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THE PARLIAMENT OF THE  
COMMONWEALTH OF AUSTRALIA

SENATE

INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL (NO 2) 1990

EXPLANATORY MEMORANDUM

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



## INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL (No 2) 1990

### OUTLINE

This Bill proposes amendments to a number of Acts within the Industrial Relations Portfolio and to the Defence Act 1903. The Acts to be amended and a general outline of the proposed amendments are set out below.

#### Amendments of the Defence Act 1903

The amendments of this Act will vary the arrangements relating to appointments to the Defence Force Remuneration Tribunal. A person will not be able to be appointed to the Tribunal within 12 months of having been a member of the Defence Force. Appointments will be able to be made for any period up to 5 years.

#### Amendments of the Industrial Relations Act 1988

The amendments of this Act are intended to improve its operation by clarifying and extending certain provisions and correcting some errors and omissions.

The main amendments will:

- . allow individuals affected by the breach of an award to sue for and recover a penalty for the breach;
- . allow for the recovery from employers of unpaid superannuation contributions;
- . allow non-unionists to sue for the recovery of unpaid wages due under awards;
- . provide for the ordering of interest on money judgments under the Act up to the time of judgment and for money judgments to bear interest following judgment; and
- . allow regulations to be made in relation to the keeping by employers of time and wages records.

#### Amendments of the Industrial Relations (Consequential Provisions) Act 1988

The main amendment proposed to this Act seeks to insert a new section which will enable a Presidential Member who was also a Presidential Member of the former Australian Conciliation and Arbitration Commission and who was not covered by the Judges' Pensions Act 1968 to elect to be covered by that Act.

Other amendments of this Act correct some errors and omissions and deal with matters consequential on other legislation.

Amendment of the Long Service Leave (Commonwealth Employees) Act 1976

The amendments of this Act are of a machinery nature to enable the Act to cover Australian Federal Police staff members.

Amendments of the National Occupational Health and Safety Commission Act 1985

The amendments of this Act are intended to reflect Australian Capital Territory self government and to change arrangements for persons acting as Chief Executive Officer of the Commission.

Amendments of the Remuneration and Allowances Act 1990

The amendment of this Act is intended to remove from its scope the Chief Magistrate and Magistrates of the Australian Capital Territory.

Amendments of the States Grants (Coal Mining Industry Long Service Leave) Act 1949

The amendments to this Act are mainly of a drafting or machinery nature. The major amendments will allow the Commonwealth to make certain advances to the States and recover its costs of administration of the Coal Mining Industry Long Service Leave Scheme.

Financial Impact Statement

The provisions of this Bill are not expected to have a significant financial impact on the Commonwealth. The amendment of the Remuneration and Allowances Act 1990, will allow formal transfer of responsibility for ACT Magistrates salaries to the Territory. The amendment of the States Grants (Coal Mining Industry Long Service Leave) Act 1949 will facilitate cost recovery by the Commonwealth.

## NOTES ON CLAUSES

### Part 1 - Preliminary

#### Clause 1 - Short Title

The short title of the Act is given.

#### Clause 2 - Commencement

Provision is made for the dates of commencement of the legislation. Some provisions have retrospective effect [see notes on clauses 22, 23, 24, and 26]. Clauses 8, 13 and 21 are to commence on the same day as the Industrial Relations Legislation Amendment Act 1990. Clause 33 is to commence on Proclamation or the expiration of 6 months from the date of Royal Assent, whichever first occurs. The remaining provisions of the Bill commence on Royal Assent.

### Part 2 - Amendments of the Defence Act 1903

#### Clause 3 - Principal Act

This clause defines the term 'Principal Act' for the purposes of this Part to mean the Defence Act 1903.

#### Clause 4 - Establishment of the Defence Force Remuneration Tribunal

This clause amends subsection (5) of section 58G of the Principal Act which prohibits the appointment of a person to the Defence Forces Remuneration Tribunal if that person has been a member of the Defence Forces in the preceding 5 years. The amendment made by this clause reduces that period to one year.

#### Clause 5 - Terms and Tenure of Office

This clause amends section 58L of the Principal Act to enable appointments to be made to the Defence Force Remuneration Tribunal for any period up to 5 years. Currently appointments may only be made for a 5 year term.

