

INDUSTRIAL RELATIONS REFORM BILL 1994

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

The objectives of this Bill are to provide:

- more effective arrangements for direct bargaining, including a new instrument of enterprise flexibility agreements, and a sanction-free bargaining period in the negotiation of certified agreements;
- a fair, secure and equitable safety net for all employees through minimum entitlements that give effect to international treaty obligations;
- measures to prevent and eliminate discrimination in workplace and industrial arrangements;
- consistency with certain provisions of the *Commonwealth Industrial Relations Reform Act 1993*;
- more equitable processes in the Queensland Industrial Relations Commission;
- other changes to improve the effectiveness of the Act;
- consequent amendments to the *Public Service Management and Employment Act 1988*
- a minor amendment to the *Vocational Education, Training and Employment Act 1991*.

Reasons for the Bill

The intent of this Bill is to encourage and facilitate the making of agreements between the parties involved in industrial relations. The Bill also aims to ensure that Queensland law complies with certain international treaties under which Australia has obligations.

On 14 December 1993 the Commonwealth Industrial Relations Reform Bill completed its passage through Federal Parliament. It will become law on 30 March 1994. In terms of its relevance to the State industrial relations system, the *Industrial Relations Reform Act* [IRRA] aims first, to provide all employees with access to specified minimum entitlements as prescribed by particular International Conventions, and second, to assist enterprise bargaining further.

The minimum entitlements are:

- minimum wages;
- equal pay for work of equal value;
- rights to redundancy pay and protection against unfair dismissal;
- the right to twelve months' unpaid parental leave.

The IRRA provides that the new Industrial Relations Court and the Australian Industrial Relations Commission [AIRC] must refrain from dealing with a matter where an alternative and adequate mechanism or remedy exists under State machinery. Amendments proposed in this Bill are necessary to ensure that equivalent arrangements are provided in Queensland's industrial relations system. The provision of the minimum entitlements is also—and primarily—a recognition of the international obligations associated with the specified Conventions.

The IRRA's extension of enterprise bargaining merits adoption into the State system in similar form as well as to provide for further harmonisation between the two systems.

Other amendments acknowledge developments in industrial relations since the Act was introduced in 1990. They are designed to enhance and provide more equitable processes in the Queensland Industrial Relations Commission [QIRC]; to provide improved benefits for various employees; and to help regulate the affairs of industrial organisations.

Estimated Cost for Government Implementation

There will be minimal additional costs to Government. Changes associated with the provision of minimum entitlements will lead to an increased workload for the QIRC in certain areas. In cases where amalgamation ballots of Federal industrial organisations are recognised for counterpart State organisations there will be a saving for the Electoral

Commission of Queensland which currently bears the full cost of State ballots.

The emphasis on bargaining places more onus on the parties and in many cases, a less direct role for the QIRC.

Government employees presently receive at least the levels of minimum entitlements and casual employees employed by the Government already have access to long service leave.

Consultation

Consultation has taken place on the proposed legislation with the statutory tripartite advisory body, the Industrial Relations Consultative Committee which includes representatives of employer associations, trade unions and Government. The Bar Association, the Law Society and the Queensland Council for Civil Liberties were also consulted.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Short title

Clause 1 sets out the short title of the Act.

PART 2—AMENDMENT OF *INDUSTRIAL RELATIONS ACT 1990*

Act Amended

Clause 2 provides that it is the *Industrial Relations Act 1990* which is being amended by this Part.

Amendment of Section 3: (Objects)

Clause 3(1) amends the “objects” section of the Act (Section 3). New objects are added to reflect the intentions of the amendments made by the Bill. These paragraphs emphasise:

- encouraging and facilitating the making of agreements;
- establishing and maintaining an effective framework for protecting wages and employment conditions through awards and ensuring that labour standards meet Australia's international obligations;
- providing a framework of rights and responsibilities for the parties involved in industrial relations which encourages fair and effective bargaining and ensures that parties abide by their agreements;
- helping to prevent and eliminate discrimination on various grounds.

Clause 3(3) makes a minor change to object 3 (d), bringing it into line with Section 3(e) of the Commonwealth *Industrial Relations Act 1988* [the Commonwealth Act].

Amendment of Section 5: (Meaning of terms)

Clause 4 introduces new and revised definitions to complement the amendments proposed by the Bill. The significance of these definitions is explained in the notes below on the relevant substantive provisions.

Insertion of new Sections 30A and 30B:

Section 30A: Performance of Commission's functions

Clause 5 of the Bill inserts a new Section 30A dealing with the performance of the Commission's functions.

The Commission is, so far as it can, to ensure that the system of awards provides for secure, relevant and consistent wages and conditions of employment and also to have proper regard to the interests of the parties immediately concerned and of the community as a whole.

The new Section 30A will also require the Commission, in performing its functions, to take account of the principles of the ILO's Workers with Family Responsibilities Convention, 1981. That Convention is to be added to the Schedules to the Act as Schedule 8.

This provision gives effect to the intention that, in relation to matters within the Commission's jurisdiction, discrimination against workers with family responsibilities should be prevented and that workers should be assisted in reconciling their employment and family responsibilities.

Section 30B: Commission decisions to be in plain English

Clause 5 inserts a new Section 30B requiring the Commission's decisions to be expressed in plain English and, as far as possible, structured in a way that is easy to understand.

Insertion of new Divisions 4-7 in Part 4: Industrial Relations Commission

Clause 6 inserts a new Division 4—Minimum wages; a new Division 5—Equal remuneration for work of equal value; a new Division 6—Further provisions about orders under Division 4 or 5 and a new Division 7—Industry Consultative Councils into Part 4. These provisions reflect Divisions 1, 2 and 4 of Part VIA and Section 133 of the Commonwealth Act. The Bill indicates the relevant sections of the Commonwealth Act, where appropriate.

Division 4—Minimum wages

Section 49AA: Object of Division

The object of Division 4 is to give effect to the “Minimum Wages Convention”. This is the International Labour Organisation's [ILO's] Minimum Wage Fixing Convention 1970. This definition is added to Section 5(1) of the Act by Clause 4 of this Bill. The text of this Convention is at new Schedule 1 to the Act, inserted by Clause 39.

The Convention requires there to be a system of minimum wages that covers all groups of wage earners whose terms of employment are such that coverage would be appropriate. The “competent authority”—in the

Australian context, industrial conciliation and arbitration tribunals such as the QIRC—is to decide which groups are to be covered by such a system.

Section 49AB: Meaning of expressions

This proposed section specifies that expressions in the Minimum Wages Convention that are also used in Division 4 have the meaning that they have in the Convention.

Section 49AC: Orders setting minimum wages

This proposed section, together with the next two sections, sets out the scope of the orders that the QIRC is to make in setting minimum wages. These sections reflect Sections 49AC, 49AD and 49AE of the Commonwealth Act and the requirements of the Minimum Wages Convention. Under Section 49AE employees are ineligible for a minimum wages order from the AIRC if their minimum wages can be set and adjusted by a “State arbitrator”. The powers of the QIRC meet the definition of State arbitrator in the Commonwealth Act, and the complementary provisions proposed in this Division will enhance the jurisdiction of the QIRC.

The Commission may make an order either setting the same minimum wage for all employees in a specified group or setting different minimum wages for different categories of employees in a specified group.

Different minimum wages for different occupations and for various degrees of occupational skill are recognised as a legitimate means of implementation of the Minimum Wages Convention by the expert bodies of the ILO.

Section 49AD: Orders only on application

The Commission will be able to make a minimum wages order only on application. The applicant must be an employee to be covered by the order or an industrial organisation entitled to represent employees to be included in the order. An “industrial organisation” as defined by Section 5(1) of the Act means (relevantly) an association registered under the Act.

Section 49AE: When Commission may make order

Proposed Section 49AE details the circumstances and manner in which the QIRC is to make a minimum wages order. Under Subsection (1) the Commission will be able to make an order only if it is satisfied that coverage of the “group” of employees by a system of minimum wages is appropriate, given their terms of employment. The second requirement is that at least some employees are not “ineligible” as specified in Subsection (3).

Subsection (2) requires an order to specify which employees are excluded from its operation because they are ineligible. This could be done, for example, by describing a category or categories of employees.

Subsection (3) defines the term “ineligible”. Employees are ineligible to be covered by a minimum wages order if they already have the protection of a system of setting and adjusting minimum wages. That is, they are either covered by an award, certified agreement, enterprise flexibility agreement or industrial agreement which sets minimum wages, or proceedings have commenced in the QIRC for one of these instruments under Part 10 or Part 10A of the Act.

Subsection (4) requires the Commission to take account of the views of relevant trade unions and employer organisations about which group of employees should be covered by an order and whether coverage of that group by a system of minimum wages is appropriate. The organisations include employee organisations entitled to represent the employees concerned; employer organisations entitled to represent the employers of the employees; and unregistered organisations representing employers of the employees.

These provisions implement Article 1.2 of the Minimum Wages Convention, requiring full consultation with representative organisations of employers and workers as to the groups of wage earners for which coverage is appropriate. The ILO has accepted that these requirements would be met by a system where employers’ and workers’ representatives were given an opportunity to give evidence before a tribunal, as this subsection provides.

Subsection (5) provides that the relevant individual employers must also be given the opportunity to be heard by the Commission before it makes an order. The term “as prescribed” means that the way in which this opportunity is to be exercised is to be set by regulation, as is customary for

arrangements for QIRC applications and hearings.

Section 49AF: Matters to be considered when setting minimum wages

These provisions give effect to Article 3 of the Minimum Wages Convention. The proposed section requires that, in setting minimum wages, the Commission must consider the principles it applies in setting minimum wages under its award-making jurisdiction (Part 10). It also must consider the needs of workers and their families and a range of economic factors as set out in paragraphs (b) and (c).

This section only requires the Commission to “consider” the specified matters; it does not prescribe what weight the QIRC should place on each factor.

Section 49AG: Division does not limit other rights

This proposed section makes it clear that this legislation on minimum wages does not limit any other right that a person or industrial organisation has to establish minimum wages. These provisions will not prevent access to awards, industrial agreements or certified agreements, for example.

Division 5—Equal remuneration for work of equal value

As noted above, this proposed Division mirrors Division 2 of Part VIA of the Commonwealth *Industrial Relations Act*. Under that Act (Section 170BE), the AIRC must refrain from exercising its powers in relation to equal remuneration if an adequate alternative remedy exists under State law. An intent of this proposed Division is to provide such a remedy.

Section 49BA: Object of Division

The object of this proposed Division is to give effect to four international treaties (including two ILO Conventions) and two ILO Recommendations. The treaties are described in paragraph (a) as the “Anti-Discrimination Conventions”. This term is defined in Clause 4 of the Bill (amending

Section 5 of the Act) as:

- the ILO Equal Remuneration Convention, which is set out in new Schedule 2;
- the Convention on the Elimination of all Forms of Discrimination against Women, which is set out in new Schedule 3;
- the ILO Convention concerning Discrimination in respect of Employment and Occupation, which is set out in new Schedule 4;
- Articles 3 and 7 of the Economic, Social and Cultural Rights Covenant.

The ILO Recommendations referred to are the Equal Remuneration Recommendation and the Discrimination (Employment and Occupation) Recommendation, the text of which is set out in new Schedules 6 and 7 respectively.

Section 49BB: Meaning of expressions

The phrase “equal remuneration for work of equal value” is defined as “equal remuneration for men and women workers for work of equal value”. Subsection (2) gives this phrase the same meaning as it has in the Equal Remuneration Convention, which defines it in Article 1 as “rates of remuneration established without discrimination based on sex”. The Convention is aimed at the elimination of differences in remuneration which are based on sex, whether directly or indirectly.

The other Anti-Discrimination Conventions and the ILO Recommendations are also given effect by this Division, because the central concept of “equal remuneration for work of equal value” is expressed in certain obligations imposed by those Conventions and in the measures set out in the Recommendations.

Section 49BC: Orders requiring equal remuneration

This proposed section enables the Commission to make any order it considers appropriate to ensure employees will receive equal remuneration for work of equal value. This includes the power to order increases in rates of remuneration.

Section 49BD: Orders only on application

Proposed Section 49BD provides that the Commission can make an order under this Division only on application from an employee to be covered by the order or an industrial organisation entitled to represent the relevant employees or the Anti-Discrimination Commissioner.

Section 49BE: When Commission must and may only make order

This provision specifies the circumstances in which the Commission can make an order for equal remuneration. An order may be made only if the employees involved do not already have equal remuneration and only if the order can reasonably be regarded as appropriate and as giving effect to one of the Anti-Discrimination Conventions or ILO Recommendations.

Section 49BF: Immediate or progressive introduction of equal remuneration

The Commission will have the discretion to order that equal remuneration be carried out immediately or in progressive stages.

Section 49BG: Employer not to reduce remuneration

This proposed section will prevent an employer reducing remuneration because an application or order has been made under this Division. A reduction made for that reason is ineffective; the employee would retain a legal entitlement to the original remuneration.

Section 49BH: Division does not limit other rights

This legislation does not limit any other right to secure equal remuneration for work of equal value—for example, by awards or determinations of anti-discrimination bodies.

Division 6—Further provisions about orders under Division 4 or 5**Section 49CA: Orders to be written**

This proposed section requires an order of the Commission under Divisions 4 or 5 to be in writing.

Section 49CB: When orders take effect

Orders of the Commission may only take effect from the date they are issued or a later specified date.

Section 49CC: Compliance with orders

Proposed Section 49CC provides that the compliance provisions of the Act have the same effect in relation to orders of the Commission under Divisions 4 and 5 as they do in relation to awards.

Section 49CD: Amendment and revocation of orders

The Commission may amend or revoke an order made under Division 4 or 5 only on application by:

- an employer, or employer representative, covered by the order; or
- an employee, or employee representative, covered by the order.

Section 49CE: Inconsistent awards or orders

Section 49CE provides that any award or industrial agreement, certified agreement, enterprise flexibility agreement or order of the Commission which is inconsistent with an order under Division 4 or 5 has no effect to the extent the inconsistency detrimentally affects the rights of the employees.

Division 7—Industry consultative councils**Section 49D: Industry consultative councils**

This proposed section requires the Commission to encourage and facilitate the establishment and effective operation of industry consultative councils. The Commission is to encourage the industrial parties in a particular industry to use the relevant consultative council to pursue improvements in efficiency and competitiveness and to overcome barriers to workplace reform in that industry.

