THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

INDUSTRIAL RELATIONS REFORM BILL 1993

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be moved on behalf of the Government

(Circulated on the authority of the Minister for Industrial Relations, the Hon Laurie Brereton MP)

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(Amendments to be moved on behalf of the Government)

OUTLINE

These amendments alter three Parts of the bill as follows:

- Part 3 of the bill is amended by Amendment No's 1-2;
- Part 4 of the bill is amended by Amendment No's 3-4;
- Part 5 of the bill is amended by Amendment No's 5-9.

A summary of the amendments, and of their context in the bill as originally introduced in the Senate, is set out below.

Part 3 of the bill - The Award System

Part 3 of the bill (clauses 5-17; pp.3-8) amends Part VI of the *Industrial Relations Act 1988* (IR Act) to establish clearly the place of awards as a secure, relevant and consistent safety net of minimum wages and conditions of employment. This is achieved by new objects and provisions which support that objective. The place of paid rates awards is recognised in the new provisions.

The amendments:

- extend the requirement for a finding of an industrial dispute to be made by the Australian Industrial Relations Commission (the Commission) before a matter is dismissed or it refrains from hearing a matter or determining an industrial dispute. In addition to subparagraph 111(1)(g)(iii) of the IR Act, the proposed requirement is now to apply to subparagraphs 111(1)(g)(i) and (ii);
- extend the range of circumstances where the Commission must take steps to remedy deficiencies in the provisions of an award following a review of the award under proposed section 150A; this will now apply when the Commission considers that the award prescribes matters in unnecessary detail.

Part 4 of the bill - Minimum Entitlements of Employees

Part 4 of the bill (clauses 18-24, pp.8-23) provides for employees to have minimum entitlements that give effect to certain treaty obligations. These entitlements concern minimum wages, equal remuneration for work of equal value, termination of employment and parental leave.

The amendments:

- require that when the Commission is considering an application under Part VIB for an order setting minimum wages the Commission should give an applicant and each employer to be covered the opportunity to be heard;

- specify the minimum amount of compensation that must be paid in lieu of notice of termination.

Part 5 of the bill - Promoting Bargaining and Facilitating Agreements

This part of the bill introduces a new Part VIB into the IR Act (proposed sections 170LA-170RB; pp.29-65). Part VIB contains provisions relating to:

a) certified agreements (transferred and amended from Division 3A of Part VI of the IR Act. Division 3A is to be repealed);

b) enterprise flexibility agreements - a new form of workplace arrangements which will allow the Commission to approve agreements between an employer and employees;

c) immunity from civil liability - which is available to parties negotiating a single business certified agreement provided certain conditions are met.

Division 2 - Certified Agreements

As drafted, the bill requires the Commission to terminate a certified agreement if a successful case is made against the extension of that agreement. An amendment is proposed so that the requirement will be for the Commission to refuse to approve the extension, rather than bring the agreement to an end.

Division 3 - Enterprise Flexibility Agreements

Amendments are to be made to the provisions which allow eligible unions to become bound by an enterprise flexibility agreement.

As drafted, the bill allows an eligible union to become bound by an agreement at any time that it so chooses.

The amendment will confine the opportunities for an eligible union to become party to an enterprise flexibility agreement to:

- the period prior to the Commission's approval of the agreement;

- the period prior to the Commission's approval of an application to vary the agreement;

- the period when the agreement's specified period of operation has expired and it continues in force by operation of the IR Act.

Division 4 - Immunity from civil liability

There is an amendment to the requirement that an employer, proposing to lock out employees in a bargaining period, give 72 hours notice to each employee or lose the new immunity. Instead, the employer, 72 hours before the lock out, must either give each employee written notice or take other reasonable steps to notify the employee. A failure to do so will deny the employer immunity for the lock out of each employee whom the employer did not take reasonable steps to notify.

FINANCIAL IMPACT STATEMENT

The amendments to the bill will not have any significant impact on Commonwealth expenditure.

NOTES ON CLAUSES

PART 3 - THE AWARD SYSTEM

Clause 12 : Particular powers of Commission

Amendment No : 1

This amendment concerns clause 12 of the bill. That clause proposes certain amendments to s.111 of the IR Act. Section 111 gives the Commission a range of powers in relation to matters within its jurisdiction.

Among these powers, the Commission is able, on various grounds, to dismiss a matter or refrain from further hearing a matter or determining an industrial dispute.

These grounds include:

- that the dispute or part of the dispute is trivial [paragraph 111(1)(g)(i)];
- that the industrial dispute or part has been dealt with, is being dealt with or is proper to be dealt with by a State industrial authority [paragraph 111(1)(g)(ii)];
- that further proceedings are not necessary or desirable in the public interest [paragraph 111(1)(g)(iii)].

Paragraph (a) of clause 12 [proposed new subsection 111(1AA)] would require the Commission, in relation to an industrial dispute, to have first decided (under section 101) whether the matter is an industrial dispute within its jurisdiction. This would not apply to any other proceedings before the Commission to which subparagraph 111(1)(g)(iii) applies.

It is now proposed to extend the requirement for a finding of an industrial dispute to be made before a matter is dismissed, etc, under paragraph 111(1)(g).

The proposed requirement is also to apply to subparagraphs 111(1)(g)(i) and (ii).

This is because it is considered more appropriate for the Commission to be satisfied about what is in dispute and who are the parties to the dispute before the Commission decides whether it will dismiss or refrain from hearing some or all of the matters involved in the dispute[1].

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[1] The High Court of Australia found in 1989 that it was possible for the discretion under paragraph 111(1)(g) to be exercised before a dispute was found under s.101 - *Re ABEU; ex parte Citicorp Australia Ltd* (1989) 167 CLR 513.

