LABOUR RELATIONS LEGISLATION AMENDMENT BILL 2006

EXPLANATORY MEMORANDUM

Introduction

1. The *Labour Relations Legislation Amendment Bill 2006* **(the Bill)** will amend various Acts, namely to:

   (a) provide for reasonable hours of work under the *Minimum Conditions of Employment Act 1993* **(MCE Act)**;

   (b) make minor amendments to the right of entry provisions under the *Industrial Relations Act 1979* **(IR Act)**;

   (c) enable the Western Australian Industrial Relations Commission **(WAIRC)** to independently set wages for State-based employees under awards and the MCE Act;

   (d) enable an employer or a union seeking to make a federal collective agreement to initiate good faith bargaining under the IR Act;

   (e) prohibit employers from requiring or unduly pressuring employees to contract-out of annual leave under the MCE Act;

   (f) improve minimum parental leave, sick leave, carer's leave and bereavement leave entitlements under the MCE Act;

   (g) improve long service leave entitlements under the *Long Service Leave Act 1958* **(LSL Act)** and the *Construction Industry Portable Paid Long Service Leave Act 1985* **(Construction Act)**;

   (h) abolish the Long Service Leave General Order of the WAIRC;

   (i) enhance Industrial Inspectors' powers under the LSL Act; and

   (j) designate the MCE Act's and LSL Act's record-keeping provisions as civil penalty provisions, instead of offence provisions.

Part 1 of the Bill

2. The Bill will be known as the *Labour Relations Legislation Amendment Act 2006* **(Amendment Act)**.

3. Most parts of the Amendment Act will come into effect on the day of Royal Assent.

4. Part 7 Division 1 of the Amendment Act outlines amendments to the Construction Act. Part 7 Division 1 will only come into effect on the day of Royal Assent if that day is the beginning of a quarter. If not, it will come into effect on the first day of the first quarter commencing after the day of Royal Assent.

5. Ensuring that Part 7 Division 1 of the Amendment Act commences on the first day of a quarter will assist with implementation of the reforms. The Construction Industry Long Service Leave Payments Board, which administers long service leave under the Construction Act, operates on the basis of quarterly accounting periods.

Part 2 of the Bill

6. Part 2 of the Bill will amend the MCE Act to incorporate the outcome of the Australian Industrial Relations Commission **(AIRC)** decision of 23 July 2002 in the Reasonable Hours Test Case (PR072002).

7. The decision provided that an employer may require an employee to work reasonable overtime. However, an employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to certain factors.

8. Part 2 of the Bill reflects the AIRC decision by amending the MCE Act to protect Western Australian employees from being required to work unreasonable overtime. To assist in determining whether additional hours are reasonable, the Bill details a range of factors to be considered.

9. In addition, to clarify when the protection against unreasonable overtime comes into operation, the Bill will set a legislative cap on ordinary hours of 38 hours per week. However, it will remain open to employers and employees to prescribe a different figure in an appropriate award or agreement, which may be more or less than 38 hours per week.

Section 3 of the Bill

10. Section 3 of the Bill specifies that the amendments contained in Part 2 of the Bill are to be made to the MCE Act.

Section 4 of the Bill

11. Section 4 of the Bill will amend section 3(1) of the MCE Act to specify that the maximum hours of work provisions, contained in new Part 2A,

will constitute a “minimum condition of employment” as defined by section 3(1).

12. This amendment will give effect to the maximum hours of work provisions through the operation of section 5 of the MCE Act. Section 5 provides that the conditions contained in the MCE Act which are defined to be minimum conditions of employment by section 3(1) are to be implied into all Western Australian industrial instruments.

13. The intent is that these minimum conditions will be enforceable as terms of the relevant industrial instrument. In addition, in accordance with section 5(2) of the MCE Act, where an industrial instrument contains a provision that is less favourable than the minimum condition, the minimum condition overrides the less favourable provision.

14. In relation to maximum hours, the test to be applied in determining whether the terms of an instrument are less favourable than those of the MCE Act is to be based on the number of hours specified in the instrument. A provision specifying a lesser amount of hours is more favourable than a provision specifying a greater number of hours. The reason being that upon reaching the maximum number of hours it is open to an employee to negotiate higher wage rates, etc. before performing further work.

15. Therefore, if an award-free employee’s contract of employment specified that they were to work a maximum of 45 hours of work per week, this would be less favourable than the 38 hours specified in the MCE Act and the 38 hours would apply. However, the additional seven hours of work could constitute reasonable overtime depending on the circumstances of the case. Conversely, if the contract specified 20 hours, the contractual provision would not be affected by the terms of MCE Act.

16. Section 4 of the Bill also proposes to amend section 3(1) of the MCE Act by inserting a definition of “public holiday”. The days to be defined as public holidays will be those days set out in Schedule 1 of the MCE Act. This definition was previously contained in section 29 of the MCE Act. However, it previously only had application in relation to the public holiday provision contained in Division 5 of the MCE Act. It has been relocated to section 3(1) to enable the definition to be used elsewhere in the MCE Act. No change is intended to the operation of the definition as a consequence of its movement. The previous definition in section 29 will be repealed by section 6 of the Bill.

Section 5 of the Bill

17. Section 5 of the Bill will insert new Part 2A into the MCE Act. Part 2A contains the substantive detail of the new reasonable hours of work provisions.

18. Section 9A of the MCE Act will establish the maximum hours of work for Western Australian employees. It provides that an employee may not be required or requested by an employer to work more than the employee's maximum ordinary hours of work plus reasonable additional hours.

19. Section 9A(1) provides that an employee's maximum ordinary hours are as specified in the relevant industrial instrument or, where there is no relevant industrial instrument, 38 hours per week.

20. Section 9A(2) is a technical provision designed to clarify that for the purpose of calculating the number of hours that an employee has worked in a particular week, the hours worked by the employee are taken to include any hours of authorised leave taken by the employee during the week. Authorised leave means leave, or an absence, whether paid or unpaid, that is authorised:

    (a) by an employee's employer;

    (b) by, or under, a term or condition of an employee's employment; or

    (c) by, or under a law, or an instrument in force under a law, of the State or the Commonwealth.

21. Section 9A(3) clarifies that the ability to include a number of ordinary hours in an industrial instrument that is different to 38 hours per week, is not constrained by these amendments. The term industrial instrument is defined in section 9A(4) as meaning an award or an employer-employee agreement. It should be noted that the term "award" has an extended operation under the MCE Act and, by virtue of section 3, in addition to awards made under the IR Act includes any industrial agreement or order of the WAIRC made under the IR Act.

22. The term "reasonable additional hours" is defined by reference to section 9B of the MCE Act. Section 9B outlines the factors to be considered in determining whether additional hours that an employee is required or requested by an employer to work are reasonable additional hours. Section 9B(1) requires that all relevant factors be taken into account.

23. Section 9B(2) provides a non-exhaustive list of relevant factors. These factors include those factors identified by the AIRC in the Reasonable Hours Test Case. The factors include:

    (a) any risk to the employee's health and safety that might reasonably be expected to arise if the employee worked the additional hours;

(b) the employee's personal circumstances (including family responsibilities);

(c) the conduct of the operations or business in relation to which the employee is required or requested to work the additional hours;

(d) any notice given by the employer of the requirement or request that the employee work the additional hours;

(e) any notice given by the employee of the employee's intention to refuse to work the additional hours;

(f) whether any of the additional hours are on a public holiday in the area of the State where the employee is required or requested to work;

(g) the employee's hours of work over the four weeks ending immediately before the employee is required or requested to work the additional hours.

24. The reasonableness of a request or requirement to work additional hours is to be assessed from the viewpoint of an independent third party to the relationship. That is, the reasonableness is not to be assessed exclusively from the perspective of the employer or the employee.

Section 6 of the Bill

25. Section 6 of the Bill repeals section 29 of the MCE Act. Section 29 previously contained a definition of the term "public holidays". This term is now included with the definitions generally applicable within the MCE Act situated in section 3(1).

Part 3 of the Bill

26. Part 3 of the Bill will amend Part II, Division 2G of the IR Act which provides authorised representatives of unions with an ability to enter premises during working hours where relevant employees work.

27. The authorised representative may only enter such premises in order to:

(a) hold discussions with any of the relevant employees who wish to participate in those discussions (section 49H); or

(b) investigate any suspected breach of the IR Act, the LSL Act, the MCE Act, the *Occupational Safety and Health Act 1984*, the *Mines Safety and Inspection Act 1994* or an award, order, industrial agreement or employer-employee agreement that applies to relevant employees (section 49I).

28. A “relevant employee” is defined by section 49G as meaning, when used in connection with the exercise of a power by an authorised representative of a union, an employee who is a member of the union or who is eligible to become a member of the union.

29. Section 49G defines an “authorised representative” as meaning a person who holds an authority in force under Division 2G. Section 49J then sets out the procedure for the issuing of such an authority. Under section 49J, the Registrar of the WAIRC must, when requested by a union secretary to do so, issue an authority to a person nominated by the secretary. Once issued, the authority remains in force unless it is revoked or suspended under section 49J(5) or section 49J(6).

30. Section 49J(5) provides that the WAIRC may revoke or suspend an authority if satisfied that the person to whom it was issued has:

    (a) acted in an improper manner in exercising any power conferred on them by Division 2G of the IR Act; or

    (b) intentionally and unduly hindered an employer or employees during their working time.

31. If an individual’s authority is revoked under section 49J(5), the Registrar must not issue another authority to the individual unless ordered to do so by the Commission in Court Session.

32. Section 49J(6) provides that the Registrar may, on application by the secretary of the union on whose behalf the application for the authority was made, revoke an individual’s authority.

33. In summary, section 49J(5) is intended to operate as a disciplinary provision to stop the abuse of a union official’s right of entry powers. By contrast, section 49J(6) is intended as an administrative provision to allow unions to seek the revocation of an authority held by one of their officials should they no longer be employed by the union, or change their role within the union to one that no longer requires them to enter worksites.