### Part 3 - Amendments of the Industrial Relations Act 1988

#### Clause 6 - Principal Act

This clause defines the term 'Principal Act' in the Part to mean the Industrial Relations Act 1988.

Clause 7 - Interpretation

This clause corrects a drafting error in subsection 4(7) of the Principal Act.

Clause 8 - Limitations of appeals from Court to High Court

This clause makes an amendment to section 57 of the Principal Act required as a consequence of amendments made to the Principal Act by section 15 of the Industrial Relations Legislation Amendment Act 1990. The clause will operate upon the commencement of that section after that Act takes effect.

Clause 9 - Inspectors

Section 84 of the Principal Act provides for the appointment as inspectors of persons employed or appointed under the Public Service Act 1922.

Proposed new sub-paragraph 84(2)(b) provides that other persons may be appointed for a fixed term. The regulations will prescribe the maximum term for which such an appointment may be made.

Proposed new subsection 84(4A) provides that the powers and functions of inspectors appointed for a fixed term may be limited by the terms of the instrument of appointment.

Clause 10 - Imposition and Recovery of Penalties

Section 178 of the Principal Act deals with the imposition and recovery of penalties for breaches of awards and orders of the Australian Industrial Relations Commission. The section is to be amended by:

- permitting non-unionists as well as unionists to come within its scope;
- providing for a Court to be able to order the payment of unpaid or underpaid superannuation contributions which are required to be made by employers under awards.

Paragraph (a) of clause 10

Subsection 178(5) specifies who may sue for and recover a penalty for a breach of an award or order, and includes, under paragraph 178(5)(c), "a member of an organisation who is affected by the breach". No provision is made for an affected person who is not a member of an organisation to bring such proceedings.

Paragraph (a) of clause 10 proposes the replacement of paragraph 178(5)(c) by a revised provision under which an employer who is a member of an organisation and who is affected by the breach may bring proceedings.

In addition, new paragraph 178(5)(ca) is to be inserted. Under this provision, a person who is an employee (or was an employee at the time of the breach) and who is affected by the breach may also bring proceedings.

In other words, both unionists and non-unionists who are affected by a breach of an award or order will have standing to bring proceedings under section 178

Paragraph (b) of clause 10

Where a proceeding has been brought under section 178 for a breach of an award or order, the court may, under subsection 178(6), order the employer concerned to pay to an employee an amount to rectify an underpayment by the employer of any amount to which the employee was "entitled under (the) award or order".

This has been judicially interpreted to confine the court to making an order in respect of a member of a union registered under the Act - Seymour v. Stawell Timber (1985) 70 A.L.R. 391.

It is proposed to bring non-unionists as well as unionists within the scope of this provision. This will be achieved by the amendment of subsection 178(6) which is proposed in paragraph (b) of clause 10.

Paragraph (c) of clause 10

Another difficulty arises where the employer is required by an award or order to make a payment not to the employee concerned but for the benefit of the employee to a superannuation fund. Existing subsection 178(6) does not cover such a case, and an employee's interests could only be protected by relying on common law proceedings.

It is proposed under paragraph (c) of clause 10 to overcome this difficulty by inserting new subsections (6A) and (6B) in section 178.

Under proposed subsection 178(6A), a court will, in section 178 proceedings, be able to order an employer to make good any non-payment or underpayment of superannuation contributions which the employer was required under an award or order to make on behalf of a person. The provision is expressed in wide terms to allow the court concerned to make an appropriate order to restore the person to the position which the person would have been in but for the employer's default. This will allow the court to take account of, for example, whether the order should be made for a payment to be made to a particular fund or to take account of the case where a former employee has passed retirement age. The provision does not distinguish between unionists and non-unionists.

Under proposed subsection 178(6B), the court is to be able to order the payment by the employer to a superannuation fund:

- an amount equivalent to the non-payment or underpayment concerned; and
- an additional amount which the court considers to represent the return which would have accrued on that first amount.

The provision is not intended to limit the orders which the court may make under proposed subsection 178(6A).

Paragraph (d) of clause 10

This proposes a consequential amendment to subsection 178(7), to make it clear that a six year limitation period applies to matters coming within proposed subsection 178(6A).

