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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**WORKPLACE RELATIONS LEGISLATION AMENDMENT (INDEPENDENT
CONTRACTORS) BILL 2006**

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

(Circulated by authority of the Minister for Employment and Workplace Relations, the
Honourable Kevin Andrews MP)

WORKPLACE RELATIONS LEGISLATION AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006

OUTLINE

The proposed Government amendments to Schedules 1 and 2 of the Bill would amend provisions relating to independent contracting arrangements. The amendments would further refine and strengthen the Government's commitment to ensure that genuine working relationships are upheld.

The amendments would:

- amend the sham penalty provisions (proposed sections 900 and 901) so that the defence of recklessness is available to a person who breaches the civil remedy provision. This would achieve greater consistency with other similar provisions in the *Workplace Relations Act 1996* (WR Act);
- amend the remedies available under the re-engagement penalty (proposed section 902) to allow the Federal Court of Australia and the Federal Magistrates Court to order the reinstatement of, or the payment of compensation to, a person dismissed in breach of this provision. The amendment would also allow the courts to issue interim injunctions to prevent contraventions of the proposed provision; and
- make consequential amendments to the *Building and Construction Industry Improvement Act 2005* (BCII Act) to allow the Australian Building and Construction (ABC) Commissioner and an ABC Inspector to investigate and bring court proceedings in relation to alleged breaches of the sham penalty provisions, and provisions of the *Independent Contractors Act 2006* (IC Act).

The proposed Government amendments would also insert 4 new Schedules which would make amendments to a number of provisions in the WR Act.

Schedule 3 contains amendments relating to protecting redundancy entitlements. It would provide for the preservation of agreement-based redundancy provisions for a maximum period of 12 months after a workplace agreement, pre-reform certified agreement (CA), pre-reform Australian workplace agreement (AWA) or a preserved State agreement (PSA) is terminated either unilaterally with 90 days written notice, or by the Australian Industrial Relations Commission (AIRC) where it is not contrary to the public interest, on application by the employer. In addition, the measures will provide for the treatment of preserved redundancy provisions on transmission of business.

Schedule 4 would insert new provisions dealing with the standing down of employees in certain circumstances where work is unavailable due to events out of the control of the employer.

Schedule 5 would make a number of technical amendments to Part 7 of the Act relating to the Standard, including amendments that would:

- modify the frequency of payment guarantee, so that a contract of employment or workplace agreement guarantees an employee frequency of payment for periods of one month or less the employer must comply with such provisions;
- cap the accrual of annual and personal/carer's leave so that leave does not accrue in respect of hours worked above 38 hours per week;

- change the payment rule for personal/carer's leave, compassionate leave and leave for pregnant employees who cannot be transferred to a safe job, so that an employee is entitled to be paid a rate for each hour of leave taken at his or her hourly basic periodic rate of pay (consistent with the payment rule for annual leave); and
- enable an employee to request to cash out an amount of paid personal/carer's leave each year, provided that a minimum balance of at least 15 days leave remains available after cashing out (for full-time employees, pro rata for part-time employees).

Schedule 6 would make a number of technical amendments including:

- clarifying the relationship between the Standard and pre-reform CAs, pre-reform AWAs, section 170MX awards and PSAs to ensure that if such an instrument does not deal with one or more of the minimum entitlements covered by the Standard, an employee will have the benefit of the Standard in respect of those entitlements;
- ensuring that employees may waive both the requirement to have a workplace agreement and the requirement to have the information statement for seven days before approving that agreement or a variation to it;
- enabling Notional Agreements Preserving State Awards (NAPSA) and PSAs to operate, within certain limitations, in conjunction with pre-reform CAs and AWAs;
- clarifying that a term of a NAPSA is only unenforceable in relation to a particular employee, where the Standard also provides for a matter in relation to that employee;
- amending the rules which provide for the continuing operation of s170MX awards; and
- other miscellaneous technical amendments.

NOTES ON AMENDMENTS

Amendment No. 1 – Clause 2, page 2 (at the end of the table)

1. This is a commencement clause. It indicates that Schedules 3, 4, 5 and 6 commence the day after the day on which this Act receives the Royal Assent.

Amendment No. 2 – Schedule 1, item 1, page 3 (lines 24 to 31)

2. This amendment would omit proposed subsection 900(2) and substitute a new provision.

3. Proposed section 900 would allow a civil penalty to be imposed by the Federal Court or the Federal Magistrates Court on persons who misrepresent an existing employment relationship as an independent contracting arrangement. Subsection (2), as it is proposed to be amended, would provide a defence to the civil penalty if the person proves that at the time the representation was made, the person did not know that the contract formed an employment rather than an independent contracting arrangement and nor were they reckless as to the nature of the contract. ‘Recklessness’ will take its common law meaning as the Commonwealth Criminal Code does not apply to the civil remedy provisions in the WR Act.

Amendment No. 3 – Schedule 1, item 1, page 4 (lines 20 to 28)

4. This amendment would omit proposed subsection 901(2) and substitute a new provision.

5. Proposed section 901 would allow a civil penalty to be imposed by the Federal Court or the Federal Magistrates Court on persons who misrepresent a proposed employment relationship as an independent contracting arrangement. Subsection (2), as it is proposed to be amended, would provide a defence to the civil penalty if the person proves that at the time the representation was made, the person did not know that the contract would, if entered into, form an employment rather than an independent contracting arrangement and they were not reckless as to the nature of the proposed contract.

Amendment No. 4 – Schedule 1, item 1, page 5 (lines 16 to 19)

6. This amendment would omit proposed subsection 902(3) and substitute a new provision. It is a technical correction to remove an incorrect reference to proceedings under Division 3 of Part 14 (Compliance), as proceedings would be brought under proposed Part 22 (Sham arrangements) of the WR Act.

7. This amendment would also insert a legislative note to proposed section 902, consequential upon amendment 4, referring the reader to proposed subsection 904(2A) which would allow the Federal Court or the Federal Magistrates Court to grant an injunction for a breach of the section. The note would also alert readers to section 838 of the WR Act.

Amendment No. 5 – Schedule 1, item 1, page 6 (after line 8)

8. This amendment would add three new subsections to proposed section 904 which relates to orders the Federal Court or the Federal Magistrates Court may make where a person has contravened subsection 902(1). Proposed subsection 902(1) would provide that a civil penalty could apply if an employer dismisses, or threatens to dismiss, an employee with the sole or dominant purpose of re-engaging that employee as an independent contractor to do the same, or substantially the same, work.

9. Proposed subsection 904(2A) would allow the Federal Court or the Federal Magistrates Court to grant an injunction and make any other orders it considers necessary to stop a breach of subsection 902(1) or to remedy the effects of a breach. Proposed subsection 904(2B) would outline some of the ‘other orders’ the court could make which are alluded to in proposed subsection (2A). These other orders include reinstatement of a dismissed employee and compensation for an employee who has been dismissed or threatened with dismissal to compensate them for any loss suffered as a result.

10. Proposed subsection 904(2C) would provide that the orders the court could make under subsection (2A) may be made instead of, or as well as, any pecuniary penalty imposed under proposed section 904.

Amendment No. 6 – Schedule 2, item 2, page 8 (lines 9 to 12)

11. This amendment would omit item 2 of the Bill and substitute a new provision. This amendment is consequential on the repeal of existing Part 22 of the WR Act dealing with contract outworkers in Victoria in the textile, clothing and footwear industry (see item 3 of Schedule 2 of this Bill) and the removal of proposed Part 4 of the Independent Contractors Bill 2006.

Amendment No. 7 – Schedule 2, item 4, page 8 (lines 15 to 21)

12. This amendment would delete item 4 of Schedule 2 of the Bill. This amendment is consequential on the repeal of existing Part 22 of the WR Act (see item 3 of Schedule 2 of this Bill) and the removal of proposed Part 4 of the Independent Contractors Bill 2006 (IC Bill).

Amendment No. 8 – Schedule 2, page 10 (after line 6)

13. This amendment would insert a new item in the Bill.

New item 6A – Subsection 75(2)

14. This item would repeal subsection 75(2) of the BCII Act which relates to the jurisdiction of the Federal Magistrates Court in unfair contract matters involving building work. The repeal of this subsection is a consequence of the repeal of section 47 of the BCII Act by item 6 of Schedule 2 of the Bill.

Amendment No. 9 – Schedule 2, page 10 (after line 11)

15. This amendment would insert new Part 3 into Schedule 2 of the Bill. The new Part would make amendments to the BCII Act as a consequence of the enactment of the IC Bill.

New Part 3 – Consequential amendments relating to building contractors

Building and Construction Industry Improvement Act 2005

New Item 8 – Subsection 4(1) (paragraph (a) of the definition of ‘designated building law’

16. This item would amend the definition of designated building law to include the IC Act.

New Item 9 – Subparagraph 10(a)(i)

New Item 10 – Subparagraph 10(b)(i)

New Item 11 – Paragraph 10(d)

New Item 12 – Paragraph 10(e)

New Item 13 – Paragraph 10(f)

17. These items would amend section 10 of the BCII Act which sets out the functions of the ABC Commissioner. These amendments would require the ABC Commissioner to:

- monitor and promote compliance with the IC Act;
- investigate suspected contraventions of the IC Act by building industry participants;
- provide assistance and advice to building industry participants regarding their rights and obligations under the IC Act;
- provide representation to a building industry participant who is, or might become, a party to a proceeding under the IC Act; and
- disseminate information about the IC Act affecting building industry participants.

New Item 14 – Paragraph 67(c)

18. This item would make a consequential amendment to paragraph 67(c) of the BCII Act. The effect of the amendment would be to allow the ABC Commissioner to publish details of non-compliance with the IC Act of a building industry participant.

New Item 15 – Paragraph 71(1)(b)

19. This item would make a consequential amendment to paragraph 71(1)(b) of the BCII Act. The effect of the amendment would be to allow the ABC Commissioner to intervene before a court in civil proceedings regarding matters that arise under the IC Act.

New Item 16 – Subsection 73(3)

20. This item would make a technical amendment to subsection 73(3) of the BCII Act by updating a cross-reference to the WR Act. The section of the WR Act referred to in subsection 73(3) was renumbered by the *Workplace Relations Amendment (Work Choices) Act 2005* (the Work Choices Act).

New Item 17 – After section 73

21. This item would insert new section 73A in the BCII Act.

22. The effect of this amendment would be to empower the ABC Commissioner or an ABC Inspector to institute proceedings under the IC Act.

23. Proposed subsections 73A(1) and (2) would provide that where the IC Act authorises a workplace inspector to institute proceedings in a court, the provision is to be read as also

authorising the ABC Commissioner or an ABC Inspector to make such an application where the proceedings involve matters that involve either a building industry participant or building work.

24. Proposed subsection 73A(3) would provide that directions issued by the Minister under subsection 167(7) of the WR Act to workplace inspectors do not apply to the ABC Commissioner or ABC Inspectors when instituting proceedings under the IC Act.

New item 18 – Paragraph 77(1)(b)

25. This item would make a consequential amendment to paragraph 77(1)(b) of the BCII Act. The effect of this amendment would be to ensure that no one is liable to civil proceedings for loss, damage or injury suffered by another person because of anything done (or omitted to be done) in good faith and without negligence by a protected person in the exercise, or purported exercise, of their functions under the IC Act.

26. Protected person is defined in subsection 77(2) of the BCII Act.

New item 19 – Subparagraph 78(2)(d)(i)

27. This item would make a consequential amendment to subparagraph 78(2)(d)(i) of the BCII Act. The effect of this amendment would be to allow the making of regulations under the BCII Act that require a building industry participant to notify the ABC Commissioner of an application made to a court under the IC Act.

New Schedule 3 – Amendments relating to protecting redundancy entitlements

Amendment No. 10 – Page 10, at the end of the Bill (after proposed Part 3 of Schedule 2)

28. Amendment No. 14 would insert Schedule 3 into the Bill. The items in this Schedule would amend the WR Act to provide for the preservation of agreement-based redundancy provisions for a maximum period of 12 months after the agreement is terminated.

29. These measures would apply in relation to workplace agreements, pre-reform certified agreements, pre-reform Australian workplace agreements, and PSAs (individual and collective).

30. In the case of a workplace agreement, redundancy provisions would be preserved where the agreement is unilaterally terminated by the employer with 90 days notice. In the case of a pre-reform CA, pre-reform AWA and a PSA, redundancy provisions would be preserved where the agreement is terminated by the AIRC on application by the employer, where it is not contrary to the public interest.

31. The amendments in Schedule 3 would also provide for the treatment of preserved redundancy provisions on transmission of business.

Item 1 – At the end of subsection 347(7)

32. This item would insert a legislative note which would indicate that the operation of section 399A may apply in relation to a terminated workplace agreement, that is, that redundancy provisions in a terminated workplace agreement may continue to have effect for a period of up to 12 months after the agreement is terminated.

Item 2 – Paragraph 393(4)(b)

33. This item would require a bargaining agent that has been requested by an employer to lodge a section 393 declaration to take reasonable steps to ensure that a written copy of any undertakings in relation to the terminated workplace agreement is given to those parties mentioned in paragraph 393(4)(a).

34. The intention is to ensure that obligations in section 393 are also imposed on an employer where a bargaining agent has acted on behalf of that employer.

Item 3 – At the end of subsection 393(5)

35. Subsection 393(5) sets out the form and content of the unilateral termination notice.

36. This item would amend subsection 393(5) so that the notice must state whether the parties to the workplace agreement will continue to be bound by one or more redundancy provisions included in the agreement pursuant to section 399A. This obligation would apply only where an employer bound by the workplace agreement, or a bargaining agent that has been requested by the employer, gives notice of the unilateral termination.

37. This item would also provide that if the parties bound by the workplace agreement will continue to be bound by a redundancy provision or provisions under section 399A, the notice must include an annexed copy of the redundancy provision/s.

Item 4 – Paragraph 394(5)(a)

38. Paragraph 394(5)(a) provides that an employer contravenes the subsection if it has made an undertaking in relation to a termination of a workplace agreement under section 393 and does not annex a copy of the undertaking to a declaration to terminate that is lodged.

39. This item would ensure that subsection 394(5) also applies to a bargaining agent that lodges a declaration to terminate a workplace agreement at the request of an employer bound by the agreement.

40. The intention is to ensure that obligations in section 394 are also imposed on an employer where a bargaining agent is acting on behalf of that employer.

Item 5 – Paragraph 394(5)(c)

41. This item is consequential on Item 4 and would repeal and replace paragraph 394(5)(c). The effect of the amendment would be to ensure that a copy of the undertakings must be annexed by either the employer bound by the agreement, or a bargaining agent that lodges a declaration to terminate a workplace agreement at the request of an employer bound by the agreement.

Item 6 – At the end of subsection 395(1)

42. Section 395 deals with the lodgement of unilateral termination documents with the Employment Advocate.

43. This item would amend subsection 395(1) so that a declaration to terminate a workplace agreement under section 393 must state whether the parties to the agreement will continue to be bound by one or more redundancy provisions pursuant to section 399A. This amendment would apply where an employer that is bound by the agreement, or a bargaining agent that is requested by an employer bound by the agreement, lodges a declaration to terminate a workplace agreement.

Item 7 – Subsection 395(2)

44. The amendment proposed by this item is consequential on item 6 and would repeal and replace subsection 395(2).

45. Proposed subsection 395(2) would provide that undertakings are lodged in relation to a termination of an agreement under section 393, if an employer bound by the agreement or a bargaining agent that is requested by an employer bound by the agreement, lodges a declaration to terminate a workplace agreement under subsection (1) and annexes a copy of the undertakings to the declaration.

Item 8 After subsection 396(1)

46. Section 396 provides that the Employment Advocate must issue a receipt for a lodgement of a declaration of termination of a workplace agreement. Additionally, the section sets out the persons that must be given a receipt of lodgement.

47. This amendment would insert new subsection 396(1A) to provide additional requirements in relation to a receipt issued by the Employment Advocate where an employer or an employer's

bargaining agent who acts at the employer's request, lodges a notice under section 393 and a declaration of termination under section 395 of the Act.

48. Where this is the case, the receipt must state whether or not the section 395 declaration itself states that there are redundancy provisions which will continue to operate, and if so, if the declaration has an annexed copy of those provisions.

