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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

WORKPLACE RELATIONS AND OTHER LEGISLATION AMENDMENT BILL (No. 2) 1996

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Industrial Relations, the Honourable Peter Reith MP)

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WORKPLACE RELATIONS AND OTHER LEGISLATION AMENDMENT BILL (No. 2) 1996

OUTLINE

The *Workplace Relations and Other Legislation Amendment Bill (No. 2) 1996* (the Amendment Bill) will amend the *Workplace Relations Act 1996* (the WR Act), using the additional Commonwealth legislative capacity to be provided by the references of certain matters to the Commonwealth Parliament by the *Commonwealth Powers (Industrial Relations) Bill 1996* (the Victorian referral legislation), introduced in the Victorian Parliament on 19 November 1996 of Victoria, when enacted.

Extended operation of the Workplace Relations Act

The Amendment Bill will provide additional operation in Victoria for provisions of the WR Act as follows, in reliance on powers relating to referred matters (and subject to the limitations on the scope of the references set out in the Victorian referral legislation).

Provisions relating to industrial disputes will have an additional operation by reference to a substitute definition of 'industrial dispute', which will replace the requirement for interstateness with a reference to disputes in Victoria. However, awards made under the additional operation in relation to a dispute in the Victorian public sector will not prevail over Victorian laws prescribed by the Commonwealth.

Provisions concerning Australian workplace agreements (AWAs) and certified agreements (CAs) will have the same expanded operation in Victoria that they do in the Territories, ie, they will not only be available to corporations and their employees, or, in the case of CAs, to employers who are party to an industrial dispute and representative registered organisations of employees.

Provisions concerning termination of employment will have the same expanded operation in Victoria that they do in the Territories, ie, the unfair dismissal provisions will apply to all employees, not only those under Federal awards and agreements and employed by a constitutional corporation, etc.

Provisions concerning freedom of association will have the same expanded operation in Victoria that they do in the Territories, ie, they will not be limited in relation to corporations, registered organisations, etc.

Continuation of certain aspects of the Victorian system

The Amendment Bill will also introduce new Commonwealth provisions, preserving some aspects of the current Victorian system, as follows.

The Amendment Bill will maintain the current minimum conditions of employment for Victorian employees under Schedule 1 of the *Employee Relations Act 1992* (Vic.), while enabling the Australian Industrial Relations Commission to set and periodically adjust minimum wages within the framework which has been established by the Employee Relations Commission of Victoria. The minimum conditions under this Part of the Act will not apply to

any employee who becomes subject to a Federal agreement. Where an employee becomes subject to a Federal award, the award will apply to the extent that it provides for entitlements otherwise applying under new Schedule 1A. (The Act will also provide for meal breaks, subject to any employment agreement, Federal agreement or Federal award; this is a minimum condition in the *Employee Relations Act 1992* (Vic.), though not in Schedule 1 of that Act.)

The Amendment Bill will preserve the effect of employment agreements entered into under the *Employee Relations Act 1992* (Vic.) before the commencement of these amendments. These will cease to apply where an employee becomes subject to a Federal agreement, and any Federal award will prevail to the extent of any inconsistency. There will be limitations on access to protected industrial action where an employment agreement is in force, consistent with the limitations under the WR Act where parties have entered into a CA or AWA under that Act. These limitations will apply to employers, to employees and to organisations of employees, until expiry of any collective employment agreement to which they are parties, and, in the case of an individual employment agreement actually entered into (not merely deemed to exist on the expiry of an award or collective agreement, or by operation of legislation), during the period of three years from the commencement of relevant provisions under this Bill. This latter period reflects the limitation on access to protected action for persons bound by an AWA (which may have a maximum period of 3 years before protected action is available).

The Amendment Bill will enable modification by regulations of the provisions of the WR Act concerning registered organisations, in relation to transitional registration applications by associations which were recognised under the *Employee Relations Act 1992* (Vic.). This is intended to enable transitional access to the rights of registered organisations under the WR Act, in relation to the industry sectors for which the associations were recognised. During this transitional period, recognised associations would be able to apply for formal registration.

Other amendments

The Amendment Bill will also make two technical amendments. The Australian Industrial Relations Commission will be enabled to exercise powers in relation to AWAs under complementary State legislation. Schedule 8 to the Workplace Relations and Other Legislation Amendment Act 1996 (No. 60 of 1996), concerning certified agreements, will be able to commence before Schedule 10, concerning AWAs.

FINANCIAL IMPACT STATEMENT

The additional operation of the WR Act arising from these amendments will give rise to some additional workload for the Australian Industrial Relations Commission and the Employment Advocate, and additional administrative workload in terms of federal compliance activities and information services. Resource implications of Victoria's referral of matters to the Parliament of the Commonwealth are to be addressed in an agreement between the Commonwealth and Victoria. Any net requirements for Commonwealth funding in out years will be addressed through normal budgetary processes.

NOTES ON CLAUSES

Note: all references to the *Workplace Relations Act 1996* in these notes mean the Act as amended by the *Workplace Relations and Other Legislation Amendment Act 1996* (No.60 of 1996), whether or not those amendments have yet taken place.

Clause 1 - Short title

This provides the Act's short title.

Clause 2 - Commencement

The Act commences on Assent. The item in the Schedules commence on proclamation, other than item 1 of Schedule 1 (which inserts Part XV - *Matters referred by Victoria* - into the WR Act) and Schedule 3 (which makes some minor amendments to the WR Act).

Clause 3 - Schedules

This provides for the effect of the Schedules in amending the Acts to which they relate.