Clause 11 - Recovery of wages etc.

Section 179 of the Principal Act enables an employee "entitled to the benefit of an award or order" to sue for any payment due under an award or order, subject to a 6 year limitation period.

It is most unlikely that a non-unionist has standing under this provision, as the expression "entitled to the benefit of an award" has been held, in another context, to refer only to a member of a federally registered union bound by an award - Leontiades' Case (1980) 43 F.L.R. 193.

The proposed amendment will revise section 179 to allow an employee, whether a unionist or not, to bring an action to recover payments which were required to be made under an award.

Under proposed subsection 179(2) the new arrangements will apply to the recovery of payments whether required to be made before or after the commencement of this clause.

Clause 12 - Insertion of new sections

This clause inserts new sections 179A and 179B in the Principal Act to make clear a court's authority to award interest in relation to money judgments in proceedings under the Act.

Proposed subsection 179A - *interest up to judgment* - provides for the inclusion in a sum, for which judgment is given under subsection 178(6) or section 179, of interest up to judgment at such rate as the Court thinks fit. Such interest is to be included upon application, unless good cause is shown to the contrary.

Proposed subsection 179B - *interest on judgment* - provides for a judgment debt in proceedings under the Act to bear interest from the date of effect of the judgment or order concerned.

Interest is to be at the rate applicable to a judgment debt under the Federal Court of Australia Act 1976.

The new sections essentially reproduce sections 51A and 52 of the Federal Court of Australia Act 1976, while resolving some uncertainty as to the operation of these sections in relation to amounts awarded in proceedings under the Principal Act. They also resolve possible inconsistencies in the operation of State laws, otherwise applied to proceedings under the Act by section 79 of the Judiciary Act 1903, by establishing uniform standards.

The new sections are not intended to limit the availability of interest under existing laws on money judgments under other provisions of the Act.

Clause 13 - Change of name or alteration of eligibility rules of organisation

This clause makes an amendment to section 204 of the Principal Act which is consequential upon amendments made by section 10 of the Industrial Relations Legislation Amendment Act 1990 and which will operate on the commencement of that section after that Act takes effect.

Clause 14 - Conduct by the Australian Electoral Commission

Section 210 of the Principal Act requires each election for an office in a registered organisation or a branch of such an organisation to be conducted by the Australian Electoral Commission, except where an exemption has been granted by a Registrar of the Australian Industrial Registry under section 213.

Exemptions under that section appear to apply to all offices within the organisation or branch. It is uncertain whether an exemption can be granted in respect of a particular office or offices.

Clause 14 is consequential on clause 16 which will explicitly authorise a Registrar to grant an exemption in relation to a particular office or offices or all offices in an organisation or branch.

Clause 15 - Application for organisation or branch to conduct its elections

Section 211 of the Principal Act enables a registered organisation or a branch of such an organisation to apply to the Industrial Registrar for an exemption from the requirement that elections for offices in the organisation be conducted by the Australian Electoral Commission.

This clause amends section 211 to make it clear that an organisation or branch may apply for an exemption in respect of an election for a particular office or offices or all elections for offices in the organisation or branch. The current provision may restrict such an application to an



exemption relating to all elections for offices in the organisation or branch concerned.

The amendment should be read together with those made by clauses 14 and 16.

Clause 16 - Registrar may permit organisations or branch to conduct its elections

Section 213 of the Principal Act empowers a Registrar of the Australian Industrial Registry to grant an exemption from elections for office being officially conducted. Such an exemption (which can be revoked) may be granted if certain criteria are met.

This clause amends section 213 to make it clear that a Registrar may grant an exemption, applied for under section 211, in respect of all elections for office in an organisation or branch or an election for a particular office or offices in that organisation or branch.

Clause 16 should be read together with clauses 14 and 15.

Clause 17 - Records relating to employees

This clause inserts a new section 353A in the Principal Act to allow regulations to be made concerning records relating to employees.

The Act permits a court to order, under section 178, the payment to an employee of an amount of unpaid wages. Under section 179, an employee may sue for an amount required to be paid by an employer under an award or order. In each case, there is a six year limitation period. However, there is no obligation under the Act on an employer to maintain time and wages records for such a period and only some awards contain such provisions. The lack of such an obligation creates difficulties for inspectors, employers and employees in ascertaining an amount due.

