LABOUR RELATIONS REFORM BILL 2002

EXPLANATORY MEMORANDUM

INTRODUCTION

1. The *Labour Relations Reform Bill 2002* sets the scene for a new era in labour relations in this State. The Bill establishes a just and balanced system and provides a fair go for all parties involved in the workplaces of Western Australia.

2. The objects of the *Labour Relations Reform Bill 2002* are:

   a) to amend the *Workplace Agreements Act 1993* (the WA Act) to provide for the phasing out and expiry of that Act.

   b) to introduce Employer Employee Agreements (EEAs). (See table below for differences between workplace agreements and EEAs).

   c) to repeal the Court Government's "third wave" (eg provisions on pre strike ballots, restrictions on union political expenditure, federal award coverage, compulsory resume work orders, restrictions on right of entry, and inspection of time and wages records).

   d) to enhance the *Minimum Conditions of Employment Act 1993* (the MCE Act).

   e) to promote a collective approach to industrial relations through new objects of the *Industrial Relations Act 1979* (the IR Act) and new powers for the Western Australian Industrial Relations Commission (the Commission), facilitating the award making and collective agreement making process and introducing good faith bargaining.

f) to reinstate the Commission as an effective independent umpire in industrial relations by amending the IR Act to clarify and increase the powers of the Commission.

g) to reform the unfair dismissal provisions.

PART 1 – PRELIMINARY

3. The Act will be cited as the *Labour Relations Reform Act 2002* and amends the IR Act unless otherwise specified.

4. The Act will come into operation on a date fixed by proclamation. Different dates of operation may be set for the various provisions. Notwithstanding this, section 109(6) comes into operation on the day it receives the Royal Assent and Part 3 Division 3 and sections 106 and 111 come into operation on the expiry of the WA Act as provided for by section 4A of that Act.

PART 2 – AMENDMENTS TO PROVIDE FOR EMPLOYER-EMPLOYEE AGREEMENTS

5. Importantly, Part 2 applies to prospective employers and employees where the context so requires.

The Making of an EEA

6. EEAs are individual agreements between employers and employees that may deal with any industrial matter. By section 3(1) of the IR Act, EEAs may have extra-territorial operation.

7. Special provision is made for people with mental disabilities to make EEAs under Division 9.

8. EEAs operate to the exclusion of any award or industrial agreement, unless the parties provide otherwise in the EEA. An EEA does not displace the contract of employment, but has effect as if it formed part of the contract and regardless of any provision of the contract.

9. EEAs cannot be made during the term of an industrial agreement, including one continued in force under section 41(6) of the IR Act. There is a limited exception with respect to people with disabilities.

10. Employers must provide prospective and existing employees with detailed information before making an EEA, including a copy of any relevant award (or approved summary thereof) and an information statement prepared by the Registrar of the Commission. The information must be provided to new employees at least 5 days before the EEA is signed, and 14 days in the case of existing employees. Failure to provide the required information results in the EEA being refused registration. The provision of information provides employees with a cooling off period in which to consider their options.

11. Parties may appoint a bargaining agent to assist them in connection with the making and operation of EEAs. Bargaining agents may represent parties in disputes, including in arbitration proceedings under the EEA provisions. Bargaining agents are not otherwise entitled to represent parties before the Commission, the Industrial Appeal Court or the Industrial Magistrate's Court unless they are duly authorized under section 112A of the IR Act.

Form and Content of EEAs

12. EEAs are written documents requiring both parties' signature, which must be witnessed by an independent adult person. EEAs are required to specify the nature of the employment relationship between the parties (eg. full-time or part-time).

13. EEAs can only be made with persons under the age of 18 years where the EEA is countersigned by an adult person (the counter signatory) who is responsible for the daily care of the young person, such as a parent or guardian.

14. EEAs must contain provisions for the resolution of disputes. The parties have the ability to appoint an arbitrator, who may be the

Commission, to finally resolve the matter at hand. The EEA must specify how any costs associated with arbitration will be borne by the parties. However, the regulations limit employees' liability with respect to such costs.

Commencement, Duration and Variation

15. For new employees, EEAs commence on employment or some later date specified in the EEA. For existing employees, EEAs commence on registration or some later date specified in the EEA.

16. EEAs are able to run for a maximum of three years. The EEA ceases to have effect at the end of its specified term. The expiry of an EEA does not, of itself, terminate the contract of employment to which it relates.

17. On expiry of an EEA, any relevant award or industrial agreement provision applies to the employee. In the absence of such provisions, the terms and conditions of the EEA are imported into the employee's contract of employment, except for the prescribed term of the EEA and the dispute settlement provisions.

18. There is no ability for parties to vary the EEA during its term. However, the parties can agree to cancel the EEA at any time.

Registration of EEAs

19. The Registrar of the Commission is responsible for the registration of EEAs and has powers of delegation to facilitate this function.

20. EEAs must be lodged with the Registrar within 21 days of signing by the relevant parties. EEAs that are not lodged within the 21-day time period must be refused lodgement.

21. EEAs made with new employees cease immediately at the end of this period. A new employee may recover any amount he or she would have been entitled to under a relevant award or industrial agreement for that period. The employment of the new employee is then regulated by any relevant award or industrial agreement, or in the absence of

either of these, a contract of employment containing the same terms and conditions as those of the expired EEA, except for the prescribed term of the EEA and the dispute settlement provisions.

22. The Registrar is prevented from registering EEAs for a period of 14 days after lodgement. This provides another cooling off period, during which time the Registrar must satisfy himself or herself that the EEA is in order for registration. The Registrar has broad information gathering powers to assist in this function.

23. Either party to the EEA (including a counter signatory and a representative), or their bargaining agent, may make written submissions to the Registrar any time prior to registration. These submissions are likely to help the Registrar clarify whether a party genuinely consented to, and understood the terms of, an EEA.

24. Where an EEA does not meet with technical content requirements, the Registrar must give the parties an opportunity to amend the EEA. There is no ability, however, for parties to amend deficiencies in the EEA making process that may affect an employee's genuine choice and informed consent. For example, where employers fail to provide employees with the required information before making EEAs.

25. The Registrar may approve or refuse registration of EEAs. A refusal does not have effect until the end of the period allowed for parties to appeal the refusal. If an appeal is made, a refusal does not have effect unless the appeal fails.

26. Parties have appeal rights to the Commission where an EEA is refused registration. In determination of the appeal the Commission may dispose of the appeal in various ways, for example, by confirming the refusal of registration or ordering the Registrar to register the EEA.

No – Disadvantage Test

27. EEAs are required to meet an award-based No Disadvantage Test (the NDT). This means that EEAs cannot overall disadvantage employees in comparison with a relevant State award, or where no such award applies, a comparable State or Commonwealth award.

28. Employers may seek the Registrar's assistance to determine the relevant or comparable award for the purposes of assessing the NDT.

29. The NDT requires the Registrar to take account of all relevant benefits, both monetary and non-monetary, that an employee would obtain under an EEA as compared to the relevant or comparable award. The NDT ensures that on balance employees are not overall disadvantaged. For this reason, the comparability of non-monetary benefits is required to be taken into account. Awards often contain non-monetary benefits, such as study leave or meal breaks. It is appropriate that the NDT take account of such benefits.

