EXPLANATORY MEMORANDUM

CONTRACTUAL BENEFITS BILL 2007

INTRODUCTION

Under section 29(1)(b)(ii) of the *Industrial Relations Act 1979* (IR Act) an employee may refer to the Western Australian Industrial Relations Commission (WAIRC) a claim that they have been denied a benefit to which they are entitled under their contract of employment. The claim is an industrial matter that may be referred to the WAIRC.

Since the introduction of the Federal Government's Work Choices legislation, only employees who fall within the State industrial relations system (primarily those who are not employees of constitutional corporations) have recourse for denied contractual benefits pursuant to the IR Act.

The capacity of federal system employees (primarily those employed by constitutional corporations) to bring claims in the WAIRC for denial of contractual benefits has been excluded by Work Choices.

The *Contractual Benefits Bill 2007* (the Bill) restores the capacity for employees of constitutional corporations to make claims for denied contractual benefits in respect of their common law contracts of employment.

This avenue provides employees with an accessible option for recovering entitlements, in the absence of which the primary alternative is to pursue potentially expensive common law actions in the courts.

Amendments to the IR Act in the *Industrial and Related Legislation Amendment Bill 2007* expand the jurisdiction of the WAIRC in relation to contractual benefits matters to benefits that are not industrial matters. This involves the repeal of current section 29(1)(b)(ii) of the IR Act and introduction of new section 28A. The expanded jurisdiction in proposed section 28A is reflected in the Bill and will have effect from proclamation. The jurisdiction in respect of contractual benefits that are industrial matters is restored effective 27 March 2006.

PART 1 – PRELIMINARY

Clause 1 – Short Title

The Act will be cited as the *Contractual Benefits Act 2007* and is a new piece of legislation.

Clause 2 – Commencement

The formal part of the Act commences the day the Act receives the Royal Assent. The substantive parts of the Act come into operation on a day, or on days, to be fixed by proclamation.

Clause 3 – Terms used in the Act

Clause 3(1) provides relevant definitions for the purposes of the Bill. It adopts definitions consistent with definitions in sections 7(1) and 80C(1) of the IR Act for "Arbitrator", "commissioner", "industrial matter" and "WAIRC" and the *Workplace Relations Act 1996* (WR Act) for "employee", "employer" and "employment".

Clause 3 of the Bill effectively sets out the scope of the Bill's operation by defining the employees and employers to which the Bill applies. The Bill applies to employers who are constitutional corporations and employees of those employers.

The definitions of "contractual benefit" and "Commonwealth instrument" set out the scope of the matters that will be capable of being the subject of a claim referred under clause 6. A contractual benefit is broadly defined as any benefit to which an employee is entitled under a contract of employment whether express or implied.

Consistent with amendments to the IR Act in the *Industrial and Related Legislation Amendment Bill 2007* contractual benefits will not be confined to "industrial matters", rather any benefit under a contract of employment will be capable of being the subject of a claim.

"Contractual benefit" does not include a benefit under a Commonwealth instrument such as an award or workplace agreement as defined in the WR Act.

Clause 3(2) provides that a reference to an employee or an employer includes a reference to a former employee or former employer. This replicates the effect of section 7(1a) of the IR Act which applies to contractual benefits claims under that Act.

Clause 3(3) replicates the effect of section 7(6) of the IR Act. Section 7(6) was inserted into the IR Act in 2002 (by the *Labour Relations Reform Act 2002*) to address a concern that musicians and entertainers had no accessible remedy in the event they were not paid monies owed for performances.

The *Labour Relations Reform Act 2002* inserted section 7(6) which modified the definition of employer and employee to ensure that musicians, entertainers, and those that hire them, were within the contractual benefits jurisdiction of the WAIRC. Where a person or group of persons are engaged by a constitutional corporation this Bill reinstates the previous entitlement under the IR Act that the person or persons are to be regarded as employees and may refer claims accordingly.

PART 2 – CLAIMS IN RESPECT OF CONTRACTUAL BENEFITS

Part 2 contains the substantive provisions that allow an employee of a constitutional corporation to refer a claim for a denied contractual benefit to the WAIRC and empower the WAIRC to deal with the claim.

Clause 4 – Jurisdiction of WAIRC
Clause 4 of the Bill confers jurisdiction on the WAIRC to hear and determine claims for contractual benefits referred under clause 6.

