



Changes in federal workplace relations law — legislation guide

December 1996

CONTENTS

Executive summary	3
1. Reshaping Australia's industrial relations	7
2. Role of the federal award system	9
3. Agreements	16
4. Freedom of association and organisational arrangements	25
5. Industrial action	29
6. Unfair dismissal	32
7. Harmonisation of federal and State industrial relations systems	35
8. Other legislative initiatives	38



Changes in federal workplace relations law — legislation guide Executive summary

A new framework

The Workplace Relations Act addresses the Federal Government's priorities and reshapes the Australian industrial relations system. The new framework supports a more direct relationship between employers and employees, with a much reduced role for third party intervention and greater labour market flexibility.

The *Workplace Relations and Other Legislation Amendment Act 1996*, amending the former *Industrial Relations Act 1988* was passed by the Commonwealth Parliament on 21 November 1996 and received Royal Assent on 25 November 1996. It implements the reform package announced during the 1996 election.

To reflect the new emphasis of the system on the relationship between employers and employees at the workplace, the title of the Industrial Relations Act has been changed to the Workplace Relations Act.

Objects

The objects of the new Act focus the system on: giving primary responsibility for industrial relations and agreement-making to employers and employees at the enterprise and workplace levels, with the role of the award system focused on providing a safety net of fair and enforceable minimum wages and conditions; ensuring freedom of association; avoiding discrimination; assisting employees to balance their work and family responsibilities effectively; and assisting in giving effect to Australia's international obligations in respect of labour standards.

Awards as safety net

The award system is to be simplified and the Australian Industrial Relations Commission (AIRC)'s award-making role focused on setting a safety net of fair and enforceable minimum wages and conditions. The objects of Part VI of the Act and the provisions describing the functions of the AIRC, have been amended to reflect these priorities. The detailed mechanism for determining safety net pay adjustments and other award minima is not prescribed, but left to the AIRC to establish.

Awards to be simplified

To simplify awards so that they focus the safety net on minimum standards, the AIRC's arbitral jurisdiction is confined so that in most circumstances, it can only make awards to settle disputes in

relation to 20 ‘allowable award matters’. Other matters will generally be determined at the enterprise or workplace level, whether in formal agreements or informally.

Transitional arrangements apply, whereby parties to existing awards will be encouraged and assisted to simplify their awards to focus on allowable matters and address other issues by agreement. After 18 months, any award provisions outside the allowable matters will no longer be enforceable. Under the simplification process, awards are also to be reviewed to ensure that they operate to accommodate the needs of individual enterprises and workplaces.

In exceptional circumstances, the AIRC will be able to make an order in arbitration of a dispute on a matter that does not fall within the scope of the allowable matters. However, the AIRC’s powers in this regard are closely circumscribed to ensure that access to arbitration is a last resort.

Paid rates awards

Generally, the AIRC will be able to make minimum rates awards only. So no ~~paid~~ paid rates awards are allowed. Existing paid rates awards will be treated in the same way as minimum rates awards and will be subject to the same simplification process. It is expected that existing paid rates structures will be phased out and translated into minimum rates arrangements — with overall pay entitlements protected in such a conversion process.

Agreement-making choices

Actual wages and conditions and working arrangements more generally will be determined as far as possible by agreement of employers and employees at the enterprise and workplace levels. To provide more effective choice and flexibility for parties in reaching agreements, the new Act provides for Australian workplace agreements (AWAs) and certified agreements (CAs).

AWAs

AWAs are individual agreements between an employer and his or her employees. While they may be reached collectively, they must be signed individually. Employees are able to appoint a bargaining agent (including a union) to negotiate on their behalf but there will be no uninvited union involvement.

AWAs will be approved by the Employment Advocate (EA), a new statutory office established under the Act.

To approve an AWA, the EA will need to be satisfied that:

- it meets the no-disadvantage test, that is, that when considered as a whole, the agreement is no less favorable to the employee concerned, than the relevant award and any relevant laws; and
- the employer explained the effect of the AWA to the employee and that the employee genuinely consented to the making of the AWA.

Where the EA is in doubt as to whether an agreement meets the no-disadvantage test, he or she will refer it to the AIRC to resolve the question. The AIRC will be able to approve agreements which do not meet the no-disadvantage test provided they are not contrary to the public interest, for example, if they are part of a reasonable strategy to deal with a short term business crisis and to assist in the revival of a business.

The Employment Advocate

In addition to approving AWAs, the EA’s functions include:

- providing advice to employees and employers, especially small businesses, on the new Act and AWAs;
- handling alleged breaches of AWAs and the freedom of association provisions;
- assisting employees in prosecuting breaches where appropriate; and
- providing aggregated statistics on AWAs.

In performing its functions, the EA will pay particular regard to the needs of workers in a disadvantaged bargaining position, to assisting workers to balance work and family responsibilities, and to promoting better work and management practices through AWAs. The new Act sets out the powers of the EA to enable the EA to exercise his or her functions effectively.

Certified agreements

New arrangements are introduced for CAs to make them more accessible. Scope has been provided for CAs to be reached directly with employees (for example, in workplaces with no or few union members) but in such cases, relevant unions will be able to participate in negotiations and become parties to an agreement where a member requests this. CAs will continue to be ratified by the AIRC. They are also required to meet the no-disadvantage test. The AIRC must also be satisfied that employees have had the agreement explained to them, and that the majority of employees to whom the agreement will apply have genuinely endorsed the agreement.

The former provisions for Enterprise Flexibility Agreements (EFAs) have been repealed, with appropriate transitional arrangements established for the very small number of existing agreements.

Where a bargaining period for a CA is terminated because of the risk of serious harmful effects for the economy or the community, or where the parties have customarily been covered by a paid rates award and are unable to reach an agreement, the AIRC may arbitrate but only in confined circumstances: access to arbitration is to be only as a last resort after conciliation is exhausted; and any arbitration is to be undertaken by a Full Bench, having regard to a range of issues including the merits of the case, the interests of the parties and the public interest, how productivity might be improved, and any principles established by a Full Bench of the AIRC.

Freedom of association and organisations

A fundamental principle underpinning the Government's industrial relations policy is freedom of association. Union structures and roles are being revamped: the minimum registration requirement has been lowered from 100 to 50 members; the 'conveniently belong' requirement has been replaced with a new provision focusing on effective representation; and special provision has been made for the creation of enterprise unions.

Individual employees will have the freedom to join or not to join a union of their choice: preference clauses have been outlawed and compulsory unionism or discrimination based on membership or non-membership of a union or employer association is prohibited.

Union right of entry to workplaces is contingent on the union's obtaining a permit from the Registrar in circumstances defined by the Act. Provision has also been made for the disamalgamation of unions, subject to membership support

Industrial action

There is a limited right to strike and lock out while negotiating CAs and AWAs, but not during the period of an agreement's operation. The right to strike and to lock out for CAs is contingent on the relevant

party's initiating a bargaining period and making a genuine attempt to reach agreement with the other party. Notification of proposed industrial action is also required. The AIRC can suspend or terminate a bargaining period on a number of grounds.

The AIRC's powers to make orders preventing or stopping industrial action (other than for the protected right to strike and lock out) have been strengthened. Access to injunctive relief is available for breaches of such orders. Strike pay is prohibited.

Boycotts

Secondary boycott provisions have been restored to the Trade Practices Act.

'Fair go all round' unfair dismissal

A new unfair dismissal system applies only to the federal jurisdiction. The system relies substantially on the corporations power and is based on the principle of a 'fair go all round'. The prohibition on termination without the required notice or pay in lieu remains. Dismissal on grounds which are discriminatory continues to be proscribed.

All applications concerning a termination of employment will commence in the AIRC, where it is intended that the role of conciliation will be pre-eminent.

Federal/State harmonisation

Harmonisation of federal and State systems of industrial relations is being pursued through:

- complementary legislation and other arrangements (for example, between the federal and State tribunals); and
- a cooperative approach to administrative arrangements and service delivery.

