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THE PARLIAMENT OF THE COMMONWEALTH

OF AUSTRALIA

SENATE

INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL 1990

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Industrial Relations, Senator the Hon Peter Cook)

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INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL 1990

Outline

The Bill proposes a number of changes to the provisions of the Industrial Relations Act 1988 which deal with the registration, size, coverage and amalgamation of organisations. It also proposes significant additions to the objects of the Act to provide legislative guidance to the Australian Industrial Relations Commission (the Commission) in the exercise of its power in these areas. Certain other amendments are also proposed.

Major Amendments

Major amendments made to the Act concern:

(a) the provision of an increased minimum membership requirement for the registration of an association under section 189 of the Act:

- the number of members who are employees must be 20,000 unless special circumstances justify a lower figure;

(b) a further review commencing in 1994 of the continued registration of organisations which do not meet the revised minimum membership requirement:

- this is in addition to the review, currently provided for under section 193 of the Act and which will commence in 1992, of the continued registration of organisations with less than 1,000 members who are employees;

(c) the revision of section 118 to make the powers of the Commission available to alter the representative rights and coverage of registered organisations in a wider range of circumstances;

(d) the amendment of section 122 which enables the Commission to award preference to members of an organisation:

- examples of matters in relation to which preference may be given are to be included;

- the range of persons who may be the subject of a preference order is slightly widened;

(e) a new Division dealing with the amalgamation of organisations, and providing speedier and more flexible procedures:

- difficulties in the amalgamation process will be avoided or minimised;

- federations of organisations proposing to amalgamate will be able to seek recognition under the Act and thereby be entitled to represent their constituent organisations for the purposes of the Act.

(f) the insertion of two new objects in the Act:

- to encourage and facilitate the amalgamation of organisations; and

- to encourage and facilitate the development of organisations, particularly by a reduction in the number of organisations that are in an industry or enterprise.

Other Amendments

A number of amendments of a minor policy or technical nature are also proposed.

Financial Impact Statement

The new amalgamation provisions provided in the Bill are likely to have the effect of encouraging a greater number of amalgamations between organisations than have occurred in the past. An increase in the number of amalgamations will result in additional cost to the Commonwealth, as it meets the cost of amalgamation ballots conducted by the Australian Electoral Commission.

It is not possible to give a reliable estimate of the increased costs which may result given the difficulty in judging the impact of the new legislation on the number of amalgamations between organisations.

NOTES ON CLAUSES

Part 1 - Preliminary

Clause 1: Short title

The short title of the Act given.

Clause 2: Commencement

The Act will commence on a date fixed by proclamation, or six months after the day on which Royal Assent is given, whichever is the earlier.

Part 2 - Amendments of the Industrial Relations Act 1988

Clause 3: Principal Act

The term "Principal Act" is defined for the purposes of the Part to mean the Industrial Relations Act 1988 (the Act).

Clause 4: Objects of the Act

This clause proposes the amendment of section 3 of the Act to include two new objects of the Act:

> "(j) to encourage and facilitate the amalgamation of organisations"; and
>
> "(k) to encourage and facilitate the development of organisations, particularly by reducing the number of organisations that are in an industry or enterprise."

Under section 90 of the Act the Australian Industrial Relations Commission (the Commission) is required in the performance of its functions to take into account the public interest and, for that purpose, to have regard to the objects of the Act. The two new objects should give clearer legislative direction to the manner in which the Commission exercises its discretions relating to organisations of employers and employees, particularly in respect of registration, amalgamation and union representation rights. The provisions of the Act dealing with these matters are amended by provisions in the Bill.

Clause 5: Interpretation

This clause amends the definitions of "demarcation dispute" and "industrial dispute" in subsection 4(1) of the Act.

Paragraph (a) amends the definition of demarcation dispute to make it clear that the examples of demarcation disputes given in the definition are not exhaustive.

Paragraph (b) inserts a further example of a demarcation dispute in the definition to make it clear that any dispute about the representation under the Act of the industrial interests of employees by an organisation of employees is a demarcation dispute. It is intended to apply to a dispute

even where an organisation, which does not have coverage under its rules of the work concerned, is seeking or purporting to exercise a right to represent the interests of the employees concerned.

Paragraph (c) amends the definition of "industrial dispute" to make it clear that an industrial dispute constituted by a demarcation dispute involving a registered organisation or its members in that capacity need not extend beyond the limits of one State but may be an intra-State dispute.

These provisions reflect the importance attached to providing a means of preventing or settling industrial difficulties arising from demarcation problems, particularly in cases where registered organisations and their members are involved.

Clause 6: Additional operation of the Act

The clause will make a consequential amendment to the title of the Australian National Airlines Commission in section 5 of the Act reflecting its incorporation as Australian Airlines Limited.

Clause 7: Appeals to Full Bench

This clause revises subsection 45(4) of the Act to extend to a Presidential Member the power to order a stay of proceedings where an appeal has been instituted under section 45. Currently only a Full Bench has this power. This will improve the administration of the work of the Commission.

Clause 8: Limitation on appeals to Full Court

This makes a consequential amendment to reflect the proposed repeal of the provisions of Division 7 of Part IX of the Act which is to be replaced by a new Division (see notes on clause 15).

Clause 9: Acting Deputy Industrial Registrars

For reasons of administrative convenience, the Industrial Registrar is to be empowered to appoint acting Deputy Industrial Registrars under section 77 of the Act. At present, this power is vested in the Minister who has delegated it under section 348 to the Secretary of the Department.

Clause 10: Repeal of s.118 and substitution of new sections

The clause provides for the repeal of section 118 of the Act and the insertion of two new sections.

Proposed section 118 will require the Commission, when exercising its powers in relation to a demarcation dispute [see the notes on clause 5 and the proposed revised definitions of "demarcation dispute" and "industrial dispute" in subsection 4(1) of the Act], to consider whether it should consult with appropriate peak councils which are representative of organisations of employers or employees.

Paragraph (b) of proposed section 118 permits such consultation.

Proposed section 118A deals with the Commission's powers to alter the rights of organisations to represent, under the Act, the industrial interests of particular classes or groups of employees. Such a power exists under section 118 at present but is only exercisable for the purposes of preventing or settling a demarcation dispute.

The Commission will be able, under proposed subsection (1), to make such rights exclusive, to confer them where they do not exist or to remove them. These powers will be exercisable on the application of an organisation, an employer or the Minister.

In considering whether to make an order under the section the Commission is required under proposed subsection (2) to consider whether to consult with appropriate peak councils and is permitted to so consult with such peak councils. Paragraph (2)(c) will require the Commission to have regard to agreements or understandings about the representation by organisations of employees of particular classes or groups of employees.

Under proposed subsection (3) an order may be made subject to conditions or limitations.

Proposed subsection (4) provides that only a Presidential Member or a Full Bench may exercise powers under this section.

Procedures are established in proposed subsections (5), (6) and (7) for the Commission, having made an order under this section, to refer the matter to a designated Presidential Member unless it is satisfied that no alteration of the rules of an organisation concerned is necessary. After giving such an organisation an opportunity to be heard, the Presidential Member is to make such alterations as necessary to the rules of any organisation concerned to reflect the order.

It is not necessary for a rule alteration to be made for an order under this clause to operate. An order takes effect of its own force and in accordance with its terms.

Proposed subclause (2) provides that orders made under current sub-section 118(3) of the Act prior to the commencement of proposed section 118A remain in force, following the commencement, as if made under proposed sub-section 118A(1).

