (see paragraph 94ZL(1)(a)).

747. Subsection 94ZQ(2) would provide that an application for short adoption leave must be given to the employer no later than 14 days before the proposed day of placement of the child.

748. However, subsection 94ZQ(3) would provide an exception to the general rule in subsection 94ZQ(2), which applies where the employee is unable to comply due to:

- the day when the placement is expected to start; or
- any other compelling reason.

749. In such cases, the employee would be required to provide the application as soon as reasonably practicable before the first day of short adoption leave.

750. The Note to this section would remind readers that the use of personal information provided to an employer by an employee under this section may be subject to the *Privacy Act 1988*.

### *New section 94ZR Long adoption leave—application*

751. Proposed section 94ZR would set out the documentary requirements for an application for long adoption leave.

752. Subsections 94ZR(1) – (2) would require the written application to be given to the employer at least ten weeks before the first day of leave sought.

753. Subsection 94ZR(3) would provide an exception to the documentary requirements, where the employee is unable to comply due to:

- the day when the placement is expected to start; or
- any other compelling reason.

754. In such cases, the employee would be required to provide the application as soon reasonably practicable before the first day of long adoption leave.

755. The Note to this section would remind readers that the use of personal information provided to an employer by an employee under this section may be subject to the *Privacy Act 1988*.

*New section 94ZS Adoption leave—additional documents*

756. Proposed section 94ZS would require the employee to submit additional documents with an application for adoption leave.

757. Subsection 94ZS(2) would require the documents to be given to the employer before the period of adoption leave starts or, where an employee is proposing to take both short and long adoption leave, before short adoption leave has commenced.

758. Subsection 94ZS(3) would provide that an employer must provide his or her employer with a statement from an adoption agency stating the expected placement date and a statutory declaration. Subsection 94ZS(4) would set out the requirements of the statutory declaration.

759. The Note to this section would remind readers that the use of personal information provided to an employer by an employee under this section may be subject to the *Privacy Act 1988*.

**New Subdivision J – Adoption leave: from start to finish**

*New section 94ZT Short adoption leave—when taken*

760. Proposed section 94ZT would allow an employee to take short adoption leave at any time within the three week period starting on the day the child is placed with the employee.

*New section 94ZU Long adoption leave—when taken*

761. Proposed section 94ZU would provide that an employee may take long adoption leave at any time within 12 months from the date the child is placed with the employee. So, for example, the employee's spouse may take adoption leave for six months starting from the day of placement, after which he ceases to be the primary carer-giver. The employee may then take a period of long adoption leave herself from that time, provided that the combined total of leave taken does not exceed 52 weeks.

*New section 94ZV Placement does not proceed—effect on adoption leave*

762. Proposed section 94ZV would set out the effect on adoption leave where the placement of the child with the employee does not proceed or is cancelled or discontinued (including where the child dies during the period of adoption leave).

763. Subsection 94ZV(2) would provide that the employer would no longer be entitled to a period of adoption leave (including any authorised leave taken in conjunction with the adoption leave) if the leave had not yet started.

764. Subsection 94ZV(3) would allow the employee to continue taking the period of leave in the event of cancellation or discontinuation of the placement after the placement has started.

- However, as pointed out in the Note to this subsection, the employee may shorten the period with the employer's approval – proposed section 94ZX. If the employee wishes to take advantage of the return to work guarantee and the period of leave is longer than four weeks, the employee must give the employer at least four weeks notice of his or her return to work under proposed section 94ZZ.

765. Subsection 94ZV(4) would enable the employer to cancel the remaining period of long adoption leave by providing at least four weeks notice of the cancellation to the employee. If a notice is given, the entitlement to leave ends on the day specified in the notice (subsection 94ZV(5)).

*New section 94ZW End of long adoption leave if employee stops being primary care-giver*

766. Proposed section 94ZW would enable an employer to require an employee to return to work where they have ceased to be the primary care-giver of the child.

767. Under subsections 94ZW(1) – (2), long adoption leave would be cancelled on the provision of at least 4 four weeks notice by the employer if the employee:

- is not the primary carer giver for a substantial period; and
- it is reasonable to expect that the employee will not resume being the primary care-giver within a reasonable period.

768. Subsection 94ZW(3) would provide that the period of long adoption leave ends with effect from the date stated in the notice by the employer.

*New section 94ZX– Variation of period of long adoption leave*

769. Proposed section 94ZX would allow an employee to extend or shorten a period of long adoption leave after it has commenced.

770. The section would be subject to proposed Subdivision H and the limitations in proposed sections 94ZU, 94ZV and 94ZW (these provisions place a maximum limit of 52 weeks on the total amount of unpaid adoption leave available, and impose other conditions on the leave in the

event that the placement does not proceed or where the employee ceases to be the primary care-giver).

771. Subsection 94ZX(2) would require the employer to grant a request for an extension of the adoption leave provided the appropriate notice is given. Any further extension is by agreement between the employer and employee (paragraph 94ZX(2)(b)).

772. Under subsection 94ZX(3), the leave may be shortened by an agreement in writing between the employer and employee. The Note would confirm that where the period of adoption leave is longer than four weeks, the employee must also give his or her employer four weeks notice of his or her intended return to work to take advantage of the return to work guarantee under section 94ZZ.

*New section 94ZY Employee's right to terminate employment during adoption leave*

773. Subsection 94ZY(1) would confirm the employee's right to terminate his employment at any time during a period of adoption leave. Subsection 94ZY(2) would provide that the employee's right to terminate is subject to any relevant notice or procedural requirements in either a contract of employment or legislation.

774. Termination of employment at the initiative of the employer is not covered by the Standard as it would be subject to other remedies under the WR Act (see Part VIA) and, in appropriate cases, under discrimination legislation.

*New section 94ZZ Return to work guarantee—adoption leave*

775. Proposed section 94ZZ would set out the return to work guarantee. The guarantee would apply in circumstances in which an employee returns to work following a period of leave including or made up of adoption leave. In these circumstances, the employee is entitled to return to the position held immediately before a period of adoption leave.

776. Proposed paragraph 94ZZ(1)(a) would provide that the return to work guarantee applies if the *adoption-related leave period* (that is, leave taken in relation to the placement of a child, including or constituted by adoption leave) is less than four weeks. Proposed paragraph 94ZZ(1)(b) would provide that the guarantee applies for leave that is longer than four weeks if employee gives the employer four weeks written notice of the proposed date of his or return to work. Paragraph 94ZZ(1)(c) would also extend the guarantee to the situation where the placement of the child does not proceed (see proposed section 94ZV) and where the employee ceases to be the primary care-giver of the child (see proposed section 94ZW).

777. Subsection 94ZZ(2) would provide that the employee is entitled to return:

- to the position held immediately before starting a period of leave including or constituted by adoption leave; or
- to a position the employee was promoted to or voluntarily transferred to during the leave.



778. However, subsection 94ZZ(3) would provide that if the position (the former position) no longer exists, and the employee is qualified for, and can perform the duties of, other positions in the employer's employment, the employer must employ him or her in whichever of those positions is nearest in status and remuneration to the former position.

*New section 94ZZA – Replacement employees – long adoption leave*

779. Proposed section 94ZZA would require the employer to tell any replacement to an employee on adoption leave that:

- the engagement is temporary; and
- the employee on adoption leave has a right to return to the position he or she held immediately before taking adoption leave under section 94ZZ.

780. The employer would be required to provide this information to both a *primary replacement* (subsection 94ZZA(1)) and *secondary replacement* (subsection 94ZZA(2)).

781. Subsection 94ZZA(3) would provide that for the purposes of the notification obligation, an *employee* includes a casual employee.

782. The section would also allow the employer engaging a permanent employee to replace an employee on adoption leave to fill the employee's position temporarily. So, for example, an employer could legitimately offer someone a permanent engagement on the basis that for the first six months the new employee would fill in for the employee on adoption leave, and then afterwards the employer would assign the new employee to work elsewhere in the organisation.

**New Subdivision K – Parental leave: Service**

*New section 94ZZB – Parental leave and service*

783. Proposed section 94ZZB would set out the effect of any form of parental leave on continuity of service. The definition of continuous service is not intended to affect, or be affected by, this provision.

784. Subsection 94ZZB(1) would provide that continuity of service is not broken by a period of parental leave.

785. Subsection 94ZZB(2) would provide that parental leave does not count as service except as set out in paragraphs 94ZZB(2)(a) – (c).

786. For example, if an employee's entitlement to annual leave is provided for under the Standard, the employee will accrue no annual leave for the period during which they are on parental leave. However, the employee would not lose accumulated leave credits, as the employee's continuity of service is not broken by the parental leave.

787. Subsection 94ZZB(3) would define *parental leave* for the purposes of service under this section as meaning:

- maternity leave;
- paid leave under subparagraph 94F(2)(b)(i) or (ii) (where the employee is fit to work in a different position but no suitable safe job is available);
- paternity leave;
- pre-adoption leave;
- adoption leave.

#### Illustrative Example

Benjamin works 38 hours per week as a full-time employee for Dragon Dining Rooms Pty Ltd. He has been working there for three and a half years. He is taking six-months of adoption leave to be the primary care-giver for the child he and his spouse Saveria have adopted. As parental leave does not count as service, Benjamin will not accrue any annual leave during that period of adoption leave. However, he will not lose his accrued annual leave entitlements, or any other entitlements, as his continuity of service with his employer during that period of adoption leave has not been broken.

### **New Part VB – Workplace agreements**

#### **New Division 1 – Preliminary**

##### *New section 95 – Definition*

788. Proposed section 95 would define *Court* to mean the Federal Court of Australia or the Federal Magistrates Court. This definition would allow parties to bring legal actions relating to Part VB in either court.

789. Proposed section 95 would also include ‘sign post’ definitions referring the reader to particular provisions in the Bill, such as proposed section 95B which would provide a definition of *new business*.

##### *New section 95A – Single business and single employer*

790. Proposed section 95A would define *single business* and *part* of a single business for the purposes of Part VB. It is intended that collective agreements would cover a single business or part of a single business unless the exceptions in subsection 95A(2) apply or the agreement is a multiple-business agreement made under proposed section 96E.

791. Subsection 95A(1) would define *single business* as a business, project or undertaking that is carried on by an employer, or activities carried on by the Commonwealth, a State or Territory, or a Commonwealth, State or Territory authority.

792. Subsection 95A(2) would allow two or more employers to be treated as one employer in certain circumstances. Paragraph 95A(2)(a) would provide that where two or more employers carry on a business, project or undertaking as a joint venture or common enterprise, they would

be deemed to be one employer for the purposes of the definition of single business in subsection 95A(1).

793. Subparagraph 95A(2)(b)(i) would provide that where two or more related corporations under the *Corporations Act 2001* carry on a single business, those corporations may be treated as one employer and the single businesses may be treated as one single business.

794. By deeming multiple businesses and employers to be single businesses and single employers in certain circumstances, subsection 95A(2) would have the effect of allowing these employers to make one collective agreement covering certain joint business activities. This would eliminate the need for these businesses to make separate collective agreements or a multiple-business agreement, but would only apply in the limited circumstances set out in paragraphs 95A(2)(a) and (b). These would be exceptions to the requirement that a collective agreement must apply to a single business or part of a single business.

795. Subsection 95A(3) defines a *part* of a single business to include a geographically distinct part or a distinct operational or organisational unit within the single business. The definition is inclusive and does not limit the scope for collective agreements to apply to a part of a single business that may be constituted in any relevant way (eg all of the boilermakers employed in the business).

#### *New section 95B – New business*

796. Proposed section 95B would define *new business* for the purposes of sections 96C and 96D, which would provide for the making of greenfields agreements (a type of collective agreement that would not involve employee approval as it would be made prior to the employment of any employees).

797. Proposed section 95B would provide that an agreement relates to a *new business* if the agreement relates to:

- a new business, project or undertaking that the employer is proposing to establish (subparagraph 95B(1)(a)(i)); or
- new activities proposed to be carried on by a government authority (subparagraph 95B(1)(a)(ii)); and
- the business, project or undertaking or the activities are a single business or part of a single business (paragraph 95B(1)(b)).

798. Proposed section 95B is intended to clarify any uncertainty arising from the jurisprudence about the definition of new business. Greenfields agreements are only available where the employer is establishing or proposing to establish a new business (see pre-reform paragraph 170LL(1)(a), proposed paragraph 96C(1)(a) and proposed paragraph 96D(a)). On several occasions the AIRC has decided that this requirement means that an employer cannot make a greenfields agreement to cover activities on a new project, which are of the same nature as its existing business activities. In these decisions the AIRC found that the new activities would not constitute a new business, but instead involved the same business being undertaken on

a new site (see *Re Patrick Cargo Pty Limited Certified Agreement 2002* (PR920391); *Re PALS Playford B Refurbishment and Maintenance Contract Agreement 2001-2004*, (PR924609); *Re Pelican Point Complete Scaffold Contracting Pty Ltd Power Station Enterprise Bargaining Agreement 2003-2004*, (PR931021); *Re Whyalla Steelworks, (Downer RML Pty Ltd – Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (Electrical Division)) Blast Furnace Reline 2004 Outage Agreement* (PR943195)).

799. However, in *Brunel Technical Services Offshore Pty Ltd Bayu-Darwin Pipeline Agreement 2004* (PR950406) (*Brunel*) the Full Bench of the AIRC took a different view. The Full Bench found that a new project was a new business, based on the requirement for a new business in pre-reform paragraph 170LL(1)(a), which the Full Bench said was referable to the definition of new business in pre-reform section 170LB.

800. For these reasons, the Full Bench found an employer could make a greenfields agreement to cover activities on a new project.

801. The Full Bench in *Brunel* did not overrule the earlier AIRC decisions, instead distinguishing them and noting that each case turned on its facts. Proposed section 95B would clarify that the definition of *new business* would include a new business, new project or new undertaking and is not limited to the circumstances where those activities are of a different nature to those previously carried on by the employer.

#### *New section 95C – AWAs with Commonwealth employees*

802. Proposed section 95C would provide special arrangements for AWAs relating to Commonwealth employees.

803. Subsection 95C(1) would provide that an agency head (as defined by the *Public Service Act 1999*) may act on behalf of the Commonwealth in relation to an AWA with persons in their agency who are engaged under the *Public Service Act 1999*.

804. Subsection 95C(2) would provide that a Secretary of a Department (as defined by the *Parliamentary Service Act 1999*) may act on behalf of the Commonwealth in relation to an AWAs with persons in their agency who are engaged under the *Parliamentary Service Act 1999*.

#### *New section 95D – Extended operation of Part in relation to proposed workplace agreements*

805. Proposed section 95D would provide a translation rule that would extend the operation of Part VB –Workplace agreements in certain circumstances, where the context permits.

806. Paragraph 95D(a) would provide that, so far as context permits, a reference to a workplace agreement includes a proposed workplace agreement. For example, where proposed section 97C refers to a workplace agreement, that reference includes a proposed workplace agreement.

807. Paragraph 95D(b) would provide that, so far as the context permits, a reference to an employer, includes a proposed employer in relation to a proposed workplace agreement. For example, where proposed section 98C refers to an employer having a workplace agreement approved, that includes a proposed employer having a proposed workplace agreement approved.

808. Paragraph 95D(c) would provide that, so far as the context permits, a reference to an employee, includes a proposed employee in relation to a proposed workplace agreement. For example, where proposed section 104 refers to duress being applied to an employee in relation to an AWA, that reference includes duress being applied to a proposed employee in relation to a proposed AWA.

#### *New section 95E – Extraterritorial extension*

809. Proposed section 95E would provide for the extraterritorial extension of Part VB.

810. Proposed subsection 95E(1) would extend the application of the Part (and related provisions of the WR Act) to persons, acts, omissions, matters and things outside Australia that are connected with a workplace agreement relating to an Australian-based employee or an Australian employer (as those expressions would be defined in subsection 4(1)). The note under subsection 95E(1) makes clear that, for the purposes of section 95E, *Australia* includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands and the coastal sea.

811. Subsection 95E(1) would have the effect of allowing workplace agreements to be made by Australian employers with non-Australian-based employees, and by non-Australian employers with Australian-based employees, wherever the work was to be performed. It would also extend Part VB and related provisions of the WR Act in other ways, for example by extending the application of proposed section 104A (making false and misleading statement in relation to workplace agreements) to statements made outside Australia.

812. Subsection 95E(2) would provide a specific definition of *this Act* for the purposes of proposed section 95E. This is because the definition of *this Act* in subsection 4(1) (which would otherwise apply) does not include the Registration and Accountability of Organisations Schedule and regulations made under it. The specific definition would ensure that the extraterritorial extension under subsection 95E(1) would apply to that Schedule and those regulations so far as they relate to Part VB.

#### **New Division 2 – Types of workplace agreements**

##### *New section 96 – Australian workplace agreements (AWAs)*

813. Proposed section 96 would provide for the making of individual agreements between an employer and employee. These agreements would be known as *Australian workplace agreements* or AWAs.

814. Subsection 96(1) would provide that an employer may make an AWA in writing with a person whose employment will be subject to the agreement.

815. Subsection 96(2) would provide that an AWA may be made before the commencement of the employment. This would enable an employer to enter into an AWA with a future employee to ensure that an AWA is in place from the start of the employment relationship.

*New section 96A – Employee collective agreements*

816. Proposed section 96A would provide for the making of collective agreements directly between an employer and its employees without union involvement. These agreements would be known as *employee collective agreements*.

817. Proposed section 96A would provide that an employer may make an agreement in writing with persons who are employed in a single business or part of a single business of the employer at the time of making the agreement.

*New section 96B – Union collective agreements*

818. Proposed section 96B would provide for the making of collective agreements between an employer and one or more organisations of employees. These agreements would be known as *union collective agreements*.

819. Proposed section 96B would provide that an employer may make an agreement in writing where, at the time the agreement is made, each organisation of employees:

- has at least one member employed in the single business or part of the single business whose employment will be subject to the agreement (paragraph 96B(a)); and
- is entitled to represent the industrial interests of the member in relation to work that will be subject to the agreement (paragraph 96B(b)).

820. These requirements are intended to ensure that an organisation of employees only enters into a union collective agreement where it has an interest in the workplace arising from having at least one member employed at the workplace who it is entitled to represent.

*New section 96C – Union greenfields agreements*

821. Proposed section 96C would provide for the making of collective agreements between an employer and one or more organisations of employees in relation to a new business as defined by proposed section 95B. These agreements would be known as *union greenfields agreements*.

822. Subsection 96C(1) would provide that an employer may make an agreement in writing with one or more organisations of employees if:

- when the agreement is made, it relates to a new business that the employer proposes to establish or is establishing (paragraph 96C(1)(a));
- the agreement is to be made before the employment of any of the persons who will be necessary for the normal operation of the business and whose employment will be subject to the agreement (paragraph 96C(1)(b)); and

- the one or more organisations meet the requirements of subsection 96C(2) (paragraph 96C(1)(c)).

823. Subsection 96C(2) would provide that, in order to make a union greenfields agreement, each organisation of employees must be entitled to represent the industrial interests of one or more of the persons whose employment is likely to be subject to the agreement, in relation to the work that will be subject to the agreement.

824. It would not be necessary to seek the approval of employees prior to the employer lodging a union greenfields agreement and it coming into operation.

*New section 96D – Employer greenfields agreements*

825. Proposed section 96D would provide for employers to make collective agreements in relation to a new business as defined by proposed section 95B. These agreements would be known as *employer greenfields agreements*.

826. Proposed section 96D would provide that an employer may make an agreement in writing if:

- the agreement relates to a new business that the employer proposes to establish or is establishing (paragraph 96D(a)); and
- the agreement is to be made before the employment of any of the persons who will be necessary for the normal operation of the business and whose employment will be subject to the agreement (paragraph 96D(b)).

827. It would not be necessary to seek the approval of employees prior to the employer lodging an employer greenfields agreement and it coming into operation.

*New section 96E – Multiple-business agreements*

828. Proposed section 96E would provide for multiple employers to make a single agreement that applies to all of their businesses. These agreements would be known as *multiple-business agreements*. Prior to making or varying such an agreement, an employer would have to seek authorisation from the Employment Advocate under proposed section 96F.

829. Subsection 96E(1) would provide that a *multiple-business agreement* is a collective agreement that relates to any of, or a combination of, different single businesses or parts of different single businesses, carried on by one or more employers.

830. The note under subsection 96E(1) would refer to proposed sections 99A and 102I which would make it a civil remedy provision to lodge a multiple-business agreement without authorisation.

831. Subsection 96E(2) would provide that, so far as the context permits, Part VB has effect in relation to a multiple-business agreement of a particular type as if the agreement were a collective agreement of that type. This means that if, for example, a multiple-business

agreement is made as an employee collective agreement, the requirements for employee collective agreements found in Part VB, apart from Division 2, apply to the agreement.

832. Subsection 96E(3) would provide that, so far as the context permits, Part VB has effect in relation to a multiple-business agreement as if a reference to the employer were a reference to any one of the employers who are party to the multiple-business agreement. This means that, for example, one of the employers can lodge the multiple-business agreement on behalf of all of the employers.

*New section 96F – Authorisation of multiple-business agreements*

833. Proposed section 96F would allow the Employment Advocate to authorise an employer to make or vary a multiple-business agreement.

834. Subsection 96F(1) would provide that an employer acting on behalf of the other employers seeking to negotiate a multiple-business agreement may apply to the Employment Advocate for an authorisation to make the agreement. It is intended that this would occur prior to the commencement of negotiations for the agreement. See proposed section 99A which would make it a civil remedy provision to lodge a multiple-business agreement without authorisation.

835. Subsection 96F(2) would provide that the regulations may set out a procedure for applying to the Employment Advocate for the authorisation. Where such a procedure is established, the Employment Advocate would not have to consider an application for authorisation that is not made in accordance with the procedure.

836. Subsection 96F(3) would provide the Employment Advocate must not grant an authorisation unless he or she is satisfied that it is in the public interest to do so, having regard to:

- whether the matters dealt with in the agreement could be more appropriately dealt with by a different collective agreement (paragraph 96F(3)(a)); and
- any other matters specified in the regulations (paragraph 96F(3)(a)).

837. If the Employment Advocate grants an authorisation, the parties could make or vary a multiple-business agreement in accordance with the relevant provisions of Part VB.

*New section 96G – When a workplace agreement is made*

838. Proposed section 96G would provide the time at which a workplace agreement is *made*.

839. Paragraph 96G(a) would provide that an AWA is *made* when it is approved in accordance with proposed section 98C.

840. Paragraph 96G(b) would provide that an employee collective agreement is *made* when it is approved in accordance with proposed section 98C.



841. Paragraph 96G(c) would provide that a union collective agreement is *made* when the employer and the organisation or organisations agree to the terms of the agreement.

842. Paragraph 96G(d) would provide that a union greenfields agreement is *made* when the employer and the organisation or organisations agree to the terms of the agreement.

843. Paragraph 96G(e) would provide that an employer greenfields agreement is *made* when the employer lodges the agreement.

844. The concept of when an agreement is made is included in Part VB because of the effect that making an agreement has on parties' rights. Once a collective agreement is made any bargaining period on foot between the parties ends, with the effect that any industrial action taken after that time would not be protected action (see paragraph 107E(a)). Also, there is a prohibition on an employer withdrawing from a union collective agreement or union greenfields agreement after it has been made (see proposed section 98B).

### **New Division 3 – Bargaining agents**

#### *New section 97 – Bargaining agents – qualifications*

845. Proposed section 97 would provide for the qualifications of bargaining agents who may assist employees in making an AWA or employee collective agreement. Bargaining agents would be able to assist employees in relation to the making, variation or termination of an AWA (see proposed section 97A). Employees would also be able to appoint bargaining agents to meet and confer with their employer about the making or variation of an employee collective agreement or the variation of an employee greenfields agreement (see proposed section 97B).

846. Subsection 97(1) would provide that a person can only be a bargaining agent if the person meets the qualifications in this section at the time of their appointment.

847. Subsection 97(2) would provide that the person must meet the requirements (if any) specified in the regulations.

848. Subsection 97(3) would provide that where an organisation of employees is to be a bargaining agent:

- at least one person whose employment is or will be subject to the agreement must be a member of the organisation (paragraph 97(3)(a)); and
- the organisation must be entitled to represent the person's industrial interests in relation to work that is or will be subject to the agreement (paragraph 97(3)(a)).

849. The requirements in 97(3) are intended to ensure that an organisation of employees only acts as a bargaining agent where it has an interest in the workplace arising from having at least one member at the workplace that it is entitled to represent.

*New section 97A – Bargaining agents – AWAs*

850. Proposed section 97A would set out requirements for an employer or employee to appoint a bargaining agent in relation to the making, variation or termination of an AWA and for the other party in the negotiations to recognise that bargaining agent.

851. Subsection 97A(1) would provide that either the employer or the employee may appoint a person to be his or her bargaining agent to negotiate the making, variation or termination of an AWA. The appointment must be in writing.

852. The note under subsection 97A(1) would refer to subsection 104(3) which would provide that there is a civil remedy for coercion in relation to appointments made under proposed section 97A.

853. Subsection 97A(2) requires the recognition of the appointment of a duly appointed bargaining agent by the other party for the purposes of subsection (1).

854. Subsection 97A(3) would provide that a person is not in breach of subsection (2) if he or she was not given a copy of the bargaining agent's instrument of appointment before refusing to recognise the bargaining agent. The words 'does not apply' in subsection 97A(3) would mean that the burden of proving that a contravention of subsection 97A(2) did not occur, because of subsection 97A(3), would be reversed (ie it would be upon the defendant).

855. Subsection 97A(4) would provide that subsection 97A(2) is a civil remedy provision.

856. The note under subsection 97A(4) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units for a failure to recognise another party's bargaining agent when negotiating an AWA (see proposed section 105D).

*New section 97B – Bargaining agent – employee negotiated agreements*

857. Proposed section 97B would set out requirements for employees to appoint a bargaining agent to represent them by meeting and conferring with the employer in relation to an employee collective agreement.

858. Subsection 97B(1) would provide that a person whose employment will be subject to an employee collective agreement may request a bargaining agent to represent them in meeting and conferring with the employer about the agreement.

859. The note under subsection 97B(1) would refer to subsection 104(4) which would provide a civil remedy for coercion in relation to appointments made under proposed section 97B.

860. Subsection 97B(2) would provide that a person whose employment is or will be subject to an employer greenfields agreement may request a bargaining agent to represent them in meeting and conferring with the employer about the variation of the agreement.

861. The note under subsection 97B(2) would refer to subsection 104(4) which would provide that there is a civil remedy for coercion in relation to appointments made under proposed section 97B.

862. Subsection 97B(3) would provide that an employee may request that the employer meet and confer with the employee's bargaining agent about the agreement. If an employee makes such a request the employer would be required to give the bargaining agent a reasonable opportunity to meet and confer with the employer about the agreement in the period beginning seven days before the agreement is approved and ending when the agreement is approved. Subsection 97B(4) would provide that subsection 97B(2) is a civil remedy provision.

863. The note under subsection 97A(4) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units for a failure to meet and confer with a bargaining agent about an employee negotiated agreement in the period beginning seven days before the agreement is approved and ending when the agreement is approved.

864. Subsection 97B(5) would provide that the employer's obligation to meet and confer with a bargaining agent ceases if the employee withdraws the request for the employer to do so.

865. Subsection 97B(6) would provide the Employment Advocate power to issue a certificate that:

- on application by a bargaining agent – an employee has made a request for the bargaining agent to represent the employee in meeting and conferring with the employer (paragraph 97B(6)(a)); or
- on application by the employer – that the employer does not need to meet and confer with the bargaining agent because the employee has withdrawn the request.

866. It is not intended that gaining a certificate under subsection 97B(6) would be a pre-requisite to a bargaining agent being able to represent an employee.

867. It is intended that one certificate may be issued in relation to several employees appointing the same bargaining agent.

868. Subsection 97B(7) would provide that the certificate must not identify any of the employees. This is intended to ensure that an employee or group of employees may anonymously ask for the employer to meet and confer with their bargaining agent.

869. In this context subsection 97B(8) would provide that the certificate is prima facie evidence for all purposes that the employee or employees made the request.

870. While it is intended that an organisation of employees would be able to be a bargaining agent for an employee in relation to an employee collective agreement, an employee's choice of bargaining agents would not be limited.

871. A number of employers have interpreted a similar requirement to subsection 97B(2) in pre-reform subsection 170LK(5) to mean that the employee must tell the employer directly of their request (see, for example, *CFMEU v S.J. Weir Pty Ltd* (PR947609)). However, an employee may inform their bargaining agent that they wish them to meet and confer with the employer about the agreement. The bargaining agent may then inform the employer of the employee's request (see subsections 97B(4), (5) and (6) for details of evidencing such a request).

#### **New Division 4 – Pre-lodgment procedure**

##### *New section 97C – Eligible employee*

872. Proposed section 97C would provide a definition of *eligible employee* for the purposes of Division 4 of Part VB. The concept of an eligible employee is a drafting tool to provide a short hand term for the employees that have rights in relation to making a workplace agreement, and reduces the need for repetition.

873. Proposed section 97C would define an *eligible employee* to be:

- in the case of an AWA – the person whose employment will be subject to the AWA (paragraph 97C(a)); or
- in the case of a collective agreement – a person employed by the employer whose employment will be subject to the agreement (paragraph 97C(b)).

##### *New section 98 – Providing employees with ready access and information statement*

874. Proposed section 98 would provide a period of time in which employees may consider a workplace agreement and obtain advice about that agreement prior to approving it. Subsection 98(1) would require the employer to take reasonable steps to ensure that all eligible employees have ready access to the agreement in writing for at least seven days prior to the agreement being approved.

875. Subsection 98(2) would require the employer to take reasonable steps to ensure that all eligible employees are given an information statement at least seven days prior to the agreement being approved.

876. Subsection 98(3) would provide that, if a person becomes an eligible employee during the seven day period before the agreement is approved, the employer must take reasonable steps to ensure that the person is given an information statement (paragraph 98(3)(a)) and ready access to the agreement (paragraph 98(3)(b)) from no later than the time the person becomes an eligible employee.

877. Subsection 98(4) would provide that the information statement mentioned in subsection 98(2) and paragraph 98(3)(a) must contain information about:

- when and how the employer will seek approval of the agreement (paragraph 98(4)(a));

- the effect of the provisions relating to bargaining agents (paragraphs 98(4)(b) and (c)); and
- anything else that the Employment Advocate requires by notice published in the *Gazette* (paragraph 98(4)(d)).

878. It is intended that the Employment Advocate would produce a standard form information statement for the employer to provide to employees, which would be published in the *Gazette* and available from the Employment Advocate. Employers would then fill in any necessary details, for example, when and how the employer would seek approval of the agreement.

879. Subsection 98(5) would provide that, if the eligible employees have waived the remainder of the seven day period, the employer no longer has to provide ready access to the agreement under subsections 98(1) and (3).

880. Subsection 98(6) would provide that if a workplace agreement incorporates terms from another industrial instrument by reference, the eligible employees only have ready access to the workplace agreement if they have ready access to the other industrial instrument in writing. The requirements for incorporating industrial instruments by reference can be found in proposed section 101C.

881. Subsection 98(7) would provide that if the content of the workplace agreement is changed during the seven day period prior to approval, the change results in a separate workplace agreement.

882. The note under subsection 98(7) would provide if an agreement is amended during the seven day period, the employer must restart the period and repeat the steps in subsections 98(1), 98(2) and 98(3).

883. Subsection 98(8) would provide that an employer contravenes subsection 98(8) if it lodges a workplace agreement without providing ready access to the agreement in accordance with subsection 98(1) and paragraph 98(3)(b).

884. Subsection 98(9) would provide that an employer contravenes the provision if it lodges a workplace agreement without providing eligible employees with an information statement in accordance with subsection 98(2) and paragraph 98(3)(a).

885. Subsection 98(10) would provide that subsections 98(8) and (9) are civil remedy provisions.

886. The note under subsection 98(10) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units for a failure to take reasonable steps to provide ready access to an agreement or an information statement in relation to an agreement.

887. Subsection 98(11) would provide that an employer would not contravene subsections 98(8) or (9) more than once in relation to a particular workplace agreement. This

means that, for example, where an employer has ten employees and fails to give the employees ready access to the workplace agreement, that is only one contravention of subsection 98(8), rather than ten.

*New section 98A – Employees may waive ready access*

888. Proposed section 98A would provide for employees to waive the remainder of the ready access period. It is intended that this would allow an employer and its employees to approve a workplace agreement more quickly, where the employees decide that they have had sufficient time to consider the agreement and are happy to bring forward the approval. This would address the problem that the pre-reform agreement making process required parties to wait 14 days to approve an agreement, even where the employees had made up their minds and were happy to approve the agreement instantly.

889. Subsection 98A(1) would provide that the persons mentioned in subsection 98A(2) may make a waiver in relation to a workplace agreement.

890. Subsection 98A(2) would provide that the persons are all the eligible employees at the time the waiver is made.

891. Subsection 98A(3) would require the waiver to be in writing and dated.

892. Subsection 98A(4) would provide that the waiver is made when all of the eligible employees sign the waiver.

893. Subsection 98A(5) would provide that the waiver takes effect when it is made.

*New section 98B – Prohibition on withdrawal from union collective agreement*

894. Proposed section 98B would prohibit withdrawal from a union collective agreement.

895. Subsection 98B(1) would require an employer to take reasonable steps to seek approval of a union collective agreement within a reasonable period after the agreement is made.

896. Subsection 98B(2) would provide that subsection 98B(1) is a civil remedy provision.

897. The note under subsection 98B(2) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units for withdrawing from a union collective agreement.

898. This measure would ensure that when an employer and one or more organisations of employees have come to an agreement, that agreement would be put to the employees for approval.

899. The employer would be given a reasonable period in which to put the agreement to the employees. This acknowledges that what is a reasonable period will vary depending on the circumstances of the employer. For example, a reasonable period might be longer for a large

business with 10 000 employees and offices located around Australia, but may be shorter for a business with 15 employees that are all located in one office.

900. Proposed section 98B only applies to union collective agreements as there would be no need to apply the provision to other types of workplace agreement. There are no corresponding prohibitions on an organisation of employees withdrawing from a union collective agreement as, if that occurred, the employer would still be able to lodge the agreement with the Employment Advocate and bring it into operation (see proposed subsection 100(1)).

*New section 98C – Approval of a workplace agreement*

901. Proposed section 98C would provide for the manner in which certain agreements are to be *approved* by employees before they are lodged. Proposed section 98C would not apply to greenfields agreements, which do not have to be approved.

902. Subsection 98C(1) would provide that an AWA is *approved* if:

- the AWA is signed and dated by the employee and the employer (paragraph 98C(1)(a)); and
- those signatures are witnessed (paragraph 98C(1)(b)).

903. Paragraph 98C(1)(c) would provide additional requirements for the approval of an AWA, where the employee is under the age of 18. These are:

- that the AWA is signed and dated by an appropriate adult (such as the employee's parent or guardian, but not the employer) who is aged at least 18 (subparagraphs 98C(1)(c)(i) and (ii)); and
- that the person's signature is witnessed (subparagraph 98C(1)(c)(iii)).

904. This additional requirement of having an AWA signed by an appropriate adult is intended to provide further protection to employees who may be vulnerable because of their age. The term 'appropriate adult' is intended to be broad enough to allow a person who is under 18 but does not have a parent or guardian available to seek the signature from another adult who has an interest in the young person's well being (eg another member of the person's family).

905. Subsection 98C(2) would provide for how an employee collective agreement or union collective agreement is to be *approved*.

906. Paragraph 98C(2)(a) would require the employer to give all of the persons employed by the employer at the time of approving the agreement whose employment will be subject to the agreement a reasonable opportunity to decide whether they want to approve the agreement.

907. Paragraph 98C(2)(b) would additionally require that:

- if the decision is made by vote – a majority of those persons who cast a valid vote decide that they want to approve the agreement; or

- otherwise – a majority of those persons decide that they want to approve the agreement.

908. This means that once the employer has provided employees with a reasonable opportunity to decide whether they want to approve an employee collective agreement or a union collective agreement, determining whether an agreement has been approved would involve counting the votes of the employees and not an assessment of the genuineness of employees' consent.

*New section 98D – Employer must not lodge unapproved agreement*

909. Proposed section 98D would provide remedies against an employer that lodges a workplace agreement which has not been approved in accordance with 98C.

910. Subsection 98D(1) would provide that an employer contravenes subsection 98D(1) if:

- it lodges a workplace agreement (paragraph 98D(1)(a)); and
- the agreement has not been approved in accordance with proposed section 98C (paragraph 98D(1)(b)).

911. Subsection 98D(2) would provide that subsection 98D(1) is a civil remedy provision.

912. The note under subsection 98D(2) would refer to Division 11 of Part VB. Under these provisions the Court may:

- order a pecuniary penalty of up to 60 penalty units for a contravention of subsection 98D(1) (see proposed section 105D);
- declare that all or part of the agreement is void (see proposed section 105F);
- vary the terms of the agreement, including its nominal expiry date (see proposed section 105G);
- order compensation (see proposed section 105J); and/or
- grant injunctions (see proposed section 105K);

for lodging a workplace agreement (other than a greenfields agreement) that has not been approved.

**New Division 5 – Lodgment**

*New section 99 – Employer must lodge certain workplace agreements with the Employment Advocate*

913. Proposed section 99 would require employers to lodge certain workplace agreements with the Employment Advocate.



914. Subsection 99(1) would require an employer to lodge an AWA, employee collective agreement or a union collective agreement within 14 days of the agreement being approved under proposed section 98C.

915. Subsection 99(2) would require an employer to lodge a union greenfields agreement within 14 days of the agreement being made under proposed section 96G.

916. Subsection 99(3) would provide that subsections 99(1) and (2) are civil remedy provisions.

917. The note under subsection 99(2) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units for a failure to lodge a workplace agreement:

- for an AWA, employee collective agreement or union collective agreement – within fourteen days of it being approved; or
- for a union greenfields agreement – within fourteen days of it being made.

918. It is intended that the time frame and penalties in proposed section 99 would encourage employers to speedily lodge workplace agreements once they are made or approved (depending on the agreement).

919. Only employers would be able to lodge agreements with the Employment Advocate. This would be consistent with an agreement making system where integrity of the system is ensured through a penalty regime. It would be difficult to effectively attribute responsibility for a breach of the lodgment requirements if more than one party to the agreement were responsible for lodgment. However, the Court would have discretion not to order a penalty against an employer who was pressured into lodging an agreement inappropriately. Where such pressure occurred, an employer would be able to seek an injunction under proposed section 105K to restrain prohibited conduct.

920. Proposed section 99 would not make reference to an employer lodging an employer greenfields agreement. There is no obligation for an employer to lodge an employer greenfields agreement, as these agreements are not approved by employees and not made until they are lodged. However, an employer greenfields agreement would not come into operation until the employer lodged it with the Employment Advocate.

*New section 99A – Lodging multiple-business agreement without authorisation*

921. Proposed section 99A would prohibit an employer from lodging a multiple-business agreement that has not been authorised by the Employment Advocate under proposed section 96F.

922. Subsection 99A(1) would provide that an employer contravenes subsection 99A(1) if:

- the employer lodges a multiple-business agreement; and

- the agreement has not been authorised under 96F.

923. Subsection 99A(2) would provide that subsection 99A(1) is a civil remedy provision.

924. The note under subsection 99A(2) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 60 penalty units for lodging a multiple-business agreement without authorisation.

925. Only one of the multiple employers would lodge an agreement. It would be the employer who would be liable for a failure to obtain an authorisation. However, the Court would have discretion not to order a penalty against an employer who was pressured into lodging an agreement inappropriately. Where such pressure occurred, an employer would be able to seek an injunction under proposed section 105K to restrain prohibited conduct.

926. Where a multiple-business agreement is lodged without authorisation, the agreement would not be able to come into operation by operation of law (subsection 100(3)).

*New section 99B – Lodging of workplace agreement documents with the Employment Advocate*

927. Proposed section 99B would provide the method by which an employer would *lodge* a workplace agreement, thus bringing it into operation (see subsection 100(1)).

928. Subsection 99B(1) would provide that the employer *lodges* a workplace agreement if:

- the employer lodges a declaration under subsection (2) (paragraph 99B(1)(a)); and
- a copy of the workplace agreement is annexed to the declaration (paragraph 99B(1)(b)).

929. Subsection 99B(2) would provide that an employer *lodges* a declaration if the employer gives the declaration to the Employment Advocate and the declaration meets the requirements of subsection 99B(3).

930. The note under subsection 99B(2) makes clear that providing false or misleading information or documents under subsection 99B(2) would be a criminal offence under sections 137.1 and 137.2 of the *Criminal Code*.

931. Subsection 99B(3) allows the Employment Advocate to set out requirements for the form of the declaration, by notice published in the *Gazette*. It is intended that the Employment Advocate would exercise his or her power under subsection 99B(3) to create a standard form declaration. The employer would then fill in any necessary details, for example, the name of the agreement, and lodge that standard form declaration along with a copy of the workplace agreement with the Employment Advocate (subsections 99B(1) and (2)). It is also intended that the standard form declaration would require an employer to declare that the agreement was made and/or approved in accordance with the requirements of Divisions 3 and 4 of Part VB.

932. An employer would only need to lodge a copy of the workplace agreement as it is intended that the regulations would require an employer to retain a signed original of the

workplace agreement for a specified period. It is intended that a workplace agreement could be lodged electronically, by fax, by hand or by post. However, it is likely that the vast majority of lodgments would be electronic. Requiring the employer to only lodge a copy of the workplace agreement would facilitate the implementation of electronic lodgment for workplace agreements.

933. Subsection 99B(4) would provide that a declaration is only taken to be given to the Employment Advocate if the Employment Advocate actually receives it. This means that if an employer lodges a workplace agreement by post, the agreement would only be taken to be lodged when the Employment Advocate receives the declaration.

934. The note under subsection 99B(4) would make clear that section 29 of the *Acts Interpretation Act 1901* or section 160 of the *Evidence Act 1995* do not apply to workplace agreements. These provisions might otherwise create a presumption that the 'postal-acceptance rule' applies to workplace agreements.

935. Subsection 99B(5) would provide that the Employment Advocate is not required to consider or determine whether any of the requirements of Part VB have been met in relation to the making or content of a declaration or workplace agreement. This is intended to make it clear that lodgment of a declaration and an agreement could occur without any scrutiny by the Employment Advocate.

*New section 99C – Employment Advocate must issue receipt for lodgment of declaration for workplace agreement*

936. Proposed section 99C would provide for the Employment Advocate to issue a receipt for the lodgment of a workplace agreement.

937. Subsection 99C(1) would require the Employment Advocate to issue a receipt if a declaration is lodged under subsection 99B(2).

938. Subsection 99C(2) would require the Employment Advocate to give a copy of the receipt to:

- the employer (paragraph 99C(2)(a));
- if the agreement is an AWA – the employee (paragraph 99C(2)(b)); and
- if the agreement is a union collective agreement or a union greenfields agreement – the organisation or organisations bound by the agreement (paragraph 99C(2)(c)).

939. This mechanism is necessary in the context of a system where agreements come into operation on lodgment (see subsection 100(1)), as parties need to know the time when the agreement applies to them.

940. It is intended that where a workplace agreement is lodged electronically, the information provided in the electronic declaration would be sufficient for the Employment Advocate's systems to instantly issue an electronic receipt without needing to scrutinise the agreement. Where an agreement is lodged by other means, the information provided in the declaration would

be sufficient for the Employment Advocate to issue a receipt after examining the declaration to the extent necessary to determine where to send the receipt. After receiving a receipt, the employer would be required to pass on the receipt to the relevant employees (see proposed section 99D).

*New section 99D – Employer must notify employees after lodging workplace agreement*

941. Proposed section 99D would require the employer to take reasonable steps to pass on copies of the lodgment receipt from the Employment Advocate to employees whose employment is subject to the agreement.

942. Subsection 99D(1) would require an employer in relation to a collective agreement to take reasonable steps to ensure that the lodgment receipt is given to persons whose employment is, at the time the employer receives the receipt, subject to the agreement, within 21 days of the employer receiving the receipt from the Employment Advocate. The reference to ‘persons’ is intended to ensure that an employer would not contravene subsection 99D(1) more than once in relation to a particular workplace agreement. This means that, for example, where an employer has ten employees and fails to give the employees a copy of the lodgment receipt, that is only one contravention of subsection 99D(3), rather than ten.

943. Subsection 99D(1) does not apply to AWAs as the Employment Advocate would provide a lodgment receipt directly to the employee.

944. Subsection 99D(2) would provide that subsection 99D(1) is a civil remedy provision.

945. The note under subsection 99D(2) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units against an employer for failing to pass on a lodgment receipt to employees.

946. Subsection 99D(3) would provide that proposed section 99D does not apply in relation to a greenfields agreement.

**New Division 6 – Operation of workplace agreements and persons bound**

*New section 100 – When a workplace agreement is in operation*

947. Proposed section 100 would set out when a workplace agreement comes into operation and ceases to be in operation.

948. Subsection 100(1) would provide that a workplace agreement comes into operation on the day the agreement is lodged.

949. Subsection 100(2) would provide that a workplace agreement comes into operation even if the requirements relating to Divisions 3 and 4 of Part VB have not been complied with. This would be a necessary consequence of a lodgment only system that does not involve workplace agreements being scrutinised prior to coming into operation.

950. It is intended that once lodged, a workplace agreement will remain in operation even if Divisions 3 and 4 have not been complied with, unless the Court decides otherwise. For example, an employer might lodge a collective agreement without giving employees ready access to the agreement under proposed section 98 or seeking their approval for that agreement under proposed section 98C. In those circumstances, the agreement would come into operation. However, the employer could have committed a criminal offence by making a false declaration when lodging the agreement (see note under subsection 99B(2)) and be liable for remedies including pecuniary penalties and compensating employees that have suffered loss or damage as a result of the employer's actions.

951. Subsection 100(3) would provide that a multiple-business agreement comes into operation only if it has been authorised under proposed section 96F, even though the agreement could be lodged under proposed section 99 without prior authorisation. As with other types of agreement, the agreement would remain in operation unless the Court decides otherwise.

952. Subsection 100(4) would provide that a workplace agreement ceases to be in operation if:

- it is terminated in accordance with Division 9 of Part VB (paragraph 100(4)(a));
- in the case of an AWA – it has been replaced by another AWA (paragraph 100(4)(b)); or
- the Court declares it to be void under paragraph 105F(1)(a) (paragraph 100(4)(b)).

953. It is intended that an AWA would be replaced under paragraph 100(4)(b) at any time the employer and employee enter into another AWA. It would not be necessary for an AWA to have passed its nominal expiry date before the employer could make a new AWA with the employee and lodge it.

954. Subsection 100(5) would provide that a collective agreement ceases to be in operation in relation to an employee if it has passed its nominal expiry date and has been replaced by another collective agreement in relation to that employee. It is intended that once a collective agreement is no longer in operation in relation to any employees, it would cease to operate in its entirety. The concept of an agreement ceasing to be in operation in relation to an employee would be included in Part VB in order to allow an employer to make agreements that operate simultaneously, while ensuring that no more than one agreement would have effect in relation to an employee at any one time (see subsection 100A(1)).

#### Illustrative Example

Nathan works in the manufacturing area of a shoe factory under a collective agreement which only covers the manufacturing area. Nathan's collective agreement has a nominal expiry date of 31 December 2007. On 1 January 2006 Nathan's employer lodges a collective agreement which covers the whole shoe factory. In that situation, subsection 100(5) and subsection 100A(3) operate so that Nathan will continue to work under the manufacturing area's collective agreement until 31 December 2007 and, after 31 December 2007, Nathan will work under the collective agreement covering the whole shoe factory.

955. The note under subsection 100(5) would refer the reader to proposed Part VIAA which sets out transmission of business rules and the circumstances where an agreement binding on an employer because of transmission of business will cease to operate.

956. Subsection 100(6) would provide additional circumstances in which a multiple-business agreement could cease to be in operation. A multiple-business agreement would cease to operate in relation to a single business if, for example, after the multiple-business agreement comes into operation, a collective agreement covering only one of the businesses covered by the multiple-business agreement is lodged. It is intended that this provision would allow a single business or part of a single business which is subject to a multiple-business agreement to, at any time, leave the multiple-business agreement and make a collective agreement that only covers their single business or part of a single business.

957. The note under subsection 100(6) would give an example of the operation of the provision

958. Subsection 100(7) provides that if a workplace agreement has ceased operating under subsection 100(4) it could never operate again. This is intended to prevent the agreement that has ceased operating under subsection 100(4) from being 'revived' by coming back into operation.

959. Subsection 100(8) provides that if a workplace agreement has ceased operating in relation to an employee because of subsection 100(5) it can never operate again in relation to an employee. Subsection 100(8) is intended to prevent collective agreements from being 'revived'.

960. However, this would be different to the situation where an employee moves around a business or in and out of a business. For example, an employee might work for an organisation under a collective agreement for a period. The employee might then leave the organisation but return to the organisation during the life of the same collective agreement. In those circumstances, when the employee returned to the organisation their terms and conditions would, once again, be determined by the collective agreement. This is because the collective agreement would not have ceased operating in relation to that employee as a result of replacement. Rather, it ceased operation in relation to that employee as a result of the employee moving businesses.

961. Subsection 100(9) would provide that once a multiple-business agreement has ceased operation in relation to a single business or part of a single business it can never again operate in relation to that single business or part of a single business.

962. Subsection 100(10) would provide, in effect, that if at any time when the agreement is in operation the employer ceases to fall within the constitutional coverage of the Bill, the agreement would cease operating.

*New section 100A – Relationship between overlapping workplace agreements*

963. Proposed section 100A would set out what is to occur where more than one workplace agreement purports to have effect in relation to a single employee at the same time.

964. Subsection 100A(1) would provide that only one workplace agreement can have effect at a particular time in relation to a particular employee. It is intended that this would encourage parties to make comprehensive workplace agreements rather than leaving some matters out of an agreement for later negotiations. However, where parties do not include a matter, they would be able to vary their agreement under the simplified process in Division 8 of Part VB.

965. Subsection 100A(2) would provide that a collective agreement has no effect in relation to an employee while an AWA operates in relation to the employee. The intention of this provision is to ensure that, regardless of whether a collective agreement is in operation in a workplace, the employer and an employee may make an AWA at any time and that AWA will provide the employee's terms and conditions instead of the collective agreement. It would not be necessary for the collective agreement to have passed its nominal expiry date for the AWA to come into operation.

966. Subsection 100A(3) would provide that if:

- a collective agreement (the first agreement) binding an employee is in operation; and
- another collective agreement (the later agreement) binding the employee is lodged before the nominal expiry date of the first agreement

the later agreement has no effect in relation to the employee until the nominal expiry date of the first agreement.

967. The note under subsection 100A(3) explains that after the nominal expiry date of the first agreement, it ceases operating and the later agreement takes effect in relation to the employee.

#### Illustrative Example

On 1 January 2006 a collective agreement is lodged covering the administration staff in a single business (the first agreement) with a nominal expiry date of 31 December 2009. On 1 January 2007, another collective agreement is lodged covering the whole single business (the second agreement) with a nominal expiry date of 31 December 2011. The second agreement would come into operation on 1 January 2006, but only have effect in relation to employees that are not administration staff. However, after 31 December 2009 (the nominal expiry date of the first agreement), the first agreement would cease to be in operation (as it would be replaced by the second agreement) and the second agreement would have effect in relation to all of the employees in the single business.

#### *New section 100B – Effect of awards while workplace agreement is in operation*

968. Proposed section 100B would provide that an award has no effect in relation to an employee while a workplace agreement operates in relation to the employee. The intention of this provision is to ensure that a workplace agreement comprehensively provides an employee's terms and conditions of employment, instead of the employee's terms and conditions deriving from both a workplace agreement and an award simultaneously.

969. It is intended that this provision would only affect an employee in relation to one job at a time. For example, if an employee had two jobs, the fact that the employee is subject to a workplace agreement in one job would not affect an award that applies in relation to the employee's other job.

*New section 100C – Workplace agreement displaces certain Commonwealth laws*

970. Proposed section 100C would provide for workplace agreements to displace certain Commonwealth laws.

971. Subsection 100C(1) would provide that a workplace agreement may, to the extent of any inconsistency, displace prescribed conditions of employment contained in Commonwealth laws that are prescribed in the regulations.

972. Subsection 100C(2) would set out definitions of *Commonwealth law* and *prescribed conditions* for the purposes of this section.

973. This means that, for example, the regulations may provide that workplace agreements made with Commonwealth public sector employees, override conditions of employment specified in the *Public Service Act 1999*, that are prescribed.

*New section 100D – Persons bound by workplace agreements*

974. Proposed section 100D would set out who is bound by a workplace agreement that is in operation.

975. Proposed section 100D would provide that a workplace agreement that is in operation binds:

- the employer in relation to the agreement (paragraph 100D(a));
- all persons whose employment is, at any time when the agreement is in operation, subject to the agreement (paragraph 100D(b)); and
- if the agreement is a union collective agreement or union greenfields agreement – the organisation or organisations of employees with which the employer made the agreement (paragraph 100D(c)).

976. A workplace agreement would not be able to bind anyone unless it is in operation. However, persons may still have obligations in relation to a workplace agreement before it comes into operation, for example, an employer's obligation to lodge a workplace agreement within 14 days of it being approved (see proposed subsection 99(1)).

977. Paragraph 100D(b) includes the phrase 'at any time the agreement is in operation' as that phrase is intended to clarify that the employment of an employee who joins a business during the life of a collective agreement would be subject to that agreement, even though the employee was not involved in making or approving the agreement.



978. The note under paragraph 100D(b) would clarify that a person may also be bound by a workplace agreement by operation of Part VIAA – Transmission of business.

## **New Division 7 – Content of workplace agreements**

### **New Subdivision A – Required content**

979. The note under the heading to proposed Subdivision A would refer to proposed Part VA – Fair Pay and Conditions Standard, which sets out the operation of the FPCS.

#### *New section 101 – Nominal expiry date*

980. Proposed section 101 would set out when a workplace agreement is taken to have passed the nominal expiry date.

981. Paragraph 101(1)(a) would provide that the *nominal expiry date* of a greenfields agreement is a date specified in the agreement that is no later than the first anniversary of the lodgment date of the agreement. If an agreement does not specify a nominal expiry date or specifies a nominal expiry date that is later than the first anniversary of the agreement being lodged, the nominal expiry date would be deemed to be the first anniversary of the lodgment date of the agreement.

982. Paragraph 101(1)(b) would provide that the *nominal expiry date* for other workplace agreements is a date specified in the agreement that is no later than the fifth anniversary of the lodgment date of the agreement. If an agreement does not specify a nominal expiry date or specifies a nominal expiry date that is later than the fifth anniversary of the agreement being lodged, the nominal expiry date would be deemed to be the fifth anniversary of the lodgment date of the agreement.

983. Under paragraph 101(2)(a) if parties vary the nominal expiry date of a greenfields agreement and the agreement as varied does not specify a nominal expiry date or specifies a nominal expiry date that is later than the first anniversary of the lodgment date of the agreement, the *nominal expiry date* would be deemed to be the first anniversary of the lodgment date of the agreement.

984. Paragraph 101(2)(b) would provide for parties to vary the nominal expiry date of other workplace agreements. If an agreement as varied does not specify a nominal expiry date or specifies a nominal expiry date that is later than the fifth anniversary of the lodgment date of the agreement, the *nominal expiry date* would be deemed to be the fifth anniversary of the lodgment date of the agreement.

985. These measures would allow greenfields agreements to have a nominal life of one year while all other workplace agreements could have a nominal life of up to five years. After the nominal expiry date of a workplace agreement:

- parties could take protected action in support of a new agreement (proposed section 110);

- a collective agreement could be replaced by another collective agreement (proposed section 100);
- another collective agreement could come into operation in relation to an employee (proposed section 100A).

986. It is not intended that proposed section 101 would prevent the Court using its powers under proposed section 105G to vary a workplace agreement.

*New section 101A – Workplace agreement to include dispute settlement procedures*

987. Proposed section 101A would provide for workplace agreements to include dispute settlement procedures.

988. Subsection 101A(1) would require a workplace agreement to include procedures for settling disputes about matters arising under the agreement between:

- the employer (paragraph 101A(1)(a)); and
- the employees whose employment will be subject to the agreement (paragraph 101A(1)(b)).

989. Subsection 101A(2) would provide that if a workplace agreement does not include dispute settlement procedures it will be deemed to include the model dispute settlement procedures in Division 2 of Part VIIA of the Bill. This means that parties to workplace agreements would have the option of developing their own dispute settlement procedures or relying on the dispute settlement procedure provided in the Bill. Where an agreement is silent in relation to dispute settlement procedures, the dispute settlement procedure in the Bill would be 'read into' the agreement by operation of law.

*New section 101B – Protected award conditions*

990. Proposed section 101B would provide a mechanism to deem certain award conditions to be included in a workplace agreement.

991. Subsection 101B(1) would provide that this section applies if:

- a person's employment is subject to a workplace agreement (paragraph 101B(1)(a)); and
- but for the agreement, the protected award conditions would have effect in relation to the person's employment (paragraph 101B(1)(b)).

992. Subsection 101B(2) would provide that the protected award conditions:

- are taken to be included in the workplace agreement (paragraph 101B(2)(a));
- have effect in relation to the person's employment (paragraph 101B(2)(b)); and

- have that effect subject to any terms of the workplace agreement that expressly exclude or modify all or part of them (paragraph 101B(2)(c)).

993. Subsection 101B(3) would define terms relating to protected award conditions for the purposes of section 101B.

994. Subsection 101B(3) would define *outworker* to mean an employee who performs work at private residential premises or premises that are not the employer's business or commercial premises.

995. Subsection 101B(3) would define *outworker conditions* to mean conditions for outworkers, other than pay, but only to the extent necessary to ensure that their overall conditions of employment are fair and reasonable in comparison with the conditions of employment specified in a relevant awards or awards for employees who perform the same kind of work at an employer's business or commercial premises.

996. Subsection 101B(3) would define *protected allowable award matters* to mean:

- rest breaks (paragraph 101B(3)(a));
- incentive-based payments and bonuses (paragraph 101B(3)(b));
- annual leave loadings (paragraph 101B(3)(c));
- public holidays declared by or under State or Territory law and related entitlements for working on those days (paragraph 101B(3)(d));
- certain allowances relating to employees' out of pocket expenses, skills not taken into account in pay rates and disabilities associated with the performance of work in particular conditions or locations (paragraph 101B(3)(e));
- loadings for overtime or shift work (paragraph 101B(3)(f));
- penalty rates (paragraph 101B(3)(g)); and
- any other matter prescribed in the regulations.

997. Subsection 101B(3) would define *protected award conditions* to mean the terms of an award, as in force from time to time to the extent that those terms:

- deal with protected allowable award matters (paragraph 101B(3)(a)); and
- do not deal with matters which are not allowable award matters (see proposed section 116B) or matters specified in the regulations (paragraph 101B(3)(b)).

998. The note under subsection 101B(3) would refer to certain allowable award matters which are referred to in proposed section 116.

999. It is intended that proposed section 101B would have the effect of protected award conditions being 'read into' a workplace agreement unless the agreement expressly modifies or excludes them.

#### Illustrative Example

Matt is employed by Frances Furnishings Pty Ltd as a curtain cutter. Frances Furnishings Pty Ltd operates in NSW. It is a respondent to the federal Home Furnishings and Interior Decorators Award (the award). The award provides for, among other things, entitlements to public holidays in accordance with NSW legislation and penalty rates for work undertaken on public holidays. On 1 July 2006, Frances Furnishings makes a collective agreement with its employees. When the agreement comes into operation, Matt and other employees to whom the award would apply will receive entitlements to public holidays and penalty rates in accordance with the award unless the agreement expressly removes those entitlements or changes them and the majority of employees approve the agreement.

Five years later, Frances Furnishings Pty Ltd makes a second collective agreement with its employees. It turns out that the first collective agreement expressly excluded the award. Even so, public holidays and penalty rates in accordance with the award would be included in the agreement unless the second agreement expressly removes or changes those entitlements and the majority of employees approve the agreement.

#### *New section 101C – Calling up content of other documents*

1000. Proposed section 101C would set out the circumstances in which a workplace agreement could 'call up' the terms of an award or workplace agreement.

1001. Subsections 101C(1) and (2) would provide that a workplace agreement may incorporate by reference terms from an award or workplace agreement if all the requirements in subsection 101C(3) are satisfied.

1002. The note under subsection 101C(2) would refer the reader to clause 9 of Schedule 14, which would set out the means by which a pre-reform certified agreement may be 'called up' into a workplace agreement.

1003. Subsection 101C(3) would allow an award to be 'called up' where the award is binding on the employer just before the agreement is made, the award regulates any term or condition of employment of persons engaged in a particular kind of work and that work will be subject to the agreement when the agreement comes into operation.

1004. If the industrial instrument is a workplace agreement, it would have to regulate the employment of at least one person whose employment will be subject to the agreement just before the agreement is made (paragraph 101C(3)(b)).

1005. Subsection 101C(4) would provide that where an award or agreement is incorporated by reference, it must be clear in the agreement about whether the industrial instrument is to apply as it was at the time it was incorporated or as varied from time to time. This measure is intended to

facilitate the enforcement of agreements by making clear to the parties what terms and conditions apply to employees.

1006. Subsection 101C(5) would provide that a term of a workplace agreement is void to the extent that it incorporates by reference terms from an industrial instrument mentioned in subsection 101C(2) if the requirements of subsection 101C(3) are not satisfied. This means that such terms would not be enforceable.

1007. Subsection 101C(6) would provide that a term of a workplace agreement is void to the extent that it incorporates by reference terms from:

- an award or agreement regulating terms and conditions that is in force under a law of a State (other than a common law contract of employment) (paragraph 101C(6)(a));
- an agreement, arrangement, deed or memorandum of understanding that regulates terms or conditions of employment and was created by a process of collective negotiation eg a so called ‘unregistered agreement’ such as the Victorian Building Industry Agreement (paragraph 101C(6)(a)); or
- an industrial instrument specified in the regulations.

1008. Subsection 101C(7) would provide that a term of a workplace agreement is void to the extent that it applies or adopts terms from an instrument mentioned in subsection 101C(2) or (6), without incorporating those terms by reference in accordance with proposed section 101C. It is intended that workplace agreements will be able to incorporate terms by reference and not ‘call up’ terms by other means.

1009. It is intended that proposed section 101C would encourage parties to make comprehensive agreements. Specifically, it is intended that parties would only be able to ‘call up’ industrial instruments by incorporating them into the agreement by reference as opposed to, for example, providing that the agreement is to be ‘read in conjunction’ with another industrial instrument. It is intended that parties would only be able to incorporate terms by reference from a federal award or workplace agreement that applied to the employer and employees immediately before the agreement is made. It is not intended that parties be able to ‘call up’ awards or agreements that were in operation at a much earlier date, eg a 2006 agreement attempting to ‘call up’ an award made in 1988. It is intended that all other forms of ‘calling up’ industrial instruments would be void. However, proposed section 101C is not intended to limit the ability of parties to ‘call up’ workplace policies such as an annual leave policy.

### **New Subdivision B – Prohibited content**

#### *New section 101D – Prohibited content*

1010. Proposed section 101D would provide that the regulations may specify matters that are *prohibited content* for the purposes of the WR Act.

1011. It is intended that the regulations would provide a non-exhaustive list of matters which are prohibited from being included in a workplace agreement. The list would include matters such as:

- matters that do not pertain to the employment relationship; and
- terms which are objectionable because they allow or require a breach of the proposed freedom of association provisions.

*New section 101E – Employer must not lodge agreement containing prohibited content*

1012. Proposed section 101E would provide that an employer contravenes a civil penalty provisions if they lodge a workplace agreement containing prohibited content.

1013. Subsection 101E(1) would provide that an employer contravenes subsection 101E(1) if:

- it lodges a workplace agreement or a variation to a workplace agreement (paragraph 101E(1)(a));
- the agreement or agreement as varied contains prohibited content (paragraph 101E(1)(b)); and
- the employer was reckless as to whether the agreement or agreement as varied contains prohibited content (paragraph 101E(1)(c)).

1014. Subsection 101E(2) would provide that subsection 101E(1) would not apply if:

- before the agreement or variation was lodged, the Employment Advocate advised the employer that the agreement (or variation) did not include prohibited content (paragraph 101E(2)(a)); and
- the advice was in the form specified by the regulations (paragraph 101E(2)(b)).

1015. Subsection 101E(3) would provide that subsection 101E(1) is a civil remedy provision under Division 11 of Part VB. This means that the Court may order a pecuniary penalty of up to 60 penalty units for a contravention of subsection 101E(1) (see proposed section 105D).

1016. This section is intended to act as a deterrent against employers including prohibited content in workplace agreements. However, to assist employers to determine what is or is not prohibited content, the Employment Advocate will be able to provide advice as to the character of a particular term or terms. If the Employment Advocate advises that a term is not prohibited content, this would form a defence to an action for a contravention of the civil remedy provision.

*New section 101F – Prohibited content in workplace agreement is void*

1017. Proposed section 101F would provide that a term of a workplace agreement is void to the extent that it contains prohibited content.

1018. The notes under 101F would refer to:

- proposed section 101K (which deals with the Employment Advocate's power to remove prohibited content); and
  - proposed section 101E, 101M and 101N (which are civil remedy provisions relating to prohibited content).

1019. This means that if a workplace agreement contains prohibited content, the agreement would continue to operate although, by operation of law, a term containing prohibited content would be unenforceable.

*New section 101G – Initiating consideration of removal of prohibited content*

1020. Proposed section 101G would provide the first steps in the process of the Employment Advocate removing prohibited content from a workplace agreement.

1021. Subsection 101G(1) would provide that the Employment Advocate may exercise his or her power to remove prohibited content from a workplace agreement either on his or her own initiative (paragraph 101G(1)(a)) or on application by any person (paragraph 101G(1)(b)).

1022. Subsection 101G(2) would provide that the requirements in proposed sections 101H, 101I and 101K are an exhaustive statement of the requirements of the natural justice hearing rule in relation to the Employment Advocate's decision in relation to deciding whether an agreement contains prohibited content.

1023. It is intended that, similar to section 422B of the *Migration Act 1958*, subsection 101G(2) would exclude any rights to procedural fairness that parties might otherwise have, except any prohibition against bias by the Employment Advocate in making a decision under proposed sections 101H, 101I and 101K.

*New section 101H – Employment Advocate must give notice that he or she is considering variation*

1024. Proposed section 101H would provide notice requirements in relation to the removal of prohibited content.

1025. Subsection 101H(1) would require the Employment Advocate to give to the persons mentioned in subsection 101H(2) a notice meeting the requirements of subsection 101I(1) stating that he or she is considering varying an agreement to remove prohibited content.

1026. Subsection 101H(2) would list the persons as:

- the employer in relation to the workplace agreement (paragraph 101H(2)(a));
- if the agreement is an AWA – the employee (paragraph 101H(2)(b)); and

- if the agreement is a union collective agreement or a union greenfields agreement – the organisation or organisations bound by the agreement (paragraph 101H(2)(c)).

1027. This would be the initial step in allowing parties to the agreement to participate in the process of considering whether the content is prohibited.

*New section 101I – Matters to be contained in notice*

1028. Proposed section 101I would provide for the content of the notice that the Employment Advocate must provide.

1029. Subsection 101I(1) would require that the notice:

- is dated (paragraph 101I(1)(a));
- states that the Employment Advocate is considering making the variation (paragraph 101I(1)(b));
- state the reasons why the Employment Advocate is considering making the variation (paragraph 101I(1)(c));
- set out the terms of the variation (paragraph 101I(1)(d));
- invite the persons mentioned in subsection 101I(2) to make a written submission about whether the Employment Advocate should make the variation (paragraph 101I(1)(e)); and
- states that any submission must be made within the *objection period* (ie 28 days after the date of the notice (paragraph 101I(1)(f))).

1030. Subsection 101I(2) would list the persons as:

- the employer in relation to the workplace agreement (paragraph 101I(2)(a));
- if the agreement is an AWA – the employee (paragraph 101I(2)(b)); and
- if the agreement is a union collective agreement or a union greenfields agreement – the organisation or organisations bound by the agreement (paragraph 101I(2)(c)).

*New section 101J – Employer must ensure employees have ready access to notice*

1031. Proposed section 101J would require the employer to pass on the notice relating to a possible variation to remove prohibited content to employees.

1032. Subsection 101J(1) would require an employer in relation to a collective agreement to take reasonable steps to ensure that the notice is given to persons whose employment is subject to the agreement, at a time during the objection period.

1033. Subsection 101J(2) would provide that subsection 101J(1) is a civil remedy provision.



1034. The note under subsection 101J(2) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units against an employer for failing to take reasonable steps to give employees ready access to a notice.

1035. The reference to ‘persons’ in subsection 101J(1) is intended to ensure that an employer would not contravene subsection 101J(2) more than once in relation to a particular workplace agreement. This means that, for example, where an employer has ten employees and fails to give the employees ready access to the notice, that is only one contravention of subsection 101J(2), rather than ten.

1036. Subsection 101J(1) would not apply to AWAs as the Employment Advocate would provide the notice directly to the employee.

*New section 101K – Employment Advocate must remove prohibited content from agreement*

1037. Proposed section 101K would require the Employment Advocate to remove content from a workplace agreement where he or she finds that content to be prohibited content.

1038. Subsection 101K(1) would provide that if the Employment Advocate is satisfied that a term of the workplace agreement contains prohibited content, the Employment Advocate must vary the agreement to remove the content.

1039. Subsection 101K(2) would require the Employment Advocate to consider any submission from any of the persons mentioned in subsection 101I(2) in determining whether to vary the agreement.

1040. Subsection 101K(3) would prohibit the Employment Advocate from removing the prohibited content until the end of the objection period.

1041. Subsection 101K(4) would require that, if the Employment Advocate decides to vary an agreement to remove prohibited content, he or she must:

- give notice to the persons mentioned in 101H(2) (paragraph 101K(4)(a)); and
- if the agreement is a collective agreement – publish a notice in the *Gazette* stating that the variation has been made and setting out the particulars of the variation (paragraph 101K(4)(b)).

1042. Although it is discretionary for the Employment Advocate to act on its own motion to investigate whether a workplace agreement contains prohibited content, once the Employment Advocate has formed the view that an agreement does so, he or she must remove that content.

*New section 101L – Employer must give employees notice of removal of prohibited content*

1043. Proposed section 101L would require the employer to pass on the notice of removal of prohibited content from the Employment Advocate to employees.

1044. Subsection 101L(1) would require an employer in relation to a collective agreement to take reasonable steps to ensure that, within 21 days of receiving the notice from the Employment Advocate, the notice is given to persons whose employment is subject to the agreement at the time the employer receives the receipt.

1045. Subsection 101L(2) would provide that subsection 101L(1) is a civil remedy provision

1046. The note under subsection 101L(2) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units for failing to take reasonable steps to give employees a notice relating to removal of prohibited content.

1047. The reference to ‘persons’ is intended to ensure that an employer would not contravene subsections 101L(2) more than once in relation to a particular workplace agreement. This means that, for example, where an employer has ten employees and fails to give the employees ready access to the notice, that is only one contravention of subsection 101L(2), rather than ten.

1048. Subsection 101L(2) does not apply to AWAs as the Employment Advocate would provide a notice directly to the employee under paragraph 101K(4)(a) and subsection 101H(2).

*New section 101M – Seeking to include prohibited content in an agreement*

1049. Subsection 101M(1) would provide that a person contravenes subsection 101M(1) if:

- in the course of negotiations, the person seeks to include a term in a workplace agreement or variation to a workplace agreement (paragraph 101M(1)(a));
- that term includes prohibited content (paragraph 101M(1)(b)); and
- the person is reckless as to whether the term includes prohibited content (paragraph 101M(1)(c)).

1050. Subsection 101M(2) would provide that subsection 101M(1) is a civil remedy provision

1051. The note under subsection 101M(2) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 60 penalty units for seeking to include prohibited content in a workplace agreement or variation to a workplace agreement.

*New Section 101N – Misrepresentations about prohibited content*

1052. Proposed section 101N would provide penalties for misrepresentations in relation to prohibited content.

1053. Subsection 101N(1) would provide that a person contravenes subsection 101N(1) if:

- the person makes a representation in relation to a workplace agreement or variation that a particular term does not contain prohibited content (paragraph 101N(1)(a)); and

- the person is reckless as to whether the term includes prohibited content (paragraph 101N(1)(b)).

1054. Subsection 101N(2) would provide that subsection 101N(1) is a civil remedy provision.

1055. The note under subsection 101N(2) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 60 penalty units for making misrepresentations about prohibited content.

## **New Division 8 – Varying a workplace agreement**

### **New Subdivision A – General**

#### *New section 102 – Varying a workplace agreement*

1056. Proposed section 102 would provide for who may vary a workplace agreement.

1057. Subsection 102(1) would provide that the following persons may make a variation, in writing, to a workplace agreement that is in operation:

- in the case of an AWA – the employer and employee (paragraph 102(1)(a));
- in the case of an employee collective agreement or employer greenfields agreement – the employer and the persons employed at the time whose employment will be subject to the agreement as varied (paragraph 102(1)(b)); and
- in the case of a union collective agreement or a union greenfields agreement – the employer and the one or more organisations of employees that are bound by the agreement (paragraph 102(1)(c)).

1058. The example would provide that an agreement may be varied to provide additional pay.

1059. Subsection 102(2) would provide that a workplace agreement cannot be varied except in accordance with:

- Division 8 of Part VB (paragraph 102(2)(a));
- proposed section 101K (which deals with prohibited content) (paragraph 102(2)(b));
- proposed subsection 352A (which deals with discriminatory agreements) (paragraph 102(2)(c)); or
- an order of the Court under proposed section 105G (paragraph 102(2)(d)).

1060. The note under subsection 102(2) would provide that the subsection would not apply to an agreement where the obligations under the agreement can change because of the agreement itself. For example, where an agreement refers to terms and conditions being governed by a workplace policy as varied from time to time, subsection 102(2) would not stop the policy from

being varied nor would it require that the agreement be varied in accordance with Division 8 of Part VB each time the policy is varied.

*New section 102A – When a variation to a workplace agreement is made*

1061. Proposed section 102A would provide the time at which a variation to workplace agreement is *made*.

1062. Paragraph 102A(a) would provide that a variation to an AWA is *made* when it is approved in accordance with proposed section 102F.

1063. Paragraph 102A(b) would provide that a variation to an employee collective agreement is *made* when it is approved in accordance with proposed section 102F.

1064. Paragraph 102A(c) would provide that a variation to a union collective agreement is *made* when the employer and the organisation or organisations agree to the terms of the variation.

1065. Paragraph 102A(d) would provide that a variation to a union greenfields agreement is *made* when the employer and the organisation or organisations agree to the terms of the variation.

1066. Paragraph 102A(e) would provide that a variation to an employer greenfields agreement is *made* when it is approved in accordance with proposed section 102F.

**New Subdivision B – Pre lodgment procedure for variations**

*New section 102B – Eligible employee in relation to variation of workplace agreement*

1067. Proposed section 102B would provide a definition of *eligible employee* for the purposes of this Subdivision. The concept of an eligible employee is a drafting tool to provide a short hand term for the employees that have rights in relation to making a variation to a workplace agreement, and reduces the need for repetition.

1068. Proposed section 102B would define an *eligible employee* to be:

- in the case of an AWA – the employee (paragraph 102B(a)); or
- in the case of a collective agreement – a person employed by the employer whose employment is subject to the agreement or will be (paragraph 102B(b)).

1069. It is intended that agreements may be varied to change which employees the agreement covers. For example, an agreement applying to a part of a single business may be varied to cover the whole business and vice versa. However, it is intended that paragraph 102B(b) would operate so that such a variation could only occur with the approval of both:

- the persons whose employment is currently subject to the agreement; and

- the persons currently employed by the employer whose employment will be subject to the agreement as varied.

*New section 102C – Providing employees with ready access and information statement*

1070. Proposed section 102C would provide a period of time in which employees may consider a variation to a workplace agreement and obtain advice about that variation prior to approving it.

1071. Subsection 102C(1) would require the employer to take reasonable steps to ensure that all eligible employees have ready access to the variation in writing for at least seven days prior to the variation being approved.

1072. Subsection 102C(2) would require the employer to take reasonable steps to ensure that all eligible employees are given an information statement at least seven days prior to the variation being approved.

1073. Subsection 102C(3) would provide that if a person becomes an eligible employee during the seven day period before the variation is approved, the employer must take reasonable steps to ensure that the person is given an information statement (paragraph 102C(3)(a)) and ready access to the variation (paragraph 102C(3)(b)) from no later than the time the person becomes an eligible employee.

1074. Subsection 102C(4) would provide that the information statement mentioned in subsection 102C(2) and paragraph 102C(3)(a) must contain information about:

- when and how the employer will seek approval of the variation (paragraph 102C(4)(a));
- the effect of the provisions relating to bargaining agents (paragraphs 102C(4)(b) and (c)); and
- anything else that the Employment Advocate requires by notice published in the *Gazette* (paragraph 102C(4)(d)).

1075. It is intended that the Employment Advocate would produce a standard form information statement for the employer to provide to employees, which would be published in the *Gazette* and available from the Employment Advocate. The employer would then fill in any necessary details, for example, when and how the employer would seek approval for the variation.

1076. Subsection 102C(5) would provide that if the eligible employees have waived the remainder of the seven day period, the employer no longer has to provide ready access to the variation.

1077. Subsection 102C(6) would provide that if a because of the variation a workplace agreement as varied would incorporate by reference terms from an industrial instrument mentioned in subsection 101C(2), the eligible employees only have ready access to the variation if they have ready access to the other industrial instrument in writing. The requirements for incorporating industrial instruments by reference can be found in proposed section 101C.

1078. Subsection 102C(7) would provide that if the content of the variation is changed during the seven day period prior to approval, the change results in a separate variation.

1079. The note under subsection 102C(7) makes clear that if the content of a variation is amended during the seven day period, the employer must restart the period and repeat the steps in subsections 102C(1), 102C(2) and 102C(3).

1080. Subsection 102C(8) would provide that an employer contravenes subsection 102C(8) if it lodges a variation to a workplace agreement without having provided ready access to the variation in accordance with subsection 102C(1) and paragraph 102C(3)(b).

1081. Subsection 102C(9) would provide that an employer contravenes subsection 102C(9) if it lodges a variation to a workplace agreement without providing eligible employees with an information statement in accordance with subsection 102C(2) and paragraph 102C(3)(a).

1082. Subsection 102C(10) would provide that subsections 102C(8) and (9) are civil remedy provisions.

1083. The note under subsection 102C(10) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units for a failure to take reasonable steps to provide ready access to a variation to an agreement or an information statement in relation to a variation.

1084. Subsection 102C(11) would provide that an employer would not contravene subsections 102C(8) or (9) more than once in relation to a particular variation. This means that, for example, where an employer has ten employees and fails to give the employees ready access to the variation, that is only one contravention of subsection 102C(8), rather than ten.

*New section 102D – Employees may waive ready access*

1085. Proposed section 102D would provide for employees to waive the remainder of the ready access period. It is intended that this would allow an employer and its employees to approve a variation to a workplace agreement more quickly, where the employees decide that they have had sufficient time to consider the variation and are happy to bring forward the approval. This would address the problem that the pre-reform agreement making process required parties to wait 14 days to approve a variation, even where the employees had made up their minds and were happy to approve the variation instantly.

1086. Subsection 102D(1) would provide that the persons mentioned in subsection 102D(2) may make a waiver in relation to a variation to a workplace agreement.

1087. Subsection 102D(2) would provide that the persons are all the eligible employees at the time the waiver is made.

1088. Subsection 102D(3) would require the waiver to be in writing and dated.

1089. Subsection 102D(4) would provide that the waiver is made when all of the eligible employees sign the waiver.

1090. Subsection 102D(5) would provide that the waiver takes effect when it is made.

*New section 102E – Prohibition on withdrawal from variation to union collective agreement*

1091. Proposed section 102E would prohibit an employer from withdrawing from a variation to a union collective agreement.

1092. Subsection 102E(1) would require an employer to take reasonable steps to seek approval of a variation to a union collective agreement or union greenfields agreement within a reasonable period after the variation is made.

1093. Subsection 102E(2) would provide that subsection 102E(1) is a civil remedy provision.

1094. The note under subsection 102E(2) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units for withdrawing from a variation to a union collective agreement or union greenfields agreement.

1095. This measure would ensure that when an employer and one or more organisations of employees have come to an agreement about a variation, that variation would put to the employees for approval.

1096. The employer would be given a reasonable period in which to put the variation to the employees. This acknowledges that what is a reasonable period will vary depending on the circumstances of the employer. For example, a reasonable period might be longer for a large business with 10 000 employees and offices located around Australia, but may be shorter for a business with 15 employees that are all located in one office.

1097. Proposed section 102E only applies to union collective agreements as there would be no need to apply the provision to other types of workplace agreement. There are no corresponding prohibitions on an organisation of employees withdrawing from a variation to a union collective agreement or union greenfields agreement as, if that occurred, the employer would still be able to lodge the variation with the Employment Advocate and bring it into operation (see proposed section 102M).

*New section 102F – Approval of a variation to a workplace agreement*

1098. Proposed section 102F would set out the manner in which variations to workplace agreements are to be *approved* by employees before they are lodged.

1099. Subsection 102F(1) would provide that a variation to an AWA is *approved* if:

- the variation is signed and dated by the employee and the employer (paragraph 102F(1)(a)); and
- those signatures are witnessed (paragraph 102F(1)(b)).

1100. Paragraph 102F(1)(c) would provide additional requirements for the approval of a variation to an AWA, where the employee is under the age of 18. These are:

- that the variation is signed and dated by an appropriate adult (such as the employee's parent or guardian, but not the employer) who is aged at least 18 (subparagraphs 102F(1)(c)(i) and (ii)); and
- that the person's signature is witnessed (subparagraph 102F(1)(c)(iii)).

1101. This additional requirement of having a variation to an AWA signed by an appropriate adult is intended to provide further protection to employees who may be vulnerable because of their age. The term 'appropriate adult' is intended to be broad enough to allow a person who is under 18 but does not have a parent or guardian available to seek the signature from another adult who has an interest in the young person's well being, for example, another member of the person's family.

1102. Subsection 102F(2) would provide for how a variation to a collective agreement is to be *approved*. Paragraph 102F(2)(a) would require the employer to give all of the persons employed at the time of approving the variation whose employment is or will be subject to the agreement a reasonable opportunity to decide whether they want to approve the variation.

1103. Paragraph 102F(2)(b) would additionally require that:

- if the decision is made by vote – a majority of those persons who cast a valid vote decide that they want to approve the variation; or
- otherwise – a majority of those persons decide that they want to approve the variation.

1104. This means that once the employer has provided employees with a reasonable opportunity to decide whether they want to approve a variation to a collective agreement, determining whether a variation to an agreement has been approved would involve counting the votes of the employees and not an assessment of the genuineness of employees' consent.

*New section 102G – Employer must not lodge unapproved variation*

1105. Proposed section 102G would provide remedies against an employer that lodges a variation to a workplace agreement which has not been approved in accordance with proposed section 102F.

1106. Subsection 102G(1) would provide that an employer contravenes the subsection if:

- it lodges a variation to a workplace agreement (paragraph 102G(1)(a)); and
- the variation has not been approved in accordance with proposed section 102F (paragraph 102G(1)(b)).

1107. Subsection 102G(2) would provide that subsection 102G(1) is a civil remedy provision.



1108. The note under subsection 102G(2) would refer to Division 11 of Part VB. Under these provisions the Court may:

- order a pecuniary penalty of up to 60 penalty units for a contravention of subsection 98D(1) (see proposed section 105D);
- declare that all or part of the agreement is void (see proposed section 105F);
- vary the terms of the agreement, including its nominal expiry date (see proposed section 105G);
- order compensation (see proposed section 105J); and/or
- grant injunctions (see proposed section 105K)

for lodging a variation to a workplace agreement that has not been approved.

### **New Subdivision C – Lodgment of variations**

#### *New section 102H – Employer must lodge variations with the Employment Advocate*

1109. Proposed section 102H would require employers to lodge variations to workplace agreements with the Employment Advocate.

1110. Subsection 102H(1) would require an employer to lodge a variation within 14 days of the variation being approved under proposed section 102F.

1111. Subsection 102H(2) would provide that subsection 102H(1) is a civil remedy provision.

1112. The note under subsection 102H(2) would refer to Division 11 of Part VB.

1113. This means that the Court may order a pecuniary penalty of up to 30 penalty units for a failure to lodge a variation to a workplace agreement within fourteen days of it being approved

1114. It is intended that the time frame and penalties in proposed section 102H would encourage employers to lodge variations to workplace agreements once they are approved, in a timely manner.

1115. Only employers would be able to lodge variations to agreements with the Employment Advocate. This would be consistent with an agreement making system where integrity of the system is ensured through a penalty regime. It would be difficult to effectively attribute responsibility for a breach of the lodgment requirements if more than one party to the agreement were responsible for lodgment. However, the Court would have discretion not to order a penalty against an employer who was pressured into lodging an agreement inappropriately. Where such pressure occurred, an employer would be able to seek an injunction under proposed section 105KV for prohibited conduct.

*New section 102I – Lodging variation to multiple-business agreement without authorisation*

1116. Proposed section 102I would prohibit an employer from lodging a variation to multiple-business agreement that has not been authorised by the Employment Advocate under proposed section 96F.

1117. Subsection 102I(1) would provide that an employer contravenes subsection 102I(1) if:

- the employer lodges a variation to a multiple-business agreement; and
- the variation has not been authorised under 96F.

1118. Subsection 102I(2) would provide that subsection 102I(1) is a civil remedy provision.

1119. The note under subsection 102I(2) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 60 penalty units against an employer for lodging a variation to a multiple-business agreement without authorisation.

1120. Only one of the multiple employers bound by the agreement would be required to lodge a variation to the agreement. It would be that employer who would be liable for a failure to obtain an authorisation. However, the Court would have discretion not to order a penalty against an employer who was pressured into lodging a variation to an agreement inappropriately. Where such pressure occurred, an employer would be able to seek an injunction under proposed section 105K to restrain prohibited conduct.

1121. Where a variation to a multiple-business agreement is lodged without authorisation, subsection 102M(3) would operate and the variation would not be able to come into operation.

*New section 102J – Lodging of variation documents with the Employment Advocate*

1122. Proposed section 102J would provide the method by which an employer would *lodge* a variation to a workplace agreement, thus bringing it into operation (see subsection 102M(1)).

1123. Subsection 102J(1) would provide that the employer *lodges* a variation to a workplace agreement if:

- the employer lodges a declaration under subsection 102J(2) (paragraph 102J(1)(a)); and
- a copy of the variation is annexed to the declaration (paragraph 102J(1)(b)).

1124. Subsection 102J(2) would provide that an employer *lodges* a declaration if the employer gives the declaration to the Employment Advocate and the declaration meets the requirements of subsection 102J(3).

1125. The note under subsection 102J(2) makes clear that providing false or misleading information or documents under subsection 102J(2) would be a criminal offence under sections 137.1 and 137.2 of the *Criminal Code*.

1126. Subsection 102J(3) allows the Employment Advocate to set out requirements for the form of the declaration, by notice published in the *Gazette*. It is intended that the Employment Advocate would exercise its power under subsection 102J(3) to create a standard form declaration. An employer would then fill in any necessary details, for example, the name of the agreement, and lodge that standard form declaration along with a copy of the variation with the Employment Advocate (subsections 102J(1) and (2)). It is also intended that the standard form declaration would require an employer to declare that the agreement was made and/or approved in accordance with the requirements of Divisions 3 and 4 of Part VB.

1127. An employer would only need to lodge a copy of the variation as it is intended that the regulations would require the employer to retain a signed original of the variation for a specified period. It is intended that a variation could be lodged electronically, by fax, by hand or by post. However, it is likely that the vast majority of lodgments would be electronic. Requiring the employer to only lodge a copy of the variation would facilitate the implementation of electronic lodgment for variations.

1128. Subsection 102J(4) would provide that a declaration is only taken to be given to the Employment Advocate if the Employment Advocate actually receives it. This means that if an employer lodges a variation by post, the variation would only be taken to be lodged when the Employment Advocate receives the declaration.

1129. The note under subsection 102J(4) would make clear that section 29 of the *Acts Interpretation Act 1901* or section 160 of the *Evidence Act 1995* do not apply to variations. These provisions might otherwise create a presumption that the ‘postal-acceptance rule’ applies to variations.

1130. Subsection 102J(5) would provide that the Employment Advocate is not required to consider or determine whether any of the requirements of Part VB – Workplace agreements have been met in relation to the making or content of a declaration or variation. This is intended to make it clear that lodgment of a declaration and a variation would occur without any scrutiny by the Employment Advocate.

*New section 102K – Employment Advocate must issue receipt for lodgment of declaration for variation*

1131. Proposed section 102K would provide for the Employment Advocate to issue a receipt for the lodgment of a variation to a workplace agreement.

1132. Subsection 102K(1) would require the Employment Advocate to issue a receipt if a declaration is lodged under subsection 102J(2).

1133. Subsection 102K(2) would require the Employment Advocate to give a copy of the receipt to:

- the employer (paragraph 102K(2)(a));
- if the agreement is an AWA – the employee (paragraph 102K(2)(b)); and

- if the agreement is a union collective agreement or a union greenfields agreement – the organisation or organisations bound by the agreement (paragraph 102K(2)(c)).

1134. This mechanism is necessary in the context of a system where variations come into operation on lodgment (see subsection 102M(1)), as the parties need to know when they start being subject to the variation.

1135. It is intended that where a variation is lodged electronically, the information provided in the electronic declaration would be sufficient for the Employment Advocate's systems to instantly issue an electronic receipt without needing to scrutinise the agreement. Where a variation is lodged by other means, the information provided in the declaration would be sufficient for the Employment Advocate to issue a receipt after examining the declaration to the extent necessary to determine where to send the receipt. After receiving a receipt, the employer would be required to pass on the receipt to the employees (see proposed section 102L).

*New section 102L – Employer must notify employees after lodging variation*

1136. Proposed section 102L would require the employer to take reasonable steps to pass on copies of the lodgment receipt from the Employment Advocate to employees.

1137. Subsection 102L(1) would require an employer in relation to a collective agreement to take reasonable steps to ensure that the lodgment receipt is given to persons whose employment is, at the time the employer receives the receipt, subject to the agreement, within 21 days of the employer receiving the receipt from the Employment Advocate. The reference to 'persons' is intended to ensure that an employer would not contravene subsection 102L(1) more than once in relation to a particular variation. This means that, for example, where an employer has ten employees and fails to give all employees a copy of the lodgment receipt, that is only one contravention of subsection 102L(1), rather than ten.

1138. Subsection 102L(1) does not apply to AWAs as the Employment Advocate would provide a lodgment receipt directly to the employee.

1139. Subsection 102L(2) would provide that subsection 102L(1) is a civil remedy provision.

1140. The note under subsection 102L(2) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units against an employer for failing to pass on a lodgment receipt to employees.

**New Subdivision E – When a variation comes into operation**

*New section 102M – When a variation comes into operation*

1141. Proposed section 102M would provide for when a variation to a workplace agreement comes into operation.

1142. Subsection 102M(1) would provide that a variation to a workplace agreement comes into operation when the variation is lodged with the Employment Advocate in accordance with section 102J.

1143. Subsection 102M(2) would provide that the variation comes into operation even if the requirements in Division 3 of Part VB and Subdivision B of Division 8 of Part VB have not been met.

## **New Division 9 – Terminating a workplace agreement**

### **New Subdivision A – General**

#### *New section 103 – Types of termination*

1144. Proposed section 103 would set out the ways in which a workplace agreement may be terminated.

1145. Subsection 103(1) would provide that a workplace agreement may be terminated:

- by approval (paragraph 103(1)(a)); or
- unilaterally (paragraph 103(1)(b)).

1146. Subsection 103(2) would provide that a workplace agreement is terminated when:

- a termination is lodged with the Employment Advocate in accordance with proposed section 103H (paragraph 103(2)(a));
- a declaration to terminate the agreement in accordance with subsection 103K(2) is lodged with the Employment Advocate in accordance with proposed section 103N (paragraph 103(2)(b)); or
- a declaration to terminate the agreement in accordance with subsection 103L(2) is lodged with the Employment Advocate in accordance with proposed section 103N (paragraph 103(2)(c)).

### **New Subdivision B – Termination by approval (pre-lodgment procedure)**

#### *New section 103A – Terminating a workplace agreement by approval*

1147. Proposed section 103A would provide that the following persons may agree to terminate a workplace agreement:

- in the case of an AWA – the employer and employee (paragraph 103A(a));
- in the case of an employee collective agreement or employer greenfields agreement – the employer and employees whose employment is be subject to the agreement (paragraph 103A(b));
- in the case of a union collective agreement or a union greenfields agreement – the employer and the one or more organisations of employees that are bound by the agreement (paragraph 103A(c)).

*New section 103B – Eligible employee in relation to termination of workplace agreement*

1148. Proposed section 103B would provide a definition of *eligible employee* for the purposes of this Subdivision. The concept of an eligible employee is a drafting tool to provide a short hand term for the employees that have rights in relation to terminating a workplace agreement, and reduces the need for repetition.

1149. Proposed section 103B would define an *eligible employee* to be:

- in the case of an AWA – the employee (paragraph 103B(a)); or
- in the case of a collective agreement – a person employed at the time of the termination whose employment is subject to the agreement (paragraph 103B(b)).

*New section 103C – Providing employees with information statement*

1150. Proposed section 103C would provide a period of time in which employees may consider a proposal to terminate a workplace agreement and obtain advice about that termination prior to approving it.

1151. Subsection 103C(1) would require the employer to take reasonable steps to ensure that all eligible employees are given an information statement at least seven days prior to the agreement being terminated.

1152. Subsection 103C(2) would provide that, if a person becomes an eligible employee during the seven day period before the agreement is terminated, the employer must take reasonable steps to ensure that the person is given an information statement from no later than the time the person becomes an eligible employee.

1153. Subsection 103C(3) would provide that the information statement mentioned in subsections 103C(1) and (2) must contain information about:

- when and how the employer will seek approval of the termination (paragraph 103C(3)(a));
- if the agreement is an AWA – the effect of the provisions relating to bargaining agents (paragraph 103C(3)(b)); and
- anything else that the Employment Advocate requires by notice published in the *Gazette* (paragraph 103C(3)(c)).

1154. It is intended that the Employment Advocate would produce a standard form information statement for the employer to provide to employees, which would be published in the *Gazette* and available from the Employment Advocate. An employer would then fill in any necessary details, for example, when and how the employer would seek approval of the termination.

1155. Subsection 103C(4) would provide that an employer contravenes subsection 103C(4) if it lodges a declaration to terminate a workplace agreement without providing eligible employees with an information statement in accordance with subsections 103C(1) and (2).

1156. Subsection 103C(5) would provide that subsection 103C(4) is a civil remedy provision.

1157. The note under subsection 103C(5) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units against an employer for a failure to take reasonable steps to provide an information statement in relation to terminating an agreement.

Subsection 103C(6) would provide that an employer would not contravene subsection 103C(4) more than once in relation to a particular termination. This means that, for example, where an employer has ten employees and fails to give the employees an information statement, that is only one contravention of subsection 103C(4), rather than ten.

*New section 103D – Prohibition on withdrawal from variation to union collective agreement*

1158. Proposed section 103D would prohibit withdrawal from a termination to a union collective agreement or union greenfields agreement.

1159. Subsection 103D(1) would require an employer that has agreed to terminate a union collective agreement or union greenfields agreement to take reasonable steps to seek approval for the termination of the union collective agreement or union greenfields agreement within a reasonable period after agreeing to terminate the agreement.

1160. Subsection 103D(2) would provide that subsection 103D(1) is a civil remedy provision.

1161. The note under subsection 103D(2) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units against an employer for withdrawing from a termination of a union collective agreement or union greenfields agreement.

1162. This measure would ensure that when an employer and one or more organisations of employees have come to an agreement about a termination, that termination would put to the employees for approval.

1163. The employer would be given a reasonable period in which to put the termination to the employees. This acknowledges that what is a reasonable period will vary depending on the circumstances of the employer. For example, a reasonable period might be longer for a large business with 10 000 employees and offices located around Australia, but may be shorter for a business with 15 employees that are all located in one office.

1164. Proposed section 103D only applies to union collective agreements and union greenfields agreements as there would be no need to apply the provision to other types of workplace agreement. There are no corresponding prohibitions on an organisation of employees withdrawing from a variation to a union collective agreement or union greenfields agreement as, if that occurred, the employer would still be able to lodge the termination with the Employment Advocate and bring it into operation (see proposed section 103Q).

*New section 103E – Approval of a termination*

1165. Proposed section 103E would provide for the manner in which terminations are to be *approved* by employees before they are lodged.

1166. Subsection 103E(1) would provide that a termination of an AWA is *approved* if:

- the employer and employee make a written termination agreement to terminate the AWA (paragraph (103E(1)(a)));
- the termination agreement is signed and dated by the employee and the employer (paragraph 103E(1)(b)); and
- those signatures are witnessed (paragraph 103E(1)(c)).

1167. Paragraph 103E(1)(d) would provide additional requirements for the approval of a termination agreement, where the employee is under the age of 18. These are:

- that the termination agreement is signed and dated by an appropriate adult (such as the employee's parent or guardian, but not the employer) who is aged at least 18 (subparagraphs 103E(1)(d)(i) and (ii)); and
- that the person's signature is witnessed (subparagraph 103E(1)(d)(iii)).

1168. This additional requirement of having a termination agreement signed by an appropriate adult is intended to provide further protection to employees who may be vulnerable because of their age. The term 'appropriate adult' is intended to be broad enough to allow a person who is under 18 but does not have a parent or guardian available to seek the signature from another adult who has an interest in the young person's well being, for example, another member of the person's family.

1169. Subsection 103E(2) would set out how a termination of a collective agreement is to be *approved*.

1170. Paragraph 103E(2)(a) would require the employer to give all of the persons whose employment is subject to the agreement a reasonable opportunity to decide whether they want to approve the termination.

1171. Paragraph 103E(2)(b) would additionally require that:

- if the decision is made by vote – a majority of those persons who cast a valid vote decide that they want to approve the termination; or
- otherwise – a majority of those persons decide that they want to approve the termination.

1172. This means that once the employer has provided employees with a reasonable opportunity to decide whether they want to approve a termination of a collective agreement,



determining whether an agreement has been approved would involve counting the votes of the employees and not an assessment of the genuineness of employees' consent.

*New section 103F – Employer must not lodge unapproved termination*

1173. Proposed section 103F would provide remedies against an employer that lodges a termination of a workplace agreement which has not been approved in accordance with proposed 103E.

1174. Subsection 103F(1) would provide that an employer contravenes the subsection if:

- it lodges a termination of a workplace agreement (paragraph 103F(1)(a)); and
- the variation has not been approved in accordance with proposed section 103E (paragraph 103F(1)(b)).

1175. Subsection 103F(2) would provide that subsection 103F(1) is a civil remedy provision.

1176. The note under subsection 103F(2) would refer to Division 11 of Part VB. Under these provisions the Court may:

- order a pecuniary penalty of up to 60 penalty units for a contravention of subsection 98D(1) (see proposed section 105D);
- order that the agreement continues to operate despite the termination (see proposed section 105H);
- order compensation (see proposed section 105J); and/or
- grant injunctions (see proposed section 105K)

for lodging a termination of a workplace agreement that has not been approved.

**New Subdivision C – Termination by approval (lodgment)**

*New section 103G – Employer must lodge termination with the Employment Advocate*

1177. Proposed section 103G would require employers to lodge terminations of workplace agreements with the Employment Advocate.

1178. Subsection 103G(1) would require an employer to lodge a termination within 14 days of the termination being approved under proposed section 103E.

1179. Subsection 103G(2) would provide that subsection 103G(1) is a civil remedy provision.

1180. The note under subsection 103G(2) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units against an employee for a failure to lodge a termination of a workplace agreement within fourteen days of it being approved

1181. It is intended that the time frame and penalties in proposed section 103G would encourage employers to lodge terminations of workplace agreements once they are approved, in a timely manner.

1182. Only employers would be able to lodge terminations of agreements with the Employment Advocate. This would be consistent with an agreement making system where integrity of the system is ensured through a penalty regime. It would be difficult to effectively attribute responsibility for a breach of the lodgment requirements if more than one party to the agreement were responsible for lodgment. However, the Court would have discretion not to order a penalty against an employer who was pressured into lodging an agreement inappropriately. Where such pressure occurred, an employer would be able to seek an injunction under proposed section 105K for prohibited conduct.

*New section 103H – Lodging termination documents with the Employment Advocate*

1183. Proposed section 103H would provide the method by which an employer would *lodge* a termination of a workplace agreement, thus terminating the agreement (see paragraph 100(4)(a)).

1184. Subsection 103H(1) would provide that the employer *lodges* a termination of a workplace agreement if:

- the employer lodges a declaration under subsection (2) (paragraph 103H(1)(a)); and
- if the agreement is an AWA – a copy of the termination agreement is annexed to the declaration (paragraph 103H(1)(b)).

1185. Subsection 103H(2) would provide that an employer *lodges* a declaration if the employer gives the declaration to the Employment Advocate and the declaration meets the requirements of subsection 103H(3).

1186. The note under subsection 103H(2) explains that providing false or misleading information or documents under subsection 103H(2) would be a criminal offence under sections 137.1 and 137.2 of the *Criminal Code*.

1187. Subsection 103H(3) allows the Employment Advocate to set out requirements for the form of the declaration, by notice published in the *Gazette*. It is intended that the Employment Advocate would exercise its power under subsection 103H(3) to create a standard form declaration. An employer would then fill in any necessary details, for example, the name of the agreement, and lodge that standard form declaration with the Employment Advocate (subsections 103H(1) and (2)). It is also intended that the standard form declaration would require an employer to declare that the agreement was terminated in accordance with the requirements of Division 3 of Part VB and Subdivision B of Division 9 of Part VB.

1188. Subsection 103H(4) would provide that a declaration is only taken to be given to the Employment Advocate if the Employment Advocate actually receives it. This means that if an employer lodges a termination of a workplace agreement by post, the agreement would only be taken to be lodged when the Employment Advocate receives the declaration.

1189. The note under subsection 103H(4) makes clear that this means that section 29 of the *Acts Interpretation Act 1901* or section 160 of the *Evidence Act 1995* do not apply to terminations of workplace agreements. These provisions might otherwise create a presumption that the ‘postal-acceptance rule’ applies to terminations of workplace agreements.

1190. Subsection 103H(5) would provide that the Employment Advocate is not required to consider or determine whether any of the requirements of Part VB have been met in relation to the making or content of a declaration or termination of a workplace agreement. This is intended to make it clear that lodgment of a declaration and a termination would occur without any scrutiny by the Employment Advocate.

*New section 103I – Employment Advocate must issue receipt for lodgment of declaration for termination*

1191. Proposed section 103I would provide for the Employment Advocate to issue a receipt for the lodgment of a termination of a workplace agreement.

1192. Subsection 103I(1) would require the Employment Advocate to issue a receipt if a declaration is lodged under subsection 103H(2).

1193. Subsection 103I(2) would require the Employment Advocate to give a copy of the receipt to:

- the employer (paragraph 103I(2)(a));
- if the agreement is an AWA – the employee (paragraph 103I(2)(b)); and
- if the agreement is a union collective agreement or a union greenfields agreement – the organisation or organisations bound by the agreement (paragraph 103I(2)(c)).

1194. This mechanism is necessary in the context of a system where termination takes effect on lodgment (see subsection 103(2)), as parties need to know when the termination takes effect.

1195. It is intended that where a termination is lodged electronically, the information provided in the electronic declaration would be sufficient for the Employment Advocate’s systems to instantly issue an electronic receipt. Where a termination is lodged by other means, the information provided in the declaration would be sufficient for the Employment Advocate to issue a receipt after examining the declaration to the extent necessary to determine where to send the receipt. After receiving a receipt, the employer would be required to pass on the receipt to the employees (see proposed section 103J).