Other initiatives

Other initiatives include:

- repeal of the minimum entitlements provisions giving the AIRC power to make orders for minimum wages (as other appropriate machinery exists for handling such matters);
- retention of the minimum entitlements provisions giving the AIRC power to make orders for equal remuneration for men and women workers for work of equal value, with an amendment to protect employers from being faced with multiple claims in different forums in relation to a single alleged instance of inequality of remuneration;
- complementary institutional arrangements to give the AIRC's operations greater flexibility and effectiveness;
- transfer of the jurisdiction of the Industrial Relations Court of Australia to the Federal Court; and
- repeal of the *Trade Union Training Authority Act 1975*.

1. Reshaping Australia's industrial relations

Why the changes are important

Industrial relations reform has a fundamental role to play in supporting the Government's broader strategy for national economic development by securing low inflation, sustainable economic growth and more jobs, especially for young people, together with microeconomic reforms in sectors that are critical to our international competitiveness.

Key principles

The Government's essential objectives in reforming Australia's industrial relations arrangements are to develop a cooperative workplace culture between employers and their employees and a genuinely flexible and fair labour market. Realising those aims will mean higher productivity and employment generally, and better pay and living standards for Australian workers. Accordingly, it has been a major priority for the Howard Government, which has put in place legislation and supporting initiatives consistent with the Coalition's stated pre-election policies.

The Government's aim is to establish a workplace relations system built on the following principles:

- a more direct relationship between employers and employees, with a reduced role for third party intervention;
- a fair go for all — so that the system is appropriately balanced and delivers benefits for both employees and employers;
- genuine freedom of association and greater choice of union representation;
- a more accessible system.

The new legislative framework

Key reforms to achieve this involve:

- maintaining the award system to provide a safety net of fair and enforceable minimum wages and conditions:
 - with continuing safety net adjustments focused on the low paid, but
 - ensuring that awards are focused on minimum wages and conditions and are simplified to a set of allowable matters, with all other matters being determined as far as possible by agreement at the enterprise and workplace level;
- providing for effective choice and flexibility in reaching both collective and individual agreements through:
 - the introduction of Australian workplace agreements (AWAs), subject to a no disadvantage test and administered by the Employment Advocate (EA);
 - revised arrangements for certified agreements to make them more widely available and to ensure that they have the endorsement of a majority of employees; and
 - revised provisions relating to industrial action, aimed at strengthening compliance with awards and orders of the Australian Industrial Relations Commission (AIRC), and to underpin the commitments in agreements during their period of operation;

- confining the AIRC's arbitral role, so as to avoid inappropriate interaction between agreements and awards and the associated risk of wage instability;
- ensuring greater employee choice about representation and removing uninvited union involvement in the bargaining process:
 - while opening opportunities to strengthen the focus of unionism at the enterprise level; and
- replacing the unfair dismissals provisions with a system based on a 'fair go allround'.

Objects

The objects of the new Workplace Relations Act reflect the Government's policy as set out at Figure 1.

A revised role for the AIRC and the establishment of the EA will facilitate the effective achievement of these aims.

Figure 1—The principal object of the Workplace Relations Act

The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

- a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and
- b) ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and
- c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act; and
- d) providing the means:
 - i) for wages and conditions of employment to be determined as far as possible by agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards; and
 - ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and
- e) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them; and
- f) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and
- g) ensuring that employee and employer organisations registered under this Act are representative of and accountable to their members and are able to operate effectively; and
- h) enabling the Commission to prevent and settle industrial disputes as far as possible by conciliation and, where appropriate and within specified limits, by arbitration; and
- i) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and
- j) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and
- k) assisting in giving effect to Australia's international obligations in relation to labour standards.

2. The Role of the federal award system

Policy

The role of the award system is to provide a safety net of fair and enforceable minimum wages and conditions, with benefits beyond it being a matter for agreement at enterprise or workplace level. The role of the AIRC, the scope of awards and arrangements for their adjustment need to be consistent with and reinforce that minimum safety net function. This is important for the viability of the wage system — in ensuring its capacity both to provide safety net protection and to meet overall economic objectives.

Focus of awards

New objects reflect the role envisaged for awards as an effective safety net of fair and enforceable minimum wages and conditions of employment that are simplified and suited to the efficient performance of work according to the needs of particular enterprises and workplaces, and established and maintained by the AIRC.

The setting of award rates and conditions will focus on their role as a safety net. The AIRC is required to have regard to the following:

- the need to provide fair minimum standards for employees in the context of living standards prevailing in the wider Australian community;
- economic factors, including levels of productivity and inflation and the desirability of attaining a high level of employment;
- when adjusting the safety net, the needs of the low paid;
- the need for any alterations to wage relativities between awards to be based on work value considerations;
- the need to support training arrangements through appropriate trainee wages;
- the need to provide a Supported Wage System for people with disabilities;
- the principle of equal pay for work of equal value without discrimination based on sex; and
- the need to prevent discrimination.

The requirements in the *Industrial Relations Act 1988* that awards be maintained at a 'relevant level' (s. 88A) and that 'secure, relevant and consistent' minimum award wages be maintained (s. 90AA) are replaced by provisions which focus more directly on awards as setting minimum standards and acting as a safety net.

Adjusting the safety net

The mechanism by which the AIRC adjusts safety net rates of pay and other award minima is not be prescribed in the legislation. This will be a matter for the AIRC to determine (for example, through its Review of Wage Principles), within the framework and objects of the legislation and after hearing the submissions of all the parties.

Above the safety net

The AIRC's role is focused on the setting of minima (including safety net adjustments). It is not appropriate for parties to be able to have the outcomes of enterprise agreements implemented through, or reflected in, consent awards. In addition, the AIRC generally will not be able to arbitrate above the minimum safety net. Strictly limited exceptions to this are made in relation to circumstances where a bargaining period is terminated because industrial action threatens serious harm to the community or the economy, or where a bargaining period is terminated because there is no reasonable prospect of the parties reaching agreement, and the parties have been customarily covered by a paid rates award (see part 3, Agreements).

Conciliation role of AIRC

Conciliation will be available with respect to all matters, including agreements. In addition, during the conciliation process, the AIRC, must if requested by the parties, conduct a hearing and make a recommendation to resolve differences, provided it is satisfied that the parties will abide by the recommendation.

Award simplification

Consistent with the focus of awards on safety net minimum wages and conditions and, as foreshadowed in *Better Pay for Better Work*, the process of award simplification will be expedited. The AIRC's arbitral is confined to disputes about certain allowable matters. Other matters should generally be determined at the enterprise or workplace level, whether in formal agreements or informally.

'Allowable matters'

The matters that may be addressed in awards are at Figure 2.

Other matters

Various other matters will be governed by statute. Further matters that generally would be for determination at the enterprise or workplace level include: authorised stop work meetings; clothing; disciplinary measures; occupational health and safety (consistent with any legislative provisions); introduction of change; union picnic day; training (although some award provisions may be relevant, for example, those relating to classifications and apprenticeships/traineeships); study leave; and trade union training leave.

Figure 2 — The 'allowable matters' set out in the Workplace Relations Act

The following are the allowable matters

- classifications of employees and skill-based career paths
- ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours
- rates of pay (such as hourly rates and annual salaries), rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage system
- piece rates, tallies and bonuses
- annual leave and leave loadings
- long service leave
- personal/carer's leave, including sick leave, family leave, bereavement leave, compassionate leave, cultural leave and other like forms of leave
- cover parental leave, including maternity and adoption leave
- public holidays
- allowances
- loadings for working overtime or for casual or shift work
- penalty rates
- redundancy pay and notice of termination
- stand-down provisions
- dispute settling procedures
- jury service
- type of employment, such as full-time employment, casual employment, regular part-time employment and shift work
- superannuation
- pay and conditions for outworkers, but only when compared with those specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises
- provisions incidental to the allowable matters and necessary for the effective operation of the award (for example, date and period of operation of the award, and facilitative provisions).

Process for award simplification

New awards will only be able to contain provisions settling disputes in relation to the 20 allowable matters, from the date of commencement of the awards-related provisions of the new Act (1 January 1997). Transitional arrangements apply whereby parties to existing awards are encouraged and assisted to simplify their awards to focus on the allowable terms and conditions, with other matters addressed by agreement.

After 18 months, any non-prescribed matters still in awards will not be enforceable. Transitional provisions in the new Act allow for enterprise agreements that have been given effect as consent awards and approved by the AIRC under its principles relating to enterprise agreements to be exempt from the simplification process until after their termination time has passed. All other consent awards will be subject to simplification.