By operation of sub-section (3) a matter that is before the Commission under the provisions of section 118 of the Act, immediately before the commencement of proposed section 118A, will, on commencement of that section be dealt with under the provisions of proposed section 118A as if it were an application under that section.

Clause 11: Power to grant preference to members of organisations etc

This clause proposes the insertion of subsection (1A) in section 122 of the Act which provides the Commission with the power to direct that preference be given to particular organisations or members of organisations. Proposed subsection (1A) provides examples of matters in relation to which preference may be directed by the Commission.

Proposed amendments to subsections (1), (2) and (3) of section 122 will extend the power of the Commission to award preference, if it considers it appropriate, to persons who have applied to become members of organisations.

Clause 12: Criteria for registration

Under this clause it is proposed that section 189 of the Act be amended to increase the minimum membership requirement for the registration of an association under the Act from 1,000 to 20,000 members. The Commission may register associations with less than the required minimum membership in special circumstances. The other requirements for registration are unchanged.

Subclause 2 provides that an application for registration made prior to the commencement of clause 12 is to be dealt with under the provisions of existing section 189, as if that section had not been amended. Section 189 currently requires a minimum number of 1,000 members.

Clause 13: Registration

Clause 13 seeks to amend section 191 of the Principal Act to correct a technical error in that section.

As presently worded, subsection 191(1) of the Principal Act requires that, where a Presidential Member grants an application by an association for registration as an organisation under the Act, the Industrial Registrar must enter certain details in the register of organisations, including the `eligibility rules' of the association. This was intended to mean the rules of the newly registered organisation relating to the conditions of eligibility for membership and to the description of the industry, if any, in connection with which the organisation has been registered.

In subsection 4(1) of the Principal Act, however, "eligibility rules" are defined so as to mean rules relating to conditions of eligibility for membership or to the description of the industry, if any, in connection with which an organisation is, or an association is proposed to be, registered.

The reference to "eligibility rules" in subsection 191(1), therefore, does not take account of the disjunctive "or" contained in the definition of "eligibility rules".

The proposed amendment of subsection 191(1) will overcome this deficiency by simply requiring that the Industrial Registrar

enter "prescribed particulars" in the register of organisations. It is intended that regulations will then be made which will give effect to the original intention of the provision.

The proposed amendment of subsection 191(2) is consequential upon the proposed amendment of subsection 191(1).

Clause 14: Repeal of section 193 and substitution of two new sections, 193 and 193A

Under section 193 of the Act, a designated Presidential Member is required, from 1 March 1992 to commence a review of the continued registration of each small organisation of employees [defined in subsection 193(7) as those with fewer than 1,000 members]. If not satisfied that special circumstances exist which justify its continued registration in the public interest, the designated Presidential Member is to deregister the organisation.

Clause 14 of the Bill proposes the repeal of section 193 and the substitution of new sections 193 and 193A which provide for a two stage review of the registration of small organisations.

The review provided for under the existing section 193 and the two stage review provided by proposed sections 193 and 193A have the same objective, and complement other provisions in the Act and in the Bill directed towards reducing of the number of unions operating within the federal industrial relations system.

Proposed section 193 provides stage 1 of the review. A designated Presidential Member will be required to consider whether special circumstances exist justifying the continued registration of each small organisation, in the public interest - proposed subsections (1) and (2). If not satisfied that special circumstances exist, the designated Presidential Member will be required to cancel the registration of the small organisation concerned - proposed subsection (6). A small organisation is defined in proposed subsection (7) as an organisation with fewer than 1,000 members who are employees. Stage 1 must be commenced in the period from 1 March 1992 to 28 February 1993.

Proposed section 193A provides stage 2 of the review which will operate in a similar manner to stage 1.

For the purposes of proposed section 193A, a small organisation is defined as an employee organisation with fewer than 20,000 members who are employees - proposed subsection (7).

Stage 2 of the review must be commenced in the period from 1 March 1994 to 28 February 1995.

If an organisation which has fewer than 20,000 such members at the beginning of stage 2 increases its membership to at least 20,000 before its continued registration is considered by the

designated Presidential Member, or remains the subject of a review commenced under stage 1, the Presidential Member is not required to carry out stage 2 of the review in respect of that organisation - proposed sub-section (4).

The proposed section also provides for periodic reviews of small organisations [paragraph 2(b)] at the discretion of the designated Presidential Member, but they may only be conducted, in respect of any small organisation, once every three years.

It should be noted that, if the registration of a small organisation with fewer than 1000 members continued, it would be liable, subject to the discretion of the designated Presidential Member, to be periodically reviewed under sections 193 and 193A.

Clause 15: Repeal of Division 7 of Part IX and substitution of new Division

Clause 15 repeals Division 7 of Part IX of the Act and substitutes a new Division 7. Part IX deals with organisations registered under the Act and both the existing and new Division 7 provide for the processes by which registered organisations of employees or employers may amalgamate.

The intention of the new Division is to provide for speedier, more flexible processes leading to a determination by members of whether an amalgamation is to proceed. This is to be achieved by revised procedures and by measures designed to minimise, as far as possible, delays or difficulties arising from technical problems or defects in the steps taken by the organisations which are seeking to amalgamate. It will remain for members of the organisations concerned to decide whether an amalgamation is to proceed, and safeguards will exist to ensure the provision to members of information about a proposed amalgamation.

The proposed new Division is divided into 7 subdivisions, covering various aspects of the procedure for securing the members' approval of an amalgamation and the consequences of an amalgamation taking effect.

A number of provisions of existing Division 7 will be retained in or provide the basis for provisions of the new Division.

Proposed Subdivision A: General

The proposed subdivision contains provisions of general application to matters under the new Division.

Proposed section 233: Application of objects to Division etc

The proposed section contains a statement of Parliamentary intention relating to the application of the objects of the Act to amalgamations. The Act's explicit objects are set out in section 3. Under section 90 of the Act, the Commission must, in the performance of its functions, take into account the public interest and, for that purpose, have regard, among other things, to the objects of the Act.

Proposed paragraph 233(a) requires particular regard to be had to three of the objects expressed in section 3:

- to encourage the efficient management of organisations - paragraph 3(h);
- to encourage and facilitate the amalgamation of organisations - proposed paragraph 3(j);
- to encourage and facilitate the development of organisations, particularly by reducing the number of organisations that are in an industry or enterprise - proposed paragraph 3(k).

This statement is designed to provide particular guidance to the Commission and the Federal Court of Australia (the Court) when exercising their powers and discretions under the Division. It does not, however, prevent the Commission or the Court from having regard to other express or implied objects, or from considering the effect on a discretion of the scope and purpose of the Act.

Proposed paragraph 233(b), while reflecting the importance attached in the legislative scheme to the right of the members of an organisation to determine its future, emphasises a primary aim of the proposed changes to the Act's amalgamation provisions. That aim is to proceed quickly to the point where a decision is made on whether an organisation is to amalgamate with another.

Accordingly, paragraph 233(b) states that the Act is to be applied to the amalgamation of organisations in a way which is fair, practical, quick and non-legalistic.

In so applying the Act, the Commission and the Court will be expected to take account of the object expressed in paragraph 3(g) of the Act, namely, to encourage the democratic control of organisations and the participation by their members in the affairs of organisations.

It is to be noted that both the Commission and the Court would have new, discretionary powers under the Division to overcome delays and difficulties in the amalgamation process.

Proposed section 234: Interpretation

This defines certain terms used in the Division and supplements the Act's general interpretation provision, section 4.