*New section 103J – Employer must notify employees after lodging termination*

1196. Proposed section 103J would require the employer to take reasonable steps to pass on copies of the lodgment receipt from the Employment Advocate to employees.

1197. Subsection 103J(1) would require an employer in relation to a collective agreement to take reasonable steps to ensure that the lodgment receipt is given to persons whose employment

was, just before the agreement was terminated, subject to the agreement, within 21 days of the employer receiving the receipt from the Employment Advocate. The reference to ‘persons’ is intended to ensure that an employer would not contravene subsection 103J(2) more than once in relation to a particular termination. This means that, for example, where an employer has ten employees and fails to give all employees a copy of the lodgment receipt, that is only one contravention of subsection 103J(3), rather than ten.

1198. Subsection 103J(1) does not apply to AWAs as the Employment Advocate would provide a lodgment receipt directly to the employee.

1199. Subsection 103J(2) would provide that subsection 103J(1) is a civil remedy provision.

1200. The note under subsection 103J(2) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units for failing to pass on a lodgment receipt to employees.

### **New Subdivision D – Unilateral termination after nominal expiry date**

#### *New section 103K – Unilateral termination in a manner provided for in workplace agreement*

1201. Proposed section 103K would provide for a workplace agreement to be terminated after its nominal expiry date in the manner provided for in the agreement. When an agreement is terminated under proposed section 103K, employees’ terms and conditions of employment would be derived from the FPCS (see proposed section 103R).

1202. Subsection 103K(1) would provide when the section applies (ie where a workplace agreement provides for a manner of terminating the agreement after its nominal expiry date).

1203. Subsection 103K(2) would provide that any of the following persons could unilaterally terminate the agreement by lodging a declaration under proposed section 103N:

- the employer (paragraph 103K(2)(a));
- a majority of employees whose employment is subject to the agreement when the notice mentioned in subsection 103K(3) is given (paragraph 103K(2)(b));
- in the case of an AWA – a bargaining agent at the request of the employer or employee (paragraph 103K(2)(c)); or
- an organisation of employees that is bound by the agreement (paragraph 103K(2)(d)).

1204. Subsection 103K(3) would only allow a workplace agreement to be unilaterally terminated under proposed section 103K where:

- the agreement has passed its nominal expiry date (paragraph 103K(3)(a)); and
- all the requirements in the agreement for terminating the agreement are met (paragraph 103K(3)(b)).

1205. The note under subsection 103K(3) notes that providing false or misleading information or documents under proposed section 103K would be a criminal offence under sections 137.1 and 137.2 of the *Criminal Code*.

1206. Subsection 103K(4) would require the person terminating the agreement to, at least 14 days before lodging the declaration, take reasonable steps to ensure that the following persons are given written notice of the termination:

- the employer (paragraph 103K(5)(a));
- each employee whose employment is subject to the agreement when the notice is given (paragraph 103K(5)(b)); and
- an organisation of employees that is bound by the agreement (paragraph 103K(5)(c)).

1207. Subsection 103K(5) would provide that the notice mentioned in subsection 103K(4) must:

- state that the workplace agreement is to be terminated in the manner provided for by the agreement (paragraph 103K(5)(a));
- be in the form (if any) that the Employment Advocate requires by notice published in the *Gazette* (paragraph 103K(5)(b)); and
- contain any information that the Employment Advocate requires by notice published in the *Gazette* (paragraph 103K(5)(c)).

1208. It is intended that the Employment Advocate would produce a standard form notice. A person terminating the agreement would then fill in any necessary details, for example, the clause of the agreement being relied upon to terminate it, and provide that standard form notice to the persons mentioned in subsection 103K(4).

1209. Subsection 103K(6) would provide that a person contravenes the subsection if:

- the person lodges a declaration to terminate a workplace agreement (paragraph 103K(6)(a)); and
- the person did not comply with subsections 103K(4) and (5) (paragraph 103K(6)(b)).

1210. Subsection 103K(7) would provide that subsection 103K(6) is a civil remedy provision.

1211. The note under subsection 103K(7) would refer to Division 11 of Part VB. Under these provisions the Court may:

- order a pecuniary penalty of up to 60 penalty units for a contravention of subsection 98D(1) (see proposed section 105D);

- order that the workplace agreement continues to operate despite the termination (see proposed section 105H);
- order compensation (see proposed section 105J); and
- order injunctions (see proposed section 105K).

1212. Subsection 103K(8) would provide that proposed section 103K does not apply to multiple-business agreements. It is intended that multiple-business agreements could only be terminated by approval.

*New section 103L – Unilateral termination with 90 days written notice*

1213. Proposed section 103L would provide for a workplace agreement to be terminated after its nominal expiry date on 90 days written notice. When an agreement is terminated under proposed section 103L, employees' terms and conditions of employment would be derived from the FPCS (see proposed section 103R).

1214. Subsection 103L(1) would provide that a workplace agreement may be terminated on after its nominal expiry date on 90 days written notice regardless of whether the agreement provides for a manner in which it may be terminated.

1215. Subsection 103L(2) would list the persons who may unilaterally terminate a workplace agreement on 90 days notice as:

- the employer (paragraph 103L(2)(a));
- a majority of employees whose employment is subject to the agreement when the notice mentioned in subsection 103L(3) is given (paragraph 103L(2)(b));
- in the case of an AWA – a bargaining agent at the request of the employer or employee (paragraph 103L(2)(c)); or
- an organisation of employees that is bound by the agreement (paragraph 103L(2)(d)).

1216. Subsection 103L(3) would only allow a workplace agreement to be unilaterally terminated under proposed section 103L if the agreement has passed its nominal expiry date

1217. The note under proposed subsection 103L(3) makes clear that providing false or misleading information or documents under the section would be a criminal offence under sections 137.1 and 137.2 of the *Criminal Code*.

1218. Subsection 103L(4) would require the person or persons terminating the agreement to, at least 90 days before lodging the declaration, take reasonable steps to ensure that:

- persons bound by the agreement are given written notice of the termination (paragraph 103L(4)(a)); and

- if the person giving the notice is the employer – a written copy of the undertakings (if any) made by the employer under proposed section 103M.

1219. Subsection 103L(5) would provide that the notice mentioned in subsection 103L(4) must:

- state that the workplace agreement is to be terminated (paragraph 103L(5)(a));
- specify the day on which the person or persons propose to lodge the notice (paragraph 103L(5)(b));
- be in the form (if any) that the Employment Advocate requires by notice published in the *Gazette* (paragraph 103K(5)(c)); and
- contain any information that the Employment Advocate requires by notice published in the *Gazette* (paragraph 103L(5)(d)).

1220. It is intended that the Employment Advocate would produce a standard form notice. A person terminating the agreement would then fill in any necessary details, for example, the name of the agreement, and provide that standard form notice to the persons mentioned in subsection 103L(4).

1221. Subsection 103L(6) would provide that an employer contravenes the subsection if:

- it lodges a declaration to terminate a workplace agreement (paragraph 103L(6)(a)); and
- the person did not comply with subsections 103L(4) and (5) (paragraph 103L(6)(b)).

1222. Subsection 103L(7) would provide that subsection 103L(6) is a civil remedy provision.

1223. The note under subsection 103L(7) would refer to Division 11 of Part VB. Under these provisions the Court may:

- order a pecuniary penalty of up to 60 penalty units for a contravention of subsection 98D(1) (see proposed section 105D);
- order that the agreement continue to operate despite the termination (see proposed section 105H); and
- order compensation (see proposed section 105J).

1224. Subsection 103L(8) would provide that the section does not apply to multiple-business agreements. It is intended that multiple-business agreements could only be terminated by approval.

*New section 103M – Undertakings about post-termination conditions*

1225. Proposed section 103M would provide for an employer that terminates an agreement under proposed section 103L to make undertakings about the employees' terms and conditions after the agreement is terminated.

1226. Subsection 103M(1) would provide that an employer intending to terminate a workplace agreement under subsection 103L(2) may make undertakings as to the terms and conditions of employees who were covered by the workplace agreement just before it was terminated.

1227. Subsection 103M(2) would provide for the undertakings to come into operation on the day the agreement is terminated.

1228. Subsection 103M(3) would provide for the undertakings to cease to operate in relation to an employee when the employee's employment becomes subject to a later workplace agreement. For example, if, after the agreement is terminated, the employer makes an AWA with an employee who is covered by the undertakings, the undertakings cease to apply to that employee.

1229. Subsection 103M(4) would provide for undertakings to operate as if they were a workplace agreement for the purposes of their enforcement, inspectors' powers and any other provision of the Bill specified in the regulations.

1230. Subsection 103M(5) would provide that an employer contravenes subsection 103M(5) if:

- it lodges a declaration to terminate a workplace agreement (paragraph 103M(5)(a));
- it has made undertakings in relation to that termination (paragraph 103M(5)(b)); and
- it did not annex a copy of the undertakings to the declaration (paragraph 103M(5)(b)).

1231. Subsection 103M(6) would provide that subsection 103M(5) is a civil remedy provision.

1232. The note under subsection 103M(6) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 60 penalty units for a contravention of subsection 103M(5) (see proposed section 105D).

*New section 103N – Lodging unilateral termination documents with the Employment Advocate*

1233. Proposed section 103N would provide the method by which an employer would *lodge* a termination of a workplace agreement, thus terminating the agreement (see paragraph 100(4)(a)).

1234. Subsection 103N(1) would provide that a person *lodges* a declaration to terminate a workplace agreement if:

- the employer gives it to the Employment Advocate (paragraph 103N(1)(a)); and



- it meets the form requirements mentioned in subsection 103N(3) (paragraph 103N(1)(b)).

1235. The note under subsection 103N(1) makes clear that providing false or misleading information or documents under subsection 103N(1) would be a criminal offence under sections 137.1 and 137.2 of the *Criminal Code*.

1236. Subsection 103N(2) would provide that if the person lodging the declaration is the employer, the employer *lodges* undertakings if:

- he or she lodges a declaration under subsection 103N(1); and
- a copy of the undertakings is annexed to the declaration.

1237. Subsection 103N(3) allows the Employment Advocate to set out requirements for the form of the declaration, by notice published in the *Gazette*. It is intended that the Employment Advocate would exercise its power under subsection 103N(3) to create a standard form declaration. An employer would then fill in any necessary details, for example, the name of the agreement, and lodge that standard form declaration with the Employment Advocate (subsections 103N(1) and (2)). It is also intended that the standard form declaration would require an employer to declare that the agreement was terminated in accordance with the requirements of Division 3 of Part VB and Subdivision D of Division 9 of Part VB.

1238. Subsection 103N(4) would provide that a declaration is only taken to be given to the Employment Advocate if the Employment Advocate actually receives it. This means that if an employer lodges a termination of a workplace agreement by post, the agreement would only be taken to be lodged when the Employment Advocate receives the declaration.

1239. The note under subsection 103N(4) makes clear that this means that section 29 of the *Acts Interpretation Act 1901* or section 160 of the *Evidence Act 1995* do not apply to terminations of workplace agreements. These provisions might otherwise create a presumption that the ‘postal-acceptance rule’ applies to terminations of workplace agreements.

1240. Subsection 103N(5) would provide that the Employment Advocate is not required to consider or determine whether any of the requirements of Part VB have been met in relation to the making or content of a declaration or termination of a workplace agreement. This is intended to make it clear that lodgment of a declaration and a termination would occur without any scrutiny by the Employment Advocate.

*New section 103O – Employment Advocate must issue receipt for lodgment of declaration for notice of termination*

1241. Proposed section 103O would provide for the Employment Advocate to issue a receipt for the lodgment of a declaration for a notice of termination of a workplace agreement.

1242. Subsection 103O(1) would require the Employment Advocate to issue a receipt if a declaration is lodged under subsection 103N(1).

1243. Subsection 103O(2) would require the Employment Advocate to give a copy of the receipt to:

- the person that lodges the declaration (paragraph 103O(2)(a));
- the employer (paragraph 103O(2)(b));
- if the agreement is an AWA – the employee (paragraph 103O(2)(c)); and
- if the agreement is a union collective agreement or a union greenfields agreement – the organisation or organisations bound by the agreement (paragraph 103O(2)(d)).

1244. This mechanism is necessary in the context of a system where termination takes effect on lodgment (see proposed section 103Q).

1245. It is intended that where a declaration is lodged electronically, the information provided in the electronic declaration would be sufficient for the Employment Advocate's systems to instantly issue an electronic receipt without needing to scrutinise the agreement. Where a declaration is lodged by other means, the information provided in the declaration would be sufficient for the Employment Advocate to issue a receipt after examining the declaration to the extent necessary to determine where to send the receipt. After receiving a receipt, the employer would be required to pass on the receipt to the employees (see proposed section 103P).

*New section 103P – Employer must notify employees after lodging termination*

1246. Proposed section 103P would require the employer to take reasonable steps to pass on copies of the lodgment receipt from the Employment Advocate to employees.

1247. Subsection 103P(1) would require an employer in relation to a collective agreement to take reasonable steps to ensure that the lodgment receipt is given to persons whose employment was, just before the agreement was terminated, subject to the agreement, within 21 days of the employer receiving the receipt from the Employment Advocate. The reference to 'persons' is intended to ensure that an employer would not contravene subsection 103P(2) more than once in relation to a particular termination. This means that, for example, where an employer has ten employees and fails to give all employees a copy of the lodgment receipt, that is only one contravention of subsection 103P(2), rather than ten.

1248. Subsection 103P(1) does not apply to AWAs as the Employment Advocate would provide a lodgment receipt directly to the employee.

1249. Subsection 103P(2) would provide that subsection 103P(1) is a civil remedy provision.

1250. The note under subsection 103P(2) would refer to Division 11 of Part VB. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units against an employer for failing to pass on a lodgment receipt to employees.

## **New Subdivision E – Effect of termination**

### *New section 103Q – When a termination takes effect*

1251. Proposed section 103Q would provide that a termination of a workplace agreement takes effect even if the following requirements are not met:

- requirements relating to bargaining agents (paragraph 103Q(a));
- if the termination is by approval – the requirements of Subdivision B of Division 9 of Part VB – Termination by approval (paragraph 103Q(b)); or
- if the termination is unilateral – the requirements for notice of termination under subsections 103K(4) and (5) and subsections 103L(4) and (5).

1252. It is intended that once lodged, a termination of a workplace agreement will take effect, despite non-compliance, unless the Court orders otherwise. It is intended that the increased number of penalties, broader range of remedies and improved Court powers under Part VB will ensure the integrity of the requirements relating to terminating workplace agreements. This would be a necessary consequence of a lodgment only system that does not involve terminations of workplace agreements being scrutinised prior to taking effect.

### *New section 103R – Consequence of termination of agreement—application of other industrial instruments*

1253. Proposed section 103R would provide for employees' terms and conditions to be protected under the FPCS after an agreement is terminated.

1254. Subsection 103R(1) would provide that an industrial instrument mentioned in subsection 103R(3) ie an award or workplace agreement has no effect in relation to an employee if a workplace agreement that operated in relation to that employee was terminated. This means that an employee would not 'fall back' onto another industrial instrument, but would be entitled to the FPCS and any voluntary undertakings.

1255. The notes under subsection 103R(1) refer readers to provisions relating to the operation of the FPCS and voluntary undertakings.

1256. Subsection 103R(2) would provide that, once an agreement is terminated, an industrial instrument would have no effect in relation to the employee until another workplace agreement (the later agreement) comes into operation in relation to the employee. The industrial instrument would have effect again from that time. Where the industrial instrument is an award this would enable it to provide protected award conditions for the purposes of the later agreement (see proposed section 101B for an explanation of protected award conditions).

1257. Subsection 103R(3) identifies the industrial instruments referred to in subsection 103R(1) as an award or workplace agreement.

## **New Division 10 – Prohibited conduct**

### *New section 104 – Coercion and duress*

1258. Proposed section 104 would provide remedies against certain prohibited conduct in relation to workplace agreements and bargaining agents for certain workplace agreements.

1259. Subsection 104(1) would relate to collective agreements. Subsection 104(1) would prohibit a person from:

- engaging in, organising, or threatening to engage in or organise any industrial action (paragraph 104(1)(a));
- taking or threatening to take other action (paragraph 104(1)(b)); or
- refraining or threatening to refrain from taking any action (paragraph 104(1)(c))

with intent to coerce another person to agree or not agree to make, approve, lodge, vary or terminate a collective agreement.

1260. Subsection 104(2) would provide that the prohibitions in subsection 104(1) would not apply to protected action. This would mean that if industrial action is found to be protected action it would not amount to coercive conduct.

1261. Subsection 104(3) would prohibit persons from coercing or attempting to coerce an employer of employee in relation to the appointment or termination of a bargaining agent.

1262. Subsection 104(4) would prohibit persons from coercing or attempting to coerce an employee in relation to a request or withdrawal of a request for the employer to meet and confer with the employee's bargaining agent.

1263. Subsection 104(5) would prohibit persons from applying duress to an employer or employee in connection with an AWA.

1264. Subsection 104(6) would clarify that an employer does not apply duress to an employee for the purposes of subsection 104(5) merely because the employer requires the employee to make an AWA with the employer as a condition of employment. This means that an employer may make an AWA a condition of the person becoming an employee.

1265. Subsection 104(7) would provide that subsections 104(1), (3), (4) and (5) are civil remedy provisions.

1266. The note under subsection 104(7) would refer to Division 11 of Part VB. Under these provisions the Court may:

- order a pecuniary penalty of up to 60 penalty units for a contravention of subsections 104(1), (3), (4) or (5) (see proposed section 105D);
- declare that all or part of the agreement is void (see proposed section 105F);

- vary the terms of the agreement, including its nominal expiry date (see proposed section 105G);
- order that a workplace agreement continues to operate despite its termination (see proposed section 105H);
- order compensation (see proposed section 105J); and
- grant injunctions (see proposed section 105K)

*New section 104A – False or misleading statements*

1267. Proposed section 104A would provide remedies against persons who make false or misleading statements relating to workplace agreements.

1268. Subsection 104A(1) would provide that a person contravenes the section if:

- the person makes a false or misleading statement to another person (paragraph 104A(1)(a));
- the person is reckless as to whether the statement is false or misleading (paragraph 104A(1)(b)); and
- the making of the statement causes the other person to or not to make, approve, lodge, vary or terminate a workplace agreement (paragraph 104A(1)(c)).

1269. Subsection 104A(2) would provide that subsection 104A(1) is a civil remedy provision.

1270. The note under subsection 104A(2) would refer to Division 11 of Part VB. Under these provisions the Court may:

- order a pecuniary penalty of up to 60 penalty units for a contravention of subsection 104A(1) (see proposed section 105D);
- declare that all or part of the agreement is void (see proposed section 105F);
- vary the terms of the agreement, including its nominal expiry date (see proposed section 105G);
- order that a workplace agreement continues to operate despite its termination (see proposed section 105H);
- order compensation (see proposed section 105J); and
- grant injunctions (see proposed section 105K).

*New section 104B – Employers not to discriminate between unionist and non unionist*

1271. Proposed section 104B would prohibit an employer from discriminating between unionists and non-unionists in negotiations for a collective agreement.

1272. Subsection 104B(1) would prohibit an employer in negotiating a collective agreement or a variation to a collective agreement, from discriminating between union members and non-members, or between members of different unions because of that membership.

1273. Subsection 104B(2) would provide that subsection 104B(1) is a civil remedy provision.

1274. The note under subsection 104A(2) would refer to Division 11 of Part VB. Under these provisions the Court may:

- order a pecuniary penalty of up to 60 penalty units (see proposed section 105D); and
- grant injunctions (see proposed subsection 105K(1)).

## **New Division 11 – Contravention of civil penalty provisions**

### **New Subdivision A – General**

#### *New section 105 – General powers of Court not affected by this Division*

1275. Proposed section 105 would clarify that Division 11 of Part VB does not affect the Court's powers under Part XIV – Jurisdiction of the Federal Court of Australia and Federal Magistrates Court.

#### *New section 105A – Workplace inspector may take over proceeding*

1276. Proposed section 105A would provide for workplace inspectors to be able to take over proceedings and continue or discontinue them.

1277. Subsection 105A(1) would provide that a workplace inspector may take over a proceeding that was instituted or being carried on by another person under Division 11 of Part VB.

1278. Subsection 105A(2) would provide that a workplace inspector who has taken over a proceeding may carry it on further or discontinue it.

1279. For example, it is intended that a workplace inspector might take over a proceeding where the Government has an interest in continuing or discontinuing the case.

#### *New section 105B – Standing for civil remedies*

1280. Proposed section 105B would provide for who may bring an action under Part VB in relation to a workplace agreement.

1281. Subsection 105B(1) would provide that any of the following persons may apply to the Court for an order in relation to a workplace agreement:

- an employee who is or will be bound by a workplace agreement (paragraph 105B(1)(a));

- the employer, where it was not the person who contravened the civil remedy provision and the provision is mentioned in subsection 105B(2) (paragraph 105B(1)(b));
- an organisation of employees that is or will be bound by a workplace agreement (paragraph 105B(1)(c));
- an organisation of employees that represents an employee who is or will be bound by a workplace agreement (paragraph 105B(1)(d));
- if the agreement is an AWA – a bargaining agent (paragraph 105B(1)(e));
- a workplace inspector (paragraph 105B(1)(f)); or
- a person specified in the regulations (paragraph 105B(1)(g)).

1282. Subsection 105B(2) would specify the civil remedy provisions that an employer may bring an action for under Part VB.

1283. Subsection 105B(3) would provide that an organisation of employees can only bring an action on behalf of an employee where:

- the employee has requested the organisation to do so (paragraph 105B(3)(a));
- a member of the organisation is employed by the employee's employer (paragraph 105B(3)(b)), this member need not be the employee himself or herself; and
- the organisation is entitled, under its eligibility rules, to represent the industrial interests of the employee (paragraph 105B(3)(c)).

1284. These requirements are intended to ensure that an organisation of employees only brings an action on behalf of an employee where it has an interest in the workplace arising from having at least one member employed at the workplace whom it is entitled to represent.

### **New Subdivision B – Pecuniary penalty for contravention of civil remedy provisions**

#### *New section 105C – Application of Subdivision*

1285. Proposed section 105C would provide this Subdivision applies to a contravention by a person of a civil remedy provision under part VB.

#### *New section 105D – Court may order pecuniary penalty*

1286. Proposed section 105D would set the maximum pecuniary penalties for contravening a civil remedy provision for individuals and bodies corporate.

1287. Subsection 105D(1) would provide that the Court may order a person that contravenes a civil remedy provision to pay a pecuniary penalty of up to:

- for individuals – the maximum number of penalty units specified in subsection 105D(2) (paragraph 105D(1)(a)); and

- for bodies corporate – five times the maximum number of penalty units specified in subsection 105D(2) (paragraph 105D(1)(b)).

1288. Subsection 105D(2) would list the maximum number of penalty units for contravening specific civil remedy provisions.

### **New Subdivision C – Other remedies for contravention of certain civil remedy provisions**

#### *New section 105E – Application of Subdivision*

1289. Proposed section 105E would provide that this Subdivision applies to certain civil remedy provisions that attract remedies in addition to the pecuniary penalties in proposed section 105D.

1290. Proposed section 105E would provide that this Subdivision C of Division 11 of Part VB applies where:

- an employer lodges an unapproved workplace agreement (see proposed section 98D);
- an employer lodges an unapproved variation to a workplace agreement (see proposed section 102G);
- an employer lodges an unapproved termination of a workplace agreement (see proposed section 103F);
- a person lodges a declaration to terminate a workplace agreement in accordance with the agreement's terms without giving notice of the termination (see subsection 103K(6));
- a person lodges a declaration to terminate a workplace agreement by giving 90 days notice without giving sufficient notice of the termination (see subsection 103L(6));
- a person coerces another person in relation to a collective agreement (see subsection 104(1));
- a person applies duress to another person in connection with an AWA (see subsection 104(5));
- a person's false or misleading statements cause another person to or not to make, approve, lodge, vary or terminate a workplace agreement (see proposed section 104A).

#### *New section 105F – Court may declare workplace agreement or part of workplace agreement void*

1291. Proposed section 105F would provide for the Court to void all or part of a workplace agreement as a remedy for a contravention of one of the civil remedy provisions listed in proposed section 105E.



*New section 105G – Court may vary terms of workplace agreement*

1292. Proposed section 105G would provide the Court with the discretion to vary the terms of a workplace agreement to remedy a contravention of one of the civil remedy provisions listed in proposed section 105E.

*New section 105H – Court may order that workplace agreement continues to operate despite termination*

1293. Proposed section 105H would provide that where the contravention of one of the civil remedy provisions listed in proposed section 105E has resulted in the termination of a workplace agreement, the Court may order that the workplace agreement continues to operate despite being terminated as the result of a contravention.

*New section 105I – Date of effect and preconditions for orders under sections 105F, 105G and 105H*

1294. Proposed section 105I would provide for the date of effect and preconditions for certain Court orders.

1295. Subsection 105I(1) would provide that a court order under section 105F, 105G or 105H would take effect from no earlier than the date of the order. For example, a variation could not be backdated. Instead the Court might order compensation in relation to the period between the occurrence of the breach and the date of the variation order.

1296. Subsection 105I(2) would provide that the Court may only make an order under section 105F, 105G or 105H if the Court considers that the order is appropriate to:

- remedy all or part of any loss or damage resulting from the contravention of the civil remedy provision mentioned in proposed section 105E (paragraph 105I(2)(a)); or
- prevent or reduce all or part of that loss or damage (paragraph 105I(2)(b)).

*New section 105J – Court may order compensation*

1297. Proposed section 105J would provide for the Court to order a person who contravened a civil remedy provision mentioned in proposed section 105E to pay compensation, in the amount that the Court considers appropriate for any loss or damage resulting from the contravention suffered by an employee whose employment is subject to the agreement.

*New section 105K – Court may order injunction*

1298. Proposed section 105K would provide for the Court to grant injunctions.

1299. Subsection 105K(1) would provide for the Court to grant an injunction requiring the person contravening a civil remedy provision to cease doing so, or preventing a person contravening a civil remedy provision.

1300. Subsection 105K(2) would also allow the Court to grant an injunction in relation to a breach of proposed section 104B, which prohibits discrimination between unionists and non-unionists.

1301. The Court could also grant interim injunctions to restrain a threatened contravention or stop a contravention that is occurring (see proposed section 354A).

## **Part VC – Industrial Action**

### **Division 1 – Preliminary**

#### *New section 106 – Definitions*

1302. Proposed section 106 would set out certain defined terms that are used in Part VC.

1303. Subsection 106(2) would apply expressions from Part VB, which relates to agreement making, to Part VC.

#### *New section 106A – Meaning of **industrial action***

1304. Proposed section 106A would provide a definition of industrial action which would apply to the Act. The definition has been amended from that set out in pre-reform subsection 4(1) to reflect the changed constitutional basis on which the Act is to be based. As the Act (apart from Schedule 13) will no longer regulate industrial action on the basis of the conciliation and arbitration power set out in section 51(xxxv) of the Constitution, references to industrial action in connection with industrial disputes would be removed. Instead, industrial action would be defined by reference to certain types of action taken by an employer or an employee (as defined in proposed subsections 4AA(1) and 4AB(1)).

1305. Paragraphs 106A(1)(a) – (c) would set out the types of conduct by an employee that constitute industrial action, including a failure to attend for work. A legislative note referring to a decision of a Full Bench of the AIRC clarifies that action must be industrial in character to be industrial action for the purposes of the Act.

1306. Paragraph 106A(1)(d) would provide that the only type of conduct by an employer that constitutes industrial action is a lockout.

1307. Paragraphs 106A(1)(e) – (g) would set out various types of conduct that do not constitute industrial action, including where action by an employee that would otherwise be industrial action is based on a reasonable concern by the employee about an imminent risk to health and safety (subparagraph 106A(1)(g)(i)) and the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work (subparagraph 106A(1)(g)(ii)).

1308. Subsection 106A(4) would provide that an employee seeking to rely on the health and safety exception in paragraph 106A(1)(g)(i) bears the burden of proving that he or she had a reasonable concern.

*New section 106B – Meaning of **pattern bargaining***

1309. Proposed section 106B would provide a definition of pattern bargaining which would apply in Part VC. Pattern bargaining would occur when a person who is a negotiating party for two or more collective agreements seeks common wages or conditions in two or more of those agreements, by engaging in a course of conduct that extends beyond a single business. A course of conduct that does not extend beyond a single business cannot be caught by the definition.

1310. Subsection 106B(2) would provide an exception where a negotiating party is seeking terms or conditions of employment determined by the Full Bench of the AIRC in a decision establishing national standards.

1311. Subsection 106B(3) would provide an exception where a negotiating party is genuinely trying to reach an agreement for a single business, or part of a single business.

1312. Subsection 106B(4) would provide a list of factors relevant to whether the negotiating party is genuinely trying to reach agreement.

1313. Subsection 106B(5) would provide that where a negotiating party seeks to rely on the exception at subsection 106B(3), the negotiating party bears the burden of proving that the party was genuinely trying to reach agreement.

**Division 2 – Bargaining Periods**

*New section 107 – Initiation of bargaining period*

1314. Proposed section 107 would provide for a bargaining period to be initiated in relation to the negotiation of employee collective agreements (proposed section 96A) or union collective agreements (proposed section 96B) that are not:

- multiple-business agreements (proposed section 96E); or
- agreements with 2 or more corporations that are treated as one employer (because of proposed paragraph 95A(2)(b)).

1315. During a bargaining period, negotiating parties may, subject to certain conditions, take industrial action without attracting civil legal liability (*protected industrial action* – see proposed section 108).

1316. A bargaining period may be started by an *initiating party*: that is, any of the persons who may make an agreement under Division 2 of Part VB. These are an employer, an organisation of employees or an employee acting not only on his or her own behalf but also on behalf of other employees.

1317. This Division also refers to a *negotiating party*. The term is defined in subsection 107(4). The initiating party is a negotiating party for the purposes of the Division as is any person with whom the initiating party wants to make an agreement.

1318. Subsection 107(3) would provide that a bargaining period is initiated by the initiating party giving written notice to each of the other negotiating parties and the AIRC.

*New section 107A – Employee may appoint agent to initiate bargaining period*

1319. Proposed section 107A would provide that an employee who wishes to initiate a bargaining period under section 107 may appoint an agent to initiate the bargaining period on his or her behalf. This will give the employee the option of remaining anonymous to his or her employer.

1320. The new section would also specify that where an agent has been appointed to initiate a bargaining period under section 107, the written notice required to be given to the AIRC under subsection 107(3) must include the name of the employee who appointed the agent.

1321. Subsection 107A(3) would provide that the regulations may make provision in relation to the qualifications and appointment of any agents appointed under this section.

*New section 107B – Identity of person who has appointed agent not to be disclosed*

1322. Proposed subsection 107B(1) would further protect the identity of an employee who appoints an agent under section 107A by prohibiting the AIRC from disclosing information that would identify persons who have appointed an agent. However, the AIRC will be able to disclose information that would identify persons who have appointed an agent if the disclosure is required or authorised by law or in writing by the person whose identity would otherwise be protected.

1323. Subsection 107B(3) would make it an offence for any person to disclose protected information that would identify a person who has appointed a bargaining agent under section 107A.

1324. In order for a prosecution of this offence to be successful all elements of the offences must be proved. The person must have reasonable grounds to believe that the information will identify another person as someone who has appointed a bargaining agent under section 107A (paragraph 107B(3)(c)). In relation to the other elements of the offence, the default fault elements contained in the *Criminal Code* will apply to the offence. Therefore, for the offence to be proved, a person must intentionally disclose information (paragraph 107B(3)(a)), while being reckless as to whether the circumstances set out in paragraphs 107B(3)(b), (d), (e) and (f) exist (the concepts of ‘intention’ and ‘recklessness’ are defined in Division 5 of Part 2.2 of the *Criminal Code*). The proposed maximum penalty for this offence is 6 months imprisonment.

1325. Subsection 107B(4) would provide definitions of the terms *protected information* and *Registry official* for the purposes of section 107B.

*New section 107C – Particulars to accompany notice*

1326. Proposed section 107C would provide that a notice of a bargaining period must be accompanied by relevant particulars which are specified in the section. These include details of

where, to whom and for how long the proposed collective agreement would apply and its suggested content.

*New section 107D – When bargaining period begins*

1327. Proposed section 107D would provide that a bargaining period begins at the end of 7 days after the day on which the initiating notice was given, or where there is more than one negotiating party, and each was notified on different days, the end of 7 days after the last notification.

*New section 107E – When bargaining period ends*

1328. Proposed section 107E would provide that a bargaining period ends when the parties have entered into a collective agreement under proposed sections 96A or 96B, or the initiating party tells one or more of the negotiating parties that it no longer wishes to negotiate a collective agreement, or where the bargaining period is terminated by the AIRC (sections 107G and 107H) or by declaration of the Minister (section 112).

*New section 107F – Power of Commission to restrict initiation of new bargaining periods*

1329. Proposed section 107F would allow the AIRC to restrict the initiation of a new bargaining period where a negotiating party has ended a bargaining period. The AIRC would be able to make a declaration that a specified former negotiating party or a specified employee is not allowed to initiate a new bargaining period or may only initiate one on certain conditions in relation to specified matters that were dealt with by the proposed collective agreement.

1330. Subsection 107F(3) would provide that the AIRC may not make such an order unless:

- it has given the former negotiating parties an opportunity to be heard;
- the AIRC considers that it is in the public interest to make the order; and
- if, assuming the bargaining period had not ended, the AIRC could have made an order under proposed section 107G(1) terminating or suspending the bargaining period because a circumstance set out in subsection 107G(2), (3), (7) or (8) exists or existed.

1331. This would ensure that where a negotiating party is engaging in behaviour which would justify the suspension or termination of a bargaining period, that negotiating party cannot frustrate the effect of a suspension or termination of the bargaining period by ending the bargaining period itself, initiating a new bargaining period and continuing to engage in the same behaviour.

*New section 107G – Suspension and termination of bargaining periods— general powers of Commission*

1332. Proposed subsection 107G(1) would provide that the AIRC must suspend or terminate a bargaining period if it is satisfied that particular circumstances exist or existed. The AIRC

would be required to give the negotiating parties an opportunity to be heard before making an order.

1333. Subsection 107G(2) would require the AIRC to suspend or terminate the bargaining period if a negotiating party that has organised or taken, or is organising or taking, industrial action to support or advance claims in respect of the proposed collective agreement:

- did not genuinely try to reach an agreement before taking the industrial action;
- is not genuinely trying to reach an agreement; or
- has failed to comply with any orders or directions of the AIRC made during the bargaining period about the making of the agreement or to a matter that has arisen in negotiations for the agreement or about industrial action that relates to the agreement or negotiations.

1334. The types of orders or directions that would fall within subsection 107G(2) include orders or directions made in relation to secret ballots for protected industrial action and orders made during the bargaining period to stop or prevent industrial action that is not protected action.

1335. Subsection 107G(3) would require the AIRC to suspend or terminate the bargaining period if industrial action to support or advance claims in respect of the proposed collective agreement is being taken, or is threatened, impending or probable and that action:

- is adversely affecting, or would adversely affect, the employer (in relation to the bargaining period) or that employer's employees; and
- is threatening or would threaten to endanger the life, the personal safety or health or the welfare, of the population or a part of it, or to cause significant damage to the Australian economy or an important part of it.

1336. Subsections 107G(4) and (5) would require the AIRC, as far as practicable, to hear and determine an application made because industrial action is endangering or threatens to endanger life etc. within five days or, if the AIRC cannot do so within five days, to make an interim order suspending the bargaining period until the application is determined.

1337. Subsection 107G(6) would require the AIRC, if it terminates the bargaining period because industrial action is endangering or threatens to endanger life etc., to send each of the negotiating parties a notice that:

- sets out the effect of the provisions of the Bill about workplace determinations; and
- informs them that they may agree to submit the matters at issue during bargaining to an alternative dispute resolution process conducted by the AIRC or another provider.

1338. Subsection 107G(7) would require the AIRC to suspend or terminate the bargaining period if industrial action is being taken by an organisation of employees that is a negotiating

party, or by a member of the organisation that is an employee of the employer or by an officer or employee of such an organisation to support or advance claims in respect of employees who are not members, nor entitled to be members, of the organisation.

1339. Subsection 107G(8) would require the AIRC to suspend or terminate the bargaining period where industrial action is being taken by an organisation of employees that relates either to a demarcation dispute or contravenes an order of the AIRC relating to a demarcation dispute.

1340. Subsection 107G(9) would provide that the AIRC can, of its own motion, make an order suspending or terminating the bargaining period where industrial action is endangering or threatens to endanger life etc. Otherwise, the AIRC can only suspend or terminate the bargaining period where a negotiating party makes an application.

1341. Subsections 107G(12) and (13) would provide that if the AIRC makes an order suspending or terminating the bargaining period, it may also prevent a negotiating party or employee of the employer from initiating a new bargaining period or impose conditions on the initiation of a new bargaining period.

1342. Subsection 107G(14) would permit the AIRC, in exceptional circumstances, to extend the required period of notice of protected action from 3 days to up to 7 days, following the end of a period of suspension.

*New section 107H – Suspension and termination of bargaining periods – pattern bargaining*

1343. Proposed section 107H(1) would provide that the AIRC must suspend or terminate the bargaining period if a negotiating party is engaged in pattern bargaining in relation to a proposed collective agreement. Another negotiating party, or a person specified in the regulations, may apply for such an order.

1344. Subsection 107H(3) would provide that whether the bargaining period is suspended or terminated and, if it is suspended, for how long, would be determined by the AIRC as it considers appropriate.

1345. Subsections 107H(6) and (7) would provide that if the AIRC makes an order suspending or terminating the bargaining period, it may also prevent a negotiating party or employee of the employer from initiating a new bargaining period or impose conditions on the initiation of a new bargaining period.

1346. Subsection 107H(8) would permit the AIRC, in exceptional circumstances, to extend the required period of notice of protected action from 3 days to up to 7 days, following the end of a period of suspension.

*New section 107I – Suspension of bargaining periods – cooling off*

1347. Proposed subsection 107I(1) would require the AIRC to suspend a bargaining period, on application by a negotiating party, if protected industrial action is being taken and the AIRC considers that suspension is appropriate. Paragraph 107I(1)(c) sets out a number of factors to

which the AIRC must have regard in considering the appropriateness of a suspension, including whether a cooling off period would be beneficial to the parties, the duration of any industrial action and the public interest. The period of suspension would be what the AIRC considered appropriate.

1348. Subsection 107I(3) would provide that the AIRC must extend the suspension if a negotiating party makes an application for an extension of the suspension and the AIRC considers that the extension is appropriate. The AIRC would be required to have regard to the same matters that were relevant to the initial suspension of the bargaining period, as well as whether the negotiating parties had genuinely tried to reach agreement during the cooling off period. Only one extension may be given.

1349. Subsection 107I(6) would require the AIRC, if it suspends, or extends the suspension of, the bargaining period, to send each of the negotiating parties a notice that informs them that they may agree to submit the matters at issue during bargaining to an alternative dispute resolution process conducted by the AIRC or another provider.

1350. Subsection 107I(7) would permit the AIRC, in exceptional circumstances, to extend the required period of notice of protected action from 3 days to up to 7 days, following the end of a period of suspension.

*New section 107J – Suspension of bargaining period – significant harm to third party*

1351. Proposed section 107J would require the AIRC to suspend the bargaining period if protected industrial action is being taken and the AIRC considers that:

- the action is adversely affecting the employer (in relation to the bargaining period), or that employer's employees;
- the action is threatening to cause significant harm to a third party; and
- it is appropriate to suspend the bargaining period.

1352. An application for suspension of the bargaining period could be made by or on behalf of any directly person affected by the action (other than a negotiating party) or the Minister.

1353. Subsection 107J(2) would require the AIRC, when considering whether the action is threatening to cause significant harm to a third party, to have regard to a number of matters including:

- the extent to which the third party is particularly vulnerable to the effects of the action; and
- the extent to which the action threatens to damage the ongoing viability of the third party's business, disrupt the supply of goods or services to the third party's business, reduce the third party's capacity to fulfill a contractual obligation or otherwise cause economic loss to the third party.



1354. The period of suspension would be what the AIRC considered appropriate. However, subsection 107J(3) would limit the total period of suspension, including any extension, to three months.

1355. Subsection 107J(4) would provide that the AIRC must extend the suspension if the AIRC considers that an extension is appropriate. The AIRC would be required to have regard to the same matters that were relevant to the initial suspension. Only one extension could be given.

1356. Subsection 107J(7) would require the AIRC, if it suspends, or extends the suspension of, the bargaining period, to send each of the negotiating parties a notice that informs them that they may agree to submit the matters at issue during bargaining to an alternative dispute resolution process conducted by the AIRC or a private provider.

1357. Subsection 107J(8) would permit the AIRC, in exceptional circumstances, to extend the required period of notice of protected action from 3 days to up to 7 days, following the end of a period of suspension.

*New section 107K – Industrial action without further protected action ballot after end of suspension of bargaining period*

1358. Proposed section 107K deals with the situation where a bargaining period has been suspended by the AIRC and, prior to the suspension, industrial action had been authorised by a protected action ballot and that industrial action had either:

- not been taken prior to the suspension;
- had not ended prior to the suspension; or
- was authorised beyond the suspension.

1359. Under subsection 107K(2) industrial action would be able to recommence, after the suspension ends, without the need for another secret ballot. The period for which the bargaining period was suspended would be ignored when working out when the industrial action may be organised or engaged in.

1360. Subsections 107K(3) and (4) would provide that the industrial action would not be protected action unless three working days written notice of the intended action (or such longer period as was specified in the order suspending the bargaining period) and the day on which it will begin is given to the employer.

### Illustrative Example

Diane owns a printing company, Merryprints Pty Ltd. Her employees initiated a bargaining period seeking an employee collective agreement. A secret ballot authorised the employees to engage in protected industrial action — being the imposition of work bans every weekend for a period of 12 weeks starting from a specified date. After five weeks, the bargaining period was suspended for four weeks for cooling off.

Under proposed section 107K, once the period of suspension ends, the employees could give the required written notice that the work bans authorised by the ballot would be imposed for a further seven weeks, being the balance of the authorised industrial action. No further protected action ballot would be required.

## **Division 3 – Protected Action**

### **Subdivision A – What is protected action?**

#### *New section 108 – Protected Action*

1361. Proposed section 108 would provide that industrial action is protected if:

- it is protected under subsections 108(2) or (3);
- no exclusion in Subdivision B of this Division applies; and
- the action is not excluded because of subsection 107K(3) which outlines the notice requirements for parties wishing to recommence action following the end of a period of suspension.

1362. Subsections 108(2) and (3) would provide that to be regarded as protected, industrial action must take place during a bargaining period and must either be for the purpose of:

- supporting or advancing claims made in respect of the proposed collective agreement; or
- responding to industrial action by another negotiating party.

1363. Notes 1 and 2 to subsection 108(3) would clarify the subsection's effect. Note 1 would make it clear that the subsection does not affect an employer's right to refuse to pay an employee where the employee has not performed work as directed. Note 2 would explain that the subsection does not affect an employer's right to stand down employees in accordance with a stand-down authorisation under an award.

1364. Subsections 108(4) and (5) would deal with the effects of industrial action taken by an employer. The affected employees' contracts of employment would not be terminated, but their employer would not have to pay them for the period of industrial action. In addition, industrial action would only be permissible if the employees' continuity of service is not disturbed in prescribed respects.

## **Subdivision B – Exclusions From protected action**

### *New section 108A – Exclusion – claims in support of inclusion of prohibited content*

1365. Proposed section 108A would provide that industrial action is not protected action if it is to support or advance claims to include *prohibited content*, which is defined at proposed section 101D, in the proposed collective agreement.

### *New section 108B – Exclusion – industrial action while bargaining period is suspended*

1366. Proposed section 108B would provide that industrial action in relation to a proposed collective agreement is not protected action if it is engaged in while a bargaining period is suspended.

### *New section 108C – Exclusion – industrial action must not involve persons who are not protected for that industrial action*

1367. Proposed section 108C would clarify that protected industrial action can only be taken by parties to whom a proposed collective agreement would apply (ie an organisation of employees, employer, or employee that is a negotiating party in respect of the agreement, or a member of an organisation of employees negotiating party whose employment will be subject to the proposed collective agreement or an officer or employee of an organisation of employees negotiating party acting in that capacity).

1368. Industrial action will lose its protected status if it is organised or engaged in in concert with any person or organisation of employees that is not protected in respect of the specific industrial action being taken (ie action solely in pursuit of a specific agreement by those who it is proposed will be subject to that agreement).

### *New section 108D – Exclusion – industrial action must not be in support of pattern bargaining claims*

1369. Proposed section 108D would remove the protected status from industrial action that is organised or engaged in to support or advance claims by a negotiating party that is engaged in pattern bargaining in relation to the proposed collective agreement.

### *New section 108E Exclusion – industrial action must not be taken until after nominal expiry date of workplace agreements or workplace determinations*

1370. Proposed section 108E would provide that industrial action engaged in in contravention of sections 110 (prohibition on industrial action before nominal expiry date of collective agreements or workplace determinations) or 110A (prohibition on industrial action before nominal expiry date of AWAs) is not protected action.

### *New section 108F Exclusion – notice of action to be given*

1371. Proposed section 108F would require notice to be given of proposed industrial action, for that action to be protected.

1372. Subsection 108F(2) would provide for the following notice requirements in respect of employee or employee organisation actions:

- if the action is taken in response to, and is taken after the start of, industrial action against the employees by the employer – written notice of the intention to take the action; or
- in any other case – the *required written notice*.

1373. *Required written notice* would be defined in subsection 108F(3) as 3 working days or any greater number of days specified in a protected action ballot order made under section 109M.

1374. Subsection 108F(4) would set out the notice requirements in respect of employer actions where an employee organisation is a negotiating party. Action by the employer will not be protected unless:

- if the industrial action is taken in response to, and is taken after the start of industrial action by an organisation that is a negotiating party – written notice of the intended industrial action is given; or
- in any other case – at least 3 working days written notice is given.

1375. Paragraph 108F(4)(b) would set out more specific notice requirements in respect of employer action as it relates to a particular employee. Action by the employer would not be protected unless written notice of the industrial action is given:

- if the industrial action is taken in response to, and is taken after the start of industrial action by an organisation that is a negotiating party – before the industrial action begins; or
- in any other case – at least 3 working days before the industrial action begins.

1376. Subsection 108F(5) would set out the notice requirements in respect of employer actions where an employee whose employment will be subject to the proposed collective agreement is a negotiating party. Action by the employer would not be protected in so far as it relates to a particular employee unless notice is given:

- if the industrial action is in response to, and takes place after the start of industrial action by any of the employees who are negotiating parties – before the industrial action begins; or
- in any other case – at least 3 working days before the industrial action begins.

1377. The notice requirement in paragraph 108F(4)(b) and subsection 108F(5) would normally be in writing and given to the person concerned, although other reasonable steps to notify the particular employee may suffice (for example, notices in newspapers or bulletins on noticeboards in the business may be appropriate steps).

1378. The notice would be required to state the nature of the intended action and the day on which it is proposed to begin.

1379. Where action must be authorised by a protected action ballot notice could not be given before the declaration of the results of the ballot.

1380. If the notification relates to industrial action by an employer (whether it is the employer, organisation of employees or an employee giving the notification) it could not be given before the start of the bargaining period.

*New section 108G – Employee may appoint agent to give notice under section 108F*

1381. Proposed section 108G would provide that an employee who is a negotiating party who has appointed an agent under section 107A to initiate a bargaining period under section 107, and who wishes to give an employer notice of intention to take industrial action under section 108F, may use that agent to give notice on his or her behalf. This would give the employee the option of remaining anonymous to their employer.

*New section 108H – Exclusion – requirement that employee organisation or employee comply with Commission orders and directions*

1382. Proposed subsection 108H(1) would provide that industrial action by a member of an organisation of employees would not be protected action (under section 108) unless, prior to the commencement of the action, the organisation complied with all orders or directions made by the AIRC in relation to (or that relate to industrial action relating to) the proposed collective agreement or to matters that arose during negotiations for the proposed collective agreement. Similarly, subsection 108H(2) would provide that where an employee takes industrial action, that industrial action would not be protected action, unless the employee complied with all relevant orders and directions of the AIRC prior to taking the action.

*New section 108I – Exclusion – requirement that employer genuinely try to reach agreement etc.*

1383. Proposed section 108I would provide that an employer must make genuine attempts to reach agreement as a pre-requisite to taking protected industrial action against employees. In addition, the employer must have complied with any orders or directions of the AIRC made during the bargaining period in relation to (or that relate to industrial action relating to) the proposed collective agreement or to matters that arose during negotiations for the proposed collective agreement.

*New section 108J Exclusion – employee and employee organisation action to be authorised by secret ballot or be in response to employer action*

1384. Proposed section 108J would provide that industrial action taken by an organisation of employees, its members, an officer or employee of an organisation or by employees who are negotiating parties, would not be protected action unless the action is taken in response to industrial action by the employer, or the action has been authorised by a protected action ballot.

*New section 108K – Exclusion – employee organisation action must be duly authorised*

1385. Proposed section 108K would replicate pre-reform section 170MR. It would provide that the engaging in of industrial action by members of an organisation of employees that is a negotiating party is only protected action if it is properly authorised. The section would set out what is required for authorisation (and provides that a technical breach in good faith does not vitiate authorisation). Written notice of such authorisation must be given to a Registrar. Any legal challenge to the validity of such authorisation must be brought within 6 months of notice of the authorisation having been given to a Registrar.

**Subdivision C – Significance of action being protected action**

*New section 108L – Immunity provisions*

1386. Proposed section 108L would set out what immunity applies to protected action.

1387. It would be equivalent to pre-reform section 170MT. Where a person is engaged in protected industrial action, immunity would exist from civil liability any law (whether written or unwritten) in force in a State or Territory. This would apply to Commonwealth and State statutes, as well as the common law. It would not apply to action involving harm to persons or property, unlawful dealing with property, defamation or any breach of the criminal law.

*New section 108M – Employer not to dismiss employee etc. for engaging in protected action*

1388. Proposed 108M would substantially replicate pre-reform section 170MU which prohibits the dismissal of an employee (or otherwise injure an employee in his or her employment) where the employee proposes to engage in, is engaging in or has engaged in protected action.

1389. Proposed section 108M would be a civil remedy provision. The possible remedies for breach of proposed 108M would include:

- a pecuniary penalty – the maximum of which is 60 penalty units for a natural person or 3000 penalty units for a body corporate;
- an injunction or any other orders the Court considers necessary to stop the breach or remedy its effects;
- if the employee was dismissed, an order for reinstatement; and/or
- compensation to an affected employee.

1390. Paragraph 108M(2)(b)(i) would provide that the prohibition against dismissing or otherwise discriminating against the employee does not apply to a refusal by the employer to pay an employee because the refusal is in accordance with section 114 (prohibition on the making or acceptance of payments in relation to certain periods of industrial action).

1391. Subsection 108M(7) would set out who can apply to the Court in respect of a breach of the section.

1392. As with pre-reform section 170MU, in proceedings for a contravention of subsection 108M(1), the onus would be on an employer to show that the dismissal or discrimination did not occur because the employee proposed to engage, was engaging or had engaged in the protected action.

#### **Division 4 – Secret ballots of proposed protected action**

##### **New Subdivision A – General**

###### *New section 109 – Object of Division and overview of Division*

1393. This section would establish that the object of the new Division is to provide employees with access to a process of fair and democratic secret ballots to determine whether protected industrial action should be taken. The provisions are designed to be facilitative (ie to provide the means for accessing protected action) not prohibitive (ie to outline the circumstances in which such action is not available).

1394. Subsection 109(3) would make clear that a protected action ballot would not be required in the case of action taken in response to industrial action by the employer.

###### *New section 109A – Definitions*

1395. Proposed section 109A would define the terms used in new Division 4.

##### **New Subdivision B – Application for order for protected action ballot to be held**

###### *New section 109B – Who may apply for a ballot order etc.*

1396. Under proposed subsection 109B(1), an application for a protected action ballot order could only be made once a bargaining period for a proposed collective agreement has commenced. However, if there was an existing agreement applying to relevant employees (the definition of *relevant employee* would be set out in section 109A) then the application could not be made before the nominal expiry date of the agreement. If there were more than one agreement, the last occurring of the nominal expiry dates of those agreements would be the earliest date the application could be made for a protected action ballot order. This reflects the fact that protected action could not be taken before the nominal expiry date of an agreement.

1397. The persons who could make an application for a protected action ballot order depend on who initiated the bargaining period under section 107.

1398. Proposed subsection 109B(3) would provide that if an organisation of employees initiated the bargaining period, then that union could apply to the AIRC for a ballot order. If an employee or employees initiated the bargaining period, then any employee who is a negotiating party for the proposed agreement, or such employees acting jointly, could apply to the AIRC for a ballot order.

1399. Subsection 109B(4) would provide that an employee or employees acting jointly could not make an application to the AIRC for a ballot order unless that application had the support of a prescribed number of employees who would be subject to the proposed agreement. This would

ensure that a sufficient level of employee support exists to justify the holding of a ballot, where employees are seeking such a ballot.

1400. An analogous requirement is proposed in relation to ballot applications by an organisation of employees. Under proposed subsection 109D(2) an organisation of employees would be required to provide evidence that the application has been authorised by or through the union's committee of management as part of its application for a ballot order.

1401. The term *prescribed number* would be defined in proposed section 109A. The *prescribed number* would vary depending on the size of the workplace. If fewer than 80 employees would be subject to the proposed agreement, then at least four of the employees would be required to support the ballot application. If between 80 and 5000 employees would be subject to the proposed agreement, at least five per cent of the employees would be required to support the ballot application. If more than 5000 employees would be subject to the proposed agreement, then at least 250 of the employees would be required to support the ballot application.

1402. Proposed subsection 109B(5) would provide that where an employee or group of employees acting jointly have initiated a bargaining period for an agreement and industrial action is proposed, those persons may appoint an agent to represent them in making the ballot application and for all purposes connected with the ballot application. This is intended to enable employees making an application for a protected action ballot to remain anonymous.

*New section 109C – Contents of application*

1403. Proposed section 109C would establish the mandatory requirements for a ballot application under section 109B. Applications would be required to include the following information:

- the question or questions to put to the relevant employees in the ballot, including the nature of the proposed industrial action;
- details of the types of employees who are to be balloted; and
- any details required by rules of the AIRC made for the purpose of this section.

1404. The applicant may, in the application, nominate a person to conduct the ballot (although the question of who is to conduct the ballot is ultimately determined by the AIRC – paragraph 109N(1)(e) and section 109ZE).

1405. The President of the AIRC, under the general rule-making powers may make rules about matters to be included in an application and the form in which the application would be made.

*New section 109D – Material to accompany application*

1406. Proposed section 109D would require the applicant to provide certain material to the AIRC with the ballot application, including:



- a copy of the notice initiating the bargaining period and the particulars accompanying that notice;
- a declaration by the applicant that the industrial action to which the application relates is not for the purpose of advancing or supporting claims to include prohibited content in the proposed collective agreement;
- if the applicant is an organisation of employees, a written notice showing that the application has been duly authorised by the committee of management of the organisation or someone authorised by such a committee; and
- if the applicant is represented by an agent, a document containing the name of the employee applicant or applicants.

1407. It would be an offence to intentionally make a statement in the declaration required by section 109D that was false or misleading. The default fault elements of the *Criminal Code Act 1995* of intention (with respect to the making of the statement) and recklessness (with respect to it being false or misleading) would apply. The proposed maximum penalty for a contravention of this offence would be 30 penalty units.

*New section 109E – Notice of application*

1408. Proposed section 109E would require the applicant to give a copy of the application to the relevant employer and any person nominated in the application to conduct the ballot within 24 hours of the application being lodged with the AIRC. However, the applicant would not be required to give these parties copies of the material accompanying the application that must be given to the AIRC under proposed section 109D, such as the document containing the names of applicant employees where the applicants are represented by an agent.

*New section 109F – Joint applications*

1409. Proposed section 109F would provide that where an employee seeking an agreement has initiated a bargaining period for the proposed agreement, two or more employees who would be subject to the proposed agreement could make a ballot application jointly.

1410. If a joint application were made, another employee could, with the consent of the other applicants, add their name to the application, and an applicant could withdraw their name from the application.

1411. Proposed subsection 109F(4) would allow the President of the AIRC to establish rules, under the general rule-making powers, regarding how the provisions of the Act relating to ballot orders apply to joint applicants.

**New Subdivision C – Determination of application and order for ballot to be held**

*New section 109G – Commission may notify parties etc. of procedure*

1412. Proposed section 109G would allow the AIRC, after an application for a ballot order is lodged, to notify all parties, or a person who may become an authorised ballot agent of the

procedure, for dealing with the application, if the AIRC considers that this would expedite the proceedings.

*New section 109H – Commission to act quickly in relation to application etc.*

1413. Proposed subsection 109H(1) would require the AIRC to act as quickly as practicable to determine an application for a ballot order and, as far as is reasonably possible, to act within two working days of the application being made.

1414. A note would be inserted after proposed subsection 109H(1) to make it clear that, in exercising its powers under Division 4, the general procedural obligations on the AIRC (such as the requirement to act according to equity, good conscience and the substantial merits of the case) are applicable.

1415. Subsection 109H(2) would provide that, in spite of the timeframe foreshadowed by this section, the AIRC must not determine an application for a ballot order unless it is satisfied that the notice requirements in proposed section 109E have been complied with and that all parties and relevant employees have had a reasonable opportunity to make submissions in relation to the application. The timeframe for dealing with applications would be a factor in determining what was reasonable in the circumstances.

*New section 109I – Parties and relevant employees may make submissions and apply for directions*

1416. Under proposed section 109I, a *party* or a *relevant employee* (these terms are defined in section 109A) would be entitled to make submissions to, or to apply for directions from, the AIRC about the application, or about any aspect of the conduct of the protected action ballot.

1417. A person nominated in an application to conduct a ballot could make submissions, and apply for directions, relating to the application.

1418. An authorised ballot agent could make submissions, and apply for directions, relating to any aspect of a protected action ballot.

1419. The AIRC could refuse to consider a submission if it is satisfied that the submission is vexatious, frivolous, misconceived or lacking in substance.

*New section 109J – Commission may make orders or give directions*

1420. Proposed section 109J would empower the AIRC to make orders or issue directions in relation to a ballot order or the conduct of a protected action ballot. However, the AIRC should make orders or issue directions to ensure that ballots are conducted expeditiously.

1421. In considering whether to make such orders or issue such directions, the AIRC would be required to have regard to the desirability of the ballot results being available to the parties within 10 days of a ballot order being made.

*New section 109K – Commission procedure regarding multiple applications*

1422. Proposed section 109K would be aimed at avoiding any disruption that may be caused to an employer's operations by the conduct of more than one protected action ballot proposed to be held within a short space of time (especially, for example, if the ballots are intended to be attendance ballots).

1423. The AIRC would be empowered to hear and determine at the same time multiple applications that concern the same employer or the same place of work where different employers are involved (such as a construction site). The AIRC can order such ballots to be held at the same time. However, the AIRC may only do so if it considers that this would not unreasonably delay the determination of any of the applications.

*New section 109L – Application not to be granted unless certain conditions are met*

1424. Proposed section 109L would set out the conditions to be met prior to the AIRC granting an application for a protected action ballot order. It would also set out the basis upon which the AIRC may refuse an application.

1425. Subsection 109L(1) would require the AIRC to grant an application for a ballot order if is satisfied that that the applicant:

- has, during the bargaining period, genuinely tried to reach agreement with the employer;
- is genuinely continuing to attempt to reach agreement with the employer; and
- is not engaged in pattern bargaining.

1426. A note would be inserted after this subsection to refer to the fact that, in order for an application to be considered by the AIRC, it must meet the requirements set out in proposed Subdivision B of Division 4.

1427. A second note would be inserted referring to section 107D to clarify when a bargaining period is deemed to have begun.

1428. A third note would be inserted after subsection 109L(1) to cross reference this subsection with the provisions elsewhere in the Act dealing with pattern bargaining.

1429. The AIRC would have discretion to refuse an application, despite subsection 109L(1), if it is satisfied that granting the application would be inconsistent with the object of this Division (see section 109), or if it is satisfied that the applicant, or an employee who would be eligible to vote in the proposed ballot, has at any time contravened a provision of this Division or an order or direction made by the AIRC under the Division.

*New section 109M – Grant of application – order for ballot to be held*

1430. Proposed section 109M would require the AIRC to order the applicant to hold a ballot in accordance with Division 4, where it grants an application for a ballot order.

*New section 109N – Matters to be included in order*

1431. Proposed section 109N would set out the information that would be required to be contained in a ballot order made by the AIRC, including:

- specifying the name of the applicant or the applicant's agent;
- the type of employees to be balloted;
- the voting method;
- the timetable for the ballot;
- the name of the person authorised by the AIRC to conduct the ballot
- the name of the independent adviser for the ballot (if one is appointed); and
- the question or questions to be put to the relevant employees in the ballot, including the nature of the proposed action.

1432. Two notes would be inserted after subsection 109N to cross-reference this provision with those provisions in the WR Act which specify who may be authorised by the AIRC to conduct a protected action ballot (section 109ZE) and who may be authorised by the AIRC to be an independent advisor (section 109ZF).

1433. Subsection 109N(2) would require the order to specify a postal ballot as the voting method unless the AIRC is satisfied that another voting method proposed in the application is more efficient and expeditious than a postal ballot.

1434. If the ballot is to be conducted by a postal ballot, the ballot order would have to specify that voting is to take place by way of declaration voting. Subsection 109N(3) would then set out what is meant by *declaration voting*, including that the ballot paper must be placed in a *declaration envelope* (this term is defined in section 109A).

1435. If a ballot is to be conducted by an attendance ballot, the ballot order would be required to specify that voting is to take place during breaks or otherwise outside work hours.

1436. The AIRC could specify in a ballot order a longer period than the existing three days written notice, required by paragraph 108F(2)(b), before protected industrial action can be taken. The period could be extended to up to seven days if the AIRC is satisfied that there are exceptional circumstances.

*New section 109O – Guidelines for ballot timetables*

1437. Proposed subsection 109O(1) would assist the AIRC to more speedily determine applications by allowing the President of the AIRC to develop guidelines concerning timetables for the conduct of protected action ballots. The President would be able to consult with the Australian Electoral Commission (the AEC) and any other person in developing any guidelines under this section.

1438. Subsection 109O(2), which has been included to assist readers, would make clear that any guidelines developed under subsection 109O(1) are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*.

*New section 109P – Power of Commission to require information relevant to roll of voters*

1439. The only employees who would be eligible to vote in a protected action ballots are those who would be subject to the proposed agreement and, in the case of union initiated ballots, who are also members of the union that is the applicant for the order. To determine whether a particular person is eligible to vote in a ballot would frequently require the AIRC (or the authorised ballot agent) to obtain information from the employer and the applicant.

1440. Proposed subsection 109P(1) would allow the AIRC to order the applicant or the employer of the employees (or both) to provide the AIRC with a list of employees who might be eligible to vote in a proposed ballot, and any other information that the AIRC reasonably requires to assist in compiling the roll of voters for the proposed ballot.

1441. The AIRC would be able to require the list or other information to be provided either to it or to the authorised ballot agent and could require it be provided in whatever form the AIRC thinks is appropriate.

*New section 109Q – Roll to be compiled by Commission or ballot agent*

1442. Proposed subsection 109Q would provide for the compilation of the roll of voters by the AIRC to give to the authorised ballot agent or for the AIRC to order that the authorised ballot agent compile the roll of voters.

*New section 109R – Eligibility to be included on the roll*

1443. Proposed section 109R would establish who is eligible to be included on a roll to vote in a protected action ballot.

1444. It would establish that a person is only eligible to vote in a protected action ballot if the person:

- was employed by the relevant employer on the day the ballot order was made; and
- would be subject to the proposed agreement in respect of which the relevant bargaining period was initiated.

1445. If the applicant for the ballot order is an organisation of employees, the person would be required to have been a member of the organisation on the day the ballot order was made by the AIRC.

1446. Under subsection 109R(2), a person whose employment is subject to an AWA whose nominal expiry date has not passed would not be eligible to vote in a ballot, even if the person meets the other requirements for eligibility in subsection 109R(1).

*New section 109S – Adding or removing names from the roll*

1447. Proposed section 109S would set out the circumstances under which names can be added or removed from the roll of voters.

1448. The ballot agent would be required to add a person's name to the roll of voters for a ballot at any time before the day on which the roll is to close, if the person requests that their name be added to the roll, and the ballot agent is satisfied that the person is eligible to be included on the roll of voters (subsection 109S(1)).

1449. A person could apply to the AIRC for a declaration that they are eligible to be included on the roll of voters for a ballot. If the AIRC is satisfied that the person is eligible to be included on the roll of voters, and the application is made before the day on which the roll is to close, the AIRC must make the declaration sought, and direct the ballot agent to include the person's name on the roll of voters for the ballot (subsection 109S(2)).

1450. A process for removing a person's name from the roll of voters would be provided under subsection 109S(3). A party to a ballot order, a person whose name is on the roll of voters for the ballot or the authorised ballot agent, would be able to apply to the AIRC, before the day on which the roll is to close, for a declaration that a person whose name is on the roll of voters is not eligible to be included on the roll. If the AIRC is satisfied that the person is not eligible to be included on the roll of voters, the AIRC must make the declaration sought and direct the ballot agent to remove the person's name from the roll of voters.

*New section 109T – Variation of order*

1451. Proposed section 109T would set out the circumstances in which it is possible to vary a protected action ballot order.

1452. Subsection 109T(1) would allow an applicant for a ballot order to apply to the AIRC, at any time before the expiry of the ballot order, to have the ballot order varied (for example, to deal with unanticipated circumstances).

1453. Subsection 109T(2) would allow the authorised ballot agent to apply to the AIRC, at any time before voting had closed, to have the voting method or timetable for the ballot specified in the ballot order varied. This would enable the ballot agent to request an alteration in the timetable if, for example, they encountered difficulties in compiling the roll of voters that would prevent the completion of the ballot within the ordered timeframe.

*New section 109U – Expiry and revocation of order*

1454. Proposed section 109U would set out how ballot orders expire and in what circumstances they could be revoked.

1455. A ballot order expires if a ballot has not been held within the period specified in the ballot order.

1456. It would be open for the applicant for a ballot order to apply to the AIRC to have the order revoked at any time before the order expires. If such an application were made, the AIRC must revoke the order.

*New section 109V – Compliance with orders and directions*

1457. Proposed section 109V would provide that if the AIRC makes an order or direction under this Division expressed to apply to a person or an organisation of employees, that person or organisation must comply with the order or direction.

1458. Subsection 109V(2) would provide that subsection 109V(1) is a civil remedy provision (and a note at the bottom of the section will refer to Division 4 of Part VIII which deals with civil remedy provisions). A pecuniary penalty of up to 300 penalty units for a body corporate (or 60 penalty units for a natural person) may be imposed in relation to a breach of this section. Subsection 109V(5) would set out who may apply for a civil remedy order for breach of subsection 109V(1).

*New section 109W – Commission to notify parties and authorised ballot agent*

1459. Proposed section 109W would require the AIRC, as soon as practicable after it makes, varies, or revokes a ballot order, to ensure that a copy of that order or revocation is given to each party to the application and the authorised ballot agent.

**New Subdivision D – Conduct and results of protected action ballot**

*New section 109X – Conduct of ballot*

1460. Proposed section 109X would provide that a ballot will not be a protected action ballot unless it is conducted by the *authorised ballot agent* (defined in section 109A).

1461. The effect of this section would be that a ballot must be conducted by the ballot agent appointed by the AIRC in the ballot order for the ballot to comply with the requirements of Division 4. If someone else conducts the ballot then any industrial action that was to be taken following such a ballot would not be protected industrial action under section 108J.

*New section 109Y – Form of ballot paper*

1462. Proposed section 109Y would require the ballot paper for a protected action ballot to be in the prescribed form, and contain the following information:

- the name of the applicant or applicant's agent (as the case requires);
- the types of employees who are to be balloted (for example, their occupations, work groups and locations);
- the name of the ballot agent authorised to conduct the ballot;
- the question or questions to be put to voters, including the nature of the proposed industrial action;

- a statement that the voter's vote is secret and that the voter is free to choose whether or not to support the proposed industrial action;
- instructions to the voter on how to complete the ballot paper; and
- the day on which voting in the ballot is to close.

*New section 109Z – Who can vote*

1463. Proposed section 109Z would provide that a person cannot vote in a ballot unless the person's name is on the roll of voters for the ballot (established under section 109Q and, if applicable, as varied under section 109S).

*New section 109ZA – Declaration of ballot results*

1464. Proposed section 109ZA would require the authorised ballot agent to make a declaration of the results of the ballot in writing, and inform the applicant, the affected employer and the Industrial Registrar, in writing, of the results as soon as practicable after the close of voting.

*New section 109ZB – Ballot reports*

1465. Proposed section 109ZB would provide a mechanism for the AIRC to ensure that protected action ballots are conducted in an open and fair manner. The reports required to be produced under this section could be relevant in any future consideration by the AIRC as to whether someone is a fit and proper person to be an authorised ballot agent or independent ballot adviser.

1466. Under this section, the authorised ballot agent and the authorised independent adviser (if one has been appointed), would be required to provide a written report to the Industrial Registrar about the conduct of the ballot as soon as practicable after the close of voting in the ballot.

1467. The provisions requiring the provision of a written report would be civil remedy provisions to which Part VIII of the Act applies (subsection 109ZB(7)). A pecuniary penalty of up to 300 penalty units for a body corporate or 60 penalty units for a natural person may be imposed for breach of these provisions.

1468. The ballot reports would be required to set out the details of any complaints made to the authorised ballot agent or authorised independent adviser about the conduct of the ballot or any irregularities in the conduct of the ballot that have come to their attention. However, these provisions would not limit the scope of any report to the Industrial Registrar.

1469. Subsection 109ZB(11) would define what is meant by *conduct* and *irregularity* in this section. However, these requirements would not limit what may be included in the report; nor does the absence of these factors mean a report is not necessary.

*New section 109ZC – Effect of ballot*

1470. Proposed section 109ZC would set out the effects of a protected action ballot. Under this section, industrial action would only be authorised by a protected action ballot if:



- the industrial action was the subject of a ballot conducted in accordance with the provisions of this Division;
- at least 50 per cent of persons on the roll of voters for the ballot voted in the ballot;
- more than 50 per cent of the votes validly cast in the ballot approved the industrial action; and
- the action commences within a 30 day period, beginning on the day the results of the ballot are declared. The AIRC could extend this 30 day period by up to 30 days if both the employer and applicant for the ballot order jointly apply for such an extension. There may only be one such extension (subsection 109ZC(4)).

1471. A note would be inserted after subsection 109ZC(1) to clarify that industrial action can only be protected industrial action if it is authorised under this Division or unless it is in response to industrial action by the employer.

1472. However, action would not be authorised if it occurs after the end of the bargaining period that gave rise to the application for a ballot (section 107E sets out when a bargaining period ends). A note would be inserted after subsection 109ZC(2) to make clear that if another bargaining period is initiated later, and industrial action is proposed, then that industrial action will only be protected if a new application for a ballot is granted and the other requirements of this Division are met.

*New section 109ZD – Registrar to record questions put in ballot, and to publish results of ballot*

1473. Proposed section 109ZD would require the Industrial Registrar to keep records relating to ballots and to publish the results of a ballot.

### **New Subdivision E – Authorised ballot agents and authorised independent advisers**

*New section 109ZE – Who may be an authorised ballot agent?*

1474. Proposed section 109ZE would deal with who the AIRC may name as an authorised ballot agent.

1475. The AIRC may name either the AEC or another person as an authorised ballot agent (subsection 109ZE(1)).

1476. The AIRC could not name a person other than the AEC unless the AIRC is satisfied that the person:

- is capable of ensuring the security and secrecy of votes cast in the ballot, and that the ballot will be fair and democratic;
- will conduct the ballot expeditiously; and
- is otherwise a fit and proper person to conduct the ballot.

1477. Subsection 109ZE(5) would allow for regulations to be made to prescribe conditions a person must meet, and factors the AIRC must take into account, for the AIRC to be satisfied that a person is a fit and proper person to conduct a ballot.

1478. An applicant for a ballot may apply to be the authorised ballot agent. However, the AIRC must not name that applicant as the authorised ballot agent unless the applicant nominates another person to be the authorised independent adviser for the ballot and the AIRC names that person as the authorised independent adviser (subsection 109ZE(3)). A note would be inserted after subsection 109ZE(3) to refer to section 109ZF which would set out who may be appointed by the AIRC to be the independent adviser. This requirement is designed to allow applicants to run their own ballots, provided that the applicants are properly advised by independent advisers so as to ensure the maintenance of fairness and democracy in the running of ballots.

1479. If the AIRC is not satisfied that a person nominated by the applicant to be the authorised ballot agent is sufficiently independent of the applicant, then the AIRC is not to name the person as the authorised ballot agent unless an authorised independent adviser has been nominated by the applicant and appointed by the AIRC (subsection 109ZE(4)). A note would be inserted after subsection 109ZE(4) to refer to section 109ZF which would set out who may be authorised by the AIRC to be the independent adviser.

*New section 109ZF – Who may be an authorised independent adviser?*

1480. Proposed section 109ZF would set out who may be appointed as an authorised independent adviser.

1481. The AIRC must not name a person as the authorised independent adviser for a ballot unless it is satisfied that the person is:

- sufficiently independent of the applicant;
- is capable of providing advice and recommendations to the authorised ballot agent that are directed towards ensuring that the ballot will be fair and democratic; and
- has consented to being named as the authorised independent advisor.

1482. These requirements are designed to safeguard the fair and democratic conduct of ballots in circumstances where the applicant is appointed as a ballot agent. They would also protect persons from being named as authorised ballot agents without their knowledge or consent.

1483. Subsection 109ZF(3) would allow the making of regulations to prescribe factors that the AIRC must take into account when determining if a person is capable of providing such advice and recommendations to the authorised ballot agent.

**New Subdivision F – Funding of ballots**

*New section 109ZG – Liability for cost of ballot*

1484. Proposed section 109ZG would establish who will be liable for the cost of carrying out that ballot.

1485. The applicant for a ballot order is liable for the cost of holding the ballot. Where a ballot application is made jointly, each applicant will be jointly and severally liable for the cost of holding the ballot (subsections 109ZG(1) and (2)).

1486. However, these requirements would operate subject to subsections 109ZH(3) and (6) which provide for the Commonwealth being partly liable for the reasonable costs of a ballot if certain conditions are met. The conditions under which the Commonwealth would partly meet the reasonable and genuine cost of holding the ballot would be found in section 109ZH.

1487. Subsection 109ZG(4) would provide a definition of the *cost of holding the ballot*.

*New section 109ZH – Commonwealth has partial liability for cost of ballot*

1488. Proposed section 109ZH would provide that the Commonwealth will be liable to pay to the authorised ballot agent 80 per cent of the reasonable ballot costs in certain circumstances.

1489. Where the authorised ballot agent is not the AEC, the Industrial Registrar would be required to determine the reasonable ballot cost, on application by the applicant, within a reasonable time after the day on which the ballot closed.

1490. Subsection 109ZH(2) would provide that where the Industrial Registrar has determined the reasonable cost of a ballot conducted by an authorised ballot agent other than the AEC under subsection 109ZH(1), the Commonwealth is liable to pay to the authorised ballot agent 80 per cent of the amount.

1491. To the extent that the Commonwealth becomes liable for the ballot costs, the liability of the applicant would be discharged.

1492. Subsection 109ZH(4) would enable regulations to be made prescribing matters that are to be taken into account by the Industrial Registrar in determining whether ballot costs are reasonably and genuinely incurred.

1493. Where the authorised ballot agent is the AEC, the AEC must certify, within a reasonable time after the completion of the ballot, the amount of the reasonable costs charged to the applicant in relation to holding the ballot (subsection 109ZH(5)). The liability of the applicant would then be reduced by 80 per cent of the amount certified by the AEC.

*New section 109ZI – Liability for cost of legal challenges*

1494. Proposed section 109ZI would allow the making of regulations to deal with who would be liable for costs incurred in relation to any legal challenges to ballots. The definition of the *costs of holding the ballot* would not include legal costs.

## **New Subdivision G – Miscellaneous**

*New section 109ZJ – Identity of certain persons not to be disclosed by Commission*

*New section 109ZK – Persons not to disclose identity of certain persons*

1495. Proposed sections 109ZJ and 109ZK would set out the limited circumstances in which the AIRC or a person could lawfully disclose information that would identify certain persons.

1496. The AIRC must not disclose information that it has reasonable grounds to believe would identify a person as:

- an applicant for a ballot order, where the applicant is represented by an agent;
- an employee who supports an application for a ballot order, for the purposes of subsection 109B(5);
- a person whose name appears on the roll of voters for a ballot; or
- a person who is party to an Australian Workplace Agreement.

1497. Subsection 109ZJ(2) would provide exceptions to the prohibition in on disclosure by the AIRC in subsection 109ZJ(1). It would provide that the AIRC could disclose information specified in subsection 109ZJ(1) if the disclosure is required or permitted by law or if the disclosure has been authorised in writing by the person whose identity would otherwise be protected.

1498. A similar prohibition on revealing protected information would apply to persons generally under proposed section 109ZK. Under this section, it would be an offence for a person to disclose certain persons' identity.

1499. In order for a prosecution of this offence to be successful all elements of the offences must be proved. The person must have reasonable grounds to believe that the information will identify another person as someone referred to in subsection 109ZJ(1). In relation to the other elements of the offence, the default fault elements contained in the *Criminal Code Act 1995* would apply. Therefore, for the offence to be proved, a person must intentionally disclose information while being reckless as to whether the circumstances set out in paragraphs 109ZK(1)(b) and (d) – (f) exist. The proposed maximum penalty for this offence is 6 months imprisonment.

*New section 109ZL – Immunity if person acted in good faith on ballot results*

1500. Proposed section 109ZL would provide that where the results of a protected action ballot, as declared by the authorised ballot agent, purport to authorise particular industrial action, and an organisation or person goes ahead and takes or participates in industrial action acting in good faith relying on the results of the ballot, no legal action is able to be taken against that organisation or those persons, if it is subsequently established that the action was not in fact authorised by the ballot.

1501. This immunity would not apply in cases where the industrial action resulted in personal injury, wilful or reckless damage to property or the unlawful taking, keeping or use of property. There would be no immunity against legal action for defamation in the course of industrial action. These exceptions are in line with the exceptions to immunity provided by proposed section 108L.

*New section 109ZM – Limits on challenges etc. to ballot orders etc.*

*New section 109ZN – Limits on challenges etc. to ballots*

*New section 109ZO – Penalties not affected*

1502. These three proposed sections would protect the integrity of the conduct of ballots and ballot results, by limiting the circumstances in which ballot orders, the conduct of ballots and ballot results may be challenged.

1503. Under section 109ZM, a ballot order, or a decision, direction or order relating to a ballot order, would only be open to challenge where:

- it is being alleged that another party has contravened (other than in a technical way) the secret ballots provisions or an AIRC order or direction relating to secret ballots; or misled the AIRC in proceedings to which the order or decision relates; and
- the relevant court considers that there is a reasonable basis for the allegation.

1504. Proposed section 109ZN would protect ballot results and the conduct of ballots from challenge where the ballot has been conducted or has purportedly been conducted unless:

- it is being alleged that another party has contravened (other than in a technical way) the secret ballots provisions or a AIRC order or direction relating to secret ballots; acted fraudulently in relation to the conduct or declaration; or acted in such a way as to cause an irregularity that affected, or could have affected, the outcome of the ballot; and
- the relevant court is satisfied that there is a reasonable basis for the allegation.

1505. The terms *conduct* and *irregularity* would be defined, for the purposes of this section by subsection 109ZN(3).

1506. Proposed section 109ZO would make clear that the limitations in sections 109ZM and 109ZN do not prevent a penalty being imposed upon a person for a contravention of the WR Act. The effect of this provision would be to ensure that criminal and civil sanctions that would otherwise be relevant to conduct in relation to a protected action ballot remain applicable (for example, the criminal sanctions contained in section 317 of the Act).

*New section 109ZP – Preservation of roll of voters, ballot papers etc.*

1507. Under proposed section 109ZP an authorised ballot agent who conducts a protected action ballot would be required to keep the roll of voters, all ballot papers, envelopes and other records relevant to the ballot for one year after completion of the ballot. This would be an

offence provision. The default fault element of intention (under the *Criminal Code*) would apply to the conduct of failing to keep this material. Contravention of this section would be an offence subject to a maximum penalty of 6 months imprisonment.

*New section 109ZQ – Conferral of function on Australian Electoral Commission*

1508. Proposed section 109ZQ would ensure that if the AEC is the authorised ballot agent for a ballot under Division 4, it is a function of the AEC to conduct the ballot. That is, if the AIRC authorises the AEC to conduct a ballot in a ballot order, the AEC would be required to conduct the ballot. The AEC would also be unable to make a submission or application to the AIRC to avoid being nominated or appointed as an authorised ballot agent (subsection 109ZQ(2)).

*New section 109ZR – Regulations*

1509. Under proposed section 109ZR, regulations would be able to be made in relation to the following matters:

- the qualifications and appointment of applicants' agents;
- procedures to be followed in conducting a ballot or class of ballot;
- the qualifications, appointment, powers and duties of scrutineers;
- the powers and duties of authorised independent advisers; and
- the manner in which ballot results are to be published under section 109ZD.

**Division 5 – Industrial action not to be engaged in before nominal expiry of workplace agreement or workplace determination**

*New section 110 – Industrial action etc must not be taken before nominal expiry day of collective agreement or workplace determination*

1510. Proposed section 110 would provide that industrial action cannot be taken or organised from the time that a collective agreement made under Part VB or a workplace determination made under Division 8 of this Part comes into operation until the nominal expiry date of the agreement or determination has passed.

1511. Subsection 110(1) deals with industrial action taken by an employee, or organised by an organisation or officer or employee of an organisation. Subsection 110(3) deals with industrial action taken by an employer.

1512. The section would be a civil remedy provision. The possible remedies for breach of section 110 are pecuniary penalties 300 penalty units for a body corporate or 60 penalty units for a natural person and/or an injunction or any other orders the Court considers necessary to stop the breach or remedy its effects.

1513. Proposed subsections 110(7) and (8) would set out who can apply to the Federal Court or Federal Magistrates Court in respect of a breach of this proposed section

*New section 110A – Industrial action must not be taken before nominal expiry date of AWA*

1514. Proposed section 110A would provide that industrial action cannot be taken from the time that an AWA comes into operation until its nominal expiry date has passed.

1515. Subsection 110A(1) deals with industrial action taken by an employee. Subsection 110A(2) deals with industrial action by an employer.

1516. The section would be a civil remedy provision. The possible remedies for breach are pecuniary penalties – up to or 300 penalty units for a body corporate or 60 penalty units for a natural person and/or an injunction or any other orders the Court considers necessary to stop the breach or remedy its effects.

1517. Subsections 110A(6) and (7) would set out who can apply to the Federal Court or Federal Magistrates Court in respect of a breach of the proposed section.

### **Division 6 – Orders and injunctions against industrial action**

*New section 111 – Orders and injunctions against industrial action—general*

1518. Pre-reform section 127 of the WR Act allows the AIRC to make orders to stop or prevent unprotected industrial action in relation to an industrial dispute, the negotiation or proposed negotiation of an agreement, or work that is related to an award or agreement which is either happening, threatened, impending or probable.

1519. Proposed section 111 reflects the changed constitutional basis of the Act and is designed to strengthen and enhance pre-reform section 127, consistent with the Government's policy intention of providing effective and timely relief in respect of unprotected industrial action.

1520. Section 111 would provide remedies for unprotected industrial action by federal system employees and employers and for industrial action by wholly state system employees and employers where that industrial action has a substantial effect on the business of a constitutional corporation (*constitutional corporation* is defined in subsection 4(1) of the Bill).

1521. Subsections 111(1) and (2) would set out the pre-requisites for the making of an order to stop or prevent unprotected industrial action, depending upon whether the action is by federal-system employees or employers (subsection 111(1)) or non-federal system employees or employers (subsection 111(2)).

1522. Subsection 111(4) would set out the category of those who may seek an order to stop or prevent the industrial action being taken or organised.

1523. Subsection 111(5) would require the AIRC, as far as practicable, to hear and determine an application for an order under this section within 48 hours of the application being made.

1524. Subsections 111(6), (7) and (8) would address the situation where the AIRC is unable to determine an application within 48 hours of it being made. In such circumstances, the AIRC would be required to issue an interim order (within 48 hours of the application being made),

which would operate until the application is determined. The only circumstance in which the AIRC must not make an order is where it would be contrary to the public interest to do so.

1525. Subsection 111(9) would provide that in making an order concerning industrial action, the AIRC is not required to state the specific industrial action to which the order relates. This provision is designed to allow comprehensive orders to be made, without the need to identify each instance of industrial action separately.

1526. Subsection 111(10) would expressly state that a person to whom an order or interim order applies must comply with that order. This would be a civil remedy provision (subsection 111(11)).

1527. An order under subsection 111(1) or an interim order under subsection 111(6) would not apply to protected action (subsection 111(13)).

1528. The Federal Court or the Federal Magistrates Court would be empowered to grant an injunction (on terms it considers appropriate) where it is satisfied that a person has failed to comply or is proposing to fail to comply with an order or interim order of the AIRC under this section.

*New section 111A – Injunction against industrial action if pattern bargaining engaged in in relation to proposed collective agreement*

1529. Proposed section 111A would allow any person to make application to the Federal Court or the Federal Magistrates Court for an injunction to stop or prevent industrial action that is taken to support or advance claims by a negotiating party that is engaged in pattern bargaining.

**Division 7 – Ministerial declarations terminating bargaining periods**

*New section 112 – Minister’s declaration*

1530. Proposed section 112 would allow the Minister to terminate by written declaration a bargaining period if the Minister is satisfied that industrial action is being taken or is threatened, impending or probable and the Minister is satisfied that the action:

- is adversely affecting (or would adversely affect) an employer who is a negotiating party, or that employer’s employees; and
- is threatening (or would threaten) to endanger the life, the personal safety or health, or the welfare of the population or a part of the population, or to cause significant damage to the Australian economy or an important part of it.

1531. Subsections 112(3) – (5) would require the Minister to publish any declaration in the *Gazette*, to inform the AIRC of the making of the declaration, and to take all reasonable steps to make the negotiating parties in relation to the bargaining period aware of:

- the fact that the declaration has been made;
- the effect of the provisions of the Bill about workplace determinations; and



- the fact that they may agree to submit the matters at issue during bargaining to an alternative dispute resolution process conducted by the AIRC or a private provider.

1532. Subsection 112(6) would provide that any declaration may state that a specified negotiating party or employee of the employer is restricted from initiating a new bargaining period or may impose conditions on the initiation of a new bargaining period.

1533. Subsection 112(7) is included to provide assistance to readers, as a declaration made by the Minister is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

*New section 112A – Minister’s directions to remove or reduce the threat*

1534. Proposed subsection 112A(1) would permit the Minister to make written directions, if the Minister makes a declaration terminating the bargaining period under section 112, if the Minister is satisfied that the directions are reasonably directed to removing or reducing the threat to endanger the life etc. set out in paragraph 112(1)(c). The directions could require specified negotiating parties, or specified employees of an employer who is a negotiating party, to take, or refrain from taking, the actions set out in the directions.

1535. Subsection 112A(2) would require the Minister to take all reasonable steps, as soon as reasonably practicable, to make the persons to whom any directions apply aware of the directions.

1536. Subsection 112A(3) would be included to provide assistance to readers, as directions made by the Minister are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*.

1537. Subsection 112A(4) would provide that a person must comply with any direction made by the Minister.

1538. Subsection 112A(4) would be a civil remedy provision (subsection 112A(5)). The possible remedy for breach of subsection 112A(4) would be a pecuniary penalty – up to 300 penalty units for a body corporate or 60 penalty units for a natural person.

1539. Subsection 112A(8) would provide that only a workplace inspector may apply to the Court in respect of a breach of a Ministerial direction under this section.

**Division 8 – Workplace determinations**

*New section 113 – Application of Division*

1540. Proposed section 113 would provide that Division 8 of Part VC would apply if a bargaining period has been terminated by the AIRC because of industrial action endangering the life etc. (under proposed subsection 107G(3)) or by a Ministerial declaration.

*New section 113A – Definitions*

1541. Proposed section 113A would set out certain defined terms that are used in Division 8 of Part VC.

*New section 113B – Negotiating period*

1542. Proposed section 113B would provide for a *negotiating period* following the termination of a bargaining period. The negotiating period would be 21 days. The AIRC must extend the negotiating period by a further 21 days if the negotiating parties have not settled the matters at issue during bargaining, and all of the negotiating parties apply for an extension. This power could be exercised by a single member, and could be exercised once only.

*New section 113C – When Full Bench must make workplace determination*

1543. Proposed section 113C would provide that if the negotiating period has ended and the negotiating parties have not settled the matters at issue during bargaining, a Full Bench of the AIRC must make a workplace determination as soon as practicable.

1544. Subsection 113C(5) is included to provide assistance to readers, as a workplace determination is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

*New section 113D – Content of workplace determination*

1545. Proposed section 113D would set out the terms that could be included in workplace determinations. Terms not mentioned in the section could not be included.

1546. Subsection 113D(1) would require the workplace determination to contain terms that deal with the matters at issue during bargaining. However, the Full Bench would not be restricted to determining matters on which the negotiating parties had not reached agreement.

1547. Subsections 113D(2) – (3) would provide that the workplace determination comes into operation when it is made, and must contain a nominal expiry date no later than five years after that date.

1548. Subsection 113D(4) would provide that a workplace determination must not contain prohibited content. A definition of prohibited content would be set out in section 101D.

1549. Subsection 113D(5) would set out the factors to which the Full Bench must have regard when making a determination. The list of factors would be exhaustive and the Full Bench would not be able to consider any additional matters, although further matters can be added by regulation.

1550. Subsection 113D(6) would provide that the workplace determination must require disputes about matters arising under the determination to be dealt with in accordance with the model dispute resolution process in Part VIIA.

*New section 113E – Who is bound by a workplace determination?*

1551. Proposed section 113E would set out the parties that are bound by a workplace determination, being:

- the negotiating parties in relation to the terminated bargaining period; and
- all employees whose employment is subject to the workplace determination.

*New section 113F – Act applies to workplace determination as if it were a collective agreement*

1552. Proposed section 113F would provide that, subject to certain exceptions, the Act would apply to a workplace determination as if it were a collective agreement in operation. This would mean that other provisions of the Act which affect a collective agreement in operation – such as rules about the interaction of collective agreements with other industrial instruments – apply to workplace determinations.

1553. Subsection 113F(2) would provide that the following provisions would be exceptions to the above rule:

- provisions stating who would be bound by a collective agreement – because the persons bound by a workplace determination would be set out in section 113E;
- provisions relating to the content of collective agreements – because the content of workplace determinations would be set out in section 113D; and
- provisions relating to the variation of collective agreements – because workplace determinations cannot be varied (the parties would need to make a workplace agreement if they wished to change the terms and conditions governing the employment).

1554. Subsection 113F(3) would provide that the provisions stating when parties may agree to terminate a collective agreement (at Subdivision B of Division 9 of Part VB) would apply to a workplace determination only once a workplace determination has passed its nominal expiry date.

1555. Subsection 113F(4) would provide that a workplace determination can be replaced by a collective agreement at any time, including before its nominal expiry date has passed. The effect of subsections 113F(1) and 100(5) would be that if an employee bound by a workplace determination subsequently makes an AWA, the workplace determination would be of no effect while the AWA is in operation.

**Division 9 – Payments in relation to periods of industrial action**

*New section 114 – Payments not to be made or accepted in relation to periods of industrial action*

1556. Division 9 would deal with the prohibition on paying or seeking the payment of strike pay.

1557. Proposed subsection 114(2) would prohibit an employer, in the circumstances set out in the provision, from making a payment to an employee for a period during which the employee engages in industrial action. Where the period of industrial action is fewer than four hours in a day, the employer must not pay an employee for four hours. If the period of industrial action is four hours or more in a day then the employer must not pay an employee for the period of the industrial action. Subsection 114(5) would prohibit an employee from accepting such a payment.

1558. Subsections 114(2) and (5) would be civil remedy provisions (subsection 114(6)). The possible orders that the Federal Court or Federal Magistrates Court could make for a breach of these provisions are:

- a pecuniary penalty – up to 60 penalty units for a natural person and 300 penalty units for a body corporate;
- an injunction or any other orders the Court considers necessary to stop the breach or remedy its effects; and
- any other consequential orders.

1559. Applications in relation to contraventions may be made by a workplace inspector, a person who has an interest in the matter or any other person prescribed by the regulations (subsection 114(9)).

*New section 114A – Organisations not to take action for payments in relation to periods of industrial action*

1560. Proposed subsection 114A(1) would prohibit an organisation or an officer, member or employee of an organisation from making a claim against an employer for payment to an employee in relation to a day when the employee was engaged, or engages in, industrial action. The provision also prohibits conduct intended to coerce the employer into making such a payment (paragraph 114A(1)(b)).

1561. By subsections 114A(2) and (3), an action done by the committee of management of an organisation or the persons specified in subsection 114A(2) would be taken to be an act of the organisation unless the committee of management or a person authorised by the committee or an officer of the organisation has taken reasonable steps to prevent the action.

1562. Subsection 114A(1) would be a civil remedy provision (subsection 114A(4)). The possible orders that the Court could make for a breach of this provision are:

- a pecuniary penalty – up to 300 penalty units for a body corporate or 60 penalty units for a natural person;
- compensation to the affected employer;
- an injunction or any other orders the Court considers necessary to stop the breach or remedy its effects; and

- any other consequential orders.

1563. However, an order for compensation in favour of the employer could not be made if the employer had itself contravened the prohibition on paying strike pay (subsection 114A(7)).

1564. Applications in relation to contraventions may be made by the employer concerned, a workplace inspector, a person who has an interest in the matter or any other person prescribed by the regulations (subsection 114A(8)).

*New section 114B – Persons not to coerce people for payments in relation to periods of industrial action*

1565. Proposed subsection 114B(1) would prohibit pressure being applied to independent contractors to make payments to their employees in respect of days on which industrial action is taken. This prohibition would apply irrespective of whether the industrial action was protected or unprotected. Subsection 114B(7) would make the term independent contractor an exception to the general rule that a reference to an independent contractor is limited to a natural person – see proposed subsection 4(2).

1566. Subsection 114B(1) would be a civil remedy provision (subsection 114B(2)). The possible orders that the Court could make for a breach of this provision are:

- a pecuniary penalty – up to 300 penalty units for a body corporate or 60 penalty units for a natural person;
- an injunction or any other orders the Court considers necessary to stop the breach or remedy its effects; and
- any other consequential orders.

1567. Applications in relation to contraventions may be made by the contractor concerned, a workplace inspector, a person who has an interest in the matter or any other person prescribed by the regulations.

### **New Part VI – Awards**

1568. The proposed provisions of Part VI are directed at ensuring that awards operate as a modern and simple safety net, providing minimum safety net entitlements for award-reliant employees. To this end:

- awards will continue to provide for a range of matters including pay-related benefits such as penalty rates and overtime loadings, as well as public holidays and meal breaks;
- awards will be simplified to reduce complexity and ensure a greater focus at the workplace level: a number of currently allowable award matters will cease to be allowable, while other allowable matters will be changed in scope;

- awards will be rationalised to remove duplication and minimise the number of awards applying to employers – an Award Review Taskforce will recommend to Government an approach to rationalising awards, which will then be undertaken by the AIRC in accordance with a request from the Minister;
- the AIRC’s powers to vary awards, other than as part of the rationalisation or simplification processes, will be limited to circumstances where variation is essential to the maintenance of a minimum award safety net.

### **New Division 1 – Preliminary**

#### *New section 115 – Objects of Part*

1569. Proposed section 115 would set out the objects of the Part. The objects make clear that awards are to provide minimum safety net entitlements for award-reliant employees.

1570. The proposed objects of the Part are to ensure that:

- minimum safety net entitlements are protected through a system of enforceable awards maintained by the AIRC (paragraph 115(a));
- awards are simplified and rationalised to reduce complexity and make them more conducive to the efficient performance of work (paragraph 115(b)); and
- the AIRC performs its functions in a way which encourages the making of agreements at the workplace level, and protects the competitive position of young people in the labour market and promotes youth employment, youth skills and community standards, and assists in reducing youth unemployment (paragraph 115(c)).

#### *New section 115A – Performance of functions by the Commission*

1571. Proposed section 115A would direct the AIRC as to the manner in which it performs its functions under the Part.

1572. Subsection 115A(1) would require the AIRC to perform its functions under the Part in a manner that furthers the objects of the Act and the Part.

1573. Subsection 115A(2) would set out the matters to which the AIRC must have regard when performing its functions. These matters reflect the safety net role of award entitlements in the new system, the central role of the AFPC in setting wage rates, and the importance of ensuring a strong economy. The factors are:

- the desirability of high levels of productivity, low inflation, job creation and high employment (paragraph 115A(2)(a));
- decisions of the AFPC, and particularly the need to ensure that its decisions are not inconsistent with wage-setting decisions of the AFPC (paragraph 115A(2)(b)); and
- providing minimum safety net entitlements that do not act as a disincentive to bargaining at the workplace level (paragraph 115A(2)(c)).

*New section 115B – This Part does not apply in relation to prescribed employees in Australia*

1574. Proposed subsection 115B(1) would authorise the making of regulations to prescribe employees in Australia (by class or otherwise – see Note 1 to the subsection) to whom the provisions of the Part do not apply. If an employee was prescribed, the Part would not apply to the employee's employer in respect of that employee. Legislative note 1 to subsection 115B(1) would note that, for the purposes of section 115B, *Australia* includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands and the coastal sea.

1575. The purpose of the regulation making power would be to dis-apply the award provisions on the basis of insufficiency of connection between the employment and Australia. Proposed subsection 115B(2) would require that the Minister be satisfied that there was not a sufficient connection between the employee's employment and Australia. Although it would be open to the Commonwealth to apply an award to any employee in Australia, it may be impracticable or inappropriate to apply awards to some employees in Australia (for example, flight crew of a foreign airline who transit in and out of Australia, or an employee of a foreign employer on a short visit to, or tour of, Australia), and the regulation making power could be used to dis-apply the award provisions to those employees.

*New section 115C – Extraterritorial operation*

1576. Proposed subsection 115C(1) would extend the application of the Part (and related provisions of the WR Act) to certain employees outside Australia and to their employers. The legislative note to subsection 115C(1) would note that, for the purposes of section 115C, *Australia* includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands and the coastal sea.

1577. In Australia's exclusive economic zone, awards would apply to employees of Australian employers (as defined in subsection 4(1)) unless regulations were made to dis-apply the application of the Part to such an employee (see proposed paragraph 115C(2)(a)). Regulations could also extend the operation of award provisions to other employees in the exclusive economic zone (see proposed paragraph 115C(2)(b)). In making regulations, account would be taken of Australia's international law obligations in relation to foreign-flagged ships and foreign-registered aircraft.

1578. In relation to employees in, on or over Australia's continental shelf beyond the exclusive economic zone, the award provisions would apply only if regulations prescribed the part of the continental shelf where the employee was located and the employee met the requirements prescribed by the regulations (see proposed subsection 115C(3)). In making regulations, account would be taken of Australia's international law obligations in relation to foreign-flagged ships and foreign-registered aircraft and its obligations in relation to matters in, on or over the continental shelf (including under agreements with other countries in relation to particular areas of the continental shelf). The legislative note to subsection 115C(3) would make clear that the regulations could prescribe different requirements for different parts of the continental shelf, including for reasons connected with Australia's international obligations.

1579. Outside Australia and the exclusive economic zone and continental shelf, the award provisions would apply to Australian-based employees of Australian employers (as those expressions would be defined in subsection 4(1)). Regulations could be made to prescribe an employee outside Australia and the exclusive economic zone and continental shelf as an employee to whom the award provisions do not apply. (See proposed subsection 115C(4).)

### **New Division 2 – Terms that may be included in awards**

1580. This Division would make provision for the terms that may be included in an award. The Division would set out what matters are allowable award matters, and list some specific matters that would not be allowable (Subdivision A). The Division would also specify other matters that are permitted to be included in an award (Subdivision B), provide for certain terms in awards to cease to have effect (Subdivision C), and permit regulations to be made to deal with award conditions for part-time employees (Subdivision D).

### **New Subdivision A – Allowable award matters**

1581. This Subdivision would list allowable award matters and specific matters that are not allowable award matters. In this way the subdivision would establish both what may be included in an award and what may not.

#### *New section 116 – Allowable award matters*

1582. Proposed subsection 116(1) would set out the list of allowable award matters. Each of the allowable award matters would have its ordinary workplace relations meaning. The list of allowable matters would be affected by proposed section 116B.

1583. Paragraph 116(1)(a) would make ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours an allowable award matter.

#### Ordinary time hours of work

1584. The ‘ordinary time’ aspect of this allowable award matter will intersect with the guarantee of maximum ordinary hours of work that is part of the Standard (proposed section 91C). Where an award provides for less than the maximum guaranteed by the Standard, the award would continue to apply (as such an award would be compliant with the Standard). However, a three year transitional period will be provided for pre-reform awards. After that period, an award term that provides a lower standard than the maximum ordinary hours guaranteed by the Standard (eg if it provides for 40 maximum hours of work per week) will not operate to the extent it would be contrary to the Standard.

#### The time within which ordinary time hours of work are performed

1585. This aspect of the allowable matter would encompass award terms about, for example, the span of ordinary time hours of work or flexible hours arrangements.



### Rest breaks

1586. The reference to 'rest breaks' would mean that award terms specifying rest breaks, including meal breaks, crib breaks and breaks between shifts, are allowable award matters.

### Notice periods and variations to working hours

1587. The reference to 'notice periods and variations to working hours' would mean that award terms that regulate the amount of notice required to a change to a roster of working hours, variations to working hour rosters, and make up time arrangements would be allowable.

1588. Paragraph 116(1)(b) would make allowable terms in awards about incentive based payments and bonuses and the derivation or alteration of such payments. An incentive based payment or bonus is a payment that is a direct or indirect inducement, reward or benefit which aims to motivate an employee to achieve a particular goal or target. Payments can be ongoing or made on a periodic or one-off basis. This matter also includes piece rate payments where piece workers have a minimum rate of pay guaranteed by a periodic rate of pay set by the Australian Fair Pay Commission.

1589. Paragraph 116(1)(c) would make annual leave loadings an allowable award matter. This means that an award term may grant an additional payment to an employee taking annual leave.

1590. Paragraph 116(1)(d) would make ceremonial leave an allowable award matter. This would encompass, for example, a clause which provides an entitlement for an Aboriginal or Torres Strait Islander employee to attend a culturally significant ceremonial event.

1591. Paragraph 116(1)(e) would make allowable the observance of certain days as public holidays, and entitlements of employees to payment in respect of those days.

1592. The scope of this allowable matter would be limited to days declared by or under a law of a State or Territory as days to be observed generally with that State or Territory, or a region of that State or Territory, as public holidays by employees who work in that State, Territory or region.

1593. This allowable award matter would include days such as New Year's Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, ANZAC Day, Queen's Birthday, Labour Day, Christmas Day and Boxing Day, plus Adelaide Cup Day and Proclamation Day in South Australia, Foundation Day in Western Australia, Canberra Day in the ACT and Picnic Day in the Northern Territory as these days are observed generally within the State or Territory. It would also include declared regional holidays such as Melbourne Cup Day, Brisbane Show Day, Regatta Day in southern Tasmania and Recreation Day in northern Tasmania as these days are observed generally within a region of a State or Territory.

1594. The allowable award matter would exclude other days not declared under a law of a State or Territory to be observed generally throughout a State or Territory or a region a State or Territory. For example, the observance of a public holiday within a particular industry (such as

bank holidays) would not be an allowable award matter if that day would only be observed by some sections of the population within a State or Territory or a region of that State or Territory.