With the consent of the Chief Industrial Commissioner, a Commissioner may chair meetings of the council or participate in its discussions or nominate another member of the Commission to be represented on the council in those capacities. In giving his or her consent, the Chief Industrial Commissioner must be satisfied that the council is properly representative of employer organisations and associations and industrial organisations of employees in that industry. The word “industry” is defined in the section.

Section 70: (Basis of procedures and decisions of the Commission and Industrial Magistrates)

Clause 7 amends Section 70 of the Act to ensure that the Commission has regard to the objects of the Act as well as the economic factors already specified.

Amendment of Section 83: (Representation of parties)

Clause 8 amends Section 83 of the Act to provide for legal representation in proceedings under Section 39—power to vary or void contracts. Such representation will be available with the leave of the Commission if it considers it desirable for the effective conduct of the proceedings. At present legal representation is available only with the consent of all parties.

Replacement of Section 89: Enforcement of Commission’s orders

Clause 9 replaces Section 89 and introduces new arrangements for the enforcement of orders of the Commission which remove the existing requirement to file an affidavit as to compliance and the role of the Industrial Registrar in the proceedings.

Subsection (2) specifies that the Commission may make an order directed to a person only after considering whether it would be more appropriate to direct the order against an industrial organisation.

Subsection (3) provides that if an order is made against a person the order must specify the person's name and time for complying with the order.

In Subsection (5), if a party to the industrial dispute considers that the order has not been substantially complied with, the party may cause a notice to be issued under the rules of court calling on the industrial organisation or person to show cause to the Full Industrial Court why the industrial organisation or person should not be dealt with under Section 90.

Amendment of Part 10: (Awards and industrial agreements)

Clause 10 amends Part 10 (Awards and industrial agreements) to provide a new Division 1—The Award System. This stresses the importance of secure, relevant awards which provide fair wages and conditions. The Division will have three subdivisions comprising:

Subdivision 1—Objects of Division

Subdivision 2—Awards [this is the existing Division 1 of Part 10]

Subdivision 3—Paid rates awards.

Division 1—The award system

Subdivision 1— Objects of Division

Section 105A: Objects of Division

The objects emphasise the protection of fair minimum wages and employment conditions by awards.

Paragraph (b) reflects the importance of awards in providing a secure foundation for direct bargaining leading to agreements suited to the individual needs of industries and enterprises and the employees in those industries and enterprises.

At the same time, the objects seek to ensure that awards themselves are suited to the efficient performance of work in particular industries and enterprises, while proper account is to be taken of employee interests, as noted in paragraph (c).

To maintain the productivity and industrial stability of industries, the objects seek to ensure that due regard is had, in the award system, to stable and appropriate relativities, based on the matters referred to in paragraph (d).

Paragraph (e) is intended to ensure that the Commission will perform and exercise its powers and functions in relation to making and amending awards in a way that gives prompt access to the safety net of minimum wages and employment conditions for those employees who do not have such wages and conditions.

Subdivision 3—Paid rates awards

Section 108A: Objects of Subdivision

The objects set out in proposed Section 108A specifically refer to the role of paid rates awards, where appropriate, in relation to the protection of the wages and employment conditions of employees. The second object emphasises the importance of such awards being suited to the efficient performance of work in particular industries and enterprises, while proper account is to be taken of employees' interests.

A paid rates award is defined by Clause 4 (amending Section 5) as an award that specifies actual entitlements, rather than minimum entitlements, in relation to wages and employment conditions.

Such awards are common in certain areas of industry, such as public sector employment. It is considered contrary to the maintenance of good industrial relations and a climate in which there can be a constructive approach to reaching agreements not to provide for such awards.

Section 108B: Making or amending paid rates awards

Proposed Section 108B is intended to ensure that employees whose wages and conditions of employment have customarily been determined by a paid rates award or awards will, subject to certain qualifications, continue to have such awards.

The new section is meant to apply to areas of employment with a history of coverage by paid rates awards.

The Commission must make paid rates awards for those employees who have customarily had them, unless it considers that this would be against the public interest or the parties have agreed otherwise.

The Commission need not make or amend a paid rates award if it considers it is more appropriate for the matters to be dealt with in a certified agreement or enterprise flexibility agreement, or there is a reasonable prospect of such an agreement.

The Commission need not make a paid rates award if the parties concerned do not want it to do so.

It will be for the Commission to decide in any matter before it whether or not to make an award or to amend an award, and what to include in the award or amendment.

Under proposed Section 139DP the Commission may make an award or amend an award which in either instance becomes a paid rates award in circumstances where it has terminated a bargaining period because there is industrial action which threatens to have specific outcomes (e.g., danger to life, personal property etc.)—see notes for proposed Section 139DP.

Section 108C: Commission to maintain existing paid rates awards

The Commission will be obliged by proposed Section 30A(2) to maintain all awards in a way that ensures that wages and employment conditions under them form an appropriate part of the overall system of awards. Although consistent wages and conditions are required for minimum rates awards under Section 30A(2), paid rates awards do not have to be consistent with minimum rates awards.

Section 108D: Party acting inconsistently with award's status as a paid rates award

This proposed section will allow the Commission to cancel a paid rates award and replace it with a minimum rates award or amend a paid rates award to make it a minimum rates award if satisfied, after giving the parties an opportunity to be heard, that a party to such an award has acted in a way that is so inconsistent with the award as to make it inappropriate for the award to continue as a paid rates award.

Section 108E: Statement identifying paid rates awards

In order to avoid uncertainty about whether an award is a paid rates award, the Commission is to be required to include a statement in a paid rates award identifying it as such.

Amendment of Section 128: (Persons bound by agreement)

Clause 11 inserts a definition of “party” into Section 128 of the Act. This makes it clear that the term includes a successor, assignee or transmittee to or of the whole or part of the business of a party to an industrial agreement.

Any person who takes over a business of an employer bound by an industrial agreement will automatically be bound by the industrial agreement.

Amendment of Section 131: (Powers of Commission re awards)

Clause 12 provides a new Subsection (4) which gives the Commission the discretion to refrain from dealing with an application for amendment of an award while it considers that the parties should try to negotiate a certified agreement or enterprise flexibility agreement, and there is a reasonable prospect of such an agreement.

Insertion of new Subsections 131A and 131B

Clause 13 inserts new provisions intended to give legislative encouragement to the use of enterprise flexibility provisions in awards.

Section 131A: Commission to include enterprise flexibility provisions in awards

Section 131A requires the Commission, if it considers it appropriate, to establish processes in awards for agreements to be negotiated at the enterprise or workplace level about its more efficient operation.

Section 131B: Amendment of award to give effect to agreement negotiated under enterprise flexibility provision

Section 131B provides for the case where an award permits an agreement to be made to amend its terms. Such an agreement must meet the “no disadvantage” test specified in Subsections (2) and (3). Under this requirement, an agreement of this kind cannot lead to the amendment of the parent award if it reduces any entitlements or protections of the relevant employees under an award or an industrial agreement (and, in the context of their employment conditions considered as a whole, the Commission considers that the reduction is contrary to the public interest).

An industrial organisation of employees that is a party to the award is entitled, under Subsection (4), to be heard on the application.

Under Subsection (5), an amendment must not be refused merely because a relevant industrial organisation refuses to agree or consent to the amendment and the Commission considers the refusal to be unreasonable.

Insertion of new Section 134A

Clause 14 inserts a new Section 134A in Division 4 of Part 10.

Section 134A: Commission must review awards and industrial agreements

This proposed section will require the Commission to review each award or industrial agreement once in each 3-year period. Subsection (1) explains how that period is to be identified for each award or industrial agreement.

The Commission is to take steps (which will be prescribed under the regulations) to remedy any deficiency of the following kinds:

- the award or industrial agreement contains a “discriminatory provision”;^{*}

- the provisions of the award or industrial agreement are obsolete or need updating;
- the award or industrial agreement is not structured in a way that is easy to understand;
- the award or industrial agreement prescribes matters in unnecessary detail;
- the terms of the award or industrial agreement are inappropriate in providing for secure, relevant and consistent wages and employment conditions;
- the award is not expressed in plain English.

A party to an award or industrial agreement who has a genuine interest is to be given an opportunity to be heard before any action is taken to amend the award.

* “discriminatory provision” is defined in Clause 4, amending Section 5, as a provision that discriminates against an employee on the basis of an attribute for which discrimination is prohibited under the *Anti-Discrimination Act 1991*, or on the basis of family responsibilities. This does not include provisions that discriminate on the basis of the inherent requirements of the job; or in employment as a member of staff of a religious institution provided the discrimination is to avoid injury to particular religious susceptibilities; or by remunerating young employees according to age.

Section 7 of the *Anti-Discrimination Act 1991* prohibits discrimination on the basis of: sex; marital status; pregnancy; parental status; age; race; impairment; religion; political belief or activity; trade union activity; lawful sexual activity; and association with someone identified by one of these attributes.

The addition of discrimination on the basis of family responsibilities is in accord with obligations under the ILO Workers with Family Responsibilities Convention. The text of this Convention is in new Schedule 8 of the Act.

Insertion of new Part 10A

Clause 15 introduces a new Part 10A which addresses certified agreements and enterprise flexibility agreements. It also provides for immunity from civil liability in certain circumstances.

The new Part 10A comprises six Divisions:

Division 1—Objects and interpretation

Division 2—Certified agreements

Division 3—Enterprise flexibility agreements

Division 4—Immunity from civil liability for protected action d u r i n g bargaining period

Division 5—Conciliation in relation to proposed agreements

Division 6—Provisions common to certified agreements and enterprise flexibility agreements

This part is complementary to Part VIB of the Commonwealth Act.

PART 10A—PROMOTING BARGAINING AND FACILITATING AGREEMENTS

Division 1—Objects and interpretation

Section 139AA: Objects of Part

The objects are intended to provide guidance to the Commission in the performance of its functions under the new Part 10A.

Subsection (1) contains two objects:

- to promote bargaining and facilitate the making of agreements that will facilitate labour market reform; and
- to encourage their use, particularly at the workplace or enterprise level.

Under Subsection (2) the Commission must perform its functions in a way which furthers the objects of the Act and, in particular, the objects of Part 10A.

Subsection (3) will exclude the application of Section 70(3) of the Act to this Division. This means that in exercising its functions under Part 10A,

the Commission is not required to consider the public interest unless specifically required to do so by a provision of Part 10A. Where a provision of Part 10A requires the Commission to take the public interest into account, it is not precluded from considering, as part of that public interest, the elements specified in Section 70(3), as amended by this Bill (see Clause 7, above).

Under proposed Subsection (4), a single Industrial Commissioner may perform any of the Commission's functions under Part 10A.

Section 139AB: Definitions

- Proposed Section 139AB defines particular terms used in this Part.
- “eligible union” is defined in relation to an enterprise carried on by an employer. Eligible unions are given certain rights under Division 3 of Part 10A, to participate in enterprise flexibility agreements. An eligible union is an industrial organisation of employees that is party to an award that binds the employer in respect of work performed in the enterprise and which has members who are employed in the enterprise.
- “employer” is defined as including a joint venture or common enterprise being carried on by 2 or more employers.
- “enterprise” is defined to provide that an enterprise can be a business that is carried on by a single employer, a geographically distinct part of such a business or a group comprised of two or more such parts.
- “negotiating party” is defined as the initiating party and the proposed party in Section 139DD.
- A “part” of a single business is defined so that a part may be, but is not confined to, a geographically distinct part or a distinct operational or organisational unit within the single business. The Commission will be able to refuse certification of an agreement that relates to part of a single business where the part is identified by criteria other than these and the Commission considers that the agreement results in unfair discrimination between employees in the part covered by the agreement and other employees in the business (see notes on proposed Subsection 139BD).

- “party” is defined to include a successor, assignee or transmittee to or of the whole or part of the business of a party to a certified agreement or enterprise flexibility agreement. This definition is included to ensure that the provisions relating to parties to certified agreements and enterprise flexibility agreements apply equally to persons who take over the business of a party.
- “period of the agreement” is defined as the period of operation specified in the agreement or such extended time determined under proposed Section 139BK (for certified agreements) or Section 139CJ (for enterprise flexibility agreements).
- “relevant industrial matter” is defined as an industrial matter that is the subject of negotiations.
- “single business” is defined to include a joint venture, a common enterprise, a single project or undertaking, activities carried on by the State or a State authority, as well as a business carried on by a single employer.
- “single enterprise” is defined to include a single business, part of a single business or a single workplace.

Division 2—Certified agreements

Section 139BA: Certified agreements

Under this proposed section an employer (or employers’ organisation) and an industrial organisation of employees may make a memorandum of agreed terms about an industrial matter.

The parties must apply to the Commission for the certification of such agreements.

Section 139BB: Organisations entitled to be heard

This proposed section provides that certain industrial organisations of employees are entitled to be heard in proceedings in the Commission relating to applications for:

- the certification of an agreement that applies to a single business, part of a single business or a single place of work; and

- approval to extend or amend a certified agreement that applies to a single business, part of a single business or a single workplace.

Subsection (1) provides that an organisation is entitled to be heard if:

- it is entitled to represent the industrial interests of employees of the business (or part of the business or single place of work) to which the agreement applies and it has members employed in that business, part of a business or workplace; or
- it is party to an award which binds the employer in respect of work performed in the business, part of a business or workplace and can show that it has a genuine interest in the application;

Subsection (2) provides that as soon as practicable after it receives an application the Commission must notify each organisation that is entitled to be heard, that the application has been made and that they have a right to be heard.

Subsection (3) ensures that proposed Subsection (1) does not affect the right that any organisation of employees might otherwise have to intervene or be heard in the proceedings.

Section 139BC: Certification of agreements

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

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

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

- there is an award, or industrial agreement which regulates the wages and conditions of the employees covered by the agreement. If there is no applicable award or industrial agreement, the agreement must nominate an award or industrial agreement in its place—Subsection 2(a)(ii);
- the agreement does not disadvantage the employees who are covered by the agreement—Subsection (1)(a):
 - matters which must be considered in deciding whether an agreement disadvantages employees are stipulated in Subsection (2) (see notes below);

- the agreement contains dispute settling procedures—Subsection (1)(b);
- the agreement establishes a process for the parties to consult each other over workplace change.
 - the parties may by agreement waive this requirement—Subsection 1(c);
- during negotiations for the agreement reasonable steps were taken to consult with employees about the agreement—Subsection (1)(d);
 - this does not apply if the agreement applies to a new business and at the time certification was sought there were no employees employed in the business—see Subsection (3);
- before the application for certification was made reasonable steps were taken to:
 - inform employees covered by the agreement about its terms—paragraph (e)(i);
 - explain to those employees the effect of those terms, in particular the dispute settling procedures—paragraphs (e)(ii) and (e)(iii);
 - inform them that an application for certification would be made and the consequences of certification—paragraph (e)(iv);

(this does not apply if the agreement applies to new business and, at the time certification was sought there were no employees employed in the business—see Subsection (3));
- where an agreement applies only to a single enterprise namely:
 - all employee organisations (unions) that are party to an award or industrial agreement that regulates wages and conditions of employment of employees covered by the agreement must be party to the agreement—paragraph (f)(i);
 - if there is no such award or industrial agreement each employee organisation that is entitled to represent the industrial interests of the employees covered by the agreement.