SCHEDULE 1 - AMENDMENT OF THE WORKPLACE RELATIONS ACT 1996: REFERENCE OF VICTORIAN MATTERS

Item 1 - Before Schedule 1

Item 1 proposes the insertion of a new Part XV, *Matters referred by Victoria*, into the Workplace Relations Act.

New Part XV will extend the existing provisions of the WR Act and include some additional provisions. This is as a result of the referral of certain matters to the Parliament of the Commonwealth by the Victorian *Commonwealth Powers (Industrial Relations) Act 1996*. [1]

Part XV has 3 Divisions. Each is described in the following notes. It should be noted that Schedule 1 is divided into several items to permit the staged commencement, if appropriate, of provisions giving effect to the various referred matters.

New Part XV - *Matters referred by Victoria*

New Division 1 - *Preliminary*

New section 488 - Object

This expresses the purpose of Part XV, namely, to provide for the wider operation of the WR Act as a result of the referral of certain matters by Victoria. These matters are dealt with in the following Divisions.

New section 489 - Interpretation

This section defines terms used in Part XV.

New Division 2 - *Extension of existing Commonwealth provisions*

New section 490 - Division only has effect if supported by reference

This section makes it clear that each section of Division 2 only operates for as long as, and to the extent that, the relevant referral of a matter to the Parliament of the Commonwealth is in effect. This reflects the constitutional position. (A list of certain matters excluded from the referrals of matters by the Victorian *Commonwealth Powers (Industrial Relations) Act 1996* appears as an Appendix to this Explanatory Memorandum.)

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[1] The wider operation of the WR Act relies on section 51 (xxxvii) of the Constitution which empowers the Commonwealth Parliament to make laws which respect to matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliament the matter is referred, or which afterwards adopt the law.

New section 491 - Exclusion of Commonwealth employment

This section makes it clear that Division 2 does not apply to employment by the Commonwealth, consistent with the constitutional position prior to the referral of power.

Item 2 - At the end of Division 2 of Part XV

This item proposes the insertion in Part XV of new section 492. That section will apply the termination of employment provisions of the WR Act (new Division 3 of Part VIA) more widely.

The application of those provisions in Victoria without the reference would, put broadly, only be to employees of corporations under Federal awards and agreements and employees of the Commonwealth. The reference will allow those provisions to be extended to apply to all employees, except those employees who come within matters excluded from the referral by section 5 of the Victorian referral legislation. It is intended that exclusions from the operation of Division 3 of Part VIA of the WR Act apart from its extended operation will apply equally to the extended operation.

New section 492 - Additional effect of Act - termination of employment

The section extends the operation of the relevant provisions of the WR Act to termination of employment of at the initiative of the employer of any employee in Victoria. This provision relies on the referral of this matter to the Parliament of the Commonwealth by subsection 4(4) of the Victorian referral legislation. These provisions are subject to the exclusion from the referral (see the Appendix to this Explanatory Memorandum) and any exemption under the Regulations from the termination provisions (Part VIA, Division 3).

Item 3 - At the end of Division 2 of Part XV

This item proposes the insertion of a series of sections which extend the operation of the WR Act in reliance on the referral of certain matters by section 4 of the Victorian referral legislation.

New section 493 - Additional effect of Act - industrial disputes

This section gives the WR Act a wider application in relation to industrial disputes. Under subsection 4 (1) of the WR Act, an industrial dispute is relevantly defined as:

> an industrial dispute (including a threatened, impending or probable industrial dispute)... extending beyond the limits of any one State; and... that is about matters pertaining to the relationship between employers and employees.

This reflects the relevant constitutional power [s.51 (xxxv) of the Constitution]. This has various consequences, including for the jurisdiction of the AIRC in exercising its powers of conciliation and arbitration to prevent or settle industrial disputes.

This section gives the WR Act an additional operation in relation to industrial disputes by treating industrial disputes as including those within the limits of Victoria. This is in addition to the WR Act's application to industrial disputes which extend beyond the limits of any one State. As a consequence, intra-State industrial disputes will be covered for Victoria.

It should be noted, however, that the Victorian referral legislation [paragraph 5 (1)(d)] expressly excludes the matter of making awards or orders as common rules.

Proposed subsection (4) will allow the regulations to prescribe Victorian laws so that they prevail to the extent of any inconsistency over an award or order made in respect of an industrial dispute under the extended operation of the WR Act. This will not affect the operation of the WR Act apart from its extended operation.

New section 494 - Additional effect of Act - certified agreements

This section will extend the operation of Division 2 of Part VIB of the WR Act. Under that Division, an employer who is in a corporation may make an agreement with the employees of the corporation or a relevant organisation of employees or both. Under the extended operation [which relies on subsection 4(2) of the Victorian referral legislation], any employer will be able to enter into such an agreement. The provision is not intended to prevent an multiple-business agreement from being made under the operation of s.170LC of the WR Act involving unincorporated employers in Victoria .

It should also be noted that certified agreements made under Division 3 of Part VIB of the WR Act to prevent or settle industrial disputes may be made in relation to intra-State disputes (see the notes on the preceding section).

New section 495 - Additional effect of Act - AWAs

This section will extend the operation of the relevant provisions of the WR Act relating to Australian Workplace Agreements (AWAs), particularly Part VID. For constitutional reasons, AWAs may only be made under the WR Act by certain employers (eg, corporations) with employees.

Relying on the referral in subsection 4(3) of the Victorian referral legislation, AWAs will be available to employers and employees in Victoria (subject to the exclusions set out in section 5 of the Victorian referral legislation).

New section 496 - Additional effect of Act - freedom of association

Part XA of the WR Act concerns freedom of association. For constitutional reasons, it does not have universal application. This section [which relies on subsection 4(6) of the Victorian referral legislation] gives Part XA that wider application in Victoria, subject to the exclusion under section 5 of the Victorian referral legislation of specified matters.