1595. Paragraph 116(1)(e) would not preclude an award from providing for the substitution of different days to be observed as public holidays or from providing for arrangements to be made at the workplace or enterprise level for the substitution of different days to be observed as public holidays.

1596. Paragraph 116(1)(f) would make allowable in awards monetary allowances for:

- expenses incurred in the course of employment – for example, travel, accommodation, uniform, motor vehicle, meal or telephone expenses incurred in the course of employment;
- responsibilities or skills that are not taken into account in rates of pay for employees – for example, a monetary allowance for the performance of additional duties at a higher level or for holding a particular qualification;
- disabilities associated with the performance of particular tasks (for example, handling hazardous materials) or work in particular conditions (for example, work in cold rooms) or locations (for example, work in remote locations).

1597. Paragraph 116(1)(g) would make allowable loadings for working overtime or for shift work. This would allow awards to include terms about, for example: the definition of overtime, time off in lieu of payment for overtime, and a rate of pay that is higher than a minimum rate for working overtime or shift work.

1598. Paragraph 116(1)(h) would make penalty rates an allowable award matter. This means that a rate of pay higher than the rate for ordinary pay, and payable in specified circumstances, may be set in an award – for example, award terms providing for overtime, weekend and public holiday rates.

1599. Paragraph 116(1)(i) would make redundancy pay within the meaning of subsection 116(4) an allowable award matter. This would limit *redundancy pay* to redundancy pay in relation to a termination of employment by an employer of 15 or more employees; and which is either, at the initiative of the employer and on the grounds of operational requirements, or, because the employer is insolvent.

1600. Paragraph 116(1)(j) would make stand-down provisions an allowable award matter. This means that a term of an award may provide, for example, for a temporary suspension of employees where they cannot be usefully employed because of a breakdown of machinery at the employer's business premises for which the employer cannot reasonably be held responsible. An award term that provides for the deduction of wages in circumstances of a stand down would also be allowable under this paragraph.

1601. Paragraph 116(1)(k) would make dispute settling procedures an allowable award matter. However, the effect of proposed section 116A would be that the model dispute resolution

process set out in proposed Part VIIA would apply to all awards. A term providing for any other dispute settling process or procedure would cease to operate from the reform commencement.

1602. Paragraph 116(1)(l) would make allowable terms in an award about type of employment, such as full-time employment, casual employment, regular part-time employment and shift work. Type of employment is that category of employment which identifies the basis upon which a particular employee is employed. This allowable matter would also encompass terms in an award providing for, for example, fixed term employees, daily hire employees, apprentices and trainees.

1603. Paragraph 116(1)(m) would make allowable certain conditions for outworkers, such as chain of contract arrangements, registration of employers, employer record keeping and inspection.

1604. This allowable award matter would require outworkers' overall conditions of employment to be fair and reasonable in comparison with the conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises. This means that what is allowable under this paragraph is affected by a comparison with the award conditions of employment for employees who perform the same kind of work at an employer's business or commercial premises as outworkers.

1605. Subsection 116(2) would ensure that a matter listed in subsection 116(1) is only allowable to the extent that it pertains to the relationship between employers bound by the award and their employees. This means that the matters listed in subsection 116(1) must not pertain to any other relationship, including a relationship between an employer bound by the award and an independent contractor, or the relationship between an employee and an organisation of employees.

1606. Subsection 116(3) would ensure that the terms of an award about any given allowable award matter may only provide a minimum safety net entitlement in relation to that matter, independent of any other award term or to the award as a whole.

1607. Subsection 116(4) would define *redundancy pay* for the purposes of paragraph 116(1)(i) as redundancy pay in relation to a termination of employment that is:

- by an employer of 15 or more employees;
- either at the initiative of the employer and on the grounds of operational requirements or because the employer is insolvent.

1608. Termination of employment would be at the initiative of the employer and on the grounds of operational requirements where the employer decides that for economic, technological or other reasons the position or job occupied by an employee has become superfluous, in excess of, or unnecessary for, the requirements of that employer's enterprise.

1609. Some current awards define redundancy as occurring when an employee ceases to be employed by an employer in any situation, other than for reasons of misconduct or refusal of duty. This broad definition of redundancy may lead to redundancy payments being paid in some circumstances where termination of employment was not at the initiative of the employer and on the grounds of operational requirements. This includes, for example, to the estate of an employee that has died while still employed. Award terms providing for redundancy payments in ordinary resignation situations are also not to be treated as a redundancy.

1610. Redundancy would also arise in circumstances where an employer is insolvent and the termination arises from the insolvency, whether the employer actively terminates the employment relationship or not.

1611. Subsection 116(5) would set out how to determine whether an employer has 15 or more employees at the relevant time, for the purposes of paragraph 116(4)(a). The provision makes clear that this calculation is to include any employee who becomes redundant, and any casual employee engaged by the employer on a regular and systematic basis for at least 12 months. The relevant time is when notice of the redundancy is given or when the redundancy occurs, whichever happens first.

1612. Subsection 116(6) would provide definitions for *conditions* and *outworker* – these terms relate to paragraph 116(1)(m).

#### *New section 116A – Dispute settling procedures*

1613. Proposed section 116A would ensure that each award contains the model dispute resolution process contained in proposed Part VIIA. Terms in awards that provide for any other dispute resolution process would not be allowable for the purposes of paragraph 116(1)(k) (which would provide that dispute resolution procedures are an allowable award matter).

#### *New section 116B – Matters that are not allowable award matters*

1614. Proposed section 116B would affect the scope of the allowable matters contained in subsection 116(1), by specifying particular matters that are not allowable matters.

1615. Paragraph 116B(1)(a) would specify as non-allowable terms in an award about the rights of an organisation of employers or employees to participate in, or represent the employer or employee in, the whole or part of a dispute settling procedure, unless the organisation is a representative of the employer's or employee's choice.

1616. This limitation is intended to ensure that an award provides employees and employers with choice as to representation, and also to give employees and employers a choice about whether or not they want a representative present at all. It is intended to prevent award terms that allow an organisation to intervene using the model dispute settling procedure if an employee or employer has not requested its assistance.

1617. Paragraph 116B(1)(b) would provide that the matter of transfers from one type of employment to another type of employment is not an allowable award matter. This means an

award term that, for example, provides for the conversion of an employee from casual employment to part-time or full-time employment would not be an allowable award matter. However, a term of an award that permits access to a different type of employment for a set period of time, for example, a full-time employee who returns to work part-time after parental leave until their child reaches school age, would not fall under paragraph 116B(1)(b) and would therefore be allowable.

1618. Paragraph 116B(1)(c) would provide that the number or proportion of employees that an employer may employ in a particular type of employment is not an allowable award matter. This means that an award would not be allowed to contain terms that impose, or would have the effect of imposing, a limit on the number of persons that may be employed in a particular type of employment, whether by imposing a quota on that employment type or requiring a minimum or maximum number of employees in a particular type of employment.

1619. Paragraph 116B(1)(d) would provide that direct or indirect prohibitions on an employer employing employees in a particular type of employment is not an allowable award matter. For example, an award term limiting the employment of casual employees only to periods up to but not exceeding a specified number of weeks (say six or 12 weeks), would be an indirect prohibition on an employer employing employees in a particular type of employment and would not, therefore, be a term about an allowable award matter.

1620. Paragraph 116B(1)(e) would provide that the maximum or minimum hours of work for regular part-time employees is not an allowable award matter. This means an award term that prescribes the maximum or minimum hours for regular part-time employees would not be about an allowable award matter. Paragraph 116B(1)(e) would operate subject to the terms of subsection 116B(2), which would permit an award term setting a minimum number of consecutive hours that an employer may require a regular part-time employee to work.

1621. Paragraph 116B(1)(f) would provide that restrictions on the range or duration of training arrangements are not allowable award matters. This means, for example, that an award term providing that apprenticeships will be for a specific duration would not be a term about an allowable award matter. Equally, an award term that limited the circumstances in which the duration of a training arrangement could be varied (for example, by requiring the agreement of a State or Territory training authority) would not be a term about an allowable award matter.

1622. Paragraph 116B(1)(g) would provide that restrictions on the engagement of independent contractors and requirements relating to their engagement are not allowable award matters. This means, for example, that an award term that only allows the use of independent contractors to top up the existing full-time labour force (to cover seasonal or peak work loads, for instance) would not be a term about an allowable award matter – such a cap on the use of independent contractors would amount to a restriction on the engagement of independent contractors. Similarly, a clause that required certain prerequisites (such as consultation with employees or a union) to be satisfied before independent contractors could be engaged by an employer would not be allowable.

1623. Paragraph 116B(1)(h) would make non-allowable restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency. For example, a term of an award which prevented the use of labour hire workers except in cases where those workers were paid at the same rate as employees of the business where the labour hire workers are also engaged would not be a term about an allowable award matter. (Proposed subsection 116(3) defines terms relevant to this paragraph.)

1624. Paragraph 116B(1)(i) would provide that union picnic days is not an allowable award matter. This means an award term that provides for a union picnic day that would otherwise be allowable under paragraph 116(1)(e) (which relates to public holidays) is not an allowable award matter.

1625. Paragraph 116B(1)(j) would provide that tallies is not an allowable award matter. This means an award term that, for example, provides for a tally payment system in the meat industry is not a term about an allowable award matter.

1626. Paragraph 116B(1)(k) would provide that dispute resolution training leave is not an allowable award matter. This means an award term providing leave to attend a training course directed to the dispute resolution process is not a term about an allowable award matter.

1627. Paragraph 116B(1)(l) would provide that trade union training leave is not an allowable award matter. This means that an award term providing leave to attend a course directed to the training of union delegates or workplace representatives is not a term about an allowable award matter. Terms about other trade union training courses dealing with workplace relations issues would also be non-allowable award matters.

1628. Paragraph 116B(1)(m) would allow additional matters to be prescribed by the regulations as not allowable.

1629. Subsection 116B(2) would ensure that paragraph 116B(1)(e) (which would render not allowable terms about the maximum or minimum hours for regular part-time employees) would not prevent a term being included in an award that:

- sets a minimum number of consecutive hours that an employer may require a regular part-time employee to work – for example, a term that allowed an employer to require a regular part-time employee to work at least three consecutive hours; or
- facilitated a regular pattern in the hours worked by regular part time employees – for example, an award term may enable a regular part-time employee to work fifteen hours each week over the course of a four week period.

Subsection 116B(3) would provide a definition of *labour hire agency* and *labour hire worker* for the purposes of proposed section 116B.

*New section 116C – Matters provided for by the Australian Fair Pay and Conditions Standard*

1630. Subsection 116C(1) would make clear that a matter that is provided for by the Standard, for example, minimum rates of pay, is not an allowable award matter.

1631. The exception to this rule – terms in an award about ordinary hours of work – would be provided by subsection 116C(2). Ordinary hours of work would be expressly allowable under paragraph 116(1)(a).

*New section 116D – Awards may not include terms involving discrimination and preference*

1632. Proposed section 116D would provide that a term of an award is not allowable to the extent that it requires or permits, or has the effect of requiring or permitting, any conduct that would contravene proposed Part XA (Freedom of Association).

*New section 116E – Awards may not include certain terms about rights of entry*

1633. Proposed section 116E would provide that an award term is not allowable to the extent that it would require or authorise an officer or employee of an organisation to enter premises for the purposes listed in the section – which include inspecting or viewing work performed on premises of an employer bound by the award.

*New section 116F – Awards may not include enterprise flexibility provisions*

1634. Proposed section 116F would provide that to the extent that an award term is an enterprise flexibility provision (as defined immediately before the reform commencement), it would not be about an allowable award matter.

**New Subdivision B – Other terms that are permitted in awards**

*New section 116G – Preserved award terms*

1635. Proposed section 116G would provide that preserved award terms are terms that are permitted to be in awards. Preserved award terms are dealt with in proposed Division 3.

*New section 116H – Facilitative provisions*

1636. A facilitative provision is a term of an award which permits an employer and employees to agree on how specified terms of an award are to apply at the workplace level.

1637. Subsection 116H(1) would allow a facilitative provision in an award. This subsection would operate subject to the requirements of the remainder of this section.

1638. Subsection 116H(2) would ensure that a facilitative provision must not require agreement between a majority of employees and an employer on how a term in the award is to operate; rather a facilitative provision must permit agreement between an individual employee and his or her employer.

1639. Subsection 116H(3) would provide that a facilitative provision may only operate in respect of an allowable award matter or a preserved award term.

1640. Subsection 116H(4) would provide that a facilitative provision is of no effect to the extent that it does not comply with subsections 116H(2) and (3).

*New section 116I – Incidental and machinery terms*

1641. Subsection 116I(1) would permit an award to include terms that are both:

- incidental to a term in the award that is allowable; and
- are essential to enable an award term to function in a practical way.

1642. Subsection 116I(2) would provide that an award term that is not an allowable award matter because of other proposed sections (proposed sections 116B, 116D, 116E or 116F) cannot be included in an award because of the operation of proposed section 116I.

*New section 116J – Anti-discrimination clauses*

1643. Proposed section 116J would permit an award to include a model anti-discrimination clause.

*New section 116K – Boards of reference*

1644. Proposed section 116K would provide for the ongoing operation of terms in awards that appoint, or permit the appointment of, boards of reference, subject to specific operational limitations. To the extent that an existing term would not comply with these requirements, it would be of no effect (subsection 116K(2)). The key provision in this regard is subsection 116K(4), which would provide that a term of an award that appoints, or gives power to appoint, a board of reference may confer upon the board of reference an administrative function (as defined), and must not confer upon the board of reference a function of settling or determining disputes about any matter arising under the award. A function conferred under subsection 116K(4) may only relate to an allowable award matter or other terms that are permitted to be included in an award (subsection 116K(5)). In this regard, subsection 116K(3) would provide for how terms providing for boards of reference are dealt with during award rationalisation.

1645. Subsection 116K(6) would provide that a board of reference may consist of or include a member of the AIRC.

1646. Subsection 116K(7) would provide for regulations to be made in relation to a particular board of reference or boards of reference in general including, but not limited to, the functions and powers of the board or boards. This would enable the operation of boards of reference to be monitored and adjusted, if necessary.

**New Subdivision C – Terms in awards that cease to have effect**

*New section 116L – Terms in awards that cease to have effect after the reform commencement*

1647. An award term that is not permitted to be included in an award – for example because it is not about a matter within the list of allowable award matters (subsection 116(1)), or is specifically made not allowable (subsection 116B(1)) – would cease to have effect immediately after the reform commencement. For example, an award term providing for the circumstances in



which casual employment may be converted to part-time or full-time employment (which would not be allowable because of subsection 116B(1)) would cease to apply after reform commencement (subsection 116L(1)). This would not affect preserved award terms (subsection 116L(2)).

### **New Subdivision D – Regulations relating to part-time employees**

#### *New section 116M – Award conditions for part-time employees*

1648. Proposed section 116M would permit regulations to be made to deal with conditions for part-time employees. Such regulations may:

- provide for an award to have effect so that a part-time employee is entitled to conditions to which a full time employee is entitled under the award; and/or
- provide for an award to have effect so that conditions that would apply to the part-time employee are adjusted in proportion to the hours worked by the part-time employee.

### **New Division 3 – Preserved award entitlements**

1649. Proposed Division 3 would provide for the preservation of certain terms in awards upon the reform commencement. Division 3 would also address how an employee's entitlements under preserved award terms interact with the Standard – as a number of the award terms that would be preserved deal with matters also covered by the Standard.

#### *New section 117 – Preservation of certain award terms*

1650. Proposed section 117 would provide for the preservation of terms in pre-reform and post-rationalisation awards (subsection 117(1)). The terms are preserved to the extent that they are about the matters listed in subsection 117(2) (subsection 117(3)). Unlike other matters that are not included as allowable award matters (see proposed Division 2), preserved award terms do not cease to operate on reform commencement. This is made clear by the note under subsection 117(1).

1651. The matters are: annual leave, personal/carer's leave, parental leave (including maternity leave and adoption leave), long service leave, notice of termination, jury service and superannuation (subsection 117(2)). A preserved award term about superannuation would cease to have effect at the end of 30 June 2008 (subsection 117(4)).

- The first three of these matters are also dealt with by the Standard. Employees will continue to have entitlements under these terms where they are *more generous* than the Standard (see proposed sections 117C-117E).
- In relation to superannuation, the Government announced in 2004, with the passage of the *Superannuation Laws Amendment (2004 Measures No.2) Act 2004*, that all employees would be treated in a consistent manner for superannuation guarantee purposes. The Government announced that from 1 July 2008 ordinary time earnings (as defined by the Superannuation Guarantee legislation) would be the earnings base for determining the superannuation guarantee liability for all

employees. Accordingly, award-based earnings bases will cease to operate from this date.

1652. Subsection 117(5) would provide that a preserved award term continues to have effect for the purposes of the Act. Such terms may not be varied.

1653. Proposed subsection 117(6) would make clear that personal/carer's leave includes war service sick leave, infectious diseases sick leave and other like forms of sick leave.

1654. Proposed subsection 117(7) would enable regulations to provide that parental leave does not include special maternity leave and personal/carer's leave does not include compassionate leave and unpaid carer's leave. The effect of such regulations would be to exclude these matters from the 'more generous' comparison between the preserved award term and the Standard – meaning that employees would be entitled to special maternity leave, compassionate leave and unpaid carer's leave as provided under the Standard regardless of the terms of their award. This is necessary as such entitlements are not part of the general award standard, and may otherwise be lost when applying a global more generous test (based on overall quantum of entitlement – as described below).

1655. Proposed subsection 117(8) would provide that regulations made under proposed subsection 117(7) may apply generally or in respect of employees engaged in specified types of employment.

*New section 117A – Preserved award terms of rationalised awards*

1656. Proposed section 117A would ensure that preserved award terms are included in awards that replace existing awards because of the award rationalization process. This is the case whether the award results from a new award being made (made under proposed section 118E) or an existing award being varied (under proposed section 118J).

1657. A note immediately following proposed subsection 117A(1) clarifies that a replaced award may be either a rationalised award (proposed section 118E) or a pre-reform award.

1658. Proposed subsection 117A(2) would provide that the preserved award term of the replaced award is taken to be included in the rationalised award. This means that if the preserved award term is not included in the rationalised award the preserved award term would be taken to be in the award in any event as a matter of law.

1659. Subsections 117A(3), (4) and (5) explain that the 'coverage' of a preserved award term included in an award remains the same, but does not expand, as a result of its being included in a rationalised award – that is, the same employers and class or classes of employees (including employees employed after the rationalised award was made) remain subject to the term.

*New section 117B – When preserved award entitlements have effect*

1660. Proposed section 117B would deal with the effect of entitlements under preserved award terms, and the interaction of some of those entitlements with the Standard.

1661. Where an employee has an entitlement under a preserved award term to a matter that is also dealt with by the Standard (ie annual leave, personal/carer's leave or parental leave), the employee is entitled to the *more generous* of the award term and the Standard (subsection 117B(2)). (The meaning of *more generous* would be dealt with by proposed section 117C.)

1662. Where an employee has an entitlement under a preserved award term about one of the other matters (ie long service leave, notice of termination, jury service or superannuation), the entitlement has effect in accordance with the award term. Where an award term relates to a matter dealt with by State or Territory legislation – such as long service leave, jury service or superannuation (among other matters), that legislation is not excluded by the Act, but section 7D provides that awards prevail over State laws to the extent of any inconsistency. This means that where an award provides for such matters as long service leave or jury service, the award would continue to apply to the extent of any inconsistency.

*New section 117C – Meaning of more generous*

1663. Proposed subsection 117C(1) would identify the circumstances when an employee's entitlement under a preserved award term about a matter is *more generous* than the employee's entitlement about an equivalent matter under the Standard.

1664. Subsection 117C(1) would provide that whether an entitlement under a preserved award term is more generous than an entitlement about a corresponding matter under the Standard:

- is to be determined by regulations (paragraph 117C(1)(a)); or
- if regulations do not deal with a matter, in accordance with the ordinary meaning of the term *more generous* (paragraph 117C(1)(b)).

1665. It is intended that regulations will be made specifying circumstances in which an award entitlement is to be taken to be more generous than the Standard, based on the overall quantum of the entitlement. Where an award entitlement is more generous than the Standard, the whole of the award term will apply to the exclusion of the Standard – including any associated administrative arrangements set out in the award relating to that leave entitlement.

An example of a more generous award entitlement would be the entitlement to annual leave set out in the Nurses (Victorian Health Services) Award 2000. An employee covered by that award is entitled to up to six weeks annual leave, while the corresponding entitlement in the Standard is four weeks (or, potentially five weeks if the employee is a shiftworker as defined by the Standard). In this instance, the award entitlement would apply.

1666. Proposed subsection 117C(2) would provide that if a matter does not correspond directly to a matter in the Standard, regulations made under paragraph 117C(1)(a) may provide that the matters correspond for the purposes of Division 3.

*New section 117D – Modifications that may be prescribed—personal/carer’s leave*

1667. Proposed section 117D would enable regulations to be made to specify that certain aspects of preserved award terms about personal/carer’s leave are to be treated as preserved award terms about separate matters.

1668. The matters about which such regulations could be made are:

- war service sick leave (paragraph 117D(1)(a));
- infectious diseases sick leave (paragraph 117D(1)(b)); and
- any other like form of sick leave. (paragraph 117D(1)(c))

1669. This is necessary to ensure that, in applying the global *more generous* test (based on overall quantum of entitlement), specific entitlements under the preserved award terms that apply to some employees are not lost. The effect of the regulations would be to ensure that in respect of those matters, there would be no comparable matter against which an assessment with the Standard could be made – meaning that the award entitlement would continue to apply.

*New section 117E – Modifications that may be prescribed—parental leave*

1670. Proposed section 117E would enable regulations to be made to specify that paid and unpaid parental leave are to be treated as separate matters for the purpose of the more generous comparison (subsection 117E(1)).

1671. The effect of such regulations would be to enable an award entitlement to paid parental leave to continue to operate, despite the terms of the Standard.

1672. The parental leave provisions of the Standard (see proposed section 94D) would operate to ensure that the amount of unpaid leave that an employee is entitled to under the Standard is reduced by any amount of paid leave (subsection 117E(2)). This reflects how the Standard would operate generally in relation to other forms of leave taken in conjunction with parental leave.

*New section 117F – Preserved award terms—employers bound after reform commencement*

1673. Proposed section 117F would provide that, where an employer that was not bound by a particular award immediately before the reform commencement is subsequently bound by the award, then the employer would not become bound by any preserved award terms included in the award – that is, the ‘coverage’ of preserved award terms does not change.

**New Division 4 – Award rationalisation and award simplification**

1674. The Award Review Taskforce is an independent body established to examine and report to the Government on two projects relevant to the Government’s workplace relations reform agenda. They are to report to the Government with recommendations for the rationalisation of:

- award wage and classification structures; and

- federal awards.

### **New Subdivision A – Award rationalisation**

1675. Under its Terms of Reference, the Award Review Taskforce would review awards and recommend to the Government an approach to rationalising awards:

- on an industry sector basis;
- to permit general coverage of employers and employees (and appropriate organisations of employers and employees) according to relevant industry sector based awards; and
- to address coverage of award free employers and employees who would be in the federal system at or after reform commencement and who have not been able to reach individual or collective workplace agreements. In this regard, the Award Review Taskforce should give consideration to the option of a ‘general’ or ‘miscellaneous’ award to cover these employers and employees.

1676. Preserved award entitlements (see proposed Division 3 of Part VI) will be protected during this process. The Award Review Taskforce will consider the manner in which preserved award entitlements are to be accommodated in the new awards that result from the rationalisation process.

1677. This process, coupled with award simplification, is designed to ensure a modern and less complex award framework that is more conducive to the efficient performance of work.

1678. The award rationalisation process will be the only way the AIRC can make new awards after reform commencement.

### *New section 118 – Commission’s award rationalisation function*

1679. Proposed section 118 would set out the manner in which the AIRC is to perform its function of rationalising awards (subsection 118(1)).

1680. Subsection 118(2) would provide that award rationalisation is to be carried out in accordance with a written request (an *award rationalisation request*) made by the Minister to the President. The intention is that an award rationalisation request will not be made until such time as the Award Review Taskforce has provided its report to the Minister. The Minister will consider the report provided when making the award rationalisation request.

1681. Subsection 118(3) would provide that each award rationalisation request must specify:

- the rationalisation process to be undertaken (paragraph 118(3)(a));
- the principles to be applied by the AIRC in rationalising awards (paragraph 118(3)(b)); and

- the time by which the process must be completed (which must be no later than 3 years after the request is made) (paragraph 118(3)(c)).

1682. The legislation will allow subsequent award rationalisation requests, should this prove necessary or desirable.

1683. Subsection 118(4) would provide some guidance on the principles that the Minister may include in an award rationalisation request made under subsection 118(3). These principles may include:

- the awards to which the rationalisation process relates (paragraph 118(4)(1)(a));
- the nature of, and the extent of coverage of, awards resulting from award rationalization (paragraph 118(4)(1)(b)); and
- matters that may be included in rationalised awards (subject to the terms of the Act)(paragraph 118(4)(1)(c)).

1684. An award rationalisation request may be varied or revoked by the Minister (subsection 118(5)).

1685. An award rationalisation request, and an instrument varying or revoking a request, are not legislative instruments for the purposes of the *Legislative Instruments Act 2003* (subsection 118(6)). The reason for this is that the exemption is consistent with the existing exemption for instruments that deal with persons' terms and conditions of employment. The request, and any variation or revocation, is the first step in the process of a new award being made or awards being varied as a result of the award rationalisation process.

*New section 118A – Commission must deal with State-based differences*

1686. Proposed section 118A would provide that when rationalising awards, the AIRC must ensure that terms and conditions of employment included in awards made or varied as a result of the award rationalisation process are not determined by reference to State or Territory boundaries and that the terms of the award apply in each State and Territory. This direction to the AIRC reflects the move to a unified national system of workplace relations. Removing State-based differences is an essential element of this.

1687. Subsections 118A(1) – (2) would confirm the priority the AIRC is to give to the task of removing State-based differences.

1688. Subsection 118A(3) would confirm that the AIRC must ensure, during any subsequent award rationalisation process, that terms and conditions of employment contained in varied or new awards continue to be set without reference to State or Territory boundaries and to apply in each State or Territory.

1689. Subsection 118A(4) would provide one exception to this – preserved award terms (see proposed Division 3 of Part VI), are to be included in the rationalised award without variation, because of the 'frozen' nature of those terms.

*New section 118B – Award rationalisation to be undertaken by Full Bench*

1690. Proposed section 118B would provide that once an award rationalisation request is received, the President must establish one or more Full Benches to undertake the award rationalisation process. Due to the anticipated breadth of the award rationalisation process, it is anticipated that the President may need to establish more than one Full Bench to undertake the process within the timeframe established by a request made under proposed section 118.

*New section 118C – Award rationalisation request to be published*

1691. Proposed section 118C would provide that the award rationalisation request must be published, as soon as practicable after it has been received by the President, in a manner prescribed in the regulations, or if not so prescribed, in a manner a Registrar thinks appropriate.

*New section 118D – Minister may intervene*

1692. Proposed section 118D would provide the Minister with a right to intervene in proceedings that relate to award rationalisation. Such a right is appropriate, given the Minister would have initiated the rationalisation process and established the principles under which it is to be conducted. The Minister may, for example, be able to assist the AIRC in relation to the conduct of the process or to clarify the intention of matters set out in the award rationalisation request.

*New section 118E – Making awards as a result of award rationalisation*

1693. Proposed section 118E would provide that one or more new awards may result from an award rationalisation process undertaken by a Full Bench.

*New section 118F – Making awards as a result of award rationalisation*

1694. Proposed section 118F would provide that after reform commencement, the award rationalisation process is the only way in which the AIRC may make a new award. There would be no other mechanism for the AIRC to make new awards.

*New section 118G – Awards may not include certain terms*

1695. Proposed section 118G would make clear that the AIRC may only include matters in a rationalised award that are permitted by Division 2 to be included in an award.

1696. Awards that result from the award rationalisation process must only contain those matters that may be included in awards that are set out in proposed Division 2 of Part VI – including, allowable award matters (proposed section 116), preserved award terms (proposed section 116G), facilitative provisions (proposed section 116H) and incidental and machinery terms (proposed section 116I). Proposed sections 116B, 116C, 116D and 116E would identify matters that are not allowable award matters and may not, as a result, be included in an award.

*New section 118H – Awards must include term about regular part-time employment*

1697. Proposed section 118H would require the AIRC to ensure that, in making a new award as part of an award rationalisation process, the award provides for regular part-time employment.

The proposed note at the end of this section would identify clauses 15.3.1 to 15.3.5 of the Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998 as an appropriate model.

*New section 118I – Who is bound by awards*

1698. Proposed section 118I would identify the employers, employees and organisations that are to be bound by a rationalised award. Under this proposed section, a rationalised award must be expressed to bind:

- specified employers (paragraph 118I(2)(a)) – who may be specified either by name or by inclusion in a specified class or classes (paragraph 118I(4)(a));
- specified employees of employers bound by the award in respect of work that is regulated by the award (paragraph 118I(2)(b)) – specified by inclusion in a specified class or classes (paragraph 118I(4)(b)).

1699. A class or classes of employers or employees may be described by reference to a particular industry or particular kinds of work (subsection 118I(5)).

1700. Further, the award may be expressed to bind one or more specified organisations (subsection 118I(3)) (that is unions or employer associations registered under Schedule 1B). Organisations must be specified by name (paragraph 118I(4)(c)).

*New section 118J – Variation of awards as part of award rationalisation*

*New section 118K – Revocation of awards as part of award rationalisation*

1701. Proposed sections 118J and 118K set out powers the AIRC may exercise as part of an award rationalisation process – in addition to the power to make new awards described above.

1702. Proposed section 118J would allow the AIRC to vary existing awards to give effect to the outcomes of the rationalisation process.

1703. The ability to vary awards under proposed section 118J is subject to the same constraints as when a new award or awards are made as a result of the rationalisation process under proposed section 118E. Therefore:

- the only matters that can be dealt with in an award that is varied are those matters identified as being able to be included in an award in proposed Division 2 of Part VI (subsection 118J(2));
- the AIRC must include a term about regular part-time employment in a varied award (unless such a clause is already included in the award) (subsection 118J(3)); and
- any additional employers, employees and organisations to be bound by the award as varied must be specified in the same manner as provided for in subsections 118I(2) – (6) (subsections 118J(4) – (5)).



1704. Proposed section 118K would provide that awards may be revoked by the AIRC as part of the award rationalisation process (noting that identifying awards to be deleted is one of the matters to be considered by the Award Review Taskforce under its Terms of Reference).

1705. The intended operation of sections 118J and 118K with proposed section 118E can be illustrated by the following examples:

- If the award rationalisation request specifies that the AIRC is to make new awards to operate either as a respondent based or to all employers in a particular industry in a number of defined industry sectors, a Full Bench may decide to make new awards to operate on a respondent or common rule basis in each of the nominated industry sectors.
- As a result, the AIRC would then revoke the awards that are replaced by the new award.
- An alternative course of action may be for the AIRC to nominate an award to be the rationalised award, make appropriate variations to that award (including extending its coverage) and then revoke the awards that are replaced by the varied award.

#### *New section 118L – Preserved award terms*

1706. Proposed section 118L would provide that the AIRC's power to vary or make an award as part of the award rationalisation process must not be exercised in a manner that is inconsistent with proposed Division 3 of Part VI (which relates to preserved award entitlements).

1707. This proposed section would make it clear that preserved award terms from the award or awards that are replaced by a rationalised award are to be included in the rationalised award.

#### **New Subdivision B – Award simplification**

1708. Award simplification is the process whereby the content of an award is adjusted to ensure that the award contains only allowable award matters and other terms that are permitted to be in awards. The matters that would be able, from reform commencement, to be included in awards, and those which are not, are dealt with in proposed Division 2 of the Part.

1709. Matters that are not allowable matters would cease to have effect from reform commencement (see proposed section 116L). The AIRC will subsequently be required to vary awards so that they no longer deal with non-allowable matters. The Award Review Taskforce is to report to Government on how the process and timing of this phase of award simplification can be best coordinated with the award rationalisation process described above (see proposed Subdivision A, Division 4).

#### *New section 118M – Review and simplification of awards*

1710. Proposed section 118M provides for the review and simplification of awards. Where an award is obsolete or no longer capable of operating, simplification would not be required – such an award must be revoked (subsection 118M(5)).

1711. Subsection 118M(1) would require the AIRC to review all awards for the purpose of determining whether the awards include terms that may not be included (see proposed Division 2 of Part VI).

1712. Subsection 118M(2) would provide that the AIRC may review awards for the purpose of determining the terms that may be included in awards under proposed Part VI at the same time or in conjunction with reviewing the awards for other purposes – this would enable the process to occur in conjunction with award rationalisation, if appropriate.

1713. Subsection 118M(3) would require the AIRC to carry out the review within the time prescribed by the regulations and in accordance with any directions prescribed in the regulations. After reviewing an award, the AIRC would be required to vary the award (if necessary) to ensure that it contains only terms that may be included in an award (subsection 118M(4)).

*New section 118N – Principles for award simplification*

1714. Proposed section 118N would provide the AIRC with the power to establish principles for award simplification.

1715. Proposed subsection 118N(1) would provide that, subject to the review and simplification of awards (see proposed section 118M the AIRC may establish principles for the review and simplification of awards relating to the operation of proposed section 118M. Under subsection 118N(2), these principles would be able to relate to:

- the making or varying of awards about each allowable award matter; and
- terms that may be included in awards (including allowable matters).

1716. Subsection 118N(3) would provide that once principles (if any) have been established, the power of the AIRC to vary an award is exercisable only in a manner consistent with those principles.

1717. In exercising its powers under this section, the President of the AIRC or a Full Bench would be empowered to direct a member of the AIRC to provide a report in relation to a particular matter (subsection 118N(4)). The member would be required to provide the report requested, after conducting such investigation as is necessary (subsection 118N(5)).

*New section 118O – Minister may intervene*

1718. Proposed section 118O would provide the Minister with a right to intervene in a proceeding that relates to an award simplification process.

**New subdivision C – Special technical requirements**

*New section 118P – Inclusion of preserved award terms in written awards*

1719. Proposed section 118P would set out the technical requirements for the inclusion of preserved award terms in awards that are rationalised under proposed sections 118E and 118J.

1720. Subsection 118P(2) would require the AIRC to:

- include any preserved award term in the award, and identify it as a preserved award term (paragraphs 118P(2)(a) and (b)); and
- identify the employers and employees bound by the preserved award term 118P(2)(c) and (d).

1721. Subsection 118P(3) would enable the AIRC to condense preserved award terms of the same substantive effect. The AIRC would be required to identify the employers and employees bound by the condensed term.

1722. This provision would mean that if a number of the awards to be replaced by a rationalised award contain a preserved award term that relates to, for example, annual leave, and these terms are in substance the same, then the preserved award term need only be included once in the rationalised award.

1723. Subsections 118P(4) and (5) would clarify the manner in which employers and employees bound by the preserved award term are to be identified in the rationalised award.

#### *New section 118Q – Reprints of varied awards*

1724. Proposed section 118Q would provide that awards varied as part of the rationalisation process must be consolidated and printed by the Industrial Registrar as soon as is practicable after the award is varied.

### **New Division 5 – Variation and revocation of awards**

#### **New Subdivision A – Variation of awards**

##### *New section 119 – Variation of awards – general*

1725. Proposed section 119 would identify the only ways in which an award may be varied. Under subsection (1) these would be:

- as a result of the award rationalisation process;
- as a result of the award simplification process;
- if essential to maintain minimum safety net entitlements (proposed section 119A);
- to remove ambiguity or uncertainty, remove discrimination and on other technical grounds (proposed section 119B);
- to bind additional employers, employees or organisations to an award 120);
- to remove objectionable provisions from an award (proposed section 273); or
- in any further circumstances prescribed by the regulations.

1726. Subsection 119(2) would ensure that the AIRC does not vary a preserved award term. Preserved award terms are terms that are to be 'frozen' in awards on reform commencement. They are to be included in rationalised awards, but their content and coverage must not change.

1727. Subsection 119(3) would prevent the AIRC varying a facilitative provision included in an award under proposed section 116H except:

- as part of an award rationalisation process (paragraph 119(3)(a));
- as part of the award simplification process (paragraph 119(3)(b)); or
- for one of the technical reasons set out in proposed section 119B (paragraph 119(3)(c)).

1728. Subsection 119(4) would also prevent the AIRC varying the model dispute resolution clause that is inserted in all awards by proposed section 116A. The model dispute resolution clause is contained in proposed Part VIIA.

*New section 119A – Variation of awards if essential to maintain minimum safety net entitlements*

1729. Proposed section 119A would focus the AIRC on maintaining minimum safety net entitlements, by providing that an award may only be varied on the basis that the variation is essential to the maintenance of minimum safety net entitlements (subsection 119A(1)).

1730. Subsection 119A(2) would vest in the AIRC the ability to take the steps it considers appropriate to notify those bound by the award and any other interested persons or bodies (which may include peak employer and employee bodies) of an application to vary an award.

1731. Subsection 119A(3) would provide the Minister with a right to intervene in a variation application made under proposed section 119A. In light of the proposed role of the award system – fewer, simpler awards focussed more directly on providing minimum safety net entitlements – it is appropriate that the Minister have a right to make submissions on the content of the minimum safety net.

1732. The criteria for varying an award would be set out in subsection 119A(4). Paragraph 119A(4)(a) provides that the variation may only be made if the AIRC is satisfied that the variation is essential to the maintenance of minimum safety net entitlements. An example of such a variation would be to include in an award the model clauses that result from test case decisions of the AIRC such as in the *Reasonable Hours Case [PR072002]*.

1733. In addition, all of the conditions set out in paragraph 119A(4)(b) must be met for an order varying the award to be made. These conditions are:

- the award as varied would not be inconsistent with decisions of the AFPC (subparagraph 119A(4)(b)(i));
- the award as varied would provide only minimum safety net entitlements for employees bound by the award (subparagraph 119A(4)(b)(ii));

- the award as varied would not be inconsistent with the outcomes (if any) of award simplification and award rationalisation (subparagraph 119A(4)(b)(iii)); and
- the making of the variation would not operate as a disincentive to agreement-making at the workplace level (subparagraph 119A(4)(b)(iv)).

1734. Regulations would be able to prescribe additional requirements, if appropriate (subparagraph 119A(4)(b)(v)).

*New section 119B – Variation of awards – other grounds*

1735. Proposed section 119B would provide for other limited circumstances in which the AIRC may vary awards.

1736. Subsection 119B(1) would enable the AIRC to vary an award or a term of an award to remove any ambiguity or uncertainty.

1737. Subsections 119B(2), (3), (4) and (7) would provide for the variation of an award to remove discrimination if an award is referred to the AIRC under section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act 1986).

1738. Subsection 119B(5) would enable the AIRC on application by an employer, employee or organisation to vary an award to reflect a name change or omit the name of an employer, employee or organisation that is bound by the award.

1739. The applicant would bear the onus of demonstrating that a variation under subsection 119B(5) should be made (subsection 119B(6)).

**New Subdivision B – Revocation of awards**

1740. This Subdivision would set out the circumstances in which an award can be revoked. The use of the word ‘revoke’ and not the previous formulation, ‘set aside or revoke’, is not intended to change the scope of the AIRC’s power. Rather, the intention is to use a clearer style consistent with section 15AC of the *Acts Interpretation Act 1901*.

*New section 119C – Revocation of awards – general*

1741. Proposed section 119C would identify the various ways in which an award may be revoked. These are:

- as a result of an award rationalisation process (paragraph 119C(a));
- as a result of the award simplification process (the current award simplification process has already resulted in over 900 awards being revoked) (paragraph 119C(b)); or
- if the award is obsolete or no longer capable of operating (paragraph 119C(c)).

1742. It is expected that a number of awards will need to be revoked as a result of the award rationalisation and award simplification processes. Under its Terms of Reference, the Award Review Taskforce is being asked to report to the Minister, as part of its consideration of award rationalisation, on the extent to which awards can be amalgamated/combined to avoid overlapping of awards, and to minimise the number of awards applying in relation to particular employers, and whether some awards should be deleted.

*New section 119D – Revocation of awards – award obsolete or no longer capable of operating*

1743. Proposed section 119D would enable an employer, employee or organisation bound by an award to apply to the AIRC to have the award revoked if the award is obsolete or is no longer capable of operating (119D(1)).

1744. Subsection 119D(2) would require the AIRC to take such steps as it thinks appropriate to notify those bound by the award of the application to revoke. This might include, for example, placing advertisements in appropriate daily newspapers.

1745. An order revoking the award would have to be made by the AIRC if it is satisfied that the award is obsolete and no longer capable of operating and making the order would not be contrary to the public interest (subsection 119D(3)).

**New Division 6 – Binding additional employers, employees and organisations to awards**

1746. Proposed Division 6 would enable an award-free employer, employee or organisation to apply to be bound by a federal award. The application may only be made by an employer, employee or organisation that is not already bound by an award. This will be relevant, for example, for those employers, employees or organisations that come into the expanded federal system from State systems. It is not the intention to enable those employers, employees or organisations that are already bound by a federal award to apply to be bound by an additional award or awards. The ability to make such an application will be more relevant before award rationalisation occurs, than afterwards (as part of the award rationalisation process will involve identifying those that are to be bound by relevant post-rationalisation awards).

*New section 120 – Binding additional employers, employees and organisations to awards*

1747. Proposed section 120 would provide that the AIRC may make an order varying an award to bind an employer, employee or organisation to an award (subsection 120(1)), and that such an order may only be made in accordance with this Division (subsection 120(2)). Proposed sections 120A, 120B and 120C would set out the circumstances in which such an application can be made.

*New section 120A – Application to be bound by an award – agreement between employer and employees*

1748. Proposed section 120A would enable an application to be made to the AIRC by an employer for an order varying an award to bind the employer and a specified class or classes of employees, in circumstances where the application to be bound has the support of a valid majority of employees whose employment would be covered by the award.

1749. Subsection 120A(2) would require the AIRC to take such steps as it thinks appropriate to notify those bound by the award of the application. This might include, for example, placing advertisements in appropriate daily newspapers.

1750. Subsection 120A(3) would provide that an order varying the award may be made by the AIRC if it is satisfied that:

- a valid majority of the employees of the employer who would be bound by the award support the application (paragraph 120A(3)(a)) – proposed section 120E would provide for the regulations to prescribe the manner in which a valid majority of employees is to be established;
- the award is an appropriate award to regulate the terms and conditions of employment of the relevant employees (paragraph 120A(3)(b)) – if the AIRC determines that the award specified in the application is not appropriate, then an order cannot be made; if the employer and employees wish to make an application to be bound by a different award, evidence of a fresh valid majority in support of the alternate award must be provided; and
- the employer is not already bound by an award that regulates the terms and conditions of employment of the employees to be covered (paragraph 120A(3)(c)).

1751. Subsection 120A(4) would provide that the AIRC can make an order approving the application and varying the award without convening a hearing unless it requires further information in order to be satisfied of the matters set out in paragraphs 120A(3)(a) – (b).

*New section 120B – Application to be bound by an award – no agreement between employer and employees*

1752. Proposed section 120B would enable an employer, or an employee or group of employees of the employer, to apply to the AIRC to be bound by an award where there is no agreement between the employer and employees.

1753. Subsection 120B(1) would provide for the making of such an application.

1754. Subsection 120B(2) would enable an employer to make an application without the support of the valid majority of its employees.

1755. Subsection 120B(3) would enable an employee or group of employees to make an application without the support of the employer.

1756. Subsection 120B(4) would require the AIRC to take such steps as it thinks appropriate to notify those bound by the award of the application. This might include, for example, placing advertisements in appropriate daily newspapers.

1757. Subsection 120B(5) would provide that the AIRC may make an order varying the award in the manner specified in the application only if it is satisfied that:

- the employer and the employees who would be bound by the award have been unable to make a workplace agreement, despite having made reasonable efforts to do so (paragraph 120B(5)(a)); *Reasonable efforts*, as defined in subsection 120B(7), does not require the taking of *protected action* (that is, industrial action in pursuit of such an agreement). A workplace agreement is defined in subsection 4(1) to be an Australian workplace agreement or a collective agreement;
- the award is an appropriate award to regulate the terms and conditions of employment of the relevant employees (paragraph 120B(5)(b)); and
- the employer is not already bound by an award that regulates the terms and conditions of employment of the employees to be covered (paragraph 120B(5)(c)).

1758. Subsection 120B(6) would enable an organisation to make an application on behalf of an employee and represent the employee in the application if the employee requests such assistance (paragraph 120B(6)(a)) and the organisation is entitled, under its eligibility rules, to represent the industrial interests of the employee.

1759. Subsection 120B(7) defines the terms *protected action* and *reasonable efforts* for the purpose of this section.

*New section 120C – Application to be bound by an award – new organisations*

1760. Proposed section 120C would enable a new organisation to apply to be bound by an award.

1761. Subsection 120C(1) would provide for the making of such an application.

1762. This provision would enable a State registered employer or employee association that enter the federal system on or after reform commencement, and obtain transitional or full registration in accordance with the Registration and Accountability of Organisations Schedule, to apply to the AIRC for an order binding it to an award.

1763. An organisation that comes into existence after reform commencement will also be able to apply to be bound under this proposed section.

1764. Subsection 120C(2) would require the AIRC to take such steps as it thinks appropriate to notify those bound by the award and other interested persons and bodies (which may include peak employer and employee bodies) of the application. This might include, for example, placing advertisements in appropriate daily newspapers.

1765. Subsection 120C(3) would provide the Minister with a right to intervene in the application.



1766. Subsection 120C(4) would provide that the AIRC may make an order if it is satisfied that:

- the new organisation has at least one member who is bound by the award and it may, under its eligibility rules, represent the industrial interests of that member (paragraph 120C(4)(a));
- being bound by the specified award is necessary to enable the organisation to properly represent the industrial interests of its members – this may include, for example, enabling the organisation to investigate a suspected breach of the award under proposed section 208 or to enter premises to hold discussions with members or prospective members under proposed section 221 (paragraph 120C(4)(b)); and
- the award regulates an industry in which the organisation has traditionally represented the industrial interests of its members that work in that industry (paragraph 120C(4)(c)).

1767. Subsection 120C(5) would define *new organisation* to mean an association granted registration as an organisation under the Registration and Accountability of Organisations Schedule on or after reform commencement or a transitionally registered association (see clause 2 of Schedule 17).

*New section 120D – Application by new organisation to be bound by an award – additional matters*

1768. Proposed section 120D would set out important additional matters in relation to an application made under proposed section 120C. They are:

- the application under subsection 120C(1) must be made within one year from the day on which the new organisation was registered under Schedule 1B or Schedule 17 – therefore, if the new organisation was registered on 1 July 2006, the application would need to be made on or before 30 June 2007 (subsection 120D(1)); and
- if the application to be bound specifies a rationalised award made under section 118E, the application must be heard by a Full Bench (subsection 120D(2)).

*New section 120E – Process for valid majority of employees*

1769. Proposed section 120E would provide that the process to establish a valid majority of employees for the purposes of this Division may be prescribed in the regulations.

*New section 120F – General provisions*

1770. Proposed section 120F would provide guidance to the AIRC about the manner in which employers, employees or organisations bound by an award may be specified in the award.

1771. Subsection 120F(2) would provide that:

- employers may be specified by name or by inclusion in a specified class or classes (paragraph 120F(2)(a));
- employees must be specified by inclusion in a specified class or classes (paragraph 120F(2)(b)); and
- organisations must be specified by name (paragraph 120F(2)(c)).

1772. Subsection 120F(1) would enable a class of employees to be described by reference to a particular industry (for example, retail, insurance) or particular kinds of work (for example, clerical, storeworker).

### **New Division 7 – Technical matters**

1773. Proposed Division 7 would set out a range of technical matters relating to the making and variation of awards.

#### *New section 121 – Making and publication of awards and award-related orders*

1774. Proposed section 121 would provide for the making and publication of awards and award-related orders.

- Subsection 4(1) defines *award-related order* to mean an order varying, revoking or suspending an award. The circumstances in which an award may be varied or revoked are listed in proposed sections 119 and 119C. The AIRC may also revoke or suspend an award or order under proposed section 44Q in proposed Division 3A of Part II.

1775. Subsection 121(1) would provide that both an award and an award-related order must:

- be reduced to writing (paragraph 121(1)(a));
- be signed by at least one member of the Full Bench if the award or award-related order was made by a Full Bench or by at least one member of the AIRC in the case of any other order (paragraph 121(1)(b)); and
- show the date on which it is signed (paragraph 121(1)(c)).

1776. As soon as the award or award related order is signed, the AIRC must (under subsection 121(2)) give to a Registrar:

- a copy of the award or order (paragraph 121(2)(a));
- written reasons for the award or order (paragraph 121(2)(b)); and
- a list that specifies the employers, employees and organisations bound by the award or order (paragraph 121(2)(c)).

1777. The intention is that written reasons must accompany every decision of the AIRC that results in an award or award-related order being made.

1778. The Registrar must (under subsection 121(3)) promptly:

- make available a copy of the award or order and the written reasons to each employer, employee and organisation shown on the list given to the Registrar (paragraph 121(3)(a));
- ensure that the award, order and written reasons are made available for inspection at each registry (paragraph 121(3)(b)); and
- ensure the publication of these items occurs as soon as is practicable after they are received (paragraph 121(3)(c)).

*New section 121A – Awards and award-related orders must meet certain requirements*

1779. Proposed section 121A would set out other general matters to which the AIRC must have regard when making an award or an award-related order.

1780. Subsection 121A(1) would provide that, when making an award or award-related order, the AIRC must ensure that the award or order:

- does not include matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level (paragraph 121A(1)(a)). Awards are intended to provide award-reliant employees with minimum safety net entitlements. Matters above the safety net are matters about which employers and employees may reach agreement;
- does not prescribe work practices or procedures that restrict or hinder the efficient performance of work (paragraph 121A(1)(b)); and
- does not include terms that have the effect of restricting or hindering productivity, having regard to fairness to employees (paragraph 121A(1)(c)).

1781. Subsection 121A(2) would provide further guidance to the AIRC on the matters it must consider when making an award or award-related order:

- where appropriate, the AIRC may include facilitative provisions (paragraph 121A(2)(a)) – proposed section 116H would provide that an award may include a facilitative provision and set out how such a provision may operate;
- the AIRC must ensure that the award includes terms providing for the employment of regular part-time employees (paragraph 121A(2)(b)) – this is a mandatory requirement. The intention is to ensure that awards contain sufficient flexibility to enable both employers and employees to choose the most appropriate mode of employment to suit their particular circumstances. The proposed note at the end of this paragraph would identify clauses 15.3.1 to 15.3.5 of the Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998 as an appropriate model for this term;
- the AIRC must ensure that the award or order is expressed in plain English and is easy to understand in structure and content (paragraph 121A(2)(c));

- the AIRC must ensure that the award or order does not include terms that are obsolete or that need updating (paragraph 121A(2)(d)); and
- the AIRC must ensure that the award or order does not include discriminatory terms (paragraph 121A(2)(e)).

1782. Subsection 121A(3) would qualify paragraph 121A(2)(e) by setting out the circumstances when an award or award-related order would not discriminate against an employee. They are where an award or award-related order discriminates:

- in respect of particular employment, on the basis of the inherent requirements of that employment (paragraph 121A(3)(a)) – an example of such genuine occupational requirements would be the employment of persons of a particular age, sex or race in relation to dramatic or an artistic performance; or
- in respect of employment with an institution conducted in accordance with the teachings or beliefs of a particular religion or creed, on the basis of those teachings and in good faith (paragraph 121A(3)(b)).

*New section 121B – Registrar’s powers if member ceases to be a member*

1783. Proposed section 121B is a technical provision that would enable continuity in circumstances where a member of the AIRC ceases to be a member after an award or award-related order is made, but before the award or award-related order made by the member has been reduced to writing. In these circumstances, the award or award-related order will be deemed to have effect as if it was signed by that member if the Registrar reduces the award or award-related order to writing, signs it and seals it with the seal of the AIRC.

*New section 121C – Form of awards*

1784. Proposed section 121C would provide that an award or award-related order must be framed so as best to express the decision of the AIRC and must avoid any unnecessary technicalities.

*New section 121D – Date of awards*

1785. Proposed section 121D would provide that the date of an award or award-related order is the date upon which it is signed in the manner set out in proposed section 121, that is, by at least one member of a Full Bench in the case of an award or order is made by a Full Bench, or in the case of any other order, at least one member of the AIRC.

*New section 121E – Commencement of awards*

1786. Proposed section 121E would provide that an award or award-related order must be expressed to come into force on a specified day (subsection 121E(1)) which, unless exceptional circumstances exist, must not be earlier than the date of the award or order.

*New section 121F – Continuation of awards*

1787. Proposed section 121F would provide that an award continues in force until it is revoked in a manner set out in proposed section 119C, that is, as a result of the award rationalisation or simplification process or if the award is obsolete or is no longer capable of operating.

*New section 121G – Awards of the Commission are final*

1788. Proposed section 121G would protect the validity of awards and award related orders.

1789. Subsection 121G(1) would provide that, subject to this Act, protect an award or award-related order (including an award or order made on appeal) from being challenged or called into question in a court.

1790. Subsection 121G(2) would provide that an award or award-related order is not invalid if the award or order is made by the AIRC constituted otherwise than as provided in the WR Act.

*New section 121H – Reprints of award as varied*

1791. Proposed section 121H would confirm that a copy of a document purporting to be a copy of an award as varied and printed by the Government Printer is evidence of the award as varied in all courts.

*New section 121I – Expressions used in awards*

1792. Proposed section 121I would provide that, unless the contrary intention appears in an award or award related order, an expression used in these documents has the same meaning as it would have in an Act because of either the *Acts Interpretation Act 1901* or this Act.

**New Part VIAA – Transmission of business rules**

1793. Proposed Part VIAA would contain the transmission of business rules relevant to the transfer of instruments created at or after reform commencement, replacing paragraph 149(1)(d) and sections 170MB, 170MBA and 170VS of the pre-reform Act for these purposes.

**New Division 1 – Introductory**

1794. Proposed Division 1 would contain the object of the Part VIAA and provide an outline of the structure of proposed Part VIAA and relevant definitions.

*New section 122 – Object*

1795. Proposed section 122 would outline the object of Part VIAA which is to provide for the transfer of employer obligations under those instruments contained in Divisions 3 – 6 when the whole, or a part, of a person's business is transmitted to another person.

1796. The Part uses the term 'transmitted'. This would also encompass assignment of a business, or part of a business from one person to another and the succession of a business, or part of a business, to one person from another.

*New section 122A – Simplified outline*

1797. Proposed section 122A would create a simplified outline detailing the way that Part VIAA is structured.

1798. Proposed Division 2 would provide for when Part VIAA is to apply and define key terms that are used throughout Part VIAA.

1799. Proposed Division 3 would contain provisions particular to the transfer of *Australian Workplace Agreements* (AWAs) from one employer to another upon a transmission of business.

1800. Proposed Division 4 would contain provisions particular to the transfer of collective agreements from one employer to another upon a transmission of business.

1801. Proposed Division 5 would contain provisions particular to the transfer of awards from one employer to another upon transmission of business.

1802. Proposed Division 6 would contain provisions particular to the transfer of *Australian Preserved Classification Scales* (APCSs) upon a transmission of business.

1803. Proposed Division 7 would contain provisions detailing what happens to an employee's parental leave and other entitlements arising under the Standard when there is a transmission of business.

1804. Proposed Division 8 would deal with notification obligations for an employer who becomes a successor, transmittee or assignee to a transferring business, as well as lodgment of notices and civil remedy provisions relevant to the notification requirements.

1805. Proposed Division 9 would enable regulations to be made to deal with additional transmission of business issues that may arise.

*New section 122B – Definitions*

1806. Proposed section 122B would define key terms for the purposes of Part VIAA, many by reference to definitions in proposed Division 2.

**New Division 2 – Application of Part**

1807. This Division would define when Part VIAA would apply and provide definitions for key terms.

*New section 123 – Application of Part*

1808. Proposed section 123 would outline the circumstances in which Part VIAA applies.

1809. Subsection 123(1) would provide that Part VIAA applies if a person becomes the successor, transmittee or assignee of the whole, or a part of, a business of another person.

1810. In this context the person who initially owned the business being transferred is the *old employer* and the person who becomes the successor, transmittee or assignee is the *new employer*. The term ‘person’ is used in this definition so that Part VIAA also captures transmissions where the old employer ceased to be an employer (eg because it dismisses all of its employees) before, or at the time when the business transfers.

1811. Additionally, the term ‘person’ would cover the situation where the new employer is not yet an employer because it does not have any employees until, or after, the transmission occurs.

1812. Subsection 123(2) would define, for the purposes of Part VIAA, the ‘*business being transferred*’ as the business, or part of the business, of which the new employer is the successor, transmittee or assignee.

1813. Subsection 123(3) would define, for the purposes of Part VIAA, the ‘*time of transmission*’ as the time at which the new employer becomes the successor, assignee or transmittee of the business being transferred.

1814. Subsection 123(4) would define the ‘*transmission period*’ as the period of 12 months from the time of transmission. This is the maximum period of time that a new employer may be bound by a transmitted instrument by operation of Part VIAA, except with respect to an APCS which would not be subject to a transmission period.

#### *New section 123A – Transferring employees*

1815. Proposed section 123A would create a definition of ‘*transferring employees*’ for the purposes of Part VIAA.

1816. Subsection 123A(1) would provide that a person is a transferring employee if the person is employed by the old employer immediately before the time of transmission and the person ceases to be employed by the old employer and then becomes employed by the new employer within two months of the time of transmission.

1817. The proposed definition of transferring employees seeks to ensure that the operation of Part VIAA cannot be avoided the new employer delaying the employment of an employee of the old employer until after the time of transmission, rather than at the time of transmission.

1818. Subsection 123A(2) would provide that a person is also a transferring employee for the purposes of Part VIAA if the person:

- (a) is employed by the old employer at any time within the period of one month before the time of transmission; and
- (b) the person’s employment is terminated because of, or for reasons that include, genuine ‘operational reasons’; and
- (c) the person becomes employed by the new employer within two months of the time of transmission.

1819. *Operational reasons* is attributed with the same meaning as in proposed subsection 170CE(5D) of the WR Act (see item 112). Subsection 170CE(5D) would provide that the definition of operational reasons are reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or to part of the employer's undertaking, establishment, service or business.

1820. This limb of the definition of transferring employee is also an anti-avoidance provision which is intended to ensure that the effect of Part VIAA could not be avoided by the old employer terminating the employment of the employees shortly before the time of transmission.

1821. Accordingly, the transmission of business rules in proposed Part VIAA would extend to a situation where the old employer made employees redundant in anticipation of a transmission of business, or part of a business, close to the time of transmission and the new employer employs those employees.

1822. Therefore, if an employee's position is genuinely redundant and thus the employee's employment is terminated by the old employer within one month of the time of transmission, this break in employment would not preclude the employee from being a transferring employee for the purposes of Part VIAA, if the employee is employed by the new employer within two months of the time of transmission.

#### Illustrative Example

Liesl is employed by Marcus Holdings Corporation (Marcus) and has always received high performance ratings. Marcus has been running at a loss for the past two financial years and is finally placed in administration on 1 August 2005. As a result many of Marcus's employees, including Liesl, are terminated by reason of redundancy on this date.

On 20 August 2005, the business and assets of Marcus are transmitted to Levy Corp. To ensure the business is viable, Levy Corp wished to retain those employees still with Marcus and take on some of those made redundant. Liesl is employed by Levy Corp on 27 August 2005. Because she was terminated for genuine operational reasons by Marcus within one month of the time of transmission and employed by Levy Corp within two months of the time of transmission, she will be a 'transferring employee'.

1823. Subsection 123A(3) would be a facilitative provision consequential upon the inclusion of subsection 123A(2). It is to enable Part VIIA to operate with respect to an employee who is a transferring employee, but whose employment was terminated by the old employer within one month prior to the time of transmission without need for an additional reference or extension of the term transferring employee wherever used in the Part.

#### *New section 123B – transferring employees in relation to a particular instrument*

1824. Proposed section 123B would describe how an employee is a transferring employee in relation to a particular instrument. In this context, the term *instrument* incorporates all industrial instruments created under the proposed Act (eg workplace agreements, awards and APCs).



1825. Subsection 123B(1) would provide that in order for a particular instrument to bind a new employer there must be a transferring employee who was, immediately before the time of transmission, bound or covered by a relevant instrument. Additionally, the transferring employee's employment with the new employer must be capable of being covered by the particular instrument.

1826. Subsection 123B(2) would provide that an employee ceases to be a transferring employee in relation to a particular instrument where the transferring employee ceases to be employed by the new employer after the time of transmission or the transferring employee's employment with the new employer changes so that the instrument is no longer capable of applying to that employment. Additionally, the transferring employee ceases to be a transferring employee when the transmission period ends, except in relation to an APCS. This is because a transmitted APCS does not have a transmission period.

1827. The terms '*apply*' or '*applied*' in these provisions would encompass all the various ways in which an instrument may regulate an employee's terms and conditions of employment. Accordingly, the term should not be read as a limitation on the scope of the provision.

1828. Subsection 123B(2) would clarify that a preserved APCS is to be treated as an instrument in this context.

#### Example

M Sparkles Corporation (Sparkles) has three divisions; the Human Resources Division (HRD), the Engineering Division (ED) and the Maintenance Division (MD). In respect of employees employed in the HRD, Sparkles is bound by a collective agreement. For employees employed in the ED, Sparkles is bound by AWAs. Finally, for employees of the MD, an award binds Sparkles.

Sparkles decide to sell off parts of its business, namely the maintenance and human resources divisions. Spiller Corporation buys both divisions as distinct and operative parts of a business.

Peter is employed by Sparkles as a recruitment officer and is bound by the collective agreement. At the time of transmission Spiller Corporation employs Peter as a recruitment officer. Peter would therefore be a transferring employee in respect of the collective agreement, and the collective agreement would become binding on Spiller Corporation.

Spiller Corporation employs none of Sparkles MD employees. This means that there are no *transferring employees* in relation to the award. The transmission of business does not have the effect of binding Spiller Corporation with respect to the award.

### **New Division 3 – Transmission of AWA**

1829. Proposed Division 3 would contain the transmission of business provisions specific to the transfer of AWAs from an old employer to a new employer.

#### *New section 124 – Transmission of AWA*

##### *New employer bound by AWA*

1830. Proposed subsection 124(1) would provide that where, immediately before the time of transmission, the old employer and an employee were bound by an AWA, and the employee is a transferring employee in relation to the AWA, the new employer becomes bound by the AWA.

1831. This means that a new employer who is a successor, transmittee or assignee to a business or part of a business, would be bound by the AWA that was binding on the old employer, in respect of an employee if that employee is employed by the new employer within two months and the AWA is capable of covering the employee's employment with the new employer.

1832. The proposed note would mention that where the AWA becomes binding on the new employer by force of this section, the new employer may have obligations under proposed sections 129 and 129A with respect to notification.

##### *Period for which the new employer remains bound*

1833. Proposed Subsection 124(2) would establish for how long the new employer is bound to the transmitted AWA. It would specify four events which would cause the new employer to no longer be bound by the transmitted AWA. This result would be brought about on the occurrence of whichever of the events occurs first. They are outlined below.

1834. Firstly, the new employer would cease to be bound if the transmitted AWA was terminated in accordance with Division 9 of Part VB (ie the AWA may be terminated by approval). Note that section 125 would provide that an AWA may not be unilaterally terminated during the transmission period, even where it has reached its nominal expiry date.

1835. Secondly, if the transmitted AWA ceased to be in operation because it was replaced in accordance with proposed section 100(3)(c) by a new AWA that binds the transferring employee and the new employer.

1836. Thirdly, the transmitted AWA would no longer bind the new employer if the employee ceased to be a transferring employee in relation to the AWA. For example, this could occur where the transferring employee ceased to be employed by the new employer, or moved to another job while still working for the new employer that is not capable of being covered by the transmitted AWA.

1837. Finally, the transmitted AWA would no longer bind the new employer once the transmission period ends. This means that the maximum period for which a new employer would be bound by the transmitted AWA by force of subsection 124(1) would be 12 months.

*Old employer's rights and obligations that arose before time of transmission not affected*

1838. Proposed subsection 124(3) would provide that this section does not affect the rights and obligations of the old employer in respect of a transferring employee that arose before the time of transmission. This means, for example, that subsection 124(1) is not intended to transfer liability for accrued employee entitlements to a new employer from an old employer.

*New section 124A – Termination of transmitted AWA*

*Modified operation of subsections 103K(2) and 103L(2)*

1839. Proposed subsection 124A(1) would provide that during the transmission period, the transmitted AWA may not be unilaterally terminated in accordance with proposed subsections 103K(2) and 103L(2), even though it has reached its specified nominal expiry date. Usually, a nominal expiry date is the date after which an AWA could be unilaterally terminated. Proposed section 124A departs from this rule for a transmitted AWA.

*Subsection 103R(1) does not apply*

1840. Proposed subsection 124A(2) would create an exception to the rule proposed in proposed subsection 103R(1) which would usually provide that where an AWA is terminated, an employee formerly bound by the AWA could not return to a collective agreement or award that binds the employer and would otherwise apply.

1841. Instead, where the transmission period ends or the transmitted AWA is terminated, a transferring employee formerly bound by the transmitted AWA could be bound by any workplace agreement or award that binds the new employer and is capable of applying on its terms. Where there is no workplace agreement or award capable of applying to the transferred employee's employment, the transferred employee would be covered by the Standard.

1842. The proposed Note would clarify the application of proposed paragraph 124A(2)(b) which specifies what happens to a transferring employee in relation to a transmitted AWA at the time the transmission period ends.

**New Division 4 – Transmission of collective agreement**

1843. Proposed Division 4 would contain the transmission of business provisions specific to the transfer of collective agreements from an *old employer* to a *new employer*.

1844. In Division 4 *collective agreement* has the same meaning as in proposed Part VB and includes a *workplace determination* (see proposed s.113F).

## **New Subdivision A – General**

1845. Subdivision A of Division 4 would contain the general provisions relating to the transfer of collective agreements.

### *New section 125 – Transmission of collective agreement*

#### *New employer bound by collective agreement*

1846. Proposed subsection 125(1) would provide that where the old employer and employees of the old employer were bound by a collective agreement immediately before the time of transmission and there is at least one transferring employee in relation to the collective agreement, the new employer would be bound by the collective agreement.

1847. This means that a new employer who is a successor, transmittee or assignee to a business or part of a business, would be bound by the collective agreement that was binding on the old employer, in respect of an employee if that employee is employed by the new employer within two months, and the collective agreement is capable of covering the employee's employment with the new employer.

1848. Proposed Note 1 would mention that where the collective agreement becomes binding on the new employer by force of this section, the new employer may have obligations imposed by section 129 and section 129A with respect to notification.

1849. Proposed Note 2 would mention that the provision should be read in conjunction with and subject to proposed section 125A.

#### *Period for which new employer remains bound*

1850. Proposed subsection 125(2) would establish for how long the new employer will be bound by the transmitted collective agreement. It would specify four events which would cause the new employer to no longer be bound by the transmitted collective agreement in its entirety. This result would be brought about on the occurrence of whichever of the events occurs first. They are outlined below.

1851. Firstly, the transmitted collective agreement could be terminated in accordance with proposed Division 9 of Part VB (ie the collective agreement may be terminated by approval). Note that section 125C would provide that a transmitted collective agreement may not be unilaterally terminated during the transmission period, even where it has reached its nominal expiry date.

1852. Secondly, the transmitted collective agreement would cease to bind the new employer when there are no longer any transferring employees in relation to the transmitted collective agreement. This is where all transferring employees for example, either cease to be employed by the new employer or move to another job while working for the new employer that is not capable of being covered by the transmitted collective agreement.

1853. Thirdly, the new employer would cease to be bound by the transmitted collective agreement in respect of the transferring employees if the transferring employees replace the

transmitted collective agreement with another collective agreement, or all of the transferring employees enter into AWAs with the new employer.

1854. The proposed note would mention that proposed subsection 125(3) should be considered to determine how the new employer ceases to be bound by a transmitted collective agreement in respect of each transferring employee in order to assess whether all transferring employees are no longer bound by the transmitted collective agreement.

1855. Lastly, the transmitted collective agreement would not be binding on the new employer once the transmission period ends. This means that a new employer would only be bound by the transmitted collective agreement by force of subsection 125(1) for a maximum period of 12 months.

*Period for which new employer remains bound in relation to a particular transferring employee*

1856. Proposed subsection 125(3) would provide the circumstances where the new employer would no longer be bound by the transmitted collective agreement in relation to each transferring employee in contrast to proposed subsection 125(2) which would stipulate when the new employer ceases to be bound by the transmitted collective agreement in respect of all employees. Subsection 125(3) lists three ways in which this can occur.

1857. Firstly, the transmitted collective agreement would cease to be in operation in relation to a transferring employee where the new employer makes an AWA with the transferring employee.

1858. Secondly, the transmitted collective agreement would cease to be in operation in relation to the transferring employee where it is replaced by another collective agreement that binds the new employer and the (formerly) transferring employee. Note that proposed section 125B(3) would provide that another collective agreement could replace a transmitted collective agreement, even where the transmitted collective agreement has not reached its specified nominal expiry date.

1859. Finally, the transmitted collective agreement would cease to be binding on a particular transferring employee because an event in proposed subsection 125(2) has occurred.

*New employer bound only in relation to employment of transferring employees in the business being transferred*

1860. Proposed subsection 125(4) would provide that a new employer is bound by the transmitted collective agreement in respect of transferring employees only, in relation to the business being transferred. This provision is intended to limit the application of the transmitted collective agreement to transferring employees while they are employed in the business being transferred. Therefore, employees of the new employer who are not transferring employees cannot be bound by the transmitted collective agreement.

*New employer bound subject to Commission order*

1861. Proposed subsection 125(5) would provide that a new employer is bound by the transmitted collective agreement by force of proposed subsections 125(1), 125(2) and 125(3), subject to an order of the AIRC under proposed section 125E.

*Old employer's rights and obligations that arose before time of transmission not affected*

1862. Proposed subsection 125(6) would provide that this section does not affect the rights and obligations of the old employer in respect of a transferring employee that arose before the time of transmission. This means, for example, that the subsection 125(1) is not intended to transfer liability for accrued employee entitlements to a new employer from an old employer.

*New section 125A – Interaction rules*

1863. Proposed section 125A would provide interaction rules that are specific to transmitted collective agreements and other instruments. Proposed section 125A is to be read in conjunction with section 125.

*Transmitted agreement*

1864. Proposed subsection 125A(1) would provide that this section applies if subsection 125(1) applies to the collective agreement (ie to an agreement that is a transmitted collective agreement).

*Existing collective agreement*

1865. Subsection 125A(2) would specify arrangements for where the new employer is bound by a collective agreement immediately before the time of transmission (the *existing collective agreement*) with respect to other employees who are not transferring employees, and the existing collective agreement would be capable of applying on its terms to a transferring employee. The existing collective agreement would not apply to the transferring employee by force of this section.

1866. This would ensure that a transmitted collective agreement would not be 'overridden' by another existing collective agreement that binds the new employer because of the interaction rules in Part VC that would otherwise apply.

1867. However, the subsection is not intended to limit the operation of the existing collective agreement where the transmitted collective agreement is terminated.

1868. Proposed subsection 125A(3) would provide that subsection 125A(2) only applies until the end of the transmission period. Therefore, at the end of 12 months from the time of transmission, the existing collective agreement if it is capable of applying on its terms, would not be precluded from applying to a former transferring employee by subsection 125A(2). A new employer's existing collective agreement might therefore become binding on former transferring employees once the end of the transmission period has passed or the transmitted collective agreement is terminated.

*New section 125B – Transmitted collective agreement ceasing in relation to transferring employee*

*Transmitted agreement*

1869. Proposed subsection 125B(1) would provide that this section applies if subsection 125(1) applies to the collective agreement (ie to an agreement that is a *transmitted collective agreement*).

*AWA*

1870. Proposed subsection 125B(2) would provide that, despite proposed subsection 100(2), the transmitted collective agreement ceases to be in operation in relation to a transferred employee if the new employer and the transferred employee make a new AWA. This means that the transmitted collective agreement would not bind the new employer in respect of the transferring employee again, when an AWA has operated in respect of the employment, even if the AWA is terminated prior to the end of the transmission period.

1871. The proposed Note would explain the need for this rule, by indicating that a collective agreement is normally only suspended in respect of a particular employee while an AWA is in operation, whereas the effect of proposed subsection 125B(2) would be to permanently cancel the transmitted collective agreement's operation.

*Replacement collective agreement*

1872. Proposed subsection 125B(3) would provide that a transmitted collective agreement could be replaced by another collective agreement even if the transmitted collective agreement has not passed its nominal expiry date. This could arise either because the new employer makes a new agreement with the transferring employee or if the employer varies an existing collective agreement so that it applies on its terms to the transferring employees. This provision operates with respect to a transmitted collective agreement, despite proposed subsection 100(5).

*New section 125 – Termination of transmitted collective agreement*

*Transmitted agreement*

1873. Proposed subsection 125C(1) would provide that this section applies if subsection 125(1) applies to the collective agreement (ie to an agreement that is a *transmitted collective agreement*).

*Modified operation of subsections 103K(2) and 103L(2)*

1874. Proposed subsection 125C(2) would provide that a transmitted collective agreement may not be terminated under subsections 103K(2) or 103(2) (ie by unilateral termination) during the transmission period even though the agreement has passed its nominal expiry date. This provision is intended to be an exception to the rule that a collective agreement can be unilaterally terminated when it has reached its nominal expiry date to ensure that a valid majority of transferring employees must approve the termination of the transmitted collective agreement.

*Subsection 103R(1) does not apply*

1875. Proposed subsection 125C(3) would create an exception to the rule in proposed subsection 103R(1) which would usually provide that where a collective agreement is terminated, an employee formerly bound by the collective agreement could not return to an award that would otherwise apply.

1876. Instead, where the transmission period ends or the transmitted collective agreement is terminated, a transferring employee formerly bound by the transmitted collective agreement can be bound by any workplace agreement or award capable of applying. Where there is no workplace agreement or award capable of applying to the transferred employee's employment, the transferred employee would be covered by the Standard.

1877. The proposed Note would clarify the application of proposed paragraph 125C(3)(b) which specifies what happens to a transferring employee in relation to a transmitted collective agreement at the time the transmission period ends.

*Special rule for transmitted workplace determination*

1878. Proposed subsection 125C(4) would address the case where the transmitted collective agreement is a workplace determination. Proposed subsection 113F(3) would not apply from the time of transmission. This means that a workplace determination may be terminated as if it were a collective agreement, for the purposes of Division 4.

1879. Proposed Notes 1 and 2 would indicate that proposed subsection 125C(4) departs from the usual rule that workplace determinations cannot be terminated by approval prior to their nominal expiry dates.

**New Subdivision B – Commission's powers**

1880. Subdivision B would deal with the AIRC's power to make orders with respect to transferring collective agreements.

*New section 125D – Application and terminology*

1881. Proposed subsection 125D(1) would provide that the Subdivision applies if a person is bound by a collective agreement and that person's business or part of a business becomes, or is likely to become transmitted.

1882. This definition would enable the Subdivision to capture the time before transmission, as well as the time at, or after transmission.

1883. Proposed subsection 125D(2) defines terms to be used in the Subdivision, which again reflect that the Subdivision is to apply before, at and after the time of transmission.



*New section 125E – Commission may make order*

1884. Proposed subsections 125E(1) and (2) would provide that the AIRC can make an order that an *incoming employer*:

- is not, or will not be, bound by a collective agreement that would otherwise bind the incoming employer under proposed subsection 125(1); or
  - is, or will be, bound by the collective agreement that binds an incoming employer by operation of subsection 125(1), but only to the extent that the AIRC's order specifies including for a specified period.

1885. The AIRC's order must specify the day from which the order takes effect, however this time cannot be before the *transfer time*.

1886. Proposed subsection 125E(3) would provide that the AIRC cannot make an order that would vary or extend the transmission time to provide that a transmitting collective agreement is binding on a new employer for a period longer than 12 months.

*New section 125F – When an application for an order can be made*

1887. This item would provide that an application for an order under subsection 125E(1) can be made before, at or after the transfer time.

*New section 125G – Who may apply for order*

1888. Proposed section 125G would prescribe who may apply for an order from the AIRC under proposed section 125E in respect of a transmitted collective agreement.

1889. Proposed subsection 125G(1) would provide that before the transfer time, an application for an order can only be made by the outgoing employer. Therefore, before the transfer time the incoming employer could not apply for an order that would limit the effect of a transmitting collective agreement.

1890. Proposed subsection 125G(2) would provide that at or after the transfer time, an application may be made by:

- the incoming employer;
- a transferring employee in relation to the collective agreement;
- an organisation of employees that is bound by the collective agreement;
- or an organisation of employees that is entitled to apply in accordance with proposed paragraph 125G(2)(d).

1891. The outgoing employer cannot apply for an order at or after the transfer time as it would no longer be bound by the collective agreement in respect of the transferring employee under this Subdivision.

*New section 125H – Applicant to give notice of application*

1892. Proposed section 125H would provide that an applicant for an order by the AIRC under proposed section 125E must take reasonable steps to give written notice of the application to all persons who may make submissions in relation to the application (a person who can make a submission would be specified by proposed section 125I). This is not a civil remedy provision.

*New section 125I – Submissions in relation to application*

1893. Proposed section 125I would establish who may make a submission to the AIRC in relation to an application for an order under proposed section 125E to prevent or stop a collective agreement from transmitting.

1894. Under subsections 125I(1) and (2), before the transfer time the following persons must be given an opportunity by the AIRC to make a submission:

- the applicant;
- an employee of the outgoing employer who is bound by the collective agreement and who is employed in the business concerned;
- the incoming employer;
- an organisation of employees that is bound by the collective agreement;
- an organisation of employees that is entitled to make a submission under proposed paragraph 125I(2)(d).

1895. Under proposed subsections 125I(1) and 125I(3), at or after the transfer time the following persons must be given an opportunity by the AIRC to make a submission:

- the applicant;
- the incoming employer;
- a transferring employee in relation to the transmitted collective agreement;
- an organisation of employees that is bound by the transmitted collective agreement; and
- an organisation of employees that is entitled to make a submission under proposed paragraph 125I(3)(d).

1896. The requirements for organisations under proposed paragraphs 125I(2)(d) and 125I(3)(d) mirror the requirements for standing with respect to enforcement and compliance in proposed Part VIII.

## **New Division 5 – Transmission of award**

1897. Proposed Division 5 would contain the transmission of business rules specific to the transfer of awards from an old employer to a new employer.

1898. In Division 5, awards would have the same meaning as under proposed Part VI.

### *New section 126 – Transmission of award*

#### *New employer bound by award*

1899. Proposed subsection 126(1) would provide that where the old employer was immediately before the time of transmission bound by an award, and there is at least one transferring employee in relation to the award, and the new employer would not otherwise be bound by the award, this section binds the new employer to the award.

1900. This means that a new employer who is a successor, transferee or assignee to a business or part of a business, will be bound by the award that was binding on the old employer, in respect of an employee if that employee is employed by the new employer within two months and the award is capable of covering the employee's employment with the new employer.

1901. Proposed Note 1 would explain that proposed paragraph 126(1)(c) (which requires that the new employer is not otherwise bound by the award) is required as there are circumstances where a transmitting award might already be binding on the new employer though in respect of non-transferring employees.

1902. Proposed Note 2 would mention that where the award becomes binding on the new employer by force of this section, the new employer may have obligations imposed by sections 129 and 129A with respect to notification.

1903. Proposed Note 3 would mention that the provision should be read in conjunction with, and is subject to, proposed section 126A.

#### *Period for which new employer remains bound*

1904. Proposed subsection 126(2) would establish for how long the new employer will be bound by the transmitted award. It would specify four events which would cause the new employer to no longer be bound by the transmitted award in its entirety. This result would be brought about on the occurrence of whichever of the events occurs first. They are outlined below.

1905. Firstly, the transmitted award could be revoked (see proposed Part VI). The AIRC can revoke an award in limited circumstances (ie as part of award rationalisation, award simplification, or where the award is no longer applicable or is obsolete), so that it is no longer binding on the new employer.

1906. Secondly, the transmitted award would cease to bind the new employer when there are no longer any transferring employees in relation to the transmitted award. This is where all transferring employees for example, either cease to be employed by the new employer or move

to another job while working for the new employer that is not capable of being covered by the transmitted award.

1907. Thirdly, the new employer would cease to be bound by the transmitted award in respect of the transferring employees if a collective agreement comes into operation in relation to all of the transferring employees, or all the employees enter into AWAs with the new employer.

1908. The proposed Note would mention that proposed subsection 126(3) should be considered to determine how the new employer ceases to be bound by a transmitted award in respect of each transferring employee in order to assess whether all transferring employees are no longer bound by the transmitted award

1909. Finally, the transmitted award would not be binding on the new employer once the transmission period ends. This means that a new employer would only be bound by the transmitted award by force of subsection 126(1) for a maximum period of 12 months.

*Period for which new employer remains bound in relation to particular transferring employee*

1910. Proposed subsection 126(3) would provide the circumstances where the new employer would no longer be bound by the transmitted award in relation to each transferring employee in contrast to proposed subsection 126(2) which would stipulate when the new employer ceases to be bound by the transmitting award in respect of all employees. Subsection 126(3) lists three ways in which this can occur.

1911. Firstly, the award would cease to be in operation in relation to a transferring employee where the new employer makes an AWA with the transferring employee.

1912. Secondly, the award would cease to be in operation in relation to the transferring employee where it is replaced by a collective agreement that binds the new employer and the (formerly) transferring employee.

1913. Finally, the award may cease to be binding on a particular transferring employee because an event in proposed subsection 126(2) has occurred.

1914. New employer bound only in relation to employment of transferring employees

1915. Proposed subsection 126(4) would provide that a new employer is bound to the transmitted award in respect of transferring employees only. Therefore, the transmitted award cannot bind employees of the new employer who are not transferring employees by force of subsection 126(1).

*Commission order*

1916. Proposed subsection 126(5) would provide that proposed subsections 126(1), 126(2) and 126(3) have effect subject to any order of the AIRC.

1917. Proposed subsection 126(6) would ensure that the AIRC cannot make an order which would extend the transmission period for more than 12 months. This would be the only limitation imposed by this section on orders of the AIRC in relation to transmitted awards.

*Old employer's rights and obligations that arose before time of transmission not affected*

1918. Proposed subsection 126(7) would provide that this section does not affect the rights and obligations of the old employer in respect of a transferring employee that arose before the time of transmission. This means, for example, that the subsection 126(1) does not intend to transfer liability for accrued employee entitlements to a new employer from an old employer.

*New section 126A – Interaction rules*

*Transmitted award*

1919. Proposed subsection 126A(1) would provide that this section applies if subsection 126(1) applies to the award (ie to a *transmitted award*).

*Collective agreement*

1920. Proposed subsection 126A(2) would provide that an award would transmit to a new employer under subsection 126(1) subject to proposed section 100B. Proposed section 100B would provide that an award has no effect in relation to an employee's employment while a collective agreement operates in relation to that employment. Therefore, if at the time of transmission the new employer is bound by a collective agreement that applies on its terms to a transferring employee, the transmitting award would have no effect while that collective agreement is in operation and the collective agreement would come into force in relation to any transferring employees immediately after the time of transmission.

1921. The proposed Note would indicate that proposed section 126B modifies the operation of section 100B in relation to AWAs and collective agreements that come into operation after the time of transmission.

*New section 126B – Transmitted award ceasing in relation to transferring employee*

*Transmitted award*

1922. Proposed subsection 126B(1) would provide that this section applies if subsection 126(1) applies to the award (ie to an award that is a *transmitted award*).

*AWA*

1923. Proposed subsection 126B(2) would provide that a transmitted award ceases to be in operation in relation to a transferring employee if the new employer and the transferring employee make an AWA after the time of transmission.

1924. The proposed Note would clarify that under this section, a transmitted award is not suspended while the AWA is in operation. Rather the transmitted award ceases to operate with respect to the particular transferring employee and would not revive even if the AWA is terminated within the transmission period.

### *Collective agreement*

1925. Proposed subsection 126B(3) would provide that a transmitted award ceases to be in operation in relation to a transferring employee if the new employer and the transferring employee make a collective agreement after the time of transmission.

1926. The proposed Note would clarify that under this section, a transmitted award is not suspended while the collective agreement is in operation, rather the transmitted award ceases to operate with respect to the particular transferring employee and would not revive even if the collective agreement was terminated within the transmission period.

#### Illustrative Example

Arianna is a mechanic employed by Clarke Enterprises who is bound by the Vehicle Industry – Repair, Services and Retail Award 1983 (the Award) in relation to Arianna’s employment.

Clarke Enterprises is sold to TJ Mechanical Repairs Pty Ltd (TJ) which takes Arianna on as a transferring employee to work as a mechanic, so that TJ is bound in relation to the Award, in relation to Arianna’s employment.

However, TJ has a collective agreement that is binding on all of its employees who are mechanics. Because this agreement is on its terms capable of applying to Arianna, the Award ceases to operate in respect of Arianna. Arianna is now bound by the collective agreement.

### **New Division 6 – Transmission of APCS**

1927. Proposed Division 6 would contain the transmission provisions specific to the transfer of an APCS from an old employer to a new employer. APCSs would be established under Division 2 of Part VA (the Australian Fair Pay and Conditions Standard).

#### *New section 127 – Transmission of APCS*

##### *New employer bound by APCS*

1928. Proposed subsection 127(1) would provide that where, immediately before the time of transmission, an employee’s employment with the old employer is covered by an APCS, the employee is a transferring employee in relation to the APCS and the new employer would not otherwise be covered by the APCS, this section binds the new employer to the APCS in respect of the transferring employee.

1929. This means that a new employer who is a successor, transmittee or assignee to a business or part of a business, will be bound by the APCS that was binding on the old employer in respect of an employee if that employee is employed by the new employer within two months and the APCS is capable of applying to the employee’s employment with the new employer.

1930. Under subsection 127(1) the term *covered by* would be intended to include ‘bound by’ and ‘applied to’. The term should not be read as a limitation to the provision.

*Employee ceasing to be transferring employee*

1931. Proposed subsection 127(2) would provide that where the employee ceases to be a transferring employee in relation to the APCS, the new employer would not be bound to the APCS by force of subsection 127(1). This could occur if the transferring employee resigns or moves to another job while still working for the new employer in a position that is not capable of being covered by the APCS.

1932. An APCS would not stop applying to an APCS at the end of 12 months after transmission, as there is no transmission period for an APCS.

*Old employer's rights and obligations that arose before time of transmission not affected*

1933. Proposed subsection 127(3) would provide that this section does not affect the rights and obligations of the old employer in respect of a transferring employee that arose before the time of transmission. This means, for example, that the subsection 127(1) is not intended to transfer liability for accrued employee entitlements to a new employer from an old employer.

**New Division 7 – Entitlements under Australian Fair Pay and Conditions Standard**

1934. Proposed Division 7 would contain provisions that prescribe what happens to certain entitlements accrued or arising under the Australian Fair Pay and Conditions Standard upon a transmission of business.

*New section 128 – Parental leave entitlements*

1935. Proposed section 128 would provide for the transfer of parental leave entitlements to a new employer from an old employer. *Parental leave* has the same meaning as under proposed Division 6 of Part VA (ie it includes maternity, paternity and adoption leave).

1936. Subsection 128(1) would provide that at the time of transmission, a new employer would become liable for a transferring employee's entitlements in relation to parental leave entitlement that arise under the Standard, and any other parental leave entitlement, that the old employer was liable for immediately before the time of transmission. When this occurs, the old employer ceases to be liable for those entitlements.

1937. Subsection 128(2) would stipulate how service is to be counted for the purposes of calculating parental leave under the Standard where a new employer takes on the entitlement under subsection 128(1).

1938. Paragraph 128(2)(a) would provide that any of the transferring employee's service with the old employer which counted towards parental leave would count for the purposes of working out the transferring employees entitlement to parental leave.

1939. Paragraph 128(2)(b) would provide that any service with a previous employer that the old employer recognised as service towards working out the employee's parental leave entitlement, would also count when calculating the transferring employee's entitlement to parental leave.

1940. Subsection 128(2) would have the effect of providing for continuity of service where the new employer takes on the old employer's liability for a parental leave entitlement arising under the Standard.

1941. The combined effect of subsections 128(1) and 128(2) would be that where a new employer takes on the old employer's liability for parental leave in relation to a transferring employee's entitlement under the Standard, any entitlement to parental leave would be unaffected by the transmission of business. This would be the case even where a transferring employee is on parental leave at the time of transmission.

1942. Subsection 128(3) would deal with the documentation in relation to parental leave arising under the Standard.

1943. Where documentation is given to the old employer by a transferring employee who has not commenced parental leave before the time of transmission and the old employer notified the new employer of the documentation in accordance with subsection 128(4), the documentation is treated as if it had been given to the new employer.

1944. Under proposed Division 6 of Part VA, the employee usually only has to provide documentation to their employer in order to take parental leave. Subsection 128(3) would ensure that where documentation has been given to an old employer by a transferring employee and there is a transmission of business, the transmission of business would not 'interrupt' a transferring employee's entitlement to parental leave. This is because documentation given to an old employer, would be treated as if it were originally given to the new employer.

1945. Subsection 128(3) would provide that where there are transferring employees who have parental leave entitlements under the Standard, an old employer may have notification obligations in respect of the new employer under subsection 128(4).

1946. Subsection 128(4) would provide that an old employer must notify the new employer of any person who is or is likely to be a transferring employee and is on parental leave at the time of transmission.

1947. Additionally, the old employer must notify the new employer of any parental leave documentation that is given to the old employer before the time of transmission by a person who is, or is likely to be a transferring employee.

1948. The notification must be given to the new employer in writing, within 14 days of the time of transmission.

1949. The proposed Note indicates that this is a civil remedy provision and should be read in conjunction with proposed section 129C.

*New section 128A – New employer assuming liability for particular entitlements*

1950. Proposed section 128A would provide for the transfer of accrued employee entitlements in relation to matters, other than parental leave, under the Standard, in certain circumstances.



The provisions allow for new and old employers to agree to transfer particular employee entitlements to the new employer upon transmission of business. Where this does not occur, the old employer will remain liable for those accrued entitlements. The provisions intend to allow for a 'clean break' in relation to particular accrued entitlements (with the exception of parental leave).

1951. Subsection 128A(1) would provide that the section applies where the new employer agrees in writing, before the time of transmission to take on a transferring employee's entitlements in relation to a particular matter.

1952. Paragraphs 128A(1)(a) and (b) are intended to include all the ways that an employer may agree to take on a transferring employee's particular entitlement. However, if a new employer takes on a transferring employee's entitlement in some other way, the provision should not be read as excluding that from its operation.

1953. The words *particular matter* would refer to the type of entitlement that has accrued, for example the matter of annual leave, or the matter of sick leave.

1954. Subsection 128A(2) provides that where the requirements of subsection 128A(1) are met, then at the time of transmission the new employer becomes liable for the balance of the transferring employee's entitlements if any (not including parental leave):

- that accrued under the Standard in relation to the matter before the time of transmission; and
- for which the old employer was liable immediately before the time of transmission.

1955. Where this occurs the old employer ceases to be liable for the entitlements.

1956. Subsection 128A(3) would provide that where liability for a matter transfers to the new employer under proposed subsection 128A(1), for the purposes of calculating the transferring employee's entitlements under the Standard, both of the following count:

- the transferring employee's service with the old employer that counts for the purposes of calculating that matter; and
- any service with a previous employer (that counted for the purposes of calculating that matter) that the old employer recognised as counting in relation to that matter.

#### *128B – New employer assuming entitlements generally*

1957. Proposed section 128B would provide for the transfer of accrued employee entitlements in relation to matters, other than parental leave, under the Standard in certain circumstances. The provisions allow for new and old employers to agree to transfer employee entitlements to the new employer upon transmission of business. Where this does not occur, the old employer will remain liable. The provisions intend to allow for a 'clean break' in relation to accrued entitlements (with the exception of parental leave).

1958. Subsection 128B(1) would provide that the section applies where the new employer agrees in writing, before the time of transmission to take on a transferring employee's entitlements generally.

1959. Paragraphs 128B(1)(a) and (b) are intended to include all the ways that an employer may agree to take on a transferring employee's entitlements. However, if a new employer takes on a transferring employee's entitlement in some other way, the provision should not be read as excluding that from its operation.

1960. Subsection 128B(2) provides that where the requirements of proposed subsection 128B(1) are met, then at the time of transmission the new employer becomes liable for the balance of the transferring employee's entitlements if any (not including parental leave):

- that accrued under the Standard in relation to the matter before the time of transmission; and
- for which the old employer was liable immediately before the time of transmission.

1961. Where this occurs the old employer ceases to be liable for the entitlements.

1962. Subsection 128B(3) would provide that where liability for a matter transfers to the new employer under 128B(1), for the purposes of calculating the transferring employee's entitlements under the Standard, both the following count:

- the transferring employee's service with the old employer that counts for the purposes of calculating the entitlements; and
- any service with a previous employer (that counted for the purposes of calculating the entitlements) that the old employer recognised as counting in relation to those entitlements.

## **New Division 8 – Notice requirements and enforcement**

### *New section 129 – Informing transferring employees about transmission instrument*

1963. Proposed section 129 would create notification obligations for a new employer with respect to a transferring employee. The effect of the provisions would be to inform the transferring employee about the operation of transferred instruments and the nature of the instruments that could apply to the transferred employee and new employer in a transmission of business situation. The provisions are civil remedy provisions.

1964. Subsection 129(1) would apply where an instrument binds an employer by force of the transmission of business provisions (see proposed sections 124, 125 and 126) in respect of a transferring employee.

1965. Subsection 129(2) would provide that within 28 days after the transferring employee commences employment with the new employer, the new employer must take reasonable steps to give the transferring employee a notice that complies with subsection 129(3). There may be

exceptional circumstances which prevent a new employer from complying with subsection 129(1).

1966. Subsection 129(3) would set out what must be contained in the notice for it to comply with the provision.

1967. The notice must:

- identify the transmitted instrument (eg the name and date of commencement of the award, collective agreement or AWA);
- confirm that the new employer is bound by the transmitted instrument;
- specify the end date for the transmission period (ie the actual date that is 12 months from the time of transmission);
- explain that the new employer will continue to be bound by the transmitted instrument until the end of the transmission period unless it is terminated or otherwise ceases to have effect before the end of that period;
- specify how the transferred employee and the new employer might cease to be bound to the transmitted instrument;
- set out the new employer's intentions for what instruments will cover the transferring employer (eg the employer intends to make a new collective agreement with the transferred employees); and
- identify any other instrument that may be capable of applying on its terms to the transferring employees when the transmission period ends, or if the transmitted instrument was terminated.

1968. The requirement that the new employer's intentions be indicated in relation to the instrument that would regulate the transferring employees employment at the end of the transmission period (or if the transmitted instrument is terminated), should not of itself be seen as imposing any legal obligation on the new employer to act as intended. However, this would not preclude penalties under some other law if these statements amounted to, for example, fraud or misleading conduct.

1969. Subsection 129(4) would establish situations where a new employer does not have the notification obligations imposed by section 129.

1970. The first is where a transmitted award ceases to operate with respect to all transferring employees at the time of transmission because an existing collective agreement is capable of applying to all the transferring employees under proposed section 126A.

1971. The second situation is where the new employer and the transferring employee become bound by an AWA or collective agreement at the time of transmission or within 14 days of the time of transmission.

1972. Finally, where the relevant instrument is a transmitted workplace agreement, and the new employer and a transferring employee make an AWA within 14 days after the time of transmission, then the new employer would not have notification obligations in respect of that transferring employee.

1973. The reason for removing the notification requirements in these situations is that the transmitted instrument ceases to operate under Part VIAA or, at the choice of a transferring employee, soon after the time of transmission, making notification redundant.

*New section 129A – Lodging copy of notice with Employment Advocate*

*Only one transferring employee*

1974. Proposed subsection 129A(1) would deal with the situation where there is only one transferring employee with respect to the particular transmitted instrument.

1975. Where there is only one transferring employee with respect to a transmitting AWA, collective agreement or an award, and the new employer gives notice under subsection 129(2) to that employee, the employer must also lodge a copy of the notice with the Employment Advocate.

1976. This notice must be lodged in accordance with subsection 129A(4) within 14 days of giving the notice to the transferring employee.

1977. Proposed Note 1 would indicate that subsection 129A(1) is a civil remedy provision with reference to section 129C.

1978. Proposed Note 2 would refer to obligations imposed by sections 137.1 and 137.2 of the *Criminal Code Act 1995* in relation to the provision of information or documents.

*Multiple transferring employees and notices all given on the one day*

1979. Proposed subsection 129A(2) would deal with the situation where there are a number of transferring employees with respect to a particular instrument, who were all given notice under subsection 129(2) on the same day.

1980. Where the new employer gives a number of notices under subsection 129(2) to transferring employees in relation to a collective agreement or an award, and all the notices are given on the one day, the employer must lodge a copy of one of those notices with the Employment Advocate.

1981. This notice must be lodged in accordance with subsection 129A(4) within 14 days of giving the notice to the transferring employee.

1982. Proposed Note 1 would indicate that subsection 129A(2) is a civil remedy provision with reference to section 129C.

1983. Proposed Note 2 would refer to obligations imposed by sections 137.1 and 137.2 of the *Criminal Code Act 1995* in relation to the provision of information or documents.

*Multiple transferring employees and notices given on different days*

1984. Proposed subsection 129A(3) would deal with the situation where there are a number of transferring employees with respect to a particular instrument, who were all given notice under subsection 129(2) but on different days.

1985. Where the new employer gives a number of notices under subsection 129(2) to transferring employees in relation to a collective agreement or an award, and all the notices are given on different days, the employer must also lodge a copy of one of those notices with the Employment Advocate.

1986. This notice must be a copy of the notice given on the first of those days and lodged in accordance with subsection 129A(4) within 14 days of giving the first notice to a transferring employee.

1987. Proposed Note 1 would indicate that subsection 129A(3) is a civil remedy provision with reference to section 129C.

1988. Proposed Note 2 would refer to obligations imposed by sections 137.1 and 137.2 of the *Criminal Code Act 1995* in relation to the provision of information or documents.

*Lodgment with the Employment Advocate*

1989. Proposed subsection 129A(4) would provide that a notice is lodged in accordance with this subsection only once it is actually received by the Employment Advocate.

1990. The proposed note would explain that subsection 129A(4) departs from section 29 of the *Acts Interpretation Act 1901* (AI Act). Section 29 of the AI Act provides that service of a document is normally effected when it is 'properly prepaid, addressed and posted'.

*New section 129B – Employment Advocate must issue receipt for lodgment*

1991. Proposed section 129B would oblige the Employment Advocate to issue a receipt for a notice that it receives under section 129A. The receipt must state that it was lodged in accordance with section 129A and specify the date.

1992. The Employment Advocate would need to give a copy of the receipt to the person who lodged the notice under section 129A.

*New section 129C – Civil remedies*

1993. Proposed section 129C would deal with the civil remedy provisions of Part VIAA.

1994. Subsection 129C(1) that would specify the notification provisions are civil remedy provisions. These include the notification requirements in relation to parental leave under

subsection 128(4), and the obligations of a new employer in relation to the operation of transmitted instruments under subsections 129(2), 129A(1), (2) and (3).

1995. The proposed note would indicate that proposed Division 4 of Part VIII also contains provisions that are relevant to the consideration of civil remedies under the WR Act.

1996. Proposed subsections 129C(2) and (3) would provide that the Federal Magistrates Court, or the Federal Court (the Court) may order a person who has contravened the civil remedy provisions to pay a pecuniary penalty of not more than 300 penalty units for a body corporate or 60 penalty units in other cases.

1997. Subsection 129C(4) would establish who has standing (ie who is entitled) to make an application in relation to enforcing the notification requirements for parental leave under subsection 128(4). Relevantly, a transferring employee, an organisation of employees that is entitled to represent a transferring employee under paragraph 129C(4)(b), a workplace inspector or the new employer is entitled to make an application in respect of subsection 128(5).

1998. Subsection 129C(5) would establish who has standing (ie who is entitled) to make an application in relation to enforcing the provision of notices under subsections 129(2), 129A(1), 129A(2) and 129A(3). Who has standing will vary depending on the nature of the transmitted instrument.

### **New Division 9 – Miscellaneous**

1999. Proposed Division 9 would contain facilitative provision in relation to Part VIAA.

#### *New section 130 – Regulations*

2000. Proposed section 130 would enable regulations to be made with respect to the succession, transmission or assignment of a business or part of a business, and the obligations of employers in these situations. The regulations might also deal with the terms and conditions of the employment of employees whose employment is affected by a transmission, assignment or succession of a business, or part of a business.

2001. This regulation making power is intended to be broad in scope, and should not be construed narrowly.

### **Item 72 – Before Division 2**

2002. This item would insert a new Division in Part VIA.

### **Division 1 – Entitlement to meal breaks**

2003. Proposed Division 1 of Part VIA would provide an entitlement to an unpaid meal interval of at least 30 minutes after 5 hours continuous work to employees who are:

- within the meaning of the term ‘employees’ in subsection 4AA(1) of the WR Act; and

- not covered by an award or a workplace agreement, or an industrial instrument prescribed in the regulations.

2004. The entitlement provided by proposed Division 1 would not form part of the Standard.

2005. Proposed Division 1 would comprise of new sections 170AA, 170AB, 170AC and 170AD.

2006. The model dispute resolution process set out in Part VIIA would be available to deal with disputes under Division 1 of Part VIA.

2007. Enforcement of and compliance with the entitlement provided under Division 1 of Part VIA would be addressed in proposed Part VIII.

*New section 170AA – Meal breaks*

2008. Proposed section 170AA would provide that an employer must not require an employee to work for more than five hours continuously without an unpaid interval of at least 30 minutes for a meal. This would be subject to proposed section 170AB. Proposed section 170AB would provide which ‘employers’ and ‘employees’ are subject to this requirement.

*New section 170AB – Displacement of entitlement to meal breaks*

2009. Proposed section 170AB would provide that proposed section 170AA does not apply in relation to the employment of an employee (for the purposes of this Division) while an award, workplace agreement, or an industrial instrument prescribed by the regulations, operates in respect of that particular employment. This would prevent any conflict arising between entitlements contained in industrial instruments and the new minimum entitlement.

*New section 170AC – Model dispute resolution process*

2010. Proposed section 170AC would provide that the model dispute resolution process, set out in proposed Part VIIA, would be capable of applying to disputes under proposed Division 1 of Part VIA, including whether the provisions apply to the particular employment of an employee.

*New section 170AD – Extraterritorial extension*

2011. Proposed subsection 170AD(1) would extend the application of Part VIA (as amended) and the rest of the WR Act as it relates to Part VIA to employees outside Australia and their employers provided they meet the requirements of this section. The legislative note to subsection 170AD(1) would clarify that, for the purposes of section 170AD, *Australia* includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea.

2012. In Australia’s exclusive economic zone, the meal break provisions would apply only to employees of Australian employers (as defined in subsection 4(1)) unless regulations were made to dis-apply the application of the Part to such an employee (subsection 170AD(2)(a)). However, regulations could extend the operation of the meal break provisions to other employees in the exclusive economic zone (subsection 170AD(2)(b)). In making regulations,

account would be taken of Australia's international law obligations in relation to foreign-flagged ships and foreign-registered aircraft.