34. The proposed amendment would prevent union officials from avoiding revocation or suspension proceedings by “voluntarily” having their authority revoked under section 49J(6).

Section 7 of the Bill

35. Section 7 of the Bill specifies that the amendment contained in Part 3 is to be made to the IR Act.

Section 8 of the Bill

36. The amendment contained in section 8 of the Bill will insert new section 49J(6a) into the IR Act. Section 49J(6a) will prevent the Registrar from revoking an authority under section 49J(6) where proceedings against the authority holder are pending or in progress under section 49J(5). Section 49J(6a) will also prevent the Registrar from revoking the authority under section 49J(6), if appeal proceedings in respect of a decision under section 49J(5) are pending or in progress, or the time within which such proceedings may be instituted has not elapsed.

Part 4 of the Bill

37. The IR Act currently provides the WAIRC with two wage-setting mechanisms. Specifically, the WAIRC can:

    (a) issue a General Order under Part II Division 3 to adjust rates of wages generally; and

    (b) issue an order under Part II Division 3A to adjust the rates of wages specified by the MCE Act.

38. Section 51 of the IR Act currently provides a mechanism for increasing State award wage rates each time a "National Wage Decision" is handed down by the "Australian Commission". Both terms are defined by the IR Act:

    "Australian Commission" means the Australian Industrial Relations Commission established by the Commonwealth Act (section 7(1)); and

    "National Wage Decision" means a decision which is made by a Full Bench of the Australian Commission; relates to rates of wages; and is applicable generally to awards made under the Commonwealth Act (section 51(1)).

39. The mechanism for adopting the National Wage Decision is currently contained in section 51(2) of the IR Act. Section 51(2) requires the WAIRC to consider each National Wage Decision handed down by the AIRC. Unless the WAIRC is satisfied there are good reasons not to do so, it must then make a General Order giving effect to the National Wage decision in awards in force under the IR Act.

40. Section 10 of the MCE Act establishes a series of minimum wages in Western Australia that coexist with award rates of pay. Section 51E of the IR Act currently prescribes that the WAIRC shall review these minimum weekly rates of pay prescribed under the MCE Act each time it reviews the National Wage Decision.

41. The MCE Act minimum wage applies to all employees in the State industrial relations system. Where an award provides a wage that is less than the MCE Act minimum wage, the MCE Act wage will prevail.

42. While not required to do so, the WAIRC has in practice adopted the approach of setting the same wage rate for both the award and MCE Act minimum wages.

43. Previously under the Federal Government's *Workplace Relations Act 1996* **(WR Act)**, the AIRC issued a National Wage Decision to deliver minimum wage increases to federal awards. The AIRC was required to consider the needs of the low paid, the impact of its decisions on the economy, and levels of employment. The outcome of the National Wage Decision applied to employees in the federal award system generally, and as outlined above, also "flowed on" to Western Australian employees.

44. The federal *Workplace Relations Amendment (Work Choices) Act 2005* **(Work Choices)** has largely removed the power of award wage determination from the AIRC. Instead, the Australian Fair Pay Commission **(AFPC)** will determine wage levels for employees in the federal system. The considerations that the AFPC must take into account are largely economic criteria. The Federal Government has announced that the first AFPC decision is unlikely to be issued until Spring 2006.

45. The Full Bench of the AIRC confirmed in its decision of 21 December 2005 (PR966840) that it will "no longer have responsibility for the fixation of a minimum wages safety net". In effect, there will be no National Wage Case, as it is currently known and as required for the effective operation of the State's wage setting mechanisms.

46. For five years after the commencement of Work Choices, the AIRC will retain a very limited power to issue transitional award wage increases for employees currently covered by federal awards who are not employed by employers with the requisite constitutional nexus. However, Work Choices will require the AIRC to effectively mirror the increases granted by the AFPC.

47. This role in transitional award wage setting does not represent a National Wage Decision, as required under section 51 of the IR Act, as it will not apply to all awards generally but only to certain employees under awards.

48. Therefore, section 51 of the IR Act would appear to become inoperative and the annual mechanism to provide across-the-board wage increases to State awards will no longer exist. In practice, there will be no annual requirement for the WAIRC to provide an increase to awards.

49. Therefore, Part 4 of the Bill introduces a comprehensive mechanism for enabling the WAIRC to independently adjust minimum rates of pay under the Western Australian industrial relations system, including through:

    (a) adjusting award rates of pay; and

    (b) setting the statutory minimum wages provided for by the MCE Act.

50. It is the Government's intent to maintain a system to deliver responsible increases to award rates of pay and to the minimum wage established under the MCE Act. The provisions that achieve this are set out below.

Section 9 of the Bill

51. Section 9 of the Bill specifies that the amendments contained in Part 4 of the Bill are, unless otherwise specified, to be made to the IR Act.

Section 10 of the Bill

52. Section 10 of the Bill will amend section 26(1) of the IR Act, which provides the WAIRC with general guidance on the manner in which it is to exercise jurisdiction under the IR Act. Section 10 of the Bill will insert section 26(1a) into the IR Act, which will relieve the WAIRC from the need to take into account the considerations contained in section 26(1)(d) when making its annual State Wage order. These considerations are instead replaced with the more exhaustive list of considerations contained in proposed section 50A(2) of the IR Act to which the WAIRC is to have regard when making the State Wage order.

53. Among the significant differences between the criteria to be applied in the making of a State Wage order under section 50A and the WAIRC exercising its other wage-setting functions, which will remain subject to section 26(1), are that in making the State Wage order the WAIRC is to have a particular focus on:

    (a) the state of the Western Australian economy and the potential impact of its decision on that economy; and

    (b) the capacity of employers as a whole to bear the costs of increased wages. This can be contrasted with section 26(1) of the IR Act which requires the WAIRC to have regard to both capacity of employers as a whole and the capacity of individual employers to bear the costs of increased wages.

54. Nothing in section 10 of the Bill is intended to affect the considerations to which the WAIRC is to consider in exercising its other wage-setting functions.

Section 11 of the Bill

55. Section 11 of the Bill will repeal section 30(2) of the IR Act. Section 30(2) currently provides the Commonwealth Minister with enhanced intervention rights in proceedings before the WAIRC. The effect of the repeal of section 30(2) will be to require the Commonwealth Minister to seek intervention under section 27(1)(k) of the IR Act. That is, the Commonwealth Minister will be required to demonstrate that the Commonwealth has a sufficient interest in the relevant matter.

Section 12 of the Bill

56. Section 12 of the Bill is a technical amendment replacing a reference to the previous State Wage order provision of section 51 with a reference to the new State Wage order provision of section 50A.

Section 13 of the Bill

57. Section 13 of the Bill will repeal sections 50(9) and 50(10) of the IR Act.

58. Section 50(9) currently enables the WAIRC when issuing a General Order which affects awards or industrial agreements to direct the Registrar to "publish in the required manner" those provisions of the awards or industrial agreements that are affected by the General Order. The term "publish in the required manner" is defined in section 7 of the IR Act as meaning to be published by the Registrar in the next available issue of the Industrial Gazette and:

    (a) in a newspaper circulating throughout the State; or

    (b) on an internet website maintained by the WAIRC.

59. Section 50(9) will be repealed and replaced with section 51BD which replicates the terms of section 50(9). This amendment will clarify that the same publication requirements relate to all General Orders, those issued under section 50 and section 50A.

60. Section 50(10) of the IR Act currently specifies the parties to be given an opportunity to be heard in relation to the making of General Orders under either existing section 50 or section 51. This provision will be repealed and replaced with sections 51BA and 51BB, which set out the parties to be notified of proceedings for a State Wage order under proposed section 50A and the parties to be given an opportunity to be heard in relation to such a matter.

Section 14 of the Bill

61. Section 14 of the Bill contains the key operative provisions of the State Wage order mechanism, specifically:

    (a) section 50A, which sets out the obligations on the WAIRC to issue an annual State Wage order; and

    (b) section 50B, which sets out specific obligations in relation to those provisions of the State Wage order applying to apprentices and trainees.

62. Proposed section 50A is incorporated within Division 3 of Part II to clarify that the new State Wage order mechanism is merely a subset of the WAIRC's more expansive General Order making function under section 50. It is intended that section 50A is to provide a mechanism for an annual wage increase for Western Australian employees, without hindering the WAIRC's other functions. That is, it is not intended to diminish the WAIRC's capacity to issue General Orders under section 50 in relation to wage rates. This is reflected in section 50A(1), which requires the WAIRC to issue a General Order, which is merely called the State Wage order.

63. Due to the characterisation of section 50A as a form of section 50 General Order, section 50(1) operates to vest the power to issue a State Wage order in the Commission in Court Session. References in this Explanatory Memorandum to the WAIRC's jurisdiction to issue a State Wage order should therefore be taken to be references to the Commission in Court Session exercising this jurisdiction.

64. Section 50A requires the WAIRC to issue an annual General Order, called the State Wage order, which will comprise seven elements. Specifically, the State Wage order will:

    (a) set the adult weekly minimum rate of pay applicable under section 12 of the MCE Act (section 50A(1)(a)(i));

    (b) set the weekly minimum rate of pay applicable to apprentices under section 14 of the MCE Act (section 50A(1)(a)(ii));

    (c) set the minimum weekly rate of pay applicable to trainees under section 15 of the MCE Act (section 50A(1)(a)(iii));

    (d) adjust wage rates contained in awards (section 50A(1)(b));

    (e) vary each award containing wage rates adjusted under section 50A(1)(b) to ensure that the awards appropriately reflect the terms of the State Wage order (section 50A(1)(c)(i));

(f) make changes to specified awards which are consequential to the WAIRC exercising its function of making the State Wage order (section 50A(1)(c)(ii)); and

(g) establish a statement of principles to be followed by the WAIRC in exercising its wage-setting functions under the IR Act (section 50A(1)(d)).