The AIRC will also review awards to ensure that provisions do not include matters of detail more appropriately dealt with by agreement at the workplace or enterprise level, do not prescribe work practices or procedures that restrict the efficient performance of work, and do not contain provisions that restrict productivity, while also having regard to fairness for employees. The AIRC must also review awards to ensure that they contain facilitative provisions, contain provisions enabling the employment of regular part-time employees where appropriate, are easy to understand, non-discriminatory, do not contain obsolete provisions, and are appropriate from the point of view of trainee wages and a supported wages system for people with disabilities.

The Act defines a 'regular part-time employee' as a person who works less than full-time hours, who has reasonably predictable hours of work, and who receives the same award conditions as full-time employees on a pro rata basis.

Restrictions on regular part-time work (such as quotas and minimum and maximum weekly hours provisions) will be removed from the award system through the award simplification process. However, the AIRC will be able to include in awards provisions:

- defining the types of employment available under the award (including regular part-time work with pro rata conditions);
- specifying the minimum number of consecutive hours that a regular part-time employee may be required to work;
- facilitating a regular pattern in the hours worked by these employees; and relating to variations to working hours and notice periods for regular part-time (and other) employees.

The changes are intended to encourage the spread of, and improve access to, part-time work with pro rata conditions and reasonable predictability of working hours.

Arbitration on non-allowable matters—only in exceptional circumstances

The AIRC is able to arbitrate in exceptional circumstances and make an order on a matter in dispute that does not fall into the scope of allowable matters provided:

- a party to the dispute has made a genuine attempt to reach agreement;
- there is no reasonable prospect of such an agreement being reached by conciliation, or further conciliation, by the AIRC;
- it is appropriate to settle the matter in such a way; and
- it would be harsh or unjust not to do so.

Such orders are to:

- relate only to a single matter;
- only be made if the Commission is satisfied that the making of the order is in the public interest;
- only apply to a single business (unless the Commission is satisfied that there is no other appropriate manner of settling the dispute);
- be made by a Full Bench (except where it relates to a single enterprise); and
- cease to be in force after two years.

Such orders will not form part of the benchmark for the no-disadvantage test proposed for agreements (refer part 3, Agreements).

Junior wages

Junior wages are exempted from age discrimination requirements for a further three years from 22 June 1997. After that date, the Commission may extend the exemption on a case by case basis in accordance with guidelines established by a full bench of the Commission. The Act requires a full bench of the Commission to report to the Parliament through the Minister on the feasibility of the replacement of junior rates with non-discriminatory alternatives.

Simplification and the interaction between federal and State awards

At present there are many Federal awards which contain comprehensive provisions relating to terms and conditions of employment. These award provisions displace provisions of State awards that would otherwise apply, particularly State awards that are common rules.

Arbitration on non-allowable matters — only in exceptional circumstances. When federal awards are simplified so that they contain only allowable award matters, there is scope for State award provisions relating to non-allowable matters, that have previously been overridden by federal award provisions, to revive.

To prevent this, a provision has been included which will ensure that where a corporation is bound by an award, and the award is simplified to include only allowable award matters, (and as a consequence the award no longer overrides the provisions of a State award relating to non-allowable award matters), the corporation will not be bound by those State award provisions unless it takes positive steps to become so bound (that is, applies to the relevant State authority). For constitutional reasons the provision is only able to apply to corporations.

Paid rates awards

The focusing of the award system on the provision of a safety net of minimum terms and conditions of employment will apply to all awards, regardless of their customary status as either minimum rates or paid rates. All awards will be simplified: the same allowable matters and the same process and timing will apply. There will be no new paid rates awards.

Over time, and following consultation between the parties, it is expected that existing paid rates structures will be phased out and translated into minimum rates arrangements under the supervision of the AIRC. Transitional provisions will work to ensure that overall pay entitlements are not reduced as part of the conversion process. Wages and conditions beyond the minimum safety net will be a matter for the parties themselves to settle through enterprise and workplace agreements. Provision is made for special case arbitration in exceptional circumstances where paid rates awards have customarily applied and all efforts to reach agreement have been exhausted (see part 3, Agreements).

The expectation, however, is that most parties who have been on paid rates awards will be covered by agreements. This is not new as employees covered by paid rates awards have generally already made the transition to enterprise bargaining, so that their actual terms and conditions are now determined by agreements rather than awards.

Coverage of federal awards

The 'fast tracking' provisions which prevent objections being heard to the transfer from a State jurisdiction into the federal jurisdiction have been removed and the criteria for moving from State to federal award coverage changed.

The Act provides that a federal award will not override a State employment agreement, and that employers and employees covered by a federal award will be able to opt out of the award into a State employment agreement, provided that the State Act under which the employment agreement was made meets certain criteria. The State Act must provide that the agreement must be approved by a State industrial authority.

The State industrial authority, before approving the agreement, is required to be satisfied that:

- taking remuneration and employment conditions as a whole, employees will not be disadvantaged in comparison with the relevant award;
- the agreement was genuinely made or was made in the absence of duress or coercion; and
- the agreement covers all employees who could reasonably be expected to be covered.

In the case of applications for federal awards for employees under State agreements and State awards, the AIRC must cease dealing with the dispute where it is satisfied that a State award or agreement governs the wages and conditions of the employees in question, unless it is satisfied that to cease dealing with the dispute would be contrary to the public interest. In effect, a federal award will only displace a State award or State employment agreement where the public interest would be served by federal award coverage. In determining the public interest, the AIRC is required to give primary consideration to the views of employers and employees affected, and to ascertain their views as quickly as possible.

These changes are important in the broader context of pursuing more complementary arrangements between the federal and State systems (see part 7, Harmonisation of federal/State industrial relations systems). The States' support has been sought for complementary legislation to enable unincorporated federal employers (outside the Territories) to access federal agreements, particularly Australian workplace agreements, and the new unfair dismissal provisions.

While a federal award will not be a prerequisite for securing a federal agreement, provisions requiring the AIRC to take a speedy decision in relation to the making of interim awards, if it considers that such an award may be necessary to protect the wages and conditions of employment of the relevant employees for an interim period, have been retained.

3. Agreements

Policy

To provide more effective choice and flexibility for parties in reaching agreements, the new Act provides for Australian workplace agreements (AWAs) and certified agreements (CAs). Both forms of agreement are designed to enable employers and employees at the workplace to take responsibility for their own industrial relations.

As noted in part 1, new objects will facilitate the determination of terms and conditions of employment as far as possible by agreement between employers and employees at the enterprise and workplace level, subject to certain statutory requirements.

The operation of AWAs will be supported by the establishment of the Employment Advocate (EA) and the Office of the Employment Advocate (OEA).

Australian workplace agreements

The Act provides for the establishment of AWAs on as wide a basis as possible. The corporations power is used to provide for enforceable individual employment agreements between corporations and their employees. The Territories power and the Commonwealth's power in respect of its own employees are also relied on, together with limited reliance on the trade and commerce power. Complementary legislation is being sought from the States to enable full coverage of unincorporated employers. Following legislation to give effect to Victoria's referral of its industrial relations powers to the Commonwealth (see part 7), all employers and employees in Victoria will be able to enter into AWAs.

Bargaining agents

AWAs may be reached collectively, but will be required to be signed individually. Employees will be able to appoint a bargaining agent to act on their behalf in relation to the making, approval, variation or termination of an AWA, but uninvited union involvement will be excluded. Employers will also be able to nominate a bargaining agent to act on their behalf.

A bargaining agent may include a group of individuals (such as a consultative committee) or an organisation (such as a union). There will be no restrictions on the people or organisations who could be an agent, except through regulations which are being made to require that they be legally competent to enter into contracts and have not been convicted within a specified period of an offence involving fraud or dishonesty. Authority to act as an agent must be made in writing and may be terminated at any time in writing.

Parties will be required to recognise nominated bargaining agents of the other party, but this will not involve an obligation to negotiate. It is prohibited to coerce or attempt to coerce another party to appoint or not appoint a particular person as a bargaining agent, or to terminate the appointment of an authorised bargaining agent. Such coercion, or failure to recognise a bargaining agent, may be subject to injunctive relief and/or a penalty. Uninvited third parties are prohibited from using threats or intimidation with the intention of hindering the making of an AWA.