~ there are exceptions to this in proposed Subsections (4)

and (5)—see notes below;

- the employee organisations that are party to the agreement must be represented by a single bargaining unit—paragraph (f)(ii);
- the agreement specifies its period of operation—Subsection (1)(g):

Subsection (2) provides guidance to the Commission on how to determine whether an agreement disadvantages employees.

The Commission is required to decide whether certification of the agreement would result in the reduction of any entitlements or protections which the employees enjoy under an award or industrial agreement; or would not provide entitlements or protection equal to an award or industrial agreement nominated under Subsection (1)(f)(ii)B.

If the Commission decides that such a reduction would occur, it must then determine whether, in the context of their employment conditions as a whole, the reduction would be contrary to the public interest. If so, the agreement will be taken to disadvantage employees for the purposes of Subsection 1(a).

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

Subsections (4) and (5) specify the exceptions to the “single bargaining unit” requirement of Subsection (1)(f). Under Subsection (4), such an agreement can still be certified even if not all such organisations are party to the agreement, provided the Commission is satisfied that:

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

Subsection (5) provides, in effect, that it is not a prerequisite to

certification of such an agreement that an organisation of employees be party to an agreement if the organisation has no members employed in the single business, part of a single business or single place of work.

Section 139BD: When Commission must refuse to certify agreements

Subsection (1) provides that when an agreement applies more widely than to a single business, the Commission may refuse certification on public interest grounds.

Subsection (2) provides that the Commission *must* refuse to certify an agreement where it thinks that any term of the agreement is inconsistent with:

- a provision of proposed Part 4, Divisions 2 and 3, and Part 11, Division 4 (i.e. a provision concerning minimum entitlements of employees); or
- an order of the Commission under those Divisions;

Subsection (3) provides that the Commission *must* refuse to certify an agreement where, in respect of negotiations over the agreement, the employer has contravened the provisions of the Act which:

- prohibit an employer from taking action prejudicial to the interests of an employee on the basis of the employee's union (or non-union) status or activities or on the basis of his/her conscientious objection to union membership (Sections 342, 343 and 344 of the Principal Act);
- prohibit discrimination between union members and non-union members when negotiating an agreement (see notes on proposed Section 139FA).

This extends to circumstances where the employer has caused another person to engage in such conduct and where another person has engaged in such conduct on behalf of the employer—Subsections (3)(b) and (c).

Subsection (4) allows the Commission to certify an agreement, despite the existence of grounds for refusal under proposed Subsection (3), if it is satisfied that the contravention and its effects have been fully remedied.

Under Subsection (5), the Commission *must* refuse certification of an agreement if it thinks that a provision of the agreement contains a discriminatory provision (see the notes on proposed Section 134A).

Proposed Subsection (6) provides that where an agreement applies only to a part of a single business and the part is neither a geographically distinct part of the business nor a distinct operational or organisational unit within the business, the Commission may refuse certification if it thinks that the part of the business has been contrived in a way that unfairly excludes some of the other employees of the business.

Section 139BE: How agreement may provide for amendment

Subsection (1) provides that, unless certain criteria are met, the Commission must refuse to certify an agreement which provides for any of its terms to be amended by a later agreement.

The criteria are:

- that the agreement specifies which terms are to be amended, the circumstances in which they can be amended and the ways in which they can be amended—Subsection (1)(a); and
- that the agreement specifies that all parties bound by the agreement at the time of amendment agree to the amendment and the amendment must be approved by the Commission under proposed Section 139BM (see notes below)—Subsection (1)(b)(i) and (ii).

Subsection (2) provides that Subsection (1) does not apply to an agreement which allows for obligations of parties under it to change without the need for a later agreement; e.g., an agreement which allowed rates of pay specified in it to alter in the future by reference to a specified formula.

Section 139BF: Other options open to Commission instead of refusing to certify agreements

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

Under Subsection (2), the Commission may accept an undertaking from a party, or parties, about how the agreement will operate. If the Commission is satisfied that the undertaking meets its concerns, it may certify the agreement—Subsection (3). If the undertaking is breached, the Commission may terminate the agreement provided all parties to the agreement are given an opportunity to be heard—Subsection (4).

Under Subsection (5), the Commission must, before refusing to certify an agreement, give the parties an opportunity to amend the agreement to make it certifiable. The parties must also be given the opportunity to take any other action that might be necessary to make the agreement certifiable.

Section 139BG: Commission to protect interests of certain employees

The proposed section will require the Commission to identify employees whose interests may not have been sufficiently taken into account in the negotiations.

The provision also includes examples of the types of employees whose interests may not have been taken into account. The identified groups are women, people whose first language is not English and young people.

To decide whether sufficient account has been taken of these employees' interests, the Commission must inquire into the adequacy of the consultations and explanations and information provided to them.

If the Commission considers that there has been a failure to consult or explain, it must make orders to remedy that failure and its effects.

Section 139BH: Procedures for preventing and settling disputes

This proposed section complements Section 139BC(1)(b) which, in effect, provides that a certified agreement must contain dispute settling procedures. Proposed Section 139BH provides that the dispute settling procedures in an agreement may give the Commission the power to settle disputes over the application of the agreement.

The Commission will have a discretion as to whether it will allow the inclusion of these terms in an agreement. The Commission might take the view that dispute settling procedures contained in the agreement propose a role for the Commission which is inappropriate.

Section 139BI: Operation of certified agreements

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

Under Subsection (1), a certified agreement comes into force when it is certified. It remains in force during its specified period of operation (or that period as extended—see notes on proposed Section 139BK), or until it is terminated (see notes on proposed Sections 139BN, 139BPA, 139BP and 139BQA which, in effect, provide for termination in various circumstances).

Under Subsection (2) if an agreement remains in force until the end of the period specified in the agreement it will continue in force until:

- the Commission terminates it;
- the parties vary it;
- a new agreement is certified in substitution; or
- there are no longer parties from both industrial organisations of employees, employers or industrial organisations of employers.

At the conclusion of the period specified in the agreement, the agreement will continue in force indefinitely if no action is taken by the Commission or 1 or more of the parties.

Section 139BJ: Party may retire from a certified agreement

This proposed section allows a party to an agreement to notify the Industrial Registrar's office of its intention to retire from the agreement. The notice must give at least 30 days' notice and can be filed:

- within 30 days before the end of the period of agreement; or
- any time while the agreement remains in force under proposed Section 139BI(2).

At the end of the specified period (at least 30 days) the party who filed the notice ceases to be party to the agreement.

Section 139BK: Extension of certified agreements

Proposed Section 139BK provides the circumstances in which the period of operation of a certified agreement may be extended.

If an agreement applies otherwise than to a single enterprise, its period of operation may be extended by the parties agreeing and one or more of the parties notifying the Commission of the extension—Subsection (1)(b)(ii);

- this must be done before the expiry of the period of operation of the agreement.

If an agreement applies only to a single enterprise and the parties agree to an extension, they must apply to the Commission for approval;

- one or more of the parties must apply for such approval before the expiry of the agreement's period of operation—Subsection (1)(b)(i);
- Subsection (2) extends the period of operation of the agreement until the approval application is determined;
- the Commission must approve the application unless it has been satisfied that the extension would not be in the interests of the employees covered by the agreement—Subsection (3);
 - ~ it may only be so satisfied by the arguments of an industrial organisation of employees that is entitled to be heard on the matter.
 - ~ if the Commission is satisfied that an extension would not be in the interests of the employees covered by the agreement, it must refuse to approve the extension.

Section 139BL: Effect of certified agreements

While a certified agreement is in force, the terms of the agreement prevail over the terms of an award or industrial agreement to the extent of any inconsistency.

Paragraph (b) provides that the terms of a certified agreement do not prevail over the terms of a prior enterprise flexibility agreement.

Paragraph (c) provides that while a certified agreement is in force, the agreement can only be amended by the parties as provided in proposed Sections 139BM or 139BN.

Paragraph (d) provides that while a certified agreement is in force, it can only be amended for the purpose of removing ambiguity or uncertainty.

Under paragraph (e), the Commission is precluded from exercising arbitration powers to amend the agreement, except where such arbitration powers are provided for in proposed Section 139BH. This provision is intended to ensure that, during the period of operation of an agreement, the agreement is only capable of being varied in the limited circumstances specified in proposed Section 139BH.

Section 139BM: Amendment of certified agreement as provided in the agreement.

Proposed Section 139BE (see notes above) provides that in certain circumstances an agreement may be certified despite the fact that it contemplates an amendment of some of its terms by a later agreement. Proposed Section 139BM governs applications to the Commission for the approval of such an amendment.

Subsection (1) provides that an amendment of an agreement by a later agreement only takes effect if approved by the Commission (on application by the parties bound by the agreement).

Subsection (2) specifies certain criteria for Commission approval. If these are met the Commission must approve the amendment; if they are not met, the Commission must not approve the amendment. The criteria are:

- that the amendment was made in accordance with the agreement—Subsection (2)(a);
- that the amendment has been agreed to by all parties bound by the agreement when the amendment was made—Subsection (2)(b);
- if the agreement was not in existence and the Commission was faced with an application for the certification of an agreement plus the proposed amendment
 - that the Commission would have no grounds under the provisions governing certification (proposed Sections 139BC(1)(a) and 139BD) to refuse to certify such an agreement.

Section 139BMA: Procedure if grounds to refuse amendments exist

Section 139BMA provides that if the Commission has grounds to refuse to approve an amendment, it may accept an undertaking from one or more of the parties and approve the amendment on the basis of that undertaking—Subsection (2). If an undertaking under Subsection (2) is not observed the Commission may set aside the amendment but before doing so it must give the parties an opportunity to be heard—Subsection (3).

Subsection (4) also provides that, in any case, before refusing to approve an amendment, the Commission must give the parties an opportunity to do whatever might be necessary to enable the Commission to approve the amendment.

Section 139BN: Certified agreements may be amended or terminated by Full Bench

This proposed section sets out the circumstances in which the Full Bench of the Queensland Industrial Relations Commission may review the operation of a certified agreement and the action it may take following such a review.

Subsection (1) provides that any review of a certified agreement must be conducted by a Full Bench of the Commission, that a review may be conducted at any time while the certified agreement is in force, and that the parties to the certified agreement must be given the opportunity to be heard.

Subsection (2) provides that a review may be initiated by the Full Bench acting on its own initiative or on the application of an organisation or person bound by the agreement, and in no other circumstances.

On reviewing certified agreements (proposed Subsection (3)), it is open to a Full Bench to find that the continued operation of the agreement would be unfair to the employees covered by the agreement—Subsection 3(a)

- in relation to a certified agreement *other than* one which applies only to a single enterprise, it is open to find that the continued operation of the agreement would be contrary to the public interest—Subsection 3(b).

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

- terminate the agreement—Subsection (4)(a);

- accept an undertaking from all or any of the parties in relation to the operation of the agreement—Subsection (4)(b);
- permit the parties to amend the agreement—Subsection (4)(c).

If an undertaking given under Subsection (4)(b) is breached, the Full Bench may terminate the agreement. Before doing so, it must give the parties an opportunity to be heard—Subsection (5).

Section 139BO: Review of certified agreements

A Full Bench must, by the end of each period of three years of the operation of a certified agreement, review the operation of the agreement after giving the parties to the agreement an opportunity to be heard.

Section 139BPA: Party may withdraw by consent

A party to a certified agreement may apply to the Commission to withdraw from the agreement, where all the other parties agree. If the Commission considers that it is in the public interest to do so, it may allow such applications.

Subsection (2) provides that a party to a certified agreement may, with the consent of all the relevant parties, give notice to the Commission stating that the party does not want to remain bound by the agreement. Relevant parties are defined in Subsection (2) as follows:

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

Section 139BP: Certified agreements may be terminated by parties

Under Subsection (1), all the parties to a certified agreement, if they agree, may jointly give the Commission notice stating that they want the agreement to be terminated.

Subsection (2) provides that the Commission may make an order or declaration to terminate the agreement, provided it considers that it is in the public interest to do so.

Section 139BQA: Party affected by industrial action may withdraw

Subsection (1) provides a mechanism whereby a party to a certified agreement may be released from the agreement if another party to the agreement engages in industrial action.

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

Subsection (2) provides that, upon receipt of such an application, the Commission may declare that the applicant party is no longer bound, provided the Commission is satisfied that it is in the public interest to make such a declaration.

Section 139BQ: Enforcement of certified agreements

This proposed section enables a certified agreement to be enforced in the same way as an award.

Division 3—Enterprise flexibility agreements

Division 3 contains new provisions which allow agreements between an employer and the employees in an enterprise, in certain circumstances, to be approved by the Commission and given the status of awards.

Section 139CA: Employer may apply for approval of implementation of enterprise flexibility agreement

Under proposed Section 139CA, an employer carrying on an enterprise may prepare an agreement. The employer may apply to the Commission for the approval of that agreement.

It is expected that the employer will apply to the Commission only if the agreement reflects the outcome of negotiations by the employer with

employees covered by the agreement (and any eligible unions that choose to take part—eligible unions are defined in proposed Section 139AB). This is because:

- approval by the Commission of implementation of the agreement depends on a majority of the employees covered by the agreement genuinely agreeing to be bound by it (see Section 139CC(3)(h)); and
- the Commission may refuse to approve the implementation of an agreement if the employer failed to notify eligible unions about the negotiations or to give them a reasonable opportunity to take part (see proposed Section 139CD(6)).

Section 139CB: Organisations entitled to be heard

This proposed section provides that, where an application is made to the Commission to approve the implementation of an enterprise flexibility agreement, certain organisations of employees are entitled to be heard in the proceedings relating to enterprise flexibility agreements.

Subsection (1) provides where an application is made to the Commission for:

- the approval of the implementation of an agreement; or
- an extension to an agreement's period of operation

an industrial organisation of employees that is party to an award that binds the employer in respect of work performed in the enterprise is entitled to be heard in the Commission proceedings.