65. Proposed section 50A(1)(a) requires the WAIRC to set those minimum rates of pay established by the MCE Act. The power of the WAIRC under proposed section 50A(1)(a) is equivalent to its previous jurisdiction under section 51D. However, the processes surrounding this jurisdiction that were previously contained in Part II, Division 3A, Subdivision 2 of the IR Act have now been replaced with revised provisions contained in section 50BA to section 50BE, which apply generally to the making of all General Orders.

66. Proposed section 50A(1)(b) replaces section 51 of the IR Act. It will require the WAIRC to annually adjust award wage rates. That is, to increase or decrease award wage rates. The ability of the WAIRC to make differing adjustments to different awards or within awards is codified in section 50A(2) (discussed below).

67. Proposed section 50A(1)(c) confers two separate functions on the WAIRC. Proposed section 50A(1)(c)(i) requires the WAIRC to vary each award affected by the adjustment of award wage rates under section 50A(1)(b) to ensure each award reflects the terms of the order. That is, that the wage rates within the award incorporate the adjustments made under section 50A(1)(b) and that awards adequately reflect the MCE Act wage rates set under section 50A(1)(a). The requirement to only vary those awards affected by the operation of section 50A(1)(b) is intended to ensure that those awards that do not contain wage rates (such as awards limited to dealing with superannuation or redundancy) are not needlessly complicated by the issuing of the State Wage order and the operation of section 50A(1)(c)(i).

68. Unlike the other element of the State Wage order, proposed section 50A(1)(c)(ii) vests a discretionary power in the WAIRC to examine individual awards and make any necessary changes to the awards that are required to give the State Wage order its intended effect. This power is intended to address the issues that have previously arisen when the WAIRC has attempted to apply previous State Wage Case outcomes resulting from the operation of section 51 to awards.

69. In summary, section 50A(1)(c)(ii) will enable the WAIRC to deal with award provisions that, in the past, may have been difficult to vary to give true effect to the General Order, or to rectify and prevent deficiencies, inaccuracies or absurdities that have arisen over time.

70. Examples of the intended operation of section 50A(1)(c)(ii) include problems that have been experienced by the WAIRC in applying junior, apprentice, trainee, fixed dollar, and other rates of pay in various General Orders applying State Wage Cases since 1997, and the problems that arose out of the 2003 State Wage Case with regard to adult apprentices. These examples should not be read to specifically limit the powers under these provisions, but rather point out that the power is intended to enable the WAIRC to produce an effective, accurate and comprehensive award system.

71. Proposed section 50A(1)(d) requires the WAIRC to annually set out a statement of principles that must, while in no way limiting the jurisdiction of the WAIRC, be applied and followed in all instances of the WAIRC exercising its jurisdiction to set wages. That is, having been set by the Commission in Court Session during the State Wage order proceedings the statement of principles is to be applied by all subsequent proceedings by the WAIRC, whether as constituted by a single Commissioner or a subsequent Commission in Court Session, where the WAIRC is setting wages. It is not intended that the statement of principles would be applicable to non-wage related matters.

72. Proposed section 50A(2) is intended to clarify that while the WAIRC must adjust award wage rates under section 50A(1)(b), it has a broad discretion as to the form of this adjustment. Proposed section 50A(2) makes it clear that the WAIRC may adjust awards generally or may issue a State Wage order that has different effects on different awards. For example, section 50A(2) would enable the WAIRC to issue a State Wage order that increased one set of classification within awards by a different dollar amount to other classifications.

73. Proposed section 50A(3) establishes the criteria which the WAIRC is to consider prior to making a State Wage order. These criteria are intended to balance social and economic factors to ensure Western Australian employees are protected by a fair system of wages, which are sustainable over the long-term. The criteria in section 50A(3) focus on the needs of existing employees.

74. Proposed section 50A(4) replicates existing section 51(5) and is intended to ensure that when adjusting award wages and varying awards to incorporate such adjustments, the WAIRC is to ensure that there is consistency and equity between those that are subject to the State Wage order.

75. Proposed section 50A(5) provides that the date of effect of each year's State Wage order will be 1 July. However, the appropriate increased wage rates will only be applied to individual employees for their first full pay period after 1 July each year.

76. Proposed section 50A(6) clarifies the interaction between State Wage orders. It provides that upon a State Wage order commencing to have effect, it supercedes all previous such orders. Therefore, the MCE Act minimum wage applying to employees is always the relevant wage as set by the most recent State Wage order.

77. Proposed sections 50A(7) and 50A(8) operate together. They provide that the WAIRC cannot add to or vary a State Wage order but can correct, amend or waive errors, defects or irregularities in the order. The intent of these provisions is to provide certainty to employers and employees as to the minimum wages operating in Western Australia at any time, without restricting the WAIRC's ability to correct mistakes made in the making of the order.

78. Proposed section 50B replicates the terms of previous section 51G of the IR Act, which provided guidance to the WAIRC when exercising its wage-setting function in relation to setting MCE Act minimum wages for apprentices and trainees. The only point of difference between new section 50B and previous section 51G is the removal of previous section 51G(3). Section 51G was inserted into the IR Act through the *Labour Relations Reform Act 2002*. The intent in inserting section 51G was to provide the WAIRC with the unfettered power to issue, for the purposes of the MCE Act, a specific minimum wage for apprentice and trainees at 21 years of age and over. However, section 51G(3) has unnecessarily prevented the WAIRC from issuing such 21 years of age and over rates without reference to other criteria. The Bill therefore removes the relevant section, to enable the WAIRC to correctly issue such a rate, as it currently does for many State awards.

Section 15 of the Bill

79. Section 15 of the Bill repeals section 51 of the IR Act. This gives effect to the decision to replace section 51 with section 50A.

Section 16 of the Bill

80. Section 16 of the Bill contains a technical amendment to section 51B of the IR Act. Section 51B prevents the WAIRC from issuing a General Order under the IR Act which would have the effect of setting a minimum condition as defined by the MCE Act. To avoid doubt the amendment to section 51B makes it clear that the WAIRC can exercise its wage setting functions under section 50A in relation to MCE Act minimum wage rates.

Section 17 of the Bill

81. Section 17 of the Bill contains those provisions designed to underpin the operation of the WAIRC's General Order jurisdiction, including its jurisdiction to make a State Wage order. The provisions contained in section 17 of the Bill are:

(a) proposed section 51BA of the IR Act, which sets out the parties to be notified of the commencement of General Order proceedings;

(b) proposed section 51BB, which sets out the parties to be given a right to be heard in General Order proceedings;

(c) proposed section 51BC, which empowers the Chief Commissioner to direct a single Commissioner to deal with conciliation, interlocutory or procedural matters that arise during General Order proceedings;

(d) proposed section 51BD, which deals with the publication of awards and industrial agreements that are affected by the making of a General Order, including a State Wage order; and

(e) proposed section 51BE, which deals with the publication of General Orders.

82. Proposed section 51BA sets out the parties to be notified of the commencement of General Order proceedings. Section 51BA(1)(a) requires the WAIRC to notify the specified parties of the initial hearing of all General Order proceedings. These specified parties include the:

(a) Trades and Labor Council of Western Australia;

(b) Chamber of Commerce and Industry of Western Australia (Incorporated);

(c) Australian Mines and Metals Association (Incorporated); and

(d) State Minister.

83. The WAIRC will also have a broad discretion under section 51BA(1)(a) to inform any other person it considers may be of assistance of such hearings.

84. Proposed section 51BA(1)(b) gives the WAIRC a broad discretion to publish notices of initial hearings in General Order proceedings. This would enable the WAIRC to, if it considered it appropriate, broadly advertise its intent to conduct General Order proceedings.

85. While the operation of proposed section 51BA(1) applies generally to all General Orders matters, proposed section 51BA(2) relieves the WAIRC of the obligation of complying with section 51BA(1) when the General Order matter at issue is to be conducted under section 51A. As section 51A is concerned with public sector discipline the class of potentially affected person is relatively small and unlikely to need to be informed by the mechanisms contained in section 51BA(1).

86. Proposed section 51BB requires the WAIRC to provide certain parties with a right to be heard prior to the making of a General Order. These parties include any person given a notice through the operation of section 51BA(1)(a) and any other person to which the WAIRC grants leave to intervene (that is, other parties who can demonstrate that they have a sufficient interest in the making of the General Order as required by section 27(1)(k) of the IR Act).

87. Proposed section 51BC empowers the Chief Commissioner to direct a single Commissioner to deal with conciliation, interlocutory or procedural matters that arise during General Order proceedings. This section would allow directions hearings and other procedural matters to be resolved by a single Commissioner, without the need to convene the Commission in Court Session.

88. Proposed section 51BD deals with the publication of awards and industrial agreements that are affected by the making of a General Order, including a State Wage order. It provides that the WAIRC may direct the Registrar to "publish in the required manner" the terms of awards and industrial agreements affected by the making of a General Order, including a State Wage order. The term "publish in the required manner" is defined in section 7 of the IR Act as meaning to be published by the Registrar in the next available issue of the Industrial Gazette and:

    (a) in a newspaper circulating throughout the State; or

    (b) on an internet website maintained by the WAIRC.

89. Similarly, proposed section 51BE would require the Registrar to "publish in the required manner" all General Orders made under the IR Act.

Section 18 of the Bill

90. Section 18 of the Bill is a technical amendment to repeal the definition of "award" contained in section 51C(1) of the IR Act. Prior to these amendments, this definition was used in the interpretation of section 51G of the IR Act. However, the Bill will repeal section 51G.

Section 19 of the Bill

91. Section 19 of the Bill will repeal Part II Division 3A, Subdivision 2 of the IR Act. This Subdivision contains the existing provisions relating to the setting of minimum weekly rates of pay under the MCE Act. These provisions have now been replaced with the new provisions relating to the making of the State Wage order.

Section 20 of the Bill

92. Section 20 of the Bill makes technical amendments to section 51N of the IR Act to remove references to sections 51E and 51F, as these sections will be repealed.