Approval of AWAs by the Employment Advocate

AWAs will be required to be approved by the EA. Before approving an AWA, the EA will need to be satisfied that it meets the no-disadvantage test. This means that the proposed agreement when considered as a whole, must be no less favourable to the employee concerned, than the relevant award and any relevant laws. The EA will also need to be satisfied that:

- the agreement contains an anti-discrimination clause and a dispute resolution procedure;
- the agreement does not include any provisions that prohibit or restrict one of the parties from disclosing details of the AWA to another person;
- the employer provided the employee with a copy of the proposed agreement, in the case of existing employees, at least 14 days before signing it, and in the case of new employees, at least 5 days before signing it;
- the employer explained the effect of the AWA to the employee;
- the employee genuinely consented to the making of the AWA; and
- in the case where an employer has not offered an AWA in the same terms to all comparable employees, the employer did not act unfairly or unreasonably in failing to do so.

If the EA is in doubt about whether the proposed agreement, when considered as a whole, would be less favourable to the employee than the relevant award and any relevant laws, he or she can suggest that the parties amend the AWA or make approval conditional on one of the parties giving an undertaking which ensured that the agreement would not disadvantage the employee in its operation. Such an undertaking would, if accepted, then form part of the agreement.

Referral to AIRC if needed

If the EA's concerns cannot be resolved in either of these ways, he or she will refer the AWA to the AIRC to determine whether or not it meets the no-disadvantage test.

If an agreement does not meet the no-disadvantage test, that is, if it would be less favourable overall to the employee concerned than the relevant award and any relevant laws, the AIRC will apply a public interest test. This will enable it to approve agreements which do not meet the no disadvantage test if they are not contrary to the public interest, for example, if they are part of a reasonable strategy to deal with a short term business crisis and to assist in the revival of a business.

In applying the public interest test, the AIRC could meet with the parties and/or their bargaining agents in camera but there would be no right of intervention by any third party.

Either party to a proposed AWA or a variation agreement which has been referred to the AIRC will be able to withdraw the proposed agreement or variation by notice in writing lodged with the AIRC.

AWAs for new employees

An AWA for an existing employee will come into operation when it is approved, or on a later date specified in the AWA. In order to enable new employees to enter into employment expeditiously, an AWA for a new employee will come into operation when it is filed with the EA for approval, on a date specified in the AWA, or when the employment commences, whichever is the latest. Where such an AWA is subsequently refused approval, or modified in order to be accepted for approval, an employee is entitled to recover from the employer in an eligible court the shortfall between his or her entitlements under the AWA, and his or her entitlements under any amended AWA or, in the absence of an agreement, the relevant award.

Terminating an AWA

An employer and employee may at any time make a written agreement to terminate an AWA. After its nominal expiry date, an AWA continues in force unless it is replaced by a new agreement, terminated by agreement between the parties or, on the application of one of the parties, terminated by the AIRC if it considers that termination is not contrary to the public interest. Parties are also able to include in their agreement alternative arrangements for the termination of the agreement after the nominal expiry date.

Protected action when negotiating an AWA

There is a right to take industrial action and to lock out employees in the negotiation of an AWA. Immunity from civil liability in respect of industrial action or lockouts is conditional upon giving 3 working days' notice to the other party of the intention to take the action. Industrial action or lockouts during the period of operation of an agreement are prohibited.

Certified agreements — more accessible

The new legislation modifies the CA provisions with arrangements designed to make CAs more accessible. Transitional provisions cover existing agreements.

CAs will continue to be able to be made between the parties to an (interstate) industrial dispute to settle a dispute or a part of a dispute or to prevent further disputes. These provisions, which rely on the conciliation and arbitration power, allow agreements to be made between employers and unions.

Access to CAs is being broadened by relying also on the corporations power, the Territories, trade and commerce powers and powers in respect of Commonwealth employees. Under these provisions, CAs will be able to be made between employers and unions, or between employers and employees (for example, in workplaces with no or few union members). In these cases, a union must have a member in the enterprise concerned (whose interests it may represent) to be able to make an agreement or to participate in negotiations. In the case of agreements made between an employer and employees directly, a union will be able to represent its member(s) in negotiations and become bound by the final agreement only if a member so requests (although the union may choose not to be bound). Such agreements may cover all the employees in a single business, or the employees in part of a single business.

Award no longer a precondition

The previous precondition to certification of an agreement that there be a federal or State award in place before an agreement can be certified has been removed. Where parties who are not covered by an award wish to enter into a certified agreement, the AIRC will determine an appropriate award to act as a benchmark for the no- disadvantage test (see below).

AIRC certification

Before certifying an agreement, the AIRC must be satisfied that:

- the agreement meets the no-disadvantage test;
- a majority of employees to whom the agreement is to apply have genuinely made, or genuinely approved, the agreement
 - this requirement does not apply to agreements for greenfields sites;

- employees had the agreement explained to them in ways which were appropriate to their particular circumstances and needs;
- if the agreement covers only part of a single business, that it does not unfairly exclude some employees; and

- the agreement is not discriminatory on grounds including age, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin
 - there is a temporary exception for junior rates of pay and exceptions for discrimination because of the inherent requirements of the job or for employment in religious institutions.

Multi-employer agreements

Given the enterprise based focus of the agreement system, the capacity for multi-employer agreements to be certified is tightly circumscribed and involves testing against the public interest by a Full Bench of the AIRC. The consent of all employers and the majority of the employees to be covered by the agreement is required. Protected action is not available in the making of such agreements.

Terminating a CA

CAs are required to specify their period of operation, and there is an upper limit of three years. A CA can be terminated at any time by agreement between the parties, provided a majority of employees agree to the termination. After its nominal expiry date, a CA continues in force unless it is replaced by a new agreement, terminated by agreement between the parties or, on the application of one of the parties, terminated by the AIRC if the AIRC considers that termination is not contrary to the public interest. Parties are also able to include in their agreement, alternative arrangements for the termination of the agreement after its normal expiry date.

New employees and CAs

Unless otherwise agreed by the parties, new employees will be automatically covered by a relevant CA. However, a CA may expressly allow the employer to enter into AWAs with employees covered by the CA; in such cases, depending on the relevant provisions in the CA, the AWA will displace the CA, or prevail over it to the extent of any inconsistency.

AIRC assistance

The AIRC continues to be able to assist bargaining processes through its conciliation function, including through the issuing of orders (the good faith bargaining provisions in the old Act have, however, been removed).

Protected action and CAs

There is a right to take industrial action (but not by secondary boycotts) and to lock out during bargaining for single-business certified agreements (but not for multiple-business agreements). In the negotiation of single business CAs, for industrial action or a lockout to be regarded as protected action (that is, free from certain civil liability) it must take place during a bargaining period, which is initiated by a party giving written notice to each other party and to the AIRC about the party's intention to reach agreement. Industrial action or a lockout must also meet other conditions to be protected, including that it has been preceded by a genuine attempt to reach agreement, and 3 working days' notice must be given to the relevant party about the proposed industrial action.

Termination of a bargaining period — conciliation first

The AIRC can suspend or terminate a bargaining period (and then suspend or terminate the 'protected' status of any industrial action or lock out) on a number of grounds, including that genuine bargaining is not occurring, that a party taking industrial action is not complying with AIRC directions or recommendations, that industrial action is threatening to endanger the life, personal safety, health or welfare of the population or a part of it, or to cause significant damage to the Australian economy or an important part of it, or that, for parties who have customarily been covered by paid rates awards, there is no reasonable prospect of their reaching an agreement.

Where the AIRC terminates a bargaining period because of threatened harm to the community or the economy, or because of failed bargaining in an area customarily covered by a paid rates award, it must conciliate to facilitate the making of an certified agreement or otherwise to settle any matter or issue that could be covered by such an agreement. The requirement for conciliation applies even if the AIRC has already attempted conciliation during the bargaining period.

When arbitration is needed

If conciliation is not successful, and if it is not likely that further conciliation would result in the matters that were at issue during the bargaining period being settled within a reasonable time, the Commission must, if it considers appropriate, arbitrate to settle the matters. Such arbitration is required to be undertaken by a Full Bench, having regard to, among other things, the merits of the case, the interests of the parties and the public interest, how productivity might be improved, and any principles established by a Full Bench of the AIRC.