Item 4 - At the end of Part XV

This item proposes the insertion of two new Divisions in Part XV. New Division 3 contains provisions which preserve the effect of certain aspects of the *Employee Relations Act 1992* (Vic.) in relation to minimum conditions of employment, employment agreements, and meal intervals. New Division 4 enables regulations to modify the effect of the Act in relation to associations which were recognised under the *Employee Relations Act 1992* (Vic.). This is intended to give them access on a transitional basis to the Federal system.

New Division 3 - *New Commonwealth provisions*

New Subdivision A - *General*

New section 497 - Division only has effect if supported by reference

Each section of the Division only has effect for so long and in so far as the Victorian referral legislation supports the section. (A list of certain matters excluded from the referrals of matters by the Victorian *Commonwealth Powers (Industrial Relations) Act 1996* appears as an Appendix to this Explanatory Memorandum.)

New section 498 - Exclusion of Commonwealth employment

This section makes it clear that Division 3 does not apply to employment by the Commonwealth, consistent with the constitutional position prior to the referral of power.

New section 499 - Inconsistency with other Commonwealth laws

This section establishes the relationship between Division 3 of new Part XV and any other Commonwealth law. Where there is any inconsistency, the other Commonwealth law prevails.

New Subdivision B - *Minimum terms and conditions of Victorian employees*

Subdivision B relies on the referral by the Victorian Parliament of the matter of minimum conditions of employment for employees in Victoria [subsection 4 (4) of the Victorian referral legislation]. The Subdivision provides minimum conditions in similar terms as expressed in Schedule 1A to the *Employee Relations Act 1992* (Vic.). This is to ensure that an objective of the referral, ie, that employees in Victoria who are not under a Federal award or agreement are not disadvantaged by the repeal (after the referral takes place) of the minimum terms and conditions now provided by the Employee Relations Act.

New section 500 - Minimum terms and conditions of employment

Subsection (1) provides that minimum terms and conditions of employment for employees in Victoria are contained in Schedule 1A. (This will be a new Schedule to the WR Act.) Subsection (2) makes clear that these minimum terms and conditions are intended to supplement entitlements under Part VIA of the WR Act (which also provides for certain

minimum entitlements for employees generally), and under any other legislation of the Commonwealth (apart from the WR Act) or of Victoria or any other State or Territory.

The reference to entitlements under other State or Territory legislation is meant to prevent the displacement by this new Commonwealth law of any entitlements provided under other State or Territory legislation for employees working in Victoria (eg, a public servant of another State who is working in Victoria).

New section 501 - Minimum wages

Under the *Employee Relations Act 1992* (Vic.), the Employee Relations Commission of Victoria (ERCV) has powers to declare industry sectors and work classification in those sectors. The ERCV may also set and adjust a minimum wage for employees within such declared work classifications. The ERCV has declared a number of industry sectors and work classifications or interim work classifications, as well as determining certain minimum wages.

This section will permit the Australian Industrial Relations Commission to set or adjust a minimum wage, from time to time, for employees within a work classification as defined in Division 1 of new Part XV, other than employees who are subject to an award, a certified agreement or an AWA. Under that definition, a work classification is one which, immediately before the commencement of the relevant referral of the matter of setting and adjusting minimum wages [see subsection 4 (7) of the Victorian referral legislation], was either a declared work classification under the *Employee Relations Act 1992* (Vic.) or one which had been declared by the ERCV as an interim work classification. Consistently with this referral, the AIRC will not be able to declare new industry sectors nor new work classifications.

The new section reflects powers of the ERCV under the *Employee Relations Act 1992* (Vic.) in respect of setting and adjusting minimum wages.

The AIRC will only be able to exercise its powers under the section on application by the persons specified in subsection (2), but will be able to differentiate between categories of employees within the work classifications [see subsection (3)].

Subsection (4) sets out criteria which the AIRC must take into consideration when determining minimum wages. These are not exhaustive and the AIRC will be able to have regard to other relevant matters, consistently with its general responsibilities under the WR Act (eg, to take into account the public interest as required by s.90 of the WR Act).

Under subsection (5), minimum wages are to be expressed as an hourly rate for the relevant working week [but subsection (6) precludes any determination of standard business hours under this section].

Subsection (7) allows the AIRC to have regard transcript of or evidence given in, proceedings before the ERCV relating to the setting or adjusting of a minimum wage. It does not qualify the AIRC's capacity under other sections of the WR Act (eg, ss.110, 111) to decide how proceedings are to be conducted.

New section 502 - Reference of minimum wage proceeding to Full Bench

The minimum wage may only be determined under the *Employee Relations Act 1992* (Vic.) by the ERCV in Full session. Part XV will leave it to the AIRC to determine whether particular applications should be heard by a Full Bench.

If a minimum wage proceeding is heard by a single member, however, it will be possible under this section for a party or the Minister to seek the reference of the proceeding to a Full Bench. This section is similar to section 107 of the WR Act (which deals with the referral of industrial disputes to a Full Bench).

New section 503 - Modified application of section 143 in relation to minimum wages orders

This modifies s.143 of the WR Act which deals with how AIRC decisions and determinations are expressed and published. There are different requirements for awards and for other instruments.

This section makes it clear that the more onerous requirements relating to awards do not apply to minimum wage orders under this Division and that a copy of any such order need only be available at a Registry of the Australian Industrial Registry in Victoria.

New section 504 - Certain provisions of no effect

This section maintains a requirement of the *Employee Relations Act 1992* (Vic.), relating to minimum terms and conditions of employment by providing, in effect, that no provision of an employment agreement (within the meaning of Part XV) or any other contract of employment with an employee in Victoria operates to the extent that it provides a term and condition of employment less favourable to an employee than the minimum applicable under new Schedule 1A.