Subsection (2) provides that, as soon as practicable after an application is made, the Commission must notify each organisation of employees entitled to be heard that an application has been made and that they have an entitlement to be heard.

Subsection (3) provides that these provisions do not affect any other right any organisation of employees (or any other person or body) might have to intervene or be heard (or make an application to do so) in respect of the application.

Section 139CC: Approval of implementation of agreement

This proposed section requires the Commission to approve the implementation of an enterprise flexibility agreement if certain criteria are met (and prohibits the Commission from so approving if they are not met).

The criteria, which are cumulative, are specified in proposed Subsection (2):

- the agreement must be confined to the enterprise carried on by the employer applicant—Subsection (2)(a);
- wages and conditions of employment of employees covered by the agreement must be regulated by an award or industrial agreement—Subsection (2)(b);
- the agreement must cover all the employees in the enterprise whose wages and conditions are so regulated—Subsection (2)(c);
- the agreement must not disadvantage the employees who are covered by the agreement—Subsection (2)(d):
 - ~ matters to be considered in deciding whether an agreement disadvantages employees are specified in proposed Subsection (3) (see notes below);
- the agreement must contain dispute settling procedures—Subsection (2)(e);
- the agreement must establish a process for the persons bound by the agreement to consult each other about changes to work organisation and work performance in the enterprise—Subsection (2)(f)(i):
 - ~ the parties may agree that it is not necessary for the agreement to contain such provisions (and satisfy the Commission that they have so agreed)—Subsection (2)(f)(ii);
- the Commission must be satisfied that, during negotiations for the agreement, reasonable steps were taken to consult the employees about the agreement—Subsection (2)(g);
- the Commission must be satisfied that, before application was made for the approval of an agreement, reasonable steps were taken:
 - ~ to inform employees of the terms of the

agreement—Subsection (2)(h)(i);

~ to explain to them the effect of those terms, in particular the dispute settling clause—Subsections (2)(h)(ii) and (iii);

~ to inform them that an application would be made to the Commission for approval of the agreement—Subsections (2)(h)(iv);

- a majority of the employees covered by the agreement must have agreed to its terms—Subsection (2)(i). The term “majority of employees” is defined in Section 139CC(1) as a majority of persons who were employees on a date specified in the agreement (not more than seven days before the application for approval);
 - ~ those persons need not all have agreed at the same time;
- the agreement must specify its period of operation—Subsection (2)(j).

Subsection (3) specifies how the Commission is to determine whether an agreement disadvantages employees.

The Commission is required to decide whether its approval of the implementation of the agreement would result in the reduction of any entitlements or protections which the employees enjoy under an award or industrial agreement.

If the Commission decides that such a reduction would occur, it must then determine whether, in the context of their employment conditions as a whole, the reduction would be contrary to the public interest. If so (and only if this is the case) the agreement will be taken to disadvantage employees for the purposes of Subsection (2)(d).

Section 139CD: When Commission must refuse to approve implementation of agreements

This proposed section provides grounds, additional to those specified in proposed Section 139CC, upon which the Commission is to refuse to approve an agreement.

Under Subsection (1) the Commission must refuse to approve the implementation of an agreement if a provision of the agreement is inconsistent with:

- a provision of proposed Part 4, Divisions 2 or 3 or Part 11, Division 4 (i.e. a provision concerning minimum entitlements of employees); or
- an order of the Commission under those Divisions.

Subsection (2) provides a discretion for the Commission to refuse to approve the implementation of an enterprise flexibility agreement on public interest grounds:

- this discretion is only to be exercised in exceptional circumstances.

Subsection (2) further qualifies the discretion the Commission has under Subsection (1). Subsection (3) provides that approving the implementation of an agreement is not to be regarded as contrary to the public interest merely because the agreement is inconsistent with Full Bench principles relating to the determination of wages and employment conditions by awards.

Subsection (4) specifies grounds in relation to which it is mandatory for the Commission to refuse to approve implementation of an agreement (unless Subsection (5) applies). Under Subsection (4), the Commission must refuse approval if:

- in negotiating the agreement, the employer has contravened the provisions of the Act which:
 - ~ prohibit discrimination between union members and non-union members (proposed Section 139FA—see notes below);
 - ~ require the employer to negotiate with a union, where an employee has notified the employer that he or she wishes to be represented by his or her union (proposed Section 139ED—see notes below);
 - ~ make it an offence to take certain action prejudicial to the interests of an employee on the basis of the employee’s union (or non-union) status or activities , or on the basis of his/her conscientious objection to union membership (Sections 342, 343, 344);
- in negotiating an agreement, the employer has caused someone else to take action which would amount to such a contravention if the employer had taken the action;

- someone else has taken such action on behalf of the employer.

Under Subsection (5), the Commission may approve the implementation of an agreement despite contravention or conduct referred to in Subsection (4), if it is satisfied that the contravention or conduct and its effects have been fully remedied.

Subsection (6) provides that the Commission may refuse to approve the implementation of an agreement if an employer did not notify each eligible union (as defined in proposed Section 139AB) that negotiations for an agreement were occurring:

- the employer is required to have notified the eligible unions as soon as practicable after negotiations began.

Subsection (6) also provides that the Commission *may* refuse to approve implementation of an agreement if the employer failed to give each eligible union an opportunity to take part in negotiations and to be a party to the agreement.

Subsection (7) removes the discretion provided for in Subsection (6) where the employer could not reasonably have been expected to know that an organisation was an eligible union when the negotiations began.

Subsection (8) provides that, in deciding what action (if any) to take under proposed Subsection (6), the Commission must consider whether the employer's failure was intentional (and any other relevant circumstances).

Under Subsection (9), the Commission *must* refuse to approve the implementation of an agreement if it contains a discriminatory provision (see notes above on proposed Section 134A).

Section 139CE: How agreement may provide for its amendment

Proposed Section 139CE specifies the circumstances in which an agreement may provide for its terms to be amended by a later agreement applying to the same enterprise.

Subsection (1) provides that the Commission must refuse to approve the implementation of an agreement which provides for any of its terms to be amended by a later agreement, unless the first agreement specifies which terms can be amended and the circumstances in which and the ways in which they can be amended.

(The amendment must be approved by the Commission—see notes on proposed Section 139CL.)

Subsection (2) provides that Subsection (1) does not apply to an agreement which allows for the obligations of parties to change without the need for a later agreement; for example, Subsection (1) would not apply to an agreement which allowed for rates of pay specified in it to be altered in the future by reference to a specified formula.

Section 139CF: Other options open to Commission instead of refusing to approve implementation

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

Under Subsection (2), the Commission may accept an undertaking from a person or persons who would be bound by the agreement, about how the agreement will operate. The person or persons must be considered by the Commission to be appropriate to give the undertaking.

If the Commission is satisfied that the undertaking meets its concerns, it may approve the implementation of the agreement (Subsection (3)). If the undertaking is breached, the Commission may terminate the agreement, provided that, before it does so, all persons bound by the agreement are given an opportunity to be heard—Subsection (4).

Under Subsection (5), the Commission must, before refusing to approve the implementation of an agreement:

- give the employer an opportunity to amend the agreement;
 - ~ a majority of the employees must approve of the employer's amendment;
 - ~ the Commission must give a direction as to the method by which this majority approval is obtained;
 - : the class of employees from which majority approval must be obtained is those employees who were covered by the agreement on a day specified in the Commission's direction;

- give the persons who would be bound by the agreement an opportunity to take any other action that might enable the Commission to approve the agreement; e.g., undertake more appropriate or comprehensive consultations with employees about the effect of the agreement.

Section 139CG: Commission to protect interests of certain employees

The proposed section will require the Commission to identify employees whose interests may not have been sufficiently taken into account in the negotiations.

The provision also includes examples of the types of employees whose interests may not have been taken into account. The identified groups are women, people whose first language is not English and young people.

To decide whether sufficient account has been taken of these employees' interests, the Commission must inquire into the adequacy of the consultations and explanations and information provided to them.

If the Commission considers that there has been a failure to consult or explain, it must make orders to remedy that failure and its effects.

Section 139CH: Procedures for preventing and settling disputes

This proposed section complements Section 139CC(2)(e) which provides that an agreement must contain a disputes settling clause.

The proposed section provides that the disputes settling provisions of an agreement may empower the Commission to settle disputes over the application of the agreement.

The Commission will have a discretion as to whether it will allow the inclusion of these terms in an agreement. The Commission might refuse to allow the inclusion of such terms where, for example, the disputes settling procedures contained in the agreement proposed a role for the Commission which it considered to be inappropriate.

Section 139CHA: Provisions relevant when business has distinct parts

Subsection (1) gives the Commission a discretion to regard parts of a

business carried on by a single employer as geographically distinct. This is intended to allow for separate parts of the business of a single employer to have separate enterprise flexibility agreements in circumstances where it is not clear that those parts are geographically distinct (for example where two parts of the business are located in the same city).

Subsection (2) allows the Commission to approve the implementation of an enterprise flexibility agreement which applies to the whole of the business of a single employer, or, alternatively to approve the implementation of separate agreements applying to geographically distinct parts, or groups of geographically distinct parts, of the business.

Subsection (3) precludes an enterprise flexibility agreement applying to the whole of a business and one that applies to a part or parts of that business being in force at the same time.

Section 139CI: Operation of enterprise flexibility agreements

This proposed section contains provisions relating to the period during which an enterprise flexibility agreement is in force and to the status of an enterprise flexibility agreement after its specified period of operation expires. (An enterprise flexibility agreement must specify the period of operation of the agreement—see Section 139CC(2)(j)).

Under Subsection (1), an enterprise flexibility agreement comes into force when its implementation is approved. It remains in force for the period of operation specified in the agreement (or that period as extended—see notes on proposed Section 139CJ), and until:

- it is terminated (see notes on proposed Sections 139CF(4), 139CM, 139COA, 139CO and 139CPA which provide for termination);
- there are only employers remaining as persons bound by the agreement or, alternatively, there are only employees or employee organisations remaining as persons bound by the agreement;
- it is replaced by a new enterprise flexibility agreement or by a certified agreement (this is not possible during the agreement's specified period of operation).

If the Commission or any of the parties take no action at the conclusion of the period specified in the agreement, or any extended period (see notes

on proposed Section 139CJ), the agreement will remain in force.

Section 139CJ: Extension of enterprise flexibility agreements

This proposed section specifies the circumstances in which the persons bound by an enterprise flexibility agreement may extend, and further extend, the agreement's specified period of operation.

Under this section, an employer may apply to the Commission for the extension of an enterprise flexibility agreement's period of operation.

Subject to the provisions of Subsection (2), the Commission must grant the application if it is satisfied that a majority of employees have genuinely agreed to the proposed extension;

- the employees from whom the majority approval must be obtained are those employees who were covered by the agreement on a day specified in the application;
 - ~ the day specified in the application must not be more than seven days before the application was made;
- the majority may have agreed at different times, but must have agreed on or before the specified day.

Under Subsection (3), the Commission must not extend the agreement's period of operation if:

- the period (or the period as extended) ended before the application for extension was made; or
- the Commission has been satisfied that the extension would not be in the interests of the employees covered by the agreement;
 - ~ the Commission can only be satisfied in this regard by an industrial organisation of employees that is entitled to be heard on the matter (see proposed Section 139CB—organisations entitled to be heard).

Subsection (4) permits the Commission to order the interim extension of the period of operation of an agreement pending the determination of an application for extension.

Section 139CK: Effect of enterprise flexibility agreements

While an enterprise flexibility agreement is in force:

- its terms prevail over the terms of any award or industrial agreement—paragraph (a);
- its terms do not prevail over the terms of a prior certified agreement;
- its terms can only be varied by the employer in circumstances specified in paragraph (c), namely:
 - ~ where the agreement provides for an amendment and this is approved by the Commission under proposed Section 139CL;
 - ~ following a review of the agreement under proposed Section 139CM.

(Paragraph (c) is expressed in terms of amendment by the employer because it is the employer who applies for the approval of the implementation of the agreement. It is not intended to leave at large any capacity of employees to amend the agreement.)

- the agreement can only be amended for the purpose of removing ambiguity or uncertainty—paragraph (d);
- the Commission is precluded from exercising any powers other than those in the Division to amend the agreement.

Section 139CL: Amendment of enterprise flexibility agreement as provided in the agreement

This proposed section complements proposed Section 139CE (see notes above) which provides for the circumstances in which the Commission may approve the implementation of an agreement that contemplates an amendment of its terms by a later agreement.

Subsection (1) provides that an application must be made to the Commission for its approval of the amendment;

- the agreement that is to be varied must have provided for its variation by a later agreement.

Subsection (2) provides that the Commission must treat the application for approval of the amendment as if;

- it were an application for the approval of the implementation of an agreement which contained the terms of the original agreement plus the variation; and
- the original agreement was not in force.

This means that an application for the approval of an amendment is subject to the same tests as an application for the approval of the implementation (see proposed Sections 139CC and 139CD). It also means that any organisation of employees that was entitled to be heard in relation to the application for the approval of the implementation of an agreement, is entitled to be heard in relation to the application for the approval of its amendment.

Under proposed Subsection (3), the Commission may approve the amendment only if:

- the amendment was made in accordance with the terms of the main agreement;
- the enterprise to which the amendment applies is the same as the one to which the main agreement applies;
- the amendment provides only for varying the main agreement and for matters incidental to varying it.

Section 139CM: Enterprise flexibility agreements may be amended or terminated by Full Bench

This proposed section sets out the circumstances in which the Full Bench of the Commission may review the operation of an enterprise flexibility agreement and what action it may take following such a review.

Subsection (1) provides that a review must be conducted by a Full Bench. A review may only be conducted while an agreement is in force. The persons bound by the agreement must be given an opportunity to be heard.

Subsection (2) provides that a review may be conducted by the Full Bench, acting on its own initiative or on the application of an industrial organisation or person bound by the agreement, and in no other circumstances.

On reviewing an enterprise flexibility agreement, if a Full Bench finds

that the continued operation of the agreement would be unfair to the employees covered by the agreement, it may:

- terminate the agreement—Subsection (3)(a);
- accept an undertaking in relation to the operation of the agreement (the Commission may determine who it considers is appropriate to give such an undertaking)—Subsection (3)(b);
- permit the employer to amend the agreement—Subsection (3)(c);
 - ~ the employer can only do this with the approval of the majority of employees;
 - ~ the Commission is to direct how this approval is obtained;
 - ~ the class of employees from which majority approval must be obtained, is those employees who were covered by the agreement on a day specified in the Commission’s direction.