49. The intention is that parties bound by the preserved redundancy provisions are made aware that the employer or the employer's bargaining agent has declared that there are redundancy provisions in the agreement that may continue to operate under section 399A of the WR Act. The amendment does not require the Employment Advocate to assess whether or not the workplace agreement has redundancy provisions that may continue to apply.

Item 9 – At the end of Division 9 of Part 8

50. This item would insert new section 399A into the Act to deal with the preservation of redundancy provisions which are included in workplace agreements, when the agreement is terminated.

51. Subsection 399A(2A) would ensure that Parts 6 (workplace inspectors) and 14 (compliance) of the Act apply to preserved redundancy provisions which were initially included in a workplace agreement, as if the redundancy provisions were a workplace agreement in operation.

Section 399A Preservation of redundancy provisions in certain circumstances

52. Proposed subsection 399A(1) would provide that the section applies if a workplace agreement is terminated under section 393 by an employer that is bound by the agreement, or by a bargaining agent at the request of an employer that is bound by a workplace agreement.

53. This means that redundancy provisions that are in a workplace agreement will only be preserved by section 399A if the workplace agreement is terminated unilaterally with 90 days written notice on application by an employer or the employer's bargaining agent. Therefore, section 399A will not apply, for example, where a workplace agreement is terminated by approval under Subdivision B of Division 9 of Part 8 of the WR Act.

54. Subsection 399A(2) would provide that any party that was bound by the workplace agreement just before it was terminated will continue to be bound by any redundancy provision that was included in the agreement. This means that an employer, employee or an organisation of employees may continue to be bound by redundancy provisions that were included in a workplace agreement despite the agreement ceasing to be in operation because of the termination.

55. The redundancy provisions will have effect as if they are included in a workplace agreement that is still operating – that is, the provisions can be enforced as if they were still included in an instrument. This means, for example, the provisions can be enforced by an employee who was bound by them immediately before the employee was terminated on the grounds of operational requirements.

56. Subsection 399A(3) would provide that a party ceases to be bound by the redundancy provisions in relation to an employee who is also bound by the redundancy provision if one of the following occurs, whichever occurs first:

- the end of the period of 12 months from the time the workplace agreement was terminated;
- the employee is no longer employed by the employer; or
- a new workplace agreement comes into operation in relation to the employee and employer.

57. The intention is that the parties will continue to be bound by a preserved redundancy provision for a maximum period of 12 months, unless the employee ceases employment with the employer, or a new workplace agreement comes into operation.

58. Subsection 399A(4) would provide a definition of ‘redundancy provision’ for the purposes of section 399A. Redundancy provision means any provision, including incidental and machinery provisions, about redundancy pay to the extent that the provision relates to a termination of employment at the initiative of the employer on the grounds of genuine operational requirements or because the employer is insolvent. This is consistent with the definition of redundancy pay in relation to awards in subsection 513(4) of the WR Act.

59. This means that section 399A may operate to preserve a broad range of redundancy provisions which relate to a termination of employment, for example clauses that deal with redundancy pay where:

- an employer arranges suitable alternative employment for an employee;
- an employer is unable to meet its redundancy pay obligations;
- there is a transmission of business from the employer to a new employer.

60. However, section 399A would not operate to preserve a redundancy pay provision which related to, for example, entitlements payable on resignation of employment by an employee.

Item 10 – After Division 6 of Part 11

61. This amendment would insert a new Division into Part 11 of the WR Act to deal with the transmission of preserved redundancy provisions which were initially included in a workplace agreement where there is a transmission of business between an old employer and a new employer.

Division 6A Transmission of preserved redundancy provisions from workplace agreements

62. It is intended that the transfer of preserved redundancy provisions in a transmission of business are dealt with similarly to other instruments in Part 11 of the WR Act. Therefore, the definition and application provisions in Divisions 1 and 2 of Part 11 of the WR Act also apply, where relevant, to Division 6A.

598A Transmission of preserved redundancy provisions from workplace agreements

63. Proposed subsection 598A(1) would provide that a new employer is bound by a redundancy provision in relation to a transferring employee, if immediately before the time of transmission, the old employer and the employee were bound under section 399A, or under a previous application of section 598, by a preserved redundancy provision. This means that a new employer would not be bound by a preserved redundancy provision if it does not employ any transferring employees.

64. The proposed legislative note would indicate that the new employer has notification obligations in relation to transferring employees as provided by sections 603A and 603B.

65. New subsection 598A(2) would provide that subject to subsection (3), the transferred redundancy provision will prevail over any other instrument that might apply to the transferred employee, to the extent of any inconsistency.

66. New subsection 598A(3) would provide that a new employer and a transferring employee will remain bound by a preserved redundancy provision until the first of the following occurs:

- the end of the period of 12 months from the time that the workplace agreement that initially contained the redundancy provisions was terminated. This means that the date that the redundancy provisions cease to apply to the new employer is the same date that the provisions would have ceased to apply to the old employer. The intention is that the new employer's obligations with respect to the redundancy provisions match the old employer's. The obligations do not start afresh on transmission;
- the transferring employee ceases to be employed by the new employer;
- the new employer and the transferring employee become bound by a new workplace agreement.

67. New subsection 598A(4) would provide that section 598A does not affect any rights or obligations of the old employer that may have arisen before the time of transmission.

68. This means, for example, that subsection 598A(1) will not operate to transfer liability for accrued employee entitlements to a new employer from an old employer. However, note that the redundancy provisions may provide that accrued entitlements become the responsibility of the new employer.

69. Subsection 598A(5) would define 'instrument' and 'redundancy provision' for the purposes of section 598A.

70. Instrument means:

- a workplace agreement – as defined in section 4 of the WR Act;
- a pre-reform CA – as defined in clause 1 of Schedule 7 to the WR Act;
- a preserved State agreement – as defined in clause 1 of Schedule 8 to the WR Act;
- a notional agreement preserving State awards – as defined in clause 1 of Schedule 8 to the WR Act;
- an award – as defined in section 4 of the WR Act.

71. 'Redundancy provision' means any provision, including incidental and machinery provisions, that are about redundancy pay to the extent that the provision relates to a termination of employment. The termination of employment must be at the initiative of the employer on the grounds of operational requirements or because the employer is insolvent.

Item 11 – After section 603

72. This amendment would insert new sections 603A and 603B in the WR Act to create notification obligations for new employers in respect of transferred preserved redundancy provisions. The effect of the provisions would be to require the new employer to inform the transferring employee about the continued operation of the preserved redundancy provisions, and to lodge the relevant notice with the Employment Advocate.

603A Informing transferring employees about transmission of preserved redundancy provisions

73. Proposed subsection 603A(1) would provide that section 603A applies if an employer is bound by one or more transferred preserved redundancy provisions under section 598A.

74. Subsection 603A(2) would provide that the new employer must take reasonable steps to give a transferring employee written notice that complies with subsection 603A(3) within 28 days of the employee commencing employment with the new employer.

75. The proposed legislative note would indicate that subsection 603A(2) is a civil remedy provision. The note would also indicate that section 605 is relevant to the operation of section 603A. Section 605 which deals with civil remedies for the purposes of Part 11 of the WR Act.

76. Subsection 603A(3) would set out what the written notice must contain.

77. The notice must:

- identify the redundancy provision or provisions that have transferred to the new employer as a result of the transmission of business;
- state that the new employer is bound by those transferred redundancy provision or provisions as if they were the old employer;
- provide the date which is 12 months after the time that the workplace agreement that initially included the redundancy provision or provisions was terminated; and
- provide that the new employer will be bound by the transferred redundancy provisions as if they were part of a workplace agreement until the date which is 12 months after the time that the workplace agreement that initially included the redundancy provision/s was terminated, or alternatively, that the new employer will be bound until an earlier date as dealt with in subsection 598A(3). (Section 598A(3) deals with the time that a new employer and transferring employee are bound by transferring redundancy provisions).

78. Subsection 603A(4) would have the effect of relieving the new employer from the notification obligations outlined in subsection 603A(2) if the new employer and the transferring employee make a new workplace agreement within 14 days of the time of transmission.

79. The reason for removing the notification requirement in this situation is that the preserved redundancy clauses would cease to operate soon after the time of transmission, making notification redundant.

603B Lodging copy of notice about preserved redundancy provisions with Employment Advocate

80. Proposed subsection 603B(1) would provide that an employer must lodge a copy of any notice given to a transferring employee under section 603A with the Employment Advocate.
81. Proposed Note 1 would indicate that section 603B is a civil remedy provision. The Note would also indicate that section 605 is relevant to the operation of section 603B which deals with civil penalties for the purposes of Part 11 of the WR Act.
82. Proposed Note 2 would refer to obligations imposed by sections 137.1 and 137.2 of the *Criminal Code Act 1995* in relation to the provision of information of documents.
83. Proposed subsection 603B(2) would deal with the lodgement of the notice for redundancy provisions that were initially included in either an AWA or a collective agreement.
84. For an AWA, notice must be lodged with the Employment Advocate within 14 days after the day on which notice is given by an employer to an employee under section 603A.
85. For a collective agreement, notice must be lodged with the Employment Advocate within 14 days of the earliest day on which notice was given by the employer to an employee under section 603A.
86. Proposed subsection 603B(3) would provide that a notice is lodged in accordance with this section only once it is actually received by the Employment Advocate.
87. The proposed note would explain that subsection 603B(3) departs from section 29 of the *Acts Interpretation Act 1901* (AI Act). Section 29 of the AI Act provides that service of a document is normally effected when it is ‘properly prepaid, addressed and posted’.

Item 12 – Subsection 604(1)

Item 13 – Subsection 604(2)

Item 14 – Subsection 604(3)

88. These items would amend section 604 so that the provision also applies where a lodgement of notice occurs under section 603B.
89. Section 604 deals with the issuing of receipts by the Employment Advocate in relation to lodgement of notifications.

Item 15 – At the end of subsection 605(1)

90. This item would amend subsection 605(1) to ensure that notification obligations created by subsections 603(A)(2) and 603B(1) are civil remedy provisions. (Subsection 605(1) sets out the provisions in Division 8 that are civil remedy provisions).

Item 16 – Subsection 605(5)

91. This item would amend subsection 605(5) to ensure that the provisions which set out who can apply for an order in relation to a civil remedy provision also apply with respect to a

preserved redundancy provision that was previously included in an AWA or collective agreement.

92. In particular, this item would amend subsection 605(5) to ensure that an application for an order may be made by those persons listed in Items 1 and 2 in relation to a preserved redundancy provision that was initially included in either an AWA or collective agreement.

Item 17 – Subsection 605(5) (table item 2)

93. This item would amend paragraph (b) in table Item 2 in order to refer also to organisations of employees that are bound by preserved redundancy provisions. This amendment will enable an organisation of employees that is bound by the preserved redundancy provision to make an application for an order under subsection 605(2).

Item 17A –

94. Item 17A would amend the first legislative note to section 717. The legislative note currently provides that undertakings and workplace determinations are treated as if they are collective agreements for the purposes of the Act. The item would ensure that the note also indicates that preserved redundancy provisions are treated as workplace agreements for the purposes of the Act. For example, preserved redundancy provisions that were initially included in an AWA will be treated as if the provisions are themselves an AWA.

95. This amendment would alert the reader to the fact that penalties can be imposed and underpayments recovered in the event that a redundancy provision is breached.

Item 18 – At the end of subclause 3(4) of Schedule 7

96. The proposed legislative note would indicate that clause 6A may affect the operation of a terminated pre-reform certified agreement, that is, that redundancy provisions in a terminated pre-reform CA may continue to have effect after the agreement is terminated.

Item 19 – After clause 6 of Schedule 7

97. This item would insert new clause 6A into Schedule 7 to the WR Act to deal with the preservation of redundancy provisions that are contained in a CA, when the agreement is terminated. The item would also insert new clauses 6B and 6C, which deal with notification obligations in relation to preserved redundancy provisions.

98. Subclause 6A(2A) would ensure that Parts 6 (workplace inspectors) and 14 (compliance) of the Act apply to preserved redundancy provisions that were initially included in a pre-reform certified agreement, as if they were a pre-reform certified agreement in operation.

99. Note that clauses 6 and 16 of Schedule 7 to the Act provide that a pre-reform certified agreement is treated as if it is a collective agreement for Parts 6 and 14 of the Act.

6A Preservation of redundancy provisions in certain circumstances

100. Proposed subclause 6A(1) would provide that the section applies if a pre-reform CA is terminated by the AIRC on application by an employer that is bound by the agreement. The section would only apply when the AIRC terminates an agreement where it is satisfied that it is not

contrary to the public interest to do so, in accordance with subsection 170MH(3) of the pre-reform WR Act.

101. This means that redundancy provisions that are in a pre-reform CA will only be preserved by clause 6A if the pre-reform CA is terminated under subsection 170MH(3) on application by an employer. Therefore, redundancy provisions will not continue to operate after a pre-reform CA has been terminated, for example, where a valid majority of employees approve the termination pursuant to section 170MG of the pre-reform WR Act.

102. The proposed note at the end of subclause 6A(1) would indicate that subsection 170MH(3) of the pre-reform WR Act continues to operate because of paragraph 2(1)(k) of Schedule 7.

103. Subclause 6A(2) would provide that any party that was bound by the pre-reform CA just before it was terminated will continue to be bound by any redundancy provision that was included in the agreement. This means that an employer, employee or an organisation of employees may continue to be bound by redundancy provisions included in a pre-reform CA despite the agreement ceasing to be in operation because of the termination.

104. The redundancy provisions will have effect as if they are included in a pre-reform CA that is still operating – that is, the provisions can be enforced as if they were still included in an instrument. This means, for example, the provisions can be enforced by an employee who was bound by them immediately before the employee was terminated on the grounds of genuine operational requirements.

105. Subclause 6A(3) would deal with the interaction of preserved redundancy provisions with other instruments that may also apply to the parties. Relevantly, a preserved redundancy provision will override any other redundancy provision included in any other instrument that may have effect. ‘Instrument’ is a defined term for the purposes of clause 6A.

106. However, this interaction rule operates subject to subclause 6A(4).

107. Subclause 6A(4) provides that a party ceases to be bound by the redundancy provisions in relation to an employee who is also bound by the redundancy provision if one of the following occurs, whichever occurs first:

- the end of the period of 12 months from the time the pre-reform CA was terminated;
- the employee is no longer employed by the employer; or
- a new workplace agreement comes into operation in relation to the employee and employer.

108. The intention is that the parties will continue to be bound by a preserved redundancy provision for a maximum period of 12 months, unless the employee ceases employment with the employer, or a workplace agreement comes into operation.

109. Subclause 6A(5) would provide definitions of ‘instrument’ and ‘redundancy provision’ for the purposes of clause 6A.

110. Instrument means:

- a preserved State agreement – as defined in clause 1 of Schedule 8 to the WR Act;

- a notional agreement preserving State awards – as defined in clause 1 of Schedule 8 to the WR Act;
- an award – as defined in section 4 of the WR Act;
- a transitional award – as defined in clause 2 of Schedule 6 to the WR Act.

111. ‘Redundancy provision’ means any provision, including incidental and machinery provisions, that are about redundancy pay to the extent that the provision relates to a termination of employment at the initiative of the employer on the grounds of operational requirements or because the employer is insolvent.

112. This means that clause 6A may operate to preserve a broad range of redundancy provisions which relate to a termination of employment, for example clauses that deal with redundancy pay where:

- an employer arranges suitable alternative employment for an employee;
- an employer is unable to meet its redundancy pay obligations;
- there is a transmission of business from the employer to a new employer.

113. However, clause 6A would not operate to preserve a redundancy pay provision which related to, for example, entitlements payable on resignation of employment by an employee.

6B Notification of preservation of redundancy provisions

114. Proposed clause 6B would create notification obligations for the AIRC in certain circumstances.

115. Subclause 6B(1) would provide that notification obligations only arise where redundancy provisions have been preserved under clause 6A.

116. Subclause 6B(2) would ensure that where the AIRC makes an order terminating a pre-reform CA under subsection 170MH(3) of the pre-reform WR Act, a copy of that order is given to an employer and any organisation of employees that will be bound by the redundancy provisions.

117. Subclause 6B(3) would set out what must be included in the Commission’s order.

118. The order must:

- identify any redundancy provision or provisions in the pre-reform CA that will continue to operate after the agreement is terminated;
- explain that the parties bound by the pre-reform CA will continue to be bound by the preserved redundancy provision or provisions;
- specify the date that is 12 months from the time the order terminating the agreement takes effect;

- explain that the parties will remain bound by the preserved redundancy provisions until that date, or an earlier date in accordance with subclause 6A(4). (Subclause 6A(4) outlines when parties will stop being bound by preserved redundancy clauses in relation to an employee).