New section 505 - Employer must comply with minimum terms and conditions of employment

Under this section, employers must not enter into contracts of employment with employees in Victoria that provide terms or conditions of employment less favourable than those provided by new Schedule 1A. Where such a provision is contained in the contract, the contract is not illegal, void or unenforceable only for that reason. This requirement [reflecting an element of the scheme under the *Employee Relations Act 1992* (Vic.)] complements the other guarantees concerning minimum conditions.

New section 506 - Deemed inclusion of minimum terms and conditions in contracts etc.

Employment agreements under the *Employee Relations Act 1992* (Vic.) will be given continued effect by Subdivision D (see notes below), and will be enforceable under sections 178 and 179 of the WR Act.

If an employment agreement does not satisfy the minimum terms and conditions of new Schedule 1A, then under this section the relevant standard under Schedule 1A is enforceable.

Similarly, if a contract of employment (other than employment agreement) fails to comply with Schedule 1A, any money that would be owing under the contract to the employee if the contract did comply is recoverable in an eligible court (ie, the Industrial Division of the Magistrates' Court of Victoria or any other court prescribed by the regulations).

New section 507 - Limit on operation of sections 505 and 506 and Schedule 1A

The minimum conditions do not apply to employees subject to a certified agreement or an AWA under the WR Act.

It should be noted that before a certified agreement or an AWA comes into force under the WR Act it must satisfy a no-disadvantage test (see Part VIE of the WR Act).

An agreement will not satisfy that test if there is a reduction in the overall terms and conditions of employment of the relevant employees under, among other things, awards or 'any other law of the Commonwealth'. This will apply to the minimum terms and conditions under new Schedule 1A. [Agreements which do not pass the no-disadvantage test may be given effect only if the AIRC finds that it is in the public interest for them to operate - see sections 170LT, 170MD, 170VPG and 170VPH.]

New section 508 - Relationship between awards and minimum terms and conditions of employment

An award of the AIRC prevails to the extent of any inconsistency with the minimum terms and conditions under new Schedule 1A. It is intended that an employee in Victoria should not particular entitlements under that Schedule where, for example, an award does not address those entitlements.

New section 509 - Exemption from minimum rates of pay

In line with the scheme of the *Employee Relations Act 1992* (Vic.), the AIRC is to be able to issue certificates for certain employees which exclude the obligation to pay to those employees the minimum rate of pay otherwise applying by force of Part XV and Schedule 1A.

The AIRC must be satisfied that the person is unable to obtain work at the relevant minimum rate, because of the person's age, infirmity or slowness. Where a certificate is given, it must specify another minimum rate which the AIRC considers to be appropriate. The AIRC may determine the period for which the certificate is in force.

There are also rules set out in the section about the number of employees with such certificates who may be employed without AIRC consent.

A refusal to grant or renew a certificate will be applicable.

Previous certificates issued under the *Employee Relations Act 1992* (Vic.) which are in force when the referral takes effect continue in force.

New Subdivision C - *Intervals for meals*

New section 510 - Intervals for meals

Part XV will also continue another entitlement established by the *Employee Relations Act 1992* (Vic.). This is a requirement that an employer must not require an employee in Victoria to work for more than 5 hours continuously without a meal interval of at least half an hour. This may be displaced by an employment agreement which expressly allows a different arrangement. This section preserves that entitlement and the effect of any employment agreements (continued in force by Part XV) on the entitlement. The section is a penalty provision for the purposes of Part XV. Non compliance with the meal interval requirement will attract the remedies contained in Subdivision E of Division 3 (see notes below).

New section 511 - Relationship between section 510 and other laws etc.

The entitlement to a meal interval supplements (and does not override) any other entitlements under legislation of the Commonwealth (other than the WR Act) or Victoria or any other State or Territory.

New section 512 - Limit on operation of section 510

The entitlement to a meal interval does not apply while an employee is subject to a certified agreement or AWA under the WR Act. The entitlement must, however, be taken into account in determining whether such an agreement passes the no-disadvantage test under Part VIE.

New section 513 - Relationship between awards and section 510

An award of the AIRC prevails to the extent of any inconsistency with the entitlement to a meal interval.

New Subdivision D - *Employment agreements*

The Subdivision deals with employment agreements made under the *Employee Relations Act 1992* (Vic.). After the referral scheme commences, such agreements will no longer be available, but it is intended that existing agreements be given continuing operation. This Subdivision so provides and sets out certain rules relating to such agreements and their contents. These requirements are consistent with those under the State legislation.

The Subdivision also provides for the relationship between continuing employment agreements, awards and agreements made under the WR Act.

New section 514 - Continued operation of employment agreements

This section provides for the continuation of employment agreements under the *Employee Relations Act 1992* (Vic.) after the commencement of Part XV.

It also provides that an employment agreement ceases to be in force, or does not come into force, in relation to an employee who is subject to a certified agreement or AWA. The employment agreement does not revive when the certified agreement or AWA ceases to be in force.

New section 515 - Individual employment agreements on cessation of collective employment agreements

This section provides, in similar terms to the *Employee Relations Act 1992* (Vic.), for what happens when a collective employment agreement made under that Act ceases to be in force. In such a case, each employee and the employer concerned are taken, for the purposes of this Division, to be parties to individual employment agreements, when the same terms and conditions as the collective employment agreement.

New section 516 - Lodging collective employment agreements within 14 days of coming into force etc.