2013. In relation to employees in, on or over Australia's continental shelf beyond the exclusive economic zone, the meal break provisions would apply only if regulations prescribed the part of the continental shelf where the employee was located and the employee met the requirements prescribed by the regulations (subsection 170AD(3)). In making regulations, account would be taken of Australia's international law obligations in relation to foreign-flagged ships and foreign-registered aircraft and its obligations in relation to matters in, on or over the continental shelf (including under agreements with other countries in relation to particular areas of the continental shelf). The legislative note to subsection 170AD(3) would make clear that the regulations could prescribe different requirements for different parts of the continental shelf, including for reasons connected with Australia's international obligations.

2014. Outside Australia and the exclusive economic zone and continental shelf, the meal break provisions would apply to Australian-based employees of Australian employers (as those expressions would be defined in subsection 4(1)). Regulations could be made to prescribe an employee outside Australia and the exclusive economic zone and continental shelf as an employee to whom the meal break provisions do not apply (subsection 170AD(4)).

2015. Subsection 170AD(5) would provide a specific definition of *this Act* for the purposes of section 170AD. This is because the definition of *this Act* in subsection 4(1) (which would otherwise apply) does not include the Registration and Accountability of Organisations Schedule and regulations made under it. The specific definition would ensure that the extraterritorial extension under subsection 170AD(1) would apply to that Schedule and those regulations so far as they relate to Division 1 of Part VIA.

### **Item 73 – At the end of section 170B**

2016. This item would insert a legislative note at the end of section 170B, indicating that the terms *employer*, *employee* and *employment* have their ordinary meaning for the purposes of Division 2 of Part VIA. This is provided for in sections 4AA, 4AB and 4AC and Schedule 1.

2017. This is because Division 2 of Part VIA has universal application to employees in Australia, regardless of the identity or corporate status of their employer, in keeping with its purpose to give effect, or further effect, to:

- the Equal Remuneration Convention, 1951;
- the Convention on the Elimination of all Forms of Discrimination against Women;
- the Convention concerning Discrimination in respect of Employment and Occupation;
- Articles 3 and 7 of the International Covenant on Economic, Social and Cultural Rights;



- the Equal Remuneration Recommendation, 1951, which the General Conference of the International Labour Organisation adopted on 29 June 1951 and is also known as Recommendation No. 90; and
- the Discrimination (Employment and Occupation) Remuneration Recommendation, 1958, which the General Conference of the International Labour Organisation adopted on 25 June 1957 and is also known as Recommendation No. 111 (see section 170BA, and definition of ‘Anti-Discrimination Conventions’ in subsection 4(1)).

**Item 74 – After section 170BA**

2018. This item would insert new sections 170BAB and 170BAC.

*New section 170BAB – Relationship of this Division to other laws providing alternative remedies*

2019. Proposed section 170BAB would specify when the AIRC is able to hear and/or determine an application under Division 2 of Part VIA where other similar remedies are available.

2020. Subsection 170BAB(1) would provide that the AIRC must not deal with an application for equal remuneration orders, if it is satisfied that an adequate alternative remedy exists. If a State or Territory law is excluded by the operation of proposed section 7C, and if no other adequate alternative remedies exist, subsection 170BAB(1) would not prevent the AIRC from dealing with an equal remuneration application under Division 2 of Part VIA.

2021. Subsections 170BAB(2) – (5) are intended to preclude an applicant from bringing proceedings under Division 2 of Part VIA and some other provision of the WR Act or another law of the Commonwealth, a State or Territory, seeking equal remuneration for work of equal value either concurrently or where one set of proceedings has been successfully resolved. For example, where an applicant has two remedies open to him or her to seek an order providing equal remuneration for work of equal value, the applicant must elect to pursue one remedy or the other, but not both. Under subsection 170BAB(2), the applicant would be precluded from bringing an application under Division 2 of Part VIA if an action seeking an alternative remedy has commenced. Conversely, if an application is made under Division 2 of Part VIA, subsection 170BAB(4) would prevent the applicant commencing proceedings in respect of an alternative remedy.

2022. However, if an application for an alternative remedy is discontinued by the applicant or fails for want of jurisdiction, the applicant would not be prevented from making an application under this Division as provided by subsection 170BAB(3). Under subsection 170BAB(5), the applicant would also not be precluded from commencing proceedings for an alternative remedy if an application for equal remuneration under Division 2 of Part VIA was discontinued or failed for lack of jurisdiction.

2023. Subsection 170BAB(6) would clarify that the making of an application under a Commonwealth, State or Territory law seeking compensation for past discrimination in relation to employment, and no other orders, would not prevent an applicant from seeking orders under Division 2 of Part VIA. This is because an order for compensation only addressing past wrongs

is different in substance to an equal remuneration order under Division 2 of Part VIA, which would deal with future rights and remedies.

*New section 170BAC – Relationship of this Division to orders, determinations or decisions of the AFPC*

2024. Proposed section 170BAC would specify how decisions of the AIRC and the AFPC interact in the equal remuneration context.

2025. Under proposed Part IA of the WR Act, the AFPC would replace the AIRC in its role of making decisions about minimum wages. In making those decisions, the AFPC would be required to apply the principle that men and women should receive equal remuneration for work of equal value (see proposed section 90ZR).

2026. To provide consistency between AFPC and AIRC decisions, subsection 170BAC(1) would direct the AIRC to have regard to decisions of the AFPC in making orders under Division 2 of Part VIA, including any statements that the AFPC makes about the principle that men and women should receive equal remuneration for work of equal value.

2027. Further, to ensure that decisions of the AFPC made on a national level are not inadvertently undermined, subsection 170BAC(2) would prevent the AIRC dealing with an application if the proposed order would have the effect of setting aside or varying rates set by the AFPC. Specifically, subsection 170BAC(2) would provide that the AIRC must not deal with an application under Division 2 of Part VIA if:

- the comparator group of workers (workers whom the applicant contends are performing work of equal value to the work performed by the employees who would be covered by the proposed order) is being paid a wage set by the AFPC under the WR Act;
- enforcement of the orders sought by the applicant would have the effect of changing a wage set by the AFPC; or
- the proposed order would be inconsistent with a decision of the AFPC that is in force.

**Item 75 – Subsection 170BC(2)**

2028. Consistent with ensuring the integrity of the AFPC's role in relation to minimum wages, this item would amend subsection 170BC(2) to provide that the AIRC may make an order to provide for increases in rates of pay to provide equal remuneration for work of equal value, except the rates of pay set by the AFPC (as per subsection 170BAC(2)).

**Item 76 – Subsection 170BC(3)**

2029. This item would repeal and replace paragraph 170BC(3)(b) to clarify that, amongst other things, before making an order under this Division the AIRC would need to be satisfied that the proposed order could be reasonably regarded as appropriate and adapted to giving effect to one or more of:

- the Equal Remuneration Convention, 1951;
- the Convention on the Elimination of all Forms of Discrimination against Women;
- the Convention concerning Discrimination in respect of Employment and Occupation;
- Articles 3 and 7 of the International Covenant on Economic, Social and Cultural Rights;
- the Equal Remuneration Recommendation, 1951; and
- the Discrimination (Employment and Occupation) Remuneration Recommendation, 1958.

**Item 77 – After section 170BD**

2030. This item would insert new sections.

*New section 170BDA – Conciliation or mediation*

2031. Proposed section 170BDA would specify a compulsory conciliation or mediation process as part of equal remuneration proceedings. This would formalise current practice by the AIRC, which often conducts conciliation of equal remuneration matters.

2032. Subsection 170BDA(1) would provide that the AIRC must not start hearing and determining an application for orders under Division 2 of Part VIA until it has attempted to settle the matter by conciliation or alternatively until an (agreed) independent third person has attempted to settle the matter by mediation. Where the parties do not agree to mediation, or cannot agree on who will conduct mediation, the AIRC would conduct conciliation.

2033. Subsection 170BDA(2) would provide that the AIRC may order the applicant, and each employer against whom an order is sought, to be present or represented at the conciliation or mediation.

2034. Subsections 170BDA(3) and (4) would provide for interested parties (as well as the applicant and the employer) to participate in the conciliation or mediation. This is to allow all employees who would be covered by a proposed order an opportunity to participate in the conciliation or mediation.

2035. Subsection 170BDA(3) would provide that the AIRC may order that the employees to be covered by the proposed order be allowed to be present or represented at the conciliation or mediation. Subsection 170BDA(4) would provide that the AIRC may order that the applicant, or

each employer against whom an order is sought, must inform the employees to be covered by the proposed order of:

- the making of the application for an equal remuneration order;
- the details of the application and the proposed order; and
- the time and place of the proposed conciliation or mediation.

*New section 170BDB – If conciliation or mediation is unsuccessful*

2036. Proposed section 170BDB would specify what the AIRC can or must do if all reasonable attempts to settle a matter by conciliation or mediation, or part of a matter, are unsuccessful. The process outlined would provide all interested persons with a clear indication of when the conciliation or mediation process has concluded and when the AIRC can commence to hear and determine the application.

2037. Subsection 170BDB(1) would provide that if the AIRC decides that conciliation is, or is likely to be, unsuccessful, or alternatively, the person conducting the mediation informs the AIRC that mediation has not, or is unlikely to produce, a settled outcome, the AIRC must advise the parties accordingly.

2038. Subsection 170BDB(2) would provide that the AIRC may order that the applicant, and each employer against whom an order is sought, inform the employees who would be covered by the order (such as those informed pursuant to proposed subsection 170BDA(4)) that conciliation or mediation has been unsuccessful.

2039. Once the parties have been informed that conciliation or mediation has been unsuccessful, subsection 170BDB(3) would allow the AIRC to hear and determine the matter, or the part that was not settled.

*New section 170BDC – Hearing of matter by member who conducted conciliation*

2040. Proposed section 170BDC would provide that if a member of the AIRC has exercised conciliation powers under proposed section 170BDA in relation to a matter, the member must not hear and determine, or take part in the hearing and determination of, the matter if a person who was at the conciliation objects. Proposed section 170BDC would only apply if conciliation occurred under paragraph 170BDA(1)(a).

**Item 78 – Section 170BE**

2041. This item would repeal section 170BE as the requirement for the AIRC to refrain from hearing an equal remuneration application if an adequate alternative remedy exists would be contained in proposed subsection 170BAB(1).

**Item 79 – After section 170BG**

2042. This item would insert new sections 170BGA, 170BGB, 170BGC and 170BGD which are explained below

*New section 170BGA – Employer not to prejudice employee*

2043. Proposed subsection 170BGA(1) would provide that an employer must not for the reason, or for reasons including the reason, that an equal remuneration application or order has been made, do or threaten to do any of the following:

- dismiss an employee;
- injure an employee;
- alter the position of an employee to the employee's prejudice.

2044. Proposed section 170BGA would protect the employees of an employer against whom an equal remuneration order is sought, from any injury resulting from the fact that an equal remuneration order is being sought. The protection afforded by proposed section 170BGA would cover not only those employees who would be covered by the proposed order, but all employees of an employer against whom an application is sought, including those in the comparator group for the purposes of the action. For example, where a female employee makes an equal remuneration application on the basis that male employees at the same level doing the same job are paid \$50 more than herself, it would be a breach of proposed section 170BGA for the employer to terminate either the female applicant, or any or all of the male employees who the applicant alleges are performing work of equal value and are paid more, to prevent the AIRC from making the relevant comparison.

2045. Subsection 170BGA(2) would provide that this is a civil remedy provision.

*New section 170BGB – Penalties etc. for contravention of section 170BGA*

2046. Proposed section 170BGB would provide that the Federal Court, or the Federal Magistrates Court, may make certain orders upon application in relation to a person who has contravened proposed section 170BGA.

2047. Subsections 170BGB(1) and 170BGB(3) would allow a broad range of remedies to be ordered including penalties (to the maximum amount provided under subsection 170BGB(2) of 300 penalty units for a body corporate or 60 penalty units otherwise), compensation, injunctions and any other order.

2048. An application may be made by an *eligible person*. *Eligible person* would be defined by subsection 170BGB(4) to include:

- a workplace inspector;
- a person affected by the contravention of subsection 170BGA;

- an organisation of employees that has been requested by an employee of the employer, whom it is entitled to represent, to make an application on the employee's behalf;
- the Sex Discrimination Commissioner (appointed under the *Sex Discrimination Act 1984*); and
- a person prescribed by the regulations to be an 'eligible person' (subsection 170BGB(5) would provide that the regulations may provide that a person is prescribed as an 'eligible person' only in relation to certain circumstances).

*New section 170BGC – Proof not required of the reason for conduct*

2049. Proposed subsection 170BGC(1) would provide that, in an application under proposed section 170BGB, a reverse onus of proof shall apply. Therefore, to avoid a civil penalty, the defendant employer would be required to demonstrate that its reasons for engaging in the impugned conduct (that was alleged to be a breach of proposed section 170BGA) did not include that an equal remuneration application or order had been made. If the defendant employer failed to discharge this onus of proof, then their conduct would be taken to constitute a breach of section 170BGA.

2050. A 'reverse onus of proof' applies because an employer against whom an order is sought would be in a better position than the applicant to know, and to provide evidence of its reasons for engaging in particular conduct.

2051. Subsection 170BGC(2) would provide that the reverse onus of proof would not apply in relation to an application for an interim injunction.

*New section 170BGD – Extraterritorial extension*

2052. Proposed subsection 170BGD(1) would extend the applications of this Division (and the rest of the WR Act so far as it relates to this Division) so that the AIRC would have power to make an equal remuneration order in respect of an employee whose remuneration was determined by or under an Australian law (whether Commonwealth, State or Territory) or a contract of employment made in Australia, regardless of where the employment took place or where the employer operated or was formed. The legislative note to subsection 170BGD(1) would note that, for the purposes of section 170BGD, *Australia* includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands and the coastal sea.

2053. Proposed subsection 170BGD(2) would provide a section-specific definition of *this Act*. This is because the definition of *this Act* in subsection 4(1) (which would otherwise apply) does not include the Registration and Accountability of Organisations Schedule and regulations made under it. The specific definition would ensure that the extraterritorial extension under subsection 170BGD(1) would apply to that Schedule and those regulations so far as they relate to Division 2 of Part VIA.

**Item 80 – Sections 170BH, 170BHA and 170BI**

2054. This item would delete sections 170BH, 170BHA and 170BI.

2055. Section 170BH would no longer be required as proposed paragraph 7C(1)(c) would determine the extent to which State of Territory laws provide other rights to secure equal remuneration for work of equal value.

2056. The requirement for the AIRC to refrain from hearing an equal remuneration application under Division 2 of Part VIA if proceedings in respect of an alternative remedy are on foot, and provisions precluding an applicant from commencing other proceedings for an alternative remedy where an application under Division 2 of Part VIA is on foot, would be contained in proposed section 170BAB, making section 170BHA redundant.

2057. Section 170BI would no longer be required as it relies on the conciliation and arbitration power under the Constitution to give secondary effect to Division 2 of Part VIA. Given the proposed changed constitutional underpinnings to the WR Act, as well as the fact that the external affairs power which supports this Division provides for universal coverage, section 170BI would be redundant.

**Item 81 – Paragraph 170CA(1)(e)**

2058. This item would amend paragraph 170CA(1)(e) by deleting a reference to Subdivision D of Part VIA. This item is consequential upon item 144, which would repeal Subdivision D of Division 3 of Part VIA.

**Item 82 – After section 170CA**

2059. This item would insert a new section 170CA

*New section 170CAA – Meaning of **employee**, **employer** and **employment***

2060. Proposed section 170CAA would define the terms *employee*, *employer* and *employment*, for the purposes of Division 3 of Part VIA of the WR Act. It is intended that the definitions of *employee*, *employer* and *employment* provided by subsection 4AA(1) of the WR Act would not apply, except where a provision expressly states that it applies to, or in relation to, the termination of the employment of an employee within the meaning of subsection 4AA(1).

2061. It is intended that the meaning of employee provided by subsection 4AA(1) will only apply to the following provisions of Division 3 of Part VIA of the WR Act:

- subsection 170CB(1); and
- subsection 170CB(4).

2062. It is intended that the meaning of employee provided by paragraph (b) of the definition of *employee* in section 170CAA, which is an employee within the ordinary meaning of that expression, will apply to all other provisions of Division 3 of Part VIA of the WR Act which are not listed in the paragraph set out immediately above.

2063. The distinction in subsection 170CAA, between an employee within the meaning of subsection 4AA(1) and an employee within the meaning of paragraph (b) of the definition of *employee* in subsection 170CAA, is drawn because of the different jurisdictional application of the termination of employment provisions:

- applications to the AIRC for conciliation and arbitration on the ground that a termination was harsh, unjust or unreasonable ('unfair dismissal') only apply to the termination of employment of an employee within the meaning of subsection 4AA(1);
- applications alleging that an employee's employment has been terminated on certain unlawful grounds (section 170CK), that in certain redundancy situations Centrelink has not been appropriately informed before terminations occur (section 170CL) or which claim an entitlement to notice, or payment in lieu of notice, of termination of employment (section 170CM), apply to all employees in Australia, regardless of the identity of their employer, and therefore proposed paragraph (b) of the definition of *employee* in section 170CAA would apply; and
- Subdivision E, which provides that certain orders may be made by the AIRC in certain redundancy situations, has universal application for employees in Australia, regardless of the identity of their employer, and therefore proposed paragraph (b) of the definition of *employee* in section 170CAA would apply.

2064. The definitions of *employer* and *employment* for the purposes of Division 3 of Part VIA are similarly stated to limit the unfair dismissal provisions to applications brought by employees who fall within proposed subsection 4AA(1).

### **Item 83 – Subsection 170CB(1)**

2065. This item would repeal the words after the word 'before' in subsection 170CB(1), and replace them with the words 'the termination, an employee within the meaning of subsection 4AA(1)'.

2066. As a result, subsection 170CB(1) would provide that Subdivision B of Division 3 of Part VIA (applications to the AIRC for conciliation and arbitration on the ground that a termination was harsh, unjust or unreasonable) is intended to apply to employees within the meaning provided by subsection 4AA(1), that is, to an individual so far as he or she is employed, except on a vocational placement, by:

- a constitutional corporation; or
- the Commonwealth; or
- a person or entity (which may be an unincorporated club), so far as the person or entity, in connection with constitutional trade or commerce, employs an individual as a flight crew officer, a maritime employee or a waterside worker; or
- a body corporate incorporated in a Territory; or



- a person or entity (which may be an unincorporated club) that carries on an activity in a Territory in Australia, so far as the person or entity employs the employee in connection with the activity carried on in the Territory.

**Item 84– Subsection 170CB(2)**

2067. This item would amend subsection 170CB(2) by deleting a reference to section 170CN. This item is consequential upon items 132 and 144, which would repeal subsection 170CN and Subdivision D of Division 3 of Part VIA respectively.

**Item 85 – Subsection 170CB(3)**

2068. This item would amend subsection 170CB(3) by deleting a reference to Subdivision D of Part VIA. This item is consequential upon item 144, which would repeal Subdivision D of Division 3 of Part VIA.

**Item 86 – Subsection 170CB(4)**

2069. This item would amend subsection 170CB(4) by deleting a reference to Subdivision D of Part VIA. This item is consequential upon item 144, which would repeal Subdivision D of Division 3 of Part VIA.

**Item 87 – Subsection 170CB(4)**

2070. This item would repeal all the words after the word ‘termination’ in subsection 170CB(4), and replace them with the words ‘the employment of an employee within the meaning of subsection 4AA(1)’.

2071. This item would provide that, in addition to the effect that they have in accordance with other provisions of section 170CB, Subdivisions C and E of Division 3 also apply to employees within the meaning provided by subsection 4AA(1), in reliance on the constitutional powers which underpin the definition of *employee* in subsection 4AA(1).

**Item 88 – Subsection 170CB(5)**

2072. This item would amend subsection 170CB(5) by deleting a reference to Subdivision D of Part VIA. This item is consequential upon item 144, which would repeal Subdivision D of Division 3 of Part VIA.

**Item 89 – Subsection 170CBA(1)**

2073. This item would amend subsection 170CBA(1) by deleting a reference to Subdivision D of Part VIA. This item is consequential upon item 144, which would repeal Subdivision D of Division 3 of Part VIA.

**Item 90 – Subparagraph 170CBA(1)(f)(i)**

2074. This item would amend subparagraph 170CBA(1)(f)(i), by replacing the term ‘award conditions’ with the term ‘award-derived conditions’, as defined by subsection 170CD(3). The need for changing this term arises from the fact that, after the reform commencement, awards

within the meaning of subsection 4(1) would no longer regulate wages. For award covered employees, wages would be regulated by an APCS.

2075. The new term ‘award-derived conditions’ incorporates those changes as to how wages are to be determined, so that the exclusion relating to the remuneration cap in proposed subparagraph 170CBA(1)(f)(i) continues to operate to capture award-free employees.

**Item 91 – At the end of subsection 170CBA(1)**

2076. This item would insert a new paragraph to subsection 170CBA(1).

2077. Proposed paragraph 170CBA(1)(g) would exclude an employee who is engaged on a seasonal basis, within the meaning of subsection 170CBA(6A), from the operation of Subdivisions B, E and F of Part VIA and sections 170CL and 170CM.

2078. An employee employed on a seasonal basis would retain access to a remedy under section 170CK.

2079. In *SPC Ardmona v Esam and Organ* [Print PR957947], the AIRC held that a contract that would run until the end of a season (that was not defined to end at a certain predetermined date) would not be a contract for a specified period of time such as to attract the exclusion in paragraph 170CBA(1)(a). In that decision, the AIRC applied previous case law which provided that, if a contract of employment ‘*provides that it is to run until some future event, the timing of the happening of which is uncertain when the contract is made, the contract will be for an indeterminate period of time.*’ Therefore, the AIRC held that such a contract would not be within the exclusion in paragraph 170CBA(1)(a).

2080. The exclusion provided by paragraph 170CBA(1)(g) would apply to an employee engaged under a contract of employment which the parties understood to be short term or temporary in nature and would run until some future event:

- the timing of the happening of which was uncertain when the contract was made;
- which was related to the nature of the work to be performed; and
- which was objectively ascertainable when it occurs.

2081. The exclusion provided by paragraph 170CBA(1)(g) would not create an additional subset of casual employment. The exclusion for casual employees is provided by paragraph 170CBA(1)(d).

2082. Paragraph 170CBA(1)(g) would be consistent with the principle, reflected in paragraphs 170CBA(1)(a) and (b), that employees who are engaged on a defined short-term basis which will end at a time foreseen by the parties should not be able to access remedies under Subdivisions B, E and F of Part VIA and sections 170CL and 170CM.

**Illustrative Example (Employment for the duration of a defined season)**

Frances is offered employment with Best Prices in Town Pty Ltd, to work in the store for the duration of the pre-Christmas period and until a day in January when the post-Christmas sales have ended. She accepts employment on that basis, and her contract of employment states that she will be employed until the post-Christmas sales have ended at Best Prices in Town Pty Ltd.

At the time that Frances commences employment in the store, both employees and the manager of the store are uncertain when exactly the post-Christmas sales will end as this will depend upon, among other things, how much stock is purchased before Christmas and how quickly stock is purchased after Christmas.

In mid-January, Best Prices in Town Pty Ltd takes down its sale signs and fills its shelves with regular stock. At the same time, Frances's employment is terminated as the post-Christmas sales have ended. She would have no recourse to an unfair dismissal remedy as she was engaged on a seasonal basis and her employment ended at a time foreseen by the parties (the end of the Christmas season).

**Item 92 – Subsection 170CBA(1) (note 2)**

2083. This item would amend one of the notes to subsection 170CBA(1) and is consequential upon item 9, which would insert section 7C to exclude certain State and Territory laws in respect of employees within the meaning of proposed subsection 4AA(1).

**Item 93 – After subsection 170CBA(1)**

2084. This item would insert a new subsection 170CBA(1A).

2085. Proposed subsection 170CBA(1A) would be a technical amendment aimed at ensuring that all employees have access to a remedy under section 170CK.

2086. This means that there would be no excluded categories of employees under section 170CBA for the purposes of making an application alleging a breach of section 170CK.

**Item 94 – Subsection 170CBA(2)**

2087. This item would amend subsection 170CBA(2) by deleting a reference to Subdivision D of Part VIA. This item is consequential upon item 144, which would repeal Subdivision D of Division 3 of Part VIA.

**Item 95 – Subsection 170CBA(4)**

2088. This item would repeal subsection 170CBA(4) and is consequential upon the use of the new term 'award-derived conditions' that would be defined in proposed subsection 170CD(3).

**Item 96 – After subsection 170CBA(6)**

2089. This item would insert new subsections 170CBA(6A), (6B) and (6C).

2090. Proposed subsection 170CBA(6A) would provide that, for the purposes of the ‘seasonal employee’ exclusion in proposed paragraph 170CBA(1)(g), an employee must be engaged to perform work for the duration of a specified season.

2091. Proposed subsection 170CBA(6B) would define *season*, for the purposes of the ‘seasonal employee’ exclusion in proposed paragraph 170CBA(1)(g), as a period that:

- is determined at the commencement of the employee’s engagement;
- begins at the commencement of the employee’s engagement; and
- will end at the occurrence of a future event, the timing of which is uncertain when the contract is made, but which is related to the nature of the work to be performed and will be objectively ascertainable when it occurs.

2092. Save that the timing of the future event will be uncertain until it occurs, it is intended that the ‘seasonal employee’ exclusion would operate in a similar manner to the ‘specified period of time’ exclusion in subparagraph 170CBA(1)(a).

2093. As an example, each of the following engagements may be a specified season within the meaning of subsection 170CBA(6B):

- engagement at a fruit cannery for the duration of the picking season for a particular fruit or fruits;
- engagement at a retail store until the end of the post-Christmas sales; or
- engagement at a beach-side resort until the end of the summer peak holiday season.

2094. Each of the following is an example of an engagement that would not be a specified season within the meaning of subsection 170CBA(6B):

- an engagement until the employer decides, for whatever reason the employer likes, to terminate the employment – this would involve a subjective assessment by the employer of when the employment ends and would not be objectively ascertainable; or
- an engagement as a motor mechanic until Collingwood Football Club wins another AFL premiership – although the timing of this event is uncertain at commencement and would be objectively ascertainable when it occurs, it fails to meet the requirement that the future event is related to the nature of the work to be performed by the employee.

2095. Proposed subsection 170CBA(6C) would provide that regulations may be made providing that a particular period is, or is not, a ‘season’ for the purposes of subsection 170CBA(6A).

**Item 97 – Subsection 170CBA(7)**

2096. This item would amend subsection 170CBA(7) by deleting a reference to Subdivision D of Part VIA. This item is consequential upon item 144, which would repeal Subdivision D of Division 3 of Part VIA.

**Item 98 – Subsection 170CBA(7) (note 1)**

2097. This item would amend one of the notes to subsection 170CBA(7) and is consequential upon item 9, which would insert section 7C to exclude certain State and Territory laws in respect of employees within the meaning of proposed subsection 4AA(1).

**Item 99 – After section 170CCA**

*New section 170CCB – Extraterritorial extension*

2098. Proposed subsection 170CCB(1) would extend the application of this Division (and rest of the WR Act in so far as it relates to this Division) to the termination or proposed termination of an Australian-based employee, even if the employee was employed outside Australia at the time of the termination, the proposed time of termination or the time of the termination proposal, or the act causing the termination or proposal to terminate occurred outside Australia. The termination provisions would therefore be given application to Australian-based employees whatever the geographical circumstances of the termination or termination related conduct (at least outside Australia's exclusive economic zone and continental shelf – see proposed subsection 170CCB(2)).

2099. The legislative note to subsection 170CCB(1) would note that, in this context, *Australia* includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea.

2100. Proposed subsection 170CCB(2) would restrict the extension in subsection 170CCB(1) where, at the time of the termination, proposed termination or termination proposal, the employee was employed by a non-Australian employer and the employee's primary place of work was in Australia's exclusive economic zone or in, on or over Australia's continental shelf beyond that zone. However, regulations could be made either to exclude an employee from this restriction (and thus to apply the extraterritorial extension in subsection 170CCB(1)) or to dis-apply the extension in subsection 170CCB(1) in relation to an employee who is not covered by the restriction (see proposed subparagraph 170CCB(2)(a)(iii) and paragraph 170CCB(2)(b)). In making regulations, account would be taken of Australia's international law obligations in relation to foreign-flagged ships and foreign-registered aircraft and its obligations in relation to matters in, on or over the continental shelf (including under agreements with other countries in relation to particular areas of the continental shelf).

2101. The definitions of *Australian-based employee* and *Australian employer* in proposed subsection 170CCB(3) would ensure that the extraterritorial extension made by subsection 170CCB(1) (read with subsection 170CCB(2)) would apply to the employees and employers to whom the termination provisions applied (see section 170CAA) and not only to those who are *employees* and *employers* within the meaning of subsections 4AA(1) and 4AB(1) respectively

(the employees and employers who would fall within the general constitutional coverage of the amended WR Act).

2102. Proposed subsection 170CCB(3) would also provide a specific definition of *this Act* for the purposes of section 170CCB. This is because the definition of *this Act* in subsection 4(1) (which would otherwise apply) does not include the Registration and Accountability of Organisations Schedule and regulations made under it. The specific definition would ensure that the extraterritorial extension under subsection 170CCB(1) would apply to that Schedule and those regulations so far as they relate to Division 3 of Part VIA.

**Item 100 – Subsection 170CD(1) (definition of *Commonwealth public sector employee*)**

2103. This item would repeal the definition of *Commonwealth public sector employee* in subsection 170CD(1) which is consequential upon items 83 and 87 which would repeal the reference to ‘Commonwealth public sector employee’ in section 170CB.

**Item 101 – Subsection 170CD(1)**

2104. This item would add a definition to subsection 170CD(1) by providing that any reference to *the Court* in Division 3 of Part VIA of the WR Act means either the Federal Court of Australia or the Federal Magistrates Court.

**Item 102 – Subsection 170CD(1) (paragraph (a) of the definition of *daily hire employee*)**

2105. This item would repeal and replace paragraph (a) of the definition of *daily hire employee* in subsection 170CD(1).

2106. This item would remove references to pre-reform certified agreements, pre-reform AWAs, State awards, State employment agreements and old IR agreements from paragraph (a) of the definition of ‘daily hire employee’ in subsection 170CD(1) as this part of the definition would be dealt with in item 10 of Schedule 4 to the Bill.

**Item 103 – Subsection 170CD(1) (definition of *Federal award employee*)**

2107. This item would repeal the definition of *Federal award employee* in subsection 170CD(1) and is consequential upon item 83 which would repeal the reference to ‘Federal award employee’ in subsection 170CB(1).

**Item 104 – Subsection 170CD(1) (definition of *State or Territory training authority*)**

2108. This item would repeal the definition of *State or Territory training authority* in subsection 170CD(1) as the definition of ‘State or Territory training authority’ provided by proposed section 4 would apply.

**Item 105 – After subsection 170CD(1)**

2109. This item would insert subsection 170CD(1A)

2110. Proposed subsection 170CD(1A) would provide that, for the purposes of paragraph (b) of the definition of *daily hire employee* in subsection 170CD(1), the terms *award*, *old IR*

*agreement, State award and State employment agreement* would retain the meanings that applied to those terms under subsection 4(1) of the WR Act immediately before the reform commencement.

**Item 106 – Subsection 170CD(2)**

2111. This item would amend subsection 170CD(2) by deleting a reference to Subdivision D of Part VIA. This item is consequential upon item 144, which would repeal Subdivision D of Division 3 of Part VIA.

**Item 107 – Subsection 170CD(3)**

2112. This item would amend subsection 170CD(3) by replacing the term *award conditions* with the term *award-derived conditions*, and by defining the term *award-derived conditions*.

2113. The need for changing this term arises from the fact that, after the reform commencement, awards within the meaning of subsection 4(1) would no longer regulate wages. For award covered employees, wages would be regulated by an APCS.

2114. The term ‘employed under award-derived conditions’ is intended to have a meaning similar to the meaning of ‘employed under award conditions’ considered by the AIRC in *Deane v Paper Australia Pty Ltd* [Print PR929820].

2115. It is intended that an employee would be employed under award-derived conditions if the employer was bound:

- in relation to the employee’s wages and conditions of employment – by an *award* (as defined by subitem 10(2) of Schedule 4 to the Bill), collective agreement or AWA; or
- in relation to the employee’s wages by an APCS, and in relation to the employee’s conditions of employment, by an award, a collective agreement or an AWA.

2116. After the reform commencement, an award within the meaning of proposed subsection 4(1) cannot regulate wages. However, subitem 10(2) of Schedule 4 to the Bill provides that, for the purposes of subsection 170CD(3), ‘award’ shall be taken to be a reference to the following instruments, within the meaning of the WR Act:

- a Division 2 certified agreement;
- a Division 3 certified agreement;
- a notional agreement preserving State awards;
- a preserved State agreement;
- a transitional award;
- an old IR Act agreement;

- a pre-reform AWA; and
- a common rule continued in effect by clause 82 of Schedule 13.

**Item 108 – Subsection 170CE(1)**

2117. This item would amend subsection 170CE(1) by inserting references to proposed subsections 170CE(5C) and (5E) which would contain new limitations on making applications alleging harsh, unjust or unreasonable termination.

**Item 109 – Paragraph 170CE(1)(b)**

2118. This item would amend subsection 170CE(1)(b) by deleting a reference to section 170CN. This item is consequential upon items 132 and 144, which would repeal subsection 170CN and Subdivision D of Division 3 of Part VIA respectively.

**Item 110 – Subsection 170CE(3)**

2119. This item would amend subsection 170CE(3) by deleting a reference to section 170CN. This item is consequential upon items 132 and 144, which would repeal subsection 170CN and Subdivision D of Division 3 of Part VIA respectively.

**Item 111 – Paragraph 170CE(5B)(a)**

2120. This item would amend paragraph 170CE(5B)(a) by extending the default qualifying period for making an application alleging that a termination was harsh, unjust or unreasonable from three months to six months.

2121. The changed qualifying period in paragraph 170CE(5B)(a) would not affect the *period of probation* in paragraph 170CBA(1)(c).

2122. The *qualifying period* under paragraph 170CE(5B)(a) stipulates the length of an employee's employment with an employer before being able to lodge an unfair dismissal application. Probation is different as it refers to a period set by the employer to assess suitability for employment.

2123. This item will only apply to employees whose employment commenced after the commencement of this item. Item 4 of Schedule for to the Bill provides that that any employee who has already commenced or completed a qualifying period of employment will not be affected by this item.

**Item 112 – After subsection 170CE(5B)**

2124. This item would insert new subsections 170CE(5C) and 170CE(5D).

2125. Proposed subsections 170CE(5C) and 170CE(5D) would create a new exclusion in relation to applications alleging that a termination was harsh, unjust or unreasonable ('unfair dismissal').



2126. The exclusion created by subsections 170CE(5C) and (5D) would not apply to an application alleging a contravention of:

- section 170CK ( employee's employment may not be terminated on certain grounds);
- section 170CL (in certain redundancy situations Centrelink must be informed before terminations occur); or
- section 170CM (in certain circumstances, employer must provide notice, or payment in lieu of notice, of termination of employment).

2127. The exclusion would provide that an application alleging unfair dismissal, or grounds including unfair dismissal, must not be made if the employee's employment was terminated for genuine operational reasons or reasons that included genuine operational reasons.

2128. Subsection 170CE(5D) would provide that *operational reasons* are reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business or part thereof. For example, a termination by reason of redundancy because a machine will do a job that was previously done by an employee would be a genuine operational reason.

2129. A mere assertion by an employer that a termination was for operational reasons will not be sufficient to render an unfair dismissal application invalid. Proposed section 170CEE would provide that the AIRC must be satisfied that the operational reasons relied upon by the employer were genuine, before making an order that the application is not a valid application to the extent that it alleges an unfair dismissal.

2130. The following two pages provide three illustrative examples.

Illustrative Example (Termination that is for a genuine operational reason, and not for a reason prohibited by section 170CK)

Jan is the General Manager of Great Stockings Pty Ltd, an employer with more than 100 employees. Great Stockings Pty Ltd employs 20 employees in its logistics division, which is responsible for the receipt, storage and dispatch of all goods purchased and sold by Great Stockings Pty Ltd.

As a result of the purchase of newer and more efficient equipment, it is now possible for Great Stockings Pty Ltd to process the same volume of goods with only 15 employees in the logistics division. Accordingly, five of the 20 positions in the Great Stockings Pty Ltd logistics division are no longer required.

Jan decides that, because five positions are redundant in the logistics division, the company should terminate the employment of five employees in the Great Stockings Pty Ltd logistics division. She directs that the human resources manager of Great Stockings Pty Ltd should provide notice of termination, and all other amounts owing upon termination, to five of the employees who are employed in the logistics division.

Among the employees whose employment is terminated as a result of this decision is Todd. Although disappointed that his employment is terminated, Todd does not believe that the decision to terminate his employment was made on the basis of any of the grounds prohibited under section 170CK of the WR Act. He suspects, however, that he was selected for termination because he had been involved in a fight at the workplace a few weeks earlier.

Todd is unable to make an application to the AIRC alleging that the termination of his employment was harsh, unjust or unreasonable, because the reasons for his termination included genuine operational reasons.

Illustrative Example (Termination that is for a genuine operational reason, but also for a reason prohibited by section 170CK)

Another employee amongst the five logistics division employees whose employment was terminated at the same time as Todd is Hamish. Hamish has recently moved to Australia from Scotland, and he has a thick Glaswegian accent that Jan finds very difficult to understand. When he is informed by the human resources manager at Great Stockings Pty Ltd that his employment is going to be terminated by reason of redundancy, Hamish asks why he was selected to be dismissed. The human resources manager answers that one of the reasons is because Jan, and other managers at Great Stockings Pty Ltd, can never understand what Hamish says on the phone.

Like Todd, Hamish is unable to make an application to the AIRC alleging that the termination of his employment was harsh, unjust or unreasonable, because the reasons for his termination included genuine operational reasons.

However, Hamish believes that the reasons for the termination of his employment also included his race and national origin, in contravention of paragraph 170CK(2)(f).

Hamish is able to make an application under subsection 170CE(1)(b), on the ground that the reasons for the termination of his employment included a reason prohibited by paragraph 170CK(2)(f): his race and his national origin.

Notwithstanding that the reasons for the termination of his employment included genuine operational reasons, Hamish is not excluded from making an application alleging a contravention of section 170CK.

Illustrative Example ('Sham' redundancy)

Paula is employed by Holistic Approach Pty Ltd, a manufacturer that employs more than 100 employees. Paula works as a quality control supervisor at Holistic Approach Pty Ltd, and David is the general manager. David observes that Paula spends too much time talking to colleagues about non work-related matters during working hours, when she should be performing other duties.

Rather than counsel Paula about her behaviour, David decides that it would be easier to terminate her employment. David approaches Paula and tells her that her position is redundant, and that therefore her employment will be terminated. Holistic Approach Pty Ltd pays to Paula all amounts owing to her as a result of the termination of her employment on the basis of redundancy. A few days after Paula finishes work, a new quality control supervisor (Jenny) is employed. Jenny's duties are exactly the same as those which were performed by Paula before Paula's employment was terminated.

Paula makes an application to the AIRC on the ground that the termination of her employment was harsh, unjust or unreasonable. It would be open to her to argue that her termination was not for genuine operational reasons as although she was given redundancy pay, it appears that her position was still required.

2131. The definition of *operational reasons* in subsection 170CE(5D) is not intended to apply or affect the use of the term *operational requirements* in Part VA.

**Item 113 – Before subsection 170CE(6)**

2132. This item would insert new subsections 170CE(5E) and 170CE(5F).

2133. Proposed subsection 170CE(5E) would provide that an application alleging that a termination was harsh, unjust or unreasonable, or grounds including unfair dismissal, must not be made under subsection 170CE(1) where, at the relevant time, the respondent employer employed 100 employees or fewer than 100 employees.

2134. The calculation of employees would include full-time employees, part-time employees, the employee who has been terminated (paragraph 170CE(5E)(a)) and casual employees who have been engaged by the employer on a regular and systematic basis for at least 12 months (paragraph 170CE(5E)(b)), but would not include any other casual employee.

2135. All employees must be counted when calculating the number of employees employed. Part-time employees would be counted as one employee for the purposes of this calculation, regardless of the proportion of full-time hours that they work. Each casual employee that is to be included in the calculation will also count for one employee, regardless of whether the casual employee is at work on the day that the applicant's employment was terminated.

2136. Paragraph 170CE(5F)(a) would provide that, for the purposes of calculating the number of employees, the *relevant time* would be the earlier of the time when the employer gave the employee notice of termination, or the time when the employer terminated the employee's employment.

2137. Paragraph 170CE(5F)(b) would provide that, for the purposes of calculating the number of employees, *employee* shall have its ordinary meaning. This is intended to be subject to the exclusion of short-term casuals by subsection 170CE(5E).

**Item 114 – At the end of section 170CEA**

2138. This item would give the AIRC the power to dismiss applications by employees in respect of a 'harsh, unjust or unreasonable' termination of employment (ie on grounds referred to in paragraph 170CE(1)(a) or grounds including that ground) without being required to hold a hearing.

2139. Section 170CEA allows an employer respondent to an application, in respect of a termination of employment, to move for dismissal of an application at any stage of the proceedings based on a jurisdictional objection. A respondent can make a jurisdictional objection where it is of the view that the AIRC has no jurisdiction to hear an application because the employee is excluded from making an application under section 170CE.

2140. Proposed subsection 170CEA(4) would ensure that only motions to dismiss an application made with respect to a termination that was harsh, unjust or unreasonable or on

grounds that include that ground, may be determined without holding a hearing. Therefore, an application purporting that a termination was unlawful for a breach of sections 170CL, 170CK and 170CM would not be able to have a jurisdictional objection determined by the AIRC without a hearing.

2141. Proposed subsection 170CEA(5) would establish that where the AIRC is satisfied that an unfair dismissal application cannot be made because of a lack of jurisdiction, the AIRC must order that the application is not valid. A lack of jurisdiction would be limited for the purposes of this subsection to mean that:

- the employee is excluded from making an application under section 170CE because the employee is part of an excluded class of employee under section 170CBA;
- the employee is excluded from making an application under section 170CE because of the qualifying period exemption (subsection 170CE(5A)); or
- the employee is excluded from making an application under section 170CE because of the '100 employees or fewer' exemption (subsection 170CE(5E)).

2142. Proposed section 170CEA(6) would enable the AIRC to make an order under section 170CEA(5) without holding a hearing.

2143. Where an application includes a ground referred to in subsection 170CE(1)(a) and another ground, the AIRC can determine the jurisdictional objection with respect to the section 170CE(1)(a) ground without a hearing. However with respect to any other grounds (ie the unlawful termination grounds), the AIRC must hold a hearing.

#### **Item 115 – After section 170CEA**

2144. This item would insert new sections 170CEB, 170CEC, 170CED and 170CEE, which would allow the AIRC to decide further matters without a hearing.

#### *New section 170CEB – Applications that are frivolous, vexatious or lacking in substance*

2145. Proposed section 170CEB would provide that the AIRC may dismiss an application by an employee on the ground that the termination was harsh, unjust or unreasonable, or on grounds that include that ground, on the basis that the application is 'frivolous, vexatious or lacking in substance'.

2146. Subsection 170CEB(1) would allow the AIRC to make an order that an application is frivolous, vexatious or lacking in substance where the respondent moves for the dismissal of the application on that ground. Where the AIRC is satisfied that the application is frivolous, vexatious or lacking in substance, it must make an order dismissing the application, or dismissing the application to the extent that it is made on the ground that the termination is harsh, unjust or unreasonable.

2147. Subsection 170CEB(2) would provide that the AIRC is not required to hold a hearing to determine whether an application is frivolous, vexatious or lacking in substance.

2148. Proposed section 170CEB would not define ‘frivolous, vexatious or lacking in substance’. For the purposes of section 170CEB the terms should be attributed their ordinary meanings.

*New section 170CEC – Extension of time applications may be decided without a hearing*

2149. Subsection 170CE(7) of the WR Act, provides, among other things, that an application under subsection 170CE(1) must be lodged within 21 days after the day on which the termination took effect or within such period as the AIRC allows on an application made during or after those 21 days.

2150. Proposed section 170CEC would provide that where an application is made requesting the AIRC to allow an application to be lodged after the period of 21 days, the AIRC is not required to hold a hearing to determine the extension of time application.

2151. Proposed section 170CEC would only enable the AIRC to determine an application for an extension of time with respect to an application, or that part of an application, made on the ground that the termination was harsh, unjust or unreasonable.

*New section 170CED – Matters that do not require a hearing*

2152. Proposed section 170CED would provide further guidance for the AIRC with respect to dismissing an application without holding a hearing under sections 170CEA, 170CEB and 170CEC.

2153. Subsection 170CED(1) would provide that the AIRC must take into account the cost that would be caused to the business of the respondent employer if the employer had to attend a hearing to determine the matter.

2154. Subsection 170CED(2) would provide that where the AIRC decides not to hold a hearing, it must, before making an order or deciding whether to grant an extension of time, allow the employee and respondent employer to provide further information that relates to the issue that the AIRC wishes to decide without a hearing. The subsection would also direct the AIRC to take account of any information that is provided.

2155. Subsection 170CED(3) would make it clear that if as a result of the information before it, the AIRC considers it necessary to hold a hearing with respect to the issue that it had proposed to decide ‘on the papers’, it will not be precluded from doing so at any time before it makes an order under proposed sections 170CEA, 170CEB or 170CEC.

2156. Proposed subsection 170CED(4) would ensure that an invitation under proposed paragraph 170CED(2)(a) must be given by the AIRC in writing to the applicant employee and respondent employer and make clear by which time the information is required in order for it to be considered by the AIRC.

*New section 170CEE – Dismissal of application relating to termination for operational reasons*

2157. Proposed section 170CEE would provide how the AIRC is to consider jurisdictional issues in an application alleging that a termination was harsh, unjust or unreasonable, which relates to a termination that was for genuine operational reasons or reasons that include genuine operational reasons. Under proposed subsection 170CEE(4), the definition of *operational reasons* in subsection 170CE(5D) would apply( see item 112).

2158. If an application under section 170CE alleges unfair dismissal, or grounds that include unfair dismissal and the respondent has, under section 170CEA, moved for dismissal of the application on the grounds that the termination was for genuine operational reasons or reasons that include genuine operational reasons, subparagraph 170CEE(1)(b)(i) would provide that the AIRC must hold a hearing to determine whether the ‘operational reasons’ exclusion applies before taking any further action in relation to the application.

2159. Furthermore, even if the respondent does not move for dismissal of the application, if it appears to the AIRC on the face of the material before it that the termination may have been for genuine operational reasons or reasons that include genuine operational reasons, subparagraph 170CEE(1)(b)(ii) would provide that the AIRC must hold a hearing to determine whether the ‘operational reasons’ exclusion applies before taking any further action in relation to the application. This would be, for example, where the applicant employee has indicated in the application that the respondent gave operational reasons as a reason for dismissal.

2160. The procedure for the hearing and determination of the ‘operational reasons’ exclusion is unlike any other grounds for jurisdictional objection to an unfair dismissal application. One difference is that in respect of the ‘operational reasons’ exclusion the AIRC may conduct a jurisdictional hearing on its own motion, without a motion to dismiss being lodged by the respondent. Another difference is that, unlike other jurisdictional grounds for exclusion, the ‘operational reasons’ exclusion cannot be determined ‘on the papers’ (see item 114) by the AIRC.

2161. In subparagraph 170CEE(1)(b)(ii), the term ‘all the materials before’ the AIRC might consist only of the employee’s unfair dismissal application, any documents attached to that application, and any documents that the respondent might have provided to the AIRC in response to the employee’s application.

2162. Proposed subsection 170CEE(2) would provide that, if as a result of the hearing conducted under subsection 170CEE(1), the AIRC is satisfied that the employee’s employment was terminated for genuine operational reasons:

- if the application alleges unfair dismissal and no other grounds, the AIRC must make an order that the application is invalid; and
- if the application alleges unfair dismissal and other grounds under section 170CE, the AIRC must make an order that the application is invalid to the extent that it alleges unfair dismissal.

2163. Subject to the requirements of sections 45 and 170JF, an application for leave to appeal to a Full Bench of the AIRC may be instituted in relation to a decision of a single member of the AIRC to make an order, or not to make an order, under subsection 170CE(2).

2164. Proposed subsection 170CEE(3) would provide that, subject to any right of appeal to a Full Bench of the AIRC, a finding of the AIRC that it is not satisfied that the termination was for genuine operational reasons would be final and binding between the parties in any proceedings before the AIRC. Therefore, a finding made by the AIRC that the termination was not for genuine operational reasons shall be binding upon the parties in an arbitration conducted under section 170CG and, if applicable, in the determination of remedies under section 170CH. It is not intended that, because of subsection 170CEE, a finding that the termination was not for genuine operational reasons shall be binding in respect of any court proceedings.

**Item 116 – Paragraph 170CFA(3)(b)**

2165. This item would amend paragraph 170CFA(3)(b) by deleting a reference to section 170CN. This item is consequential upon items 132 and 144, which would repeal subsection 170CN and Subdivision D of Division 3 of Part VIA respectively.

**Item 117 – Subsection 170CFA(4)**

2166. This item would amend subsection 170CFA(4) by deleting a reference to section 170CN. This item is consequential upon items 132 and 144, which would repeal subsection 170CN and Subdivision D of Division 3 of Part VIA respectively.

**Item 118 – Paragraph 170CFA(5)(c)**

2167. This item would amend paragraph 170CFA(5)(c) by deleting a reference to section 170CN. This item is consequential upon items 132 and 144, which repeal subsection 170CN and Subdivision D of Division 3 of Part VIA respectively.

**Item 119 – Subsection 170CFA(7)**

2168. This item would amend subsection 170CFA(7) to remove the words ‘for all purposes other than the making of an election out of time in accordance with subsection (8)’. This is a consequential amendment upon item 120 which would repeal and replace subsection 170CFA(8) and add a new subsection 170CFA(9).

2169. Proposed subsection 170CFA(7) would therefore provide that where an applicant fails to lodge an election under subsections 170CFA(1), (2), (3), (4) or (5) within 7 days after the day of issue of a subsection 170CF(2) conciliation certificate, then the application is taken to have been discontinued by the applicant.

**Item 120 – Subsection 170CFA(8)**

2170. This item would repeal and replace subsection 170CFA(8) and add a new subsection 170CFA(9).



2171. Proposed subsection 170CFA(8) would prohibit the AIRC from extending the period in which an applicant can make an election to proceed to arbitration. This means that an election to proceed to arbitration in respect of an application alleging unlawful termination and/or unfair dismissal must be made strictly within 7 days of a conciliation certificate being issued by the AIRC. There would be no power for the AIRC to accept an election after the 7 day period.

2172. Proposed subsection 170CFA(9) would ensure that where an application is discontinued after the applicant fails to elect to proceed to arbitration under subsection 170CFA(7), an applicant is not entitled to appeal to the Full Bench of the AIRC under section 45.

**Item 121 – Paragraph 170CG(3)(a)**

2173. This item would amend paragraph 170CG(3)(a) by inserting a reference to the effect of the employee’s capacity or conduct on the safety and welfare of other employees.

2174. Accordingly, in assessing whether an employee’s dismissal was harsh, unjust or unreasonable, the AIRC would need to have regard to, amongst other things:

- whether the employee’s capacity may have put at risk the safety or welfare of other employees; and
- any conduct of the employee that may have put at risk the safety or welfare of other employees.

**Item 122 – Paragraph 170CG(3)(a)**

2175. This item would amend paragraph 170CG(3)(a) and is consequential upon proposed subsections 170CE(5C) and 170CE(5D) that would provide that an application alleging unfair dismissal, or grounds including unfair dismissal, must not be made if the employee’s employment was terminated for genuine operational reasons or reasons that included genuine operational reasons.

2176. Proposed paragraph 170CG(3)(a) would provide that when conducting an arbitration under section 170CG, the AIRC would not be required to take into account the operational requirements of the business.

**Item 123 – After section 170CG**

2177. This item would insert a new section.

*New section 170CGA – Exercise of arbitration powers by member who has exercised conciliation powers*

2178. Proposed section 170CGA would provide that if a member of the AIRC has exercised conciliation powers under Division 3 of Part VIA, the member must not exercise arbitration powers, or take part in the exercise of arbitration powers, if a party to the arbitration objects. Proposed section 170CGA would apply to:

- an arbitration under section 170CG in relation to an application to the AIRC on the ground that a termination was harsh, unjust or unreasonable, where the member of the AIRC has conducted a conciliation under section 170CF; and
- the hearing and determination of an application for orders under proposed section 170GA, where the member of the AIRC has conducted a conciliation under proposed section 170GBA.

**Item 124 – Paragraph 170CH(4)(b)**

2179. This item would propose a technical amendment that is consequential upon item 124 which would insert a new subsection 170CH(4A).

**Item 125 – After subsection 170CH(4)**

2180. This item would insert a new subsection 170CH(4A).

2181. Proposed subsection 170CH(4A) would ensure that employees do not receive windfall gains through termination of employment remedies, by requiring the AIRC to have regard to additional matters in making an order for lost remuneration where a reinstatement order has been made. These additional matters are:

- income earned by the employee from employment or other work during the period between dismissal and reinstatement; and
- the amount of any income reasonably likely to be earned by the employee during the period between the making of an order of reinstatement and actual reinstatement.

2182. Proposed subsection 170CH(4A) is consistent with the principle that an employee should be put back into the position that they would have been in, but for the unfair dismissal. An employee who is unfairly dismissed should not, however, profit from the termination.

**Item 126 – Subsection 170CH(7)**

2183. This item would propose a technical amendment that is consequential on item 128 which would insert a new subsection 170CH(7A).

**Item 127 – After paragraph 170CH(7)(d)**

2184. Subsection 170CH(7) requires the AIRC to have regard to all the circumstances of a matter in assessing an appropriate amount to be paid to an employee in lieu of reinstatement (ie in cases where the AIRC determines that reinstatement is not appropriate).

2185. The provision sets out an inclusive list of factors to be considered, including the effect of any order on the employer's viability, the amount of remuneration the employee would have earned but for the termination, and any efforts made by the employee to mitigate the loss suffered as a result of the termination of their employment.

2186. Proposed paragraph 170CH(7)(da) would add to that list by requiring the AIRC to also consider any misconduct of the employee that contributed to the employer's decision to terminate the employee's employment.

**Item 128 – After subsection 170CH(7)**

2187. This item would insert a new subsection 170CH(7A).

2188. Proposed subsection 170CH(7A) would preclude the AIRC from including in an amount to be paid to an employee in lieu of reinstatement, a component by way of compensation for shock, humiliation, distress or other analogous hurt, caused by the manner in which the employee's employment was terminated.

2189. At common law, the established view is that distress or humiliation inflicted upon an employee related to a termination of employment is not as a general rule compensable, no matter how obvious a consequence of the dismissal (*Addis v Gramophone Co Ltd* [1909] AC 488 and *Baltic Shipping Co v Dillon* (1993) 176 CLR 344). The proposed amendment would therefore be consistent with principles established at common law.

**Item 129 – Before subsection 170CH(8)**

2190. This item would insert a new subsection 170CH(7B).

2191. Proposed 170CH(7B) would require the AIRC to reduce the amount paid to an employee in lieu of reinstatement by an appropriate amount where it finds that the employee's misconduct contributed to the dismissal.

**Illustrative Example**

Shauna is employed by M Sparkles Pty Ltd. M Sparkles Pty Ltd has a written policy that allows employees to take home any of the company's products that do not pass the company's manufacturing standards. However, the policy creates procedures that must be followed when removing any of the products. In particular, employees must record in a designated book what, and how much product they have removed. The employee must then receive the supervisor's endorsement that the record is true and correct.

Shauna decides to take home some inferior lollipops and fills out the record book accordingly but she fails to get her supervisor Peter's signature in the book.

The following day her employer terminates her employment for failing to follow company procedures and policy.

The AIRC finds that the dismissal was harsh, unjust or unreasonable because Shauna was a model employee and other employees frequently failed to follow company policy and had not been dismissed. However in ordering the payment of an amount in lieu of reinstatement, the AIRC takes account of the fact that Shauna's failure to follow company policy contributed to her dismissal. The AIRC accordingly reduces the amount of money that it would have ordered Shauna be paid but for her misconduct.

**Item 130 – Subsections 170CH(8) and (9)**

2192. This item would amend subsections 170CH(8) and (9), by replacing the term ‘award conditions’ with the term ‘award-derived conditions’, as defined by subsection 170CD(3). This item is consequential upon item 107.

**Item 131 – After subsection 170CJ(3)**

2193. Subsection 170CJ(3) provides that where a party to a proceeding relating to an application made under section 170CE with respect to a termination of employment causes costs to be incurred by the other party to the proceeding because of the party’s unreasonable act or omission, the AIRC can make an order for costs against that party. The AIRC may only make an order for costs on application by the other party.

2194. Proposed subsection 170CJ(3A) would extend the 170CJ(3) costs provision, so that costs may be ordered not only against a party to a proceeding, but also directly against a representative of a party to the proceedings. The same test would apply to representatives as for costs orders against a party generally.

**Item 132 – Section 170CN**

2195. This item would repeal section 170CN. Section 170CN currently provides that an employer must not terminate an employee’s employment in contravention of an order in force under section 170FA. This amendment is consequential on item 143, which would repeal Subdivision D of Division 3 of Part VIA, including section 170FA.

**Item 133 – Section 170CO**

2196. This item would amend section 170CO by deleting a reference to section 170CN. This item is consequential upon items 132 and 144, which would repeal subsection 170CN and Subdivision D of Division 3 of Part VIA respectively.

**Item 134 – Subsection 170CP(1)**

2197. This item would amend subsection 170CP(1) by deleting a reference to section 170CN. This item is consequential upon items 132 and 144, which would repeal subsection 170CN and Subdivision D of Division 3 of Part VIA respectively.

**Item 135 – Subsection 170CP(2)**

2198. This item would amend subsection 170CP(2) by replacing the term *a court of competent jurisdiction* with the term *an eligible court*. This item is consequential upon item 170 which would repeal and replace section 177A.

**Item 136 – Subsection 170CP(3)**

2199. This item would amend subsection 170CP(3) by deleting a reference to section 170CN. This item is consequential upon items 132 and 144, which would repeal subsection 170CN and Subdivision D of Division 3 of Part VIA respectively.

**Item 137 – Subsection 170CP(5)**

2200. This item would amend subsection 170CP(5) by deleting a reference to section 170CN. This item is consequential upon items 132 and 144, which would repeal subsection 170CN and Subdivision D of Division 3 of Part VIA respectively.

**Item 138 – Subsection 170CR(1)**

2201. This item would amend subsection 170CR(1) by deleting a reference to section 170CN. This item is consequential upon items 132 and 144, which would repeal subsection 170CN and Subdivision D of Division 3 of Part VIA respectively.

**Item 139 – Paragraph 170CR(1)(c)**

2202. This item would propose a technical amendment that is consequential upon items 140 and 141, which would insert subsections 170CR(1A) – (2B).

**Item 140 – After subsection 170CR(1)**

2203. This item would insert a new subsection 170CR(1A).

2204. Proposed subsection 170CR(1A) would provide that an amount of compensation ordered by the Federal Court of Australia or the Federal Magistrates Court under paragraph 170CR(1)(c) or (d) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the employee by the manner in which their employment was terminated.

2205. Proposed subsection 170CR(1A) would ensure that orders for compensation made by the Federal Court of Australia or the Federal Magistrates Court for unlawful termination of employment are consistent with orders for compensation made by the AIRC with respect to unfair dismissal under the proposed provisions outlined at item 128.

**Item 141 – Subsection 170CR(2)**

2206. This item would repeal and replace subsection 170CR(2) and add new subsections 170CR(2A) and 170CR(2B).

2207. Proposed subsection 170CR(2) would provide that where the Federal Court of Australia or the Federal Magistrates Court is fixing an amount under paragraph 170CR(1)(c) for an employee who was employed under *award-derived* conditions before the termination, the amount must not exceed:

- the total amount of remuneration received by the employee or that the employee was entitled to (whichever is the highest) for any period of employment with the employer for 6 months immediately before the termination (other than any period of leave without full pay); and
- if the employee was on leave without pay or full pay, the amount of remuneration taken to have been received by the employee in accordance with the regulations.

2208. Proposed subsection 170CR(2) would ensure that an amount of compensation ordered by the Federal Court of Australia or the Federal Magistrates Court with respect to an employee employed under award-derived conditions is consistent with an order by the AIRC in unfair dismissal matters under subsection 170CH(8).

2209. Proposed subsection 170CR(2A) would provide that where the Federal Court of Australia or the Federal Magistrates Court is fixing an amount under paragraph 170CR(1)(c) for an employee who was not employed under award-derived conditions before the termination, the amount must not exceed:

- a total of the amounts determined under subsection 170CR(2) if the employee were covered by the subsection; or
- the amount of \$32 000 as indexed in accordance with a formula prescribed by the regulations,

whichever is the lowest amount.

2210. The amount established by the regulations is set by reference to a formula that draws upon average weekly full time earnings. The amount is adjusted each financial year – as at 1 July 2005 it was set at \$47 500.

2211. Proposed subsection 170CR(2A) would ensure that an amount of compensation ordered by the Federal Court of Australia or the Federal Magistrates Court with respect to an employee not employed under award-derived conditions is consistent with an order by the AIRC under subsection 170CH(9) in relation to unfair dismissal remedies.

2212. Proposed subsection 170CR(2B) would ensure that an order made by the Federal Court of Australia or the Federal Magistrates Court under paragraphs 170CR(1)(c) or (d) can allow the employer to pay the amount in instalments as specified by the relevant court.

2213. Proposed subsection 170CR(2B) would be consistent with subsection 170CH(10), which enables the AIRC to make orders allowing an employer to pay an amount in instalments under paragraph 170CH(4)(b) or subsection 170CH(6).

#### **Item 142 – Subsection 170CR(6)**

2214. This item would amend subsection 170CR(6) by deleting a reference to section 170CN. This item is consequential upon items 132 and 144, which would repeal subsection 170CN and Subdivision D of Division 3 of Part VIA respectively.

#### **Item 143 – Section 170CR (note)**

2215. This item would amend the legislative note to section 170CR by deleting a reference to section 170CN. This item is consequential upon items 132 and 144, which would repeal subsection 170CN and Subdivision D of Division 3 of Part VIA respectively.

**Item 144 – Subdivision D of Division 3 of Part VIA**

2216. This item would repeal Subdivision D of Division 3 of Part VIA.

**Item 145 – Subsection 170GA(2)**

2217. This item would amend subsection 170GA(2) by adding a reference to subsection 170GA(2A). This item is consequential upon item 146, which would limit the powers of the AIRC to make orders under section 170GA.

**Item 146 – After subsection 170GA(2)**

2218. This item would insert a new subsection.

*New subsection 170GA(2A)*

2219. Proposed subsection 170GA(2A) would limit the orders that the AIRC may make under subsection 170GA(2). The AIRC's powers under subsection 170GA would not include the power to make orders for the following matters referred to in proposed paragraphs 170GA(2A)(a) – (f):

- reinstatement of an employee;
- withdrawal of a notice of termination if the notice period has not expired;
- payment of an amount in lieu of reinstatement;
- payment of severance pay;
- disclosure of confidential information or commercially sensitive information relating to the employer, unless the recipient of such information gives an enforceable undertaking not to disclose the information to any other person;
- disclosure of personal information relating to a particular employee, unless the employee has given written consent to the disclosure of the information and the disclosure is in accordance with that consent.

2220. Therefore, the AIRC would be restricted to making orders under section 170GA that put the parties in the position that they would have been in had consultations occurred, and had information been provided, in accordance with section 170GA. Examples of what AIRC orders under subsection 170GA might include are:

- that the employer meet with affected employees and their unions, to provide information about the matters set out in paragraph 170GA(1)(a), subject to provision of an enforceable undertaking not to disclose confidential information or commercially sensitive information to any other person;
- the employer consult with the employees and their unions, about the matters set out in paragraph 170GA(1)(b); or

- in circumstances where the employment of employees is terminated prior to such provision of information and consultation, the employer pay to each affected employee an amount reflecting the remuneration which the employee would have earned during the information and consultation period, had consultations occurred and information been provided, in accordance with section 170GA.

2221. Paragraphs 170GA(2A)(e) and (f) would also protect the interests of the employer and affected employees against unauthorised disclosure by people to whom information is provided or with whom consultations occur.

**Item 147 – At the end of section 170GA**

2222. This item would insert a new subsection.

2223. Proposed subsection 170GA(4) would provide that, for the purposes of subsection 170GA(2A), *commercially sensitive information*, *confidential information* and *personal information* would have their ordinary meanings, unless the regulations provided other meanings for those terms.

**Item 148 – After section 170GB**

2224. This item would insert a new section.

*New section 170GBA – Powers and procedures of Commission for dealing with applications*

2225. Proposed section 170GBA would provide that the AIRC may attempt to settle an application for orders under section 170GA by conciliation. However, the AIRC would not be required to attempt conciliation before hearing and determining a matter and/or making orders under section 170GA.

**Item 149 – Section 170GD**

2226. This item would repeal section 170GD and is consequential upon item 71, which would repeal (amongst other things) Division 2 of Part VI. Provisions relating to the powers of the AIRC would be contained within Division 3A of Part II (item 20).

**Item 150 – Subdivision F of Division 3 of Part VIA (heading)**

2227. This item would repeal and replace the heading of Subdivision F with ‘Rights relating to termination of employment’. This change reflects the amendments proposed by items 9, 152 and 153, which deal with the interaction of the WR Act with other laws.

2228. Subdivision F would contain sections 170HB, 170HBA and 170HC. These provisions outline the way the Commonwealth termination of employment laws interact with other relevant laws and prevent ‘double-dipping’.



**Item 151 – Section 170HA**

2229. This item would repeal section 170HA and is consequential upon item 9, which would insert section 7C to exclude certain State and Territory laws in respect of employees within the meaning of proposed subsection 4AA(1).

**Item 152 – Section 170HB**

2230. This item would repeal and replace pre-reform section 170HB.

2231. Proposed section 170HB would stop ‘double-dipping’ in cases where an employee can choose to commence unfair dismissal proceedings under Subdivision B of Division 3 of Part VIA in respect of a termination of employment, and under another law, including:

- other provisions of the WR Act;
- other laws of the Commonwealth; and
- State and Territory laws that are not excluded by the operation of the WR Act (eg State and Territory anti-discrimination legislation).

2232. Subsection 170HB(1) would ensure that proceedings cannot be commenced under the WR Act where an application has already been commenced in respect of that termination of employment under another law, unless the proceeding has been discontinued by the employee or has failed for lack of jurisdiction.

2233. Subsection 170HB(2) would similarly ensure that where proceedings have been initiated in the federal unfair dismissal jurisdiction, no other proceeding can be commenced in respect of that termination under another law, unless the proceedings have been discontinued by the employee or failed for lack of jurisdiction.

2234. Subsections 170HB(3) and 170HB(4) would provide that those other termination proceedings apart from a federal termination of employment application under section 170CE(1) which are referred to in subsections 170HB(1) and 170HB(2) would include any other application alleging the termination was unlawful, but would not include action to recover amounts payable upon termination that the employer failed to provide (for example, an amount in lieu of notice of termination).

**Item 153 – Section 170HC**

2235. This item would repeal and replace pre-reform section 170HC.

2236. Proposed section 170HC would stop ‘double dipping’ in cases where an employee may be able to commence an unlawful termination application on the ground that the termination constitutes a contravention of section 170CK and another law, including:

- other provisions of the WR Act;
- other laws of the Commonwealth; and

- State and Territory laws not excluded by the operation of the WR Act (eg State and Territory anti-discrimination legislation).

2237. Subsection 170HC(1) would provide that an application alleging unlawful termination of employment must not be made under the WR Act, where the employee has commenced other proceedings in respect of the termination of employment, unless the other termination proceedings have been discontinued by the employee or have failed for lack of jurisdiction. Under subsection 170HC(3), other termination proceedings include those that allege that the termination was unlawful or harsh, unjust or unreasonable.

2238. The reason that ‘harsh, unjust or unreasonable’ is included in this definition of other termination proceedings is because employees that fall outside proposed subsection 4AA(1) (ie State covered employees) can bring an unlawful termination application and so may have to choose between a State unfair dismissal remedy and a federal unlawful termination remedy. However, State unfair dismissal remedies are excluded for employees as defined in subsection 4AA(1), so a similar provision is not required for those employees under proposed section 170HB.

2239. Subsection 170HC(2) would similarly ensure that where proceedings have been initiated in the federal unlawful termination jurisdiction, no other proceeding can be commenced in respect of that termination under another law, unless the proceeding has been discontinued by the employee or failed for lack of jurisdiction.

2240. Subsections 170HC(3) and 170HC(4) would provide that those other termination proceedings apart from a federal termination of employment application under section 170CE(1) which are referred to in subsections 170HC(1) and 170HC(2) would include any other application alleging the termination was unlawful or harsh, unjust or unreasonable, but would not include action to recover amounts payable upon termination that the employer failed to provide (for example, payment in lieu of notice of termination).

#### **Item 154 – Subsection 170JC(1)**

2241. This item would repeal subsection 170JC(1). Enforcement of orders of the AIRC made under Part VIA would be dealt with in Part VIII, because of the definition of *applicable provision* in section 177A [item 170].

#### **Item 155 – Subsection 170JC(2)**

2242. This item would amend subsection 170JC(2) by removing the words ‘For the purposes of applying Part VIII in that way’.

2243. This item is consequential upon the repeal of subsection 170JC(1) by item 154.

#### **Item 156 – Subsection 170JC(3)**

2244. This item would amend subsection 170JC(3) by removing the words ‘(as it applies in accordance with this section)’.

2245. This item is consequential upon the repeal of subsection 170JC(1) by item 154.

**Item 157 – Paragraph 170JC(3)(a)**

2246. This item would amend paragraph 170JC(3)(a), replacing the term ‘the Court’ with the term ‘the Court or the Federal Magistrates Court’.

2247. This item would provide that enforcement proceedings under paragraph 170JC(3)(a) can be initiated in either the Federal Court of Australia or the Federal Magistrates Court.

**Item 158 – Paragraph 170JC(3)(b)**

2248. This item would amend paragraph 170JC(3)(b), replacing the term ‘a court of competent jurisdiction’ with the term ‘an eligible court’. This item is consequential upon item 170 which would repeal and replace section 177A.

**Item 159 – At the end of section 170JD**

2249. This item would add a new subsection 170JD(4).

2250. Section 170JD of the WR Act provides that the AIRC can vary or revoke an order under Part VIA, on application by a person (or their representative) that is covered by the order or to whom the order relates.

2251. Proposed subsection 170JD(4) would make it clear that where an application is dismissed without a hearing, either by an order made under proposed subsection 170CEA(5) or proposed section 170CEB, or a decision made under proposed section 170CEC, a party may not apply to have the order or decision varied or revoked.

**Item 160 – Section 170JE**

2252. This item would repeal section 170JE and is consequential on item 71, which would repeal (amongst other things) Divisions 2 and 3 of Part VI of the WR Act. Provisions relating to the powers of the AIRC would be contained within Division 3A of Part II.

**Item 161 – Section 170JEA**

2253. This item would amend section 170JEA, replacing the term ‘or the Court’ with the term ‘, the Court or the Federal Magistrates Court’.

2254. In proceedings for a remedy under Subdivision C of Division 3 of Part VIA, or enforcement proceedings under section 170JC(3), an employer that is a party to a proceeding has the same representation rights in the Federal Magistrates Court as it would have in the Federal Court of Australia where proceedings can be brought in either forum.

**Item 162 – Sections 170JEB and 170JEC**

2255. This item would repeal sections 170JEB and 170JEC and is consequential on item 71, which would repeal (amongst other things) Divisions 2 and 3 of Part VI of the WR Act. Provisions relating to the powers of the AIRC would be contained within Division 3A of Part II.

**Item 163 – At the end of section 170JF**

2256. This item would create a new subsection 170JF(3).

2257. Section 170JF provides that a person who is entitled to apply to vary or revoke an order under section 170JD is also entitled to appeal to a Full Bench of the AIRC under section 45 against an order made under Part VIA.

2258. Proposed subsection 170JF(3) would make it clear that the right to appeal to a Full Bench does not apply in relation to an order under section 170CEA(5) or section 170CEB, or in relation to a decision under section 170CEC.

**Item 164 – Section 170JG**

2259. This item would make a consequential amendment to section 170JG by replacing the term ‘, or certified agreement or AWA’ with the term ‘or workplace agreement’. This reflects changes to how agreements are referred to in proposed Part VB and throughout the WR Act.

2260. Note also that item 10(2) of Schedule 4 to the Bill would provide that, for the purposes of subsection 170JG, ‘award’ shall be taken to be a reference to the following instruments, within the meaning of the WR Act:

- a pre-reform certified agreement ;
- a Division 3 certified agreement;
- a notional agreement preserving State awards;
- a preserved State agreement;
- a transitional award;
- an old IR agreement;
- a pre-reform AWA; and
- a common rule continued in effect by clause 82 of Schedule 13 to the WR Act.

**Item 165 – Section 170JH**

2261. This item would repeal section 170JH as interaction with State and Territory laws and awards would be dealt with in proposed sections 7C and 7D.

**Item 166 – At the end of Division 4 of Part VIA**

2262. This item would add a new section.

*Section 170JI – Meaning of employee and employer*

2263. This item would provide that, throughout Division 4 of Part VIA of the WR Act, the terms *employee* and *employer* are taken to have the same meaning as in the provision of Part VIA to which the provision in Division 4 of Part VIA relates.

2264. That is:

- to the extent that a provision in Division 4 of Part VIA relates to an application to the AIRC on the ground that a termination was harsh, unjust or unreasonable, the terms *employee* and *employer* have the meanings provided by proposed subsections 4AA(1), 4AB(1) and 4AC(1); and
- to the extent that a provision in Division 4 of Part VIA relates to an application alleging a contravention of section 170CK, 170CL or 170CM, or seeking orders under section 170GA, the terms *employee* and *employer* have the meanings provided by paragraph (b) of the definition of each term in section 170CAA.

**Item 167 – Division 5 of Part VIA**

2265. This item would repeal and replace Division 5 of Part VIA.

**Division 5 – Parental leave**

2266. Proposed Division 5 of Part VIA would extend the parental leave entitlements contained in proposed Division 6 of Part VA to those employees in Australia who are not covered by the Standard, subject to some limitations. Employees who are entitled to parental leave under the Standard are not entitled to parental leave under this Division.

2267. As a result of this extension, the parental leave standards prescribed by Division 6 of Part VA would have universal application for employees in Australia, regardless of the identity of their employer. This is in keeping with the purpose of Division 5 of Part VIA to give effect, or further effect, to the international conventions referred to in proposed section 170KA.

2268. The model dispute resolution process set out in Part VIIA would be available to deal with disputes under Division 5 of Part VIA.

2269. Enforcement of and compliance with the entitlements provided under Division 5 of Part VIA would be addressed in Part VIII of the WR Act.

*New section 170KA – Object and application of Division*

2270. Proposed section 170KA would provide that the object of Division 5 of Part VIA is to give effect, or further effect, to the:

- Workers with Family Responsibilities Convention, 1981, referred to in subsection 4(1) as the Family Responsibilities Convention (a copy of this Convention is at Schedule 12 to the WR Act); and

- Workers with Family Responsibilities Recommendation, 1981, which the General Conference of the International Labour Organisation adopted on 23 June 1981 and is also known as Recommendation No. 165:
  - by providing universal access for employees in Australia to a system of unpaid parental leave, and a system of unpaid adoption leave, that will help men and women workers who have responsibilities in relation to their dependant children:
  - to prepare for, enter, participate in or advance in economic activity; and
  - to reconcile their employment and family responsibilities.

2271. The legislative note to section 170KA would indicate that the terms *employer*, *employee* and *employment* have their ordinary meaning for the purposes of Division 5 of Part VIA. This is provided for in sections 4AA, 4AB and 4AC and Schedule 1.

*New section 170KB – Entitlement to parental leave*

2272. Proposed section 170KB would provide that the provisions of proposed Division 6 of Part VA are taken to apply in relation to an employee who is not an employee within the meaning of proposed subsection 4AA(1) of the WR Act as if the employee were an employee to whom Division 6 of Part VA applied. Note 1 to proposed section 170KB would make it clear that employees who are within the meaning provided by proposed subsection 4AA(1) have parental leave entitlements under Division 6 of Part VA.

2273. Paragraph 170KB(b) would further provide that the entitlement under Division 5 of Part VIA does not extend to a casual employee, unless the employee is an eligible casual employee. The meaning of those terms is the same as in Division 6 of Part VA, except that the term *employee* is to be read as an employee for the purposes of Division 5 of Part VIA.

2274. Note 2 would refer to the location of compliance provisions for proposed section 170KB.

*New section 170KC – Division supplements other laws*

2275. Proposed section 170KC would provide that Division 5 of Part VIA is intended to supplement, and not to override, entitlements under other Commonwealth, State and Territory legislation and awards.

2276. The provisions of proposed section 7C, which would state that the WR Act is intended to override certain laws in relation to the employment of employees as defined by proposed subsection 4AA(1), will not apply to Division 5 of Part VIA as this Division only applies to employees who fall outside proposed subsection 4AA(1).

*New section 170KD – Model dispute resolution process*

2277. Proposed section 170KD would provide that the model dispute resolution process, set out in proposed Part VIIA, would be capable of applying to disputes under proposed Division 5 of Part VIA, including disputes about whether this Division applies to a particular employee.

## **Item 168 – Parts VIB, VID, VIE and VII**

2278. This item would repeal pre-reform Parts VIB, VID, VIE and VII of the WR Act and insert new Part VIIA.

### **New Part VIIA – Dispute resolution processes**

2279. Proposed Part VIIA would introduce new dispute resolution processes to be used for particular disputes between employers and employees at the workplace level. It would:

- provide a model dispute resolution process to be used in relation to disputes arising under awards, workplace agreements (where the agreement does not contain its own dispute settlement process), the Standard and other instruments;
- change the role of the AIRC in dealing with disputes arising under an agreement that provides for the AIRC to settle disputes about the application of the agreement; and
- set out rules for Dispute Resolution Providers other than the AIRC.

2280. The focus of the new provisions is encouraging parties to a dispute to attempt to resolve the dispute between themselves, either at the workplace level or with the assistance of a third party of their choice.

## **New Division 1 – Preliminary**

### *New section 171 – Object*

2281. Proposed section 171 would insert objects for the new Part VIIA. The objects of the Part would be to:

- encourage employers and employees to take responsibility for solving any dispute that may arise between them at the workplace level (paragraph (a)); and
- introduce greater flexibility for dispute resolution by allowing the parties to a dispute to choose the best forum in which to attempt to solve the dispute (paragraph (b)).

### *New section 172 – Court process*

2282. Proposed section 172 would provide that the dispute resolution processes described in this Part do not interfere with a person's right to take court action to resolve a dispute, such as court action to enforce a term of an award, workplace agreement, or a statutory entitlement (eg, parental leave as provided by Division 5, Part VIA).

## **New Division 2 – Model dispute resolution process**

2283. Proposed Division 2 would provide a model dispute resolution process to be used by employers and employees in the attempted resolution of particular types of disputes at the workplace level.

*New section 173 – Model dispute resolution process*

2284. Proposed section 173 would set out the purpose of the Division, which is to prescribe the model dispute resolution process.

2285. A note would identify some of the types of disputes that the model dispute resolution process may be used for, such as disputes about:

- the application of the Standard (section 89E);
- the application of awards (section 116A);
- the terms of a workplace agreement, where the agreement itself does not include a dispute resolution process (section 101A);
- the application of a workplace determination (section 113D);
- meal breaks for the purpose of Division 1 of Part VIA (section 170AC); and
- parental leave for the purpose of Division 5 of Part VIA (section 170KD).

2286. The note is not an exhaustive list of the types of disputes that must be dealt with under the model dispute resolution process. For instance, Schedule 15 of the Bill would also provide that the model dispute resolution process is deemed to apply to a dispute about the application of a preserved State agreement (clause 14), or a notional State agreement (clause 37).

*New section 174 – Resolving dispute at workplace level*

2287. Proposed section 174 would provide the first step for the model dispute resolution process, which is that the parties must genuinely attempt to resolve the dispute at the workplace level. This requirement is intended to encourage employers and employees to take responsibility for resolving disputes that arise between them. The ‘genuineness’ of dispute resolution attempts would be demonstrated by the parties engaging with each other in a cooperative and timely way to attempt to resolve the dispute. The objective is to try and resolve issues through consensus at an early stage, which will reduce costs, increase productivity and build better working relationships.

2288. A note would indicate that the first step may involve the employee (or employees) first discussing the matter in dispute with their supervisor and, if the dispute is still not resolved, with more senior management. This reflects existing common practice for dispute settling at the workplace level. The process described in the note is only an example. As under the current system, employers and employees remain free to choose the most appropriate arrangements for attempting to settle disputes at the workplace level.

*New section 175 – Where dispute cannot be resolved at workplace level*

2289. Proposed section 175 would provide the next step in the process if workplace level discussions have not succeeded in settling the dispute.



2290. Subsection 175(1) would allow any party to the dispute to elect to refer the matter to an alternative dispute resolution process. An alternative dispute resolution process involves the parties seeking expert outside assistance to try to resolve their dispute.

2291. Subsection 175(2) would provide that the alternative dispute resolution process is to be conducted by a person agreed between the parties in dispute. Subsection 175(6) would provide that where an alternative dispute resolution process is used, the parties to the dispute must genuinely attempt to resolve the dispute using that process. This would include making genuine attempts to agree on who should conduct the alternative dispute resolution process if the parties are unable to resolve the dispute at the workplace level.

2292. The requirement to make genuine attempts to resolve the dispute is intended to prevent a party or parties acting in a manner designed to frustrate settlement of the dispute. For instance, a party could request a dispute resolution process and then not participate or refuse to participate in meaningful negotiations with the person that they are in dispute with. Taking such an approach would cause delay, impose extra costs on the other party or simply discourage attempts at meaningful discussions.

2293. Subsection 175(3) would provide that if the employer and the employee cannot agree on who would provide the assistance under the alternative dispute resolution process, either party may notify the Industrial Registrar of this fact.

2294. Subsection 175(4) would require the Industrial Registrar to provide all parties to the dispute with information that will be prescribed in the regulations. It is anticipated that the prescribed information would include information about the types of alternative dispute resolution services that are available for the purposes of this Part.

2295. After the Industrial Registrar has provided the prescribed information, there would be a *consideration period* of 14 days (defined in subsection 175(7)) to provide the parties with another opportunity to reach agreement about using an alternative dispute resolution process, including who should conduct that process. If at the expiry of the consideration period no agreement has been reached, either party to the dispute may lodge an application with the AIRC for the AIRC to conduct the alternative dispute resolution process (subsection 175(5)).

2296. The appointment of the AIRC to conduct the dispute resolution process in these circumstances would help to ensure that the settlement of disputes provided for in this Division is not frustrated by the parties being unable to agree on who will conduct the process.

2297. The fact that the AIRC would conduct the alternative dispute resolution process if the parties are unable to agree on a provider does not prevent the parties from agreeing at an earlier stage under subsection 175(1) to refer their dispute to the AIRC for assistance. In these circumstances, the consideration period and other requirements would not apply.

#### *New section 176 – Conduct during dispute*

2298. Proposed section 176 would outline certain responsibilities of the employer and employee(s) who are in dispute.

2299. Subsection 176(1) would require an employee who is a party to a dispute resolution process (including when that process is at the stage of workplace level discussions) to:

- continue to work in accordance with his or her contract of employment, unless the employee has a reasonable concern about an imminent risk to his or her health or safety; and
- comply with any reasonable direction given by his or her employer to perform other available work, either at the same workplace or at another workplace.

2300. Subsection 176(2) would provide that an employer's direction to perform other available work must have regard to:

- the provisions of any Commonwealth, State, or Territory occupational health and safety legislation that applies; and
- whether the proposed work is appropriate for the employee to perform.

### **New Division 3 – Alternative dispute resolution process conducted by Commission under model dispute resolution process**

2301. Proposed Division 3 would deal with the AIRC's processes and powers where it conducts a dispute resolution process as part of the model dispute resolution process prescribed in Division 2. The AIRC may conduct a dispute resolution process either because:

- the parties to the dispute agree to give the AIRC such a role; or
- the AIRC is appointed to such a role in accordance with this Division.

#### *New section 176A – Alternative dispute resolution process*

2302. Proposed section 176A would provide a non-exhaustive list of procedures able to be used for the resolution of disputes under the model dispute resolution process.

2303. *Conferencing* (paragraph 176A(a)) is a general term that refers to meetings in which the parties and/or their representatives discuss the issues in dispute with or without the assistance of a dispute resolution specialist. Conferencing may combine facilitative and advisory dispute resolution processes depending on the outcome that is sought by the parties.

2304. *Mediation* (paragraph 176A(b)) is a process in which the parties to a dispute, with the assistance of a mediator, identify the disputed issues, develop options, consider alternatives and try to reach an agreement. The mediator has no advisory role regarding the issues in dispute or the possible outcomes, but may advise on the mediation process.

2305. *Assisted negotiation* (paragraph 176A(c)) is a process in which the parties to a dispute, who have identified the issues to be negotiated, use the assistance of a dispute resolution practitioner to negotiate an outcome. The person who is assisting the negotiations has no advisory role on the content of the matters discussed or the outcome of the process, but may provide advice to the parties about processes the parties may use to aid their dispute resolution.

2306. *Neutral evaluation* (paragraph 176A(d)) is a process in which the person who provides assistance in the dispute resolution process considers and appraises the dispute and provides advice on the facts of the dispute, the law and, in some cases, possible or desirable outcomes and how these may be achieved.

2307. *Case appraisal* (paragraph 176A(e)) is a process in which a dispute resolution practitioner (the case appraiser) investigates the dispute and provides advice on possible and desirable outcomes and the means by which these may be achieved.

2308. *Conciliation* (paragraph 176A(f)) is a process in which the parties to a dispute, with the assistance of a conciliator, identify the issues in dispute, develop options, consider alternatives and attempt to reach an agreed outcome. The conciliator may have an advisory role on the content of the dispute or its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation, make suggestions for terms of settlement, give expert advice on likely settlement terms, and actively encourage the participants to reach an agreement. Conciliation covers a broad spectrum of processes used to resolve complaints and disputes including:

- informal discussions held between the parties and an external person or body in an attempt to avoid, resolve or manage a dispute; and
- combined processes in which, for example, an impartial party facilitates discussion between the parties, provides advice on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement.

2309. *Arbitration* (paragraph 176A(g)) is a process in which the parties to a dispute present arguments and evidence to the arbitrator who makes a determination.

2310. Paragraph 176A(h) would allow regulations to be made to specify other types of procedures or services as being an alternative dispute resolution process for the purposes of the Division.

#### *New section 176B – Application*

2311. Proposed section 176B would provide a process for making an application to the AIRC when the process outlined in section 175 has been completed.

2312. Subsection 176B(1) would limit the circumstances in which an application may be made to the AIRC. An application may only be made if the dispute is one that may be resolved using the model dispute resolution process, and the parties to the dispute have been unable to resolve the matter(s) in dispute at the workplace level.

2313. Subsection 176B(2) would prescribe the details that must be included in an application to the AIRC under this Division. The required information will assist the AIRC to determine whether it has jurisdiction to deal with the matter. The application must describe the matter or matters in dispute and specify that the application to the AIRC is made under the model dispute

resolution process (as distinct from a different process that may be included in a workplace agreement). The person who is seeking the AIRC's assistance must also sign the application.

2314. The AIRC may allow amendments to the application and correct, amend or waive any error, defect or irregularity in the application (subsection 176B(4)).

2315. Subsection 176B(3) would allow the AIRC to request additional information from the applicant about the matter(s) in dispute and the attempts made at the workplace level to resolve the dispute. This ensures that the AIRC has sufficient information upon which to make a decision about whether it has jurisdiction to deal with the matter.

*New section 176C – Refusing application*

2316. Proposed section 176C would provide grounds upon which the AIRC could refuse an application for its assistance made under this Division.

2317. Subsection 176C(1) would require the AIRC to refuse to provide dispute resolution assistance if the dispute is not one to which the model dispute resolution process applies (section 173).

2318. Subsection 176C(2) would provide that the AIRC may refuse to provide dispute resolution assistance if the parties have not made a genuine attempt to either:

- resolve the dispute at the workplace level (section 174); or
- reach agreement about who should conduct the alternative dispute resolution process (section 175).

2319. It is intended that the AIRC would have discretion to refuse an application where none of the parties have entered into reasonable discussions about the matter(s) in dispute or the process through which the dispute is to be resolved. In particular, the party who elects to use the dispute resolution process in this Division should not be able to bring a matter before the AIRC by unreasonably refusing to discuss alternatives to the AIRC providing the dispute resolution process. However, the AIRC may accept an application under this Division if the refusal of one or more parties to engage in discussions would deny the other party or parties a reasonable opportunity to pursue resolution of the dispute.

### Illustrative Example

Maire works as a steel processor for a can company in regional Queensland. She is covered by the Metals Industry Award 1998. She thinks her employer has been underpaying her shift loadings. Workplace level discussions involving Maire's shift supervisor, the payroll clerk, the plant manager and the union delegate fail to resolve the issue. Maire suggests to the plant manager that they could get someone from the community legal centre to conciliate the dispute, but the plant manager says 'there's nothing more to talk about'.

Maire notifies a dispute with the Industrial Registrar. The Registrar provides Maire and her employer with some extra information, including that if they still haven't made progress after 14 days the AIRC may be able to provide assistance. Maire again approaches the plant manager about agreeing to conciliate. He refuses to discuss the matter anymore. Three weeks later Maire applies to the AIRC for assistance with dispute resolution.

The AIRC considers that Maire's employer has not made a genuine attempt to settle the dispute with Maire. However, as Maire has done all that she can to attempt to resolve the dispute, the AIRC could agree to conduct an alternative dispute resolution process, as to not do so would be unfair to Maire.

### *New section 176D – Commission's powers*

2320. Proposed section 176D would prescribe the AIRC's powers and processes for conducting alternative dispute resolution under the model dispute resolution process.

2321. Subsection 176D(2) would allow the AIRC to schedule conferences between the parties and/or their representatives. These conferences could involve a Commissioner being present, or only involve the parties and/or their representatives (paragraph 176A(a)).

2322. Subsection 176D(3) would require the AIRC to act quickly, relatively informally, and in accordance with any agreement between the employer and employee concerned about how the alternative dispute resolution process should be conducted. It is intended that the AIRC would proceed in accordance with the wishes of the parties, rather than the AIRC being primarily responsible for choosing the ways in which dispute resolution should be attempted or guiding the parties to what the AIRC considers being the most appropriate outcome.

2323. Subsection 176D(4) would provide that the AIRC cannot use any of the following powers when it is conducting alternative dispute resolution under the model dispute resolution process:

- compel a person to do anything;
- make an award or order in relation to any matter that is in dispute; or
- appoint a board of reference (section 116K).

2324. The combined effect of paragraphs 176D(4)(b) – (c) and subsection 176D(5) is that the AIRC may only arbitrate or determine a matter under the model dispute resolution process if all of the parties to the dispute agree to it doing so. In all other cases, the AIRC would be prohibited from doing so.

2325. Subsection 176D(6) would allow the parties to a dispute under the model dispute resolution process to be represented. The AIRC may impose reasonable limitations on the use or role of representatives.

2326. Subsection 176D(7) would allow the AIRC to make recommendations about the best ways in which to resolve an aspect or aspects of the dispute, but only in circumstances where all parties have requested that it make such a recommendation.

2327. Subsection 176D(8) would make clear that the powers of the AIRC which would be prescribed in Subdivision B , Division 3A of Part II do not apply where the AIRC is conducting an alternative dispute resolution process under the model dispute resolution process.

*New section 176E – Privacy*

2328. Proposed section 176E would set down privacy and confidentiality requirements for an alternative dispute resolution process conducted by the AIRC under this Division.

2329. Subsection 176E(1) would require the AIRC to conduct an alternative dispute resolution process in private. This means that the AIRC may not publish transcripts or decisions with respect to a dispute that is conducted under this Division.

2330. Subsection 176E(2) would prohibit the AIRC from disclosing or using any information or document that is produced before the AIRC during an alternative dispute resolution process. There are four exceptions to this prohibition, being where the disclosure or use is:

- needed for the purpose of conducting the alternative dispute resolution process (paragraph 176E(2)(a));
- consented to by the parties to the alternative dispute resolution process (paragraph 176E(2)(b));
- authorised by regulations made for the purpose of this section (paragraph 176E(2)(c)); or
- required or permitted by law (paragraph 176E(2)(d)).

2331. Subsection 176E(3) would make anything said or done in the course of an alternative dispute resolution process inadmissible evidence in any court, arbitration, or other proceeding that is related to the dispute, unless the parties agree to the admission of such evidence or the evidence is admitted in circumstances prescribed by regulations made for the purposes of paragraph 176E(3)(e). This is consistent with the general law position that verbal and written communications made ‘without prejudice’ during settlement negotiations for a dispute are inadmissible in subsequent proceedings relating to the subject matter of the negotiations.

2332. The inclusion of a regulation making power in subsections 176E(2) – (3) is designed to retain some flexibility to add further categories where it would be appropriate to allow the disclose or use of information, documents, or evidence in any future proceedings. In the event that regulations are proposed to be made, the Attorney-General will be consulted with regard to any policy implications for the administration of civil or criminal justice, or alternative dispute resolution.

*New section 176F – When alternative dispute resolution process complete*

2333. Proposed section 176F would provide for when a dispute resolution process conducted under this Division is completed. This would be when the parties agree that the matters in dispute are resolved (paragraph 176F(a)), or when the person who initiated the use of the dispute resolution process does not wish to continue with it (paragraph 176F(b)).

**New Division 4 – Alternative dispute resolution process used to resolve other disputes**

2334. Proposed Division 4 would provide a process by which the AIRC may provide assistance to parties to attempt to resolve disputes that arise during collective bargaining negotiations.

*New section 176G – Application*

2335. Proposed section 176G would allow *negotiating parties* for a collective agreement (as defined for the purposes of proposed Part VB – Workplace Agreements) to apply to the AIRC for assistance in relation to a matter in dispute that has arisen in the course of bargaining.

2336. The AIRC will only be able to assist negotiating parties during collective bargaining when both parties agree to seek its assistance. This is consistent with genuine agreement making, where the focus is on the parties reaching agreement between themselves. Negotiating parties are not limited to using the AIRC in these circumstances. They would be able to agree to refer the outstanding issue(s) to a private dispute resolution specialist for assistance, rather than the AIRC.

2337. Subsection 176G(2) sets out the procedural requirements for making an application under this Division.

2338. Subsection 176G(3) would allow the AIRC to seek more information from the parties on the matter(s) in dispute.

*New section 176H – Grounds on which Commission must refuse application*

2339. Proposed section 176H would require the AIRC to refuse an application for its assistance made under this Division if the matters in dispute do not arise in the course of collective bargaining, or because all of the negotiating parties have not agreed to seek the AIRC's assistance (ie the requirements in paragraphs 176G(a) – (b) have not been met).

*New section 176I – Powers of the Commission*

2340. Proposed section 176I would specify that, with one exception, the AIRC has the same powers when conducting a dispute resolution process under this Division as it does when

conducting a dispute resolution process under Division 3 of this Part. The exception is that the AIRC may not be conferred arbitral or determinative powers by the parties to the dispute (contrast proposed section 176D). This is consistent with the existing position in the WR Act where the AIRC's role during collective bargaining negotiations is confined to exercising conciliation powers (pre-reform section 170NA).

*New section 176J – Privacy*

2341. Proposed section 176J would set down privacy and confidentiality requirements for an alternative dispute resolution process conducted by the AIRC under this Division. These requirements are the same as those contained in proposed section 176E.

2342. Subsection 176J(1) would require the AIRC to conduct an alternative dispute resolution process in private. This means that the AIRC may not publish transcripts or decisions with respect to a dispute that it conducts under this Division.

2343. Subsection 176J(2) would prohibit the AIRC from disclosing or using any information or document that is produced before the AIRC during an alternative dispute resolution process. There are four exceptions to this prohibition, being where the disclosure or use is:

- needed for the purpose of conducting the alternative dispute resolution process (paragraph 176J(2)(a));
- consented to by the parties to the alternative dispute resolution process (paragraph 176J(2)(b));
- authorised by regulations made for the purpose of this section (paragraph 176J(2)(c)); or
- required or permitted by law (paragraph 176J(2)(d)).

2344. Subsection 176J(3) would make anything said or done in the course of an alternative dispute resolution process inadmissible evidence in any court, arbitration, or other proceeding that is related to the dispute, unless the parties agree to the admission of such evidence, or the evidence is admitted in circumstances prescribed by regulations made for the purposes of paragraph 176J(3)(e).

2345. The inclusion of a regulation making power in subsections 176J(2) – (3) is designed to retain some flexibility to allow the disclosure or use of information, or the admission of evidence in future proceedings. In the event that regulations are proposed to be made, the Attorney-General will be consulted with regard to any policy implications for the administration of civil or criminal justice, or alternative dispute resolution.

*New section 176K – When alternative dispute resolution process complete*

2346. Proposed section 176K would provide that a dispute resolution process conducted under this Division is completed when the parties agree that the matters in dispute are resolved. It is not necessary for the settlement of the parties' dispute to be reflected in the terms of a workplace



agreement – the parties may agree that a matter is not one they wish to include in the proposed workplace agreement.

**New Division 5 – Dispute resolution process conducted by the Commission under workplace agreement**

2347. Proposed Division 5 would enable the AIRC to provide assistance to parties who are in dispute about the application of a workplace agreement. This Division only applies where the terms of the workplace agreement confer the AIRC with jurisdiction under that agreement's dispute resolution process (proposed subsection 101A(1)).

*New section 176L – Application*

2348. Proposed section 176L would set out the process for making an application to the AIRC under a dispute resolution process contained in a workplace agreement.

2349. Subsection 176L(1) would limit the circumstances in which an application may be made to the AIRC. An application may only be made if the dispute is one that is able to be resolved in accordance with the terms of the workplace agreement's dispute resolution process, and the parties to the dispute have complied with any terms of the workplace agreement requiring them to take particular steps (eg to try to resolve the dispute at the workplace level) before the application is made to the AIRC.

2350. Subsection 176L(2) would set out the details that must be included in an application to the AIRC under this Division. The required information will assist the AIRC to determine whether it has jurisdiction to deal with the matter. The application must describe the matter(s) that the employer and employee(s) are in dispute about, and specify that the application to the AIRC is made under the dispute resolution process in a workplace agreement (as distinct from the model dispute resolution process described in Divisions 2 and 3). The person who is seeking the AIRC's assistance must also sign the application.

2351. Subsection 176L(3) would allow the AIRC to request additional information from the applicant about the matter(s) in dispute and the steps taken by the parties in an attempt to resolve the dispute. It is intended that the AIRC may also request further information about the terms of the workplace agreement in order to properly assess the matters in dispute and the steps taken by the parties. This ensures that the AIRC has sufficient information upon which to make a decision about whether it has jurisdiction to deal with the matter.

*New section 176M – Grounds on which Commission must refuse application*

2352. Proposed section 176M would provide grounds upon which the AIRC must refuse an application for its assistance made under this Division. The AIRC would not be able to provide dispute resolution assistance if the dispute is not one that, under the terms of the workplace agreement, is able to be dealt with using a dispute resolution process conducted by the AIRC or if the parties have not followed the steps that are required by the terms of the workplace agreement.

### Illustrative Example

Gavan is an electrician employed by Country Power Pty Ltd. Country Power has installed global positioning systems (GPS) in all company vehicles (including Gavan's van) so that the closest electrician to a power supply problem can be easily identified, thus improving customer service. The company has suspended Gavan without pay under the company's disciplinary code in the Country Power Agreement (the agreement). The company says the GPS indicated that Gavan had been at the pub during working hours. Gavan disputes the company's decision to suspend him, telling his manager that he was at the pub for a counter lunch and that he wasn't drinking. Gavan's manager doesn't believe his version of events, saying that no-one goes into a pub without wanting to drink. Gavan notifies a dispute with the AIRC about the application of the agreement. The agreement contains a dispute resolution process:

*1. Where a dispute arises about the application of this Agreement, in the first instance, the aggrieved employee shall discuss the dispute with their manager and attempt to settle the issue in dispute by a written agreement.*

*2. Where a dispute is not resolved under step 1, either party may (within a reasonable time) request the setting up of a Disputes Committee. The Disputes Committee shall comprise two employees (other than the aggrieved employee), and two managers (other than the manager referred to in step 1). The Disputes Committee shall attempt to resolve the disputed matter within five working days of its first meeting. Any resolution shall be documented in writing, subject to ratification by the employee concerned and the employer.*

*3. Should a dispute not be resolved by using the processes in steps 1 or 2, the dispute may be referred by either party to the Australian Industrial Relations Commission for conciliation and, if conciliation fails, by arbitration.*

The AIRC refuses to hear Gavan's application because he has not followed step two in the agreement's dispute resolution process. The AIRC tells Gavan he may apply to the AIRC later if the Disputes Committee is unable to resolve the dispute.

### *New section 176N – Commission's powers*

2353. Proposed section 176N would confine the AIRC's powers with respect to a dispute resolution process in a workplace agreement.

2354. Subsection 176N(1) would specify that the AIRC only has those powers that are given to it either under the terms of the workplace agreement, or agreed between the parties to the dispute.

2355. Subsection 176N(2) would explicitly prohibit the AIRC from making *orders* (defined in section 4 of the WR Act) when it is conducting a dispute resolution process under a workplace agreement. This would have the consequence that an appeal under section 45 of the WR Act may not be instituted in reliance on the AIRC having made an order in relation to a dispute resolution process in a workplace agreement.

2356. Subsection 176N(3) would require the AIRC to act quickly, relatively informally, and in accordance with any agreement between the employer and employee concerned about how the alternative dispute resolution process should be conducted. It is intended that the AIRC would

proceed in accordance with the wishes of the parties, rather than the AIRC being primarily responsible for choosing the ways in which dispute resolution should be attempted or guiding the parties to what the AIRC considers being the most appropriate outcome.

2357. Subsection 176N(4) would clarify that the powers of the AIRC which would be prescribed in Subdivision B, Division 3A of Part II do not apply where the AIRC is conducting the model dispute resolution process. In *Re: Telstra Ltd & Communications, Electrical and Plumbing Union* [Print PR940569], a full bench of the AIRC decided that where the dispute settlement process in an agreement was silent, there was a statutory presumption that the AIRC possessed all of its general dispute settling powers contained in Part VI of the WR Act, unless any power was inconsistent with the other terms of the agreement. The AIRC made this finding based on the fact that Part VI of the WR Act was expressed to apply to any other proceeding before the AIRC ‘unless the context otherwise requires’. As a result of subsection 176N(4), the parties to a workplace agreement, in any dispute about that agreement’s application, would be free to specify the role they want the AIRC to play in their dispute resolution process. For example, the parties may expressly agree to give the AIRC particular powers by reference to other Parts of the Act (ie, the power to compel the production of relevant evidence).

2358. If no powers are expressly conferred in a workplace agreement’s dispute resolution process, the AIRC would only have whatever powers that may be conferred by the agreement of the parties (as explained with respect to paragraph 176N(3)(c)).

#### *New section 176O – Privacy*

2359. Proposed section 176O would set down privacy and confidentiality requirements for an alternative dispute resolution process conducted by the AIRC in accordance with the terms of a workplace agreement. These requirements are the same as those explained with respect to proposed section 176D.

### **Division 6 – Dispute resolution process conducted by another provider**

#### *New section 176P – Application of this Division*

2360. Proposed section 176P would provide that this Division applies to a dispute resolution process that is conducted by a person or party other than the AIRC. This reflects the fact that the AIRC would not have exclusive jurisdiction to deal with disputes, but that parties are free to choose the dispute settlement arrangement that best meets their mutual needs.

#### *New section 176Q – Representation*

2361. Proposed section 176Q would provide that the person or body who is conducting a dispute resolution process under this Division may allow the parties to be represented and control the conduct of any such representative.

