# INDUSTRIAL RELATIONS LEGISLATION

# AMENDMENT AND REPEAL BILL 1995

# EXPLANATORY NOTES

## PART 1 - PRELIMINARY

Clause 1
This clause provides that for the purposes of citation, the Act is to be called the Industrial Relations Legislation Amendment and Repeal Act 1995. The original Bill is to be withdrawn following the tabling of the amendments. In order to avoid confusion when referring to the two Bills, this Bill has been given a new name.

Clause 2
This clause provides that whenever the Industrial Relations Act 1979 is referred to in the Bill it will be referred to as the principal Act.

Clause 3
This clause provides that the provisions relating to strike ballots, political donations, bargaining and industrial agents, the invalidating of existing provisions in awards, orders and industrial agreements relating to the inspection of employee time and wages records, the giving to employees a choice of superannuation fund, the giving to the Australian Medical Association an increased capacity to represent medical practitioners and the repeal of the Truck Act 1899 and the Factories and Shops Act 1963, will come into operation on proclamation, while the rest of the Act will come into operation on the day it receives the Royal Assent. Those matters which will come into operation on proclamation are delayed in order to have relevant Regulations drafted or to give timely notice of changes to legislation having substantive effect.

## PART 2 - STRIKE BALLOTS

This Part imposes obligations on organisations and their members to undertake secret ballots prior to engaging in any form of industrial action involving a stoppage of work or a ban or limitation on the performance of work.

Clause 4
Clause 4 inserts a new Part VIB in the Industrial Relations Act 1979. Section 97(1) defines a "strike" as industrial action by 2 or more employees or by an organisation that involves a stoppage of or ban or limitation on the performance of the work that is required under the employee's contract of employment.

The section also includes a definition of a "related federal body" as a Counterpart Federal Body within the meaning of section 71 of the Act or a Branch which has been declared by the Full Bench to operate in conjunction with an organisation as if they were the same body. State registered organisations and the State branches of federal organisations are distinct legal entities, although they frequently have the same name, the same officers, operate from the same premises, use the same stationary and membership cards and use the one bank account. The term "related federal body" is to be used in the Act to refer to the State branch of the federal organisation. These organisations, being registered under the federal Act, are not amenable to State law. The State Act currently recognises only some of these organisations, namely those which are a "Counterpart Federal Body" under section 71 of the Act.

A "Counterpart Federal Body" is a Branch of a Federal organisation registered under the Commonwealth Act, which shares the same rules, with respect to qualifications for membership and the offices which can exist within the Branch, as a State organisation registered under Division 4 of Part II of the State Act.

The Registrar issues the State organisation with a certificate declaring that the provisions of the Act relating to elections for office within a State organisation do not apply in relation to offices in that organisation and that persons holding office in accordance with the rules of the Counterpart Federal body shall be officers of the State organisation (ie officers elected or appointed to office in the federal organisation automatically become officers in the State organisation). This certificate must be issued after the committee of management of the State organisation has notified the Registrar that the rules have been altered to provide that each office may be held by the person who, in accordance with the rules of the federal Counterpart Body holds office in that body.

The certificate recognises that officers of the Branch of the Federal organisation will be the same persons who are officers of the State organisation. However, this is dependant upon the issuing of a certificate. The same relationship may exist without the certificate, but it is not currently recognised under the State Act.

The objective of the definition is to provide a means of giving recognition to the relationship. The insertion of subsections (2) and (3) allows the Full Bench to determine that a Branch of the federal organisation is effectively operating as if it were a federal Counterpart Body even though no section 71 certificate exists. The Full Bench can declare that the organisation is a related federal body, if it has rules as to the qualification of people for membership that enable the members of the organisation, or a substantial proportion of them, to be members of the Branch, has the same officers and employees, or some of the same officers and employees, as the organisation, shares premises in the State with the organisation, or has funds or accounts that are jointly owned, managed or controlled by the organisation.

This is being done to prevent the State organisation saying that any unlawful actions under the State Act or actions which are subject to some form of prescription, were done by the federal Branch. This is achieved by providing that actions done by the related federal body are, in the absence of evidence to the contrary, taken to have been done by the State organisation.

The new Section 97A(1) clarifies that the provisions relating to strike ballots, do not confer any rights or affect any liabilities, civil or criminal and whether arising under the Industrial Relations Act 1979, or any other written law or the common law. Organisations and their members may still be sued for damages arising out of any torts that are committed in the taking of the strike action and are liable under the existing criminal law in respect of any offences committed through or in conjunction with strike action. This is the case despite anything to the contrary in the rules of an organisation.

Subsection (3) excludes the operation of this Part from situations where the strike action is by parties to a workplace agreement and subsection (4) provides that strikes which are in progress when the legislation comes into force is not subject to the provisions of this Part, provided the strike does not contravene the rules of the organisation and is completed within 28 days of this part coming into force.

The new section 97B specifies that a member of an organisation shall not take part in a strike of any kind, unless

- a strike ballot has been conducted;
- the member was entitled to vote in that ballot;
- the type of strike taking place has been approved by the ballot;
- the strike takes place within 28 days of the ballot result being declared; and
- the employer has been notified of the intention to strike.

Subsection (2) provides that organisations are prohibited from inciting, encouraging or assisting members or being knowingly concerned in or party to members going on strike contrary to the provisions.

Subsection (3) prescribes how particular types of strikes become approved. A particular kind of strike is allowed only if it has been endorsed by the members. Endorsement occurs when a majority of members entitled to vote in the ballot have voted "Yes" to being willing to take part in a strike of that particular kind.

Subsection (4) clarifies that a meeting called for the purpose of the organisation finding out the views of members on taking a strike or to give advice or information relative to a strike, does not amount to inciting or encouraging or participating in a breach of the strike ballot provisions.

Section 97C details the responsibilities of members and the organisation in respect of this Part. Subsection (1) provides that where a member of the organisation is also a member of the related federal body, any strike action taken by the member is taken to have been done in the members capacity as a member of the State organisation, unless the member proves otherwise.

Subsection (2) provides that the organisation is taken to have contravened the strike ballot provisions if any officer or employee of the organisation incited, encouraged or assisted members to strike in contravention of the provisions or was knowingly concerned in or a party to members taking strike action contrary to the provisions. There is no liability if the organisation can prove that the officer or employee acted without the organisation's consent or connivance and the organisation exercised sufficient diligence, in all the circumstances, to prevent the officer or employee from behaving in that way.

Section 97D prescribes the processes for obtaining a strike ballot. If a strike is contemplated, the organisation or a member of it who has an interest in the matter, may apply to the Commission for a strike ballot to be conducted. An application is to be in writing and state the reasons for the application, the relevant facts and details of the proposed form of strike. The application must be accompanied by a list of the employers likely to have employees taking part in any strike and such other particulars as may be prescribed by regulations. The Commission is required to deal with such applications as expeditiously as possible and try to give a decision and any necessary directions within 7 days of the application being made.

Section 97E deals with the role of the Commission. If an application for a strike ballot is made by the organisation and that application has been approved by the organisation's committee of management, the Commission must order the ballot to be conducted.

If the application is made by a member or by the organisation without the endorsement of the committee of management, the Commission has a discretion as to whether or not to order a ballot to be conducted. The Commission also has the power to order a ballot to be conducted on its own motion if it believes that a strike is contemplated and a strike ballot is justified by the circumstances.

The Commission is not limited to the information provided in the application in making its decision and the paramount considerations in dealing with an application are to be the circumstances and the provisions of this Part of the Act.

When its decision is made, the Commission is to give, in writing and to the applicant, the organisation concerned and any other party to the proceedings -

- notice of any decision on whether to conduct a ballot;
- notice of any decision on whether more than one ballot will be conducted for members who have different places of work;
- reasons for each decision; and
- any directions as to who is to vote and who is to conduct the ballot

If the application has been made by a member of the organisation or the organisation without an endorsement by the committee of management and the Commission refuses to order a strike ballot to be conducted, or the applicant wishes to contest the Commission's direction as to who may take part in the strike ballot, that applicant may appeal to the Full Bench against the decision or direction. An appeal must be lodged within 48 hours of the decision or direction being given.

Any person who is not the applicant but who has been given notice of the strike ballot decision, notice of whether more than one ballot will be conducted for members who have different places of work, details of the reasons for the decision and directions on who is to vote and who is to conduct the ballot, may also appeal to the Full Bench, but only on grounds that the decision is wrong in law or is in excess of jurisdiction. The existing appeal provisions apply to all appeals under this Part.

Section 97F deals with who is entitled to vote and where the ballot is to be conducted. The class of members who will be entitled to vote will be decided by the Commission and a direction given to this effect to the person conducting the ballot. Only employees who are members of the organisation and included in the list of members that is drawn up by the person conducting the ballot will be eligible to vote in the strike ballot.

Where members work in different places, the Commission is empowered to order separate strike ballots for each workplace, a single ballot for all workplaces or separate ballots for such separate workplaces as the Commission orders. A ballot is only applicable in respect of the workplace or workplaces for which it was held.

Section 97G deals with who is to conduct the strike ballot. Subsection (1) provides that the Commission can order the Registrar or some other person to conduct the ballot, arrange for an officer of the Electoral Commission or some other person appointed by the Electoral Commissioner to conduct the ballot or direct that the ballot will be conducted by the relevant organisation.