Provision is made for the lodging with a Federal industrial registrar of collective employment agreements (CEAs) which were made under the *Employee Relations Act 1992* (Vic.) but not lodged with the Chief Commission Administration Officer of Victoria, as required by that Act. Similar provision is made for lodging CEAs which were made before the commencement of the referral provisions but come into force after that time. A period of 14 days is allowed for lodging such CEAs. If not lodged, they cease to have effect.

New section 517 - Variation of collective employment agreements

This provides for the variation of collective employment agreements. This may only be for the specific purposes set out in subsection (1). Copies of the varied agreement must be lodged with a Federal industrial registrar within 14 days of the variation or the variation ceases to have effect.

New section 518 - Stand down provisions

In line with equivalent provisions (s.14 and Schedule 5) in the *Employee Relations Act 1992* (Vic.), this section provides for stand down powers to be deemed to part of an employment agreement which does not contain such a provision.

New section 519 - Dispute resolution provisions

To maintain a requirement (s.14 and Schedule 5) of the *Employee Relations Act* (Vic.), this section provides a dispute resolution process which is deemed to be part of any continuing employment agreement which lacks such a provision.

New section 520 - Limit on damages etc. for breach of employment agreement

Consistently with the relevant provision (s.19) of the *Employee Relations Act 1992* (Vic.), there is a limit of $5000 on the amount of damages which is recoverable from an employee for contravening an employment agreement.

New section 521 - Employer to give copy of employment agreement

To maintain the relevant requirement [s.10 (2)] of the *Employee Relations Act 1992* (Vic.), there is an obligation on an employer to give an employee bound by an employment agreement a copy of the agreement on request.

New section 522 - Registrar not to divulge information in employment agreements

In line with the equivalent provision [s.13(3)] of the *Employee Relations Act 1992* (Vic.), the contents of employment agreements held by a Federal Industrial Registrar are confidential to the parties or a person who may enforce them.

New section 523 - Restriction on protected action and AWA industrial action: employees
New section 524 - Restriction on protected action and AWA industrial action: employers
New section 525 - Restriction on protected action: organisations

To facilitate the integration of the Federal and State systems following the commencement of the referral schemes, there are to be certain rules as to when protected industrial action is to be available to parties to employment agreements made (but not those *deemed* to exist) under the *Employee Relations Act 1992* (Vic.). These sections set out those rules in relation to when industrial action which is protected (ie, does not give rise to civil liability) may be taken by such parties when they are seeking to make a certified agreement or an AWA under Parts VIB and VID respectively of the WR Act.

The restrictions proposed for access to protected action correspond to similar limits for parties who have made certified agreements or AWAs (or their representative registered organisations). Under the relevant provisions of the WR Act (sections 170MN and 170VU), industrial action is not available until the nominal expiry date of the relevant certified agreement of AWA.

For a collective employment agreement (CEA) made under the *Employee Relations Act 1992* (Vic.), an employer or employee who is bound by the CEA will similarly only be able to take protected action after the CEA expires. Under the *Employee Relations Act 1992* (Vic.), (s.11), the date of expiry of a CEA must be specified in the CEA and must not be more than 5 years after the date on which the CEA came into force.

A similar restriction will apply in relation to when industrial action which is organised or engaged in by an organisation of employees for the purposes of securing a certified agreement is protected. Where the action is taken to support or advance claims in respect of the employment of employees who are bound by a collective employment agreement, the industrial action will not be protected before the expiry of the CEA.

Under these sections, similar restrictions apply in relation to employers and employees bound by individual employment agreements (IEAs). Because no expiry date is required for IEAs under the *Employee Relations Act 1992* (Vic.), the legislation will provide that protected action is only available 3 years after the commencement of the Division. The period of 3 years corresponds to the maximum period permitted under the WR Act for an agreement to operate as a 'closed' agreement without access to protected industrial action.

These provisions do not prevent certified agreements or AWAs entering into force, if the parties to a CEA or IEA so wish. Similarly, subject to section 111AAA, an award relating to such employers and employees may be made during these periods.

New section 526 - Application of Act as if employment agreement were a certified agreement

This section provides that the Act, apart from specified provisions, applies in relation to an employment agreement in the same way as it applies in relation to a certified agreement. This provides a consistent way to determine the status of employment agreements continued under Part XV in relation to other elements of the WR Act, for those cases not specifically addressed under Division 3. The main effect is to enable the enforcement of employment agreements under sections 178 and 179 of the WR Act, in the Federal Court, a District, County or Local Court, or a magistrate's court (including enforcement by way of a small claims procedure, in the case of an action under section 179 in a magistrate's court).

The provisions for which employment agreements are not to be taken to be certified agreements are as follows:

- Part VIB (which provides for the making, variation, etc, of certified agreements);
- section 143 (which provides for publication of certified agreements);
- section 353A (which provides for regulations in relation to record keeping) - this is addressed separately under a later section of Division 3; and
- section 358A (which provides for reports about development in making agreements).

Subsection (2) ensures that a reference in any other Act to a certified agreement within the meaning of the WR Act is not to be taken to include a reference to an employment agreement.

New section 527 - Application of section 111AAA as if employment agreement were a State employment agreement

This section, which is subject to the next section, preserves the effect which section 111AAA would have had in relation to employment agreements made under the *Employee Relations Act 1992* (Vic.). This means that the AIRC, if satisfied that an employment agreement governs wages and conditions of employment of particular employees, must cease dealing with a relevant industrial dispute, unless satisfied that ceasing would not be in the public interest.

New section 528 - Exclusion of certain agreements from sections 523, 524, 525 and 527

This section gives effect to the intention that the restrictions on access to protected action under the preceding sections do not apply to any agreements *deemed* to be in existence under the *Employee Relations Act 1992* (Vic.),or other relevant State legislation. The restrictions will only apply to agreements *made* by the parties to them.

