THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL 1992

EXPLANATORY MEMORANDUM

(Circulated on the authority of the Minister for Industrial Relations, Senator the Honourable Peter Cook)

33107/92 Cat. No. 92 4384 7

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Printed by Authority by the Commonwealth Government Printer

INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL 1992

OUTLINE

This bill amends the *Industrial Relations Act 1988* to:

(a) give the Australian Industrial Relations Commission (AIRC) jurisdiction to resolve industrial disputes over the use of independent contractors, rather than employees, for the performance of work;

(b) provide that when exercising this jurisdiction the AIRC can alter the pay of independent contractors only to the extent necessary to prevent contracts that are unfair, harsh or against the public interest;

(c) require the AIRC to consider the circumstances of the contract arrangements, and to take account of cost and efficiency;

(d) allow the AIRC to review individual contracts for the provision of services by independent contractors if those contracts are unfair, harsh or against the public interest;

(e) allow independent contractors to join federally-registered unions and, if they choose, to be represented by their union in negotiations;

(f) prohibit coercion of an independent contractor to join a union, and prohibit discrimination against independent contractors for joining or not joining a union;

(g) encourage and facilitate the use of certified agreements for the prevention and settlement of disputes, while continuing to protect employees' entitlements;

(h) ensure that industry-wide agreements are not contrary to the public interest;

(i) establish simpler, less legalistic, processes for the recovery in State magistrates' courts of amounts owing to employees under awards; and

(j) provide for the Vice President of the AIRC to coordinate the work of a new panel of Presidential Members which will deal with matters involving organisations registered under the Act.

The bill amends the *National Labour Consultative Council Act 1977* to expand the membership of that Council and allow other persons to be invited to participate in its meetings.

Several minor technical amendments of industrial relations legislation are also included in the bill.

FINANCIAL IMPACT STATEMENT

The bill will have no significant impact on Commonwealth expenditure.

NOTES ON CLAUSES

PART 1 – PRELIMINARY

Clauses 1 and 2 : short title, etc, and commencement.

The clauses are formal provisions, relating to the bill's citation and the commencement of its provisions.

Clauses 1 and 2 commence on Assent.

The remaining clauses commence by proclamation. If any of them has not been proclaimed to operate within 6 months of Assent, it commences on the first day after that period.

PART 2 – AMENDMENTS OF THE INDUSTRIAL RELATIONS ACT 1988

Clause 3 : Principal Act

This a formal provision which allows the Industrial Relations Act 1988 to be referred to in this Part of the bill as the "Principal Act".

Clause 4 : Interpretation.

The clause amends subsection 4(1) of the Principal Act which defines terms used in that Act.

Revised definition of "bans clause"

The definition of "bans clause" in subsection 4(1) is to be amended by paragraph (a) of clause 4 to make it clear that the specification in an award of procedures for preventing and settling disputes between the parties to the award does not come within the definition of a "bans clause". The adoption of such procedures in awards is encouraged by section 91 of the Principal Act.

A difficulty has arisen because it is common for such award provisions to prohibit industrial action while the dispute settling procedures are being followed. The prohibition in an award of industrial action comes within the definition of a "bans clause" which, under section 125, can only be included in an award by a Presidential Member or Full Bench. This has the unintended result that other members of the AIRC may not be able to include such dispute settling procedures in awards [see Re Australian Postal Commission (Postal Workers) Award (1989) 28 IR 40].

To avoid this unnecessary condition, dispute settling procedures are to be excluded from the definition of a "bans clause".

Revised definition of "certified agreements"

Paragraph (b) of clause 4 will revise the definition of "certified agreement" to reflect the proposed insertion in Part VI of the Principal Act [by clause 9 of this bill] of new Division 3A, Certified Agreements.

Revised definitions of "designated Presidential Member" and "panel"

Paragraphs (c) and (f) are consequential upon the amendments proposed in clause 5 relating to the establishment of the Vice President's panel.

Wider definition of "industrial dispute"

Paragraph (d) will widen the definition of industrial dispute in subsection 4(1) of the Principal Act. It will bring within the AIRC's jurisdiction disputes about the use or proposed use of independent contractors, rather than employees, for the performance of work. It will apply to the use of independent contractors to perform work in a new business or new category of business undertaken by an employer, or in an expansion of an existing business, as well as to the use of independent contractors in substitution for employees.

This provision is part of a legislative scheme in the bill under which:

- the AIRC is to be able, subject to certain limits, to prevent and settle disputes of the character described above;

- independent contractors are to be able to join registered organisations of employees (clauses 14–16) and to be represented, with the contractors' consent, by such organisations for the purposes of contract negotiations (clause 17);

- independent contractors are to be protected against discrimination resulting from rights under the Act being exercised by them or on their behalf;

- the AIRC is to be able to review (see notes on clause 8) the fairness of certain contracts for the performance of work by independent contractors who are members of registered organisations of employees.

The details of the legislative scheme are discussed in the notes on clauses 8 and 14–19.

Consequential change

Paragraph (e) of clause 4 makes a consequential change to the definition of industrial dispute in subsection 4(1) of the Principal Act.

Clause 5 : new section 38 : Vice President's Panel

Section 38 of the Principal Act enables the President of the AIRC to designate Presidential Members to be responsible for the exercise of those powers and the performance of those functions that are conferred by the Principal Act on a designated Presidential Member. Those powers and functions concern various matters involving organisations of employers and employees under the Principal Act (eg, registration; changes to eligibility rules; amalgamation).

New section 38 recognises the importance, complexity and amount of the work of designated Presidential Members by establishing a specific panel for such work under the control of the Vice President. This approach is similar to that taken in section 37 of the Principal Act under which industry panels are established for the purposes of preventing and settling disputes in each industry (or a group of industries) concerned.

Under new subsection 38(1), the Vice President's panel will be established, comprising the Vice President and at least one other Presidential Member (but not the President) assigned to the panel by the President.

Proposed subsection 38(2) requires the Vice President to organise and allocate the work of the panel. Its other members must comply with the directions of the Vice President in relation to that work [for comparison, see subsection 37(2)].

In line with the flexibility provided for in the organisation of the AIRC's work, proposed subsection 38(3) permits any member of the panel to be a member of another panel under section 37.

Proposed subsection 38(4) makes it clear that membership of the Vice President's panel does not affect any other powers, functions or duties of a member.

New section 38 should be read with the revised definition of "designated Presidential Member" [see paragraph 4(c)]. That revised definition will operate to make references in the Principal Act to a designated Presidential Member mean the member of the Vice President's panel with responsibility for the exercise of the power or function concerned.

Clause 6 : Appeals to Full Bench

The clause will amend section 45 of the Principal Act which provides for appeals to a Full Bench of the AIRC against various decisions under the Principal Act.

Provision is to be made, by inserting new paragraphs (ea), (eb) and (ec) into subsection 45(1), for appeals from:

- a finding, or a decision not to make a finding, under proposed section 127B (see clause 8) that a contract for the services of an independent contractor is unfair;

- an order, or a decision not to make an order, under proposed section 127C (see clause 8) in relation to such a contract;

- the certification of an agreement under proposed section 134C where the agreement applies only to a single business, part of a single business or single place of work (see clause 9). Such an appeal will only be available to an organisation of employees which is required under subparagraph 134E(1)(e)(i) to be party to the agreement and which is not party to the agreement [new paragraph 45(3)(ba)].

Clause 7 : Power to grant preference to members of organisations, etc.