Subsection (2) provides that an organisation or a member, employee or officer of an organisation cannot be appointed by the Commission under subsection (1)(a) or by the Electoral Commissioner under subsection (1)(b) to conduct a strike ballot involving members of that organisation.

Where the organisation is directed to conduct the ballot under subsection (1)(c), subsection (10) provides that the organisation must conduct the ballot in accordance with its rules, any regulations made under section 97I and any directions given by the Commission and must lodge with the Registrar a copy of the register of members. The Registrar or Deputy Registrar is responsible for supervising the ballot and must report the outcome to the Commission.

Where any rules of an organisation relating to ballots are contrary to or inconsistent with the regulations made under section 97I, or a direction of the Commission, subsection (11) provides that the regulations or the direction of the Commission will prevail.

Subsections (3) and (4) empower the Commission to give directions, whether as a result of being asked or otherwise, to the person conducting the ballot and that person must comply with such directions.

Subsection (5) specifies what the person conducting the ballot must do in respect of the ballot. The person is obliged to take all reasonable steps to compile an accurate list of the names and addresses of members entitled to vote in the ballot and the identity of their employers, to ensure that individual member's votes remain secret and that no irregularities occur in the conducting of the ballot.

Subsection (6) gives the person conducting the ballot power to take any necessary action and give necessary directions to persons in order to conduct the ballot. Where such a person is acting on behalf of an organisation conducting the ballot under subsection (1)(c), the directions he or she gives are subject to authorisation being given by the Registrar or Deputy Registrar.

Subsection (7) deals with the responsibility of persons given directions by the person conducting the strike ballot. A person is prohibited from refusing or failing to comply with any such directions and is not permitted to obstruct or hinder the person conducting the strike ballot or any other person who is carrying out a direction given by the person conducting the strike ballot.

Strike ballots are to be conducted in accordance with a code of practice which is set out in schedule 3 to the Act. This is provided for in subsection (8).

Scrutineers are allowed to be appointed by any party to the application for a strike ballot and subsection (9) provides for their appointment to be in a prescribed manner.

Section 97H provides that the person conducting the strike ballot is required to notify all the employers of the persons who took part in the ballot, of the outcome of the ballot and any member of the organisation who is going to take part in a strike that the ballot has endorsed must give notice to the employer of that intention. The employee is absolved from having to give notice if the organisation has given notice

of the intention to strike. Notice is required to be as directed by the Commission or in a prescribed manner and within a prescribed time.

Section 97I deals with the governor's regulation making powers in respect of this Part. The Governor can make regulations on

- how strike ballots are to be conducted;
- how scrutineers are to be appointed and their functions;
- what the functions of the Registrar and Deputy Registrar are in respect of supervising organisations conducting ballots;
- what questions and other matters must be presented to voters in a ballot;
- what are the functions of the person conducting the strike ballot;
- how the expenses of conducting the ballot are to be met and the extent to which the State may pay for conducting the ballot;
- authorising the State to pay for the conduct of ballots;
- making a breach of the regulations an offence carrying penalties of up to $2000; and
- other matters or things which are required or permitted to be prescribed.

These regulations are in addition to and do not derogate from the requirements of the code of practice in schedule 3.

## PART 3 - POLITICAL DONATIONS BY ORGANISATIONS

This Part deals with donations by organisations and their members to political parties or candidates for election to the Parliaments of a State or the Commonwealth.

Clause 7
This clause inserts a new Part VIC into the Industrial Relations Act 1979.

The new section 97N(1) defines "election candidate" as a candidate in an election to the Parliament of a State or the Commonwealth, a "political party" as a body having one of its objects or activities the promotion of a particular election candidate or candidates, a "political fund" as the account required to be created if an organisation is to make any "political donations".

The only monies which can go into a political fund are:

- amounts raised from a "political levy" - which is defined as monies raised by a special call to members to give money to the political fund and payment of which is voluntary;
- those portions of the membership subscriptions which members have agreed may be paid into the political fund;
- any interest on or earnings of the monies in the political fund; and
- any portion of the organisation's "ordinary moneys" - defined as any money except specific political levies, monies that are part of the membership subscription specifically appropriated to the political fund and interest or earnings on the monies in the political fund - provided that the State Council of the organisation or whatever the largest democratic decision making body of it is called, has endorsed the payment of those monies into the political fund.

Subsection 97N(2) defines what constitutes a political donation. Any payment to a political party (including subscription or affiliation fees), payments to an election

candidate or a group of candidates, payment of the expenses of an election candidate or group of candidates or a political party or any payments to other people on the understanding that the monies will be given to election candidates or a political party or pay their expenses, amount to a political donation.

Many State registered organisations have related federal bodies, organisations which are registered under the federal Act and frequently have the same name, the same officers, operate from the same premises, use the same stationary and membership cards and use the one bank account. The two organisations are however, distinct legal entities and as the federally registered organisation is not amenable to State law, it is necessary to ensure that the actions of the State organisation are distinguishable from those of the federal organisation. Section 97O does this by providing that where the State organisation has a fund or account which is jointly owned, managed or controlled by the organisation and another body, the fund is to be regarded as being controlled by the State organisation. The effect of this section will be that the organisation and the other body will have to have separate accounts if they do not want all the money in joint accounts to be considered to be controlled by the State organisation.

Section 97P provides for the creation of political funds, the payments to go into them and the payments to be made from them. Subsection (1) provides that an organisation must create a political fund if any political donations are to be made by the organisation.

Subsection (2) provides that any payments from members by way of a levy or the proportion of the membership subscriptions that members have agreed can go into the political fund, must be paid into the political fund. Subsection (3) requires any interest or earnings from monies in the political fund to be credited to the political fund.

Subsection (4) permits an organisation to credit to the political fund any of its ordinary monies, provided that if a member has specified that none of that member's subscription is to go to the political fund or only a specified portion of it, the organisation cannot credit to the political fund any of that first mentioned member's subscription and no greater portion of the subscription than has been authorised by the second mentioned member. Subsection (5) provides that the rules of an organisation must enable a member to make these choices and subsection (6) prohibits the organisation from acting contrary to the member's choice.

Subsection (7) provides that if a member does not wish to have any proportion of his or her membership subscription paid into the political fund, the member is not entitled to get a discount on the membership subscription. All members will be required to pay the same subscriptions.

Subsection (8) is a prohibition on the organisation making any political donations except from monies in the political fund. Subsection (9) provides that the state council of an organisation, (which under subsection (10) is the only body legally capable of authorising payments from the organisation's ordinary monies to the political fund and making political donations from the political fund) may make a decision about payments from the ordinary monies going into the political fund at the same time as it makes decisions about payments on political donations.

Subsection (10) is the provision specifying that political donations can only be made in accordance with the rules of the organisation and that the rules must provide for the state council of the organisation to make decisions about political donations.

Subsection (11) provides that if an organisation does not have a body known as the state council, the expression "state council" refers to the body in the organisation which the President, on application by the organisation, designates as having the same functions as the state council of an organisation.

Subsection (12) is a qualification on the requirement of subsection (10) that only the state council of an organisation can authorise a political donation. It provides that if the organisation has received monies from members by way of a political levy, those monies may be given as a political donation without the express approval of the state council.

Subsection (13) is a further qualification to subsections (10) and (12). It provides that if the organisation imposes a political levy and a member of the organisation has given money with the direction that the monies are to be given to or in respect of a particular political party or election candidates, the organisation must comply with that direction and not make any payments which would be contrary to that direction. A member who makes such a direction is authorised by subsection (14) to change the direction by giving written notice.

Subsection (15) provides that an organisation shall not impose political levies unless the rules of the organisation allow the organisation to do so and any such rules must allow the member to choose to pay it or not to pay it.

The new section 97Q requires the Registrar to review each union's rules within 12 months of clause 7 of the Bill coming into force and bring before the President for amendment, any rules which are inconsistent with or contrary to the above subsections.

In order to ensure compliance with this Part, section 97R requires an organisation to make available to the Registrar or Deputy Registrar on request, its records relating to political donations and political funds. When the auditor audits the records of the organisation he is required to express an opinion as to whether there has been any contravention or failure to comply with the provisions. If the organisation's accounting records do not enable this to be ascertained, the auditor must report this.

Section 97S provides that if the organisation contravenes the provisions, any officer of the organisation who was knowingly concerned in or a party to the transaction and knew that it contravened the provisions, has also contravened the provisions. This provision recognises the fact that organisations can only operate through their officers and makes the officers equally culpable.

Breaches of the provisions are dealt with in section 97T. If a person contravenes or fails to comply with the provisions relating to political funds and political donations, a member of the organisation or the Registrar, a Deputy Registrar or an industrial inspector can apply to the industrial magistrate's court, using Local Court's Act practice and procedure, for a pecuniary penalty to be imposed and other relief to be granted.

If the proceedings establish that the breaches occurred, the industrial magistrate's court can impose a pecuniary penalty of up to $1000 for an individual and $5,000 for the organisation. It can also order the political party or election candidate or any person who received money to give to a political party or election candidates, to forfeit to the Crown any unauthorised payment that has been made. Orders to the person to do any specified thing or cease to do some specified thing that will remedy the breach can also be made. The proceedings will be dismissed if the breaches are not proven to have occurred.

In any proceedings, the costs of legal representation can only be awarded against the unsuccessful party if the proceedings have been brought or defended frivolously or vexatiously. Costs cannot be awarded against the Registrar, a Deputy Registrar or an industrial inspector in respect of any proceedings these officers have brought.