2362. Subsection 176Q(1) would make representation subject to the approval of the person or body who is conducting the dispute resolution process. This is consistent with processes before the AIRC, in which representation is subject to leave being granted (section 42 of the WR Act).

2363. Subsection 176Q(2) would allow the person conducting the dispute resolution process to set reasonable limits on the representative's conduct.

2364. Subsection 176Q(3) would deal with disputes about the application of a workplace agreement. This subsection would make any limits imposed on a party's representative by the person conducting the dispute resolution process subject to the terms of the workplace agreement. This means that if the agreement provides a party with a right to be represented, that right cannot be removed by the person conducting the dispute resolution process.

*New section 176R – Privacy*

2365. Proposed section 176R would set down privacy and confidentiality requirements for a dispute resolution process that is conducted by a person or body that is not the AIRC.

2366. These requirements are substantially the same as those which would apply with respect to the AIRC (as explained for proposed section 176E).

2367. Subsection 176R(3) would make contraventions of subsections 176R(1) – (2) a civil remedy provision. Subsections 176R(5) – (6) would provide for pecuniary penalties to be ordered by a Court against a person who has contravened subsections 176R(1) – (2).

2368. Subsection 176R(7) would identify who may apply to a Court for a pecuniary penalty under subsection 176R(5).

**Item 169 – Division 1 of Part VIII (heading)**

2369. This item would repeal and change the heading of this Division from 'Division 1 – Penalties and other remedies for contravention of awards and orders' to 'Division 1 – Definitions'.

**Item 170 – Subsection 177A**

2370. This item would repeal section 177A and substitute a new section 177A that defines the terms to be used in Part VIII.

2371. Under proposed section 177A, an *applicable provision*, in relation to a *person* (this term is defined in subsection 4(1)), would mean a term of one of the following that applies to that person:

- an AWA;
- the Standard;
- an award;
- a collective agreement; or
- an order of the AIRC (except an order made under Division 4 of Part VC).

2372. An *applicable provision* would also include an entitlement of a person under either section 170AA (meal breaks) or section 170KB (extended entitlement to parental leave).

2373. A note would be inserted after the proposed definition of *applicable provision* to make it clear that a workplace determination and an undertaking are to be treated as though they were collective agreements. This means that they are to be enforced as though they were collective agreements (for example, the standing rules in proposed section 177AA for collective agreements will apply to proceedings for breach of an undertaking).

2374. A second note would be inserted after the proposed definition of *applicable provision* to indicate that orders of the AIRC made under Division 4 of Part VC would be enforceable under section 109V.

2375. Proposed section 177A would also define *eligible court* to mean:

- *the Court* (this term is defined in subsection 4(1));
- the Federal Magistrates Court;
- a District, County or Local Court;
- a magistrate's court;
- the Industrial Relations Court of South Australia; or
- any other State or Territory court that is prescribed by the regulations.

#### **Item 171 – Before section 178**

2376. This item would insert a new section and Division heading.

#### **Division 2 – Penalties and other remedies for contravention of applicable provisions**

##### *New section 177AA – Standing to apply for penalties or remedies under this Division*

2377. Proposed section 177AA would establish who may apply for a penalty or other remedy under this Division for a breach of an applicable provision. The table in subsection 177AA(1) would set out who may apply for such a penalty or remedy in relation to each applicable provision.

2378. A note would be inserted after subsection 177AA(1) to clarify that a workplace determination and an undertaking are to be treated as though they were collective agreements.

2379. Subsection 177AA(2) would set out the circumstances in which an organisation of employees that represents an employee who is bound by an AWA may apply for a penalty or other remedy under this Division. This subsection would provide that an organisation of employees would only be able to commence such proceedings where:

- the employee has requested, in writing, the organisation to make an application on his or her behalf;
- a member of the organisation (not necessarily the employee on whose behalf the organisation is applying) is employed by the employee's employer; and
- the organisation is entitled, under its eligibility rules, to represent the industrial interests of the employee who has requested representation in relation to work carried on by that employee for his or her employer.

2380. This subsection would ensure that an employee does not unwittingly become the subject of a dispute between their employer and a union. It is designed to protect the employee who chooses to be party to an AWA, while retaining the ability of unions to represent their members, and others who elect to appoint unions as their agents.

2381. Subsection 177AA(3) would set out the circumstances in which an organisation of employees could apply for a penalty or other remedy in relation to a breach of an applicable provision that is:

- a term of the Standard;
- a term of a collective agreement;
- section 170AA; or
- section 170KB.

2382. Under this subsection, an organisation of employees would not be able to make an application for a penalty or other remedy unless a member of that organisation is employed by the respondent employer and the breach relates to, or affects, that member of the organisation or work carried on by that member for the employer. This subsection would allow an organisation of employees to seek penalties or other remedies where that organisation has a member at the relevant workplace who is affected by a breach of an applicable provision.

#### **Item 172 – Subsection 178(1)**

2383. This item would repeal subsection 178(1) which sets out which courts may impose penalties for a breach of an award, order of the AIRC or a certified agreement.

2384. Proposed subsection 178(1) would establish that an eligible court may impose a penalty, in accordance with this Division, for a breach of an applicable term. The maximum penalties for contravening this subsection would be dealt with in subsection 178(4).

#### **Item 173 – Paragraph 178(2)(a)**

#### **Item 174 – Paragraph 178(2)(b)**

2385. These items would repeal and replace paragraph 178(2)(a) and amend paragraph 178(2)(b).

2386. Under these proposed amendments, a person who commits two or more breaches of an applicable provision in the same course of conduct would be deemed by these proposed amendments to have only breached subsection 178(2) once. This would prevent a person being punished multiple times for the same breach of an applicable provision.

**Illustrative Example**

Daniel and Julia are employed by Hill Water Haulage Pty Ltd (Hill Water). Both Daniel and Julia have been working a lot of overtime at the request of their employer. Under their collective agreement, they are entitled to be paid penalty rates for this overtime work. However, when the next pay period comes around, both Daniel and Julia find that they have not been paid for any overtime they have worked and Hill Water is refusing to make any additional payments. If Daniel and Julia were to bring proceedings under subsection 178(1) seeking a penalty against Hill Water for breach of an applicable provision (ie a term in their collective agreement) an eligible court could only impose one penalty on the company. This is because the wrongful conduct arose out of the same course of conduct by Hill Water.

**Item 175 – Subsection 178(3)**

2387. This item would repeal and replace subsection 178(3) which sets out the circumstances in which subsection 178(2) does not apply.

2388. As noted above, subsection 178(2), as amended, would provide that two or more breaches of an applicable provision are to constitute the same breach where they arise out of the same course of conduct. However, proposed subsection 178(3) would provide that subsection 178(2) would not apply after an eligible court had imposed a penalty on a person for the original two or more breaches. In effect, an order made by an eligible court would ‘reset the counter’ allowing a fresh penalty to be imposed for any new breaches of an applicable provision.

**Illustrative Example (continued)**

Continuing the previous example, if Daniel and Julia obtained orders from an eligible court which imposed a penalty under subsection 178(1) on Hill Water for breach of the overtime clause of their collective agreement, then any subsequent breaches of that same clause would make Hill Water liable for an additional penalty. For instance, if, after the order was made, Daniel and Julia worked more overtime and were again not paid for that work, they could seek another penalty against Hill Water for breach of an applicable provision.

**Item 176 – Subsections 178(4) to (5A)**

2389. This item would repeal subsections 178(4) – (5A) which establish maximum penalty amounts and standing arrangements for the recovery of penalties in respect of various industrial instruments.

2390. Proposed subsection 178(4) would set the maximum penalties to be imposed under subsection 178(1) for a breach of an applicable provision. The proposed maximum penalty would be 60 penalty units for an individual and 300 penalty units for a body corporate.

2391. Proposed subsection 178(5) would allow an eligible court to order the payment of an amount for loss or damages where it considers that a party to an AWA has suffered injury at the hands of the other party to the AWA as a result of that person breaching an applicable provision in that AWA.

**Item 177 – Subsection 178(6)**

**Item 178 – Subsection 178(6)**

**Item 179 – Subsection 178(6A)**

**Item 180 – Subsection 178(6A)**

**Item 181 – Subsection 178(6B)**

**Item 183 – Subsection 178(8)**

2392. These items would make consequential amendments to reflect the inclusion in the Bill of the new concepts of eligible court and/or applicable provision.

2393. The proposed amendments to subsections 178(6) and (6A) would exclude an applicable provision which is a term of an AWA because subsection 178(5) provides an equivalent remedy for employees who are parties to an AWA.

**Item 182 – Subsection 178(7)**

2394. This item would make a technical amendment reflecting current drafting practice.

**Item 184 – Subsection 178(9)**

2395. This item would repeal subsection 178(9) which defines *employee* to include an independent contractor for the purposes of section 178, as it applies to orders of the AIRC made under pre-reform section 127B. This subsection has no application under pre-reform section 178 as no court of competent jurisdiction has power to make orders under pre-reform section 127B.

**Item 185 – Section 179**

2396. This item would repeal section 179 and replace it with the following sections.

*New section 179 – Recovery of wages etc.*

2397. This proposed section would provide that where an employer is required by an applicable provision (except a term of an AWA) to pay an amount to an employee, or an amount into an employee's superannuation fund, that employee (or a workplace inspector on that employee's behalf) can lodge an application in an eligible court to recover that amount but that application must be made within six years of the time the employer was required to make the payment.

*New section 179AA – Damages for breach of AWA*

2398. This proposed section would provide that a party to an AWA may recover an amount for loss or damage as a result of a breach of an AWA by the other party. An action for loss or damages must be brought in an eligible court within six years of the date on which the cause of action arose.



**Item 186 – Subsection 179A(1)**

2399. This item would amend subsection 179A(1) to allow an eligible court to order interest for the period until judgement on an amount ordered to be paid under subsections 178(5) or (6) or under sections 179 or 179AA.

**Item 187 – Subsection 179A(1)(a)**

2400. This item would make consequential amendments to reflect the inclusion in the Bill of the new concepts of eligible court by replacing the term ‘Court or a court of competent jurisdiction, as the case may be’ with the term ‘an eligible court’.

**Item 188 – Section 179B**

2401. This item would repeal section 179B which allows a court of competent jurisdiction to impose interest on judgements. Under proposed section 179B, interest would apply from the date on which judgement is entered to any judgement or order made by an eligible court under subsections 178(5) and (6), section 179 or 179AA.

**Item 189 – Paragraph 179C(a)**

2402. This item would allow a person seeking to recover loss or damages as a result of a breach of an AWA to utilise the small claims procedures in a magistrate’s court. The small claims procedure is set out at section 179D.

**Item 190 – Paragraph 180(1)(a)**

2403. This item would make consequential amendments to reflect the inclusion in the Bill of the new concept applicable provision.

**Item 191 – Division 3 of Part VIII**

2404. This item would repeal Division 3 of Part VIII which allows a Full Bench of the AIRC to suspend or cancel awards or orders where certain conditions are met. The power of the AIRC to deal with awards and orders in this manner will be dealt with in proposed section 44Q.

**Item 192 – At the end of Part VIII**

2405. This item would insert a new Division at the end of Part VIII.

**Division 4 – General provisions relating to civil remedies**

*New section 188 – Operation of this Division*

2406. This proposed section would define what is meant by the term *civil remedy provisions*. It would provide that *civil remedy provisions* means:

- section 178;
- another provision of this Act declared to be a civil remedy provision; and

- another provision of the WR Act that provides a remedy for a contravention of a civil remedy provision.

*New section 189 – Involvement in contravention treated in same way as actual contravention*

2407. This proposed section would establish that a person involved in a contravention of a civil remedy provision is to be treated as having contravened that provision personally. The term *involved in* would be defined for the purposes of this section by subsection 189(2).

*New section 190 – Civil evidence and procedure rules for civil remedy orders*

2408. This proposed section would provide that a court hearing a matter under a civil remedy provision must apply the rules of evidence and procedure for civil matters.

*New section 191 – Recovery of pecuniary penalties*

2409. This proposed section would provide that a pecuniary penalty payable under a civil remedy provision may be recovered as a debt due to the person to whom that penalty is payable. A pecuniary penalty would be payable to a person where an order to this effect is made under paragraph 356(b).

*New section 192 – Civil proceedings after criminal proceedings*

2410. Under this proposed section, a court must not make an order under a civil remedy provision that requires a person to pay a pecuniary penalty if that person has been convicted of an offence which relates to substantially the same conduct to which the order could otherwise be made. This proposed section would ensure that a person who is convicted of a criminal offence would not also face a pecuniary penalty in relation to the same conduct.

**Illustrative Example**

Benita operates a bakery which employs Sam. Sam and some of her fellow employees have been engaging in industrial action, in contravention of an order of the AIRC to stop that action under section 111. Contravening an order of the AIRC would be an offence under proposed subsection 299(3) of the WR Act. If Sam is convicted of an offence under this provision, this proposed section would operate to prevent a court from subsequently ordering Sam to pay a pecuniary penalty under subsection 178(1) for breach of an applicable provision (namely an order of the AIRC).

*New section 193 – Criminal proceedings during civil proceedings*

2411. This proposed section would set out the interrelationship between criminal and civil proceedings that relate to conduct of a person which may be a breach of a civil remedy provision. Under subsection 193(1), proceedings for a order under a civil remedy provision which would require that person to pay a pecuniary penalty would be stayed where:

- criminal proceedings are started, or have already been started, against the person for an offence; and

- the offence is constituted by conduct that is substantially the same as the conduct in relation to which an order under a civil remedy provision is proposed to be made.

2412. Under subsection 193(2), proceedings for an order under a civil remedy provision would be able to be resumed if the person was not convicted of an offence relating to that conduct. Alternatively, if the person is convicted of an offence, proceedings for an order under a civil remedy provision would be dismissed.

**Illustrative Example (continued)**

Based on the previous example, if criminal proceedings in relation to the breach of the section 111 order were commenced while the action under subsection 178(1) for a civil penalty against Sam for breach of an applicable provision were still on foot, this section would operate to stay the civil action pending the outcome of the criminal proceedings. Benita's proceedings for a pecuniary penalty would be dismissed if Sam were convicted of the offence for failing to comply with an order of the AIRC. However, if she were found not guilty, the civil proceedings could be resumed.

*New section 194 – Criminal proceedings after civil proceedings*

2413. This proposed section would provide that criminal proceedings may be commenced against a person for conduct that is substantially the same as that for which a pecuniary penalty has been imposed.

*New section 195 – Evidence given in proceedings for pecuniary penalty not admissible in criminal proceedings*

2414. This proposed section would provide that evidence given in proceedings for a pecuniary penalty is inadmissible in subsequent criminal proceedings which relate to substantially the same conduct. This proposed section would not, however, apply in respect of a criminal proceeding for false evidence given by the individual in proceedings under a civil remedy provision.

*New section 196 – Civil double jeopardy*

2415. This proposed section would apply the double jeopardy principle to civil remedy provisions under the WR Act. Under this proposed section, a person would not be liable to pay a pecuniary penalty under another law of the Commonwealth relating to conduct that was substantially the same as that for which they have already been ordered to pay a pecuniary penalty under a civil remedy provision.

**Item 193 – Parts VIIIA, IX and XA**

2416. This item would repeal Parts VIIIA, IX and XA and substitute new Parts IX and XA.

## **Part IX – Right of Entry**

2417. The proposed right of entry provisions would enhance the right of entry system to clearly spell out parties' rights and responsibilities. The right of entry provisions would:

- strengthen the provisions for dealing with the issue, suspension and revocation of right of entry permits;
- impose a 'fit and proper person' requirement for organisation officials seeking a right of entry permit;
- more clearly set out the rights and obligations of organisation officials, employers and occupiers of premises; and
- empower the AIRC to deal with abuses of the right of entry system.

2418. The proposed right of entry regime would impose additional conditions upon the exercise of certain rights of entry provided under occupational health and safety legislation, within constitutional limitations.

2419. The proposed right of entry provisions would expand the grounds for suspension and revocation of permits and would require a Registrar to suspend or revoke a permit in certain circumstances, including where the permit holder's right of entry under State law has been cancelled or suspended. The AIRC would also be explicitly empowered to make orders to address abuse of the right of entry system.

### **Division 1 – Preliminary**

#### *New section 197 – Objects of this Part*

2420. Proposed section 197 would set out the objects of this Part, in addition to the principal object in section 3 of the WR Act. These objects are to:

- establish a framework that balances the right of organisations to represent their members in the workplace and the right of occupiers and employers to conduct their business without undue interference or harassment;
- ensure that permit holders are fit and proper persons and understand their rights and obligations under this Part;
- ensure that occupiers and employers understand their rights and obligations under this Part; and
- ensure that permits are suspended or revoked where rights granted under this Part are misused.

#### *New section 198 – Definitions*

2421. Proposed section 198 would define a number of terms used in this Part, including:

- *OHS law*, which would be defined as a law of a State or Territory prescribed by the regulations; and
- *authority documents*, which are relevant to the exercise of a right of entry onto premises by a permit holder, would be defined as the permit holder's permit together with one of an entry notice, an exemption certificate or an order of the AIRC.

*New section 199 – Form of entry notice*

2422. Proposed section 199 would require the Registrar to approve a form of entry notice in writing (subsection 199(1)).

2423. Subsection 199(2) would set out the particulars that the form must include. These are:

- the premises that are proposed to be entered;
- the organisation in respect of which the relevant permit was issued;
- any other matters or information prescribed by the regulations.

2424. However, subsection 199(2) would not limit the matters which may be required by, or contained in, the form of entry notice (subsection 199(3)).

*New section 200 – Extraterritorial extension*

2425. Subsection 200(1) would extend the application of the Part (and related provisions of the WR Act) to premises in Australia's *exclusive economic zone* owned or occupied by an *Australian employer* (as defined in subsection 4(1)). The subsection would have effect subject to Australia's international law obligations in relation to foreign-flagged ships and foreign-registered aircraft so that consideration would need to be given to those obligations in any case where it was intended to seek to board a foreign-flagged ship or foreign-registered aircraft.

2426. Subsection 200(2) would extend the application of the Part (and related provisions of the WR Act) to premises in, on or over a prescribed part of Australia's continental shelf beyond the exclusive economic zone. The extension would operate only if the premises were connected with the exploration of the continental shelf or the exploitation of its resources and the requirements prescribed in the regulations were met. In making regulations, account would be taken of Australia's international law obligations in relation to foreign-flagged ships and foreign-registered aircraft and its obligations in relation to matters in, on or over the continental shelf (including under agreements with other countries in relation to particular areas of the continental shelf). The legislative note to subsection 200(3) would make clear that the regulations could prescribe different requirements for different parts of the continental shelf, including for reasons connected with Australia's international obligations.

2427. Subsection 200(3) would provide a specific definition of *this Act* for the purposes of section 200. This is because the definition of *this Act* in subsection 4(1) (which would otherwise apply) does not include the Registration and Accountability of Organisations Schedule and regulations made under it. The specific definition would ensure that the extraterritorial extension

under subsection 200(1) would apply to that Schedule and those regulations so far as they relate to Part IX.

## **Division 2 – Issue of permits**

### *New section 201 – Issue of permit*

2428. Proposed section 201 would provide for the issuing of a permit by the Registrar to an official of an organisation who is named in an application by the organisation (subsections 201(1) and (2)). The term *official* would be defined in proposed section 198 to include both an officer and employee of an organisation.

2429. Subsection 201(3) would provide that the permit must include any conditions imposed by the Registrar (under proposed section 202), and any conditions imposed by the AIRC on the permit for abuse of the permit system (under proposed section 231).

2430. Subsection 201(4) would provide that regulations may be made on a number of matters relating to the application for, and issue of, permits under proposed section 201. For instance, the regulations may specify the documents that must accompany an application for a permit and the form of the permit (subsection 201(4)).

### *New section 202 – Imposition of permit conditions at time of issue*

2431. Proposed section 202 would provide that at the time a permit is issued a Registrar may impose conditions on that permit that limit its effect. In deciding whether to impose any conditions, the Registrar must have regard to the list of matters specified in proposed subsection 203(2), which relate to whether the applicant for a permit is a fit and proper person.

2432. A legislative note would indicate that the conditions that might be imposed could include a limit on the range of premises to which a permit applies, or the time of day when entry may be made.

### *New section 203 – Permit not to be issued in certain cases*

2433. Proposed section 203 would set out the circumstances where an application for a permit must be refused.

2434. Subsection 203(1) would provide that a Registrar must not issue a permit to an official unless the Registrar is satisfied that the official is a fit and proper person to hold the permit having regard to the matters referred to in subsection 203(2). These include whether:

- the official has received appropriate training about the rights and responsibilities of a permit holder;
- the official has ever been convicted of a certain type of offence;
- the official or any other person (such as the official's organisation) has ever been ordered to pay a penalty under any Commonwealth, State or Territory industrial law in respect of the official's conduct (a penalty may be imposed for a contravention of

a *civil remedy provision* as defined in the Bill or for a breach of a State or Territory industrial law);

- a previous permit issued to the official under the proposed Part IX, or under the repealed right of entry provisions, has been revoked, suspended or made subject to conditions; or
- the official's right of entry for industrial purposes under a State or Territory industrial law or an OHS law has ever been suspended, cancelled, or had conditions imposed on it, or the official has been disqualified under a State or Territory industrial law or an OHS law from exercising or applying for a right of entry for industrial purposes.

2435. A legislative note would be inserted beneath proposed subsection 203(2) to make clear that Part VIIC of the *Crimes Act 1914*, which deals with spent convictions, would apply to these provisions, meaning that persons applying for a permit would not be required to disclose a spent conviction.

2436. Subsections 203(3) and (4) would prohibit the Registrar from issuing a permit in the following circumstances:

- where the issue is prevented by an order of the AIRC under proposed section 231 (which would provide that the AIRC may revoke a permit because an organisation or official for an organisation has abused the rights conferred on a permit holder) or under proposed section 233 (which would provide the AIRC with power to make orders to settle disputes about right of entry);
- during a disqualification period specified by a Registrar under proposed section 205, which would provide for the revocation and suspension of a permit by a Registrar; or
- where an official's right of entry has been suspended under a State industrial law or an OHS law, or that person has been disqualified from exercising or applying for a right of entry under State industrial law or an OHS law.

### **Division 3 – Expiry, revocation, suspension etc. of entry permits**

#### *New section 204 – Expiry of permit*

2437. Proposed section 204 would provide that a permit remains in force for three years from the date of issue unless it is revoked or the permit holder ceases to be an official of the organisation before that date, whichever happens first.

#### *New section 205 – Revocation, suspension etc. by Industrial Registrar*

2438. Proposed section 205 would provide for the revocation or suspension of permits or the imposition of conditions on permits, by a Registrar. An application would be able to be made by a workplace inspector or a prescribed person. Any application would be required to be in accordance with the regulations.

2439. The Registrar may revoke, suspend or impose conditions on one or more permits held by the permit holder, having regard to the matters specified in subsection 203(2) (subsections 205(2) and (3)).

2440. Subsections 205(4) and (5) would provide that the Registrar must revoke or suspend a permit where:

- the permit holder was found to have contravened proposed section 229, which would prohibit misrepresentations about right of entry;
- the permit holder was ordered to pay a penalty under the WR Act in respect of a contravention of the right of entry provisions;
- the permit holder's right of entry for industrial purposes under a State industrial law was cancelled or suspended or the permit holder has been disqualified under a State industrial law from exercising or applying for a right of entry for industrial purposes; or
- the permit holder has, in exercising right of entry under an OHS law, engaged in conduct that was not authorised by the OHS law.

2441. Subsection 205(7) would provide that a period of suspension or revocation under subsection 205(4) must be for at least the *minimum disqualification period*. This means:

- three months on the first occasion a Registrar takes action under subsection 205(7);
- 12 months on the second occasion; or
- five years on the third and any subsequent occasion.

2442. The Registrar's decision would be appealable under section 81 of the WR Act.

2443. Subsection 205(6) would provide that the AIRC may quash or vary a mandatory revocation or suspension of a permit (pursuant to paragraphs 205(5)(b) or (e)) where the AIRC is satisfied that the revocation or suspension was harsh or unreasonable in the circumstances. For example, if a permit was revoked due to conduct not being authorised by a State OHS law, the AIRC may quash the revocation of the federal permit if it is satisfied that the conduct was of such a minor or petty nature that revocation was unduly harsh or unreasonable in the circumstances.

*New section 206 – Revoked etc. permit must be returned to Registrar*

2444. Proposed section 206 would require a permit holder to return his or her permit to a Registrar within seven days of its revocation, expiration, suspension or when conditions are imposed on the permit after is issued (subsection 206(1)).

2445. Subsection 206(1) would be a civil remedy provision.



2446. In the case of a suspended permit, subsection 206(3) would require a Registrar to return the permit if the permit holder or the permit holder's organisation requests its return and the Registrar is satisfied that the permit is still in force.

*New section 207 – Extra conditions to be endorsed on permit*

2447. Proposed section 207 would provide that where conditions are imposed on a permit by a Registrar (under proposed section 205) or by the AIRC (under proposed section 231), the permit ceases to have effect until the Registrar has endorsed the conditions on the permit.

**Division 4 – Right of entry to investigate suspected breaches**

2448. Division 4 would set out the circumstances in which a permit holder for an organisation may seek entry to investigate suspected breaches of the WR Act or relevant industrial instruments. The general rule would be set out in proposed section 208. Proposed sections 210 and 212 – 214 would impose limitations on the right of entry.

2449. The proposed provisions in Division 4 would not apply to entry by consent. In such a case, it is the consent that authorises entry, not the provisions of Division 4.

*New section 208 – Right of entry to investigate breach*

2450. Proposed section 208 would set out the circumstances in which a permit holder for an organisation may enter premises to investigate a suspected breach of the WR Act or a relevant industrial instrument.

2451. Subsection 208(1) would authorise a permit holder for an organisation to enter premises for the purpose of investigating a suspected breach of:

- the WR Act; or
- an award, collective agreement or order under the WR Act binding on the permit holder's organisation.

2452. Subsection 208(1) would provide that a right of entry must only be exercised:

- during working hours;
- to enter premises where work is being carried out by one or more employees who are members of the permit holder's organisation; and
- where the suspected breach relates to or affects that work of any of those employees.

2453. Proposed paragraph 208(1)(b) would provide that a permit holder may enter premises to investigate the suspected breach of an AWA. However, this is qualified by proposed subsection 208(2) which would provide that right of entry to premises to investigate a suspected breach of an AWA may only be exercised where the employee who is a party to the AWA makes a written request to the organisation to investigate the breach.

2454. A permit holder must have reasonable grounds for believing there is a suspected breach for the entry to be valid.

*New section 209 – Rights of permit holder after entering premises*

2455. Proposed section 209 would specify what permit holders may do after entering premises for the purpose of investigating a suspected breach.

2456. Subsections 209(2) and (4) would provide that while on premises, permit holders can, in order to investigate a suspected breach, exercise a number of rights during working hours including:

- inspecting machinery or materials;
- interviewing employees who are members or are eligible to be members of the permit holder's organisation; and/or
- requiring an affected employer to produce or allow access to any records relevant to the suspected breach other than non-member records – the term *non-member record* would be defined in subsection (12).

2457. Subsection 209(3) would make it clear, for the avoidance of doubt, that a refusal or failure by a person to participate in an interview under subsection 209(2) would not constitute conduct covered by section 149.1 of the *Criminal Code* (which relates to obstruction of Commonwealth officials).

2458. Subsection 209(5) would authorise a permit holder to issue a notice to require an affected employer to, on a later day or days specified in the notice:

- produce or allow access to records (other than *non-member records*) relevant to the suspected breach at the premises or at another agreed place; and/or
- allow the permit holder to inspect and make copies of any of these records during working hours.

2459. The day or days specified in the notice would have to be at least 14 days after the day on which the notice is given (subsection 209(6)).

2460. Subsection 209(7) would provide that before exercising rights under subsections 209(4) or (5), the permit holder must show the employer specified documents (*authority documents* as defined in proposed section 198) evidencing the authority to exercise right of entry.

2461. Subsection 209(8) would entitle a permit holder to enter premises during working hours for the purpose of inspecting and copying the records under a notice in subsection 209(5). A legislative note would be inserted under proposed subsection 209(8) to highlight that the *Privacy Act 1988* has rules about the disclosure of personal information which may be applicable to personal information acquired through exercise of powers under proposed section 209.

2462. Upon application by a permit holder (subsection 209(9)) in accordance with the regulations and setting out the grounds upon which the application is made (subsection 209(11)), the AIRC would have discretion to order access to non-member records if it is satisfied that access is necessary to investigate the suspected breach. Before making such an order, the AIRC would be required to have regard to any conditions that apply to the permit holder's permit (subsection 209(10)).

2463. If the permit holder obtains an order under subsection 209(10) then the entry would be authorised by the order and will be subject to any conditions in the order.

2464. Subsection 209(12) would define the terms *non-member record* and *record relevant to the suspected breach*.

*New section 210 – Limitation on rights – entry notice or exemption certificate*

2465. Proposed section 210 would provide that entry to premises under proposed section 208 is not authorised unless the notice requirements in either subsection 210(2) or (3) are complied with.

2466. Subsection 210(2) would provide that a permit holder is not authorised to enter premises pursuant to an entry notice under proposed section 210 unless:

- the permit holder has given 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;
- the notice specifies entry is authorised under proposed section 208 and identifies the particulars of the suspected breach or breaches. The requirement to specify particulars means that specific details of the alleged breach must be provided beyond merely identifying what instrument or areas of the Bill are alleged to have been breached. The details should be sufficiently specific to enable the employer to identify which particular parts of the business or categories of employees are affected by the alleged breach; and
- entry is on the day specified in the notice.

2467. Subsection 210(3) would provide that a permit holder is not authorised to enter premises under proposed section 208 pursuant to an exemption certificate unless:

- a copy of the exemption certificate issued under proposed section 211 is given to the occupier of the premises not more than 14 days before the entry.
- entry is on the day specified in the certificate; and
- the premises are those specified in the certificate.

2468. Subsection 210(4) would provide that conduct after entry under proposed section 209 is not authorised unless the conduct is for the purpose of investigating a suspected breach identified in the entry notice.

2469. Proposed section 210 would relate to entry authorised by proposed section 208, not entry in other circumstances. Accordingly, proposed section 210 would not be applicable to entry to inspect records at a later agreed time (under subsection 209(8)) or entry under an AIRC order to enter premises to inspect non-member records (under subsection 209(10)).

*New section 211 – Exemption from requirement to provide entry notice*

2470. Proposed section 211 would allow an organisation to apply for a certificate exempting it from the notice requirements for entry onto premises under proposed section 209 (subsection 211(1)).

2471. A Registrar would be required to issue such a certificate if satisfied that there are reasonable grounds for believing that advance notice of entry might result in relevant evidence being destroyed, altered or concealed (subsection 211(2)).

2472. The exemption certificate would be required to specify certain matters, including the premises and the organisation to which it applies, the particulars of the suspected breach or breaches, the day or days on which it operates and that proposed section 208 is the section that authorises entry (subsection 211(3)).

2473. Subsection 211(4) would provide that regulations may be made in relation to the form of application and of the exemption certificate.

*New section 212 – Limitation on rights – failure to comply with requests of occupier or affected employer*

2474. Proposed section 212 would provide that entry is not authorised under proposed Division 4 unless a permit holder complies with specific requests of an occupier or affected employer. A permit holder would not be authorised to enter or remain on premises if the permit holder fails to comply with a request by an occupier or affected employer to:

- produce documents evidencing authority to enter premises (subsection 212(1));
- observe occupational health and safety requirements that apply to the premises, provided the request is reasonable (subsection 212(2)); and/or
- conduct interviews in a particular room or area of the premises or to take a particular route to reach a particular room or area of the premises to conduct an interview, provided the request is reasonable (subsection 212(3)).

2475. Subsection 212(4) would make it clear that a request to conduct interviews in a particular room or take a particular route to reach a particular room or area of the premises is not unreasonable merely because it is not the room, area or route that the permit holder would have chosen.

2476. Proposed section 232 would allow the AIRC to make whatever orders it considers appropriate if it is satisfied that a request by an employer or occupier of premises is not a reasonable request.

*New section 213 – Limitation on rights – residential premises*

2477. Proposed section 213 would provide that proposed Division 4 does not authorise a person to enter any part of premises that is used for residential purposes.

*New section 214 – Limitation on rights – permit conditions*

2478. Proposed section 214 would provide that, other than in relation to entry authorised by the AIRC under subsection 209(10), a permit holder's rights under proposed Division 4 are subject to any conditions that apply to his or her permit.

*New section 215 – Burden of proving reasonable grounds for suspecting breach*

2479. Proposed section 215 would provide that the burden of proving the existence of reasonable grounds for suspecting a breach, as mentioned in proposed section 208, is on the person asserting the existence of those grounds. This is designed to ensure that a permit holder's suspicion of a breach is objectively reasonable having regard to the information in the possession of the permit holder at the time of the purported exercise of the right of entry.

**Division 5 –Entry for OHS purposes**

2480. Division 5 would impose additional conditions on right of entry pursuant to State or Territory OHS legislation. No additional rights of entry would be conferred by Division 5.

2481. State and Territory OHS laws contain their own limitations and obligations for permit holders for when they seek to exercise OHS right of entry. These limitations would continue to apply.

*New section 216 – OHS entries to which this Division applies*

2482. Proposed section 216 would set out the types of entry to premises to which the provisions in proposed Division 5 would apply, including where:

- the premises are occupied or otherwise controlled by a constitutional corporation or the Commonwealth; or
- the premises are located in a Territory; or
- the premises are, or are located in, a Commonwealth place; or
- the right relates to requirements to be met by a constitutional corporation or the Commonwealth in its capacity as an employer, an employee of a constitutional corporation or the Commonwealth, or a contractor providing services for a constitutional corporation or the Commonwealth; or
- the right relates to conduct engaged in, or activity undertaken or controlled, by a constitutional corporation or the Commonwealth in its capacity as an employer, an employee of a constitutional corporation or the Commonwealth, or a contractor providing services for a constitutional corporation or the Commonwealth; or

- the exercise of the right will have a direct effect on a constitutional corporation or the Commonwealth in its capacity as an employer, an employee of a constitutional corporation or the Commonwealth, or a contractor providing services for a constitutional corporation or the Commonwealth.

*New section 217 – Permit required for OHS entry*

2483. Proposed section 217 would require that an official of an organisation who seeks to exercise any right of entry under a State or Territory OHS law to premises covered by proposed section 216 must hold a right of entry permit under the proposed right of entry provisions and exercise that right during working hours (subsection 217(1)).

2484. Subsection 217(1) would be a civil remedy provision.

*New section 218 – Rights to inspect employment records after entering premises*

2485. Proposed section 218 would impose conditions on any rights that a permit holder may have under an OHS law to inspect employment records. The conditions are that the permit holder would need to:

- enter the premises in accordance with proposed section 217;
- provide 24 hours notice; and
- provide the reasons for seeking to exercise such right(s). The permit holder would need to provide reasons why the inspection of the employment records is relevant to the performance of the permit holder's function under the State OHS law.

2486. Proposed section 218 would not impose any limitation as to when the required 24 hours notice to inspect employment records could be provided. Accordingly, the 24 hours notice could be provided before, during or after the permit holder has entered premises in accordance with proposed section 217.

2487. Proposed section 218 would not confer any additional rights to inspect documents. The right to inspect documents (including employment records) would remain subject to the provisions of the relevant State OHS law.

*New section 219 – Limitation on OHS entry – failure to comply with requests of occupier*

2488. Subsection 219(1) would provide that a person seeking to exercise, or exercising, a right of entry under a State or Territory OHS law, must not enter or remain on the premises unless that person produces his or her permit for inspection if requested to do so by the occupier of the premises.

2489. Subsection 219(3) would provide that if a permit holder fails to comply with a reasonable request (by the occupier of a premises) to comply with an OHS requirement that applies to the premises, the permit holder must not enter, or remain on, the premises.

2490. Subsections 219(2) and (4) would provide that subsections 219(1) and (3) are civil remedy provisions.

2491. Proposed section 232 would allow the AIRC to make whatever orders it considers appropriate if it is satisfied that a request by an occupier of premises is not a reasonable request.

*New section 220 – Limitation on OHS entry – permit conditions*

2492. Proposed section 220 would provide that a permit holder's right to enter premises under an OHS law in accordance with proposed section 217 is subject to any conditions that apply to the permit.

**Division 6 – Right of entry to hold discussions with employees**

2493. Proposed Division 6 would set out the circumstances in which a permit holder for an organisation may enter premises to hold discussions with employees. The general rule would be set out in proposed section 221. Proposed sections 222 – 227 would impose limitations on the right of entry.

2494. The rules in proposed Division 6 would not apply to entry by consent. In such a case, it is the consent that authorises entry, not the provisions of proposed Division 6.

*New section 221 – Right of entry to hold discussions with employees*

2495. Proposed section 221 would authorise a permit holder for an organisation to enter premises for the purpose of holding discussions with any employee who wishes to participate in those discussions, provided the employee:

- carries out work on the premises which is covered by an award or collective agreement that binds the permit holder's organisation; and
- is a member or eligible to be a member of the permit holder's organisation.

*New section 222 – Limitation on rights – times of entry and discussions*

2496. Proposed section 222 would provide that a permit holder may only enter premises in accordance with proposed section 221 during working hours and may only hold discussions during the employees' meal-time or other breaks.

*New section 223 – Limitation on rights – conscientious objection certificates*

2497. Proposed section 223 would provide that a permit holder is not authorised to enter premises if an employer:

- employs all the employees at the premises and holds a conscientious objection certificate in force under section 180 of Schedule 1B to the WR Act which has been endorsed under subsection 223(2), or under section 285C of the repealed Part IX; and

- employs 20 or fewer employees at the premises, none of whom are members of an organisation.

2498. A Registrar may only endorse a certificate if satisfied that the employer is a practising member of a religious society or order whose beliefs preclude membership of any other body.

*New section 224 – Limitation on rights – entry notice*

2499. Proposed section 224 would provide that proposed Division 6 does not authorise entry to premises or subsequent conduct on the premises unless:

- a permit holder gave an entry notice to the occupier at least 24 hours but not more than 14 days before the entry;
- the notice specifies proposed section 221 as authorising the entry; and
- the entry is on a day specified in the notice.

*New section 225 – Limitation on rights – residential premises*

2500. Proposed section 225 would provide that proposed Division 6 does not authorise entry onto any part of premises that is used for residential purposes.

*New section 226 – Limitation on rights – failure to comply with requests of the occupier or affected employer*

2501. Proposed section 226 would provide that unless a permit holder complies with specified requests of occupiers or affected employers, entry is not authorised under proposed Division 6 to hold discussions. Specifically, a permit holder would have to comply with a request to:

- produce documents evidencing authority to enter premises (subsection 226(1));
- observe occupational health and safety requirements that apply to the premises, provided the request is reasonable (subsection 226(2)); and/or
- hold discussions in a particular room or area of the premises or to take a particular route to reach a particular room or area of the premises to hold discussions, provided the request is reasonable (subsection 226(3)).

2502. Subsection 226(4) would make it clear that a request to hold discussions in a particular room or take a particular route to reach a particular room or area of the premises is not unreasonable merely because it is not the room, area or route that the permit holder would have chosen.

2503. Proposed section 232 would allow the AIRC to make whatever orders it considers appropriate if it is satisfied that a request by an employer or occupier of premises is not a reasonable request.



*New section 227 – Limitation on rights – permit conditions*

2504. Proposed section 227 would provide that a permit holder's rights under proposed Division 6 are subject to any conditions that apply to the permit (eg. conditions imposed by the AIRC or the Registrar).

**Division 7 – Prohibitions**

*New section 228 – Hindering, obstruction etc. in relation to this Part*

2505. Proposed section 228 would prohibit certain conduct in relation to the exercise of powers under proposed Part IX or under a State or Territory OHS law in accordance with proposed section 217, including:

- a permit holder intentionally hindering or obstructing any person, or otherwise acting in an improper manner (subsection 228(1));
- a person intentionally hindering or obstructing a permit holder exercising rights under this Part or refusing or unduly delaying entry to premises by a permit holder who is entitled to enter the premises (subsections 228(3) and 228(7)); and
- an employer refusing or failing to comply with a requirement to produce documents under subsections 209(4) or (5) (subsection 228(5)).

2506. Subsection 228(9) would make it clear that a failure by a permit holder and an affected employer to agree on a place to provide access to documents for inspection under paragraph 209(5)(a) does not constitute hindering or obstructing a permit holder.

2507. Subsection 228(10) would provide that a person could be found to have hindered or obstructed a permit holder by engaging in conduct after an entry notice has been given but before a permit holder enters the premises. A legislative note provides an example that a person may contravene the provisions by destroying, concealing or manufacturing evidence relevant to a suspected breach prior to the entry.

2508. Subsections 228(1), (3), (5) and (7) would be civil remedy provisions.

*New section 229 – Misrepresentations about right of entry*

2509. Proposed section 229 would prohibit a person (the first person) intentionally or recklessly giving an impression to a second person that the first person, or another person, is authorised under proposed Part IX to exercise particular rights.

2510. Examples of behaviour which this section would cover are:

- where a person seeks to enter premises pursuant to proposed Part IX without a valid permit; or
- a permit holder does not comply with a condition attached to a permit.

2511. Misrepresentations about being authorised to enter premises would also include misrepresentations about a right to enter premises under an order by the AIRC in subsection 209(10).

2512. Proposed subsection 229(1) would be a civil remedy provision (subsection 229(3)).

### **Division 8 – Enforcement**

#### *New section 230 – Penalties etc. for contravention of civil remedy provisions*

2513. Proposed section 230 would provide that an *eligible person* would be able to apply to the Federal Court of Australia or the Federal Magistrates Court in respect of a contravention of a civil remedy provision. An *eligible person* would be a workplace inspector, a person affected by the contravention, or a person prescribed by the regulations (subsection 230(5)).

2514. Subsection 230(1) would set out the orders that these courts could make against a person who contravenes a civil remedy provision:

- a pecuniary penalty on the defendant;
- damages payable to a specified person; and
- any other order the Court thinks appropriate (including an injunction pursuant to subsection 230(3)).

2515. Subsection 230(2) would provide that the maximum pecuniary penalty that the courts could impose is 300 penalty units in the case of a body corporate, or 60 penalty units in other cases (by operation of section 4AA of the *Crimes Act 1914*, the value of a penalty unit is currently \$110).

2516. Subsection 230(5) would allow regulations prescribing a person as an *eligible person* (ie a person able to bring proceedings for breach of a civil remedy provision) to limit the circumstances in which the person may make an application.

### **Division 9 – Powers of the Commission**

2517. Proposed Division 9 would set out the specific powers available to the AIRC to deal with matters under proposed Part IX. These specific powers would be in addition to the general powers of the AIRC contained in proposed Subdivision B of Division 3A of Part II. Some of the right of entry powers would be based on the existing powers provided for in the WR Act.

#### *New section 231 – Orders by Commission for abuse of system*

2518. Proposed section 231 would allow the AIRC to make orders restricting the rights of an organisation which, or an official of an organisation who, has abused rights conferred by this Part (subsection 231(1)). The AIRC would be able to make an order on its own motion or on application by a workplace inspector (subsection 231(2)).

2519. The AIRC may:

- revoke or suspend some or all of the permits that have been issued in respect of the organisation. This would enable the AIRC to revoke permits issued to sections of an organisation, for example a particular branch of an organisation;
- impose conditions on some or all of the permits that have been issued in respect of an organisation or might in the future be issued in respect of the organisation; and/or
- ban the issue of permits for a specified period in relation to a specified person or in respect of the organisation generally (subsection 231(3)).

2520. An organisation, or official of an organisation who is subject to an order would be required to comply with the order (subsection 231(4)).

2521. Subsection 231(5) would state that subsection 231(4) is a civil remedy provision.

2522. Subsection 231(6) would provide that the AIRC's powers to make orders under this section may only be exercised by the President or, if the President directs, another Presidential member or a Full Bench.

2523. Subsection 231(7) would, without limiting subsection 231(1), provide that engaging in recruitment conduct that is unduly disruptive either because it is excessive in the circumstances or for some other reason would constitute the abuse of rights conferred by proposed Part IX. *Recruitment conduct* is defined in proposed subsection 231(8) to mean encouraging employees to become members of an organisation.

*New section 232 – Unreasonable requests by occupier or affected employer*

2524. Proposed section 232 would allow the AIRC to make whatever orders it considers appropriate in respect of the rights of a permit holder to enter premises to investigate breaches, hold discussions, or for OHS purposes if it is satisfied that the occupier of the premises has made a request to a permit holder under proposed section 212, 219 or 226 that is not a reasonable request (subsection 232(1)).

2525. For example, a request would not be unreasonable merely because the employer did not provide the room or area chosen by the permit holder. However, a request would be unreasonable if it involved specifying a room or particular area of premises for interviews or discussions that was patently inadequate for the purpose.

2526. Subsection 232(2) would empower the AIRC to make a range of orders, including an order authorising access to premises for specified purposes.

2527. Subsection 232(3) would provide for the AIRC's powers to make orders under this section to be exercised only by the President or, if the President directs, another Presidential member or a Full Bench.

2528. Subsection 232(4) would empower the AIRC to act on application or on its own motion.

*New section 233 – Disputes about the operation of this Part*

2529. Proposed section 233 would permit the AIRC to settle disputes about the operation of proposed Part IX.

2530. Subsection 233(2) would provide for an application to be made by a permit holder, a permit holder's organisation, an affected employer, an occupier of OHS premises or a person who employs employees who carry out work on OHS premises.

2531. Subsection 233(3) would provide that in making any order, the AIRC must have regard to fairness between the parties concerned and must not confer rights that are additional to, or inconsistent with, rights exercisable under proposed Part IX.

2532. Subsection 233(4) would make it clear that the AIRC has the power, for the purpose of settling a dispute, to revoke, suspend or impose limiting conditions on a right of entry permit issued under this Part.

2533. Subsection 233(5) would define *limiting condition* and *OHS premises*.

*New section 234 – Powers of inspection*

2534. Proposed section 234 would provide the AIRC with powers to conduct inspections where relevant to a proceeding under Part IX.

2535. Subsection 234(1) would provide that a member of the AIRC may at any time during working hours:

- enter prescribed premises;
- inspect or view, among other things, any work, machinery or document on the premises;
- interview on the premises any employee who is usually engaged in work on the premises.

2536. Subsection 234(2) would provide a definition of *prescribed premises*.

*New section 235 – Parties to proceedings*

2537. Proposed section 235 would provide the AIRC with the power to direct parties to be joined or struck out as parties to proceedings under proposed Part IX.

*New section 236 – Kinds of orders*

2538. Proposed 236 would provide the AIRC with the power to make certain types of orders relevant to right of entry matters, including:

- consent orders;
- provisional or interim orders; and
- orders that engaging in conduct in breach of a specified term of an order is taken to be a separate breach of the term on each day the conduct continues.

*New section 237 – Relief not limited to claim*

2539. Proposed section 237 would provide that in making an order in proceedings under proposed Part IX, the AIRC is not restricted to the specific relief claimed by the parties concerned, but may include anything in the order which the AIRC considers necessary or expedient for the purposes of dealing with the proceeding.

*New section 238 – Publishing orders*

2540. Proposed section 238 would impose a number of obligations on the AIRC and the Registrar in relation to orders made by the AIRC, including that:

- the AIRC must express an order in plain English and must promptly put the order in writing and provide it to a Registrar;
- a Registrar must promptly provide the order and any written reasons to the relevant parties and arrange for the order and written reasons to be published as soon as practicable.

### **Part XA – Freedom of Association**

2541. The proposed provisions would replicate and build on the pre-reform freedom of association provisions and add specific measures to improve freedom of association protection.

2542. Proposed Part XA would apply broadly to employers, employees, independent contractors and industrial associations to the extent possible having regard to the constitutional powers relied upon.

2543. The proposed freedom of association provisions would enhance freedom of association protection by introducing a small number of general prohibitions dealing with the most common forms of inappropriate conduct that are contrary to rights to freedom of association.

2544. The general prohibitions would deal with matters including coercion in relation to joining and resigning from an industrial association, industrial action because of a person's membership status and misrepresentations about requirements to become a member of an industrial association.

2545. The proposed freedom of association provisions would ensure that independent contractors are better protected in relation to freedom of association, including by prohibiting discrimination and coercion in relation to whether or not a person has a particular type of workplace agreement covering their employees.

2546. Civil remedies would be available where there is a breach of the proposed freedom of association provisions.

### **Division 1 – Preliminary**

#### *New section 239 – Objects of Part*

2547. Proposed section 239 would set out the objects of proposed Part XA, which are in addition to the principal object set out in proposed section 3, particularly:

- that employers, employees and independent contractors are free to join or not join an industrial association as they may choose;
- that employers, employees and independent contractors are not discriminated against or victimised by virtue of that choice;
- to provide effective relief to employers, employees and independent contractors who are prevented or inhibited from exercising their rights to freedom of association; and
- ensuring there are effective remedies to address conduct which infringes the rights to freedom of association.

#### *New section 240 – Definitions*

2548. Subsection 240(1) would contain definitions relevant to the operation of proposed Part XA, including:

- *bargaining services* would be defined to mean services provided by or on behalf of an industrial association in relation to an agreement, or proposed agreement, under proposed Part VB (including the negotiation, making, approval, lodgment, operation, extension, variation or termination of the agreement);
- *bargaining services fee* would be defined to mean a fee, other than membership dues, payable to an industrial association or to someone else in lieu of an industrial association, wholly or partly for the provision, or purported provision of *bargaining services*; and
- *threat* would mean a threat of any kind, whether direct or indirect and whether express or implied.

#### *New section 241 – Meaning of **industrial action***

2549. Proposed section 241 would provide that, for the purposes of proposed Part XA, the definition of *industrial action* has effect as if the words *employer*, *employee* and *employment* had their ordinary meaning, rather than any expanded or limited meaning otherwise given to them by the WR Act.

#### *New section 242 – Meaning of **office***

2550. Proposed section 242 would provide for a meaning of *office*, in relation to an association, as relevant to proposed Part XA.

## **Division 2 – Conduct to which this Part applies**

2551. Proposed Division 2 would set out the constitutional basis for the provisions of proposed Part XA.

2552. It is intended that proposed Part XA would apply broadly to employers, employees, independent contractors and industrial associations to the extent possible having regard to the constitutional powers relied upon. It is intended that a range of constitutional powers would be relied upon, including the corporations power, the powers to deal with conduct by or affecting the Commonwealth and Commonwealth authorities, the Territories power and the Commonwealth places power.

### *New section 249 – Extraterritorial extension*

2553. Proposed section 249 would extend the application of proposed Part XA (and related provisions of the WR Act) to conduct outside Australia. For this purpose, Australia extends to the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands and the coastal sea (see section 15B and paragraph 17(a) of the *Acts Interpretation Act 1901*).

2554. Proposed subsections 249(1), (2) and (3) would extend Part XA (and related provisions of the WR Act) to conduct in Australia's exclusive economic zone and continental shelf and to conduct outside Australia and the exclusive economic zone and continental shelf that:

- is by a registered organisation or an Australian-based employee (or a group of persons including either of these), and affects adversely, or is intended to affect adversely, an Australian employer;
- is by an Australian employer or a group including an Australian employer and affects adversely, or is intended to affect adversely, an Australian-based employee; and
- affects adversely, or is intended to affect adversely, an independent contractor who has a prescribed connection with Australia or a group including such a contractor.

2555. *Australian-based employee, Australian employer and organisation* would be defined for these purposes in subsection 4(1).

2556. The extension to Australia's continental shelf beyond the exclusive economic zone would apply only if the employee was in a prescribed part of that area and met the requirements prescribed by the regulations for that part of the area. The legislative note to subsection 249(2) would make it clear that the regulations could prescribe different requirements for different parts of the continental shelf, including for reasons connected with Australia's international obligations.

2557. Subsection 249(4) would provide a specific definition of *this Act* for the purposes of proposed section 249. This is because the definition of *this Act* in subsection 4(1) (which would otherwise apply) does not include the Registration and Accountability of Organisations Schedule and regulations made under it. The specific definition would ensure that the extraterritorial

extension under subsection 249(1) would apply to that Schedule and those regulations so far as they relate to Part XA.

### **Division 3 – General prohibitions relating to freedom of association**

2558. Proposed Division 3 would provide for a small number of general prohibitions dealing with the most common forms of inappropriate conduct that are contrary to rights to freedom of association.

2559. All of the proposed sections in proposed Division 3 would be civil remedy provisions.

#### *New section 250 – Coercion*

2560. Proposed section 250 would prohibit a person from organising or taking, or threatening to organise or take, action against another person with intent to coerce the other person or a third person to:

- become, or not become, an officer or member of an industrial association; or
- remain, or cease to be, an officer or member of an industrial association.

#### *New section 251 – False or misleading statements about membership*

2561. Proposed section 251 would prohibit a person from making a false or misleading representation about another person's:

- obligation to be or not to be, or to become or not to become or to cease to be, an officer or member of an industrial association; or
- obligation to disclose whether he or she is, or has been, a member of an industrial association or a particular industrial association; or
- need to be, or not to be, an officer or member of an industrial association or a particular industrial association, to obtain the benefit of an industrial instrument.

2562. An example of a false or misleading statement about membership would be a representation that describes a building site as a 'no ticket, no start' site or as a 'union site' in a way that suggests or implies that a person must be a member of an organisation to enter or work on that site.

#### *New section 252 – Industrial action for reasons relating to membership*

2563. Proposed section 252 would prohibit a person from organising or taking, or threatening to organise or take, industrial action against another person on the basis of whether or not that person is, has been or proposes to be or not to be, or proposes to cease to be, a member or officer of an industrial association.



#### **Division 4 – Conduct by employers etc.**

*New section 253 – Dismissal etc. of members of industrial associations etc.*

2564. Proposed section 253 would prohibit an employer or other person from doing, or threatening to do, for a prohibited reason as described in proposed section 254, or for reasons that include a prohibited reason, any of the matters set out in subsections 253(1) and (4). These are, broadly, matters which harm persons who are employees in relation to their employment, or independent contractors in relation to their contract or proposed contract.

2565. A mistaken belief as to the existence of a prohibited reason would be irrelevant as to whether an employer or other person contravenes proposed section 253.

2566. Subsections 253(2) and (5) would provide that subsections 253(1) and (4) respectively are civil remedy provisions.

2567. Subsections 253(3) and (6) would provide that if there is no intention to employ or engage another person, then there cannot be a refusal to employ or engage for the purposes of paragraphs 253(1)(d) and (4)(d) respectively.

*New section 254 – Prohibited reasons*

2568. Subsection 254(1) would list matters, each of which would constitute a prohibited reason if it motivates conduct referred to in subsections 253(1) or (4). The list of prohibited reasons is substantially based on the existing prohibitions in pre-reform section 298L of the WR Act. The paragraphs detailing the prohibited reasons would be alternative.

2569. Subsection 254(2) would deal with threats to engage in conduct referred to in subsections 253(1) and (4). If the threat to engage in that conduct is intended to dissuade or prevent a person from doing something referred to in subsection 254(1) or to coerce the person to do it, the threat is taken to have been made for that prohibited reason. *Threat* would be defined in subsection 240(1) as a threat of any kind, whether direct or indirect, express or implied.

*New section 255 – Inducements to cease membership etc. of industrial associations etc.*

2570. Proposed section 255 would prohibit an employer, or a person who has engaged an independent contractor, from inducing an employee or the independent contractor to:

- become, or not become, an officer or member of an industrial association; or
- remain or cease to be, an officer or member of an industrial association.

2571. Subsection 255(2) would provide for subsection 255(1) to be a civil remedy provision.

#### **Division 5 – Conduct by employees etc.**

2572. Proposed Division 5 would concern conduct by employees or independent contractors against certain persons for proscribed reasons.

*New section 256 – Cessation of work*

2573. Subsection 256(1) would prohibit the cessation of work by an employee or an independent contractor for the reasons set out in proposed section 256. Those reasons are based on the prohibited grounds in proposed section 254, to the extent that they are applicable in this context.

2574. Subsection 256(1) would be a civil remedy provision.

**Division 6 – Conduct by industrial associations etc.**

2575. Proposed Division 6 would prohibit various types of conduct by industrial associations, for proscribed reasons, against employers, employees, members of industrial associations and independent contractors.

*New section 257 – Industrial associations acting against employers*

2576. Proposed section 257 would safeguard employers from industrial action taken or threatened by an industrial association for various reasons, including:

- whether the employer is or is not an officer or member of an industrial association; or
- to coerce the employer to or not to become, remain or cease to be an officer or member of an industrial association; or
- to encourage the employer to take action which, if taken, would contravene subsection 253(1); or
- to encourage an employer to harm an employee who has failed to abide by a direction from the industrial association.

2577. Subsections 257(1), 257(3), 257(5) and 257(7) would be civil remedy provisions.

*New section 258 – Industrial associations acting against employees etc.*

2578. Subsection 258(1) is intended to protect the freedom of employees to choose whether or not they wish to take part in industrial action, and of their right to seek a secret ballot under an industrial law. This would be done by prohibiting an industrial association from taking, or threatening to take, action which has the effect of prejudicing a person's employment or prospective employment to coerce the person to participate in industrial action or to dissuade or prevent them from seeking a secret ballot.

2579. Subsection 258(3) would prohibit an industrial association, or a member or officer of an industrial association, from taking, or threatening to take, action that has the effect of prejudicing a person in his or her employment or prospective employment, and from advising, encouraging or inciting another person to take such action, if the reason for the action or conduct includes that the person:

- does not propose to, has not agreed to pay, or has not paid, a bargaining services fee;
- is, has been, proposes to become or has at any time proposed to become an officer or member of an industrial association;
- is not, does not propose to be or proposes to cease to be a member of an industrial association;
- has not paid, has not agreed to pay or does not propose to pay a fee (however described) to an industrial association;
- has refused or failed to join in industrial action; or
- has made or proposes to make an inquiry or complaint to a person or body having the capacity under an industrial law to seek compliance with that law or the observance of a person's rights under an industrial instrument.

2580. Subsections 258(1) and (3) would be civil remedy provisions.

*New section 259 – Industrial associations acting against members*

2581. Proposed section 259 would be similar to proposed section 258 in many respects, but applies specifically to members of an industrial association and intends to protect them from adverse action by the industrial association, or by an officer or member of the industrial association.

2582. Proposed section 259 would be a civil remedy provision.

*New section 260 – Industrial associations acting against independent contractors etc.*

2583. Proposed section 260 is intended to provide protections for independent contractors from victimisation by industrial associations.

2584. Proposed section 260 would extend the existing equivalent provision in the WR Act (section 298S) by an expanded range of prohibitions on discriminatory action, including such action against an eligible person:

- because of that person's membership of an industrial association or non-membership;
- for the person's refusal or failure to comply with a direction given by an industrial association;
- because the person did not, or proposes not to, pay a fee (however described) to an industrial association; or
- because the person makes, or proposes to make, an inquiry or complaint to a person or body having the capacity under an industrial law to seek compliance with that law or the observance of the person's rights under an industrial instrument.

2585. Subsection 260(2) would prohibit not only discriminatory conduct against a person, but also conduct against any person employed or engaged by that person.

2586. Subsection 260(4) would make it clear that the prohibitions in subsection 260(2) do not prevent an industrial association from entering into an agreement with another person for the supply of goods or services to members of the industrial association (eg. by offering discounted services to a member of the industrial association).

2587. Subsection 260(5) would prohibit the taking of discriminatory action for a *prohibited reason*, as defined in subsection 260(7).

2588. Subsection 260(7) would provide that conduct is for a *prohibited reason* if it concerns the non payment of a *bargaining services fee* as defined in subsection 240(1).

2589. Subsections 260(2) and (5) would be civil remedy provisions.

*New section 261 – Industrial associations acting against independent contractors etc. to encourage contraventions*

2590. Subsection 261(1) would be similar to subsection 257(5), which would apply in relation to employers. Subsection 261(1) would apply to prohibit certain action against persons, including independent contractors, which, if taken, would contravene subsection 253(4).

2591. Subsection 261(1) would be a civil remedy provision.

*New section 262 – Industrial associations not to demand bargaining services fee*

2592. Subsection 262(1) would prohibit an industrial association, or an officer or member of an industrial association, from demanding payment of a bargaining services fee.

2593. Subsection 262(1) would be a civil remedy provision.

2594. Subsection 262(3) would provide an exception to 262(1) where a bargaining services fee is payable to an industrial association under a contract for the provision of bargaining services.

2595. Subsection 262(4) would provide a definition of *demand* for the purposes of proposed section 262.

*New section 263 – Action to coerce person to pay bargaining services fee*

2596. Subsection 263(1) would prohibit an industrial association from taking, or threatening to take, action against a person with intent to coerce the person, or another person, to pay a bargaining services fee. Subsection 263(1) would capture third-party conduct where, for example, an industrial association takes industrial action against an employer to force an employee who is not a member of the industrial association to pay a bargaining services fee.

2597. Subsection 263(1) would be a civil remedy provision.

*New section 264 – Industrial associations not prevented from entering contracts*

2598. Proposed section 264 would make it clear that nothing in the freedom of association provisions prevents an industrial association from entering into a contract for the provision of bargaining services with a person who is not a member of the industrial association.

**Division 7 – Conduct in relation to industrial instruments**

*New section 265 – Discrimination against employer in relation to industrial instruments*

2599. Subsection 265(1) would prohibit a person from discriminating against an employer on the basis that the employment of its employees is covered by or proposed to be covered by a particular type of industrial instrument, the Standard or an industrial instrument made with a particular person. This section would only apply to discrimination on the basis of the particular type of industrial instrument (for instance, that the instrument is an AWA or a collective agreement) or who the agreement is made with, rather than anything contained in the agreement.

2600. For example, proposed section 265 would prohibit:

- a head contractor refusing to engage a subcontractor because the subcontractor's employees are covered by a certified agreement to which an organisation is not a party;
- a head contractor refusing to engage a subcontractor on the basis that a particular organisation is not a party to the subcontractor's certified agreement;
- an organisation disrupting the operations of an employer (other than through protected action) on the basis that the employer's employees are not covered by a collective agreement.

2601. Subsection 265(1) would be a civil remedy provision.

2602. Subsection 265(3) would make it clear that that the prohibition under subsection 265(1) would not apply to any industrial action that is protected action.

**Division 8 – False or misleading representations about bargaining services fees etc.**

*New section 266 – False or misleading representations about bargaining services fees etc.*

2603. Proposed section 266 would prohibit a person from making a false or misleading representation about another person's:

- liability to pay a bargaining services fee;
- obligation to enter into an agreement to pay a bargaining services fee; or
- obligation to become a member of an industrial association.

2604. Proposed section 266 would be a civil remedy provision.

## **Division 9 – Enforcement**

### *New section 267 – Definition*

2605. Proposed section 267 would contain a definition of *person*, for the purposes of proposed Division 9, to include an industrial association.

2606. A legislative note would be inserted to highlight that proposed section 189 would provide that a person involved in a contravention of a civil remedy provision is taken to have contravened the civil remedy provision.

### *New section 268 – Penalties etc. for contravention of civil penalty provisions*

2607. Proposed section 268 would allow an *eligible person* to apply to the Court in respect of a contravention of a civil penalty provision. An *eligible person* would be a workplace inspector, a person affected by the contravention, or a person prescribed by the regulations (subsection 268(4)).

2608. Subsection 268(1) would set out the orders that the Court can, on application, make in relation to a person who contravenes a civil penalty provision in proposed Part XA.

2609. Subsection 268(2) would provide for the Court to be able to order a maximum pecuniary penalty of 300 penalty units in the case of a body corporate, or 60 penalty units in other cases (by operation of section 4AA of the *Crimes Act 1914*, the value of a penalty unit is currently \$110).

2610. The Court would also be able to order:

- damages payable to a specified person; and/or
- any other order the Court thinks appropriate including an injunction.

2611. Subsection 268(5) would allow regulations to prescribe a person as an *eligible person* (ie a person able to bring proceedings for breach of a civil penalty provision) and would allow regulations to limit the circumstances in which the person may make an application.

### *New section 269 – Conduct that contravenes Division 3 and another Division of this Part*

2612. Proposed section 269 would apply where the same conduct constituted both a contravention of proposed Division 3 and another Division. In such circumstances, the Court would only be able to make orders under proposed section 268 in relation to only one of those contraventions. This reflects the fact that certain conduct could breach both one of the general prohibitions in Division 3 and a specific prohibition in another Division.

### *New section 270 – Proof not required of the reason for, or the intention of, conduct*

2613. Subsection 270(1) would reverse the onus of proof applicable to civil proceedings for a contravention of a civil remedy provision in proposed Part XA. It is based upon pre-reform section 298V of the WR Act.

2614. Typically, in a civil action, the onus would fall on the complainant to establish, on the balance of probabilities that the conduct complained of was carried out for a particular reason or with a particular intent, in contravention of the relevant provision.

2615. However, subsection 270(1) would provide that, once a complainant has alleged that a person's actual or threatened conduct is motivated by a reason or intent that would contravene the relevant provision(s) of proposed Part XA, the person would have to establish, on the balance of probabilities, that the conduct was not carried out unlawfully.

2616. The reverse onus would not apply to the granting of interim injunctions. This differs from pre-reform section 298V of the WR Act, and is intended to address the problems that can arise from the interaction of the reverse onus with the 'balance of convenience' test that applies to interim injunctions.

### **Division 10 – Objectionable provisions**

#### *New section 271 – Meaning of objectionable provision*

2617. Subsection 271(1) would contain a definition of *objectionable provision* for the purposes of proposed Division 9. An objectionable provision would be a provision that:

- requires or permits any conduct that would breach proposed Part XA;
- directly or indirectly requires a person to encourage another person to join or remain a member of an industrial association or not to join or not to remain a member of an industrial association;
- indicates support for or opposition to persons being members of an industrial association; or
- requires or permits payment of a bargaining service fee.

#### *New section 272 – Objectionable provisions etc. in industrial instruments etc.*

2618. Subsection 272(1) would provide that a provision in an award is void to the extent it is an objectionable provision.

2619. In relation to a workplace agreement, proposed section 101D would provide that the regulations may specify matters that are prohibited content for the purposes of the Bill. It is intended that the regulations would provide a non-exhaustive list of matters which are prohibited from being included in a workplace agreement. The list would include matters such as objectionable provisions. Proposed section 101F would provide that a term of a workplace agreement is void to the extent that it contains prohibited content.

#### *New section 273 – Removal of objectionable provisions from awards*

2620. Proposed subsection 273(1) would provide that, on application, the AIRC must remove objectionable provisions from awards. Similar provisions in proposed Part VB would provide for the removal of objectionable provisions from agreements by the Employment Advocate (see proposed section 101K).

## **Division 11 – Miscellaneous**

### *New section 274 – Freedom of association not dependent on certificate*

2621. Proposed subsection 274(1) would confirm that a person's right to freedom of association does not depend on whether the person holds a conscientious objection certificate (which can be issued by a Registrar under section 180 of Schedule 1B of the WR Act).

### **Item 194 – Paragraph 299(1)(d)**

2622. This item would make an amendment consequential on that item 195 which would repeal paragraph 299(1)(e).

### **Item 195 – Paragraph 299(1)(e)**

2623. This item would repeal paragraph 299(1)(e) which makes it an offence to do any other act or thing that would, if the AIRC were a court of record, be a contempt of that court.

2624. This proposed amendment would implement the recommendations of a report of the Australian Law Reform Commission (ALRC) on the law of contempt in Australia (1987) which identified difficulties with contempt provisions of the kind in paragraph 299(1)(e). The report recommended that such provisions be repealed and replaced by specific statutory offences that identify contemptuous conduct.

### **Item 196 – At the end of section 299**

2625. This item would insert new offences that codify certain forms of contempt. It would also insert two notes at the end of subsection 299(1) identifying other offences relating to improper influence of the AIRC and interference with its proceedings.

2626. At common law, conduct which interferes with a court's proceedings, through improperly influencing judges or witnesses, is contempt. Paragraphs 299(1)(a) – (d) make it an offence to engage in such conduct.

### Contravening an order of the Commission

2627. Proposed subsection 299(3) would establish an offence of contravening an order of the AIRC. The fault elements that operate with respect to a failure to comply with an order of the AIRC are recklessness and intention. These fault elements are defined in Chapter 2 of the *Criminal Code*. The maximum penalty that would apply to this offence is imprisonment for 12 months.

2628. Subsection 4B(2) of the *Crimes Act 1914* would allow a term of imprisonment to be converted into a pecuniary penalty. Under the formula in that subsection, the maximum penalty would be 60 penalty units for an individual and 300 penalty units for a body corporate.

### Publishing false allegation of misconduct affecting the Commission

2629. Proposed subsection 299(5) would establish an offence of publishing a false allegation of misconduct affecting the AIRC. To commit the offence, the publication must be likely to have a



significant adverse effect on the public confidence in the AIRC is properly performing its functions and exercising its powers. The effect must be on the institution of the AIRC rather than merely having caused harm to an individual member of the AIRC. 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 also need to be reckless as to the likelihood of the statement having a significant adverse effect.

2630. The maximum penalty for this offence is 12 months imprisonment. This offence could be converted into a pecuniary penalty under the subsection 4B(2) of the *Crimes Act 1914*.

2631. A note at the end of subsection 299(5) would provide that the heading 'General offences' is inserted in relation to subsection 299(1).

#### **Item 197 – Section 300**

2632. This item would make a technical amendment to replace a the reference in section 300 to subsection 119(1) with proposed subsection 44M(1).

#### **Item 198 – Section 305A**

2633. This item would repeal section 305A which makes it an offence for a person to not comply with a requirement made by an authorised officer under pre-reform paragraph 83BH(4)(d) or subsection 83BH(5). This item is consequential to the repeal of Division 2 of Part IVA by item 45.

2634. Equivalent offence provisions will exist under section 305 (failure to comply with a requirement made by a workplace inspector).

#### **Item 199 – Section 307**

2635. This item would repeal pre-reform section 307 and substitute a new section 307.

#### *New section 307 – False statement in application for protected action ballot order*

2636. The proposed subsection would provide that a person commits an offence if he or she makes or joins in an application for a protected action ballot order under Division 4 of Part VC and that application contains a false or misleading statement which is material to the application.

2637. The penalty for this offence is 30 penalty units.

**Item 200 – Section 308**

**Item 201 – Subsections 317(1) and (1A)**

**Item 202 – Subsections 317(2), (3) and (4)**

**Item 203 – Subsection 317(5)**

2638. These items make amendments consequential to the repeal of provisions in Division 4 of Part IV of the pre-reform Act which allows the AIRC to order secret ballots in relation to industrial disputes and industrial action. New Division 4 of Part VC would provide for protected action ballots.

**Item 204 – Section 338**

2639. This item would make a consequential amendment to section 338 to reflect the introduction of workplace agreements.

**Item 205 – Subsection 347(1)**

2640. This item would make a technical amendment to subsection 347(1) reflecting current drafting practice.

**Item 206 – After subsection 347(1)**

2641. This item would insert a new subsection.

2642. Pre-reform subsection 347(1) provides that a party to proceedings under the WR Act shall not be ordered to pay the costs of another party unless the first party instituted the proceedings vexatiously or without reasonable cause.

2643. Proposed subsection 347(1A) would serve as an exception to subsection 347(1). It would enable a court hearing proceedings in a matter arising under the WR Act to order one party to pay the costs of another party where that first party has, by unreasonable act of omission, caused the second party to incur otherwise unnecessary costs. A costs order under this subsection could be made irrespective of the outcome of the proceedings.

2644. This subsection would not apply to proceedings under section 170CP (unlawful termination) because costs orders in relation to applications under that section are dealt with separately by section 170CS.

2645. The meaning of *costs* in this subsection is dealt with in pre-reform subsection 347(2).

### Illustrative Example

Willy and Charlie are opposing parties to proceedings under the WR Act (other than proceedings under section 170CP). They are both represented by lawyers. Charlie's lawyers have been prompt in filing their documents with the court and have complied with all directions that have been issued. Willy's lawyers have not been so cooperative. They continually disregarded the court's directions by filing documents late, and continually raised frivolous arguments during proceedings. This conduct by Willy's lawyers caused additional costs to Charlie. In this situation, a court could, under subsection 347(1A), require Willy to pay some or all of the additional costs incurred by Charlie. Such an order could be made irrespective of whether Charlie's arguments were successful.

### Item 207 – Subsection 347(2)

2646. This item would make a consequential amendment to subsection 347(2) to ensure that the definition of *costs* applies to both subsections 347(1) and (1A).

### Item 208 – After section 349

2647. This item would insert a new section 349A

#### *New Section 349A – Signature on behalf of body corporate*

2648. Proposed section 349A would provide that a document signed on behalf of a body corporate does not require a corporate seal. Instead such documents may be signed by an authorised officer of the body corporate.

### Item 209 – After section 352

2649. This item would include a new section to deal with the power of the AIRC to vary workplace agreements. It would also include three new sections dealing with the power of the Court to vary or set aside (in whole or in part) contracts for services binding upon independent contractors which are harsh or unfair.

#### *New section 352A – Variation of workplace agreements on grounds of sex discrimination*

2650. Proposed section 352A would provide that subsections 119B(2), (3), (4) and (7) of the WR Act apply in relation to a workplace agreement made under Part VB, as if a reference in those subsections to an award or a term of an award were a reference to a workplace agreement or a term of a workplace agreement. This would provide for the variation of a workplace agreement to remove discrimination, if a workplace agreement is referred to the AIRC under section 46PW of the HREOC Act 1986.

2651. Subsection 352A(2) would provide that, before varying a workplace agreement that has been referred to it by HREOC, the AIRC must give the persons bound by the agreement, and the employees covered by the agreement, an opportunity to amend the agreement (under the terms of Part VB) to remove the relevant discrimination.

*New section 352B – Court’s power in relation to unfair contracts with independent contractors*

2652. This proposed section would set out the powers of the Federal Court of Australia regarding unfair contracts. Pre-reform section 127A which is in Part VI would be repealed by item 71.

2653. Subsection 352B(1) would define *contract* for the purposes of this section and section 352C. Under this definition, a *contract* must be a contract for services which is:

- binding on an *independent contractor* (this term is defined in subsection 4(1A) to be confined to natural persons); and
- relates to the performance of work, other than work for the private and domestic purposes of the other party to the contract.

2654. Subsection 352B(2) would establish the grounds on which an application could be made to the Court to review a contract. These grounds would be that the contract was unfair or harsh. The Court would be able to have regard to the matters listed in subsection 352B(4) when determining whether a contract is in fact harsh or unfair.

2655. The Court would be entitled to conclude that a contract was harsh or unfair on any ground, irrespective of whether that ground was canvassed in an application made under subsection 352B(2) (subsection 352B(6)). However, once the Court has come to the conclusion that a contract is harsh or unfair, it must record its opinion and state whether that opinion relates to the whole, or just a specified part, of the contract (subsection 352B(5)).

2656. Subsection 352B(3) would establish who may make an application under subsection 352B(2) for an order under section 352C. An organisation or association would only have standing to make an application under these provisions where they were authorised in writing by the party to the contract whom they are representing.

2657. Subsection 352B(7) would require the Court to exercise its powers under this section in a way which furthers the principal object of the WR Act (contained in section 3).

*New section 352C – Court may make orders about unfair contracts*

2658. Proposed section 352C would establish the orders that the Court may make in relation to a finding that a contract is harsh or unfair under subsection 352B(2). It would allow the Court to make orders varying the contract or setting it aside, in whole or in part (subsection 352C(1)).

2659. The proposed section would specify the purpose for which orders could be made (subsection 352C(2)), the time from which that order takes effect (subsection 352C(4)) and who may enforce any orders made (subsection 352C(5)). This proposed section would also empower the Court to make interim orders where it is desirable to do so in order to preserve the positions of parties to the contract (subsection 352C(3)). Subsection 352C(6) would provide that section 352C does not limit any other rights of parties to the contract.

*New section 352D – Application of sections 352B and 352C*

2660. Proposed section 352D would limit the kinds of contracts to which sections 352B and 352C apply for constitutional reasons. This section would confine the operation of the unfair contracts provisions to contracts which relate to the corporations power, the trade and commerce power and the Territories power in the Constitution. It would be in similar terms to pre-reform section 127C.

2661. This section would remove the application of pre-reform section 127C to contracts ‘relating to the business of a constitutional corporation’ (pre-reform paragraph 127C(1)(b)). This paragraph was found to be unconstitutional by the High Court in *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.

2662. Subsection 352D(2) would define *contract* for the purposes of this section to have the same meaning as in proposed section 352B.

**Item 210 – Subsections 353A(1) and (2)**

2663. This item would make a consequential amendment to subsections 353A(1) and (2) to reflect the introduction of workplace agreements.

**Item 211 – After section 354**

2664. This item would insert a new section.

*New section 354A – Interim injunctions*

2665. Proposed section 354A would provide that if a court has, under any provision of the WR Act, the power to grant an injunction, that power will include the ability of the court to grant interim injunctions pending its final decision in relation to the matter before it.

**Item 212 – After section 355**

2666. This item would inset a new section.

*New section 355A – Powers of courts*

2667. Proposed section 355A would provide that a provision of the WR Act which confers power on a court does not affect any other power that the court may otherwise have.

**Item 213 – Section 356**

**Item 214 – Paragraph 357(1)(a)**

2668. These items would make minor amendments to the language of these provisions to ensure that pecuniary penalties are referred to consistently throughout the WR Act.

**Item 215 – Paragraph 357(1)(b)**

2669. This item would make technical amendments to insert additional references to proposed subsection 178(5) in paragraph 357(1)(b). It would allow a Registrar to issue a certificate with respect to an order of an eligible court under subsection 178(5) specifying the amount payable, to

whom payment must be made and by whom payment must be made. This certificate could then be lodged by a person as a proof of debt in any court of competent jurisdiction.

**Item 216 – Paragraphs 358A(1)(a) and (b)**

2670. This item would amend paragraphs 358A(1)(a) and (b) and insert a new paragraph 358A(1)(ba) altering the frequency with which the Minister must cause a person to report about agreement making.

**Item 217 – Paragraph 358A(1)(c)**

2671. This item would make consequential amendment to pre-reform paragraph 358A(1)(c) to reflect the introduction of workplace agreements.

**Item 218 – Paragraph 358A(1)(d)**

2672. This item would make a consequential amendment to pre-reform paragraph 385A(1)(d) by expanding the class of potentially disadvantaged persons to which the report to the Minister must have particular regard.

**Item 219 – After section 358A**

2673. This item would inset a new section.

*New section 358B – Acquisition of property*

2674. It is not anticipated that the Bill (or instruments made under it), or the Act as amended (or instruments made under it) would effect any acquisition of property on other than just terms contrary to paragraph 51(xxxi) of the Constitution. Proposed section 358B would be included in the amended Act out of an abundance of caution to ensure that an acquisition contrary to paragraph 51(xxxi) could not take place. In any circumstance where an acquisition contrary to paragraph 51(xxxi) would otherwise be effected, the relevant law or instrument would not apply.

**Item 220 – Paragraph 359(2)(f)**

2675. This item would make a consequential amendment to paragraph 359(2)(f) to reflect introduction of workplace agreements.

**Item 221– Paragraph 359(2)(fa)**

2676. This item would repeal paragraph 359(2)(fa) which permits the making of regulations delegating any functions or powers under pre-reform Part VIE (no-disadvantage test). This is consequential on the repeal of Part VIE by item 168.

**Item 222 – At the end of section 359**

2677. This item would include five new subsections at the end of section 359. Section 359 relates to the regulation making powers of the Governor-General under the WR Act.

2678. Proposed subsection 359(4) would provide that jurisdiction for certain provisions of the WR Act could be conferred on State or Territory courts by regulations. Under this subsection,

such a conferral on a State or Territory court could only be made where the provision is a civil remedy provision and that provision would normally be enforceable in the Court or the Federal Magistrates Court.

2679. The remaining subsections would allow for the establishment of an ‘infringement notice scheme’ for offences and civil remedy provisions in the regulations. In relation to offences against the regulations, subsection 359(5) would provide that regulations may allow for a person alleged to have committed such an offence to pay a pecuniary penalty to the Commonwealth as an alternative to prosecution. Such a pecuniary penalty would not exceed one-fifth of the maximum penalty able to be imposed by a court in relation to that offence (subsection 359(6)).

2680. Subsection 359(7) would provide that the regulations may include provisions enabling a person alleged to have contravened a civil remedy provision, the remedy for which includes payment of a pecuniary penalty, to pay to the Commonwealth a pecuniary penalty as an alternative to facing proceedings (subsection 359(8)). The pecuniary penalty prescribed by the regulations would not be more than one-tenth of the maximum penalty able to be imposed by a court for a contravention of that civil remedy provision.

**Item 223 – Part XIV (heading)**

2681. This item would repeal the existing heading of Part XIV and substitute a new heading ‘Part XIV – Jurisdiction of the Federal Court of Australia and Federal Magistrates Court’. The effect of this amendment is to indicate the conferring of similar jurisdiction, with necessary amendments, to the Federal Magistrates Court. This is necessary because currently, Part XIV deals only with the Federal Court of Australia’s jurisdiction.

**Item 224 – At the end of section 412**

2682. This item would insert a new subsection to confer jurisdiction on the Federal Magistrates Court that is similar to that of the Federal Court of Australia.

2683. Proposed subsection 412(4) would provide the Federal Magistrates Court with jurisdiction over the matters currently arising under the WR Act and set out in subsections 412(1)(a), (1)(b), (1)(c), (1)(e) and (1)(f). They are matters arising under the WR Act in relation to which:

- (a) applications may be made to it under this Act; or
- (b) actions may be brought in it under this Act; or
- (c) questions may be referred to it under this Act; or
- (d) penalties may be sued for and recovered under this Act; or
- (e) prosecutions may be instituted for offences against this Act.

2684. The effect of this amendment would be that the Federal Magistrates Court would have the jurisdiction to deal with the wide range of matters that arise under the Bill. For example, the Federal Magistrates Court would have jurisdiction to deal with contraventions of the pre-lodgment procedures in relation to workplace agreements. It could also hear applications

relating to duress or coercion in relation to agreement making. However, the Federal Magistrates Court would not have jurisdiction in relation to prerogative writs or appeals.

**Item 225 – Subsection 413(1)**

2685. This item would amend subsection 413(1) by inserting a reference to the Federal Magistrates Court. This item is consequential upon item 222 which provides the Federal Magistrates Court with jurisdiction to interpret awards.

**Item 226 – Subsection 413(2)**

2686. This item would amend subsection 413(2) by inserting a reference to the Federal Magistrates Court. This item is consequential upon item 222.

**Item 227 – Subsection 413A(1)**

2687. This item would amend subsection 413A(1) by inserting a reference to provide the Federal Magistrates Court with the same jurisdiction as the Federal Court of Australia currently exercises, and to substitute any reference to ‘certified agreement’ with ‘collective agreement’.

2688. The change from certified agreements to collective agreements would be consequential to the implementation of the new lodgment-only system for all agreements under the Bill.

**Item 228 – Paragraph 413A(1)(b)**

2689. This item would amend paragraph 413A(1)(b) by omitting the word ‘certified’ to reflect the introduction of the term ‘workplace agreement’.

**Item 229 – Subsection 413A(2)**

2690. This item would amend subsection 413A(2) by inserting a reference to the Federal Magistrates Court. This item is consequential upon item 225.

**Item 230 – Subsection 414(1)**

2691. This item would amend subsection 414(1) by inserting a reference to the Federal Magistrates Court. This would give the Federal Magistrates Court exclusive jurisdiction, along with the Federal Court of Australia, to hear a matter where an organisation or member of an organisation is sued, or against whom a pecuniary penalty is brought.

**Item 231 – At the end of subsection 414(1)**

2692. This item would amend subsection 414(1) by inserting a note at the end of the subsection. It is intended that the note would provide for regulations to confer jurisdiction on a specified State or Territory court in relation to a civil penalty provision.

**Item 232 – After subsection 469(1)**

2693. This item would amend subsection 469 by inserting a new subsection 469(1A) allowing a party to a proceeding before the Federal Magistrates Court in a matter arising under the WR Act or the *Building and Construction Industry Improvement Act 2005* (the BCII Act 2005) to appear



in person. This would provide for the same representation rights to parties before the Federal Magistrates Court as those that currently apply to proceedings before the Federal Court of Australia.

**Item 233 – Subsections 469(2) and (2B)**

2694. This item would amend subsection 469(2) and subsection 469(2B) by inserting a reference to the Federal Magistrates Court. This item is consequential upon item 222.

**Item 234 – Subsection 469(9)**

2695. This item would amend subsection 469(9) by inserting a reference to the Federal Magistrates Court. This item is consequential upon item 222.

**Item 235 – Section 470**

2696. This item would amend section 470 to renumber the subsections as a result of the insertion of a new subsection by item 236 below.

**Item 236 – At the end of section 470**

2697. This item would amend section 470 by inserting a new subsection 470(2) to enable the Federal Magistrates Court to grant organisations, persons or bodies the ability to intervene in proceedings before it where it is of the opinion that the organisation, person or body should be heard. This would mirror the existing provision currently applying to proceedings before the Federal Court of Australia.

**Item 237 – After subsection 471(1)**

2698. This item would amend section 471 by inserting new subsection 471(1A) to provide the Minister with the ability to intervene in a proceeding before the Federal Magistrates Court in a matter arising under the WR Act or the BCII Act 2005. This would mirror the existing provision which currently enables the Minister to intervene in the public interest in a proceeding before the Federal Court of Australia.

**Item 238 – Subsection 471(2)**

2699. This item would amend subsection 471(2) by inserting a reference to the Federal Magistrates Court. This item is consequential upon item 222 and item 235.

**Item 239 – Subsection 471(3)**

2700. This item would amend subsection 471(3) by inserting a reference to the Federal Magistrates Court. This item is consequential upon item 222 and item 235.

**Item 240 – Part XV**

2701. This item would repeal Part XV, and substitute a new Part XV.

## Part XV – Matters referred by Victoria

2702. Proposed Part XV would contain provisions relating to the employment of employees in Victoria (within the meaning of section 3 of the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic)) who are not otherwise within the scope of the WR Act (see proposed section 489 for discussion of the scope of Part XV).

2703. Proposed Part XV would comprise 12 Divisions:

- Division 1 – Introduction (sections 488 – 490)
- Division 2 – Pay and conditions (sections 491 – 499)
- Division 3 – Workplace agreements (sections 500 – 502)
- Division 4 – Industrial action (sections 503 – 505)
- Division 5 – Meal breaks (sections 506 – 507)
- Division 6 – Termination of employment (sections 508 – 509)
- Division 7 – Freedom of Association (section 510)
- Division 8 – Right of entry (sections 511 – 512)
- Division 9 – Transmission of business (sections 513 – 514)
- Division 10 – Employment agreements (sections 515 – 526)
- Division 11 – Exclusion of Victorian laws (section 527)
- Division 12 – Additional effect of other provisions of this Act (section 528)

### *New section 488 – Object*

2704. Proposed section 488 would provide that the main object of Part XV is to extend various provisions of the WR Act, so that they apply to employees in Victoria who are covered by the referral of legislative power from the Parliament of Victoria to the Parliament of the Commonwealth in the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) ('CP(IR) Act'). Therefore, the employees affected by Part XV (other than Division 10) are those employees in Victoria who are brought within the scope of the WR Act by the referral of power in the CP(IR) Act and who are not otherwise within the general constitutional coverage of the amended WR Act.

2705. The new object also relates to the creation of Victoria-specific provisions that are required because of Victoria's particular position within the federal workplace relations jurisdiction.

*New section 489 – Definitions*

2706. Proposed section 489 would provide definitions of *employer*, *employee* and *employment* to apply throughout Part XV of the WR Act, other than proposed Division 10 (see proposed section 515 for the Division 10 definition of these terms).

2707. Section 489 would establish a contrary intention for the purposes of the generally applicable definitions of the terms *employer*, *employee* and *employment* in subsections 4AA(1), 4AB(1) and 4AC(1) (which apply to all uses of those terms unless a contrary intention appears). This is required because proposed Part XV (other than Division 10) would apply only to employees in Victoria who are covered by the CP(IR) Act and who not are otherwise within the general constitutional coverage of the amended WR Act.

Illustrative Example – person who is employed by a constitutional corporation in Victoria

Richard is employed by Spinning Deliveries Pty Ltd. Richard works in Victoria. Richard wants to know if the provisions of Part XV apply to his employment.

The provisions of Part XV, except for Division 10 (employment agreements) do not apply to Richard's employment. This is because Spinning Deliveries Pty Ltd is an *employer* within the meaning of subsection 4AB(1), and therefore excluded by the definition of *employer* in section 489.

Illustrative Example – person who is employed by a sole trader in Victoria

Vivienne is employed by Wilma, to work in Wilma's corner store in Geelong. Wilma owns her corner store herself – she has not registered a corporation under the *Corporations Act 2001* or any other law. Vivienne and Wilma want to know if their employment relationship is covered by Part XV of the WR Act.

The provisions of Part XV will apply to the employment of Vivienne by Wilma. This is because Wilma is an *employer* within the meaning of section 3 of the CP(IR) Act and she is not an *employer* within the meaning of subsection 4AB(1) of the WR Act.

*New section 490 – Part only has force if supported by reference*

2708. Proposed section 490 would make it clear that each section of Part XV, other than paragraph 493(b) and Divisions 9 and 10 (for which separate provision is made), only operates for as long as, and in so far as, a relevant referral of a matter to the Parliament of the Commonwealth under the CP(IR) Act is in effect and provides sufficient legislative power for the provision to have effect. This reflects the constitutional position.

2709. Divisions 9 and 10 of Part XV would each have their own provisions relating to the extent to which the Divisions are supported by the CP(IR) Act (see proposed subsections 513(2), 513(3) and 516(2)).

2710. Paragraph 493(b), which would refer to provisions of Division 6 of Part VA as they apply to an employee because of section 170KB, is supported by the constitutional head of power which supports Division 6 of Part VA. Accordingly, paragraph 493(b) does not rely upon a power referred by the Parliament of Victoria to the Parliament of the Commonwealth in the CP(IR) Act.

### **New Division 2 – Pay and conditions**

2711. Proposed Division 2 of Part XV would provide that *employees* within the meaning of proposed section 489 are covered by the Standard, subject to certain modifications to ensure that the provisions are clearly supported by the CP(IR) Act.

#### *New section 491 – Additional effect of Act – AFPC’s powers*

2712. Proposed section 491 would extend the wage-setting powers of the AFPC to the employment of an employee in Victoria (as those terms are defined in proposed section 489), subject to certain modifications that flow from the terms of the CP(IR) Act.

2713. Proposed Part IA would contain provisions relating to the establishment and functions of the AFPC.

2714. Subject to the limitations in sections 495, 496, 497, 498 and 525 and clause 30 of Schedule 14, the AFPC would be able to exercise the same powers in respect of *employees* within the meaning of section 489 as it does in respect of *employees* within the meaning of subsection 4AA(1).

2715. For the purposes of this extended application, each reference in paragraph 7J(2)(d) to an *employee*, within the meaning of paragraph 7J(2)(d), is to be read as a reference to an *employee* within the meaning of section 489 in Victoria (that is, an employee covered by Part XV of the WR Act because of the CP(IR) Act and not otherwise within the general constitutional coverage of the amended WR Act).

#### *New section 492 – Additional effect of Act – Australian Fair Pay and Conditions Standard*

2716. Proposed section 492 would provide that, without affecting its general operation, Part VA of the WR Act also has effect in relation to the employment of an employee in Victoria (as those terms are defined in proposed section 489). Proposed Part VA contains provisions relating to the Standard.

2717. It is intended that, subject to the limitations in sections 495, 496, 497, 498 and 525, paragraph 492(1)(d) and clause 30 of Schedule 14, all employees in Victoria will have access to the Standard that is provided by Part VA of the WR Act.

2718. For the purposes of this extended application, each reference in Part VA to an *employee*, an *employer* or *employment* (within the meaning of Part VA) is to be read as a reference to an *employee*, an *employer* or *employment* (within the meaning of section 489) in Victoria.

2719. Paragraph 492(1)(d) would provide that, for the purposes of this extended application, Division 2 of Part VA has effect as if certain provisions had not been enacted.

2720. These modifications flow from the terms of the referral of power, which permit adjustment of wage rates only within the framework of the industry sectors and classifications that existed at the time of the referral. This means that the AFPC's powers to adjust classifications within an APCS will not apply to those employees in Victoria who are in the federal system solely because of the referral of power. It also means that the guarantee of the FMW for those employees not covered by an APCS cannot apply to these employees.

2721. As a result, the wage-setting provisions will operate in relation to employees (within the meaning of section 489) as if the following provisions had not been enacted:

- Subdivision D of Division 2 of Part VA – this Subdivision, which would provide a guarantee against reductions below pre-reform commencement rates of pay; a specific wages guarantee is provided for Victorian referral employees by section 497;
- Subdivision E of Division 2 of Part VA – this Subdivision, which would provide a guarantee against reductions below standard or a special FMW to employees within the meaning of Part VA, cannot be applied to employees (within the meaning of section 489) in Victoria, because of the terms of the referral of power in the CP(IR) Act;
- Subdivision F of Division 2 of Part VA – this Subdivision, which would provide for setting and adjusting standard and special FMW, cannot be applied to employees (within the meaning of section 489) in Victoria, because of the terms of the referral of power in the CP(IR) Act;
- Subdivision I of Division 2 of Part VA – this Subdivision, which would enable the AFPC to determine new APCSs for employees covered by Part VA, cannot be applied to employees (within the meaning of section 489) in Victoria, because of the terms of the referral of power in the CP(IR) Act;
- Subdivision K of Division 2 of Part VA – this Subdivision, which would provide for adjustments by the AFPC to accommodate the AIRC's 2005 Safety Net Review decision, has no application to the APCSs derived from each minimum wage order made by the AIRC prior to reform commencement under section 501, because each of those minimum wage orders has been varied by the AIRC to accommodate the AIRC's 2005 Safety Net Review (see *Shop, Distributive and Allied Employees Association and others* [PR960817]);
- Subdivision L of Division 2 of Part VA – this Subdivision, which would provide that the AFPC may set a new APCS to apply to all, or a class of, employees with a disability if they are covered by Part VA, cannot be applied to employees (within the meaning of section 489) in Victoria, because of the terms of the referral of power in the CP(IR) Act;

- section 90ZA – this section, which would provide for what happens if two or more APCSs would otherwise cover an employee who is covered by Part VA, would not apply to an *employee* (within the meaning of section 489) in Victoria, because the ‘work classifications’ referred to in subsection 496(3) would apply;
- section 90ZB – this section, which would require the AFPC to remove coverage rules described by reference to State or Territory boundaries, is not relevant to APCSs supported by the referral of power (because the terms of the referral of power in the CP(IR) Act necessarily support only minimum wage-setting for employees in Victoria);
- section 90ZC – this section, which would deem APCS rates of employees who are covered by Part VA to at least equal the FMW rates after the first exercise of the AFPC’s powers takes effect, cannot be applied to *employees* (within the meaning of section 489) in Victoria, because of the terms of the referral of power in the CP(IR) Act;
- section 90ZL – this section, which provides that the AFPC may adjust the APCSs which apply to employees who are covered by Part VA, would not apply to *employees* (within the meaning of section 489) in Victoria; the AFPC’s powers to adjust the APCSs which apply to *employees* (within the meaning of section 489) in Victoria would be provided (and limited) by section 495;
- section 90ZM – this section, which would enable the AFPC to revoke an APCS, does not apply to the framework of industry sectors and classifications referred by the Victorian Parliament (as the referral does not permit these to be altered or revoked);
- subsection 90F(3) – this subsection, which would provide a guaranteed basic periodic rate of pay for an employee covered by Part VA who is not covered by an APCS and who is not a junior employee, an employee with a disability, or an employee to whom a training arrangement applies, cannot be applied to *employees* (within the meaning of section 489) in Victoria, because of the terms of the referral of power in the CP(IR) Act;
- subsection 90F(4) – this subsection, which would provide a guaranteed basic periodic rate of pay for an employee covered by Part VA who is not covered by an APCS and who is a junior employee, an employee with a disability, or an employee to whom a training arrangement applies, cannot be applied to employees (within the meaning of section 489) in Victoria, because of the terms of the referral of power in the CP(IR) Act;
- paragraph 90H(3)(b) – this paragraph, which would provide a default casual loading percentage for employees covered by Part VA who are subject to a collective agreement or AWA, cannot be applied to *employees* (within the meaning of section 489) in Victoria, because of the terms of the referral of power in the CP(IR) Act; and
- paragraph 90W(2)(b) – this paragraph, which would provide that the APCS of an employee covered by Part VA may be a preserved or a new APCS, cannot be

applied to *employees* (within the meaning of section 489) in Victoria, because of the terms of the referral of power in the CP(IR) Act.

2722. Paragraph 492(1)(e) would provide that, for the purposes of this extended application, a minimum wage order made by the AIRC prior to reform commencement under section 501 would be a pre-reform federal wage instrument within the meaning provided by proposed section 90B (and would be subject to the jurisdiction of the AFPC on reform commencement as a preserved APCS).

2723. Paragraph 492(1)(f) would provide that, for the purposes of the extended application of the Standard in Victoria, section 89E (which applies the model dispute resolution process to a dispute about entitlements under Divisions 3 to 6 of Part VA) has effect as if Part VIIA (which contains the model dispute resolution process) had been modified by applying the definitions of *employee*, *employer* and *employment* which are provided in section 489.

2724. Paragraph 492(1)(g) would provide that, for the purposes of its extended application in Victoria, the Standard applies as if Division 6 (which relates to parental leave) had not been enacted. Division 6 of Part VA applies to this group of employees separately, relying on the constitutional head of power which supports Division 5 of Part VIA of the WR Act. Because *employees* in Victoria (within the meaning of section 489) are already covered by Division 5 of Part VIA, Part XV would not itself provide parental leave entitlements to these employees.

2725. Subsection 492(2) would provide that subsection 492(1) has effect subject to each of:

- section 495, which would provide for the adjustment of APCSs that cover *employees* (within the meaning of section 489) in Victoria;
- section 496, which would limit the application of minimum wage standards for *employees* (within the meaning of section 489) in Victoria;
- section 497, which would provide a guarantee to *employees* (within the meaning of section 489) in Victoria against reductions below pre-reform basic periodic rates of pay;
- section 498, which would provide a guarantee to *employees* (within the meaning of section 489) in Victoria against reductions below pre-reform casual loadings that apply to basic periodic rates of pay;
- section 525, which would provide for the relationship between the Standard and employment agreements which apply under Division 10 of Part XV; and
- clause 30 of Schedule 14, which would provide that the Standard does not apply to an employee whose employment is regulated by a pre-reform certified agreement or pre-reform AWA (in keeping with the interaction of pre-reform agreements and the Standard generally).

2726. Subsection 492(3) would provide that the repeal of sections 501 and 501A does not affect the continuity of an APCS-derived from a minimum wage order made under those sections.

2727. Section 86, which sets out powers of workplace inspectors, would also have effect in relation to the Standard that applies to an *employee* (within the meaning of section 489) in Victoria because of section 492.

*New section 493 – Application of the Australian Fair Pay and Conditions Standard to employees in Victoria*

2728. Proposed section 493 would provide that, for the purposes of the application of Divisions 1, 10, 11 and 12 of Part XV of the WR Act to an *employee* (within the meaning of section 489) in Victoria, a reference to a provision of the Standard is to be read as:

- a reference to that Standard as it applies to the employee because of section 492 (this does not include Division 6 of Part VA, because of paragraph 492(1)(g)); and
- a reference to Division 6 of Part VA as that Division applies to the employee because of section 170KB.

2729. Because employees in Victoria (within the meaning of section 489) are already covered by Division 5 of Part VIA, Part XV would not itself provide parental leave entitlements to these employees. However, section 493 would provide that references elsewhere in Part XV to the Standard would include a reference to the parental leave provisions of Division 6 of Part VA as that Division applies to the employee because of Division 5 of Part VIA.

*New section 494 – Additional provisions of the Australian Fair Pay and Conditions Standard*

2730. Proposed section 494 would provide that, for the purposes of the WR Act, the following provisions will apply as part of the Standard as it applies to an *employee* (within the meaning of section 489) in Victoria:

- section 495;
- section 496;
- section 497
- section 498.

2731. These provisions are all discussed below.

*New section 495 – Adjustment of APCSs*

2732. Proposed section 495 would provide that the AFPC may adjust the rate and casual loading provisions of an APCS which applies to employees (within the meaning of section 489) in Victoria. This adjustment power would be subject to the provisions of Part VA listed in subsection 495(2) – these limitations reflect limitations that would apply generally to the adjustment of an APCS.



*New section 496 – Limitation on application of minimum wage standards*

2733. Proposed section 496 would limit the wage-setting powers of the AFPC in relation to minimum wage for *employees* (within the meaning of section 489) in Victoria, so that the powers exercised by the AFPC in relation to *employees* (within the meaning of section 489) in Victoria do not go further than the powers referred to the Parliament of the Commonwealth by the CP(IR) Act.

2734. Paragraph 496(1)(a) would provide that the AFPC must not exercise its wage-setting powers so as to set or adjust a minimum wage for *employees* (within the meaning of section 489) in Victoria if the employees are not within a *work classification*, within the meaning of subsection 4(7) of the CP(IR) Act. The effect of this would be that the only wage-setting power that the AFPC can exercise in relation to *employees* (within the meaning of section 489) in Victoria is to set and adjust wages for the work classifications referred to in subsection 4(7) of the CP(IR) Act.

2735. The work classifications referred to in section 496 are the work classifications created by the Employee Relations Commission of Victoria under repealed provisions of the former *Employee Relations Act 1992* (Vic). These are the same work classifications as contained in the minimum wage orders made by the AIRC prior to reform commencement under sections 501 and 501A of the WR Act.

2736. Paragraph 496(1)(b) would provide that any exercise by the AFPC of its wage-setting powers to set or adjust a minimum wage for *employees* (within the meaning of section 489) in Victoria has no effect while the employees are subject to an award or agreement made under the WR Act.

- The meaning of *award* for the purposes of this section is extended by clauses 89, 95 and 102 of Schedule 13.
- An employee whose employment is regulated by a *pre-reform certified agreement* or *pre-reform AWA* (within the meaning of Schedule 14), would not be affected by an exercise of the AIRC's wage-setting powers, because of clause 30 of Schedule 14.

2737. The effect of paragraph 496(1)(b) is that any minimum wages set by the AFPC for *employees* (within the meaning of section 489) in Victoria will not apply while an employee is subject to an award or agreement made under the WR Act. If an *employee* (within the meaning of section 489) in Victoria ceases to be covered by an award or agreement, the wage most recently set by the AFPC for the employee's work classification will apply to the employee.

2738. Subsection 496(2) extends the effect of subsection 496(1) to cover provisions of the Standard that set or adjust a minimum wage in Victoria (such as 90Q, which sets the FMW at \$12.75 per hour).

2739. As a result of this section, minimum wages that would otherwise be applicable to *employees* (within the meaning of section 489) in Victoria, will not apply to an employee who is subject to an award (including a transitional award, Victorian reference transitional award or

common rule declaration under proposed Schedule 13), or agreement (including a pre-reform agreement).

2740. The limitations in section 496 are necessary because of the terms of the referral of power in the CP(IR) Act, which enables the Commonwealth to legislate for the setting and adjusting of minimum wages for employees who are subject to an award or agreement under the WR Act.

2741. The limitation would not apply to employees who are covered by an employment agreement continued in existence by Division 10 of Part XV. This is because such an employment agreement was originally made under repealed provisions of the *Employee Relations Act 1992 (Vic)*, and not the WR Act.

*New section 497 – Guarantee against reductions below pre-reform basic periodic rates of pay*

2742. Proposed section 497 would provide a minimum wage guarantee to employees (within the meaning of section 489) in Victoria who are covered by an APCS adjusted by the AFPC, that the basic periodic rate for each work classification shall not be less than the pre-reform basic periodic rate for that work classification.