New section 529 - Relationship between employment agreements and awards

This section provides that an award prevails to the extent of any inconsistency with an employment agreement. This maintains the situation in place before the referral of power.

New section 530 - Relationship between employment agreements and enterprise flexibility agreements

This section deals with enterprise flexibility agreements continued in operation after the repeal of Part VIC of the WR Act by transitional provisions of the WROLA Act. It provides that any such agreement also prevails to the extent of any inconsistency with an employment agreement.

New section 531 - Record keeping

This section enables the regulations on keeping of records by employers to deal specifically with the obligations of employers covered by an employment agreement. This will allow the regulations to make provision which is more consistent with the record-keeping requirements currently applicable under the *Employee Relations Act 1992* (Vic.).

New Subdivision E - *Contravention of penalty provisions*

New section 532 - Penalties for contravening penalty provisions

This section provides for enforcement of penalty provisions. It follows the approach of sections 170NF and 170VV of the WR Act, which provide for enforcement of penalty provisions in relation to certified agreements and AWA provisions.

The definition of 'penalty provision' in section 489 identifies the provisions in Division 3 of Part XV and in Schedule 1A which are enforceable under this section. The penalty provisions do not create offences. However, any employee or employer concerned in a contravention of a penalty provision (or any other person prescribed by regulations for this purpose) may apply to an eligible court (as defined in section 489) for an order imposing a penalty.

New section 533 - Injunctions

This section enables an eligible court to grant an injunction against contravention of a penalty provision.

New Division 4 - *Recognised associations*

New section 534 - Regulations relating to transitional registration applications

The *Employee Relations Act 1992* (Vic.) provides for recognition of associations, in relation to industry sectors. This section enables the making of regulations modifying Part IX of the WR Act (Registered organisations) and related provisions. These regulations will enable such associations to make 'transitional registration applications', which are defined in section 489 as applications for registration under Part IX of the WR Act made within 2 years after the commencement of Division 4 of Part XV.

The regulations will be able to deal with the making and grant of such applications, and with the registering of associations as a result of such applications. Section 33(3A) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make regulations with respect to particular matters, the power includes a power to make different provisions with respect to different matters or different classes of matters. Accordingly, it will be possible for the regulations, for example, to make different provision in respect of a first transitional registration application (grant of which could provide ready access to basic representation rights in respect of the relevant industry sector, in Victoria, for a limited period, but without imposing the full range of obligations to which organisations are normally subject) and in respect of a subsequent transitional registration application by the same association (which could provide permanent registration, but on the basis of compliance with virtually the full range of obligations for organisations generally).

If all of the referrals of matters by Victoria are revoked, the modifications will cease to have effect so that further transitional registration applications cannot be made, and modifications of the Act in relation to such applications and associations would not apply. However, the validity of the registration of an organisation which was previously a recognised association, and had applied under the WR Act as modified by the regulations, will not be affected. This will enable such an organisation to continue to operate under the WR Act, to the extent that its operations are supported by other available powers under the Constitution, rather than power in respect of matters referred by the Victorian Parliament.

New section 535 - Regulations relating to certain recognised associations that have become registered

This section enables the making of regulations to modify the effect of Part IX and related provisions of the WR Act, and other provisions of the WR Act which relate to the representation rights of organisations. Such regulations would be in relation to a recognised association which has been registered as a result of a transitional registration application, and in relation to an organisation of which a registered association is a part. Restriction of representation rights of organisations is normally dependent on the terms of the eligibility rules of the organisations - in the case of recognised associations, it is intended that the regulations will enable the restriction of representation rights by reference to the industry sectors for which the associations had been recognised under the *Employee Relations Act 1992* (Vic.) (and by reference to location in Victoria).

For organisations of which recognised associations are part, ie where a Victorian Branch of a federally-registered organisation had achieved recognition as an association, it is intended that the regulations should enable additional representation rights by that organisation, but only to the extent of the industry sector for which the Branch had been recognised, and only in Victoria.

Item 5 - Insertion of new Schedule 1A before Schedule 1

Proposed Schedule 1A is described below.

New section 500, introduction of which is proposed by item 4, provides that minimum terms and conditions of employment for employees in Victoria are contained in Schedule 1A. Schedule 1A is based on Schedule 1 to the *Employee Relations Act 1992* (Vic.).

Some provisions of Schedule 1A are specified as penalty provisions. New section 532 provides that an eligible court may make an order imposing a penalty on a person who contravenes a penalty provision. The maximum penalty is $10,000 for a body corporate and $2,000 in other cases. An application for an order may be made by any employee or employer concerned, or prescribed person. An eligible court is the Industrial Division of the Magistrates' Court of Victoria, or any court prescribed by the regulations.

Schedule 1A - *Minimum terms and conditions of employment*

Part 1 - *General*

Minimum terms and conditions of employment for employees under Schedule 1A are:

- paid annual leave for each year of the number of ordinary hours required to be worked in any 4 week period. The leave accrues on a pro-rata basis and is cumulative;
- paid sick leave for each year of the number of ordinary hours required to be worked in any 1 week period. The leave accrues on a pro-rata basis and is cumulative;
- the greater of:
  - any minimum wage for the work classification of the employee set or adjusted by the Australian Industrial Relations Commission;
  - the rate of pay that applied or would have applied to the employee under the Employee Relations Act;
- as provided in the Schedule, parental leave (maternity, paternity and adoption leave) and an entitlement to work part-time in connection with the birth or adoption of a child;
- as provided in the Schedule, an entitlement to be given certain periods of notice of termination or compensation instead of notice.