In making such an award, the AIRC is not limited by the scope of the allowable award matters and need not make minimum rates awards (see part 2). Awards made by the AIRC under these provisions can only apply to the single business to which the bargaining period applied. They cannot be varied other than to remove ambiguity or uncertainty, or to insert, remove or vary a provision authorising an employer to stand-down an employee.

They must specify a date as their nominal expiry date, and a bargaining period cannot be initiated before the nominal expiry date. Before their nominal expiry date, they can be revoked by the Full Bench only if it is satisfied that there is agreement between the parties bound (that is, the employer and the unions(s) or the employer and majority of employees) for the revocation and the revocation would not be contrary to the public interest. After their nominal expiry date, they would be terminated on application by a party if the AIRC considered that termination would not be contrary to the public interest. Such awards do not form part of the benchmark for the application of the no-disadvantage test.

When industrial action not permitted

When an agreement has been reached, industrial action is not permitted during its period of operation (that is, before its nominal expiry date).

AWA/CA relationships

CAs and AWAs may coexist in the same workplace, the legislation includes provisions specifying the circumstances in which one form of agreement takes precedence over the other (see subsection 170VQ(6)).

Both AWAs and CAs are able to be terminated early, varied or extended by agreement. Industrial action cannot be taken to force such a change during the period of operation of the agreement. For AWAs, changes need to be processed through the EA; for CAs they need to be processed through the AIRC, following majority endorsement.

CAs prevail over federal or State awards or State agreements to the extent of any inconsistency. AWAs operate to the exclusion of federal or State awards or State agreements. Both CAs and AWAs prevail over inconsistent terms and conditions of employment specified in a State law. However, both operate subject to any State law dealing with occupational health and safety, workers' compensation or apprenticeship.

Bargaining report

The legislation requires a biennial report on bargaining and agreement-making to be prepared, with a particular focus on the effects of bargaining during the reporting period on women, part-time employees, persons from a non-English speaking background and young people. The first report must cover the period from the commencement of the legislation to 31 December 1997. The Minister is required to table the report in Parliament.

Enterprise Flexibility Agreement provisions repealed

The Enterprise Flexibility Agreement (EFA) provisions have been repealed. Transitional provisions ensure the continuation of existing EFAs. At any time when an EFA is in force, the employer and any of the employees bound by the EFA will be able to enter into AWAs. Where the employer and one or more employees have entered into AWAs, the EFA would cease to have effect in relation to employees covered by AWAs. Otherwise, after the stated expiry date of an EFA, the EFA will continue in force unless it is replaced by a CA or terminated by the AIRC on application by one of the parties where the AIRC considers that termination would not be contrary to the public interest.

No-disadvantage test: general application

Both AWAs and CAs will be required to meet a no-disadvantage test. This means that agreements must not result in a reduction in employees' overall terms and conditions of employment when compared with the relevant award and any relevant laws. Where employees who are entering into an AWA are not covered by an award, the EA will determine an appropriate award for the purpose of establishing a benchmark for the no-disadvantage test. Where employees who are entering a CA are not covered by an award, the AIRC will determine an appropriate award.

There is scope for an agreement that would result in an overall reduction to be approved if its approval is judged by the AIRC not to be contrary to the public interest, for example, where the agreement is part of a reasonable strategy to deal with a short-term business crisis, and to help in the revival of the business.

The no-disadvantage test is a global test, which means that an agreement would be able to fall below any individual terms and conditions set by the award or legislative benchmarks, provided that there was no-

disadvantage with respect to the overall package. The public interest test would only apply where there was an overall disadvantage.

No-disadvantage test: special cases

Wages for persons with disabilities employed under the Supported Wage System (SWS) and for employees undertaking approved apprenticeships or traineeships are treated as special cases for the purposes of the no-disadvantage test. This is to ensure that appropriate wage arrangements can be included in AWAs and CAs for such employees even though the relevant award does not make appropriate provision for these employment arrangements.

In the application of the no-disadvantage test, wages set in accordance with the SWS for a person employed under the SWS will not be taken to reduce the wages of the employee.

Wages included in an agreement for employees undertaking an approved apprenticeship or traineeship will also not be taken to reduce the wages of the employees for the purposes of the no-disadvantage test where the wages are based on the most relevant award rate adjusted for time spent in training.

In the case of approved traineeships:

- the award rate which is adjusted is the relevant non-training rate (for example, the junior rate); and
- the proportion must be determined by the approving authority having regard to the reduction in the productive time of a trainee due to time spent in training under the traineeship.

These provisions do not apply to existing traineeships already included in awards, such as the National Training Wage traineeships.

For apprenticeships:

- the award rate which is adjusted is the most relevant apprentice rate — these rates are adjusted in accordance with a proportion which is determined by the approving authority which approves each apprenticeship or traineeship; and
- the proportion must take into account the proportionate difference in the productive time for the approved apprenticeship compared with the relevant award apprenticeship.

An agreement may also include alternative criteria to those specified in the award for determining the basis on which the apprentice or trainee progresses through the relevant wage scale. The alternative criteria must be determined by an approving authority. This will enable the parties to an agreement to adopt competency-based progression criteria where they consider this appropriate.

The Employment Advocate

The EA is a Statutory Officer with powers and functions set out in the legislation. The Office of the Employment Advocate (OEA) is being established as a distinct entity in the Department of Industrial Relations to facilitate the operation of AWAs and foster proper understanding and application of the opportunities, rights and obligations provided for by the new Act.

The intention is to maximise co-operation with State and Territory Governments and explore the scope for delegating or contracting out the performance of some functions and activities (for example, to extend the EA's accessibility in more remote locations).

Broadly, the functions of the EA are:

- providing assistance and advice to employees and employers, especially small businesses, on the new Act, AWAs, the no-disadvantage test and the freedom of association provisions;

- approving AWAs, ensuring that they meet the no-disadvantage test and other statutory requirements;
- handling alleged breaches of AWAs or the freedom of association provisions, and assisting employees in prosecuting breaches where appropriate.

In performing its functions, the EA is required to pay particular regard to:

- the needs of workers in a disadvantaged bargaining position (for example, women, people from a non-English speaking background, young people, apprentices, trainees and outworkers);
- assisting workers to balance work and family responsibilities; and
- promoting better work and management practices through Australian workplace agreements.

To enable these functions to be carried out effectively, the EA has the power to:

- ascertain AWA observance through inspectoral services (for example, to enter premises, inspect work machinery etc, interview employees, require the production of documents and make copies etc) and to facilitate voluntary compliance where there have been breaches;
- assist an individual party to an AWA to seek in a court the recovery of outstanding entitlements, interest, costs and a penalty against a party for breaching an AWA or the Act and regulations. The EA will also be able to provide assistance to a party involved in prosecution under the freedom of association provisions. In all cases, using the services of the EA will be a matter of choice, as a party will be able to pursue matters in the court independently if preferred; and
- assist claimants in using a quick, inexpensive and simple procedure, without the need for legal representation, to recover amounts of less than \$10 000 in Magistrates' Courts.

4. Freedom of association and organisational arrangements

Policy

Among the fundamental principles underpinning the Government's industrial relations policy are the principle of freedom of choice, the principle of freedom of association (the choice to be or not to be in a union or employer organisation, and the choice of which union or employer organisation) and the principle that all Australians be treated equally before the law. Greater choice will encourage the development of registered organisations that are more competitive, providing a higher level of service to members.

To give effect to these objectives, the new Act includes provisions which make membership of all organisations voluntary. Compulsory unionism and preference are outlawed. Greater freedom to form and join unions is facilitated by repealing the 'conveniently belong' restriction on registration and replacing it with a new provision, reducing the minimum number of members for a union to be registered, allowing for the registration of enterprise unions with different registration criteria from other organisations, and providing for the disamalgamation of unions. The objects of the Act also reflect those aims by emphasising that organisations should be representative of, and accountable to, their members and able to operate effectively.

Following a review to establish the most effective arrangements, provisions will be enacted for the accountability of organisations to their members to be strengthened by improving the financial accounting and reporting provisions. Amendments to strengthen the Industrial Registrar's supervisory powers are included in the new Act.

Unlawful conduct

The AIRC is denied jurisdiction over matters which relate to claims for preference. Existing provisions providing for preference will cease to have effect.