Section 21 of the Bill

93. Section 21 of the Bill makes consequential amendments to the MCE Act to replace references to provisions in Part II Division 3A, Subdivision 2, which will be repealed. These references are to be replaced with references to the relevant State Wage order provision that will set the MCE Act wage in question, specifically:

    (a) section 12 of the MCE Act will be amended to replace a reference to existing section 51F of the IR Act with a reference to section 50A(1)(a)(i);

    (b) section 14 of the MCE Act will be amended to replace a reference to existing section 51F of the IR Act with a reference to section 50A(1)(a)(ii); and

    (c) section 15 of the MCE Act will be amended to replace a reference to existing section 51F of the IR Act with a reference to section 50A(1)(a)(iii).

Section 22 of the Bill

94. Section 22 of the Bill contains transitional provisions to deal with the status of existing General Orders made under sections 51 and 51F. It also contains transitional provisions to deal with the making of the first State Wage order.

95. General Orders made under sections 51 and 51F which are currently in operation, as at the commencement of the Amendment Act, will continue to have effect until overridden by the first State Wage order.

96. In relation to the making of the first State Wage order, section 22 of the Bill provides the WAIRC with a discretion to issue this order after 1 July 2006. Where the WAIRC does so it must specify a date on which the order is to come into effect. The date of effect cannot be prior to the date that the WAIRC makes the State Wage order. Where the WAIRC exercises this discretion and issues the 2006 State Wage order after 1 July 2006, it will apply to employees, apprentices and trainees in respect of their first pay period after the order is issued.

97. Section 22 of the Bill also deals with the application that was made by the Trades and Labor Council of Western Australia which is currently before the WAIRC seeking a general increase to award wage rates

under section 50 of the IR Act. If this application is heard and determined by the WAIRC and results in award wage rates being adjusted generally under section 50, then the WAIRC is not to adjust award wages under proposed section 50A(1)(b) for the 2006 year.

Part 5 of the Bill

98. Part 5 of the Bill will insert Division 3B into Part II of the IR Act. The Division will facilitate bargaining in good faith for a federal collective agreement under the federal WR Act. The amendments will further principal objects of the IR Act to:

    (a) provide for rights and obligations in relation to good faith bargaining (section 6(aa) of the IR Act); and

    (b) promote collective bargaining and to establish the primacy of collective agreements over individual agreements (section 6(ad) of the IR Act).

99. Part II Division 3B of the IR Act is intended to:

    (a) enable an employer or a union in the federal system to initiate bargaining for a collective agreement, in which case the parties will be required to bargain in good faith;

    (b) allow good faith bargaining to occur before the nominal expiry date of a federal collective agreement;

    (c) allow good faith bargaining to occur whether or not parties have initiated a bargaining period under the WR Act, and whether or not protected industrial action is occurring; and

    (d) enable the WAIRC to assist parties with bargaining for a federal collective agreement.

Section 24 of the Bill

100. Section 24 of the Bill will amend section 7(5) of the IR Act to clarify the WAIRC's jurisdiction to deal with bargaining in good faith for a federal collective agreement.

Section 25 of the Bill

101. Section 25 of the Bill will insert Division 3B (sections 51O-51T) into Part II of the IR Act.

102. Section 51O of the IR Act will define terms used in Division 3B. Some terms take their meaning from the WR Act, so that:

(a) "collective agreement" relevantly means an employee collective agreement, a union collective agreement, a union greenfields agreement or a multiple-business agreement under the WR Act;

(b) "employer" includes a constitutional corporation;

(c) "employee" includes an individual employed by a constitutional corporation;

(d) "organisation" means an organisation registered pursuant to the WR Act **(union)**.

103. Section 51P of the IR Act must be read in conjunction with the definition of "negotiating party" in section 51O(1) and with section 51R(2). A union will be able to initiate good faith bargaining on behalf of employees, provided the requirements in section 51P are met. It is intended that a union may act on behalf of employees collectively, even if only one eligible employee requests the union's representation.

104. A union could act "on behalf of employees" by:

(a) initiating bargaining for an employee collective agreement, in which case the union would be the initiating party; or

(b) responding to an employer who has initiated bargaining for an employee collective agreement, in which case the union would be a negotiating party.

105. For example, an employer could be proposing to make a collective agreement with its employees. A union could initiate bargaining on behalf of the employees under the IR Act to require the employer to bargain in good faith.

106. Alternatively in this situation, the union could initiate bargaining with a view to making a union collective agreement, rather than an employee collective agreement as proposed by the employer. In this case the union would be acting in its own right, and not on behalf of employees within the meaning of section 51P.

107. Section 51Q of the IR Act must be read in conjunction with section 51S(2)(b). In effect, the duty of good faith requires a negotiating party to recognise another negotiating party's bargaining agent appointed for the purposes of Part II Division 3B.

108. Sections 51Q(1)-(3) of the IR Act require the appointment and any termination of a bargaining agent to be in writing. A copy of the appointment or termination must be provided to each other negotiating party.

109. Section 51Q(4) of the IR Act will ensure that a bargaining agent who provides advice or other services to a negotiating party will not offend

section 123 of the *Legal Practice Act 2003* (prohibition on unqualified legal practice).

110. Section 51R of the IR Act sets out the process for initiating good faith bargaining under Division 3B. An employer or a union may initiate bargaining by providing a written notice that complies with section 51R(3) to:

    (a) each other negotiating party; and

    (b) the office of the Registrar of the WAIRC.

111. Sections 51R(1), 51R(3)(b) and 51R(4) of the IR Act envisage that bargaining could be initiated with more than one party under Division 3B. This is consistent with the ability to make multiple-business agreements under the WR Act.

112. Section 51S of the IR Act will impose a duty on parties to bargain in good faith where bargaining has been initiated. What is meant by "bargaining in good faith" will depend on the circumstances of each case. However, indicia are provided in existing section 42B(2) of the IR Act.

113. Section 51S(3) will enable any code of good faith made by the Commission in Court Session under existing section 42C of the IR Act to apply to bargaining for a collective agreement.

114. Section 51T will apply existing sections 42D and 42E of the IR Act to bargaining for a collective agreement.

115. Section 42D of the IR Act will clarify that the duty to bargain in good faith does not require a party to:

    (a) agree on any matter for inclusion in, or exclusion from, a collective agreement; or

    (b) enter into a collective agreement.

116. Section 42E of the IR Act will enable the WAIRC to assist parties with bargaining for a collective agreement. Subject to section 51T(2), it is intended that the WAIRC have broad powers to facilitate bargaining. Consistent with section 42D, section 51T(2) will clarify that the WAIRC cannot require parties to enter into a collective agreement.

117. The WAIRC will be able to use its powers of conciliation and arbitration to assist parties bargain for a collective agreement. Among other things, the WAIRC will be able to make orders to ensure parties bargain in good faith.

118. Section 42E(3) specifically enables the WAIRC to order that a party do, or refrain from doing, any particular thing for the purposes of good faith bargaining. For example, the WAIRC could order that an employer

refrain from offering individual agreements for a specified period if this would facilitate good faith bargaining.

119. It is possible that good faith bargaining under Part II Division 3B of the IR Act could occur at the same time as protected industrial action under the WR Act. In this situation, the WAIRC would have to be cognisant of the immunity conferred on such industrial action under the WR Act when exercising its powers under section 42E of the IR Act.

120. Any order made by the WAIRC under section 42E (as applied by section 51T) will be enforceable by the Industrial Magistrate's Court under section 83 of the IR Act.

Section 26 of the Bill

121. Section 26 of the Bill will exclude section 51S from the application of section 84A of the IR Act, meaning a contravention of the duty to bargain in good faith will not be enforceable through the WAIRC Full Bench.

Part 6 of the Bill

122. Part 6 of the Bill will amend the MCE Act, namely with respect to minimum leave entitlements.

Section 28(1) of the Bill

123. Section 28(1) of the Bill will amend section 3(1) of the MCE Act by deleting the definition of "casual employee". Case law of the Industrial Magistrate's Court has demonstrated the inequity of this definition. The definition may have the effect of deeming an employee to be casual, even if the facts of the particular demonstrate otherwise.

124. By deleting the definition it is intended that the Industrial Magistrate's Court be free to construe the meaning of "casual employee" at common law. For example, the Court could have regard to common law indicia such as the incidence and duration of employment.

Section 28(2) of the Bill

125. A definition of "annual leave" is being added to assist with the interpretation of section 8 of the MCE Act, as this stands alone from the other annual leave provisions in Division 3 of Part 4 of the MCE Act.

126. A definition of "carer's leave" is being added to specify the reasons for which the carer's leave entitlement under sections 20A and 20B of the MCE Act can be used. The scope of this leave is being extended to include an unexpected emergency affecting a member of the employee's family or household, consistent with the AIRC Family Provisions Test Case decision of 2005 (PR082005).

127. An unexpected emergency may involve a situation arising from an unexpected incident at, or disruption to, or breakdown in, the normal care arrangements of a dependant of an employee, including the childcare centre or school of the employee's child, or day care or nursing home of an elderly parent or dependent relative, which requires the employee's urgent attention. An unexpected emergency may also arise when the normal carer of an employee's child or dependent family member is unwell, or when an employee needs to take a family or household member to a medical appointment or hospital.

128. The definition of "continuous service" is being moved from section 32 of the MCE Act for the exclusive interpretation of Division 6 relating to parental leave, to section 3 of the MCE Act to apply across the whole of the Act. The definition no longer specifically includes "any period of parental leave" as this is sufficiently covered in "a period of leave or absence authorised by the employer". Parental leave is a period of authorised leave.

129. A revised definition of "member of the employee's family or household" is being inserted into section 3 of the MCE Act. This replaces the two different definitions in sections 20A(2) and 27(1) of the MCE Act which are being repealed. This new definition will apply consistently to both the bereavement leave and carer's leave provisions in Part 4 of the MCE Act. The new definition is being broadened to include grandparents and siblings for bereavement leave, consistent with the current definition for carer's leave. An adopted child is not specifically included in the definition as this is sufficiently implied in the broad definition of a child (see section 75 of the *Adoption Act 1994*).