Clause 4(2) extends to the WAIRC the powers and functions that it would have if it were dealing with a contractual benefit claim pursuant to the provisions of the IR Act, subject to the provisions of the Bill. This clause reflects the objective of the Bill to essentially restore the jurisdiction that was removed by Work Choices. The jurisdiction under the Bill is intended to closely reflect the jurisdiction of the WAIRC in dealing with claims pursuant to the IR Act. The only limitations on IR Act functions arise from express provisions of the Bill that are inconsistent with or different from the functions under the IR Act.

Clause 5 – Constitution of WAIRC
This clause provides for the constitution of the WAIRC by a single commissioner for the purposes of dealing with a claim pursuant to clause 6.

Clause 6 – Referral of claim
Clause 6(1) provides for an employee to refer a claim that the employer has denied the employee a benefit to which they are entitled under their contract of employment, subject to the exclusions in clauses 6(2) and 6(3).

Clause 6(2) excludes claims from being referred where the claim is based exclusively on the ground that an employee has been denied a benefit implied into the contract of employment by section 5(1)(c) of the *Minimum Conditions of Employment Act 1993* (MCE Act). While these implied conditions are defined to be contractual benefits under clause 3, enforcement will continue to be in the Industrial Magistrates Court where there is not otherwise a contractual benefits claim within the WAIRC's jurisdiction under the Bill.

The definition of contractual benefit to include a condition implied by the MCE Act is intended to obviate the need for an employee to refer a claim to the WAIRC and separately claim in the Industrial Magistrates Court where benefits of both kinds have been denied. Conditions implied under the MCE Act will continue to be enforced in the Industrial Magistrates Court if they are the only benefit that has been denied or that is being claimed.

Clause 6(3) provides that claims that are not industrial matters will be able to be referred if the contractual benefit is denied after the commencement of the clause (clause 6(3)(a)(i)). Claims that are industrial matters will be referable if the contractual benefits were denied on or after 27 March 2006 (clause 6(3)(a)(ii)). This provision restores the entitlement to refer claims in respect of industrial matters from the date of commencement of the Work Choices legislation.

Claims are able to be referred to the WAIRC for 6 years after the denial of the contractual benefit (clause 6(3)(b)).

Amendments in the *Industrial and Related Legislation Amendment Bill 2007* prospectively (from proclamation) allow claims for denied contractual benefits that are not industrial matters under the IR Act. Similarly, the Bill provides that claims that are not industrial matters will be able to be referred if they are denied after proclamation of the Bill.

Claims relating to benefits denied prior to 27 March 2006 are able to be referred pursuant to the IR Act (by virtue of regulation 1.2(2) of the *Workplace Relations Regulations 2006*).

Clause 6(4) requires the employee to serve a copy of the claim on the employer.

Clause 7 – Parties to proceedings

Clause 7 identifies the parties to proceedings as the employee who refers the claim and the employer on whom or which the claim is served in accordance with the requirement in clause 6(4), subject to the WAIRC directing that parties be struck out or persons be joined pursuant to applied section 27(1)(j) of the IR Act.

Clause 8 – Applied provisions of IR Act

Clause 8(1) of the Bill applies provisions of the IR Act relevant and necessary to hearing and determining contractual benefits claims. The applied provisions are subject to other provisions of the Bill, apply as modified by clause 8(4) and, for the purposes of the applied provisions in paragraphs (a) through (k), apply with any other modifications that the WAIRC determines to be necessary or appropriate (clause 8(3)). The applied provisions relate to:

(a) functions and powers of the WAIRC (paragraphs (a) through (d) and (g) of clause 8(1));

(b) intervention by the Minister for Employment Protection (paragraph (e));

(c) representation by the parties (paragraph (f) as modified by clause 8(4)(a));

(d) evidence before the WAIRC (paragraph (h) as modified by clause 8(4)(b));

(e) the form of WAIRC decisions are to be in the form of an award, order or declaration (paragraphs (i) through (k)); and

(f) appeals to the WAIRC Full Bench and Western Australian Industrial Appeal Court (paragraphs (l) through (o), with section 90 applying as modified by clause 8(4)(c) so that an appeal can be made to the Western Australian Industrial Appeal Court on the ground that the WAIRC's decision is in excess of jurisdiction).