30. EEAs do not fail the NDT by reason only of reduced wage rates being payable to employees eligible for the Commonwealth's Supported Wage System (the SWS). The SWS allows the payment of reduced wage rates to employees with disabilities based on their productive capacity. However, this does not mean that employers must use the SWS in order to determine wage rates under EEAs for people with disabilities. Rather, the SWS provides the Registrar with a nationally accepted benchmark against which wage rates are measured.

31. The Commission is responsible for establishing an NDT instrument that sets out principles and guidelines concerning the NDT. The Commission is empowered to revoke, amend or substitute another instrument for it on application by the Minister or prescribed peak industrial bodies. The Commission is required to take into account public comment when determining such applications.

Register

32. With the exception of employees' names and addresses, provisions of EEAs made in the private sector are open for public inspection. However, parties to an EEA may apply to the Commission to exempt the provision or provisions of an EEA from public inspection.

33. On the other hand, provisions of EEAs made in the public sector are always subject to public inspection, including employees' names and addresses. Public sector employees are identified by reference to the *Public Sector Management Act 1994*.

Disputes

34. EEAs must contain dispute settlement provisions to deal with any question, dispute or difficulty that arises out of, or in the course of, employment under the EEA.

35. The regulations may specify time limits in connection with the performance of dispute resolution procedures under EEAs. A party may refer a dispute to the Commission for resolution where the other party fails to comply with any such time limits. The Commission is empowered to arbitrate such disputes, regardless of whether it was nominated as arbitrator under the EEA.

36. Two or more employees may agree in writing to have their disputes dealt with in the one arbitration. The employees must be employed by the same employer and must have similar dispute settlement provisions under their respective EEAs. In addition, the disputes must substantially concern the same issues. The arbitrator has discretion to determine the disputes in the one arbitration.

37. Arbitrators are empowered to resolve disputes, subject to certain constraints. Arbitrators cannot make determinations that are properly within the jurisdiction of an industrial magistrate's court under section 83 of the IR Act. Determinations of arbitrators must not conflict with, or be inconsistent with, the EEA or the contract of employment.

38. Arbitrators' determinations are final. Determinations are required to be complied with by the parties, unless they agree in writing not to comply.

39. Determinations or orders of the Commission acting in the capacity of an arbitrator are enforceable under section 83 of the IR Act. Determinations and orders of other arbitrators are only so enforceable if lodged with the Commission by the arbitrator, on request of one of the parties.

40. The Industrial Magistrate's Court is not bound by a determination as to the meaning or effect of EEA provisions when exercising its powers under section 83 of the IR Act.

EEAs for Persons with Mental Disabilities

41. Provision is made for people with mental disabilities to make EEAs, by allowing the appointment of substitute decision-makers (representatives) to make EEAs on their behalf. The appointment of representatives overcomes issues concerning a person's legal capacity to make an EEA.

42. Various people may be appointed as representatives, including any adult person closely associated with the person with the mental disability. Representatives may make EEAs on behalf of people with mental disabilities, and do other things in connection with the operation of the EEA. Representatives must act in the best interests of the person whom they are representing.

43. The Registrar is responsible for approving representatives. Procedures are established for the revocation of a representative's appointment. Revocation may occur on prescribed grounds, including where the person with the mental disability no longer wishes the representative to act on their behalf. The Registrar, and in certain circumstances the Guardianship and Administration Board (the Board), may revoke a representative's appointment and appoint a substitute representative.

44. Where application is made to the Board for the revocation of a representative's appointment, the Board's usual procedures apply in determining such an application. An application for revocation of a representative's appointment is made pursuant to regulations under the IR Act.

Certain Conduct Prohibited

45. Certain conduct is prohibited in connection with offering and making EEAs. It is unlawful for employers to advertise or to offer employment conditional on the making of EEAs. It is also unlawful to offer a transfer or promotion in employment conditional on the making of the EEA. However, there is nothing to prevent parties from providing for promotional or transfer opportunities within an EEA.

46. Division 10 establishes civil penalty provisions that deal with unlawful conduct affecting employees, prospective employees and employers. The civil penalty provisions cover a wide range of scenarios, including where employees are dismissed or disadvantaged in employment because they choose not to make an EEA.

47. Industrial inspectors are empowered to investigate alleged contraventions of civil penalty provisions and to commence proceedings in an industrial magistrate's court. Civil penalty provisions proceed through the Industrial Magistrate's Court's general jurisdiction and must be proven to a balance of probabilities.

48. Division 10 provides for various remedies and penalties where unlawful conduct is proven. The Court may order parties to do certain things, to ameliorate the effects of the contravention. For example, an employer who offers employment conditional on the making of an EEA may be required by the Court to make a lawful offer of employment. This may require the employer, for example, to offer the prospective employee employment on the basis of any relevant award, as well as the EEA.

49. Contravention of civil penalty provisions may attract pecuniary penalties, which may in turn be payable to the aggrieved party. The Court is additionally empowered to make compliance orders, including interim orders. Contravention of compliance orders is punishable as an offence.

50. Where an employer dismisses or otherwise disadvantages an employee by reason of refusing to enter into an EEA or cancellation agreement, the burden is on the employer to prove that they acted lawfully.

General

51. Division 11 requires the Commission as constituted by the Commission in Court Session to review the operation and effectiveness of the EEA system.

Registration Requirements for EEAs

52. Schedule 4 sets out the registration requirements for EEAs.

Powers to Obtain Information, and Related Provisions

53. Schedule 5 sets out the powers that may be exercised by the Registrar and arbitrators in the exercise of their respective functions.

TABLE- KEY DIFFERENCES BETWEEN EEAs AND WORKPLACE AGREEMENTS

Workplace Agreements (WPAs)	EEAs
No restriction on age WPAs can be made with minors.	**Section 97UM** EEAs cannot be made with a person under 18 years unless countersigned by an independent adult as prescribed.
No preference to collective bargaining WPAs can be made during the term of an industrial agreement.	**Section 97UF** EEAs cannot be made where a relevant industrial agreement applies, thereby giving preference to collective bargaining.
No informed choice Employers are not required to provide employees with any information before making WPAs. Employees are only required to be given a copy of the WPA, once it has been made (ie. after the fact).	**Section 97UG** Employers are required to provide employees with detailed information before making EEAs (5 days for new employees, 14 days for existing employees). Failure to provide information will result in non-registration of the EEA. Ensures **genuine** and **informed** choice, and provides employees with a "cooling off period" to consider options.
No requirement that parties' signatures be witnessed WPAs are only required to be signed by the employer and employee.	**Section 97UL(3)** Signatures of parties must be witnessed by an independent adult, to help protect genuine choice.
WPAs can commence immediately for existing employees WPAs for existing employees can commence immediately on signing.	**Section 97UR** EEAs for existing employees commence on registration or some later date, not on signing. This protects existing employment arrangements, in event EEA subsequently refused registration.
No protection of entitlements when WPA ends Upon cessation of WPAs, there is no protection of employees' entitlements, meaning they could drop back to statutory minimum conditions of employment (ie. where there is no award or industrial agreement).	**Section 97UT** Employees' entitlements protected on cessation of EEAs, so they either revert to applicable award or industrial agreement conditions, or at least maintain same conditions as those contained in EEA (ie. where there is no award or industrial agreement).
Unfair registration process WPAs can be registered, even if they contain conditions below minimum conditions. There is no cooling off period between lodgment and registration. No capacity for bargaining agents to make submissions. Appeal rights to the Supreme Court, which effectively denies employees access due to costs.	**Division 5** EEAs must comply with minimum conditions. There is a further 14 day cooling off period between lodgment and registration. Capacity for bargaining agents and parties to make submissions to Registrar prior to registration. Appeal rights to WAIRC.
WPAs can continue indefinitely WPAs can have a nominal term of 5 years, and can continue indefinitely thereafter. This has meant many employees have been locked out of collective representation for extended periods.	**Section 97US** EEAs can only extend for a maximum term of 3 years, with no capacity for them to continue beyond expiry.