Where unauthorised political donations have been made and the money is not fully recoverable from the political party or election candidates or the person to whom it was given for payment to a political party or election candidate, the money is a debt owed to the Crown by the official who was found to have been knowingly concerned or involved in the contravention by the organisation. The Registrar, Deputy Registrar or an industrial inspector are authorised to institute proceedings in the industrial magistrate's court to recover such monies.

The new section 97U is an offence provision. Where a person fails to comply with an order of the industrial magistrate's court to do any specified thing or cease any specified activity in order to remedy a breach, an offence is committed and the person is liable to a fine of $1000 if an individual and $5000 in any other case, with daily penalties of $100 and $500 respectively if the offence continues.

Section 97V requires an organisation to file with the Registrar annual returns in respect of political donations during the financial year. The return, certified by statutory declaration, must detail the amount of any donation over $1500 or sum of lesser donations which in total exceed $1500 if it goes to a particular political party or election candidate or group of election candidates, the manner is which the donation was made, the identity of the person who received it and the political fund from which the donation came. These records are to be open for public inspection at the Registrar's office.

Clause 8

This clause effects a number of consequential amendments in other Parts of the Act. An amendment is made to the provisions dealing with the industrial magistrate's court jurisdiction, to give the court jurisdiction to deal with proceedings involving political donations using Local Court's Act practice and procedure. Other amendments are made to the provisions dealing with the jurisdiction of the Full Bench under section 84A to exclude breaches of the political donation provisions from the Full Bench's jurisdiction and to sections 93 and 102A which enable the Registrar, Deputy Registrar or an industrial inspector to institute proceedings on their own motion. Section 103 is also amended to enable proceedings against different persons which involve the same facts, to be joined in the one application.

## PART 4 - OFFICIALS OF ORGANISATIONS

This Part imposes general fiduciary obligations on officials of organisations who are involved in the financial management of the organisation and provides for remedies if those obligations are breached.

Clause 9
This clause amends section 63(1)(c) of the Act, which deals with the accounting records required to be kept by an organisation. The existing section 63(1)(c) merely requires an organisation to keep accounts in proper form of the receipts, payments, funds and effects of the organisation. The amendment will require accounting records to be maintained in accordance with nationally recognised accounting standards.

Clause 10
This clause amends section 65 of the Act, which deals with the requirement for organisations to file with the Registrar annual reports of the financial affairs of the organisation. It requires an organisation to file an audited sources and application of funds statement, as well as a balance sheet and income and expenditure statement.

Clause 11
Clause 11 inserts section 65A into the Act. The section grants the auditor of the organisation full and free access to all the accounting records of the organisation and requires the officials of organisations to provide information or explanations to the auditor if necessary.

Clause 12
Clause 12 inserts a new Division 5 into Part II of the Act. The Division expressly deals with the financial obligations of officers and employees of an organisation. Officials who are entitled to participate directly in the financial management of the organisation are designated "finance officials" and are subject to the provisions of this Part.

The new section 74 details the obligations of a finance official. When performing the functions of his or her office or employment, a finance official must act honestly at all times and must exercise reasonable care and diligence in the performance of his or her duties. The degree of care and diligence required is that which a reasonable person in that position would be expected to exercise. The official must also ensure that the organisation keeps proper accounting records.

A finance official or former official must not make use of any information obtained in the position for his or her personal enrichment or to enrich another person or to damage or cause loss to the organisation. However, the provisions do not apply if the pecuniary advantage is for the organisation itself or if the consent of the organisation's committee of management has been obtained. Where the committee of management gives consent, the membership of the organisation must be informed of the details.

A finance official or former official must not make use of the official's position for personal enrichment or to enrich another person or to damage or cause loss to the organisation. Where the use of the position is for the performance of the functions of the official's office or employment this is permitted.

The finance officials must also provide the committee of management with details of their pecuniary interests in the form required by the rules of the organisation and as often as the rules require and where a finance official has a personal interest in any matter involving the organisation, he or she must disclose details of that interest to the committee of management as soon as the official becomes aware of it.

The provisions are in addition to any other rule of law relating to the duties or liabilities of officials and do not prevent ordinary civil proceedings being instituted for any breach of the other rules of law. However, a new section 79 deals with instances where breaches of this Part of the Act have, arising out of the same conduct, also resulted in proceedings being instituted in other courts.

The new section 75 provides a means of ensuring that the obligations in section 74 have not been breached. When the organisation files its annual returns with the Registrar of the WA Industrial Relations Commission, the auditor must express an opinion as to whether any official has not complied with his or her duties and if the record keeping has been of such poor quality that the auditor cannot express an informed opinion, that fact is also to be reported.

The new section 76 is inserted to avoid the possibility that an organisation's rules may be in conflict with the new provisions of the Act. If any of the rules of an organisation are inconsistent with the Act, the inconsistent rule is invalid. The Registrar is to review the rules of each organisation within 6 months of the amendments coming into force and if any of the rules are inconsistent, to take them before the President to have them amended.

The new section 77 deals with the enforcement of the provisions. If a finance official or former finance official fails to comply with any of the duties imposed, then the organisation, an officer or a member of the organisation or the Registrar, a Deputy Registrar or an industrial inspector can apply to the industrial magistrate's court, using Local Court's Act practice and procedure, for a pecuniary penalty to be imposed and other relief to be granted.

If the proceedings establish that the breaches occurred, the industrial magistrate's court can caution the official, impose a pecuniary penalty of up to $5,000, order the official to pay compensation for any loss or damage suffered by the organisation, and order restitution or forfeiture of any pecuniary advantage the official or another person has obtained. Orders to the official to do any specified thing or cease to do some specified thing that will remedy the breach can also be made.

Although there may be a number of breaches of duty involved, if those breaches arose out of a single course of conduct, only one penalty can be imposed on the official. The proceedings will be dismissed if the breaches are not proven to have occurred.

In any proceedings, costs can be awarded against the unsuccessful party, except where the proceedings have been brought by the Registrar, a Deputy Registrar or an industrial inspector.

The new section 78 is an offence provision. Where a person fails to comply with an order of the industrial magistrate's court to do any specified thing or cease any specified activity in order to remedy a breach of duty, an offence is committed and

the person is liable to a fine of $5000, with a daily penalty of $500 if the offence continues.

The new section 79 addresses the possibility of two sets of proceedings arising out of the same conduct. A breach of an official's duties may also give rise to proceedings in the ordinary civil courts because of a breach of some other rule of law. Provision is made for this by specifying that civil proceedings are not to be commenced in both the industrial magistrate's court and the ordinary civil courts in respect of the same conduct. If any party wishes to commence proceedings in the ordinary civil courts, the proceedings before the industrial magistrate's court must first be withdrawn or not pursued.

Where proceedings have commenced in the ordinary civil courts and they involve a matter that the industrial magistrate's court has jurisdiction to hear, that civil court may order that the matter be dealt with in the industrial magistrate's court. Similarly, where an ordinary civil court has jurisdiction to deal with a matter involving a breach of duty, the industrial magistrate's court may order proceedings transferred to the ordinary civil courts.

The industrial magistrate's court, when making any orders for payment of monies following the transfer of a case from the civil courts, is required to take into consideration any monies that have been ordered to be paid by the ordinary civil courts.

A breach of an official's duties may also be a contravention of the criminal law (eg misappropriation of funds). If an official is charged under the criminal law, that does not prevent proceedings being taken for breach of the duties under the Act, but in such circumstances, the industrial magistrate's court cannot impose any penalties, regardless of whether or not the person is convicted or acquitted. However, the outcome of the criminal proceedings is not to affect such an official's liability to pay compensation, to make restitution, to forfeit any pecuniary advantage the official has obtained or to comply with specific performance orders that might be made.

## PART 5 - MISCELLANEOUS PROVISIONS RELATING TO AWARDS ETC

This Part amends the provisions of the Act relating to the contents of awards and industrial agreements made or registered by the WA Industrial Relations Commission.

Clause 13

This clause amends the definition of "industrial matter" in section 7 of the Act to provide that the issue of collection of union subscriptions by an employer is not an industrial matter. A subsequent clause will require the Commission to remove from awards and industrial agreements, any provisions relating to the collection of union subscriptions.

Clause 14

Section 26 of the Act provides general directions to the Commission as to how it shall act in the exercise of its jurisdiction under the Act. Subsection (1)(c) requires the Commission to have regard, where appropriate, for the interests of the community as a whole and subsection (1)(d) lists a number of things which affect the

community as a whole, such as the state of the national and State economies, employment and inflation. This clause removes the requirement for the Commission to have regard for the community as a whole only when it is appropriate and makes the specific matters affecting the community as a whole, equally as important as the interests of the parties immediately concerned in any proceedings. It also adds an additional requirement for the Commission to have regard for any changes in productivity that have or are likely to occur.

Clause 15

This clause adds a requirement that when the Commission registers an industrial agreement under section 41 of the Act, the parties to the agreement must provide an estimate of the number of employees the agreement will apply to. The reason for the amendment is to enable more efficient collection of data on the number of persons who are bound by awards and agreements of various kinds.

Clause 16

This clause inserts a new Division 2A in the Act. Section 49A in the new Division requires the Commission not to make any new awards or orders, or register new industrial agreements unless they contain provisions for the settlement of any disputes that might arise between employers and employees. The award, order or industrial agreement provisions must require the parties to confer among themselves before taking any dispute to the Commission. The Commissions has the power not to exercise its arbitral powers under section 44 of the Act if the dispute settlement procedures in the relevant award, order, or industrial agreement have not been followed. A subsequent clause requires any existing awards, orders or industrial agreements that do not have such provisions amended.