New section 353A will enable regulations to be made which will eliminate these difficulties. The regulations will be able to cover the making and retention by employers of records relating to the employment of workers under awards and the inspection of such records. Under section 359 penalties not exceeding \$1000 may be prescribed for breaches of the regulations. It is intended that an appropriate penalty will be prescribed.

Clause 18 - Enforcement of penalties etc.

Section 357 of the Principal Act concerns the enforcement of penalties and judgments under various provisions relating to contraventions of awards or orders.

The clause amends section 357 by inserting a new paragraph 357(1)(ba). This is consequential on the insertion under

clause 10 of subsections 178(6A) and (6B) relating to certain payments under awards or orders in respect of superannuation.

#### Clause 19 - Schedule 1

Subsection 4(1) and paragraph 5(3)(e) of the Principal Act provide that certain matters set out in clause 3 of Schedule 1 to the Act relating to the Australian Federal Police (AFP) are excluded from the jurisdiction of the Australian Industrial Relations Commission (AIRC).

An amendment to paragraph 3(b) of Schedule 1 to the Principal Act is proposed to provide that appointments (including the term for which a staff member may be appointed), promotions, discipline, demotions, retirements or dismissals of staff members (non-police) of the AFP are not matters which can be considered by the AIRC.

While other issues, such as salary levels, remain within the jurisdiction of the AIRC, as is the case with police members of the AFP, it is necessary to exclude the matters listed in paragraph 3(b) of Schedule 1 because of the nature of the AFP as a disciplined force.

The amendment was unintentionally omitted from the Australian Federal Police Legislation Amendment Act (No 2) 1989 and is consistent with other amendments to Schedule 1 of the Principal Act contained in that Act.

That Act and this amendment are designed to create a more unified AFP workforce.

#### Part 4 - Amendments of the Industrial Relations (Consequential Provisions) Act 1988

##### Clause 20 - Principal Act

This clause defines the Principal Act for the purposes of this Part to be the Industrial Relations (Consequential Provisions) Act 1988.

##### Clause 21 - Certain proceedings to be dealt with under the Industrial Relations Act.

A consequential amendment is proposed to section 8 of the Principal Act to reflect amendments made to the Principal Act by section 15 of the Industrial Relations Legislation Amendment Act 1990. This clause will take effect upon the commencement of section 15 of that Act after that Act takes effect.

Clause 22 - Application of Judges' Pension Act in certain circumstances

This clause seeks to insert a new section 81A in the Principal Act.

Proposed new section 81A is intended to place all Presidential Members of the Australian Industrial Relations Commission (the new Commission) who were previously Presidential Members of the Australian Conciliation and Arbitration Commission (the former Commission) in the same position in relation to possible entitlements under the Judges' Pensions Act 1968.

By virtue of the definition of "Judge" in subsection 4(1) of the Judges' Pensions Act, that Act applies to a person who, by virtue of a Commonwealth Act, has the same status as, among other things, a Judge of a federal court. Subsection 9(2) of the Industrial Relations Act 1988 (the new Act) confers such status on a Presidential Member of the new Commission.

Subsection 22(1) of the new Act, however, excludes, subject to subsection 22(2), the application of the Judges' Pensions Act to a person who was, immediately before being appointed to the new Commission as a Presidential Member, an eligible employee for the purposes of the Superannuation Act 1976.

Subsection 22(2) of the new Act permits such a person to elect, by written notice given to the Minister within a specified time, to cease to be an eligible employee for the purposes of the Superannuation Act. Where such an election is made, that person comes within the Judges' Pensions Act. Such an election may be made by any person who, immediately before appointment as a Presidential Member of the new Commission, was such an eligible employee. This includes a Presidential Member of the new Commission who was:

- . a Presidential Member of the former Commission; and
- . such an eligible employee during the period of service in that office.

Such service may not, however, be taken into account for the purposes of any entitlement to a judicial pension under the Judges' Pensions Act.

In the circumstances of the replacement of the former Commission by the new Commission to which new appointments have been made, including a number of persons who were Presidential Members of the former Commission, it is considered that section 22 does not operate fairly in relation to a Presidential Member of the new Commission who had been a Presidential Member of the former Commission while that person's prior service in the latter capacity cannot be so taken into account.