Clause 7 amends section 122 of the Principal Act. Section 122 allows the AIRC to direct that preference be given, in relation to particular matters, to members of organisations registered under that Act or persons who have applied to become members.

Clauses 14–16 of the bill provide for independent contractors to become members of unions registered as organisations under the Principal Act.

Clause 7 will deny to the AIRC the power to direct that preference be given to employees over independent contractors, to independent contractors over employees, or to some independent contractors over others.

Clause 8 : Insertion of new provisions relating to independent contractors

An outline of the proposed legislative scheme to give the AIRC limited jurisdiction over industrial disputes involving independent contractors is contained in the notes on clause 4 (see *wider definition of "industrial dispute"* in those notes).

Two elements of the scheme are contained in clause 8:

- provision is made as to how the AIRC is to exercise its jurisdiction over an industrial dispute about the use or the proposed use of independent contractors;

- the AIRC is given jurisdiction to review certain unfair contracts with independent contractors.

Exercise of jurisdiction over industrial disputes about the use or proposed use of independent contractors

Proposed section 127A : Disputes about independent contractors

Under proposed section 127A, the AIRC is required to have regard to 5 criteria, when exercising its powers of conciliation and arbitration in relation to the proposed jurisdiction. It will also be able to have regard to any other matter which it considers relevant.

The criteria prescribed under paragraph 127A(1)(a) are:

- considerations of cost and efficiency;
- whether, in the opinion of the AIRC, the use or proposed use of independent contractors is intended to avoid any obligations of an employer in connection with the employment of employees;
- whether the total remuneration of an independent contractor who is used or proposed to be used, is, or is likely to be, less than the total remuneration of an employee performing the same work over the same period;
- the effect of the use or the proposed use of independent contractors on the development of the skills of workers in the industry;
- relevant custom and practice in connection with the use of independent contractors in the industry concerned.

In applying these criteria, the AIRC must (see section 90 of the Principal Act) have regard to the objects of the Principal Act, which include:

- the promotion of industrial harmony and co-operation among the parties involved in industrial relations in Australia [paragraph 3(a) of the Principal Act];
- ensuring that, in the prevention and settlement of industrial disputes, proper regard is had to the interests of the parties immediately concerned and to the interests (including the economic interests) of the Australian community as a whole [paragraph 3(c) of the Principal Act].

The purpose of the provisions is to ensure that, in the context of preventing or settling an industrial dispute about the use of independent contractors, the AIRC takes account of economic considerations as well as the effects on employment and conditions of employment.

The new provisions are not to be taken to imply that the AIRC is, in dealing with such a dispute, directed to lean towards any particular outcome. It is for the AIRC to determine how a dispute should be settled, acting "according to equity, good conscience and the substantial merits of the case", as required by paragraph 110(2)(c) of the Principal Act.

It is not intended that, in dealing with industrial disputes about the use of independent contractors, the AIRC determine their remuneration, except in limited circumstances.

Proposed subsection 127A(2) provides that, in exercising its jurisdiction about such a dispute, the AIRC is not, subject to an exception, to determine the consideration (in whatever form) for the services of independent contractors. The AIRC is to be

able to make such a determination if it is necessary to prevent the engagement of independent contractors on terms that are unfair, harsh or against the public interest.

Review of unfair contracts with independent contractors

Proposed sections 127B–127D empower the AIRC to examine the fairness of contracts relating to the performance of work by an independent contractor who is a member of a registered organisation of employees (under other proposed amendments, such organisations will be able to admit independent contractors to membership).

This power is intended to complement the other proposed provisions relating to the use of independent contractors to perform work.

Proposed section 127B : unfair contracts with independent contractors

Proposed section 127B relates to the review of such contracts.

Under subsection 127B(1), *"contract"* is defined so that:

- the section applies to contracts for the performance of work which bind an independent contractor who is a member of an organisation of employees;

- the section does not apply to such contracts where the contract concerned is for the performance of work for private and domestic purposes, e.g. where a householder engages an independent contractor for some work in relation to the householder's home.

A further restriction on the types of contract covered is explained in the notes below on proposed section 127D.

Subsection 127B(2) allows an application to be made to the AIRC for the review of a contract on the grounds that it is unfair, harsh or against the public interest. The review jurisdiction will only be exercisable by a Presidential Member or a Full Bench.

Standing to apply for a review is given by proposed subsection 127B(3) to:

- a party to the contract concerned;

- an organisation of employees to which the independent contractor belongs, acting with the member's consent;

- an organisation [or association] of employers of which the person contracting for the services is a member, acting on that person's behalf.

Proposed subsection 127B(4) makes it clear that the AIRC is not limited in what it may consider in deciding whether a contract is unfair. By way of illustration, however, certain criteria are set out:

- the relative strength of the parties' bargaining positions;
- whether there was any undue influence or pressure on, or unfair tactics used against, a party;
- whether the contract could undermine the skills of employees performing work in the industry concerned;
- whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing the work over the same period.

Proposed subsection 127B(5) requires the AIRC, if it forms the opinion that a contract or a part of a contract is unfair, harsh or against the public interest, to record that opinion.

Under proposed subsection 127B(6), the AIRC will be able to form such an opinion, even if the particular ground on which it does so had not been canvassed in the application for review.

Proposed subsection 127B(7) requires the AIRC to act under the section in a way which furthers the objects of the Principal Act.

Proposed section 127C : Commission may make orders about unfair contracts

Under this section, the AIRC will be able to make orders to set aside the whole or part of a contract, to vary the contract, and to make other orders in respect of the contractual relationship between the parties to the contract - proposed subsection 127C(1).

Orders may only be prospective in operation [proposed subsection 127C(4)] and, under subsection 127C(2), may only be made for the purpose of placing the parties to the contract as nearly as practicable on a footing which redresses the unfairness.

The AIRC is to be able to make interim orders to preserve a party's position - proposed subsection 127C(3).

Orders made under proposed section 127C are to be enforceable by the Federal Court on application by a party to the contract - proposed subsection 127C(5). Subsection 127C(5) will not exclude any jurisdiction that another court would otherwise have.

A party to a reviewable contract is not prevented by these provisions from exercising any other legal rights which that party may have in respect of the contract - proposed subsection 127C(6).

Proposed section 127D : Application of sections 127B and 127C

Proposed section 127D provides that various heads of constitutional power are to support section 127B and section 127C, and that those sections are only applicable to contracts referrable to those heads of power.

Clause 9 : Insertion of new Division 3A - Certified agreements

New Division 3A is to replace sections 115 to 117 of the Principal Act. Those provisions concern *certified agreements*, that is, agreements reached between the parties to an industrial dispute which are then certified by the AIRC and, by definition, become awards. Certified agreements under the existing provisions have certain characteristics including by being for a fixed term and only being variable for limited purposes during their period of operation. Certified agreements do not have to conform with general principles (eg, the National Wage Case principles) established from time to time by the AIRC in relation to the determination of wages and conditions of employment under other awards.

An underlying principle of the certified agreement provisions, which were introduced with the Principal Act, is that the parties to a dispute should have the capacity to reach their own agreement and to have it made into an award without necessarily meeting the same requirements for the content of the agreement as would apply to the content of other awards.

This was intended to result in greater choice and flexibility (see Second Reading Speech on the *Industrial Relations Bill 1988*, Australia, House of Representatives 1988, Debates, Vol. HR.161, p.2337). In practice, parties and the AIRC appear to have found the certified agreement process difficult. The new Division is aimed at encouraging the use of certified agreements and making the process easier.