119. The intention of clause 6B is to ensure that parties bound by the preserved redundancy clauses are informed of their continuing rights and obligations in relation to redundancy pay.

6C Employer must notify employees of preserved redundancy provisions

120. Proposed clause 6C would create notification obligations for an employer bound by a pre-reform CA in certain circumstances.

121. Subclause 6C(1) would provide that an employer that has received a copy of an order terminating a pre-reform CA must take reasonable steps to ensure that all employees that were bound by the agreement just before it was terminated by the AIRC are given a copy of the notice. The employer must do so within 21 days of receiving the copy.

122. Subclause 6C(2) would provide that subclause (1) is a civil remedy provision.

123. The note to subclause 6C(2) would indicate that Division 3 of Part 14 of the Act contains other provisions about civil remedies which may be relevant.

124. Subclause 6C(3) would provide that the Court may order a person that has contravened subclause (1) to pay a pecuniary penalty.

125. The note to subclause 6C(3) would indicate that Division 3 of Part 14 of the WR Act contains other provisions about civil remedies which may be relevant.

126. Subclause 6C(4) would provide that the penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in other cases, eg for an individual.

127. Subclause 6C(5) would deal with who can make an application for a civil remedy order in relation to the employer's obligation under subclause (1) to give employees a copy of the AIRC's order.

128. Relevantly, an employee or an organisation of employees that was bound by the pre-reform CA just before it was terminated can apply for an order. Additionally, an organisation of employees that is entitled, under its eligibility rules to represent the industrial interests of an employee bound by the pre-reform CA, has at least one member that is employed by the employer, and that has been requested to do so by the employee may also apply. Finally, a workplace inspector also has standing to apply for an order under this subclause.

Item 20 – At the end of subclause 18(3) of Schedule 7

129. This item would insert a legislative note under subclause 18(3) to direct the reader to consider the operation of clause 20A in relation to a terminated pre-reform AWA, that is, that redundancy provisions in a terminated pre-reform AWA may continue to have effect after the agreement is terminated.

Item 21 – After clause 20 of Schedule 7

130. This item would insert new clause 20A into Schedule 7 to the WR Act to deal with the preservation of redundancy provisions that are contained in a pre-reform AWA, when the agreement is terminated. The item would also insert clause 20B, which would deal with notification obligations in relation to preserved redundancy provisions.

131. Subclause 20A(2A) would ensure that Parts 6 (workplace inspectors) and 14 (compliance) of the Act apply to the preserved redundancy provisions that were initially included in a pre-reform AWA, as if they were a pre-reform AWA in operation.

132. Note that clause 20 of Schedule 7 to the Act provides that a pre-reform AWA is treated as if it is an AWA for Parts 6 and 14 of the Act.

20A Preservation of redundancy provisions in certain circumstances

133. New subclause 20A(1) would provide that the section applies if a pre-reform AWA is terminated by the AIRC on application by an employer that is bound by the agreement. The section would only apply when the AIRC terminates an agreement in accordance with subsection 170VM(3) of the pre-reform WR Act, that is, where it is satisfied that it is not contrary to the public interest to do so.

134. This means that redundancy provisions that are in a pre-reform AWA will only be preserved by clause 20A if the pre-reform AWA is terminated under subsection 170MH(3) on application by an employer. Therefore, redundancy provisions will not continue to operate after a pre-reform AWA has been terminated, for example, because the employer and employee bound by the agreement agree to terminate the agreement in writing pursuant to subsections 170VM(1) and (2) of the pre-reform WR Act.

135. The proposed note to subclause (1) would inform the reader that subsection 170VM(3) of the pre-reform WR Act continues to operate because of paragraph 17(1)(c) of Schedule 7.

136. Subclause 20A(2) would provide that the employer and employee that were bound by the pre-reform AWA just before it was terminated will continue to be bound by any redundancy provision that was included in the agreement. The redundancy provisions would have effect as if they are included in a pre-reform AWA that is still operating – that is, the provisions can be enforced as if they were still included in an instrument. This means, for example, the provisions can be enforced by an employee who was bound by them immediately before the employee was terminated on the grounds of genuine operational requirements.

137. Subclause 20A(3) would deal with the interaction of preserved redundancy provisions with other instruments that may also apply to the employer and employee. Relevantly, a preserved redundancy provision will override any other redundancy provision included in any other instrument that may have effect. ‘Instrument’ is a defined term for the purposes of clause 20A.

138. However, this interaction rule operates subject to subclause 20A(4).

139. Subclause 20A(4) would provide that an employer ceases to be bound by the redundancy provisions in relation to an employee who is also bound by the redundancy provision if one of the following occurs, whichever occurs first:

- the end of the period of 12 months from the time the pre-reform AWA was terminated;

- the employee is no longer employed by the employer; or
- a new workplace agreement comes into operation in relation to the employee and employer.

140. The intention is that the parties will continue to be bound by a preserved redundancy provision for a maximum period of 12 months, unless the employee is no longer employed by the employer, or a new workplace agreement comes into operation.

141. Subclause 20A(5) would provide definitions of ‘instrument’ and ‘redundancy provision’ for the purposes of clause 20A.

142. Instrument means:

- a collective agreement – as defined in section 4 of the WR Act;
- a pre-reform CA – as defined in clause 1 of Schedule 7 to the WR Act;
- a notional agreement preserving State awards – as defined in clause 1 of Schedule 8 to the WR Act;
- an award – as defined in clause 4 of the WR Act.

143. ‘Redundancy provision’ means any provision, including incidental and machinery provisions, that are about redundancy pay to the extent that the provision relates to a termination of employment at the initiative of the employer on the grounds of operational requirements or because the employer is insolvent.

144. This means that clause 20A may operate to preserve a broad range of redundancy provisions which relate to a termination of employment, for example clauses that deal with redundancy pay where:

- an employer arranges suitable alternative employment for an employee;
- an employer is unable to meet its redundancy pay obligations;
- there is a transmission of business from the employer to a new employer.

145. However, clause 20A would not operate to preserve a redundancy pay provision which related to, for example, entitlements payable on resignation of employment by an employee.

20B Notification of preservation of redundancy provisions

146. Proposed clause 20B would create notification obligations for the AIRC in certain circumstances.

147. Subclause 20B(1) would provide that notification obligations only arise where redundancy provisions have been preserved under clause 20A.

148. Subclause 20B(2) would affect the operation of subsection 170VM(4) of the pre-reform WR Act. Currently, subsection 170VM(4) of the pre-reform WR Act provides that the AIRC must issue a copy of its determination terminating a pre-reform AWA to the parties bound by the AWA and to the Employment Advocate.

149. Subclause 20B(2) would ensure that the determination:

- identifies any redundancy provision or provisions in the pre-reform AWA that will continue to operate after the agreement is terminated;
- explains that the employer and employee will continue to be bound by the preserved redundancy provision or provisions;
- specify the date that is 12 months from the time the order terminating the agreement takes effect;
- explain that the employer and employee will remain bound by the preserved redundancy provision or provisions until that date, or one earlier in accordance with subclause 20A(4). (Subclause 20A(4) outlines when parties will stop being bound by preserved redundancy clauses in relation to an employee).

150. The intention of clause 20B is to ensure that an employer and employee bound by the preserved redundancy clauses are informed of their continuing rights and obligations in relation to redundancy pay.

Item 22 – After clause 21 of Schedule 8

151. This item would insert new clauses 21A, 21B, 21C, 21D and 21E into the WR Act to deal with the preservation of redundancy provisions that are contained in a PSA, when the agreement is terminated. These new clauses would also deal with notification obligations in relation to preserved redundancy provisions.

152. The preservation of redundancy provisions in relation to PSAs are dealt with separately depending on whether the instrument is a preserved collective State agreement or an preserved individual State agreement.

153. Subclause 21A(2A) would ensure that Parts 6 (workplace inspectors) and 14 (compliance) of the Act apply to the preserved redundancy provisions that were initially included in a preserved collective State agreement, as if they were a preserved collective State agreement in operation.

154. Note that subclauses 20(1) and 20(2) of Schedule 8 to the Act provide that a preserved collective State agreement should be treated as if it is a collective agreement in relation to workplace inspectors and enforcement. The effect of subclause 21A(2A) therefore, is that Parts 6 and 14 of the Act apply to preserved redundancy provisions which were initially included in a preserved collective State agreement, as if the redundancy provisions were a collective agreement in operation.

155. Subclause 21D(2A) would ensure that Parts 6 (workplace inspectors) and 14 (compliance) of the Act apply to the preserved redundancy provisions that were initially included in a preserved individual State agreement, as if they were a preserved individual State agreement in operation.

156. Note that subclauses 20(3) and 20(4) of Schedule 8 to the Act provide that a preserved individual State agreement should be treated as if it is an AWA in relation to workplace inspectors and enforcement. The effect of subclause 21D(2A) therefore, is that Parts 6 and 14 of

the Act apply to preserved redundancy provisions which were initially included in a preserved individual State agreement, as if the redundancy provisions were an AWA in operation.

21A Preservation of redundancy provisions in preserved collective State agreements in certain circumstances

157. Proposed subclause 21A(1) would provide that the section applies if a preserved collective State agreement is terminated by the AIRC, on application by an employer who is bound by the agreement. The section would only apply when the AIRC terminates an agreement where it is satisfied that it is not contrary to the public interest to do so, in accordance with subsection 170MH(3) of the pre-reform WR Act.

158. This means that redundancy provisions will only be preserved by clause 21A if the PSA is terminated under subsection 170MH(3) on application by an employer. Therefore, redundancy provisions will not continue to operate after a PSA has been terminated, for example, where a valid majority of employees approve the termination under section 170MG of the pre-reform WR Act.

159. The proposed note to subclause 21A(1) would inform the reader that subsection 170MH(3) of the pre-reform Act operates in relation to preserved collective State agreements because of subclause 21(2) of Schedule 8 to the Act and paragraph 2(1)(k) of Schedule 7. Subclause 21(2) provides that a preserved collective State agreement can only be terminated in the same way a CA could have been terminated under the pre-reform WR Act.

160. Subclause 21A(2) would provide that any party that was bound by the preserved collective State agreement just before it was terminated will continue to be bound by any redundancy provision that was included in the agreement. This means that an employer, employee or an organisation of employees may continue to be bound by redundancy provisions included in the preserved collective State agreement despite the agreement ceasing to be in operation because of the termination.

161. The redundancy provisions would have effect as if they are included in a preserved collective State agreement that is still operating – that is, the provisions can be enforced as if they were still included in an instrument. This means, for example, the provisions can be enforced by an employee who was bound by them immediately before the employee was terminated on the grounds of genuine operational requirements.

162. Subclause 21A(3) would deal with the interaction of preserved redundancy provisions with other instruments that may also apply to the parties. Relevantly, a preserved redundancy provision will override any other redundancy provision included in any other instrument that may have effect. Instrument is a defined term for the purposes of clause 21A.

163. However, this interaction rule operates subject to subclause 21A(4).

164. Subclause 21A(4) provides that a party ceases to be bound by the redundancy provisions in relation to an employee who is also bound by the redundancy provision if one of the following occurs, whichever occurs first:

- the end of the period of 12 months from the time the preserved collective State agreement was terminated;
- the employee is no longer employed by the employer; or

- a new workplace agreement comes into operation in relation to the employee and employer.

165. The intention is that the parties will continue to be bound by a preserved redundancy provision for a maximum period of 12 months, unless the employee ceases employment with the employer or a new workplace agreement comes into operation.

166. Subclause 21A(5) would provide definitions of ‘instrument’ and ‘redundancy’ for the purposes of clause 21A.

167. ‘Instrument’ means:

- a pre-reform certified agreement – as defined in clause 1 of Schedule 7 to the WR Act;
- a notional agreement preserving State awards – as defined in clause 1 of Schedule 8 to the WR Act;
- an award – as defined in section 4 of the WR Act.

168. ‘Redundancy provision’ means any provision, including incidental and machinery provisions, that are about redundancy pay to the extent that the provision relates to a termination of employment at the initiative of the employer on the grounds of operational requirements or because the employer is insolvent.

169. This means that clause 21A may operate to preserve a broad range of redundancy provisions which relate to a termination of employment, for example clauses that deal with redundancy pay where:

- an employer arranges suitable alternative employment for an employee;
- an employer is unable to meet its redundancy pay obligations;
- there is a transmission of business from the employer to a new employer.

170. However, clause 21A would not operate to preserve a redundancy pay provision which related to, for example, entitlements payable on resignation of employment by an employee.

21B Notification of preservation of redundancy provisions in preserved collective State agreements

171. Proposed clause 21B would create notification obligations for the AIRC in certain circumstances.

172. Subclause 21B(1) would provide that notification obligations only arise where redundancy provisions have been preserved under clause 21A.

173. Subclause 21B(2) would ensure that where the AIRC makes an order terminating a preserved collective State agreement under subsection 170MH(3) of the pre-reform WR Act that a copy of that order is given to an employer and any organisation of employees who will be bound by the redundancy provisions.

174. Subclause 21B(3) would set out what must be included in the AIRC’s order.

175. The order must:

- identify any redundancy provision or provisions in the preserved collective State agreement that will continue to operate after the agreement is terminated;
- explain that the parties bound by the preserved collective State agreement will continue to be bound by the preserved redundancy provision or provisions;
- specify the date that is 12 months from the time the order terminating the agreement takes effect;
- explain that the parties will remain bound by the preserved redundancy provision or provisions until that date, or an earlier date in accordance with subclause 21A(4). (Subclause 21A(4) outlines when parties will stop being bound by preserved redundancy clauses in relation to an employee).

176. The intention of clause 21B is to ensure that parties bound by the preserved redundancy clauses are informed of their continuing rights and obligations in relation to redundancy pay.

21C Employer must notify employees of preserved redundancy provisions in preserved collective State agreements

177. Proposed clause 21C would create notification obligations for an employer bound by a preserved collective State agreement in certain circumstances.

178. Subclause 21C(1) would provide that an employer who has received a copy of an order terminating a preserved collective State agreement must take reasonable steps to ensure that all employees that were bound by the agreement just before it was terminated by the AIRC are given a copy of the notice. The employer must do so within 21 days of receiving the copy.

179. Subclause 21C(2) would provide that subclause (1) is a civil remedy provision.

180. The note to subclause 21C(2) would indicate that Division 3 of Part 14 of the WR Act contains other provisions about civil remedies which may be relevant.

181. Subclause 21C(3) would provide that the Court may order a person who has contravened subclause (1) to pay a pecuniary penalty.

182. The note to subclause 21C(3) would indicate that Division 3 of Part 14 of the WR Act contains other provisions about civil remedies which may be relevant.

183. Subclause 21C(4) would provide that the penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in other cases, eg for an individual.

184. Subclause 21C(5) would deal with who can make an application for a civil remedy order in relation to the employer's obligation under subclause (1) to give employees a copy of the AIRC's order.

185. Relevantly, an employee or an organisation of employees that was bound by the preserved collective State agreement just before it was terminated can apply for an order. Additionally, an organisation of employees that is entitled, under its eligibility rules to represent the industrial interests of an employee bound by the preserved collective State agreement, has at least one

member employed by the employer, and that has been requested to do so by the employee, may also apply. Finally, a workplace inspector also has standing to apply for an order under this subclause.

21D Preservation of redundancy provisions in preserved individual State agreements certain circumstances

186. Proposed subclause 21D(1) would provide that the section applies if a preserved individual State agreement is terminated by the AIRC, on application by an employer who is bound by the agreement. The section would only apply when the AIRC terminates an agreement where it is satisfied that it is not contrary to the public interest to do so, in accordance with subsection 170VM(3) of the pre-reform WR Act.

187. This means that redundancy provisions that are in a preserved individual State agreement will only be preserved by clause 21D if the preserved individual State agreement is terminated under subsection 170VM(3) on application by an employer.

188. Therefore, redundancy provisions will not continue to operate after a preserved individual State agreement has been terminated, for example, because the employer and employee bound by the agreement agree to terminate the agreement in writing pursuant to subsections 170VM(1) and (2) of the pre-reform WR Act.