WORKPLACE AGREEMENTS (WPAs)	EEAS
No WAIRC involvement WPAs are registered by Commissioner of Workplace Agreements, a political body established to oust the WAIRC. WPAs are specifically excluded from WAIRC's jurisdiction. This has generally meant employees excluded from unfair dismissal in the WAIRC.	**Sections 97UY & 97YI** Registrar of WAIRC will register EEAs. EEAs not excluded from WAIRC's jurisdiction, which means employees will have access to unfair dismissal in WAIRC. WAIRC to establish NDT and periodically review processes for EEAs.
No award safety net WPAs have been used to undercut award conditions on wholesale basis, as there is no requirement they at least meet minimum award standards.	**Division 6** EEAs must meet a no disadvantage test (NDT), which means they cannot overall disadvantage employees in comparison with a relevant or comparable award (State or otherwise). This will ensure award conditions are not eroded.
WPAs confidential Private sector WPAs are confidential. This secrecy has contributed to their exploitative nature, and has made it difficult to monitor trends/usage.	**Division 7** Private and public sector EEAs will be public (except for employees' names). This will enable accurate monitoring of usage, and will promote accountability within the system.
Disputes limited to meaning and effect Dispute settlement limited to disputes concerning meaning and effect of WPA only. This has left many employees high and dry, with nowhere to go for dispute settlement.	**Section 97UN** Dispute settlement under EEAs will extend to settlement of any question, dispute or difficulty arising out of or in the course of employment. This will ensure employees have redress for all employment related disputes.
Conditional employment WPAs can be offered as a condition of employment, which has resulted in a lack of genuine choice and restricted employment opportunities for many employees.	**Sections 97XZ and 97Y** EEAs cannot be offered, or advertised, as a condition of employment. Employees must be provided with genuine choice at the time any offer of employment made (ie. choice between EEA, relevant award or contract of employment in absence of award).
No meaningful remedies It is very difficult for employees to obtain redress where unlawful conduct occurs in connection with WPAs. Firstly, because offences must be proven beyond reasonable doubt, and secondly, because there is no capacity for the wrong to be rectified through meaningful remedies. No automatic ability for inspectors to investigate allegations of unlawful conduct.	**Division 10** Employees' genuine choice protected by new civil penalty provisions, which need only be proven to balance of probabilities. Also provides for meaningful remedies, to ensure employees are put into the position they would have been in had the unlawful conduct not occurred. Inspectors may investigate allegations of unlawful conduct on behalf of employees and initiate proceedings.
No right of entry Unions have no right of entry.	**Part 8** Unions have right of entry.

PART 3 – AMENDMENTS TO *WORKPLACE AGREEMENTS ACT 1993*, TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

54. Part 3 of this Bill is directed towards the abolition of the WA Act.

55. Workplace agreements which were registered prior to 22 March 2001 will remain in operation for up to 12 months after the commencement of this Part.

56. Workplace agreements will not be required to comply with a no disadvantage test against the relevant award for the duration of their operation.

57. Workplace agreements which were registered on or after 22 March 2001 will only remain in operation for up to 6 months after the commencement of this Part.

58. The WA Act, in section 19(4), allowed an arrangement whereby a workplace agreement in effect continued beyond its nominal expiry date. Agreements which are continuing in operation by effect of this section will only remain in operation for up to 6 months after the commencement of this Part.

59. Agreements which continue in effect will need to comply with the enhanced provisions contained in the MCE Act.

60. Any collective agreements which have been lodged for registration with the Office of the Commissioner of Workplace Agreements, but have not been registered, will not come into effect. Individual agreements which may have already been signed by the parties prior to the designated day, but not registered, will cease to have effect from the designated day.

61. Upon the expiry of a workplace agreement, or its prior cancellation by the parties, new arrangements will come into effect for both the employer and the employee which will act as a safety net for those employers and employees who have not already entered into alternative employment arrangements.

62. The provisions will ensure that no employee, other than by agreement, will be worse off following the expiry of their workplace agreement. Every employee's contract of employment, which was either part of their workplace agreement or operated alongside it will remain in existence and operation. Employers will not be permitted to reduce an employee's wages below that being paid under the workplace agreement.

63. Where a relevant award exists, an employee's employment will also be subject to that award. An employer will be required to comply with all of the terms and conditions contained in the provisions of the relevant award, including penalty rates, allowances and rates of pay. Employers will only apply the ordinary wage as expressed in the award to the provisions of the award.

64. It is expected that employees will continue to work the same hours of work after the expiry of their agreement and will receive the higher of either their wages under:

    a) the contract of employment; or

    b) as required under the relevant award.

65. However, an employee will not be entitled to recover payment under their contract of employment **and** the penalties and allowances payable under the award. Employers in these circumstances are to be protected from the principle of "set-off" as it is currently applied by the Industrial Magistrate's Court (see Poletti v Ecob 91 ALR 381).

66. If no relevant award exists, the employee and employer become party to a common law contract of employment which has the same terms and conditions as the expired workplace agreement. The same applies to employees who were party to a collective workplace agreement, except that the changes necessary to make the contract applicable to an individual are deemed to have occurred.

67. All rights, entitlements, obligations and liabilities which have accrued prior to the expiry of the workplace agreement are preserved.

68. The remainder of the provisions in Division 1 of Part 3 amend the WA Act to repeal the provisions which allow for the making of workplace agreements and transform the WA Act into the form which it will take until its expiry, 12 months after the commencement of this Part.

69. These changes prevent the making or variation of any further workplace agreements, except agreements to cancel existing workplace agreements.

70. Agreements cancelling existing workplace agreements will not be registered. They will merely need to be made in writing to evidence the party's intention. Such an approach will save resources by allowing the Office of the Commissioner of Workplace Agreements to be closed without exposing the parties to any risks.

71. The provisions of the WA Act relating to unfair dismissal have been amended. All employees working under a workplace agreement will have the same entitlement for unfair dismissal as all other employees in Western Australia. Their claim will now be heard, not in the Industrial Magistrate's Court, but by the Commission, consistent with the majority of employees in the Western Australian jurisdiction.

72. Consistent with preserving the rights and entitlements of employees under expired workplace agreements, the provisions relating to enforcement of rights and obligations under the WA Act are retained. This will allow employees and employers who remain party to a workplace agreement to enforce their entitlements.