Proposed section 235: Procedure to be followed for proposed amalgamation

This concerns how an amalgamation is to be achieved and how difficulties in meeting the Division's requirements before an amalgamation takes effect may be overcome.

Under proposed subsection (1), the amalgamation procedure set down in the Division must be followed. This requirement does not limit the operation of the powers of the Commission or the Court to give directions or make orders in relation to amalgamations.

Proposed subsection (2) prevents an amalgamation from being achieved otherwise than under the new Division.

Proposed subsection (3) empowers a designated Presidential Member to give directions and make orders for resolving any difficulty or likely difficulty in the application of the Act up to the point of amalgamation. This general discretionary power is to be read together with specific discretionary powers elsewhere in the Division which are exercisable by the designated Presidential Member. Proposed paragraphs 233(a) and (b) - the statement of legislative intention - are of particular relevance to the exercise of such powers.

Under proposed subsection (4), the power will not be able to be exercised to override the express requirements of the Act or of an order made by the Court. This will not prevent the designated Presidential Member from giving directions or making orders that are not inconsistent with such requirements. In addition, the proposed subsection permits the designated Presidential Member to vary or dispense with requirements of the Regulations, the Rules of the Commission and the rules of an organisation.

Proposed Subdivision B - Preliminary matters

Under this subdivision, provision is made for the voluntary establishment of a federation of organisations prior to their amalgamation and for a procedure to authorise the use of an organisation's funds and other resources to promote a proposed amalgamation in which it is involved.

Proposed section 236: Federations

The section provides a mechanism whereby organisations intending to amalgamate can have their interests represented under the Act by a single body. It is considered that such a process may assist the organisations concerned in their preparation for a future amalgamation.

Under proposed subsections (1) and (2), organisations which propose to amalgamate may, before lodging an application to initiate the formal amalgamation processes under the Division, apply for a designated Presidential Member's approval of their recognition as a federation. An application is to contain prescribed particulars.

The Presidential Member is required, under proposed subsection (3), to grant the application if satisfied that the organisations intend to lodge an application under the Act to initiate the formal amalgamation procedures.

Proposed subsection (4) requires the Industrial Registrar, where such approval has been granted, to record prescribed details in the register of organisations.

A federation may, under proposed subsection (5), represent its constituent members for the purposes of the Act, eg, by representing them in proceedings before the Commission or the Court.

Proposed subsection (6) makes it clear, however, that a federation may not be a party to an award.

The composition of a federation may, under proposed subsection (7), be varied after its recognition subject to the approval of the designated Presidential Member.

Under proposed subsection (8), a federation ceases to exist:

- upon the amalgamation taking effect;

- if the prescribed period (to be provided for in the Regulations) has elapsed without the lodging of an application to initiate the formal amalgamation processes;

- if a Full Bench of the Commission finds that the federation's industrial conduct is preventing or hindering the attainment of an object of the Act.

Proposed subsection (9) makes it clear that membership of a federation does not limit an organisation's right to represent itself or its members.

Proposed section 237: Use of resources to support proposed amalgamation

This section is intended to make it clear that an organisation is not prevented from using its resources, financial or otherwise, to support a proposed amalgamation in which it is involved.

A decision of the Federal Court of Australia [Anderson v. Johnson (1990) 32 AILR Case report No.246] has prevented organisations from using their resources after the day on which notice of an amalgamation ballot is given to promote a particular result in the ballot.

Under proposed subsection (1), a committee of management will be able to authorise the use of its resources to support the approval of a proposed amalgamation in which the organisation is involved.

To protect the interests of members, the proposed section requires that they be given reasonable notice of the Committee of Management's decision.

Proposed subsection (2) makes it clear that the proposed section does not limit any other power that an organisation

has to use its financial and other resources in support of or for any other purposes of an amalgamation.

Proposed Subdivision C - Commencement of Amalgamation

The proposed subdivision contains provisions relating to the initiation of the procedures leading to the approval or rejection of a proposed amalgamation.

Proposed section 238: Scheme for amalgamation

Under subsection (1), it is proposed that, as under the existing arrangements, there be a formal scheme for a proposed amalgamation.

Details required to be contained in the scheme are specified in proposed subsection (2) but, under proposed subsection (3), other matters may be included. The scheme is to be approved (proposed section 240) and lodged (proposed section 242). The proposed provisions are also complemented by a new requirement (proposed section 242) that an outline of the scheme be prepared and lodged.

Reference should be made to proposed section 253E, which permits the alteration and amendment of a scheme. Other provisions will also permit this to occur.

Proposed section 239: Alternative schemes for amalgamation

A proposed amalgamation involving 3 or more organisations will fail to proceed if it is not approved by the members of each of those organisations.

Where an amalgamation involving 3 or more organisations fails, this section will enable the amalgamation scheme (see notes on proposed section 238) to provide in such circumstances for an alternative amalgamation of some of the organisations concerned. Provisions to the same effect are contained in the Act's current amalgamation Division which is to be repealed.

Subsection (1) authorises the inclusion in a scheme of provisions for an alternative amalgamation and sets out how it may operate.

Subsection (2) stipulates certain additional particulars which must be included in a scheme which provides for an alternative amalgamation.

Proposed section 240: Approval by committee of management

Existing paragraph 236(1)(c) of the Act implies a requirement that the committee of management of each existing organisation concerned in an amalgamation must pass a resolution approving the amalgamation. This is to be replaced under proposed subsection (1) by an express requirement that each such committee of management approve, by resolution, the scheme for a proposed amalgamation, as well as any alteration to the scheme.

Proposed subsection (2) concerns the approval for the purposes of a scheme of proposed alterations to the rules of an organisation concerned in a proposed amalgamation.

To avoid delay, a committee of management of such an organisation will be able to approve the scheme, as well as any alterations to the scheme and any proposed alteration to the organisation's rules, as provided for in the scheme. The committee of management will also be able to approve variations to the proposed rule alterations specified in the scheme. All of these approvals may be given even though a different procedure for such approvals is expressed in the organisation's existing rules. It will be open to a committee of management to decide which procedure to follow.

Proposed section 241: Community of interest declaration

Existing organisations concerned in a proposed amalgamation are able under the proposed section to seek a declaration that they have a community of interest. Such a declaration means that less onerous requirements apply in relation to the required return of votes in an amalgamation ballot (see notes on proposed section 253K).

The proposed section will replace existing section 239 of the Act. Some alterations are proposed. There will no longer be an express requirement that the Presidential Member be satisfied that the amalgamation would further the objects of the Act. It is considered that in the light of the new objects in proposed paragraphs 3(j) and (k) (see notes on clause 4 of the Bill), the Commission's obligation under section 90 of the Act to have regard to the objects, and the proposed statement of legislative intention in proposed section 233, the requirement is redundant.

A second change compared with the existing provision relates to the criteria for establishing a community of interest. At present, a substantial number of members of each of the organisations concerned must meet the criteria.

It is proposed that they be altered to require a substantial number of members of one of the organisations concerned to meet the criteria. This change addresses problems identified by a Full Bench of the Australian Conciliation and Arbitration Commission in a 1984 decision relating to a proposed amalgamation in the printing industry (reported in Commonwealth Arbitration Reports, vol 295, at page 90) when dealing with a matter under the community of interest provisions of the repealed Conciliation and Arbitration Act 1904.