Clause 8(2) provides that the following sections of the IR Act apply as if the references to "this Act" were references to the Bill:

(a) section 3 relating to off-shore application;

(b) sections 16 and 16A relating to powers, duties and delegations by the Chief Commissioner;

(c) section 17 relating to acting appointments; and

(d) section 104 relating to prosecution of offences.

Clause 9 – Conciliation
Clause 10 – Compulsory attendance at conciliation
Clause 11 – Settlement of claim or part of claim
Clause 12 – Determination of claim where no resolution by conciliation

Clause 9 requires that the WAIRC conciliate claims at first instance unless it is satisfied that any attempt to settle the claim by conciliation is likely to be unsuccessful (clause 12(1)(b)). Conciliation could be considered likely to be unsuccessful if, for example, the claim is properly served but the respondent does not lodge an answer and cannot be contacted, or if the service of a summons to attend is not able to be effected. Clause 9 adopts, with and without amendment, various provisions in sections 32 and 44 of the IR Act that are considered appropriate to the exercise of the jurisdiction in the clause.

Clause 9(8) provides for enforcement of directions, orders or declarations in conciliation to proceed before the WAIRC Full Bench via section 84A of the IR Act. Among other things, section 84A of the IR Act enables the WAIRC Full Bench to order penalties against a person.

Clause 10 of the Bill provides that the WAIRC may require attendance at conciliation. These provisions are consistent with the provisions relating to compulsory conferences in section 44 of the IR Act.

Clause 11 enables the WAIRC to make an order or file a memorandum reflecting the agreement of the parties where a claim is settled through conciliation.

If a claim is not settled through conciliation, **clause 12** empowers the WAIRC to hear and determine the claim, consistent with its powers under the IR Act.

Clauses 9 through 12 of the Bill essentially replicate provisions of sections 32 and 44 of the IR Act relevant to contractual benefits claims, with appropriate or desirable amendments. Comparable enforcement provisions are also included in the Bill. The table below details the comparable provisions:

Clause of Bill	Comparable section/s of IR Act
Clause 9(1)	Section 32(1)
Clause 9(2)(a)	Section 32(2) Section 44(5a)
Clause 9(2)(b)	Section 32(3) and 32(8)(3)
Clause 9(3)	Section 32(8) Section 44(6)
Clause 9(4)	Section 32(4) Section 44(12d)
Clause 9(5)	Section 44(6a)
Clause 9(6)	Section 44(5)
Clause 9(7)	Section 44(12a)
Clause 9(8)	Section 84A
Clause 10(1)	Section 44(1)
Clause 10(2)	Section 44(2)
Clause 10(3)	Section 44(3)
Clause 10(4)	Section 84A
Clause 11	Section 44(8)
Clause 12(1)	Section 32(6) Section 44(9)
Clause 12(2) – (4)	Section 44(10) – (12)

Clause 13 – Costs

Clause 13 of the Bill enables a successful party to claim costs for the services of a legal practitioner or agent where a claim is frivolously or vexatiously instituted or defended. This clause is intended to discourage frivolous or vexatious claims and defences. It will also ensure that where such claims are made, there is a capacity to cover costs incurred as a result of the frivolous or vexatious claim or defence.

Clause 14 – Claims on behalf of government officers

Clause 14 provides an avenue for redress for contractual benefits (that are industrial matters) of government officers who are employed by constitutional corporations. Prior to Work Choices, a claim that a government officer had been denied a contractual benefit could be referred to the public service arbitrator (**Arbitrator**) where the claim was an industrial matter under Part IIA of the IR Act.

Consistent with the objective of the Bill to restore the rights removed by Work Choices, clause 14 restores access to the Arbitrator in respect of a claim that a government officer has been denied a contractual benefit where the claim is an industrial matter (clause 14(2) and (3)).

Consistent with the jurisdiction of the Arbitrator under the IR Act, a claim that a government officer has been denied a contractual benefit may be referred by the same persons who may refer an industrial matter under section 80F(1) of the IR Act (clause 14(2)).

Clause 14(5) provides that clause 14 operates in respect of contractual benefits denied on or after 27 March 2006. Contractual benefits denied prior to that time are referable as industrial matters within the Arbitrator's jurisdiction under the IR Act. A claim may be referred within 6 years from the refusal or failure of the employer to allow the contractual benefit (clause 14(5)(b)).

Pursuant to clause 14(6), the Arbitrator, on a claim under clause 14, will have the same functions as if the claim were an industrial matter referred under section 80E of the IR Act. The provisions of the IR Act apply to the referral of a claim under the clause.