73. The register of documents generated by the Office of the Commissioner for Workplace Agreements will be managed by the Registrar of the Commission.

74. Division 2 of Part 3 sets up the transitional arrangements for the expiry of the WA Act. Accordingly, employees and employers will be able to bring an action after the expiry of the WA Act in relation to conduct which occurred during its existence. To facilitate such claims, employers will be obliged to keep all employment records relating to a workplace agreement for 7 years after the making of the agreement.

75. There are also provisions making consequential amendments to other legislation as a result of the expiry of the WA Act. The remaining consequential amendments will be achieved by regulations.

PART 4 – AMENDMENTS ABOUT AWARDS

76. With the repeal of workplace agreements, many employees will revert to award conditions if a new agreement is not negotiated. However, many awards have not kept pace with many of the progressive improvements to wages and conditions of employment.

77. Conditions of employment in some awards are inferior to those provided by the MCE Act. Some awards provide wages that are less than the minimum award wage or contain wage rates that have not been adjusted by the arbitrated safety net increase awarded by the Commission each year. This causes confusion for some employers in determining which conditions apply.

78. Conditions of employment in some awards are complex, unwieldy and difficult to understand, or are no longer relevant or appropriate for the employees and organisations to whom the award applies. Some awards contain outdated provisions that are directly or indirectly discriminatory under the *Equal Opportunity Act 1984* (the EO Act), while other awards simply do not represent current working arrangements.

79. Under this revised industrial system, awards will play an important safety net role for bargaining, both for collective and individual agreements.

Making a New Award

80. Making a new award for employees with no award coverage will be streamlined. The new provisions in the Bill place the onus on any party opposing the making of a new award to show that it would not be in the public interest to make such an award. Unless there are good reasons not to, a new award will be made.

81. The responsibility of the Commission to provide a system of fair wages and conditions of employment, whether that is through awards, agreements or orders, will be strengthened and emphasized in the objects of the IR Act. A new object will be added for this purpose.

82. The Commission will also be given the ability to make an interim award where no award currently exists:

    a) to protect the existing wages and conditions of employees with no award;

    b) to provide a fair basis for the no-disadvantage test; or

    c) for any other appropriate reason, pending the making of a new award.

83. An existing award will be able to be extended to cover an industry not previously covered by that award, provided the employees to be covered by that award are not already covered by another award.

Award Modernisation

84. The Commission will be given the power to review and vary awards to ensure all awards are consistent with current legislative and workplace requirements.

85. The Commission will be required to ensure that awards provide at least the award minimum wage as determined by the Commission in Court Session each year and meet the standards established by the MCE Act.

86. The Commission will also be required to ensure that awards do not contain any provisions which are obsolete or require updating, or any provisions that discriminate against employees on any grounds provided in the EO Act as being unlawful.

87. The Commission may also vary an award to ensure it facilitates the efficient performance of work according to the needs of industry and enterprises within the industry, balanced with fairness to the employees in the industry and enterprises. This is to ensure that the Commission takes into account and balances the needs of enterprises, industries, and employees.

88. Any named party to an award may also make application to vary an award for any of these reasons.

89. All named parties to an award and the peak industrial bodies must be informed of any proposed variations to an award and be given the opportunity to be heard on the proposed variations before the award is varied.

90. Parties to an industrial agreement may agree to incorporate the more modern and relevant conditions of employment that have been negotiated for the agreement, into the relevant award.

91. This will assist in the modernisation of awards, to update them and make them more relevant to the enterprise or industry. However, these agreement provisions will still only apply to the employer and employees who were bound by that agreement.

92. This provision cannot be used as a means for flowing on the terms of an agreement made with one employer to any other employer bound by the same award. The IR Act will expressly limit these terms and conditions to those employees covered by the industrial agreement.

PART 5 – AMENDMENTS ABOUT THE INDUSTRIAL RELATIONS COMMISSION AND THE INDUSTRIAL APPEAL COURT

93. The IR Act is amended to strengthen the power and effectiveness of the Commission. The legislation affirms that proceedings before the Commission cannot be removed from the Commission or challenged in any other court. That is, prerogative relief is prohibited.

94. The Commission is given express power to use both its conciliation and arbitration functions, however it so requires, to administer justice in a timely and efficient manner.

95. The Commission is given additional powers to control lengthy and irrelevant arbitration. Time limits can be imposed where necessary and the Commission can require that evidence or argument be presented in writing. These powers will ensure that matters are determined in an expeditious, but fair, manner.

Amendments to the Industrial Appeal Court

96. The grounds of appeal to the Industrial Appeal Court will be properly defined in accordance with the role of the Court within the appellate system.

97. Grounds of appeal are limited to questions of jurisdiction on the basis that the subject matter of the appeal is not an industrial matter and to questions of construction and interpretation.

98. To ensure that justice is properly administered, failure to afford the right to be heard will continue to be within the jurisdiction of the Industrial Appeal Court.

99. The options available to the Industrial Appeal Court when determining matters will include an across-the-board ability to dismiss an appeal, if the Court determines that the appellant has not suffered an injustice. This option can be exercised regardless of whether or not the grounds of appeal have been made out.

100. The availability of this option will overcome situations such as that in *Airlite Cleaning Pty Ltd v ALHMWU [2001] WASCA 19*. In that case, the Court allowed an appeal on the basis that there had been an error of law. Although the Respondent had failed to follow a procedural requirement, the appellant had not suffered an injustice. The inflexibility of the system meant that the Court had no option but to remit the matter to the Commission to be dealt with after the procedural requirement was completed. This was a costly and time-consuming exercise for both parties.

101. The inclusion of this option provides flexibility within the appellate system and will assist the Industrial Appeal Court to deliver fair and just outcomes.

PART 6 – AMENDMENTS ABOUT INDUSTRIAL AGREEMENTS AND GOOD FAITH BARGAINING

102. The provisions relating to good faith bargaining and industrial agreements have been developed to encourage parties to negotiate openly and honestly. It is intended that this will lead to more successful resolution of negotiated outcomes.

103. The objects of the IR Act will be amended. Some of the amendments are designed to support fundamental tenets of the IR Act such as freedom of association and a recognition of the importance of equal remuneration for men and women for work of equal value.

104. The objects will also recognise the primacy of collective over individual agreements and the need for a system of fair terms and conditions. The importance of the needs of the enterprise have been recognised at both a general level and in the process of bargaining, provided those needs are balanced against the needs of the employees of the enterprise.

105. The new recognition of balancing the needs of the enterprise with the needs of their employees has been given greater standing by an amendment as to the exercise of the Commission's jurisdiction under section 26 of the IR Act.

106. Parties will be able to access the obligation to bargain in good faith under section 42B by initiating bargaining with another party under section 42 of the IR Act. In the case of unions, they will be able to commence bargaining with several employers who are proposed to be bound by a similar industrial agreement.

107. An employer may commence bargaining with several unions to cover their entire workforce in an industrial agreement.

108. Bargaining will be initiated by the provision of a notice containing details about the proposed agreement such as the employees it will cover and its area of operation. A notice initiating bargaining will be able to be issued up to 90 days prior to the expiry of a current industrial agreement to allow the parties time to reach agreement prior to the nominal expiry date of the current agreement.