Section 49B in the new Division limits the power of the Commission to make awards, orders or register industrial agreements that empower a representative of an organisation to inspect the time and wages records of employees or former employees. Any provisions of an award, order or industrial agreement relating to the inspection of records by representatives of organisations, must provide that -

- the records can not be inspected if the employee is not a member of the organisation and has objected in writing to the records being made available for inspection;
- the representative has a right to inspect any notification of refusal of consent or objection to the representative of the organisation examining the records;
- the person inspecting the records must be duly authorised by the organisation concerned;
- reasonable notice of not less than 24 hours is given by the representative of the intention to inspect records;
- the employer must try to keep separated from other employee records, the records relating to employees who are not members of the organisation and who have refused to consent to their records being inspected;
- the employer must try to prevent records relating to non-members of the organisation who have refused consent to their records being inspected, from being inspected by a representative of the organisation; and
- the employer must try to ascertain from employees or prospective employees whether the employee wishes to refuse to give consent to the records being inspected by a representative of an organisation.

A person is not permitted to persuade or attempt to persuade an employee or potential employee by threats or intimidation, to consent or refuse to consent in writing to having the employee's time and wages records inspected by a representative of an organisation. A breach of this subsection is a enforceable before the Full Bench of the Commission under section 84A of the Act. Penalties of up to $500 for an individual and $2000 for an employer or organisation can be imposed.

Clause 17

Subclause (1) of this clause invalidates, from the date clause 13 of the Bill comes into effect, any existing provisions in awards, orders or industrial agreements relating to the deduction of union subscriptions from employee wages.

Subclause (2) invalidates, from the date clause 16 of the Bill comes into effect, any existing provisions in awards, orders or industrial agreements relating to the inspection of time and wages records which is inconsistent with the new section 49B

Within 6 months of the amendments coming into force, the Commission is to review each award, order or industrial agreement, publish in the press a notice that it is proposed to vary the relevant provisions of the provisions if they are inconsistent with the Act and invite employers and organisations who are parties to the award, order or industrial agreements, to appear and be heard on the proposed amendments.

Upon hearing the parties, the Commission is required to vary the relevant awards, orders or industrial agreements by omitting any subscription deduction provisions that are no longer of any effect because of subsection (1), insert dispute settlement procedure provisions if they do not already exist and vary or amend the provisions relating to inspection of time and wages records if they are inconsistent with section 49B.

Clause 18

This clause inserts a new section 49C into the Act. The provisions of section 49C require the Commission not to make any award or order or register an industrial agreement unless the superannuation provisions in that award, order or industrial agreement give the employee the choice of into which complying superannuation fund the employer's contributions are to be paid.

The provisions to be inserted into any award, order or industrial agreement must allow the employee to nominate a fund into which the employer contributions are to be paid. The only funds that are eligible for the employee to nominate are those that are complying funds under the Commonwealth Government's Superannuation Guarantee (Administration) Act 1992 and which have rules enabling contributions to be made in respect of the particular employees concerned.

The provisions of the award, order or industrial agreement must also

- require the employer to notify the employee that the employee has a right to choose into which fund contributions in respect of him or her will be paid;
- allows the employer to make contributions to any complying fund if the employee has not nominated a fund or the employee nominated fund is not a complying fund, but only until the employee nominates a complying fund;

- requires both employer and employee to be bound by the choice of the employee unless both parties subsequently agree to change the fund into which contributions are paid; and
- requires the employer not to unreasonably refuse to agree to a change of fund when requested by the employee.

The Governor is to make regulations specifying how an employer must notify an employee of his or her right to choose the superannuation fund into which the employer's contributions will be paid and how the employee must nominate the chosen fund.

It is to be an offence punishable by a fine of up to $1000 for an individual and $5000 in any other case to use threats or intimidation to persuade or attempt to persuade an employee or prospective employee to nominate a particular superannuation scheme, or persuade an employer to contribute to a particular superannuation scheme or to agree to a change of scheme.

Subclause (2) invalidates, from the time this clause comes into operation, any provision of an award, order or industrial agreement that does not give the employee a choice of superannuation scheme and authorises an employer to make contributions to any complying superannuation scheme until the employee nominates a complying superannuation scheme. The regulations applying to how the employee is to be notified of his or her right to choose a superannuation scheme and how that choice must be notified to the employer, apply to notifications and nominations made under this subclause, as does the binding effect of the employee's choice and the obligation on the employer not to unreasonably refuse to a change of scheme.

Within 6 months of the clause coming into effect, the Commission is review all awards, orders and industrial agreements to see if they are consistent with the new provisions, and if not, to vary them to make them consistent with the Act. The Commission must publish in the press a notice that it is proposed to vary any provisions which are inconsistent and invite any employer or organisation that is bound by the award, order or industrial agreement to make submissions on the proposed variations before they are made.

## PART 6 BARGAINING AND INDUSTRIAL AGENTS

This Part deals with persons who carry on business as industrial or bargaining agents. It provides for a scheme of registration and gives them the right to charge fees for appearing on behalf of parties in the Industrial Relations Commission, the Industrial Magistrate's Court and the Industrial Appeal Court or for acting as a bargaining agent in the negotiation of workplace agreements or for providing advice on industrial matters. This has hitherto been prohibited by the Legal Practitioner's Act.

Clause 20

This clause inserts into the Act section 81E, which provides that in proceedings before the industrial magistrate's court, the parties may appear in person or be represented by an agent or a legal practitioner. The existing representation

provisions are the same but appear in the Industrial Magistrate's Court Regulations which are to be amended.

Clause 21

The new section 112A inserted by this clause deals with persons carrying on business as industrial or bargaining agents. It provides that a person who charges fees for appearing on behalf of a party in the WA Industrial Relations Commission, the Industrial Magistrate's Court or the Industrial Appeal Court or for the provision of advice or other services in relation to industrial matters, is carrying on business as an industrial agent. Subsection (2) of the new section provides that if such a person is not a legal practitioner or registered as an industrial agent, he or she commits an offence and the industrial magistrate's court can impose a penalty of up to $2000. The penalty is also applicable to a person who holds himself out as carrying on business as an industrial agent.

Subsection (3) of the new section provides that a person who is registered as an agent under this section, is an employee of a registered agent, or is an officer or employee of an organisation, or of the Trades and Labor Council, the Chamber of Commerce and Industry, or the Mines and Metals Association, is an authorised person for the purposes of section 77A of the Legal Practitioners Act 1893. Section 77A is inserted by clause 22 of this Bill.

In order for a person to obtain registration as an industrial agent the person must provide evidence that they have professional indemnity insurance or sufficient assets to cover any claims arising out the persons to cover any claims arising out of the agent's negligence or other fault.

The Governor will make regulations that create a scheme for industrial agents to become registered and the procedures that are to be followed, prescribe a code of conduct which the industrial agent must comply with in order to continue to be registered, specify what circumstances will disqualify a person from being registered or will result in the cancellation of registration and the procedures that will apply in each case and provide for how appeals may be made to the Full Bench against the disqualification from or cancellation of registration.

Clause 22

This clause inserts a new section 77A into the Legal Practitioners Act 1893. The new section provides that the prohibition (in sections 76 and 77 of that Act) on persons who are not certificated legal practitioners from appearing, for a fee, in any legal proceedings on behalf of another person or doing legal work, does not apply when the appearing in legal proceedings or doing legal work for a fee, is authorised by some other statute. Subsection (3) of the new section 112A of the Industrial Relations Act 1979 is the authorisation provision for allowing paid agents to appear before the WA Industrial Relations Commission, the Industrial Magistrate's Court and the Industrial Appeal Court and to provide advice or other services in respect of industrial matters.

Clause 23

Since industrial and bargaining agents also operate in the area of workplace agreements, amendments are required to that Act in order to authorise paid agents to operate.

Subclause (1) of clause 23 inserts a definition of "legal practitioner" into section 3 of the Workplace Agreements Act 1993 to clarify that where the words "legal practitioner" are used in the Act, it means a legal practitioner who has a current WA practice certificate. A person who is a legal practitioner but does not have a WA practice certificate (eg a person who practices law in another State) can only appear as an agent and is subject to all the provisions relating to industrial agents.

Subclause (2) inserts a new section 37 into the Workplace Agreements Act 1993. The section, which deals with who may appear for a party in an appeal against a refusal to register a workplace agreement is repealed and re-enacted in slightly different form to ensure consistency in expression throughout the various Acts which allow agents to appear and also to correct a grammatical error in the original.

Subclause (3) repeals and re-enacts section 53 of the Workplace Agreements Act in slightly different form. The section deals with who may appear for a party in any proceedings seeking to enforce the terms of a workplace agreement is similar to the repeal and re-enactment of section 37. The repeal and re-enactment in substantially the same terms is done in order to achieve consistency of expression throughout the various Acts in which agents are allowed to appear on behalf of a party.