The Full Bench noted the impracticality of the current requirement in circumstances where a large organisation proposed to amalgamate with a small organisation and suggested that a test like that proposed would be more practical. The Full Bench also noted that such a test had been developed in the National Labour Consultative Council but not subsequently adopted in the legislation.

A third change is to restore the discretion which the since abolished Australian Conciliation and Arbitration Commission had to find the existence of a community of interest in circumstances other than those specified in the Act.

A fourth change is to permit a community of interest application to be made to and dealt with by the Commission before a formal application is made for approval of the submission of a proposed amalgamation to a ballot. This is intended to assist organisations in their preparation for a possible amalgamation.

Proposed subsection (1) permits an application to be made for a community of interest declaration. The time for making an application is specified in proposed subsection (2). It may be made before or at the same time as the lodging under proposed section 242 of an application for an approval for the submission of an amalgamation to ballot.

Under proposed subsection (3), a designated Presidential Member is required to arrange for a hearing in relation to the application for a declaration which has been lodged before the application under proposed section 242. Under proposed section 251, submissions to such a hearing may only be made by the applicants or by any other person with the leave of the Presidential Member and in relation to a prescribed matter.

Where an application for a declaration is lodged with the application under section 242, the hearing is to be conducted under proposed section 250.

Proposed subsection (4) requires a declaration of a community of interest to be made if the Presidential Member is, at the conclusion of a hearing, satisfied as to the existence of such a community of interest.

Proposed subsection (5) sets out the circumstances in which the Presidential Member must be satisfied as to the existence of a community of interest between organisations of employees in relation to their industrial interests. This is where the Presidential Member is satisfied that a substantial number of members of one of the organisations concerned meets one of the tests set out in the proposed section.

A similar requirement in relation to organisations of employers is contained in proposed subsection (6).

It is made clear in proposed subsection (7) that a designated Presidential Member has a discretion to find that a community of interest exists in other circumstances.

Proposed subsection (8) will operate to cause a declaration of community of interest to lapse if, having been made in anticipation of an application under proposed section 242, no such application is made within 6 months. This is not intended to prevent further applications for a declaration of a community of interest.

A designated Presidential Member may, under proposed subsection (9), revoke a declaration of community of interest if satisfied that such a community of interest has ceased to exist. This provision is intended to put beyond doubt the Commission's power in this regard, for which general provision is made in paragraph 111 (1)(f) and subsection 111 (2) of the Act.

Proposed section 242: Application for approval for submission of amalgamation to ballot

The proposed section concerns the initiating step in the formal process for seeking the Commission's approval of the submission of an amalgamation to a ballot of members.

Subsection (1) requires the lodging of the requisite application in the Industrial Registry.

Under subsection (2), the application must be accompanied by the scheme for the amalgamation - see notes on proposed section 238 - and an outline of the scheme.

The outline is intended to be a simple explanation of the amalgamation. It will be provided to members to enable them to make an informed decision on an amalgamation scheme before participating in a ballot. This is reflected in proposed subsection (3), which limits an outline to 3000 words and requires it to contain sufficient information on the scheme. Reference should also be made to proposed section 253F, which, subject to a designated Presidential Member's approval, permits certain modifications.

Proposed section 243: Holding of office after amalgamation

The proposed provision replaces section 252 of the Act. Like that section, it allows transitional arrangements under which the rules of a proposed amalgamated organisation or an association intended to be registered in place of the amalgamating organisations provide for:

- a person who holds an office in any of the organisations concerned immediately before their amalgamation to hold a different office after the amalgamation without being elected to that office as normally required under the Act; and

- the continuation in office after an amalgamation of a person who holds that office in an organisation which is not deregistering for the purposes of the amalgamation provided the person held that office immediately before the amalgamation.

Proposed subsection (1) so provides. It excludes the normal requirement under section 197 for an election but limits to a maximum of 4 years the period of appointment or continuation in office.

A further requirement is imposed by proposed subsection (2) under which reasonable provision must be made for

synchronising elections for the offices so held with other elections in the organisation after the amalgamation. It is intended that this be done where it is practical to do so.

Proposed subsection (3) excludes the ordinary time limits under section 199 of the Act for holding office until an election is required. This recognises that a person may, under an arrangement permitted by this section, continue to hold office for a period exceeding those stipulated in section 199.

Proposed subsection (4) provides for the ordinary requirements of section 200 to apply for the filling of a casual vacancy in an office held in accordance with proposed subsection (1). Accordingly the rules will be able to permit the filling of such a casual vacancy for the unexpired term other than by an ordinary election, provided that unexpired term does not exceed three quarters of the full term of the office or 12 months, whichever is the greater.

The proposed section is not intended to affect the application of any principles of law relating to the acceptability of differences between:

- the duties of an office held by a person which is replaced by another office to which that person is not elected as normally required by the Act; and

- the duties of that latter office.

Proposed section 244: Application for exemption from ballot

The proposed section and proposed section 253G will replace subsections 243(8)-(10) of the Act. They relate to an exemption from a ballot of members of a large organisation which is amalgamating with a much smaller body.

Proposed subsection (1) allows an organisation concerned in a proposed amalgamation to apply to the Commission for such an exemption.

Under proposed subsection (2) that application must be lodged at the same time as the application for approval of the submission of the amalgamation to ballot.

Proposed section 245: Application for ballot not conducted under section 253J.

This will be a new provision and reference should also be made to another new provision, proposed section 253H.

Proposed subsection (1) permits an organisation concerned in a proposed amalgamation to apply to the Commission for permission to have an amalgamation ballot conducted other than by secret postal ballot under proposed section 253J. Proposed section 253H sets out the criteria for such an alternative ballot.

Under proposed subsection (2), an application must be lodged with the application for approval of the submission of the amalgamation to ballot.

Proposed section 246: Lodging "yes case"

This proposed section and proposed section 253D relate to the lodging by an organisation of a statement in favour of a proposed amalgamation for distribution to members in the ballot. Similar provision is made now in subsections 244(3)-(6) of the Act which will be repealed.

Proposed subsection (1) permits the lodging of such a written statement, not exceeding 2000 words, in support of the proposed amalgamation and any alternative amalgamation which is proposed should the principal amalgamation fail. It should be noted that, under proposed section 252D, material other than words may be permitted to be included in the statement.

Proposed subsection (2) requires the lodging of the statement with the application for approval of the submission of the application to ballot.

Proposed Subdivision D - Role of Australian Electoral Commission

Proposed section 247 : Ballots to be conducted by Australian Electoral Commission

All amalgamation ballots under the Division must be conducted by the Australian Electoral Commission. Reference should also be made to section 253P under which the Commonwealth bears the cost of such ballots.

Proposed section 248 : Notification of Australian Electoral Commission

The section is intended to provide a means whereby, in line with the objective of quick amalgamation processes, the Australian Electoral Commission is given the earliest opportunity to prepare for any ballots that may be required.

Proposed subsection (1) requires the Industrial Registrar to notify the Australian Electoral Commission at once when an application is lodged for approval for the submission of the amalgamation to ballot.

Under proposed subsection (2), the Australian Electoral Commission is required to take such action as it considers necessary or desirable to conduct any prospective ballots quickly. Proposed section 249 is relevant in this context.

Proposed section 249 : Officer of organisation to provide information for ballot etc

An official of the Australian Electoral Commission who has written authorisation from that Commission is to be empowered to require an officer or employee of an organisation by written notice to provide information or documents.

This may only be done where reasonably necessary for the purposes of an amalgamation ballot. Due notice must be given. Non-compliance will be an offence under section 318 of the Act.