Clause 17 : New section 150A - C mmission to review awards

Amendment No : 2

Clause 17 will insert new section 150A in the IR Act. Section 150A will require the Commission to review each award in force (other than certified agreements and enterprise flexibility agreements) once in each 3 year period.

The Commission is to be required to take steps (which will be prescribed by regulation) to remedy certain deficiencies - see proposed paragraphs 150A(2)(a) - (d). An additional deficiency is to be specified, namely, that an award prescribes matters in unnecessary detail. This will be provided for in new paragraph 150A(2)(e).

PART 4 - MINIMUM ENTITLEMENTS OF EMPLOYEES

Clause 21 : Insertion of new Part VIA

Division 1 - Minimum Wages

Propos d s ction 170AE - When Commission must make order

Amendment No : 3

This amendment inserts a new subsection 170AE(4A) which imposes an additional express requirement on the Commission when it is considering an application, in this new jurisdiction, for an order setting minimum wages. The Commission must give the applicant, and each employer to be covered, an opportunity to be heard. The method of giving this opportunity is to be prescribed by regulations.

Division 3 - Termination of employment

Subdivision B - Requirements for lawful termination of employment

Proposed s ction 170DB - Employee to be given notice of termination

Amendment No : 4

This amendment adds proposed subsections 170DB(4) and (5) which specify the minimum amount of compensation that must be paid in lieu of notice of termination. It is the amount to which the particular employee would have been entitled had the employment continued during the period for which notice would otherwise have been given.

PART 5 - PROMOTING BARGAINING AND FACILITATING AGREEMENTS

Clause 31 : Insertion of New Part

Proposed Part VIB : Promoting Bargaining and Facilitating Agreements

Division 2 - Certified Agreements

Proposed section 170MI - Extension of Certified Agreements

Amendment No : 5

Section 170MI, to be included in the IR Act by clause 31 of the bill, makes provision for the extension of the period of operation of a certified agreement.

The proposed amendment to subsection 170MI(4) will operate so that where the Commission is satisfied that an extension would not be in the interests of employees covered by the agreement, the Commission must refuse to approve the extension.

As presently drafted the Commission is required to terminate the agreement in these circumstances.

In the normal course of events a certified agreement is not terminated on the expiry of its period of operation. Rather it continues to operate, but may be varied in certain circumstances (see subsection 170MJ(3)).

It would be anomalous if an unsuccessful application for the extension of the period of operation of an agreement resulted in the termination of the agreement. The proposed amendment removes that anomaly.

Division 3 - Enterprise Flexibility Agreements

Proposed section 170NC - Approval of Implementation of Agreem nt

Amendment No : 6

The proposed amendment of subparagraph 170NC(1)(f)(i) will remove a requirement that an enterprise flexibility agreement must *provide* for consultation on changes to work organisation and work performance and replace it with a requirement that an agreement must establish a process for such consultation.

Without the amendment, the requirement would be unnecessarily onerous, potentially requiring consultation on every change to work performance or work organisation, irrespective of how minor. The amendment will allow parties some flexibility in determining the circumstances which they consider require consultation.

The amendment brings the provision into line with similar provisions relating to certified agreements.

Amendment No : 7

Under the proposed amendment to paragraph 170NC(1)(g), the requirement to consult employees who are to be covered by an enterprise flexibility agreement is to be altered.

As presently expressed in the bill, the subparagraph would require consultation on every term that was proposed whether or not that term was included in the agreement that is presented for the Commission's approval.

The amendment casts the requirement in more general terms, requiring reasonable steps to be taken to consult employees "about the agreement".

Proposed section 170NO - Eligible Union may agree to be bound by Enterprise Flexibility Agreement

Amendment No : 8

Proposed section 170NO is to be omitted and replaced by a new section 170NO. The new section limits the circumstances in which an eligible union may agree to be bound by an enterprise flexibility agreement.

As previously drafted, an eligible union could agree to be bound by an enterprise flexibility agreement at any time, by providing written notice to the employer.

The proposed amendment will limit the occasions on which an eligible union can agree to be bound by an enterprise flexibility agreement to:

- the period prior to the Commission's approval of the agreement;
- where an agreement is to be varied - the period prior to the variation taking effect;
- the period when the agreement continues in force under subsection 170NI(3) - ie, after 3 months after the agreement's specified period of operation has expired.

Division 4 - Immunity from civil liability

Amendment No : 9

Division 4 - *Immunity from civil liability* - of proposed Part VIB - *Promoting Bargaining and Facilitating Agreements* - provides certain legal entitlements for employees and unions to engage in industrial action while bargaining for an agreement which, if made, is intended to be certified.

This amendment replaces proposed section 170PH (72 hours' notice of action to be given).

The revised section 170PH will modify the originally proposed requirement that an employer who proposes to lock out an employee under proposed section 170PG must give each such employee 72 hours written notice[2]. This is seen as being too onerous.

The replacement provision will instead require an employer:

- to give at least 72 hours written notice to each relevant organisation of employees [see proposed subsection 170PH(2)(a)];

- in the case of an employee, at least 72 hours before the lock out, to give that employee written notice or to take other reasonable steps to notify the employees.

Failure to comply in relation to an employee will result in the lock out of that employee not being protected action. In other words, the employee will not be entitled to refuse under subsection 170PG(5) to refuse to pay that employee. This does not, however, affect any other right that the employer may have to refuse to pay that employee.

"*Reasonable steps*" might include (depending on the circumstances) telling the employee of the proposed lock out or by posting notices or publishing details of the lock out in the media. Written notice will, however, automatically suffice as notice.

[2] A federally registered union will still be required under proposed section 170PH to give at least 72 hours written notice to an employer of industrial action in support of a proposed certified agreement.


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