Subclause (4) repeats, for the purposes of the Workplace Agreements Act, the provisions of section 112A inserted in the Industrial Relations Act by clause 21 of the Bill. The new section 101A provides that a person who charges fees for acting as a bargaining agent in the negotiation of a workplace agreement or for appearing on behalf of a party in appeals against the refusal to register a workplace agreement or in proceedings to enforce the terms of a workplace agreement or for the provision of advice or other services in relation to workplace agreements is carrying on business as an industrial agent. A person who is not a legal practitioner or registered as an industrial agent and charges fees for such work, commits an offence. The industrial magistrate's court can impose a penalty of up to $2000 and the penalty is also applicable to a person who holds himself out as carrying on business as a bargaining agent.

Subsection (3) of the new section provides that a person who is registered as a bargaining agent under this section, is an employee of a registered agent, or is an officer or employee of an organisation, or of the Trades and Labor Council, the Chamber of Commerce and Industry, or the Mines and Metals Association, is an authorised person for the purposes of section 77A of the Legal Practitioners Act 1893. Section 77A is inserted by clause 22 of this Bill.

In order for a person to obtain registration as a bargaining agent the person must provide evidence that they have professional indemnity insurance or sufficient assets to cover any claims arising out the persons to cover any claims arising out of the agent's negligence or other fault.

Subclause (5) provides for Regulations to be made by the Governor to create a scheme for industrial agents to become registered and the procedures that are to be followed, prescribe a code of conduct which the industrial agent must comply with in order to continue to be registered, specify what circumstances will disqualify a person from being registered or will result in the cancellation of registration and the procedures that will apply in each case, and provide for how appeals may be made to the Full Bench against the disqualification from or cancellation of registration.

## PART 7 - INDUSTRIAL MAGISTRATE'S COURTS

This Part amends the provisions of the Act conferring jurisdiction on an industrial magistrate's court and prescribing the practice and procedure therein.

Clause 24
This clause repeals section 81A of the Industrial Relations Act 1979 and substitutes a new section. The new provision recognises the additional matters that are to be dealt with by the industrial magistrate's court . Section 77 is the provision dealing with the financial obligations of officials; section 83 deals with breaches of awards and industrial agreements; section 83A deals with offences against the Act; section 96J deals with the granting of injunctive relief in cases of discrimination over union membership; and section 110, 111 and 112 deal with the recovery of monies owing.

Clause 25
Section 81AA of the Act confers jurisdiction on an industrial magistrate's court to hear complaints of offences and claims for entitlements under other Acts. This amendment confers additional jurisdiction on the industrial magistrate's court and enables it to hear and determine claims for long service leave benefits that have been conferred by the Long Service Leave Act 1958, complaints of offences against that Act and complaints of offences relating to the employment of children, contrary to the Child Welfare Act 1947.

Clause 26
This clause inserts a section that specifies that the industrial magistrate's court exercises two types of jurisdiction, civil and criminal, and what practice and procedure will be observed in any proceedings.

The general jurisdiction applies for matters involving sections 77, 83, 96J, 110, 111, or 112 of the Industrial Relations Act 1979, the recovery of long service leave benefits under the Long Service Leave Act and benefits due under a workplace agreement. The criminal jurisdiction applies to offences under the Industrial Relations Act, the Workplace Agreements Act, the Long Service Leave Act, the Child Welfare Act and the Minimum Conditions of Employment Act.

Subsection (2) reproduces the effect of the existing subsections 83(7) and 83(8) - which because they are limited solely to award enforcement are to be repealed - and provides generally that civil practice and procedure applies whenever the industrial magistrate's court is exercising its general jurisdiction.

Subsection (3) enables regulations to be made to increase the range of matters that may be dealt with using the small disputes provisions of the Local Courts Act 1904.

Subsection (4) provides that where warrants of execution are required to enforce compliance with orders of the industrial magistrate's court, the property available for seizure is the same property that is available to enforce orders of the Industrial Appeal Court. Section 88 of the Act specifies this for the Industrial Appeal Court.

Subsection (5) provides additional confirmation (see section 5 Interpretation Act 1984) that the industrial magistrate's court when dealing with offences, is a court of summary jurisdiction.

Subsection (6) provides that orders of the industrial magistrate's court that are made when the court is exercising prosecution jurisdiction are enforceable in the same manner as orders made in courts of petty sessions.

Subsection (7) provides that orders of the industrial magistrate's court that are made when the court is exercising general jurisdiction are enforceable in accordance with regulations made by the Governor under section 113(3) of the Act.

Subsection (8) gives formal recognition to the presumption that court proceedings are regular unless proven otherwise. It replaces an identical provision in the repealed section 81A.

Clause 27

Sections 81D(3) and 81D(4) of the Act are amended by this clause. These deal with the powers of the Clerk of the industrial magistrate's court. The amendment simplifies the wording of the section and provides that when the industrial magistrate's court is exercising the prosecution jurisdiction, the Clerk of Court has the powers of a Petty Sessions Clerk of Courts. The powers and duties of such a Clerk are specified in the Justices Act 1902. When the general jurisdiction is being exercised, the amendment provides that the Clerk of the Court has the powers of a Local Court Clerk of Courts. The duties and powers of such a Clerk are specified in the Local Courts Act.

Clause 28

Section 82A provides that proceedings to enforce awards or industrial agreements or for breaches of the Act which are not offences must be brought within 6 years of the date the breach occurred. This amendment will allow proceedings for breaches by a union official of the financial obligations duties imposed by Division 5 of Part II of the Act, to be brought within 6 years of the date of the contravention.

Clause 29

This clause inserts a sub-section that gives the industrial magistrate's court exclusive jurisdiction to deal with complaints about breaches of awards, industrial agreements and orders and replaces an identical provision in the repealed section 81A.

The clause also deletes subsections (7) and (8) of section 83 of the Act. Those subsections provided that civil practice and procedure applied in the industrial magistrate's court. As they were limited to award breach proceedings (ie section 83) they have been repealed and replaced (section 81CA(2) ) with a general provision providing for civil practice and procedure to apply in the court whenever it exercises the general jurisdiction.

Clause 30

This clause inserts a new section 83A. The provisions replace subsections (1) and (1a) of the repealed section 81A and confers jurisdiction on the industrial magistrate's court to hear complaints for offences under the Act in accordance with the provisions of the Justices Act

Subsection (2) excludes Part VIII of the Justices Act 1902 from the practice and procedure to be followed in matters in the industrial magistrate's court. Part VIII of the Justices Act 1902 relates to appeals from petty sessions matters. As appeals in the industrial magistrate's court go to the Full Bench of the Industrial Relations Commission, it is necessary to exclude the appeal provisions in the Justices Act 1902.

Subsection (3) confers exclusive jurisdiction on the industrial magistrate's court to hear complaints of offences against the Act. It replaces the repealed subsection 81A(1a).

Clause 31

Section 96J allows the industrial magistrate's court to grant injunctive relief in cases of discrimination on the basis of union membership. Subsection (3) provides for civil practice and procedure to apply in such applications. This is now provided for in section 81CA(1) and this clause repeals the no longer required section 96J(3).

Clause 32

This clause amends section 111 of the Act. Section 111 prohibits premiums being sought or paid for granting employment to a person and empowers a court of competent jurisdiction to order any such premiums be refunded. This amendment provides that such matters will be heard in the industrial magistrate's court.

Clause 33

Section 112 provides that union rules that provide for fines and levies to be imposed on an employee for complying with his contract of service are invalid and any monies paid as a result of such fines or levies can be recovered in a court of competent jurisdiction. This amendment provides that such matters will be heard in the industrial magistrate's court.

Clause 34

Section 62 of the Workplace Agreements Act 1993 provides that civil practice and procedure apply when the industrial magistrate's court is dealing with claims for breaches of a workplace agreement. This is now provided for in section 81CA of the Industrial Relations Act 1979 and section 62 is repealed by this clause.

## PART 8 - MISCELLANEOUS AMENDMENTS

This Part effects a variety of miscellaneous amendments to the Industrial Relations Act 1979, by:

- inserting in the definitions section, a definition of subscription
- requiring organisations to purge their membership lists 4 times a year;
- enabling the Registrar to have invalid organisational rules amended without requiring a complaint by a member;
- enabling proceedings involving an organisation which has amalgamated with another organisation to be continued against the amalgamated organisation;
- allowing the WA Branch of the Australian Medical Association Inc greater rights to represent medical practitioners in industrial matters;
- enabling industrial inspectors to enforce industrial agreements and more effectively obtain access to records and information from persons in remote locations;

- consolidating the provisions dealing with who may institute proceedings for offences under the Act; and
- requiring the complete text of industrial agreements to be published.

Clause 35
This clause inserts a definition of subscription as the amount due or payable in respect of membership in an organisation and deletes the existing references to "dues" and "fees". The definition relates to the political expenditure provisions in the Bill and the limitations on an organisation expending membership subscriptions on political donations.

Clause 36
This clause amends the existing section 55(4)(f) which requires the register of members in an organisation to be purged of unfinancial members every 12 months, by deleting paragraph (f). The purging of the register is to be dealt with in a new section 64D.

Clause 37
Clause 37 inserts a new section 64D which is a requirement that the register be purged 4 times a year. This follows from the amendments in the Industrial Legislation Amendment Act 1995 which inserted new provisions (sections 64A, 64B and 64C) relating to resignation and cessation of membership in an organisation once the member becomes unfinancial.

Clause 38
An organisation's rules cannot be contrary to the provisions of any Act. Section 66 enables the Registrar to bring before the President on the complaint of a member, union rules that are contrary to any Act. The President then amends the rules. This amendment enables the Registrar to have the rules amended without requiring a member of the union to first lodge a complaint.