Proposed Subdivision E - Procedure for approval of amalgamation

The proposed subdivision provides for the steps to be taken from the lodging of an application under proposed section 242 for approval for the submission of the amalgamation to ballot up to the declaration of the result of any such ballot.

The existing procedures under the Act are revised in various ways to provide for greater speed and adaptability to changing circumstances, and some new provisions are inserted for that purpose.

An alternative to a secret postal ballot in an amalgamation ballot is to be available, subject to certain safeguards.

Proposed section 250: Fixing hearing in relation to amalgamation etc

A designated Presidential Member must, upon the lodging of an application under proposed section 242, fix the time and place for hearing submissions relating to that application and any other application lodged with it, ie, an application for a community of interest declaration (proposed section 241), for exemption from an amalgamation ballot (proposed section 244), or for an amalgamation ballot other than by secret postal ballot (proposed section 245).

Provision is also made for notifying organisations and other interested persons of the hearing.

Proposed section 251: Submissions at amalgamation hearings

Under this provision, applicants are entitled to make submissions at a hearing of applications under proposed subsection 241(3) (relating to an application for a community of interest declaration before any other application is made) and proposed section 250 (see notes above).

Other persons may only make submissions with the leave of a designated Presidential Member on matters to be prescribed in the regulations.

Proposed section 252: Approval for submission to ballot of amalgamation not involving extension of eligibility rules etc

Under the proposed section, provision is made (along the lines of existing section 240 of the Act) for a proposed amalgamation to proceed, in certain circumstances, to a ballot without objections being permitted.

Proposed subsection (1) sets out the tests to be satisfied before approval to proceed to ballot under this section can be

given by a designated Presidential Member after a hearing under proposed section 250.

Approval may only be given if, as a result of the amalgamation:

- no new organisation is to be registered;
- the eligibility rule of the amalgamated organisation will be no wider than the combined eligibility rules of the amalgamating organisations;
- the amalgamated organisation's name will not be the same or confusingly similar to that of another organisation;
- any rule alterations will not contravene the Act, awards and the general law;
- the deregistration of an organisation for the purposes of the amalgamation is lawful.

If any of the tests is not met, the Presidential Member must, under proposed subsection (2), refuse to approve the submission of the amalgamation to ballot or take the action described in proposed subsections (3) and (7).

Proposed subsection (3) will, in the interests of avoiding delay, permit the Presidential Member to authorise the alteration of the scheme for the amalgamation (including any proposed rule alterations).

It is made clear by proposed subsection (5) that such authorisation may be subject to conditions. Alternatively, the Presidential Member may accept an undertaking that the scheme will be suitably altered.

Where this occurs, approval may then be given for the submission of the amalgamation to ballot.

Proposed subsection (4) will allow the Presidential Member to authorise a committee of management to make such alterations and, where necessary, in accordance with a procedure specified by the Presidential Member. Where such authority is given, it will be valid for the committee of management to act under it, even though it is not consistent with any requirements of the rules of the organisation concerned.

Proposed subsection (5) addresses the situation where any conditions imposed under subsection (3) are breached or an undertaking under that subsection is not fulfilled as required.

In those circumstances, the Presidential Member is empowered:

- to amend the scheme;
- to give directions and orders in relation to the ballot (for example, to delay it or to require certain information about any changes to be given to persons

entitled to vote) or otherwise in relation to the amalgamation procedure.

It is made clear under proposed subsection (6) that the Presidential Member's powers from any other source will not be limited by subsection (5).

Proposed subsections (7) and (8) relate to the Presidential Member's power to adjourn the proceedings, rather than refuse the application concerned.

Proposed section 253: Objections in relation to amalgamation involving extension of eligibility rules

It is intended to provide in the regulations for notice to be given where an application is refused under proposed section 252 for failing to meet the tests set out in that section.

Proposed section 253 permits objections to be made by a prescribed person on a prescribed ground (similar provision is made in existing section 241 of the Act). The designated Presidential Member will be required to hear such objections.

Proposed section 253A: Approval for submission to ballot of amalgamation involving extension of eligibility rules etc

Provision is to be made under proposed subsection (1) for authorising the submission of an amalgamation to ballot where any objections are dismissed and criteria similar to those set out in proposed section 252 are met.

Provisions intended to assist in avoiding or minimising delay which are similar to those in proposed section 252 are included.

A designated Presidential Member may, rather than refuse to approve the submission of the amalgamation to ballot, permit alterations to the scheme or accept an undertaking to alter the scheme - see proposed subsection (3).

Proposed subsections (4) and (5) permit a designated Presidential Member to permit a committee of management to make any requisite alterations to the scheme (including to proposed rules or rule alterations) under, if necessary, a procedure specified by the Presidential Member.

Non-compliance with conditions or an undertaking relating to altering the scheme may be dealt with under proposed subsection (6). The Presidential Member may make suitable amendments to the scheme, or give directions and orders relating to the conduct of the amalgamation ballot or the amalgamation procedure. This will not limit any other powers of the Presidential Member - see proposed subsection (7).

Under proposed subsections (8) and (9), the Presidential Member may, without limiting other adjournment powers, adjourn the proceeding rather than refuse it.

Proposed section 253B: Fixing commencing and closing days of ballot

Where an amalgamation is approved for submission to a ballot, the designated Presidential Member must, under proposed subsection (1), fix the commencing and closing days of the ballot. For this purpose, the designated Presidential Member is to consult the Electoral Commissioner.

It should be recalled that, under proposed subdivision D, Role of the Australian Electoral Commission (AEC), the AEC is required to conduct all amalgamation ballots, to be notified immediately of applications for submission of an amalgamation to ballot and has power to take necessary steps to prepare for such a ballot.

These provisions, together with other changes to accelerate the amalgamation processes of the Act, are intended to permit a shorter period from the date of approval of the submission of an amalgamation to ballot to the period during which a ballot is conducted.

Accordingly, the commencing day is not to be later than 28 days after the day on which the approval is given, unless the designated Presidential Member considers that the AEC requires a longer period or the organisations concerned request a later commencing day.

Other provisions are made in relation to the commencing and closing days for ballots on alternative amalgamation proposals as well as for varying commencing and closing days - proposed subsections (3)-(5).

Proposed section 253C: Roll of voters for ballot

The persons who may vote in an amalgamation ballot are specified. The roll of voters is to comprise persons who, on the day on which the commencing and closing days for the ballot are fixed, or 28 days before the commencing day for the ballot (whichever is the later):

- are entitled under the rules of an organisation involved in the amalgamation to vote at such a ballot; or

- when there is no such provision in the rules, persons who are entitled under the organisation's rules to vote in an election ballot for an office in the organisation.

The early involvement under section 248 of the Australian Electoral Commission in preparation for an amalgamation should permit the roll of voters to be compiled by the day on which the designated Presidential Member fixes the commencing and closing days.

Proposed section 253D: "Yes case" and "no case" for amalgamation

The proposed section refers to the statement (a "yes case" statement) supporting a proposed amalgamation, which may,

under proposed section 246, be lodged with the Industrial Registry. Provision is also made for the lodging by a prescribed number of members of the organisation of a written statement (a "no case" statement) opposing the amalgamation and any proposed alternative amalgamation.

Proposed subsection (1) gives the designated Presidential Member discretion to permit the organisation to alter its "yes case" statement.

Proposed subsection (2) allows a prescribed number of members of the organisation to lodge with the Industrial Registry a "no case" statement. This must be done no later than 7 days before the date fixed by the Presidential Member for hearing submissions about the amalgamation. The statement must not exceed 2000 words.