109. Where there is no industrial agreement, good faith bargaining may commence at any time.

110. Multi-employer agreements will not be subject to any particular constraints outside of those generally applicable to the registration of industrial agreements. However, before an employer association is served it must agree to accept service on behalf of its members or the union will be required to serve those members individually. Where an employer or union is notified that it is requested to bargain as a group with others, it may as part of good faith bargaining request the Commission to determine that it may bargain separately.

111. When a party receives a notice proposing to initiate bargaining, they have 21 days in which to respond. If they respond in the affirmative, then bargaining commences and the obligations pertaining to good faith bargaining apply.

112. Good faith bargaining includes such obligations as stating and explaining the party's position, meeting at reasonable times and places, disclosing relevant and necessary information, acting honestly, bargaining genuinely and adhering to outcomes and commitments made. Bargaining genuinely will require a party not to hold on steadfastly to an inflexible and unreasonable bargaining position.

113. The fact that a party takes industrial action during bargaining does not necessarily mean that they are not bargaining in good faith. However, the Commission will be able to examine the conduct of the parties and may determine that the act of taking industrial action was in breach of the duty to bargain in good faith.

114. There is a short provision dealing with bargaining agents. This is not used in the same sense as registered industrial agents elsewhere in the IR Act. It is directed to ensure that parties recognise the other's duly authorized representatives in bargaining, whoever they may be.

115. Section 42C provides the Commission in Court Session with the power to provide guidance on good faith bargaining by way of a Code of Good Faith.

116. Significantly, good faith bargaining does not require parties to reach an agreement or to agree on particular terms of an agreement.

117. As good faith bargaining is a process, the Commission will be empowered to compel parties to comply with those requirements. However, they will not have the power to require a party to make an agreement or agree to any particular term of a proposed agreement.

118. The obligations associated with good faith bargaining continue until either an industrial agreement is made or the Commission ends bargaining.

119. The Commission has been provided with greater authority in relation to the exercise of its arbitral powers. Section 42G will allow parties who have reached agreement on some but not all terms of a proposed industrial agreement to agree to the Commission determining the outstanding issues.

120. The Commission, by exercising either its powers of conciliation or arbitration, will be able to resolve the outstanding issues. The items determined by the Commission must form part of the then registered industrial agreement.

121. Where the parties have been unable to reach agreement on any terms of the proposed agreement or are not prepared to agree to the Commission determining the outstanding issues, either party may apply to the Commission to end bargaining. The Commission may only do this where it considers that there is no reasonable prospect of an agreement being reached. However, where a request to end bargaining is made by a party that has not, in the opinion of the Commission, been bargaining in good faith, the Commission will not end bargaining. A party should generally be considered to have failed to bargain in good faith where it has failed to comply with orders made by the Commission during the process of good faith bargaining.

122. While the purpose of the good faith bargaining provisions is to provide all possible assistance to the parties to reach agreement without third party intervention, the Commission will be empowered on application to arbitrate an outcome in the form of an enterprise order where it ends bargaining. The Commission will also be empowered to arbitrate an outcome where a party has refused to bargain as prescribed, in which case the aggrieved party may apply to the Commission for an enterprise order.

123. An enterprise order will be able to include all matters which were the subject of negotiation or that would normally appear in an industrial agreement, subject to the usual constraints on the Commission's jurisdiction. It will be limited to a maximum nominal term of 2 years. Only a single employer will be allowed to be party to an enterprise order. Organisations of associations of employers will not be able to be a party to an enterprise order.

124. An enterprise order may only be varied during its term by agreement between the parties. It may be replaced during its term, but only by the registration of an industrial agreement. After the nominal expiry of an enterprise order, the order continues in effect until it is replaced by either an industrial agreement, award or another enterprise order.

125. The Bill implements a number of miscellaneous amendments. Among these is a clarification of the status of prior industrial agreements. These will now be cancelled by a later award, order or industrial agreement to the extent that they are not specifically saved by the later agreement. This will aid employers and unions by removing potential confusion associated with multiple instruments applying simultaneously to an employer.

126. Industrial agreements will also be limited to a maximum nominal term of 3 years. However, they will continue to operate after nominal expiry until either party formally withdraws.

PART 7 – AMENDMENTS ABOUT UNFAIR DISMISSAL AND EMPLOYMENT ISSUES

127. An efficient and effective unfair dismissal system should provide an appropriate balance between the rights and interests of both employers and employees. The system should reflect the following key features:

a) a simple process, which provides as much scope as possible for agreed outcomes without resort to arbitration;

b) appropriate mechanisms to discourage unmeritorious claims;

c) expeditious processing and resolution of claims; and

d) appropriate remedies which reflect the intent and purpose of unfair dismissal protection.

128. The unfair dismissal system has become an increasingly compensation focussed jurisdiction. Reinstatement should properly be the primary remedy, with compensation only considered where reinstatement is impracticable.

129. There is also a need to correct a legislative anomaly, highlighted in the case of *City of Geraldton -v- Cooling [2000] WASCA 346* (the Cooling Decision), whereby reinstated employees are unable to be awarded lost wages between dismissal and reinstatement.

130. The following key changes will be made to the unfair dismissal and associated enforcement provisions of the IR Act.

131. Reinstatement will be the primary remedy regardless of whether the employer agrees to pay compensation.

132. The Commission will be empowered to order an employer to pay the employee remuneration between dismissal and reinstatement or re-employment. This will overcome the anomaly highlighted in the Cooling Decision.

133. The Commission will be required to take into account a properly constituted probationary period when determining the merits of an unfair dismissal claim.

134. Enhanced powers for the enforcement of an unfair dismissal order in the Industrial Magistrate's Court will be introduced.

135. The filing fee for an unfair dismissal claim to will be increased to $50 from $5, although this will be established by regulation.

136. The Commission will have discretion to hear claims lodged out of time and the legislation will ensure that claims lodged with the Australian Industrial Relations Commission (the AIRC) cannot be determined by the Commission unless they have been withdrawn from the AIRC or have failed in that forum for lack of jurisdiction.

137. Enhanced powers for enforcement will ensure employers cannot simply choose to "buy out" a reinstatement order by refusing to comply with it. In the current IR Act employees must apply for a separate order for compensation when their desire, and their legal right, is to be reinstated.

138. To this end, new provisions at section 83B of the IR Act will provide the Industrial Magistrate's Court with new powers to order either specific performance of a reinstatement order or enhanced compensation in lieu.

139. Provisions relating to probationary employees will ensure the Commission properly takes into account genuine probationary arrangements when determining unfair dismissal claims.

140. Preliminary matters will be handled by the Registrar to reduce the time taken for applications to be heard and enhance the scope for agreed outcomes. The existing process of referral for investigation by individual commissioners under section 93(8) of the IR Act is ad hoc and the new provisions will create a more transparent and accountable process.

141. The present 28 day time limit for lodging claims is considered an unnecessary constraint on the Commission's jurisdiction. Accordingly, the Commission will have the ability to hear claims lodged out of time if it considers it would be unfair not to do so.

142. The increase in the cost of lodging an unfair dismissal claim from $5 to $50 will discourage unmeritorious claims and better reflect the cost of processing a claim. This will be provided in regulation and the regulations will allow the Commission to waive the fee in cases of genuine need.