Clause 15 – Enforcement of orders in Industrial Magistrates Court

Clause 15 provides that orders made under sections 11, 12, 13 or 14, that is orders by the WAIRC where the claim is settled at conciliation, orders arising from the hearing and determination of the claim or costs orders, as well as orders by the Arbitrator under section 14, are enforceable in the Industrial Magistrates Court pursuant to section 83 of the IR Act. Among other things, section 83 of the IR Act enables the Industrial Magistrates Court to order penalties against a person.

Clause 16 – Effect of other proceedings

Clause 16 seeks to prevent claims being made in multiple jurisdictions in respect of the same denied contractual benefit where there is concurrent jurisdiction to make a claim in respect of the same subject matter. For example, proceedings in respect of the same denied contractual benefit might be able to be made in the WAIRC, the Industrial Magistrates Court, the Magistrates Court or other civil courts. Multiple claims should not have to be defended simultaneously. However, if other proceedings are discontinued or fail for want of jurisdiction, an employee will still be able to proceed with a claim to the WAIRC.

The clause achieves its objective by preventing the WAIRC from dealing with a claim if other proceedings have been commenced in another jurisdiction in respect of the same subject matter. The WAIRC may deal with a claim if other proceedings are discontinued or fail for want of jurisdiction.

Clause 17 – Transfer of claim

Clause 17 seeks to address an issue arising from the uncertainty of Work Choices and the difficulty ascertaining whether an employer is a constitutional corporation or not. Whether an employer is a constitutional corporation is often a complex legal question. However, the answer to that question determines the jurisdiction in which a claim is able to be made.

An employee who lodges a claim pursuant to this Bill on the mistaken basis that the employer is a constitutional corporation will be able to have the claim transferred to the jurisdiction under the IR Act if that turns out to be the appropriate jurisdiction.

A claim that is transferred will then be dealt with as if it were referred under the IR Act and any proceedings were proceedings under the IR Act.

Clause 18 – Act does not derogate from IR Act
This clause ensures that the provisions of the Bill do not have any consequences for or limitations on any function or power of the WAIRC under provisions of the IR Act.

PART 3 – REGULATIONS

Clause 19 – Regulations
Clause 19 effectively extends the regulation making powers under section 113 of the IR Act to this Bill. Regulations may be made pursuant to section 113 of the IR Act to:

(a) prescribe any matter that the Bill requires or permits to be prescribed;

(b) prescribe any matter that is necessary or convenient to be prescribed for the purposes of the Bill;

(c) regulate the practice and procedure to be followed in relation to the referral, bringing, hearing and determination of claims and appeals under the Bill.

PART 4 – CONSEQUENTIAL AMENDMENTS

Part 4 makes minor consequential amendments to the IR Act and the *Occupational Safety and Health Act 1984*.

Division 1 – Amendments to *Industrial Relations Act 1979*

Clauses 20 and 21 – Section 81CA amended
The amendment to the IR Act effected by these clauses, is a consequential amendment arising from the provisions in the Bill that confer enforcement jurisdiction on the Industrial Magistrates Court. The Division incorporates jurisdiction under the Bill as part of the Industrial Magistrates Court's general jurisdiction.

Division 2 – Amendments to *Occupational Safety and Health Act 1984*

Clauses 22 and 23– Section 51K amended
Division 2 amends section 51K of the *Occupational Safety and Health Act 1994* which relates to matters that may be heard together by the Occupational Safety and Health Tribunal (**OSH Tribunal**).

Subsection (4) of section 51K provides that the Chief Commissioner can allocate a contractual benefits claim (as described in section 29(1)(b)(ii) of the IR Act) to the OSH Tribunal where the OSH Tribunal is dealing with a matter pursuant to section 51G that involves the same employer and arises out of the same circumstances.

The amendment deletes the paragraph that refers to claims pursuant to section 29(1)(b)(ii) of the IR Act as section 29(1)(b)(ii) is to be repealed by the *Industrial and Related Legislation Amendment Bill 2007*. The reference to section 29(1)(b)(ii) is replaced by a provision which allows contractual benefits claims whether pursuant to proposed section 28A[1] of the IR Act or pursuant to the *Contractual Benefits Act 2007* to be allocated to the OSH Tribunal where section 51K(4)(b) applies.

[1] *Industrial and Related Legislation Amendment Bill 2007* clause 10.