189. The proposed note at the end of subclause (1) would inform the reader that subsection 170VM(3) of the pre-reform WR Act operates because of subclause 21D(3) of Schedule 8 and paragraph 17(1)(c) of Schedule 7.

190. Subclause 21D(2) would provide that the employer and employee that were bound by the preserved individual State agreement just before it was terminated will continue to be bound by any redundancy provision or provisions that were included in the agreement despite the agreement ceasing to be in operation because of the termination.

191. The redundancy provisions will have effect as if they are included in a preserved individual State agreement that is still operating – that is, the provisions can be enforced as if they were still included in an instrument. This means, for example, the provisions can be enforced by an employee who was bound by them immediately before the employee was terminated on the grounds of genuine operational requirements.

192. Subclause 21D(3) would deal with the interaction of preserved redundancy provisions with other instruments that may also apply to the employer and employee. Relevantly, a preserved redundancy provision will override any other redundancy provision included in any other instrument that may have effect. ‘Instrument’ is a defined term for the purposes of clause 21D.

193. However, this interaction rule operates subject to subclause 21D(4).

194. Subclause 21D(4) provides that an employer ceases to be bound by the redundancy provisions in relation to an employee who is also bound by the redundancy provision if one of the following occurs, whichever occurs first:

- the end of the period of 12 months from the time the preserved individual State agreement was terminated;
- the employee is no longer employed by the employer; or

- a new workplace agreement comes into operation in relation to the employee and employer.

195. The intention is that the parties will continue to be bound by a preserved redundancy provision for a maximum period of 12 months, unless the employee ceases employment with the employer, or a new workplace agreement comes into operation.

196. Subclause 21D(5) would provide definitions of ‘instrument’ and ‘redundancy provision’ for the purposes of clause 21D.

197. ‘Instrument’ means:

- a pre-reform certified agreement – as defined in clause 1 of Schedule 7 to the WR Act;
- a notional agreement preserving State awards – as defined in clause 1 of Schedule 8 to the WR Act;
- an award – as defined in clause 4 of the WR Act.

198. ‘Redundancy provision’ means any provision, including incidental and machinery provisions that are about redundancy pay to the extent that the provision relates to redundancy pay in relation to a termination of employment at the initiative of the employer on the grounds of operational requirements or because the employer is insolvent.

199. This means that clause 21D may operate to preserve a broad range of redundancy provisions which relate to a termination of employment, for example clauses that deal with redundancy pay where:

- an employer arranges suitable alternative employment for an employee;
- an employer is unable to meet its redundancy pay obligations;
- there is a transmission of business from the employer to a new employer.

200. However, clause 21D would not operate to preserve a redundancy pay provision which related to, for example, entitlements payable on resignation of employment by an employee.

21E Notification of preservation of redundancy provisions

201. Proposed clause 21E would create notification obligations for the AIRC in certain circumstances.

202. Subclause 21E(1) would provide that notification obligations only arise where redundancy provisions have been preserved under clause 21D.

203. Subclause 21E(2) would affect the operation of subsection 170VM(4) of the pre-reform WR Act. Currently, subsection 170VM(4) provides that the AIRC must issue a copy of its determination terminating a preserved individual State agreement to the parties bound by the agreement and to the Employment Advocate.

204. Subclause 21E(2) would ensure that the determination:

- identifies any redundancy provision or provisions in the preserved collective State agreement that will continue to operate after the agreement is terminated;
- explains that the employer and employee will continue to be bound by the preserved redundancy provision or provisions;
- specify the date that is 12 months from the time the order terminating the agreement takes effect;
- explain that the employer and employee will remain bound by the preserved redundancy provision or provisions until that date, or an earlier date in accordance with subclause 21D(4). (Subclause 21D(4) outlines when parties will stop being bound by preserved redundancy clauses in relation to an employee).

205. The intention of clause 21E is to ensure that an employer and employee bound by the preserved redundancy clauses are informed of their continuing rights and obligations in relation to redundancy pay.

Item 23 – After Part 5 of Schedule 9

206. This item would insert a new Part 5A into Schedule 9 to the WR Act to deal with the transmission of preserved redundancy provisions which were initially included in a pre-reform AWA, a pre-reform CA or a PSA, where there is a transmission of business between an old employer and a new employer.

207. It is intended that the transfer of preserved redundancy provisions in a transmission of business are dealt with similarly to other instruments in Schedule 9 to the WR Act. Therefore, the definition and application provisions in Parts 1 and 2 of Schedule 9 to the WR Act also apply, where relevant, to Part 5A.

Clause 27A Transmission of preserved redundancy provisions

208. New subclause 27A(1) would provide that a new employer is bound by a redundancy provision in relation to a transferring employee, if immediately before the time of transmission the old employer and the employee were bound by a preserved redundancy provision under clauses 6A or 20A of Schedule 7, or clauses 21A or 21D of Schedule 8, or under a previous application of subclause 27A(1). This means that a new employer will not be bound by a preserved redundancy provision if it does not employ any transferring employees.

209. The note to subclause 27A(1) would direct the reader to the new employer's notification obligations in relation to transferring employees that are set out in clauses 29A and 29B.

210. New subclause 27A(2) would provide that subject to subclause (3), the transferred redundancy provision will prevail over any other instrument that might apply to the transferred employee, to the extent of any inconsistency.

211. New subclause 27A(3) would provide that a new employer and a transferring employee will remain bound by a preserved redundancy provision until one of the following occurs, whichever occurs first:

- the end of the period of 12 months from the time that the agreement that initially contained the redundancy provisions was terminated. This means that the date that the redundancy

provisions cease to apply to the new employer is the same date that the provisions would have ceased to apply to the old employer. The intention is that the new employer's obligations with respect to the redundancy provisions match the old employer's. The obligations do not start afresh on transmission.

- the transferring employee ceases to be employed by the new employer;
- the new employer and the transferring employee become bound by a new workplace agreement.

212. New subsection 27A(4) would provide that section 27A does not affect any rights or obligations of the old employer that may have arisen before the time of transmission.

213. This means, for example, that subclause 27A(1) will not operate to transfer liability for accrued employee entitlements to a new employer from an old employer. However, note that the redundancy provisions may provide that accrued entitlements become the responsibility of the new employer.

214. Subclause 27A(5) would define 'instrument' and 'redundancy provision' for the purposes of section 27A.

215. 'Instrument' means:

- a workplace agreement – as defined in section 4 of the WR Act;
- a pre-reform CA – as defined in clause 1 of Schedule 7 to the WR Act;
- a preserved State agreement – as defined in clause 1 of Schedule 8 to the WR Act;
- a notional agreement preserving State awards – as defined in clause 1 of Schedule 8 to the WR Act;
- an award – as defined in section 4 of the WR Act;
- a transitional award, as defined in clause 2 of Schedule 6 to the WR Act.

216. 'Redundancy provision' means any provision, including incidental and machinery provisions, that are about redundancy pay in relation to a termination of employment. The termination of employment must be at the initiative of the employer on the grounds of operational requirements or because the employer is insolvent.

Item 24 – After clause 29 of Schedule 9

217. This item would insert new sections 29A and 29B to create notification obligations for new employers in respect of transferred preserved redundancy provisions. The effect of the provisions would be to require the new employer to inform the transferring employee about the continued operation of the preserved redundancy provisions, and to lodge the relevant notice with the Employment Advocate.

29A Informing transferring employees about transmission of preserved redundancy provisions

218. Proposed subclause 29A(1) would provide that clause 29A applies if an employer is bound by one or more transferred preserved redundancy provisions under clause 27A.

219. Subclause 29A(2) would provide that the new employer must take reasonable steps to give a transferring employee written notice that complies with subclause (3) within 28 days of the employee commencing employment with the new employer.

220. The proposed note would indicate that subclause 29A(2) is a civil remedy provision. The note would also direct the reader to clause 31 which deals with civil penalties for the purposes of Schedule 9 to the WR Act.

221. Subclause 29A(3) would set out what the written notice must contain.

222. The notice must:

- identify the redundancy provision or provisions that have transferred to the new employer as a result of the transmission of business;
- state that the new employer is bound by those transferred redundancy provision or provisions as if they were the old employer;
- provide the date which is 12 months after the time that the agreement that initially included the redundancy provision or provisions was terminated; and
- provide that the new employer will be bound by the transferred redundancy provisions as if they were part of an agreement until the date which is 12 months after the time that the agreement that initially included the redundancy provision or provisions was terminated, or alternatively, that the new employer will be bound until an earlier date in accordance subclause 27A(3). (Subclause 27A(3) deals with the time that a new employer and transferring employee are bound by transferring redundancy provisions).

223. Subclause 29A(4) would have the effect of relieving the new employer from the notification obligations outlined in subclause 29A(2) if the new employer and the transferring employee make a new workplace agreement within 14 days of the time of transmission.

224. The reason for removing the notification requirements in this situation is that the preserved redundancy clauses would cease to operate soon after the time of transmission, making notification redundant.

29B Lodging copy of notice about preserved redundancy provisions with Employment Advocate

225. Proposed subclause 29B(1) would provide that an employer must lodge a copy of any notice given to a transferring employee under clause 29A with the Employment Advocate.

226. Proposed Note 1 would indicate that clause 29B is a civil remedy provision. The note would also direct the reader to clause 31 which deals with civil penalties for the purposes of Schedule 9 to the WR Act.

227. Note 2 would refer to obligations imposed by sections 137.1 and 137.2 of the *Criminal Code Act 1995* in relation to the provision of information of documents.

228. Subclause 29B(2) would deal with the lodgement of the notice for both redundancy provisions that were initially included in a pre-reform AWA or preserved individual State agreement or a pre-reform CA or preserved State collective agreement.

229. For a pre-reform AWA or preserved individual State agreement, notice must be lodged with the Employment Advocate within 14 days after the day on which notice is given by an employer to an employee under section 29A.

230. For a pre-reform CA or preserved State collective agreement, notice must be lodged with the Employment Advocate within 14 days of the earliest day on which notice was given by the employer to an employee under section 29A.

231. New subclause 29B(3) would provide that a notice is lodged in accordance with this section only once it is actually received by the Employment Advocate.

232. The proposed note at the end of subclause 29B(3) would explain that subclause 29B(3) departs from section 29 of the *Acts Interpretation Act 1901* (AI Act). Section 29 of the AI Act provides that service of a document is normally effected when it is 'properly prepaid, addressed and posted'.

Item 25 – Subclause 30(1) of Schedule 9

Item 26 – Subclause 30(2) of Schedule 9

Item 27 – Subclause 30(3) of Schedule 9

233. These items would amend subclause 30(1) of Schedule 9 to the WR Act so that it also applies where a lodgement of notice occurs under clause 29B.

234. Clause 30 deals with the issuing of receipts by the Employment Advocate in relation to lodgement of notifications.

Item 28 – At the end of subclause 31(1) of Schedule 9

235. This item would amend subclause 31(1) of Schedule 9 to the WR Act to ensure that notification obligations created by subclauses 29A(2) and 29B(1) are civil remedy provisions. (Subclause 31(1) sets out the clauses in Part 6 that are civil remedy provisions).

Item 29 – Subclause 31(4) of Schedule 9

236. This item would amend subclause 31(4) of Schedule 9 to the WR Act to ensure that the provisions which state the persons that can apply for an order in relation to a civil remedy provision also apply with respect to a preserved redundancy provision that was previously included in a pre-reform AWA, pre-reform CA or PSA.

237. In particular, this item would amend subclause 31(4) to ensure that an application for an order may be made by those persons listed in Items 1, 2 and 4 in relation to a preserved redundancy provision that was initially included in a pre-reform AWA, pre-reform CA, or a PSA.

Item 30 – Subclause 31(4) of Schedule 9 (table items 2 and 4)

238. This amendment would amend paragraph (b) in table Item 2 and paragraph (b) in table item 4 in order to ensure that the clause refers also to organisations of employees that are bound by redundancy provisions. This amendment will enable an organisation of employees that is bound by the redundancy provision to make an application for an order under subclause 31(4).

Item 31 – Application

239. This application provision would provide that the amendments made by items 1 – 30 of this Schedule only apply to a workplace agreement, pre-reform AWA, pre-reform CA, or PSA that is terminated after this item commences.

Schedule 4 – Amendments relating to stand downs

Amendment 11

240. Item 11 inserts a new Schedule of amendments relating to stand downs.

Workplace Relations Act 1996

Item 1 Subsection 4(1)

241. Subsection 4(1) would insert a definition for an authorised stand down as provided for in proposed subsection 691B(1).

Item 2 – Section 13(1) (after table item 6)

242. Subsection 13(1) of the WR Act lists provisions of the WR Act that have extraterritorial application. Item 2 would add a reference to the proposed section 691C to the list in subsection 13(1).

Item 3 – At the end of paragraph 183(1)(b)

243. Proposed subparagraph 183(1)(b)(iv) is an amendment consequential on proposed section 691A. The proposed subparagraph makes it clear that any period of stand down does not count as an employee's guaranteed hours, for the purposes of the wage guarantee under the Standard as long as the stand down of the employee is an authorised stand down, as defined under the WR Act.

Item 4 – At the end of Part 12

New Division 7 – Stand downs

244. Item 3 would insert a new Division 7 in Part 12 of the WR Act, dealing with stand downs of employees.

New section 691A

245. Proposed section 691A provides a default right for an employer to stand down an employee, if the employee could not be usefully employed because of particular circumstances being:

- any strike (which would include a strike by a third party which affects the employer);
- breakdown of machinery; or
- any stoppage of work for any cause for which the employer cannot reasonably be held responsible (this would include, but is not limited, to natural disasters).

246. Under proposed subsection 691A(1), the stand down right would apply where there is no contract of employment or industrial instrument that provides for a stand down for the relevant circumstance. Alternatively, the right would apply where the provision for a stand down in a contract of employment or industrial instrument requires third party authorisation. Under proposed section 691A(5) a provision for third party authorisation has no effect.

247. If proposed subsection 691A(1) applies, under proposed section 691(2), an employer may deduct payment, otherwise payable to an employee, during the stand down period.

248. Proposed subsections 691A(3) – (4) ensure the maintenance of entitlements, other than payment, that would otherwise have accrued to an employee who is stood down. Accordingly, proposed subsection 691A(3) would ensure that the period the employee is stood down does not break the employee’s continuity of service. Proposed section 691(4) would ensure that the period of stand down counts as service for all purposes. Proposed subsections 691A(3) and (4) are in similar terms to existing subsection 238(1) and (2) (in relation to annual leave), and subsection 260(1) and (2) of the WR Act (in relation to paid personal leave). This means that an employee that is stood down continues to accrue, for example, annual and personal/carer’s leave, at least to the extent provided under the Part 7 of the WR Act.

249. Proposed subsection 691A(6) would define the term ‘industrial instrument’ for the purpose of proposed section 691A.

New section 691B

250. Proposed section 691B provides that an employer must not stand down an employee unless the stand down is authorised under subsection 691A(2) or an applicable provision of an industrial instrument (as defined) or a contract of employment. This proposed amendment ensures that an employee will only be stood down where it is permissible to do so under legislation, an industrial instrument or a contract of employment. An employer who chooses to stand down a employee where there is no authority to do so will be subject to a civil penalty under Part 14 of the WR Act (see Item 5 of this Schedule). The employer may also breach an applicable contract of employment or industrial agreement, which reflects current law.

251. The penalties that may be imposed under Part 14 are consistent with the penalties that apply in relation to the breaches of the meal breaks and public holidays provisions.

252. Proposed subsection 691B(2) would provide that the model dispute resolution process applies to any dispute arising under this section. The proposed provision makes it clear that section 697 of the WR Act does not apply.

253. Proposed subsection 691B(3) also provides that a employee that has been stood down or a workplace inspector can seek an injunction from the Federal Court of Australia or the Federal Magistrates Court to require an employer to not stand down employees where it is not authorised. For example, where the employer cannot demonstrate that employees cannot be usefully employed, or where it is unclear that the strike, breakdown or stoppage is responsible for the lack of work.

254. This is consistent with injunctive relief that is already available under the WR Act in relation to public holiday entitlements (as per section 616 of the WR Act) as well as in relation to the Australian Fair Pay and Conditions Standard (as per Division 7 of Part 7 of the WR Act).