2743. This guarantee is in different terms to the guarantee provided by Subdivision D of Division 2 of Part VA because, in the case of employees (within the meaning of section 489) in Victoria, the AFPC will not be able to adjust the classification provisions of an APCS or set new APCSs.

*New section 498 – Guarantee against reductions below pre-reform casual loadings that apply to basic periodic rates of pay*

2744. Proposed section 498 would provide a guarantee to *employees* (within the meaning of section 489) in Victoria who are covered by an APCS set or adjusted by the AFPC, that the casual loading that applies to the basic periodic rate for each work classification shall not be less than the pre-reform casual loading that applied to the basic periodic rate for that work classification.

2745. This guarantee is in different terms to the guarantee provided by Subdivision D of Division 2 of Part VA because, in the case of *employees* (within the meaning of section 489) in Victoria, the AFPC will not be able to adjust the classification provisions of an APCS or set new APCSs.

*New section 499 – Additional effect of Act – enforcement of, and compliance with, the Australian Fair Pay and Conditions Standard*

2746. Proposed section 499 would provide for the extension of the compliance and enforcement provisions of Part VIII to the Standard as it applies (because of section 492) to an *employee* (within the meaning of section 489) in Victoria.

2747. For the purposes of this extended application, each reference in Part VIII to an *employee*, an *employer* or *employment* (within the meaning of Part VIII) is to be read as a reference to an *employee*, an *employer* or *employment* (within the meaning of section 489) in Victoria. This

means that an *employee* (within the meaning of section 489) in Victoria can enforce the Standard (as it applies because of section 492) in the same way as an *employee* within the meaning of subsection 4AA(1).

### **New Division 3 – Workplace agreements**

2748. Proposed Division 3 of Part XV would provide *employees* and *employers* (within the meaning of section 489) with the ability to make workplace agreements in accordance with Part VB, subject to certain modifications to ensure that the provisions are clearly supported by the CP(IR) Act.

#### *New section 500 – Additional effect of Act – Workplace agreements*

2749. Proposed section 500 would provide that, without affecting its general operation, Part VB of the WR Act also has effect (subject to the requirements in sections 501 and 502) in relation to agreements about matters pertaining to the relationship between:

- an *employer* or *employers* (within the meaning of section 489) in Victoria; and
- an *employee* or *employees* (within the meaning of section 489) in Victoria.

2750. For the purposes of this extended application, each reference in Part VB to an *employee*, an *employer* or *employment* (within the meaning of Part VB) is to be read as a reference to an *employee*, an *employer* or *employment* (within the meaning of section 489) in Victoria.

2751. Subsection 500(1) also provides that provisions of the WR Act which are related provisions to Part VB of the WR Act (other than Part VIAA – transmission of business) have the same extended effect. Related provisions would include the proposed provisions about the model dispute resolution procedure (Part VIIA), compliance (Part VIII) and industrial action (Part VC) as well as proposed section 352A, in so far as they relate to workplace agreements.

2752. Subsections 500(3) and 500(4) would allow the making of regulations to specify what is, and is not, a related provision for the purposes of section 500.

#### *New section 501 – Workplace agreements – mandatory term about basic periodic rate of pay*

2753. Proposed section 501 would provide that a collective agreement or AWA which covers *employees* (within the meaning of section 489) in Victoria must contain an express term to the effect that, for so long as the employee is covered by the agreement, the employer will provide a basic periodic rate of pay that is at least equal to:

- if the employee is within a *work classification* within the meaning of section 496, the basic periodic rate of pay that would be payable to the employee if the employee's wage were as provided under the Standard (as it applies under section 492), ie the basic periodic rate of pay attaching to the employee's work classification;
- if the employee is not within a *work classification* within the meaning of section 496, and is a junior employee, an employee with a disability or an employee to

whom a training arrangement applies, the rate of pay specified in, or worked out in accordance with a method specified in, the regulations; or

- if the employee is not within a *work classification* within the meaning of section 496, and is not a junior employee, an employee with a disability or an employee to whom a training arrangement applies, the standard FMW provided under sections 90Q and 90R.

2754. This section is intended to provide a wages guarantee to employees (within the meaning of section 489) in Victoria who are subject to a collective agreement or AWA, that is similar to the wages guarantee which would apply to employees within the meaning of subsection 4AA(1). The wages guarantee provided by the Standard, as extended by Division 2 of Part XV, cannot be applied to employees (within the meaning of section 489) in Victoria who are subject to a collective agreement or AWA, because of the terms of the referral of power in the CP(IR) Act.

2755. Subsection 501(3) would provide that a collective agreement or AWA which covers an employee (within the meaning of section 489) in Victoria is void if it does not contain the mandatory term provided by subsection 501.

#### *New section 502 – Workplace agreements – mandatory term about casual loading*

2756. Proposed section 502 would provide that a collective agreement or AWA which covers *employees* (within the meaning of section 489) in Victoria, who are casual employees, must contain an express term to the effect that, for so long as a casual employee is covered by the agreement, the casual loading that is payable to a casual employee will not be less than the default casual loading percentage provided by Division 2 of Part VA. (The default casual loading percentage is the benchmark for agreement making, irrespective of the casual loading that would otherwise apply to the employee.)

2757. This section is intended to provide a casual loading guarantee to *employees* (within the meaning of section 489) in Victoria who are subject to a collective agreement or AWA, that is similar to the casual loading guarantee which would apply to employees within the meaning of subsection 4AA(1). The casual loading guarantee provided by the Standard, as extended by Division 2 of Part XV, cannot be applied to *employees* (within the meaning of section 489) in Victoria who are subject to a collective agreement or AWA, because of the terms of the referral of power in the CP(IR) Act.

2758. Subsection 502(2) would provide that a collective agreement or AWA which covers a casual employee who is an *employee* (within the meaning of section 489) in Victoria is void if it does not contain the mandatory term provided by subsection 502.

#### **Division 4 – Industrial action**

2759. Proposed Division 4 of Part XV would provide that the provisions relating to the taking of industrial action in proposed Part VC would apply to *employees* and *employers* within the meaning of section 489, subject to certain modifications to ensure that the provisions are clearly supported by the CP(IR) Act.

*New section 503 – Additional effect of Act – industrial action*

2760. Proposed section 503 would provide that, without affecting its general operation, Part VC of the WR Act (other than proposed Division 8 of Part VC – see paragraph 503(d)) also has effect in relation to industrial action engaged in by *employers* (within the meaning of section 489) in Victoria or *employees* (within the meaning of section 489) in Victoria, subject to an altered definition of the term *industrial action*.

2761. Paragraph 503(e) and subsections 503(1) – (6) set out a replacement definition of *industrial action*. The key difference between this definition, and the definition in proposed section 106A is the requirement in paragraph 503(1)(e) that, to attract the extended application, the industrial action must be ‘agreement-related’. This requirement has been adopted to ensure that the industrial action provisions fall within the terms of the referral of power in the CP(IR) Act.

2762. The term *agreement-related* would be defined by subsection 503(3). Action would be agreement-related if it:

- relates to the negotiation or proposed negotiation of an agreement under Part VB (as that Part has effect because of section 500); or
- affects or relates to work that is regulated by an agreement under Part VB (as that Part has effect because of section 500).

2763. For the purposes of this extended application, each reference in Part VC and in 503(1) – (6) to an *employee*, an *employer* or *employment* (within the meaning of Part VC) is to be read as a reference to an *employee*, an *employer* or *employment* (within the meaning of section 489) in Victoria.

2764. Because section 500 would extend Part VB and *related provisions*, a reference in section 503 to a *collective agreement* or AWA would include a collective agreement or AWA which has been made or is proposed to be made under Part VB, as that Part has effect because of 500.

*New section 504 – Intervention in proceedings under Part VC*

2765. Proposed section 504 would provide that the AIRC must, on application, grant to a Minister of Victoria, on behalf of the Government of Victoria, leave to intervene in proceedings under Division 2 of Part VC (which relates to suspension and termination of bargaining periods), or an appeal against a decision of the AIRC made under Division 2 of Part VC, if one or more of the relevant employees are *employees* (within the meaning of section 489) in Victoria.

2766. Section 504 is not intended to grant a Minister of Victoria a right to intervene in proceedings concerning Division 2 of Part VC in circumstances where the proceedings do not relate to *employees* (within the meaning of section 489) in Victoria. If the proceedings relate only to *employees* within the meaning of subsection 4AA(1), a Minister of Victoria has no automatic right, under section 504, to be granted leave to intervene, although he or she might still be entitled to seek leave to intervene in the usual way.

*New section 505 – Additional effect of Act – enforcement of, and compliance with, orders under Part VC*

2767. Proposed section 505 would extend the application of the compliance provisions in proposed Part VIII of the WR Act to an order of the AIRC under proposed Part VC (which relates to industrial action) as it applies because of section 503.

2768. For the purposes of this extended application, each reference in Part VIII to an *employee*, an *employer* or *employment* (within the meaning of Part VIII) is to be read as a reference to an *employee*, an *employer* or *employment* (within the meaning of section 489) in Victoria. This means that an *employee* or *employer* (within the meaning of section 489) in Victoria can enforce the orders under Part VC (as it applies because of section 503) in the same way as an *employee* or *employer* within the meaning of subsection 4AA(1) or 4AB(1).

**New Division 5 – Meal breaks**

*New section 506 – Additional effect of Act-meal breaks*

2769. Proposed section 506 would provide *employees* (within the meaning of section 489) in Victoria the same meal break entitlement as *employees* (within the meaning of subsection 4AA(1)) would be provided by proposed Division 1 of Part VIA, subject to certain modifications as a result of the terms of the CP(IR) Act.

2770. The model dispute resolution process would also apply to disputes about this entitlement.

*New section 507 – Additional effect of Act – enforcement of, and compliance with, section 170AA*

2771. Proposed section 507 would extend the application of the compliance provisions in proposed Part VIII to the meal break entitlement (as it applies because of section 506) to an *employee* (within the meaning of section 489) in Victoria.

2772. For the purposes of this extended application, each reference in Part VIII to an *employee*, an *employer* or *employment* (within the meaning of Part VIII) is to be read as a reference to an *employee*, an *employer* or *employment* (within the meaning of section 489) in Victoria. This means that an *employee* (within the meaning of section 489) in Victoria can enforce the meal break entitlement (as it applies because of section 507) in the same way as an *employee* within the meaning of subsection 4AA(1) or 4AB(1).

**New Division 6 – Termination of employment**

2773. Proposed Division 6 of Part XV would provide that an *employee* (within the meaning of section 489) whose employment is terminated shall have the same rights to make an application to the AIRC alleging that the termination was harsh, unjust or unreasonable, as the employee would have if he or she were an *employee* within the meaning of subsection 4AA(1).

*New section 508 – Additional effect of Act-termination of employment*

2774. Proposed section 508 would ensure that the provisions of Division 3 of Part VIA which enable certain dismissed employees to make an application to the AIRC alleging that the termination of his or her employment was harsh, unjust or unreasonable will apply to *employees*

(within the meaning of subsection 489) in Victoria in the same way as they would apply to *employees* within the meaning of subsection 4AA(1). The exclusions from the unfair dismissal jurisdiction contained in sections 170CE and 170CBA would also apply to *employees* (within the meaning of subsection 489) in Victoria in the same way as they would apply to employees within the meaning of subsection 4AA(1).

2775. Proposed section 508 is not intended to affect the meaning of *employee* and *employer* provided by subparagraph (b) of the definition of those two terms in subsection 170CAA(1), as they relate to the ‘unlawful termination’ provisions which cover *employees* within the (wider) meaning provided by subsection 4AA(2).

*New section 509 – Additional effect of Act – enforcement of, and compliance with, orders under Division 3 of Part VIA*

2776. Proposed section 509 would extend the application of the compliance provisions in proposed Part VIII to orders of the AIRC under Division 3 of Part VIA (as it applies because of section 508) to an employee (within the meaning of section 489) in Victoria.

2777. For the purposes of this extended application, each reference in Part VIII to an *employee*, an *employer* or *employment* (within the meaning of Part VIII) is to be read as a reference to an *employee*, an *employer* or *employment* (within the meaning of section 489) in Victoria. This means that an *employee* or *employer* (within the meaning of section 489) in Victoria can enforce an order of the AIRC under Division 3 of Part VIA (as it applies because of section 508) in the same way as an *employee* or *employer* within the meaning of subsection 4AA(1) or 4AB(1).

**New Division 7 – Freedom of Association**

**2778.** Proposed Division 7 of Part XV would provide that, in addition to its general constitutional coverage, Part XA also has effect in relation to conduct in Victoria.

*New section 510 – Additional effect of Act – freedom of association*

2779. Proposed section 510 would provide that, without affecting its general operation, Part XA of the WR Act also has effect in relation to conduct in Victoria.

2780. For the purposes of this extended application, the meanings of *employee*, *employer* and *employment* which are contained in Part XA will continue to apply – that is, those meanings would not be replaced by the meanings contained in section 489.

2781. Subsection 510(2) would provide that the extended application provided by subsection 510(1) shall apply despite proposed subsection 243(3) which would, if subsection 510(2) were not enacted, prevent the extension of Part XA in this context.

**New Division 8 – Right of entry**

2782. Proposed Division 8 of Part XV would modify the operation of Part IX of the WR Act, to the extent that it relates to entry onto premises of an *employer* (within the meaning of section 489) in Victoria. The modifications are made to ensure that the provisions fall with the terms of the referral of power in the CP(IR) Act.

*New section 511 – Right of entry*

2783. Proposed section 511 would provide that Part IX of the WR Act has effect in relation to premises of an *employer* (within the meaning of section 489) in Victoria subject to paragraphs 511(a) and (b).

2784. The modifications made by paragraphs 511(a) and (b) to the application of Part IX to premises of an *employer* (within the meaning of section 489) in Victoria give effect to the terms of the referral of power from the Victorian Parliament to the Commonwealth Parliament in the CP(IR) Act.

2785. Paragraph 511(a) would provide that Part IX has effect in relation to premises of an *employer* (within the meaning of section 489) in Victoria as if Division 4 of Part IX did not authorise entering the premises of an *employer* (within the meaning of section 489) in Victoria for the purposes of investigating a suspected breach unless the suspected breach relates to:

- a provision of the WR Act (as that provision has effect because of Part XV); or
- an agreement under Part VB (as Part VB has effect because of section 500).

2786. A right of entry to premises in Victoria to investigate a suspected breach of a transitional award or a Victorian reference transitional award, or a common rule which applies to an industry in Victoria, would be provided by proposed clauses 105 and 91 of Schedule 13 to the WR Act.

2787. Paragraph 511(b) would provide that Part IX has effect in relation to premises of an *employer* (within the meaning of section 489) in Victoria as if Division 6 of Part IX did not authorise entering the premises of an *employer* (within the meaning of section 489) in Victoria for the purposes of holding discussions unless the discussions relate to:

- an agreement under Part VB (as Part VB has effect because of proposed section 500); or
- a proposed agreement under Part VB (as Part VB has effect because of proposed section 500).

2788. In the event that the proposed discussions do not relate to an agreement or proposed agreement, Division 6 of Part IX cannot be applied to *employees* (within the meaning of section 489) in Victoria.

*New section 512 – Additional effect of Act – enforcement of, and compliance with, orders under Part IX*

2789. Proposed section 512 would extend the application of the compliance provisions in proposed Part VIII to an order of the AIRC under Part IX in relation to premises of an *employer* (within the meaning of section 489) in Victoria.



2790. This means that an *employee* or *employer* (within the meaning of section 489) in Victoria can enforce orders under Part IX (as it applies because of proposed Division 8 of Part XV) in the same way as an *employee* or *employer* within the meaning of subsection 4AA(1) or 4AB(1).

### **New Division 9 – Transmission of business**

2791. Proposed Division 8 of Part XV would provide that Part VIAA has effect in relation to transmissions of business involving one or more employers that are *employers* (within the meaning of section 489) in Victoria or involving a workplace agreement made under Part VB as that Part would apply because of section 500.

#### *New section 513 – Additional effect of Act – Transmission of business*

2792. Proposed section 513 would provide that, without affecting its general operation, Part VIAA of the WR Act also has effect as if:

- each reference in Part VIAA to an *employee*, an *employer* or *employment* (within the meaning of Part XA) included a reference to an *employee*, an *employer* or *employment* (within the meaning of section 489) in Victoria;
- Division 5 of Part VIAA had not been enacted;
- each reference in Part VIAA to an AWA included a reference to an AWA made under Part VB as that Part has effect because of section 500;
- each reference in Part VIAA to a collective agreement included a reference to a collective agreement made under Part VB as that Part has effect because of section 500;
- each reference in Part VIAA to a workplace agreement included a reference to a workplace agreement made under Part VB as that Part has effect because of section 500; and
- each reference in Part VIAA to the Standard included a reference to the Standard as that Standard has effect because of section 492.

2793. As a result of proposed section 513, the transmission of business provisions in Part VIAA would also apply to an AWA, a collective agreement and the Standard in relation to a transmission of business:

- from an employer within the meaning of subsection 4AB(1) to an employer within the meaning of section 489;
- from an employer within the meaning of section 489 to an employer within the meaning of subsection 4AB(1); and
- from an employer within the meaning of section 489 to an employer within the meaning of section 489;

regardless of whether the AWA or collective agreement was made under Part VB or under Part VA as that Part has effect because of section 492, or whether the Standard has effect under Part VA or because of section 492.

2794. Subsections 513(2) and 513(3) would provide that Part VIAA as it applies to an employer in Victoria under Division 9 only has effect while supported by the CP(IR) Act.

*New section 514 – Additional effect of Act – enforcement of, and compliance with, orders under Part VIAA*

2795. Proposed section 514 would extend the application of the compliance provisions in proposed Part VIII to an order of the AIRC under Part VIAA (as it applies because of section 513) to an *employee* (within the meaning of section 489) in Victoria.

2796. For the purposes of this extended application, each reference in Part VIII to an *employee*, an *employer* or *employment* (within the meaning of Part VIII) is to be read as a reference to an *employee*, an *employer* or *employment* (within the meaning of section 489) in Victoria. This means that an *employee* or *employer* (within the meaning of section 489) in Victoria can enforce an order of the AIRC under Part VIAA (as it applies because of section 513) in the same way as an *employee* or *employer* within the meaning of subsection 4AA(1) or 4AB(1).

**New Division 10 – Employment agreements**

2797. Proposed Division 10 of Part XV would contain arrangements for the continued application of employment agreements which were originally made under the *Employee Relations Act 1992 (Vic)* (now known as the *Long Service Leave Act 1996 (Vic)*).

2798. While the *Employee Relations Act 1992 (Vic)* originally provided for the making of both collective and individual employment agreements, all employment agreements which currently continue to exist under Subdivision E of Part XV of the pre-reform WR Act are, because of the terms of the *Employee Relations Act 1992 (Vic)* and Subdivision E of Part XV of the pre-reform WR Act, individual employment agreements.

*New section 515 – Definitions*

2799. Proposed section 515 would provide that Division 10 would apply to any *employee* within the meaning of the CP(IR) Act, but not a person who is undertaking a vocational placement.

2800. This definition would apply only to Division 10 of Part XV – meaning that the definitions of the terms *employee*, *employer* and *employment* which are contained in each of subsections 4AA(1), 4AB(1) and 4AC(1) of the WR Act and 489 do not apply to Division 10 of Part XV of the WR Act.

2801. Section 515 would define *employment agreement* for the purposes of Division 10 of Part XV to mean an agreement that, immediately before the reform commencement, was continued in force by Subdivision E of Division 3 of Part XV of the WR Act. These employment agreements were originally made under repealed provisions of the *Employee Relations Act 1992 (Vic)*.

*New section 516 – Application of this Division*

2802. Proposed section 516 provides for the application of Division 10 of Part XV.

2803. Subsection 516(1) would provide that Division 10 of Part XV applies to an employment agreement if:

- the employer and employee bound by the employment agreement are an *employer* and *employee* within the meaning of section 489; or
- the employer and employee bound by the employment agreement are an *employer* and *employee* within the meaning of subsections 4AA(1), 4AB(1) and 4AC(1).

2804. Subsection 516(2) would provide that, to the extent that the employer and employee bound by the employment agreement are an *employer* and *employee* within the meaning of section 489, Division 10 of Part XV only operates for as long as, and in so far as, the relevant referral of a matter to the Parliament of the Commonwealth is in effect and provides sufficient legislative power for the section to have effect. This reflects the constitutional position.

*New section 517 – Inconsistency with other Commonwealth laws*

2805. Proposed section 517 would establish the relationship between Division 10 of Part XV of the WR Act and any other Commonwealth law. Where there is any inconsistency, the other Commonwealth law prevails. This is subject to clause 39 of Schedule 14, which would provide that a designated old IR agreement (within the meaning of subclause 39(1) of Schedule 14) prevails to the extent of any inconsistency with an employment agreement.

*New section 518 – Continued operation of employment agreements*

2806. Proposed section 518 would provide that an employment agreement, within the meaning of section 515, will continue in effect until the employee covered by the employment agreement becomes covered by an AWA, collective agreement or a workplace determination made under Part VB of the WR Act.

*New section 519 – Stand down provisions*

2807. Proposed section 519 would provide that if an employment agreement, within the meaning of section 515, does not contain a stand-down provision, it will be deemed to include the stand-down provision contained in subsection 519(2). This is in line with equivalent repealed provisions (section 14 and Schedule 5) of the *Employee Relations Act 1992* (Vic).

2808. Proposed section 519 does not apply more generally to contracts of employment in Victoria.

*New section 520 – Model dispute resolution process*

2809. Proposed section 520 would provide that an *employment agreement* (within the meaning of section 515) is taken to include a term requiring that disputes about the application of the employment agreement are to be resolved using the model dispute resolution process contained in Part VIIA of the WR Act.

2810. Subsection 520(2) would render void a term of an *employment agreement* (within the meaning of section 515) that would deal with a dispute about the application of the employment agreement in any way other than that contained in the model dispute resolution process contained in Part VIIA of the WR Act.

*New section 521 – Additional effect of Act – enforcing employment agreements*

2811. Proposed section 521 would extend the application of the compliance provisions in proposed Part VIII to an employment agreement, within the meaning of section 515.

2812. For the purposes of this extended application, each reference in Part VIII to an *employee*, *employer* or *employment* (within the meaning of Part VIII) is to be read as a reference to an *employee*, *employer* or *employment* (within the meaning of section 515) in Victoria.

2813. Furthermore, for the purposes of this extended application, each reference in Part VIII to an AWA is to be read as a reference to an *employment agreement* within the meaning of section 515. An employment agreement would be enforceable under Part VIII as if it were an AWA, and eligible persons who could apply to enforce an employment agreement would be the same as who could apply to enforce an AWA.

*New section 522 – Employer to give copy of employment agreement*

2814. Proposed section 522 would provide that an employer bound by an *employment agreement* (within the meaning of section 515) must, on being requested to do so by the employee bound by the employment agreement, provide a copy of the employment agreement to the employee as soon as possible. This maintains a requirement of a repealed provision (section 10(2)) of the *Employee Relations Act 1992* (Vic).

*New section 523 – Additional effect of Act – employee records and pay slips*

2815. Proposed section 523 would provide that, without affecting its general operation, section 353A also has effect in relation to the employment of a person under an *employment agreement* (within the meaning of section 515).

2816. For the purposes of this extended application, each reference in section 353A to an *employer* or *employment* (within the meaning of section 353A) is to be read as a reference to an *employer* or *employment* (within the meaning of section 515) in Victoria.

2817. Furthermore, for the purposes of this extended application, each reference in section 353A to an ‘AWA’ is to be read as a reference to an employment agreement within the meaning of section 515.

*New section 524 – Registrar not to divulge information in employment agreements*

2818. Proposed section 524 would provide that the contents of employment agreements (within the meaning of section 515) held by the Australian Industrial Registrar are confidential to the parties or a person who may enforce the employment agreement. This is consistent with a repealed provision (subsection 13(3)) of the *Employee Relations Act 1992* (Vic).

*New section 525 – Relationship between employment agreements and Australian Fair Pay and Conditions Standard*

*New section 525 – Relationship between employment agreements and Australian Fair Pay and Conditions Standard*

Proposed section 525 would provide that where an entitlement under a term of an employment agreement is more favourable to the employee than a similar entitlement which is part of the Standard, the employee will be entitled to the entitlement under the employment agreement, and that where the Standard is more favourable the Standard will prevail.

As a result of section 525, the terms of an employment agreement within the meaning of section 515 would be underpinned by the terms and conditions contained in the Standard as contained in:

- Part VA – for an *employee* within the meaning of subsection 4AA(1); or
- Part VA (except for Division 6) as extended by section 492 and Division 6 of Part VA as extended by section 170KB – for an *employee* within the meaning of section 489 (see section 493).

The effect of section 525 is similar to that of a repealed provision (see subsections 25(2) and 26(2)) of the *Employee Relations Act 1992* (Vic) which provided that employment agreements were underpinned by Schedule 1 of that Act, and with section 504 of the pre-reform WR Act, which provides that employment agreements are underpinned by Schedule 1A of the WR Act. Post-reform, Schedule 1A would be replaced by the Standard.

*New section 526 – Relationship between employment agreements and awards*

2819. Proposed section 526 would provide that an award (under Part VI of the WR Act) prevails to the extent of any inconsistency with an employment agreement within the meaning of section 515.

2820. The meaning of *award* for the purposes of this section is extended by clauses 89, 95 and 102 of Schedule 13.

**New Division 11 – Exclusion of Victorian laws<sup>99</sup>**

2821. Proposed Division 11 would provide that the WR Act is intended to override certain State and Territory laws, to the extent that they relate to an *employee*, an *employer* or *employment* (within the meaning of section 489) in Victoria.

*New section 527 – Additional effect of Act – exclusion of Victorian laws*

2822. Proposed section 527 would provide that, without affecting their general operation, sections 7C (other than paragraphs 7C(3)(f) and (m)), 7D and 7E also have effect as if each reference in those provisions to an *employee*, an *employer* or *employment* (within the meaning of those sections) were a reference to an *employee*, an *employer* or *employment* (within the meaning of section 489) in Victoria.

2823. The effect of section 527 would be that the provisions of sections 7C, 7D and 7E would apply to exclude State and Territory laws to the extent that they would otherwise apply in

relation to an *employee* (within the meaning of section 489) in Victoria or an *employer* (within the meaning of section 489) in Victoria.

2824. Proposed section 527 would not affect the operation of proposed clause 87 of Schedule 13, which would provide that a common rule that applies under Schedule 13 to an industry in Victoria is not intended to exclude or limit the operation of a law of Victoria that is capable of operating concurrently with the common rule.

### **New Division 12 – Other provisions of this Act**

#### *New section 528 – Additional effect of other provisions of this Act*

2825. Proposed section 528 would enable regulations to be made modifying the effect of various provisions of the WR Act, to give effect or further effect to the CP(IR) Act.

2826. This regulation-making power would be used to give extended effect to provisions of the WR Act not already dealt with in Part XV, to make laws as provided for in (and subject to the provisions of) the CP(IR) Act.

#### **Item 241 – Section 538 (definition of *employee*)**

2827. This item would repeal and replace the definition of *employee* in section 538 so that the definition of *employee* for the purposes of Part XVI is different to the definition in Part XV. An *employee* for the purposes of Part XVI is an employee employed by a constitutional corporation.

#### **Item 242 – Subsection 541(1)**

2828. This item would amend subsection 541(1) by deleting the reference to subsection 541(5).

2829. This item is consequential upon item 246, which would repeal subsection 541(5).

#### **Item 243 – Subsection 541(3)**

2830. This item would amend subsection 541(3) by deleting the reference to Schedule 1A of the WR Act and replacing it with a reference to the Standard in proposed Part VA.

2831. This item would be consequential upon item 264, which would repeal Schedule 1A of the WR Act.

#### **Item 244 – Subsection 541(3)**

2832. This item would amend subsection 541(3) by deleting the reference to subsection 541(5).

2833. This item is consequential upon item 246, which would repeal subsection 541(5).

#### **Item 245 – Subsection 541(4)**

2834. This item would amend subsection 541(4) by deleting the reference to Schedule 1A of the WR Act and replacing it with a reference to the Standard in proposed Part VA.

2835. This item would be consequential upon item 264, which would repeal Schedule 1A of the WR Act.

**Item 246 – Subsection 541(5)**

2836. This item would repeal subsection 541(5). The statutory amount owed to a person under Part XVI would be calculated in accordance with subsection 541(3), without reference to any award made under the WR Act.

**Item 247 – Paragraph 548(1)(a)**

2837. This item would make a minor amendment affecting the use of terminology.

**Items 248 – 263**

2838. These items would amend provisions inserted by Schedule 3 of the Bill, which inserts new Part XVII. This new Part would commence ahead of other provisions in the Bill to ensure that provisions that provide for minimum wages and conditions for school-based apprentices and trainees would commence at the start of the 2006 school year.

**Item 248 – Section 550 (definition of *additional condition*)**

2839. This item would omit ‘a wage instrument other than a rate of pay’ from the definition of *additional condition* in section 550, and substitute instead ‘an award or notional agreement preserving State awards’. This is a technical amendment, consequent on the repeal of the definition of *wage instrument* by item 254.

**Item 249 – Section 550 (definition of *employee*)**

2840. This item would repeal the definition of employee, consequent on insertion of that definition in section 4(1) of the WR Act by item 2.

**Item 250 – Section 550 (definition of *employer*)**

2841. This item would repeal the definition of employer, consequent on insertion of that definition in section 4(1) of the WR Act by item 2.

**Item 251 – Section 550 (definition of *full-time apprentice*)**

2842. This item would omit ‘wage instrument’ from the definition of *full-time apprentice* in section 550, and substitute instead ‘award or notional agreement preserving State awards’. This is a technical amendment, consequent on the operation of proposed section 90ZD and the repeal of the definition of *wage instrument* by item 254.

**Item 252 – Section 550 (definition of *State or Territory training authority*)**

2843. This item would repeal the definition of *State or Territory training authority* from Part XVII, consequent on insertion of that definition in section 4(1) of the WR Act by item 2.

**Item 253 – Section 550 (definition of *training arrangement*)**

2844. This item would repeal the definition of *training arrangement* from Part XVII, consequent on insertion of that definition in section 4(1) of the WR Act by item 2.

**Item 254 – Section 550 (definition of *wage instrument*)**

2845. This item would repeal the definition of *wage instrument*. This is a technical amendment to reflect the fact that the relevant wage and classification provisions in awards will be translated into a preserved APCS under proposed section 90ZD.

**Item 255 – Section 551**

2846. This item would repeal section 551, consequent on new section 7C that would exclude the application of particular laws of a State or Territory.

**Item 256 – Section 552**

2847. This item would repeal section 552, consequent on the translation of the rates of pay for school-based apprentices into a preserved APCS under proposed section 90ZD.

**Item 257 – Section 553(5)**

2848. This item would repeal subsection 553(5) and substitute an alternative subsection, consequent on the operation of proposed section 90ZD and the repeal of the definition of *wage instrument* by item 254.

**Item 258 – Subsection 554(1)**

2849. This item would omit the words ‘a wage instrument’ in subsection 554(1) and substitute ‘an APCS’, consequent on the operation of proposed section 90ZD and the repeal of the definition of *wage instrument* by item 254.

**Item 259 – Section 555**

2850. This item would repeal section 555, consequent on the translation of the rates of pay for school-based apprentices into a preserved APCS under proposed section 90ZD.

**Item 260 – Subsection 556(6)**

2851. This item would repeal subsection 556(6) and substitute an alternative subsection, consequent on the operation of proposed section 90ZD and the repeal of the definition of *wage instrument* in section 550.

**Item 261 – At the end of section 557**

2852. This item would add a new subsection 557(3) to provide that section 557, which provides a 20% loading in lieu of certain conditions, has effect as if it were a provision of the Standard.



**Item 262 – Section 558**

2853. This item would make a minor technical amendment, consequent on the translation of the rates of pay for school-based apprentices into a preserved Australian Pay and Classification Scale under proposed section 90ZD.

**Item 263 – Section 558**

2854. This item would made minor amendments, consequent on the repeal of sections 552 and 555 made by this Schedule.

**Item 264 – Schedule 1A**

2855. This item would repeal Schedule 1A of the WR Act.

2856. Schedule 1A would be replaced by the Standard in proposed Part VA (see item 238).

**Items 265 – 355**

2857. These items would make a number of amendments to Schedule 1B including:

- changing the constitutional underpinnings for the registration of organisations under Schedule 1B;
- reducing the minimum number of members required for the formation of an enterprise association from fifty members to twenty;
- providing additional grounds upon which an organisation may be deregistered;
- allowing for applications for withdrawal from amalgamation to be made in relation to amalgamations that occurred prior to 31 December 1996 and expanding the class of persons who can apply for a ballot for withdrawal; and
- providing particular powers for the AIRC in addition to the powers set out in proposed Part II.

2858. A number of minor and consequential amendments would also be made to Schedule 1B.

**Item 265 – Section 1 of Schedule 1B**

2859. Item 265 would replace the words ‘the objects of the Schedule’ with ‘Parliament’s intention in enacting this Schedule’ in Section 1, which provides an outline of Chapter 1 of Schedule 1B. This amendment is consequential to the amendment to section 5 made by Item 266.

**Item 266 – Section 5 of Schedule 1B**

2860. Item 266 would repeal pre-reform section 5 of Schedule 1B and replace it with a new section 5. Proposed section 5 would provide that Parliament’s intention in enacting Schedule 1B is to:

- enhance relations between employees and employers and reduce the adverse effect of industrial disputation (subsection 5(1)); and
- assist employers and employees to promote and protect their economic and social interests by facilitating the formation of employer and employee organisations equipped with rights and privileges (subsection 5(4)).

2861. Subsection 5(2)) would provide that the Parliament considers that the relations between employers and employees would be enhanced, and the adverse effects of industrial disputation would be reduced, if associations of employers and employees are required to meet the standards set out in Schedule 1B.

2862. Subsection 5(3) would state that those standards:

- ensure that employee and employer organisations registered under this Schedule are representative of and accountable to their members, and are able to operate effectively (paragraph 5(3)(a));
- encourage members to participate in the affairs of organisations to which they belong (paragraph 5(3)(b));
- encourage the efficient management of organisations and high standards of accountability of organisations to their members (paragraph 5(3)(c)); and
- provide for the democratic functioning and control of organisations (paragraph 5(3)(d)).

2863. These four paragraphs are the same as the present objects of Schedule 1B. Paragraph 5(3)(e) would be a new provision that provides that the standards set out in Schedule 1B will facilitate the registration of a diverse range of employer and employee associations.

**Item 267 – Section 6 of Schedule 1B**

**Item 268 – Section 6 of Schedule 1B**

**Item 269 – Section 6 of Schedule 1B (definition of *AWA*)**

**Item 270 – Section 6 of Schedule 1B (definition of *award*)**

**Item 271 – Section 6 of Schedule 1B (definition of *certified agreement*)**

**Item 272 – Section 6 of Schedule 1B**

**Item 273 – Section 6 of Schedule 1B (definition of *enterprise*)**

**Item 274 – Section 6 of Schedule 1B (definition of *enterprise association*)**

**Item 275 – Section 6 of Schedule 1B (definition of *enterprise organisation*)**

**Item 276 – Section 6 of Schedule 1B**

**Item 277 – Section 6 of Schedule 1B**

**Item 278 – Section 6 of Schedule 1B**

**Item 279 – Section 6 of Schedule 1B (definition of *industrial dispute*)**

**Item 280 – Section 6 of Schedule 1B (definition of *old IR agreement*)**

**Item 281 – Section 6 of Schedule 1B**

**Item 282 – Section 6 of Schedule 1B**

**Item 283 – Section 6 of Schedule 1B**

**Item 284 – Section 6 of Schedule 1B**

**Item 285 – Section 6 of Schedule 1B**

**Item 286 – Section 6 of Schedule 1B**

2864. These items would repeal, replace or insert a number of definitions in section 6 of Schedule 1B to reflect amendments made by this Schedule or by the Bill.

2865. Item 270 would repeal the pre-reform definition of *award* and insert a new definition providing that an award means an award within the meaning of the WR Act and a transitional award within the meaning of proposed Schedule 13 of the WR Act.

**Item 287 – Section 7 of Schedule 1B**

This item repeals the pre-reform definition of industrial action in section 7 and replaces it with a new definition. The new definition would replicate the definition of industrial action that will apply for the purposes of the WR Act (as contained in proposed Part VC, proposed section 106A). This will ensure that the definitions of industrial action in the WR Act and in Schedule 1B are consistent.

**Item 288 – Section 8 of Schedule 1B**

This item would repeal section 8, which defines the term *industrial dispute*. This definition is no longer necessary as Schedule 1B will not be underpinned by the conciliation and arbitration power.

**Item 289 – Section 18 of Schedule 1B**

2866. This item would repeal pre-reform section 18 and insert new sections 18, 18A, 18B, 18C and 18D.

2867. Pre-reform section 18 provides that the associations which may apply for registration under Schedule 1B are employer associations, employee associations and enterprise associations. Proposed section 18 would provide for the registration of the same classes of associations, but these would now be called:

- federally registrable associations of employers;
- federally registrable associations of employees; and
- federally registrable enterprise associations.

Federally registrable associations of employers

2868. Proposed section 18A would set out the requirements an association of employers would need to meet to be registered as an organisation under Schedule 1B.

2869. Subsection 18A(1) would provide that an association of employers is federally registrable if it is either a constitutional corporation or the majority of its members are federal system employers.

2870. Subsection 18A(2) would define a *federal system employer*, as being:

- a constitutional corporation;
- an employer in relation to an enterprise that is within other Constitutional heads of power; or
- an employer in Victoria, provided that the provisions of Schedule 1B that would apply to the employer or to the association of which the employer is a member would fall within the legislative power referred to the Commonwealth under the CP(IP) Act 1996 ('the Victorian referral').

2871. Subsection 18A(3) would provide that an associations of employers is not federally registrable if it has a member who is not either:

- an employer (paragraph 18A(3)(a));
- a person (other than an employee) who carries on a business (paragraph 18A(3)(b)); or
- an officer of the association (paragraph 18A(3)(c)).

2872. The restrictions on who may be a member of an association for it to be registered under Schedule 1B are consistent with similar restrictions in pre-reform paragraph 18(1)(a).

#### Illustrative Example

The West Australian Arts and Commerce Society is an employer association. It has ten members, nine of which are federal system employers. The tenth member, Todd, is an art teacher.

The Society applied for registration under Schedule 1 B but its application was rejected because the application disclosed that Todd:

- was not an employer;
- did not carry on a business; and
- was not an officer of the association

2873. Subsection 18A(4) would provide that an association of employers which is only a body corporate by virtue of being registered as an organisation under Schedule 1B and does not have a majority of members who are federal system employers is not federally registrable. However, if the association is otherwise a constitutional corporation or does have a majority of federal

system employer members it would be federally registrable as it would meet the criteria in subsection 18A(1).

Federally registrable associations of employees

2874. Proposed section 18B would set out the requirements an association of employees would need to meet to be registered as an organisation under Schedule 1B.

2875. Subsection 18B(1) would provide that an association of employees is federally registrable if it is either a constitutional corporation or the majority of its members are federal system employees.

2876. Subsection 18B(2) would define a *federal system employee*, as being a person:

- employed by a constitutional corporation;
- employed in an enterprise that is within other constitutional heads of power;
- employed in Victoria provided that the provisions of Schedule 1B that would apply to the employee or to the association of which the employee is a member would fall within the Victorian referral; or
- who is an independent contractor who if he or she was an employee would fall within one of the categories above.

2877. Subsection 18B(3) would provide that an associations of employees is not federally registrable if it has a member who is not either:

- an employee (paragraph 18B(3)(a));
- a person deemed to be an employee or eligible for membership of an industrial organisation under specified State industrial laws (paragraph 18B(3)(b) and subsection 18B(4));
- an independent contractor who if he or she was an employee would be eligible for membership (paragraph 18B(3)(c)); or
- an officer of the association (paragraph 18B(3)(d)).

2878. The restrictions on who may be a member of an association for it to be registered under Schedule 1B are the same as current restrictions in pre-reform paragraph 18(1)(b).

2879. Subsection 18B(4) would provide that an association of employees which is only a body corporate by virtue of being registered as an organisation under Schedule 1B and does not have a majority of federal system employee members is not federally registrable. However, if the association is otherwise a constitutional corporation or does have a majority of federal system employee members it would be federally registrable as it would meet the criteria in subsection 18B(1).

Federally registrable enterprise associations

2880. Subsection 18C(1) would provide that an enterprise association is an association with a majority of members who are employees performing work in the same enterprise.

2881. Subsection 18C(2) would provide that an enterprise association is federally registrable if it meets any of the following criteria:

- it is a constitutional corporation;
- the majority of its members are federal system employees;
- the employer or employers in relation to the relevant enterprise are constitutional corporations;
- the relevant enterprise is within other Constitutional heads of power; or
- the relevant enterprise is in Victoria provided that the provisions of Schedule 1B that would apply to the association fall within the Victorian referral.

2882. Subsection 18C(3) would provide that an enterprise association is not federally registrable if it has a member who is not either:

- an employee performing work in the relevant enterprise (paragraph 18C(3)(a));
- a person deemed to be an employee or eligible for membership of an industrial organisation under specified State industrial laws (paragraph 18C(3)(b) and subsection 18C(4));
- an independent contractor who if he or she was an employee would be eligible for membership or could be characterised as an employee falling within the scope of paragraph 18B(2)(a)-(d) (paragraph 18C(3)(c)); or
- an officer of the association (paragraph 18C(3)(d)).

2883. These restrictions on who may be a member of an association for it to be registered under Schedule 1B are consistent with the current restrictions in pre-reform paragraph 18(1)(c).

2884. Subsection 18C(5) would provide that an association of employees which is only a body corporate by virtue of being registered as an organisation under Schedule 1B and does not satisfy paragraphs (b) to (k) of subsection 18C(2) is not federally registrable. However, if the association is otherwise a constitutional corporation or does satisfy paragraphs (b) to (k) of subsection 18C(2) it would be federally registrable.

Constitutional validity

2885. Proposed section 18D would provide, in essence, for the reading down of aspects of proposed sections 18A to 18C if it was found that the Parliament did not have sufficient legislative power to provide for the registration of associations of employers, associations of

employees and enterprise associations under particular heads of constitutional power relied upon in those sections.

**Item 290 – Subparagraph 19(1)(a)(i) of Schedule 1B**

**Item 291 – Paragraph 19(1)(i) of Schedule 1B**

**Item 292 – Subsection 19(3) of Schedule 1B**

**Item 293 – Subparagraph 20(1)(a)(i) of Schedule 1B**

2886. These items would make consequential amendments to section 19 of Schedule 1B.

2887. Item 290 would replace a reference to repealed section 18 of Schedule 1B with a reference to proposed paragraphs 18(a) or (b).

2888. Items 291 and 292 would replace the words ‘the objects of the Schedule’ with ‘Parliament’s intention in enacting this Schedule’ to reflect amendments to section 5 made by Item 265.

2889. Items 293 would replace a reference to repealed section 18 with a reference to proposed paragraph 18(c).

**Item 294 – Paragraph 20(1)(c) of Schedule 1B**

2890. This item would amend paragraph 20(1)(c) to reduce the number of members an enterprise association must have to be eligible for registration from fifty members to twenty.

**Item 295 – Paragraph 20(1)(i) of Schedule 1B**

2891. This item would make a technical amendment consequential to reflect amendments to section 5 made by Item 266.

**Item 296 – Subsection 20(1B) of Schedule 1B**

2892. Paragraph 20(1)(b) of Schedule 1B provides that the AIRC cannot grant an application for registration by an enterprise association unless it is satisfied that the association is free from control by, or improper influence from, any employer, whether at the enterprise in question or otherwise.

2893. This item would repeal pre-reform subsection 20(1B) that requires the AIRC to take into account the fact that an employer meets or will meet costs and expenses of an enterprise association (or provides or will provide services to the association) when considering whether the association is free from control or improper influence.

2894. The AIRC will still be required to satisfy itself according to paragraph 20(1)(b) that the enterprise association is free from control or improper influence.

**Item 297 – Paragraphs 21(3)(a), 21(4)(a) and 22(3)(a) of Schedule 1B**

2895. This item would replace references to repealed paragraph 18(1)(b) or (c) with references to proposed paragraphs 18(b) or (c).

**Item 298 – Paragraph 28(1)(a) of Schedule 1B**

**Item 299 – Paragraph 28(1)(b) of Schedule 1B**

**Item 300 – Paragraphs 28(1)(d) and (e) of Schedule 1B**

**Item 301 – After subsection 28(1) of Schedule 1B**

**Item 302 – Subsection 28(2) of Schedule 1B**

**Item 303 – Subsection 28(7) of Schedule 1B**

**Item 304 – Subsection 29(1) of Schedule 1B**

**Item 305 – Paragraph 29(2)(a) of Schedule 1B**

2896. These items will make a number of amendments to section 28, which deals with the cancellation of an organisation's registration.

2897. Item 298 would repeal paragraph 28(1)(a), which deals with specified types of conduct by an organisation that may form the basis of an application for deregistration and replace it with a new paragraph 28(1)(a). Proposed paragraph 28(1)(a) would replicate the pre-reform paragraph, but would:

- replace references to 'a certified agreement or an old IR agreement' with references to 'collective agreement' to reflect changes in the terminology in the agreement making provisions; and
- include a reference to 'Parliament's intention in enacting this Schedule' to reflect amendments to section 5 made by Item 266.

2898. Item 299 would repeal paragraph 28(1)(b), which provides that an application for deregistration may be made on the ground that the organisation has engaged in industrial action that has prevented, hindered or interfered with trade or commerce or the provision of any public service by a Commonwealth, State or Territory Government or an authority of such a Government. It would insert a new paragraph 28(1)(b), which would be in similar terms but would replace the grounds dealing with trade or commerce with a single reference to preventing, hindering or interfering with the activities of a federal system employer (subparagraph 28(b)(i)). This would cover the existing references to trade and commerce plus the additional areas covered by the definition of federal system employer in proposed subsection 18A(2), for example it would cover an employer engaged in the supply of postal, telegraphic or telephonic services.

2899. Item 300 would repeal pre-reform subsections 28(1)(d) and (e) which provide that a ground for an application for deregistration is a failure by the organisation (or a substantial number of its members or a section or class of its members) to comply with an injunction to stop or prevent industrial action under pre-reform subsection 127(6) or (7) of the WR Act or an order



granted in connection with a contravention of the strike pay provisions under pre-reform section 187AD of the WR Act. It would retain these two grounds (amended to reflect the changed numbering of these provisions in the WR Act) and add four additional grounds that the organisation (or a substantial number of its members or a section or class of its members) has failed to comply with:

- an order made under the WR Act's freedom of association provisions (subparagraph 28(1)(d)(iii));
- an interim injunction granted under section 354A of the WR Act where the interim injunction relates to a breach of section 111 of the WR Act, the strike pay or freedom of association provisions (subparagraph 28(1)(d)(iv));
- an order made under section 23 of Schedule 1B, which deals with contraventions of prohibitions in relation to the formation or registration of employee association provisions contained in sections 21 and 22 (subparagraph 28(1)(d)(v)); or
- an order made under subsection 131(2), which deals with contraventions of the withdrawal from amalgamation provisions (subparagraph 28(1)(d)(vi))

2900. Item 301 would insert a new subsection 28(1A) which would provide that the Industrial Registrar may apply for the cancellation of the registration of an organisation on the ground that the organisation has failed to comply with an order of the Federal Court under subsection 336(5). A legislative note would be inserted to explain that section 336 deals with the situation where a Registrar is satisfied, after conducting an investigation, that a reporting unit of an organisation has contravened the financial records, accounting and auditing provisions or guidelines or rules relating to financial matters.

2901. Item 302 would amend subsection 28(2), which requires that an organisation in relation to which an application for deregistration has been made must be given the opportunity to be heard, to include a reference to proposed subsection 28(1A). This will ensure that an organisation is entitled to be heard when the application for deregistration is made under proposed subsection 28(1A).

2902. Item 303 would repeal subsection 28(7) and replace it with a new subsection. Proposed subsection 28(7) would be in similar terms to the existing provision, but would include references to the expanded range of Court orders and injunctions that may give rise to an application for deregistration proposed by Item 295. It would also replace the reference to section 127 of the WR Act with a reference to section 111 of the WR Act to reflect the changed numbering of that provision by other proposed amendments to the WR Act.

2903. Item 304 would make a consequential amendment to subsection 29(1) to include a reference to proposed subsection 28(1A).

2904. Item 305 would make a consequential amendment to paragraph 29(2)(a) by replacing the reference to 'a certified agreement or an old IR agreement' with 'collective agreement' to reflect changes in the terminology in the agreement making provisions.

**Item 306 – Subparagraph 30(1)(c)(ii) of Schedule 1B**

2905. This item would repeal pre-reform subparagraph 30(1)(c)(ii), which sets out a ground upon which the AIRC, on its motion, may cancel the registration of an organisation and insert new subparagraphs 30(1)(c)(ii)-(v) as grounds for the cancellation of registration by the AIRC.

2906. Subparagraph 30(1)(c)(ii) would retain the existing ground that an organisation of employees has fewer than 50 employee members, but make clear that it does not apply to enterprise associations.

2907. Subparagraph 30(1)(c)(iii) would provide that the registration of an enterprise association may be cancelled if it has fewer than 20 employee members. This reflects the amendment to the minimum number of members required to form an enterprise association made by Item 289.

2908. Subparagraph 30(1)(c)(iv) would provide a new ground for deregistration of an organisation of employers, being that the employer members, in aggregate over the previous six month period, have employed less than 50 employees on an average taken per month.

2909. Subparagraph 30(1)(c)(v) would provide that the AIRC may cancel the registration of an organisation if the organisation is not, or is no longer, federally registrable.

**Item 307 – Subsection 32(c) of Schedule 1B**

**Item 308 – Subsection 38(6) of Schedule 1B**

**Item 310 – Paragraph 55(1)(d) of Schedule 1B**

**Item 311 – Paragraph 57(1)(b) of Schedule 1B**

**Item 312 – Sub-subparagraph 73(2)(c)(ii)(A) of Schedule 1B**

**Item 313 – Paragraph 76(a) of Schedule 1B**

2910. These items would make a number of consequential amendments to replace references to ‘a certified agreement or an old IR agreement’ with references to ‘collective agreement’ to reflect changes in the terminology in the agreement making provisions.

**Item 309 – Paragraph 38(8)(c) of Schedule 1B**

2911. This item would replace a reference to ‘the Object of Schedule 1B’ with a reference to ‘Parliament’s intention in enacting this Schedule’ to reflect amendments to section 5 made by Item 266.

**Item 314 – Paragraphs 94(1)(b) and (c) of Schedule 1B**

**Item 315 – After paragraph 94(3)(a) of Schedule 1B**

**Item 316 – At the end of subsection 94(3) of Schedule 1B**

**Item 317 – At the end of section 94 of Schedule 1B**

**Item 318 – Paragraph 106(2)(c) of Schedule 1B**

**Item 319 – Paragraph 107(1)(c) of Schedule 1B**

2912. These items would make a number of amendments to the provisions concerning ballots for the withdrawal from amalgamated organisations by a constituent part of an amalgamated organisation.

2913. Item 314 would extend the period in which an application for a ballot to approve a withdrawal from amalgamation may be made. Pre-reform paragraphs 94(1)(b) and (c) have the effect that a withdrawal from amalgamation may only occur if the amalgamation occurred after 31 December 1996. They require the application to be made within five years of the amalgamation, but not within two years of the date the amalgamation occurred. These paragraphs would be repealed and replaced with new Paragraphs 94(1)(b) and (c). Proposed paragraphs 94(1)(b) and (c) would retain the requirements in relation to amalgamations that occurred after 31 December 1996 but would also allow applications to be made in relation to amalgamations that occurred prior to 31 December 1996. An application for withdrawal from an amalgamation that occurred before 31 December 1996 could be made within 3 years of the commencement of the proposed subparagraph or any longer period that may be prescribed by regulations (subparagraph 94(1)(c)(ii)).

2914. Items 315 to 316 would expand the range of persons who may make an application for a ballot for withdrawal from amalgamation. The new categories of persons who could make an application are:

- a person authorised to make the application by the prescribed number of constituent members (Item 310, proposed paragraph 94(3)(aa)). Regulations would be made to prescribe this number;
- a person who is either a constituent member or a member of a committee of management referred to in pre-reform paragraphs 94(3)(b) and (c) and authorised to make the application by a committee of management referred to in pre-reform paragraphs 94(3)(b) and (c) (Item 311, paragraph 94(3)(d)).

2915. Item 317 would insert a new subsection 94(6), which would provide that the regulations may prescribe the manner in which the prescribed number of constituent members or the committee of management may authorise an application that may be made under proposed paragraph 94(3)(a) or subparagraph 94(3)(d)(ii).

2916. Items 318 and 319 would make consequential amendments to sections 106 and 107 respectively to provide that the new categories of applicants created by proposed 94(3)(aa) and (d) are entitled to receive copies of the certificate showing particulars of the ballot issued under section 106 and the post-ballot report by the AEC in relation to any ballots taken as a result of an application he or she has made.

#### **Item 320 – Subsection 113(1) of Schedule 1B**

#### **Item 321 – Subsection 113(2) of Schedule 1B**

2917. These items would make consequential amendments to replace references to ‘a certified agreement or an old IR agreement’ with references to ‘collective agreement’ to reflect changes in the terminology in the agreement making provisions.

**Item 322 – After section 113 of Schedule 1B**

2918. This item would insert a new section 113A into Schedule 1B.

2919. Where a withdrawal from amalgamation has occurred, the Industrial Registrar must register the part of the organisation that has withdrawn from amalgamation as an organisation in its own right (section 110). The part of the organisation that has withdrawn is known as a newly registered organisation and the organisation from which it has withdrawn is known as the amalgamated organisation (section 93(1)).

2920. Proposed section 113A would provide that any collective agreement made on or after the day on which the registration of the newly registered organisation takes effect and which is binding on the amalgamated organisation will also be binding on the newly registered organisation if the agreement covers employees who are eligible to be members of the newly registered organisation. Any such agreement will have effect for all purposes as though references to the amalgamated organisation included references to the newly registered organisation.

2921. Subsection 113A(3) has the effect that this automatic binding of newly registered organisations to collective agreements binding the amalgamated organisation will only occur in relation to collective agreements made within five years of the registration of the newly registered organisation taking effect.

2922. Section 113A will supplement pre-reform subsection 113, which applies to orders, awards or collective agreements that were made prior to the withdrawal from amalgamation.

**Item 323 – Subsection 134(1) of Schedule 1B**

**Item 324 – Subsection 134(2) of Schedule 1B**

2923. Item 323 would repeal subsection 134(1), as it refers to provisions of the pre-reform WR Act that would be repealed by the Bill.

2924. Item 324 would amend subsection 134(2) consequential to the amendment to subsection 134(1) made by item Mfro22.

**Item 325 – Subsection 135 of Schedule 1B**

2925. This item would repeal the note at the end of section 135, which refers to the AIRC being able to order a secret ballot under section 135 of the WR Act as section 135 of the WR Act will be repealed by amendments made by another item in the Bill.

**Item 326 – At the end of Chapter 4 of Schedule 1B**

2926. This item would insert a new section 138A into Schedule 1B.

2927. Proposed section 138A would provide that regulations may be made modifying the way that Chapter 4, which deals with the ability of the AIRC to make orders concerning the representation rights of organisations, applies in relation to an organisation that before being

registered was a State registered association or a transitionally registered association under Schedule 17.

2928. Subsection 138A(2) would provide that such regulations may specify the weight to be given by the AIRC to existing State demarcation orders.

2929. It is intended that the regulations made under this section would require the AIRC to take appropriate account of any State demarcation orders and whether those demarcations should be maintained in the federal system. This will assist parties in retaining existing demarcation arrangements that have developed as a result of state demarcation orders which will no longer be applicable to the parties when they move into the federal system.

**Item 327 – Paragraph 142(1)(a) of Schedule 1B**

**Item 328 – Subparagraphs 142(1)(b)(i) and (ii) of Schedule 1B**

2930. These items would make consequential amendments to replace references to ‘a certified agreement or an old IR agreement’ with references to ‘collective agreement’ to reflect changes in the terminology in the agreement making provisions.

**Item 329 – Paragraph 142(1)(c) of Schedule 1B**

**Item 330 – Subparagraph 144(3)(a)(i) of Schedule 1B**

**Item 331 – Before subparagraph 151(5)(a)(i) of Schedule 1B**

**Item 332 – Paragraph 152(6)(a) of Schedule 1B**

**Item 333 – Paragraph 159(1)(a) of Schedule 1B**

**Item 334 – Subsection 177(3) of Schedule 1B**

**Item 335 – Subparagraph 180(1)(a)(i) of Schedule 1B**

**Item 336 – Subparagraph 180(1)(a)(ii) of Schedule 1B**

**Item 337 – Subsection 180(5) of Schedule 1B**

**Item 338 – Subparagraph 246(2)(b)(i) of Schedule 1B**

**Item 339 – Subparagraph 249(5)(b)(i) of Schedule 1B**

2931. These items will make amendments consequential to amendments made by other items in this Schedule or items in Schedule Amendments to the WR Act.

2932. Items 329, 331 and 322 would make amendments consequential to amendments to section 5 made by Item 265 to refer to ‘Parliament’s intention in enacting this Schedule’.

2933. Items 330, 333, 334, 338 and 339 would make consequential amendments to replace references to ‘a certified agreement or an old IR agreement’ with references to ‘collective agreement’ to reflect changes in the terminology in the agreement making provisions.

2934. Items 335 and 336 would make amendments consequential to the repeal of pre-reform section 18 by Item 289.

2935. Item 337 would delete subsection 180(5) which provides that the fact that an employer holds a conscientious objection certificate does not prevent the employer being a party to an industrial dispute. This provision is no longer necessary as the system will not be underpinned by the conciliation and arbitration power.

**Item 340 – At the end of section 281 of Schedule 1B**

**Item 341 – At the end of Chapter 9 of Schedule 1B**

2936. Item 341 would insert a new Part 3 of Chapter 9 (which lays down general duties of officers and employees in relation to orders and directions) into Schedule 1B to the WR Act.

2937. Item 340 would insert an outline of proposed Part 3 of Chapter 9 of Schedule 1B into the pre-reform outline of Chapter 9.

**Part 3 – General duties in relation to orders and directions**

**Division 1 – Preliminary**

*Section 294 – Simplified outline*

2938. Proposed section 294 would provide a simplified outline of the Part.

*Section 295 – Meaning of involved*

2939. Proposed section 295 would provide a definition of the term ‘involved’, which would be relevant to the operation of the duties to be established within the Part.

*Section 296 – Application to officers and employees of branches*

2940. Proposed section 296 would ensure that any references within the Part to officers or employees of organisations applies equally to officers and employees of the branches of such organisations.

**Division 2 – General duties in relation to orders and directions**

*Section 297 – Order or direction applying to organisation – civil obligation*

2941. Proposed section 297 would set out the civil obligation of officers and employees of an organisation with respect to orders or directions of the Federal Court or the AIRC that apply to that organisation.

2942. Subsection 297(2) would establish a duty on officers and employees of the relevant organisation and its branches not to act in a manner that would result in their organisation contravening any such order or direction. To contravene this section the officer or employee must know, or be reckless as to whether, that act would result in the organisation contravening the order.

2943. Subsection 297(3) would extend contravention of the duty to any officer or employee involved in a contravention of an order or direction made against their organisation or involved

in a contravention of subsection (2). What constitutes being ‘involved’ is set out in proposed section 295.

2944. Both subsection 297(2) and subsection 297 (3) would be civil penalty provisions.

*Section 298 – Prohibition order or direction applying to organisation – civil obligation*

2945. Proposed section 298 would set out the civil obligation of officers and employees of an organisation with respect to orders or directions of the Federal Court or the AIRC that apply to that organisation and which prohibit the organisation from engaging in certain behaviour. That is, an officer or employee must not do what his or her organisation has been ordered or directed not to do.

2946. Subsection 298(2) would establish a duty on officers and employees of the relevant organisation and its branches to not do anything that would contravene the order. This obligation would apply when the order has been expressed to apply to the organisation, as opposed to the individual officer or employee. That is, an officer or employee must not do what his or her organisation has been ordered or directed not to do. To contravene this section the officer or employee must know, or be reckless as to whether, that act would result in a contravention.

2947. Subsection (3) would extend contravention of the duty to any officer or employee involved in a contravention of subsection (2). What constitutes being ‘involved’ is set out in proposed section 295.

2948. Both subsection (2) and subsection (3) would be civil penalty provisions.

*Section 299 – Order or direction applying to officer – civil obligation*

2949. Proposed section 299 would set out the civil obligation of an officer of an organisation with respect to orders or directions of the Federal Court or the AIRC that apply to that officer.

2950. Subsection 299(2) would require an officer not to knowingly or recklessly contravene any order or direction that applies to him or her.

2951. Subsection 299(3) would extend contravention of the duty to any officer or employee of the organisation involved in a contravention of subsection (2). What constitutes being ‘involved’ is set out in proposed section 295.

2952. Both subsection 299(2) and subsection 299(3) would be civil penalty provisions.

*Section 300 – Prohibition order or direction applying to officer – civil obligation*

2953. Proposed section 300 would set out the civil obligation of officers and employees of an organisation with respect to orders or directions of the Federal Court or the AIRC that apply to an officer of that organisation and which prohibit the officer from doing something.

2954. Section 300 would apply where the Federal Court or the AIRC has made an order that applies to an officer of an organisation. Subsection 300(2) would establish a duty on all employees and officers of the relevant organisations and its branches, requiring them not to act in a manner that would result in a contravention of the order or direction. That is, an officer or employee of an organisation must not do what any officer of that organisation has been ordered or directed not to do. To contravene this section the employee or officer must know, or be reckless as to whether, that act would result in a contravention.

2955. Subsection 300(3) would extend contravention of the duty to any officer or employee involved in the contravention of subsection 300(2). What constitutes being ‘involved’ is set out in proposed section 295.

Both subsection 300(2) and subsection 300(3) would be civil penalty provisions.

*Section 301 – Order or direction applying to employee – civil obligation*

2956. Proposed section 301 would set out the civil obligation of an employee of an organisation with respect to orders or directions of the Federal Court or the AIRC that apply to the employee.

2957. Subsection 301(2) would provide that the employee to whom the order or direction applies must not knowingly or recklessly contravene the order or direction.

2958. Subsection 301(3) would extend contravention of the duty to any officer or employee of the organisation who is involved in a contravention of subsection (2). What constitutes being ‘involved’ would be set out in proposed section 295.

2959. Both subsection 301(2) and subsection 301(3) would be civil penalty provisions.

*Section 302 – Prohibition order or direction applying to employee – civil obligation*

2960. Proposed section 302 would set out the civil obligation of officers and employees of an organisation with respect to orders or directions of the Federal Court or the AIRC that apply to an employee of that organisation and which prohibit the employee from doing something.

2961. Subsection 302(2) would establish a duty on all officers and employees of the relevant organisation and its branches not to act in a manner that would result in a contravention of the order or direction. That is, an officer or employee of an organisation must not do what any officer or employee of that organisation has been ordered or directed not to do. To contravene this section the employee or officer must know, or be reckless as to whether, that act would result in a contravention.

2962. Subsection 302(3) would extend contravention of the duty to any officer or employee involved in the contravention of subsection 302(2). What constitutes being ‘involved’ would be set out in proposed section 295.

2963. Both subsection 302(2) and subsection 302(3) would be civil penalty provisions.



*Section 303 – Order or direction applying to member of organisation– civil obligation*

2964. Proposed section 303 would set out the civil obligation of officers and employees of an organisation with respect to orders or directions of the Federal Court or the AIRC that apply to a member of that organisation.

2965. Subsection 303(2) would establish a duty on officers and employees of the organisation and its branches not to be involved in a contravention of such an order. What constitutes being ‘involved’ is set out in proposed section 295.

2966. Subsection 303(2) is a civil penalty provision.

*Section 303A – Application of Division*

2967. Proposed section 303A would provide that proposed Division 2 of Part 3 would apply to orders and directions made before, on or after the commencement of the Division, but would only apply to acts and omissions occurring on or the commencement of the Division.

**Item 342 – After paragraph 305(2)(zj) of Schedule 1B**

2968. Section 305 lists the civil penalty provisions contained in Schedule 1B to the WR Act, and provides that application may be made to the Federal Court for orders in relation to contravention of a civil penalty provision.

2969. Item 342 would insert new paragraph (zk) into subsection 305(2), to make reference to the civil penalty provisions that will be inserted by item paulm4 (ie new Part 3 of Chapter 9).

**Item 343 – After subsection 307(1) of Schedule 1B**

2970. Section 307 enables the Federal Court to order that a person who has contravened a civil penalty provision relating to the duties of officers and employees of registered organisations must compensate the organisation for damage it has suffered as a result of the contravention.

2971. New subsection 307(1A) would be inserted in section 307. The new provision would allow the Court to order a person to pay compensation to an organisation if the person contravened a civil penalty provision in new Part 3 of Chapter 9, if the organisation took reasonable steps to prevent the contravention, and the contravention resulted in the organisation suffering damage.

2972. A note at the bottom of this item would refer to the heading of subsection 307(1) being amended to take into account changes made by this item and ensure it would more accurately describe the operation of that provision.

**Item 344 – At the end of subsection 310(1) of Schedule 1B**

2973. Section 310 sets out who may make an application for an order relating to a contravention of a civil penalty provision. Currently, the section states that the Industrial Registrar, or a person authorised in writing by the Industrial Registrar, may apply for an order under Part 2 of Chapter 10.

2974. This item would amend subsection 310(1) to provide that the Industrial Registrar (or the person authorised by the Industrial Registrar under the subsection) cannot make an application in relation to a contravention of a provision covered by proposed paragraph 305(2)(zk), which would be inserted by item 337 of the Bill. That is, the Industrial Registrar (or the person authorised by the Industrial Registrar under the subsection) cannot make an application in relation to a contravention of the general duties in relation to orders and directions of the Federal Court and the AIRC. Applications in relation to the contravention of those general duties would be dealt with in item 340.

**Item 345 – After subsection 310(1) of Schedule 1B**

2975. This item would also amend section 310. It would insert proposed subsection 310(2) to make it clear that only the Minister, or some other person authorised in writing by the Minister, may apply for an order under this Part in relation to a contravention of a provision covered by paragraph 305(2)(zk). All other applications may continue to be made by the Industrial Registrar, or a person authorised by the Industrial Registrar.

**Item 346 – Section 317 of Schedule 1B (after the paragraph relating to Part 4A)**

2976. This item would insert words into the simplified outline of Chapter 11 in section 317 to refer to the particular powers of the AIRC that would be included in this Chapter by Item 343.

**Item 347 – Subparagraphs 337A(b)(iii), (iv) and (v) of Schedule 1B.**

2977. Pre-reform section 337A sets out the disclosures made by whistleblowers which qualify for protection under the Schedule. In order to qualify, disclosures must be made to certain persons. These are listed at pre-reform subsection 337A(b) and include the director of the Building Industry Taskforce, inspectors and authorised officers. With the passage of the BCII Act 2005, the Building Industry Taskforce has ceased to exist and has been replaced by the Office of Australian Building and Construction Commissioner. Changes that would be made by other items in the Bill would provide that rather than inspectors and authorised officers, there will only be workplace inspectors.

2978. This item repeals references to the director of the Building Industry Taskforce, inspectors and authorised officers and replaces them with references to:

- the Australian Building and Construction Commissioner (subparagraph 337A(b)(iii));
- an Australian Building and Construction Inspector ( subparagraph 337A(b)(iv));  
and
- workplace inspectors (337A(b)(iv)).

**Item 348 – After Part 4A of Chapter 11 of Schedule 1B**

2979. This item would insert a new Part 4B into Schedule 1B.

2980. Proposed Part 4B would set out the specific powers available to the AIRC to deal with matters under Schedule 1B. These powers would be in addition to the general powers of the AIRC contained in Subdivision B of Division 3A of Part II of the WR Act. Some of the powers would be based on the existing powers provided for in the WR Act.

2981. Proposed section 337F would provide the AIRC with powers to conduct inspections and enter premises where relevant to a proceeding under Schedule 1B.

2982. Subsection 337F (1) would provide that a member of the AIRC may at any time during working hours:

- enter prescribed premises;
- inspect or view, among other things, any work, machinery or document on the premises (proposed paragraph 337F(1)(b)); and
- interview on the premises any employee who is usually engaged in work on the premises.

2983. Subsection 337F(2) would provide a definition of *prescribed premises*.

2984. Proposed section 337G would provide the AIRC with the power to direct parties to be joined or struck out as parties to proceedings under Schedule 1B.

2985. Proposed 337H would provide the AIRC with the power to make certain types of orders relevant to right of entry matters, including:

- consent orders;
- provisional or interim orders; and
- orders that engaging in conduct in breach of a specified term of an order is taken to be a separate breach of the term on each day the conduct continues.

2986. Proposed section 337J would provide that in making an order in proceedings under Schedule 1B, the AIRC is not restricted to the specific relief claimed by the parties concerned, but may include anything in the order which the AIRC considers necessary or expedient for the purposes of dealing with the proceeding.

2987. Proposed section 337K would impose a number of obligations on the AIRC and the Registrar in relation to orders made by the AIRC, including that:

- the AIRC must express an order in plain English and must promptly put the order in writing and provide it to a Registrar;
- a Registrar must promptly provide the order and any written reasons to the relevant parties and arrange for the order and written reasons to be published as soon as practicable.

**Item 349 – Section 345 of Schedule 1B**

**Item 350 – At the end of section 345 of Schedule 1B**

**Item 351 – Section 346 of Schedule 1B**

**Item 352 – At the end of section 346 of Schedule 1B**

2988. These items would make amendments consequential to amendments to the WR Act in relation to protected action ballots.

2989. Items 349 and 350 would provide that the right of every financial member of an organisation to participate in particular ballots provided in section 345 does not apply to protected action ballots. The proposed provisions dealing with protected action ballots will include provisions on who is entitled to vote in such ballots.

2990. Items 351 and 352 would provide that the right of financial members to request details from the returning officer in relation to ballots contained in section 346 does not apply to protected action ballots.

**Item 353 – Section 357 in Schedule 1B**

**Item 354 – Paragraph 358(1)(a) in Schedule 1B**

2991. These items would make minor amendments to the language of these provisions to ensure that penalties involving the payment of a monetary fine are referred to consistently throughout the WR Act.

**Item 355 – Schedule 1 (heading)**

2992. This item would repeal the heading and substitute ‘Schedule 1 – Extra provisions relating to definitions’.

**Item 356 – Clause 1 of Schedule 1 (definition of *flight crew officer’s employer*)**

2993. This item would repeal the definition of *flight crew officer’s employer*.

**Item 357– Clause 1 of Schedule 1 (definition of *waterside employer*)**

2994. This item would repeal the definition of *waterside employer*.

**Item 358– Clause 2 of Schedule 1**

2995. This item would repeal clause 2 of Schedule 1 and substitute the following clauses

*Clause 2 – References to employee with its ordinary meaning*

2996. Proposed clause 2 would, for the purposes of proposed subsection 4AA(2), list references in the amended WR Act to the word *employee* which use its ordinary meaning. (See the explanatory notes to proposed subsection 4AA(2) in relation to the use of this list.)

*Clause 3 – References to employer with its ordinary meaning*

2997. Proposed clause 3 would, for the purposes of proposed subsection 4AB(2), list references in the amended WR Act to the word *employer* which use its ordinary meaning. (See the explanatory notes to proposed subsection 4AB(2) in relation to the use of this list.)

*Clause 4 – References to employment with its ordinary meaning*

2998. Proposed clause 4 would, for the purposes of proposed subsection 4AC(2), list references in the amended WR Act to the word *employment* which use its ordinary meaning. (See the explanatory notes to proposed subsection 4AC(2) in relation to the use of this list.)

*Clause 5 – Regulations may amend clauses 2, 3 and 4*

2999. Proposed clause 5 would provide for regulations to amend clause 2, 3, and 4 and ensure that any amendments may be incorporated into the WR Act.

**Item 359– After Schedule 12**

3000. This item would insert new Schedule 13.

**Schedule 13 – Transitional arrangements for parties bound by federal awards**

3001. Proposed Schedule 13 would provide transitional arrangements underpinned by the conciliation and arbitration power set out in subsection 51(xxxv) of the Constitution for a transitional period of five years.

3002. The Schedule would provide for the continued operation of existing awards for employers (to be defined as *transitional employers*) bound by the award immediately before reform commencement that are not covered by the definition of *employer* in subsection 4AB(1).

3003. It will remain possible for parties to notify alleged industrial disputes, and the AIRC will continue to prevent and settle disputes. However, the manner in which the AIRC will be permitted to deal with those disputes will be amended to reflect the transitional nature of the system provided for by the Schedule.

3004. The transitional system will afford transitional employers the opportunity and time to decide whether or not they want to remain in the federal system.

3005. During the transitional period, transitional employers may decide to incorporate (or take other action to bring themselves within the definition of employer in subsection 4AB(1)) and, as a result, remain in the federal system. Alternatively, transitional employers and employees may decide to revert to their respective State industrial relations systems by entering into agreements under State legislation. In some circumstances, it will be open to apply to the AIRC to opt out of the transitional system.

3006. At the end of the five year transitional period, the awards that apply in the transitional system will cease to operate, and those employers and employees remaining in the transitional system revert to their respective State industrial relations system.

3007. In respect of transitional employers and their employees in Victoria, a similar transitional system will apply, but with some differences flowing from the fact that the Parliament of Victoria has referred legislative power for certain workplace relations matters to the Parliament of the Commonwealth in the CP(IP) Act and the terms of the referral legislation.

3008. The differences include that:

- because of the operation of proposed section 492, transitional employers and their employees in Victoria will, with some limited exceptions, be covered by the Standard and their transitional awards will be underpinned by the Standard;
- common rule declarations made by the AIRC in respect of industries in Victoria will continue to apply to transitional employers and their employees in Victoria;
- because of the operation of proposed section 500, transitional employers and employees in Victoria may enter into workplace agreements under Part VB, that will displace transitional awards; and
- at the end of the five year transitional period, transitional employers and their employees in Victoria that are still covered by a transitional award or common rule award will cease to be covered by those instruments, and they will revert to the Standard.

## **New Part 1 – Preliminary**

### **New Division 1 – Objects of Schedule**

#### *New clause 1 – Objects of the Schedule*

3009. Proposed clause 1 would set out the objects of the Schedule. The proposed objects make it clear that the Schedule is to establish transitional arrangements for the ongoing operation of awards (to be defined as *transitional awards*) in respect of those employers that were bound to those awards immediately before reform commencement and their employees (to be defined as *transitional employees*).

3010. The proposed objects of the Schedule are to ensure that:

- transitional awards continue to operate and are to be maintained by the AIRC within certain limits specified in the Schedule (paragraph 1(2)(a));
- transitional employers and their employees are able to cease to be bound by a transitional award in appropriate circumstances, including through agreement-making under State legislation (thus effectively opting out of the transitional system) (paragraph 1(2)(b));
- the AIRC's functions and powers to vary transitional awards – which remain available in specified circumstances (to enable the ongoing variation of awards in relation to wages and other monetary entitlements) – are exercised so as not to be inconsistent with wage-setting decisions of the AFPC (paragraph 1(2)(c)) and

- appropriate compliance and enforcement mechanisms remain available (paragraph 1(2)(d)).

## **New Division 2 – Interpretation**

### *New clause 2 – Interpretation*

3011. Proposed clause 2 would set out the definitions of certain terms as they apply in the Schedule. In addition, a number of the definitions in subsection 4(1) would also apply to the Schedule. Key definitions include:

- *excluded employer* – which would mean an employer that is not covered by the definition of employer in subsection 4AB(1) (which relies on a range of constitutional powers including the corporations power);
- *industrial dispute* – this definition reflects the existing definition in most respects, but removes reference to demarcation disputes (as there will no longer be a direct connection between the existence of an industrial dispute and the power of the AIRC to make a representation order under Schedule 1B); the definition also makes explicit that a dispute about the relationship between a transitional employer and a transitional employee cannot encompass matters that pertain to the relationship between the employer and a third party (such as an independent contractor). The powers and procedures available to the AIRC to deal with an industrial dispute are set out in Part 3 of the Schedule;
- *transitional award* would be defined to have the meaning on and from reform commencement set out in subclause 4(2) and will include any variations made to these awards under the Schedule – the effect of Part 7 is that Victorian reference awards (that is, awards supported by the Victorian Parliament’s reference of powers) will be transitional awards;
- *transitional employee* would be defined to mean an employee of a transitional employer;
- *transitional employer* would be defined to mean an excluded employer that is bound by a transitional award.

### *New clause 3 – Meaning of industrial action*

3012. Proposed clause 3 would provide a definition of *industrial action*. The definition would specifically identify the conduct of transitional employees and transitional employers in relation to an industrial dispute or work covered by an award that constitutes industrial action. It would also specifically identify conduct by transitional employers and transitional employees that does not amount to industrial action.

## **New Division 3 – Continuing operation of awards**

3013. Proposed Division 3 would provide for the continuing operation of awards in the transitional system. Transitional awards would cease to operate at the end of a five year transitional period.

*New clause 4 – Continuing operation of awards in force before reform commencement*

3014. Proposed clause 4 would provide for the continuing operation of awards in the transitional system.

3015. The Schedule would not create a new instrument in the same terms as the existing award (as with awards under Part VI), but rather provide that existing awards made to prevent or settle industrial disputes continue to operate and continue to bind those employers and employees (as well as registered organisations) that are in the transitional system.

3016. Subclause 4(2) would provide that, to the extent that the award regulates excluded employers in respect of the employment of their employees, the award continues in force and binds:

- all excluded employers that were bound by the award immediately before reform commencement – this includes employers who were bound by the award because of a transmission of business or through membership of an employer organisation, as well as employers bound directly by respondency (paragraph 4(2)(a));
- a successor, assignee or transmittee (whether immediate or not) to or of the business or part of the business of an excluded employer identified in paragraph (a) on the proviso that the successor, assignee or transmittee is a transitional employer at the time of acquiring or taking over the business or part of the business (paragraph 4(2)(b)) – this paragraph applies only to transitional employers, and would not operate to transmit a transitional award to an employer as defined in subsection 4AB(1) or an excluded employer that is not bound by a transitional award;
- all organisations that were bound by the award immediately before reform commencement (paragraph 4(2)(c)); and
- all employees of transitional employers who, immediately before reform commencement, were members of organisations that were bound by the award (paragraph 4(2)(d)).

3017. Subclause 4(3) would provide further clarification as to the excluded employers that will be bound by a transitional award in the transitional system.

3018. Subclause 4(4) would confirm that an award that is continued in force by this clause is called a transitional award.

3019. The intention of this clause is to set out those parties that are to be bound by transitional awards and that are, therefore, in the transitional system on reform commencement. The Schedule does not provide for new employers, employees or organisations to enter the transitional system by becoming bound by a transitional award during the transitional period. Once in the transitional system, the transitional employers and their employees may leave the transitional system in the manner provided for in proposed Part 5 of the Schedule or by the transitional employer deciding to incorporate or otherwise taking action to bring themselves within the definition of employer in subsection 4AB(1).



*New clause 5 – Particular rules about transitional awards*

3020. Proposed clause 5 would provide additional rules to clarify the parties bound by a transitional award.

3021. Subclause 5(1) would provide that if an excluded employer was, immediately before reform commencement, regulated by a State employment agreement in respect of the employment of an employee, the employer is not bound by a transitional award in respect of the employment of that employee at any time after reform commencement. Such an employer will remain in its respective State workplace relations system in relation to that employment, and may not enter the transitional federal system. (However, an employer may remain covered by the transitional federal system in respect of some employees, but have State employment agreements with others.)

3022. Subclause 5(2) would provide that a transitional employer that is bound by a transitional award as a result of its membership of an organisation that is bound by the award, will cease to be bound by a transitional award when it ceases to be a member of that organisation, unless it is otherwise bound by a transitional award.

3023. Subclause 5(3) would make similar provision in respect of an employee who ceases to be a member of an organisation that is bound by the transitional award.

- Proposed clause 69 would set out details of those parties to be bound by an order of the AIRC varying, revoking or suspending a transitional award under the Schedule. Parties bound by these orders cannot extend beyond those bound to the transitional award under subclause 4(2).

*New clause 6 – Cessation of transitional award*

3024. Proposed clause 6 would provide for the cessation of any continuing transitional awards at the end of the five year transitional period. (An award may be revoked during the transitional period in limited circumstances – see proposed clause 31.)

3025. Subclause 6(2) would make clear that that transitional employees will not lose any rights that accrued under a transitional award prior to it ceasing to operate – such as to leave and payment for work performed before the end of the transitional period.

**New Part 2 – Performance of Commission’s functions**

*New clause 7 – General functions of Commission*

3026. Proposed clause 7 would specify the functions to be performed by the AIRC under the Schedule.

3027. Subclause 7(1) would provide that the functions of the AIRC under the Schedule are to prevent and settle industrial disputes:

- so far as possible, by conciliation (paragraph 7(1)(a)); and

- as a last resort and within the limits of the AIRC's powers under the Schedule, by arbitration (paragraph 7(1)(b)).

3028. Subclause 7(2) would provide that when settling an industrial dispute by arbitration, the AIRC may vary a transitional award in the manner permitted by clause 29. (This clause sets out the matters in transitional awards that the AIRC may deal with by arbitration.)

3029. Subclause 7(3) would make it clear that the AIRC does not have the ability to make new awards when it exercises its dispute settling powers under the Schedule.

*New clause 8 – Performance of Commission's functions under this Schedule*

3030. Proposed clause 8 would provide for the manner in which the AIRC is to perform its functions under the Schedule.

3031. Subclause 8(1) would require the AIRC to perform its functions under the Schedule in a way that furthers the objects of the Schedule. Due to the specific nature of the transitional system, it is not proposed that the principal object of the Act set out in proposed section 3 would apply to the performance of the AIRC's functions under the Schedule.

3032. Subclause 8(2) would provide that when performing its functions under the Schedule, the AIRC must ensure that minimum safety net entitlements are maintained for wages and other specified monetary entitlements (listed in subclause 29(2)) and in doing so, must have regard to:

- the desirability of high levels of productivity, low inflation, creation of jobs and high levels of employment (paragraph 8(2)(a));
- the principle that the wages and other monetary entitlements of transitional employees should not place them at a disadvantage compared with entitlements of employees within the 'mainstream' federal system (paragraph 8(2)(b)); and
- the principle that the costs to transitional employers of wages and other monetary entitlements should not place them at a competitive disadvantage in relation to employers within the 'mainstream' federal system (paragraph 8(2)(c)).

3033. In having regard to the economic factors specified in paragraph 8(2)(a), subclause 8(3) would require the AIRC to have regard to:

- wage setting decisions of the AFPC (paragraph 8(3)(a)); and
- in particular, any statements by the AFPC about the effect of wage increases on productivity, inflation and levels of employment (paragraph 8(3)(b)).

3034. Subclause 8(4) would set out further matters to which the AIRC is to have regard when performing its functions. These are:

- the desirability of its decisions being consistent with wage setting decisions of the AFPC (paragraph 8(4)(a)); and

- the importance of providing minimum safety net entitlements that act as an incentive to bargaining at the workplace level (paragraph 8(4)(b)).

*New clause 9 – Anti-discrimination considerations*

3035. Proposed clause 9 would set out anti-discrimination matters which the AIRC must take into account when exercising its functions under the Schedule.

3036. Subsection 9(1) would detail these matters, which are that the AIRC must:

- apply the principle that men and women should receive equal remuneration for work of equal value (paragraph 9(1)(a));
- have regard to the need to provide pro-rata disability pay methods for transitional employees with disabilities (paragraph 9(1)(b));
- take account of the principles embodied in Commonwealth anti-discrimination legislation (paragraph 9(1)(c));
- take account of the principles embodied in the Family Responsibilities Convention, in particular, those relating to preventing discrimination against workers who have family responsibilities and helping workers reconcile work and family responsibilities (paragraph 9(1)(d)); and
- ensure that decisions do not contain provisions that discriminate on specified grounds (paragraph 9(1)(e)).

3037. Subclause 9(2) would clarify that the AIRC does not discriminate against transitional employees by determining a rate of pay for junior transitional employees, transitional employees with a disability or transitional employees to whom training arrangements apply.

*New clause 10 – Commission to have regard to operation of Superannuation Guarantee legislation*

3038. Proposed clause 10 would require the AIRC to have regard to Commonwealth superannuation legislation when exercising its power to vary pay rates in transitional awards. This proposed clause is in similar terms to the pre-reform section 90A.

*New clause 11 – Commission to encourage agreement on procedures for preventing and settling disputes*

3039. Proposed clause 11 would require the AIRC, if appropriate, to encourage the parties to a dispute to agree on procedures for settling further disputes between them. This provides guidance to the AIRC that is similar to that provided by pre-reform section 91.

3040. However, unlike the pre-reform provision, any agreed procedures will not be able to be included in a transitional award, as this will be beyond the arbitral powers of the AIRC (see subclause 29(2) that sets out the allowable transitional award matters that may be varied by the AIRC).

*New clause 12 – Commission to have regard to compliance with disputes procedures*

3041. Proposed clause 12 would provide that the AIRC must, when exercising its powers, have regard to the extent to which dispute resolution procedures have been complied with by parties. Apart from plain English amendments, this clause is identical to pre-reform section 92.

*New clause 13 – No automatic flow-on of terms of certain agreements*

3042. Proposed clause 13 would ensure that the AIRC does not vary a transitional award to include terms based on the terms of a workplace agreement, a pre-reform certified agreement or a section 170MX award unless it is satisfied that including the terms in the award:

- would not be inconsistent with the objects of the Schedule (paragraph 13(1)(a));
- would not be inconsistent with wage-setting decisions of the AFPC (paragraph 13(1)(b)); and
- would not be otherwise contrary to the public interest (paragraph 13(1)(c)).

3043. Subclause 13(2) would define the terms *pre-reform certified agreement* and *section 170MX award* used in subclause (1).

*New clause 14 – Commission to act quickly*

3044. Proposed clause 14 would require the AIRC to act as quickly as possible in performing its functions under the Schedule. However, it would nonetheless be required to give higher priority to the performance of its other functions under the Act.

*New clause 15 – Commission not required to have regard to certain matters*

3045. Proposed clause 15 would provide that the AIRC is not to have regard to the general public interest consideration in proposed section 44A when it performs its functions under the Schedule. The specific matters that the AIRC is to consider in exercising its functions are contained in the Schedule.

**New Part 3 – Powers and procedures of Commission for dealing with industrial disputes**

**New Division 1 – Settlement of industrial disputes**

**New Subdivision A – Scope of industrial disputes**

*New clause 16 – Scope of industrial disputes*

3046. Proposed clause 16 would establish that an industrial dispute under the Schedule may only relate to an allowable transitional award matter, and set out the extent to which the AIRC may deal with such a dispute by conciliation and/or arbitration.

3047. Subclause 16(1) would provide that an industrial dispute dealt with by conciliation may be about any of the allowable transitional award matters.

3048. Subclause 16(2) would limit the scope of ‘industrial dispute’ for the purposes of:

- dealing with the dispute by arbitration,
- preventing or settling an industrial dispute, and maintaining the settlement of an industrial dispute, by varying a transitional award.

3049. In such cases, the dispute may relate only to the subclass of allowable transitional award matters listed in subclause 29(2).

### **New Subdivision B – Allowable transitional award matters**

3050. This Subdivision would set out what matters are allowable transitional award matters, and list some specific matters that would not be considered allowable. (Proposed Subdivision C would also specify other matters that are permitted to be included in a transitional award.)

#### *New clause 17 – Allowable transitional award matters*

3051. Proposed clause 17 would provide the list of allowable transitional award matters and establish the limits of some of the allowable transitional award matters.

3052. Proposed subclause 17(1) would set out the list of allowable transitional award matters.

- The scope of these matters is affected by proposed clause 18, which identifies specific matters that are not allowable transitional award matters.
- The scope of the allowable transitional award matters is also affected by the fact that entitlements about certain matters (long service leave, notice of termination, jury service and superannuation) that were allowable immediately before the reform commencement are preserved under proposed clause 22.

3053. Paragraph 17(1)(a) would provide that classifications of transitional employees and skill-based career paths are allowable.

3054. Paragraph 17(1)(b) would make ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours an allowable transitional award matter.

#### Ordinary time hours of work

3055. Ordinary time hours of work is the time within which hours are worked in an ordinary working week or day.

#### The time within which ordinary time hours of work are performed

3056. This aspect of the allowable matter would encompass award terms about, for example, the span of ordinary time hours of work or flexible hours arrangements.

Rest breaks

3057. The reference to ‘rest breaks’ would mean that award terms specifying rest breaks, including meal breaks, crib breaks and breaks between shifts, are allowable transitional award matters.

Notice periods and variations to working hours

3058. The reference to ‘notice periods and variations to working hours’ would mean that award terms that regulate the amount of notice required to a change to a roster of working hours, variations to working hour rosters, and make up time arrangements would be allowable.

3059. Paragraph 17(1)(c) would make allowable terms in transitional awards about rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors and transitional employees to whom training arrangements apply, and rates of pay for transitional employees under the supported wage system.

3060. Paragraph 17(1)(d) would make allowable terms in transitional awards about incentive based payments, piece rates and bonuses and the derivation or alteration of such payments. An incentive based payment or bonus is a payment that is a direct or indirect inducement, reward or benefit which aims to motivate an employee to achieve a particular goal or target. Payments can be ongoing or made on a periodic or one-off basis. Piece rates are a system of payment by results where pay is calculated by reference to quantifiable outputs of the employee, such as articles produced, delivered or sold, or kilometres travelled.

3061. Paragraph 17(1)(e) would make annual leave and annual leave loadings an allowable transitional award matter.

3062. Paragraph 17(1)(f) would make personal/carer’s leave an allowable transitional award matter. Paragraph 17(1)(g) would make ceremonial leave an allowable transitional award matter. This would encompass, for example, a clause which provides an entitlement for an Aboriginal or Torres Strait Islander employee to attend a culturally significant ceremonial event.

3063. Paragraph 17(1)(h) would make parental leave, including maternity leave and adoption leave an allowable transitional award matter.

3064. Paragraph 17(1)(i) would make allowable the observance of certain days as public holidays, and entitlements of employees to payment in respect of those days.

3065. The scope of this allowable transitional award matter would be limited to days declared by or under a law of a State or Territory as days to be observed generally within that State or Territory, or a region of that State or Territory, as public holidays by employees who work in that State, Territory or region.

3066. This allowable transitional award matter would include days such as New Year’s Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, ANZAC Day, Queen’s Birthday, Labour Day, Christmas Day and Boxing Day, plus Adelaide Cup Day and Proclamation Day in

South Australia, Foundation Day in Western Australia, Canberra Day in the ACT and Picnic Day in the Northern Territory as these days are observed generally within the State or Territory. It would also include declared regional holidays such as Melbourne Cup Day, Brisbane Show Day, Regatta Day in southern Tasmania and Recreation Day in northern Tasmania as these days are observed generally within a region of a State or Territory.

3067. The allowable transitional award matter would exclude other days not declared under a law of a State or Territory to be observed generally throughout a State or Territory or a region of a State or Territory. For example, the observance of a public holiday within a particular industry (such as bank holidays) would not be an allowable transitional award matter if that day would only be observed by some sections of the population within a State or Territory or a region of that State or Territory.

3068. Paragraph 17(1)(i) would not preclude a transitional award from providing for the substitution of different days to be observed as public holidays or from providing for arrangements to be made at the workplace or enterprise level for the substitution of different days to be observed as public holidays.

3069. Paragraph 17(1)(j) would make allowable in transitional awards monetary allowances for:

- expenses incurred in the course of employment – for example, travel, accommodation, uniform, motor vehicle, meal or telephone expenses incurred in the course of employment;
- responsibilities or skills that are not taken into account in rates of pay for employees – for example, a monetary allowance for the performance of additional duties at a higher level or for holding a particular qualification;
- disabilities associated with the performance of particular tasks (for example, handling hazardous materials) or work in particular conditions (for example, work in cold rooms) or locations (for example, work in remote locations).

3070. Paragraph 17(1)(k) would make allowable loadings for working overtime or for casual or shift work. This would allow transitional awards to contain terms about, for example: the definition of overtime, time off in lieu of payment for overtime, and a rate of pay that is higher than a minimum rate for working overtime, casual or shift work.

3071. Paragraph 17(1)(l) would make penalty rates an allowable transitional award matter. This means that a rate of pay higher than the rate for ordinary pay, and payable in specified circumstances, may be set in an award – for example, transitional award terms providing for overtime, weekend and public holiday rates.

3072. Paragraph 17(1)(m) would make redundancy pay within the meaning of subclause (3) an allowable transitional award matter. This would limit *redundancy pay* to redundancy pay in relation to a termination of employment by an employer of 15 or more employees; and which is

either, at the initiative of the employer and on the grounds of operational requirements, or, because the employer is insolvent.

3073. Paragraph 17(1)(n) would make stand-down provisions an allowable transitional award matter. This means that a term of a transitional award may contain, for example, for a temporary suspension of transitional employees where they cannot be usefully employed because of a breakdown of machinery at the transitional employer's business premises for which the transitional employer cannot reasonably be held responsible. A transitional award term that provides for the deduction of wages in circumstances of a stand down would be allowable under this paragraph.

3074. Paragraph 17(1)(o) would make dispute settling procedures an allowable transitional award matter. This means a transitional award may contain a term providing a mechanism for the settlement of industrial disputes.

3075. Paragraph 17(1)(p) would make allowable terms in a transitional award about type of employment, such as full-time employment, casual employment, regular part time employment and shift work. A 'type of employment' is the category of employment which identifies the basis upon which a particular employee is employed. This allowable matter would also encompass terms in a transitional award providing for, for example, fixed term employees, daily hire employees, apprentices and trainees.

3076. Paragraph 17(1)(q) would make allowable pay and conditions for outworkers, including chain of contract arrangements, registration of employers, employer record keeping and inspection.

3077. This allowable award matter would require outworkers' overall pay and conditions of employment to be fair and reasonable in comparison with the pay and conditions of employment specified in a relevant transitional award or transitional awards for employees who perform the same kind of work at an employer's business or commercial premises. This means that what is allowable under this paragraph is affected by a comparison with the transitional award pay and conditions of employment for transitional employees who perform the same kind of work at a transitional employer's business or commercial premises as outworkers.

3078. Proposed subclause 17(2) would clarify that personal/carer's leave (listed as allowable in paragraph 17(1)(f)) includes war service sick leave, infectious diseases sick leave and other like forms of sick leave.

3079. Subclause 17(3) would define *redundancy pay* for the purposes of paragraph 17(1)(m) as redundancy pay in relation to a termination of employment that is:

- by a transitional employer of 15 or more transitional employees;
- either at the initiative of the transitional employer and on the grounds of operational requirements or because the transitional employer is insolvent.



3080. Termination of employment would be at the initiative of the transitional employer and on the grounds of operational requirements where the transitional employer decides that for economic, technological or other reasons the position or job occupied by an employee has become superfluous, in excess of, or unnecessary for, the requirements of that transitional employer's enterprise.

3081. Some current awards define redundancy as occurring when an employee ceases to be employed by an employer in any situation, other than for reasons of misconduct or refusal of duty. This broad definition of redundancy may lead to redundancy payments being paid in some circumstances where termination of employment was not at the initiative of the employer and on the grounds of operational requirements. This includes, for example, to the estate of a transitional employee who has died while still employed. Award terms providing for redundancy payments in ordinary resignation situations are also not to be treated as dealing with redundancy pay.

3082. Redundancy would also arise in circumstances where a transitional employer is insolvent and the termination arises from the insolvency, whether the transitional employer actively terminates the employment relationship or not.

3083. Subclause 17(4) would set out how to determine whether a transitional employer has 15 or more transitional employees at the relevant time, for the purposes of paragraph 17(3)(a). The provision makes clear that this calculation is to include any transitional employee who becomes redundant, and any casual transitional employee engaged by the transitional employer on a regular and systematic basis for at least 12 months. The relevant time is when notice of the redundancy is given or when the redundancy occurs, whichever happens first.

*New clause 18 – Matters that are not allowable transitional award matters*

3084. Proposed clause 18 would affect the scope of the allowable transitional award matters in subclause 17(1), by specifying particular matters that are not allowable transitional award matters.

3085. Paragraph 18(1)(a) would specify as not allowable terms in a transitional award about the rights of an organisation to participate in, or represent a transitional employer or transitional employee in, the whole or part of a dispute settling procedure, unless the organisation is a representative of the employer's or employee's choice.

3086. This limitation is intended to ensure that a transitional award provides employees and employers with choice as to representation, and also to give transitional employees and transitional employers a choice about whether or not they want a representative present at all. It is intended to prevent transitional award terms that allow an organisation to intervene using a dispute settling procedure if a transitional employee or transitional employer has not requested its assistance.

3087. Paragraph 18(1)(b) would provide that the matter of transfers from one type of employment to another type of employment is not an allowable award matter. This means a transitional award term that, for example, provides for the conversion of an employee from

casual employment to part-time or full-time employment would not be an allowable transitional award matter. However, a term of a transitional award that permits access to a different type of employment for a set period of time, for example, a full-time employee who returns to work part-time after parental leave until their child reaches school age, would not fall under paragraph 18(1)(b) and would therefore be allowable.

3088. Paragraph 18(1)(c) would provide that the number or proportion of transitional employees that a transitional employer may employ in a particular type of employment is not an allowable transitional award matter. This means that an award would not be allowed to contain terms that impose, or would have the effect of imposing, a limit on the number of persons that may be employed in a particular type of employment, whether by imposing a quota on that employment type or requiring a minimum or maximum number of employees in a particular type of employment.

3089. Paragraph 18(1)(d) would provide that a direct or indirect prohibition on a transitional employer employing transitional employees in a particular type of employment is not an allowable transitional award matter. For example, a transitional award clause limiting the employment of casual transitional employees only to periods up to but not exceeding a specified number of weeks (say 6 or 12 weeks), would be an indirect prohibition on a transitional employer employing transitional employees in a particular type of employment and would not, therefore, be a clause about an allowable transitional award matter.

3090. Paragraph 18(1)(e) would provide that the maximum or minimum hours of work for regular part-time transitional employees is not an allowable transitional award matter. This means a transitional award term that prescribes the maximum or minimum hours for regular part-time transitional employees would not be about an allowable transitional award matter. Paragraph 18(1)(e) would operate subject to the terms of subclause 18(2), which would permit a transitional award term setting a minimum number of consecutive hours that a transitional employer may require a regular part-time transitional employee to work.

3091. Paragraph 18(1)(f) would provide that restrictions on the range or duration of training arrangements are not allowable transitional award matters. This means, for example, that a transitional award term providing that apprenticeships will be for a specific duration would not be a term about an allowable transitional award matter. Equally, a transitional award term that limited the circumstances in which the duration of a training arrangement could be varied (for example, by requiring the agreement of a State or Territory training authority) would not be a term about an allowable transitional award matter.

3092. Paragraph 18(1)(g) would provide that restrictions on the engagement of independent contractors and requirements relating to their engagement are not allowable transitional award matters. This means, for example, that a transitional award term that only allows the use of independent contractors to top up the existing full-time labour force (to cover seasonal or peak work loads, for instance) would not be a term about an allowable transitional award matter – such a cap on the use of independent contractors would amount to a restriction on the engagement of independent contractors. Similarly, a clause that required certain prerequisites

(such as consultation with transitional employees or a union) to be satisfied before independent contractors could be engaged by a transitional employer would not be allowable.

3093. Paragraph 18(1)(h) would make non-allowable restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency. For example, a term of a transitional award which prevented the use of labour hire workers except in cases where those workers were paid at the same rate as transitional employees of the business where the labour hire workers are also engaged would not be a term about an allowable transitional award matter. (Subclause (3) defines terms relevant to this paragraph.)

3094. Paragraph 18(1)(i) would provide that union picnic days is not an allowable transitional award matter. This means a transitional award term that provides for a union picnic day that would otherwise be allowable under paragraph 17(1)(i) (which relates to public holidays) is not an allowable transitional award matter.

3095. Paragraph 18(1)(j) would provide that tallies is not an allowable transitional award matter. This means a transitional award term that, for example, provides for a tally payment system in the meat industry is not a term about an allowable transitional award matter.

3096. Paragraph 18(1)(k) would provide that dispute resolution training leave is not an allowable transitional award matter. This means a transitional award term providing leave to attend a training course directed to the dispute resolution process is not a term about a transitional allowable award matter.

3097. Paragraph 18(1)(l) would provide that trade union training leave is not an allowable transitional award matter. This means that an award term providing leave to attend a course directed to the training of union delegates or workplace representatives is not a term about an allowable award matter. Terms about other trade union training courses dealing with workplace relations issues would also not be terms about allowable transitional award matters.

3098. Paragraph 18(1)(m) would allow additional matters to be prescribed by regulations as not allowable.

3099. Subclause 18(2) would ensure that paragraph 18(1)(e) (which would render not allowable terms about the maximum or minimum hours for regular part-time transitional employees) would not prevent a term being included in a transitional award that:

- set a minimum number of consecutive hours that a transitional employer may require a regular part-time transitional employee to work – for example, a term that allowed a transitional employer to require a regular part-time transitional employee to work at least three consecutive hours; or
- facilitated a regular pattern in the hours worked by regular part time transitional employees – for example, a transitional award term may enable a regular part-time

transitional employee to work fifteen hours each week over the course of a four week period.

3100. Subclause 18(3) would provide a definition of *labour hire agency* and *labour hire worker* for the purposes of proposed clause 18.

*New clause 19 – Terms involving discrimination and preference not to be included*

3101. Proposed clause 19 would provide that a term of a transitional award is not allowable to the extent that it requires or permits, or has the effect of requiring or permitting, any conduct that would contravene Part XA (Freedom of Association).

*New clause 20 – Terms about rights of entry not to be included*

3102. Proposed clause 20 would provide that a transitional award term is not allowable to the extent that it would require or authorise an officer or employee of an organisation to enter premises for the purposes listed in the clause – which include inspecting or viewing work performed on premises of a transitional employer bound by the award.

*New clause 21 Enterprise flexibility provisions not to be included*

3103. Proposed clause 21 would provide that to the extent that a transitional award term is an enterprise flexibility provision (as defined immediately before reform commencement), it would not be about an allowable transitional award matter.

**New Subdivision C – Other terms that may be included in transitional awards**

*New clause 22 – Preserved transitional award terms*

3104. Proposed subclause 22(1) would provide that a transitional award may contain preserved transitional award terms.

3105. Proposed subclause 22(2) would provide that a *preserved transitional award term* is a term of a transitional award that is about a matter listed in subclause 22(3) and that had effect under a transitional award on reform commencement. Preserved transitional award terms do not cease to operate on reform commencement – subclause 22(5) would provide that a preserved transitional award term continues to have effect for the purposes of the Schedule. However, such terms may not be varied.

3106. The preserved transitional award matters are: long service leave, notice of termination, jury service and superannuation (subclause 22(3)). A term in a transitional award is only a preserved transitional award term to the extent that it is about one of these matters (subclause 22(4)).

3107. A preserved award term about superannuation would cease to have effect at the end of 30 June 2008 (subclause 22(6)). The Government announced in 2004, with the passage of the *Superannuation Laws Amendment (2004 Measures No.2) Act 2004*, that all employees would be treated in a consistent manner for superannuation guarantee purposes. The Government announced that from 1 July 2008 ordinary time earnings (as defined by the Superannuation Guarantee legislation) would be the earnings base for determining the superannuation guarantee

liability for all employees. Accordingly, award-based earnings bases will cease to operate from this date.

*New clause 23 – Facilitative provisions*

3108. A facilitative provision is a term of an award (including a transitional award) which permits an employer and employees to agree on how specified terms of the award are to apply at the workplace level.

3109. Subclause 23(1) would allow a facilitative provision in a transitional award. This subclause would operate subject to the requirements of the remainder of this clause.