Accordingly, section 81A:

- . enables such a person to elect to cease to be an eligible employee for the purposes of the Superannuation Act, thereby coming within the Judges' Pensions Act;
- . requires such an election to be made by written notice to the Minister given before 31 January 1991 (to permit sufficient time for such an election to be made after the provision takes effect);
- . permits prior service as a Presidential Member of the former Commission to be taken into account as service as a Judge for the purposes of the Judges' Pensions Act;
- . treats such an election as if it were an election made under section 22 of the new Act, thereby preventing the person making such an election from retaining an entitlement to benefits under the Superannuation Act as well as becoming entitled to a pension under the Judges' Pensions Act.

There is one Presidential Member of the new Commission who would be able to make an election under proposed section 81A.

By subclause 2(2), clause 22 is to be taken to have commenced on 1 March 1989, which is the day on which the new Commission came into existence. The retrospective commencement is necessary to enable the Presidential Member's service with the new Commission to be taken into account for the purposes of the Judges' Pensions Act. It will not affect the rights of any person (other than the Commonwealth) in an adverse manner.

#### Clause 23 - Coal Industry Act

Clause 23 seeks to amend section 88 of the Principal Act to correct an omission in that section.

Subsection 88(1) of the Principal Act provides that the Coal Industry Act 1946 has effect as though a reference in that Act to certain bodies established under the repealed Conciliation and Arbitration Act 1904 were a reference to the corresponding bodies established under the Industrial Relations Act 1988. There is, however, no provision for references in the Coal Industry Act to the previous Conciliation and Arbitration Act to be taken as references to the Industrial Relations Act.

Accordingly, the proposed amendment of section 88 of the Principal Act will have the effect that a reference in the Coal Industry Act to the repealed Conciliation and Arbitration Act is to be read as including a reference to the Industrial Relations Act.

By subclause 2(2), clause 23 is also to be taken to have commenced on 1 March 1989 which is the day on which the Principal Act commenced. It will not affect the rights of any person and is a necessary machinery measure.

Clause 24 - Schedule 2

This clause corrects minor drafting errors contained in consequential amendments to a number of Acts made by Schedule 2 of the Principal Act. It also is to be taken to have commenced on 1 March 1989.

**Part 5 - Amendment of the Long Service Leave  
(Commonwealth Employees) Act 1976**

Clause 25 - Principal Act

This clause defines the term "Principal Act" in this Part to mean the Long Service Leave (Commonwealth Employees) Act 1976.

Clause 26 - Meaning of employment in Government Service

This clause proposes the amendment of section 10 of the Principal Act to provide that "staff members", that is, non-police staff of the Australian Federal Police, are covered by the provisions of the Principal Act.

The amendment is necessary as a consequence of the commencement of most of the provisions of the Australian Federal Police Legislation Amendment Act (No 2) 1989 on 1 January 1990.

Prior to the commencement of that Act, non-police members of the Australian Federal Police were employed under the Public Service Act 1922 and, as a consequence, subject to the provisions of the Principal Act.

From 1 January 1990 "staff members" of the Australian Federal Police are employed under the Australian Federal Police Act 1979. This amendment, which under clause 2 of the Bill is to be taken to have commenced on 1 January 1990, will ensure that staff members have the same long service leave entitlements as police members of the Australian Federal Police.

**Part 6 - Amendments of the National Occupational  
Health and Safety Commission Act 1985**

Clause 27 - Principal Act

Clause 27 identifies the Principal Act to which the amendments proposed by Part 5 of the Bill will apply as the National Occupational Health and Safety Commission Act 1985.

Clause 28 - Interpretation

Clause 28 makes a number of amendments to the definition section (section 3) of the Principal Act to provide the Australian Capital Territory with the same rights of

representation on the National Occupational Health and Safety Commission as a State or the Northern Territory, in recognition of the transition to self-government of the A.C.T.

Clause 29 - Functions of the Commission

Clause 29 makes other consequential amendments to the Principal Act to give recognition to the self-governing status of the A.C.T.

Clause 30 - Certain A.C.T. Self-Government (Consequential Provisions) Regulations cease to have effect.