New section 691C

255. Proposed subsection 691C(1) would extend the application of proposed Division 7 of Part 12, and the rest of the WR Act as it relates to that Division 7, to employees outside Australia and their employers provided they meet the requirements of this section. The legislative note to subsection 691C(1) clarifies that, for the purposes of section 691C Australia includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea.

256. Under proposed subsection 691C(2), in Australia's exclusive economic zone, the stand down provision would apply in respect of employees of Australian employers (defined in subsection 4(1)) unless regulations were made to provide that the provision does not apply. Regulations could also extend the operation of the provision to employees in the exclusive economic zone.

257. Under proposed subsection 691C(3), the stand down provision would only apply to employees in, on or over Australia's continental shelf beyond the exclusive economic zone, if regulations prescribed the part of the continental shelf where the employee was located and the employee met the requirements prescribed by the regulations.

258. Under proposed subsection 691C(4), the stand down provision would apply outside Australia and the exclusive economic zone and continental shelf, to Australian-based employees of Australian employers (as those expressions would be defined in subsection 4(1)). Regulations could be made to prescribe an employee outside Australia and the exclusive economic zone and continental shelf as an employee to whom the provision does not apply.

259. Subsection 691C(5) would provide a specific definition of this WR Act for the purposes of section 691C. This is because the definition of this WR Act in subsection 4(1) (which would otherwise apply) does not include the Registration and Accountability of Organisations Schedule and regulations made under it. The specific definition would ensure that the extraterritorial extension under subsection 170AD(1) would apply to that Schedule and those regulations so far as they relate to Division 7 of Part 12.

260. In making regulations under proposed subsections 691C(2)-(4), account would be taken of Australia's international law obligations, including obligations in relation to foreign-flagged ships and foreign registered aircraft.

Item 5 Section 717 (at the end of the definition of *applicable provision*)

261. Proposed section 717 is merely a technical amendment to extend the existing penalty provisions in Part 14 of the WR Act (which deals with compliance) to the prohibition of unauthorised stand downs.

262. The maximum penalty would be 60 penalty units for an individual or 300 penalty units for a body corporate.

Item 6 Subsection 718(1) (at the end of the table)

263. The proposed subsection 718(1) merely adds to the table the persons who may apply for a penalty or other remedy under Division 2 in relation to a breach of the stand down provisions such as an employee to whom proposed subsection 691B(1) applies and an inspector.

Item 7 Subsection 718(2)

264. Proposed subsection 718(2) is a technical amendment to apply penalty provisions to an employee who has been stood down and it is an unauthorised stand down.

Item 8 – After Division 7A of Part 21

Division 7A- Stand downs

265. Item 8 would insert a new division 7A of Part 21 of the WR Act. Part 21 generally extends and includes additional provisions in the WR Act as a result of the referral of certain matters to the Parliament of the Commonwealth by the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria (the Victorian reference Act).

266. New section 880A in proposed Division 7A of Part 21 would extend the application of proposed Division 7 of Part 12 to cover employers and the employment of any employee in Victoria, to whom the Act applies because of the Victorian reference Act.

Item 9 – Section 891

267. Item 9 would repeal existing section 891, which provides for a stand down provision in Victorian employment agreements. The repeal of section 891 is consequent on the new stand down provision in section 691A and its operation in Victoria pursuant to section 880A.

Items 10, 11 and 12

268. Items 10, 11 and 12 would respectively amend paragraph 89(1)(a), 95(a) and 102(a) of Part 7 of Schedule 6 to the Act. Part 7 relates to transitional arrangements for Victorian employers and employees bound by federal awards.

269. The proposed amendments would ensure that the stand down right in proposed section 691A would apply to a common rule, Victorian reference award and a transitional award in Victoria (other than a Victorian reference award), as if those instruments were an award mentioned in section 691A.

Schedule 5 – Amendments relating to the Australian Fair Pay and Conditions Standard

270. This amendment would insert Schedule 5 into the Bill. The items in this Schedule would amend Part 7 of the Act which establishes the Standard.

Item 1 – Subsection 189(1)

271. Item 1 would repeal and replace subsection 189(1) to modify the guarantee of frequency of payment for employees whose employment is covered by an Australian Pay and Classification Scale (APCS) that makes provision for their frequency of payment. The proposed amendment would provide that a frequency of payment provision in an APCS apply where the workplace agreement or contract of employment does not otherwise provide a frequency of payment in accordance with paragraphs (c) and (d).

272. Proposed paragraph 189(1)(c) would provide that if a workplace agreement that covers the employee's employment and guarantees an employee frequency of payment in respect of periods of one month or less the employer must comply with such provisions.

273. If paragraph 189(1)(c) did not apply, then proposed paragraph 189(1)(d) would provide that if a written contract of employment covers the employee's employment and guarantees the employee frequency of payment in respect of periods of one month or less the employer must comply with such provisions.

274. This means that the frequency of payment provisions in an APCS would only apply if a written contract of employment or workplace agreement provides for a frequency of payment of more than one month.

Item 2 – After subsection 226(1)

275. This amendment is a technical amendment to clarify the circumstances in which an employer can be held to have contravened subsection 226(1), which provides that an employee must not be required or requested to work more than a certain number of hours in a week. Proposed subsection 226(1A) would make it clear that a breach of subsection 226(1) by an employer can only occur if the employee is required or requested to work additional hours and the employee actually works those additional hours. An employer cannot be held to have breached subsection 226(1) for merely requesting an employee to work more than 38 hours or reasonable additional hours.

Item 3 – Section 228

Item 4 – Section 228 (at the end of the definition of shift worker)

Item 5 – At the end of section 228

276. These items would amend section 228 of Division 4 of Part 7 of the Act to enable regulations to be made to exclude shift workers in a specified class, or classes, from the entitlement under subsection 232(3) to accrue an additional week of paid annual leave each year.

277. Under section 228 of the Act, a shift worker is defined as an employee who:

- works in a business in which shifts are continuously rostered 24 hours a day for seven days a week:
- is regularly rostered to work those shifts: and
- regularly works on Sundays and public holidays.

278. The definition of ‘shift worker’ is broad and may extend the minimum entitlement to an additional week of annual leave for employees in industries who did not previously have such entitlements.

279. The proposed amendment would enable the Regulations to more precisely target the additional annual leave entitlement (proposed subsection 228(2)).

280. Proposed subsection 228(3) would provide (without limiting scope of the regulation-making power) that a specified class may be described by reference to a particular industry, particular kinds of work (for example, by occupation), a particular type of employment or a particular type of shift work.

281. Item 3 is a minor technical amendment consequential on item 5.

282. Item 4 would insert a note after the definition of shift worker in section 228, cross-referencing new subsection 228(2).

Item 6 – Paragraph 229(1)(a)

283. This item would repeal and replace paragraph 229(1)(a) of Part 7 of the Act. This provision forms the basis for the calculation of annual leave entitlements under the Standard for employees who work specified hours.

284. Under the Act, employees (other than casuals) are entitled to accrue annual leave on the basis of their nominal hours worked for each completed four week period of continuous service (subsection 232(2)). Nominal hours worked is defined in section 229 of the Act. Provision is made for employee whose hours of work are specified, unspecified, or variable.

285. For employees who are employed to work a specified number of hours per week, nominal hours worked is defined as the employee’s specified hours less hours of leave that do not count as service and/or hours of industrial action (subsection 229(1)).

- An employee’s weekly hours of work (and thus their specified hours) may be averaged over a period of up to 12 months by written agreement between the employer and employee under subparagraph 226(1)(a)(ii) of the Act.

286. The term specified hours is not defined in the Act, but can be taken to mean those hours identified or set down in advance as the hours normally to be worked by the employee. Contrary to the intention of the legislation, this is likely to include regular overtime.

287. Accordingly, under the Act as currently drafted, an employee who is regularly required to work more than 38 hours per week would be entitled to accrue and be paid leave on the basis of both ordinary and overtime hours. This is an unintended consequence of the way the accrual rule was drafted.

288. Under proposed new subparagraph 229(1)(a), the base number of weekly hours for calculating annual leave would be the employee's specified hours, up to a maximum of 38 hours per week. The effect of the amendment would be that, under the Standard, an employee would not accrue annual leave in respect of hours above 38 hours per week. This would be broadly consistent with pre-reform arrangements under awards and agreements, in which leave generally accrued on the basis of ordinary time hours (that is, overtime hours were not included).

289. The proposed amendment would only affect the minimum entitlement under the Standard for employees whose specified hours are more than 38 hours per week. It would remain open for employers and employees to agree to more favourable arrangements in workplace agreements or contracts of employment.

290. The amendment would not affect leave accrual for employees whose specified hours are less than 38 hours per week. Nor would it affect employees who are not engaged to work specified hours, as the number of weekly hours that may form part of the annual leave accrual calculation for these employees is already set at the lesser of 38 hours, or the actual hours worked by the employee (subsection 229(4)).

291. The proposed amendment would not affect arrangements for annual leave accrual in pre-reform certified agreements (CAs) and AWAs. Further, where an award provides a more generous annual entitlement to annual leave than the Standard, the award entitlement applies in full (including any related administrative arrangements, such as accrual rules) to the exclusion of the Standard.

Item 7 – After subsection 229(4)

Item 8 – Subsection 229(4) (note 3)

292. Item 7 would insert a new subsection 229(4A) in Division 4 of Part 7 of the Workplace Relations Act 1996 (the Act), which would clarify that periods of authorised unpaid leave and unauthorised leave do not count as service for the purposes of annual leave accrual under the Standard, unless specific provision is made for this to occur.

293. Under the Standard, annual leave accrues for each completed four week period of continuous service on the basis of 1/13th of an employee's nominal hours worked (subsection 232(2)). An employee's nominal hours worked exclude hours of leave that do not count as service, and periods of industrial action.

294. Before the commencement of the Work Choices Act Amendments, unpaid leave did not count as service unless provided for by an award, workplace agreement, or contract of employment. The intention was to retain this under the Standard. However, there has been some confusion as to whether annual leave under the Standard accrues while an employee is on leave without pay.

295. This amendment clarifies the original intention by expressly providing that the types of leave that count as service may be governed by the Act, or by an applicable contract, workplace agreement, or award. The Act only deals with the 'service status' of the types of leave to which an employee is entitled under the Standard. The Act makes clear that unpaid carer's leave and unpaid parental leave do not count as service (the effect of this being that leave does not accrue in respect of such periods), but in other cases whether unpaid leave counts as service will depend on the terms of an applicable contract, agreement, or award.

296. New subparagraph 229(4A) would make clear that periods of authorised unpaid leave and unauthorised leave do not count as service for the purposes of calculating an employee's nominal hours worked (under subparagraphs 229(1)(b)(i) and 229(4)(a)(ii)), unless otherwise expressly provided by:

- a term or condition of the employee's employment;
- a Commonwealth, State or Territory law or instrument; or
- the regulations.

297. The proposed note under subsection 229(4A) would identify the sections of the Act that deal with the service status of the types of leave an employee is entitled to under the Standard.

Illustrative example

For the past four weeks Amy worked 38 hours in each of weeks 1, 2 and 4, and took authorised leave without pay in week 3. Amy's absence in week 3 does not break her continuity of service (that is, it does not interrupt the four week period over which leave accrues). However, Amy would not accrue annual leave in respect of week 3, as unpaid leave does not count as service for the purpose of determining an employee's nominal hours worked.

298. Item 8 is a minor technical amendment consequential to item 7. This item would repeal note (3) at the end of section 229. This note is no longer necessary in light of the proposed new note under section 229(4A).

Item 9 – Paragraph 233(1)(c)

Item 10 – Subsection 235(1)

Item 11 – Subsection 235(2)

299. Section 235 currently provides that, under the Standard, an employee on annual leave is entitled to be paid the employee's basic periodic rate of pay applying at the time immediately before the period of leave begins.

300. Item 10 is a technical amendment to subsection 235(1) of the Act. The amendment would clarify that an employee on annual leave is entitled to be paid for each hour (or part hour) of leave taken at his or her basic periodic rate of pay expressed as an hourly rate (reflecting the fact that this is how annual leave accrues under the Standard).

- The basic periodic rate of pay under section 235 refers to the employee's actual basic periodic rate of pay - which may be their guaranteed basic periodic rate of pay (the rate that is payable under an Australian Pay and Classification Scale), or, if an employee is bound by a contract of employment or workplace agreement, to the rate specified in that instrument.

Illustrative Example

Bec is employed by Clifford's Crazy Cricket Store Pty Ltd.

Under her contract of employment, she is entitled to be paid \$25 per hour, including \$5 per hour in allowances. However, under an applicable pay scale, Bec is guaranteed \$15 per hour (her guaranteed basic periodic rate of pay).

Under the annual leave payment rule in subsection 233(1), Bec is entitled to be paid \$20 per hour during the leave period.

301. The amendments made by items 9 and 11 are consequential on proposed item 10.

302. Item 9 would amend paragraph 233(1)(c) of the Act so that where an employee forgoes an amount of annual leave under section 233, the payment rate for the amount of leave forgone would be the employee's hourly basic periodic rate of pay.

303. Item 11 would amend subsection 235(2) to clarify that an employee whose employment is terminated is entitled to be paid for each hour (or part hour) of any untaken annual leave at his or her hourly basic periodic rate of pay.

Item 12 – At the end of section 236

304. This item would insert proposed new subsections 236(7) to 236(10) in Division 5 of Part 7 of the Act. These provisions would set out new administrative rules about the taking of annual leave for employees affected by the proposed amendment that would cap nominal hours worked for the purposes of annual leave accrual at 38 hours per week (see item 6).

305. Proposed subsection 236(7) would apply to employees affected by the cap on the number of hours that may form part of the annual leave accrual calculation under new subparagraph 229(1)(a)(ii) – that is, it applies to employees whose nominal hours worked would otherwise (in the absence of item 6) be more than 38.

306. For employees who work 38 hours per week or less, the amount of leave taken will generally correspond to the hours that count towards determining the employee's nominal hours worked. However, where an employee who works more than 38 hours per week takes annual leave, the number of hours leave to which the employee is entitled will be affected as a result of capping leave accrual under the proposed amendment in item 6.

307. To ensure that an employee affected by item 6 remains entitled to four full weeks of annual leave, under proposed subsection 236(7), such an employee is entitled to be absent not only for the hours (or part hours) that count towards determining their nominal hours worked, but also for any other hours (or part hours) that the employee would otherwise have worked on that day. This additional time is not paid leave and is not deducted from the employee's leave balance.

308. Where the entitlement is not equivalent to the employee's nominal hours worked on that day (because leave is taken for only part of a day), the provision is not relevant and does not apply.

309. The amendment is necessary because, under the amendment proposed in item 6, an issue may arise as to the duration of days or weeks of annual leave an employee may take as a result of capping annual leave accrual at 38 hours per week.

310. Under the Act as currently drafted, an employee who works 40 hours per week (8 hours per day) accrues 160 hours of paid annual leave each year - the equivalent of 4 weeks at 40 hours each (assuming no deductions for periods of leave that do not count as service or industrial action). Under the proposed amendment under item 6, this employee would accrue 152 hours of paid annual leave each year - the equivalent of 3.8 weeks of 40 hours each.

311. This amendment would ensure that an employee affected by the proposed capping of leave in item 6 remains entitled to four full weeks of annual leave. That is, she would be entitled to paid annual leave for the hours that would count towards her nominal hours worked (152 hours), and to be absent for other hours that she would have worked during the period (8 hours).

312. The proposed amendment includes an example that illustrates the intended operation of subsection 236(7). For the purpose of the example, it is assumed that the additional 2 hours of work that the employee is required to work above 38 hours in a week are reasonable additional hours under paragraph 226(1)(b).

313. Proposed subsection 236(8) would make clear that any absence taken to be authorised under subsection 236(7) is not paid annual leave and does not count as service for the purpose of leave accrual under the Standard. However, such absence does not break an employee's continuity of service.

314. Proposed subsection 236(9) would provide for what constitutes a 'day' where a shift or other type of working arrangement is spread over two consecutive days. This would be achieved by effectively deeming a shift spread over two days to be a day, while the remaining parts of the day in which the shift falls would be taken not to be part of the day.

315. Proposed subsection 236(10) would enable regulations to be made for the purpose of determining:

- what hours in a day count towards an employee's weekly nominal hours worked; and
- what hours in a day would be hours in a day that an employee would otherwise work.

316. The purpose of the proposed regulation making power is to ensure that regulations can be made to ensure that the intended objectives of amendment can be achieved, and to address any unintended consequences.