Proposed subsection 253D(10) provides that the minimum number of members for the purposes of proposed subsection (2) is 1000 or 5% of the total membership of the organisation, whichever is the lesser, as calculated on the day the application for approval of the submission of the amalgamation to ballot was lodged under proposed subsection 242. This is changed from the current requirement under subsection 244(6) of the Act which provides for 5% or 250, whichever is the lesser. The change is intended to give greater proportionality to the requirement in its application to large organisations.

The Presidential Member may, under proposed subsection (3), allow alterations to the "no case" statement.

Under proposed subsection (4), a copy of both the "yes case" and "no case" statements, if lodged, must, subject to subsections (5), (6) and (7), be sent with the ballot paper sent to the persons entitled to vote in the amalgamation ballot, unless the ballot is conducted otherwise than by secret postal ballot - see proposed subsection (9).

There may be situations when more than one "no case" statement is lodged. Under proposed subsection (5), the Presidential Member is required in these circumstances to prepare or to have prepared a single "no case" statement of no longer than 2000 words, based on all the "no case" statements lodged. This is to be done, where practical, in consultation with representatives of the persons who lodged the "no case" statements, and the final statement must fairly present the substance of all arguments against the amalgamation. If it is necessary for such a statement to be altered after it has been settled, the Presidential Member may do so under the broad discretionary powers which will be conferred by the subdivision. When such a statement is prepared, it must be provided to persons entitled to vote in the amalgamation ballot as if it had been lodged under subsection (2).

Under proposed subsection (6), the Presidential Member has power to correct factual errors in either a "yes case" or a "no case" statement or amend it to comply with the Act or regulations.

Under proposed subsections (7) and (8), a "yes case" or "no case" statement may contain matter such as diagrams, photographs, drawings, etc.

Proposed section 253E: Alteration and amendment of scheme

Alterations and amendments to the proposed amalgamation scheme are dealt with in the proposed section. Reference should also be made to proposed section 240, and proposed sections 252 and 253A. The provision is intended to make the amalgamation process more adaptable, by allowing the scheme to be altered, for example, to reflect changes to the rules of an organisation before an amalgamation takes place.

It should also be noted that, under the succession provisions proposed in subdivision F, an amalgamated organisation will take the place of a deregistered organisation for the purposes of any uncompleted matters which might, if completed before the amalgamation, have resulted in a change to the scheme.

Under proposed subsections (1), (2) and (3), such alterations may be permitted by the designated Presidential Member at any time before the commencing day of the amalgamation ballot, and may include alterations to the rules of any proposed or existing organisation involved in the amalgamation.

The Presidential Member may give permission to alter any aspect of the scheme of amalgamation, including any proposed rules, subject to conditions. In addition, to avoid delay, the Presidential Member may specify a procedure which the committees of management of existing organisations may follow, in spite of any other requirements in their rules.

When the Presidential Member has given permission, the committees of management of existing organisations involved in the amalgamation may, by resolution, alter the scheme, including the proposed rules of the amalgamated association, notwithstanding anything in their rules.

Under proposed subsection (4), if the Presidential Member has permitted the alteration of the scheme subject to conditions, and those conditions are breached, the Presidential Member may then amend the scheme, including:

- any rules of a proposed organisation;
- any alterations proposed to the rules of existing organisations involved in the amalgamation.

The Presidential Member may also give directions or orders regarding the conduct of the amalgamation ballot or specifying the procedure which must be followed regarding the amalgamation.

It is not intended that the specification of the Presidential Member's powers in proposed subsection (4) limit the Presidential Member's powers generally. This is made clear in proposed subsection (5).

Proposed subsection (6) provides that if any alteration to the scheme for amalgamation occurs, the outline of the scheme required under proposed subparagraph 242(2)(b) must be amended appropriately.

Proposed section 253F: Outline of scheme for amalgamation

This provision should be read with proposed subsections 242(2) and (3), which require an informative outline of the scheme, not exceeding 3000 words, to be lodged.

Proposed subsection (1) of this section gives the designated Presidential Member discretion to allow more than 3000 words.

Under proposed subsection (2), the Presidential Member may permit the outline to include material not in the form of words, such as diagrams, photographs and illustrations.

Under proposed subsection (3), the Presidential Member may allow the existing organisations involved in the amalgamation to amend the outline. In addition, the Presidential Member may amend the outline to correct factual errors and to ensure that it complies with the provisions of the Act.

Proposed section 253G: Exemption from ballot

Under proposed section 244, an existing organisation involved in a proposed amalgamation (the proposed amalgamated organisation) may apply to be exempted from the requirement for an amalgamation ballot.

Under proposed subsection (1) of this section, where a proposed amalgamated organisation has applied for such an exemption, if the total number of members who could, because of the amalgamation, be admitted to membership of the proposed amalgamated organisation does not exceed 25% of the number of members that organisation had on the day it applied for the exemption, the designated Presidential Member must grant the application. The application may be refused if the Presidential Member considers that to be warranted.

Under proposed subsection (2), if the exemption applied for under proposed section 244 is granted, the members of the proposed amalgamated organisation are taken to have approved both the proposed principal amalgamation and each proposed alternative amalgamation, if any.

The corresponding provisions of the Act [subsections 243(8)-(10)], which are to be repealed, provided for an exemption threshold of 5%. It is proposed to be increased to 25% because the existing figure is considered to be too low.

Proposed section 253H: Approval for ballot not conducted under section 253J

Under proposed section 245, an existing organisation concerned in a proposed amalgamation may seek approval for a proposal to conduct an amalgamation ballot otherwise than by secret postal ballot conducted by the Australian Electoral Commission under

section 253J. Proposed section 253H deals with the circumstances in which such an application may be granted, namely, that:

- the proposal satisfies the various criteria specified in proposed paragraph 253H(b) (which are intended to ensure a fair ballot conducted by the Australian Electoral Commission at meetings with proper provision for notice, secret voting and absent voting); and

- the designated Presidential Member has consulted with the Electoral Commissioner and is satisfied that the proposal:

  - is practicable;
  - is likely to result in a fuller participation of members than would result in a ballot conducted under proposed section 253J; and
  - will give members adequate opportunity to vote on the amalgamation without intimidation.

If satisfied, the Presidential Member must approve the proposal at the conclusion of a hearing concerning the proposed amalgamation arranged under proposed section 250.

Proposed section 253J: Secret postal ballot of members

Under proposed subsection (1), once a proposed amalgamation has been approved by the designated Presidential Member for submission to ballot in accordance with proposed sections 252 or 253A, a secret postal ballot must be conducted by the Australian Electoral Commission for members of each existing organisation involved in the proposed amalgamation. This subsection does not apply, however, where an exemption from a ballot has been granted under proposed section 253G or the ballot is to be conducted under proposed section 253H.

Where an amalgamation scheme includes as well as a principal amalgamation a proposed alternative amalgamation, proposed subsection (2) requires the Australian Electoral Commission to conduct, at the same time and in the same manner as the ballot in relation to the principal amalgamation, a ballot in respect of each alternative amalgamation proposal.

The question to be put to the members of each of the organisations involved in the proposed amalgamation is whether, in the event that the proposed principal amalgamation does not take place, they approve the proposed alternative amalgamation or amalgamations.

Proposed subsection (3) provides that, in the event that more than one ballot is necessary, only one ballot paper is to be used for all ballots.