New section 134A : Objects of Division

Section 134A will set out objects which are intended to provide guidance to the AIRC in the performance of its functions under the new Division.

Proposed subsection (1) contains two objects of the Division, namely, to facilitate the making and certifying of agreements, and encouraging their use in the prevention and settlement of disputes.

Under proposed subsection (2), the AIRC must perform those functions in a way which furthers the objects of the Principal Act and, in particular, the objects of the Division.

Reflecting the particular public interest safeguards contained in the new Division, proposed subsection (3) excludes the application of section 90 of the Principal Act to the Division. Similarly, to avoid delay, section 106 of the Principal Act does not apply. Under that section, certain matters must be considered by a Full Bench of the AIRC. The exclusion of s.106 does not prevent an application for the certification of an agreement from being dealt with by a Full Bench: it will be a matter for the President's discretion.

New section 134B : Definitions

Particular terms used in the Division are defined.

"Party" is defined to include a successor, assignee or transmittee to or of the whole or part of the business of a party to a certified agreement. The definition is in the same terms as paragraph 149(d) of the Principal Act, and is included to ensure that the provisions relating to parties to certified agreements apply equally to persons who take over the business of a party to the agreement.

"Single business" is defined to include a joint venture, a common enterprise, a single project or undertaking, activities carried on by the Commonwealth, a State or a Territory, or a Commonwealth, State or Territory authority, as well as a business carried on by a single employer.

New section 134C : Certified agreements

Under this section, the parties to an industrial dispute or any of them may make a memorandum of agreed terms for the settlement of all or any of the matters in dispute or the prevention of further disputes – proposed subsection (1) – and apply to the AIRC for the certification of the memorandum – proposed subsection (3).

It is made clear – proposed subsection (2) – that a single memorandum may apply to more than one dispute, if the parties agree.

New section 134D : Minister may intervene in certain cases

Where an agreement applies to a single business, part of a single business or a single place of work, the Minister is entitled as of right under subsection (1) to intervene in an application for certification on the ground that certification is likely to seriously jeopardise the public interest.

Written notice of intervention must be given to the Industrial Registrar – subsection (2). The section does not limit the Minister's right under section 44 to intervene in public sector employment matters and matters before a Full Bench.

The Minister's right of intervention under this section is intended to exist for a limited period while the operation of the new provisions becomes established. Accordingly, the provision ceases to operate 18 months after the commencement of the section.

New section 134E : Certification of Agreements

This section requires the AIRC to certify an agreement if certain criteria are met (and prevents the AIRC from certifying an agreement unless they are met), subject to certain exceptions.

The criteria, which are cumulative, are specified in subsection (1).

An agreement must be certified if the AIRC is satisfied that:

- the agreement does not disadvantage the employees who are covered by the agreement – paragraph (1)(a):
  - certain matters to be considered in deciding whether an agreement disadvantages employees are stipulated in subsection (2) (see notes below).
- it contains dispute settling procedures – paragraph 1(b);
- before the application for certification was made, each organisation of employees that is a party to the agreement took reasonable steps to consult members whose employment is covered by the agreement over its terms and to inform them of the organisation's intention to apply for certification – paragraph (1)(c):
  - it is left for the organisation's internal processes to provide for any system of approval;
  - reference should also be made to subsection (3) (see notes below), which provides for an exception to the consultation requirement;
  - the organisation must inform the AIRC whether or not it has consulted its members and of the outcome of any such consultations – paragraph (1)(d);
- an additional criterion – paragraph 1(e) – applies where an agreement applies only to a single business, part of a single business or a single place of work, namely:
  - all employee organisations that are party to an award covering work performed in the business (or part of a business or place of work) must be party to the agreement – subparagraph (e)(i)(A):
    - there is an exception to this in subsection (4) (see notes below);
  - where there is no such award, an employee organisation that is capable of covering employees in the business (or part of the

business or place of work) must be party to the agreement – subparagraph (e)(i)(B);

- the employee organisations parties to the agreement must be represented by a single bargaining unit – subparagraph (e)(ii);

. the agreement specifies its period of operation – paragraph 1(f) – which is important for the application of new section 134J (see the notes on this section below).

Subsection (2) : disadvantage to employees

Proposed subsection (2) provides guidance to the AIRC on how to determine whether an agreement disadvantages employees. Under the proposed subsection, the AIRC is required to decide whether certification of the agreement would result in the reduction of any entitlements or protections which the employees enjoy under any award or under any other law that the AIRC considers relevant. If the AIRC decides that such a reduction would occur, it must then determine whether, in the context of the terms and conditions of the employees concerned as a whole, the reduction would be contrary to the public interest. If so, the agreement will be taken to disadvantage employees for the purposes of paragraph 1(a).

The objective of the provisions relating to the question of whether employees will be disadvantaged by an agreement, if it is certified and so takes effect, is to balance:

. on the one hand, the capacity of the parties to an agreement to decide on arrangements about work and related matters and to have them given force as a certified agreement; and

. on the other hand, to ensure that such arrangements are not unfair to the employees concerned by reducing the employment standards which apply to them.

Subsection (3) : exception to consultation requirement

Under proposed paragraph (1)(d), there is a requirement on an organisation of employees to consult affected members about an agreement.

There may be cases, however, where a new business, project or undertaking is being established and an agreement is negotiated before the business, etc, commences operation (eg, on a so-called "greenfields" site). Under subsection (3), it is made clear that there is no requirement for consultation if there are no members who are employed in connection with the business, etc. This does not exclude consultation by the union concerned with members, if it considers it appropriate.

Subsection (4) : exception to "single bargaining unit" requirement

Under proposed paragraph (1)(e), there is a requirement that where an agreement applies only to a single business, part of a single business or single place of work, all federally registered organisations of employees which are party to an award applying to that single business, etc, must be party to the agreement. Under subsection (4), an agreement can still be certified even if not all such organisations are party to the agreement, provided the AIRC is satisfied that:

- each of the organisations has been given the opportunity to be party to the agreement; and
- at least one such organisation is party to the agreement; and
- the agreement is in the interests of the employees it covers.

New section 134F

This section provides grounds, additional to those specified in proposed section 134E, upon which the AIRC may refuse to certify an agreement.

The first of these, paragraph 1(a), is where the agreement contains terms which the AIRC would not have power to include in an award. This provision gives clear expression to the fact that a certified agreement has the same status as an award (see the definition of *"award"* in subsection 4(1) of the Principal Act), and the AIRC's jurisdiction in respect of certified agreements is no wider than it is for awards. If an agreement contains matters which are outside the AIRC's jurisdiction, parties are provided with the opportunity to amend, to enable certification – see notes on proposed section 134DA.

The exception in respect of section 95 of the Principal Act reflects the intention that a certified agreement will not be prohibited from containing terms that are based on the terms of another certified agreement. (Section 95, as amended by this bill, provides for such a prohibition in the case of all other awards.)

Paragraph 1(b) provides that, where an agreement has application wider than a single business, part of a single business or a single place of work, the AIRC may refuse to certify if it thinks certification would be contrary to the public interest.

Subsection (2) provides a narrower public interest test in respect of agreements which apply to a single business, part of a single business or place of work. In these circumstances, the AIRC will only be able to refuse certification on public interest grounds where the Minister has intervened under section 134D (see notes on that section) and where the AIRC thinks that certification is likely to *"seriously jeopardise"* the public interest.