143. Upon proclamation of the Act, employees who earn in excess of $90,000 per annum and whose employment is not subject to an industrial instrument, will be excluded from lodging a claim for unfair dismissal or denied contractual benefits. The prescribed amount will be indexed annually by regulation.

144. The Commission will also have the ability to issue orders against third parties to the employment relationship in certain cases where it considers a third party may be acting so as to prevent or hinder the employee's employment, their transfer to a particular site or their reinstatement or re-employment.

145. Interim orders will be available to the Commission but will be limited to those unfair dismissal cases heard through the provisions of Section 44.

PART 8 – AMENDMENTS ABOUT RIGHT OF ENTRY, RECORD KEEPING AND INSPECTION OF RECORDS

146. The IR Act will be amended to repeal existing sections 49AB - Power of entry - and 49B – Inspection of records.

147. New provisions will be inserted into the IR Act covering right of entry, record keeping and inspection of records.

148. The new right of entry provisions will enable authorised representatives to enter, during working hours, premises where relevant employees work for the purposes of holding discussions with relevant employees or to investigate breaches of relevant industrial instruments and laws.

149. In order to hold discussions, an authorised representative is required to give a minimum of 24 hours notice unless an award, order or industrial agreement that extends to the relevant employees makes provision as to right of entry and either does not require notice to be given or requires a specified period of notice. In such cases the award, order or industrial agreement notice provisions will prevail.

150. Notice is not required with regard to entry on the basis of investigating a suspected breach. However, 24 hours notice is required for the production of employment records for those records held on the employer's premises and 48 hours for those records held other than on the employer's premises.

151. The Commission may waive the notice requirement on application if it is satisfied that to give such notice would defeat the purpose for which the power is intended to be exercised. For example, a union may believe that an employer will destroy records if given notice.

152. Authorised representatives will only be duly authorised if they hold an instrument of authority issued under the IR Act by the Registrar of the Commission.

153. The Commission will be empowered to revoke or suspend such permits if an authorised representative has acted improperly in the exercise of the powers conferred on them by the IR Act or if they have intentionally and unduly hindered an employer or employees during their working time.

154. Civil penalty provisions will be inserted as sanctions against those who obstruct or hinder others in relation to this section or who purport to be authorised to exercise right of entry powers without such authority.

155. In addition to, or instead of ordering such penalties, the Industrial Magistrate's Court may issue an order for the purpose of preventing any further contravention of the relevant provision.

156. In order to enter or remain on premises authorised representatives will be required to, if requested to do so by the occupier of those premises, show their authority. This, combined with the sanctions in the IR Act, will ensure that only bona fide representatives will be able to lawfully enter and remain on premises in the exercise of the powers conferred on them by the IR Act.

157. The new provisions provide greater balance and consistency in the State system. The provisions of awards will be of no effect to the extent that they are inconsistent with, or additional to, the IR Act provisions.

158. The IR Act will also prescribe minimum record keeping and inspection requirements for employers and employees bound by industrial instruments. This will create greater consistency with respect to such requirements and ensure compliance with relevant industrial instruments is more easily determined.

159. Employers and employees bound by awards, orders, industrial agreements and EEAs will be subject to the new provisions. The remainder will be subject to the provisions of the MCE Act.

160. Individual employees will now have the right to access their own employment records.

PART 9 – AMENDMENTS ABOUT PROCEDURE AND ENFORCEMENT

161. The enforcement regime of the IR Act has been strengthened with respect to parties who breach industrial instruments, engage in other unlawful conduct or disobey orders of the Commission or the Industrial Magistrate's Court.

162. The Bill has doubled the penalties applicable to a breach of an industrial instrument. The Bill allows an industrial magistrate to make compliance orders for the purpose of preventing further contravention of an industrial instrument. It is intended such orders will be made in conjunction with penalties awarded for breach of an industrial instrument.

163. Compliance orders will deal specifically with the provision of the industrial instrument that has been breached and allow an industrial magistrate to make an order preventing further contravention.

164. Compliance orders will help to deal with employers who determine it is more economically viable to incur a penalty for breach of an industrial instrument, rather than comply with the instrument. Breach of a compliance order will constitute an offence and significant penalties can be incurred.

Civil Penalty Provisions

165. A new enforcement regime has been introduced in the form of civil penalty provisions. The limited ability of the Full Bench of the Commission to impose penalties for a breach of the IR Act, and the complexity of proving offences in the Industrial Magistrate's Court, has proven to be an obstacle in ensuring observance of industrial laws.

166. Specific provisions of the Bill dealing with certain conduct have been deemed to be civil penalty provisions. These include time and wages record keeping and access requirements, obstruction of industrial inspectors and authorised representatives carrying out duties prescribed by the IR Act, authorised representatives acting without authority, offences in relation to elections and prohibited conduct in relation to EEAs.

167. Civil penalty provisions attract a fine of up to $5000 in the case of an employer, organisation or association and $1000 in any other case. In addition, or alternatively, a compliance order may be made. As commented on above, compliance orders are to be issued to prevent further contravention or failure to comply with a particular provision that has already been breached.

168. For example, an employer may incur a fine when prosecuted for failure to maintain time and wages records. Under the proposed reforms, the Industrial Magistrate's Court may also issue a compliance order, compelling the employer to commence the keeping of time and wages

records. Further contravention of record keeping requirements made out in the compliance order will constitute an offence and significant fines may be incurred.

169. The burden of proof for civil penalty provisions is to the civil standard of balance of probabilities. A civil standard will provide a greater opportunity for matters to be efficiently prosecuted and for the observance of industrial laws to be enhanced.

Unfair Dismissal Orders

170. The remedies available for breach of an unfair dismissal order of the Commission have been enhanced through the Industrial Magistrate's Court. The reforms provide for specific performance of the original order for reinstatement, re-employment or compensation made by the Commission.

171. An employee who has received an order for reinstatement or re-employment from the Commission may elect on application to the Industrial Magistrate's Court for compensation in lieu of the original order. A minimum of 6 months' and a maximum of 12 months' remuneration may be awarded.

172. In addition to the order for specific performance of the original order or compensation in lieu, a penalty may be imposed of up to $5000 for an employer who fails to comply with an order of the Commission. In the case of an order for reinstatement or re-employment, the Industrial Magistrate may also order an employer to pay remuneration lost as a result of the failure to comply with the order.

173. In the event an employer refuses to obey an order of the Industrial Magistrate's Court for specific performance of the original order or compensation in lieu of reinstatement or re-employment, such conduct will constitute an offence.

Penalties

174. The new enforcement regime increases the penalties that can be applied in relation to breach of industrial instruments, breach of unfair dismissal orders of the Commission and civil penalty provisions.

175. Breach of compliance orders and orders for specific performance in respect to unfair dismissal constitutes an offence. The penalty able to be imposed for offences is up to $25,000 and $2500 per day in respect of a body corporate and $5000 and $500 per day in the case of an individual.

176. Where penalties are imposed by order, the penalties may be made payable to the affected party.

177. The improved enforcement regime will provide the mechanism necessary to ensure the rights of all parties in the system are adequately protected. The proposed enforcement provisions aim to provide an increased deterrent to non-compliance and significant penalties for those parties who consistently contravene industrial laws.