Employment discrimination against, or victimisation of, an individual (or threats of such action) is unlawful, where that occurs on the grounds of:

- the person's membership or non-membership of a registered organisation or an association applying for registration;
- the person's seeking to exercise rights under the Act or under an award or agreement, or seeking the assistance of any person or body under the Act which has the capacity to seek the observance of the Act or the person's rights under an award or agreement; and/or the person's participation in proceedings under the Act before the AIRC or another tribunal or a court.

An employer who becomes bound by an agreement is prohibited from refusing to extend the terms and conditions of that agreement to any other employees who would be covered by the agreement if they were members of a union that is a party to the agreement, or if they were not members of a union (or a particular union).

Individuals (including independent contractors) are protected against coercion (whether direct or indirect) to join or not to join an organisation or to cease to be a member of an organisation. In addition, where agreements are made directly with employees, the new Act provides that an employer must not coerce or attempt to coerce an employee not to request, or to withdraw a request, for an organisation to represent the employee in meeting and conferring with the employer about the agreement.

The existing provisions of the Act which create offences for discrimination against, or victimisation of, members of organisations and independent contractors are integrated with the new provisions. The unlawful conduct in all cases will give rise to civil remedies (with a civil standard of proof), rather than criminal liability (which has a higher standard of proof).

The new provisions relating to unlawful conduct are intended to apply to employers, unions and other persons outside the federal system, except that an application to the court cannot be made if an application in respect of the conduct has already been made under a law of a State or Territory, unless that application failed for lack of jurisdiction.

The Federal Court of Australia will be empowered to impose a penalty; make such orders (including interim and final injunctions) as it thinks necessary to stop (or prevent) the prohibited conduct and to remedy its effects; and to award financial compensation to the victim of the prohibited conduct.

Organisations

New provisions will assist in the establishment of new unions, including enterprise unions. The minimum registration requirement will be lowered (from 100 to 50 members). The Act will continue to provide that an applicant association must be capable of being engaged in an interstate industrial dispute to be eligible for registration, except in the case of enterprise unions.

The 'conveniently belong' restrictions on registration are repealed and replaced by a new provision requiring a registered organisation that objects to an applicant's registration to establish that the applicant's members could more conveniently be members of the objecting organisation, and would be more effectively represented by that organisation. However, even if the specified grounds for objection are satisfied, it will be possible to register an applicant association with appropriate undertakings or alterations to its rules.

Similar criteria to those specified for registration apply to alteration of eligibility rules.

Enterprise unions

The Act introduces provisions for the registration of enterprise unions, that is, associations of employees which have eligibility rules covering a majority of employees in an enterprise. The registration criteria for enterprise unions differ from those applicable to organisations as follows:

- the Designated Presidential Member must be satisfied that a majority of persons eligible to be members of the applicant enterprise union support its registration;
- it will not be necessary for the enterprise union to be capable of being engaged in an interstate industrial dispute; and
- the 'more conveniently' belong grounds for objection previously noted would not be available in relation to applications for registration by enterprise unions.

Because the corporations power will be used to support certified agreements, an enterprise union will be able to enter into such an agreement with a corporation. No jurisdictional restrictions will apply to enterprise unions in the Territories. The threshold for organisations, including unions, to be subject to less demanding financial reporting requirements will be raised from \$10 000 to \$20 000.

Demarcation issues

The powers of the AIRC to make orders about the representative rights of organisations has been revised so that it can only make orders dealing with demarcation between registered unions. Further, it can only make such orders where there are actual or threatened harmful effects on an employer's operations. In considering whether to make an order, the AIRC will have to give primacy to the views of employees involved, and consider the effect of any order it may make on the operations of the business and any prior understandings about representation rights or previous demarcation orders involving the organisation to which an order would relate.

Disamalgamation of unions

Provision will be made to allow for the disamalgamation of federally registered unions. This recognises that amalgamations occurred after 1991 in the context of pressured circumstances (for example, new provisions of the Industrial Relations Act designed to force small unions into such relationships). It also recognises that there may be situations where amalgamations turn out to be unsatisfactory.

Accordingly, for a reasonable period after an amalgamation, an application to disamalgamate will be possible. A prescribed number or percentage of members of an amalgamated union who were or would have been eligible, immediately before the amalgamation, for membership of a union which participated in the amalgamation, and which was deregistered for the purposes of the amalgamation, will be able to seek a ballot on the proposed disamalgamation. This will also be available in relation to a former State branch of a union which was deregistered for the purposes of an amalgamation. Subject to a majority being in favour of disamalgamation, the Federal Court will be able to approve the disamalgamation and to make appropriate orders about the fair division of the assets and liabilities, and any other matters necessary to be dealt with to implement the disamalgamation fairly.

Accountability of organisations

The powers of the Industrial Registrar to ensure that organisations meet the financial accounting and reporting requirements of the Act will be strengthened. In addition, as noted above, there will also be a review of those provisions more generally. This is intended to improve their operation, particularly by

ensuring that organisations are properly accountable to their members and that members have ready access to properly kept and audited accounts. Following the review, the relevant provisions will be modified in later amendments to the Act to make them as nearly as practicable the same as those for companies.

Union right of entry

The provisions of the *Industrial Relations Act 1988* relating to the rights of unions to enter workplaces have been removed. The new Act includes statutory rights of entry, both to investigate suspected award or other breaches and for the purposes of discussions with employees, contingent on the union obtaining a permit from the Registrar.

Permit arrangements

On the application of an organisation, the Registrar may issue a permit to an officer or employee of an organisation. A permit will remain in force for 3 years unless it is revoked or the person to whom it was issued ceases to be an officer of the organisation.

The holder of a permit is authorised to enter premises during working hours for the purpose of investigating suspected breaches of the Act or of an award, order or certified agreement that is in force and binding on the organisation of which the permit holder is an officer or employee. The right of entry to investigate breaches may only be exercised in respect of premises where there are employees who are members of the organisation.

A permit holder is also authorised to enter premises during working hours for the purpose of holding discussions with any employees who wish to participate in the discussions. This right of entry only applies to premises where there are employees who are members of the organisation concerned or employees who are eligible to be members of that organisation, and the employer is bound by an award, to whom the union is a party. Discussions may only be held during the employees' meal-time or other breaks.

A permit holder is not entitled to enter premises unless the occupier has been given at least 24 hour's notice of the person's intention to do so, and is not entitled to enter premises used for residential purposes without the permission of the occupier.

Recovery of subscriptions owed

The new Act places a 12-month time limit on a person's liability for arrears owing in relation to membership subscriptions, fees, levies, fines etc. The limit will apply to arrears owing by members as well as former members, and will apply in respect of arrears owing to either a union or an employer organisation.

5. Industrial action

Policy

Legislative provisions dealing with industrial action have been revised in order to achieve a fair balance between the rights of employers, employees, representative organisations and the general community.

Consistent with the generally accepted principles of collective bargaining, industrial action is permitted in certain circumstances. There is a right to engage in such action and a right to lock out under the Workplace Relations Act in relation to bargaining for a single business CA or an AWA. Industrial action other than for genuine bargaining for agreements is not otherwise compatible with the norms of the system and is unlawful.

The AIRC's powers to stop or prevent unlawful industrial action have been strengthened.

Agreements

As noted in part 3, the legislation provides for a limited right to engage in industrial action or to lock out employees in the negotiation of single-business certified agreements. For industrial action or a lockout to be regarded as protected action (that is, immune from certain civil liability) it must take place during a bargaining period, which is initiated by a party giving written notice to each other party and to the Australian Industrial Relations Commission about the party's intention to reach an agreement. Industrial action or a lockout must also meet other conditions to be protected, including that it has been preceded by a genuine attempt to reach agreement, and notice must be given to the relevant party about the proposed industrial action.

The AIRC can suspend or terminate a bargaining period (and thus suspend the protected status of industrial action) on a number of grounds, including that:

- genuine bargaining is not occurring;
- a party taking industrial action is not complying with AIRC directions or recommendations;
- the action relates to a significant extent to a demarcation dispute;
- industrial action is threatening to endanger the life, personal safety, health or welfare of the population or a part of it, or to cause significant damage to the Australian economy or an important part of it; or
- for parties who have customarily been covered by paid rates awards, there is no reasonable prospect of their reaching an agreement.