Clause 39
This clause amends section 72 of the Act, which deals with the amalgamation of organisations. The amendments are intended to accommodate the problem of proceedings being brought against a particular organisation being frustrated by the organisation amalgamating with another organisation. Upon amalgamation, the registration and the legal existence of the two former organisations ceases and proceedings can no longer be continued. This amendment provides that in addition to taking over the property and membership of the two former organisations, the amalgamated organisation takes on any contingent liabilities of the two former organisations.

Clause 40
Section 72A of the Act deals with coverage of employee organisations and the capacity for organisations to seek from the Commission the right to have a single union cover all employees at a particular site or in an enterprise, regardless of their existing constitutional rules. This amendment is to allow the Australian Medical Association (AMA) to seek such single coverage. The existing provisions limit the right to make applications to organisations that are registered under section 53 of the Act. As the AMA will not be registered as an organisation under section 53 of the Industrial Relations Act 1979, but is to be given representation rights as if it was an

employee organisation, its rights to apply under section 72A need to be made express.

Clause 41
This clause inserts provisions enabling the AMA to represent before the WA Industrial Relations Commission employee medical practitioners in general. The existing scope for the AMA to represent medical practitioners is expressly limited to those practitioners employed in public hospitals.

This amendment is inserted in order to accommodate the changes in the delivery of health services which have seen many hospital-delivered services being provided outside the physical environs of the public hospitals or in conjunction with private hospitals. The AMA will have its potential industrial coverage extended by removing the existing limitation on it being able to represent only those Government medical practitioners employed in public hospitals. It will have the right, for the purposes of the Act, to represent the industrial interests of medical practitioners as employees. However, as the AMA also represents the interests of medical practitioners as employers and as it has interests other than industrial relations, the organisation will not be required to register under section 53 as an employee organisation.

Although the AMA will have the status of an organisation under the Act, it will be subject to some of the provisions relating to organisations. The AMA will be subject to the jurisdiction of the Commission with respect to a restricted definition of "industrial matter" and the general jurisdiction and powers of the Commission under Division 2 of Part II. The ability of the Commission to make General Orders under Division 3 will also apply to it, as well as section 80C(4) which provides that where a dispute about organisational coverage of government officers arises, regard shall be given to past coverage. Section 80F which provides for who may refer industrial matters to a Public Service Arbitrator is also applicable to the AMA. The AMA will also be able to utilise and be subject to the enforcement provisions of the Act, and enforce its awards, industrial agreements and orders under Part III. The freedom of association provisions of Part VIA will apply to the AMA.

The AMA will only be able to seek coverage of medical practitioners as defined in the Medical Act 1894. However, subsection (3) of the new section 72B provides that, , the AMA does not have an exclusive right to represent such except where granted that right under section 72A of the Act. The amendment will not grant the AMA any exclusive privileges in respect of representing medical practitioners. The Civil Service Association (CSA) also has constitutional coverage of certain medical practitioners employed in the public sector and whether or not the AMA is given the right to represent any particular group of medical practitioners will depend upon the WAIRC's assessment of which organisation is the most appropriate in the circumstances.

Subsections (4), (5) and (6) impose requirements on the AMA to lodge with the Registrar a copy of its rules as in force when the amendments come into force and any amendments thereto within 30 days of them being made and also to annually file with the Registrar details of the names and addresses of its office holders and the number of members.

The repeal of subsections (5) and (6) of section 80C of the Act removes the restriction on the AMA representing before the Public Service Arbitrator only those

medical practitioners employed in a public hospital as does the amendment to section 80X(1) of the Act which deals with the Promotion Appeals Board's jurisdiction and who may represent persons appearing before it.

A consequential amendment is made to the Hospitals Amendment Act 1994 by repealing part of item 11 in the table to section 18 of that Act. That part of item 11 purported to amend section 80C(5) as a consequential amendment and allow any other association, whether registered under the Industrial Relations Act 1979 or not, to represent medical practitioners if they were approved by the WA Industrial Relations Commission (WAIRC) in any particular application or claim. This particular amendment was not proclaimed because it was realised after enactment that the AMA that it would need to satisfy the WAIRC on each occasion, that it was a fit body to represent the medical practitioners in question, even in public hospitals where it had previously had coverage.

The repeal of this provision is necessary because it was unacceptable that an organisation which has in the past been allowed, as a matter of right, to represent medical practitioners employed within public hospitals, would in the future need to satisfy the WAIRC that it was the most appropriate organisation to continue to represent them on each occasion that a matter came before the Commission.

Clause 42

This clause repeals section 96M of the Act. Section 96M provides for who may prosecute for an offence against sections 96C, 96D or 96E of the Act. The provisions specifying who may prosecute for any offence under the Act are inserted in a new section 104 of the Act.

Clause 43

Section 98(1) of the Act is amended by inserting the words "industrial agreement" in the subsection dealing with the powers and duties of industrial inspectors. The amendment will now confirm that industrial inspectors have powers to secure the observance of "industrial agreements" as well as the "provisions of this Act and of awards and order in force".

The amendment to subsection (2) enables industrial inspectors to conduct investigations and make reports, as directed by the Minister, in relation to the observance of the provisions of industrial agreements, as well as awards, orders and the Act.

The amendment to subsection (3) is designed to overcome the problem experienced predominantly by regional industrial inspectors in obtaining time and wages records and responses to queries from employers who live outside the regional centres. An industrial inspector is given power under the Act to enter industrial premises and examine and take copies of records and require a person to answer questions, but cannot require originals or copies of the records to be sent to him or for the person to give written answers to questions. Outside the metropolitan area, where the regional inspector may be several hundred kilometres from the employer's premises, this limitation makes the performance of the inspector's functions extremely difficult.

The amendments allow an industrial inspector to require that the records be sent for his examination, empower him to retain those records and to require written answers be given to questions.

Clause 44
Section 102A enables the Registrar, Deputy Registrar or an industrial inspector to initiate proceedings on their own motion for breaches of awards, breaches of the Act or offences under the Act. The right of these officers to initiate proceedings on their own motion in respect of offences has been transferred to section 104 and this amendment reflects that change.

Clause 45
This clause inserts a new section 104 into the Act. Section 104 provides a general authorisation section for persons to bring proceedings for offences against the Act. As a general principle, unless expressly provided for in legislation any person may initiate proceedings for an offence under an Act. In practice, proceedings are usually brought by the police. However, proceedings in respect of offences against industrial legislation have traditionally been brought and are continued by this section to be brought only by authorised persons.

The persons who may institute proceedings are someone who is expressly authorised by the Minister, someone affected by the conduct complained of and the statutory officers, the Registrar, Deputy Registrar and industrial inspectors. Without this general authorisation, a separate section would be required in respect of each section of the Act that creates offences, to specify who could bring proceedings.

Industrial inspectors and the Registrar and Deputy Registrar are authorised by this section to institute proceedings on their own motion.

Clause 46
This is a consequential amendment following the insertion of the definition of "subscription" into section 7 of the Act, to ensure consistency in referring to the monies members pay as a condition of membership as distinct from those that are paid voluntarily or otherwise because of special resolutions of the management of an organisation.

Clause 47
This clause requires the full text of industrial agreements be published. Industrial agreements are presently registered after an order is issued for registration by a Commissioner. With the removal of the public interest test, the provisions of the legislation do not allow a Commissioner to interfere with that agreement except for the purpose of giving clear expression to the true intention of the parties or if it is an agreement which applies to more than a single enterprise.

A number of industrial agreements are being registered in which the contents of those agreements are made confidential. As these agreements have the force of law it is important for the parties and specifically for the employees affected, to see what is being registered.

Clause 48
This clause provides that in the subsequent sections of the Bill, the Minimum Conditions of Employment Act 1993 is referred to as the Minimum Conditions Act.

Clause 49
This clause amends the Minimum Conditions of Employment Act 1993 to clarify that where an employee is required to hold himself or herself on call or sleep over at the

employer's premises in order to be available for a callout, that time spent on call or on sleep over duties, does not count as time worked for the purposes of the minimum hourly rate to be paid to employees for each hour worked in excess of 40 per week. The amendment is made to clarify some confusion arising from there being no definition of what constitutes work in the Minimum Conditions of Employment Act 1993.

Clause 50
This clause amends the provisions in the Minimum Conditions of Employment Act 1993 relating to payment of accrued annual leave entitlements on termination of employment. There have been instances where employees have left their employment unlawfully, in that the employee did not terminate the employment in accordance with the provisions of the contract of employment or award or industrial agreement or was terminated for misconduct such as stealing. In such instances, under the existing provisions, the employee would be entitled to payment of any accrued annual leave entitlements.

This amendment will provide that if the employee terminates unlawfully, the entitlement to payment in lieu of leave will be lost except where a full year's entitlement to annual leave has accrued, become vested in the employee and has not been taken. Any complete year's entitlement to annual leave will be paid out but not any part year's entitlement.

If the employee is terminated for misconduct, the employee will forfeit any entitlement to payment in lieu of accrued leave, except where a full year's entitlement to annual leave has accrued, become vested in the employee and has not been taken, before the misconduct occurred. Any complete year's entitlement to annual leave will be paid out but not any part year's entitlement.