3110. Subclause 23(2) would ensure that a facilitative provision not require agreement between a majority of transitional employees and a transitional employer on how a term in the transitional award is to operate; rather a facilitative provision must permit agreement between an individual transitional employee and his or her employer.

3111. Subclause 23(3) would provide that a facilitative provision may only operate in respect of an allowable transitional award matter or a preserved transitional award term.

3112. Subclause 23(4) would provide that a facilitative provision is of no effect to the extent that it does not comply with subclauses 23(2) and (3).

*New clause 24 – Incidental and machinery terms*

3113. Subclause 24(1) would permit a transitional award to contain terms that are both:

- incidental to a term in the transitional award that is allowable; and
- essential to enable a particular term to function in a practical way.

3114. Subclause 24(2) would provide that a transitional award term that is not an allowable transitional award matter because of other proposed clauses (proposed clauses 18, 19, 20 or 21) cannot become allowable because of the operation of proposed clause 24.

*New clause 25 – Anti-discrimination clauses*

3115. Proposed clause 25 would permit a transitional award to contain a model anti-discrimination clause.

*New clause 26 – Boards of reference*

3116. Proposed clause 26 would provide for the ongoing operation of terms in transitional awards that appoint, or permit the appointment of, boards of reference, subject to specific operational limitations. To the extent that an existing term would not comply with these requirements, it would be of no effect (subclause 26(2)). The key provision in this regard is subclause 26(3), which would provide that a term of a transitional award that appoints, or gives power to appoint, a board of reference may confer upon the board of reference an administrative function (as defined), and must not confer upon the board of reference a function of settling or

determining disputes about any matter arising under the transitional award. A function conferred under subclause 26(3) may only relate to an allowable transitional award matter or other terms that are permitted to be contained in an award (subclause 26(4)).

3117. Subclause 26(5) would provide that a board of reference may consist of or include a member of the AIRC.

3118. Subclause 26(6) would provide for regulations to be made in relation to a particular board of reference or boards of reference in general including, but not limited to, the functions and powers of the board or boards. This would enable the operation of boards of reference to be monitored and adjusted, if necessary.

#### **New Subdivision D – Terms in transitional awards that cease to have effect**

##### *New clause 27 – Terms in transitional awards that cease to have effect after the reform commencement*

3119. A transitional award term that is not permitted to be contained in a transitional award – for example because it is not about a matter within the list of allowable transitional award matters (subclause 17(1)), or because it is specifically made not allowable (subclause 18(1)) – would cease to have effect immediately after reform commencement. For example, a transitional award term providing for the circumstances in which casual employment may be transferred to part time or full time employment (which would not be allowable because of subclause 18(1)) would cease to apply after reform commencement (subclause 27(1)). This would not affect preserved award terms (subclause 27(2)).

#### **New Division 2 – Variation and revocation of transitional awards**

##### *New clause 28 Variation of transitional awards – general*

3120. Proposed clause 28 would list the circumstances in which the AIRC may vary a transitional award.

3121. Subclause 28(1) would provide that the AIRC may only vary an award where it is dealing with an industrial dispute (under proposed clause 29); to remove ambiguity or uncertainty, or where an award is a discriminatory award (under proposed clause 30).

3122. The AIRC must not vary a preserved transitional award term (subclause 28(2)) or a facilitative provision within meaning of clause 23 except on a ground set out in proposed clause 30 (subclause 28(3)).

##### *New clause 29 Variation of transitional awards – dealing with industrial dispute*

3123. Proposed subclause 29(1) would provide that in preventing or settling and industrial dispute, or maintaining the settlement of an industrial dispute, the AIRC's power to vary a transitional award extends only to varying the award:

- to provide minimum safety net entitlements about matters listed in subclause 29(2);

- to do anything that the AIRC is permitted to do by regulations under subclause 29(3);
- to include incidental and machinery terms relating to the matters listed in subclause 29(2) (see proposed clause 24)

3124. Subclause 29(2) would provide that the matters that the AIRC may deal with for the purposes of varying a transitional award are:

- rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors and transitional employees to whom training arrangements apply, and rates of pay for transitional employees under the supported wage system;
- incentive-based payments, piece rates and bonuses;
- annual leave loadings;
- monetary allowances as described in paragraph 17(1)(j);
- loadings for working overtime or for casual or shift work;
- penalty rates;
- pay for outworkers;
- any other allowable transitional award matter prescribed by the regulations.

3125. A note under proposed subclause 29(2) reminds readers that the AIRC must have regard to the matters noted in clauses 8 and 9 in exercising its power to vary an award.

3126. Subclauses 29(3) and (4) would enable regulations to be made to extend the range of allowable matters that the AIRC may deal with in circumstances where it considers it appropriate to vary a transitional award in respect of rates of pay for part-time transitional employees, junior transitional employees or transitional employees to whom training arrangements apply. These provisions are intended to enable regulations to be made that will permit the AIRC to make necessary changes to an award consequential on inserting wage rates for these categories of employee – such as including relevant classifications, and providing pro-rata access to leave entitlements.

*New clause 30 – Variation of transitional awards–discrimination, etc.*

3127. Proposed section 30 would provide for other limited circumstances in which the AIRC may vary awards.

3128. Subsection 30 (1) would enable the AIRC to make an order to vary a term of a transitional award about a matter listed in subclause 29(2) to remove any ambiguity or uncertainty.

3129. Subsections 30(2), (3), (4) and (7) would provide for an order to be made varying a transitional award to remove discrimination if the award is referred to the AIRC under section 46PW of the HREOC Act 1986.

3130. Subsection 30(5) would enable the AIRC to make an order to vary a transitional award:

- to reflect a name change by an employer or organisation;
- if an organisation's registration has been cancelled; or
- if the employer organisation has ceased to exist.

3131. The applicant would bear the onus of demonstrating that a variation under subsection 30(5) should be made (subsection 30(6)).

3132. This clause reflects pre-reform section 111A and subsections 113(2), (2A), (3) and (5).

*New clause 31 – Revocation of transitional awards*

3133. Proposed clause 31 would set out circumstances in which a transitional award may be revoked.

- The use of the word 'revoke' and not the previous formulation, 'set aside or revoke', is not intended to change the scope of the AIRC's power. Rather, the intention is to use a clearer style consistent with section 15AC of the *Acts Interpretation Act 1901*.

3134. Subclause 31(1) would provide that the AIRC may only make an order revoking a transitional award if:

- it is satisfied that the award is obsolete or no longer capable of operating; and
- it would not be contrary to the public interest to revoke the award.

3135. Subclause 31(2) would provide that if an application is made seeking an order under proposed subclause 31(1), the AIRC must, as it considers appropriate, ensure that each transitional employer and organisation bound by the transitional award is made aware of the application.

3136. Subclause 31(3) would ensure that the AIRC does not make an order revoking a transitional award if one or more transitional employees have an entitlement under a preserved transitional award term in the transitional award.

*New clause 32 – Applications for variation, suspension or revocation of transitional awards*

3137. Proposed clause 32 would provide that this Schedule applies with respect to applications (including proceedings about applications) for the variation, suspension or revocation of transitional awards and applies in the same manner, as far as is possible, as it applies with respect to industrial disputes and proceedings about industrial disputes. An application for the variation,



suspension or revocation of transitional awards is to be treated as if it were the notification of an industrial dispute. Proposed clause 32 reflects pre-reform subsection 113(4).

### **New Division 3 – Procedure for dealing with industrial disputes**

#### *New clause 33 – Notification of industrial disputes*

3138. Proposed clause 33 would provide for the notification of alleged industrial disputes.

3139. New disputes will be able to be notified after reform commencement, although the range of matters about which the AIRC will be empowered to conciliate, or arbitrate by varying a transitional award, would be altered.

3140. This clause is based on pre-reform section 99.

#### *New clause 34 – Disputes to be dealt with by conciliation where possible*

3141. Proposed clause 34 would require an alleged industrial dispute to be conciliated unless the relevant Presidential Member does not consider that this would assist resolution of the dispute.

3142. Where an alleged dispute is not referred for conciliation, it must be dealt with by arbitration. The relevant Presidential Member must publish reasons for not referring a matter for initial conciliation.

3143. Proposed clause 34 is based on pre-reform section 100.

#### *New clause 35 – Findings as to industrial disputes*

3144. Proposed subclause 35(1) would provide for the AIRC to make a formal finding that an industrial dispute exists.

3145. A finding that an industrial dispute exists may be relied upon by the AIRC for the purposes of exercising powers in subsequent proceedings about the same industrial dispute (other than powers on an appeal about the finding) (subclause 35(2)).

3146. Proposed subclause 35(3) would provide that a determination or finding of the AIRC about the existence of an industrial dispute is binding and conclusive for all purposes.

3147. This clause is based on pre-reform section 101.

#### *New clause 36 – Action to be taken where dispute referred for conciliation*

3148. Proposed clause 36 would require a member of the AIRC dealing with a dispute by conciliation to take all appropriate steps to assist the parties to agree on terms to prevent or settle the dispute, including arranging conferences of parties and facilitating discussion amongst the parties. This clause is based on pre-reform section 102.

*New clause 37 – Completion of conciliation proceeding*

3149. Proposed subclause 37 would provide for the conclusion of conciliation.

3150. This clause is based on pre-reform section 103.

*New clause 38 – Arbitration*

3151. When conciliation is complete, proposed clause 38 would require the AIRC to deal with those matters still in dispute by arbitration. Subclause 29(2) would list the matters in relation to which the AIRC may arbitrate.

3152. Proposed clause 38 is based on pre-reform section 104.

*New clause 39 – Exercise of arbitration powers by member who has exercised conciliation powers*

3153. Subclause 39(1) would provide that a member who conciliated a dispute must not arbitrate, or take part in arbitration, if a party to the arbitration proceeding objects. Certain procedural activity listed in subclause 39(2) would not amount to exercising conciliation powers about the industrial dispute – eg arranging for a conference of the parties or their representatives that the member did not attend (paragraph 39(2)(c)).

3154. Proposed clause 39 is based on pre-reform section 105.

*New clause 40 – Allowable transitional award matters to be dealt with by Full Bench*

3155. Proposed clause 40 is based on pre-reform section 106 – which allows a Full Bench of the AIRC to establish principles about each allowable award matter.

3156. Under proposed clause 40, the Full Bench may establish principles about those matters about which it may arbitrate (these are listed in subclause 29(2)).

3157. The power of the AIRC to vary a transitional award about a matter referred to in subclause 29(2) is exercisable only by a Full Bench unless the variation gives effect to orders of a Full Bench made after reform commencement or is consistent with principles established by a Full Bench after reform commencement (subclause 40(2)).

*New clause 41 – Reference of disputes to Full Bench*

3158. Proposed clause 41 would enable an application to be made for the President to refer a dispute or an alleged dispute, including a question arising about an industrial dispute, to a Full Bench. The basis on which such an application may be made is that the matter is of such importance that it should, in the public interest, be dealt with by a Full Bench.

3159. Proposed clause 41 is based on pre-reform section 107.

*New clause 42 – President may deal with certain proceedings*

3160. Proposed clause 42 would enable the President to decide, on his or her own motion, to deal with, or refer to a Full Bench, a dispute or an alleged dispute, including a question arising about an industrial dispute.

3161. Proposed clause 42 is based on pre-reform section 108.

*New clause 43 – Review on application by Minister*

3162. Proposed clause 43 would enable the Minister to apply to the President for a review by a Full Bench of an order made for the purposes of the Schedule, or a decision about the making of such an order, if it appears to the Minister that the order or decision is contrary to the public interest. Proposed clause 43 also sets out the procedure to be followed where the Minister seeks a review under this clause.

3163. Proposed clause 43 is based on pre-reform section 109.

*New clause 44 – Procedure of Commission*

3164. Proposed clause 44 would provide general guidance about the procedure of the AIRC.

3165. The proposed clause indicates that the procedure of the AIRC when dealing with an industrial dispute is (subject to the Act and any rules made by the President) within the discretion of the AIRC, that it is not bound by the rules of evidence, and that it must act according to equity, good conscience and the merits of the case.

3166. The AIRC may require evidence or argument to be presented in writing and may decide the matters on which it will hear oral evidence or argument. Proposed clause 44 reflects pre-reform section 110.

*New clause 45 – Provisions in Part II that do not apply to performance of Commission's functions under the Schedule*

3167. Proposed clause 45 would provide that a number of the general powers and procedures of the AIRC – to be contained in Part II of the Act – do not apply to the performance of a function by the AIRC under the Schedule. In large part this is because specific equivalent provision is made in the Schedule.

**New Division 4 – Powers of Commission for dealing with industrial disputes**

*New clause 46 – Particular powers of Commission*

3168. Proposed clause 46 is based on pre-reform section 111, although some changes have been made to the AIRC's powers.

3169. The clause would set out particular powers the AIRC may exercise in relation to an industrial dispute that arises under the Schedule.

3170. Subclause 46(1) would set out these powers, which include that the AIRC may:

- inform itself in any manner it considers appropriate (paragraph 46(1)(a));
- issue directions about procedural matters relating to the hearing or determination of an industrial dispute (paragraph 46(1)(c));
- within limits imposed by the Schedule, vary or revoke a transitional award, order, direction, recommendation or other decision (paragraph 46(1)(d));
- dismiss trivial matters (subparagraph 46(1)(e)(i));
- refer a matter to an expert and accept the expert's report as evidence (paragraph 46(1)(j); and
- correct, amend or waive errors, defects or irregularities, whether in substance or form (paragraph 46(1)(m)).

3171. Some changes have been made to the AIRC's powers. It will, for example, no longer have a general power to do anything it considers necessary to deal with a matter (pre-reform paragraph 111(1)(t)), or to extend legislative timeframes (pre-reform paragraph 111(1)(r)).

3172. Subclauses 46(2) and (3) would deal with related procedural matters.

#### *New clause 47 – Recommendations by consent*

3173. Proposed clause 47 would enable the AIRC, when it is exercising its powers of conciliation in relation to a particular allowable award matter, to conduct a hearing and make recommendations about those matters. The AIRC may conduct a hearing and make recommendations about particular aspects of the matter on which the parties are not able to reach agreement:

- on the request of all the parties;
- where the AIRC is satisfied that genuine attempts have been made to reach agreement about certain matters; and
- the parties have agreed to comply with the AIRC's recommendations (subclause 47(1)).

3174. Subclause 47(2) would provide that the AIRC is not prevented by this clause from making recommendations in other circumstances.

3175. This clause is based on pre-reform section 111AA.

#### **New Division 5 – Other powers of the Commission**

##### *New clause 48 – Power to make further orders in settlement of industrial dispute etc.*

3176. Proposed clause 48 would enable orders to be made in settlement of an industrial dispute, despite the fact that an award or order has previously been made in relation to the dispute. This provision is based on pre-reform section 114.

*New clause 49 – Relief not limited to claim*

3177. Proposed clause 49 would provide that, subject to the limits placed on the AIRC's power to conciliate and/or arbitrate by other provisions in the Schedule, the AIRC is not restricted to the relief sought or demands made by the parties in the course of the dispute.

3178. This proposed clause is based on pre-reform section 120.

*New clause 50 – Power to provide special rates of wages*

3179. Proposed clause 50 would enable the AIRC to vary an award that prescribes a minimum rate of pay to provide:

- for the payment of wages at a lower rate to transitional employees who are unable to earn a wage at the minimum rate; and
- that the lower rate must not be paid to a transitional employee unless a particular person or authority has certified that the transitional employee is unable to earn a wage at the minimum rate.

3180. This proposed clause is based on pre-reform section 123.

*New clause 51 – Orders to stop or prevent industrial action*

3181. Proposed clause 51 would set out the grounds upon which an order that industrial action stop or not occur can be obtained and the process to be followed to obtain and enforce such an order.

3182. Subclause 51(1) would enable the AIRC to make an order that industrial action that is happening, or is threatened or probable, in relation to an industrial dispute stop or not occur. The scope of the AIRC's power to make such orders is limited by the range of matters about which it can arbitrate – see subclause 29(2).

3183. Subclause 51(2) would identify those who may apply for such an order. The AIRC may also make such an order on its own initiative.

3184. Subclause 51(8) would enable the Federal Court to grant an injunction on such terms as it considers appropriate if it is satisfied that a person or organisation against whom an order is made:

- has engaged in conduct in breach of an AIRC order (paragraph 51(8)(a)); or
- is proposing to engage in such conduct (paragraph 51(8)(b)).

3185. This proposed clause is based on pre-reform section 127.

### **New Part 4 – Ballots ordered by the Commission**

#### *New clause 52 – Commission may order secret ballot*

3186. Proposed clause 52 would set out the circumstances in which the AIRC may order a secret ballot. This clause is expressed in similar terms to pre-reform subsection 135(1).

3187. Subclause 52(1) would provide that the AIRC may order a secret ballot of members of an organisation to be conducted, and provide directions as to the conduct of the ballot, if it considers that the prevention or settlement of an industrial dispute might be helped by finding out the attitudes of the members of an organisation involved in an industrial dispute. In order to make such an order, the AIRC must have the power to deal with the dispute under the Schedule.

3188. Subclause 52(2) would provide that the AIRC's powers to make and revoke such an order may only be exercised by a Presidential Member or a Full Bench.

#### *New clause 53 – Scope of directions for secret ballots*

3189. Proposed clause 53 would provide for the type of directions that are to be given by the AIRC when ordering a secret ballot. This proposed clause is expressed in similar terms to pre-reform section 137.

3190. Subsection 53(1) would provide that the direction given must provide for all matters relating to the ballot, including:

- the questions to be put to the vote (paragraph 53(1)(a));
- the eligibility of persons to vote (paragraph 53(1)(b)); and
- the conduct of the ballot generally (paragraph 53(1)(c)).

3191. Subsection 53(2) would require the AIRC to consult with the Industrial Registrar or the Electoral Commissioner (the latter if the ballot is to be conducted by the AEC) before giving directions.

#### *New clause 54 – Conduct of ballot*

3192. Proposed clause 54 would provide for the manner in which the ballot is to be conducted. The provisions of this clause are based on pre-reform subsections 138(1) – (5).

3193. Subclause 54(1) would provide details of the directions to be made by the AIRC for the conduct of the secret ballot. Subclause 54(5) would require the Industrial Registrar to conduct the ballot or make arrangements for the conduct of the ballot in accordance with the AIRC's directions.

3194. Subclause 54(2) would stipulate that a person to whom a direction is given must comply. Failure to do so is an offence, with a maximum penalty of 30 penalty units.

3195. Subclause 54(3) would provide that an offence under subclause (2) is an offence of strict liability, meaning that it is not possible to argue that there was an excuse for non-compliance.

3196. Where the AIRC orders that the ballot is to be conducted by a person approved by the Industrial Registrar, the Commonwealth is liable to pay the reasonable costs of the conduct of the ballot as assessed by a Registrar (subclause 54(4))

3197. Subclause 54(6) would provide the manner in which the results of the ballot are to be communicated.

*New clause 55 – Commission to have regard to result of ballot*

3198. Proposed clause 55 would require the AIRC to have regard to the result of the ballot in any relevant conciliation or arbitration proceeding. This clause is expressed in similar terms to pre-reform section 139.

*New clause 56 – Offences in relation to ballots*

3199. Proposed clause 56 would ensure that pre-reform section 317 (which creates offences in relation to ballots) will apply to a ballot ordered under the Part in the same way as it applies to other ballots ordered under the Act.

**New Part 5 – Circumstances in which transitional awards cease to be binding**

3200. Proposed Part 5 would set out the means by which transitional employers and their employees can cease to be bound by a transitional award. They are:

- a transitional employer making a State employment agreement with one or more of its employees (clause 57);
- an application to the AIRC for an order that the transitional award cease to apply because the parties have been unable to make a State employment agreement (clause 58); or
- an application to the AIRC for an order that the transitional award cease to apply because the AIRC has been unable to resolve an industrial dispute (clause 59) – for example, because of limits on the AIRC’s power to deal with certain issues by arbitration.

3201. The effect of ceasing to be bound by an award is that the employer would revert to the relevant State workplace relations system.

3202. Proposed clauses 57 and 58 would not apply to employers and employees in Victoria (as those terms are defined by proposed section 489), as State employment agreements are not able to be made in Victoria.

3203. If an order under subclause 59(3) is made by the AIRC in respect of an employer and its employees in Victoria (as those terms are defined by proposed section 489), then the employer and employee in Victoria may become bound by a common rule (within the meaning of clause

82 of Schedule 13) or by the Standard as it applies because of proposed section 492 and proposed Division 5 of Part VIA.

*New clause 57 – Ceasing to be bound by a transitional award – making a State employment agreement*

3204. Proposed clause 57 would provide that a transitional employer bound by a transitional award will cease to be bound by that award in respect of the employment of a transitional employee covered by that award if the transitional employer makes a State employment agreement with the transitional employee. Once the transitional employer ceases to be bound by a transitional award in respect of particular employment it cannot be subsequently bound by a transitional award in respect of that employment (paragraph 57(1)(b)).

3205. It will be possible for an employer to be bound by a transitional award in respect of some employees, and State employment agreements in respect of others.

*New clause 58 – Ceasing to be bound by a transitional award – inability to make a State employment agreement*

3206. Proposed clause 58 would enable a transitional employer or one or more of the transitional employer's employees to apply to the AIRC for an order that the transitional employer cease to be bound by a transitional award in respect of the employment of transitional employees.

3207. Subclause 58(1) would provide the grounds for making such an application – that a transitional employer has made genuine efforts to make a State employment agreement with one or more of its employees, but has been unable to do so.

3208. Subclause 58(2) would require the AIRC to make the order sought if it is satisfied that genuine efforts have been made by the transitional employer to make a State employment agreement with one or more of the transitional employees, but has been unable to do so.

*New clause 59 – Ceasing to be bound by transitional award – inability to resolve industrial dispute under the Schedule*

3209. Proposed clause 59 would provide a mechanism for a party to an industrial dispute to apply for an order that a transitional award cease to bind a transitional employer if a dispute has not been able to be resolved under the Schedule. For example, an order might be sought where parties have a genuine dispute about an allowable transitional award matter that the AIRC cannot resolve by arbitration as it is not one of the allowable transitional award matters listed in subclause 29(2).

*New clause 60 – Interaction between transitional awards and State laws and State awards*

3210. Proposed clause 60 would provide that if a State law or State award is inconsistent with, or deals with a matter dealt with, in a transitional award, the transitional award prevails and the State law or State award, to the extent of the inconsistency or in relation to the matter dealt with, is invalid.



3211. This proposed clause is expressed in similar terms to pre-reform subsection 152(1).

### **New Part 6 – Technical matters relating to transitional awards**

3212. Proposed Part 6 would set out a range of technical matters relating to orders made by the AIRC for the purposes of the Schedule and transitional awards.

#### *New clause 61 – Making and publication of orders*

3213. Proposed clause 61 would provide for the making and publication of orders made by the AIRC for the purposes of the Schedule. This would include transitional award-related orders and also other orders the AIRC may make under the Schedule such as an order to stop or prevent industrial action (see clause 51).

Subclause 61(1) would provide that an order be reduced to writing and be signed and dated.

3214. The AIRC must provide written reasons for making the order (subclause 61(2)), and the order and written reasons must be made available to relevant parties and published (subclause 61(3)).

3215. This clause is based on the provisions of pre-reform section 143.

#### *New clause 62 – Requirement for transitional award-related orders*

3216. Proposed section 62 would set out other general matters to which the AIRC must have regard when making a *transitional award related order*. (A *transitional award-related order* is defined in subclause 2(1) to mean an order varying, revoking or suspending a transitional award under the Schedule.)

3217. Subsection 62 would provide that, when making a *transitional award-related order*, the AIRC must ensure that the order:

- is expressed in plain English and is easy to understand in structure and content;
- does not include terms that are obsolete or that need updating;
- if appropriate, contains terms for the Supported Wage System – to provide for the employment of workers with disabilities; and
- include wage arrangements for the full range of apprenticeships, traineeships and other training arrangements.

3218. Subsection 62(2) would set out the circumstances when a *transitional award related order* would not discriminate against an employee.

3219. This clause is based on pre-reform section 143.

*New clause 63 – Registrar’s powers if member ceases to be a member after making an order*

3220. Proposed clause 63 is a technical provision that would enable continuity in circumstances where a member of the AIRC ceases to be a member after an order has been made for the purposes of the Schedule, but before the order made by the member has been reduced to writing. In these circumstances, the order will be deemed to have effect as if it was signed by that member if the Registrar reduces the order to writing, signs it and seals it with the seal of the AIRC.

3221. This clause is based on pre-reform section 143.

*New clause 64 – Form of orders*

3222. Proposed clause 64 would provide that an order made for the purposes of the Schedule must be framed so as best to express the decision of the AIRC and must avoid any unnecessary technicalities.

3223. This clause is based on pre-reform section 144.

*New clause 65 – Date of orders*

3224. Proposed clause 65 would provide that the date of an order made by the AIRC for the purposes of the Schedule is the date upon which it is signed in the manner set out in proposed clause 61, that is, by at least one member of a Full Bench in the case of an order made by a Full Bench, or in the case of any other order, at least one member of the AIRC.

3225. This clause is based on pre-reform section 145.

*New clause 66 – Date of effect of orders*

3226. Proposed clause 66 would provide that an order made by the AIRC for the purposes of the Schedule must be expressed to come into force on a specified day (subclause 66(1)). Other than in exceptional circumstances, the order must not be retrospective (subclause 66(2)).

3227. This clause is based on pre-reform section 146.

*New clause 67 – Term of orders*

3228. Proposed clause 67 would specify that an order made by the AIRC for the purposes of the Schedule must specify the period for which the order is to continue in force (subclause 67(1)) and in determining this period, the AIRC must have regard to the wishes of the parties to the industrial dispute and the desirability of stability in workplace relations (subclause 67(2)).

3229. This clause is based on the provisions of pre-reform section 147.

*New clause 68 – Continuation of transitional awards*

3230. Proposed clause 68 would provide for the continuation of transitional awards and orders varying transitional awards.

3231. This clause is based on pre-reform section 148.

*New clause 69 – Persons bound by orders varying transitional awards*

3232. Proposed clause 69 would set out the parties that are bound by an order that varies a transitional award. This clause is based on pre-reform section 149.

3233. The parties that can be bound by an order varying a transitional award under this clause are listed in subclause 69(1). An order can only bind those parties that are already bound by the transitional award under clause 4. It is not the intention of this clause that employers, employees and organisations that are not bound by a transitional award and, therefore, are not in the transitional system, can enter the transitional system by becoming bound by a transitional award under this clause.

3234. An order varying a transitional award must not bind a transitional employer, transitional employee or organisation that was not bound by the transitional award on reform commencement (subclause 69(2)).

*New clause 70 – Transitional awards and transitional award-related orders of Commission are final*

3235. Proposed clause 70 would protect the validity of transitional awards and transitional award-related orders.

3236. Subclause 70(1) would provide that such instruments are final and conclusive and that they may not be challenged or called into question in a court.

3237. Subclause 70(2) would provide that a transitional award or transitional award-related order is not invalid because it was made by the AIRC constituted otherwise than as provided in the WR Act.

*New clause 71 – Reprints of transitional awards as varied*

3238. Proposed clause 71 would confirm that a copy of a document purporting to be a copy of a transitional award as varied and printed by the Government Printer is evidence of the transitional award as varied in all courts.

*New clause 72 – Expressions used in transitional award*

3239. Proposed clause 72 would provide that, unless the contrary intention appears in a transitional award, an expression used in the award has the same meaning as it would have in an Act because of either the *Acts Interpretation Act 1901* or as it has in the WR Act.

## **New Part 7 – Matters relating to Victoria**

3240. Proposed Part 7 would provide special provisions in respect of transitional awards that cover employees in Victoria, who are within the referral of power from the Parliament of Victoria to the Parliament of the Commonwealth in the CP(IR) Act but are not ‘employees’ within the meaning of subsection 4AA(1). These special provisions arise from the terms of the CP(IR) Act, and will only apply only in so far as and as long as they are within the powers referred by the CP(IR) Act. These special provisions for Victoria include the continuation of a system of common rule awards, for the transitional period.

### **New Division 1 – Matters referred by Victoria**

3241. Proposed Division 1 would provide for additional coverage of Victorian employees through the operation of the CP(IR) Act.

#### **New Subdivision A – Introduction**

##### *New clause 73 – Definitions*

3242. Proposed clause 73 would provide definitions to apply throughout Division 1 of Part 7 of Schedule 13 to the WR Act.

3243. Under clause 73, the terms *employee*, *employer* and *employment* would have the same meaning as provided by proposed section 489 of the WR Act. Therefore, an *employee* for the purposes of Division 1 of Part 7 of Schedule 13 would mean an employee in Victoria who is an *employee* within section 3 of the CP(IR) Act, and not an employee within the meaning of proposed subsection 4AA(1). The terms *employer* and *employment* would have a corresponding meaning. These terms are narrower than equivalent terms in proposed clause 2, because they are limited by section 3 of CP(IR) Act and they are limited geographically to Victoria.

3244. A *transitional employee* would be an *employee* (within the meaning of clause 73) of a *transitional employer* (within the meaning of clause 73). A *transitional employer* would be an *employer* (within the meaning of clause 73) that is an *excluded employer* (within the meaning of clause 2) that is bound by a *transitional award* (within the meaning of clause 2). Again, these terms have a narrower meaning than in clause 2.

3245. It is intended that, because of the definitions of *employee*, *employer*, *employment*, *transitional employee* and *transitional employer* contained in clause 73, the definitions of the same terms in clause 2 of Schedule 13 would not apply to Division 1 of Part 7 of Schedule 13 to the WR Act. This means that the provisions of Division 1 of Part 7 of Schedule 13 to the WR Act shall only apply to *employees*, *employers*, *employment*, *transitional employees* and *transitional employers* within the meanings provided by clause 73.

3246. A *transitional Victorian reference award* would mean a *transitional award* (within the meaning of clause 2) that was, prior to reform commencement, made in settlement or part settlement of an industrial dispute within the limits of Victoria, relying upon the terms of the CP(IR) Act.

3247. An *underlying award* would mean the award to which a common rule declaration relates. As a result of subclause 82(2), an underlying award will always be a *transitional award* within the meaning of clause 2.

3248. *Victorian public sector* will have the same meaning as provided in section 3 of the CP(IR) Act.

*New clause 74 – Division only has effect if supported by reference*

3249. Proposed clause 74 would make it clear that to the extent that it relates to a Victorian reference award, any clause of Schedule 13 only operates for as long as, and in so far, as the relevant referral of a matter to the Parliament of the Commonwealth is in effect and provides sufficient legislative power for the clause to have effect. This reflects the constitutional position.

3250. Subclause 74(2) would provide an exception to this general rule insofar as Schedule 13 relates to the ‘parental leave’ part of the Standard as it applies because of proposed section 170KB. Proposed section 170KB does not rely upon a referral of matter by the Parliament of Victoria to the Parliament of the Commonwealth. (The constitutional underpinning of section 170KB would be dealt with by subsection 170KA(1) (see item RC610).)

**New Subdivision B – Industrial disputes**

3251. Proposed Subdivision B would provide for the application of the industrial disputes provisions in Schedule 13 to an industrial dispute involving *employees* and *employers* (as defined in clause 73).

*New clause 75 – Industrial disputes*

3252. Proposed clause 75 would (subject to subclause 75(2)) extend the operation of Schedule 13 as if the definition of ‘industrial dispute’ in clause 2 also applied to an industrial dispute within the limits of Victoria.

3253. Subclause 75(2) would allow regulations to be made to prescribe Victorian laws so that they prevail to the extent of any inconsistency over a transitional Victorian reference award in respect of an industrial dispute concerning employment in the Victorian public sector. This will not affect the general operation of Schedule 13.

**New Subdivision C – Allowable transitional award matters**

3254. Proposed Subdivision C would extend the operation of the allowable matters provisions to Victorian transitional reference awards.

*New clause 76 – Allowable transitional award matters*

3255. Proposed clause 76 would provide that clause 17 (allowable transitional award matters) has effect, in relation to a transitional Victorian reference award as if the allowable transitional award matters did not include:

- annual leave;

- personal/carer's leave; and
- parental leave, including maternity and adoption leave.

3256. This clause is consequential upon proposed clause 77, which provides that for transitional Victorian reference awards those entitlements are treated as preserved transitional award entitlements under subclause 22(3).

#### **New Subdivision D – Preserved transitional award terms**

*New clause 77 – Preserved transitional award terms*

*New clause 78 – When preserved transitional award entitlements have effect*

*New clause 79 – Meaning of **more generous***

*New clause 80 – Modifications that may be prescribed – personal/carer's leave*

*New clause 81 – Modifications that may be prescribed – parental leave*

3257. Proposed clauses 77, 78, 79, 80 and 81 would provide that the following matters are preserved award entitlements in relation to a transitional Victorian reference award:

- annual leave;
- personal/carer's leave; and
- parental leave, including maternity and adoption leave.

3258. This proposed Subdivision would provide that an *employee* (within the meaning of proposed section 489) in Victoria who is covered by a transitional Victorian reference award shall receive the more generous of each of the preserved transitional award terms, or the relevant entitlement of the Standard, in relation to:

- annual leave;
- personal/carer's leave; and
- parental leave, including maternity and adoption leave.

3259. The 'more generous' test would apply in the same way, and with similar regulation making powers, as under proposed sections 117C, 117D, 117E and 117F.

3260. These provisions apply to employees in Victoria in a different way to employees in the other States because, as a result of the referral of power by the Parliament of Victoria to the Parliament of the Commonwealth in the CP(IR) Act, employees in Victoria will (in accordance with, and subject to the limitations in, proposed section 492) be entitled to the Standard.

#### **New Subdivision E – Common rules**

3261. Subdivision E of Division 1 of Part 7 of Schedule 13 would provide that a Victorian common rule award system will continue to apply, to employers and employees in Victoria who

are covered by Division 1 of Part XV of the WR Act, until the end of the transitional period. Existing common rule declarations would continue to apply, in relation to transitional awards, but the AIRC would not be able to make new common rule declarations.

*New clause 82 – Common rules continue to have effect during transitional period*

3262. Proposed subclause 82(1) would provide that a common rule declaration for an industry in Victoria that was in effect immediately before the reform commencement, shall after the reform commencement continue to have effect in relation to the employment by employers of *employees* (within the meaning of those terms in proposed section 489) in Victoria, until the earlier of:

- the revocation of the underlying award;
- the revocation of the common rule declaration; or
- the end of the transitional period.

3263. Subclause 82(2) would provide that the *underlying award* for a common rule declaration shall be a *transitional award* within the meaning of Schedule 13.

3264. This clause has effect subject to the power of the AIRC to vary a transitional award that is declared to be a common rule (clause 85) and the appeal provisions of section 45(7) (subclause 82(3)).

3265. Subclause 82(4) would provide that the AIRC may exercise its power under paragraph 46(1)(d) to revoke a common rule declaration.

*New clause 83 – Certain declarations continue to have effect during transitional period*

3266. Proposed clause 83 would provide that, subject to certain rights of appeal and the AIRC's power to revoke a declaration, a declaration made by the AIRC made under section 142(5) of the WR Act before the reform commencement shall continue in effect in relation to a common rule until the revocation of the common rule declaration, or the end of the transitional period.

*New clause 84 – Variation of common rules before the reform commencement*

3267. Proposed clause 84 would provide for the continuation of objection processes associated with the making of common rule declarations.

*New clause 85 – Variation of common rules during the transitional period*

3268. Proposed clause 85 would provide that if, during the transitional period, the AIRC varies a transitional award that underlies a common rule in Victoria, the variation will (subject to a declaration under paragraph 85(4)(c)) be a common rule for the same industry in Victoria, and will continue in effect from the date of effect of the variation (paragraph 85(6)(a)) until the earlier of:

- the revocation of the underlying award;

- the revocation of the variation to the underlying award; or
- the end of the transitional period.

3269. Subclauses 85(2) –(5) provide a procedure for employers and employees who are bound by a common rule to be given notice of a proposed variation to an underlying award, to lodge a notice of objection, and to seek to not be covered by the variation.

*New clause 86 – Intervention by Minister of Victoria*

3270. Proposed clause 86 would provide that the AIRC must, on application, grant to a Minister of Victoria leave to intervene in proceedings in relation to a declaration effecting a common rule.

*New clause 87 – Concurrent operation of laws of Victoria*

3271. Proposed clause 87 would provide that despite any other provision of the WR Act, neither a common rule declaration nor Subdivision E of Division 1 of Part 7 of Schedule 13 is intended to exclude or limit the operation of a law of Victoria that is capable of operating concurrently with the common rule declaration or the Subdivision. This is consistent with the constitutional position as a result of subsection 4A(1) of the CP(IR) Act.

*New clause 88 – Pre-commencement applications for review*

3272. Proposed clause 88 would provide that if an application for review was made under section 109 before the reform commencement in relation to a decision concerning a common rule in Victoria, the review application and any such review would continue to be dealt with in accordance with the terms of sections 142B and 493A as they existed prior to the reform commencement.

*New clause 89 – Common rule taken to be award*

3273. Proposed subclause 89(1) would ensure that a common rule declaration is taken to be an award for the purposes of certain provisions:

- section 100B – Effect of awards while workplace agreement is in operation;
- section 496 – Limitation on application of minimum wage standards to certain employees in Victoria;
- section 526 – Relationship between employment agreements and awards; and
- clauses 5, 15 and 19 of Schedule 14 – interaction between awards and Schedule 14 pre-reform agreements.

3274. Subclause 89(2) would provide that a common rule declaration would be taken to be a transitional award for the purposes of subclause 60 (which relates to the interaction between transitional awards and State laws and State awards).



3275. In the case of each of these sections, the section would apply as if a reference to an award or a transitional award were a reference to a common rule. In relation to clause 60, this would operate subject to clause 87, which ensures concurrent operation of State and federal laws.

*New clause 90 – Meaning of industrial action*

3276. Proposed clause 90 would provide that a common rule declaration would be taken to be a transitional award for the purposes of the definition of industrial action (proposed clause 3).

*New clause 91 – Right of entry*

3277. Proposed clause 91 would provide that a common rule would be taken to be a transitional award for the purposes of the right of entry provisions (which would apply to Schedule 13 by reason of proposed clause 105).

*New clause 92 – Application of provisions of Act relating to workplace inspectors*

3278. Proposed clause 92 would provide that a common rule declaration would be taken to be a transitional award for the purposes of clause 106 (workplace inspectors).

*New clause 93 – Application of provisions of Act relating to workplace inspectors*

3279. Proposed clause 93 would provide that a common rule declaration would be taken to be a transitional award for the purposes of the compliance provisions (which would apply to Schedule 13 by reason of proposed clause 107).

**New Subdivision F – Transmission of business**

*New clause 94 – Transmission of business*

3280. Proposed clause 94 would extend the transmission of business provisions in Schedule 13 to transitional Victorian reference awards, provided that the transmission was between two employers within the meaning of clause 73. This is to allow a Victorian reference award to transmit in accordance with the terms of the referral in the CP(IR) Act.

**New Subdivision G – Modification of certain provisions of the Act**

*New clause 95 – Modification of certain provisions of the Act*

3281. Proposed clause 95 would provide that a transitional Victorian reference award is to be taken to be an award for certain purposes:

- section 100B – effect of awards while workplace agreement is in operation;
- section 496 – limitation on application of minimum wage standards to certain employees in Victoria;
- section 526 – relationship between employment agreements and awards; and
- clauses 5, 15 and 19 of Schedule 14 – interaction between awards and Schedule 14 pre-reform agreements.

3282. In the case of each of these sections, the section would apply as if a reference to an award were a reference to a transitional Victorian reference award.

### **New Division 2 – Other matters**

3283. Proposed Division 2 would provide for the application of matters covered by the Standard to awards (other than Victorian reference awards) that bind excluded employers in respect of the employment of employees in Victoria.

### **New Subdivision A – Allowable transitional award matters**

*New clause 96 – Allowable transitional award matters*

### **New Subdivision B – Preserved transitional award terms**

*New clause 97 – Preserved transitional award terms*

*New clause 98 – When preserved transitional award entitlements have effect*

*New clause 99 – Meaning of **more generous***

*New clause 100 – Modifications that may be prescribed – personal/carer’s leave*

*New clause 101 – Modifications that may be prescribed – parental leave*

3284. These clauses provide for the preservation, and operation of, certain terms in awards (other than Victorian reference awards) that bind excluded employers in respect of the employment of employees in Victoria. The provisions would operate in the same way as outlined above in relation to proposed clauses 76, 77, 78, 79, 80 and 81.

3285. These provisions apply to employees in Victoria in a different way to employees in the other States because, as a result of the referral of power by the Parliament of Victoria to the Parliament of the Commonwealth in the CP(IR) Act, employees in Victoria will (in accordance with, and subject to the limitations in, proposed section 492) be entitled to the Standard.

### **Subdivision C – Modification of certain provisions of this Act**

*New clause 102 – Modification of certain provisions of the Act*

3286. Proposed clause 102 would provide that a transitional award (within the meaning of proposed clause 2), other than a transitional Victorian reference award that applies to an employee (within the meaning of proposed section 489) in Victoria is to be taken to be an award for the purposes of:

- section 100B – effect of awards while workplace agreement is in operation;
- section 496 – limitation on application of minimum wage standards to certain employees in Victoria;
- section 526 – relationship between employment agreements and awards; and
- clauses 5, 15 and 19 of Schedule 14 – interaction between awards and Schedule 14 pre-reform agreements.

3287. In the case of each of these sections, the section would apply as if a reference to an award were a reference to a transitional award (within the meaning of clause 2), other than a transitional Victorian reference award (within the meaning of clause 73) that applies to an employee (within the meaning of section 489) in Victoria.

### **New Part 8 – Miscellaneous**

#### *New clause 103 – Revocation and suspension of transitional awards*

3288. Proposed clause 103 would provide for the application of proposed section 44Q – which would enable the AIRC to revoke or suspend an award in cases of misconduct by an organisation bound by the award, or a substantial number of its members.

#### *New clause 104 – Appeals to Full Bench*

3289. Proposed clause 104 would provide for the application of proposed section 45 (appeals to Full Bench) to the Schedule.

#### *New clause 105 – Application of provisions of Act relating to right of entry*

3290. Proposed clause 105 would provide for the application of proposed Part IX (Right of entry) to the Schedule.

#### *New clause 106 – Application of provisions of Act relating to workplace inspectors*

3291. Proposed clause 106 would provide for the application of proposed Part V (Workplace inspectors) to alleged breaches of transitional awards and orders.

#### *New clause 107 – Application of provisions of Act relating to compliance*

3292. Proposed clause 107 would provide for the application of proposed Part VIII (Compliance) to alleged breaches of transitional awards and orders.

#### *New clause 108 – Application of other Parts of Act*

3293. Proposed clause 108 would enable regulations to be made to apply other provisions of the Act (with modifications if necessary) to matters covered by the Schedule.

### **Item 360 – Schedule 14**

3294. Proposed item 360 would repeal and replace Schedule 14 and insert Schedule 15 and Schedule 16.

3295. The repeal of Schedule 14 is consequential upon the repeal and replacement of Division 5 of Part VIA of the WR Act in item 166. Parental leave standards would be set out in proposed Division 6 of Part VA of the WR Act, as extended in its application by proposed section 170KB.

3296. New Schedule 14 would set out transitional arrangements for existing pre-reform industrial instruments, including pre-reform certified agreements and pre-reform AWAs.

## **Schedule 14—Transitional arrangements for existing pre-reform agreements etc**

### **Part 1 – Preliminary**

#### *New clause 1 – Definitions*

3297. Proposed clause 1 would set out certain defined terms that are used in Schedule 14.

### **Part 2 – Pre-reform certified agreements**

#### **Division 1-General**

#### *New clause 2 – Continuing operation of pre-reform certified agreements—under old provisions*

3298. Proposed clause 2 would provide that certain provisions of the pre-reform Act continue to apply to pre-reform certified agreements (other than pre-reform certified agreements binding on an excluded employer) as if the Act had not been amended. Only certain of the pre-reform Act provisions are preserved. For example, a pre-reform certified agreement would not be able to be varied following the reform commencement, other than to remove an ambiguity or uncertainty.

3299. Proposed subclause 2(2) would save regulations made under the pre-reform Act which apply to the provisions set out in subclause 2(1) so that those regulations could operate as relevant in relation to a pre-reform certified agreement.

#### *New clause 3 – Rules replacing subsections 170LX(2) and (3)*

3300. Proposed subclause 3(1) would provide that a pre-reform certified agreement ceases to be in operation in relation to an employee if a collective agreement or workplace determination comes into operation in relation to that employee. This would apply even if the pre-reform certified agreement had not passed its nominal expiry date.

3301. Proposed subclause 3(2) would provide that a pre-reform certified agreement has no effect while an AWA made under the Act following the reform commencement operates in relation to the employee. This would ensure that an employee's employment is only ever governed by one agreement. The relationship between a pre-reform certified agreement and a pre-reform AWA would be governed by subclause 17(1) – pre-reform subsection 170VQ(6) would apply.

3302. Proposed subclause 3(3) would set out certain rules about the operation of pre-reform certified agreements. A pre-reform certified agreement would cease to be in operation if it is terminated under the provisions governing termination in the pre-reform Act that would be preserved by the operation of subclause 2(1). A pre-reform certified agreement would not operate if subsection 170LY(2) of the pre-reform Act applies. Subsection 170LY(2) would provide for the interaction of pre-reform certified agreements with one another.

3303. Proposed subclauses 3(4) and (5) would clarify that where a pre-reform certified agreement has ceased operating it can never operate again.

3304. Proposed subclause 3(6) would provide that a pre-reform certified agreement may be set aside under pre-reform subsection 113(2A), which permits the AIRC to set aside discriminatory agreements.

*New clause 4 – Rules replacing section 170NC–coercion of persons to terminate certified agreements etc.*

3305. Proposed subclause 4(1) would provide that a person must not engage in certain types of coercive behaviour in relation to the termination of a pre-reform certified agreement. This subclause would broadly replicate pre-reform subsection 170NC(1). However, because it would no longer be possible for parties to make or vary an agreement under the pre-reform Act (other than variations to remove an ambiguity or uncertainty, which are made by the AIRC) the provision would only extend to terminations.

3306. Subclause 4(2) would provide that the coercion provisions do not apply where a person is engaged in protected industrial action.

3307. Subclause 4(3) would have the effect that the standing to bring a claim and remedies would be those available in relation to the pre-reform section 170NC. Remedies for breach would be an injunction and/or a pecuniary penalty of \$33 000 (300 penalty units) for a body corporate or \$6 600 (60 penalty units) for any other person.

*New clause 5 – Interaction of agreement with other instruments*

3308. Proposed subclause 5(1) would provide that a preserved State agreement and a notional agreement preserving State awards that would otherwise regulate an employee's employment are of no effect while a pre-reform certified agreement also operates to regulate the employee's employment. This would ensure that an employee's employment is only ever governed by one agreement.

3309. Subclause 5(2) would provide that a pre-reform certified agreement prevails over an award (whether a pre-reform or post-reform award) to the extent of any inconsistency. This would preserve the rule in pre-reform paragraph 170LY(1)(a) but extend it to post-reform awards.

*New clause 6 – Continuing operation of pre-reform certified agreements–under new provisions*

3310. Proposed clause 6 would provide that certain provisions under the Act (as it applies after the reform commencement) would apply in relation to pre-reform certified agreements as if they are collective agreements under the Act. These provisions would apply:

- Part V – which would give certain enforcement and compliance functions in relation to pre-reform certified agreements to workplace inspectors;
- section 110 – which would prevent parties to a pre-reform certified agreement which has not passed its nominal expiry date from taking protected industrial action;

- section 109B(2) – which would prohibit parties to a pre-reform certified agreement from applying for a secret ballot for protected industrial action until after the nominal expiry date of the agreement;
- Part VIII – which would allow pre-reform certified agreements to be enforced under the Act; and
- Part IX – which would apply the right of entry provisions for collective agreements to pre-reform certified agreements.

*New clause 7 – Effect of pre-reform certified agreement if post-reform AWA is terminated*

3311. Proposed subclause 7(1) would provide that if an employee has made an AWA under the Act following the reform commencement, and that AWA is terminated, the employee would not fall back to any pre-reform certified agreement that might otherwise regulate the employee's employment. In such circumstances, the employee would be entitled to the benefit of the Standard and any voluntary undertakings given by the employee's employer.

3312. Proposed subclause 7(2) would provide that any pre-reform certified agreement that might otherwise regulate the employee's employment would not apply from the time when the AWA was terminated until another workplace agreement comes into operation in relation to the employee.

*New clause 8 – Anti-AWA terms taken to be prohibited content*

3313. Proposed clause 8 would provide that a term in a pre-reform certified agreement that prevents the employer from making an AWA with an employee bound by the agreement is void. The Employment Advocate would be able to vary the agreement to remove the prohibited term, after affording the parties to the agreement an opportunity to make written submissions about the proposed variation.

*New clause 9 – Calling up contents of pre-reform certified agreement in workplace agreement*

3314. Proposed clause 9 would provide that a pre-reform certified agreement is to be treated as if it were a workplace agreement for the purposes of the provisions relating to calling up of industrial instruments in proposed section 101C. This would mean that a workplace agreement could incorporate by reference the terms of a pre-reform certified agreement provided, just before the workplace agreement is made, the pre-reform certified agreement regulated the employment of at least one employee who would be covered by the workplace agreement.

*New clause 10 – Application of Division to certain Division 3 pre-reform certified agreements*

3315. Proposed clause 10 would set out how Division 1 of Part 2 of Schedule 14 would apply to pre-reform certified agreements made under Division 3 of Part VIB of the pre-reform Act. It would deem such an agreement to be treated as if it has been made under pre-reform section 170LJ if the employer in relation to the agreement is either a constitutionally covered employer at the reform commencement, or becomes such an employer during the five year transitional period. This provision would reflect the changed constitutional basis for the Act, which relies principally on the corporations power in section 51(xx) of the Constitution and would cause Division 3 pre-reform certified agreements (which were supported by the conciliation and

arbitration power in section 51(xxxv) of the Constitution) to be treated as if they were supported by the corporations power to the extent possible.

#### Example

Rob is a farmer whose business is not incorporated at the reform commencement. The business is covered by a Division 3 pre-reform certified agreement, which regulates the employment of the workers on the farm. Rob decides that he wants to remain in the federal workplace relations system, and incorporates his business during the transitional period. From the time when Rob's business becomes incorporated, the Division 3 pre-reform certified agreement will be treated as if it had been made under pre-reform section 170LJ and will continue to operate even after the transitional period has ended. Rob now has the choice of making a new workplace agreement with his employees, or allowing the pre-reform agreement to continue to operate.

### **Division 2–Special rules for Division 3 pre-reform certified agreements with excluded employers**

#### *New clause 11 – Application of Division*

3316. Proposed clause 11 would provide that Division 2 of Part 2 of Schedule 14 applies to pre-reform certified agreements binding on an employer (an *excluded employer*) who is not a constitutionally covered employer at the reform commencement. It would continue to apply during the transitional period for so long as the employer is not a constitutionally covered employer. If the employer becomes constitutionally covered during the transitional period, Division 2 of Part 2 of this Schedule would cease to apply and proposed clause 10 would have the effect of applying Division 1 of Part 2 of this Schedule to the employer.

#### *New clause 12 – Cessation of Division 3 pre-reform certified agreements*

3317. Proposed subclause 12(1) would provide that an agreement covered by Division 2 of Part 2 of Schedule 14 ceases to be in operation at the earlier of, the end of the transitional period or, if the agreement has passed its nominal expiry date, the time at which the agreement is replaced by a State employment agreement. This would mean that if an employer wanted to leave the federal workplace relations system after the agreement has passed its nominal expiry date, the employer could make a State employment agreement with employees – and would exit the federal system at that time. If an employer made a State employment agreement prior to the nominal expiry date of the Division 3 pre-reform certified agreement, pre-reform subsection 170LZ(1) would operate to govern the interaction of these instruments. The employer would exit the federal system once the nominal expiry date of the Division 3 pre-reform certified agreement had passed; it would cease to operate at this time.

3318. Proposed subclause 12(2) would set out, for the avoidance of doubt, that rights accrued or liabilities incurred under an agreement prior to it ceasing to operate are not affected by the operation of the clause.

3319. Proposed subclause 12(3) would set out, for the avoidance of doubt, that subclause 12(1) does not apply if an employer becomes a constitutionally covered employer during the five year transitional period. In such circumstances, Division 1 of Part 2 of Schedule 14 would apply.

3320. Proposed subclause 12(4) would clarify that where an agreement has ceased operating it can never operate again.

*New clause 13 – Continuing operation of pre-reform certified agreements-under old provisions*

3321. Proposed clause 13 would provide that certain provisions of the pre-reform Act continue to apply to agreements covered by Division 2 of Part 2 of this Schedule as if the Act had not been amended. Only certain of the pre-reform Act provisions are preserved. For example, an agreement would not be able to be varied following the reform commencement, other than to remove an ambiguity or uncertainty.

3322. Proposed subclause 13(2) would save regulations made under the pre-reform Act which apply to the provisions set out in subclause 13(1) so that those regulations could operate as relevant in relation to a Division 3 pre-reform certified agreement.

*New clause 14 – Rules replacing subsections 170LX(2) and (3)*

3323. Proposed subclause 14(1) would provide that an agreement covered by Division 2 of Part 2 of this Schedule would cease to be in operation if it is terminated under the provisions governing termination in the pre-reform Act that would be preserved by the operation of subclause 13(1). An agreement would not operate if subsection 170LY(2) of the pre-reform Act applies. Subsection 170LY(2) would provide for the interaction of pre-reform certified agreements with one another.

3324. Proposed subclause 14(2) would clarify that where a pre-reform certified agreement has ceased operating it can never operate again.

3325. Proposed subclause 14(3) would provide that an agreement may be set aside under pre-reform subsection 113(2A), which permits the AIRC to set aside discriminatory agreements.

*New clause 15 – Interaction of agreement with awards*

3326. Proposed clause 15 would provide that while an agreement covered by Division 2 of Part 2 of Schedule 14 is in operation, it prevails over an award to the extent of any inconsistency. This would preserve the rule in pre-reform paragraph 170LY(1)(a) but extend it to post-reform awards.

*New clause 16 – Continuing operation of pre-reform certified agreements–under new provisions*

3327. Proposed clause 16 would provide that certain provisions under the Act (as it applies after the reform commencement) would apply in relation to agreements covered by Division 2 of Part 2 of Schedule 14 as if they are collective agreements under the Act. These provisions would apply:

- Part V – which would give certain enforcement and compliance functions in relation to pre-reform certified agreements to workplace inspectors;



- section 110 – which would prevent parties to a pre-reform certified agreement which has not passed its nominal expiry date from taking protected industrial action;
- subsection 109B(2) – which would prohibit parties to a pre-reform certified agreement from applying for a secret ballot for protected industrial action until after the nominal expiry date of the agreement;
- Part VIII – which would allow pre-reform certified agreements to be enforced under the Act; and
- Part IX – which would apply the right of entry provisions for collective agreements to pre-reform certified agreements.

### **Part 3 – Pre-reform AWAs**

#### *New clause 17 – Continuing operation of pre-reform AWAs—under old provisions*

3328. Proposed clause 17 would provide that certain provisions of the pre-reform Act continue to apply to pre-reform AWAs as if the Act had not been amended. Only certain of the pre-reform Act provisions are preserved. For example, a pre-reform AWA would not be able to be varied following the reform commencement.

3329. Proposed subclause 17(2) would save regulations made under the pre-reform Act which apply to the provisions set out in subclause 17(1) so that those regulations could operate as relevant in relation to pre-reform AWAs.

#### *New clause 18 – Rules replacing sections 170VJ—period of operation of AWA*

3330. Proposed subclause 18(1) would provide that a pre-reform AWA ceases to be in operation when an employer and employee make an AWA under the (post-reform) Act.

3331. Proposed subclause 18(2) would provide that a pre-reform AWA ceases to be in operation if it is terminated under the provisions governing termination in the pre-reform Act that would be preserved by the operation of subclause 17(1).

3332. Proposed subclauses 18(3) and (4) would clarify that where a pre-reform AWA has ceased operating it can never operate again.

#### *New clause 19 – Interaction of pre-reform AWAs with other instruments*

3333. Proposed clause 19 would provide that while a pre-reform AWA operates to regulate an employee's employment, any of the following instruments which would otherwise operate to regulate the employee's employment are of no effect:

- a collective agreement;
- a workplace determination;
- a preserved State agreement;

- a notional agreement preserving State awards; and
- an award.

3334. This would ensure that an employee's employment is only ever governed by one agreement.

*New clause 20 – Continuing operation of pre-reform AWAs—under new provisions*

3335. Proposed clause 20 would provide that certain provisions under the Act (as it applies after the reform commencement) would apply in relation to pre-reform AWAs as if they are (post-reform) AWAs under the Act. These provisions would apply:

- Part V – which would give certain enforcement and compliance functions in relation to pre-reform AWAs to workplace inspectors;
- section 110 – which would prevent parties to a pre-reform AWA which has not passed its nominal expiry date from taking protected industrial action;
- subsection 109B(2) – which would prohibit parties to a pre-reform AWA from applying for a secret ballot for protected industrial action until after the nominal expiry date of the agreement;
- Part VIII – which would allow pre-reform AWAs to be enforced under the Act; and
- Part IX – which would apply the right of entry provisions for AWAs to pre-reform AWAs.

*New clause 21 – Calling up contents of pre-reform AWA in workplace agreement*

3336. Proposed clause 21 would provide that a pre-reform AWA is to be treated as if it were a workplace agreement for the purposes of the provisions relating to calling up of industrial instruments in proposed section 101C. This would mean that a workplace agreement could incorporate by reference the terms of a pre-reform AWA provided, just before the workplace agreement is made, the pre-reform AWA regulated the employment of at least one employee who would be covered by the workplace agreement.

**Part 4 – Awards under subsection 170MX(3) of the pre-reform Act**

*New clause 22 – Application of Part*

3337. Proposed clause 22 would provide that Part 4 of Schedule 14 applies to an award made under pre-reform section 170MX that is in force just before the reform commencement.

*New clause 23 – Continuing operation of section 170MX awards—under old provisions*

3338. Proposed subclause (1) would provide that provisions of the pre-reform Act (including regulations made under the pre-reform Act) which relate to section 170MX awards would continue to apply in relation to the award.

3339. Proposed subclause 23(2) would provide exceptions to the above rule. This would include the removal of the AIRC's power to vary and terminate a section 170MX award. Instead, if the parties wanted to change the terms and conditions governing the employment or terminate a section 170MX award, they would need to make a workplace agreement.

*New clause 24 – Continuing operation of section 170MX awards—under new provisions*

3340. Proposed clause 24 would provide that certain provisions under the Act (as it applies after the reform commencement) would apply in relation to section 170MX awards as if they are workplace determinations under the Act. These provisions would apply:

- Part V – which would give certain enforcement and compliance functions in relation to section 170MX awards to workplace inspectors;
- section 110 – which would prevent parties subject to a section 170MX award which has not passed its nominal expiry date from taking protected industrial action;
- subsection 109B(2) – which would prohibit parties subject to a section 170MX award from applying for a secret ballot for protected industrial action until after the nominal expiry date of the award;
- Part VIII – which would allow section 170MX awards to be enforced under the Act; and
- Part IX – which would apply the right of entry provisions for collective agreements to section 170MX awards.

*New clause 25 – Interaction of section 170MX awards with other instruments*

3341. Proposed subclause 25(1) would provide that a section 170MX award has no effect while an AWA made under the Act, following the reform commencement, operates in relation to the employee. This would ensure that an employee's employment is only ever governed by one agreement. The relationship between a section 170MX award and a pre-reform AWA would be governed by subclause 23(1) – pre-reform subsection 170VQ(2) would apply.

3342. Proposed subclause 25(2) would provide that a section 170MX award ceases to be in operation in relation to an employee if a collective agreement or workplace determination comes into operation in relation to that employee. This would apply even if the section 170MX award had not passed its nominal expiry date.

3343. Proposed subclause 25(3) would provide that while a section 170MX award operates to regulate an employee's employment, any of the following instruments which would otherwise operate to regulate the employee's employment are of no effect:

- an award;
- a preserved State agreement; and
- a notional agreement preserving State awards.

*New clause 26 – Effect of section 170MX award if post-reform AWA is terminated*

3344. Proposed subclause 26(1) would provide that if an employee has made an AWA under the Act following the reform commencement, and that AWA is terminated, the employee would not fall back to any section 170MX award that might otherwise regulate the employee's employment. In such circumstances, the employee would be entitled to the benefit of the Standard and any voluntary undertakings given by the employee's employer.

3345. Proposed subclause 26(2) would provide that any section 170MX award that might otherwise regulate the employee's employment would not apply from the time when the AWA was terminated until another workplace agreement comes into operation in relation to the employee.

**Part 5 – Exceptional matters orders**

*New clause 27 – Exceptional matters orders*

3346. Proposed clause 27 would provide that an exceptional matters order made under the pre-reform Act would cease to be in force in relation to an employee on the earlier of:

- the date two years after it was made; and
- the date on which a workplace agreement or workplace determination comes into operation in relation to that employee.

**Part 6 – Old IR agreements**

*New clause 28 – Operation of old IR agreement*

3347. Proposed clause 28 would apply to certain agreements certified or approved under certain old provisions of the Act, since repealed.

3348. Subclause 28(2) would provide that 'old IR agreements' would be subject to sunset provisions, and would cease to operate at the end of a three year period beginning on the reform commencement. This would enable parties to such agreements to make a workplace agreement dealing with the matters contained in the old IR agreement (subject to whatever limitations are in the reform provisions).

3349. Subclause 28(2) would provide that an old IR agreement that would otherwise regulate an employee's employment is of no effect if a workplace agreement or workplace determination comes into operation in relation to the employee. This would ensure that an employee's employment is only ever governed by one agreement.

3350. Subclause 28(3) would clarify that where an old IR agreement has ceased operating it can never operate again.

*New clause 29 – Old IR agreement cannot be varied after the reform commencement*

3351. Proposed clause 29 would provide that an old IR agreement cannot be varied following the reform commencement. If parties wished to vary an old IR agreement, they would need to make a workplace agreement dealing with the matters.

**Part 7 – Relationships between pre-reform agreements etc. and Australian Fair Pay and Conditions Standard**

*New clause 30 – Relationships between pre-reform agreements etc. and Australian Fair Pay and Conditions Standard*

3352. Proposed clause 30 would provide that if an employee's employment is subject to a pre-reform certified agreement, a pre-reform AWA or a section 170MX award, the Standard does not apply. These instruments would have been required to pass the no disadvantage test, or would have been made by the AIRC, and so should ensure that an employee covered by them is receiving at least the benefits provided by the safety net. If such an instrument were terminated, or ceased to operate because the employee became bound by a workplace agreement under the Act, the Standard would then apply to the employee, and provide the employee with the minimum entitlements set out in the Standard.

Julian and his employer, LK Communications Pty Ltd, are parties to a pre-reform AWA. While Julian's employment is regulated by the pre-reform AWA, the Standard does not apply to him. Julian makes a new AWA under the Act with LK Communications. His pre-reform AWA would cease to operate from the time when the new AWA comes into operation. From that time, the Standard would also apply to him and to LK Communications.

**Part 8 – Applications for certification etc. before reform commencement**

*New clause 31 – Certifications under pre-reform Act after the reform commencement*

3353. Proposed clause 31 would provide that if an application had been made to the AIRC prior to the reform commencement for the certification of an agreement, the AIRC would apply the provisions of the pre-reform Act relating to certifications and either certify or refuse to certify the agreement. The new lodgment provisions in Part VB would apply to any agreement:

- made after the reform commencement; or
- made before the reform commencement but for which an application for certification had not been made to the AIRC prior to the reform commencement.

*New clause 32 – Approval of pre-reform AWAs under pre-reform Act after the reform commencement*

3354. Proposed clause 32 would provide that if an AWA had been filed with the Employment Advocate prior to the reform commencement, the Employment Advocate would apply the provisions of the pre-reform Act relating to filing and approval of AWAs and either approve or refuse to approve the agreement. The new lodgment provisions in Part VB would apply to any AWA:

- made after the reform commencement; or
- made before the reform commencement but which had not been filed with the Employment Advocate prior to the reform commencement.

### **Part 9 – Matters relating to Victoria**

3355. Proposed Part 9 would provide that, to the extent that Schedule 14 provides transitional arrangements for pre-reform agreements that were made under the extended operation of the WR Act to cover employees and employers in Victoria, purely through the referral of power by the Parliament of Victoria to the Parliament of the Commonwealth in the CP(IR) Act, those provisions would apply only in so far as and as long as they are within the powers referred by the CP(IR) Act.

3356. Part 9 also creates special rules for Division 3 pre-reform certified agreements made in reliance upon the CP(IR) Act, and deals with the interaction between an old IR agreement and an employment agreement (see proposed Division 10 of Part XV of the WR Act).

#### *New clause 33 – Definitions*

3357. Proposed clause 33 would provide definitions to apply throughout Part 9 of Schedule 14.

3358. Under clause 33, the terms *employee*, *employer* and *employment* would have the same meaning as provided by proposed section 489 of the WR Act. Consequentially, an *employee* for the purposes of Part 9 of Schedule 14 will mean an employee in Victoria who is both within the meaning of *employee* in section 3 of the CP(IP) Act 1996, and not an employee within the meaning of proposed subsection 4AA(1). Expressed another way, an *employee* within the meaning of 33 is a person who is an *employee* within the meaning of section 3 of the CP(IP) Act 1996, and not one of the following:

- an employee of a constitutional corporation; or
- an employee of the Commonwealth; or
- an employee of a person or entity (which may be an unincorporated club) of an individual, so far as the person or entity, in connection with constitutional trade or commerce, employs the individual as a flight crew officer, a maritime employee or a waterside worker;
- an employee of a body corporate incorporated in a Territory; or
- a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person or entity employs the employee in connection with the activity carried on in the Territory.

3359. The terms *employer* and *employment* would have a meaning that corresponds to *employee* in Part 9 of Schedule 14 of the WR Act.

3360. Clause 33 would also provide that, for the purposes of Part 9 of Schedule 14 of the WR Act, the term this Schedule' means Schedule 14 but not Part 9 of Schedule 14.

3361. Clause 33 would also provide that, for the purposes of Part 9 of Schedule 14 of the WR Act:

- *Victorian reference AWA* means an AWA (within the meaning of the WR Act immediately before reform commencement) made under the WR Act in its operation in accordance with section 495;
- *Victorian reference certified agreement* means a certified agreement that was made under Division 2 or 3 of Part VIB of the WR Act, under its operation in accordance with the pre-reform Division 2 of Part XV of the WR Act;
- *Victorian reference Division 3 pre-reform certified agreement* means a certified agreement that was made under Division 3 of Part VIB of the WR Act, under its operation in accordance with the pre-reform Division 2 of Part XV of the WR Act; and
- *Victorian reference section 170MX award* means a section 170MX award (within the meaning of the WR Act immediately before reform commencement) made under the WR Act in its operation in accordance with Division 2 of Part XV.

3362. The meanings of *pre-reform AWA*, *pre-reform certified agreement*, *section 170MX award* and *Division 3 pre-reform certified agreement* provided by clause 1 of Schedule 14 would apply on their terms (subject to modifications made by Part 9 of Schedule 14) to a Victorian reference AWA, Victorian reference certified agreement, Victorian reference section 170MX award and Victorian reference Division 3 pre-reform certified agreement respectively. This would be the case because:

- a *Victorian reference AWA* within the meaning of clause 33 would be within the definition of a *pre-reform AWA* within the meaning of clause 1;
- a *Victorian reference certified agreement* within the meaning of clause 33 would be within the definition of a *pre-reform certified agreement* within the meaning of clause 1;
- a *Victorian reference section 170MX award* within the meaning of clause 33 would be within the definition of a *section 170MX award* within the meaning of clause 1; and
- a *Victorian reference Division 3 pre-reform certified agreement* within the meaning of clause 33 would be within the definition of a *Division 3 pre-reform certified agreement* within the meaning of clause 1.

*New clause 34– Part only has force if supported by reference etc.*

3363. Proposed clause 34 would make it clear that each:

- clause of Part 9 of Schedule 14; and

- clause of Schedule 14, to the extent to which it relates to a Victorian reference certified agreement, Victorian reference AWA or Victorian reference section 170MX award (within the meaning of those terms in clause 33):

only operates for as long as, and in so far, as the relevant referral of a matter to the Parliament of the Commonwealth is in effect and provides sufficient legislative power for the provision to have effect. This reflects the constitutional position.

*New clause 35– Continuing operation of pre-reform certified agreements-under old provisions*

3364. Proposed clause 35 would provide that clause 2 (Continuing operation of pre-reform certified agreements-under old provisions) has effect in relation to a Victorian reference certified agreement as if each reference to a provision of the pre-reform Act were read as a reference to the provision as it has effect because of repealed Division 2 of Part XV. This would provide that the rules for pre-reform certified agreements would also apply to instruments made in reliance upon the extended application provided by Division 2 of Part XV of the WR Act as in force immediately before the reform commencement.

*New clause 36– Victorian reference Division 3 pre-reform certified agreements*

3365. Proposed clause 36 would provide that a Victorian reference Division 3 pre-reform certified agreement within the meaning of clause 33 (ie an agreement between an employer in Victoria and a union, in settlement of an intra-State Victorian industrial dispute) would, for the purposes of Schedule 14, be treated as if it were made under section 170LJ of the pre-reform WR Act as it has effect because of repealed Division 2 of Part XV. That is, for the purposes of Schedule 14, such an agreement would be treated as if it were made between an employer in Victoria and a union, under Division 2 of Part VIB of the pre-reform WR Act as it has effect because of repealed Division 2 of Part XV.

3366. To give effect to that intent, subclause 36(1) would provide that clause 10 and Division 2 of Part 2 of Schedule 14 would not apply to a Victorian reference Division 3 pre-reform certified agreement. Further, subclause 36(2) would provide that Division 1 of Part 2 of Schedule 14 would apply to a Victorian reference Division 3 pre-reform certified agreement as if it had been made under section 170LJ of the WR Act as in force before the reform commencement.

*New clause 37– Continuing operation of pre-reform AWAs-under old provisions*

3367. Proposed clause 37 would provide that clause 17 (Continuing operation of pre-reform AWAs-under old provisions) has effect in relation to a Victorian reference AWA as if each reference to a provision of the pre-reform Act were read as a reference to the provision as it has effect because of repealed section 495. This would provide that the rules for pre-reform AWAs would also apply to instruments made in reliance upon the extended application provided by Division 2 of Part XV of the WR Act as in force immediately before the reform commencement.

*New clause 38– Continuing operation of section 170MX awards-under old provisions*

3368. Proposed clause 38 would provide that clause 23 (continuing operation of section 170MX awards-under old provisions) has effect in relation to a Victorian reference section 170MX award as if each reference to a provision of the pre-reform Act were read as a reference to the



provision as it has effect because of repealed Division 2 of Part XV. This would provide that the rules for section 170MX awards would also apply to instruments made in reliance upon the extended application provided by Division 2 of Part XV of the WR Act as in force before the reform commencement.

*New clause 39 – Relationship between Victorian employment agreements and designated old IR agreements*

3369. Proposed clause 39 would provide that an old IR agreement covered by paragraph (d) of the definition of old IR agreement in clause 1 of Schedule 14 prevails to the extent of any inconsistency with an employment agreement within the meaning of proposed Division 10 of Part XV.

3370. This is consistent with the position which applied, immediately prior to 1 January 1997 under section 152 of the *Industrial Relations Act 1988*, in relation to an enterprise flexibility agreement made under Division 3 of Part VIB of the *Industrial Relations Act 1988* and an employment agreement made under the *Employee Relations Act 1992* (Vic) (as it existed immediately prior to 1 January 1997). The *Employee Relations Act 1992* (Vic) is now known as the *Long Service Leave Act 1996* (Vic).

**SCHEDULE 15 – Transitional treatment of State employment agreements and State awards**

3371. The Act would apply to the exclusion of State or Territory industrial laws (see proposed section 7C). *State or Territory industrial law* is a defined term (see proposed section 4) which includes any of the following State Acts:

- the *Industrial Relations Act 1996* of New South Wales (subparagraph 4(1)(a)(i));
- the *Industrial Relations Act 1999* of Queensland (subparagraph 4(1)(a)(ii));
- the *Industrial Relations Act 1979* of Western Australia (subparagraph 4(1)(a)(iii));
- the *Fair Work Act of 1994* of South Australia (subparagraph 4(1)(a)(iv));
- the *Industrial Relations Act 1984* of Tasmania (subparagraph 4(1)(a)(v));

3372. *Employers* and *employees*, as defined in proposed sections 4AA and 4AB, who are currently regulated by State or Territory industrial laws would be covered by this Act after the *reform commencement*. The reform commencement would be defined in subsection 4(1) to mean the commencement of Schedule 1 to the *Workplace Relations Amendment (Work Choices) Act 2005* (the Act). This means that employers and employees who, prior to the reform commencement, are bound by, or subject State awards or State employment agreements, will no longer be regulated by those awards or agreements.

3373. The purpose of Schedule 15 is to preserve for a time, certain terms and conditions of employment which apply to employers and employees and which arise under State or Territory industrial laws and State or Territory instruments that regulate terms and conditions of

employment made under those laws, as they were immediately prior to reform commencement. These preserved terms would be contained in transitional instruments.

3374. The employers, employees and organisations which would become bound by, or subject to the transitional instruments created under this Schedule would be encouraged to make workplace agreements to replace the transitional instruments.

3375. The Schedule is divided into three parts.

3376. Part 1 would define key terms used in the Schedule and would provide objects for the Schedule.

3377. Part 2 would deal with employers and employees who are covered by an agreement made under a State or territory industrial law immediately before the reform commencement. It would:

- provide for the creation of a federal transitional instrument called a *preserved State agreement*;
- determine who would be bound by, or whose employment would be subject to, the preserved State agreement;
- determine the terms and conditions of the preserved State agreement; and
- provide rules for the operation of the preserved State agreement.

3378. Part 3 would relate to employers and employees who are covered by an award made by a State industrial authority immediately before reform commencement. It would:

- provide for the creation of a federal transitional agreement called a *notional agreement preserving State awards*;
- determine who would be bound by, and whose employment would be subject to, the notional agreement;
- determine the terms and conditions of the notional agreement; and
- provide rules for the operation of the notional agreement.

## **Part 1 – Preliminary**

### *Clause 1 – Interpretation*

3379. Proposed clause 1 would define certain terms for the purposes of Schedule 15, including:

- discriminatory
- notional agreement preserving State awards

- preserved notional entitlement
- preserved notional term
- preserved State agreement

*Clause 2 – Objects*

3380. Proposed clause 2 would provide that the objects of this Schedule are:

- to preserve for a time the terms and conditions of employment, as they were immediately before the reform commencement, for those employees who, but for the Act, would be bound by or whose employment would be subject to a State employment agreement, a State award or a State or Territory Law (paragraph 2(a)); and
- to encourage employees and employers for whom those terms and conditions have been preserved to enter into workplace agreements during that time (paragraph 2(b)).

3381. It is generally intended that terms and conditions of employment arising under State employment agreements, State awards and State or Territory industrial laws would be preserved in the same or similar terms, and operate with respect to the same classes of employees and employers as they did prior to the reform commencement.

## **Part 2 – Preserved State agreements**

### **Division 1 – Preserved State agreements**

*Clause 3 – What is a preserved State agreement?*

3382. Proposed clause 3 would provide that a preserved State agreement would come into operation on reform commencement where a term or condition of a person's employment was regulated under a State employment agreement immediately before reform commencement.

3383. *State employment agreement* would be defined in proposed section 4(1) as an agreement:

- between an employer and an employee of that employer and/or a trade union;
- that regulates wages and conditions of employment of one or more of the employees;
- that is in force under a State or Territory industrial law; and
- that prevails over an inconsistent State award.

3384. A State employment agreement is referred to as *the original agreement* in the provisions of this Schedule.

3385. A *preserved State agreement* (PSA) would come into operation irrespective of whether the original agreement regulates one term or condition of the relationship between the employer

and the employee, or whether it comprehensively regulates the employment relationship. The actual terms and conditions of employment that would be preserved in a PSA would be determined by proposed clause 11 (below).

*Clause 4 – Who is bound by or subject to a preserved State agreement?*

3386. Under the WR Act a range of entitlements and obligations flow from being ‘bound by’ or from a person’s employment being ‘subject to’ an agreement. Proposed clause 4 would set out who is bound by or whose employment is subject to a preserved State agreement. This would be determined by reference to those who were bound by, or whose employment was subject to, the original agreement.

3387. Proposed subclauses 4(1) and (2) would address who would be bound by the PSA by reference to those who were bound by the original agreement. Proposed subclause 4(1) would provide that an employer, an employee or an organisation would be bound by the PSA if that employer, employee or organisation would, but for this Act, be bound by or a party to the original agreement as in force immediately before the reform commencement, would be bound by the PSA. It would not matter whether the employer, employee or organisation would have been bound under the terms of the original agreement or by operation of a State or Territory industrial law.

3388. In this Schedule an organisation takes on the proposed definition in Schedule 17 which provides that an organisation includes a *transitionally registered association*.

3389. Proposed subclause 4(2) would clarify the situation referred to in subclause 4(1) where a person is employed after reform commencement by an employer that is bound by a PSA (under subclause 4(1)). It provides that a person employed after reform commencement would be bound to the PSA provided that they would have been so bound had they been employed prior to reform commencement.

3390. Proposed subclause 4(3) and (4) would address whose employment would be subject to the PSA by reference to whose employment was subject to the original agreement. Proposed subclause 4(3) would provide that a person’s employment would be subject to the PSA if the employment of a person would, but for this Act, have been subject to the original agreement, as in force immediately before reform commencement. It would not matter whether the person’s employment would have been subject to the original agreement under its terms or by operation of a State or Territory industrial law.

3391. Proposed subclause 4(4) would clarify the situation where a person is employed after reform commencement by an employer bound by a PSA (under subclause 4(1)). It provides that the person’s employment would be subject to the PSA, provided that it would have been had they been employed prior to reform commencement.

*Clause 5 – When a preserved State agreement ceases to operate*

3392. Proposed clause 5 would provide when a preserved State agreement ceases to operate.

3393. Subclause 5(1) would provide that a PSA ceases to be in operation if it is terminated under clause 21 (see below).

3394. Subclause 5(2) would provide that a PSA ceases to be in operation in relation to an employee, if a workplace agreement comes into operation in relation to the employee (paragraph 5(2)(a)), or if a workplace determination comes into operation in relation to the employee (paragraph 5(2)(b)). This result would arise irrespective of whether the nominal expiry date of the PSA has passed. The nominal expiry date is provided for in proposed clause 12.

3395. Subclause 5(3) would provide that if a PSA has ceased to operate in relation to an employee because a workplace agreement or a workplace determination has come into operation in relation to an employee, then the PSA would never operate again in relation to that employee.

*Clause 6 – Effect of preserved State agreement*

3396. Proposed subclause 6(1) would provide that a PSA has effect according to its terms, except to the extent that its terms are varied or modified by this Part, or otherwise under this Act.

3397. Proposed subclause 6(2) would provide that this Part has effect despite the terms of the PSA itself, or any State award or law of a State.

3398. Proposed subclause 6(3) would clarify that none of the terms and conditions of a PSA are enforceable under the law of a State. The terms and conditions of employment included in a PSA would only be enforceable under the WR Act.

*Clause 7 – Effect of awards while preserved State agreement in operation*

3399. Proposed clause 7 would provide that an award has no effect in relation to an employee while the terms of a PSA operate in relation to the employee. The WR Act currently provides that a State employment agreement may generally regulate the wages and conditions of employment of an employee in spite of a federal award that would otherwise be binding on an employer in respect of the employee (subsection 152(3)). This is an exception to the approach in subsection 152(1) which provides that a federal award prevails over State laws to the extent of any inconsistency. This provision would preserve the effect of subsection 152(3) in relation to the terms and conditions contained in the PSA. This is necessary to allow the terms and conditions from the original agreement to continue to interact with a relevant award as they would do if the reform commencement did not occur.

### Illustrative Example

Jenny works as a receptionist at Henry's Strike 'em Down Ten Pin Bowling Centre in Parramatta, NSW. Her employment is covered by an enterprise agreement made under the *Industrial Relations Act 1996* (NSW). Henry's business is a respondent to the *AWU Ten Pin Bowling Award 2003*.

Prior to reform commencement, the agreement regulated Jenny and her colleagues' terms and conditions of employment in spite of the federal award, because of the operation of section 152 of the WR Act. The terms of the agreement will be included in a preserved State agreement after reform commencement, and the terms will continue to prevail over the terms of the award.

### *Clause 8 – Relationship between preserved State agreement and Australian Fair Pay and Conditions Standard*

3400. Proposed clause 8 would provide that the Standard does not apply to an employee if the employee is bound by a PSA, or the person's employment is subject to the PSA. This mirrors the situation for pre-reform federal agreements (see clause 22 of Schedule 14). The Standard does not apply to pre-reform federal agreements because those agreements were made under different circumstances prior to the Standard operating.

### *Clause 9 – What is a preserved collective State agreement and Clause 10 – What is a preserved individual State agreement?*

3401. Proposed clause 9 would define a *preserved collective agreement* as a preserved State agreement that binds more than one employee, or to which the employment of more than one employee is subject.

3402. Proposed clause 10 would define a *preserved individual agreement* as a preserved State agreement that binds only one employee, or which the employment of only one employee is subject.

3403. The distinction is relevant later in the Schedule as different rules would apply to the different types of preserved State awards in some circumstances, ie enforcement and termination.

## **Division 2 – Terms of preserved State agreement**

### *Clause 11 – Terms of preserved State agreement*

3404. This provision would provide for the terms of the PSA. It is intended that terms of the PSA would be the terms and conditions of employment arising under State or Territory industrial laws that regulated persons bound by, or whose employment was subject to, the original agreement. In addition to the terms and conditions of employment arising directly under the original agreement, any term or condition arising under a State award or State or Territory industrial law that regulated the relevant employment relationship would also be included as a term of the PSA. This recognises that State employment agreements are not necessarily comprehensive of all terms and conditions of employment arising under State or Territory industrial laws. The intention is that the various sources of terms and conditions of employment that arise under State or Territory industrial laws would interact with one another in the same

way under the WR Act as they did immediately before reform commencement. A term will only be included in the PSA to the extent that it actually applied to the person. If a term did not apply because, for example, it was included in an award which was excluded by the operation of the original agreement, then it will not be included in the PSA. A term will be incorporated as at immediately before the reform commencement.

3405. Proposed subclause 11(1) would provide that the terms of a PSA are taken to include the terms and conditions of the original agreement, as in force immediately before reform commencement. The phrase as in force immediately before reform commencement makes it clear that the terms included in the original agreement would be preserved in the PSA as they exist at that time, and would not be adjusted or varied to reflect subsequent changes to the terms of the original agreement. The terms and conditions of employment in a PSA may only be varied in accordance with this Schedule.

3406. Proposed subclause 11(2) provides for a term of a State award to be taken to be a term of the PSA in certain circumstances. This would occur where the employment of a person who is bound by, or whose employment is subject to, the PSA, is regulated in part by a State award. This could arise, for example, where the original agreement operates in conjunction with a State award. In such a case, the term of the State award, to the extent that it regulated matters pertaining to an *affected employment relationship*, is taken to be a term of the PSA.

3407. An affected employment relationship is defined in proposed subclause 11(4) to mean an employment relationship in relation to which the PSA applies. The effect of this would be that the terms of the PSA would apply to the same classes of people and in the same way as the terms of the original State award applied prior to the reform commencement. This is subject to the provisions set out in the remainder of Division 2 which modify the operation of some terms. The terms are taken to be included as they were in force immediately before the reform commencement. Future changes to the State award would not 'flow on' to the PSA.

3408. Proposed subclause 11(3) would provide that a provision of a State or Territory industrial law would also be preserved in a PSA in certain circumstances. It operates in the same way as proposed subclause 11(2) with respect to a provision of State or Territory industrial law, to the extent that the law regulated matters pertaining to an affected employment relationship.

### Illustrative Example

Sarah has been employed as a confectioner by Sweetsbury Pty Ltd (Sweetsbury) for 3 years. Sweetsbury and its employees, including Sarah, are bound by a certified agreement, made under the Queensland *Industrial Relations Act 1999* (the Act).

The certified agreement provides most of Sarah's terms and conditions of employment, however it is silent on carer's leave in relation to casual employees. Under the Act, long term casual employees are entitled to 5 days unpaid leave in each year to care and support members of their immediate family or members of their household when they are ill. Sarah comes within the definition of a long term casual employee under the Act as she has worked at Sweetsbury on a regular and systematic basis for at least one year, and is therefore entitled to five days unpaid carer's leave each year.

At the reform commencement Sweetsbury and its employees that are bound by the certified agreement (which is a *State employment agreement* under subsection 4(1) of the WR Act) would become bound by a PSA.

In this instance, the terms preserved in the PSA under clause 11 would be the terms of the certified agreement as in force immediately before the reform commencement, and the provisions of the Act relating to carer's leave for long term casuals as in force immediately before the reform commencement. Prior to reform commencement Sarah is entitled to carer's leave, and would therefore be entitled to it after the reform commencement under the terms of PSA. On the other hand, Peter is not entitled to carer's leave prior to the reform commencement because he is a casual employee who has only been employed by Sweetsbury for three months. Peter would be entitled to carer's leave under the terms of the PSA if he worked on a regular and systematic basis for at least one year.

### *Clause 12 – Nominal expiry date of a preserved State agreement*

3409. Proposed paragraph 12(a) would provide that the nominal expiry date of a PSA would be the same date on which the original agreement would have nominally expired under the relevant State or Territory industrial law. This would include a nominal expiry date provided for under the terms of the agreement itself, or under a State or Territory law directly, or a combined effect of the two.

3410. Proposed paragraph 12(b) would provide an exception to paragraph 12(a). If the nominal expiry date of the original agreement would have fallen more than three years after the commencement of the original agreement, then the nominal expiry date in the PSA will instead be the last day of the three year period after the commencement of the original agreement. Note that a PSA would continue to operate after the nominal expiry date has passed until it is terminated or replaced.

### *Clause 13 – Powers of State industrial authorities*

3411. Proposed subclause 13(1) would provide that if a PSA confers a function or power on a State industrial authority, that function must not be performed and that power must not be exercised by the State industrial authority on or after reform commencement. This subclause is intended to ensure that the terms and conditions of a PSA are only enforced under this Act, and



not under the State or Territory laws or in the State system in which the original agreement was made. It would not be appropriate for State industrial authorities to exercise powers or perform functions with respect to PSAs as PSAs would be federal instruments.

3412. Proposed subclause 13(2) would provide that the employer and the persons bound by the PSA may, by agreement, confer such a function or power on the AIRC. However this option would only apply in situations where the matter or issue does not relate to the resolution of a dispute about the application of the agreement. Proposed clause 14 provides that in such cases, the model dispute resolution process would apply (see Part VIIA of Schedule 1).

*Clause 14 – Dispute resolution processes*

3413. Proposed subclause 14(1) would provide that a PSA is taken to include a term requiring disputes about the application of the agreement to be resolved in accordance with the proposed model dispute resolution process (Part VIIA of Schedule 1).

3414. Proposed subclause 14(2) would provide that any term of the preserved State agreement that would otherwise deal with the resolution of those disputes is void to that extent. This subclause is intended to ensure that disputes in relation to the application of a PSA are resolved in a manner which is consistent with the model dispute settlement resolution process established under the WR Act, including that employers and employees be encouraged to resolve disputes at the workplace level.

*Clause 15 – Prohibited content*

3415. Proposed clause 15 would provide that a term of a preserved State agreement is void to the extent that it contains prohibited content of a prescribed kind.

**Division 3 – Varying a preserved State agreement**

*Clause 16 – Varying a preserved State agreement*

3416. Proposed clause 16 would provide that a PSA may only be varied on or after reform commencement in accordance with this Division. The terms of a PSA reflect relevant terms and conditions of employment arising under State or Territory industrial laws immediately prior to the reform commencement. They are ‘frozen’ except to the extent that they may be varied under this Division.

3417. Variation of these transitional instruments would be limited. It is considered that the parties should enter into a workplace agreement when they wish to alter the terms and conditions in the PSA.

*Clause 17 – Variation to remove ambiguity or uncertainty*

3418. Proposed clause 17 would provide that a person may apply to the AIRC to have an agreement varied for the purpose of removing ambiguity or uncertainty.

*Clause 18 – Variation to remove discrimination*

3419. Proposed clause 18 would provide for the variation of a PSA to remove any discriminatory part of a PSA if a PSA is referred to the AIRC under section 46PW of the HREOC Act 1986. The provision defines *discriminatory* for the purpose of this procedure in subclause 18(4).

*Clause 19 – Variation to remove prohibited content*

3420. Proposed clause 19 would provide a process for the removal of content prescribed under clause 15 to be prohibited content. The Employment Advocate would be responsible for the removal of such content. The process contained in clause 12 is relevantly identical to the process that would apply for prohibited content of workplace agreements, which would be prescribed under proposed section 101D and is set out in proposed sections 101G – 101L. The separate regulation making powers mean that different prohibited content could be prescribed for the purpose of the different instruments.

**Division 4 – Enforcing preserved State agreements**

*Clause 20 – Enforcing preserved State agreements*

3421. Proposed subclause 20(1) would provide that a preserved collective agreement may be enforced as if it were a collective agreement. Part VIII sets out enforcement provisions for workplace agreements.

3422. Proposed subclause 20(2) would provide that a workplace inspector has the same functions and powers in relation to a preserved collective State agreement as he or she has in relation to a collective agreement. Part V sets out functions and powers of workplace inspectors.

3423. Proposed subclause 20(3) would provide that a preserved individual State agreement may be enforced as if it were an AWA.

3424. Proposed subclause 20(4) would provide that a workplace inspector has the same functions and powers in relation to the preserved individual State agreement as he or she has in relation to an AWA.

**Division 5 – Terminating a preserved State agreement**

*Clause 21 – Terminating a preserved State agreement*

3425. Proposed clause 21 would apply to a PSA on or after reform commencement (subclause 21(1)).

3426. Proposed subclause 21(2) would provide that a preserved collective State agreement, may only be terminated in the way in which a certified agreement could be terminated immediately before reform commencement, and that the AIRC has the same powers in relation to that termination as it would have had at that time in relation to the termination of a certified agreement. This means that a preserved collective agreement may be terminated in the following circumstances:

- where a valid majority of employees approve (section 170MG);
- where the nominal expiry date has passed and the AIRC considers that it is not contrary to the public interest (section 170MH); and
- in a way provided for under the agreement after nominal expiry date (section 170MHA)

3427. Proposed subclause 21(3) would provide that a preserved individual State agreement may only be terminated in the way in which an AWA could be terminated immediately before reform commencement, and that the AIRC has the same powers in relation to that termination as it would have had immediately before reform commencement in relation to the termination of an AWA. This means that a preserved individual agreement may be terminated in the following circumstances:

- where the employer and employee agree in writing (subsection 170VM(1));
- where the nominal expiry date has passed and the AIRC considers that it is not contrary to the public interest (subsection 170VM(3)); and
- in a way provided for in the preserved individual agreement (subsection 170VM(6)).

*Clause 22 – Coercion of persons to terminate preserved State agreement*

3428. Proposed subclause 22(1) would provide that a person must not engage in certain types of coercive behaviour in relation to the termination of a PSA. This subclause would broadly replicate pre-reform subsection 170NC(1). However, because it would not be possible for parties to make or vary a PSA (other than the limited variations outlined in Division 3) the provision would only extend to terminations.

3429. Proposed subclause 22(2) would provide that the coercion provisions do not apply where a person is engaged in protected industrial action.

3430. Proposed subclause 22(3) would have the effect that the standing to bring a claim and remedies would be those available in relation to the pre-reform section 170NC.

## **Division 6 – Industrial Action**

### *Clause 23 – Industrial action must not be taken until after nominal expiry date – preserved collective State agreements*

3431. Proposed subclause 23(1) would provide that industrial action cannot be taken by those bound by, or whose employment would be subject to a collective PSA, during the period beginning on the reform commencement and ending on the nominal expiry date, regardless of whether or not that action relates to a matter dealt with in the agreement. This provision would have the same effect as proposed section 110, which applies to collective agreements. It would apply to industrial action taken by an employee, or organised by an organisation or officer of an organisation and to industrial action taken by an employer.

3432. The clause would be a civil remedy provision. The possible remedies for a breach are a pecuniary penalty – the maximum of which is \$6 600 (or 60 penalty units) for a natural person or \$33 000 (or 300 penalty units) for a body corporate and/or an injunction or any other orders the Court considers necessary to stop the breach or remedy its effects.

3433. Proposed subclauses 23(7) and (8) would set out who can apply to the Federal Court or Federal Magistrates Court in respect of a breach of the proposed clause

### *Clause 24 – Industrial action must not be taken until after nominal expiry date – preserved individual agreements*

3434. Proposed clause 24 would provide that industrial action cannot be taken by those bound by an individual PSA during the period beginning on the reform commencement day and ending on the agreement's nominal expiry date. This provision would have the same effect as proposed section 100A, which applies to AWAs. It would apply to action taken by the employer or the employee bound by the PSA.

3435. The clause would be a civil remedy provision. The possible remedies for breach are a pecuniary penalty – the maximum of which is \$6 600 (or 60 penalty units) for a natural person or \$33 000 (or 300 penalty units) for a body corporate and/or an injunction or any other orders the Court considers necessary to stop the breach or remedy its effects.

3436. Subclauses 24(6) and (7) would set out who can apply to the Federal Court or Federal Magistrates Court in respect of a breach of the proposed clause.

### *Clause 25 – Industrial action taken before nominal expiry date not protected action*

3437. This provision would clarify that industrial action taken prior to the nominal expiry date of a PSA is not protected action. It is intended that this provision would have the same effect as proposed section 108E with respect to workplace agreements.

## **Division 7 – Miscellaneous**

### *Clause 26 – Calling up contents of preserved State agreement in a workplace agreement*

3438. Proposed subclause 26(1) would provide that a workplace agreement may incorporate by reference terms from a PSA under section 101C as if the PSA were a workplace agreement.

Proposed section 101C sets out the circumstances in which a workplace agreement could ‘call up’ the terms of other industrial instruments. The intention is that when the persons who are bound by, or whose employment is subject to a PSA, make a workplace agreement, they would be able to incorporate by reference terms from the PSA.

*Clause 27 – Application of proposed section 109B in relation to preserved State agreement*

3439. Proposed clause 27 extends the operation of proposed section 109B to PSAs. Proposed section 109B sets out who would be able to apply for a protected action ballot order so that employees may take protected action to support or advance claims in respect of a proposed collective agreement.

*Clause 28 – Application of Part IX in relation to a preserved State agreement*

3440. This provision would extend the operation of the right of entry provisions in Part IX of this Act to PSAs.

*Clause 29 – Application of Part XA in relation to a preserved State agreement*

3441. This provision would extend the operation of the freedom of association provisions in Part XA of the WR Act to PSAs.

**Division 8 – Regulations**

*Clause 30 – Regulations may apply, modify or adapt Act*

3442. This provision would enable the Governor-General to make regulations applying provisions of the WR Act to PSAs, or modifying or adapting provisions of the WR Act to PSAs. This broad regulation power would ensure that legal or practical uncertainties that could emerge in relation to the operation of, or the entitlements arising under, these transitional instruments can be addressed quickly.

**Part 3 – Notional agreements preserving State awards**

3443. The intention of proposed Part 3 is to provide similar mechanisms preserving terms and conditions of employment arising under State awards and State or Territory industrial laws as provided by Part 2 with respect to State employment agreements. Rather than replicating the State awards as instruments that may apply to several different employers, employees or organisations in a particular industry, the terms and conditions would be contained in a notional agreement that operates between the relevant employer and its employees at the enterprise level.

**Division 1 – Notional agreements preserving State awards**

*Clause 31 – What is a notional agreement preserving State awards?*

3444. Proposed clause 31 would provide that a notional agreement preserving State awards would come into operation on reform commencement where a term or condition of a person’s employment was regulated under a state award or a State or Territory industrial law. State award would be defined in subsection 4(1) to mean an award, order, decision or determination of a

State industrial authority. In this Schedule, the relevant State award is referred to as the *original State award*. The relevant State or Territory law is referred to as the *original State law*.

3445. The notional agreement is taken to come into operation in respect of an employer in a *single business* or *part of a single business* and relevant employees. These terms would be defined at subsection 4(1) by reference to the definition in proposed section 95A. The intention of applying proposed section 95A to clause 32 is to provide that a notional agreement would operate like a collective agreement between a single business employer and its employee or employees. The definition of single business or part of a single business at proposed section 95A would require that the employer carries on a business, project or undertaking. Subsection 95A(2) and subparagraph 95A(2)(b)(i) would also apply to proposed clause 31, so that two or more employers would be deemed to be one employer for the purposes of proposed clause 31 where certain conditions are met.

3446. Proposed clause 31 is qualified by proposed paragraph 31(b) which would provide that a notional agreement preserving a state award would not come into operation if any term or condition of that employee's employment with the employer is regulated by a State employment agreement at the reform commencement. The intention of proposed paragraph 31(b) is to ensure that, where any term or condition of employment between an employer and a employee is regulated by a State employment agreement, those terms and conditions are preserved as a PSA under Part 2 of this Schedule, and not as a notional agreement preserving State awards under Part 3. The actual terms and conditions of employment that would be preserved in a notional agreement would be determined by proposed clause 35 (see below).

*Clause 32 – Who is bound by or subject to the notional agreement?*

3447. Proposed clause 32 would set out who is bound by or whose employment is subject to a notional agreement. This would be determined by reference to those who are bound by, or whose employment was subject to the State award or the State or Territory industrial law.

3448. Proposed subclauses 32(1) and (2) address who would be bound by the notional agreement by reference to the parties that were bound to the original State award.

3449. Proposed subclause 32(1) would provide that certain persons would be bound to the notional agreement if, but for this Act, they would be bound by the original State award as in force immediately before the reform commencement. An employer, employee or organisation bound by the original award are those who would be bound to the original agreement, subject to some qualifications necessary because the notional agreement would operate at the enterprise level. First, the provisions make it clear that the employer who would be bound is determined by reference to the single business requirement. Secondly, the provisions make it clear that an organisation would be bound where that organisation has at least one member who is an employee who would be bound and that organisation is entitled to represent the industrial interest of the employee. This ensures that organisations that were bound to the original award become bound to notional agreements where they have a representative role.

3450. Proposed subclause 32(2) would clarify the situation referred to in subclause 32(1) where a person is employed after the reform commencement by an employer that is bound by a notional

agreement (under subclause 32(1)). It would provide that a person employed after the reform commencement would be bound to the notional agreement provided that they would have been so bound had they been employed prior to reform commencement.

3451. Proposed subclauses 32(3) and (4) address who would be bound by the notional agreement by reference to persons who would have been regulated in relation to employment matters in the business by State or Territory laws.

3452. Proposed subclause 32(3) would provide that certain persons would be bound by the notional agreement if, but for this Act, they would have been regulated under the provisions of the original State law as in force immediately before the reform commencement. An employer, employee or organisation regulated by the original State law are those who would be bound to the original agreement, subject to some qualifications necessary because the notional agreement would operate at the enterprise level.

3453. Proposed subclause 32(4) would clarify the situation referred to in subclause 32(3) where a person is employed after the reform commencement by an employer bound by a notional agreement (under subclause 32(3)). It would provide that the person would be bound by the notional agreement, provided that they would have been so bound had they been employed prior to reform commencement.

3454. Proposed subclauses 32(5) and (6) address whose employment would be subject to the notional agreement by reference to whose employment would have been subject to a State award. Proposed subclause 32(5) would provide that a person's employment would be subject to the notional agreement if the person's employment was subject to the original State award as in force immediately before reform commencement. Proposed subclause 32(6) would clarify the situation referred to in subclause 32(5) where a person is employed after reform commencement by the employer. It would provide that such a person's employment would be subject to the notional agreement provided that it would have been had they been employed prior to reform commencement.

3455. Proposed subclauses 32(7) and (8) address whose employment would be subject to the notional agreement by reference to whose employment would have been regulated by the original State law as in force immediately before reform commencement.

3456. Proposed subclause 32(7) would provide that a person's employment would be subject to the notional agreement if a term or condition of employment in the business would have been regulated by the original State law as in force immediately before the reform commencement.

3457. Proposed subclause 32(8) would clarify the situation referred to in subclause 32(7) where the person is employed after reform commencement by the employer. It would provide that such a person's employment would be subject to the notional agreement provided that it would have been had they been employed prior to reform commencement.

3458. Proposed subclause 32(9) clarifies that in spite of this provision, a person who would be bound by a PSA would not be bound by a notional agreement and that the employment of a person whose employment is subject to a PSA would not be subject to a notional agreement.

#### Illustrative Example

Six months after the reform commencement Brooke is employed as an entry level process worker, by Milky Goodness Pty Ltd (Milky Goodness) a manufacturer of dairy products, based in Launceston, Tasmania. Prior to the reform commencement, the terms and conditions of employment of process workers at Milky Goodness were regulated by the Tasmanian *Butter and Cheese Makers Award 2005*. After the reform commencement the terms and conditions of employment that existed in the *Butter and Cheese Makers Award 2005* immediately before reform commencement would be preserved in a *notional agreement preserving state awards*. At the reform commencement Milky Goodness, and its current employees become bound to, or subject to the notional agreement. When Brooke is employed by Milky Goodness, her employment would become subject to the notional agreement. Milky Goodness and Brooke would be able to enforce the notional agreement under the WR Act.

#### Clause 33 – Operation of notional agreement

3459. Proposed clause 33 would provide the circumstances whereby a notional agreement would cease to operate.

3460. Subclause 33(1) would provide that a notional agreement ceases to be in operation at the end of the period of three years beginning on reform commencement. During this period, the persons who are bound by, or whose employment is subject to, the notional agreement may become bound by an award (see proposed sections 120, 120A, and 120B). During this period, the AIRC would undertake award rationalisation. The Award Review Taskforce will report to Government with recommendations for the rationalisation of award wage and classification structures and federal awards. Under its terms of reference, the Taskforce will recommend an approach to rationalise awards on an industry sector basis, and to permit general coverage of employers and employees according to the relevant industry sector based awards.

3461. Subclause 33(2) would provide that a notional agreement ceases to be in operation in relation to an employee if a workplace agreement comes into operation in relation to the employee. The workplace agreement could be a collective agreement or an AWA.

3462. This would mean that the notional agreement ceases to regulate the relationship between that employee and employer. The employer would still be bound to, or subject to the notional agreement to the extent that the notional agreement binds, or regulates terms and conditions of employment in relation to other employees bound to, or subject to the notional agreement.

3463. It is noted at proposed clause 33 that a reference to a workplace agreement includes a reference to a workplace determination.

3464. Subclause 33(3) would provide that a notional agreement ceases to be in operation in relation to an employee if an award made under proposed section 118E comes into operation in



relation to the employee. Proposed section 118E provides for the making of awards to give effect to award rationalisation.

3465. Subclause 33(4) would provide that if a notional agreement has ceased to operate in relation to an employee because of subclauses 33(1), (2) or (3), the agreement can never operate again in relation to that employee.

*Clause 34 – Effect of notional agreement*

3466. Proposed subclause 34(1) would provide that a notional agreement has effect according to its terms, except where its terms are modified or varied under this Part or under the Act.

3467. Subclause 34(2) would make it clear that this Part of the Act has effect despite terms and conditions of the original State award, the original law or any other law of a State.

3468. Subclause 34(3) would provide that none of the terms and conditions of employment included in the notional agreement are enforceable under the law of a State.