In certain cases following the termination of a bargaining period, the AIRC is able to arbitrate within circumscribed parameters (see part 3). Any industrial action or lockout that persists following the suspension or termination of a bargaining period is not protected action, and would be liable to the range of remedies and sanctions available for unlawful industrial action.

There is also a right to take industrial action and to lock out employees during bargaining for AWAs.

When an agreement has been reached, industrial action is not permitted during its period of operation (that is, before its nominal expiry date).

Awards

Industrial action is not compatible with a system in which there is access to compulsory arbitration. There will be no legal protection for industrial action except as described above in relation to agreements.

AIRC's powers

The AIRC has been given enhanced powers to give directions to stop or prevent unlawful industrial action. These apply to any matters within its jurisdiction, including inter-organisational disputes (for example, demarcation/representation disputes). The Federal Court of Australia is able to enforce such directions by injunctions and is able to award damages and sequester funds.

The AIRC's other powers in relation to unlawful industrial action have been retained (that is: stand down provisions; refraining from hearing matters where a party is not complying with an award, order, direction or recommendation; suspension or cancellation of awards; and orders in relation to industrial action in the Commonwealth and Territory public sectors).

Penalties for breaches of awards and agreements

Non-compliance with an order provides a new ground for deregistration under the Act (deregistration matters will be dealt with by the Federal Court, which will replace the Industrial Relations Court of Australia).

Non-compliance with awards and agreements is similarly unlawful. Maximum penalties for breaches of agreements have been increased (to up to \$10 000 for bodies corporate and \$2000 for individuals). There are daily penalties of \$5,000 (or \$1000 for individuals), but the parties to the agreement are able to agree to vary the amount. The maximum penalty for award breaches has also been increased to \$10 000 (\$2000 for individuals), with a maximum of \$5000 per day for a continuing breach, where the AIRC provides for daily penalties.

Strike pay

It is unlawful for an employer to pay strike pay; for a union (or its representatives) to take industrial action to pursue strike pay; or for an employee to accept strike pay. Where such action occurs or is about to occur, the Federal Court is able to make such orders as are necessary, including by issuing an injunction, and may award damages for any loss suffered as a result of the relevant unlawful conduct. The Court may also impose a monetary penalty of not more than \$10 000.

The prohibition will not apply where work has stopped or been performed differently by the employees concerned because they have a reasonable concern about their personal health and safety owing to unsafe working conditions, and they have not refused to accept a reasonable direction to perform other safe and appropriate work, whether at the same or another workplace. Such action is specifically excluded from the definition of industrial action.

The AIRC has no jurisdiction over claims for strike pay.

Secondary boycotts

Secondary boycott provisions have been restored to the *Trade Practices Act 1974*. The provisions prohibit secondary boycott conduct for the purpose of causing substantial loss or damage or a substantial lessening of competition. These provisions are complemented by provisions which ensure that the prohibition on secondary boycott action is not weakened by collusion between firms and unions. The legislation also prohibits both primary and secondary boycotts affecting overseas trade or commerce involving the movement of goods.

However, there is no contravention of the boycott provisions where the dominant purpose of the conduct substantially relates to pay, employment conditions, hours of work or working conditions covering the workplace of those involved in the dispute.

There is also an exemption for conduct the dominant purpose of which relates to environmental protection or consumer protection, but this exemption does not apply to conduct which involves industrial action. If the conduct is engaged in by an environmental organisation or a consumer organisation which is a body corporate, both the organisation and its members would be covered by the exemption. If the conduct is engaged in by an environmental organisation or a consumer organisation which is not a body corporate, then the organisation would not be subject to the prohibition on secondary and some primary boycotts (and hence would not be covered by the exemption as such). However, its members would be covered by the exemption as they would otherwise be subject to the prohibition.

In any proceedings relating to a boycott dispute, the Court is required to have regard to any action that the applicant in the proceedings has taken or could take before the AIRC or a State industrial authority in relation to the boycott dispute, particularly an application for conciliation.

Common law

The new Act retains a requirement for a 72 hour 'cooling off' period before action in tort can be taken against a federally registered union taking unlawful industrial action. However, the cooling off period will not be available in respect of action that has resulted in personal injury or damage to property, action arising out of a demarcation dispute, action relating to a claim for strike pay or action that is in breach of a Commission direction. Separate, related periods of industrial action can be regarded cumulatively for the purpose of the AIRC certifying that the 72 hour 'cooling off' period has expired.

6. Unfair dismissal

Policy

The Government is committed to introducing a new unfair dismissal scheme which provides employees with access to a fair and simple process of appeal against dismissal, based on the principle of a 'fair go all round'; is fair to both employee and employer; ensures legal costs are minimised and discourages frivolous and malicious claims; and is in accord with Australia's international obligations.

AIRC'S role

A new jurisdiction for the AIRC is created to empower it to consider whether a termination of employment was harsh, unjust or unreasonable, and to create new entitlements accordingly, by way of orders (where appropriate) enforceable in a court.

Coverage

This jurisdiction applies only in the traditional federal area of coverage, that is, employees covered by federal awards or agreements, Federal Government employees and, in the case of the Territories, all employees (whether or not they are covered by awards or agreements).

The provisions on harsh, unjust or unreasonable termination are supported by a range of constitutional heads of power, including the corporations power (but not the external affairs power as a result of the High Court decision of 4 September 1996 in *Victoria v Commonwealth of Australia*). Consequently, the provisions will apply to a federal award employee who was employed by a constitutional corporation, or who was employed in relation to interstate trade or overseas trade or commerce as a waterside worker, maritime employee or flight crew officer. The Federal Government has sought the cooperation of the States in giving the AIRC power to deal with the dismissal of employees covered by federal awards or agreements who may not be within the scope of available constitutional power, and the Act facilitates this.

Simple processes

Where an employee (within the scope of the jurisdiction) is dismissed, and claims the dismissal was harsh, unjust or unreasonable, the employee may apply to the AIRC for the claim to be dealt with. An applicant will be able to be represented by a registered organisation. There will be a filing fee (under the regulations) to discourage frivolous and malicious claims.

Conciliation first

The AIRC is required to attempt to settle the claim by conciliation, and if conciliation is unsuccessful, to arbitrate on the claim. The AIRC will issue a certificate when it is satisfied that all reasonable attempts to settle a matter by conciliation have been unsuccessful. The certificate will state the grounds upon which conciliation has been unsuccessful. The AIRC is also required at this time to provide the parties with its assessment of the merits of the application, and may recommend that the applicant not pursue a particular ground(s). Within 7 days of the certificate being issued, an applicant must choose (by written election lodged with the AIRC) whether or not to pursue any unsettled grounds.

What is harsh, unjust or unreasonable?

In determining whether a dismissal was harsh, unjust or unreasonable, the AIRC will be required to take into account relevant factors, including:

- whether there was a valid reason for the dismissal, concerning the capacity or conduct of the employee or the operational requirements of the employer's undertaking, establishment or service;
- whether the reason for the dismissal had been given to the applicant;
- whether the applicant had been given an opportunity to respond to any reason related to the applicant's capacity or conduct; and
- whether there was any warning as to unsatisfactory performance.

Remedies

The AIRC will be able to grant a remedy, where it determines that a dismissal was harsh, unjust or unreasonable, and a remedy is appropriate in all the circumstances of the case. In considering whether any remedy is appropriate in all the circumstances, the AIRC will have to consider a range of factors, including its possible effect on the viability of the employer's business, the length of the employee's service, the remuneration that the employee would have received if not for the termination, and the efforts of the employee to mitigate any loss.

The AIRC will be able to grant reinstatement (and ancillary orders in respect of lost pay) or, if reinstatement would be inappropriate, such payment in lieu of reinstatement as the AIRC thinks fair having regard to all the circumstances of the case (with a maximum of six months' remuneration; for non-award employees in the Territories or Federal Government employment, payment ordered could also not exceed an indexed \$32,000, as presently).

Payment of costs

The AIRC will be able to order payment of costs in cases of applications instituted vexatiously or without reasonable cause. If the matter proceeds to arbitration, the AIRC will be able to order costs if a party acted unreasonably in failing to discontinue or settle; if a matter is discontinued more than 14 days after conciliation, the AIRC will be able to order costs if satisfied that the employee acted unreasonably. The AIRC's orders will be subject to review and appeal in the same way as orders made in its ordinary arbitration jurisdiction, and will be enforceable by the Federal Court and State courts of competent jurisdiction. The Act enables prescription of a schedule of costs for termination cases which can include legal and professional costs, as well as non-legal costs.