If an undertaking under Subsection (3)(b) is breached, the Full Bench may terminate the agreement. Before doing so, it must give the persons bound by the agreement an opportunity to be heard—proposed Subsection (4).

Section 139CN: Review of enterprise flexibility agreements

The Full Bench will be required to review the operation of an agreement every 3 years. The proposed section is designed to ensure that a mandatory mechanism exists so that the conditions contained in an agreement do not unfairly disadvantage the parties as conditions change.

Section 139COA: Person bound may withdraw by consent

This proposed section enables a person bound by an enterprise flexibility agreement to apply to the Commission to withdraw from the agreement, where all the other persons bound by the agreement agree. If the Commission considers that it is in the public interest to do so, it may allow such applications.

Section 139CO: Enterprise flexibility agreements may be terminated by persons bound

This proposed section provides that, if they agree, all persons bound by an agreement may jointly apply to the Commission to have the agreement terminated. If the Commission considers that it is in the public interest to do so, it may declare that the agreement is terminated.

Section 139CPA: Persons affected by industrial action may withdraw

Subsections (1) and (2) provide a mechanism whereby a person bound by an enterprise flexibility agreement may be released from the agreement if another person bound by the agreement engages in industrial action.

Subsection (1) provides that the person seeking to be released must apply to the Commission for a declaration that the person is no longer bound. That person must be affected by the industrial action, the industrial action must relate to a matter dealt with in the agreement, and must be engaged in by another person or persons bound by the agreement.

Subsection (2) provides that, on receipt of such an application, the Commission may declare that the applicant is no longer bound, provided the Commission is satisfied that it is in the public interest to make such a declaration.

Section 139CP: Eligible union may agree to be bound by enterprise flexibility agreement

This proposed section provides that an “eligible union” as defined in proposed Section 139AB may agree to be bound by an enterprise flexibility agreement, by providing notice to the employer. The reciprocal agreement of the employer is not required.

The occasions on which an eligible union can agree to be bound by an enterprise flexibility agreement are limited to:

- the period prior to the Commission’s approval of the agreement;
- where an agreement is to be amended—the period prior to the amendment taking effect;
- the period when the agreement continues in force under Section 139CI.

Once notice has been given by an eligible union it is irrevocable—Subsection (6) and the union is bound by the agreement—Subsection (7)

Where a union is bound by an agreement and the agreement is subsequently amended, the union is no longer bound unless it agreed, before the amendment, to be bound by it—Subsection (8). (This does not apply to an amendment made under Section 139CK(d) to remove ambiguity or uncertainty).

Division 4—Immunity from civil liability for protected action during bargaining period

Section 139DA: Object of Division

This section sets out the object of this Division, which is to give effect to international obligations concerning the right to take industrial action. The circumstances in which the right to strike will be protected by this Act are limited to those where the industrial action is related to enterprise bargaining for a certified agreement. It is necessary to provide for the right to strike in these circumstances to facilitate the promotion and protection of the interests of the parties to an industrial dispute, because the dispute will not be settled within the safeguards and protections of the conciliation and arbitration system.

The right to strike is recognised in the International Covenant on Economic Social and Cultural Rights to which Australia is a party. Although the right to strike is not dealt with expressly by the ILO Conventions on Freedom of Association and the Right to Organise (which are set out in new Schedules 11 and 12 of the Act), the expert ILO supervisory bodies have declared that the right to strike is one of the fundamental and legitimate means for organisations to pursue their right to freedom of association¹.

¹ The Schedule to the [Commonwealth] *International Labour Organisation Act 1947* sets out a copy of the English text of the Constitution of the International Labour Organisation as in force when that Act was enacted. The Schedules to the [Commonwealth] *International Labour Organisation Act 1973* set out the English texts of various instruments of amendment of that Constitution. As at the introduction of this Bill, the amendments made by the instruments set out in Schedules 3, 4 and 5 of the 1973 Act had not yet come into force.

Australia has in recent years been the subject of adverse comment by the ILO supervisory bodies in respect of the unrestricted exposure of trade unions and their members to damages at common law for industrial action. The new proposed sections of Division 4 of Part 10A aim to restrict that exposure in the particular circumstances where the right to take industrial action is peculiarly in need of protection.

The right to strike is not unlimited. Both the International Covenant on Economic, Social and Cultural Rights and the ILO indicate that industrial action may be subject to certain limitations provided these are not incompatible with the exercise of the right itself. Provisions of Division 4 of Part 10A, detailed below, impose certain limitations on the exercise of the right to strike.

Proposed Subsection (3) sets out the legislative intention of providing a right to industrial action in circumstances where an employer is negotiating an agreement referred to in Division 2—Certified Agreements.

This Division reflects Division 4 of Part VIB of the Commonwealth Act, inserted by the [Commonwealth] IRRA.

Section 139DC: Application of Division

This proposed section defines the circumstances in which the Division applies.

Section 139DD: Initiation of a bargaining period

Division 4 is intended to operate by the creation of a defined *bargaining period* during which certain industrial action is *protected action* (see proposed Section 139DG).

A bargaining period is initiated by an employer or an industrial organisation of employees for the purposes of negotiating an agreement and having it certified.

Notice must be given to the other proposed party or parties to the agreement and to the Commission—proposed Subsection (3).

A bargaining period cannot be initiated during the period of an award that has been made as the result of the Commission terminating an earlier bargaining period as explained in the notes below on proposed Section 139DP.

Section 139DE: Particulars to accompany the notice

This specifies what particulars must be given relating to the proposed agreement.

Section 139DF: When bargaining period begins

A bargaining period begins at the end of 7 days after a notice was given (or if more than one notice was given at the end of 7 days after the later or latest notice).

Section 139DG: Protected action for which immunity is provided

The action which is protected is defined by reference to industrial action. “Industrial action” is defined in Clause 4 of the Bill, amending Section 5 of the Act. It means strikes and lockouts, which are defined further by Section 5 of the Act. The “right to strike” at international law encompasses not only absence from work but also the broader range of industrial action including work-to-rule, go slows, and lockouts.

The proposed section sets out by whom and against whom industrial action may be taken, and the circumstances in which it is protected action. An employer is entitled in the bargaining period to lock out employees. An organisation of employees, its officers, employees and members are all able to engage in industrial action. Continuity of employment is not to be broken by a lockout (this is the effect of Subsection (8)).

The proposed section only applies subject to Sections 139DH to 139DK.

Section 139DH: 72 hours’ notice of action must be given

A registered union will be required to give at least 72 hours’ notice to an employer of industrial action in support of a proposed certified agreement.

This proposed section will require an employer who proposes to lock out an employee:

- to give at least 72 hours notice to each relevant organisation of employees;
- at least 72 hours before the lockout, to give that employee notice or to take other reasonable steps to notify the employee.

Failure to comply in relation to an employee will result in the lockout of that employee not being protected action. In other words, the employer will not be entitled to refuse under proposed Subsection 139DG(7) to pay that employee. This does not, however, affect any other right that the employer may have to refuse to pay that employee.

Reasonable prerequisites to a lawful strike, including notice to the other party or to the competent authority, are considered by the expert ILO supervisory bodies to be consistent with the right to strike.

Section 139DI: Negotiation must precede industrial action

For industrial action to be protected action, a negotiating party must have attempted to reach agreement before starting industrial action or to have complied with orders under proposed Section 139EC relating to bargaining in good faith.

Reasonable prerequisites to a lawful strike, such as a requirement to have engaged in negotiation with the other party or parties, are considered by the expert ILO supervisory bodies to be consistent with the right to strike.

Section 139DJ: What happens if Commission orders a ballot under Section 190

If the Commission orders a ballot of the relevant members in relation to industrial action by the industrial organisation of employees, or its officers, employees or the members, then the industrial action is only protected action if the ballot has been taken and the industrial action approved by a majority of valid votes cast.

Reasonable prerequisites to a lawful strike, including the submission of the decision to take industrial action to a ballot of employees, are considered by the expert ILO supervisory bodies to be consistent with the right to strike.

Section 139DK: Industrial action must be properly authorised

This section requires the authorisation of industrial action by members of an industrial organisation of employees for it to be protected action.

Such authorisation may be by a committee of management, by a person authorised for the purpose by a committee, or in accordance with the rules. Technical breaches are not to be taken to invalidate authorisation. There is a 6-month limitation period on challenging authorisation. It is not a contravention of Section 204 of the Act for the rules of an organisation to provide for authorising industrial action (Section 204 requires, among other things, rules not to be contrary to law).

Section 139DL: What happens if application to certify agreement is not made within 21 days

Under this proposed section, if an agreement is reached and there was *protected action* (i.e. immune industrial action) during a bargaining period in relation to the negotiation of that agreement, a party must apply to certify the agreement within 21 days after a memorandum of the terms of the agreement is made. Failure to do so means that the relevant industrial action ceases to be protected action.

Section 139DM: Immunity for protected action

This provision sets out the legal remedies which do not apply to protected action. This includes laws in force, but that exemption does not apply if the industrial action involves personal injury; wilful or reckless destruction of or damage to property; the unlawful taking, keeping or use of property. Defamation actions remain available.

Article 8 of the ILO Freedom of Association and Protection of the Right to Organise Convention requires organisations exercising the right of freedom of association (which includes the right to strike) to respect the law of the land. While Article 8 does not allow for laws which essentially remove substantive rights, such as a general prohibition on strikes, it does allow for the application of the usual laws of the land to industrial action.

The removal of the immunity from liability where industrial action involves personal injury, wilful or reckless destruction of or damage to

property, or the unlawful taking, keeping or use of property, is consistent with the discussions in the negotiation of the Convention concerning the need for participants in industrial action to respect the law of the land. It is also consistent with the view of the expert ILO supervisory bodies, which have supported the lawfulness of strike activity provided that it remains peaceful.

Paragraph 8.1(d) of the International Covenant on Economic, Social and Cultural Rights (see Schedule 5) requires a State party to ensure the right to strike, provided that it is exercised in conformity with the laws of the particular country.

Section 139DN: When bargaining period ends

A bargaining period ends if an agreement is reached; an initiating party informs the other negotiating party or parties, that the initiating party no longer wishes to reach an agreement; or the Commission terminates the bargaining period.

Section 139DO: Power of Commission to suspend or terminate bargaining period

The circumstances in which the Commission may exercise its power to terminate a bargaining period are set out.

This may occur where a party is not genuinely trying to reach an agreement or has failed to comply with directions regarding negotiating in good faith—Subsection (1)(a). The Commission can exercise its power on this ground only if an application is made by the negotiating party—Subsection (3).

The Commission may also terminate a bargaining period where there is a serious risk to the life, personal safety or health or the welfare of the population or a part of it or of significant damage to the economy or an important part of it—Subsection (1)(b). The Commission can exercise its power on this ground on its own initiative, on application by a negotiating party, or on application by the Minister—Subsection (2).

The Commission may also terminate a bargaining period where the party who initiated the bargaining period in respect of part of a single business is failing to comply with an award, order or direction of the Commission in relation to another part of the single business—Subsection (1)(c). This is to reflect the intention that the benefit of initiating a bargaining period is not to be available to a party who refuses to accept the authority of the Commission in other relevant circumstances. The Commission can exercise its power on this ground only if an application is made by a negotiating party—Subsection (3).

The effect of proposed Subsection (5) is that, during the suspension of a bargaining period, industrial action loses its protected status in relation to the particular single business, part of a single business or place of work.

Section 139DP: What happens if Commission terminates a bargaining period under Section 139DO(1)(b)

If a bargaining period is terminated because it involves industrial action endangering life, safety, health or welfare or harm to the economy, the Commission must take certain action.

The Commission must:

- immediately begin to exercise its powers to prevent or settle the relevant industrial dispute (or part of the industrial dispute);
- if it proposes to make or amend an award to prevent or settle the dispute, make or amend the award to be a paid rates award; and
- decide on terms to be included in the paid rates award on the merits (the Commission is not bound to apply wage fixing principles applying to other awards).

An award does not have to be a paid rates award if the parties agree that it should not be such an award—Subsection (4).

For a period fixed by the Commission, such a paid rates award can only be varied on limited grounds. The higher penalties that apply to agreements are to apply to breaches of such paid rates awards (see *Clause 36* amending Section 466—Breaches of awards etc. generally).

During the period in which the award operates as a paid rates award, the parties may not initiate a bargaining period, but are not precluded from

obtaining an agreement without a bargaining period.

The obligation to make a paid rates award in this case reflects the obligation under international law to ensure that where the right to strike is forfeited, there are compensatory guarantees of adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented.

Division 5—Conciliation in relation to proposed agreements

Section 139EA: Commission may conciliate proposed agreements under this Part

The Commission is authorised to conciliate in the negotiation of agreements if it considers that such conciliation would facilitate the making of an agreement.

Section 139EB: Directions and orders to assist the making of agreements

A Full Bench of the Commission will be able to give directions and orders to facilitate the making of agreements. This may be useful in overcoming procedural difficulties.

Section 139EC: Commission orders about negotiations for agreements under this Part

The Commission may make orders about the conduct of negotiations for a certified agreement or for an enterprise flexibility agreement. These orders can be for the purpose of:

- ensuring that the parties negotiate in good faith; or
- promoting the efficient conduct of the negotiations; or
- assisting in any other way the making of an agreement.

Subsection (2) expressly allows the Commission, in an order made for

one of the purposes listed above, to specify action that a party must take or refrain from taking.

Subsection (3) requires that when the Commission exercises this power it must consider the conduct of the parties to the negotiations (in particular, the specific aspects of that conduct that are listed in Subsection (3)(a)).

Section 139ED: Representation of employees in negotiations for enterprise flexibility agreements

Proposed Section 139ED gives an employee the right to be represented by his or her union in negotiations for the purposes of securing an enterprise flexibility agreement.

Under the provision an employer must not refuse or fail to negotiate with an official of a registered union who is representing an employee.

Division 6—Provisions common to certified agreements and enterprise flexibility agreements

This proposed Division reiterates Division 5 of Part 10 of the Act, which deals with provisions common to awards and industrial agreements. This is necessitated by the insertion of the new Part 10A by this Bill.

Section 139FA: Employer not to discriminate between union members and non-union members when negotiating agreements

When an employer is negotiating a certified agreement or an enterprise flexibility agreement, the employer must not discriminate between:

- union members and non-members; or
- members of different unions,

because of that membership or non-membership.

Section 139FB: Components of wage rates

Proposed Section 139FB mirrors Section 135; it deals with components of wage rates provided for in agreements under this Part.

Section 139FC: Effect of appeal decisions on agreements

Proposed Section 139FC mirrors Section 138 and deals with the effect of appeal decisions on agreements.