317. This amendment would have no application for employees who work 38 hours per week or less. This is because these employees would not be affected by the amendment proposed in item 6.

Item 13 – Section 240

318. Item 13 is consequential to item 19, and would provide that 'basic periodic rate of pay' has the meaning given by section 178.

Item 14 – Paragraph 241(1)(a)

319. This item would repeal and replace paragraph 241(1)(a) in Part 7 of the Act. This provision forms the basis for the calculation of personal/carer's leave entitlements under the Standard.

320. This item would have the same effect in relation to personal/carer's leave as Item 6 would have in relation to annual leave. Under proposed new subparagraph 241(1)(a), the base number of weekly hours for calculating the personal/carer's leave entitlement of employees engaged for a specified number of hours would be the employee's specified hours, up to a maximum of 38 hours per week.

Item 15 – After subsection 241(4)

Item 16 – After subsection 241(4) (note 3)

321. Item 15 would insert a new subsection 241(4A) in Part 7 of the Act. This provision would clarify that periods of authorised unpaid leave and unauthorised leave do not count as service for the purposes of accrual of personal/carer's leave under the Standard.

322. Items 15 and 16 would have the same effect in relation to personal/carer's leave as Items 7 and 8 in relation to annual leave.

Item 17 – Section 243

323. Item 17 is consequential on the amendment proposed in item 19, and would enable regulations to be made prescribing the basic periodic rate for pay for piece rate employees. This proposed amendment is consistent with paragraph 231(a) of the Act, which provides that for the purpose of the annual leave payment rule, the regulations may prescribe a different definition of basic periodic rate of pay in relation to piece rate employees. Regulation 7.7A (Division 4, Part 7, Chapter 2) of the Workplace Relations Regulations 2006 was made under this provision and prescribes such a definition.

Item 18 – After section 245

324. This item would insert proposed new section 245A in Division 5 of Part 7 of the Act.

325. The proposed new section would enable an employee to request to cash out an amount of paid personal/carer's leave each year, provided that a minimum balance of at least 15 days leave remains available after cashing out (for full-time employees, pro rata for part-time employees).

- Under the Workplace Relations Regulations 2006 the ability to cash out personal/carer's leave is currently limited – the minimum entitlement to personal/carer's leave under the Standard cannot be cashed out, and only amounts of personal carer's leave above the Standard minimum entitlement can be cashed out.

326. The proposed amendment is intended to provide flexibility for employers and employees to manage personal/carer's leave balances in ways that suit their particular circumstances, while ensuring that a minimum amount of leave is available to an employee in the event of illness or injury.

327. Proposed new subsection 245A(1) would provide that cashing out is only available for employees who have been credited with more than the protected amount of paid personal/carer's leave.

328. The protected amount of personal/carer's leave would be no less than 3/52 of the nominal hours worked by the employee during the previous 12 months of service (or sequence of periods totalling 12 months of service) prior to the election to cash out being made (see proposed subsection 245A(3)). For an employee whose weekly nominal hours worked over a continuous period of 12 months service are 38 hours, the protected amount of personal/carer's leave would be 114 hours. This is equivalent to 15 days of personal/carer's leave.

329. Cashing out would be subject to a number of conditions under the proposed amendment (proposed subsection 245A(2)).

330. A workplace agreement would need to include a specific provision that entitles the employee to elect to cash out an amount of personal/carer's leave, and to be paid (within a reasonable period) an amount in lieu of the personal/carer's leave, at a rate that is no less than the employee's hourly basic periodic rate of pay (which means that leave would not be able to be cashed out at a 'discounted' rate).

331. An employee would need to make a separate written request to cash out personal/carer's leave that has been credited to the employee (it would not be possible to cash out leave in advance of it being credited), and the employer would need to agree before any cashing out occurs. An employer would be prohibited from requiring or pressuring an employee to cash out personal/carer's leave. These protections reflect the protections already provided for the cashing out of annual leave (section 233).

332. The note under subsection 245A(2) would make clear that if an employee cashes out an amount of paid personal/carer's leave, the employer is entitled to deduct the amount of leave forgone from the employee's credited leave balance.

333. The proposed amendment would not affect personal/carer's leave that accrued before the Standard applied to an employee (that is, on 27 March 2006, or on a later date, after the termination or replacement of a pre-reform AWA or CA). The arrangements that apply to this leave are as follows:

- It is possible for the parties to agree to cash out some or all of the employee's accrued pre-reform personal/carer's leave entitlement in a workplace agreement (regulation 2.23A of Chapter 7 of the Workplace Relations Regulations 2006 makes clear that the Standard does not apply to personal/carer's leave that accrued before the Standard applied to an employee, for a transitional period of five years. Such a provision in a workplace agreement is not prohibited content).
- For employees bound by an award, the rules set out in the pre-reform award continue to apply to pre-reform personal/carer's leave.
- Under clause 30 of Schedule 7 of the Act (as amended by item 41 of Schedule 6) the Standard does not apply to employees bound by a pre-reform CA or AWA. This means that the arrangements and rules for cashing out personal/carer's leave (if any) in that pre-reform agreement would continue to apply until the agreement is terminated or replaced.

Item 19 – Section 247

334. Section 247 currently provides that an employee who takes paid personal/carer's leave is to be paid at the rate the employee would reasonably have expected to be paid had the employee worked during the period of leave. The same payment rule applies in relation to compassionate leave (section 259) and to paid leave for pregnant employees in the event that transfer to a safe job is not possible (subsection 268(3)).

335. Under the existing payment rule for personal/carer's leave, an employee who takes leave is entitled to his or her basic rate of pay, as well as (for example) any allowances, overtime loadings and penalty rates that the employee could reasonably have expected to be paid had they worked during the period of leave. This is not consistent with arrangements in many pre-reform awards and agreements, in which leave is paid at the employee's ordinary rate of pay.

336. Item 19 would amend section 247 of the Act to change the payment rule for personal/carer's leave, so that an employee who takes this form of leave is entitled to be paid for each hour (or part hour) of leave at the employee's basic periodic rate of pay (expressed as an hourly rate) immediately before the period of leave begins. This is consistent with the payment arrangements for annual leave (as amended by item 10).

Item 20 – After section 247

337. This item would insert proposed new section 247A in Part 7 of the Act. This section would set out new administrative rules about the taking of personal/carer's leave, for employees affected by the proposed amendment that would cap personal/carer's leave accrual at 38 hours per week.

338. This item would have the same effect in relation to personal/carer's leave as item 12 would have in relation to annual leave.

339. Under proposed section 247A, an employee whose specified hours of work are more than 38 hours per week would be entitled to be absent from work for a full day on each occasion that she takes personal/carer's leave. For example, an employee who works 40 hours per week would be entitled to paid personal/carer's leave for the hours that would count towards her nominal hours worked on that day (7.6 hours), and to be absent for other hours that she would have worked during the period (0.4 hours).

Item 21 – Section 259

340. This item would have the same effect in relation to compassionate leave as item 19 would have in relation to personal/carer's leave.

341. Item 21 would amend the payment rule for compassionate leave in section 259, so that an employee who takes this form of leave is entitled to be paid for each hour (or part hour) of leave at the employee's basic periodic rate of pay (expressed as an hourly rate) immediately before the period of leave begins.

Item 22 – Section 262

Item 23 – At the end of section 262

Item 25 – Section 263 (definition of employee)

342. Item 23 would insert a new subsection 262(2) in Division 6 of Part 7 of the Act (which deals with the parental leave entitlement under the Standard). This new subsection would clarify that the parental leave entitlement under the Standard is intended to supplement, and not to override, entitlements under other Commonwealth legislation.

343. The proposed amendment is necessary to make clear that the parental leave provisions of the Act operate in conjunction with the *Maternity Leave (Commonwealth Employees) Act 1973*.

344. Items 22 and 25 are minor technical amendments consequential on item 23.

Item 24 – Section 263

Item 26 – Section 263

Item 27 – At the end of Subdivision A of Division 6 of Part 7

Item 29 – Subsection 268(3)

345. These items would have the same effect in relation to paid leave for pregnant employees for whom transfer to a safe job is not possible, as items 13, 17 and 19 would have in relation to personal/carer's leave.

346. Under subsection 268(2) of the Act, a pregnant employee who is entitled to maternity leave is eligible to be transferred to a safe job if she provides a medical certificate stating that she is fit to work, but is unable to continue in her present position due to risks associated with the pregnancy or position. If transferring the employee to a safe job is not reasonably practicable for the employer, the employee is entitled to paid leave during the period she is unable to continue in her present position as stated in the medical certificate or until the date of birth (whichever is earlier). Currently, an employee who takes this form of leave is entitled to be paid the amount she would reasonably have expected to be paid if she had worked during that period.

347. Item 29 would amend the payment rule for this form of leave, so that so that an employee is entitled to be paid for each hour (or part hour) of leave at the employee's basic periodic rate of pay (expressed as an hourly rate) immediately before the period of leave begins.

348. Items 24, 26 and 27 are consequential on proposed item 29.

349. Item 24 would provide that 'basic periodic rate of pay' has the meaning given by section 178. Item 26 would insert a definition of piece rate employee. Item 27 would insert a new proposed section 264A that would allow for regulations to be made prescribing a definition of basic periodic rate of pay for piece rate employees.

Item 28 – At the end of subsection 268(2)

Item 30 – After subsection 274(2)

350. The proposed amendments made by Items 30 and 28 are required to address an inconsistency in the application of the rules governing an employer's right to require an employee to commence unpaid maternity leave.

351. Under the Standard, an employee who continues to work within six weeks prior to the estimated date of birth can be asked by her employer to provide a medical certificate as to whether she is fit to work during that period. If the medical certificate indicates that the employee is not fit to work, the employer may require the employee to start maternity leave, which is unpaid under the Standard (subsection 274(2)).

352. Under subsection 268(2) of the Act, a pregnant employee who is entitled to maternity leave is eligible to be transferred to a safe job if she provides a medical certificate stating that she is fit to work, but is unable to continue in her present position due to risks associated with the pregnancy or position. Where transfer to a safe job is not practicable, an employee is entitled to take paid leave. However, in these circumstances there is no equivalent right for an employer to direct an employee to take unpaid maternity leave within six weeks before the expected date of birth, even though the employee may be unfit for any kind of work.

353. The proposed amendments made by items 30 and 28 would rectify this anomaly.

354. Item 30 would insert a new subsection 274(2A) in section 274 of the Act. The new provision would provide that if an employee takes paid leave in lieu of transfer to a safe job under subparagraphs 268(2)(b)(i) or (ii), an employer may, during the 6 weeks prior to the expected date of birth, request a medical certificate stating whether the employee is fit to work during that period. Under existing subsection 274(3), an employer may direct an employee to take unpaid leave if the medical certificate indicates that the employee is unfit for work.

355. Item 28 would insert a legislative note under subsection 268(2) of the Act cross-referencing proposed subparagraph 274(2A).

Item 31 – At the end of subsection 318(3)

Item 32 – After paragraph 2(1)(g) of Schedule 2

Item 33 – After paragraph 3(1)(c) of Schedule 2

Item 34 – After paragraph 4(1)(c) of Schedule 2

356. Section 689 of the Act extends the parental leave provisions of the Standard to all employees, not only those of constitutional corporations and other employers who fall within the scope of subsection 6(1) of the Act. This 'extended' operation of the parental leave provisions is underpinned by the external affairs power of the Constitution, as these provisions give effect to international conventions.

357. Under Division 7 of Part 7 of the Act, civil remedies are available for contravention of the Standard by employers. In general, civil remedies are constitutionally limited to contraventions of the Standard by employers within the meaning of subsection 6(1) of the Act. However,

subsection 318(3) extends the availability of civil remedies to breaches of the parental leave provisions as they apply because of section 689.

358. Item 31 would insert a note at the end of subsection 318(3) of Part 7, which would confirm that the references to employer, employee and employment have their ordinary meaning for the purposes of that subsection.

359. Schedule 2 to the Act makes extra provision for definitions used in the Act. Clauses 2, 3, and 4 of Schedule 2 provide a list of references in the Act to the terms ‘employer’, ‘employee’ and ‘employment’ respectively, where these terms are to have their ordinary meaning. Items 32, 33 and 34 would insert new paragraphs 2(1)(ga), 3(1)(ca) and 4(1)(ca) into Schedule 2 to add the references to these terms in Division 7 of Part 7, so far as the references relate to the parental leave provisions as they apply because of section 689.

Item 35 – Saving provision – annual leave

360. Item 35 would make clear that proposed item 6 does not affect any entitlement to annual leave that an employee had accrued before the commencement of the amendment. The effect of this is that employees would not lose any accrued entitlements to annual leave.

Item 36 – Saving provision – paid personal/carer’s leave

361. This item would make clear that proposed item 14 does not apply in relation to personal/carer’s leave entitlements that accrued before the commencement of item 14. This item would have the same effect in relation to personal/carer’s leave as item 35 would have in relation to annual leave.

Schedule 6 – Other amendments

Amendment 13

362. This item would insert a new Schedule of miscellaneous technical amendments.

Item 1 – Paragraph 165(1)(e)

363. This amendment would clarify that regulations can be made to permit disclosures of protected information in the circumstances that are prescribed.

Item 2 – After subsection 165(1)

364. This amendment will make it clear that a disclosure of protected information in the circumstances permitted under subsection 165(1) or any regulations made under paragraph 165(1)(e) is taken to be authorised by law for the purposes of the *Privacy Act 1988* (Privacy Act).

Item 3 – At the end of section 170

365. This amendment will make it clear that a disclosure of information by a workplace inspector in the circumstances permitted under section 170 or any regulations made under subsection 170(3) is taken to be authorised by law for the purposes of the Privacy Act.

Item 4 – Subsection 337(5)

Item 8 – Subsection 370(5)

366. Items 4 and 8 would amend subsections 337(5) and 370(5) to give effect to the policy intention that the employees who are a party to a proposed workplace agreement, or variation of an existing workplace agreement, may waive the requirement to have the information statement for 7 days prior to approving the agreement. This rectifies a drafting oversight within the Work Choices Act amendments. These amendments would clarify the intended operation of these provisions, particularly in situations where the employer gives the employees the information statement at the same time as the proposed agreement or proposed variation.

367. New subsections 337(5) and 370(5) would provide that where a waiver has been made by the eligible employees under existing section 338, or 371 with respect to variations, then the requirement for the employees to:

- have, or have ready access to the proposed agreement or variation (proposed paragraph 337(5)(a) and 370(5)(a)); and
- have the information statement (proposed paragraph 337(5) and 370(5))

for 7 days before the agreement or variation can be approved would no longer apply.

368. The intended effect of these amendments would be to ensure that employees may waive both the requirement to have (or have ready access to) the proposed agreement, or variation, and the information statement for 7 days before being able to approve the proposed agreement or variation. The employee may choose to make a waiver, under existing sections 338 or 371, at

any time after having received both the proposed agreement, or variation, and the information statement.

Illustrative Example

DJ Designs recently recruited Rose as an artist. After Rose and her manager discussed and agreed to the terms of the AWA, the manager called Rose into his office, and gave her the final version of the AWA, and the information statement obtained from the Office of the Employment Advocate website. Included in the package of documents Rose was given a form allowing her to waive the requirement to have the proposed AWA, and the information statement, for the remainder of the 7 day period.

Rose read the information statement, and then the proposed AWA. As all the terms and conditions she had agreed to with her manager were included in the AWA, Rose felt she did not need any more time to consider it. She then signed the waiver before calling in her manager's secretary to witness her signature on the AWA.

Item 5 – At the end of section 338

Item 9 – At the end of section 371

369. Items 5 and 9 propose technical amendments to sections 338 and 371.

370. Items 5 and 9 would, respectively, insert legislative notes to sections 337 and 371 to direct the reader to subsections 337(5) and 370(5), as amended, for the effect of the waiver.

371. These items would also change the heading of these sections to be “Employees may waive 7 day period”. The new headings would more accurately reflect the operation of these sections.

Item 6 – At the end of Division 5 of Part 8

New section 346A

372. This item would insert new section 346A into Part 8 of the WR Act. New section 346A would require an employer that lodges an AWA with the Employment Advocate to give a copy of that lodged AWA to the employee whose employment is subject to the AWA. The employer would be required to provide the copy of the lodged AWA to the employee as soon as practicable after lodgement.