The amendments made to the Principal Act by this Part were originally made by modification under Self-Government (Consequential Provisions) Regulations. These modifications will be unnecessary on commencement of the amendments made by this Part and by operation of this clause will cease to have effect at that time.

Clause 31 - Acting Chief Executive Officer

Clause 31 seeks to amend section 16A of the Principal Act to limit the period a person can act as Chief Executive Officer of the National Occupational Health and Safety Commission during a vacancy in that office to a maximum period of 12 months.

Section 16A of the Principal Act provides for the appointment of a person to act as Chief Executive Officer under specified circumstances, including when the office is vacant, but contains no limitation upon the period a person so appointed may continue to act.

Such a limitation is common in statutory provisions enabling a person to be appointed to act during a vacancy in an office. A limitation of 12 months is imposed by section 16 of the Principal Act on appointments to act as Chairperson of the Commission during a vacancy in that office.

Accordingly, proposed subsection 16A(1A) provides that a person appointed to act as Chief Executive Officer of the Commission during a vacancy in that office shall not continue to act for more than 12 months.

Proposed subsection (1B) makes similar provision in circumstances where the office of Chief Executive Officer of the Commission becomes vacant while a person is acting in that office either during the absence of the Chief Executive Officer or when, for any other reasons, the Chief Executive Officer is unable to perform the functions of that office.

This is consistent with the equivalent provision in section 16 of the Principal Act dealing with the appointment of an acting Chairperson of the Commission.

Part 7 - Amendment of the Remuneration and Allowances Act 1990

Clause 32 - Principal Act

This clause defines the term "Principal Act" in this Part to mean the Remuneration and Allowances Act 1990.

Clause 33 - Schedule 1

This clause remakes Part 4 of Schedule 1 to the Principal Act to omit references to the Chief Magistrate and Magistrates of the Australian Capital Territory (A.C.T.).

The Principal Act, through those references, provides for the salaries of the Magistrates concerned. Section 8 of the Act, which is not amended, provides for salaries under the Act to be paid out of the Consolidated Revenue Fund, i.e., by the Commonwealth. On 1 July 1990, the former Magistrates Court Ordinance 1933 of the A.C.T. became an A.C.T. enactment. The amendment will take the Magistrates out of the scope of the Principal Act. Their salaries will be a matter for the A.C.T., which will be able to refer that matter to the Remuneration Tribunal.

This clause will, under clause 2, commence on Proclamation or the expiration of 6 months from Royal Assent, whichever first occurs.

Part 8 - Amendments of the State Grants (Coal Mining Industry Long Service Leave) Act 1949

Clause 34 - Principal Act

This clause defines the term "Principal Act" for the purposes of the Part to mean the State Grants (Coal Mining Industry Long Service Leave) Act 1949.

Clause 35 - Coal Mining Industry Long Service Leave Fund

This clause amends section 3 of the Principal Act to omit redundant references, make a number of drafting changes and to include references to provide for the payment out of the Coal Mining Industry Long Service Leave Fund amounts referred to in proposed new sections 6 and 7 (advances to the States and the costs of administration) which are inserted by operation of clause 38.

Clause 36 - Grants to States

This clause substitutes the term 'Minister' for the term 'Treasurer' in section 4 of the Principal Act in accordance with current drafting policy. The Treasurer will continue to administer this part of the Principal Act.

Clause 37 - Further Grants to States

This clause substitutes the term 'Minister' for the term 'Treasurer' in section 4 of the Principal Act in accordance with current drafting policy. The Treasurer will continue to administer this part of the Principal Act.

Clause 38 - Insertion of new provisions

This clause repeals current section 6 of the Principal Act and substitutes three new sections.

Section 6: Advances to States

Proposed section 6 will enable the Commonwealth to make advances to the States for the purposes of the Coal Mining Industry Long Service Leave Fund.

Section 7: Reimbursement of Commonwealth administrative expenses

Proposed new section 7 will enable the Commonwealth to recover from money paid into the Coal Mining Industry Long Service Leave Fund the costs to the Commonwealth of administering that Fund. The amounts to be recovered will be as prescribed in the Regulations.

Section 8: Regulations

Proposed new section 8 provides a regulation making power for the purposes of the Principal Act.