Section 139FD: Inconsistency between agreements and contracts

Proposed Section 139FD mirrors Section 139; it provides that an agreement prevails over an inconsistent contract of service.

Amendment of Section 159: (Entitlement to long service leave)

The amendments proposed by *Clauses 16, 17, 18 and 19* of the Bill extend the existing entitlement to long service leave applying to some casual employees to all casual employees subject to the conditions prescribed.

Whilst the entitlement is as provided for in Section 159, that is 13 weeks leave after 15 years continuous service (or pro-rata after 10 years), some new arrangements have also been introduced.

Section 159(3) is a technical amendment which, in conjunction with Section 165A, allows casual employees to take long service leave in the form of its full-time equivalent.

Section 164: Continuous service of casual employees

Proposed Section 164, Subsections (1), (2) and (3) establish what constitutes continuous service of casual employees for the purpose of calculating an employee's entitlement. The service must be with the same employer and ends if the employment is broken by the passing of a period greater than 3 months between the end of one contract of employment and the next contract of employment. This provision is necessary because of the special nature of casual employment.

Subsection (4) determines from when the length of the employee's service is to be calculated. If an employee was accruing an entitlement from

23 June 1990 under the existing legislation, that entitlement is to be recognised. If no entitlement existed, the date of accrual begins from the date of operation of the legislation.

Subsection (5) preserves any previous entitlement to long service leave under an award or industrial agreement made before 23 June 1990 or the *Industrial Conciliation and Arbitration Act 1961*.

Subsection (6) provides that Section 164 does not limit an entitlement to long service leave calculated in some other way.

Section 165A: Time and manner of taking long service leave—casual employees

Proposed Section 165A provides that by agreement between the employer and employee, long service leave may be taken (as an alternative to the period of entitlement under Section 159) in the form of its full-time equivalent.

The full-time equivalent is determined by:-

- calculating the number of hours of payment for long service leave the employee is entitled to under Section 166(5); and
- dividing this figure by the number of ordinary weekly hours worked by a full-time employee.

Amendment of Section 166: (Payment for long service leave)

The proposed Section 166, Subsection (5) deals with the method of payment for long service leave for casual employees. A significant amendment to the existing method of calculation in that regard is now had to the total ordinary hours actually worked by an employee during the whole period of continuous service to which the entitlement relates. (See meaning of “actual service”). The existing method recognises only the number of hours during the 12 months prior to taking long service leave.

This variation has required a new formula for determining the amount of payment. The existing formula also has been simplified.

Proposed Sections 362(3) and 363(3) (see notes below) place an obligation on the employer to record, for the purpose of calculating the long service leave entitlement, the total hours (other than overtime) worked by a casual employee since the start of the period to which the entitlement relates.

The calculations are to be to 30 June in each year.

Sections 362(7) and 363(4) provide that on the employee's request the employer must give the employee a certificate stating the total hours recorded for the employee calculated to the previous 30 June.

The amendment proposed to Section 428 (see notes below) provides for a penalty should an employer take action to interrupt the continuity of service of a casual employee with intent to avoid an obligation in respect to long service leave.

Amendment of Part 11: (General conditions of employment)

Clause 20 of the Bill amends Part 11 (General Conditions of Employment) of the Act by replacing Division 4 (Reinstatement and Re-employment) with two new Divisions. These are Division 3A—Parental leave; and Division 4—Dismissal. These reflect the substantive provisions of Divisions 5 and 3 respectively of Part VIA of the Commonwealth Act as amended by the [Commonwealth] IRRA.

Division 3A—Parental leave

The intent of this Division is to give effect to the ILO Family Responsibilities Convention and its associated Recommendation by providing for unpaid parental leave.

The Convention applies to workers with family responsibilities where those responsibilities restrict their capacity to prepare for, enter, participate in or advance in economic activity (Article 1). The Convention embraces responsibilities in relation to dependent children (Article 1.1) and in relation to other immediate family members who clearly need the worker's care or support (Article 1.2). It requires parties to the Convention to take measures to take account of the needs of workers with family responsibilities in terms and conditions of employment (Article 4); to enable workers with family responsibilities to exercise their right to free choice of employment (Article 4); to become and remain integrated in the labour force (Article 7); and to re-enter the labour force after absence due to family responsibilities (Article 7).

The Workers with Family Responsibilities Recommendation sets out more detailed provisions which give guidance about the implementation of the Convention. The Recommendation states that measures should be taken to ensure that terms and conditions of employment are such as to enable workers with family responsibilities to reconcile their employment and family responsibilities (Paragraph 17). Paragraph 22 of the Recommendation provides specifically that either parent should have the possibility of obtaining parental leave without relinquishing employment and with rights resulting from employment being safeguarded.

Subdivision 1—Preliminary

Section 174AA: Object of Division

The object of the Division is based on provisions of the Family Responsibilities Convention and Recommendation.

Section 174AB: Basic principles

Subsection (1) states that an employee who gives birth to a child, and the employee's spouse, are entitled to 52 weeks of shared unpaid parental leave to care for the newborn child.

Subsection (2) notes that the entitlement to leave under this scheme is reduced by any other parental leave entitlement. The objective is for an employee to use any parental leave entitlement which exists under awards, before the proposed statutory leave is used.

Requirements relating to length of service, notice periods and the provision of information and documentation must be satisfied to obtain the parental leave under Subsection (3).

Subsection (4) provides that except for one week at the time of the birth, the parents must take the leave at different times.

Any other leave that is taken in conjunction with parental leave, such as annual leave, will reduce the period of the leave under Subsection (5). This provision ensures that an employee will not be absent from work for a continuous period of more than 52 weeks in conjunction with the parental leave.

Subsection (6) notes that variation of the leave is allowed in some cases. Generally notice periods apply if the need for variation is foreseeable—Subsection (7).

Subsection (8) notes that cancellation of the leave by the employer is limited to cases where the employee will not become, or stops being, the child's primary care giver, or where there has been a mistake in the amount of leave granted.

In most cases an employee who takes parental leave is entitled to return to their former job, as noted in Subsection (9). The only exception is where a woman was transferred to a safe job or a part-time job because of her pregnancy. In such a case the woman is entitled to return to the position she held immediately before the change which related to the pregnancy.

Subsection (10) recognises that taking parental leave does not break the continuity of service.

Section 174AC: Definitions

This proposed section defines some important terms that are used in the Division.

“Continuous service” means service under an unbroken contract of employment and includes a period of authorised leave or absence. The definition excludes casual and seasonal workers from access to parental leave which is consistent with existing standards, including the Parental Leave Award issued by the QIRC on 25 October 1991.

“Long paternity leave” means paternity leave under Division 3A, or other analogous leave, which an employee is entitled to, due to the birth of a child to his spouse.

“Maternity leave” is leave under Division 3A, or other analogous leave, which an employee is entitled to in respect of her pregnancy or the birth of her child.

“Parental leave” means maternity or paternity leave.

“Short paternity leave” means leave under Division 3A, or other analogous leave, that is granted to an employee in respect of the birth of the child to his spouse.

To allow reference to leave established under Division 3A, definitions of

“Division 3A long paternity leave”, “Division 3A maternity leave” and “Division 3A short paternity leave” are included.

“Employee” is defined to include a part-time employee, but not a casual or seasonal employee.

A “spouse” is defined as including a person of the opposite sex who lives in a marriage-like relationship although not being legally married. The definition also includes a person who is a former spouse.

Subdivision 2—Maternity leave

Section 174BA: Entitlement to maternity leave

This proposed section states that an employee who becomes pregnant is entitled to a single period of unpaid leave.

Section 174BB: Conditions of entitlement to maternity leave

Subsection (1) sets out the notification and documentation which an employee must provide for the employer to be required to grant the leave. The notice requirements include:

- 10 weeks notice of the estimated date of birth; and
- an application for the leave 4 weeks before the first day of the leave.

Under paragraphs (c), (d), (e), (f) and (g) the application must:

- state the first and last days of the leave; and
- be accompanied by a medical certificate which states either that the employee is pregnant and the estimated date of birth, or that the employee has given birth on a specified day; and
- include a statutory declaration which sets out:
 - any period of paternity leave her spouse has applied for or intends to apply for and any other paid leave her spouse intends to take in conjunction with the paternity leave; and

- that she will be the child's primary care giver throughout the maternity leave; and
- that she will not engage in conduct inconsistent with her contract of employment while on maternity leave.

Paragraph (g) also states it must be reasonable to expect that the employee will have completed at least one year's continuous service on the day before the estimated date of birth.

Subsection (2) provides that the 10 week notice period does not apply if, for a compelling reason such as the premature birth of the child, it was not reasonable for the employee to give the notice. Notice must still be given as soon as reasonably practicable.

A woman does not lose her entitlement to the leave if she fails to complete one year's continuous service only because of a premature birth.

Under Subsection (3) the requirement to apply for leave at least 4 weeks before the estimated date of birth will not apply when there are compelling reasons preventing compliance. The employee will still be required to submit the application as soon as is practical.

Subsection (5) makes provision for a reduction of the one year continuity requirement where a child is born prematurely.

Provision is made in Subsection (6) for a substituted period of maternity leave to be granted. This provision could apply if it became apparent during the pregnancy that the estimated date of birth was incorrect and the leave arrangements need to be altered.

Section 174BC: Period of maternity leave

This proposed section deals with the duration of the maternity leave.

Provision is made in Subsection (1), paragraphs (a) and (b) for the leave to commence on the child's estimated or actual date of birth, or a later date specified in the application. Any leave must not extend beyond the anniversary of the estimated date of birth or the child's first birthday.

Subsection (1), paragraphs (c) and (d) state that the leave must not overlap with any period of long paternity leave (other than short paternity leave), and must be taken in a continuous period.

Subsection (2) provides that the period of maternity leave is 52 weeks

less:

- any period of unpaid leave or paid leave granted in respect of the same pregnancy; and
- any period of annual or long service leave that the employee has applied for instead of, or in conjunction with, the maternity leave; and
- each period of paternity or related leave as specified in the statutory declaration.

Section 174BD: Entitlement reduced by other maternity leave available to employee

This proposed section requires an employee to take any period of maternity leave that is available to her from another source before the maternity leave available under Division 3A is taken. One reason for requiring alternative maternity leave to be taken before the Division 3A leave is that many sources of alternative leave provide for a period of leave before the birth. The parental leave provided for in Division 3A only provides for leave after the birth of the child.

Subsection (2) states that the clause applies where an employee could have applied for maternity leave from another source, such as an award, and access to such leave would have been a legally enforceable right. Subsection (3) provides that, if the period of leave from the alternative source is as long as, or longer than, the Division 3A leave the employer must not grant maternity leave under Division 3A. The employee should use the alternative leave instead.

Subsection (4) states that, if the period of alternative leave is less than the 52 weeks available under Division 3A, the employer must grant the difference between the alternative entitlement and the 52 weeks. In this situation the leave under the Division must be taken immediately after the period of alternative leave to ensure that the leave is taken in a continuous period.

There is an assumption that both periods of leave will be applied for at the same time, and a composite period of leave will be taken.

Section 174BE: Taking annual or long service leave instead of, or in conjunction with, maternity leave

The employer must grant a period of long service leave or annual leave that is applied for instead of, or in conjunction with, the maternity leave if:

- the employer would have been obliged to grant the leave if not for Division 3A; or
- the total period of maternity, paternity, and associated leave does not exceed 52 weeks.

Section 174BF: Extending maternity leave

Subsection (1) states that the employee may apply for an extension of maternity leave.

Subsection (2) requires the employer to grant one request for the extension of maternity leave provided appropriate notice is given, and the total period of relevant leave granted will not exceed 52 weeks.

Any further extension is by agreement between the employer and employee under Subsection (3).

Section 174BG: Shortening maternity leave

The employee may request, and the employer may grant, an application to shorten the maternity leave granted as provided in Subsections (1) and (2).

Section 174BH: Effect on maternity leave of failure to complete 1 year of continuous service

This provision allows the employer to cancel leave which was granted on the expectation that the employee would complete 1 year's continuous service if the employee does not complete the continuous service.

Section 174BI: Effect on maternity leave if pregnancy terminates or child dies

This proposed section applies where an employee has been granted maternity leave and the pregnancy terminates other than by the birth of a living child. This also applies if the employee gives birth to a living child who later dies.

Under Subsection (2) if the leave has not commenced the employer may cancel the leave.

Subsections (3), (4), (5), (6) and (7) provide that where the leave has begun, it may be cancelled on the provision of four weeks' notice by either party as the employee will no longer be engaged in caring for the child.

Subsection (8) requires the employer to cancel the rest of the maternity leave if the employee returns to work.

Section 174BJ: Effect on maternity leave of ceasing to be the primary care-giver

Under Subsections (1), (2) and (3), maternity leave may be cancelled on the provision of four weeks' notice by the employer if the employee:

- is not the child's primary care-giver for a substantial period; and
- it is reasonable to expect that the employee will not resume being the primary care-giver within a reasonable period.

Subsection (4) provides for the employer to cancel the rest of the maternity leave if the employee returns to work.

Section 174BK: Return to work after maternity leave

Subsection (1) states that this clause applies when an employee returns to work after a period of maternity leave.

Subsection (2) proposes a general requirement to employ a person in the substantive position she held immediately before a period of maternity leave.

Where that position no longer exists Subsection (3) states that the employer must employ her in another position which she is qualified for

and that is nearest in status and remuneration to her former position.

Section 174BL: Transfer to safe duties because of pregnancy

Where in the opinion of a doctor it is inadvisable for an employee to continue with existing duties the employer may assign the employee other duties that she can efficiently perform and that are nearest in status and remuneration to her existing position. Under paragraph (d) an employee can be directed to take leave for the period which a doctor considers necessary.

Subdivision 3—Paternity Leave

Section 174CA: Entitlement to paternity leave

This proposed section states that an employee whose spouse gives birth to a child is entitled to unpaid:

- short paternity leave for one week, starting on the child's date of birth; and
- long paternity leave which is granted in order to be the child's primary care-giver.

Section 174CB: Conditions of entitlement to short paternity leave

Short paternity leave must be granted if the following conditions are met:

- Written notice is given, 10 weeks before the date of birth which:
 - states the intention to apply for the leave; and
 - supplies a medical certificate naming the pregnant spouse and stating the estimated date of birth.
- An application is lodged, as soon as practical after the first day of the leave, which:
 - states the first and last days of the period of the leave; and

- is accompanied by a medical certificate which specifies the actual date of birth, unless that date is the date estimated in the earlier notice.