Section 29(1) of the Bill

130. Section 29(1) of the Bill will insert new section 8(1) into the MCE Act. The amendments will clarify that an employee can only contract-out of annual leave at the end of the year in which the leave accrued. New section 8(1) of the MCE Act will retain the current stipulation preventing an employee forgoing more than 50% of their annual leave entitlement in any given year.

Section 29(2) of the Bill

131. Section 29(2) of the Bill will insert new sections 8(3) and 8(4) into the MCE Act. Section 8(3) will prohibit an employer from requiring or unduly pressuring an employee to contract-out of annual leave. Section 8(4) will designate section 8(3) as a civil penalty provision for the purposes of section 83E of the IR Act.

132. As a civil penalty provision, section 8(3) of the MCE Act will be enforceable by the Industrial Magistrate's Court. Under section 83E of the IR Act, the Court will be able to impose penalties and/or make an order preventing any further breach.

133. Section 29(2) of the Bill needs to be read in conjunction with section 70 of the Bill. Section 83E of the IR Act will be amended to qualify who may apply for enforcement of section 8(3) of the MCE Act, namely:

(a) a person directly affected by the contravention;

(b) an organisation or association of which the person is a member; or

(c) an Industrial Inspector.

Section 30 of the Bill

134. The heading of Part 4 Division 2 of the MCE Act will be amended to include family care. Division 2 will be amended to provide leave for an employee's own illness or injury and leave for situations where an employee needs to provide care and support to a family or household member who is sick or injured, or as a result of an unexpected emergency. With the addition of carer's leave to this Division, it is appropriate that the heading of the Division also be amended to include the wider application of the leave provided therein.

Section 31 of the Bill

135. Current sections 19 to 20A of the MCE Act will be repealed and replaced with new sections 19 to 20B, providing the minimum entitlements to paid sick leave, paid carer's leave and unpaid carer's leave. These new provisions need to be read in conjunction with sections 21 and 22 of the MCE Act.

136. New section 19 provides the minimum paid leave entitlement that can be used as paid sick leave for an employee's personal illness or injury in accordance with section 20, or as paid carer's leave in accordance with section 20A. The total quantum of leave entitlement will not change. Further, section 19(2) provides that this entitlement will continue to accrue pro-rata on a weekly basis. It can be used as it accrues.

137. Section 19(3) will provide that this entitlement is now cumulative. Any unused leave entitlements accrued in any year after the commencement of this section (see section 31(2) of the Bill) can accumulate and be used as paid sick leave in any subsequent year. Accumulated leave entitlements are used before new entitlements that accrue in the current year.

138. Section 19(4) will provide that the entitlement to leave arising from section 19(1) can only be used as personal sick leave or carer's leave under sections 20 and 20A of the MCE Act.

139. The MCE Act did not previously provide for sick leave to be cumulative. However, most State awards and agreements provide that sick leave is

cumulative. This amendment will extend this long standing award entitlement to all employees (other than casual employees) who have paid sick leave entitlements, for leave accrued after the commencement of the Amendment Act.

140. New sections 20(1) and 20(2) of the MCE Act are consistent with the existing minimum entitlement and conditions for using sick leave as provided in current sections 19(1) and 20 of the MCE Act. Although these sections have been rearranged, there will be no change to the entitlement or conditions of use for an employee's own sick leave.

Paid carer's leave

141. Section 20A of the MCE Act will provide that employees may use any part of their leave entitlement under section 19(1) as paid carer's leave. This provides that an employee may use some or all of their current annual entitlement, as it accrues, as paid carer's leave (as defined in section 3) if all other conditions for the use of this leave as carer's leave as provided in sections 21 and 22 are satisfied.

142. This effectively increases an employee's carer's leave entitlement from 5 days to 10 days per annum or to the number of hours an employee would ordinarily work in a two week period. This is consistent with the AIRC's Family Provisions Test Case decision of 2005.

143. There is no provision for an employee to use any more than a current annual entitlement of paid leave under section 19(1) as carer's leave in any year. Although accumulated leave can be used as personal sick leave, there is no entitlement for it to be used as paid carer's leave if an employee has already used an annual entitlement of carer's leave in that year. An entitlement to carer's leave will not be cumulative.

144. Sections 20A(2) and 20A(3) provide that even after an employee has been employed for a continuous period of 12 months, the employee's entitlement to paid carer's leave is still limited to the annual entitlement at any point in time. An employee is not entitled to paid carer's leave if the employee has already used the accrued annual entitlement under section 19(1) as paid carer's leave within the 12 months immediately preceding the date on which a further request is being made.

145. If an employee has an urgent need to take further carer's leave after having exhausted the annual entitlement under section 19(1), then the employee could apply for unpaid carer's leave in accordance with new section 20B of the MCE Act.

Unpaid carer's leave

146. Section 20B of the MCE Act is a new entitlement for all employees, including casual employees, of up to 2 days of unpaid carer's leave

when the employee has exhausted all paid carer's leave entitlements under section 20A, or is not entitled to paid carer's leave.

147. This new entitlement provides up to 2 days of unpaid carer's leave for each occasion that an employee needs to take carer's leave due to an illness or injury of the employee's family or household member or an unexpected emergency involving the employee's family or household member as defined in section 3 of the MCE Act. This is the minimum entitlement. There is nothing to prevent an employer agreeing to a longer period of unpaid carer's leave if the circumstances justify it and the employer can accommodate it. This new provision needs to be read in conjunction with sections 21 and 22 of the MCE Act.

148. Section 20B of the MCE Act is consistent with the AIRC Family Provisions Test Case decision of 2005.

Section 32 of the Bill

149. Section 21 of the MCE Act will be amended to provide additional clarity pertaining to an employee's sick leave and carer's leave entitlements.

150. Paragraph (a) of section 21 will be deleted as provision is now made in section 19(3) for the leave accrued under section 19(1) to be cumulative.

151. Paragraph (b) of section 21 will be amended as a consequence of the restructuring of sections 19 and 20A, and the addition of section 20B. This paragraph provides that sick leave, paid carer's leave and unpaid carer's leave can be taken in periods of less than a whole working day. This means that an employee does not need to take a full day of leave if only a few hours of leave are required. Employers will need to keep a record of leave taken by an employee, by the hour or part thereof.

Section 33 of the Bill

152. Section 22 of the MCE Act will also be amended as a consequence of the restructuring of sections 19 and 20A, and the addition of section 20B. The requirement to provide evidence that would satisfy a reasonable person of an entitlement to use the leave provisions under Division 2 has not changed.

Section 34 of the Bill

153. Section 23 of the MCE Act will be amended to add a new provision to specify that annual leave entitlements are cumulative. This was not previously specified, but was implicit. However, as a new entitlement is being inserted into Division 2 to provide that sick leave entitlements are to be cumulative, it is desirable to specifically provide that annual leave provisions are cumulative to prevent any other interpretation being implied.

Section 35 of the Bill

154. Section 27(1) of the MCE Act will be repealed as a new definition of "member of an employee's family or household" is being inserted into section 3 of the MCE Act. The new definition will extend the definition of family members to include siblings and grandparents for the purpose of bereavement leave.

155. New section 27(1) of the MCE Act will no longer contain the detail of the family members relevant to bereavement leave, but will retain the actual entitlement to bereavement leave. The actual entitlement will not change.

Section 36 of the Bill

156. The definition of "continuous service" will be moved from section 32 of the MCE Act to section 3 to have application across the whole of the Act. In particular, this definition is now also relevant to section 20A.

157. A new definition of "employee" will be inserted into section 32 of the MCE Act, to have specific application to Division 6 - Parental Leave. The parental leave provisions will be extended to apply to eligible casual employees. Therefore, a specific definition of employee will be inserted into this Division to exclude casual employees who are not deemed to be "eligible" for the purpose of these parental leave provisions.

158. Two new subsections will be inserted into section 32 of the MCE Act to define the circumstances under which a casual employee will be deemed to be "eligible" for the purposes of this Division and parental leave entitlements.

159. Section 32(2) will provide that a casual employee is "eligible" if the employee has been engaged by an employer on a regular and systematic basis over the past 12 months, and except for the need to take parental leave, the employee would have a reasonable expectation of continuing to be engaged by the same employer on a regular and systematic basis.

160. Although casual employment is expected to be short-term in nature, the reality is that many casual employees are engaged on a regular and systematic basis. In other jurisdictions (federal, Queensland and New South Wales) such casual employees have been given access to parental leave after which they are able to resume their employment on the same basis as they were before taking parental leave. This entitlement will now be extended to similar eligible casual employees in Western Australia.

161. Section 32(3) of the MCE Act will provide for situations where an employer ceases to engage a casual employee before the employee completes 12 months of regular and systematic employment, and then re-engages the employee within 3 months for a further period or further periods of regular and systematic employment. In these circumstances, if the combined period of engagement is at least 12 months, and the employee has a reasonable expectation of continuing to be engaged by this employer on a regular and systematic basis, then the casual employee will be "eligible" for the purpose of these parental leave entitlements.

Section 37 of the Bill

162. Section 33(1) of the MCE Act will be amended to remove "other than a casual employee". This is in line with the amended definition of "employee" for this Division of the MCE Act, which excludes casual employees who are not "eligible", and the extension of the parental leave entitlement in section 33(1) to eligible casual employees as defined in new sections 32(2) and 32(3) of the MCE Act.

163. Section 33(4) of the MCE Act will be repealed and replaced with section 33(6), which includes provision for an extended period of concurrent parental leave to also be exempt from a reduction in the period of parental leave that can be taken by an employee.

164. New section 33(4) will provide that an employee may request an extension of the primary entitlement of up to 52 weeks' parental leave under section 33(1), for a further consecutive period of up to 52 weeks. If agreed by the employer, an employee could have up to 2 years of parental leave.