Delegation of Powers to the Registrar

178. To improve the operation of the Commission, the Bill provides for the delegation of certain functions of the Commission to the Registrar.

179. The process for such delegation will be developed through regulations made by the Chief Commissioner and will be under his or her supervision.

180. The matters which will be subject to delegation include claims made under section 29(1)(b) for unfair dismissal and denied contractual benefits, the review of awards for the purpose of section 40B as well as applications for the waiving of notice for the production of employment records under section 49I(7).

181. The amendments will enable the Registrar to mediate unfair dismissal and denied contractual benefits claims within an accountable and transparent framework.

182. Similarly, the review of awards to modernise them in accordance with section 40B, and the waiving of notice for production of employment records are matters which can be dealt with effectively by the Registrar. However, the Registrar will not be given the power to make orders in relation to these matters. This responsibility will remain with the Commission.

183. This delegation will expedite such matters to the benefit of all parties and free up the resources of the Commission to deal with more significant matters.

Section 113 – Commission Regulations

184. Amendments are also made to section 113 which place the general regulation making power of the Commission with the Chief Commissioner in consultation with Commission members. This will streamline the regulation making process.

185. The regulation making power for the setting of fees for matters before the Commission shall be made by the Governor as opposed to the current practice of fee setting by the Commission itself.

186. The penalty for breaching a regulation made under this section is also increased from its current level of up to $40 to a level not exceeding $1000.

PART 10 – AMENDMENTS ABOUT MINIMUM WEEKLY RATES OF PAY AND OTHER CONDITIONS OF EMPLOYMENT

187. The MCE Act is retained and improved and the matters for which there are minimum conditions are expanded.

The Minimum Wage Setting Process - General

188. The current MCE Act provides that the Minister determines the minimum weekly rates of pay.

189. This Bill removes the power of minimum wage determination from the Minister and provides that the Commission must set what is an appropriate minimum weekly rate of pay underpinning all wages in Western Australia.

190. The applicable minimum weekly rates of pay will be the minimum that an employee can be paid in Western Australia. In practice it will be most relevant for employees not covered by an award or industrial agreement. It will also be the underpinning rate for transitional workplace agreements and the new EEAs.

191. The Commission will review the minimum weekly rates of pay annually at the time of the State Wage Case. This in no way compels the Commission to issue the same rate for both determinations, nor does it prevent it from doing so. It gives the Commission necessary discretion in determining the appropriate level of the minimum weekly rates of pay.

192. The key industrial parties, (the Chamber of Commerce and Industry, Trades and Labor Council (UnionsWA), Australian Mines and Metals Association and the Minister), will be able to make submissions on the appropriate level of the minimum weekly rates of pay. At the discretion of the Commission, other interested parties will be able to make submissions on these matters.

193. There is also a separately prescribed ability for the key industry parties to make an application for review of the level of the minimum rates of pay if 12 months has elapsed since the previous increase.

Categories of Minimum Wage

194. The Commission will be required to determine and issue a minimum wage for employees 21 years of age and over. Junior minimum rates of pay will be a percentage of the adult minimum wage, as prescribed by the Act.

195. The Commission will also be required to determine and issue a separate set of minimum wage provisions for trainees and apprentices. This is the first time that the special needs of these employees have been recognised in terms of minimum wage protection.

196. Under the previous Government, the Minister simply linked trainee and apprentice minimum wages to awards, which for apprentices at least was generally adequate, but at this time the award system alone does not adequately provide a comprehensive safety net for all trainees in this State. Therefore this matter needs the special attention of the Commission. The Commission will have the complete discretion to either continue using awards, or determine a separate rate, or refer to other instruments of regulation.

197. The Commission is also empowered to determine the appropriate minimum wage for trainees and apprentices over the age of 21 years.

Hourly Divisor

198. To remove the inequities between award covered employees, and those on the statutory minimum wage, the hourly divisor for the purposes of the MCE Act is being reduced from 40 hours a week, to 38 hours a week, in line with the majority of State and federal awards.

199. The divisor serves the purpose of creating a minimum hourly rate of pay for part time and casual employees, as well as the rate for hours worked beyond 38 in any week.

Transitional Minimum Wages

200. To account for the gap between commencement of these provisions and the first minimum wage determination of the Commission, a transitional minimum wage has been set which is identical to the award minimum wage determined by the Commission in the 2001 State Wage Case (see Schedule 1 of the Bill).

Increasing the Casual Loading To 20%

201. The casual loading under the MCE Act will increase from 15% to 20%.

202. Casual employees in this State will therefore receive as an hourly minimum, the statutory minimum wage divided by 38 hours, plus 20% of the standard hourly rate.

203. Most State and federal awards, particularly those applying to industries with high concentrations of casual employees such as retail, hospitality, cleaning and manufacturing, already provide casual loadings of 20%.

204. There will be ability for the key industry parties to make application to the Commission for an increase in the percentage casual loading. The Commission will therefore be able to, on an ongoing basis, ensure that the casual loading remains consistent with community standards.

Minimum Employment Conditions

205. The following improvements are made to the MCE Act.

Sick Leave and Annual Leave Entitlements

206. As a result of reducing the hourly divisor for wages to 38, sick leave and annual leave entitlements have been amended to reflect a 38-hour week. Employees working more than a 38 hour week will be entitled to additional pay for each hour worked over 38 hours per week, but will not be entitled to additional sick leave or annual leave. Part-time employees are still entitled to paid sick leave and annual leave on a pro-rata basis contingent on the number of hours they work in a two or four week period respectively.

Carer's Leave

207. Employees will be entitled to use up to 5 days of their sick leave entitlement per year as carer's leave when they are the primary care giver for a member of their family or household who is ill or injured and in need of immediate care and attention. This leave is for situations

where a member of an employee's family or household is so ill or incapacitated that they should not be left alone and the employee is the person who is primarily responsible for providing necessary care. It also includes situations where the ill or injured family or household member requires the assistance of the employee to obtain the required medical attention or treatment.

Contracting Out of Annual Leave

208. The ability of employers and employees to contract out of annual leave for an equivalent benefit will be limited to 50% of an employee's entitlement. This will ensure employees have access to at least 2 weeks' annual leave for rest and recreation each year. Further, an agreement between an employer and employee to contract out of any annual leave will have no effect if it is made as a condition of employment. These amendments are intended to ensure that employees are given a genuine choice as to whether or not they want to contract out part of their annual leave entitlement.

General Orders Regarding Minimum Conditions of Employment

209. To clarify the role that the Commission will play under the IR Act, the Commission will, on application, be able to make a General Order in relation to a matter that is the subject of a minimum condition of employment in the MCE Act if the provisions of the General Order are more favourable to employees than those contained in the MCE Act.

210. This will provide the Commission with the continuing ability to hear arguments for and against the expansion of any statutory minimum condition of employment, and determine an outcome that provides fair employment standards and conditions of employment.

PART 11 – OTHER AMENDMENTS

Definition of Employer and Employee

211. The definition of what constitutes an "employer" for the purposes of the IR Act is integral to the jurisdiction of the Commission.

212. There has been a growing concern that the labour hire industry has not been adequately regulated by awards, and by the industrial relations system in general. It is made explicit that an employer also includes labour hire and group training organisations.