As with the Minister's right of intervention, the power of the AIRC to refuse certification in respect of an agreement covering a single business, part of a single business or a single place of work, on the basis that certification is likely to seriously jeopardise the public interest, is intended to exist for a limited period while the operation of the new provisions becomes established. Accordingly, the provision ceases to operate 18 months after the commencement of the section – subsection (3).

New section 134G : Other options open to Commission

This section contains facilitative provisions. They are intended to ensure that where an application is made for the certification of an agreement and the AIRC has grounds for refusing certification, parties are given the opportunity to rectify the problem, rather than certification simply being refused.

Under paragraph 1(a), the AIRC may accept an undertaking from a party, or parties, about how the agreement will operate. If the AIRC is satisfied that the undertaking meets its concerns, it may certify the agreement. If the undertaking is breached, the AIRC may terminate the agreement, provided all parties to the agreement are given an opportunity to be heard – subsection (2).

Under paragraph 1(b), the AIRC must, before refusing to certify an agreement, give the parties an opportunity to amend the agreement to make it certifiable. The parties must also be given the opportunity to take any other action that might be necessary to make the agreement certifiable (for example, an organisation of employees might engage in further consultations with members).

New section 134H : Procedures for preventing and settling disputes

This section complements proposed paragraph 134E(1)(b) which provides that certified agreements must contain procedures for preventing and settling disputes.

The section provides that an agreement may include terms which give the AIRC power to settle disputes over the application of the agreement or which allow the AIRC to appoint a board of reference to settle such disputes (the establishment of boards of reference is covered by section 131 of the Principal Act). The AIRC will have a discretion as to whether it will allow the inclusion of these terms in an agreement. The AIRC might take the view that disputes settling procedures contained in the agreement propose a role for the AIRC which was inappropriate.

New section 134J : Operation of certified agreements

This section contains provisions relating to the period during which a certified agreement is in force and to the status of a certified agreement after the period of operation of the agreement specified by the parties expires.

A certified agreement must specify the period of operation of the agreement [see proposed paragraph 134E(1)(f)]. During that period, the agreement cannot be

varied or terminated other than in specified, exceptional circumstances – see notes on sections 134G, 134M and 134N.

Under subsection (1), a certified agreement comes into force when it is certified. It remains in force during the period of operation specified in the agreement (or that period as extended or further extended – see notes on section 134K), unless:

- it is terminated (see notes on sections 134G, 134M and 134N which provide for termination); or

- there are only employers remaining as parties to the agreement, or, alternatively there are only employee organisations remaining as parties to the agreement (see notes on section 134N).

Subsection (2) provides that, during the period of operation specified in the agreement, section 148 of the Principal Act does not apply to the agreement (section 148 provides that, subject to any order of the AIRC or a variation under section 113, an award dealing with particular matters continues in force until a new award is made dealing with the same matters).

Under subsection (3), if an agreement remains in force until the end of the period of operation specified in the agreement (ie, it has not been brought to an end in the exceptional circumstances mentioned above), then, at that date, section 148 commences to apply to the agreement. This has the effect that, after the specified period of operation, the agreement continues in force but may be varied, set aside or replaced as if it were an ordinary award.

New section 134K : Extension of certified agreements

This section allows parties to extend, and further extend, the specified period of operation of a certified agreement – subsection (1).

For an extension to have effect, the parties must agree and must notify the AIRC of the extension. The notification must be in writing and must be provided to the AIRC before the period of operation of the agreement that is specified in the agreement expires (or before the expiry of that period as extended or further extended under the section).

New section 134L : Effect of certified agreements

It is intended that certified agreements operate differently from other awards.

Paragraph (1)(a) provides that, during the period of operation of a certified agreement specified in the agreement (or that period as extended under section 134K), the terms of the agreement prevail over the terms of an award or order of the AIRC. After the expiry of that period, the certified agreement continues in force, and its terms continue to prevail over the terms of any award or order made

prior to that time, but the AIRC may make a new award which varies or replaces the certified agreement – see notes on proposed subsection 134J(3).)

Paragraph (1)(b) provides that, during the period of operation of a certified agreement specified in the agreement, a term of the agreement can only be set aside or varied by the parties in circumstances prescribed under subsection 134M(3).

Paragraph 1(c) provides that, during the period of operation of a certified agreement specified in the agreement, the AIRC cannot set aside the agreement under subsection 113(1) of the Principal Act, and cannot cancel or suspend the agreement under section 187. (After the expiration of that period, the AIRC could set aside the agreement under subsection 113(1) – see notes on proposed section 134J – or cancel or suspend it under section 187.)

Paragraph 1(d) provides that, during the period of operation of a certified agreement specified in the agreement, the agreement can only be varied under subsection 113(2) for the purpose of:

- removing ambiguity or uncertainty; or
- including, omitting or varying a bans clause; or
- including, omitting or varying a stand-down clause.

An exception to this is provided in subsection (2), which allows parties to include in an agreement provisions which prevent the AIRC from varying the agreement to include, omit or vary bans clauses or stand-down clauses.

After the period of operation of a certified agreement specified in the agreement has expired, subsection 113(2) will apply generally and the AIRC will, upon application by a party, be able to vary the agreement – see notes on subsection 134J(3).

Under paragraph 1(e), the AIRC is precluded from exercising arbitration powers to vary the agreement, except where such arbitration powers are provided for in the new Division. This provision is intended to ensure that, during the period of operation of an agreement specified in the agreement, the agreement is only capable of being varied in the limited circumstances specified in the new Division.

New section 134M : Certified agreements may be varied or terminated by Full Bench

This section sets out the circumstances in which the AIRC may review the operation of a certified agreement and the action it may take following such a review.

Subsection (1) provides that a review of a certified agreement must be conducted by a Full Bench of the AIRC, that a review may be conducted at any time while the

certified agreement is in force, and that the parties to the certified agreement must be given the opportunity to be heard.

Subsection (2) provides that a review may be initiated by the AIRC acting on its own initiative or on the application of an organisation or person bound by the agreement and in no other circumstances. This is subject to subsection (7) which provides that, in certain circumstances, the Minister may apply to the Full Bench for the review of certain agreements.

On reviewing certified agreements:

- in relation to any certified agreement, it is open to a Full Bench to find that the continued operation of the agreement would be unfair to the employees covered by the agreement – paragraph 3(a);

- in relation to a certified agreement other than one which applies only to a single business, part of a single business or a single place of work, it is open to a Full Bench to find that the continued operation of the agreement would be contrary to the public interest – paragraph 3(b). [Subsection (7) provides a separate, different process for the review on public interest grounds of agreements which apply only to a single business, part of a single business or single place of work.]

If the Full Bench finds either of the above, it may:

- terminate the agreement – paragraph 3(c);

- accept an undertaking from all or any of the parties in relation to the operation of the agreement – paragraph 3(d);

- permit the parties to vary the agreement – paragraph 3(e).

If an undertaking given under paragraph 3(d) is breached, the Full Bench may terminate the agreement. Before doing so, it must give the parties an opportunity to be heard – subsection (4).

Subsections (5) and (6) provide a mechanism whereby a party to a certified agreement may be released from the agreement if another party to the agreement engages in industrial action.

Subsection (5) provides that the party seeking to be released must apply to the AIRC for a declaration that the party is no longer bound. That party must be affected by the industrial action, the industrial action must relate to a matter dealt with in the agreement, and must be engaged in by another party or other parties to the agreement.