Part 2 - *Maternity leave*

Part 2 of Schedule 1A provides minimum conditions relating to maternity leave.

Maternity leave is unpaid leave. An employee who becomes pregnant is entitled to a period of up to 52 weeks of maternity leave. This entitlement is reduced by any period of paternity leave taken by the employee's spouse, and except for one week at the time of confinement, cannot be taken concurrently with paternity leave. The period of maternity leave must be unbroken and must, immediately following confinement, include a period of 6 weeks of compulsory leave. An employee must have had at least 12 months of continuous service with her employer before taking maternity leave.

To obtain maternity leave, an employee must, by specified dates, produce to her employer a certificate from a registered medical practitioner stating that she is pregnant and the expected date of confinement, and a statutory declaration with certain particulars.

Maternity leave is cancelled if the pregnancy terminates otherwise than by the birth of a living child.

If the pregnancy of an employee not on maternity leave terminates within 28 weeks before her expected date of confinement otherwise than by the birth of a living child, she is entitled to such period of unpaid leave (known as special maternity leave) as a registered medical practitioner certifies to be necessary before her return to work and/or paid sick leave.

An employee on maternity leave can terminate her employment at any time by giving notice in accordance with any relevant employment agreement. An employer must not terminate an employee's employment on the ground of her pregnancy or absence on maternity leave.

Upon returning to work, an employee is entitled to the position which she held immediately before commencing maternity leave or, if the position no longer exists, a position as nearly as possible comparable in status and pay.

Part 3 - *Paternity leave*

Part 3 of Schedule 1A provides minimum conditions relating to paternity leave.

Paternity leave is unpaid leave. A male employee is entitled to one or two periods of paternity leave, of up to 52 weeks in total. An unbroken period of up to one week can be taken at the time of confinement of his spouse (short paternity leave). A further unbroken period of up to 51 weeks in order to be the primary care-giver of a child can be taken (extended paternity leave). Extended leave is reduced by any period of maternity leave taken by the employee's spouse, and cannot be taken concurrently with maternity leave. An employee must have had at least 12 months of continuous service with his employer before taking paternity leave.

To obtain paternity leave, an employee must, by specified times, produce to his employer a certificate from a registered medical practitioner stating that his spouse is pregnant and the

expected date of confinement or date of birth, and a statutory declaration with certain particulars.

Paternity leave is cancelled if the pregnancy of the employee's spouse terminates otherwise than by the birth of a living child.

An employee on paternity leave can terminate his employment at any time by giving notice in accordance with any relevant employment agreement. An employer must not terminate an employee's employment on the ground of his absence on paternity leave.

Upon returning to work, an employee is entitled to the position which he held immediately before commencing paternity leave or, if the position no longer exists, a position as nearly as possible comparable in status and pay.

Part 4 - *Adoption leave*

Part 4 of Schedule 1A provides minimum conditions relating to adoption leave.

Adoption leave is unpaid leave. An employee is entitled to one or two periods of adoption leave, of up to 52 weeks in total. An unbroken period of up to 3 weeks can be taken at the time of placement of the child (short adoption leave). An unbroken period of up to 52 weeks from the time of placement of the child in order to be the primary care-giver of the child can be taken (extended adoption leave). This entitlement is reduced by any period of short adoption leave taken and any periods of adoption leave taken by the employee's spouse, and cannot be taken concurrently with adoption leave taken by a spouse. An employee must have had at least 12 months of continuous service with his or her employer before taking adoption leave.

To obtain adoption leave, an employee must produce to the employer a statement from an adoption agency or other appropriate body of the expected date of placement, or a statement from the appropriate government authority confirming that the employee is to have custody of the child pending application for an adoption order. Before taking adoption leave, a statutory declaration with certain particulars must also be produced.

Adoption leave is cancelled if the placement of the child does not proceed.

The employer must also grant to an employee who is seeking to adopt a child up to 2 days unpaid leave to attend any compulsory interviews or examinations that are necessary as part of the adoption procedure.

An employee on adoption leave can terminate his or her employment at any time by giving notice in accordance with any relevant employment agreement. An employer must not terminate an employee's employment on the ground of his or her absence on adoption leave.

Upon returning to work, an employee is entitled to the position which he or she held immediately before commencing adoption leave or, if the position no longer exists, a position as nearly as possible comparable in status and pay.

Part 5 - *Part-time employment*

Part 5 of Schedule 1A provides minimum conditions relating to part-time employment in connection with the birth or adoption of a child.

With the agreement of the employer:

- a female employee may work part-time in one or more periods while she is pregnant if it is necessary or desirable;

- a female employee may work part-time in one or more periods from the seventh week after the birth of the child until the child's second birthday;

- a male employee may work part-time in one or more periods from the birth of the child until the child's second birthday;

  a male or female employee may work part-time, in relation to adoption, from the date of placement of the child until the second anniversary of the placement.

An employee who has had at least 12 months continuous service with an employer before commencing such part-time employment has, at the end of such employment, the right to return to his or her former position.

Before starting such a period of part-time employment the employee and employer must agree in writing that the employee may work part-time, on the hours and times to be worked, on the classification applying to the work to be performed, and on the period of part-time employment.

The employment of such a part-time employee must not be terminated by the employer because the employee is exercising rights arising under this Part.

An employer may request, but not require, an employee working part-time to work overtime.

An employee may work part-time under this Part despite any provision of any relevant employment agreement which limits or restricts the circumstances or the terms on which part-time employment may be worked.

Part 6 - *Requirements for lawful termination of employment*

Part 6 of Schedule 1A provides minimum conditions relating to the requirements for lawful termination of an employee's employment.

An employer must not terminate an employee's employment unless the employee has been given the specified period of notice, or compensation instead of notice, or the employee is guilty of serious misconduct. The amount of compensation instead of notice is specified.