373. New subsection 346A(2) would provide that subsection 346A(1) is a civil penalty provision. The note under subsection 346A(2) would refer to Division 11 of Part 8. Under these provisions the Court may order a pecuniary penalty of up to 30 penalty units against an employer that that fails to provide a copy of the lodged AWA to the employee.

Item 7 – After subsection 347(2)

374. This item would insert new subsection 347(2A), which would provide that where parties make a workplace agreement within the meaning of section 333, but the employer subsequently lodges a declaration attaching a document that is different to that agreement, the agreement that

was originally made ('the unlodged agreement') comes into operation as the workplace agreement, and the lodged agreement does not come into operation.

375. This amendment is an exception to the general rule expressed in subsection 347(1) that a workplace agreement comes into operation on the day it is lodged.

Item 10 – After paragraph 392(2)(b)

376. This item would provide that an employee can unilaterally terminate an AWA in a manner provided for in the AWA by lodging a declaration in accordance with section 395. This amendment corrects a drafting oversight.

Item 11 – After paragraph 393(2)(b)

377. This item would provide that an employee can unilaterally terminate an AWA with 90 days' written notice by lodging a declaration in accordance with section 395. This amendment corrects a drafting oversight.

Item 12 – After paragraph 407(2)(j)

378. This item would amend subsection 407(2) to insert new paragraph (ja). The effect of this amendment would be that the Court will be able to order a pecuniary penalty of up to 30 penalty units for breach of subsection 346A(1) – the requirement on the employer to provide an employee with a copy of an AWA as soon as practicable after it has been lodged.

Item 13 – At the end of subsection 482(1)

Item 14 – At the end of subsection 482(2)

379. Subsections 482(1) and 482(2) provide that applicants and joint applicants for a ballot order are liable for the costs of carrying out that ballot. Items 13 and 14 would amend these subsections to make it clear that applicants and joint applicants will be liable for the cost of carrying out the ballot even in circumstances where the ballot is not completed.

Item 15 – Subsection 482(3)

380. Subsection 482(3) provides that the liability of an applicant for the cost of carrying out a ballot is subject to subsections 483(3) and 483(6), which provide for the Commonwealth being partially liable for the costs of a ballot if certain conditions are met. Item 15 would amend subsection 482(3) to clarify that subsections 483(3) and 483(6) would only operate in relation to completed ballots.

Item 16 – After paragraph 483(1)(a)

381. Subsection 483(1) sets out the circumstances which must be satisfied before the Industrial Registrar will make a determination as to the reasonableness of costs incurred by an authorised ballot agent in relation to carrying out the ballot. Where the Industrial Registrar has made a determination as to the reasonable costs of a ballot conducted by an authorised ballot agent the Commonwealth will then be liable to pay the authorised ballot agent 80 per cent of that amount. Item 16 would amend subsection 483(1) by inserting a requirement that the ballot be completed for the Industrial Registrar to be able to make a determination as to the reasonable ballot costs.

382. This item would also amend the heading of section 483 to make clear that the Commonwealth has partial liability for the cost of completed ballots.

Item 17 – Section 611 (after paragraph (a) of the definition of public holiday)

Item 18 – Section 611 (subparagraph (b)(i) of the definition of public holiday)

383. Section 611 sets out a definition of public holiday for the purposes of Division 2 of Part 12 of the Act. Paragraph 611(a) prescribes certain public holidays which are common to all States and Territories. Paragraph 611(b) also provides that a public holiday includes any other day declared by or under a State or Territory law to be observed as a public holiday, but specifically excludes certain days, including a day in substitution for one of the public holidays specifically mentioned in paragraph 611(a).

384. The proposed amendment would amend the definition of public holiday in section 611 to also include a day that is substituted under a State or Territory law for one of the public holidays specifically mentioned in paragraph 611(a).

385. The effect of the proposed amendment would provide that an employee may refuse a request by the employee's employer to work on a holiday that is substituted for one of the days specifically mentioned in paragraph 611(a) if the employee has reasonable grounds for doing so.

Illustrative example

In a particular year, Australia Day falls on Saturday, 26 January. Under the law of a State, the following Monday, 28 January, is declared to be a substitute day for the 'Australia Day' public holiday. An employee would have the right to refuse, on reasonable grounds, to work on both Australia Day (26 January) as well as the substitute public holiday (28 January).

Item 19 – At the end of section 710

386. This item would include an additional ground upon which the AIRC must refuse to conduct dispute resolution in relation to a dispute resolution process in a workplace agreement.

387. The AIRC must refuse to conduct dispute resolution if the matter in dispute is currently the subject of proceedings, or has been settled in proceedings, under a Commonwealth, State or Territory law relating to the prevention of discrimination or equal opportunity.

388. This would mean that, for example, if a complaint about alleged discrimination in the workplace is settled in conciliation before the Human Rights and Equal Opportunity Commission, neither the employer nor employee concerned could seek an additional settlement by pursuing the same issue pursuant to Part 13 of the WR Act.

Item 20 – Subparagraph 846(2)(g)(i)

389. This item would increase the maximum pecuniary penalty under the Act for a breach of a civil remedy provision in the regulations by an individual from 5 penalty units to 10 penalty units.

Item 21 – Subparagraph 846(2)(g)(ii)

390. This item would increase the maximum pecuniary penalty under the Act applicable for a breach of a civil remedy provision in the regulations by a corporation from 25 penalty units to 50 penalty units.

Item 22 – Paragraph 864(1)(b)

Item 23 – Subsection 864(4)

391. These items are technical amendments to the Victorian wage provisions of the Act. The proposed amendments would specifically empower the Australian Fair Pay Commission to be able to adjust frequency of payment provisions in an Australian Pay and Classification Scale that applies to Victorian employees within the meaning of section 858 as it can currently for other employees under the Act.

Item 24 – After paragraph 3(1)(h) of Schedule 2

392. This amendment would provide that a reference to employer in the newly created Division 2 of Part 4 of Schedule 7 to the Act would be a reference to employer with its ordinary meaning. This amendment is consequential upon the amendment made in item 40.

Item 25 – Paragraph 72H(2)(c) of Schedule 6

Item 26 – Subclause 72H(2) of Schedule 6

393. These items would amend subclause 72H(2) of Schedule 6 so that a new transitional employer's existing certified agreement does not apply to a transferring transitional employee.

394. These amendments would ensure that the interaction rules in clause 72H are consistent with the other transmission of business interaction rules in the Act.

395. The effect of these amendments would be to ensure that a transferring transitional employee retains the benefit of his or her transmitted transitional award for a maximum period of 12 months.

Item 27 – Paragraph 77(3)(a) of Schedule 6

Item 28 – Paragraph 97(4)(a) of Schedule 6

396. Items 27 and 28 would repeal subparagraphs 77(3)(a) and 97(4)(a) of Schedule 6 to the Act respectively, and substitute new subparagraphs 77(3)(a) and 97(4)(a).

397. Award terms about parental leave (as well as those about annual leave and personal/carer's leave) are preserved, and continue to apply if they provide an employee with a more generous leave entitlement than the Standard. In relation to employees and employers within the meaning of subsections 5(1) and 6(1) of the Act, regulations can be made under subsection 527(8) to exclude certain specified entitlements under the Standard from the 'more generous' comparison with preserved award terms. Where such regulations are made, this means that these entitlements under the Standard apply irrespective of the outcome of the more generous test.

398. One of the entitlements in respect of what the regulations can be (and have been) made is the entitlement under section 268 of the Act to be transferred to a safe job, or to take paid leave if a safe job is not practicable. Under the Standard, a pregnant employee is entitled to be transferred to a safe job if she provides her employer with a medicate certificate stating that she is fit to work but is unable to continue in her present position because of illness or risks arising out of the pregnancy (section 268). If transferring the employee to a safe job is not reasonably practicable, the employee is entitled to paid leave during the period she is unable to continue in her present position as stated in the medical certificate, or until the date of birth (whichever is earlier).

399. Terms about parental leave are also preserved terms in transitional awards that bind Victorian employers and employees. Under subclauses 77(3) and 97(4) of Schedule 6 to the Act, regulations can be made similar to those that can be made under subsection 527(8). However, in one respect the relevant entitlement that can be prescribed by these regulations is not correctly identified under these subclauses. Subparagraphs 77(3)(a)(ii) and 97(4)(a)(ii) refer to the entitlement to paid leave where transfer to a safe job is not practicable, but do not refer to the right to transferred to a safe job. This is an unintended anomaly.

400. The proposed amendments made by these items would correct this anomaly, by repealing the existing provisions and inserting new subparagraphs (consistent with the regulation-making power in subparagraph 527(8)(a)(ii) of the Act) that refer to the entitlement under section 268 to transfer to a safe job or to take paid leave. The reference to special maternity leave is unchanged from the existing provisions.

Item 29 – Clause 1 of Schedule 7

401. This item would provide a definition of transitional award for the purposes of Schedule 7.

Item 30 – At the end of clause 2 of Schedule 7

Item 32 – At the end of clause 17 of Schedule 7

402. These items would insert a legislative note. The note would alert the reader to other provisions of the WR Act that affect the operation of a pre-reform certified agreement or pre-reform AWA, respectively.

403. The note would make clear that an employer or employee who is party to, or bound by, a pre-reform federal agreement would also be bound by section 16 of the WR Act upon the commencement of Schedule 1 of the Work Choices Act amendments). Section 16 provides for the WR Act to operate to the exclusion of certain State or Territory laws.

404. Furthermore, an employer or employee who is party to, or bound by, a pre-reform federal agreement may also be bound by one of the instruments created by Schedule 8 (Transitional treatment of State employment agreements and State awards). Schedule 8 has created two new federal instruments: a PSA and a NAPSA:

405. Part 2 of Schedule 8 provides for PSAs, which are derived from the terms of a State employment agreement, State award, and particular State laws that applied to a particular employee immediately before the commencement of Schedule 1 of the Work Choices Act amendments; and

406. Part 3 of Schedule 8 provides for NAPSAs, which are derived from the terms of a State award and/or particular State laws that applied to a particular employee immediately before the commencement of the Work Choices Act.

407. The additional reference in the Note:

- at the end of clause 2 of Schedule 7 – to clause 5 of Schedule 7; and
- at the end of clause 17 of Schedule 7 – to clause 19 of Schedule 7,

is relevant to determining the relationship between the particular pre-reform federal agreement and the instruments created by Schedule 8.

Item 31 – Subclause 5(1) of Schedule 7

408. This item would repeal and replace subclause 5(1) of Schedule 7.

409. Before the Work Choices Act amendments, a certified agreement would prevail to the extent of any inconsistency over a State award or State agreement. As a result, an employee's terms and conditions of employment could be determined by a certified agreement that operated in conjunction with a State agreement and/or State award.

410. Clause 5 of Schedule 7 deals with the interaction between a pre-reform certified agreement and other instruments that determine terms and conditions of employment, including PSAs and NAPSAs.

411. Subclause 5(1) currently provides that a pre-reform certified agreement operates to the exclusion of a PSA or NAPSA with the consequence that the terms in the PSA or NAPSA will not operate at all. For example, employees may be covered by a pre-reform federal agreement that is only about redundancy, with other terms and conditions of employment being derived from a State agreement, award, or law. Prior to the Work Choices Act amendments, these State instruments and State laws would have operated in conjunction with the certified agreement to the extent of any inconsistency. The effect of subclause 5(1) is that the employees' terms and conditions of employment are only regulated by the pre-reform certified agreement dealing with redundancy. Therefore, the NAPSA or PSA based on the State instrument no longer applies.

412. The proposed technical amendment would restore the arrangements that applied before the Work Choices Act amendments, and enable PSAs and NAPSAs to operate to the extent of any inconsistency with a pre-reform certified agreement.

Item 33 – Paragraph 19(d) of Schedule 7

413. This item would repeal and replace paragraph 19(d) of Schedule 7.

414. Clause 19 of Schedule 7 deals with the interaction between a pre-reform AWA and other instruments that determine terms and conditions of employment, including PSAs and NAPSAs.

415. Paragraph 19(d) currently provides that a NAPSA has no effect in relation to an employee while a pre-reform AWA is in operation.

416. The proposed amendment would provide that a pre-reform AWA would prevail to the extent of any inconsistency over a NAPSA.

Item 34 – Before clause 22 of Schedule 7

417. This item would create a Division 1 from the existing clause 22 through to clause 26, and is consequential on the creation of Division 2 by item 40.

Division 1 – Continuing operation of section 170MX awards

Item 35 – Clause 22 of Schedule 7

418. The effect of the amendment proposed by this item would be to limit the application of Division 1 to section 170MX awards which relate to employers (within the meaning of subsection 6(1)) or persons who become such an employer during the transitional period (as defined in clause 1 of Schedule 7 as being the period of five years from reform commencement).

Item 36 – Subclause 23(1) of Schedule 7

Item 37 – Clause 24 of Schedule 7

Item 38 – Clause 25 of Schedule 7

Item 39 – Subclause 26(1) of Schedule 7

419. These items would make amendments to Part 4 of Schedule 7 to the Act, consequential upon the amendment proposed by item 35.

Item 40 – At the end of Part 4 of Schedule 7

Division 2 – Special rules for section 170MX awards that bind excluded employers

420. This item would insert a new Division 2 into Part 4 of Schedule 7 to the Act to deal with section 170MX awards that bind excluded employers.

26A Application of Division

421. Clause 26A would provide that Division 2 of Part 4 of Schedule 7 applies to a section 170MX award in force just before the reform commencement or which came into force after the reform commencement because of Part 8 of Schedule 7 and which binds an excluded employer, while they remain an excluded employer during the transitional period.

26B Cessation of section 170MX award

422. New subclause 26B(1) would provide that a section 170MX award that binds an excluded employer will cease to have effect at the end of the transitional period or if replaced by a State employment agreement. This clarifies that an excluded employer will revert back to the applicable State system either at the end of the transitional period or if they enter into an agreement under applicable State legislation.

423. Subclause 26B(2) would clarify, for the avoidance of doubt, that the cessation of a section 170MX award would not affect any rights accrued or liabilities incurred under the section 170MX award while in operation.

424. Subclause 26B(3) and the accompanying note would clarify that Division 1 will apply to an excluded employer who becomes an employer (within the meaning of subsection 6(1)) before

the end of the transitional period, and that Division 2 will cease to apply from the time that they become such an employer.

425. Subclause 26B(4) would provide that where a section 170MX award has ceased operating it can never operate again.

26C Continuing operation of section 170MX awards – under old provisions

426. Subclause 26C(1) would provide that provisions of the pre-reform Act (including regulations made under the pre-reform Act) which relate to section 170MX awards would continue to apply in relation a section 170MX award binding an excluded employer.

427. Subclause 26C(2) would provide exceptions to the application of provisions of the pre-reform Act. This would include the removal of the AIRC's power in relation to revocation, variation and termination of a section 170MX award binding an excluded employer, except where it is being varied in cases of ambiguity or uncertainty, and the removal of provisions relating to bargaining periods and industrial action.

26D Continuing operation of section 170MX awards - under new provisions

428. Clause 26D would provide that certain provisions under the Act (as it applies after the reform commencement) would apply in relation to section 170MX awards binding an excluded employer, as if they are workplace determinations under the Act. These provisions would apply:

- (a) Part 6 – which would give certain enforcement and compliance functions in relation to section 170MX awards to workplace inspectors;
- (b) section 494 – which would prevent parties subject to a section 170MX award which has not passed its nominal expiry date from taking protected industrial action;
- (c) subsection 451(2) – which would prohibit parties subject to a section 170MX award from applying for a secret ballot for protected industrial action until after the nominal expiry date of the award;
- (d) Part 14 – which would allow section 170MX awards to be enforced under the Act;
- (e) and Part 15 – which would apply the right of entry provisions for collective agreements to section 170MX awards.

26E Interaction of section 170MX awards with other instruments

429. Subclause 26E would provide that while a section 170MX award operates in relation to an excluded employer and its employees the section 170MX award will prevail over a transitional award to the extent of any inconsistency. This preserves the interaction between industrial instruments capable of applying to an excluded employee during the transitional period.

Item 41 – Clause 30 of Schedule 7

430. This item would repeal and replace clause 30 of Schedule 7 to the WR Act.

431. Clause 30 of Schedule 7 currently provides that the Standard does not apply to an employee whose employment is subject to a pre-reform CA, a pre-reform AWA or a section

170MX award. This prevents the Standard from applying even if the pre-reform instrument does not deal with minimum entitlements.