Subsection (6) provides that, upon receipt of such an application, the AIRC may declare that the applicant party is no longer bound, provided the AIRC is satisfied that it is in the public interest to make such a declaration.

Subsection (7) makes separate and distinct provisions for review, by a Full Bench on public interest grounds, of certified agreements which apply only to a single business, part of a single business or single place of work. Such reviews may only be conducted where the Minister applies to a Full Bench – paragraph (7)(a). The ground on which the Minister may apply for review is that the continued operation of the agreement would *"seriously jeopardise"* the public interest. If the Full Bench finds the ground established, it may, under paragraph (7)(b):

- terminate the agreement; or
- accept an undertaking from all or any of the parties in relation to the operation of the agreement; or
- permit the parties to vary the agreement.

The right of the Minister to apply for review on the basis of substantial jeopardy to the public interest, and the power of the AIRC to review on the basis of such an application, are intended to exist for a limited period while the operation of the new provisions becomes established. Accordingly, subsection (7) ceases to operate 18 months after the commencement of the section. After that, the only ground on which agreements applying only to a single business, etc, will be reviewable will be that provided in paragraph (3)(a) – that the continued operation of the agreement would be unfair to the employees covered by the agreement.

New subsection 134N : Certified agreements may be terminated by parties

This section enables a party to a certified agreement to apply to the AIRC to withdraw from the agreement, where all the other parties agree. It also provides that, if they agree, all parties may jointly apply to the AIRC to have an agreement terminated. If the AIRC considers that it is in the public interest to do so, it may allow such applications.

Subsection (1) provides that a party to a certified agreement may, with the consent of all the relevant parties, give notice to the AIRC stating that the party does not want to remain bound by the agreement. Notice must be in writing. Relevant parties are defined in the section as follows:

- where the party seeking to withdraw from the agreement is an employer or an employer organisation – the relevant parties are parties that are organisations of employees;
- where the party seeking to withdraw from the agreement is an organisation of employees – the relevant parties are parties that are employers or organisations of employers.

Under subsection (2), all the parties to a certified agreement may jointly give the AIRC notice stating that they want the agreement to be terminated. Notice must be in writing.

Subsection (3) provides that, where the AIRC receives notice that a party no longer wishes to be bound by an agreement or that all parties wish an agreement to be terminated, it may make an order or declaration to that effect, provided it considers that it is in the public interest to do so.

Clause 10 : Insertion of new section: Definition of "court of competent jurisdiction"

This clause inserts in the Principal Act a definition of *"court of competent jurisdiction"* which will apply to Division 1 of Part VIII of the Act. At present, that Division uses the phrase *"court of competent jurisdiction"* with two different meanings.

The definition used in this clause is the same definition now set out in section 178 of the Principal Act. That definition will now apply to the whole of this Division rather than only to section 178. The only practical effect of this is to alter slightly the meaning of the phrase *"court of competent jurisdiction"* in section 179.

Section 178 gives to each *"court of competent jurisdiction"* (as defined) jurisdiction to impose a penalty for breach of an award or order of the Commission, and jurisdiction to also order, in the same proceedings, that an employer pay an employee the amount of any underpayment of money due under an award or order of the Commission.

Section 179 gives each *"court of competent jurisdiction"* the jurisdiction to decide a claim by an employee against his or her employer for a payment due under an award or order of the Commission. In section 179 the phrase *"court of competent jurisdiction"* is not defined; it has been interpreted to mean any court which, in its existing jurisdiction, would have been able to hear the matter if it were not for the restriction of federal jurisdiction to those courts on which it is conferred by Commonwealth law. In practice, this largely confines the jurisdiction to general civil courts. It is convenient that claims under section 179 also be able to be heard by specialist industrial magistrates who are also qualified magistrates. These industrial magistrates can already award payments due under federal awards, but only when a penalty is also sought. This amendment will overcome that anomaly.

In practice only State Supreme Courts will no longer have under this new definition the jurisdiction they have under the existing section 179. In the very unusual event that litigation for underpayment of award wages is sufficiently important to be determined by a superior court, it is appropriate that the proceedings be brought in the Federal Court.

Clause 10 uses the phrase *"magistrate's court"*. That phrase is given an extended definition by the Acts Interpretation Act, as set out in the notes below on proposed section 179C (clause 13).

Clause 11 : Imposition and recovery of penalties

This clause proposes the omission of subsection 178(9) of the Principal Act and the substitution of a new subsection. The proposed new subsection 178(9) will define the terms *"employee"*, *"employer"* and *"employment"* so that they include the parties to a contract for services and their relationship.

Section 178 of the Principal Act deals with the imposition and recovery of penalties where a person breaches the terms of an award or order of the AIRC. This proposed amendment complements the proposed legislative scheme which gives the AIRC a limited jurisdiction over industrial disputes concerning independent contractors and to examine and review certain unfair contracts. It will enable proceedings to be brought under section 178 in respect of a breach of an award or order made in exercise of that jurisdiction.

The old subsection 178(9) contained the same definition of *"court of competent jurisdiction"* that is now to be in the new section 177A, inserted by clause 10; the old subsection therefore becomes redundant.

Clause 12 : Recovery of wages, etc.

Section 179 of the Principal Act enables employees to sue for payments due under awards or orders of the AIRC. This clause proposes the addition to that section of a new interpretation subsection.

The proposed new subsection 179(3) will define the terms *"employee"* and *"employer"* to include the parties to a contract for services. The right of action available to employees will therefore also be available to independent contractors.

Clause 13 : Insertion of new sections : Small Claims

This clause proposes adding to the Principal Act two new sections to provide a simpler procedure for recovery of award wages.

The new procedure applies to legal proceedings brought by an employee to recover an amount that the employer is required to make by an award or order of the Commission. Section 179 of the Principal Act already allows an employee to sue for such a debt in any court of competent jurisdiction.

The bill specifies a small claims regime that will be applicable to claims in a magistrate's court for up to $5,000 (or a higher amount set by regulation). The elements of this small claims regime are:

- no party may be represented in court by a barrister or solicitor unless the magistrate so approves;
- this approval may be subject to such conditions as the magistrate considers reasonable to ensure that any other party is not unfairly disadvantaged by the legal practitioner appearing in the proceedings;
- the magistrate is not bound by the rules of evidence;
- the magistrate may correct any defect in the application;
- the magistrate is not bound to act in a formal manner, and may act without regard to technicalities and legal forms.

The regulations may make further provision concerning representation of parties; this is explained in the notes on proposed section 179D below.

Proposed section 179C – Employees may choose small claims procedure in certain magistrates' courts

Section 179C describes when the small claims procedure is to apply. The new procedure is to apply when an employee chooses to have the procedure apply and sues in a court in which the procedure is available.

The small claims procedure is to be available in a magistrate's court. The phrase "magistrate's court" is defined in the existing subsection 4(1) of the Principal Act to mean:

(a) a court constituted by a police, stipendiary or special magistrate;

(b) a court constituted by an industrial magistrate who is also a police, stipendiary or special magistrate; or

(c) in Tasmania – a Court of Requests.