The period of leave must not exceed one week and it must be reasonable to expect that the employee had completed at least 1 year's continuous service on the actual date of birth.

Under Subsection (2) the notification and continuity of service requirements do not apply if the child was premature, or some other compelling reason intervened. It is still necessary to provide the notification as soon as possible. It must also be reasonable to expect that the employee would have completed at least 1 year's continuous service by the estimated date of birth if the premature birth had not occurred.

Section 174CC: Conditions of entitlement to long paternity leave

An employer must grant long paternity leave if:

- an employee applies for the leave specifying the first and last days of the leave; and
- the application is submitted 10 weeks before the first day of the leave and is accompanied by a medical certificate which states:
 - the name of his spouse and that the spouse is either:
 - ~ pregnant and the estimated date of birth, or
 - ~ has given birth on a specified day.
- the application must also include a statutory declaration which sets out:
 - any period of maternity leave his spouse has applied for or intends to apply for and any other paid leave his spouse intends to take in conjunction with the maternity leave; and
 - that he will be the child's primary care-giver throughout the paternity leave; and
 - that he will not engage in conduct inconsistent with his contract of employment while on paternity leave.

Under Subsection (1)(e) it must also be reasonable to expect that the employee will have completed at least 1 year's continuous service on the

day before the leave is due to begin.

Subsection (2) provides that the 10 week notice period does not apply if, for a compelling reason, such as the premature birth of the child, it was not reasonable for the employee to give the notice. Notice must still be given as soon as reasonably practicable.

Section 174CD: Period of long paternity leave

Subsection (1) states that the leave must begin on the child's estimated or actual date of birth, or a later date specified in the application. The leave must not extend beyond the child's first birthday, or the anniversary of the child's estimated date of birth.

Under Subsection (1), paragraphs (c) and (d), the leave must not overlap with any period of maternity leave and must be taken in a continuous period.

Subsection (2) provides that the period of long paternity leave is 52 weeks less:

- any period of short paternity leave which is taken; and
- each period of annual or long service leave that the employee has applied for instead of, or in conjunction with, the paternity leave; and
- each period of maternity or related leave as specified in the statutory declaration.

Section 174CE: Entitlement reduced by other paternity leave available to employee

This proposed section requires an employee to take any period of paternity leave that is available to him from another source before the long paternity leave available under Division 3A is taken.

Subsection (2) states that the clause applies where an employee could have applied for paternity leave from another source, such as an award, and access to such leave would have been a legally enforceable right.

Subsection (3) provides that, if the period of leave from the alternative source is as long as, or longer than, the Division 3A leave the employer

must not grant paternity leave under the Division. The employee should use the alternative leave instead.

Subsection (4) states that, if the period of alternative leave is less than the 52 weeks available under Division 3A, the employer must grant the difference between the alternative entitlement and the 52 weeks. In this situation the leave under the Division must be taken immediately after the period of alternative leave to ensure that the leave is taken in a continuous period.

There is an assumption that both periods of leave will be applied for at the same time, and a composite period of leave will be taken.

Section 174CF: Taking annual or long service leave instead of, or in conjunction with, paternity leave

This proposed section provides that the employer must grant a period of long service leave or annual leave that is applied for instead of, or in conjunction with, the paternity leave if:

- the employer would have been obliged to grant the leave if not for Division 3A; or
- the total period of paternity, maternity, and associated leave does not exceed 52 weeks.

Section 174CG: Extending long paternity leave

Subsection (1) states that the employee may apply for an extension of long paternity leave.

Subsection (2) requires the employer to grant one request for the extension of paternity leave provided appropriate notice is given, and the total period of relevant leave granted will not exceed 52 weeks.

Any further extension is by agreement between the employer and employee under Subsection (3).

Section 174CH: Shortening paternity leave

The employee may request and the employer may grant an application to shorten the period of long paternity leave granted.

Section 174CI: Effect on long paternity leave of failure to complete 1 year of continuous service

This provision allows the employer to cancel leave that has been granted on the expectation that the employee would complete 1 year's continuous service on a particular day, where the employee does not complete that service.

Section 174CJ: Effect on long paternity leave if pregnancy terminates or child dies

This provision applies where an employee has been granted long paternity leave and his spouse's pregnancy terminates other than by the birth of a living child. The proposed section also applies if the employee's spouse gives birth to a living child who later dies.

If the leave had not commenced the employer may cancel the leave under Subsection (2).

If the leave has begun, it may be cancelled on the provision of four weeks notice by either party under Subsections (3), (4), (5), (6) and (7)..

Subsection (8) requires the employer to cancel the rest of the leave if the employee returns to work.

Section 174CK: Effect on paternity leave of ceasing to be the primary care-giver

Long paternity leave may be cancelled on the provision of 4 weeks notice if the employee:

- is not the child's primary care-giver for a substantial period; and
- it is reasonable to expect that the employee will not resume being the primary care-giver within a reasonable period.

Subsection (4) requires the employer to cancel the rest of the leave if the employee returns to work.

Section 174CL: Return to work after paternity leave

This proposed section applies when an employee returns to work after a period of long paternity leave.

Subsection (2) proposes a requirement to employ a person in the position he held immediately before the period of paternity leave.

Where that position no longer exists the employer must employ him in another position which he is qualified for and that is nearest in status and remuneration to his former position.

Subdivision 4—General

Section 174DA: Employee’s duty if excessive leave granted or if maternity leave and paternity leave overlap

This proposed section applies if the total period of parental leave granted in relation to the birth of a child, and the total of annual leave, long service leave or sick leave granted in conjunction with or instead of that parental leave, exceeds 52 weeks.

This provision also applies if the maternity leave and long paternity leave (or other leave taken in conjunction with such leave) overlap.

Subsections (2) and (3) require the employee to give the employer, and the spouse’s employer, a written notice which specifies the amount of any excess or the overlapping leave. The notice must also specify how the leave should be varied or cancelled to avoid the excess or overlap, or how the spouse’s leave is being varied or cancelled.

Subsection (4) states that the variations or cancellations must remove the excess or overlap.

An employer who receives the notice referred to may vary or cancel the leave as suggested in the notice, or as otherwise agreed, in accordance with Subsection (5).

Section 174DB: Employer to warn replacement employee that employment is only temporary

This proposed section requires the employer to warn any person who is engaged to replace an employee who is on parental leave that the employment is temporary, and about the rights of the employee who is on parental leave.

Section 174DC: Parental leave and continuity of service

Under this proposed section parental leave:

- does not break an employee’s continuity of service; but,
- does not count as service except for the purpose of determining an entitlement to a later period of parental leave, or as expressly provided in some other law, award or agreement.

Section 174DD: Effect of Division on other laws

The entitlement provided for in this Division has effect despite conflicting laws, and despite awards, agreements, enterprise flexibility agreements or orders. The entitlement does not exclude or limit the operation of any other entitlement that can operate concurrently.

Section 174DE: Regulations for adoption leave

This proposed section gives authority for the making of regulations to provide for the granting of unpaid adoption leave. Such regulations will give further effect to international obligations concerning workers with family responsibilities.

Division 4—Dismissal

This Division substantively reflects Division 3 of Part VIA of the Commonwealth Act, inserted by the IRRA. Under that Act (Sections 170EB, 170FC and 170GC) the Industrial Relations Court and the AIRC must refrain from determining applications in respect of termination of employment if adequate alternative machinery exists under State law.

Subdivision 1—Object and interpretation**Section 175AA: Object of Division**

This proposed section states the object of this Division—to give effect to

the following international instruments:

- the ILO Termination of Employment Convention, set out in new Schedule 10;
- the ILO Termination of Employment Recommendation, set out in new Schedule 13;
- the ILO Convention concerning Discrimination, set out in new Schedule 4;
- the ILO Discrimination (Employment and Occupation) Recommendation, set out in new Schedule 7;
- the ILO Family Responsibilities Convention, set out in new Schedule 8;
- the ILO Workers with Family Responsibilities Recommendation, set out in new Schedule 9.

While the first two instruments are particularly germane to the Division, the others are also pertinent to the prevention of discrimination in terminating employment.

Section 175AB: Meaning of expressions

This proposed section specifies that expressions used in Division 4 have the same meaning as in the Convention. The relevant expressions are explained below.

Section 175AC: Exclusion of employees from Division

Proposed Section 175AC excludes certain employees from the provisions of this Division. These exclusions are consistent with current Australian standards, including the QIRC's Statement of Policy on Termination of Employment, Introduction of Changes, and Redundancy, of 16 June 1987. The Termination of Employment Convention allows the exclusion of these categories of employees.

Any exclusion of employees by regulation (under Subsection (3)) must be accompanied by safeguards required by Article 2(3) of the Convention. This requires that adequate safeguards be provided against recourse to

contracts of employment for a specified period in order to avoid the protection resulting from the Convention.

Subdivision 2—Requirements for lawful dismissal

Section 175BA: When dismissal is unlawful

This proposed section establishes the circumstances when a dismissal is unlawful. It gives effect to Articles 4, 5 and 6 of the Termination of Employment Convention, and reflects Sections 170DE, 170DF and 170DG of the Commonwealth Act.

Subsection (1)(a) requires an employer not to dismiss an employee in contravention of an order under proposed Section 175DA. (The effect of this is explained in the note on that section.) Under paragraph (b) of this subsection an employer is not to dismiss an employee unless there is a valid reason which is:

- connected with the employee's conduct, capacity or performance;
- or
- based on the operational requirements of the business.

Subsection (2)(a) provides that a reason is not valid if the dismissal is harsh, unjust or unreasonable. In deciding this, regard must be had to the employee's conduct, capacity or performance, and operational requirements. Thus there will not be a valid reason for dismissal if, in the light of the factors said to be the reason for the dismissal, it was harsh, unjust or unreasonable, for example where a minor lapse in performance is the stated reason.

Paragraph (b) of Subsection (2) lists unacceptable reasons for the dismissal of an employee. Besides the Termination of Employment Convention, this gives effect to the Workers with Family Responsibilities Convention and the Convention concerning Discrimination. Both the Termination of Employment Convention and the Convention concerning Discrimination make it clear that the grounds listed are not exhaustive. Particular reference is made to Article 1(1) of the latter Convention (new Schedule 4).

Subsection (3) qualifies the list of reasons given in Subsection (2). The effect is that an employer must not dismiss an employee for one of the stated reasons unless that reason is based on the inherent requirements of the particular position. It is also a valid reason for dismissal from the staff of a religious institution provided the dismissal is to avoid injury to particular religious susceptibilities. This qualification is consistent with the exemption under the *Anti-Discrimination Act 1991*.

Section 175BB: Opportunity to defend against allegations before dismissal

Before dismissing an employee because of conduct, capacity or performance, an employer must give the employee an opportunity to defend himself or herself against allegations made, unless the employer could not reasonably be expected to give the employee this opportunity.

This section gives effect to Article 7 of the Termination of Employment Convention.

Section 175BC: Notice of dismissal or compensation to be given

This proposed section specifies the period of notice of dismissal that an employee must be given, unless the employee engages in misconduct that would make this requirement unreasonable.

Subsection (2) sets out the relevant periods of notice.

Subsection (3) allows regulations to treat breaks in service as not interrupting continuity of service. The regulations are to do this by specifying the events or other matters that must be disregarded when calculating the employee's continuous service.

Subsections (4) and (5) specify the minimum amount of compensation that must be paid in lieu of notice of dismissal. This 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.

Section 175BD: Contravention of Subdivision not an offence

In imposing these obligations on employers, Parliament is not creating an offence.

Subdivision 3—Remedies for unlawful dismissal

This Subdivision sets out the Commission’s jurisdiction under this Subdivision. A breach of the requirements in Subdivision 2 empowers the Commission to grant a remedy for unlawful dismissal.

Section 175CA: Orders only on application

This proposed section provides that the application to the Commission may be made either by the person who has been dismissed or by an industrial organisation on behalf of that person. The application must be made within 21 days after the employee is dismissed, unless the Commission allows a longer period. The equivalent Commonwealth provision stipulates 14 days; 21 days is the current time limit under the Queensland Act.

Subsection (1) gives effect to Article 8(1) of the Termination of Employment Convention, which provides for appeal to an impartial body such as a court or commission against termination.

Subsection (2) gives effect to Article 8(3) of the Termination of Employment Convention which allows a requirement that the right of appeal be exercised within a reasonable period of time after termination.

Section 175CB: Conciliation before application heard

Unless otherwise ordered by the Commission the parties to an application are the employer, the employee and the employee’s industrial organisation.

Under Subsection (2) the Commission cannot hear an application until the parties have participated in a conference to explore the possibility of resolving the matter and to ensure all the parties are fully aware of the consequences of further proceedings.

Section 175CC: Orders for unlawful dismissal other than under Section 175EC

This proposed section enables the Commission to make such orders as it thinks appropriate to negate the effect of the unlawful dismissal. Subsection (2) gives examples of what the Court can order, including reinstatement and compensation. But reinstatement is not available for breach of the obligation under Section 175BC to give either notice or compensation instead of notice.

Section 175EC (the obligation to notify the Commonwealth Employment Service in cases involving the dismissal of 15 or more employees) is excluded from these remedies, because it attracts a different remedy (see below).

This section gives effect to Article 10 of the Termination of Employment Convention which requires that the body considering an appeal against termination be empowered to order compensation or other relief and where practicable reinstatement.

Subsection (1) also places the onus of proof on the employer. The formula that gives effect to this is that the Commission may make the orders “if satisfied an employer has dismissed an employee contrary to this Division”. The onus is on the employer to satisfy the Commission that there has not been a contravention. This subsection gives effect to the provisions of Article 9.2 of the Termination of Employment Convention.

This will not apply to the making of interim or interlocutory orders in response to an application under Section 175CA as Section 175CC will only be applicable after the Commission considers the merits of the application.

Section 175CD: Orders for unlawful dismissal under Section 175EC

This proposed section provides for a penalty of up to the value of 16 penalty units (currently \$960) for breach of the obligation (specified in Section 175EC) to notify the CES. The Commission can also prevent the employer dismissing an employee without first notifying the CES. (This is the practical effect of the Commission’s order under Subsection (1)(b)).

Section 175CE: Effect of order on leave

An order under Section 175CC(2)(a) negates the effect of any break in continuity of service for calculating an employee's entitlement to sick, annual or long service leave. This restates existing Section 176, which this Bill will repeal under *Clause 20*.