Under proposed subsection (4), the votes in a ballot conducted in relation to a proposed alternative amalgamation need be counted only if it is necessary to know the results of that ballot because the principal amalgamation was not approved, or for some other purpose of the Act.

Proposed subsection (5) requires a copy of the outline of the amalgamation scheme (see also proposed sections 242 and 253F) to accompany the ballot paper sent to a person entitled to vote in the amalgamation ballot. If the outline has been altered or amended, the copy sent with the ballot paper must include these alterations or amendments. The regulations will provide that a copy of the complete scheme will be available on request.

A ballot conducted under this proposed section must be, under proposed subsection (6), conducted in the manner as prescribed by regulations.

Proposed section 253K: Determination of approval of amalgamation by members

The minimum voting requirements necessary for an approval of an amalgamation by members of an existing organisation involved in an amalgamation are to be:

- if a community of interest declaration is in force under proposed section 241 in respect of the proposed amalgamation, the proposed amalgamation is approved by a simple majority;

- otherwise, an amalgamation is approved only if at least 25% of the members on the roll of voters (as compiled in accordance with proposed section 253C) have voted in the amalgamation ballot and if more than 50% of the formal votes cast are in favour of the amalgamation.

This requirement is unchanged from that currently under section 246 of the Act.

Proposed section 253L: Further ballot if amalgamation not approved

Provision is made to enable a proposed amalgamation that has failed at ballot to be resubmitted. The designated Presidential Member will be able to dispense with various steps, for example, if there has been no change to the scheme since the amalgamation was last approved for submission to ballot.

This discretion may only be exercised if the fresh application is made within 12 months.

Proposed section 253M: Inquiries into irregularities

The proposed section provides an opportunity for an application to be made for an inquiry by the Federal Court of Australia into alleged irregularities in an amalgamation ballot. Reference should be made to the definition of "irregularity" in section 4 of the Act - it should be noted the definition of that term in proposed section 234 does not apply to an irregularity in an amalgamation ballot. Such application must be made within 30 days of the result of the ballot being declared.

Under proposed subsection (2), if the Court concludes that an irregularity has occurred and it affected or might have affected the result of the amalgamation ballot, the Court has discretion to:

- order that a step in the ballot process be taken again, where the ballot is incomplete; or
- where the ballot is completed, order a fresh ballot.

In addition, the Court may make any other order it considers necessary or desirable.

Proposed subsection (3) provides for regulations to specify the procedure of the Court for inquiries into alleged ballot irregularities, and with respect to matters relating to or arising out of such inquiries.

Proposed section 253N: Approval of amalgamation

Under proposed subsection (1), a proposed amalgamation is to be taken as approved if the members of each organisation concerned have approved it (in accordance with the Division).

Under proposed subsection (2), if, in a proposed amalgamation of more than 2 organisations, the principal amalgamation scheme is rejected, but the members of two or more of the existing organisations approve the proposed alternative amalgamation, the proposed alternative amalgamation is taken to have been approved. However, if, in the proposed amalgamation scheme, one of the existing organisations is the proposed amalgamated organisation, the members of that organisation must have approved of the proposed alternative amalgamation in the amalgamation ballot.

Proposed section 253P: Expenses of ballot

Under this proposed section, the Commonwealth bears the expenses of an amalgamation ballot.

Proposed Subdivision F: Amalgamations taking effect

The subdivision provides for the taking effect of a proposed amalgamation which has been approved at ballot. To avoid delay, there are a number of provisions which automatically make the amalgamated organisation the successor of the deregistered organisation or organisations for various purposes.

Proposed section 253Q - Action to be taken after ballot

A proposed amalgamation which is approved takes effect under the proposed section.

Proposed subsection (2) requires a designated Presidential Member, after consulting the organisations concerned, to fix an "amalgamation day" on which the amalgamation is to take

effect. "Amalgamation day" is defined in proposed section 234. Notice of the day is to be published.

Before fixing the amalgamation day, the Presidential Member must be satisfied that:

- the time for applying under proposed section 253M for an inquiry into ballot irregularities has expired (30 days after the declaration of the result of the ballot), or that there are no matters relating to such an inquiry outstanding; and

- there are no unresolved criminal proceedings against any organisation concerned in the amalgamation.

Under proposed subsection (3), the Industrial Registrar must register the amalgamated organisation and any alterations to its rules take effect on that day. The proposed deregistering organisation or organisations are deregistered. Members of the deregistering organisation automatically become members of the amalgamated organisation, without having to pay an entrance fee.

Proposed subclause 253R: Assets and liabilities of deregistered organisation become assets and liabilities of amalgamated organisation

On the amalgamation day, all assets and liabilities of an organisation which was deregistered for the purposes of the amalgamation thereupon become the assets and liabilities of the amalgamated organisation, and cease to be assets and liabilities of the deregistered organisation. The terms "asset" and "liability" are widely defined in proposed subsection 234.

Proposed subsection 253S: Resignation from membership

This subsection modifies the operation of section 264 of the Act, which deals with resignation from membership of an organisation. Normally, except in certain specific cases, a resignation is only effective at the end of 3 months after its receipt by an organisation, or such shorter period as is stipulated in the rules of the organisation.

Reflecting the shorter time frame for amalgamations, the proposed section reduces the specified time of 3 months to 1 month or such shorter period as the designated Presidential Member directs. This reduction applies on and from the day on which the amalgamation day is fixed.

Proposed section 253T: Effect of amalgamation on awards and orders

Awards and orders of the Commission which were binding on a deregistering organisation and its members immediately before the amalgamation took effect become automatically binding on the amalgamated organisation and its members, and are effective for all purposes. References in such awards or orders to an organisation which was deregistered for the

amalgamation are to be read to include references to the amalgamated organisation.

Proposed section 253U: Instruments

The proposed section ensures continuity in the operation and effect of instruments. The terms "instrument" and "instrument to which this Division applies" are widely defined in proposed section 234.

Under proposed subsection (1), such instruments continue in force from the time of the amalgamation.

Proposed subsection (2) provides that, for matters occurring from that time, a reference in an instrument to a deregistered organisation is to be read as referring to the amalgamated organisation.

Proposed section 253V: Pending proceedings

The proposed section ensures continuity in Court and Commission proceedings. It provides that the amalgamated organisation takes the place of the deregistered organisation in all proceedings pending, immediately before the amalgamation day, before a court or before the Commission. This includes, for example, an application, objection or intervention in any matter before the Commission or an action before the Court relating to rules or an award.

Proposed subsection 253W: Subdivision to have effect despite laws and agreements prohibiting transfer etc

Under proposed subsection (1), the provisions of this subdivision prevail over any other Commonwealth, State or Territory law, and over any contract, deed, undertaking, agreement or other instrument.

Proposed subsection (2) protects an organisation or other person, in respect of anything done by or because of the subdivision, or for its purposes, from liability under Commonwealth, State or Territory law or the common law for the consequences of those actions.

Under proposed subparagraph (2)(c), however, nothing in the subdivision, and nothing done by a person because of or for the purposes of the subdivision, releases to any extent any surety from all or any of the surety's obligations.

By proposed subsection (3), where the consent of a person would normally be necessary to give effect to any particular aspect of this subdivision, the consent is deemed to have been given.

Proposed section 253X: Amalgamated organisation to take steps necessary to carry out amalgamation

Proposed subsection (1) requires the amalgamated organisation to do everything necessary to ensure that, when an amalgamation has taken place, it is fully effective. That

includes, for example, taking necessary action to ensure that all required notifications of the transfer of property are given (in this respect, see proposed sections 253Y-ZB).