Paragraph 179C(b) provides for the employee who is suing to indicate that he or she wants the small claims procedure to apply. The employee can indicate this in a manner prescribed by regulations made under the Principal Act. Alternatively, the employee can indicate this choice in a manner prescribed by "rules of court" relating to that court. The phrase "rules of court" is given an extended meaning by subsection 28(1) of the Acts Interpretation Act. It means rules made by the authority with a power to make rules or orders regulating the practice and procedure of such courts. Paragraph 179C(b) of the Principal Act will therefore allow State and Territory authorities to specify a method by which an employee will indicate, when commencing proceedings, that the small claims regime is to apply; the most convenient method may vary from court to court, depending on local practice.

Proposed section 179D – Small claims procedure

Subsection 179D(2) of the Principal Act will set out the elements of the basic small claims regime.

Subsections 179D(3) and (4) will allow a more stringent regime to be applied to particular courts by regulation. This more stringent regime can prohibit or restrict legal representation (whereas the basic regime allows legal representation if the court permits).

The more stringent regime imposed by regulation can also allow officers or employees of an "organisation" to appear for parties in these proceedings. The word "organisation" is defined in the existing subsection 4(1) of the Principal Act to mean an organisation registered under that Act, ie, a federally registered trade union or employer organisation.

For State courts, the more stringent regime may only be imposed by regulation if the same restriction is already imposed by State law for some part of the court's jurisdiction. This reflects a constitutional limitation on the Commonwealth's power to alter the procedures adopted by State courts.

"Counsel or solicitor"

In restricting legal representation, this clause uses the phrase "counsel or solicitor". This is the same phrase already used in the provisions of the Principal Act that govern representation before the AIRC and the Federal Court [subsections 42(3) and 58(2)].

The High Court has decided that the phrase "counsel or solicitor", in an equivalent context, only refers to a counsel or solicitor appearing in his or her professional capacity on behalf of a client. It does not refer to a non-practising lawyer employed by a trade union or employer organisation as an officer of that organisation. The High Court's decision was made in the case The Queen v. Kelly; Ex parte the Commonwealth Public Service Clerical Association (1955) 92 Commonwealth Law Reports 10.

Therefore, this exclusion of legal representation will not exclude an official or employee of a trade union or of an employer organisation who has a legal qualification but is not actual practising as a barrister or solicitor.

Clause 14 : Associations capable of applying for registration

This amendment augments the existing authority for persons who are not employees to join unions.

Section 188 of the Principal Act specifies the categories of persons who may be eligible for membership of an association under its rules, if the association is to be capable of applying for registration under the Act. Paragraph 14(a) of the bill

proposes the insertion of a new subparagraph 188(1)(b)(iii) in the Principal Act. This will mean that an association of employees is capable of registration if, in addition to members who are employees, officers and other persons already covered by paragraph 188(1)(b), its membership also includes persons who are independent contractors. The independent contractors who are to be able to be included in the membership of such an association are to be limited to those who, if they were employees performing the same work, would be eligible for membership as employees.

Paragraph 14(b) of the bill makes a consequential amendment.

Clause 15 : Rules of organisations

Section 195 of the Principal Act sets out certain requirements for the content of the rules of an organisation registered under the Act, permits the rules to provide for any other matter not explicitly mentioned and defines a term used in the section. This clause proposes the insertion in section 195 of a new subsection (1A). The proposed subsection will allow the eligibility rules of a trade union to extend to independent contractors. This complements the amendment made to section 188 of the Principal Act.

Clause 16 : Entitlement to membership of organisations

Section 261 of the Principal Act allows an employee, unless a person of general bad character, who is eligible for membership of a union under its rules, subject to payment of any relevant dues and levies, to become and remain a member. Similar provision is made in respect of employer organisations. The section allows questions of entitlement to be brought before the Federal Court which may make orders appropriate to any such case. This clause amends the section to reflect the new independent contractor class of members of unions.

An application for a declaration as to the entitlement of an independent contractor to join an organisation will be able to be made by a person wishing to contract for the independent contractor's services, as well as the contractor and the organisation concerned. This is akin to the existing provisions relating to an employee who seeks a declaration from the Court.

Clause 17 : Proposed new section 286A : Organisation of employees may represent independent contractors

This clause proposes the insertion of section 286A into the Principal Act to allow an organisation of employees, of which an independent contractor is a member, to represent the independent contractor in negotiations in relation to the contractor's engagement under a contract for services. The organisation will only be able to do this where the independent contractor consents.

Clause 18 : C rtain offences in relation to m mbers of organisations, etc.

Section 334 of the Principal Act provides protection to employees against discriminatory action by employers, based on certain grounds related to the functioning of the industrial relations system. These include that the employee concerned has become an officer, delegate or member of an organisation, has not joined in industrial action, has made an application for or taken part in a secret ballot under the Act, is entitled to the benefit of an award or order of the AIRC or has appeared as a witness in a proceeding under the Principal Act.

Paragraph 18(d) will insert new subsections 334(7A), (7B) and (7C) in the Principal Act. Proposed subsection 334(7A) expressly extends the protections of the section to independent contractors. For that purpose, the proposed subsection defines terms used in the section so that they refer to the parties to a contract for services, the relationship constituted by such a contract and its commencement and termination.

Proposed subsection 334(7B) will allow further protection of the rights and position of independent contractors where their contracts are terminated contrary to subsections 334(1), (2) or (3). In such a case, the Court will be able to make such orders as it thinks fit to compensate the independent contractors.

Proposed subsection 334(7C) expressly ensures that the rights of reinstatement conferred on a person by section 334 do not limit any other rights of the person.

The remaining paragraphs of this clause insert an additional paragraph in each of subsections 334(1), (2) and (3) to protect independent contractors more effectively and reflect the amendments proposed by other clauses of the bill in relation to independent contractors.

Paragraph 18(a) will make it an offence for an employer to dismiss, injure in his or her engagement or prejudicially alter the position of an independent contractor because the contractor has made, or proposes to make, use of the proposed unfair contract review procedure (see the notes on clause 8), is the subject of a proposed use of that procedure by an organisation on his or her behalf, or is the subject of an order under that procedure.

Paragraph 18(b) will make it an offence for an employer to refuse to engage, or to discriminate against, an independent contractor in the terms or conditions of an engagement on the same grounds as under paragraph (a).

Paragraph 18(c) will make it an offence for an employer to threaten to terminate the engagement of an independent contractor, threaten to injure an independent contractor in his or her engagement, or threaten to alter the position of an independent contractor to his or her prejudice on the same grounds as under paragraph (a).

Clause 19 : Offences in relation to independent contractors, etc.

This clause strengthens the protection against coercion available to independent contractors. It proposes the omission and substitution of paragraph 336(1)(c) of the Principal Act. The proposed paragraph will make it an offence for an organisation to take, or threaten to take, industrial action against any person who is not an employee (e.g. an independent contractor) with intent to coerce that person to join an organisation.

The extensive provisions of the section deeming action taken by certain individuals or bodies to be action taken by an organisation remain.

Clause 20 : Transitional : Certified agreements

The existing provisions of the Industrial Relations Act 1988, sections 115–117, are to be repealed by this bill. This clause makes transitional provisions in relation to agreements which were certified, or made with the intention of an application being made for certification, under those provisions.

Paragraph 2(a) deals with agreements made, but not certified, immediately before sections 115 to 117 are repealed – such agreements will be treated as if they had been made under the new section 134C.

Paragraph 2(b) deals with agreements certified under section 115 prior to its repeal – such agreements will continue to operate as if sections 115–117 had not been repealed, but will be able to be extended under the new section 134K. (Under sections 115–117 there was no provision for extension of agreements.)