165. Such a request is to be made in writing in accordance with section 38A(1), and at least 4 weeks before the primary entitlement to parental leave under section 33(1) is due to end, in accordance with section 38(2). An employer must consider the request in accordance with the requirements under section 38B of the MCE Act.

166. This extension of parental leave is consistent with the AIRC Family Provisions Test Case decision of 2005. In the Test Case, the AIRC heard that children require more intensive care and supervision for the first 2 years of their lives, and that parents are less likely to use formal childcare for children under 2 years of age. This new provision will assist employees with children under 2 years of age to maintain their attachment to the workforce while caring for their own children at home. However, many employees may need to balance this parental responsibility with their financial needs.

167. Section 33(5) of the MCE Act will provide that an employee may request an extension of the one week concurrent parental leave that is provided under section 33(3), of not more than a further 7 weeks. This

will allow an employee to have up to 8 weeks at home at the same time as the employee's spouse or partner is on parental leave, to provide additional assistance and support immediately after the birth of a child.

168. This is consistent with the AIRC Family Provisions Test Case decision of 2005. In the Test Case, the AIRC heard that there is an intense period of care required immediately after childbirth, both for the child and the mother.

169. The provisions of sections 38A and 38B of the MCE Act will apply to section 33(5) in relation to the requirement that a request be made in writing, notice requirements, and the requirements of employers when considering such requests.

170. As it may be difficult to anticipate whether any additional parental leave will be required by the spouse or partner in advance of the birth of a child, the employee will only be required to give notice of a request for an extension of concurrent parental leave before the end of the week referred to in section 33(3) of the MCE Act.

171. Section 33(6) will replace current section 33(4) of the MCE Act. Section 33(6) will be expanded to include any extension of concurrent parental leave as provided in section 33(5). Section 33(6) provides that concurrent parental leave as provided in sections 33(3) and 33(5) is exempt from this provision which otherwise does not allow an employee to take parental leave at the same time as the employee's spouse or de facto partner in relation to the same child.

172. Section 33(7) of the MCE Act will clarify that a reference to a period of parental leave in section 33(6) includes any extension of parental leave under section 33(4) that is agreed to by the employer.

Section 38 of the Bill

173. Section 38(4) of the MCE Act will provide that an employee may make a request to return from parental leave to work on a "modified basis" as defined in section 38(8).

174. The term "modified basis" includes working on a part-time basis, working fewer days and/or fewer hours, or working different days and/or at different times than the employee was working before commencing parental leave. This may include changing the pattern of work to accommodate childcare arrangements or to enable the employee and the employee's spouse or partner to balance their childcare arrangements with their respective work commitments.

175. This new provision is intended to reduce the rate of women withdrawing from the workforce while their children are young, or leaving their job to seek alternative (often lower-skilled) part-time or

casual work elsewhere where they can attain the flexibilities they need to balance their work and family responsibilities.

176. Requests to return to work from parental leave on a modified basis are to be made in writing, giving the employer at least 7 weeks' notice, in accordance with sections 38A(1) and 38A(4) of the MCE Act. The employer must consider the request in accordance with the requirements under section 38B.

177. The AIRC Family Provisions Test Case decision of 2005 provided that employees could request to return from a period of parental leave on a part-time basis until the child reaches school age, giving the employer at least 7 weeks' notice. However, section 38(4) will not restrict such modified arrangements to the pre-school years of the child.

178. Section 38(4) has been drafted in such a way as to allow existing full-time, part-time and eligible casual employees to request a change to their working arrangements when returning from a period of parental leave without affecting their employment status. This is not a conversion clause. A casual employee would still be a casual employee, but agreed working arrangements may be modified. Existing part-time and eligible casual employees will be able to request a change to their working arrangements to work on different days and/or at different times, or a further reduction in their working hours and/or days when returning to work from a period of parental leave.

179. Section 38(5) will allow an employee, who has returned to work from a period of parental leave on a "modified basis", to subsequently request to resume working on the same basis as the employee worked before commencing parental leave. Requests must be made in writing, giving the employer at least 6 weeks' notice, in accordance with sections 38A(1) and 38A(5) of the MCE Act. The employer may need time to reorganise current work arrangements to facilitate the requested change in the working arrangements of the employee. An employer must consider the request in accordance with the requirements of section 38B.

180. Nothing prevents an employee from requesting a change to the modified working arrangements as a result of changes to their personal circumstances. This could include a graduated return to full-time hours.

181. Section 38(6) of the MCE Act will provide that an employer, who has agreed to allow an employee to return to work from parental leave on a "modified basis", may subsequently require the employee to resume working on the same basis as the employee worked before commencing parental leave if the modified working arrangements are having an adverse effect on the conduct of the operations of the business, or the employee no longer has a pre-school child as provided in section 38(7). In this case, the employer must put the requirement

and the reasons for the requirement in writing, and must give the employee at least 6 weeks' notice in accordance with section 38A(7). The employee must be given adequate notice to make alternative childcare arrangements or to find a place at a childcare centre.

182. Section 38(7) of the MCE Act will provide the grounds upon which an employer can require an employee to resume working on the same basis as before commencing parental leave. This section is to be read in conjunction with section 38B(4).

183. Sections 38(6) and 38(7) effectively give an employer the ability to withdraw from an agreed arrangement if such an arrangement is having an adverse effect on the employer's business. Section 38(5) gives an employee the ability to make a request to withdraw from an agreed arrangement if that arrangement no longer meets the employee's needs.

184. Nothing prevents an employer and employee from agreeing to an alternative arrangement, which better suits the needs of both the employer and the employee.

185. The AIRC Family Provisions Test Case decision provided that an employee may request to return from a period of parental leave on a part-time basis until the child reaches school age. Sections 38(4) and 38(5) of the MCE Act provide greater flexibility for employees who may want to return to work on a full-time basis well before or some time after their child reaches school age, or remain working on a part-time basis or modified basis while their child or children are at school. Section 38(6) provides a balance for employers to withdraw from this agreement if it is having an adverse effect on the business, as provided by section 38(7).

186. Section 38(8) provides a definition of "modified basis" as it applies to this section of the MCE Act. This has been explained above in paragraph 174 as it relates to section 38(4).

187. Section 38(9) provides that if an employee changed her working arrangements before commencing parental leave, as a direct result of being pregnant, then references in sections 38 and 38A to working arrangements immediately before the employee commenced parental leave, mean the working arrangements that were in place before such changes were made.

188. A pregnant employee may have been given approval by her employer to change the days, times or hours of work as a direct result of being pregnant. This may include a reduction in hours or days of work, or changing shifts to only work day shifts or morning shifts to accommodate the effects of pregnancy. These changes should only have been a temporary arrangement, similar to the concept of moving a pregnant employee to a "safe" job. After returning from parental

leave, and/or after a period of time working on a "modified basis", an employee may wish to return to her normal working arrangements that were in place before alternative arrangements were made as a result of her pregnancy. Similarly, an employer may require the employee to return to her normal working arrangements before such alternative or modified arrangements were put in place.

Section 39 of the Bill

189. Sections 38A and 38B will be inserted after section 38 of the MCE Act.

190. Section 38A will provide that requests made under sections 33(4), 33(5), 38(4) and 38(5) must be made in writing, and be made to the employer within a prescribed notice period to enable the employer to make alternative arrangements.

191. Although different options may be discussed between an employee and employer, any formal request must be made in writing to the employer. This will help to provide clarity to all parties about what is actually being sought. It also provides a formal record of the employee's request for record-keeping purposes. Any subsequent requests or requirements to vary agreed arrangements are also to be put in writing.

192. Similarly, section 38B(3) will require the employer's response to such requests to be put in writing, together with any parameters placed on the agreement of a request or the reasons for not agreeing to a request. This also forms part of the official record of any changes to the employee's working arrangements, or reasons for not making a change.

193. Section 38A of the MCE Act will prescribe different notice periods for each kind of request.

194. Section 38A(2) will require at least 4 weeks' notice for a request from an employee to extend parental leave by up to a further 52 weeks. This will give the employer sufficient time to make alternative arrangements to extend the current contract of the employee engaged to temporarily replace the employee on parental leave, or to recruit an alternative replacement employee.

195. Section 38A(3) will require notice be given at any time before the end of the week of concurrent leave if an employee has a need to extend this period of leave. Such an extension may be unplanned resulting from unexpected consequences arising from the birth of the child.

196. Section 38A(4) will require at least 7 weeks' notice for a request from an employee to return to work on a modified basis after a period of parental leave. This is consistent with the notice provisions for a similar entitlement in the AIRC Family Provisions Test Case decision of

2005. This should give the employer sufficient time to make alternative arrangements for work allocation with existing employees, enter into a new contract with the employee engaged to temporarily replace the employee on parental leave, or to engage a new employee, if needed, to cover the gaps of the employee who will be working on a modified basis.

197. Section 38A(5) will require at least 6 weeks' notice for a request from an employee to resume working on the same basis as the employee worked before commencing parental leave and before working on a modified basis on returning to work from parental leave. This should give the employer sufficient time to make alternative arrangements for work allocation with existing employees, or to give notice to, or make alternative arrangements for the employee engaged to cover the gaps of the employee working on a modified basis.

198. If an employee fails to comply with the required notice provisions, the employer is not obliged to agree to the request in the time provided. However, this does not prevent an employer from agreeing to the request if the employer is able to make the necessary arrangements within the notice period provided, or reaching agreement with the employee on an alternative commencement date that is not beyond the prescribed notice period.

199. Section 38A(6) is a transitional clause which enables employees who are already on parental leave when the Amendment Act comes into operation, to request an extension of their current parental leave or to return to work on a modified basis, in accordance with the new provisions.

200. Section 38A(7) will require an employer to give at least 6 weeks' notice to an employee of a requirement to resume working on the same basis as the employee worked before starting parental leave and before returning to work on a modified basis. This should give the employee time to make alternative child care arrangements or to find a place at a childcare centre.