432. Proposed subclause 30(1) would provide that the Standard does not apply to an employee in relation to a matter if a pre-reform CA, pre-reform AWA and section 170MX award which binds the employee also deals with the matter.

433. For the purpose of subclause 30(1), proposed subclause 30(2) would provide that a matter means one of the following matters referred to in subsection 171(2) of the Act:

- basic rates of pay and casual loadings (Division 2 of Part 7);
- maximum ordinary hours of work (Division 3 of Part 7);
- annual leave (Division 4 of Part 7);
- personal leave (Division 5 of Part 7); and
- parental leave and related entitlements (Division 6 of Part 7).

434. Some pre-reform instruments are not comprehensive and only deal with certain issues, with other terms and conditions of employment derived from an award, or Commonwealth or State legislation.

435. On the commencement of the Work Choices Act amendments, award terms about wages and classifications became preserved Australian Pay and Classification Scales, which form part of the Standard. Award terms about working hours continue to operate (with transitional arrangements applying for three years where the number of hours in an award exceeds the requirements of the Standard). Award terms about annual leave, personal/carer's leave and parental leave are preserved, and apply if they are more generous than the Standard. Some entitlements derived from State legislation may be preserved for employees in the federal system, as part of NAPSAs.

436. The proposed amendments would clarify that the Standard operates to fill any gaps where a pre-reform CA, pre-reform AWA and section 170MX award does not deal with some or all of the matters covered by the Standard (that is, rates of pay, hours of work, annual leave, personal/carer's leave or parental leave). If these instruments do not deal with one or more of these minimum entitlements, an employee will have the benefit of the Standard in respect of the entitlements.

437. Whether an instrument 'deals with' a matter will be a question of fact in each case. However, it is intended that the instrument would need to deal with the matter in a substantive way in order for the Standard not to apply. For example, if a pre-reform AWA provided for an amount of pay that includes an amount in lieu of paid annual leave, the AWA could be said to have dealt with the matter of annual leave (as the entitlement has been converted into a monetary amount) and the Standard would not apply. By contrast, if a pre-reform CA provided for wages to be paid in accordance with an award, the CA could not be said to have dealt with the substantive entitlement (which is left to another instrument), and the Standard would apply.

Illustrative Example 1

David is covered by a pre-reform certified agreement which only deals with leave entitlements (annual leave, personal/carer's leave and parental leave). David's other terms and conditions of employment, such as wages and hours, are derived from a federal award.

As the agreement does not deal with the matters specified in subparagraphs 171(2)(a) and (b) of the WR Act, for David and other employees bound by this agreement, the Standard would apply so that:

- wage entitlements would continue to apply under a preserved Australian Pay and Classification Scale (derived from the award);
- hours would be those specified in the award; and
- annual leave, personal/carer's leave and parental leave would continue in accordance with the terms of the pre-reform certified agreement.

Illustrative Example 2

Sienna is covered by a pre-reform AWA which requires her to work 40 hours per week in return for an 'all-in' pay rate of \$25 per hour, which includes payment in lieu of paid annual, sick, carer's and compassionate leave. The AWA makes no provision for parental leave, but under Schedule 14 of the pre-reform *Workplace Relations Act 1996*, Sienna would have had an entitlement to 52 weeks unpaid parental leave.

The AWA deals with wages, hours of work and all forms of leave covered by the Standard, except for parental leave (a matter in subparagraph 171(2)(e) of the WR Act). Although the AWA does not provide Sienna with paid leave, her AWA has 'dealt with' these matters via the hourly rate of pay.

Under the proposed amendment made by item 41, the Standard would not apply to Sienna except in relation to parental leave. Accordingly, Sienna would be entitled to 52 weeks unpaid parental leave (and related entitlements) under the Standard (Division 6, Part 7 of the WR Act).

Item 42 – At the end of clause 35 of Schedule 7

Item 43 – At the end of clause 36 of Schedule 7

Item 44 – At the end of clause 37 of Schedule 7

438. These items would insert a legislative note at the end of clauses 35 – 37 of Schedule 7. Clauses 35 – 37 provide transitional arrangements for existing pre-reform federal agreements that have been made pursuant to Victoria's referral to the Commonwealth of legislative power over certain matters (Victorian reference).

439. The note would alert the reader to section 898 of the WR Act, which may also affect the terms and conditions of employment of an employee in relation to whom a Victorian reference certified agreement or AWA is in operation.

440. Section 898 provides that, for the purpose of laws enacted in reliance on the Victorian reference, the WR Act is intended to operate to the exclusion of particular Victorian laws.

Item 45 – Clause 15E of Schedule 8

441. This item would repeal and replace clause 15E of Schedule 8.

442. Proposed subclause 15E(1) would provide that the Standard does not apply to an employee in relation to a matter if a PSA which binds the employee also deals with the matter.

443. Proposed subclause 15E(2) would provide that for the purpose of clause 15E, a matter means one of the following matters referred to in subsection 171(2) of the Act:

- basic rates of pay and casual loadings (Division 2 of Part 7);
- maximum ordinary hours of work (Division 3 of Part 7);
- annual leave (Division 4 of Part 7);
- personal leave (Division 5 of Part 7); and
- parental leave and related entitlements (Division 6 of Part 7).

444. This item would have the same effect in relation to PSAs as item 41 does in relation to pre-reform certified agreements, pre-reform AWAs and section 170MX awards.

445. The proposed amendments would clarify that the Standard operates to fill any gaps where a PSA does not deal with some or all of the matters covered by the Standard (that is, rates of pay, hours of work, annual leave, personal/carer's leave or parental leave). If a PSA does not deal with one or more of these minimum entitlements, an employee will have the benefit of the Standard in respect of the entitlements.

446. As noted above in relation to item 41, whether a PSA 'deals with' a matter will be a question of fact in each case – but it is intended that the instrument would need to deal with the matter in a substantive way in order for the Standard not to apply.

Illustrative Example

Tina is covered by a preserved State agreement which deals with wages, hours of work, annual leave and personal/carer's leave.

The agreement is silent on parental leave. Prior to the commencement of WorkChoices, Tina's parental leave entitlements were derived from Schedule 14 of the pre-reform Workplace Relations Act 1996.

For Tina and other employees bound by this agreement:

- wage entitlements, hours of work provisions, annual leave and personal/carer's leave would continue to apply according to the terms of the preserved State agreement; and
- parental leave would apply according to the Standard.

Item 46 – Clause 44 of Schedule 8

Item 47 – Clause 44 of Schedule 8

447. Clause 44 of Part 3 of Schedule 8 provides that subject to Division 5 of the Schedule, a term of a NAPSA (other than a preserved notional term) is unenforceable where the Standard also makes provision for that 'matter'.

448. Proposed item 47 would amend clause 44 to provide that where the Standard makes provision for a matter in relation to an employee, then a term of a NAPSA that also deals with the matter in relation to an employee is unenforceable.

449. The effect of the amendment is to ensure that in order for a term of a NAPSA to be unenforceable in relation to an employee, there must be a corresponding entitlement in the Standard in relation to that employee.

450. For example, even though the Standard deals with the matter of bereavement leave, it does not provide for bereavement leave in relation to a casual employee. Therefore, the amendment would ensure that a term of a NAPSA that provides for a bereavement leave entitlement in relation to a casual employee will continue to have effect because the Standard does not deal with the matter of bereavement leave, in relation to that casual employee.

Item 48 – Paragraph 20(2)(b) of Schedule 9

451. This item would repeal paragraph 20(2)(b) of Schedule 9 so that a new employer's existing collective agreement does not apply to a transferring employee who is bound by a NAPSA.

452. This amendment would ensure that the interaction rules in Clause 20 are consistent with the other transmission of business interaction rules in the Act.

453. The effect of this amendment would be to ensure that a transferring employee retains the benefit of any transmitted State instrument for a maximum period of 12 months, unless the new employer and the transferring employee make a new agreement.

Item 49 – Paragraph 5A(a) of Schedule 4

Item 50 – At the end of item 5A of Schedule 4

454. The proposed amendments made by items 49 and 50 would amend item 5A of Schedule 4 to the Work Choices Act. This amendment is necessary to clarify the type of redundancy pay obligations that are preserved by item 5A.

455. Prior to 26 March 2004, most awards exempted small businesses (those with fewer than 15 employees) from redundancy pay obligations (although under a small number of awards, small businesses were not exempt). On 26 March 2004, the AIRC decided that the small business exemption would be removed from all awards. The Government then announced that it would legislate to overturn this decision, but confirmed that entitlements existing before 26 March 2004 would not be affected.

456. Consistent with this announcement, the Work Choices Act amendments overrode the AIRC's 26 March 2004 decision but preserved rights and obligations created before that date.

- Under subsections 513(1) and 513(4) of the Act, a term of an award about redundancy pay is an allowable award matter only to the extent that it relates to a termination of employment by an employer of 15 or more employees (that is, a small business), and is either at the employer's initiative on the grounds of operational requirements, or occurs because the employer is insolvent (that is, in circumstances of genuine redundancy).
- Under section 525 of the Act, a term of an award ceases to have effect to the extent that it imposes redundancy pay obligations outside the circumstances outlined in subsection 513(4).
- However, under item 5A of Schedule 4 to the Work Choices Act, terms of awards (where they existed prior to 26 March 2004) that have the effect of requiring small businesses to pay redundancy pay "within the meaning of the amended Act" continue to apply.

457. The amendment will address some uncertainty about the scope of item 5A. The intention of item 5A was to preserve award terms about small business redundancy pay (where they existed prior to 26 March 2004) in circumstances of genuine redundancy only, as outlined in paragraph 513(4)(b) of the amended Act. However, the words "within the meaning of the amended Act" create some confusion (as the meaning of redundancy pay under the Act also excludes small business employers).

458. Accordingly, the proposed amendments made by items 49 and 50 would clarify that under item 5A, small business redundancy pay obligations that existed in awards before 26 March 2004 continue to have effect, but only to the extent that these obligations arise in circumstances of genuine redundancy (that is, within the meaning of paragraph 513(4)(b) of the amended Act).

459. The proposed amendments would be taken to apply from the date of commencement of the Work Choices Act (27 March 2006) – see item 61.

Item 51 – Application of items 4 and 5

Item 53 – Application of items 8 and 9

460. Items 51 and 53 would provide that the amendments made to subsections 337(5) and 370(5) only apply to a waiver under existing sections 338 and 371 where the waiver was made on or after the day the amendments would commence.

Item 52 – Application of item 7

461. This item would provide that new subsection 347(2A) applies, and is taken always to have applied, on and from the commencement of Schedule 1 to the Work Choices Act (27 March 2006).

Item 54 – Application of items 13 to 16

462. This item would provide that the amendments to subsections 482(1), 482(2), 482(3) and 483(1) apply to ballot orders made under section 462 of the Act from the date of commencement of this item.

Item 55 – Transitional Provision- items 13 to 16

463. This item would only apply where three pre-conditions are met. First, the protected action ballot was ordered prior to the commencement of the amendments in items 13 to 16 that would, if enacted, deal with incomplete ballots. Secondly, the nominated ballot agent was the Australian Electoral Commission (AEC). Thirdly, the AEC is satisfied that the relevant ballot process is incomplete and will not be completed.

464. This amendment will apply to a small number of pre-commencement ballots ordered under section 462 and will enable the Commonwealth to absorb 80 percent of the costs of such incomplete ballots. The amendment would place incomplete pre-commencement ballots on the same footing as completed pre-commencement ballots for the purposes of the Commonwealth reimbursing the AEC for any costs incurred where the AEC is the nominated ballot agent. The rights and obligations of the ballot applicant are unaffected by this amendment.

Item 56 – Application of items 25 and 26

This item provides that the amendments proposed by items 25 and 26 would have retrospective application to the date the Work Choices Act commenced (27 March 2006), to ensure continuity of a transferring employee's entitlements where those entitlements are derived from a transmitted transitional award.

Item 57 – Application of items 24, 29 and 34 to 40

465. This item provides that the amendments proposed by items 24, 29 and 34 to 40 would have retrospective application to the date of reform commencement (27 March 2006), to ensure that employers that do not come within the definition of employer in subsection 6(1) of the Act (excluded employers) are no longer bound by a section 170MX award if they have entered into a State employment agreement since the reform commencement.

466. Subitem (2) would provide that the civil penalty provisions in Part 14 of the Act would only apply prospectively, from the date of the commencement of the amendments. This is

necessary to ensure that excluded employers that have sought to rely on a State employment agreement cannot be prosecuted for inadvertent breaches of a section 170MX award.

467. Subitem (3) would provide a definition of reform commencement which means the commencement of Schedule 1 to the Work Choices Act.

Item 58 – Application of items 31 and 33

468. This item provides that the amendments proposed by items 31 and 33 would have retrospective application to the date Work Choices Act commenced (27 March 2006), to ensure continuity of employee entitlements.

469. The civil remedy provisions in Division 7 of Part 7 of the Act would apply to enable employees to seek remedial orders if the application of the Standard would deliver a higher entitlement than the relevant NAPSA, including when that entitlement accrues because of the retrospective operation of the amendments proposed by items 31 and 33.

470. The civil penalty provisions in Part 14 of the Act would only apply prospectively, from the date of the commencement of the amendments. This is necessary to ensure that employers affected by the retrospective application of the amendments are not penalised for relying on the Act as it stood during the period from 27 March 2006 to the commencement of the proposed technical amendments.

Item 59 – Application of items 41 and 45

471. This item provides that the amendments proposed by items 41 and 45 would have retrospective application to the date the Work Choices Act commenced (27 March 2006), to ensure that there are no gaps in entitlements.

472. The civil remedy provisions in Division 7 of Part 7 of the Act would apply to enable employees to seek remedial orders if the application of the Standard would deliver a higher entitlement than the relevant pre-reform instrument, including when that entitlement accrues because of the retrospective operation of the amendments proposed by items 41 and 45.

473. The civil penalty provisions in Part 14 of the Act would only apply prospectively, from the date of the commencement of the amendments. This is necessary to ensure that employers affected by the retrospective application of the amendments are not penalised for relying on the Act as it stood during the period from 27 March 2006 to the commencement of the proposed technical amendments.

Item 60 – Application of items 46 and 47

474. Clause 44 of Part 3 of Schedule 8 provides that subject to Division 5 of the Schedule, a term of a NAPSA (other than a preserved notional term) is unenforceable where the Standard also makes provision for that 'matter'.

475. Proposed item 60 would amend clause 44 to provide that where the Standard makes provision for a matter in relation to an employee, then a term of a NAPSA that also deals with the matter in relation to an employee is unenforceable.

476. The effect of the amendment is to ensure that in order for a term of a NAPSA to be unenforceable in relation to an employee, there must be a corresponding entitlement in the Standard in relation to that employee.

477. For example, even though the Standard deals with the matter of bereavement leave, it does not provide for bereavement leave in relation to a casual employee. Therefore, the amendment would ensure that a term of a NAPSA that provides for a bereavement leave entitlement in relation to a casual employee will continue to have effect because the Standard does not deal with the matter of bereavement leave, in relation to that casual employee.

Item 61 – Application of item 48

478. This item provides that the amendments proposed by items 48 would have retrospective application to the date Work Choices Act commenced (27 March 2006), to ensure continuity of employee entitlements.

479. Subitem (2) would provide that the civil penalty provisions in Part 14 of the Act would only apply prospectively, from the date of the commencement of the amendments. This is necessary to ensure that employers affected by the retrospective application of the amendments are not penalised for relying on the Act as it stood during the period from 27 March 2006 to the commencement of the amendments proposed by items 46 and 47.

Item 62 – Application of items 49 and 50

480. Item 61 would provide that the proposed amendments made by items 49 and 50 of this Schedule are taken to have applied on and from reform commencement - that is, 27 March 2006 (the date of commencement of Schedule 1 to the Work Choices Act).

481. The proposed amendments made by items 49 and 50 clarify some possible uncertainty about the operation of Item 5A of Schedule 4 to the Work Choices Act - with the effect that small business redundancy pay obligations that existed in awards before 26 March 2004 continue to apply, but only in circumstances of genuine redundancy. As these amendments would give effect to the original intention of the Work Choices Act (see paragraphs 457 and 458 above) they apply from reform commencement.