Paragraph 2(c) deals with the case of an agreement in respect of which an application for certification under section 115 is made prior to that section's repeal, but the agreement has not been certified at the time section 115 is repealed – in such a case, if the parties wish, the application may be treated as if it had been made under the new section 134C.

Subsection (3) provides that, in the case of an agreement made but not certified, or made with an application for certification pending, under section 115 prior to its repeal, the AIRC may permit parties to vary its terms so as to comply with the requirements of the new certified agreements provisions contained in Division 3A of Part VI.

Clause 21 : Transitional : Designated Presidential Members

This clause provides for continuity in the application of provisions of the Principal Act concerning registration of organisations. This is a consequential amendment made necessary by the change to the definition of *"designated Presidential Member"*, made by paragraph 4(c) of this bill. That phrase is now to be defined to mean a member of the new Vice President's Panel. This clause will make it clear

that things done before that change by those who were then *"designated Presidential Members"* will not need to be repeated under the amended Act.

PART 3 – AMENDMENTS OF THE NATIONAL LABOUR CONSULTATIVE COUNCIL ACT

Clause 22 : Principal Act

This is a formal provision.

Clause 23 : Definitions

This extends the definition of *"appointed member"* in the NLCC Act so that it will include the new member to be nominated by the Metal Trades Industry Association. The existing definition of *"appointed member"* already extends to all the other members appointed to the NLCC.

Clause 24 : Purpose of Council

Paragraph (a) of this clause amends the statement of the NLCC's purpose to recognise that its meetings need not be confined to representatives of the Commonwealth, of employers and of employees. By clause 27 of this bill, the Minister is to be empowered to invite others to be represented at the NLCC's meetings.

Paragraph (b) of this clause amends the existing confidentiality provision in the NLCC Act so as to recognise that invitees who are not members might participate in NLCC meetings. Invitees, like members, are to have the right to report to those they represent.

Clause 25 : Membership of Council

Paragraph (a) of this clause reflects the increase in the number of members of the NLCC from 16 to 18.

Paragraph (b) provides for the ACTU to nominate 8 members of the NLCC (in place of the reference now in the Act to the ACTU nominating 7 members). This will maintain the balance between employer and worker representatives.

Paragraph (c) provides for the NLCC to include a member nominated by the Metal Trades Industry Association.

Paragraph (d) has the effect that the nominee of the Metal Trades Industry Association will be appointed to the NLCC by the Minister.

Clause 26 : Substitute memb rs

This clause allows the Metal Trades Industry Association to nominate a person to attend any NLCC meeting which the appointed member is unable to attend.

Clause 27 : Insertion of new section: Invited representatives

This clause inserts in the NLCC Act a new section 10A allowing the Minister to invite a person, body or organisation to nominate a representative to participate in NLCC meetings without becoming a member of the NLCC.

Before issuing an invitation, the Minister will be required to consult the three organisations which nominate members of the NLCC.

Invited representatives are to be entitled to travelling allowance as if they were members of NLCC. The NLCC Act already gives NLCC members entitlement to travelling allowance at the highest rate payable to officers of the Australian Public Service, other than Secretaries.

SCHEDULE : MINOR AND CONSEQUENTIAL AMENDMENTS

INDUSTRIAL RELATIONS ACT 1988

Consequential upon the insertion by clause 9 into Part VI of the Industrial Relations Act of proposed Division 3A – *certified agreements* – the existing main provisions of the Act concerning certified agreements (sections 115–117) are to be repealed. Existing references to those sections are amended to refer to the new Division 3A. In some cases, provisions referring to those sections will require modification, as a consequence of differences in the new certified agreements provisions.

Paragraph 45(1)(b)

This paragraph presently allows appeals to a Full Bench of the AIRC against an award or order made by a member of the AIRC, except where the award or order is made under section 112. It is proposed that section 112 be repealed, but that the AIRC's power to make consent awards continue as part of its general award-making power. The exception contained in paragraph 45(1)(b) will therefore need to be amended by replacing the reference to section 112 with a reference to awards made by consent.

Paragraph 45(1)(e)

This paragraph allows an appeal to the Full Bench of the AIRC against a decision of a member of the AIRC to refuse to certify an agreement. It will be necessary to amend the paragraph to replace the reference to section 115 with a reference to

the proposed new provisions relating to certified agreements, namely Division 3A of Part VI.

Subsection 48(3)

The operation of this subsection has the effect of preventing the Commonwealth from making Regulations governing the practice and procedure of the AIRC, because the AIRC has made rules relating to its practice and procedure. The proposed amendment will restore the capacity of the Commonwealth to deal with these matters by regulation, where necessary.

Section 95

This section prevents the AIRC from including in an award terms which are based on the terms of a certified agreement, other than in exceptional circumstances. The proposed amendment deletes a reference to section 112, which is to be repealed, and provides that awards which are certified agreements are not covered by the section.

Paragraph 103(1)(a)

It is proposed to amend this paragraph by removing the reference to section 112 (which is to be repealed) and substituting the reference to section 115 with a reference to the proposed new certified agreements provisions.

Subsection 106(2)

This is a consequential amendment reflecting the fact that section 106 of the Principal Act is not to apply to the performance by the AIRC of its functions under the new Division 3A of Part VI – see notes on proposed subsection 134A(3).

Subsection 108(8)

This subsection makes reference to sections 112 and 115. Both these sections are to be repealed. Section 115 is to be replaced with Division 3A of Part VI. It is proposed that the references in subsection 108(8) be amended accordingly.

Paragraph 109(1)(b)

This paragraph presently allows the Minister to apply to the President of the AIRC for a review of a decision by a member of the AIRC to certify an agreement under section 115.

Under the proposed new provisions relating to certified agreements, specific circumstances in which the Minister may initiate a review of a certified agreement are prescribed. The continued operation of paragraph 109(1)(b) would be inconsistent with these provisions and it is therefore proposed that the paragraph be deleted.

Section 109

The new subsection 109(8) is included to make it clear that section 109 does not apply in respect of agreements certified under the new Division 3A of Part VI.

Paragraph 111(1)(b)

This paragraph is proposed to be amended to reflect the proposed repeal of section 112 and to make it clear that the AIRC's general powers to make awards and orders include the power to make such awards and orders by consent.

Paragraph 111(1)(c)

This paragraph is to be amended by substituting the reference to section 115 with a reference to the proposed new certified agreements provisions.

Section 112

In order to reduce a perceived overlap between the purpose of the special consent award provisions contained in section 112 and the certified agreements provisions, it is proposed that section 112 be repealed. The power of the AIRC to make consent awards will continue, but it will not be differentiated from the AIRC's general award-making powers. The certified agreements provisions will stand alone as a special and distinct mechanism for facilitating agreements.

Sections 115, 116 and 117

These sections contain the current provisions relating to certified agreements. It is necessary to repeal them as it is proposed that they be replaced by a new Division 3A of Part VI.

Paragraph 145(a)

It is proposed to amend this section by replacing the reference to section 115 with a reference to the proposed Division 3A of Part VI.

Section 149

It is proposed to amend section 149 to make it clear that the existing provisions of the Act relating to parties bound by awards apply to certified agreements and consent awards.

Heading to Division 1 of Part VIII

This changes the heading to Division 1. The old heading was *"Penalties for contravention of awards and orders"*. The new heading reflects the remedies (other than penalties) available under that Division, including the new *"small claims"* system.