Under proposed subsection (2), the Federal Court of Australia will be empowered, on the application of an interested person, to make orders, as appropriate, to ensure compliance with subsection (1).

Proposed section 253Y: Certificates in relation to land and interests in land

The proposed section applies where land or an interest in land has been transferred under this subdivision from a deregistered organisation to an amalgamated organisation.

Provision is made to enable a simple certificate to provide the authority for the appropriate State or Territory official (eg, a Registrar of Titles) to register and otherwise give effect to the change in ownership or in the holding of the interest.

Proposed section 253Z: Certificates in relation to charges

This provision will apply where the amalgamated organisation becomes, by force of the subdivision, the holder of a charge.

If:

- an authorised person signs a certificate which identifies the charge and states that the amalgamated organisation has become, under this subdivision, the holder of the charge; and
- the certificate is lodged with the National Companies and Securities Commission (the NCSC);

the NCSC may register the matter in the normal manner, and deal with and give effect to the certificate as if it were a properly lodged notice of assignment of the charge. "Charge" and "holder" are defined in proposed section 234.

Proposed section 253ZA: Certificates in relation to shares etc

The provision will apply where the amalgamated organisation becomes, by force of the subdivision, the holder of a share, debenture or interest in a company.

If an authorised person signs a certificate identifying the share, etc, and stating that the amalgamated organisation has, under this subdivision, become the holder of the share, etc, and the certificate is delivered to the company, the company is required to:

- register the matter in the usual way; and
- to complete all appropriate documents and deliver them to the amalgamated organisation,

as if the certificate were a proper instrument of transfer.

"Debenture" and "interest" are defined in proposed section 234.

Proposed section 253ZB: Certificates in relation to other assets

This provision will apply where an asset, other than an asset under the preceding three proposed sections, becomes an asset of the amalgamated organisation.

If:

- an authorised person signs a certificate identifying the asset and stating that, under this subdivision, the asset belongs to the amalgamated organisation; and
- the certificate is given to the person or authority responsible under the relevant State, Commonwealth or Territory law for keeping a register of such assets;

that person or authority may register the matter in the normal manner, and deal with and give effect to the certificate as if it were a proper and appropriate instrument for transactions concerning such an asset.

"Asset" is defined in proposed section 234.

Proposed section 253ZC: Court may resolve difficulties

Proposed subsection (1) gives the Federal Court of Australia a discretionary power to make any order it considers proper to resolve any difficulty arising in relation to the application of the subdivision to a particular matter. Application for such an order may be made by any interested person.

Under proposed subsection (2), such an order prevails over a Commonwealth, State or Territory law.

Proposed Subdivision G - Validation

An underlying objective of the new Division is to avoid or minimise difficulties in respect of amalgamations. Accordingly, certain acts by organisations or their officers for the purposes of an amalgamation are to be treated as valid, if done in good faith and if their validation would not do substantial injustice to interested persons or bodies. The Federal Court of Australia will have jurisdiction over these matters.

The subdivision contains appropriate provisions for this purpose which complement the validating provisions in Division 8 of Part IX of the Act.

Definitions of terms used in the subdivision ("defect", "invalidity") appear in proposed section 234.

Proposed section 253ZD : Validation of acts done in good faith

Under proposed subsection (1), acts done for the purposes of a proposed or completed amalgamation by specified persons or bodies are valid if done in good faith, notwithstanding any invalidity later discovered in relation to the act concerned.

The specified persons or bodies are an organisation concerned in the amalgamation, a committee of management of the organisation or an officer.

Proposed subsection (2) expresses certain presumptions in relation to an act under subsection (1) which are consistent with a general presumption of validity until the contrary is established.

Under proposed subsection (3), the validating provisions do not affect the capacity of the Federal Court of Australia under proposed section 253ZF to make an order displacing their effect.

It is also to be noted that the definition of "invalidity" in proposed section 234 includes a "defect", which is separately defined in the same proposed section as excluding an irregularity in relation to a ballot. This is to ensure that the separate legislative scheme for dealing with irregularities in amalgamation ballots is not affected.

Proposed section 253ZE : Validation of certain acts after 4 years

By proposed subsection (1), an act which was done by specified persons or bodies for the purposes of an amalgamation is taken to have complied with an organisation's rules and the requirements of the amalgamation Division when 4 years have elapsed from the day on which the act was done.

The specified persons or bodies are an organisation concerned in the amalgamation, a committee of management of the organisation, or an officer.

Such validation by passage of time is subject to displacement by an order of the Federal Court under proposed section 253ZF.

Proposed subsection (2) also exempts certain judicial decisions, orders and the like from the effects of proposed subsection (1).

Under proposed subsection (3), the section is to apply, subject to proposed section 253ZF, to an act done before the commencement of the section or to an act done to or by an association which has since become registered.

Proposed section 253ZF : Orders affecting application of section 253ZD or 253ZE

Under the proposed section, the Federal Court of Australia will be able to displace the validating provisions of proposed sections 253ZD and 253ZE, where it would be just to do so.

Proposed subsection (1) empowers the Court to declare that it is satisfied that the application of those validating provisions would do substantial injustice having regard to the interests of the organisation, its members, creditors or persons having dealings with it.

Under proposed subsection (2), such a declaration completely displaces any operation of proposed sections 253ZD and 253ZE.

Proposed subsection (3) specifies who may seek a declaration.

Proposed section 253ZG : Court may make orders in relation to consequences of invalidity

The proposed section empowers the Federal Court, on application, to determine whether there has been an invalidity in relation to an amalgamation or proposed amalgamation and to make certain orders to correct the invalidity.

Proposed subsection (1) enables an organisation concerned in an amalgamation, a member of the organisation or an interested person to apply for such a determination.

Under proposed subsections (2) and (3), the Court may make an appropriate declaration and orders to correct the invalidity, overcome the legal consequences of the invalidity and validate anything consequentially made invalid owing to the invalidity.

Proposed subsection (4) concerns related directions which may be given by the Court.

As a safeguard, proposed subsection (5) requires the Court, before making an order to rectify the invalidity or its consequences, to satisfy itself that substantial injustice would not occur to the organisation, a member, creditor or person dealing with it.

Proposed subsection (6) applies the section to an invalidity occurring before the commencement of the section or in relation to an association before it was registered.

Clause 16: Offences in relation to ballot

Section 317 of the Act concerns offences involving certain officially conducted ballots, including amalgamation ballots. It is amended by clause 16 to clarify the drafting and to reflect the new amalgamation Division.

Clause 17: Failure to comply with requirement made in relation to amalgamations

Section 318 of the Act concerns non-compliance with a requirement of an electoral officer in an amalgamation ballot. A consequential change is proposed.

Clause 18: Transitional provisions in relation to amalgamations

Transitional provisions are set out to deal with proposed amalgamations which commenced under the Act's repealed provisions. An amalgamation can be completed under those provisions or, if no ballots have started, under the new provisions.

Part 3 - Amendment of the Industrial Relations (Consequential Provisions) Act 1988

Clause 19: Principal Act

The Part deals with an amendment to the Industrial Relations (Consequential Provisions) Act 1988 (the IRCP Act).

Clause 20: Certain proceedings to be dealt with under Industrial Relations Act

Section 8 of the IRCP Act permits matters which commenced under the repealed Conciliation and Arbitration Act 1904 to continue. References in the section are updated.