213. The Bill also addresses a concern that musicians and entertainers have no accessible remedy in the event they have not been paid monies owed for performances.

214. Therefore the definition of employer and employee have been appropriately amended to ensure that musicians, entertainers, and those that hire them, are within the jurisdiction of the Commission.

Definition of "Industrial Matter"

215. The definition of what constitutes an "industrial matter" for the purposes of the IR Act is also integral to the jurisdiction of the Commission.

216. The amended definition of industrial matter properly provides the Commission with the ability to deal with any matter "affecting or relating or pertaining" to a number of issues relating to employment and the relationship between employers and employees. This expanded definition will remove any doubt as to the necessity for a current employment relationship for the Commission to have jurisdiction. The Commission's capacity to deal in advance with greenfields sites and employment related matters that only arise after termination will now be beyond doubt. It now also includes the collection of union subscriptions and any matter the subject of an industrial dispute.

217. The definition will also be expanded to include occupational safety and health matters which are not matters that have been referred to a safety and health magistrate.

Remuneration of Commissioners

218. The remuneration of members of the Commission will be changed from the current prescription under Section 20, which links members' salaries to the Judiciary, to a determination by the Salaries and Allowances Tribunal in accordance with Section 6(1)(e) of the *Salaries and Allowances Act 1975*.

Section 51 Amended (State Wage Case)

219. The Commission will be provided with greater flexibility in the flowing on of national wage decision increases to the State award system, including scope to make wage fixation principles that reflect State circumstances.

220. Section 51 of the IR Act provides a legislative presumption that the Commission will give effect to the increase granted to federal awards through the National Wage Case decision, to State awards.

221. Section 51, as currently constituted, is inflexible in that it arguably only provides two options: that is, either the National Wage Case decision is flowed on in its entirety, or completely rejected.

222. The issue of flow on is more complicated than a simple decision to grant an increase. Currently, the Commission cannot fully account for particular Western Australian circumstances when granting the safety net increase. Historically, the way in which the increase is granted is more of an issue than any concerns with the quantum granted on each occasion.

223. Concerns about the flexibility of section 51 need to be tempered by concerns about the protection of the labour market, employment and the economy as a whole.

224. This issue was recognised in the 1995 *Review of Western Australian Labour Relations Legislation* conducted by former Senior Commissioner Fielding. His report states:

> *Clearly, as the State and national economies become inseparable, it would be imprudent for the Commission not to endorse a National Wage Decision, save in the most exceptional cases. Indeed, for the last 20 years that has been the approach adopted by the Commission.*

225. Fielding goes further on to temper his comments by stating:

> *It is fair to conclude that a culture, if not a convention, has developed whereby National Wage Decisions will be followed. However, that can be done without following it to the letter. Indeed, the Chamber's best "fit" approach recognises that some variation may be necessary. Recent problems faced by the Commission in implementing National Wage Decisions, as they apply to paid rates awards, illustrate only too clearly the difficulties faced by the Commission in having to endorse the principles in whole, or not at all.*
>
> *The centralised wage fixing system has been the subject of much criticism in the past regarding its inflexibility, and I do not see any point in entrenching that inflexibility in this particular aspect of the Commission's work any more than in any other. One of the justifications for maintaining separate State Industrial Relations Commissions is so that judgments can be made having regard to the local environment. If the Commission cannot bring independent judgment to bear on the adoption of wage fixing principles, one of the principal reasons for its existence would be seriously undermined."*

226. The Bill implements recommendation 103 of the Fielding Review, which provides the Commission with the full discretion to either apply or not apply the national wage principles as it sees fit.

227. Also consistent with Fielding's recognition that the National and State economies are inseparable, the actual dollar amount determined in the National Decision will not be modified by the Commission in flowing on the decision.

228. The current inflexibility of section 51 also delays the Commission's ability to give effect to the National Decision in a timely manner. A new provision has therefore been created that requires the Commission to give effect to the National Wage Decision increase in State awards no later than 30 days after the National Decision.

229. Consistent with recommendation 104 of the Fielding Review, the IR Act will be amended to give the Commission the explicit power to add to, vary or rescind a General Order relating to a National Wage Decision.

230. Section 51 will also explicitly require the Commission to ensure there is consistency and equity in the variation of awards. This is to ensure that no employee to which the decision truly relates, misses out on the increase because of some technicality, like the structure of the award, or some minor deficiency in the way the award is worded.

Amendments Relating to Publication in the Industrial Gazette

231. The Registrar of the Commission will be able to publish information in electronic format. This recognises that we live in a modern day society where electronic methods of communication will better disseminate important information to the community at large and in a more economic manner to ensure that the Commission is accessible to each and every West Australian.

232. The proposed amendments remove the requirement that the Industrial Gazette must be printed by the Government Printer. The Registrar will now have the choice of seeking less expensive printing or publishing options.

Amendments about the Collection of Union Subscriptions

233. The Bill repeals the third wave legislation in relation to union dues and makes it permissible, once again, for an employer to deduct dues on behalf of a union. The collection of union dues is more than a mere administrative arrangement. Accordingly, the meaning of industrial matter is extended to include the collection of union dues.

Amendments about Duties of Employees of Organisations

234. Part II Division 5 of the IR Act will be amended to remove the financial obligation duties as they apply to employees of organisations registered under the Act (ie. paid union employees rather than office holders).

235. This will result in only the office bearers of such organisations being the subject of these requirements, rather than office bearers **and** employees who are entitled to participate in the financial management of organisations in a representative or advisory capacity.

236. Paid employees of industrial organisations will be subject to similar protections and obligations as comparable employees of companies and other community organisations.

237. Statutory responsibility for financial responsibility rests with the officials of the organisation. The amendments will facilitate this.

238. Employees of registered organisations will, however, remain subject to the common and statutory criminal law in this State, including appropriate sanctions for acts of fraud and misappropriation.

Amendments about Federal Award Coverage

239. Part IIIA of the IR Act will be repealed. This reform will ensure that a union cannot be removed as a party to a State award simply because it is seeking federal award coverage.

240. Part IIIA provides that where a federally registered organisation seeks federal award coverage for employees under a State award, the State counterpart may have its rights as a party to that State award cancelled and given to another organisation.

241. While Part IIIA of the IR Act has had little practical effect, its retention would provide the potential for employees to be denied union coverage.

Amendments about Pre-Strike Ballots

242. Part VIB of the IR Act is repealed. Associated regulations are also repealed.

243. There have been no pre-strike ballots conducted since the introduction of these provisions, despite periodic recourse to industrial action in this State in that time.

244. The removal of Part VIB will not affect the Commission's ability to resolve industrial disputes. Amendments to the functioning of the Commission will enhance its abilities in the resolution of such disputes, including industrial action.

Amendments about Political Expenditure by Organisations

245. Part VIC of the IR Act is repealed.

246. Part VIC restricts donations to political parties by industrial organisations. It contains a number of accounting and account-keeping requirements, which seek to discourage the legitimate, and long standing, use of members' funds for political purposes by industrial organisations.

247. The repeal of Part VIC will allow individual organisations to again determine how they manage the expenditure of their funds (subject to their registered rules).