**Division 2 – Terms of notional agreement**

*Clause 35 – Terms of notional agreement*

3469. Proposed clause 35 would provide for the terms of the notional agreement. It is intended that terms of the notional agreement would be the terms and conditions of employment arising under State or Territory industrial laws that regulated persons bound by, or whose employment was subject to the original State award. In addition to the terms and conditions of employment arising directly under the State award, any term or condition arising under State or Territory legislation that would have regulated the employment relationship, would also be included as a term of the notional agreement. This recognises that a person covered by a State award will also derive some terms and conditions of employment from State or Territory industrial laws. The intention is that various sources of terms and conditions of employment that arise under State or Territory industrial laws would interact with one another in the same way under the WR Act as they did immediately before the reform commencement. A term or condition will only be included in the notional agreement to the extent that it actually applied to the person. A term will be incorporated as at immediately before the reform commencement.

3470. Terms of a State award or provisions of State or Territory industrial laws which regulate or set wages will not be incorporated into a notional agreement. Rather, wages from State awards and State or Territory industrial laws would be incorporated into the Australian Pay and Classification Scales to be adjusted by the AFPC (see clause 44 below, and proposed Division 2 of Part VA).

3471. Subclause 35(1) would provide for a term of a State award to be taken to be a term of the notional agreement in certain circumstances. This would occur where the employment of a person who is bound by, or whose employment is subject to, the notional agreement, is regulated by a term of the original State award. In such a case, to the extent that the term regulated matters pertaining to an affected employment relationship, that term is taken to be a term of the notional agreement.

3472. An affected employment relationship would be defined in subclause 35(3) to mean an employment relationship to which the notional agreement applies. The term would be included as in force immediately before the reform commencement. This makes it clear that the terms are preserved as they exist at that time, and would not be adjusted or varied to reflect subsequent changes to the terms of the original State award. The effect of these provisions is that terms of the notional agreement would apply to the same classes of people in the same way as they applied in the original State award, prior to the reform commencement. This is subject to the remainder of the provisions set out in Division 3 which modify the operation of some terms.

3473. Proposed subclause 35(2) would provide that a provision of an original State law would also be preserved as a term of the notional agreement in certain circumstances. It operates in the same way as proposed subclause 35(1) with respect to a provision of an original State law to the extent that the law regulated matters pertaining to an affected employment relationship. As is the case in subclause 35(1) the term would be included as it was in force immediately before the reform commencement and would apply to the same classes of people and in the same way that it applied in the original State law.

#### Illustrative Example

Julianne has been employed as a baker's assistant at Crusty Loaves Pty Ltd (Crusty Loaves), in Perth, Western Australia, for 8 years. She is covered by the *Bakers' (Metropolitan) Award No.13 of 1987* (Bakers' Award). Among other things, the award includes provisions dealing with redundancy and provides a scale of severance pay depending on the period of continuous service. The maximum that an employee is entitled to is eight weeks severance pay in respect of a period of continuous service of four or more years. A 2005 General Order of the Western Australian Commission in relation to redundancy applies to all employees (as defined in the *Industrial Relations Act 1979*). It also provides a scale of severance pay. Under its terms, the maximum that an employee is entitled to is 16 weeks severance pay in respect of a period of continuous service of nine years and less than 10 years. This means that at the reform commencement, the terms of the notional agreement would include the terms of the Bakers' Award as well as the terms from the General Order that provides an entitlement to redundancy more beneficial than the Bakers' Award, and to the extent that those terms apply to Crusty Loaves and its employees (including Julianne).

#### *Clause 36 – Powers of State industrial authorities*

3474. Proposed subclause 36(1) would provide that if a notional agreement confers a function or power on a State industrial authority, that function must not be performed and that power must not be exercised by the State industrial authority on or after the reform commencement. This subclause is intended to ensure that the terms and conditions of a notional agreement are only enforced under this Act, and not under the State or Territory laws or in the State system in which the original agreement was made. It would not be appropriate for State industrial authorities to exercise powers or perform functions with respect to federal instruments.

3475. Proposed subclause 36(2) would provide that the employer and the persons bound by the notional agreement may, by agreement, confer such a function or power on the AIRC. However this option would only apply in situations where the matter or issue does not relate to the

resolution of a dispute about the application of the agreement. Proposed clause 37 would provide that in such a case, the model dispute resolution process would apply (see Part VIIA of Schedule 1).

*Clause 37 – Dispute resolution process*

3476. Proposed subclause 37(1) would provide that a notional agreement is taken to include a term requiring disputes about the application of the agreement to be resolved in accordance with the model dispute resolution process (see Part VIIA of Schedule 1).

3477. Proposed subclause 37(2) would provide that any term of the notional agreement that would otherwise deal with the resolution of those disputes is void to that extent.

*Clause 38 – Prohibited content*

3478. Proposed clause 38 would provide that a term of a notional agreement is void to the extent that it contains prohibited content of a prescribed kind.

**Division 3 – Varying a notional agreement preserving State awards**

*Clause 39 – Varying a notional agreement preserving State awards*

3479. Proposed clause 39 would provide that a notional agreement may only be varied on or after reform commencement in accordance with this Division. The terms of the notional agreement reflect relevant terms and conditions of employment arising under State or Territory industrial laws immediately prior to the reform commencement. They are ‘frozen’ except to the extent that they be varied under this Division.

3480. Variation of a notional agreement would be limited as it is intended that the parties to a notional agreement should enter into a workplace agreement when they wish to alter the terms and conditions of the notional agreement.

*Clause 40 – Variation to remove ambiguity or uncertainty*

3481. Proposed clause 40 would provide that a person may apply to the AIRC to have an agreement varied for the purpose of removing ambiguity or uncertainty.

*Clause 41 – Variation to remove discrimination*

3482. Proposed clause 41 would provide for the variation of a notional agreement to remove any discriminatory part of the agreement if it is referred to the AIRC under section 46PW of the HREOC Act 1986. The provision defines *discriminatory* for the purpose of this procedure in subclause 41(4).

*Clause 42 – Variation to remove prohibited content*

3483. Proposed clause 42 would provide a process for the removal of content prescribed under proposed clause 38 to be prohibited content. The Employment Advocate would be responsible for the removal of such content. The process contained in this provision is relevantly identical to the process that would apply for prohibited content of workplace agreements, which would be

prescribed under proposed section 101D and is set out in proposed sections 101D – 101L. The separate regulation making powers mean that different prohibited content may be prescribed for the purpose of the different forms of agreement.

#### **Division 4 – Enforcing the notional agreement**

##### *Clause 43 – Enforcing the notional agreement*

3484. Proposed clause 43 would provide that a notional agreement may be enforced as if it were a collective agreement. Part VIII sets out enforcement provisions for workplace agreements.

3485. This provision would provide that a workplace inspector has the same functions and powers in relation to a preserved collective State agreement as he or she has in relation to a collective agreement. Part V sets out functions and powers of workplace inspectors.

##### *Clause 44 – Matters provided for by the Australian Fair Pay and Conditions Standard*

3486. The Standard provides key minimum entitlements of employment for the employees to whom it applies (see proposed section 89A). Proposed clause 40 would provide that, where the Standard provides for a matter, then a term of the notional agreement also dealing with that matter is unenforceable. This clause would operate subject to Division 5 which would provide that certain terms of a notional agreement are to be preserved and could exclude a corresponding matter in the Standard where the term of the notional agreement is more generous. As noted in comments for clause 35, wages will not be included in notional agreements.

#### **Division 5 – Preserved notional terms and preserved notional entitlements**

3487. Proposed Division 5 would provide for the preservation and different operation of certain terms in notional agreements. These provisions are based on the proposed provisions in Division 3 of Part VI, which would provide for the preservation and special operation of certain terms in awards upon the reform commencement.

3488. Proposed Division 5 is intended to provide for the relevant terms to be dealt with in a manner which is consistent with their treatment in awards. Like Division 3 of Part VI, this Division would also address how an employee's entitlements under these terms interact with the Standard – as a number of the terms that would be preserved deal with matters also covered by the Standard.

##### *Clause 45 – Preserved notional terms of notional agreement*

3489. Proposed clause 45 would identify that certain terms in a notional agreement are *preserved notional terms*. They are terms about any or all of the matters listed in subclause 45(1). Those matters are: annual leave, personal/carer's leave, parental leave, including maternity and adoption leave, long service leave, notice of termination, jury service, and superannuation. A preserved notional term about superannuation would cease to have effect at the end of 30 June 2008.

3490. The first three of these matters are also dealt with by the Standard. Employees will continue to have entitlements under these terms where they are *more generous* than the Standard (see proposed clauses 50 – 60).

3491. In relation to superannuation, the Government announced in 2004, with the passage of the *Superannuation Laws Amendment (2004 Measures No.2) Act 2004*, that all employees would be treated in a consistent manner for superannuation guarantee purposes. The Government announced that from 1 July 2008 ordinary time earnings (as defined by the Superannuation Guarantee legislation) would be the earnings base for determining the superannuation guarantee liability for all employees). Accordingly, award-based earnings bases will cease to operate from this date.

3492. Proposed subclause 45(4) would make clear that personal/carer's leave includes war service sick leave, infectious diseases sick leave and other like forms of sick leave.

3493. Proposed subclause 45(5) would enable regulations to provide that parental leave does not include special maternity leave and personal/carer's leave does not include compassionate leave and unpaid carer's leave. The effect of such regulations would be to exclude these matters from the 'more generous' comparison between the preserved award term and the Standard – meaning that employees would be entitled to special maternity leave, compassionate leave and unpaid carer's leave as provided under the Standard regardless of the terms of their award. This is necessary as such entitlements are not part of the general award standard, and may otherwise be lost when applying a global more generous test (based on overall quantum of entitlement – as described below).

3494. Proposed subclause 45(6) would provide that regulations made under subclause 45(5) may apply generally or in respect of employees engaged in specified types of employment.

*Clause 46 – When preserved notional entitlements have effect*

3495. Proposed clause 46 would deal with the effect of entitlements under preserved notional terms, and the interaction of some of those entitlements with the Standard.

3496. Where an employee has an entitlement under a preserved notional term to a matter that is also dealt with by the Standard (ie annual leave, personal/carer's leave or parental leave), the employee is entitled to the *more generous* of the award term and the Standard (subclause 46(2)). (The meaning of *more generous* would be dealt with by proposed clause 47).

3497. Where an employee has an entitlement under a preserved notional term about one of the other matters (ie long service leave, notice of termination, jury service or superannuation), the entitlement has effect in accordance with the award term.

*Clause 47 – Meaning of more generous*

3498. Proposed clause 47 would provide when an employee's entitlement under a preserved notional term about a matter is *more generous* than the employee's entitlement about an equivalent matter under the Standard. It is intended that this proposed provision operate in the

same way as proposed section 117C with respect to the interaction between awards and the Standard.

3499. Subclause 47(1) would provide that whether an entitlement under a preserved award term is more generous than an entitlement about a corresponding matter under the Standard:

- is to be determined by regulations (paragraph 47(1)(a)); or
- if regulations do not deal with a matter, in accordance with the ordinary meaning of the term *more generous*.

3500. It is intended that regulations will be made specifying circumstances in which a preserved notional term is to be taken to be more generous than the Standard, based on the overall quantum of the entitlement. Where a preserved notional term is more generous than the Standard, the whole of the award term will apply to the exclusion of the Standard – including any associated administrative arrangements set out in the award relating to that leave entitlement.

3501. Proposed subclause 47(2) would provide that if a matter does not correspond directly to a matter in the Standard, regulations made under paragraph 47(1)(a) may provide that the matters correspond for the purposes of this Division.

*Clause 48 – Modifications that may be prescribed – personal/carer’s leave*

3502. Proposed clause 48 would enable regulations to be made to specify that certain aspects of preserved notional terms about personal/carer’s leave are to be treated as preserve notional terms about separate matters.

3503. The matters about which such regulations could be made are:

- war service sick leave
- infectious diseases sick leave
- any other like form of sick leave

3504. This is necessary to ensure that, in applying the global *more generous* test (based on overall quantum of entitlement), specific entitlements under the preserved notional terms that apply to some employees are not lost. The effect of the regulations would be to ensure that in respect of those matters, there would be no comparable matter against which an assessment with the Standard could be made – meaning that the award entitlement would continue to apply.

*Clause 49 – Modifications that may be prescribed – parental leave*

3505. Proposed clause 49 would enable regulations to be made to specify that paid and unpaid parental leave are to be treated as separate matters for the purpose of the more generous comparison (subclause 49(1)).

3506. The effect of such regulations would be to enable an entitlement to paid parental leave to continue to operate, despite the terms of the Standard.

3507. The parental leave provisions of the Standard (see proposed section 90) would operate to ensure that the amount of unpaid leave to which an employee is entitled under the Standard is reduced by any amount of paid leave (subclause 49(2)). This reflects how the Standard would operate generally in relation to other forms of leave taken in conjunction with parental leave.

*Clause 50 – Preserved notional terms taken to be included in awards*

3508. The purpose of proposed clause 50 is to ensure that a person who has a preserved notional entitlement retains that entitlement if that person becomes bound to a federal award, including a rationalised federal award. This could occur after the notional agreement ceases to operate.

3509. It is intended that, like preserved award entitlements, preserved notional entitlements would be protected during the award rationalisation process (refer to comments at subclause 33(1)). The Award Review Taskforce will consider the manner in which preserved entitlements are to be accommodated in the new awards that result from the rationalisation process.

3510. Proposed clause 50 would provide that a preserved notional term in a notional agreement is taken to be included in a rationalised award to which a person who was bound by or whose employment was subject to the notional agreement, becomes bound.

3511. This means that the preserved award term would be taken to be in the award as a matter of law.

3512. Subclauses 50(3), (4) and (5) explain that the ‘coverage’ of a preserved notional term included in an award remains the same, but does not expand, as a result of its being included in a rationalised award – that is, the same employers and class or classes of employees (including employees employed after the rationalised award was made) remain subject to the term.

3513. Proposed subclause 50(6) provides that the AIRC must not vary a preserved notional term included in an award. This is because, these terms are to be ‘frozen’ in awards. They would be included in rationalised awards, but their content and coverage would not change.

3514. Proposed subclause 50(7) extends the operation of proposed section 118P to preserved notional terms as if they are preserved award terms. Proposed section 118P ensures that preserved award terms which would be taken to be included in rationalised awards are included in rationalised awards and appropriately identified.

3515. Proposed clause 50 operates in addition to the effect of the provisions in Part VI that relate to the content and operation of awards.

*Clause 51 – Application of hours of work provision of Standard to notional agreements preserving State awards*

3516. Proposed clause 51 would provide that Division 3 of Part VA (hours of work) does not apply to the employee’s employment while the employee is bound by, or their employment is subject to, an operational notional agreement preserving State awards.

## **Division 6 – Protected Conditions**

### *Clause 52 – Protected conditions in notional agreements preserving State awards*

3517. Proposed clause 52 is a counterpart to proposed section 101B. The latter section would provide a mechanism to deem certain award conditions to be included in a workplace agreement. Proposed clause 52 provides the same ‘protected’ status with respect to the same matters in notional agreements preserving State awards to which proposed section 101B applies.

3518. The mechanism operates where the conditions (the *protected notional conditions*) would have effect in relation to the employment of a person but for the fact that the person’s employment is subject to a workplace agreement. The protected notional conditions are taken to be included in the workplace agreement and to have effect to the extent that they are not expressly excluded or modified under the terms of the workplace agreement. The intended effect is that the protected notional conditions would be ‘read into’ a workplace agreement unless the agreement expressly modified or excluded them.

3519. Protected notional conditions are terms of a notional agreement to the extent that they deal with *protected allowable award matters*. These matters are those listed in the definition of this term in clause 52(3). The matters are: rest breaks, incentive-based payments and bonuses, annual leave loading, public holidays declared by or under State law and related entitlements for working on those days, certain allowances relating to employees’ out of pocket expenses, skills not taken into account in pay rates and disabilities associated with the performance of work in particular conditions of locations, loadings for overtime or shift work, penalty rates and any other matter prescribed in the regulations.

3520. The combined effect of clause 50 and proposed section 101B is that, while a person is bound by, or their employment is subject to a notional agreement preserving a State award, the protected conditions will derive from the notional agreement. Once the notional agreement ceases to operate under proposed clause 33, the protected conditions would derive from an award to which the person has become bound.

## **Division 7 – Miscellaneous**

### *Clause 53 – Application of Part IX in relation to notional agreement preserving State awards*

3521. Proposed clause 53 would extend the operation of the right of entry provisions in Part IX of this Act to notional agreements.

### *Clause 54 – Applications of Part XA in relation to a notional agreement preserving State awards*

3522. Proposed clause 54 would extend the operation of the freedom of association provisions in Part XA of this Act to notional agreements.

## **Division 8 – Regulations**

### *Clause 55 – Regulations may apply, modify or adapt Act*

3523. Proposed Division 8 would enable the Governor-General to make regulations applying provisions of this Act to notional agreements, or modifying or adapting provisions of this Act to



notional agreements. This broad regulation power is to ensure that legal or practical uncertainties that could emerge in relation to the operation of, or the entitlements arising under, these transitional instruments can be addressed quickly.

### **Schedule 16 – Transmission of business rules (transitional instruments)**

3524. Proposed Schedule 16 would contain the transmission of business rules relevant to the transfer of transitional instruments created before reform commencement, replacing paragraph 149(1)(d) and sections 170MB, 170MBA and 170VS of the pre-reform Act for these purposes.

3525. The proposed Note would mention proposed section 4A, which outlines which Schedules have effect under the WR Act.

### **New Part 1 – Introductory**

#### *New clause 1 – Object*

3526. Proposed clause 1 would outline the object of Schedule 16, which is to provide for the transfer of employer obligations under those instruments indicated in Parts 2 – 9 of the Schedule, when the whole, or a part, of a person's business is transmitted to another person.

3527. The proposed clause uses the term *transmitted* but would also encompass assignment of a business, or part of a business, from one person to another and the succession of a business, or part of a business, to one person from another.

#### *New clause 2 – Simplified outline*

3528. Proposed clause 2 would create a simplified outline detailing the way that Schedule 16 is structured.

3529. Proposed Part 2 would provide for when the Schedule is to apply and define key terms that are used throughout Schedule 16.

3530. Proposed Part 3 would contain provisions particular to the transfer of *pre-reform Australian Workplace Agreements* (AWAs) (those AWAs created before reform commencement) from one employer to another upon a transmission of business.

3531. Proposed Part 4 would contain provisions particular to the transfer of Division 2 pre-reform CAs from one employer to another upon a transmission of business.

3532. Proposed Part 5 would contain provisions particular to the transfer of State transitional instruments from one employer to another upon transmission of business.

3533. Proposed Part 6 would deal with notification obligations for an employer who becomes a successor, transferee or assignee to a transferring business, as well as lodgment of notices and civil remedy provisions relevant to the notification requirements.

3534. Proposed Part 7 would contain provision to enable the transmission of business rules to extend to Victorian employers pursuant to the terms of the referral of power from the Parliament of Victoria to the Commonwealth under the CP(IR) Act.

3535. Proposed Part 8 would deal with the interaction between transitional instruments and awards and collective agreements, to which the transmission rules in Part VIAA apply.

3536. Proposed Part 9 would enable regulations to be made to deal with additional transmission of business issues that may arise.

*New clause 3 – Definitions*

3537. Proposed clause 3 would define key terms for the purposes of Schedule 16, many by reference to definitions in proposed Part 2 of this Schedule. Other terms are defined by reference to Schedule 14, which sets out transitional arrangements for existing pre-reform Federal agreements.

**New Part 2 – Application of Part**

3538. Proposed Part 2 would define when Schedule 16 would apply and provide definitions for key terms.

*New clause 4 – Application of Schedule*

3539. Proposed clause 4 would outline the circumstances in which Schedule 16 applies.

3540. Subclause 4(1) would provide that Schedule 16 applies if a person becomes the successor, transmittee or assignee of the whole, or a part of a business of another person.

3541. In this context the person who initially owned the business being transferred is the *old employer* and the person who becomes the successor, transmittee or assignee is the *new employer*. The term ‘person’ is used in this definition so that this Schedule also captures transmissions where the old employer ceases to be an employer (ie because it either dismisses all of its employees) before, or at the time the business transfers.

3542. Additionally, the term ‘person’ would cover the situation where the new employer is not yet an employer because it does not have any employees until or after the transmission occurs.

3543. Subclause 4(2) would define, for the purposes of Schedule 16, the ‘*business being transferred*’ as the business, or part of the business, of which the new employer is the successor, assignee or transmittee.

3544. Subclause 4(3) would define, for the purposes of Schedule 16, the ‘*time of transmission*’ as the time at which the new employer becomes the successor, transmittee or assignee of the business being transferred. The definition does not seek to pinpoint in time when a new employer becomes a successor, transmittee or assignee.

3545. Subclause 4(4) would define the ‘*transmission period*’ as the period of 12 months from the time of transmission. This is the maximum period of time that a new employer may be bound by a transmitted instrument by operation of Schedule 16.

*New clause 5 – Transferring employees*

3546. Proposed clause 5 would create a definition of a ‘*transferring employee*’ for the purposes of Schedule 16.

3547. Subclause 5(1) would provide that a person is a transferring employee, if the person is employed by the old employer immediately before the time of transmission and the person ceases to be employed by the old employer and becomes employed by the new employer within 2 months of the time of transmission.

3548. The proposed definition of transferring employee seeks to ensure that the operation of Schedule 16 cannot be avoided by the new employer employing an employee of the old employer shortly after the time of transmission, rather than at the time of transmission.

3549. Subclause 5(2) would provide that a person is also a transferring employee for the purposes of Schedule 16 if the person:

- (a) is employed by the old employer at any time within the period of 1 month before the time of transmission; and
- (b) the person’s employment is terminated because of, or for reasons that include, genuine ‘operational reasons’; and
- (c) the person becomes employed by the new employer within 2 months of the time of transmission.

3550. *Operational reasons* is attributed with the same meaning as in proposed subsection 170CE(5D) of the WR Act. Proposed subsection 170CE(5D) would provide that the definition of operational reasons are reasons of an economic, technological, structural or similar nature relating to the employer’s undertaking, establishment, service or business, or to part of the employer’s undertaking, establishment, service or business.

3551. This limb of the definition of transferring employee is also an anti-avoidance provision. It is intended that the effect of Schedule 16 would not be avoided by the old employer terminating the employment of the employees shortly before the time of transmission. Accordingly, the transmission of business rules in proposed Schedule 16 would extend to a situation where the old employer made employees redundant in anticipation of a transmission of business, or part of a business, close to the time of transmission but the new employer decides to employ them anyway.

3552. Therefore, if an employee’s employment is genuinely redundant and thus terminated by the old employer within one month of the time of transmission, this break in employment would not preclude the employee from being a transferring employee for the purposes of Schedule 16, if the employee is employed by the new employer within 2 months of the time of transmission.

### Illustrative Example

Jade is employed by Smythe's Automobiles Pty Ltd (Smythe's) and has always received high performance ratings. Smythe's has been running at a loss for the past two financial years and is finally placed in administration on 1 August 2005. As a result many of Smythe's employees, including Jade, are terminated by reason of redundancy on this date.

On 20 August 2005 the business and assets of Smythe's are transmitted to Hodgers Holdings. To ensure the business is viable, Hodgers Holdings wishes to retain those employees still with Smythe's, and to take on some of those made redundant. Jade is employed by Hodgers Holdings on 27 August 2005. Because she was terminated for genuine operational reasons by Smythe's within one month of the time of transmission and employed by Hodgers Holdings within two months of the time of transmission, she will be a 'transferring employee'.

3553. Subclause 5(3) would be a facilitative provision consequential upon the inclusion of clause 5. It is to enable Schedule 16 to operate with respect to an employee who is a transferring employee, but whose employment was terminated by the old employer within one month prior to the time of transmission without need for an additional reference or extension of the term transferring employee wherever used.

### *New clause 6 – transferring employees in relation to a particular instrument*

3554. Proposed clause 6 would describe how an employee is a transferring employee in relation to a particular instrument. In this context, the term instrument incorporates all transitional industrial instruments created before the reform commencement (eg pre-reform AWAs, Division 2 pre-reform CAs and State transitional instruments).

3555. Subclause 6(1) would provide that in order for a particular instrument to bind a new employer there must be a transferring employee who was, immediately before time of transmission, bound or covered by the relevant instrument. Additionally, the transferring employee's employment with the new employer must be capable of being covered by the particular instrument.

3556. Subclause 6(2) would provide that an employee ceases to be a transferring employee in relation to a particular instrument where the transferring employee ceases to be employed by the new employer after the time of transmission or the transferring employee's employment with the new employer changes so that the instrument is no longer capable of applying to that employment. Additionally, the transferring employee ceases to be a transferring employee when the transmission period ends.

3557. The terms 'apply' or 'applying' in these provisions is used to encompass all the various ways in which an instrument may regulate an employee's terms and conditions of employment. Accordingly, the term should not be read as a limitation on the scope of the provision.

3558. Subclause 6(3) would clarify that a *notional agreement preserving State awards* (as defined in Schedule 15) is to be treated as an instrument in this context.

### Illustrative Example

Johnston Holdings (Johnston) has three divisions. The Human Resources Division (HRD), the Engineering Division (ED) and the Maintenance Division (MD). In respect of employees employed in the HRD, Johnston is bound by a Preserved State Agreement. For employees employed in the ED, Johnston is bound by pre-reform AWAs. For employees of the MD, a notional agreement preserving a State award binds Johnston.

Johnston decides to sell off parts of its business, namely the maintenance and human resources divisions. Maddie Enterprises (Maddie) buys both divisions as distinct and operative parts of a business.

Shauna is employed by Johnston as a recruitment officer and is bound by the Preserved State Agreement. At the time of transmission Maddie employs Shauna as a recruitment officer. Shauna would therefore be a transferring employee in respect of the Preserved State Agreement, and the agreement would become binding on Maddie.

Maddie employs none of Johnston's MD employees. This means that there are no transferring employees in relation to the notional agreement preserving a State award. The transmission of business does not have the effect of binding Maddie with respect to the notional agreement.

### **New Part 3 – Transmission of pre-reform AWA**

3559. Proposed Part 3 would contain the transmission of business provisions specific to the transfer of pre-reform AWAs from an old employer to a new employer.

#### *New clause 7 – Transmission of pre-reform AWA*

##### *New employer bound by pre-reform AWA*

3560. Proposed subclause 7(1) would provide that where, immediately before the time of transmission, the old employer and an employee were bound by a pre-reform AWA, and the employee is a transferring employee in relation to the pre-reform AWA, the new employer becomes bound by the pre-reform AWA.

3561. This means that a new employer who is a successor, transmittee or assignee to a business or part of a business, will be bound by the pre-reform AWA that was binding on the old employer, in respect of an employee if that employee is employed by the new employer within 2 months and the pre-reform AWA is capable of covering the employee's employment with the new employer.

3562. Proposed Note 1 would mention that where the pre-reform AWA becomes binding on the new employer by force of this section, the new employer may have obligations imposed by clauses 28 and 29 with respect to notification.

3563. Proposed Note 2 would provide that the clause should be read in conjunction with clause 8, which provides for interaction rules.

*Period for which the new employer remains bound*

3564. Proposed subclause 7(2) would establish how long the new employer is bound to the pre-reform AWA. It would specify four events which would cause the new employer to no longer be bound by the transmitted pre-reform AWA. This result would be brought about on the occurrence of whichever of the events occurs first. They are outlined below.

3565. Firstly, the pre-reform AWA would cease to be in operation if it was terminated in accordance with section 170VM(1) of the pre-reform Act. Note that proposed clause 9 would provide that a transmitted pre-reform AWA may not be terminated during the transmission period under sections 170VM(3) and 170VM(6) of the pre-reform Act, even if it has reached its nominal expiry date.

3566. Secondly, the pre-reform AWA would cease to be in operation where it is replaced by a new AWA that binds the transferring employee and the new employer (subclause 18(1) of Schedule 14).

3567. Thirdly, the pre-reform AWA would not be binding on the new employer where the employee ceases to be a transferring employee in relation to the pre-reform AWA. This is where the transferring employee, for example, ceases to be employed by the new employer, or moves to another job while still working for the new employer that is not capable of being covered by the pre-reform AWA.

3568. Finally, the pre-reform AWA would not be binding on the new employer once the transmission period ends. This means that a new employer would be bound by the pre-reform AWA by force of subclause 7(1) for a maximum period of 12 months.

*Old employer's rights and obligations that arose before time of transmission not affected*

3569. Proposed subclause 7(3) would provide that this clause does not affect the rights and obligations of the old employer in respect of a transferring employee that arose before the time of transmission. This means, for example, that subclause 7(1) does not intend to transfer liability for accrued employee entitlements to a new employer from an old employer.

*New clause 8 – Interaction rules*

3570. Proposed subclause 8(1) would provide that from the time of transmission a transitional industrial instrument cannot apply to a transferring employee's employment, other than the pre-reform AWA. This means that a new employer's existing transitional industrial instruments are not capable under this clause of applying, on their terms to transferring employees.

3571. Proposed subclause 8(2) would clarify that subclause 8(1) has effect despite section 170VQ of the pre-reform Act.

*New clause 9 – Termination of transmitted pre-reform AWA*

*Transmitted instrument*

3572. Proposed subclause 9(1) would provide that clause 9 applies if subclause 7(1) applies to the pre-reform AWA (ie to a *transmitted pre-reform AWA*).

*Modified operation of subsections 170VM(3) to (7) of the pre-reform Act*

3573. Proposed subclause 9(2) would provide that during the transmission period, the transmitted pre-reform AWA may not be terminated in accordance with subsections 170VM(3) and 170VM(6) of the pre-reform Act, even though it has reached its specified nominal expiry date. Usually, a nominal expiry date is the date after which a pre-reform AWA could be terminated other than by agreement between the parties. Proposed clause 9 departs from this rule for a transmitted pre-reform AWA to ensure that the transmitted pre-reform AWA may not be transmitted or replaced without the transferring employees approval or agreement.

**New Part 4 – Transmission of Division 2 pre-reform certified agreements**

3574. Proposed Part 4 would contain the transmission of business provisions specific to the transfer of Division 2 pre-reform CAs from an old employer to a new employer.

3575. *Division 2 pre-reform CAs* are defined in clause 3 as those CAs (within the meaning of Schedule 14) that were made under Division 2 of Part VIB before reform commencement.

**New Division 1**

3576. Proposed Division 1 would deal with the general provisions relating to the transfer of Division 2 pre-reform CAs.

*New clause 10 – Transmission of Division 2 pre-reform certified agreement*

*New employer bound by Division 2 pre-reform certified agreement*

3577. Proposed subclause 10(1) would provide that where the old employer and employees of the old employer were bound by a Division 2 pre-reform CA immediately before the time of transmission and there is at least one transferring employee in relation to the Division 2 pre-reform CA, the new employer will be bound by the Division 2 pre-reform CA.

3578. This means that a new employer who is a successor, transmittee or assignee to a business or part of a business, will be bound by the Division 2 pre-reform CA that was binding on the old employer, in respect of an employee if that employee is employed by the new employer within 2 months and the Division 2 pre-reform CA is capable of covering the employee's employment with the new employer.

3579. Proposed Note 1 would mention that where the Division 2 pre-reform CA becomes binding on the new employer by force of this clause, the new employer may have obligations imposed by clauses 28 and clause 29 with respect to notification.

3580. Proposed Note 2 would mention that the provision should be read in conjunction with, and subject to, proposed clause 11.

*Period for which new employer remains bound*

3581. Proposed subclause 7(2) would establish how long the new employer is bound to the pre-reform AWA. It would specify four events which would cause the new employer to no longer be bound by the transmitted pre-reform AWA. This result would be brought about on the occurrence of whichever of the events occurs first. They are outlined below.

3582. Proposed subclause 10(2) would establish for how long the new employer will be bound by the Division 2 pre-reform CA. It would specify four events which would cause the new employer to no longer be bound by the Division 2 pre-reform CA, in its entirety. This result would be brought about on the occurrence of whichever of the events occurs first. They are outlined below.

3583. Firstly, the Division 2 pre-reform CA would cease to bind the employer if it was terminated in accordance with section 170MG of the pre-reform Act. This would mean that the Division 2 pre-reform CA may be terminated by the AIRC where there is valid majority of employees who approve the termination. Note that proposed clause 12(3) would provide that a Division 2 pre-reform CA may not be terminated under section 170MH or 170MHA of the pre-reform Act, during the transmission period, even where the agreement has reached its nominal expiry date.

3584. Secondly, the Division 2 pre-reform CA would cease to bind the new employer when there are no longer any transferring employees in relation to the Division 2 pre-reform CA. This is where all the transferring employees, for example, either cease to be employed by the new employer or move to another job while working for the new employer that is not capable of being covered by the Division 2 pre-reform CA.

3585. Thirdly, the new employer would cease to be bound by the Division 2 pre-reform CA in respect of the transferring employees when the transferring employees replace the Division 2 pre-reform CA with a collective agreement, or all of the transferring employees make AWAs with the new employer.

3586. The proposed Note would mention that proposed subclause 10(3) should be considered to determine how the new employer ceases to be bound by a Division 2 pre-reform CA in respect of each transferring employee in order to assess whether all transferring employees are no longer bound by the Division 2 pre-reform CA.

3587. Lastly, the Division 2 pre-reform CA would not be binding on the new employer once the transmission period ends. This means that a new employer would only be bound by the Division 2 pre-reform CA by force of subclause 10(1) for a maximum period of 12 months.



*Period for which new employer remains bound in relation to a particular transferring employee*

3588. Proposed subclause 10(3) would provide the circumstances where the new employer would no longer be bound by the Division 2 pre-reform CA in relation to each transferring employee in contrast to proposed subclause 10(2) which would stipulate when the new employer ceases to be bound by Division 2 pre-reform CA in respect of all employees. Subclause 10(3) lists three ways in which this may occur.

3589. Firstly, the Division 2 pre-reform CA would cease to be in operation in relation to a transferring employee where the new employer makes an AWA with the transferring employee.

3590. Secondly, the Division 2 pre-reform CA would cease to be in operation in relation to the transferring employee where it is replaced by a collective agreement between the new employer and the (formerly) transferring employee. Note that proposed clause 3 of Schedule 14 would provide that a collective agreement can replace a Division 2 pre-reform CA, even where the Division 2 pre-reform CA has not reached its nominal expiry date.

3591. Finally, the Division 2 pre-reform CA may cease to be binding on a particular transferring employee because an event in proposed subclause 10(2) has occurred.

*New employer bound only in relation to employment of transferring employees in the business being transferred*

3592. Proposed subsection 10(4) would provide that a new employer is bound by the Division 2 pre-reform CA in respect of transferring employees only, in relation to the business being transferred. This provision is intended to limit the application of the Division 2 pre-reform CA to transferring employees while they are employed in the business being transferred. Therefore, employees of the new employer who are not transferring employees cannot be bound by the Division 2 pre-reform CA.

*New employer bound subject to Commission order*

3593. Proposed subclause 10(5) would provide that a new employer is bound by the Division 2 pre-reform CA by operation of proposed subclauses 10(1), 10(2) and 10(3), subject to an order of the AIRC under proposed clause 14.

*Old employer's rights and obligations that arose before time of transmission not affected*

3594. Proposed subclause 10(6) would provide that this clause does not affect the rights and obligations of the old employer in respect of a transferring employee that arose before the time of transmission. This means, for example, that subclause 10(1) does not intend to transfer liability for accrued employee entitlements to a new employer from an old employer.

*New clause 11 – Interaction rules*

3595. Proposed clause 11 would provide interaction rules that are specific to Division 2 pre-reform CAs and other instruments. Proposed clause 11 is to be read in conjunction with clause 10.

*Transmitted certified agreement*

3596. Subclause 11(1) would provide that this clause applies if subclause 11(1) applies to the Division 2 pre-reform CA (ie to a transmitted Division 2 pre-reform CA).

*Existing certified agreement*

3597. Subclause 11(2) would specify arrangements for where the new employer is bound by a collective agreement immediately before the time of transmission (the *existing collective agreement*) with respect to other employees who are not transferring employees, and the existing collective agreement would be capable of applying on its terms to a transferring employee. The existing collective agreement would not apply to the transferring employee by force of this clause.

3598. The effect of this would be that a transmitted Division 2 pre-reform CA would not be 'overridden' by an existing collective agreement that binds the new employer.

3599. However, subclause 11(2) does not intend to prevent an existing collective agreement from applying to transferring employees where the transmitted Division 2 pre-reform CA is terminated during the transmission period.

3600. Proposed subclause 11(3) would provide that subclause 11(2) does not apply at the end of the transmission period. Therefore, at the end of the 12 months after transmission, the existing collective agreement if it is capable of applying on its terms, would not be precluded from applying to a former transferring employee by subclause 11(2).

3601. A new employer's existing collective agreement could therefore cover former transferring employees once the end of the transmission period has passed or where the transmitted Division 2 pre-reform CA is terminated.

*Transitional industrial instruments not to apply*

3602. Proposed subclause 11(4) would provide that from the time of transmission a transitional industrial instrument cannot apply to a transferring employee's employment, other than the transmitted Division 2 pre-reform CA. This means that a new employer's existing transitional industrial instruments are not capable on their terms of applying to transferring employees.

3603. Proposed subclause 11(5) would provide that subclause 11(4) has effect despite section 170LY of the pre-reform Act.

*New clause 12 – Termination of transmitted Division 2 pre-reform certified agreement*

*Transmitted agreement*

3604. Proposed subclause 12(1) would provide that this clause applies if subclause 10(1) applies to the Division 2 pre-reform CA (ie to a *transmitted Division 2 pre-reform CA*).

## AWA

3605. Proposed subclause 12(2) would provide that despite subclause 3(2) of Schedule 14, the transmitted Division 2 pre-reform CA ceases to be in operation in relation to a transferred employee if the new employer and the transferred employee make a new AWA. This means that the transmitted Division 2 pre-reform CA cannot bind the new employer in respect of the transferring employee again, when an AWA has operated in respect of the employment, even if the AWA is terminated prior to the end of the transmission period.

3606. The proposed Note would clarify that a Division 2 pre-reform CA is normally only suspended in respect of a particular employee while an AWA is in operation, whereas the effect of proposed subclause 12(2) would be to permanently cancel the transmitted Division 2 pre-reform CAs operation.

### *Modified operation of sections 170MH and 170MHA of the old Act*

3607. Proposed subclause 12(3) would provide that a person may not apply to the AIRC to have the transmitted Division 2 pre-reform CA terminated under sections 170MH or 170MHA of the pre-reform Act during the transmission period, even though the agreement has passed its nominal expiry date. This provision is intended to be an exception to the rule that a CA may be terminated by the AIRC, when it has reached its nominal expiry date to ensure that a valid majority of transferring employees have to approve to terminate the transmitted Division 2 pre-reform CA.

## **New Division 2 – Commission’s powers**

3608. Division 2 would deal with AIRC’s power to make orders with respect to a transferring Division 2 pre-reform CA.

### *New clause 13 – Application and terminology*

3609. Proposed subclause 13(1) would provide that the Division applies if a person is bound by a Division 2 pre-reform CA and that person’s business or part of a business becomes, or is likely to become transmitted.

3610. This definition is to enable the Division to capture the time before transmission as well as at, or after, transmission.

3611. Proposed subclause 13(2) defines terms to be used in the Division, which again reflect that the Division is to apply before, at and after the time of transmission.

### *New clause 14 – Commission may make order*

3612. Proposed subclauses 14(1) and (2) would provide that the AIRC can make an order that an *incoming employer*:

- is not, or will not be, bound by a Division 2 pre-reform CA that would otherwise bind the incoming employer under proposed subclause 10(1); or

- is, or will be, bound by the Division 2 pre-reform CA that binds an incoming employer by operation of subclause 10(1), but only to the extent that the AIRC's order specified, including for a specified period.

3613. The AIRC's order must specify the day from which the order takes effect, however this time cannot be before the *transfer time*.

3614. Proposed subclause 14(3) would provide that the AIRC cannot make an order that would vary or extend the transmission period to provide that a transmitted Division 2 pre-reform CA is binding on a new employer for a period longer than 12 months.

*New clause 15 – When an application for an order can be made*

3615. Proposed clause 15 would provide that an application for an order under subclause 14(1) can be made before, at or after the transfer time.

*New clause 16 – Who may apply for order*

3616. Proposed clause 16 would prescribe who may apply for an order from the AIRC under proposed clause 16 in respect of a Division 2 pre-reform CA.

3617. Subclause 16(1) would provide that before the transfer time, an application for an order can only be made by the *outgoing employer*. Therefore, before the transfer time the incoming employer could not apply for an order that would limit the effect of a Division 2 pre-reform CA.

3618. Subclause 16(2) would provide that at or after the transfer time, an application may be made by the:

- incoming employer;
- a transferring employee in relation to the Division 2 pre-reform CA;
- an organisation of employees that is bound by the Division 2 pre-reform CA; or
- an organisation of employees that is entitled to apply in accordance with proposed paragraph 16(2)(d).

3619. The outgoing employer cannot apply for an order at or after the transfer time as it would no longer be bound by the Division 2 pre-reform CA in respect of the transferring employee under this Division.

*New clause 17 – Applicant to give notice of application*

3620. Proposed clause 17 would provide that an applicant for an order by the AIRC under proposed clause 14 must take reasonable steps to give written notice of the application to all persons who may make submissions in relation to the application (a person who can make a submission is specified under clause 18). This is not a civil remedy provision.

*New clause 18 – Submissions in relation to application*

3621. Proposed clause 18 would establish who may make a submission to the AIRC in relation to an application for an order under proposed clause 14 with respect to the Division 2 pre-reform CA.

3622. Under subclauses 18(1) and 18(2), before the transfer time the following must be given an opportunity by the AIRC to make a submission:

- the applicant;
- an employee of the outgoing employer who is bound by the Division 2 pre-reform CA and who is employed in the business concerned;
- the incoming employer;
- an organisation of employees that is bound by the Division 2 pre-reform CA;
- an organisation of employees that is entitled to make a submission under proposed paragraph 18(2)(d).

3623. Under proposed subclauses 18(1) and 18(3), at or after the transfer time the following must be given an opportunity by the AIRC to make a submission:

- the applicant;
- the incoming employer;
- a transferring employee in relation to the transmitted Division 2 pre-reform CA;
- an organisation of employees that is bound by the transmitted Division 2 pre-reform CA; and
- an organisation of employees that is entitled to make a submission under proposed paragraph 18(3)(d).

3624. The requirements for organisations under proposed paragraphs 18(2)(d) and 18(3)(d) mirror the requirements for standing with respect to enforcement and compliance in proposed Part VIII.

*New Part 5 – Transmission of State transitional instruments*

3625. Proposed Part 5 would contain the transmission of business provisions specific to the transfer of State transitional instruments from an old employer to a new employer.

3626. State transitional instruments are defined as preserved State agreements and notional instruments preserving State awards within the meaning of Schedule 15 (at clause 3).

## **New Division 1 – General**

3627. Proposed Division 1 would deal with the general provisions relating to the transfer of State transitional instruments.

### *New clause 19 – Transmission of State transitional instruments*

#### *New employer bound by State transitional instrument*

3628. Proposed subclause 19(1) would provide that where the old employer and employees of the old employer were bound by a State transitional instrument immediately before the time of transmission and there is at least one transferring employee in relation to the State transitional instrument, the new employer will be bound by the State transitional instrument

3629. This means that a new employer who is a successor, transmittee or assignee to a business or part of a business, will be bound by the State transitional instrument that was binding on the old employer, in respect of an employee if that employee is employed by the new employer within 2 months and the State transitional instrument is capable of covering the employee's employment with the new employer.

3630. Proposed Note 1 would mention that where the State transitional instrument becomes binding on the new employer by force of this clause, the new employer may have obligations imposed by clauses 28 and 29 with respect to notification.

3631. Proposed Note 2 would mention that the provision should be read in conjunction with and subject to proposed clause 20.

#### *Period for which new employer remains bound*

3632. Proposed subclause 19(2) would establish how long the new employer will be bound by the transmitted State transitional instrument. It would specify five events which would cause the new employer to no longer be bound the transmitted State transitional instrument in its entirety. This result would be brought about on the occurrence of whichever of the events occurs first. They are outlined below.

3633. Firstly, the transmitted State transitional instrument would cease to bind the new employer if it is a preserved State agreement and it ceases to be in operation under proposed clauses 5 and 21 of Schedule 15.

3634. Secondly, the transmitted State transitional instrument would cease to be binding on the new employer, where it is a notional instrument preserving a State award, at the end of the period of 3 years, starting at the reform commencement (see clause 33(1) of Schedule 15).

3635. Thirdly, the transmitted State transitional instrument would cease to bind the new employer when there are no longer any transferring employees in relation to the transmitted State transitional instrument. This is where all the transferring employees, for example, either cease to be employed by the new employer or move to another job while working for the new employer that is not capable of being covered by the transmitted State transitional instrument.

3636. Fourthly, the new employer would cease to be bound by the transmitted State transitional instrument in respect of the transferring employees when the transferring employees replace the transmitted State transitional instrument with a collective agreement, or all of the transferring employees enter into AWAs with the new employer.

3637. Finally, the transmitted State transitional instrument would not be binding on the new employer once the transmission period ends. This means that a new employer would only be bound by the transmitted State transitional instrument by force of subclause 19(1) for a maximum period of 12 months.

3638. The proposed Note would mention that proposed subclause 19(3) should be considered to determine how the new employer ceases to be bound by a State transitional instrument in respect of each transferring employee in order to assess whether all transferring employees are no longer bound by the transmitted State transitional instrument

*Period for which new employer remains bound in relation to a particular transferring employee*

3639. Proposed subclause 19(3) would provide the circumstances where the new employer would no longer be bound by the transmitted State transitional instrument in relation to each transferring employee in contrast to proposed subclause 19(2) which would stipulate when the new employer ceases to be bound by the transmitting State transitional instrument in respect of all employees. Subclause 19(3) lists four ways in which this can occur.

3640. Firstly, the transmitted State transitional instrument, if it is a preserved State agreement, would cease to be in operation in relation to a transferring employee where the new employer makes a workplace agreement with the transferring employee.

3641. Secondly, the transmitted State transitional instrument, if it is a notional agreement preserving State awards, would cease to be in operation in relation to a transferring employee where it is replaced by a workplace agreement between the new employer and the employee.

3642. Thirdly, the transmitted State transitional instrument, if it is a notional agreement preserving State awards, may cease to be binding on the new employer if an award becomes binding on the transferring employee (proposed subclause 33(3) of Schedule 15).

3643. Lastly, the new employer may cease to be bound by the State transitional instrument because an event in proposed subclause 19(2) has occurred.

*New employer bound only in relation to employment of transferring employees in the business being transferred*

3644. Proposed subclause 19(4) would provide that a new employer is bound by the transmitted transitional State instrument in respect of transferring employees only. Therefore, employees of the new employer who are not transferring employees cannot be bound by the transmitted State transitional instrument.

*New employer bound subject to Commission order*

3645. Proposed subclause 19(5) would provide that a *new employer* is bound by the transmitted State transitional instrument by operation of subclauses 19(1), 19(2) and 19(3), subject to an order of the AIRC under proposed clause 23.

3646. Old employer's rights and obligations that arose before time of transmission not affected

3647. Proposed subclause 19(6) would provide that this clause does not affect the rights and obligations of the *old employer* in respect of a *transferring employee* that arose before the *time of transmission*. This means for example, that subclause 19(1) does not intend to transfer liability for accrued employee entitlements to a *new employer* from an *old employer*.

*New clause 20 – Interaction rules*

3648. Proposed clause 20 would provide interaction rules that are specific to transmitted State transitional instruments and other instruments. Proposed clause 20 is to be read in conjunction with clause 19.

*Transmitted instrument*

3649. Subclause 20(1) would provide that this clause applies if 19(1) applies to the State transitional instrument (ie to a transmitted State instrument).

*Collective agreement*

3650. Subclause 20(2) would specify arrangements for where the new employer is bound by a collective agreement immediately before the time of transmission (the *pre-transmission agreement*) with respect to other employees who are not transferring employees, and the pre-transmission agreement would be capable of applying on its terms to a transferring employee. The pre-transmission agreement would not apply to the transferring employee by force of this section.

3651. The effect of this would be that a transmitted State transitional instrument would not be 'overridden' by a pre-transmission agreement that binds the new employer.

3652. However, subclause 20(2) would not intend to preclude a pre-transmission agreement from applying to transferring employees where the transmitted State instrument is terminated.

3653. Proposed subclause 20(3) would provide that subclause 20(2) does not apply at the end of the transmission period. Therefore, at the end of the 12 months after transmission, the pre-transmission agreement if it is capable of applying on its terms, would not be precluded from applying to a former transferring employee by subclause 20(2). A new employer's pre-transmission agreement could therefore cover former transferring employees once the end of the transmission period has passed or where the transmitted State instrument ceases to operate.

3654. Proposed subclause 20(4) would provide that from the time of transmission a transitional industrial instrument cannot apply to a transferring employee's employment, other than the



transmitted State transitional instrument. This means that a new employer's existing transitional industrial instruments are not capable on their terms of applying to transferring employees.

3655. Proposed subclause 20(5) would provide that subclause 20(4) has effect despite subclauses 5 and 25 of Schedule 14.

*New clause 21 – Termination of preserved State agreement*

*Transmitted agreement*

3656. Proposed subclause 21(1) would provide that this clause applies if subclause 19(1) applies to the preserved State individual agreement

*Modified operation of subsection 170VM(3) – (7) of the pre-reform Act*

3657. Proposed subclause 21(2) would provide that subclause 21(3) applies to a transmitted preserved individual agreement where section 170VM of the pre-reform Act is applied to the agreement under subclause 21(3) of Schedule 15.

3658. Proposed subclause 21(3) would provide that the transmitted preserved State individual agreement cannot be terminated under subsections 170VM(3) or 170VM(6) of the pre-reform Act, during the transmission period, even if the agreement has passed its nominal expiry date. This provision is intended to be an exception to the rule that a preserved State agreement may be terminated after its nominal expiry date.

*Modified operation of sections 170MH and 170MHA of the pre-reform Act*

3659. Proposed subclause 21(4) would provide that subclause 21(5) applies to a transmitted preserved collective State agreement where section 170MH or 170MHA of the pre-reform Act is applied to the agreement under subclause 21(3) of Schedule 15.

3660. Proposed subclause 21(5) would provide that the transmitted preserved collective State agreement cannot be terminated under sections 170MH or 170MHA of the pre-reform Act, during the transmission period, even if the agreement has passed its nominal expiry date. This provision is intended to be an exception to the rule that a preserved State agreement may be terminated after its nominal expiry date, to ensure that a valid majority of transferring employee must agree to have the transmitted preserved State agreement terminated.

**New Division 2 – Commission's powers**

3661. Division 2 would deal with AIRC's power to make orders with respect to transferring State transitional instruments.

*New clause 22 – Application and terminology*

3662. Proposed subclause 22(1) would provide that the Division applies if a person is bound by a State transitional instrument and that person's business or part of a business becomes, or is likely to become, transmitted.

3663. This definition is to enable the Division to capture the time before transmission as well as at or after transmission.

3664. Proposed subclause 22(2) defines terms to be used in the Division, which again reflect that the Division is to apply before, at and after the time of transmission.

*New clause 23 – Commission may make order*

3665. Proposed subclauses 23(1) and 23(2) would provide that the AIRC can make an order that an incoming employer:

- is not, or will not be, bound by a State transitional instrument that would otherwise bind the incoming employer under subclause 19(1) or
- is, or will be, bound by the State transitional instrument that binds the incoming employer by operation of subclause 19(1) but only to the extent that the AIRC's order specified, including for a specified period.

3666. The AIRC's order must specify the day from which the order takes effect, however this time cannot be before the transfer time.

3667. Proposed subclause 23(3) would provide that the AIRC cannot make an order that would vary or extend the transmission time to provide that a transmitting State transitional instrument is binding on a new employer for a period longer than 12 months.

*New clause 24 – When an application for an order can be made*

3668. Proposed clause 24 would provide that an application for an order under subclause 23(1) can be made before, at or after the transfer time.

*New clause 25 – Who may apply for order*

3669. Proposed clause 25 would prescribe who may apply for an order from the AIRC in respect of a State transitional instrument.

3670. Subclause 25(1) would provide that before the transfer time, an application for an order can only be made by the outgoing employer. Therefore, before the transfer time, the incoming employer could not apply for an order.

3671. Subclause 25(2) would provide that at or after the transfer time, an application may be made by the incoming employer, a transferring employee in relation to the State transitional instrument, an organisation of employees that is bound by the State transitional instrument or an organisation of employees that is entitled to apply in accordance with proposed paragraph 25(2)(d). The outgoing employer cannot apply for an order at or after the transfer time as it would no longer be bound by the State transitional instrument in respect of the transferring employee under this Division.

*New clause 26 – Applicant to give notice of application*

3672. Proposed clause 26 would provide that an applicant for an order by the AIRC under proposed clause 23 must take reasonable steps to give written notice of the application to all persons who may make submissions in relation to the application (a person who can make a submission is specified under clause 27). This is not a civil remedy provision.

*New section 27 – Submission in relation to application*

3673. Proposed clause 27 would establish who may make a submission to the AIRC in relation to an application for an order under proposed clause 23 to prevent or stop a State transitional instrument from transmitting.

3674. Under subclauses 27(1) and 27(2), before the transfer time the following must be given an opportunity by the AIRC to make a submission:

- the applicant;
- an employee of the outgoing employer who is bound by the State transitional instrument and who is employed in the business concerned;
- the incoming employer;
- an organisation of employees that is bound by the State transitional instrument;
- an organisation of employees that is entitled to make a submission under proposed paragraph 27(2)(d).

3675. Under proposed subclauses 27(1) and 27(3), at or after the transfer time the following must be given an opportunity by the AIRC to make a submission:

- the applicant;
- the incoming employer;
- a transferring employee in relation to the transmitted State transitional instrument;
- an organisation of employees that is bound by the transmitted State transitional instrument; and
- an organisation of employees that is entitled to make a submission under proposed paragraph 27(3)(d)(ii).

3676. The requirements for organisations under proposed paragraphs 27(2)(d) and 27(3)(d) mirror the requirements for standing with respect to enforcement and compliance in proposed Part VIII.

## **New Part 6 – Notice requirements and enforcement**

### *New clause 28 – Informing transferring employees about transmission of transitional instrument*

3677. Proposed clause 28 would create notification obligations for a new employer with respect to a transferring employee. The effect of the provisions would be to inform the transferring employee about the operation of transferred instruments and what instruments may apply to the transferred employee and new employer in a transmission of business situation. The provisions are civil remedy provisions.

3678. Subclause 28(1) would apply where a transitional instrument binds an employer by force of the transmission of business provisions (clauses 7, 10 and 19) in respect of a transferring employee.

3679. Subclause 28(2) would provide that within 28 days after the transferring employee commences employment with the new employer, the new employer must take reasonable steps to give the transferring employee a notice that complies with subclause 28(3). There may be exceptional circumstances which prevent a new employer from complying with subsection 28(2).

3680. Subsection 28(3) would set out what must be contained in the notice for it to comply with the provision.

3681. The notice must:

- identify the transmitted transitional instrument (eg the name and date of commencement of the pre-reform AWA, Division 2 pre-reform certified agreement or State transitional instrument);
- confirm that the new employer is bound by the transmitted transitional instrument;
- specify the end date for the transmission period (ie the actual date that is 12 months from the time of transmission);
- explain that the new employer will continue to be bound by the transmitted transitional instrument until the end of the transmission period unless it is terminated or otherwise ceases to have effect before the end of that period;
- specify how the transferred employee and the new employer might cease to be bound to the transmitted transitional instrument;
- set out the new employer's intentions for what instruments will cover the transferring employer (eg the employer intends to make a new collective agreement with the transferring employees);
- identify any other instrument that may be capable of applying, on its terms to the transferring employees when the transmission period ends, or if the transmitted transitional instrument is terminated.

3682. The requirement that the new employer's intentions be indicated in relation to the instrument that would regulate the transferring employees employment at the end of the transmission period, or, if the transmitted instrument is terminated, should not of itself be seen as imposing any legal obligation on the new employer to act as intended. However, this would not preclude penalties under some other law if these statements amounted to, for example, fraud or misleading conduct.

3683. Subclause 28(4) would establish situations where a new employer does not have the notification obligations imposed by clause 28.

3684. Where a transferring employee is bound by a pre-reform AWA, and the transferring employee and the new employer make a new AWA at the time of transmission, or within 14 days of that time, then the new employer will not be obliged to give notice under clause 28.

3685. Also, where the transmitted instrument is not a pre-reform AWA and the new employer and a transferring employee become bound by an AWA or collective agreement at the time of, or within 14 days after, the time of transmission, the new employer would not have notification obligations in respect of that transferring employee.

3686. The reason for removing the notification requirements in these situations is that the transmitted transitional instrument ceases to operate under Schedule 16 or at the choice of a transferring employee soon after the time of transmission, making notification redundant.

*New clause 29 – Lodging copy of notice with Employment Advocate*

*Only one transferring employee*

3687. Proposed subclause 29(1) would deal with the situation where there is only one transferring employee with respect to the particular transmitted transitional instrument.

3688. Where there is only one transferring employee with respect to a transmitting pre-reform AWA, Division 2 pre-reform CA or State transitional instrument, and the new employer gives notice under subclause 29(2) to that employee, the employer must also lodge a copy of the notice with the Employment Advocate.

3689. This notice must be lodged in accordance with subclause 29(4) within 14 days of giving the notice to the transferring employee.

3690. Proposed Note 1 would indicate that subclause 29(1) is a civil remedy provision with reference to clause 31.

3691. Proposed Note 2 would refer to obligations imposed by sections 137.1 and 137.2 of the *Criminal Code* in relation to the provision of information or documents.

*Multiple transferring employees and notices all given on the one day*

3692. Proposed subclause 29(2) would deal with the situation where there are a number of transferring employees with respect to a particular instrument, who were all given notice under subclause 28(2) on the same day.

3693. Where the new employer gives a number of notices under subclause 28(2) to transferring employees in relation to a transmitting Division 2 pre-reform CA or State transitional instrument, and all the notices are given on the one day, the employer must lodge a copy of one of those notices with the Employment Advocate.

3694. This notice must be lodged in accordance with subclause 29(4) within 14 days of giving the notice to the transferring employee.

3695. Proposed Note 1 would indicate that subclause 29(2) is a civil remedy provision with reference to clause 31.

3696. Proposed Note 2 would refer to obligations imposed by sections 137.1 and 137.2 of the *Criminal Code* in relation to the provision of information or documents.

*Multiple transferring employees and notices given on different days*

3697. Proposed subclause 29(3) would deal with the situation where there are a number of transferring employees with respect to a particular instrument, who were all given notice under subclause 28(2) but on different days.

3698. Where the new employer gives a number of notices under subclause 28(2) to transferring employees in relation to a transmitting Division 2 pre-reform CA or State transitional instrument, and all the notices are given on different days, the employer must also lodge a copy of one of those notices with the Employment Advocate.

3699. This notice must be a copy of the notice given on the first of those days and lodged in accordance with subclause 29(4) within 14 days of giving the first notice to a transferring employee.

3700. Proposed Note 1 would indicate that subclause 29(3) is a civil remedy provision with reference to clause 31.

3701. Proposed Note 2 would refer the reader to obligations imposed by sections 137.1 and 137.2 of the *Criminal Code* in relation to the provision of information or documents.

*Lodgment with the Employment Advocate*

3702. Proposed subclause 29(4) would provide that a notice is lodged in accordance with this subclause only once it is actually received by the Employment Advocate.

3703. The proposed Note would explain that section 29 *Acts Interpretation Act 1901* (AI Act) does not apply to lodgment of a notice. Section 29 of the AI Act provides that service of a document is normally effected when it is ‘properly prepaid, addressed and posted’.

*New clause 30 – Employment Advocate must issue receipt for lodgment*

3704. Proposed clause 30 would provide that the Employment Advocate must issue a receipt for a notice received under clause 29. The receipt must state that it was lodged in accordance with clause 29 and specify the date.

3705. The Employment Advocate would need to give a copy of the receipt to the person who lodged the notice under clause 29.

*New clause 31 – Civil penalties*

3706. Proposed clause 31 would deal with the civil remedy provisions of Schedule 16.

3707. Subclause 31(1) would specify the notification provisions in relation to transmitted transitional instruments under subclauses 28(2) and 29(1), 29(2) and 29(3) are civil remedy provisions.

3708. The proposed note would indicate that proposed Division 4 of Part VIII also contains provisions that are relevant to the consideration of civil remedies under the WR Act.

3709. Proposed subclauses 29(2) and 29(3) would provide that the Federal Magistrates Court or the Federal Court (the *Court*) may order a person who has contravened the civil remedy provisions to pay a pecuniary penalty of not more than 300 penalty units for a body corporate or 60 penalty units in other cases.

3710. Subclause 29(4) would establish who has standing (ie who is entitled) to make an application in relation to enforcing the notification requirements under subclauses 28(2), 29(1), 29(2) and 29(3). Who has standing would vary depending on the nature of the transmitted transitional instrument.

**New Part 7 – Matters relating to Victoria**

3711. Proposed Part 7 would provide that, to the extent that Schedule 16 provides transmission of business rules for transitional instruments that were made under the extended operation of the WR Act to cover employees and employers in Victoria, or which apply to purely through the referral of power by the Parliament of Victoria to the Parliament of the Commonwealth in the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) (‘CP(IR) Act’), and to the extent that the transmission of business rules affect such employees and employers, those provisions would apply only in so far as and as long as they are within the powers referred by the CP(IR) Act.

*New clause 32 – Definitions*

3712. Proposed clause 32 would provide definitions to apply throughout Part 7 of Schedule 16 to the WR Act.

3713. Under clause 32, the terms *employee*, *employer* and *employment* would have the same meaning as provided by proposed section 489 of the WR Act. Consequentially, an *employee* for the purposes of Part 7 of Schedule 16 will mean an employee in Victoria who is both within the meaning of *employee* in section 3 of the CP(IR) Act, and not an employee within the meaning of proposed subsection 4AA(1). Expressed another way, an *employee* within the meaning of clause 32 is a person who is an *employee* within the meaning of section 3 of the CP(IR) Act in Victoria, and not one of the following:

- an employee of a constitutional corporation; or
- an employee of the Commonwealth; or
- an employee of a person or entity (which may be an unincorporated club) of an individual, so far as the person or entity, in connection with constitutional trade or commerce, employs the individual as a flight crew officer, a maritime employee or a waterside worker;
- an employee of a body corporate incorporated in a Territory; or
- a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person or entity employs the employee in connection with the activity carried on in the Territory.

3714. The terms *employer* and *employment* would have a meaning that corresponds to *employee* in Part 7 of Schedule 16 to the WR Act.

3715. As a result of the meanings of *pre-reform AWA*, *pre-reform certified agreement* and *section 170MX award* provided by clause 3 of Schedule 16 (see also clause 1 of Schedule 14), the provisions of Schedule 16 would apply on their terms (subject to modifications made by Part 7 of Schedule 16) to a *Victorian reference AWA*, *Victorian reference certified agreement* or *Victorian reference section 170MX award*. This would be the case because:

- a 'Victorian reference AWA' within the meaning of clause 32 would be within the definition of a 'pre-reform AWA' within the meaning of clause 3;
- a 'Victorian reference certified agreement' within the meaning of clause 32 would be within the definition of a 'pre-reform certified agreement' within the meaning of clause 3; and
- a 'Victorian reference section 170MX award' within the meaning of clause 32 would be within the definition of a 'section 170MX award' within the meaning of clause 3.



3716. Clause 32 would also provide that, for the purposes of Part 7 of Schedule 16 to the WR Act, the term ‘this Schedule’ means Schedule 16 but not Part 7 of Schedule 16.

*New clause 33—Additional effect of Schedule*

3717. Proposed clause 33 would provide that Schedule 16 shall have additional effect in relation to the *employment* of ‘employees’ by ‘employers’ (as those terms are defined by proposed section 489), for so long, and in so far, as that extended application is within a referral of matter by the Parliament of Victoria to the Parliament of the Commonwealth in the CP(IR) Act.

3718. Subclause 33(1) would provide that, without affecting its operation apart from proposed clause 33, Schedule 16 the WR Act also has effect that it would have if:

- each reference in Schedule 16 to an *employer* meant an *employer* within the meaning of proposed subsection 4AB(1) or an *employer* within the meaning of proposed section 489 in Victoria;
- each reference in Schedule 16 to an *employee* meant an *employee* within the meaning of proposed subsection 4AA(1) or an *employee* within the meaning of proposed section 489 in Victoria;
- each reference in Schedule 16 to *employment* meant *employment* within the meaning of proposed subsection 4AC(1) or *employment* within the meaning of proposed section 489 in Victoria;
- each reference in Schedule 16 to ‘employed’ included ‘employed’ within the meaning of proposed section 489 in Victoria; and
- Part 5 of Schedule 16 (which relates to State industrial instruments which are not relevant to Victoria) had not been enacted.

3719. Proposed subclause 33(2) would make it clear that, to the extent that Schedule 16 (as it has effect because of subclause 33(1)) applies if an *employer* (within the meaning of proposed section 489) in Victoria becomes the successor, transmittee or assignee of the whole, or a part, of the business of an *employer* within the meaning of proposed subsection 4AB(1) or an *employer* within the meaning of proposed section 489 in Victoria, Schedule 16 only operates for as long as, and in so far, as the relevant referral of a matter to the Parliament of the Commonwealth is in effect and provides sufficient legislative power for Schedule to have that effect. This reflects the constitutional position.

3720. Proposed subclause 33(3) would make it clear that, to the extent that Division 2 of Part 4 of Schedule 16 (as it has effect because of subclause 33(1)) applies if an *employer* (within the meaning of proposed section 489) in Victoria is likely to become the successor, transmittee or assignee of the whole, or a part, of the business of an *employer* within the meaning of proposed subsection 4AB(1) or an *employer* within the meaning of proposed section 489 in Victoria, Division 2 of Part 4 of Schedule 16 only operates for as long as, and in so far, as the relevant referral of a matter to the Parliament of the Commonwealth is in effect and provides sufficient legislative power for Schedule to have that effect. This reflects the constitutional position.

## **New Part 8 – Transitional instruments and transmitted post-reform instruments**

### *New clause 34 – Relationship between transitional instruments and transmitted collective agreement*

3721. Proposed subclause 34(1) would provide that this clause applies if subsection 125(1) applies to a collective agreement (ie to a *transmitted collective agreement*).

3722. Proposed subclause 34(2) would provide that from the time of transmission, a transitional industrial instrument does not apply to a transferring employee's employment with the new employer.

3723. This means that the transferring employees in relation to a transmitted collective agreement cannot be covered by an employer's existing transitional instrument.

3724. Proposed subclause 34(3) would define terms relevant to the clause.

### *New clause 35 – Relationship between transitional instruments and transmitted award*

3725. Proposed subclause 35(1) would provide that this clause applies if subsection 126(1) applies to an award (ie to a *transmitted award*).

3726. Proposed subclause 35(2) would provide that from the time of transmission, a transitional industrial instrument does not apply to a transferring employee's employment with the new employer.

3727. This means that the transferring employees in relation to a transmitted award, cannot be covered by an employer's existing transitional instrument.

3728. Proposed subclause 35(3) would provide that the clause operates despite provisions which may provide the contrary.

3729. Proposed subclause 35(4) would define terms relevant to the clause.

## **New Part 9 – Miscellaneous**

### *New clause 36 – Regulations*

3730. Proposed clause 36 would enable regulations to be made with respect to the succession, transmission or assignment of a business or part of a business, and the obligations of employers subject to transitional industrial instruments in these situations. The regulations might also deal with the terms and conditions of the employment of employees covered by transitional industrial instruments whose employment is affected by a transmission, assignment or succession of a business, or part of a business.

3731. This regulation making power is intended to be broad in scope, and should not be construed narrowly.

## **Schedule 2 – Transitional arrangements for State organisations**

### **Item 1 – After section 4A**

3732. This item would insert proposed clause 4B.

#### *New section 4B – Schedule 17 has effect*

3733. Proposed clause 4B would give effect to Schedule 17.

### **Item 2 – At the end of the Act**

3734. This item would add a new Schedule to the WR Act.

## **Schedule 17 – Transitionally-registered associations.**

3735. The Schedule would allow State registered employer and employee associations who have rights under State industrial laws to represent members who are moving into the federal system to gain transitional registration status under the WR Act and thereby retain their right to represent those members.

3736. A transitionally registered association would have three years to become fully registered under Schedule 1B. During that period, its activities would continue to be governed by its State registration regime and not Schedule 1B. However, it would be given the same rights and obligations as a registered organisation has under the WR Act. For example, it would be able to enter into collective agreements, apply for right of entry permits, and engage in protected industrial action.

3737. The Schedule would set out a scheme for transitional registration, including the criteria for registration and cancellation of transitional registration provisions. It would also provide that regulations may be made that would affect the way in which the registration provisions in of Schedule 1B would apply to transitionally registered associations seeking full federal registration. It is intended that those regulations would affect the operation of the ‘conveniently belong rule’ and provide that transitionally registered associations which are identical to an organisation (or part of an organisation) registered under Schedule 1B would not be entitled to fully register.

#### *New clause 1 – Definitions*

3738. Proposed clause 1 would define a number of terms which would be used in Schedule 17. One of these terms would be ‘State-registered association’, which would be defined as a body that is an industrial organisation or association for the purposes of specified State workplace relations legislation.

#### *New clause 2 – Application for transitional registration*

3739. Proposed clause 2 would set out the criteria which a State-registered association must satisfy in order to transitionally register.

3740. Such an association would not be eligible for transitional registration unless, immediately prior to the commencement of the Schedule, it:

- was bound by a State award or State employment agreement (paragraph 2(1)(a));
- had at least one member who was an employee and whose employment was subject to the award, employment agreement, or a State or Territory industrial law, or an employer of such an employee (paragraph 2(1)(b)); and
- was entitled to represent the industrial interests of the member in relation to the work that was covered by the award, employment agreement, or State or Territory industrial law (paragraph 2(1)(c)).

3741. In addition to these criteria, an association would not be eligible for transitional registration unless on the reform commencement, the employee or employer will become bound by, or the employment of the employee will be subject to, a preserved State agreement or a notional agreement preserving State awards (paragraph 2(1)(d)).

3742. The final criterion would be that the association is not already an organisation or a branch of an organisation registered under Schedule 1B (paragraph 2(1)(e)).

3743. The purpose of this requirement would be to prevent multiple registrations by the same entity as some State-registered associations may already be registered under Schedule 1B. For example, a federally registered organisation or a branch of a federally registered organisation may register as an organisation under the *Industrial Relations Act 1996* (NSW). Such associations would not be able to transitionally register under Schedule 17.

3744. Subsection 2(2) would provide that an application for transitional registration must be accompanied by:

- a copy of the rules of the association (paragraph 2(2)(b));
- other particulars of the association (for example, its address and details of its officers) (paragraph 2(2)(c)); and
- evidence establishing that the applicant satisfies the criteria set out in subsection (1) (paragraph 2(2)(a)).

3745. Subclause 2(3) would provide that the Registrar must grant an application for transitional registration if he or she is satisfied the association has satisfied the criteria set out in subclause 2(1). The grant of transitional registration would be required to be recorded on a written instrument. The written instrument issued by the Registrar:

- would not be a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (subsection 2(4)), and
- must be provided to the association granted transitional registration (subclause 351(5)).

3746. Subclause 2(6) would provide that an association is taken to be registered under Schedule 17 when the Registrar grants the application.

*New clause 3 – Application of this Act to transitionally-registered associations*

3747. Proposed clause 3 would provide that the provisions of the WR Act (other than Schedule 1B) apply to associations granted transitional registration as though they were organisations registered under Schedule 1B. This would confer upon transitionally-registered associations the same rights and obligations enjoyed by Schedule 1B organisations under the WR Act such as being able to enter into collective agreements and apply for right of entry permits.

3748. Clause 3 would also provide that the provisions of the WR Act (other than Schedule 1B) apply to the transitionally registered association as though it were a legal person.

3749. The non-application of Schedule 1B to transitionally registered associations occurs through the use of the term ‘this Act’ in the proposed section. ‘This Act’ would be defined in proposed clause 4 so as to exclude Schedule 1B or regulations made under Schedule 1B. Transitionally registered associations would not be required to comply with the provisions of Schedule 1B, insofar as they apply to organisations within the meaning of Schedule 1B. This is to avoid them being required to comply with two substantive sets of governance provisions as they will remain subject to whatever regulatory requirements are imposed upon them by virtue of their registration or status under state industrial laws.

*New clause 4 – Representation rights of transitionally-registered associations*

3750. Proposed subclause 4(1) would provide that regulations may be made enabling the AIRC to make orders in relation to the right of transitionally-registered associations to represent the interests of particular classes or groups or employees. Subclause 4(2) would provide that such regulations may specify the weight to be given by the AIRC to existing State demarcation orders. It is intended that the regulations made under this section would require the AIRC to take appropriate account of any State demarcation orders and whether those demarcations should be maintained in the federal system.

*New clause 5 – Cancellation of transitional registration*

3751. Proposed clause 5 would set out the grounds on which the Federal Court, the AIRC, or the Registrar would be able to cancel an association’s transitional registration.

Cancellation by the Federal Court

3752. Subclause 5(1) would provide that an interested person or the Minister for Employment and Workplace Relations may apply to the Federal Court for an order cancelling the transitional registration of an association on certain grounds.

3753. These grounds include that the association (or a substantial number of its members):

- has engaged in conduct which has prevented or hindered the achievement of an object of the WR Act (paragraph 5(1)(a));

- has engaged in industrial action that has prevented, hindered or interfered with the activities of a federal system employer or with the provision of any public service by the Commonwealth, a State or a Territory or an authority of the Commonwealth, a State or a Territory (subparagraphs 5(1)(b)(i) – (ii)); or
- has, or is, engaged in industrial action which has had, or is likely to have, a substantial adverse effect on the safety, health and welfare of the community or a part of the community (paragraph 5(1)(c)).

3754. A further ground for the cancellation of transitional registration would be that the association (or a substantial number of its members or a section or class of members) has failed to comply with various Court orders under the WR Act including:

- an injunction to stop industrial action (subparagraph 5(1)(d)(i));
- an order in relation to contravention of the strike pay provisions (subparagraph 5(1)(d)(ii));
- an order made under the WR Act's freedom of association provisions (subparagraph 5(1)(d)(iii));
- an interim injunction granted under proposed section 354A of the WR Act in relation to a contravention of the industrial action, strike pay or freedom of association provisions (subparagraph 5(1)(d)(iv)); or
- an order made under section 23 of Schedule 1B, which provides that certain orders may be made in consequence of a finding that an association or organisation has engaged in prohibited conduct under sections 21 and 22 of Schedule 1B (subparagraph 5(1)(d)(v)).

3755. Subclause 5(2) would provide that an association which is subject to an application to cancel its transitional registration must be given an opportunity to be heard.

3756. Subclause 5(3) would provide the Federal Court with discretion regarding whether it cancels an association's transitional registration. If the Court finds that a ground for cancellation has been established (paragraph 354(4)(a)) then it must cancel the registration unless it considers the cancellation would be unjust having regard to the gravity of the relevant conduct and any mitigating or other conduct (paragraph 5(4)(b)).

#### Cancellation by the AIRC

3757. Proposed paragraph 5(5)(a) would provide that the AIRC may, on application by a State-registered association, cancel the association's transitional registration. Proposed paragraph 5(5)(b) would provide that the AIRC, on application by an interested person or the Minister, may also cancel an association's transitional registration if it is satisfied that the association:

- was registered by mistake (subparagraph 5(5)(b)(i)); or
- is no longer a State-registered association (subparagraph 5(5)(b)(ii)).

### Cancellation by the Registrar

3758. Subsection 5(6) would provide that the Registrar may cancel an association's transitional registration if he or she is satisfied that the association no longer exists. The cancellation must be by written instrument.

3759. Subsection 5(7) would provide that the written instrument recording the cancellation of an association's transitional registration is not a legislative instrument.

### *New clause 6 – End of transitional registration*

3760. Proposed section 6 would provide that an association's transitional registration would cease:

- when cancelled by the Federal Court, the AIRC or the Registrar under section 5 (subclause 6(a)); or
- when the association becomes registered under Schedule 1B (subclause 6(b)).

3761. Clause 6 would also provide that an association's transitional registration would cease three years after the commencement of Schedule 17 (subclause 6(c)). This reflects the fact that these provisions are only transitional and that transitionally registered associations will ultimately need to become an organisation registered under Schedule 1B if they wish to retain rights under the WR Act.

### *New clause 7 – Modification of Registration and Accountability of Organisations Schedule*

3762. Proposed clause 7 would provide that regulations may be made affecting the way in which clause 19 of Schedule 1B would operate in relation to applications for registration as an organisation by transitionally-registered associations. Clause 19 of Schedule 1B sets out the criteria for registration as an employer or employee organisation. One of the requirements is that there is not already an organisation registered under Schedule 1B:

- to which the members of the association applying for registration could more conveniently belong; and
- that would more effectively represent those members.

3763. This is commonly known as the 'conveniently belong to rule'. It is intended that regulations would be made pursuant to clause 7 to provide that this rule does not apply to transitionally registered associations seeking registration under Schedule 1B.

3764. It is also intended that a regulation would also be made under section 356 to make it a criterion for registration that the transitionally-registered association is not substantially or effectively the same as a federal organisation or part of a federal organisation. That regulation would prevent, for example, the registration under Schedule 1B of a State-registered association which is identical in all respects to the State branch of an affiliated federal organisation but has a separate legal identity through being registered under a state industrial law.

### **Schedule 3 – School-based apprentices and trainees**

#### **Item 1 – After Part XVI**

3765. This item would insert a new Part XVII

#### **New Part XVII – School-based apprentices and trainees**

3766. Part XVII would provide for minimum rates of pay and conditions for school-based apprentices and trainees. Item 4 of the table in clause 2 of the Bill enables Part XVII to commence ahead of other provisions in the Bill to ensure that provisions for minimum wages and conditions for school-based apprentices and trainees commence at the start of the 2006 school year.

3767. Proposed Part XVII is designed to remove a major barrier to the employment of school-based apprentices and trainees. Some awards make no specific provision for the pay and conditions of school-based apprentices and trainees. Those awards impose disincentives to the employment of school-based apprentices and trainees because the employer must pay them the full-time apprentice or trainee rate of pay.

3768. Proposed Part XVII would remove these disincentives by establishing appropriate minimum wages and conditions for school-based apprentices and trainees who would not otherwise be covered by an appropriate instrument. The minimum wages would be set at the standard level currently contained in Federal awards.

#### *New section 550 – Definitions*

3769. Proposed section 550 would set out definitions of terms used in Part XVII, including:

3770. *School-based apprentice* would be defined as an employee whose employment is part of his or her schooling, and who would otherwise be a full-time apprentice if working full-time in the same capacity. While undertaking school-based training, the school-based apprentice continues their course of secondary education.

3771. *School-based trainee* would be defined as an employee, other than a school-based apprentice, whose employment is part of a school-based training arrangement. While undertaking school-based training, the school-based trainee would continue their course of secondary education.

3772. *Training arrangement* would be defined to mean a combination of work and training done under a training agreement or contract which is registered with a State or Territory training authority, which is also or alternatively registered under a law of a State or Territory relating to the training of employees.

3773. *Work on-the-job* would be defined, in relation to a school-based apprentice or a school-based trainee, as work that contributes directly to the productive output of the employer of that



apprentice or trainee. It is intended that time spent studying by the employee or undertaking other off-the-job training is not included within the definition.

*New section 551 – Concurrent operation of State and Territory laws*

3774. Proposed section 551 would provide that Part XVII does not apply to the exclusion of a State or Territory law to the extent that the law is capable of operating concurrently with Part XVII. It would operate from the commencement of Part XVII until Part VA commences. During the transitional period, where a State or Federal award that binds a constitutional corporation contains express provisions for school-based apprentices and trainees, pay rates in the award will apply. After the transitional period, wage and classification provisions in awards will be translated into an Australian Pay and Classification Scale.

*New section 552 – Pay for school-based apprentices*

3775. Proposed section 552 would provide for the minimum rate of pay for school-based apprentices in the transitional period, where the relevant wage instrument does not specifically provide for pay rates for this category of employees.

3776. Proposed subsection 552(1) would provide that the rate of pay for a school-based apprentice is an hourly rate of pay that is paid only for hours worked on-the-job, as calculated in accordance with a formula. The formula would provide that the rate of pay payable to a school-based apprentice is the rate for the corresponding full-time first-year apprentice (as contained in the relevant wage instrument) multiplied by 1.25. The formula is consistent with model clauses endorsed by the Full Bench of the AIRC on 6 March 2000 [Print S3850].

3777. To avoid doubt, proposed subsection 552(2) would clarify that subsection 552(1) does not prevent a school-based apprentice from receiving a higher rate of pay, for example in a workplace agreement, than the rate calculated in accordance with subsection 552(1).

3778. Proposed subsection 552(3) would provide that section 552 does not apply to a school-based apprentice if a wage instrument covers the work of the school-based apprentice, and makes specific provision for a rate of pay for school-based apprentices.

*New section 553 – Additional conditions for school-based apprentices*

3779. Proposed section 553 would provide that a school-based apprentice is entitled to the conditions of a corresponding full-time apprentice (other than rates of pay which will be determined in accordance with this proposed Part XVII).

3780. Proposed subsection 553(1) would provide that a school-based apprentice is entitled to the conditions of a corresponding full-time apprentice.

3781. Proposed subsection 553(2) would provide that the full-time conditions to which a school-based apprentice is entitled under subsection 553(1) are adjusted as necessary in proportion to the hours worked on-the-job by the school-based apprentice. The operation of proposed subsection 553(1) is intended to be subject to any regulations made under subsection 553(3).

3782. Proposed subsection 553(3) would enable regulations to be made to determine or make provision for determining:

- whether particular full-time conditions should be adjusted in proportion to the hours worked on-the-job by the school-based apprentice. (In effect, this provision would allow for adjustments to be made to the minimum entitlement that is otherwise conferred under subsection 553(2), to allow for entitlements more generous than the entitlement under subsection 553(2)); and/or
- the method for adjusting particular full-time conditions in proportion to the hours worked on-the-job by the school-based apprentice.

3783. To avoid doubt, proposed subsection 553(4) would clarify that section 553 does not prevent a school-based apprentice from receiving conditions more generous than those provided by section 553.

3784. Proposed subsection 553(5) would provide that section 553 does not apply to a school-based apprentice if a wage instrument covers the work of the school-based apprentice, and makes specific provision for rates of pay for school-based apprentices.

*New section 554 – Pay for apprentices who were school-based apprentices*

3785. Proposed section 554 would provide that, if a school-based apprentice continues an apprenticeship after finishing school, half the time spent as a school-based apprentice will count as time spent as a full-time apprentice. The intended effect of this provision is that it would, in accordance with the formula, count a person's time as a school-based apprentice for the purpose of determining the applicable wage scale for a full-time apprentice in the relevant wage instrument. For example, if an employee has spent two years as a school-based apprentice, that will count as one year spent as a full-time apprentice, and the minimum wage rate for a one-year full-time apprentice will apply.

*New section 555 – Pay for school-based trainees*

3786. Proposed section 555 would provide for the rate of pay for school-based trainees in the transitional period.

3787. Proposed subsection 555(1) would provide a specific rate of pay for school-based trainees. The minimum rate of pay for a school-based trainee enrolled in a year up to and including Year 11 would be \$7.27 per hour. The minimum rate of pay for a school-based trainee enrolled in Year 12 or a later year would be \$7.99 per hour. These rates are drawn from comparable hourly rates of pay for trainees under the *National Training Wage Award 2000*. The level of these rates reflects the fact that school-based trainees are only paid for hours they spend on-the-job, whereas the rates for full-time trainees include payment for time spent in approved off-the-job training. After the commencement of the larger reform Bill, these rates will be preserved, and subject to periodic adjustment by the AFPC.

3788. To avoid doubt, proposed subsection 555(2) would clarify that section 555 does not prevent a school-based trainee from receiving conditions more generous than those provided by subsection 555(1).

3789. Proposed subsection 555(3) would provide that section 555 does not apply to a school-based trainee if a wage instrument covers the work of the school-based trainee, and makes specific provision for a rate of pay for school-based trainees.

*New section 556 – Additional conditions for school-based trainees*

3790. Proposed section 556 would provide that a school-based trainee is entitled to the conditions of a corresponding full-time trainee (other than rates of pay which will be determined in accordance with this Part XVII).

3791. Proposed subsection 556(1) would provide that a school-based trainee is entitled to the conditions of a corresponding full-time trainee.

3792. Subject to section 557, which deals with payment of a loading in lieu of certain conditions, proposed subsection 556(2) would provide that the full-time conditions to which a school-based apprentice is entitled under subsection 556(1) are adjusted as necessary in proportion to the hours worked on-the-job by the school-based apprentice.

3793. Proposed subsection 556(3) would enable regulations to be made to determine or make provision for determining:

- whether particular full-time conditions should be adjusted in proportion to the hours worked on-the-job by the school-based trainee. (In effect, this provision would allow for adjustments to be made to the minimum entitlement that is otherwise conferred under subsection 556(2), to allow for entitlements more generous than the entitlement under subsection 556(2)); and/or
- the method for adjusting particular full-time conditions in proportion to the hours worked on-the-job by the school-based trainee.

3794. Proposed subsection 556(5) clarifies that section 556 does not prevent a school-based trainee from receiving conditions more generous than those provided by section 556.

3795. Proposed subsection 556(6) would provide that section 556 does not apply to a school-based trainee if a wage instrument covers the work of the school-based trainee, and makes specific provision for a rate of pay for school-based trainees.

*New section 557 – Loading in lieu of certain conditions*

3796. Proposed section 557 would provide for loading of 20% in lieu of certain conditions for a school-based trainee.

3797. Subsection 557(1) would provide that the employer and school-based trainee may, by written agreement, pay the school-based trainee loading in lieu of paid annual leave, paid sick leave, paid personal leave, and paid public holidays.

3798. Subsection 557(2) would provide that the loading is 20% for all hours worked on-the-job.

3799. Proposed section 558 provides that Part VIII, dealing with penalties and other remedies for contravention of awards and orders, has effect in relation to the entitlements provided in accordance with proposed sections 552(1), 553(2), 555(1) and 556(2), as if those entitlements were provided by a relevant award.

**Illustrative Example – School-based trainee**

Carolyn is a Year 12 student in Adelaide. She commences a school-based training arrangement in the hospitality industry while completing her senior secondary certificate. As part of her traineeship the school has arranged for her to attend TAFE, and she works with a local employer, David's Bar & Bistro Pty Ltd, one day each week. David's Bar & Bistro Pty Ltd. While the South Australian *Hotels, Clubs, Etc, Award* that applies to other employees in Carolyn's workplace, contains wages and conditions for full-time trainees, it has no provisions for school-based trainees.

Proposed section 555 would provide a minimum hourly rate of \$7.99 per hour for the time Carolyn spends at work. Carolyn would be also entitled to any additional conditions that apply to a full-time trainee under the award, adjusted *pro rata* for the hours she works on-the-job. Carolyn would have those entitlements on the commencement of Part XVII. After commencement of the larger reform Bill, her minimum wage would be subject to periodic adjustment by the AFPC.

#### Illustrative Example – School-based apprentice

Karl is a Year 11 student in Sydney. He commences a school-based training arrangement as a mechanic while completing his senior secondary certificate. As part of his training arrangement, the school has arranged for Karl to attend TAFE, and he works one day a week with a local employer.

Karl is employed by Bob's Mechanical Engineering Pty Ltd. While the NSW *Metal Engineering and Associated Industries (State) Award*, that applies to other employees at Bob's Mechanical Engineering Pty Ltd, contains wages and conditions for full-time apprentices, it has no provisions for school-based apprentices. However, if Karl were undertaking the registered training arrangement full-time, he would be an apprentice mechanic under the award. Accordingly, Karl is a school-based apprentice for the purposes of the definition of *school-based apprentice* in proposed section 550.

Proposed sections 552 and 553 would specify Karl's minimum wages and conditions. The minimum hourly rate of pay for the time Karl spends at work would be calculated by multiplying the applicable full-time hourly rate for a first-year apprentice mechanic under the award by 1.25 (eg  $\$6.39 \times 1.25 = \$7.99$  per hour). School-based apprentices are paid 25% more than the full-time apprentice hourly rate because they are only paid for the hours spent on-the-job. The rates for full-time apprentices include payment for both the time spent at work and in approved off-the-job training.

Karl would also be entitled to any additional conditions that apply to a full-time apprentice under the award, adjusted on a *pro rata* basis for the hours he works on-the-job.

## Schedule 4 – Transitional and other provisions

### Part 1 – Regulations for transitional etc. provisions and consequential amendments

#### Item 1 – Regulations may deal with transitional etc. matters

3800. Item 1 would enable regulations to be made about matters of a transitional, saving or application nature relating to amendments made by the Bill, including amendments made by regulations under item 2 (consequential and related amendments).

3801. Regulations made under this item might provide, for example, that for proceedings pending before a court or the AIRC immediately prior to commencement, specified provisions of the WR Act that would be amended by the Bill are to apply to those proceedings as if they had not been amended.

3802. Subitem 1(2) would provide that regulations made under this item may take effect from a date before the regulations are registered under the *Legislative Instruments Act 2003*. This is because subsection 12(2) of the *Legislative Instruments Act 2003* provides that a legislative instrument or provisions of a legislative instrument must not take effect before it is or they are registered under that Act in certain circumstances where rights would be affected or liabilities imposed. Subsection 12(3) of the *Legislative Instruments Act 2003* provides that the effect of subsection 12(2) on a legislative instrument is subject to any contrary intention in the enabling legislation. Subitem 1(2) expresses a contrary intention for this purpose.

#### Item 2 – Regulations may make consequential amendments of Acts

3803. Item 2 would enable regulations to be made making amendments of the WR Act and other Acts which are consequential on, or otherwise relate to, amendments made by the Bill. The extensive changes to structures and arrangements under the WR Act that would be made by the Bill would mean that changes to the WR Act and other Acts could be necessary or desirable to allow the provisions of those Acts to operate fully and effectively in the new system.

3804. Subitem 2(2) would provide that regulations made under this item may take effect from a date before the regulations are registered under the *Legislative Instruments Act 2003*. This is because subsection 12(2) of the *Legislative Instruments Act 2003* provides that a legislative instrument or provisions of a legislative instrument must not take effect before it is or they are registered under that Act in certain circumstances where rights would be affected or liabilities imposed. Subsection 12(3) of the *Legislative Instruments Act 2003* provides that the effect of subsection 12(2) on a legislative instrument is subject to any contrary intention in the enabling legislation. Subitem 2(2) expresses a contrary intention for this purpose.

3805. Subitem 2(3) would provide that, for the purposes of the *Amendments Incorporation Act 1905*, amendments made by regulations under item 2 are to be treated as if they were made by an Act. As noted in the legislative note to the subsection, this would mean that the amendments could be incorporated into a reprint of the amended Act.

## **Part 2 – Transitional, application and saving provisions**

### **Division 1 – Definitions**

#### **Item 3 – Definitions**

3806. This item would provide for the definitions of terms that are to apply in Part 2.

### **Division 2 – Awards**

#### **Item 4 – Continuing operation of awards in force before commencement**

3807. This item would provide for the continued operation of awards that are in force prior to reform commencement and also sets out the manner in which employers, employees and organisations are to be bound by the awards.

3808. Subitem 4(1) would provide that this item applies to an award (an *original award*) in force immediately before reform commencement.

3809. Subitem 4(2) would provide that the original award continues in force as a *pre-reform award* to the extent that it regulates employers in respect of the employment of these employees, in the same terms as the original award on and from reform commencement. The pre-reform award binds each employer bound by the original award before reform commencement and each of the employer's employees and will also bind each organisation that was bound by the original award prior to reform commencement.

3810. The terms *employer* and *employee* have the meaning in proposed subsections 4AB(1) and 4AA(1) respectively (which draw upon a range of constitutional powers). Those employees and employers that do not fall within these definitions remain covered by their pre-existing award. Arrangements for the continuing operation of awards would be provided by proposed Schedule 13.

3811. Prior to reform commencement, an original award would have only bound employees that were members of an organisation of employees that was bound by the award. On and after reform commencement, all employees of an employer bound by an award continued in force by this item will also be bound, subject to the award relating to the employee's employment by the employer.

3812. Subitems 4(3) – (4) would clarify that the intention of subitem 4(2) is to bind to the pre-reform award those employers and organisations that were bound by the original award in the manner set out in subsection 149(1) of the WR Act as it was in force immediately before reform commencement.

#### **Item 5 – Transitional provision for redundancy pay – repeal of paragraph 89A(2)(m)**

3813. Item 5 would provide that the repeal of paragraph 89A(2)(m) of the WR Act, which specifies redundancy pay as an allowable award matter, does not affect any entitlement to a redundancy payment that arose before reform commencement.

3814. The intention is that if an entitlement to redundancy pay under an award crystallised before reform commencement (where an employee had been notified by the employer that their position had been made redundant in circumstances that resulted in the employee being entitled to redundancy pay), the entitlement to receive the payment is not lost if the employment does not end until after reform commencement.

#### **Item 6 – Terms of awards that cease to have effect**

3815. Item 6 would provide that employees will not lose any rights accrued under an award prior to reform commencement when, under section 116L, a term in an award about a matter that is specified not to be an allowable award matter ceases to have effect.

3816. The intention is that employees will not lose accrued entitlements such as to leave, including annual leave or personal/carer's leave, as well as to payment for work performed where reform commencement occurs during a pay cycle.

#### **Division 3 – Termination of Employment**

3817. Division 3 contains provisions relating to amendments made by Schedule 1 of the Bill to Division 3 of Part VIA of the WR Act.

#### **Item 7 – Application to terminations that occur after the reform commencement**

3818. This item would provide that the amendments made by the items listed in subitem 7(2) would apply in relation all terminations of employment which occur after reform commencement, regardless of the date when the employment commenced.

3819. It is not intended that the amendments made by the items listed in subitem 7(2) would apply in relation to a termination of employment which occurred before reform commencement, even if the employee does not make an application under section 170CE until after reform commencement.

#### **Item 8 – Application of item 111**

3820. This item would provide that the amendment to paragraph 170CE(5B)(a) made by item 111 of Schedule 1 (extending the default qualifying period from three months to six months) would only apply to employees whose employment commenced after the commencement of this item.

3821. Therefore, the amendment made by item 111 will not apply to the employment of an employee whose qualifying period of employment, in that employment, has already commenced or has already been completed at the time of the reform commencement.

#### **Item 9 – Application of items 145 to 149**

3822. This item would provide that the amendments made by items 145, 146, 147, 148 and 149 of Schedule 1, each of which involves an amendment to Subdivision E of Division 3 of Part VIA of the WR Act, would apply in relation to an application for an order under section 170GA of the WR Act if the application is made on or after the reform commencement. As a consequence, an



application for orders under section 170GA that was made prior to reform commencement will continue to be heard and determined in accordance with Subdivision E of Division 3 of Part VIA of the WR Act as if the amendments made by items 145 to 149 had not been made.

3823. It is not intended that the application of these items will depend upon the date upon which an employer decided to terminate more than 15 employees' employment, or upon the date of the relevant terminations of employment.

3824. Subitem 9(2) would provide that, to the extent that section 170GD would continue to apply to an application for an order under section 170GA of the WR Act if the application is made before commencement (as a result of subitem 9(1)), Division 2 of Part VI of the WR Act as in force immediately before reform commencement will apply to that application.

### **Item 10 – Transitional provision for termination of employment**

3825. This item would provide that various transitional industrial instruments referred to in proposed Schedules to the WR Act will be treated as if they were 'awards' for the purposes of various provisions of Divisions 3 and 4 of Part VIA of the WR Act. Subsection 170CD(3), section 170JG and paragraph (a) of the definition of *daily hire employee* in subsection 170CD(1), would apply, on after reform commencement, as if a reference to an 'award' were a reference to one or more of the following:

- a pre-reform certified agreement, within the meaning of proposed Schedule 16 to the WR Act;
- a notional agreement preserving State awards, within the meaning of proposed Schedule 15 to the WR Act;
- a preserved State agreement, within the meaning of proposed Schedule 15 to the WR Act;
- a transitional award, within the meaning of proposed Schedule 13 to the WR Act;
- an old IR agreement, within the meaning of proposed Schedule 14 to the WR Act;
- a pre-reform AWA, within the meaning of proposed Schedule 14 to the WR Act; or
- a common rule continued in effect by proposed clause 82 of Schedule 13 to the WR Act.

3826. It is not intended that this item will affect item 105 of Schedule 1 of the Bill, which would insert proposed subsection 170CD(1A).

## **Division 4 – Miscellaneous**

### **Item 11 – Investigations started by authorised officers**

3827. This proposed item would allow an investigation that had been commenced, but not completed, by an authorised officer before the commencement of the Bill to be continued by a workplace inspector.

### **Item 12 – Application of section 83BS to pre-reform AWAs**

3828. This proposed item would extend the application of proposed section 83BS by deeming it to apply to the identification of a person who is or was a party to a pre-reform AWA in the same way as it applies to the identification of persons are or have been parties to a post-reform AWA.

### **Item 13 – Saving of existing inspectors' appointments**

3829. This item would preserve the appointment of existing inspectors under subsection 84(2). It would allow inspectors who have been appointed under the existing provisions of the WR Act to continue to perform their role as workplace inspectors for the unexpired term of their appointment.

### **Item 14 – Repeal of Part VA**

3830. This item would provide for transitional provisions as a consequence of the repeal of Part VA of the WR Act.

3831. Subitems 15(1)–(3) would provide that Division 1 of Part 2 of Chapter 7 of the *Building and Construction Industry Improvement Act 2005* (the BCII Act) has effect as if information, documents or answers given to the Secretary or an assistant pursuant to pre-reform section 88AA of the WR Act had been given or produced to the Australian Building and Construction Commissioner under section 52 of the BCII Act. The information, document or answers may be used for the purpose of proceedings under the BCII Act, which includes proceedings under the WR Act by virtue of section 73 of the BCII Act.

3832. Subitems 15(4)–(6) would provide that the requirement for the Commonwealth Ombudsman to conduct a review under pre-reform section 88AI of the WR Act on the use of the section 88A power is preserved. Instead of the review relating to a year to which section 88AA applies as defined in subsection 88AI(4), the review would relate to the period starting on 13 January 2006 and ending on the reform commencement.

### **Item 15 – Application of hours of work provisions of Standard to pre-reform awards**

3833. Under proposed item 15, a three year transitional period will be provided for pre-reform awards. After that period, an award term that provides a lower standard than the maximum ordinary hours guaranteed by the Standard (eg if it provides for 40 maximum hours of work per week) will not operate to the extent it would be contrary to the Standard.

**Item 16 – Succession, transmission or assignment of business**

3834. This item would provide that proposed Part VIAA of, and Schedule 16 to, the WR Act would apply to a succession, transmission or assignment of a business, or part of a business, that occurs at the time of, or after, reform commencement.

**Item 17 – Application of conciliation and mediation provisions**

3835. This item would provide that the conciliation and mediation provisions (proposed sections 170BDA, 170BDB and 170BDC – see item 76 of Schedule 1) would only apply to applications under Division 2 of Part VIA lodged after the commencement of those provisions. Therefore, applications which are already on foot at the time of reform commencement would not be subject under the new Division 2 of Part VIA to a compulsory conciliation or mediation stage prior to the AIRC hearing and determining the matter. This would not affect the AIRC's ability to conduct conciliation under the pre-reform powers in respect of an application for an equal remuneration remedy lodged prior to commencement.

**Item 18 – Application of parental leave**

3836. This item contains transitional provisions relating to the repeal and replacement of Division 5 of Part VIA of the WR Act (see item 166 of Schedule 1).

3837. Item 18 would provide that the repeal and replacement of Division 5 of Part VIA of the WR Act would not apply to an employee whose employment is wholly regulated by:

- a preserved State agreement;
- a notional agreement preserving a State award;
- an AWA made before the reform commencement;
- a certified agreement made before the reform commencement;
- an award made under section 170MX of the WR Act before the reform commencement;
- a transitional award; or
- an old IR agreement within the meaning of proposed Schedule 14 of the WR Act.

3838. For those employees whose employment is subject to an instrument listed above, the provisions of Division 5 of Part VIA as in force immediately before the reform commencement apply.

3839. If, after reform commencement, an employee's employment ceases to be wholly regulated by one of the instruments set out above, then item 19 of Schedule 14 will cease to apply and the employee's parental leave and adoption leave entitlements will be as provided by item 166 of Schedule 1.

**Item 19 – Application of Part VC of amended Act**

3840. Part VC would apply to all actions or states of affairs that occur after the commencement of the Part. This means that the any industrial action occurring after the commencement of the Part will be governed by the provisions of the Part, even if the industrial action started before the Part commenced.

**Item 20 – Application in relation to negotiations for workplace agreements**

3841. This item would provide for the continuation of conciliation conducted by the AIRC in relation to the negotiation of certified agreements that commenced before the reform commencement. Conciliation matters that commenced under section 170NA in Division 8 of Part VIB of the WR Act may continue to be dealt with in accordance with that provision for a *transitional period* of three months commencing on the reform commencement. This would mean that the AIRC would continue to exercise its conciliation powers including, where relevant, those particular powers contained in Division 3 of Part VI of the WR Act as in force at that time.

**Item 21 – Application of new offences in section 299**

3842. This item would provide that the offence provisions in subsections 299(3) (contravening an order of the AIRC) applies to conduct breaching an order which occurs after reform commencement even if the order itself was made by the AIRC before the date of commencement.

3843. This item would provide similarly in relation to subsection 299(5) (publishing false allegations of misconduct affecting the AIRC); it would be an offence to publish a statement after reform commencement, even if the statement was made before commencement.

**Item 22 – Transitional provision – entry permits**

3844. Item 22 would provide that permits in force under the repealed Part IX immediately before the reform commencement continue to operate. Those permits would be subject to the proposed Part IX (*new Part IX*) arrangements including the rules relating to revocation and suspension.

3845. Subitem 22(2) would define the new Part IX and repealed Part IX.

**Item 23 – Application provisions relating to registered organisations**

3846. This item would set out the application provisions for amendments made by items in Schedule 1 to the Bill.

**Item 24 – Transitional provision relating to registered organisations**

3847. This item would provide that proposed subparagraph 30(1)(c)(v) of Schedule 1B, which would provide that an organisation may be deregistered if it is not, or is no longer, federally registrable, would not apply to any currently registered organisations for a period of three years after the commencement of this item. This would provide existing organisations with the opportunity to restructure to make themselves federally registrable. In addition, it would recognise that these organisations may be operating in the transitional award system set out in Schedule 13 – Transitional arrangements for parties bound by federal awards.

## **Schedule 5 – Renumbering the Workplace Relations Act 1996**

### **Item 1 – Renumbering the Workplace Relations Act (other than the Schedules)**

#### **Item 2 – Limited renumbering of Schedules to the Workplace Relations Act**

3848. Item 1 would renumber the Parts, Divisions and sections of the WR Act so that they bear consecutive numerals starting with '1', and would similarly reletter and renumber the Subdivisions, subsections, paragraphs, subparagraphs and sub-sub-paragraphs of the WR Act. Item 2 would renumber the Schedules to the WR Act.

3849. An example of an Act that has been renumbered in a similar way is the *Migration Act 1958*, which was renumbered by the *Migration Legislation Amendment Act 1994*.

3850. Provisions in the WR Act that refer to another provision in the WR Act or to a Schedule would be amended so as to correctly identify the renumbered or relettered provision or Schedule (subitems 1(10) and 1(11)). However, subitem 1(12) would ensure that references to a provision or Schedule as in force at a time prior to commencement of this item are not changed in this way. Subitems 2(3), 2(4) and 2(5) would provide similarly in relation to references in a Schedule.

#### **Item 3 – References in other Acts to renumbered provisions and Schedules**

3851. Item 3 would provide that existing references to provisions of the WR Act or its Schedules in other Acts or in an instrument or document, are to be construed as a reference to the renumbered or relettered provision or Schedule, except where the reference is to a provision or Schedule as in force at a time prior to commencement of this item.