201. Section 38A(7) also requires the employer to provide the reasons for this requirement in the written notice. Such reasons are to be consistent with the provisions of section 38(7) of the MCE Act.

202. Section 38B will provide the grounds for an employer to determine a request from an employee to extend a period of parental leave, to return to work on a modified basis after a period of parental leave, or to resume working on the same basis as the employee worked before commencing parental leave.

203. Section 38B(1) will require an employer to agree to such a request unless there are reasonable grounds, as provided in subsections (a) and (b), not to agree.

204. In accordance with subsection (a), an employer must consider the employee's circumstances, and be satisfied that the employee's request is genuinely based on the employee's parental responsibilities.

205. Subsection (b) provides the grounds by which an employer could refuse a request from an employee, if the request would have an adverse effect on the conduct of the operations or business of the employer. This subsection needs to be read in conjunction with section 38B(4). If an employer were to refuse a request from an employee, then the grounds for refusal must be reasonable and must satisfy a reasonable person.

206. Section 38B(2) provides the grounds for an employer to determine a request from an employee to resume working on the same basis as the employee worked before commencing parental leave, after having returned from parental leave on a modified basis for a period of time. An employer is to agree to such a request unless agreeing to the request would have an adverse effect on the conduct of the operations or business of the employer. If an employer were to refuse a request from an employee, then the grounds for refusal must be reasonable and must satisfy a reasonable person.

207. In determining a request under sections 38B(1) and 38B(2), an employer should be aware that section 38B(5) provides that in any enforcement proceedings related to the request, the onus lies on the employer to demonstrate that the refusal was justified.

208. Section 38B(3) requires that the employer give the employee written notification of the employer's decision, and if refused, the reasons for refusal, in relation to a request made by an employee under sections 33(4), 33(5), 38(4) or 38(5). This written notification forms part of the official record of a response to a request for a change in an employee's working arrangements. If enforcement proceedings are commenced under section 38B(5), this written notification can be submitted as evidence of the employer's decision in relation to a request from an employee.

209. Section 38B(4) provides the grounds on which an employer may refuse a request from an employee under sections 33(4), 33(5) or 38(4), in accordance with section 38B(1), and a requirement of an employer under section 38(6). The grounds listed in (a) to (d) are consistent with those in the AIRC Family Provisions Test Case decision of 2005. However, subsection (d) has been expanded to provide greater clarity.

210. Sections 38B(1)(b) and 38B(4) particularly take into account the needs of small business and the difficulties some may have in accommodating and agreeing to particular requests. However, small businesses should still consider each request on its merits, and try to reach agreement on arrangements they can accommodate. Providing

greater flexibility in working and leave arrangements will assist employers in attracting and retained skilled employees.

211. Section 38B(5) provides enforcement provisions in relation to a request made under sections 33(4), 33(5), 38(4) and 38(5). In any enforcement proceeding brought by an employee against an employer, the onus lies on the employer to show that the refusal of the employee's request was justified in accordance with the provisions of either section 38B(1) or section 38B(2), whichever is relevant to the request that was made.

Section 40 of the Bill

212. Section 40 of the Bill will amend section 44 of the MCE Act dealing with employers' record-keeping obligations. Section 44(3) will be designated as a civil penalty provision instead of an offence provision. As a civil penalty provision, section 44(3) will be enforceable by the Industrial Magistrate's Court under section 83E of the IR Act. The Court will be able to impose penalties and/or make an order preventing any further breach.

213. This amendment, along with sections 60 and 61 of the Bill, will ensure consistency in the enforcement of record-keeping provisions across the IR Act, MCE Act and LSL Act.

214. A contravention of section 44(3) of the MCE Act that occurs before the reforms take effect will be capable of being enforced as a civil penalty provision, provided:

(a) the contravention occurred no more than 12 months before section 40 of the Amendment Act commenced; and

(b) the employer in question has not been charged with an offence in respect of the contravention.

Section 41 of the Bill

215. Section 41 of the Bill will amend section 45 of the MCE Act dealing with employers' obligations to allow certain persons access to employment records. Section 45(1) will be designated as a civil penalty provision instead of an offence provision. As a civil penalty provision, section 45(1) will be enforceable by the Industrial Magistrate's Court under section 83E of the IR Act. The Court will be able to impose penalties and/or make an order preventing any further breach.

216. A contravention of section 45(1) of the MCE Act that occurs before the reforms take effect will be capable of being enforced as a civil penalty provision, provided:

(a) the contravention occurred no more than 12 months before section 41 of the Amendment Act commenced; and

(b) the employer in question has not been charged with an offence in respect of the contravention.

Section 42 of the Bill

217. Section 42 of the Bill will repeal section 46 of the MCE Act. This is a consequential amendment resulting from the deletion of offence provisions from sections 44 and 45 of the MCE Act.

Part 7 of the Bill

218. Part 7 of the Bill will:

(a) amend the Construction Act to provide 8⅔ weeks of long service leave **(LSL)** after 10 years, subsequent entitlement after 5 years, and a pro rata entitlement on exit from the industry after 7 years;

(b) amend the LSL Act to provide 8⅔ weeks of LSL after 10 years, subsequent entitlement after 5 years, and a pro rata entitlement on termination after 7 years;

(c) amend the Construction Act and the LSL Act to exclude public holidays from any period of LSL;

(d) abolish the Long Service Leave General Order of 1978[1] **(LSL General Order)**; and

(e) make consequential amendments to the LSL Act to prevent disadvantage to those employees previously covered by the LSL General Order.

219. Currently private sector employees in Western Australia whose LSL entitlement is regulated by the Construction Act, the LSL Act or the LSL General Order, receive a less beneficial LSL entitlement than their counterparts in all other Australian States and Territories.

220. The Construction Act, the LSL Act and the LSL General Order all currently provide 13 weeks of LSL after 15 years, subsequent entitlement after 10 years, and a pro rata entitlement on termination or exit from the industry after 10 years.

Part 7 Division 1 of the Bill

221. Part 7 Division 1 of the Bill will amend the Construction Act.

[1] Western Australian Industrial Gazette, vol 58, p 116

Section 44 of the Bill

222. Section 44 of the Bill will update section 3 of the Construction Act by removing references to the repealed *Conciliation and Arbitration Act 1904,* and replacing them with references to the WR Act.

223. Section 44 of the Bill will also update section 3 of the Construction Act by amending the definition of "ordinary pay" for the purposes of collecting the levy and paying LSL entitlements. The new definition of ordinary pay will increase parity between the rate of pay that an employee receives while working and the rate of pay they receive on LSL.

Sections 45 and 46 of the Bill

224. Section 45 of the Bill will amend section 21(1)(a) of the Construction Act to provide 8⅔ weeks of LSL after 10 years of service in the industry rather than the current entitlement of 13 weeks after 15 years.

225. Section 21(1)(b) of the Construction Act will also be amended by section 45 of the Bill to provide 4⅓ weeks of LSL after completing a further 5 years of service in the industry (after the 10 years referred to above). Previously, 8⅔ weeks of LSL were offered after a further 10 years of service.

226. Section 45(2) of the Bill repeals section 21(3) of the Construction Act, which gives effect to the provisions in the Schedule. The provisions of the Schedule are now to be given effect through section 48 of the Bill.

227. In place of the repealed section 21(3) of the Construction Act, section 45(2) of the Bill inserts a new section 21(3), which clarifies the definition of ordinary pay for the purpose of section 21(1). The new section 21(3) has the effect of averaging an employee's ordinary pay over the previous year for the purpose of paying a LSL entitlement. This is designed to reduce the likelihood of employees artificially inflating their rate of pay immediately prior to receiving a LSL payment, and thus receiving an artificially high rate of pay while on LSL (or conversely, an employer artificially reducing the rate of pay).

228. Section 46 of the Bill amends section 22 of the Construction Act to provide pro rata LSL payment on exit from the construction industry after 7 years of service rather than the current 10 years.

Section 47 of the Bill

229. Section 47 of the Bill will amend section 24A of the Construction Act to allow employees to take proportional leave in advance after 7 years of service rather than the current 10 years. It remains a requirement that

the employee gain consent from their employer in order to be able to take leave in advance.

Section 48 of the Bill

230. Section 48 of the Bill will repeal section 27 of the Construction Act. Section 27 deals with ordinary pay and is no longer relevant with the changed definition of ordinary pay effected by section 44 of the Bill.

Section 49 of the Bill

231. Section 49 of the Bill repeals and replaces the current public holiday provisions in section 29 of the Construction Act. Currently, when a public holiday falls within a period of LSL, that public holiday forms part of the leave, and the employee is not entitled to an additional day of leave in respect of that public holiday. The new section 29 will entitle employees to an additional day of leave for each public holiday that falls during their period of LSL.

Section 50 of the Bill

232. Section 50 of the Bill inserts the new section 51(2) into the Construction Act. The new section 51(2) clarifies the definition of ordinary pay for the purpose of section 51 of the Construction Act.

Section 51 of the Bill

233. Section 51 of the Bill will insert a new section 56 into the Construction Act. Section 56 will give effect to the provisions of the Schedule. It will replace section 21(3) of the Construction Act, which will be repealed by section 45(2) of the Bill.

Section 52 of the Bill

234. Section 52 of the Bill will amend the Schedule to the Construction Act. Subsection (a) will amend the title of the Schedule to indicate its content. Subsection (b) will replace the reference to the repealed section 21(3) with reference to the new section 56. Subsection (c) will insert a division heading into the Schedule.

235. Subsection (d) will insert transitional provisions into the Schedule. These provisions are designed to ensure that entitlements that have been accrued prior to the commencement of the Bill are preserved. The provisions will also prevent the undesirable situation in which all employees who have completed between 10 and 15 years service are entitled to proceed on long service leave as soon as the Amendment Act commences.

236. New clause 3(1) of the Schedule details when employees who were employed prior to the commencement of the Amendment Act are able to take LSL. Employees with less than 6 years' service in the industry will be able to proceed on LSL after completing 10 years' service.