Section 175CF: Costs for frivolous or vexatious applications

This proposed section empowers the Commission to order costs against the applicant if it considers the application to be frivolous or vexatious; this includes costs for representation by counsel, solicitor or agent irrespective of whether the Commission has certified under Section 84. Section 84 provides generally that in Commission proceedings, no costs are allowed for representation unless the Commission certifies that it was in the interests of justice.

This is a restatement of existing Section 177.

Section 175CG: Further orders against employer

Proposed Section 175CG provides that if an employer wilfully fails to comply with an order of the Commission under Section 175CA, the Commission may further order that the employer pay to the employee an amount not more than the value of 50 penalty units (\$3,000) and an amount as remuneration for lost wages. Further orders can be made until the employer complies with the relief order. This section does not affect any other provisions of the Act allowing proceedings to be taken against the employer.

This replicates existing Section 178.

Subdivision 4—Orders giving effect to Articles 12 and 13 of Convention**Section 175DA: Orders giving effect to Articles 12 and 13 of Convention**

Proposed Section 175DA provides for the Commission to make certain

orders about:

- severance allowance or other separation benefits (this is dealt with in Article 12 of the ILO's Termination of Employment Convention); or
- consultation of workers' representatives by an employer who decides to dismiss at least 15 employees for reasons of an economic, technological, structural or similar nature (this is dealt within Article 13 of the Convention).

Section 175DB: Orders only on application

Applications may be made to the Commission by an employee to be covered by the order, or by an industrial organisation entitled to represent the employees to be covered by the order. The Commission can only make an order on application.

Section 175DC: Commission's powers not limited by Subdivision 5

Subdivision 5 does not limit the Commission's powers under this Subdivision. Proposed Subdivision 5 (explained below) gives the Commission power to make orders when there has been a dismissal of 15 or more employees without adequate consultation with industrial organisations.

Subdivision 5—Dismissals of 15 or more employees

Section 175EA: Orders if employer does not consult industrial organisation about proposed dismissals

Proposed Section 175EA gives further effect to Article 13 of the Termination of Employment Convention. If an employer decides to dismiss 15 or more employees, for reasons of an economic, technological, structural or similar nature, he or she must notify each industrial organisation to which any employees belonged, and give them an opportunity for consultation.

If such notification did not occur, the employees or their union can seek a remedy from the Commission.

This section does not apply if the employer could not reasonably have been expected to have known that an industrial organisation's rules entitled it to represent the employees.

Section 175EB: Orders only on application

Applications under Section 175EA may be made only by a relevant employee or industrial organisation which should have been notified in terms of Section 175EA. The Commission is to exercise this jurisdiction only on application.

Section 175EC: Employer must notify CES of proposed dismissals

An employer is required to give the CES notice when the employer decides to dismiss 15 or more employees, for reasons of an economic, technological, structural or similar nature. Failure to comply with this obligation can be penalised by a payment to an employee of up to 16 penalty units (\$960) under proposed Section 175CD, but is not an offence (proposed Section 175BD).

This section gives effect to Article 14 of the Termination of Employment Convention.

Subdivision 6—Miscellaneous

Section 175FA: Division does not limit other rights

Proposed Section 175FA makes it clear that Division 4 does not limit any other right to obtain awards, certified agreements, enterprise flexibility agreements, industrial agreements or orders about dismissals.

Section 175FB: Orders to be written

Orders made by the Commission under this Division must be in writing.

Section 175FC: Inconsistent awards, orders etc.

The proposed section provides that an award, industrial agreement, certified agreement, enterprise flexibility agreement or order of the Commission that is inconsistent with an order made under this Division does not apply to the extent that it detrimentally effects the rights of the employees.

Insertion of new Division 1A in Part 13: Industrial organisations

Clause 21 inserts a new Division into the part of the Act dealing with industrial organisations.

Division 1A—Preliminary**Section 194A: Objects of Part**

The objects proposed by this section are, with the exception of paragraph (d), based on objects stated in the existing Act. This re-positioning places the objects in a more appropriate part of the Act.

Section 196: (Criteria for registration)

Clause 22 amends the criteria for registration of industrial organisations. The minimum membership requirement for registration of an employee association will now be that the association has at least 100 members who are employees. The Clause establishes a similar requirement for employer associations seeking registration. The employer members of such an association in the aggregate must have employed an average of at least 100 employees each month in the six months immediately preceding an application for registration.

Section 197: (Continued registration of small industrial organisations)

Clause 23 amends Section 197 to take account of the reduction of minimum membership requirements for industrial organisations from 1000 to 100. The Commission will retain its power under Section 197 (2) to consider whether there are special circumstances which justify the continued

registration of small industrial organisations.

Proposed Subsection 489(2) makes it clear that there is to be no further action under this section in relation to organisations which have fewer than 1000, but more than 100 members.

Section 273: (Fixing hearing in relation to amalgamation etc.)

Clause 24 replaces Section 273 of the present Act to include a reference to proposed Section 283A.

Section 275: (Approval for submission to ballot of amalgamation not involving extension of eligibility rules etc.)

Clause 25 amends Section 275 of the present Act to include references to Section 283 and proposed Section 283A.

Section 276: (Objections in relation to amalgamation involving extension of eligibility rules etc.)

Clause 26 amends Section 276 of the present Act to clarify that objections may be made to the Commission.

Section 277: (Approval for submission to ballot of amalgamation involving extension of eligibility rules etc.)

Clause 27 amends Section 277 of the present Act to include references to Section 283 and proposed Section 283A.

Section 283: (Exemption from ballot)

Clause 28 amends Section 283 of the present Act to insert a new heading.

Section 283A: Exemption from ballot—recognition of Federal ballot

Clause 29 inserts a new Section 283A.

The proposed amendments introduce a procedure whereby the QIRC can

exempt amalgamating organisations from holding an amalgamation ballot with the ballot requirements being satisfied by relying on a Federal amalgamation ballot. The arrangements include a Federal ballot held prior to the commencement of the amendments. (Proposed Section 283A(8)).

The proposed Section 283A provides as a threshold requirement that before an exemption can be applied for by State industrial organisations, the Federal amalgamation ballot must have been conducted by counterpart Federal organisations. An explanation is provided of what constitutes a “counterpart Federal body” in Section 283A(7).

Section 283A(2) allows the amalgamating organisations to apply for the exemption from ballot under Section 267 (application for exemption from ballot). Under Section 267 the application for exemption must be filed with the amalgamation application.

Section 283A(3) enables a member of the amalgamating organisations to object to the ballot exemption on the grounds that the exemption would detrimentally affect the objector’s interest.

Section 273(3) provides for the Commission to ensure that all members of the amalgamating organisations are notified of the time and place of the hearing of submissions about the granting of the exemption.

Under Section 273(4) the notice must inform the members of the right to object and may be given in one of the ways prescribed.

Section 275 is amended to ensure that the conditions about an amalgamation with which the Commission has to be satisfied applies also to the amalgamations where an exemption from ballot is sought.

Section 275, Subsections (2), (3) and (7) include amalgamations involving exemptions in the existing procedural steps which follow depending on whether or not the Commission is satisfied the conditions have been met.

Section 276 allows for objections in relation to amalgamations involving extension of eligibility rules. Proposed Section 276 is amended to clarify that the objection is made to the Commission.

Section 277, Subsections (1) and (2) apply the existing procedural steps following the Commission’s hearing of these objections to amalgamations where an exemption from ballot is sought.

Subsection 283A(4) provides that at the conclusion of the hearing under

Section 273, the Commission may only grant an application for ballot exemption subject to the tests that:

- a required percentage of Queensland members who voted in the Federal ballot were in favour of the amalgamation. Reference is made to Section 286 which mirrors the Commonwealth Act. For a successful ballot the required numbers vary depending on whether a community of interest declaration has been made or not;
- the interest of members of the amalgamating unions who were not eligible to vote in the Federal ballot because of different eligibility rules have not been detrimentally affected;
- objections about the possible extension of eligibility rules have been resolved;
- in the Federal jurisdiction all likely legal challenges have ended.

Proposed Subsection 283A(5) specifies that should the Commission be satisfied of the matters listed in Subsection (4) it must grant the ballot exemption unless it considers the exemption should be refused in the special circumstances of the case.

Section 283A(6) provides that if the exemption is granted the members of applicant industrial organisations are taken to have approved the amalgamation and any proposed alternative amalgamation.

Amendment of Section 342: (Prejudice of employee by reason of membership of industrial organisation)

Clause 30 amends Section 342 to provide protections for employees in relation to the making of certified agreements and enterprise flexibility agreements. Proposed Subsection (2) (A) reinforces the protection already provided by the Act against an employer inducing an employee not to belong to a union.

Amendment of Section 348: (Appointment of industrial inspectors)

Clause 31 provides for the authorisation of Commonwealth and State industrial inspectors to perform dual functions for either the Commonwealth or the State.

The necessary arrangements are effected under Section 40 of the *Public*

Service Management and Employment Act 1988 (refer to amendment of this Act in Part 3 of the Bill).

Under Subsection 348(6) the making of these arrangements provides the power for a Commonwealth public servant to perform the functions of a State Inspector.

Amendment of Section 362: (Time and wages record of award employees)

Clause 32 amends Section 362 of the present Act to support proposed changes to Section 363.

Amendment of Section 363: (Wages record of non-award employees)

Clause 33 amends Section 363 of the present Act which proposes, in addition to existing records, that an employer is required to keep records of the hours worked by a casual employee for the purposes of long service leave entitlements.

Sections 362(7) and 363(4) provide that on the employee's request the employer must provide details of the hours worked.

See the notes above relating to long service leave for casual employees.

Replacement of Section 382: (Parliamentary supervision of orders in council)

Clause 34 proposes a new Section 382—notices and applications to be written—which makes it clear that notices and applications must be written.

Amendment of Section 428: (Avoiding Act's obligations)

Clause 35 amends Section 428 to provide for a penalty should an employer take action to interrupt the continuity of service of a casual employee with intent to avoid an obligation in respect to long service leave.

The maximum penalty is 40 penalty units (\$2,400). See the notes above relating to long service leave for casual employees.

Amendment of Section 466: (Breaches of awards etc. generally)

Clause 36 revises the penalties for breaches to take account of the new provisions for certified agreements and enterprise flexibility agreements.

The higher penalties provided for breaches of these instruments reflect the importance placed on honouring a freely made bargaining outcome.

One penalty unit currently has the value of \$60. Accordingly, the maximum penalties provided in this proposed Section 466 are:

- (a)(i)(A)—\$4,800
- (a)(i)(B)—\$960
- (a)(ii)(A)—\$5,400
- (a)(ii)(B)—\$1,200
- (b)(i)(A)—\$1,200
- (b)(i)(B)—\$240
- (b)(ii)(A)—\$2,400
- (b)(ii)(B)—\$480

Section 467A: Employees not to be dismissed etc. for engaging in industrial action

Clause 37 proposes the insertion of a new Section 467A—Employees not to be dismissed etc. for engaging in industrial action.

The proposed section is intended to protect an employee against dismissal for engaging in, or proposing to engage in, industrial action in relation to an industrial dispute that has been notified to the Commission or that the Commission has found to exist.

The section gives effect, in certain respects, to Australia's international obligation to provide for a right to strike. This obligation is described in the notes above.

Protection against dismissal for having participated in a strike is recognised as an important element of freedom of association. For example, the Committee on Freedom of Association of the Governing Body of the International Labour Organisation has held that the use of extremely serious measures, such as dismissal of workers for having

participated in a strike and refusal to re-employ them, implies a serious risk of abuse and constitutes a violation of freedom of association.

Such protection is not to apply if the industrial action in which the employee has engaged or proposes to engage has involved violence, wilful or reckless harm to property. The maximum penalty for an offence is to be \$12,000.

There is to be a reverse onus of proof. This reflects the fact that the knowledge of the actuating motive will be peculiarly within the knowledge of the employer.

If an employer is convicted of an offence under this section, the Commission may order reinstatement (this should be the normal remedy for dismissals) and compensation. Other rights (such as those available under Division 4—Dismissal—of Part 11—General Conditions of Employment)—are not excluded.

Provision is made for the exclusion of a class of employees from the section by regulation. Such exclusion must be consistent with Australia's international obligations. Such exclusions are limited under the relevant sources of international law, and reflect the generally limited capacity to restrict or deny a right to strike.

Section 487: Transitional certified agreements

Clause 38 proposes the insertion of a new Section 487 which provides transitional arrangements for agreements which are in the process of being certified at the commencement of this amending Act.

Section 488: Transitional provision about dismissals

The insertion of a proposed new Section 488 which provides for transitional provisions about dismissals. The section makes it clear that the new provisions will only apply to dismissals which happen after the commencement of the amending Act.

Section 489: Transitional provision about small industrial organisations

This proposes transitional arrangements for matters that might have

commenced under Section 197.

Particularly it proposes that the Commission must not exercise powers under existing Section 197(2) even if it was doing so or was authorised to do so, before the commencement.

Section 490: Numbering and renumbering of Act

This section enables the provisions of the reprinted Act to be re-numbered.

Insertion of new Schedules 1-13

Clause 39 proposes the insertion of the Schedules referred to in this Bill.

PART 3—AMENDMENT OF *PUBLIC SERVICE MANAGEMENT AND EMPLOYMENT ACT 1988*

Act amended

Clause 40 amends the *Public Service Management and Employment Act 1988*.

Amendment of Section 40: (Co-operation between the State and Commonwealth Services)

Clause 41 amends the *Public Service Management and Employment Act 1988* to authorise Commonwealth and State public servants to perform dual functions (see notes referring to the amendment of Section 348).

Under the amendment, the Governor in Council, or a Minister authorised by the Governor in Council, may:

- make arrangements with the appropriate authority of the Commonwealth for an officer of the Commonwealth public service to perform work for the Queensland Government;

- at the request of the appropriate authority of the Commonwealth, authorise an officer of the Queensland public service to perform work for the Commonwealth Government.

The amendment is necessary as under the existing State legislation the appropriate Commonwealth authority is specified as the Governor-General whereas under the Federal legislation (*Public Service Act 1922*) the Prime Minister is named as the appropriate authority.

PART 4—AMENDMENT OF VOCATIONAL EDUCATION, TRAINING AND EMPLOYMENT ACT 1991

Act amended

Clause 42 amends the *Vocational Education, Training and Employment Act 1991*.

Clause 43 proposes a minor amendment to the above Act to relocate the Schedule containing the National Vocational Education and Training Statement more appropriately at the end of the Act.

SCHEDULE—MINOR AMENDMENTS

The Schedule to this Bill proposes minor amendments consequential to the introduction of the new provisions for enterprise flexibility agreements.