Clause 51
This clause amends the Workplace Agreements Act 1993 as a consequential amendment following amendments to the Long Service Leave Act 1958. It requires employment records in respect of long service leave to be kept throughout the period of the employment and for 7 years thereafter. The requirement to maintain other records for 7 years after the entry was made is retained. This amendment is to enable a person's entitlements to long service leave to be ascertained. As the issue of long service leave entitlements are only arises after 10 or more years of service, it is at this time the records need to be examinable.

## PART 9 LONG SERVICE LEAVE ACT AMENDMENTS

This Part amends the Long Service Leave Act 1958 with consequential amendments to other legislation. The Act gives an entitlement to long service leave for those that do not have such a benefit granted by any other instrument. The references to the relative industrial legislation are brought up to date, increased flexibility is made available for the taking of leave and contracting out provisions are inserted. The enforcement provisions are made consistent with the enforcement provisions of other instruments which confer benefits on employees.

Clause 52
In this Part the relevant Act is referred to as the Long Service Leave Act.

Clause 53

The Long Service Leave Act dates from 1958 when the relevant industrial relations legislation was the Industrial Arbitration Act 1912. This was repealed and replaced by the Industrial Relations Act in 1979. This clause updates the reference to the relevant industrial relations Act.

Clause 54

Subclause (1) amends the definitions of award, industrial agreement, employer and employee in the Long Service Leave Act, deletes the definitions of Board of Reference and Commission and adds definitions of apprentice and industrial trainee.

The former definitions of award and industrial agreement included an award or industrial agreement made under the Australian Industrial Relations Act. A person covered by such an award or industrial agreement was not an employee under this Act. Some federal awards and industrial agreements do not have long service leave provisions. This amendment ensures that employees covered by federal awards and industrial agreements that have no long service leave provisions are entitled to long service leave under this Act.

Boards of Reference will no longer exist under the Act, with their function being carried out by the industrial magistrate's court.

The definition of Commission makes reference to the definition in the Industrial Relations Act 1979 and is no longer necessary.

The existing definition of employee relies upon the definition of employer. This definition has been repealed and replaced with the wording of the definition of employee used in the Industrial Relations Act. However, the exclusion (in the Industrial Relations Act) of domestic servants from the definition of employee, is not carried over, because domestic servants enjoy long service leave benefits under this Act

The definition of employer in this Act is brought into line with the definition of employer under the Industrial relations Act by using the same wording.

The definitions of apprentice and industrial trainees are taken from the Industrial Relations Act to ensure consistency of reference. The definition of workplace agreement is similarly included.

Subclause (2) amends subsections 4(2)(c) and (d) of the Act. The existing subclause 4(2)(c) provides for part time and casual employees (whose hours are not fixed) to have their long service leave benefit calculated on the basis of the average hours worked over the 12 months preceding leave being taken. This failed to accommodate persons who changed from full time to part time or vice versa at some stage or whose hours of work changed only late in the period of employment. This is amended to provide that the long service leave benefit will be calculated by reference to the average hours worked over the entire period of employment or as much of it as can be ascertained.

Where free board and/or lodging is part of the employee's remuneration and the value of it has not been quantified, the existing Act values it (for the purposes of payment during long service leave) at $3 per week for board and $1 per week for lodging. This amendment provides that the value will in future be set by regulation, thereby enabling more frequent revisions of the amount to be made.

Subclause (3) excludes certain persons from the provisions of the Act by defining them not to be employees. The existing provisions in the Act deem persons subject to an award or industrial agreement not to be employees for the purposes of the Act. The assumption is that such persons have an entitlement to long service leave under the award or industrial agreement. This may not be the case because there is no statutory requirement to have long service leave provisions in awards or industrial agreements.

This amendment provides that where a person has a long service leave benefit given by an award or industrial agreement, a workplace agreement, a term of the person's common law contract of employment or any enactment of the State, the Commonwealth or another State or Territory, then providing that entitlement is at least equivalent to what is available under this Act, such persons are not employees for the purposes of this Act.

Clause 55

Section 5 of the existing Act enabled a Board of Reference to exclude employers from the provisions of the Act if their employees had at least an equivalent long service leave benefit. That section has been repealed as Boards of Reference will no longer exist. Contracting out provisions have been inserted in lieu. Any exclusions that have been granted in the past are continued for 6 months or until the relevant employers and employees put their long service leave provisions into a contractual agreement or enter into a contracting out arrangement as provided by the substituted section (ie the long service leave benefit may be traded off by the parties). To be valid the contracting out agreement must be in writing.

Clause 56

Section 6 of the Act prescribes what counts as continuous service for the purposes of an entitlement to the long service leave benefits of the Act. This amendment updates the reference in the section to the relevant industrial relations legislation applying.

Clause 57

The existing section 8 gives an employee an entitlement to pro rata long service leave on death or termination by the employer for reasons other than misconduct, after 10 years service. There is no entitlement if the employee terminates the relationship. However, the long service leave General Order grants a pro-rata benefit when the employee terminates and the Act expressly provides in section 8A that where the eligibility under the General Order is better than under the Act, the eligibility under the General Order will be the eligibility under the Act. This amendment makes the Act consistent with the General Order in respect of the termination of employment by the employee. An employee who terminates after 10 years service is given an express entitlement to pro rata long service leave under the amended Act.

Clause 58

Under the existing provisions, where the Industrial Relations Commission General Order or an agreement between the Trades and Labor Council (TLC) and the (now) Chamber of Commerce and Industry (CCI) provides better eligibility for long service leave, the provisions of the General Order or the agreement apply to eligibility under the Act. Since there have not been any such agreements between the TLC and the CCI recorded in nearly 40 years, the provision is redundant and the reference to agreements on eligibility being reached between the TLC and CCI are deleted by this clause.

employed by that employer. Records must be produced or access to them granted before the end of the next pay period after the request is made.

Clause 63
Division 4 of Part 7 of the existing Act relates to the powers of Factories and Shops Inspectors to enforce the Act. As the Factories and Shops Act is to be repealed in this Bill and there have been no Factories and Shops inspectors for 8 years, this Division is to be repealed as no longer necessary.

Clause 64
Sections 32, 33 and 34 of the existing Act make breaches of any provision of the Act an offence and if no specific breach penalty is prescribed, a penalty of $100 with a $10 per day penalty for a continuing offence is prescribed. The only offence provisions in the amended Act are to be those related to keeping of employment records and as these have specified penalties, sections 32, 33 and 34 are redundant and are repealed.

Clause 65
Section 36 of the Act conferred jurisdiction on an industrial magistrate to hear complaints of offences against Part 6 of the Act. The amendment repeals the wording of section 36 and substitutes a general power for the industrial magistrate's court to have exclusive jurisdiction to deal with complaints of breaches of the Act that are offences (ie contraventions of the obligation to keep employment records).

Clause 66
Section 37 provides that a person, his solicitor or an agent may represent a party in proceedings involving contraventions of this Act. This amendment substitutes the words "legal practitioner" for solicitor and removes the unnecessary confirmation that the person is bound by the acts of his agent.

Clause 67
Section 38 enables the Governor to make regulations. Subsection (2) provides that the Governor may also prescribe a penalty of up to $40 to be imposed for breaches of the regulations. This amendment brings the penalty up to date and is the maximum that can be prescribed for breaches of regulations without overriding the Interpretation Act 1984.

Clause 68
Section 39 enables forms used in proceedings under the Industrial Relations Act to be used in proceedings under this Act. The amendment brings the reference to the relevant industrial relations Act up to date.

Clause 69
Division 2 of this Part deals with what is to happen in respect of matters that are that are in existence , or before a Board of Reference or the Commission or the Full Bench, under the existing Act, when this Part comes into force.

These transitional provisions provide that a person who was an employee under the definition of employee in the pre-amendment Act, remains an employee under the amended Act if he or she remains in continuous employment with his or her employer. Continuous employment is extensively defined in section 6 of the Act and includes periods of absence and employment by more than one employer if the business has been transmitted from one employer to another.

The transitional provisions also provide that exemptions from the Act granted under the old section 5, continue until a contracting out agreement under the new section 5

Clause 59

The existing long service leave provisions require a Board of Reference to determine when long service leave shall be taken if the parties cannot agree on a time, how much notice to be given to take that leave and for the leave to be taken in no more than 3 periods if it is not taken in one continuous period.

The amendments enable leave to be taken, by agreement, in multiple periods of not less than one week. If agreement cannot be reached on when the leave is to be taken, the employee is entitled to determine when it will be taken, provided that a minimum of 12 months have elapsed since it became due and 2 weeks notice of intention to take the leave is given. This replicates similar provisions in the Minimum Conditions of Employment Act in respect of the taking of annual leave.

The existing provisions also require payment in advance of leave being taken or if the parties agree, in accordance with the normal pay period arrangements or some other arrangement. This amendment replicates the Minimum Conditions of Employment Act provisions in respect of the payment of annual leave and provides that payment shall be made on a pay period basis unless the employee requests payment in advance of going on leave.

Clause 60

Parts IV, V and VI of the existing Act deal with Boards or Reference, appeals from their determinations and the enforcement of the Act respectively. As there are to be no Boards or Reference, Parts IV and V are redundant and are repealed. The new Part V, replacing Part VI confers jurisdiction on an industrial magistrate's court to deal with claims for long service leave benefits.

Subsection 11(1) of the new Part V specifies some of the issues the industrial magistrate's court can deal with. These were formally the areas of jurisdiction of the Board of Reference. Subsection 11(2) provides that the industrial magistrate's court is to have exclusive jurisdiction to deal with long service leave claims under the Act.