An employee must not terminate his or her employment unless the employer has been given the period of notice required by the relevant employment agreement, or if no such period is applicable, a period of notice equal to the employee's usual pay period.

SCHEDULE 2 - OTHER AMENDMENTS OF THE WORKPLACE RELATIONS ACT 1996

Item 1 - Section 83BR

This item would repeal section 83BR of the Workplace Relations Act 1996. The repealed section would be replaced by new section 170WKA (which is to be inserted by item 2 of this Schedule).

Item 2 - After section 170WK

This item would insert a new section 170WKA. The purpose of this section is to allow State laws to validly complement the provisions of the Workplace Relations Act relating to AWAs. The application of those provisions is limited by the constitutional powers available to the Commonwealth.

This section will apply where a State Parliament enacts complementary legislation to supplement those constitutional powers available to the Commonwealth (ie to extend the AWA provisions to employment that is beyond the constitutional powers that underpin those provisions). Because of this section, a State Parliament will be able, by that complementary legislation, to confer the necessary functions and powers on the Australian Industrial Relations Commission, the Employment Advocate and authorised officers (but not other functions and powers, because section 170WKA refers only to a State law that applies the AWA provisions of the WR Act).

It is recognised that it might be appropriate for State law to make some modifications of the AWA provisions in their application as State law; this will be provided for in regulations made under the Workplace Relations Act. The regulations will be able to specify two categories of modifications: those which the State law must make (ie 'must' if the State law is to attract the operation of this section) and those which a State can choose to include in its law.

SCHEDULE 3 - AMENDMENT OF THE WORKPLACE RELATIONS AND OTHER LEGISLATION AMENDMENT ACT 1996

Item 1 - Subsection 2(2)
Item 2 - Subsection 2(6)
Item 3 - Item 3 of Schedule 10 (heading)
Item 4 - Item 1 of Schedule 12 (heading)

Subsection 2(6) of *Workplace Relations and Other Legislation Amendment Act 1996* (the Act) requires that item 1 of Schedule 12 to the Act (which establishes the no-disadvantage test) not commence until after the commencement of item 3 of Schedule 10 to the Act (which establishes Australian Workplace Agreements).

It is intended that Schedule 12 of the Act commence before Schedule 10. To achieve this purpose, item 3 of this Schedule repeals subsection 2(6) of the Act. Subsection 2(2) of the Act, which provides for commencement generally by Proclamation, will then apply.

Items 1, 3 and 4 of this Schedule are technical amendments necessary to allow Schedule 12 to the Act to commence before Schedule 10. Specifically:

- Item 1 removes the reference to Schedule 12 from subsection 2(2) of the Act. This allows Schedule 12 to commence upon proclamation;

- Items 3 and 4 amend the headings of item 3 of Schedule 10 to the Act and item 1 of Schedule 12 to the Act. These amendments allow Part VIE (No-disadvantage test) to be inserted into the *Workplace Relations Act 1996* before Part VID (Australian Workplace Agreements).

Matters excluded from references by the Victorian Parliament

(See explanatory material on proposed sections 490 and 497, to be inserted by items 1 and 4 of Schedule 1 to the Bill.)

The matters which are excluded from the references by the Commonwealth Powers (Industrial Relations) Bill 1996 (Victoria), as introduced on 19 November 1996, and as proposed to be amended in the Legislative Council of Victoria by amendments introduced on 4 December 1996, are as follows. ('Law enforcement officer' is defined by the Victorian Bill to mean a member of the police force, police reservist, police recruit or protective services officer.)

(a) Matters pertaining to the number, identity, appointment (other than terms and conditions of appointment) and discipline (other than matters pertaining to the termination of employment) of employees, other than law enforcement officers, in the public sector.

(b) Matters pertaining to the number, identity, appointment (other than matters pertaining to terms and conditions of appointment not referred to in this paragraph), probation, promotion, transfer from place to place or position to position, physical or mental fitness, uniform, equipment, discipline or termination of employment of law enforcement officers.

(c) Matters pertaining to the number or identity of employees in the public sector dismissed or to be dismissed on grounds of redundancy.

(d) Matters pertaining to the following subject matters:

(i) workers' compensation;

(ii) superannuation;

(iii) occupational health and safety;

(iv) apprenticeship;

(v) long service leave;

(vi) days to be observed as public holidays;

(vii) equal opportunity;

but not so as to prevent the inclusion in awards or agreements made under the Commonwealth Act of provisions in relation to those matters to the extent to which the Commonwealth Act, as enacted as at 30 November 1996 (whether or not in force) allows such awards or agreements to include such provisions.

(e) The matter of the making of an award or order as, or declaring any term of an award or order to be, a common rule in the State for an industry.

(f) Matters pertaining to Ministers, members of the Parliament, judicial officers or members of administrative tribunals.

(g) Matters pertaining to persons holding office in the public sector to which the right to appoint is vested in the Governor in Council or a Minister.

(h) Matters pertaining to persons holding senior executive offices in the service of a Department within the meaning of the *Public Sector Management Act 1992* (Vic.).

(i) Matters pertaining to persons employed at the higher managerial levels in the public sector.

(j) Matters pertaining to persons employed as ministerial assistants or ministerial advisers in the service of Ministers.

(k) Matters pertaining to persons holding office as Parliamentary officers.

(l) Matters pertaining to the transfer or redundancy of employees of a body as a result of a restructure by an Act.

(m) Matters pertaining to the duties of employees if a situation of emergency is declared by or under an Act or an industry or project is, by or under an Act, declared to be a vital industry or vital project and whose work is directly affected by that declaration.

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