Other key features

The main provisions of the *Industrial Relations Act 1988* on termination of employment are replaced by this new unfair dismissal jurisdiction. However, some related matters are retained:

- the entitlement to minimum notice (the exception to the notice requirement — serious misconduct — will be defined in the regulations);
- the prohibition on termination of employment for certain proscribed (discriminatory) reasons
- the obligation to notify the CES of a decision to terminate in special redundancy circumstances; and
- the AIRC's capacities to make orders of general application on severance pay, and orders on consultation in special redundancy circumstances.

The proscribed grounds reflect s.170DF of the *Industrial Relations Act 1988* with the addition of protection against dismissal where an employee fails to sign an AWA. Unlawful termination applications will also commence in the AIRC, where it is intended that the role of conciliation will be pre-eminent.

Under the new Act, an employee or their union may make an application for a remedy in contravention of these provisions, and employees are entitled to be represented by their union in proceedings.

All applications to a court in relation to unlawful termination are subject to the requirement that the applicant holds a certificate from the AIRC. An employee cannot pursue an application in respect of unlawful termination (other than failure to provide minimum notice) together with an application in respect of harsh, unjust or unreasonable termination.

7. Harmonisation of federal and State industrial relations systems

Policy

The Government considers that the efficiency of current service delivery arrangements between the State/Territories and the Commonwealth is adversely affected by the interplay of jurisdictional factors, duplication and overlap. The current operation of Australia's dual system of State and federal industrial laws and tribunals contributes to complexity and regulatory burden for all participants. The modernisation of the federal industrial relations system effected in the Workplace Relations Act will deliver substantial improvements for Australian industry. However, to maximise the benefits available, labour market reform must also address the interaction of the federal and State systems.

All industrial relations systems, federal and State, are developing a common thrust toward productivity improvement, achieved through the formation of a co-operative workplace culture and more flexible labour market and workplace practices. A prime focus is to allow employers and employees to enter into direct arrangements with each other, with such workplace agreements being subject to certain minimum pay and conditions.

While there now exists a great deal of common ground between the proposed federal arrangements and existing State systems, there is clearly scope to reduce complexities inherent in the system. This can be achieved on two fronts: through greater harmonisation at the legislative level, and a more integrated, cooperative approach to service delivery.

Relationship between federal and state systems

Earlier sections of this guide raise a number of issues relating to the interface of the federal and State systems.

Parties to a federal award will be able to enter into agreements under State legislation, provided that the State Act under which the employment agreement was made provides that the agreement must be approved by a State industrial authority, which must be satisfied that:

- employees covered by the agreement are not disadvantaged in comparison to their entitlements under the relevant award; and
- the agreement was genuinely made or was made in the absence of duress or coercion; and
- the agreement covers all employees who could reasonably be expected to be covered.

Cooperation has been sought from the States in passing complementary legislation to enable all employers (notably those in the unincorporated sector) to be able to access federal agreements (particularly AWAs). The States have also been asked to review the provisions for processing of their agreements.

Movement between jurisdictions

In relation to movement from State jurisdictions to federal awards, the 'fast tracking' provisions have been removed and applicants for a federal award for employees covered by a State award or agreement are required to show that a federal award would be in the public interest. In determining the public interest, the AIRC is required to give primary consideration to the views of employers and employees affected, and to ascertain their views as quickly as possible. Other concerns relating to the AIRC's jurisdiction, notably over AIRC coverage and decision-making jurisdiction for State/Territory public

servants, should be ameliorated by reforms involving the simplification of awards and the phasing out of paid rates awards.

Unfair dismissal

A new jurisdiction for the AIRC has been established in relation to unfair dismissal which applies only in the traditional federal area of coverage. The States have been asked to ensure that their jurisdictions provide unfair dismissal arrangements that meet Australia's international obligations. Cooperation of the States has been sought in giving the AIRC power to deal with dismissals of employees covered by federal awards or agreements which may not be within the scope of available constitutional powers.

Freedom of association

Proposed arrangements on freedom of association are discussed in part 4. Areas of intersection with State arrangements include removal of union preference and compulsory unionism, and protection against discrimination in employment on certain grounds. The easier registration provisions will result in greater choice for employees as to whether they belong to federal or State unions.

AIRC and state tribunals

Institutional changes give the AIRC greater flexibility and effectiveness in its operation, including through complementary arrangements with State tribunals (for example, dual appointments and interworking of industrial registries). These will be complemented by measures to achieve greater efficiencies through co-operative administrative arrangements between the systems.

Use of State small claims processes

Monetary entitlements can already be pursued in State courts, with a small claims procedure available for claims under \$10 000 in Magistrates' Courts. Actions for non-monetary remedies in State courts may also be desirable. Achieving greater effectiveness in small claims procedures and the approach of the courts will be important to make these processes more accessible and simple.

Victoria

The Victorian and Commonwealth Governments have agreed to the referral of the State of Victoria's industrial relations powers. The referral will ensure the Victorian and Commonwealth industrial relations systems operate seamlessly and without wasteful jurisdictional contests.

Victorian legislation to facilitate the agreed referral passed both Houses of the Victorian Parliament on 5 December 1996. Commonwealth legislation to effect the referral was passed on 13 December 1996. The referral will apply from 31 December 1996.

Under the reforms, Victorian employers and employees will be able to enter into federal awards or federal agreements. They will be able to continue to operate under their current State agreements or informal arrangements, so long as they are not subject to a federal award or do not otherwise choose to make a federal agreement. No new formal State agreements will be possible. For those without a federal agreement or a federal award, the AIRC will be able to make safety net adjustments to Victorian minimum wages.

On referral, Victorian workers will have immediate access to the federal unfair dismissals jurisdiction.

8. Other legislative initiatives

To support the new directions and institutional arrangements, a range of other initiatives form part of the Government's policy implementation.

Minimum entitlements provisions

A range of minimum entitlements provisions, dependent on the external affairs power, were introduced by the *Industrial Relations Reform Act 1993*, forming Part VIA of the *Industrial Relations Act 1988*. They concern minimum wages, equal remuneration for work of equal value, termination of employment and parental leave.

The termination provisions are dealt with in part 6.

The new Act retains the equal remuneration provisions formerly found in Division 2, Part VIA of the *Industrial Relations Act 1988*. These provisions allow the AIRC to make orders, on application, to ensure that for employees covered by the orders there will be equal remuneration for men and women workers for work of equal value without discrimination based on sex. There has been a minor amendment to the provisions to prevent employers from being faced with multiple claims in different forums in relation to a single alleged instance of inequality of remuneration (for example, before the Human Rights and Equal Opportunity Commission as well as before the AIRC). The parental leave provisions have been retained.

As every jurisdiction has adequate machinery to deal with minimum wages, these provisions are redundant and have been repealed.

AIRC arrangements

Complementary institutional changes will give the AIRC's operations greater flexibility and effectiveness.

The obligation on the President to establish industry panels has been removed and, in directing the business of the AIRC, the President is required to have regard to the efficiencies and effective handling of the AIRC's work that may be achieved by complementary arrangements with State tribunals (for example, joint Benches in cases involving transfer of jurisdiction).

The Bargaining Division has been abolished, in light of the much clearer delineation of awards and agreements that has been established, and the inefficiencies which the former provisions caused for the AIRC.

Industrial Relations Court of Australia

The jurisdiction of the Industrial Relations Court of Australia (IRCA) has been transferred to the Federal Court of Australia. Detailed arrangements have been developed in conjunction with the Commonwealth Attorney-General.

From the date of commencement of the provisions of the legislation relating to the transfer of jurisdiction, all cases outstanding in the IRCA will be transferred to the Federal Court, except for matters where the IRCA has commenced a substantive hearing. The IRCA will retain jurisdiction until completion of those hearings and delivery of judgements, but from that time it will no longer exercise any jurisdiction. It will, however, for constitutional reasons, continue in existence until the last IRCA judge resigns his commission or retires.

Trade Union Training Authority

The *Trade Union Training Authority Act 1975* has been repealed. The Authority's operations ceased on 1 July 1996.