Clause 61

Division 1 of Part VII of the existing Act relates to appeals from determinations of Boards of Reference. Appeals from decisions of the industrial magistrate's court will go to the Full Bench of the Commission and accordingly this Division is no longer required.

Clause 62

Section 26 is Division 2 of Part VII and relates to the keeping of employment records. The existing section is repealed and replaced with record keeping provisions based on those in the Minimum Conditions of Employment Act and the Workplace Agreements Act with special provision for the keeping of records of the amount and type of leave taken by the employee and details of any section 5 contracting out arrangement that has been entered into. The records must enable calculations to be made of the amount of long service leave, if any, that an employee is entitled to. It is an offence punishable by a fine of up to $5000 not to keep records showing the relevant details and the records must be kept for the entire period of employment and for 7 years thereafter.

Similar to the provisions in the Workplace Agreements Act and the Minimum Conditions of Employment Act, section 26A inserted by this clause, provides that the employer must grant access to the records to the employee or a person authorised by the employee or an industrial inspector. The employer must allow entry to the premises to examine the records and allow the authorised person to take copies or extracts from the records. The obligation exists even if the employee is no longer

is entered into or until 6 months after this Part comes into force. The 6 months may be extended by the Minister on application by an employer.

Clause 70
Where any matters were before a Board of Reference, the Commission or the Full Bench at the time these amendments come into force and they have not been completed, the transitional provisions enable those matters to be completed as if the amendments had not come into force. Where a determination has been made by a Board of Reference or an appeal body has made a decision, that determination or appeal decision is deemed to have been made by the industrial magistrate's court or the Full Bench respectively and may be enforced accordingly.

Clause 71
The industrial magistrate's court or the Full Bench by this section is given jurisdiction to deal with any matters involving the Act that arose before the amendments came into force and in respect of which proceedings had not yet commenced.

Clause 72
Section 44 of the Minimum Conditions of Employment Act requires all employers who are not subject to an award, industrial agreement or workplace agreement to keep employment records in respect of their employees. This amendment requires such employers to keep records in respect of the employee's long service leave entitlements for the period of employment and for 7 years thereafter.

## PART 10 - REPEAL OF SPENT AND OUTDATED LEGISLATION

This Part repeals legislation which is mostly spent or outdated and where necessary, inserts in the current industrial legislation, those provisions which are still relevant.

Clause 73
This clause repeals the Masters and Servants Act 1892. The Act is largely procedural in that it provides Justices of the Peace with the authority to deal with disputes arising between employers and employees over breaches of their contracts of employment. The Act is the last of its kind in Australia. All other States have repealed such legislation.

Clause 74
This clause repeals the Truck Act 1899 and amends current legislation which refers to it. The Act is based on the United Kingdom (UK) Truck Act 1831 which ensured that employers could not deduct monies from their employees' wages without first obtaining the employee's consent or gaining lawful authority to do so. Those provisions that are still relevant have been incorporated into the Minimum Conditions of Employment Act 1993 in a new Part 3A.

Section 5 of the Industrial Relations Act 1979 provides that the Industrial relations Act will prevail over the Truck Act. This section was originally inserted in order to legalise the forfeiture of employee wages, in accordance with award provisions, when the employee had left the employment without giving notice in accordance with the award provision. The section is to be repealed and a corresponding provision is inserted into the Minimum Conditions of Employment Act 1993. Similar provisions in the Prisons Act 1981 and the Coal Industry Tribunal of WA Act 1992 are also repealed.

Clause 74(5) alters the definitions section of the Minimum Conditions of Employment Act 1993 to provide that a minimum condition is prescribed in respect of "a rate of pay, or other requirement as to pay prescribed by this Act." This is a consequential amendment arising from the inclusion of a new Part 3A in the Act. The provisions of Part 3A incorporate much of the Truck Act but provide more flexibility in the arrangements that may be made.

Section 17A of the new Part 3A provides that in Part 3A any references to an employee include any person who is in any manner employed for wages, in work of any kind or in manual labour. The definition is intended to cover all employees previously covered under the Truck Act. The term "wages" when it is used is defined to mean any money or thing had or contracted to be paid, delivered or given as a recompense, reward or remuneration for work. References in the Part to contracts of employment being limited to contracts in writing are related to agreements between employers and employees allowing for the payment of remuneration other than in money.

Section 17B of Part 3A provides that an employee is not to be forced to accept goods, accommodation or other services of any kind instead of money for wages unless this is authorised or required under the workplace agreement, award or contract of employment or under a written law. The parties can make arrangements for payment of wages in ways other than in money but such arrangements must be writing. This provision allows employees and employers greater flexibility in the payment for services by the employee. It will allow salary packages to be lawfully negotiated.

Section 17B also provides that an employee cannot be compelled by an employer to spend his or her wages in any particular way and in any proceedings where the employee claims wages from the employer, any goods, services or accommodation received by an employee in lieu of wages or any wages forced to be spent in a particular way because of coercion by an employer, is to be ignored.

Section 17C of Part 3A provides that except where an award, industrial agreement, workplace agreement or written contract of employment provides otherwise, an employee who receives money as wages is to be paid in full and in cash, by cheque, postal or money order payable to the employee, or by payment into a bank or other account at a financial institution specified by the employee. An employee must give authorisation for an employer to use any non-cash method of payment. The Crown is exempt from this provisions because of the size of its workforce which would make arranging cash payments impractical.

Section 17D of Part 3A provides that although section 17C prescribes that wages must be paid in full, this does not apply if the employee has authorised a deduction to be made and to be paid to some other person, or if the deduction is authorised by an award, industrial or workplace agreement or if it is required to be deducted in accordance with some law of the State or the Commonwealth.

Clause 75

This clause repeals the Trade Unions Act 1902 and amends current legislation which refers to it. The Act provides for the registration of unions, their immunity from criminal prosecution for common law conspiracy and their ability to obtain and dispose of property. This was considered necessary to legitimise trade union activity

in the 19th century. The English courts had considered their activities as unlawful at common law. The Industrial Relations Act 1979 provides for registration of unions and legitimises their activities. Accordingly the Trade Unions Act is now redundant.

Clause 76

This clause repeals the Factories and Shops Act 1963, amends references to the Act in existing statutes and amends the Child Welfare Act 1947 to insert provisions relating to the protection of children in employment. The Act contains provisions which establish minimum conditions for employees in factories, shops and warehouses. These include provisions related to the employment of children and young persons.

The occupational health aspects of this Act were transferred to a specific Occupational Health and Safety Act, the trading hours matters to the Retail Trading Hours Act and most of the relevant employment related provisions to the Minimum Conditions of Employment Act. The remaining sections mainly cover the appointment and powers of inspectors, a range of minimum conditions for employees of factories, shops and warehouses, offence provisions and record-keeping.

Following the repeal of this Act, the occupational health and safety requirements relating to the employment of children and young workers will be implemented under the auspices of the Occupational Health, Safety and Welfare Act 1985 through the insertion of regulations in the Occupational Health, Safety and Welfare Regulations. The welfare aspects related to the employment of children will be incorporated into the Child Welfare Act 1947.

The provisions of the Factories and Shops Act relating to the prohibition on the employment of minors are to be incorporated into the Child Welfare Act but the prohibition is not to be limited to shops, warehouses and factories. The provisions will prohibit the employment of children under 15 from working during the time they should be at school, or between 9.30pm and 6.00am, but will not apply to a child who has become exempt. An "exempt child" is one who holds a certificate under section 13(4) of the Education Act exempting him or her from attendance at school to enable him or her to engage in employment. Such a child will be at least 14 years of age.

Where the Director-General of the Department of Community Welfare is of the opinion that employment of a child will jeopardise the welfare of a child, the Director General can prohibit the child from being employed or impose limitations on the employment. Prohibition or restriction notices are served on the child, the parents or guardians of the child and the employer. Contravening the notice or allowing the notice to be contravened is an offence carrying penalties of $2000 to $5000. An industrial inspector may prosecute such contraventions as well as unlawful street trading or the unlawful employment of children, in the industrial magistrate's court.

Clause 77

This clause repeals the Salaries and Wages Freeze Act 1982 and amends references to it in other Acts. The purpose of this Act was to freeze temporarily in the public interest, the remuneration payable to employees and the holders of certain offices within the public sector of the State and the remuneration payable to employees in the private sector of the State. The majority of this Act (excepting Sections 8, 9 and 10 dealing with private sector remuneration being frozen, and offences for non-compliance) was proclaimed on December 24, 1982. The freezing

of remuneration was subject to a sunset clause but the expiry of that period did not operate to repeal the legislation.

Clause 78

This clause repeals the Temporary Reduction of Remuneration (Senior Public Officers) Act 1983. The purpose of the Act was to reduce temporarily the remuneration payable to certain employees and holders of office within the public sector of the State. The Act provides that the reduction only applies to instalments of remuneration which were payable from the first pay period payable on or after the 1 September 1983 and ending within 12 months of the day of the commencement. The reduction in remuneration was subject to a sunset clause which expired but the expiry of the period did not operate to repeal the legislation.

Clause 79

This clause clarifies that the repeal of the Salaries and Wages Freeze Act 1982 and the Temporary Reduction of Remuneration (Senior Public Officers) Act 1983 does not operate to give an entitlement to or allow a claim for any monies which a person may have lost as a result of these Acts being passed.