Subsection 179(1)

This is a formal amendment to reflect the change in the definition of *"court of competent jurisdiction"* (that change is explained in the notes on clause 10).

Subsection 179(1) of the Principal Act now refers to suing *"in the Court or in any other court of competent jurisdiction"*. This amendment omits the word *"other"*. This is because *"the Court"* (which is defined to mean the Federal Court) will no longer be within the meaning of the phrase *"court of competent jurisdiction"*.

This amendment does not alter the jurisdiction which subsection 179(1) already gives to the Federal Court.

Subsection 193(8) : (definition of "small organisation (stage 1)")

This paragraph amends section 193 of the Principal Act so that independent contractors who are members of a small organisation are taken into account in the stage 1 review of the registration of the organisation.

Subsection 193A(8) : Definition of "small organisations (stage 2)")

This paragraph amends section 193A of the Principal Act so that independent contractors who are members of a small organisation are taken into account in the stage 2 review of the registration of the organisation.

Subparagraph 296(b)(iii)

Section 296 allows for cancellation of the registration of an organisation on certain technical grounds. The proposed amendment is consequential upon the addition of proposed subparagraph 188(1)(b)(iii) to the Principal Act.

Paragraphs 335(1)(a) and (b)

It is proposed to amend these paragraphs by inserting a reference to proposed paragraphs 334(1)(ba), (2)(ba) and (3)(ba).

Subsection 336(5) (definition of "eligible person")

This proposed amendment is of a minor drafting nature.

Section 353A

Section 353A allows regulations to be made in respect of the keeping by employers and inspection of employment records. This amendment proposes the insertion of a new subsection 353A(2) which will allow the making of regulations to require employers of persons under awards to issue pay slips containing prescribed particulars.

Schedule 4

Schedule 4 of the Principal Act forms part of a scheme designed to overcome difficulties which arise from the separate federal and State registration of organisations of employees.

Under the scheme, where agreement is reached between the Federal Government and a State Government, and complementary State legislation is enacted, the State may be prescribed under section 293 of the Principal Act. When a State is so prescribed, Schedule 4 of the Principal Act applies.

Schedule 4 provides a mechanism whereby a State registered organisation of employees and its counterpart federally registered State Branch can amalgamate, so that the one entity can operate as part of the federally registered organisation and for the purposes of the applicable State law.

Agreement has been reached between the Federal Government and the South Australian Government to apply Schedule 4 in that State. South Australia has enacted complementary legislation. It is proposed that South Australia be prescribed for the purposes of Schedule 4.

As presently drafted, clauses 2 and 4 of Schedule 4 require that the rules of a State Branch of a federally registered organisation meet certain requirements. Many of the South Australian Branches of federally registered organisations have rules which presently do not meet those requirements. If South Australia is prescribed for the purposes of Schedule 4, those organisations will immediately be in breach of clauses 2 and 4 of Schedule 4.

The purpose of the proposed amendment is to allow a period of grace of 12 months after Schedule 4 begins to apply to a State, in order to enable organisations to amend their rules so as to comply with the provisions of the Schedule.

NORTHERN TERRITORY (SELF-GOVERNMENT) ACT 1988

Paragraph (a)

This paragraph applies the new definition of *"industrial dispute"* in the Principal Act to the Northern Territory jurisdiction of the Australian Industrial Relations Commission, with the omission of the requirement of interstateness.

The definition in the Principal Act is confined to interstate disputes because of a constitutional limitation that does not apply in the Territories.

Paragraph (a) omits existing subsection 53(1) of the Northern Territory (Self-Government) Act. That existing subsection applies to the Northern Territory jurisdiction of the Australian Industrial Relations Commission (ie, its jurisdiction concerning industrial disputes in the Territory) the existing definition of *"industrial*

dispute" in the Principal Act, with the omission of the requirement of interstateness. Thus the substantive effect of this paragraph of the bill is to provide that, for disputes about the use of independent contractors, the Northern Territory jurisdiction of the Australian Industrial Relations Commission is not restricted to interstate disputes, as this restriction already does not apply to any part of the Commission's Northern Territory jurisdiction.

Paragraph (b)

This paragraph inserts definitions to extend the scope of subsection 53(2) of the Northern Territory (Self-Government) Act. Subsection 53(2) extends the meaning of the reference in subsection 53(1) to an industrial dispute *"in the Territory"*; that includes an industrial dispute in relation to the employment of persons employed for the performance of work wholly or mainly in the Territory. The effect of this paragraph of the bill is that these references to *"employed"* and *"employment"* will encompass independent contractors. This reflects the change in the disputes jurisdiction of the Australian Industrial Relations Commission under the amendments of the Principal Act made by the bill.

This paragraph of the bill only extends the circumstances in which the Commission will have its broader Territory jurisdiction rather than its ordinary jurisdiction. It does this by extending the circumstances in which a dispute will be regarded as being *"in the Territory"*. This paragraph does not alter the test for determining whether the Commission has jurisdiction concerning a dispute, once it is established that the dispute is *"in the Territory"*. Under both the existing Act and this bill, that test is exactly the same as for the Commission's national jurisdiction, with the sole exception that a dispute need not be interstate in nature.

Paragraph (c)

This paragraph amends subsection 53(7) of the Northern Territory (Self-Government) Act. Subsection 53(7) provides that an award or order of the Australian Industrial Relations Commission prevails over any inconsistent Northern Territory enactment or *"determination referred to in paragraph 6(b)"*. Paragraph 6(b) refers to determinations fixing terms and conditions of employment in the Northern Territory public sector.

This paragraph will amend subsection 53(7) by substituting a reference to an instrument (defined to mean *"an award, order, decision or determination made under an enactment"* [this definition is in paragraph (e) of this part of the Schedule to the bill]. This is to confirm that an award or order made by the Commission will override not only inconsistent Northern Territory legislation, but also any inconsistent instrument made under Northern Territory legislation. The existing reference to paragraph 6(b) will no longer be appropriate because 6(b) is confined to *"employment"* and thus would not extend to any instrument concerning independent contractors.

Paragraph (d)

This paragraph amends subsection 53(7) of the Northern Territory (Self-Government) Act. The amendment is a consequence of the amendment of that subsection made by paragraph (c), explained above. The reference to a *"determination"*, which reference is to be replaced by this paragraph, is no longer appropriate as the earlier part of the subsection will now refer to an *"instrument"* rather than a determination. As a result of this amendment, subsection 53(7) will now provide that, where an *"enactment"* or an *"instrument"* [ie, a Northern Territory law or an instrument made under a Northern Territory law] is inconsistent with an award or order of the Commission, the enactment or instrument is invalid to the extent of the inconsistency.

Paragraph (e)

This defines the word *"instrument"* as used in the amendments made by paragraphs (c) and (d). This is explained in the notes on those paragraphs.

SEAT OF GOVERNMENT (ADMINISTRATION) ACT 1910

Paragraphs (a) and (b)

These amendments concern subsections 5(1) and (2) of the Seat of Government (Administration) Act. Those subsections are identical to subsections 53(1) and (2) of the Northern Territory (Self-Government) Act – described above – except that they refer to the Australian Capital Territory rather than the Northern Territory.

The amendments made by paragraphs (a) and (b) of this part of the Schedule to the bill are identical to the amendments made by paragraphs (a) and (b) of the part of the Schedule that amends the Northern Territory (Self-Government) Act – explained above – and the explanatory notes on paragraphs (a) and (b) of those amendments apply also to these amendments.