237. Clause 3(2) clarifies that the transitional provisions do not apply to periods of service in respect of which the employee was entitled to take LSL prior to the commencement day.

238. Clause 3(3) clarifies that employees to whom the transitional provisions apply, may take all the LSL that they have accrued (based on an accrual rate of 0.8667 weeks of LSL per year of service) at the time they are entitled to proceed on LSL in accordance with clause 3(1). This allows employees who, under the transitional provisions, have been required to complete more than 10 years' service to take more than 8⅔ weeks of LSL.

239. Clause 3(4) clarifies that employees to whom the transitional provisions do not apply (those who complete 15 years' service before the commencement day) are unable to take advantage of clause 3(3).

240. Clause 3(5) allows employees who have taken more than 8⅔ weeks of LSL under clause 3(3) to take further leave (to make up 13 weeks of leave) once they have completed 15 years of service.

241. Clause 3(6) clarifies that the term “commencement day” means the day on which Part 7 Division 1 comes into operation. Part 7 Division 1 of the Bill will come into effect in accordance with section 2(2) of the Bill.

Part 7 Division 2 of the Bill

242. Part 7 Division 2 of the Bill will amend the LSL Act.

Section 54 of the Bill

243. Section 54 of the Bill will amend the long title of the LSL Act to remove reference to employees whose employment is not regulated under the IR Act. The reference to the IR Act is removed to ensure that employees whose employment is regulated by the IR Act will have their entitlement to LSL regulated by the LSL Act once the LSL General Order is abolished.

Section 55 of the Bill

244. Section 55 of the Bill will amend the interpretation section of the LSL Act.

245. Section 55(1)(a) of the Bill will insert a definition of "Industrial Inspector" into the LSL Act. This is necessary for the operation of new section 12 of the LSL Act, as inserted by section 59 of the Bill.

246. Section 55(1)(b) of the Bill will delete the definition of "Commission in Court Session" from the LSL Act. This definition is no longer necessary as section 8A of the LSL Act will be repealed by section 54 of the Bill. The term "Commission in Court Session" occurs only in section 8A of the LSL Act.

247. Section 55(1)(c) of the Bill will remove commissions and bonuses from the list of exclusions from ordinary pay. It is important that, with the abolition of the LSL General Order, employees are not disadvantaged if their LSL entitlement becomes governed by the LSL Act rather than the LSL General Order. The LSL General Order does not exclude commissions or bonuses from its definition of ordinary pay. Retaining this exclusion in the LSL Act would disadvantage employees who are paid regular commissions or bonuses as part of their wages.

248. Section 55(2) of the Bill is also concerned with increasing parity between the LSL Act and the LSL General Order. The LSL Act will be amended to provide that employees who are paid on piece work, bonus work, or any other system of payment by results receive payment for long service leave based on the employee's average rate over the past year. Previously employers could pay employees the rate of pay that would have been applicable to the employee if they were employed on a time basis. This system is inconsistent with the LSL General Order and penalises employees whose productivity is sufficient to award them greater pay on a piece rate than they would earn on an hourly rate.

249. Section 55(2)(c) of the Bill deals with employees whose hours have varied over the period of employment, clarifying that full-time, part-time and casual employees may work variable hours and that employees may change from one employment type to another over their period of employment. This amendment increases consistency between the LSL Act and the LSL General Order.

Section 56 of the Bill

250. Section 56(1) of the Bill will amend section 8(2) of the LSL Act to provide 8⅔ weeks of LSL after 10 years of continuous service rather than the current entitlement of 13 weeks after 15 years.

251. Section 8(2)(b) of the LSL Act will also be amended by section 56 of the Bill to provide 4⅓ weeks of LSL after completing a further 5 years of service with the same employer (after the 10 years referred to above). Previously, 8⅔ weeks of LSL were provided after a further 10 years of service.

252. Section 56(2) of the Bill will amend section 8(3) of the LSL Act to provide pro rata LSL payment on termination of employment after 7 years of service rather than the current 10 years.

253. Section 56(3) of the Bill will repeal and replace the current transitional provisions in sections 8(4), 8(5), and 8(6) of the LSL Act. The new provisions are designed to ensure that entitlements that have been accrued prior to the commencement of the Amendment Act are preserved. The provisions will also prevent the undesirable situation in which all employees who have completed between 10 and 15 years

service are entitled to proceed on long service leave as soon as the Amendment Act commences.

254. New section 8(4) details when employees who were employed prior to the commencement of the Amendment Act are able to take LSL. Employees with less than 6 years' continuous service will be able to proceed on LSL after completing 10 years' continuous service.

255. Section 8(5) clarifies that the transitional provisions do not apply any period of employment in respect of which the employee was entitled to take LSL prior to the commencement day.

256. Section 8(6) clarifies that employees to whom the transitional provisions apply, may take all the LSL that they have accrued (based on an accrual rate of 0.8667 weeks of LSL per year of service) at the time they are entitled to proceed on LSL in accordance with section 8(4). This allows employees who, under the transitional provisions, have been required to complete more than 10 years' service to take more than 8⅔ weeks of LSL.

257. Section 8(7) clarifies that employees to whom the transitional provisions do not apply (those who complete 15 years' service before the commencement day) are unable to take advantage of section 8(6).

258. Section 8(8) allows employees who have taken more than 8⅔ weeks of LSL under section 8(6) to take further leave (to make up 13 weeks of leave) once they have completed 15 years of service.

259. Section 8(9) clarifies that the term “commencement day” means the day on which Part 7 Division 2 comes into operation. Part 7 Division 2 of the Bill will come into effect in accordance with section 2(1) of the Bill.

Section 57 of the Bill

260. Section 57 of the Bill will repeal section 8A of the LSL Act, which allowed the Commission in Court Session to vary the LSL General Order and, thereby, also vary the entitlement to LSL under the LSL Act. As the LSL General Order will be abolished, this provision is no longer necessary.

Section 58 of the Bill

261. Section 58(1) of the Bill will amend section 9(3) of the LSL Act to allow employers and employees to agree on an alternative method of payment for long service leave. Currently, the LSL Act only allows for employees to be paid in a lump sum prior to the commencement of the period of leave, or at the time payment is made in the normal course of employment. This is inconsistent with the LSL General Order, which provides employers and employees to come to an agreement on the

method of payment, such as providing twice the period of leave at half the pay.

262. Section 58(2) of the Bill will repeal and replace section 9(4) of the LSL Act. Section 9(4) of the LSL Act provides for the interaction between LSL and public holidays. Currently, when a public holiday falls within a period of LSL, that public holiday forms part of the leave, and the employee is not entitled to an additional day of leave in respect of that public holiday. The new section 9(4) will entitle employees to an additional day of leave for each public holiday that falls during their period of LSL.

Section 59 of the Bill

263. Section 59 of the Bill will insert a new section 12 into the LSL Act. The new section 12 will allow Industrial Inspectors to institute proceedings under the LSL Act in the Industrial Magistrate's Court in their own name.

264. Currently Industrial Inspectors may access employment records under section 26A of the LSL Act. Section 98 of the IR Act is also invoked by virtue of the fact that Industrial Inspectors have a function under the LSL Act. Combined, section 26A of the LSL Act and section 98 of the IR Act confer broad powers on Industrial Inspectors to investigate alleged breaches of the LSL Act. However, there is currently no express power in the LSL Act enabling Industrial Inspectors to actually bring proceedings to enforce the Act. Section 59 of the Bill will rectify this anomaly.

Sections 60, 61 and 62 of the Bill

265. Sections 60 and 61 of the Bill will remove the offence provisions from sections 26 and 26A of the LSL Act and replace them with civil penalty provisions. This will increase parity between the record-keeping provisions of the LSL Act, the IR Act and the MCE Act.

266. The civil penalty provisions that will be inserted into sections 26 and 26A of the LSL Act refer directly to section 83E of the IR Act.

267. Section 62 of the Bill will repeal Part VII Division 5 of the LSL Act. This Division relates to the offence provisions which will be removed by sections 60 and 61 of the Bill.

Part 7 Division 3 of the Bill

268. Section 63 of the Bill defines the terms used within Division 3 of the Bill.

Section 64 of the Bill

269. Section 64 of the Bill will repeal the LSL General Order.

270. Currently, most Western Australian private sector employees whose employment is regulated by a State award or agreement are entitled to LSL in accordance with the LSL General Order. Most Western Australian private sector employees whose employment is regulated by a federal instrument or are award free are entitled to LSL in accordance with the LSL Act.

271. The LSL Act and the LSL General Order do not differ substantially in the entitlements that they offer. However, the minor differences can be confusing for employers and employees alike. This duplication of LSL instruments is unnecessary and cumbersome. An independent review of Western Australian industrial relations legislation recommended that the LSL Act and the LSL General Order be consolidated to remedy this duplication of instruments[2].

Section 65 of the Bill

272. Section 65 of the Bill contains transitional provisions. The provisions are designed to ensure that, on repeal of the LSL General Order, the LSL Act will apply to people in the same manner as the LSL General Order had applied.

Part 8 of the Bill

273. Part 8 of the Bill will amend the IR Act as a consequence of certain provisions in the MCE Act and LSL Act being designated civil penalty provisions for the purposes of section 83E of the IR Act.

274. Section 68 of the Bill will amend section 81AA of the IR Act as a consequence of section 46 of the MCE Act being repealed.

275. Section 69 of the Bill will amend section 81CA(1) of the IR Act as a consequence of section 46 of the MCE Act being repealed.

276. Section 70 of the Bill will insert new section 83E(6a) into the IR Act. Section 83E(6a) will qualify who may apply for enforcement of a civil penalty provision under the MCE Act or LSL Act, namely:

(a) a person directly affected by the contravention;

(b) an organisation or association of which the person is a member; or

(c) an Industrial Inspector.

[2] Commissioner G.L. Fielding, *Review of Western Australian Labour Relations Legislation,* July 1995.